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JUDGES & LAWYERS BREAST CANCER ALERT

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WHAT'S ALL THE *BUZZ* ABOUT ALCOHOL & BREAST CANCER?

Legal Program Materials

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I. NEW YORK STATE'S FRAMEWORK FOR PROMOTING PUBLIC POLICY AND COMPLIANCE WITH STATE ADMINISTRATIVE RULE ACT

The New York Constitution vests the protection of the health of New Yorkers in the state legislature. *See* N.Y. CONST. art. XVII, § 3 ("The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made by the state and by such of its subdivisions and in such manner, and by such means as the legislature shall from time to time determine."). As such, the legislature can delegate to local governments the power to adopt and amend local laws, including health laws, *id.* Art. IX, § 2(c), as long as they are "not inconsistent with the provisions of this constitution or any general law" and not otherwise "restrict[ed]" by the state legislature. *Id.*

Likewise, the state Municipal Home Rule Law allows the "legislative body of a local government * * * [t]o delegate to any officer or agency of such local government * * * the power to adopt resolutions or to promulgate rules and regulations *for carrying into effect or fully administering the provisions of any local law*," including health laws, § 10(4)(a) (emphasis added); *see also People v. Nemadi*, 140 Misc. 2d 712, 718 (Crim. Ct., N.Y. Co. 1988) (recognizing statutory authority for regulation of local health matters, and noting that, under "this scheme New York City has enacted extensive public health regulations"); *C.L.A.S.H., Inc. v. City of New York*, 315 F. Supp. 2d 461, 491 (S.D.N.Y. 2004) (describing comprehensive process, including extensive legislative debate, presentation of testimony by over 200 witnesses, and record replete with scientific evidence from all sides, prior to the City Council's enactment of the New York City Smoke-Free Air Act).

New York's formal process for this is through the State Administrative Procedure Act, which:

> Act was enacted to provide simple, uniform administrative procedures, to guarantee that the actions of administrative agencies conform with sound standards developed in the state and the nation through constitutional, statutory, and case law, and to ensure that equitable practices will be provided to meet the public interest. Its purpose is to create uniformity among the various state agencies in developing suitable procedural safeguards in light of each agency's statutory responsibilities. Thus, the Act deals with procedures affecting an agency's rulemaking and adjudicatory functions, authorizes administrative agencies to make declaratory rulings, and makes specific provision with respect to licensing procedures. The State Administrative Procedure Act applies only to agencies of the state.

2 N.Y. Jur. 2d Administrative Law § 107 (internal citations omitted). In sum, SAPA supplies a uniform set of instructions for administrative procedure in and before the state's numerous agencies. Siegel, N.Y. Prac. § 557, Article 78 Proceeding, Introductory (6th ed.).

"An agency's administrative rule-making authority, which is derived from the delegation of legislative power, must be exercised within the parameters of the agency's enabling statutes and in accordance with SAPA." *Matter of Law Enf't Officers Union, Dist. Council 82*, *AFSCME, AFL-CIO v. State*, 229 A.D.2d 286, 292 (3d Dep't 1997).

Description of SAPA requirements (SAPA § 202):

> -File proposed regulations with Secretary of State
> -Submit notice of adoption for publication in State Register
> -Issue appropriate regulatory impact statements and other analyses
> -Hold public hearing.

See Rent Stabilization Ass'n of New York City, Inc. v. Higgins, 83 N.Y.2d 156 (1993), *cert. denied* 512 U.S. 1213 (agency complied with SAPA in promulgating family succession amendments to rent control and rent stabilization regulations, where it filed proposed regulations with Secretary of State, submitted notice of adoption for publication in State Register, issued appropriate regulatory impact statements and other analyses, and held public hearing).

Tight deadlines:

> [SAPA] establishes a timetable which must be followed by an agency in order to promulgate rules and regulations. As part of this procedure, SAPA requires an

> agency to file a notice of proposed rulemaking with the Secretary of State. This filing triggers statutory deadlines for acting on the proposed regulations. (*See* SAPA Section 202.)
>
> An agency has 180 days from the published date of the last public hearing to adopt a proposed regulation. (SAPA Section 202[2][a]). SAPA permits the extension of the 180-day period for no more than two consecutive 90-day periods. (SAPA Section 202[3][a]). Accordingly, the maximum period of time for adopting rules and regulations is 360 days.

The Desmond-Americana v. Jopling, 143 Misc. 2d 711, 712–13 (Sup. Ct., Albany Co.), *aff'd as modified sub nom. Desmond-Americana v. Jorling*, 153 A.D.2d 4 (3d Dep't 1989).

SAPA's requirements for regulatory impact statements (SAPA §202-a):

> 1. In developing a rule, an agency shall, to the extent consistent with the objectives of applicable statutes, consider utilizing approaches which are designed to avoid undue deleterious economic effects or overly burdensome impacts of the rule upon persons, including persons residing in New York state's rural areas, directly or indirectly affected by it or upon the economy or administration of state or local governmental agencies. Such approaches shall include, but not be limited to, the specification of performance standards rather than design standards.
> 2. Each agency shall, except as provided in subdivision five of this section, issue a regulatory impact statement for a rule proposed for adoption or a rule adopted on an emergency basis.
> 3. Each regulatory impact statement shall contain:
> (a) Statutory authority. A statement analyzing the statutory authority for the rule, including but not limited to the agency's interpretation of the legislative objectives of such authority;
> (b) Needs and benefits. A statement setting forth the purpose of, necessity for, and benefits derived from the rule, a citation for and summary, not to exceed five hundred words, of each scientific or statistical study, report or analysis that served as the basis for the rule, an explanation of how it was used to determine the necessity for and benefits derived from the rule, and the name of the person that produced each study, report or analysis;
> (c) Costs. A statement detailing the projected costs of the rule, which shall indicate:
> (i) the costs for the implementation of, and continuing compliance with, the rule to regulated persons;
> (ii) the costs for the implementation of, and continued administration of, the rule to the agency and to the state and its local governments; and
> (iii) the information, including the source or sources of such information, and methodology upon which the cost analysis is based; or

(iv) where an agency finds that it cannot fully provide a statement of such costs, a statement setting forth its best estimate, which shall indicate the information and methodology upon which such best estimate is based and the reason or reasons why a complete cost statement cannot be provided;

(d) Paperwork. A statement describing the need for any reporting requirements, including forms and other paperwork, which would be required as a result of the rule;

(e) Local government mandates. A statement describing any program, service, duty or responsibility imposed by the rule upon any county, city, town, village, school district, fire district or other special district;

(f) Duplication. A statement identifying relevant rules and other legal requirements of the state and federal governments, including those which may duplicate, overlap or conflict with the rule. If the statement indicates that the rule would duplicate, overlap or conflict with any other relevant rule or legal requirement, the statement should also identify all efforts which the agency has or will undertake to resolve, or minimize the impact of, such duplication, overlap or conflict on regulated persons, including, but not limited to, seeking waivers of or exemptions from such other rules or legal requirements, seeking amendment of such other rules or legal requirements, or entering into a memorandum of understanding or other agreement concerning such other rules or legal requirements;

(g) Alternative approaches. A statement indicating whether any significant alternatives to the rule were considered by the agency, including a discussion of such alternatives and the reasons why they were not incorporated into the rule;

(h) Federal standards. A statement identifying whether the rule exceeds any minimum standards of the federal government for the same or similar subject areas and, if so, an explanation of why the rule exceeds such standards; and

(i) Compliance schedule. A statement indicating the estimated period of time necessary to enable regulated persons to achieve compliance with the rule.

4. To reduce paperwork on the agencies, an agency may:

(a) Consider a series of closely related and simultaneously proposed rules as one rule for the purpose of submitting a consolidated regulatory impact statement; and

(b) Submit a consolidated regulatory impact statement for any series of virtually identical rules proposed in the same year.

5. (a) An agency may claim an exemption from the requirements of this section for a rule that involves only a technical amendment, provided, however, the agency shall state in the notice, prepared pursuant to section two hundred two of this chapter, the reason or reasons for claiming such exemption.

(b) A rule defined in subparagraph (ii) of paragraph (a) of subdivision two of section one hundred two of this chapter shall be exempt from the requirements of this section.

(c) A rule determined by an agency to be a consensus rule and proposed pursuant to subparagraph (i) of paragraph (b) of subdivision one of section two hundred two of this article shall be exempt from the requirements of this section.

6. Each agency shall issue a revised regulatory impact statement when:

> (a) the information presented in the statement is inadequate or incomplete, provided, however, such revised statement shall be submitted as soon as practicable to the secretary of state for publication in the state register, provided, further, if such statement exceeds two thousand words, the notice shall include only a summary of such statement in less than two thousand words;
>
> (b) a proposed rule contains any substantial revisions and such revisions necessitate that such statement be modified. A revised statement shall describe the reasons for such changes and shall include any modifications in the regulatory impact statement that are necessary as a result of such changes; or
>
> (c) there are no substantial revisions in the proposed rule but there are changes in the text of the rule as adopted when compared with the text of the latest published version of the proposed rule and such changes would necessitate that such statement be modified. A revised statement shall describe the reasons for such changes and shall include any modifications in the regulatory impact statement that are necessary as a result of such changes.

New administrative regulations in both state and federal regulatory processes require a cost-benefit analysis. *See e.g.* SAPA § 202–a (1)("In developing a rule, an agency shall, to the extent consistent with the objectives of applicable statutes, consider utilizing approaches which are designed to avoid undue deleterious economic effects or overly burdensome impacts of the rule upon persons") (emphasis added); Executive Order [Obama] No. 13563 of 2011 § 1(b) (76 Fed. Reg. 3821 (2011)) (instructing agencies to "propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs," "tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives," and "select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits"); Executive Order [Clinton] No. 12866 of 1993 § 1(a), (b)(5) (58 Fed. Reg. 51735 (1993)) ("In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives," and "design ... regulations in the most cost-effective manner to achieve the regulatory objective")).

> At times, there may be tensions between a local government and the state:
> There may be difficulty at times in allocating interests to State or municipality, and in marking their respective limits when they seem to come together. If any one thing, however, has been settled in the realm of thought by unison of opinion, it is

> the State-wide extension of the interest in the maintenance of life and health. The advancement of that interest, like the advancement of education, is a function of the State at large....

Adler v. Deegan, 251 N.Y. 467, 485 (1929) (Cardozo, J.).

On production of underlying data, *see Industrial Liaison Comm. of Niagara Falls Area Chamber of Com. v. Williams*, 72 N.Y.2d 137, 146 (1988) ("Nothing in the statute or regulations governing environmental impact statements requires an agency to make the raw data upon which its environmental impact statement is based available to the public").

While SAPA requires a pre-scheduled formal public hearing, that does not preclude pre-hearing informal, private conferences. *See McSpedon v. Roberts*, 117 Misc.2d 679 (Sup. Ct., N.Y. Co. 1983).

SAPA § 205 provides for judicial review of rules by means of an Article 78 proceeding or by a declaratory judgment action unless another "exclusive procedure or remedy is provided by law". *See Matter of Brodsky v. Zagata*, 165 Misc. 2d 510, 515 (Sup. Ct. Albany Co. 1995) (holding that the respondents did not comply with SAPA, observing: "SAPA § 202(6)(d)(iv) requires at the very least that an agency seeking an emergency rule adoption illustrate the circumstances which give rise to the adoption of a rule on an emergency basis. The mere parroting of the phrase "the public health, safety, or general welfare" with no specific facts, demonstrates to this Court the total absence of justification for such action. Without detailing the necessity of the adoption of a rule on an emergency basis the danger of abuse is obvious.").

II. CONSTITUTIONAL QUESTIONS

A. Separation of Powers

As with the federal government, New York State's system of government operates through powers distributed amongst the executive, legislative and judicial branches. *See* New York State Constitution Articles III, IV, and VI. "It is … obvious that one of these branches may not arrogate unto itself the powers residing wholly in another branch" *Matter of Nicholas v. Kahn*, 47 N.Y.2d 24 (1979). "The concept of the separation of powers is the bedrock of the system of government". *Matter of NYC C.L.A.S.H., Inc. v New York State Off. of Parks, Recreation and Historic Preserv.*, 27 N.Y.3d 178, 183 (2016) (internal citation omitted)." "The 'constitutional principle of separation of powers ... requires that the legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies." ' *Vapor Technology Association v. Cuomo*, 66 Misc. 3d 800 (Sup. Ct. Albany Co. 2020), *quoting Greater New York Taxi Ass'n v. NYC Taxi and Limousine Comm'n*, 25 N.Y.3d 600, 609 (2015). "The proper approach in any separation-of-powers analysis is … flexible and case-specific, addressing each agency or executive action in light of the relevant legislative delegation it invokes." *New York Statewide Coal. of Hisp. Chambers of Com. v. New York City Dep't of Health & Mental Hygiene*, 23 N.Y.3d 681, 712 (2014).

While the New York State Constitution vests "[t]he legislative power of this state in the Senate and Assembly" (Art. 3 §1), it also mandates that "[e]very local government ... shall have a legislative body elective by the people thereof". NY Const, art IX, § 1(a); *see also* Municipal Home Rule Law § 2(7). "The cornerstone of administrative law is derived from the principle that the Legislature may declare its will, and after fixing a primary standard, endow administrative agencies with the power to fill in the interstices in the legislative product by prescribing rules and

regulations consistent with the enabling legislation." *Matter of Gen. Elec. Capital Corp. v New York State Div. of Tax Appeals*, 2 N.Y.3d 249, 254 (2004); *see also Matter of Citizens for an Orderly Energy Policy v. Cuomo*, 78 N.Y.2d 398, 410 (1991) ("The Legislature is not required in its enactments to supply agencies with rigid marching orders").

Although a legislative body may enable local government agencies the power to promulgate rules and regulations involving public health, "the legislative branch may not constitutionally cede its fundamental policymaking responsibility to a regulatory agency[.]" *Matter of Medical Socy. of State of N.Y. v. Serio*, 100 N.Y.2d 854, 864 (2003). Stated differently, "[e]ven under the broadest and most open-ended of statutory mandates, an administrative agency may not use its authority as a license to correct whatever societal evils it perceives." *Boreali v. Axelrod*, 71 N.Y.2d 1, 9 (1987). An unelected administrative agency must not go "beyond interstitial rule-making and into the realm of legislating" (*Justiana v. Niagara Cty. Dep't of Health*, 45 F. Supp. 2d 236, 245 (W.D.N.Y. 1999); *cf. Rent Stabilization Ass'n of New York City, Inc. v. Higgins*, 83 N.Y.2d 156, 170 (1993) (regulations are constitutional delegations of authority where agency "has not acted on a clean slate" and "challenged regulations fill in the interstices of the legislative mandate")), thereby unilaterally and improperly "effect[ing] a radical shift of authority" from the consumer to its government. *Gonzales v. Oregon*, 546 U.S. 243, 275 (2006). An administrative agency may not "'bootstrap' or increase its own jurisdiction by administrative fiat, i.e., by promulgating rules that enlarge its powers." *439 East 88 Owners Corp. v. Tax Com'n of City of New York*, 2002 WL 32799697, *5 (Sup. Ct., N.Y. Co. 2002). An administrative agency may not trespass on the legislative role and implement controversial policy measures where the legislature has refused to act— particularly in those areas where fundamental liberty interests are at stake. *See Gonzales*, *supra*, at 546. As such, "[a] legislative grant of authority must be construed,

whenever possible, so that it is no broader than that which the separation of powers doctrine permits." *Boreali,* 71 N.Y.2d at 9; *see e.g. Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Department of Health and Mental Hygiene,* 23 N.Y.3d 681 (2014) (holding that the (Bloomberg administration's) NYC Board of Health, in adopting the "Sugary Drinks Portion Cap Rule" to restrict the size of cups and containers used by food service establishments for the provision of sugary beverages as part of its effort to combat obesity among City residents, exceeded the scope of its regulatory authority when it chose among competing policy goals, without any legislative delegation or guidance, and engaged in law-making, thus infringing upon the legislative jurisdiction of the City Council of New York); *Empire State Ass'n of Assisted Living, Inc. v. Daines*, 26 Misc. 3d 340 (Sup. Ct., Albany Co. 2009) (citing *Boreali* and concluding that the Department of Health assisted-living regulations violated separation of powers); *American Kennel Club, Inc. v. City of New York*, Index No. 13584/89 (Sup. Ct., N.Y. Co. Sept. 19, 1989) (unreported) (invoking *Boreali* to preliminarily enjoin the city Board of Health's administrative regulation of pit bulls because the rule threatened to violate separation-of-powers principles); *cf. National Restaurant Association v. The New York City Department of Health & Mental Hygiene*, 148 A.D.3d 169 (1st Dep't 2017) (upholding the NYC Board of Health's adoption of rule requiring New York City food service establishments that are part of chains with 15 or more locations to post: (1) a salt shaker symbol (the "Icon") on a menu or menu board next to any food item or combination meal that contains 2,300 milligrams or more of sodium, and (2) the statement, "Warning: [*Icon*] indicates that the sodium (salt) content of this item is higher than the total daily recommended limit (2,300 mg). High sodium intake can increase blood pressure and risk of heart disease and stroke").

Public Health Law § 225(5)(a) authorizes a public health board to "deal with any matters affecting the * * * public health". Consistent therewith, under the New York City Charter, each agency is empowered only "to adopt rules *necessary* to carry out the powers and duties *delegated to it* by or pursuant to federal, state, or local law." NYC Charter § 1043 (emphasis added). The Department of Health is one of those agencies, and its Commissioner and members are appointed by, and serve at the pleasure of, the Mayor. *See* N.Y. Charter §§ 551, 553-554. The Department is authorized to "regulate all matters affecting health in the city of New York" and to "perform all those functions and operations performed by the city that relate to the health of the people of the city, including but not limited to the mental health, mental retardation, alcoholism and substance abuse-related needs of the people of the city." *Id.* § 556. Its enumerated provisions reflect that its role is to "[e]nforce" provisions of laws related to health, id. § 556(a), "review" public health services and submit findings to the Mayor, id. § 556(b), "[s]upervis[e]" matters affecting public health, *id*. § 556(c), and "[p]romot[e] or provi[de]" public health services. *Id.*, § 556(d). That said, the Board of Health is authorized to add to or amend the city's health code "for security of life and health in the city," *id.,* § 558(b), and those actions are properly considered "a quasi-legislative act of an administrative body, rather than an act promulgated by a legislative body," *Peckham Materials Corp. v. Westchester County*, 303 A.D.2d 511, 511 (2d Dep't 2003). The Department also has the enumerated power to "promote or provide for public education on * * * the prevention and control of disease". *See, e.g.*, N.Y. Charter § 556(d)(4)-(5). Throughout, the Department and its Board must ensure that the city Health Code is consistent "with the constitution, laws of this state or this charter." N.Y. Charter § 558(b); *see also id.* § 556(c)(9) (Department may "supervise and regulate the food and drug supply of the city * * * and ensure that such *businesses and activities*

are conducted in a manner consistent with the public interest and by persons with good character, honesty and integrity.") (emphasis added).

"Striking the proper balance among health concerns, cost and privacy interests … is a uniquely legislative function" *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987). The *Boreali* four-factor test of whether an administrative agency exceeded its regulatory authority "and impermissibly trespassed on legislative jurisdiction":

> a) Whether the agency engaged in the balancing of competing concerns of public health and economic cost, thus acting on its own idea of sound public policy; *see Statewide Coalition* (*Boreali's* central theme that an administrative agency exceeds its authority when it makes difficult choices between public policy ends, rather than finds means to an end chosen by the legislature").
>
> i) An agency may engage in rulemaking:
>
> 1) The connection of the regulation with the preservation of health and safety is very direct;
> 2) There is minimal interference with the personal autonomy of those whose health is being protected; and
> 3) Value judgments concerning the underlying ends are widely shared.
>
> ii) An agency may not engage in legislative policymaking: its actions should not raise difficult, intricate and controversial issues of social policy. Thus, "[a]n agency that adopts a regulation … that interferes with commonplace daily activities preferred by large numbers of people must necessarily wrestle with complex value judgments concerning personal autonomy and economics. That is policymaking, not rulemaking." *Matter of New York Statewide Coalition*, 23 N.Y.3d 681, 699.
>
> b) Whether the agency created its own comprehensive set of rules without benefit of legislative guidance;
>
> c) Whether the agency acted in an area in which the Legislature had repeatedly tried — and failed — to reach agreement in the face of substantial public debate and vigorous lobbying by a variety of interested actions; and
>
> d) Whether any special expertise or technical competence in the field of health was involved in the development of the regulations.

The factors should not be treated as "discrete, necessary conditions that define improper policy-making by an agency, nor as criteria that should be rigidly applied in every case in which an agency is accused of crossing the line into legislative territory" (*Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v New York City Dept. of Health and Mental Hygiene*, 23 N.Y.3d 681, 696 (2014)), but the circumstances should be reviewed as a whole. *Id*. at 697. Ultimately, courts should consider that "it is the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices amongst competing ends." *Matter of NYC C.L.A.S.H., Inc. v New York State Off. of Parks, Recreation and Historic Preserv*., 27 N.Y.3d 174, 183 (2016).

B. <u>Propriety of Law</u>

1. Due Process

The Due Process Clause, U.S. CONST. amend XIV, § 1, and its counterpart in the New York Constitution, Art. 1, § 6, prohibit governmental deprivations of life, liberty, or property without due process of law. (The "New York State's Constitution's guarantee of due process is virtually coextensive with that of the U.S. Constitution." *Algarin v. New York City Dept. of Correction*, 460 F. Supp. 2d 469, 478 (S.D.N.Y. 2006), aff'd 267 F. App'x 24 (2d Cir. 2008) (citing *Century Sav. Bank v. City of New York*, 280 N.Y. 9, 10 (1939)). The Constitution confers a substantive due process right to be free from arbitrary governmental action that "infringes a protected right." *O'Connor v. Pierson*, 426 F.3d 187, 200 n.6 (2d Cir. 2005). A law may also be so arbitrary as to violate the Due Process Clause, even absent infringement of a protected right. *See, e.g., Stern v. Halligan*, 158 F.3d 729, 731 (3d Cir. 1993) (stating that general economic and social welfare legislation violates substantive due process when it fails to meet a minimum rationality standard); *American Express Travel Related Servs. Co. v. Kentucky*, 641 F.3d 685, 688-

89 (6th Cir. 2011) (same). At a minimum, for the government to infringe on fundamental liberty interests, the infringement must be narrowly tailored to serve a compelling state interest. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

"[T]he substantive component of due process encompasses, among other things, an individual's right to bodily integrity free from unjustifiable governmental interference". *Lombardi v. Whitman*, 485 F.3d 73, 79 (2d Cir. 2007), recognizing that and citing *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

2. Equal Protection

The Equal Protection Clause of the United States Constitution, U.S. CONST. amend XIV, § 1, like its counterpart in the New York Constitution, N. Y. CONST. Art. 1, § 11, protects against arbitrary governmental action. (The Equal Protection Clauses of the Federal and New York Constitutions are coextensive. *See Pinnacle Nursing Home v. Axelrod*, 928 F.2d 1306, 1317 (2d Cir. 1991)).

A "palpably arbitrary" rule would violate the Equal Protection Clause. *Nordlinger v. Hahn*, 505 U.S. 1, 2 (1992); *see also FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). Thus, an agency "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render … distinction[s] arbitrary or irrational." *Prodell v. State*, 166 Misc.2d 608, 613 (Sup. Ct., Albany County 1995) (quoting *City of Cleburne v. Cleburne Living Center* at 473 U.S. 432, 446 (1985)). Under the Equal Protection Clause, any "classification must reflect pre-existing differences" in the nature of the problem itself; the law "cannot create new ones that are supported by only their own bootstraps." *Williams v. Vermont*, 472 U.S. 14, 27 (1985). The classification, in other words, "'must rest upon some ground of difference having a fair and substantial relation to

the objective of the legislation.'" *Margolis,* 157 A.D.2d at 241 (*quoting Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 527 (1958)).

3. Commerce Clause

The Commerce Clause of the federal Constitution, U.S. CONST., Art. 1, § 8, forbids state regulation that imposes burdens on interstate commerce that clearly exceed the putative local gains, particularly where the regulatory objective "could be promoted as well with a lesser impact on interstate activities." *Pike v. Bruce Church, Inc*., 397 US 137, 142 (1970); *see also Town of Southold v. Town of East Hampton*, 477 F. 3d 38, 51 (2d Cir. 2007).

4. Compelling Commercial Speech in Violation of First Amendment

Commercial speech is entitled to First Amendment protection. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985) (a rule requiring signage is commercial speech because it proposes a commercial transaction—that is, it requires a … warning label in connection with the sale of a product); *New York State Restaurant Ass'n v. New York City Bd. of Health*, 556 F.3d 114, 131 (2d Cir. 2009) (applying the *Zauderer* standard and holding that the Board of Health's calorie disclosure rule did not violate the First Amendment rights of the NYSRA's members); *see also Nat'l Elec. Mfr. Ass'n v. Sorrell,* 272 F.3d 104 (2d Cir. 2001) *cert. denied*, 536 U.S. 905 (2002) ("[M]andated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests.").

III. ALCOHOL SALES REGULATION AND THE PREEMPTION DOCTRINE

As a result of the 21st Amendment that ended Prohibition, all 50 states are responsible for implementing their own alcoholic beverage regulatory regime. The Court of Appeals has considered the New York Alcoholic Beverage Control Law (ABCL) to be comprehensive and

detailed in nature, thereby demonstrating that the New York Legislature had "preemptive intent" in the drafting of the ABCL. As a result, the preemption doctrine constitutes a fundamental limitation on home rule powers and local municipal governments may exercise only those home rule regulatory powers over liquor licensed businesses in their jurisdictions that are not prohibited via operation of the preemption doctrine or that are otherwise provided for within the ABCL itself.

The New York State Constitution's Article 9 contains the preemption doctrine to guard against local municipal intrusion upon regulatory matters that the state has carved out for itself via preemptive intent:

> (c) In addition to powers granted in the statute of local governments or any other law, (i) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government and, (ii) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to the following subjects, whether or not they relate to the property, affairs or government of such local government, except to the extent that the legislature shall restrict the adoption of such a local law relating to other than the property, affairs or government of such local government..... Const, Art IX, §2(c).

Regarding the determination of "preemptive intent" by the state, the ABC Law lacks either an express reservation by the state of the exclusive right to regulate liquor sales, or an express delegation to municipalities of the right to do so. It is, however, implied, as indicated ABC Law § 2 which provides, in part: "The restrictions, regulations and provisions contained in this chapter are enacted by the legislature for the protection, health, welfare and safety of the people of the state.")

The courts, however, have uniformly found that the ABC Law is preemptive. The Court of Appeals observed in *People v. De Jesus*, 54 N.Y.2d 465 (1981), "since the fount of the police power is the sovereign State, such power can be exercised by a local governmental unit only when and to the degree it has been delegated such lawmaking authority [internal citations omitted]." The

De Jesus Court held that no local government may legislate in the field of alcoholic beverage regulation or of establishments which sell alcoholic beverages in the state because the state has enacted a regulatory system for alcoholic beverages manufacture, distribution and sales that was both comprehensive and detailed – thereby demonstrating "preemptive intent" in the field of alcoholic beverage regulation, as follows:

> ...the Alcoholic Beverage Control Law is surely pre-emptive. For one thing, the regulatory system it installed is both comprehensive and detailed. Of particular relevance here, it endows the State Liquor Authority with the power to grant licenses under defined circumstances and it provides for criminal sanctions against unauthorized purveyors of alcoholic beverages. Among other details, it specifies that such beverages may be sold at retail for on-premises consumption daily until 4 a.m. and that the actual consumption thereof may be permitted for one-half hour thereafter. It also carries its own provision against disorderliness being permitted on such premises. (Internal quotes and citations omitted). *People v. De Jesus*, 54 N.Y.2d at 469.

The *De Jesus* Court thereby invalidated a Rochester City ordinance prohibiting persons from patronizing any establishment selling alcoholic beverages after 2:00 a.m. because "by prohibiting persons from patronizing such establishments at times when State law would permit them to do so, the local law, in direct opposition to the pre-emptive scheme, would render illegal what is specifically allowed by State law." *People v. De Jesus* at 472; *see also Blumfield v. Town of Ramapo*, 30 Misc. 2d 678, 680 (Sup. Ct., Rockland Co. 1961) ("It is quite apparent that the provisions of the Alcoholic Beverage Control Law are exclusive and State-wide in scope and that the power to restrict and regulate the sale of alcoholic beverages is solely the province of the Legislature of the State of New York"); *William Mullare, Inc. v. Town of Hempstead*, 11 Misc. 2d 245, 246 (Sup. Ct., Nassau Co. 1958); *see also. Obsession Sports Bar & Grill, Inc. v. City of Rochester*, 235 F. Supp. 3d 461, 469 (W.D.N.Y. 2017), *aff'd*, 706 F. App'x 53 (2d Cir. 2017) (discussing city's ordinance that had been annulled in Article 78 proceeding as being pre-empted by the Alcohol Beverage and Control Law).

The *De Jesus* Court did, however, identify an exception to the Preemption Doctrine for local laws of "general application" that do not directly impinge upon the exclusive domain of the ABCL, as follows:

> ...this is not to say that establishments selling alcoholic beverages are exempt from local laws of general applications such as, to take several examples, one requiring smoke alarms in all business premises, or one forbidding dumping of refuse on city sidewalks, or one prohibiting disorderliness at any place of public resort [Internal quotes and citations omitted]." *People v. De Jesus* at 472.

Thus, a locality may enact a local law of "general application", centered on something (*e.g.,* zoning) other than the regulation of alcohol. *See e.g. DJL Restaurant Corp. v. City of New York*, 96 N.Y.2d 91 (2001) (upholding amended zoning resolution ("AZR") as applying to all adult establishments, whether or not the establishment sold alcoholic beverages, and that any impact on those who happen to sell alcohol was merely incidental to the City's land use scheme, and adding, "[while] the ABC Law preempts its field by comprehensively regulating virtually all aspects of the sale and distribution of liquor, … [t]he control of alcohol involves considerations very different from the use of land. Indeed, the ABC Law and the AZR are directed at completely distinct subject matters.")

The ABC Law does provide for local input into alcoholic beverage regulation and control in several ways, one of which is allowing local towns and cities have the ability to hold a local option vote to become "dry," or even "partially dry," by circulating petitions and holding a vote that otherwise conforms with the Election Law for their residents regarding a series of seven (7) local option questions that describe for their voters the different types of retail liquor licenses available under article 9 of the ABC Law. ABC Law §§ 141 and 142.

The questions that must be presented for voters as part of any such local option vote are set forth in ABCL §141, from which voters can choose:

> *1) Allow taverns with a limited-service menu to sell customers alcoholic beverages to drink while in the tavern?*
>
> *2) Allow full-service restaurants to sell customers alcoholic beverages to drink while in the restaurant?*
>
> *3) Allow year-round hotels with a full-service restaurants to sell customers alcoholic beverages for a customer to drink while is within the hotel?*
>
> *4) Allow summer hotels with a full-service restaurants to sell customers alcoholic beverages for a customer to drink while is within the hotel?*
>
> *5) Allow a "retail package" liquor-and-wine or wine-without-liquor stores to sell "to go" unopened bottles of liquor or wine to a customer to be taken from the store for the customer to open and drink at another location?*
>
> *6) Allow "[o]ff-premises beer and wine cooler" licensees, i.e., grocery stores or drugstores, to sell "to go" unopened containers of beer (such as six-packs and kegs) and wine coolers with not more than 6% alcohol to a customer?*
>
> *7) Allow baseball parks, racetracks, athletic fields, or stadiums to sell beer to attendees of the sporting events where admission fees are charged?*]

See e.g., Tad's Franchises, Inc. v. Inc. Vill. of Pelham Manor, 42 A.D.2d 616 (1973), *aff'd*, 35 N.Y.2d 672 (1974) ("Once the village permits a restaurant or other public eating place to be conducted in retail districts as a conforming use, it cannot turn around and regulate such incidental or extended activities as the sale of alcoholic beverages for on-premises consumption, which activities are solely within the exclusive jurisdiction of the State Liquor Authority.").

Of note is the Court of Appeals' comment in *Matter of New York Statewide Coalition of Hispanic Chambers of Commerce* that "such policy-making would likely not be implicated in situations where the Board regulates by means of posted warnings.". *But see* ABCL § 105-b - Posting of certain signs:

> 1. The authority shall prepare, have printed and distribute across the state to all persons with a license to sell any alcoholic beverage for consumption on the premises or a license to sell any alcoholic beverage for consumption off the premises, a sign or poster with conspicuous lettering that states: "Government Warning: According to the Surgeon General, women should not drink alcoholic

> beverages during pregnancy because of the risk of birth defects". Such sign or poster must have conspicuous lettering in at least seventy-two point bold face type that states the warning set forth in this subdivision, except that such sign or poster shall be captioned with the word "warning" in at least two inch lettering.
>
> 2. All persons with a license to sell any alcoholic beverage for consumption on the premises or a license to sell any alcoholic beverage for consumption off the premises shall display in a conspicuous place the sign or poster upon receiving it from the authority. Such sign shall be placed as close as possible to the place where alcoholic beverages are sold.
>
> 3. Any person with such license who violates the provisions of this section shall be subject to a civil penalty, not to exceed one hundred dollars for each day of violation.
>
> 4. Compliance with the provisions of any local law requiring the posting of signs containing warnings regarding alcoholic beverages enacted on or before the date on which the provisions of this section shall have become a law, shall be deemed to be in compliance with the provisions of this section. Nothing contained herein, however, shall be deemed to exempt any licensee not otherwise subject to the provisions of any such local law from complying with the provisions of this section.

Note also the Second Circuit's rationale for upholding the calorie-posting signs in *New York Rest Ass'n v. New York City Bd. of Health*, 556 F.3d 114, 131 (2009), *i.e.*, that the ordinance served interstitially to fill a gap in federal law, complementing a backdrop of federal regulatory requirements in the sphere of nutritional labeling, by simply requiring restaurants to make the same informational disclosures that are on food labels generally.

The Nutrition Labeling and Education Act ("NLEA"). Pub. L. 101-535, 104 Stat. 2353 (1990) provides that it "shall not be construed to preempt any provision of State law, unless such provision is expressly preempted under [21 U.S.C. § 343-1(a)]." Pub. L. No. 101-535, § 6(c)(1), 104 Stat. 2353, 2364 (21 U.S.C. § 343-1 note); *New York State Rest. Ass'n*, 556 F.3d at 123 (noting that, helpfully, the NLEA is "clear on preemption"). The NLEA further provides that its express preemption provision "shall not be construed to apply to any requirement respecting a statement in the labeling of food that provides for a warning concerning the safety of the food or component

of the food." Pub. L. No. 101-535, § 6(c)(2) (21 U.S.C. § 343-1 note) (emphasis added). In amending the NLEA in 2010, Congress retained that exemption, permitting states and localities to require warnings concerning the safety of food. Pub. L. No. 111-148 § 4205(d)(2), 124 Stat. 119, 576; *see also Sciortino v. Pepsico, Inc*., 108 F.Supp.3d 780, 801 (N.D. Cal. 2015) ("[T]he NLEA carves out an exemption from its express preemption clause where warnings concerning the safety of food or component of food are at issue.").

IV. CONSIDERATIONS FOR OVERCOMING A CHALLENGE UNDER CPLR ARTICLE 78 AND IN A DECLARATORY JUDGMENT ACTION

A. The Four Ancient Writs Consolidated in CPLR Article 78

Article 78 contains four common law writs. Mandamus to Review, Mandamus to Compel, Prohibition and Certiorari. Each serves a different purpose, and therefore has different standards. Mandamus to Review generally seeks judicial review of an administrative determination. The standard is whether the agency acted in an "arbitrary and capricious" manner in making its determination. Mandamus to Compel seeks to have the Court force an agency to perform a non-discretionary act mandated by law. Prohibition seeks to prevent a judicial officer or quasi-judicial officer from performing an act that is beyond that officer's power. Certiorari seeks to review a quasi-judicial determination of an administrative agency, a determination made after an evidentiary hearing. The standard to be applied is whether the determination is supported by "substantial evidence."

In all of these writs, significant deference must be paid to the official whose acts are being reviewed. The question is not one of a *de novo* determination whether the official was right. The standards require a finding that the official was arbitrary and capricious, or is acting – or refusing to act – contrary to law, or reached a determination after a hearing that was not merely incorrect, but lacked support in the evidence. For a good discussion of the various writs, and their standards,

see, *Hamptons Hospital v. Moore*, 52 N.Y.2d 88 (1981) (esp., the dissenting opinion); *Matter of Scherbyn v. Wayne-Finger Lakes BOCES*, 77 N Y 2d 753 (1991)(the test in mandamus to compel is a "clear legal right," while mandamus to review is the easier test of "arbitrary and capricious"); *State Division of Human Rights v. New York State Department of Correctional Services*, 90 A D 2d 51 (2d Dept. 1982) (mandamus to compel seeks to "command to perform a ministerial act" required by law); *Matter of Ifrah v. Utschig*, 98 N Y 2d 304 (2002)(So long as there is sufficient evidence in the record that the agency's determination is "rational," the Court should not interfere with a determination reached after a hearing); *Matter of P.M.S. Assets, Ltd. v. Zoning Board of Appeals*, 98 N.Y.2d 683 (2002)(same holding); *Matter of Retail Property Trust v. Board of Zoning Appeals*, 98 N.Y.2d 190 (2002)(the Appellate Division should not "substitute its own judgment for the contrary but equally reasonable determination of the Board of Zoning Appeals," for "that action was an incursion on the discretion of the Board and cannot be justified where substantial evidence in the record supports the Board's determination").

Because of the equitable nature of these ancient writs, Article 78 relief should not be granted when some other remedy is available. Thus, Mandamus to Review will not be granted unless the petitioner has "exhausted" all administrative remedies. Prohibition will not be granted unless no other remedy – such as direct appeal – is available. *See*, *Crain Communications, Inc. v. Hughes*, 74 N Y 2d 626 (1989); *Matter of Rush v. Mordue*, 68 N Y 2d 348 (1986).

A Writ of Certiorari, challenging a determination of an agency on the merits, after a hearing, is required to be transferred by *nisi prius* to the Appellate Division, for original review by that Court. *125 Bar Corp. v. State Liquor Authority*, 24 N Y 2d 174 (1969). But, first, Supreme Court should decide whether any issue other than "substantial evidence" review will determine the proceeding, and only transfer that issue to the Appellate Division if the proceeding is not otherwise

determined. Frequently, however, when substantiality is raised, Supreme Court will simply transfer the entire proceeding to the Appellate Division. The Appellate Division will typically retain the incorrectly transferred matter. *See*, *Seaview Associates v. Department of Environmental Control*, 123 A D 2d 619 (2d Dept. 1986).

B. Evaluating the Power of a Legislative Body to Enact a Law in the Face of Allegedly Contrary Provisions in the State Constitution and Statutes

CPLR 7803 states that the only questions that may be raised in a proceeding under the Article are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or
2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or
3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or
4. whether a determination was made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

See e.g., McSpedon v. Roberts, 117 Misc. 2d 679, 682–83 (Sup. Ct., N.Y. Co. 1983) ("In analyzing the relief requested in an Article 78 proceeding, for certain purposes one still has to consider the historical origins of the writs encompassed within the framework of the article, to wit; mandamus, prohibition and certiorari. … [T]he lines separating the old writs are now somewhat muddy.").

An Article 78 proceeding is appropriate to evaluate the power of a legislative body to enact a law in the face of allegedly contrary provisions in the State Constitution and statutes. *See Policemen's Benev. Ass'n of Westchester Cty., Inc. v. Bd. of Trustees of Vill. of Croton-on-Hudson*, 21 A.D.2d 693, 695 (2d Dep't 1964). When the challenge is directed not at the substance of the local ordinance but at the procedures followed in its enactment, it is maintainable in an Article 78

proceeding. *Save Pine Bush, Inc. v. City of Albany*, 70 N.Y.2d 193, 202 (1987); *Vill. of Islandia v. Cty. of Suffolk*, 162 A.D.3d 715, 716–17 (2d Dep't 2018).

Thus, an Article 78 proceeding would be appropriate for someone to challenge technical aspects of the municipality's or town's referendum under ABCL §§ 141 and 142, *e.g.*, some persons signed the petition with their initials rather than their full names, *e.g., Application of Foote*, 175 Misc. 60, 62 (Sup. Ct., Delaware Co. 1940) (signatures with just initials were not entitled to be counted), or some electors of the town who signed the petition were not registered voters at the time of the filing of the petition (*id.* at 63, upholding signatures of those not registered or enrolled, reasoning that Section 141 requires that the petition be signed by the "electors of the town", and an "elector" is one who possesses the necessary qualifications to vote, that is, a "qualified vote", and stating "That they were not actually registered or enrolled is not important, and whether or not they have since registered is of no consequence"); *see also Luce v. Chautauqua Cty. Bd. Of Elections*, 4 Misc.3d 1010(A) (Sup. Ct., Chautauqua Co. 2004) (dismissing CPLR Article 78 petition that requested that the Town Clerk of the Town of Mina and the Chautauqua County Board of Elections accept for re-filing the 2003 petitions and, furthermore, that the Board of Elections be directed to place both questions (including parenthetical language containing plain, comprehensible words) on the ballot for the 2004 general election, or, alternatively, requesting that the Court waive the three year waiting period contained in ABC Law §147, thereby permitting a new Petition to be circulated and filed with the Town Clerk).

In contrast, where the application is not questioning the power or authority of the legislative body to enact a local law, but rather the law's propriety or wisdom, a declaratory judgment action is appropriate. *See Policemen's Benev. Ass'n of Westchester Cty., Inc. v. Bd. of Trustees of Vill. of Croton-on-Hudson*, 21 A.D.2d 693, 695 (2d Dep't 1964); *see also Bon-Air Ests., Inc. v. Bldg.*

Inspector of Town of Ramapo, 31 A.D.2d 502, 504 (2d Dep't 1969). A declaratory judgment action would be appropriate were the Town to act *ultra vires*, *e.g.*, if it created a zoning ordinance that allowed the use of property in 'Retail Districts' for restaurants or other establishments serving food and drink for on-premises consumption, but at same time prohibited the restaurants or other establishments from selling alcoholic beverages for on-premises consumption. *See e.g., Tad's Franchises, Inc. v. Inc. Vill. of Pelham Manor*, 42 A.D.2d 616 (1973), *aff'd*, 35 N.Y.2d 672 (1974). Likewise, an ordinance limiting the days or hours of the sale of alcohol would trigger a declaratory judgment action. *See e.g., William Mullare, Inc. v. Town of Hempstead*, 11 Misc. 2d 245, 246 (Sup. Ct., Nassau Co. 1958) (granting permanent injunction declaratory judgment declaring void ordinance regulating the sale of alcoholic beverages on Memorial Day).

As for Article 78's interplay with SAPA, "[w]hile … SAPA is the supplier of the internals of the administrative process, Article 78 is its judicial supervisor, the vent and window through which light and air expose and refresh the dank milieu of that ubiquitous and indispensable phenomenon of our civilization: the administrative agency." Siegel, N.Y. Prac. § 557, Article 78 Proceeding, Introductory (6th ed.)

Where a CPLR Article 78 petition challenges an administrative agency's determination, and also challenges the validity of the underlying legislation of which it is accused of violating, the motion court will convert the Article 78 proceeding into a declaratory judgment action pursuant to CPLR 103(c) to then evaluate the propriety of the state law. *See e.g., Triolo v. Johnson*, 65 Misc.2d 424, 426-27 (Sup. Ct., Albany Co. 1970) (explaining that once it was determined that the legislative body was authorized to enact the law in question, "it follows that [the laws'] constitutionality may be tested."); *see also Matter of Landsdown Entertainment Corp v. New York City Department of Consumer Affairs*, 133 Misc. 2d 206 (1986), *mod on other gnds*, 141 A.D.2d

468 (1st Dep't 1988), *aff'd* 74 N.Y.2d 761 (1989) (Cabaret licensed by state liquor authority and city department of consumer affairs challenged the latter's determination that it violated the "Cabaret Law" prohibiting establishments from remaining open after 4:00 a.m. where state alcoholic beverage control law permitted patrons of drinking establishments to remain on premises and consume alcohol until 4:30 a.m.; state law was preemptive of local law in field of alcohol regulation and local law was not one of "general application" designed to ensure peace, comfort and decency of locality; although commenced as an CPLR Article 78 proceeding challenging the administrative determination, because the petition also challenged the validity of the statute, the motion court converted the Article 78 proceeding into a declaratory judgment action (and found that the state law preempted the local law); *see also Triolo v. Johnson*, 65 Misc.2d 424, 426-27 (Sup. Ct., Albany Co. 1970) (converting Article 78, the proceeding may be converted to a declaratory judgment action to determine the law's constitutionality, and holding as constitutional the Albany County Alcoholic Beverage Control Board's law limiting the retail sale of wines and liquors for off-premises consumption to the hours of 9 A.M. to 9 P.M. on weekdays and 10 A.M. to 12 noon for certain holidays, the effect of which order was to limit the state law which prohibits such sales only between midnight and 8:00 A.M. on each day exclusive of Sundays and certain holidays, since it had the reasonable basis of lessening the risk of intoxicants being placed in the hands of certain disturbers during the increased hours of closing).

The standard for judicial review of the substance of an administrative regulation (versus whether the process violated lawful procedure) is "whether the regulation has a rational basis, and is not unreasonable, arbitrary, or capricious" pursuant to CPLR 7803(3) (rather than the "substantial evidence" test of subdivision 4). *Matter of Consolation Nursing Home, Inc. v Commr. of New York State Dept. of Health*, 85 N.Y.2d 326, 331-32 (1995). A petitioner seeking to annul a

regulation must establish that it "is so lacking in reason for its promulgation that it is essentially arbitrary." *Empire State Assn v. Daines*, 26 Misc.3d 340 (Sup. Ct., Albany Co. 2009); *see also Pell v. Board of Ed. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck*, 34 N.Y.2d 222, 231 (1974) (defining "arbitrary and capricious as action taken "without sound basis in reason and … without regard to the facts.").

Contrast, the standard of review concerning an agency's compliance with SAPA:

> Regulatory promulgation consistent with the provisions of the State Administrative Procedure Act is not a matter which rests within the particular and specialized expertise of the Department. Interpretation of the State Administrative Procedure Act is not dependent on an understanding of technical data or underlying operational practices. The statute outlines uniform administrative procedures that State agencies must follow in their rule making, adjudicatory and licensing processes and that courts review in their usual de novo adjudicative function. Thus, the legislative direction to these agencies is compliance, not implementation. As specialized knowledge is not necessarily implicated, the courts use their own competence to decide issues of law raised, since those questions are of ordinary statutory reading and analysis (*see, Matter of Town of Mamaroneck PBA v. New York State Pub. Employment Relations Bd.*, 66 N.Y.2d 722, 724). Our reasoning does not mean that an agency's special expertise will never be relevant or specially respected as to a question arising under the State Administrative Procedure Act (*see, Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460), but that the principle of deference should be applied only where such expertise is relevant.

Indus. Liaison Comm. of Niagara Falls Area Chamber of Com. v. Williams, 72 N.Y.2d 137, 143–44 (1988).

C. Statute of Limitation Issues

Because the statute of limitations for Article 78 proceedings is so short – 4 months [CPLR 217] – there is a lot of case law dealing with the issue. Cases tend to arise in two formats – first, is the particular case properly an Article 78 proceeding, and thus subject to the short statutory period, even though brought as a declaratory judgment action; and second, when does the cause of action accrue for an Article 78 proceeding, and the clock start running.

The Court of Appeals has wrestled with the first of those issues on several occasions. In *Solnick v. Whalen*, 49 N.Y.2d 224 (1980), the Court said that the difference between a declaratory judgment action and an Article 78 proceeding relates to the nature of the determination being challenged. If it is "legislative," then it is properly challenged by a declaratory judgment action. If it is "administrative," it is properly an Article 78 proceeding. Individual rate setting by the Department of Health is administrative, and subject to the shorter limitations period.

In *Allen v. Blum*, 58 N Y 2d 954 (1983), petitioner sought review of a continuing policy – the Department of Social Services discontinuing welfare relief for failure to do certain acts in advance of investigation. The Court said that there, a declaratory judgment action was proper. And, in *Matter of Save The Pine Bush, Inc. v. City of Albany*, 70 N.Y.2d 193 (1987), the Court held that a challenge to legislation was by declaratory judgment, while a challenge to the procedures for enacting legislation was by Article 78.

But it was unclear and somewhat confusing, as to when an administrative act, that was of general application, and, hence, at least quasi-legislative, was subject to Article 78 challenge as opposed to declaratory judgment challenge. *See*, *Conrad v. Regan*, 155 A.D.2d 931(4th Dept. 1989) (a class action challenge to an administrative determination impacting the entire class may be brought by declaratory judgment action).

Then, the Court revisited the standards in *New York City Health and Hospitals Corp. v. McBarnette*, 84 N.Y.2d 194 (1994). The Court said it was "explaining," and not overruling, *Solnick*. The key distinction between Article 78s and declaratory judgment actions, holds the Court, is whether the challenge is to a legislative act. But even the quasi-legislative acts of administrative agencies, such as rate determinations, *even of general applicability*, may only be challenged by a timely Article 78 proceeding. It now appears, in the wake of *McBarnette*, that any

act of an administrative agency is subject only to Article 78 challenge, regardless of its nature. *See*, *Caponigro v. White*, 223 A.D.2d 365 (1st Dept. 1996) (A challenge to the New York City General Examination Regulation which bars a person who cheats on a civil service examination from taking a future exam, is an administrative regulation, not a statute; and, accordingly, it may only be challenged by an Article 78 proceeding).

The second statute of limitations issue often confronted is the accrual date of the cause of action.

The 4 month limitations period begins to run, for a claim of Mandamus to Compel, upon the refusal to act. *See*, *Matter of Bottom v. Goord*, 96 N Y 2d 870 (2001). For Mandaumus to Review, the cause of action accrues when the administrative decision sought to be reviewed becomes "final and binding" upon the aggrieved party. A petitioner cannot evade that date by demanding annulment of the determination, and then seeking to compel such annulment upon refusal. *See*, *Matter of Connell v. Town Board*, 113 A D 2d 359 (3d Dept. 1985).

The Court of Appeals has held that administrative determinations are not "final and binding" unless and until "they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." To determine if the action is final, look to "the completeness of the administrative action." And, "a pragmatic evaluation must be made of whether the decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury," with no possible administrative "ameliorative steps." *Matter of Essex County v. Zagata*, 91 N Y 2d 447 (1998) (an agency declaration that no filing with the agency has been made, and that, therefore, it will not pass upon a purported application, is final; but taking jurisdiction over a matter, where jurisdiction is disputed, is *not* final, since the erroneous assertion of jurisdiction "may ultimately never cause any real injury").

A determination becomes final and binding when it is *made* rather than when it goes into effect. *See, Allied Sanitation, Inc. v. Aponte*, 142 A D 2d 511 (1st Dept. 1988); *but, see*, *Matter of Rockland County Patrolmen's Benevolent Association, Inc. v. Town of Ramapo*, 283 A D 2d 650 (2d Dept. 2001)(In a challenge to the appointment of "part time officers," the statute began to run at the time of the actual appointments, not the earlier date when the Town created the positions, because "petitioner became aggrieved by the appointments of the part-time police officers, not by the classification itself").

D. Article 78 Cases of Interest

a. *Rosenthal v. City of New York*, 283 A D 2d 156 (1st Dept. 2001) – A challenge to the validity of a statute may be made by a declaratory judgment action. But, "where the issue, as here, is the propriety of proceedings taken under an otherwise valid statute, an article 78 proceeding is the proper vehicle," and, of course, subject to a much shorter, four-month, statute of limitations.

b. *Town of Webster v. Village of Webster*, 280 A D 2d 931 (4th Dept. 2001) – This is a dispute between the Town and the Village over water rates charged by the Village to certain Town residents. The Town claims that the Village Trustees' resolution to increase water rates was "irrational, arbitrary and capricious," and seeks a declaration that the resolution is void. The claims are untimely, since they could have been brought as an Article 78 proceeding, and this action was commenced more than four months after the resolution was adopted. Article 78 would apply, because the resolution was "administrative" rather than "legislative." "An action or a determination is deemed to be administrative where it 'is characterized by its individualized application, limited duration and informal adoption, e.g., resolution by the governing body' [citations omitted]. Here, the rate increase, which was subject to review on a yearly basis and thus was of limited duration, was effected by resolution, not by enactment of a local law or ordinance."

c. *Matter of Cartier v. County of Nassau*, 281 A D 2d 477 (2d Dept. 2001) – Petitioner commenced this Article 78 proceeding on December 30, 1997, with a January 30, 1998 return date. The notice of petition was improperly served by ordinary mail. When respondent opposed the petition on grounds of lack of jurisdiction, petitioner reserved the same notice of petition and petition on January 30, 1998, still containing a return date of that very day. The petition was heard on October 21, 1998. The granting of the petition is reversed. "Supreme Court did not have personal jurisdiction over the appellants. The original service of the notice of petition and petition by ordinary mail was jurisdictionally defective [citations omitted]. The re-service of process which was accomplished on the return date of the petition was also jurisdictionally

defective since it failed to give adequate notice of the return date to the appellants."

d. *Matter of Grant v. New York State Continuing Legal Education Board*, N.Y.L.J., August 23, 2001, p. 18, col. 1 (Sup.Ct. N.Y.Co.), *aff'd*, 292 A D 2d 193 (1st Dept. 2002) – Decisions of the CLE Board, here determining that a proposed ethics program would not be accredited because, in the words of *nisi prius*, "although the course may increase the general knowledge of an attorney, it does not constitute continuing legal education," may not be overturned absent a showing that the Board acted "arbitrarily, capriciously or contrary to law."

e. *Brodsky v. Friedlander*, 191 Misc 2d 459 (Sup.Ct. Erie Co. 2002) – Generally, an Article 78 proceeding is available to challenge conduct by institutions "chartered by the state." Thus, it is available to challenge corporate conduct, but is "not available to unincorporated associations or partnerships." Here, the novel question is whether Article 78 is applicable against "an unincorporated association whose membership is comprised of chartered educational and health provider organizations pursuing a 'public' purpose." Since each of the member organizations would, individually, be subject to Article 78 proceedings, a conclusion that Article 78 does not here apply "would enable organizations subject to this type of review to escape its reach by simply acting in concert." The Court "declines to adopt such a logical anomaly and holds that an organization pursuing a public purpose, whose individual members are subject to article 78, will itself be subject to article 78."

f. *Matter of Gates v. Hernandez*, N.Y.L.J., December 13, 2004, p. 18, col. 3 (Sup.Ct. N.Y. Co.)(Stone, J.) – A plaintiff may not, by bringing the action in the guise of a declaratory judgment action, avoid the strictures of Article 78 proceedings. Thus, here, where plaintiff seeks a judgment "declaring that NYCHA's policy of terminating tenants who are victims of alleged domestic violence is applied in an 'arbitrary and capricious manner,'" she cannot, by styling her demand as a declaratory judgment, avoid the obligation to exhaust administrative remedies required by Article 78. Similarly, "although adamantly denied, Gates is also ostensibly seeking to 'prohibit' NYCHA from proceeding against Gates as well as any other alleged tenant-victims of domestic violence. Gates avoids calling the action a 'writ of prohibition' to evade the strict rule of New York law that 'prohibition does not issue where the grievance can be redressed by ordinary proceedings at law or in equity such as by appeal, motion, or other ordinary applications.'"

g. *Stop-The-Barge v. Cahill*, 1 N.Y.3d 218 (2003) – A determination of the New York City Department of Environmental Protection became "final and binding" for purposes of mandamus to review when the 30-day "comment period," pursuant to 6 NYCRR 617.7(d)(1)(iv), expired, thus requiring no further action by the Department, and concluding its SEQRA review of a proposed project.