

10-15-2013

Simplifying the Standard of Review in North Carolina Administrative Appeals

Sarah H. Ludington

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/naalj>



Part of the [Administrative Law Commons](#), [Judges Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Sarah H. Ludington, *Simplifying the Standard of Review in North Carolina Administrative Appeals*, 33 J. Nat'l Ass'n Admin. L. Judiciary Iss. 2 (2013)
Available at: <https://digitalcommons.pepperdine.edu/naalj/vol33/iss2/4>

This Article is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Journal of the National Association of Administrative Law Judiciary by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

Simplifying the Standard of Review in North Carolina Administrative Appeals

By Sarah H. Ludington*

TABLE OF CONTENTS

I. INTRODUCTION	587
II. THE CURRENT STATE OF SUPERIOR COURT JURISDICTION OVER ADMINISTRATIVE APPEALS	591
A. <i>The Appellate and Original Jurisdiction of the North Carolina Superior Courts</i>	591
B. <i>The Default Rule: Appellate Jurisdiction as Determined by the APA</i>	593
1. The Standard of Review Under the Superior Court’s Appellate Jurisdiction.....	594
2. The <i>De Novo</i> Standard of Review	596
3. The Whole Record Standard of Review	600
a. Not Supported by Substantial Evidence.....	600
b. Arbitrary, Capricious, or an Abuse of Discretion	605
C. <i>Three Exceptions to the Default Rule of Appellate Jurisdiction</i>	606
1. Agencies Exempt from the APA	607
2. Appeals from Final Agency Decisions Where the Agency has Not Adopted an Administrative Law Judge’s Recommended Decision	608
3. Agencies with Agency-Specific Judicial Review Statutes ...	610
III. SUGGESTIONS FOR SIMPLIFYING, CLARIFYING, AND STANDARDIZING AGENCY-SPECIFIC STATUTES PROVIDING FOR JUDICIAL REVIEW.....	610
A. <i>More Procedure than is Due? Agency-Specific Review Statutes Conferring Original or Hybrid Jurisdiction in the Superior Courts</i>	612
1. Revision recommended	617
a. Statutes Enacted Prior to the APA	617
b. Statutes Conferring Hybrid Original/Appellate	

Jurisdiction	619
c. Initial Decision Not Made by an Agency or Officer in the Executive Branch	622
d. Agency Decision Made Without an Opportunity for In-Person Hearing	625
e. Review Provisions in the North Carolina Business Corporations Act and North Carolina Business Nonprofit Act	628
2.No Revision Recommended	631
B. <i>Agency-Specific Judicial Review Statutes Conferring Appellate Jurisdiction on the Superior Courts</i>	632
IV. CONCLUSION.....	636

I. INTRODUCTION

Uniformity is frequently cited as the hallmark of any fair system of justice, crucial to providing its rationality, predictability, coherence, and legitimacy.¹ The legislature enacted the North Carolina Administrative Procedure Act (APA) in 1973 with the express purpose of establishing “a uniform system of administrative rulemaking and adjudicatory procedure for agencies.”² The system extends to standards of judicial review, which are explicitly stated in section 150B-51 of Article 4 of the APA.³ Consistent with the statutory goal of uniformity, the North Carolina Supreme Court has ruled that section 150B-51 is the default standard of judicial review for appeals of agency orders and decisions.⁴ However, numerous

*Assistant Professor, Campbell Law School. With gratitude to everyone who read drafts and commented on this project, especially Judge Julian Mann, III, Bobbi Jo Boyd, Margaret Currin, Charles Daye, Lisa Lukasik, Matt Sawchak, and Richard Whisnant, and for the research assistance of Emily Pappas, Chris Waivers and Julie Yates.

¹ See, e.g., Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 38–39 (1994) (discussing the benefits of uniform interpretation of federal substantive laws); Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757, 757 (1995) (praising the “triumph of uniformity” in the adoption of the Federal Rules of Civil Procedure); Tom C. Clark, *Attorney General’s Manual on the Administrative Procedure Act*, FSU COLLEGE OF LAW (1947), <http://www.law.fsu.edu/library/admin/1947intro.html> (last visited May 31, 2013) (citing the imposition of “relative uniformity” on the federal administrative machinery as one of the goals of the act); see also *infra* text accompanying notes 110–115.

² N.C. GEN. STAT. § 150B-1 (2013). The APA was enacted in 1973 and codified in Chapter 150A of the general statutes. In 1986, sections 150A-1 through 150A-64 were recodified as sections 150B-1 through 150B-64. *Chapter 150A. Administrative Procedure Act*, NCGA, <http://www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=150A> (last visited Mar. 8, 2013).

³ N.C. GEN. STAT. §§ 150B-43 to -52. Unless otherwise indicated, all statutes referenced in the text are from North Carolina.

⁴ *Overton v. Goldsboro City Bd. of Educ.*, 283 S.E.2d 495, 498 (N.C. 1981) (applying the APA in the “interest of uniformity” to appeals from city and county boards of education when no other statute specified a standard of review, even though city and county boards were exempt from the APA); *State ex rel. Utils. Comm’n v. Bird Oil*, 273 S.E.2d 232, 235 n.1 (N.C. 1980); *State ex rel. Comm’r of Ins. v. N.C. Rate Bureau*, 269 S.E.2d 547, 559 (N.C. 1980). *But see In*

agency-specific statutes undermine the APA's goal of uniform judicial review.⁵ This Article argues that the legislature should revise such statutes, thereby standardizing, simplifying, and clarifying the standard of judicial review of administrative appeals.

The APA envisions a system where most appeals⁶ from an order or decision of a North Carolina agency are filed in a North Carolina Superior Court,⁷ invoking the *appellate* jurisdiction of the court.⁸ Any deviation from this norm must be specifically mandated by a statute that confers a standard of review at least "equal to" the one provided by the APA.⁹ Unfortunately, many statutes deviate from that norm. There are at least seventeen agency-specific statutes that confer *original* jurisdiction in the courts over administrative appeals, meaning that the reviewing court has the plenary power to retry the case.¹⁰ There are also dozens of specific judicial review provisions in agency organic statutes. While some of these statutes clearly confer appellate jurisdiction on the reviewing courts, many of them use inconsistent or unclear language. The resulting difficulty in determining the correct standard of review can be confusing to judges and litigants alike.¹¹

Discovering the correct standard of review is further complicated by the relative lack of guidance available to judges and practitioners. Appeals from administrative orders comprise only a

re McElwee, 283 S.E.2d 115, 120 (N.C. 1981) (noting that agency-specific statute provided the correct standard of review because it was enacted after the APA).

⁵ See Appendix.

⁶ Only a few administrative orders are appealable to courts other than the superior courts. For example, the North Carolina Court of Appeals reviews the final orders of the North Carolina Utilities and Industrial Commissions and certain orders of the Commission of Insurance. N.C. GEN. STAT. §§ 7A-250(b), 58-2-80. Appeals from the rulings of county game commissioners are reviewed *de novo* in the district court division. *Id.* § 7A-250(c); see *infra* text accompanying notes 158-161.

⁷ In North Carolina, the general court of justice consists of an appellate division, a superior court division, and a district court division. N.C. CONST. art. IV, § 9 (2013); N.C. GEN. STAT. § 7A-4.

⁸ N.C. GEN. STAT. §§ 150B-43, 150B-51.

⁹ *Comm'r of Ins. v. Rate Bureau*, 269 S.E.2d 547, 559 (N.C. 1980); N.C. GEN. STAT. § 150B-43.

¹⁰ See *infra* Part III.A. Original jurisdiction provides for a standard of review that is greater in scope than appellate jurisdiction.

¹¹ See *infra* Part III.B.

fraction of the superior court docket. From July 2011 to June 2012, for example, administrative appeals comprised less than 1% of the civil docket in the superior courts, and .1% of the total docket.¹² Perhaps because of the low percentage of appeals from administrative cases, scholarly articles and written opinions on the standard of review are comparatively sparse. Furthermore, it is difficult for a superior court judge, who is subject to reelection after an eight-year term,¹³ to develop expertise in this area if he rarely handles administrative appeals.¹⁴ To make matters more complicated, the legislature in 2011 tinkered with the review provisions in the APA, changing the standard of review of decisions made by the administrative law judges (ALJs) in the Office of Administrative Hearings (OAH).¹⁵

This Article has two purposes, one descriptive and one normative. The descriptive task is to provide an overview of the standards of judicial review in North Carolina, including recent legislative updates, to assist superior court judges and practitioners in understanding these standards.¹⁶ There is some urgency in educating

¹² See N.C. ADMIN. OFFICE OF THE COURTS, NORTH CAROLINA COURTS, STATISTICAL AND OPERATIONAL REPORT: TRIAL COURTS 3 (July 1, 2011–June 30, 2012), *available at* http://www.nccourts.org/Citizens/SRPlanning/Documents/2011-12_SOR-TrialCourts.pdf (reporting that only 130 administrative appeals were filed in 2011-12, of the 24,345 civil cases and 290,121 total cases filed).

¹³ N.C. CONST. art. IV, § 16 (2013).

¹⁴ Prior to 1985 the APA vested jurisdiction over administrative appeals exclusively in the Wake County Superior Court. An Act to Amend Chapter 150A of the General Statutes, ch. 746, 1985 N.C. Sess. Laws 1006. The judges in Wake County developed a familiarity with administrative cases. Currently, administrative appeals must be made to the superior court in the county where the petitioner resides, thereby dispersing the administrative caseload and making it even more difficult for superior court judges to develop expertise in the area. N.C. GEN. STAT. § 150B-45(a)(2) (2013).

¹⁵ See *infra* Part II.C.2.

¹⁶ The genesis of this Article was a paper presented by the Honorable Paul Ridgeway, a superior court judge in Wake County, to the North Carolina Conference of Superior Court Judges. Judge Ridgeway's presentation was intended to educate superior court judges, many of whom have little or no experience with administrative cases before they are elected to the bench, in the complexities of reviewing such appeals. Paul Ridgeway, Remarks at the North Carolina Conference of Superior Court Judges (Oct. 19, 2011) (transcript available at the University of North Carolina School of Government), *available at*

the North Carolina bench and bar in this area. Now that ALJs can enter final orders in contested cases, agencies have the right to appeal unfavorable decisions to the superior court,¹⁷ which may cause a significant increase in the number of cases brought to the courts and a corresponding need for a clear and predictable regime of judicial review. As long ago as 1980, the North Carolina Supreme Court noted that “[t]he proliferation of appeals from state administrative agencies during recent years requires an orderly appellate process,” which necessarily entails identifying and applying the appropriate standard of review.¹⁸ Orderly process disappears when one court must “guess the scope of review provided by another and when the parties fail to structure their arguments on appeal according to the relevant standard.”¹⁹ The normative purpose of this Article is to urge the North Carolina General Assembly to make changes that will facilitate the orderly appellate process envisioned by the APA and desired by the supreme court.

Part II of this Article surveys and summarizes the current landscape of appellate and original jurisdiction over administrative appeals in the superior courts, including recent legislative updates, with the intention of providing a useful guide to judges and practitioners alike. Part III of this Article proposes legislative updates to simplify and clarify superior court jurisdiction over

http://www.sog.unc.edu/sites/www.sog.unc.edu/files/Ridgeway_SCJ%20Conf%20manuscript%20formatted.pdf.

¹⁷ N.C. GEN. STAT. § 150B-34 (giving ALJs authority to make final decisions in contested cases); N.C. GEN. STAT. § 150B-43 (providing right to judicial review for “[a]ny party or person aggrieved by the final decision in a contested case”); N.C. GEN. STAT. § 150B-2(5) (including agency in the definition of party).

¹⁸ State *ex rel.* Utils. Comm’n v. Bird Oil Co., 273 S.E.2d 232, 235 (N.C. 1980).

¹⁹ *Id.*; see also *In re* N.C. Sav. & Loan League, 276 S.E.2d 404, 409 (N.C. 1981) (noting that “use of the correct standard clarifies the basic issues and focuses the reviewing court’s inquiry on the relevant factors”). Nevertheless, the North Carolina Supreme Court has occasionally reviewed cases in which neither of the lower courts identified the standard of review they applied, or applied an inappropriate standard of review. See, e.g., *Brooks v. McWhirter Grading Co.*, 281 S.E.2d 24, 27–28 (N.C. 1981); *N.C. Sav. & Loan League*, 276 S.E.2d at 409; *Bird Oil Co.*, 273 S.E.2d at 235. The reviewing court’s application of an incorrect standard of review may, but does not necessarily, result in a remand. See, e.g., *Meza v. Div. of Soc. Servs.*, 692 S.E.2d 96, 104 (N.C. 2010).

administrative appeals. First, the legislature should amend almost all of the statutes that confer original jurisdiction on the reviewing courts, conferring appellate jurisdiction instead. Second, the legislature should consider amending the current array of agency-specific judicial review statutes to use language that more clearly and simply confers APA-style appellate jurisdiction on the reviewing court.

II. THE CURRENT STATE OF SUPERIOR COURT JURISDICTION OVER ADMINISTRATIVE APPEALS

There are three concepts important to understanding a superior court's jurisdiction over administrative appeals: first, the difference between the appellate and original jurisdictions of the superior courts; second, the standards of review conferred by the APA, which govern the majority of all appeals from administrative decisions; and third, the exceptions to the APA's default standards of review, whether minor or significant. This section discusses each topic in turn.

A. *The Appellate and Original Jurisdiction of the North Carolina Superior Courts*

The superior court's authority to hear appeals from administrative agencies is conferred by section 7A-250(a) of the General Statutes, which establishes two distinct types of jurisdiction: "review by *original action or proceeding*, or by *appeal*."²⁰ It is critical for the superior court to understand whether the case invokes its *original* or *appellate* jurisdiction, as the different types of jurisdiction result in different scopes of review.

The superior court exercises its *appellate* jurisdiction over administrative orders in much the same way that a court of appeals exercises appellate jurisdiction over superior court orders. The scope of appellate jurisdiction is to examine the lower tribunal's decision and determine "whether the findings of fact are supported by the evidence, whether the findings support the conclusions of law, and whether the conclusions of law are a proper statement and application

²⁰ N.C. GEN. STAT. § 7A-250(a) (emphasis added).

of the law.”²¹ The superior court reviews *de novo* the lower tribunal’s decision for errors of law but defers to the lower tribunal’s findings of fact, provided that they are “supported by competent evidence.”²² When exercising its appellate jurisdiction, the superior court may not hear new evidence and does not retry the facts.²³

By contrast, the superior court exercises its *original* jurisdiction over administrative orders by essentially conducting a new trial on both the facts and the law in the case.²⁴ In this scenario, the court is empowered to “disregard the facts found in an earlier hearing or trial and engage in independent fact-finding.”²⁵ To invoke the superior court’s original jurisdiction over an appeal from an administrative decision, a statute must specifically use language that directs the superior court to take new evidence or examine evidence anew.²⁶ The power to engage in independent fact-finding is the hallmark of original jurisdiction; when the superior court exercises its original jurisdiction, it must make its own findings of fact and cannot defer this task to the agency.²⁷

²¹ *Meza*, 692 S.E.2d at 103 n.1.

²² N.C. Dep’t of Env’t & Natural Res. v. Carroll, 599 S.E.2d 888, 896 (N.C. 2004) (noting that it is the “traditional function of appellate courts to review the decisions of lower tribunals for errors of law or procedure, . . . while generally deferring to the latter’s ‘unchallenged superiority’ to act as finders of fact,” and if those facts “are supported by competent evidence, the trial court’s findings of fact are conclusive on appeal.” (citations omitted)).

²³ *See Meza*, 692 S.E.2d at 103 (finding that superior court erroneously made *de novo* findings of fact while conducting a review bound by the provisions of the APA). If a petitioner wishes to present additional evidence, and “the court is satisfied that the evidence is material to the issues, is not merely cumulative, and could not reasonably have been presented at the administrative hearing,” the superior court may remand the case to the lower tribunal “so that additional evidence can be taken.” N.C. GEN. STAT. § 150B-49.

²⁴ Even when a statute confers original jurisdiction in the superior court, the parties must still exhaust their administrative remedies. N.C. GEN. STAT. 150B-43 (conferring the right to judicial review on parties who have “exhausted all administrative remedies” and are “aggrieved by the final decision in a contested case”); *see also In re* N.C. Pesticide Bd., File Nos. IR94–128, IR94–151, IR94–155, 509 S.E.2d 165, 174 (N.C. 1998).

²⁵ *Carroll*, 599 S.E.2d at 895 n.3 (citation omitted).

²⁶ *See In re* Dunn, 326 S.E.2d 309, 311–12 (N.C. Ct. App. 1985) (finding that statute did not confer power on superior court to find new facts in appeal from tax assessment).

²⁷ *Carroll*, 599 S.E.2d at 896.

Because the standards of review in the APA are established as the default, appeals from agency orders to the superior court invoke its appellate jurisdiction, and not its original jurisdiction, unless a statute specifically provides otherwise.²⁸ Most appeals from agencies to the superior court fall within the APA's default rule, and therefore invoke only the court's appellate jurisdiction. However, because some statutes designate certain agency appeals to be within the superior court's original jurisdiction, the superior court must always determine, by reference to statute, the scope of its jurisdiction, as described in the following sections.

B. The Default Rule: Appellate Jurisdiction as Determined by the APA

In most instances of appeals from agency decisions, the jurisdiction of the superior court is determined by Article 4 of the APA. Within Article 4, section 150B-43 provides, in part, that:

Any . . . person who is aggrieved by the final decision in a contested case,²⁹ and who has exhausted all administrative remedies made available to [him] by statute or agency rule, is entitled to judicial review of the decision *under this Article, unless adequate procedure for judicial review is provided by another statute*, in which case the review shall be under such other statute.³⁰

While the statute specifically refers to decisions in contested cases, the standards of review in Article 4 also apply to agency rules when the agency has either denied or ruled on a request for a

²⁸ N.C. GEN. STAT. § 150B-43; *Dunn*, 326 S.E.2d at 311; *see infra* Part II.B.

²⁹ A contested case includes “any dispute between an agency and another person that involves the person’s rights, duties, or privileges, including licensing or the levy of a monetary penalty.” N.C. GEN. STAT. § 150B-22. The APA encourages all such disputes to be decided first through “informal” procedures. *Id.* If those proceedings fail to reach a resolution, either party may “commence an administrative proceeding,” at which time the dispute becomes a “contested case.” *Id.*

³⁰ N.C. GEN. STAT. § 150B-43 (emphasis added).

declaratory ruling pursuant to section 150B-4³¹ or has denied a petition for rulemaking pursuant to section 150B-20.³²

Accordingly, Article 4 of the APA, which confers appellate jurisdiction only, is the default authority for the superior court's jurisdiction in agency appeals. The superior court's jurisdiction over agency appeals is appellate unless the agency (1) is exempt from Article 4 of the APA, (2) is governed by a statute that specifies a different standard of review, or (3) is subject to the unique exception within Article 4.³³ The next section describes in detail the appellate jurisdiction authorized by the APA and then briefly outlines the three exceptions to the default rule.

1. The Standard of Review Under the Superior Court's Appellate Jurisdiction

When a superior court has jurisdiction over an agency decision pursuant to Article 4 of the APA, the statute authorizes two types of review, depending on the errors alleged by the petitioner³⁴: a *de novo* standard of review regarding questions of law, and “whole record” review regarding “fact-intensive” questions.³⁵ Whole record review is deferential to the agency, whereas *de novo* review is not.

While the APA designates only two standards of review—one for questions of law and one for questions of fact—some questions

³¹ N.C. GEN. STAT. § 150B-4(a)(a1) (allowing judicial review if the request for a declaratory ruling is denied, has been issued, has not been denied or granted within thirty days, or has not issued within forty-five days); *Diggs v. N.C. Dep't of Health & Human Servs.*, 578 S.E.2d 666, 669 (N.C. Ct. App. 2003) (listing elements requiring agency to issue declaratory ruling).

³² N.C. GEN. STAT. § 150B-20(d) (“Denial of a rule-making petition . . . is subject to judicial review Failure . . . to grant or deny a rule-making petition within the agency's time limit . . . [functions as] a denial” and is subject to judicial review.); *see, e.g., ACT-UP Triangle v. Comm'n for Health Servs.*, 483 S.E.2d 388, 391 (N.C. 1997) (finding that Commission had denied ACT-UP's petition to amend its rule).

³³ *See N.C. Dep't of Env't & Natural Res. v. Carroll*, 599 S.E.2d 888, 896–97 (N.C. 2004).

³⁴ *ACT-UP Triangle*, 483 S.E.2d at 392.

³⁵ N.C. GEN. STAT. § 150B-51(c); *Meza v. Div. of Soc. Servs.*, 692 S.E.2d 96, 102 (N.C. 2010); *N.C. Dep't of Env't & Natural Res. v. Carroll*, 599 S.E.2d 888, 894 (N.C. 2004); Charles E. Daye, *Powers of Administrative Law Judges, Agencies, and Courts: An Analytical and Empirical Perspective*, 79 N.C. L. REV. 1571, 1592 (2001).

are difficult to sort neatly into the categories of “law” or “fact.” Such issues, which are sometimes called “mixed question of law and fact,” often involve the application of a broad or ambiguous statutory term to the facts in a particular case;³⁶ typical examples include the definitions of “negligence” or whether an injury “arises out of and in the course of the employment.”³⁷ In such cases, the correct standard of review—deferential or not—can be determined according to functional considerations, such as the types of facts at issue, the expertise of the agency making the initial decision, and whether the reviewing judge believes that she is equally well situated as the agency to decide the matter.³⁸ Thus, for example, if the statutory term to be applied is specifically defined by statute, the reviewing court is equally well situated as the agency to interpret the term.³⁹ But if the issues turn on the credibility of witnesses, or rely on

³⁶ *NLRB v. Hearst*, 322 U.S. 111, 131 (1944) (prescribing “limited” judicial review when “the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially”).

³⁷ *Bolkhir v. N.C. State Univ.*, 365 S.E.2d 898, 900 (N.C. 1988) (“Negligence is a mixed question of law and fact, and the reviewing court must determine whether the Commission’s findings support its conclusions.”); *Ramsey v. S. Indus. Constructors Inc.*, 630 S.E.2d 681, 685 (N.C. Ct. App. 2006) (“The Commission’s determination that an accident arose out of and in the course of employment is a mixed question of law and fact This Court reviews the record to determine if the findings of fact and conclusions of law are supported by the record.”). Both of these mixed questions are decided in the first instance by the Industrial Commission and appealed directly to the Court of Appeals, where they are reviewed for “any competent evidence.” *Id.* at 685. Now that the Industrial Commission is subject to the APA, this standard of review may change. *See also* Daye, *supra* note 35, at 1593 n.82; *infra* text accompanying notes 75–78.

³⁸ For an in-depth discussion, see HARRY T. EDWARDS & LINDA A. ELLIOTT, *FEDERAL COURTS STANDARDS OF REVIEW* 12–16 (2007) (discussing the standard of review for mixed questions of law and fact); Daye, *supra* note 35, at 1592–94.

³⁹ *See, e.g.*, *Brooks v. McWhirter Grading Co.*, 281 S.E.2d 24, 27–28 (N.C. 1981) (holding that *de novo* review applied to the Board’s interpretation of the statutory term “serious,” which is specifically defined in N.C. GEN. STAT. § 95-127(18)); *In re N.C. Sav. & Loan League*, 276 S.E.2d 404, 409 (N.C. 1981) (holding that *de novo*, not whole record, review applied to the Credit Union’s interpretation of the statutory term “common bond,” which is specifically defined in N.C. GEN. STAT. § 54-109.26(b)).

specialized or technical expertise, the reviewing court should use deferential (whole record) review.⁴⁰

The next two sections will discuss, in turn, the *de novo* and whole record standards of review.

2. The *De Novo* Standard of Review

When employing the *de novo* standard of review, a superior court acts in the capacity of an appellate court and reviews the official record of an agency decision for errors of law.⁴¹ The superior court “consider[s] the matter anew[] and freely substitut[es] its own judgment for the agency’s judgment.”⁴² The court should treat the matter “as though the issue had not yet been determined.”⁴³ The court may reverse or modify the agency’s decision if it finds that “substantial rights of the petitioners may have been prejudiced.”⁴⁴

⁴⁰ State *ex rel.* Comm’r of Ins. v. N.C. Rate Bureau, 269 S.E.2d 547, 565 (N.C. 1980) (noting that, in an adjudicatory proceeding, it is for the agency, not the court, “to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence.”); Daye, *supra* note 35, at 1592–94; *see, e.g., Hearst*, 322 U.S. at 130 (applying deferential review to the agency’s decision that newsboys were statutory employees because Congress had assigned the task of defining the term to the agency in charge of administering the statute).

⁴¹ N.C. Dep’t of Env’t & Natural Res. v. Carroll, 599 S.E.2d 888, 895 (N.C. 2004). The *de novo* standard of appellate review should not be confused with jurisdictional statutes that confer original jurisdiction on the superior court to conduct a “‘de novo’ hearing or trial.” *Id.* at 896 n.3. These jurisdictional statutes empower the court to consider anew the entire matter—both law and facts—as if there had been no proceeding below. *Id.*; *see infra* Part III.B.

⁴² Mann Media, Inc. v. Randolph Cnty. Planning Bd., 565 S.E.2d. 9, 17 (N.C. 2002) (quotation marks omitted).

⁴³ Whiteco Outdoor Adver. v. Johnson Cnty. Bd. of Adjustment, 513 S.E.2d 70, 74 (N.C. Ct. App. 1999).

⁴⁴ N.C. GEN. STAT. §150B-51 (2013). The use of the phrase “may have been prejudiced” requires a harmless error analysis. Daye, *supra* note 35, at 1592; *see, e.g., Bulloch v. N.C. Dep’t of Crime Control & Pub. Safety*, 732 S.E.2d 373, 381–82 (N.C. Ct. App. 2012) (concluding that errors made by the State Personnel Commission did not prejudice the Department of Crime Control and Public Safety and affirming the Commission’s reversal of the Department’s termination of officer).

The APA identifies four issues of law that can be the basis of a petitioner's appeal⁴⁵ and therefore reviewed *de novo*:

- Whether the agency's decision was in violation of the constitution,
- Whether the decision was in excess of statutory authority or jurisdiction,
- Whether the decision was made upon unlawful procedure, and
- Whether the decision was affected by other error of law.⁴⁶

But not all errors of law receive *de novo* review, despite the APA's clear prescription. The courts traditionally defer, to a limited extent, to an agency's interpretation of an ambiguous provision of its enabling statute or a statute that it has the authority to enforce.⁴⁷ The rationale for limited deference is based on the doctrine of separation of powers, which is explicitly mandated by section 6 of article I of the North Carolina Constitution.⁴⁸ This doctrine requires the courts to defer to the authority of an agency authorized to exercise regulatory power, provided the delegation of that authority is constitutional.⁴⁹ The theory of deferential judicial review is that many agency actions, including some kinds of statutory construction,

⁴⁵ In judicial appeals subject to Article 4 of the APA, the petitioner can assert the six errors listed in section 150B-51(b): these four issues of law and the two fact-intensive issues discussed in Part II.B.2–II.B.3 of this Article. Petitioners are not limited to these assertions of error, however, as section 150B-43 also provides that “[n]othing in this Chapter shall prevent any . . . person aggrieved from invoking any judicial remedy available to [him] under the law to test the validity of any administrative action not made reviewable under this Article.”

⁴⁶ N.C. GEN. STAT. § 150B-51(b).

⁴⁷ *In re N.C. Sav. & Loan League*, 276 S.E.2d 404, 410 (N.C. 1981).

⁴⁸ N.C. CONST. art. I, § 6 (“The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.”).

⁴⁹ *Jones v. Keller*, 698 S.E.2d 49, 54 (N.C. 2010); *State ex rel. Comm’r of Ins. v. N.C. Rate Bureau*, 269 S.E.2d 547, 563 (N.C. 1980) (noting that “we must expect the Legislature to legislate only so far as is reasonable and practical to do and we must leave to executive officers the authority to accomplish the legislative purpose, guided of course by proper standards”); *Adams v. N.C. Dep’t of Natural & Econ. Res.*, 249 S.E.2d 402, 406 (N.C. 1978), (noting that “[a] modern legislature must be able to delegate in proper instances ‘a limited portion of its legislative powers’ to administrative bodies which are equipped to adapt legislation ‘to complex conditions involving numerous details with which the Legislature cannot deal directly.’”).

require expertise that the courts do not possess, and further, involve policy choices more appropriately made by the politically accountable branches of the government.⁵⁰

Compared to the federal courts, North Carolina engages in a more limited form of deference. For example, despite its longstanding tradition of deference,⁵¹ North Carolina has never adopted the highly deferential standard of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁵² Instead, in *In re North Carolina Savings & Loan League*, the North Carolina Supreme Court explicitly relied on an older federal case, *Skidmore v. Swift & Co.*,⁵³ to describe the moderate degree to which it defers to an agency's interpretation of an ambiguous statutory term.⁵⁴ Under *Skidmore*, a reviewing court accepts an agency's interpretation of a statutory term

⁵⁰ See *Gill v. Bd. of Comm'rs of Wake Cnty.*, 76 S.E. 203, 208 (N.C. 1912) (opining that "[i]f any such radical change in our governmental policy is to be made, it should originate in the Legislature, acting within its legislative sphere, and not in this court. It is inconceivable that a consistent and persistent construction given to similar statutes by the superintendent of public instruction and his legal adviser, the Attorney General, for so long a time, should have escaped the attention of the Legislature, and its silence may safely be construed as an assent to their interpretation of the word."). *But see* *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) (Roberts, C.J., dissenting) (questioning whether the federal executive agencies are politically accountable).

⁵¹ See *Gill*, 76 S.E. at 208 (deferring to the Superintendent of Public Instruction's interpretation of a statutory term, noting that "contemporaneous construction and official usage for a long period by persons charged with the administration of the law have always been regarded as legitimate and valuable aids in ascertaining the meaning of a statute").

⁵² *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, a reviewing court will not disturb the agency's interpretation of an ambiguous statute unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844. While *Chevron* has been cited in several North Carolina Court of Appeals opinions, the North Carolina Supreme Court has never adopted the *Chevron* approach. See, e.g., *Charlotte-Mecklenburg Hosp. Auth. v. N.C. Dep't of Health & Human Servs.*, 685 S.E.2d 562, 565 (N.C. Ct. App. 2009); *Martin v. N.C. Dep't of Health & Human Servs.*, 670 S.E.2d 629,632 (N.C. Ct. App. 2009); *Comm'r of Labor of N.C. v. Weekley Homes, L.P.*, 609 S.E.2d 407, 412 (N.C. Ct. App. 2005); *Teasley v. Beck*, 574 S.E.2d 137, 141 (N.C. Ct. App. 2002); *Cnty. of Durham v. N.C. Dep't of Env't & Natural Res.*, 507 S.E.2d 310, 311 (N.C. Ct. App. 1998).

⁵³ 323 U.S. 134 (1944).

⁵⁴ *In re N.C. Sav. & Loan League*, 276 S.E.2d 404, 410 (N.C. 1981).

only if the court is persuaded that the interpretation is valid.⁵⁵ While the North Carolina Supreme Court acknowledged that courts “traditionally accord[] some deference” to an agency’s interpretations of its enabling statutes, it unequivocally stated that “those interpretations are not binding.”⁵⁶ Rather, the weight given to the agency interpretation depends on “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”⁵⁷ If the court finds the agency’s interpretation unpersuasive, it has the authority to substitute a meaning closer to that intended by the legislature.⁵⁸

The style of deference articulated by *Skidmore* and *In re Appeal of North Carolina Savings & Loan League* is perhaps better described as another tool of statutory construction rather than deference. When a statute is unambiguous, the reviewing court gives the term its unambiguous meaning, giving no deference to the agency.⁵⁹ But when a statutory term is ambiguous, “the interpretation of a statute given by the agency charged with carrying it out is entitled to great weight.”⁶⁰ The agency’s interpretation joins other statutory tools—such as “the language of the act, the spirit of

⁵⁵ *Skidmore*, 323 U.S. at 140. *Skidmore* prescribes a much less deferential approach to agency interpretations than that described in *Chevron*. EDWARDS & ELLIOTT, *supra* note 38, at 160–61 (2007) (noting that *Skidmore* is less deferential than the analysis under *Chevron* Step Two); Peter L. Strauss, “Deference” is Too Confusing—Let’s Call Them “Chevron Space” and “Skidmore Weight”, 112 Colum. L. Rev. 1143, 1150–53 (2012) (describing the difference between *Chevron* and *Skidmore* deference using the metaphors of “space” and “weight”).

⁵⁶ *N.C. Sav. & Loan League*, 276 S.E.2d at 410 (finding unpersuasive the North Carolina Credit Union Commission’s interpretation of the statutory term “common bond”); *see also* Brooks v. McWhirter Grading Co., 281 S.E.2d 24, 29 (N.C. 1981) (considering whether the Board’s interpretation of the statutory term “serious” is persuasive).

⁵⁷ *N.C. Sav. & Loan League*, 276 S.E.2d at 410 (quoting *Skidmore*, 323 U.S. at 140).

⁵⁸ *Faizan v. Grain Dealers Mut. Ins. Co.*, 118 S.E.2d 303, 310 (N.C. 1961).

⁵⁹ *See, e.g., Walker v. Bd. of Trs.*, 499 S.E.2d 429, 430–31 (N.C. 1998) (concluding that statutory term was unambiguous).

⁶⁰ *Frye Reg’l Med. Ctr., Inc. v. Hunt*, 510 S.E.2d 159, 163 (N.C. 1999) (concluding that statute was ambiguous and concurring with the Department of Human Resources’s interpretation of the statutory term).

the act and what the act seeks to accomplish”⁶¹—in helping the court to determine legislative intent.

If the standards of review in the APA could be described as a spectrum of deference, *de novo* review would occupy a position at one end, representing a complete lack of deference to the agency’s position; *Skidmore* and *In re Appeal of North Carolina Savings & Loan League* would occupy a position somewhat removed from that end, but not as deferential as whole record review, which is discussed in the next section.

3. The Whole Record Standard of Review

When employing the whole record standard of review, a superior court acts in the capacity of an appellate court and deferentially reviews the official record of an agency decision for error. The APA identifies two fact-intensive issues that require deferential, whole record review:

- Whether the agency decision was supported by substantial evidence, and
- Whether the agency decision was arbitrary, capricious, or an abuse of discretion.⁶²

The following subsections discuss each of these assertions of error in turn.

a. Not Supported by Substantial Evidence

If a party asserts that an agency decision is not supported by substantial evidence, the superior court must conduct a “whole record review,”⁶³ which means an examination of all of the competent

⁶¹ *Lee v. Gore*, 717 S.E.2d 356, 358 (N.C. 2011) (describing the traditional tools of statutory construction).

⁶² N.C. GEN. STAT. § 150B-51(b)–(c) (2013). The “abuse of discretion” language was added to the statute in 2001. Prior to that time, North Carolina courts had used the phrases “abuse of discretion” and “arbitrary and capricious” interchangeably. *See Welch v. Kearns*, 134 S.E.2d 155, 156 (N.C. 1964) (defining review for abuse of discretion as review for evidence of “conscientious judgment, not arbitrary action” on the part of the decisionmaker); *High Rock Lake Ass’n v. N.C. Env’tl. Mgmt. Comm’n*, 276 S.E.2d 472, 474 (N.C. Ct. App. 1981) (concluding that omission of “abuse of discretion” from the APA did not preclude judicial review of discretionary agency decisions).

⁶³ N.C. GEN. STAT. § 150B-51(c).

evidence in the record to determine whether the agency decision is supported by substantial evidence,⁶⁴ and if not, whether substantial rights of the petitioner may have been prejudiced because the agency's findings, inferences, conclusions, or decisions were affected by the lack of substantial evidence.⁶⁵ The whole record requirement specifically means that the reviewing court must take into account "whatever in the record fairly detracts from the weight of the [agency's] evidence" when determining the substantiality of evidence supporting the agency's decision.⁶⁶ In other words, as described by the U.S. Supreme Court in *Universal Camera Corp. v. National Labor Relations Board*, whole record review requires the superior court to take into account *all* of the evidence in the record, including that which supports and detracts from the agency's findings.⁶⁷ Whole record review is deferential and presumes that agencies, not courts, are the superior fact-finders in administrative proceedings.⁶⁸

Like the federal courts, the North Carolina courts define substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁶⁹ In terms of quantity and quality of evidence, substantial evidence is more than a mere scintilla, or more than a permissible factual inference that

⁶⁴ N.C. Pesticide Bd. v. N.C. Dep't of Agric., 509 S.E.2d 165, 170 (N.C. 1998).

⁶⁵ N.C. GEN. STAT. § 150B-51(b)-(c).

⁶⁶ Lackey v. N.C. Dep't of Human Res., 293 S.E.2d 171 (N.C. 1982); Thompson v. Wake Cnty. Bd. of Educ., 233 S.E.2d 538, 541 (N.C. 1977).

⁶⁷ *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). The North Carolina Supreme Court has explicitly adopted the reasoning of *Universal Camera*. See *Thompson*, 233 S.E.2d at 541 (quoting and citing *Universal Camera* for the meaning of the whole record test).

⁶⁸ See generally KEITH WERHAN, PRINCIPLES OF ADMINISTRATIVE LAW 319-20 (2008).

⁶⁹ See *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (defining substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"); *N.C. Pesticide Bd.*, 509 S.E.2d at 170; *Walker v. N.C. Dep't of Human Res.*, 397 S.E.2d 350, 354 (N.C. Ct. App. 1990); see also N.C. GEN. STAT. § 150B-51(b)(5); *State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n*, 524 S.E.2d 10 (N.C. 2000) (quoting *Consol. Edison*, to define "substantial evidence" in the Public Utilities Act); *N.C. Dep't of Crime Control & Pub. Safety v. Greene*, 616 S.E.2d 594, 598 (N.C. Ct. App. 2005).

supports the agency's action.⁷⁰ Defined in this manner, the substantial evidence standard is similar to the standard of review of a directed verdict. The reviewing court must determine whether there is enough evidence supporting the agency's decision to refuse to direct a verdict against the agency, were it a question of fact to be tried to a jury.⁷¹

The substantial evidence test, unlike *de novo* review, is strongly deferential to the agency. The agency's findings of fact, if supported by substantial evidence, "are conclusive on appeal."⁷² The reviewing court may not replace the agency's judgment with its own "as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*."⁷³ In other words, the reviewing court must defer to the agency's findings regarding credibility of witnesses and the resolution of conflicts in their testimonies.⁷⁴

But the substantial evidence test is a more rigorous form of review than the "any competent evidence" standard, which the North Carolina courts used prior to the enactment of the APA.⁷⁵ The "any competent evidence" standard is so deferential to agency fact finders that it requires the reviewing court to uphold the agency's findings if there is even one item of competent evidence to support its findings, regardless of contradictory evidence in the record.⁷⁶ The practical

⁷⁰ See *Lackey*, 293 S.E.2d at 171; *Thompson*, 233 S.E.2d at 541. For a detailed discussion of the quantity and quality of evidence in an agency record, see *Daye*, *supra* note 35, at 1601-06.

⁷¹ See *In re Will of Buck*, 516 S.E.2d 858, 860 (N.C. 1999) (explaining that appellate review of "a trial court's rulings on motions for a directed verdict at the close of the evidence . . . [tests] whether substantial evidence introduced at trial would support a verdict in favor of the nonmoving party"); see also *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939); *WERHAN*, *supra* note 68, at 320.

⁷² *In re Wake Kidney Clinic P.A.*, 355 S.E.2d 788, 791 (N.C. Ct. App. 1987).

⁷³ *Meza v. Div. of Soc. Servs.*, 692 S.E.2d 96, 102, 105 (N.C. 2010) (quoting *Thompson*, 233 S.E.2d at 541).

⁷⁴ *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 269 S.E.2d 547, 565 (N.C. 1980); *In re Wilkins*, 242 S.E.2d 829, 841 (N.C. 1978).

⁷⁵ *In re Rogers*, 253 S.E.2d 912, 922 (N.C. 1979).

⁷⁶ See Frank W. Hanft, *Administrative Law*, 45 N.C. L. Rev. 816, 817 (1967) (describing the "any competent evidence" standard, quoting one judge as saying "if one discredited witness said the cat was black, and 10 unimpeached

effect of the “any competent evidence” standard is that the agency’s findings of fact are conclusive and binding, and rarely, if ever, overturned by the reviewing court.⁷⁷ In contrast, while it is a deferential standard, there are many examples of a reviewing court overturning an agency’s order using whole record review.⁷⁸

Since the passage of the APA, the substantial evidence test and whole record review have almost completely replaced the “any competent evidence” test and are favored by the North Carolina Supreme Court in the absence of a clear statutory directive to the contrary.⁷⁹ However, the “any competent evidence” standard is specified by statute for the decisions of the Board of Medical Examiners,⁸⁰ the Industrial Commission,⁸¹ and the Division of

witnesses declared it to be white, there was substantial evidence to support a finding by the agency that the cat was black”).

⁷⁷ *Petree v. Duke Power Co.*, 150 S.E.2d 749, 750 (N.C. 1966) (applying N.C. GEN. STAT. § 97-86 (2013), the standard of review mandated by statute for the Industrial Commission).

⁷⁸ *See, e.g.*, *Lackey v. N.C. Dep’t of Human Res.*, 293 S.E.2d 171, 178 (N.C. 1982) (overturning judgment for the Department of Human Resources, finding that report of non-examining physician, standing alone, was not substantial evidence to support a denial of Medicaid disability benefits); *State ex rel. Comm’r of Ins. v. N.C. Fire Ins. Rating Bureau*, 231 S.E.2d 882, 888–91 (N.C. 1977) (reversing the Commissioner’s disapproval of the filing of the Rating Bureau because the order was “supported only by conclusory findings of fact which, in turn, are unsupported by material and substantial evidence in view of the entire record”); *Thompson*, 233 S.E.2d at 541–44 (overturning Wake County School Board, finding that dismissal of career teacher on grounds of immorality, insubordination, and mental incapacity was not supported by substantial evidence on the entire record); *Underwood v. State Bd. of Alcoholic Control*, 181 S.E.2d 1, 7 (N.C. 1971) (overturning State Board of Alcoholic Control, finding that suspension of license was not supported by substantial evidence); *State ex rel. Utils. Comm’r v. Atlantic Coast Line R.R. Co.*, 150 S.E.2d 386, 389–91 (N.C. 1966) (overturning Utilities Commission, finding that rejection of railroad’s application to reduce agent hours was not supported by competent, material and substantial evidence in the record, and was therefore arbitrary and capricious).

⁷⁹ *In re Rogers*, 253 S.E.2d 912, 922 (N.C. 1979) (noting that “with few exceptions judicial review of administrative decisions in North Carolina is under the ‘whole record’ test,” and that the policy of the APA and other statutes favor the whole record test of judicial review).

⁸⁰ N.C. GEN. STAT. § 90-14.1 (2013) (when reviewing the Medical Board’s decision denying issuance of a license, the decision of the Board shall be upheld unless it is “not supported by any evidence admissible under this Article”); N.C. GEN. STAT. § 90-14.10 (when reviewing the Medical Board’s decision taking disciplinary action on a license, the court may reverse the Board if its decision is

Employment Security⁸²—agencies that were completely exempt from the APA until January 1, 2012.⁸³ Now that all three of these agencies are subject to the APA, it is not clear whether the “any competent evidence” review provisions in their organic statutes continue to be valid, to the extent that they conflict with the APA or provide for a standard of review that is not equivalent to whole record review.⁸⁴

“not supported by competent, material, and substantial evidence admissible under this Article”); *In re Guess*, 393 S.E.2d 833, 838 (N.C. 1989) (ruling that “[j]udicial review of a decision by the Board of Medical Examiners is made according to what is frequently referred to as the ‘any competent evidence’ standard”); *In re Rogers*, 253 S.E.2d at 922 n.4 (noting the same).

⁸¹ N.C. GEN. STAT. § 97-86 (on review, the orders of the Industrial Commission “shall be conclusive and binding as to all questions of fact; but either party to the dispute may . . . appeal from the decision of said Commission to the Court of Appeals for errors of law under the same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions”) (emphasis added). The Supreme Court interprets this statute to require “any competent evidence” review of the Commission’s findings of fact. *Deese v. Champion Int’l Corp.*, 530 S.E.2d 549, 552 (N.C. 2000); *Adams v. AVX Corp.*, 509 S.E.2d 411, 414 (N.C. 1998). Appeals from the Industrial Commission are made directly to the Court of Appeals. N.C. GEN. STAT. § 7A-250(b).

⁸² N.C. GEN. STAT. § 96-15(i) (on review, the “finding of facts by the Commission, if there is *any competent evidence* to support them and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law”) (emphasis added); see *Edgecombe Cnty. Dep’t of Soc. Servs. v. Hickman*, 712 S.E.2d 209, 211 (N.C. 2011); *Binney v. Banner Therapy Prods. Inc.*, 661 S.E.2d 717, 720 (N.C. 2008).

⁸³ The original APA listed all three of these agencies as completely exempt. Administrative Procedure Act, ch. 1331, 1973 N.C. Sess. Laws 692. All three agencies predated the enactment of the APA, which likely explains why their organic statutes specify a standard of review inconsistent with the APA. The Medical Board was created in 1859; the Industrial Commission was created in 1929; and the Division of Employment Security, formerly called the Employment Security Commission, was created in 1935.

⁸⁴ See Hanft, *supra* note 76, at 818–19 (suggesting that the “any competent evidence” standard is invalid for failure to provide adequate judicial review); *State ex rel. Comm’r of Ins. v. N.C. Rate Bureau*, 269 S.E.2d 547, 559 (N.C. 1980) (holding that “adequate procedure for judicial review . . . exists only if the scope of review is equal to that under present Article 4 of G.S. Chapter 150[B]”).

b. *Arbitrary, Capricious, or an Abuse of Discretion*

If a party asserts that an agency action is “arbitrary, capricious, or an abuse of discretion,”⁸⁵ the superior court must also conduct whole record review.⁸⁶ Agency action is arbitrary, capricious, or an abuse of discretion if it fails to reflect reasoned decision-making, is whimsical, patently in bad faith, or manifestly unfair.⁸⁷ This category reflects the basic due process notion that government decisions must, at a minimum, be rational. It functions as a “catchall” category of error that overlaps with the substantial evidence category,⁸⁸ and, because the two fact-intensive assertions of error are not easily distinguishable, they are frequently made in tandem.⁸⁹

The assertion that agency action is arbitrary and capricious is also made in cases that are not well suited to review for substantial evidence on the record because the agency’s action has not produced a record for review. Thus, for example, agencies sometimes make decisions but are not statutorily required to hold a hearing or make formal record findings. Without a record, it is impossible for a court to look for substantial evidence that supports the agency’s decision, but it is still possible to determine whether the decision was arbitrary or capricious.⁹⁰ Similarly, if a decision is committed to agency discretion, there may be no evidentiary record for the reviewing court

⁸⁵ N.C. GEN. STAT. § 150B-51(b)(6).

⁸⁶ Daye, *supra* note 35, at 1606–07.

⁸⁷ *In re Parkdale Mills*, 741 S.E.2d 416, 419 (N.C. 2013); *Comm’r of Ins. v. Rate Bureau*, 269 S.E.2d at 573 (N.C. 1980); *Lewis v. N.C. Dep’t of Human Res.*, 375 S.E.2d 712, 714 (N.C. Ct. App. 1989).

⁸⁸ Daye, *supra* note 35, at 1606–07 (noting that any agency decision not supported by substantial evidence on the record is, by definition, also arbitrary and capricious).

⁸⁹ *E.g.*, *R.J. Reynolds Tobacco Co. v. N.C. Dep’t of Env’t & Natural Res.*, 560 S.E.2d 163, 168 (N.C. Ct. App. 2002); *Joyce v. Winston-Salem Univ.*, 370 S.E.2d 866, 868 (N.C. Ct. App. 1988); *see also EDWARDS & ELLIOT*, *supra* note 38, at 182–83 (discussing subtle ways in which the differences between the two standards of review are “not great,” but “more than merely semantic”).

⁹⁰ *See, e.g., Lewis*, 375 S.E.2d at 715 (finding that agency was not arbitrary and capricious in denying grievance petition as untimely filed when petition was submitted one day after deadline); *R.J. Reynolds Tobacco Co.*, 560 S.E.2d at 170 (finding arbitrary and capricious agency denial of certification application when agency did not inspect facility).

to examine, but the court reviews the decision to ensure that the agency exercised its discretion “in good faith and in accordance with law.”⁹¹

The assertion that agency action is arbitrary, capricious, or an abuse of discretion can also arise in cases involving formal hearings, and even when an agency’s order is supported by substantial evidence. In *State ex rel. Commissioner of Insurance v. North Carolina Rate Bureau*, for example, the North Carolina Insurance Commissioner issued an order, following a hearing on a rate filing, that insurance companies must submit audited data to the Commission because unaudited data was not credible.⁹² The North Carolina Supreme Court found that the Commissioner’s order was supported by substantial evidence—uncontested expert testimony at the hearing—but, nevertheless, was arbitrary and capricious because it was “grossly imprecise in attempting to enunciate a substantive rule involving sweeping ramifications.”⁹³ In other words, the court corrected the agency for improperly announcing an important rule without providing guidance as to the meaning of the rule.

C. *Three Exceptions to the Default Rule of Appellate Jurisdiction*

As previously explained, Article 4 of the APA is intended to provide a uniform system for the review of cases appealed from agencies, whereby most appeals from an agency order invoke the appellate jurisdiction of the reviewing court and the standards of review described in section 150B-51. However, a number of exemptions from the APA disrupt the uniformity contemplated by the statute. The exemptions occur in three places: in agencies entirely exempt from the APA; in actions governed by the pre-2012 version of section 150B-51(c); and most significantly, in the complex tangle of agency-specific statutes that confer standards of review. The following subsections will discuss these topics in turn.

⁹¹ ACT-UP Triangle v. Comm’n for Health Servs., 483 S.E.2d 388, 393 (N.C. 1997).

⁹² *Comm’r of Ins.*, 269 S.E.2d at 558–59.

⁹³ *Id.* at 573.

1. Agencies Exempt from the APA

A very small number of agencies are *entirely exempt* from the APA, including the provisions regarding judicial review.⁹⁴ A superior court must consult the specific jurisdictional statutes for exempt agencies to determine the appropriate standard of review.

The largest agency that remains entirely exempt from the APA is the Utilities Commission.⁹⁵ Appeals from the Utilities Commission must be made directly to the North Carolina Court of Appeals, invoking its appellate jurisdiction.⁹⁶ This particular exemption does not especially threaten the uniformity of the review scheme contemplated by the APA, as the judicial review provisions in the Utility Commission's organic statute are essentially identical to the standards of review in section 150B-51.⁹⁷ Thus, in practice, the existence of a few APA-exempt agencies does not significantly change the default rule that the reviewing court has appellate jurisdiction over agency appeals.

⁹⁴ N.C. GEN. STAT. § 150B-1(c) (2013) (exempting fully from the APA (1) the North Carolina National Guard in exercising its court-martial jurisdiction; (2) the Department of Health and Human Services in exercising its authority over the Camp Butner reservation granted in Article 6 of Chapter 122C of the General Statutes; (3) the Utilities Commission; (4) the State Board of Elections in administering the HAVA Administrative Complaint Procedure of Article 8A of Chapter 163 of the General Statutes; and (5) the North Carolina State Lottery).

⁹⁵ N.C. GEN. STAT. § 150B-1(c). The legislature made the Industrial Commission and the Division of Employment Security subject to the APA as of January 1, 2012. Protecting and Putting North Carolina Back to Work Act, 2011 N.C. Sess. Laws 1087, 1101; An Act to Reform the Employment Security Laws of North Carolina, 2011 N.C. Sess. Laws 1717, 1721.

⁹⁶ N.C. GEN. STAT. § 7A-250(b).

⁹⁷ See N.C. GEN. STAT. §§ 62–94; State *ex rel.* Utils. Comm'n v. Bird Oil Co., 273 S.E.2d 232, 235 n.1 (N.C. 1980) (noting the “slight variation in wording” between the review provisions in section 62–94 and the APA, and concluding that the legislature intended for “judicial review of orders of the Utilities Commission and other state agencies covered by the Administrative Procedure Act to be essentially the same”); State *ex rel.* Utils. Comm'n v. Public Staff-N.C. Utils. Comm'n, 472 S.E.2d 193, 195–96 (N.C. Ct. App. 1996) (noting that “[w]here the Commission's actions do not violate the Constitution or exceed statutory authority, appellate review is limited to errors of law, arbitrary action, or decisions unsupported by competent, material and substantial evidence”) (quoting State *ex rel.* Utils. Comm'n v. Springdale Estates Ass'n, 265 S.E.2d 647, 651 (N.C. Ct. App. 1980)).

2. Appeals from Final Agency Decisions Where the Agency Has Not Adopted an Administrative Law Judge's Recommended Decision

The second minor exception to the default rule of appellate jurisdiction is found in section 150B-51(c) of the APA, as it existed prior to 2012;⁹⁸ as a practical matter, this exemption will soon cease to exist. Previously, section 150B-51(c) required the superior court to exercise a limited form of original jurisdiction over contested cases, but only if the case had previously been heard in the OAH and the agency did *not* adopt the ALJ's recommended decision.⁹⁹ In this event, the superior court would "review the official record, *de novo*, and . . . make findings of fact and conclusions of law," giving no deference to "to any prior decision made in the case," including "the findings of fact or the conclusions of law contained in the agency's final decision."¹⁰⁰ Despite the wording, the statute did not confer original jurisdiction on the superior court because it did not authorize the reviewing court to take new evidence; rather, the reviewing court was authorized to determine whether the petitioner was entitled to relief "based upon its review of the official record."¹⁰¹ In other words, when a case presented itself in this particular procedural posture, the APA conferred a hybrid form of jurisdiction on the superior court. This hybrid form was part *de novo*, in the sense that the court considered the findings of law and fact anew and was permitted to make its own findings of fact even when neither party

⁹⁸ See 2000 N.C. Sess. Laws 190.

⁹⁹ Some, but not all, of the agencies subject to the APA are required by section 150B-23 to conduct contested case hearings before the OAH. N.C. GEN. STAT. § 150B-23. Prior to January 1, 2012, the OAH would issue a recommended decision, where the agency could adopt all, none, or any part of it. See S. Res. 781 § 18, Gen. Assemb., 2011 Sess. (N.C. 2011) (amending N.C. GEN. STAT. § 150B-34) and N.C. GEN. STAT. § 150B-36 (amended 2011). Other agencies conduct their own hearings of contested cases, pursuant to the rules in Article 3A of the APA. See N.C. GEN. STAT. § 150B-38(a) (2013) (listing agencies subject to Article 3A).

¹⁰⁰ S. Res. 781 § 27 (amending N.C. GEN. STAT. § 150B-51(c)).

¹⁰¹ *Id.*; Brad Miller, *What Were We Thinking?: Legislative Intent and the 2000 Amendments to the North Carolina APA*, 79 N.C. L. REV. 1657, 1665 (2011) (indicating that the superior court's *de novo* review of the facts is based on the official record); Daye, *supra* note 35, at 1607–10.

objected to them,¹⁰² but also *limited*, in the sense that the court was confined to the facts presented in the administrative record and could not take new evidence.¹⁰³ The purpose of this legislation was to put the aggrieved party and the agency on a more equal footing and to enhance the stature of ALJs and the OAH by giving a broader scope of judicial review to agency decisions that rejected an ALJ's decision.¹⁰⁴

In 2011, the legislature amended the APA, making the ALJ's decision a "final decision" rather than a "recommended decision."¹⁰⁵ In the new statute, the agency is no longer empowered to adopt "all, none, or part" of the ALJ's decision.¹⁰⁶ Instead, the agency can petition the superior court for judicial review if it disagrees with the ALJ's order.¹⁰⁷ These amendments took effect on January 1, 2012, and apply to contested cases commenced on or after that date.¹⁰⁸ Thus the exception in former section 150B-51(c) will soon be moot, once the appeals of all matters commenced prior to the effective date of the amendment are concluded.

¹⁰² Cape Med. Trans., Inc. v. N.C. Dep't of Health & Human Servs., 590 S.E.2d 8, 14 (N.C. Ct. App. 2004).

¹⁰³ See Meza v. Div. of Soc. Servs., 692 S.E.2d 96, 101 (N.C. 2010) (opining that under N.C. Gen. Stat. § 150B-51(c), when the agency rejects the administrative law judge's recommendation, "the superior court is mandated to make findings of fact de novo, albeit on the official administrative record as opposed to taking new testimony").

¹⁰⁴ Judge Julian Mann, III, *Administrative Justice: No Longer Just a Recommendation*, 79 N.C. L. REV. 1639, 1640 (2001); Daye, *supra* note 35, at 1577-78; Miller, *supra* note 101, at 1658.

¹⁰⁵ Regulatory Reform Act of 2011 § 18, 2011 N.C. Sess. Laws 1678, 1686-87 (amending N.C. GEN. STAT. § 150B-34—Decision of ALJ).

¹⁰⁶ *Id.*

¹⁰⁷ Regulatory Reform Act of 2011 § 22, 2011 N.C. Sess. Laws 1687 (amending N.C. GEN. STAT. § 150B-43—Right to Judicial Review); § 15, 2011 N.C. Sess. Laws 1685 (amending N.C. GEN. STAT. § 150B-2(5)—definition of "Party").

¹⁰⁸ A "contested case" begins when either the agency or the individual begins an administrative proceeding to determine that person's "rights, duties, or privileges." N.C. GEN. STAT. § 150B-22. The case is commenced when the petitioner pays the fee and the petition with the OAH and the fee paid. N.C. GEN. STAT. § 150B-23.

3. Agencies with Agency-Specific Judicial Review Statutes

The final category of exceptions to the default rule of appellate jurisdiction is found in the dozens of agency-specific statutes providing for judicial review.¹⁰⁹ When one of these agency-specific statutes governs an appeal, the superior court must examine the statute to determine whether it requires the superior court's jurisdiction to be original or appellate. And even when the jurisdiction conferred is appellate, it can sometimes be difficult to determine whether the statutory language is meant to confer APA style jurisdiction or something slightly different—there is little consistency in the language used in these judicial review provisions and some downright confusing locutions. Part III of this Article will highlight some of the problems raised by the statutes that specifically confer jurisdiction over administrative appeals and will suggest legislative changes to simplify, clarify, and standardize the jurisdiction these agency-specific statutes confer.

III. SUGGESTIONS FOR SIMPLIFYING, CLARIFYING, AND STANDARDIZING AGENCY-SPECIFIC STATUTES PROVIDING FOR JUDICIAL REVIEW

It bears repeating that one of the express purposes of the North Carolina APA is to create “a *uniform* system” of state administrative action, including the judicial review of administrative action.¹¹⁰ Uniformity is so commonly accepted as a positive value in a procedural system that its benefits tend to be assumed without analysis.¹¹¹ While uniformity should not be treated as an end unto

¹⁰⁹ See Appendix.

¹¹⁰ N.C. GEN. STAT. § 150B-1-52 (emphasis added); *Empire Power Co. v. N.C. Dep't of Env't, Health & Natural Res.*, 447 S.E.2d 768, 778 (N.C. 1994) (noting the goal of uniformity in the APA). Despite encoding this goal of uniformity in the APA, the legislature has inconsistently pursued it. For example, the legislature has granted certain agencies, generally covered by the APA, exemptions from APA rulemaking requirements. RICHARD B. WHISNANT, *RULEMAKING IN NORTH CAROLINA* 3 (2005).

¹¹¹ But see Marin Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts of Appeals*, 61 DUKE L.J. 315, 377–83 (2011) (arguing that some disuniformity in case management in the federal courts of appeals is justifiable); Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1570–72 (2008) (questioning whether uniformity in the interpretation of

itself, the values of having uniform standards of review are particularly compelling in North Carolina. First, uniform standards of review streamline the decision-making process for a superior court judge, who can quickly master the standards of review in the APA and can then be confident that these standards apply in all future agency appeals. Second, uniform standards of review efficiently allocate resources between judicial and administrative decision makers.¹¹² These efficiencies are especially important when the reviewing judges are elected officials who carry large caseloads dominated by civil and criminal trials,¹¹³ have no law clerks, and may be unfamiliar with administrative law from any work before judicial service. Third, by standardizing the applicable law, uniform standards of review help to avoid errors in the superior court that result in protracted appeals and further litigation.¹¹⁴ Finally, uniform standards of review generally bolster systemic values such as rationality, predictability, coherence, and legitimacy.¹¹⁵ Litigants will not be left wondering why one petitioner received appellate review in the superior court while another obtained a trial *de novo*.

The benefits of the uniformity envisioned by the APA are currently undermined by the confusing array of agency-specific judicial review statutes, some of which confer original jurisdiction—or an exotic hybrid jurisdiction—on the superior courts, and some of

substantive federal rules is always preferable); Philip J. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, 52 VAND. L. REV. 1, 39–53 (1999) (arguing that the federal courts should “accept a certain amount of diversity in cooperative federalism programs).

¹¹² See Daye, *supra* note 35, at 1577 (noting that the goal of judicial review is to achieve a “workable and adequate system of external constraint on agency decisions through judicial oversight when citizens aggrieved by those decisions seek review”); see also text accompanying notes 127–132.

¹¹³ N.C. ADMIN. OFFICE OF THE COURTS, NORTH CAROLINA COURTS, ANNUAL REPORT 10 (July 1, 2011–June 30, 2012), available at http://www.nccourts.org/Citizens/Publications/Documents/2011-12_AnnualReport_20130328.pdf.

¹¹⁴ See *infra* text accompanying notes 141–154, 165–166.

¹¹⁵ See *Dickinson v. Zurko*, 527 U.S. 150, 154 (1999) (in the federal context, “recognizing the importance of maintaining a uniform approach to judicial review of administrative action” when the federal APA “was meant to bring uniformity to a field full of variation and diversity”); Kathryn E. Kovacs, *Leveling the Deference Playing Field*, 90 OR. L. REV. 583, 600 (2011) (noting that inconsistent application of standards of review creates unwelcome doctrinal confusion for agencies, plaintiffs, and regulated industries).

which confer appellate jurisdiction but do so in confusing, idiosyncratic, or anachronistic (pre-APA) terms.¹¹⁶ This section develops a framework for analyzing whether these statutory departures from the norm of appellate jurisdiction are justified. It then reviews the seventeen statutes that vest original or hybrid jurisdiction over administrative appeals in the superior court; this section recommends legislative revisions for all but two of them. In addition, this section urges the legislature to revise the numerous agency-specific statutes that confer appellate jurisdiction in a way that will clarify and conform their jurisdiction-conferring language.

A. *More Procedure than is Due? Agency-Specific Review Statutes Conferring Original or Hybrid Jurisdiction in the Superior Courts*

The agency-specific review statutes that differ most significantly from the APA are the seventeen statutes that vest original or hybrid jurisdiction in the superior courts. This section develops a framework for analyzing whether these statutes provide *more* procedure than is due for parties appealing an agency order.

Presumably, the statutes that confer original or hybrid jurisdiction were crafted with the laudable goal of providing aggrieved parties with adequate procedural protections, in the form of a new trial (or, in the case of hybrid jurisdiction, something very close to a new trial) in the superior court. Thus, a legislative revision that *removes* procedural protections from litigants raises due process concerns, and before recommending such a revision it is important to consider whether the extraordinary¹¹⁷ procedural protections

¹¹⁶ Charles E. Daye, *North Carolina's New Administrative Procedure Act: An Interpretive Analysis*, 53 N.C. L. Rev. 833, 899 (1974–1975) (arguing that the variety of judicial review statutes threatens the APA's goal of uniformity); Hanft, *supra* note 76, at 819 (noting that North Carolina statutes contain a “needless variety” of judicial review statutes).

¹¹⁷ The North Carolina Supreme Court has already approved of the appellate standards of review in the APA, and thus appellate review is a constitutionally adequate baseline for most appeals from agency cases. *See State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 269 S.E.2d 547, 559 (N.C. 1980) (holding that “‘adequate procedure for judicial review,’ as those words appear in present G.S. 150A-43, exists only if the scope of review is equal to that under present Article 4 of G.S. Chapter 150A”). Because appellate review of administrative action is the statutory default, any upward deviation from that

conferred by these statutes are warranted by the circumstances they address. This analysis implicates numerous procedural values that must be balanced, including the interests of the individual—e.g., the magnitude of the individual interest at stake in the proceeding—and the more systemic interests described previously—e.g., the public interests in streamlining the review process and in avoiding the unnecessary burdens on judicial resources caused by an inappropriate allocation of authority between agencies and reviewing courts.¹¹⁸ A general framework for weighing these competing interests can be derived from the seminal case on procedural due process, *Matthews v. Eldridge*, which measures “how much procedure is due” by weighing three factors in what essentially amounts to a cost-benefit analysis:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹¹⁹

norm—i.e., original or hybrid jurisdiction—is presumably justified only by unusual circumstances.

¹¹⁸ Daye, *supra* note 116, at 845.

¹¹⁹ *Matthews v. Eldridge*, 424 U.S. 319, 334–35 (1976). The Law of the Land Clause of Article I, § 19 of the North Carolina constitution, provides that “no person shall be . . . deprived of his life, liberty, or property, but by the law of the land,” and “is synonymous with the fourteenth amendment due process clause of the federal Constitution.” *McNeill v. Harnett Cnty.*, 398 S.E.2d 475, 563 (N.C. 1990); *In re Moore*, 221 S.E.2d 307, 308 (N.C. 1976). The United States Supreme Court's interpretations of the Fourteenth Amendment are “highly persuasive” in construing the Law of the Land Clause. *Bulova Watch Co. v. Brand Distribs.*, 206 S.E.2d 141, 146 (N.C. 1974). While it is beyond the scope of this Article to construct a constitutional argument for each statute, the method of analysis for determining whether procedures are consistent with the federal and state constitutions is a useful heuristic for determining whether the current and proposed statutory schemes satisfy the goals of due process.

In other words, when determining “how much procedure is due,” the critical inquiry is whether the value to the individual of additional procedures justifies the cost—in terms of money and other systemic burdens—of providing those procedures.¹²⁰ The framework suggested by *Matthews* is thus to determine whether there are unusual circumstances, such as a particularly strong individual interest at stake, that justify the imposition of extraordinary procedural protections such as original jurisdiction in judicial review proceedings in the superior courts.

While it is impossible to evaluate the *Matthews* factors in the abstract, a few general observations guide the inquiry. First, the amount of procedure due varies with the significance of the individual interest at stake. Thus, litigants in an administrative proceeding who are at risk of being deprived of a significant benefit—e.g., a loss of welfare benefits (which are subsistence benefits for the most destitute) or the loss of the right to attend school because of a long-term school suspension—are entitled to more procedural protections than those whose deprivation is less significant—e.g., a loss of disability benefits (which are awarded without consideration of economic need) or a shorter-term loss of the right to attend school.¹²¹

Second, it is important to consider whether the additional procedure at issue—original jurisdiction in the superior court—adds significantly to the likelihood of achieving an accurate result or avoiding an inaccurate one. Presumably, the value to the litigants of a new trial in superior court comes from the more formal procedures that govern litigation in that forum. When parties appealing from an administrative order encounter original jurisdiction in the superior court, they have access to the same array of information-gathering

¹²⁰ The North Carolina Court of Appeals has applied the balancing test from *Matthews v. Eldridge* in cases examining the due process rights of litigants in state administrative actions. See, e.g., *Nolan v. Town of Weddington*, 578 S.E.2d 710, 2003 WL 1873514, at *4 (N.C. App. Apr. 15, 2003).

¹²¹ See *Matthews*, 424 U.S. at 340–42 (comparing the different interests at stake in eligibility hearings for disability benefits and welfare benefits); *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (noting that “termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits”); *Goss v. Lopez*, 419 U.S. 565, 575–76 (1975) (discussing school suspensions, and noting that the weight and the nature of the interest at stake is relevant to the due process inquiry).

and truth-enforcing procedures that are available to any civil litigant. These procedures—rights to discover information, depose witnesses, exclude hearsay, and cross-examine witnesses in open court (to name a few)—are designed to maximize truth-seeking and are of greatest value in cases that involve complex, disputed facts or where witness credibility is a crucial issue.

These truth-seeking procedures may be of great value to a petitioner for judicial review when the underlying administrative procedure has not involved a contested case. In contrast, it is unlikely that parties who have already litigated a contested case in the OAH need an additional trial in superior court. After all, contested cases provide almost all of the same truth-seeking procedures to litigants, albeit in a less formal hearing.¹²² Further, elaborate truth-seeking procedures may be unnecessary in many administrative disputes, especially ones that involve objective or undisputed facts and non-discretionary determinations.¹²³ Thus, for example, if the Currituck Game Commission denies a duck blind license to an applicant whose application is incomplete, the disappointed applicant likely does not need a full trial in superior court to resolve the dispute.¹²⁴ Indeed, many far more significant agency decisions, involving complex and disputed facts and weighty interests at stake, are reviewed by superior courts in their appellate mode after a contested case.¹²⁵

Third, it is important to consider the costs of the additional procedural safeguard of a trial *de novo* in the superior court. These costs come in many forms, one of which is complexity. By departing from the uniform system of review contemplated by the APA, the statutes risk confusing litigants and judges as to the correct standard of review, resulting in protracted litigation.¹²⁶ Another cost comes

¹²² See generally N.C. GEN. STAT. §§ 150B-23 to 150B-37 (2013) (procedures in contested cases).

¹²³ See *Matthews*, 424 U.S. at 343–44 (noting that disability termination decisions were based on “routine, standard, and unbiased medical reports by physician specialists” of patients whom they had actually examined and therefore did not merit a contested evidentiary hearing).

¹²⁴ See *infra* text accompanying note 157–161.

¹²⁵ For example, the superior courts give appellate review to the denial of an air quality permit. Parties first challenge the denial of permits in a contested case before an Administrative Law Judge. N.C. GEN. STAT. §143-215.108(e).

¹²⁶ See, e.g., *infra* text accompanying notes 141–168, 165–166.

from the more formal and protracted nature of superior court proceedings, where the state will need to defend the agency. Original jurisdiction also builds redundancy into the system. A trial *de novo* means that the superior court judge must repeat the fact-finding of the lower tribunal, instead of simply reviewing the record for error. Unless the dispute has a highly contested factual record, or involves exceptionally important individual interests, it is difficult to believe that such costs are justified by the possibility of achieving a more accurate result.

Using superior court judges to retry administrative cases also represents a misallocation of resources between the judicial and executive branches of government. First, it makes the administrative decisionmaker superfluous.¹²⁷ Second, it replaces the arguably superior decisionmaker—an expert agency—with an arguably inferior one—a generalist judge who may have little knowledge or understanding of the particular statutory scheme at issue.¹²⁸

By contrast, vesting *appellate* jurisdiction in the superior courts has the beneficial effects of recognizing that agencies are in a superior position as fact finders and decisionmakers in the administrative process, capturing the efficiencies of administrative adjudication, and avoiding the negative incentives of treating the agency as a “pass through.” Further, appellate jurisdiction appropriately constrains the judicial branch from unduly interfering with the administrative process.¹²⁹ Thus, for example, even when the granting of a license relies on some non-objective factors—such as the requirement for “good moral character” to obtain a license to practice medicine¹³⁰—the denial of such a license might appropriately be given appellate review in the superior court because the expert administrators on the Medical Board (most of whom are

¹²⁷ See N.C. Dep’t of Env’t & Natural Res. v. Carroll, 599 S.E.2d 888, 896 (N.C. 2004) (noting that the superior court’s *de novo* review of the agency’s fact finding has the potential to “render an administrative agency’s statutory responsibility to find facts in contested cases a pointless formality”).

¹²⁸ See *id.* (noting the “institutional advantage” of the ALJ as fact finder).

¹²⁹ See generally CHARLES ALAN WRIGHT & CHARLES KOCH, JR., 33 FED. PRAC. & PROC. JUDICIAL REVIEW §§ 8330, 8332 (1st ed. 2013); *McKart v. United States*, 395 U.S. 185, 194–95 (1969) (noting that the exhaustion requirement similarly supports judicial economy and agency autonomy).

¹³⁰ N.C. GEN. STAT. § 90-9.1(a)(3).

doctors or involved in the medical profession¹³¹) are in a better position than the superior court to find facts and make informed decisions about the type of character needed to practice medicine.¹³²

Finally, it is important to remember that the superior court, even when acting in its appellate capacity, wields considerable authority to review and correct the lower tribunal's decision. The superior court is empowered to remand to the agency for reconsideration any arbitrary or factually unsupported decisions, or to order an appropriate result without remanding.¹³³

The following subsections will analyze each of the statutes that confer original or hybrid jurisdiction on the superior courts in light of the framework and considerations suggested by *Matthews v. Eldridge*. They conclude that, in almost every instance, the statutes vesting original jurisdiction in the superior courts confer *more* procedural protections than the circumstances require or that are cost justified.

1. Revision Recommended

a. *Statutes Enacted Prior to the APA*

Several statutes conferring original jurisdiction in the superior courts appear to have survived the enactment of the APA through oversight. For example, section 90-210.94, which predates the APA, provides that appeals from a decision of the Board of Funeral Services revoking or suspending the license of a mutual burial association are reviewed *de novo* in the superior court.¹³⁴ Currently, however, the Board of Funeral Services has the power to conduct hearings in accordance with the APA¹³⁵ and can only suspend or

¹³¹ N.C. GEN. STAT. § 90-2(a).

¹³² See *In re Guess*, 393 S.E.2d 833, 837–38 (N.C. 1989) (acknowledging the expertise of the Board of Medical Examiners).

¹³³ N.C. GEN. STAT. § 150B-51(b) (authorizing the court to affirm, remand, reverse or modify the agency order).

¹³⁴ See N.C. GEN. STAT. § 90-210.94 (“[T]he clerk of superior court shall place the matter upon the civil issue docket of the superior court and the same shall be heard *de novo*.”).

¹³⁵ N.C. GEN. STAT. § 90-210.23(d1) (“The Board is empowered to hold hearings in accordance with the provisions of this Article and of Chapter 150B to

revoke a license after a hearing.¹³⁶ While there may have been a good reason to give the licensee a new trial in the superior court at the time the statute was enacted, those reasons should probably be revisited in light of the APA.

In addition to section 90-210.94, the pre-APA statutes conferring original jurisdiction on the reviewing court include:

- Section 7A-250(c)¹³⁷ —“Appeals from rulings of county game commissions” (enacted in 1965);
- Section 20-25¹³⁸ —appeals from a discretionary revocation of a driver’s license (enacted in 1935);
- Section 20-279.2¹³⁹—appeals from the orders of the Commissioner of Motor Vehicles enforcing the Motor Vehicle Safety and Financial Responsibility Act of 1953; and
- Sections 90-14.1 and 90-14.10¹⁴⁰ —appeals from decisions of the North Carolina Medical Board

subpoena witnesses and to administer oaths to or receive the affirmation of witnesses before the Board.”).

¹³⁶ N.C. GEN. STAT. § 90-210.86.

¹³⁷ N.C. GEN. STAT. § 7A-250(c) (“Appeals from rulings of county game commissions shall be heard in the district court division. The appeal shall be heard *de novo* before a district court judge sitting in the county in which the game commission whose ruling is being appealed is located.”); *see infra* Part III.A.1.c.

¹³⁸ N.C. GEN. STAT. § 20-25 (“Any person denied a license or whose license has been canceled, suspended or revoked by the Division, except where such cancellation is mandatory under the provisions of this Article, shall have a right to file a petition . . . for a hearing in the matter in the superior court of the county wherein such person shall reside . . . and such court or judge is hereby vested with jurisdiction and it shall be its or his duty . . . to take testimony and examine into the facts of the case, and to determine whether the petitioner is entitled to a license or is subject to suspension, cancellation or revocation of license under the provisions of this Article.”); *Cole v. Faulkner*, 573 S.E.2d 614, 616 (N.C. Ct. App. 2002) (citing *In re Wright*, 45 S.E.2d 370 (N.C. 1947)) (finding that “a right to *de novo* review in superior court exists where there is a *discretionary* denial, cancellation, suspension, or revocation of a driver’s license by the DMV.”); *see infra* Part III.A.1.d.

¹³⁹ N.C. GEN. STAT. § 20-279.2(b); *see also infra* Part III.A.1.d.

¹⁴⁰ N.C. GEN. STAT. § 90-14.1 (“Upon appeal the case shall be heard by the judge without a jury, upon the record, except that in cases of alleged omissions or errors in the record, testimony may be taken by the court.”); N.C. GEN. STAT. § 90-14.10 (“Upon the review of the Board’s decision taking disciplinary action on a license, the case shall be heard by the judge without a jury, upon the record, except

(enacted in 1953) (conferring a hybrid form of original and appellate jurisdiction).

At a minimum, the legislature should review these statutes and consider revising them to conform to the review provisions of the APA, conferring appellate jurisdiction in the superior court. All of these statutes are discussed in more detail in the following subsections.

b. Statutes Conferring Hybrid Original/Appellate Jurisdiction

In addition to the statutes conferring original jurisdiction, the legislature has also experimented with hybrid review provisions that introduce further complication into the jurisdictional question. Three agency-specific statutes confer *either* original *or* appellate jurisdiction on the superior court:

- Section 108A-79(k)¹⁴¹ —appeals from benefits determinations made by the Department of Health and Human Services, and
- Sections 90-14.1 and 90-14.10¹⁴² —appeals from licensing and disciplinary decisions of the North Carolina Medical Board.

The standard of review in these statutes is problematic for several reasons. First, the statutes require a complex and unusual form of review, and anomalous legislation of this sort creates the potential for judicial error and protracted litigation. Section 108A-79(k) provides that the hearing in the superior court

that in cases of alleged omissions or errors in the record, testimony thereon may be taken by the court.”); *see infra* Part III.A.1.b.

¹⁴¹ N.C. GEN. STAT. § 108A-79(k).

¹⁴² N.C. GEN. STAT. §§ 90-14.1, 90-14.10; *see supra* note 140 and accompanying text.

shall be conducted according to the provisions of Article 4, Chapter 150B The court shall, on request, examine the evidence excluded at the hearing . . . and if the evidence was improperly excluded, the court shall consider it. Notwithstanding the foregoing provisions, the court may take testimony and examine into the facts of the case, including excluded evidence, to determine whether the final decision is in error¹⁴³

As the North Carolina Supreme Court noted in *Meza v. Division of Social Services*, however, a comparison of the standards of review in section 150B-51(b) and section 108A-79(k) shows that they are plainly inconsistent.¹⁴⁴ In construing the scheme of review contemplated by this statute, the supreme court concluded that the superior court should first conduct an APA-style review, examining questions of law *de novo* and questions of fact under the whole record test, as in section 150B-51(b).¹⁴⁵ If the superior court concludes that the agency's findings of fact are *not* supported by substantial evidence in the record, it then has the option *either* to remand the case to the agency for further proceedings *or* to conduct its own new trial on the facts and law in the case.¹⁴⁶ The court did not comment on the reasons for or wisdom of this complex hybrid of judicial review, but its costs are evident. It took five years and three levels of judicial review in *Meza* before the case was finally

¹⁴³ N.C. GEN. STAT. § 108A-79(k).

¹⁴⁴ *Meza v. Div. of Soc. Servs.*, 692 S.E.2d 96, 100 (N.C. 2010).

¹⁴⁵ *Id.* at 102.

¹⁴⁶ *Id.* It is not clear from the statute whether the superior court has the option of exercising *de novo* review absent a finding that the agency's decision is not supported by substantial evidence, although language appearing in the *Meza* opinion suggests that the superior court always has that option. *See id.* at 105 (emphasis added) ("In conclusion, we hold that the standard of review of an agency decision under N.C.G.S. § 108A-79(k) is *de novo* when the superior court exercises its statutory authority to 'take testimony and examine into the facts of the case . . . to determine whether the final decision is in error under federal and State law.' If, however, the superior court proceeds solely upon the administrative record, the hearing is governed by the provisions of the [APA], in which questions of fact are reviewed under the whole record test and questions of law are reviewed *de novo*.").

remanded to the superior court for a trial using the appropriate standard of review.¹⁴⁷

The second problem with these hybrid jurisdictional statutes is that their cost is not justified by any clear advantage of a more accurate result in the superior courts. Under section 108A-79(k), the superior court has the option to refuse to exercise its original jurisdiction and remand to the agency, even when the agency's findings of fact are unsupported by substantial evidence.¹⁴⁸ Thus, the hybrid review provides little guarantee of greater procedural safeguards to the aggrieved party.

Finally, a *de novo* trial in the superior court likely would be redundant. When making benefit determinations, the Department of Health and Human Services provides administrative hearings subject to the contested case provisions of the APA.¹⁴⁹ Original jurisdiction in the superior court is also a misallocation of judicial resources, as the agencies making the initial determination are experts in their complex and highly technical areas. To the extent that these hybrid jurisdiction statutes were modeled on the hybrid procedures in former section 150B-151(c), those procedures have now been abandoned by the legislature and should be abandoned here.¹⁵⁰

¹⁴⁷ *Id.* at 98. The North Carolina Supreme Court finally set forth the correct standard of review five years after the Department of Social Services denied the petitioner's application for Medicaid benefits. *Id.* The supreme court reversed the decisions of the appellate and superior courts, finding that the superior court had incorrectly applied the statutory standard of review. *Id.* at 105-06.

¹⁴⁸ *See id.* at 102 (“[O]nce the superior court determines, based on the whole record test, that the findings of fact are not supported by substantial evidence in the record and, therefore, cannot support the hearing officer's conclusions of law, the court can follow one of two procedures. The court can remand the case to the agency for further proceedings, or the court can take evidence, make findings of fact, and draw its own conclusions of law from the findings thus made.”).

¹⁴⁹ *See generally* N.C. GEN. STAT. § 108A-79(a)-(j) (2013) (providing for a hearing after a denial of benefits with a right to appeal to the Department). The Medical Board is also subject to the contested case provisions of the APA. N.C. GEN. STAT. § 90-14.1 (providing for a hearing after a denial of a license to practice medicine); N.C. GEN. STAT. § 90-14.2 (2013) (providing for a hearing concerning proposed disciplinary action by the Medical Board); N.C. GEN. STAT. § 150B-1(e) (mandating that “[t]he contested case provisions of [the] Chapter apply to all agencies and all proceedings not expressly exempted from the Chapter”).

¹⁵⁰ *See Meza*, 692 S.E.2d at 101 (noting that the hybrid procedures in section 108A-79(k) resemble the hybrid procedures of the now-repealed section 150B-51(c)).

While it has never been construed in a reported opinion, two statutes governing appeals from the licensing and disciplinary decisions of the North Carolina Medical Board also appear to confer a form of hybrid jurisdiction.¹⁵¹ As previously noted, these statutes pre-date the APA.¹⁵²

The legislature should revise all of these statutes to conform to the review provisions of the APA, conferring only appellate jurisdiction in the superior court.

c. Initial Decision Not Made by an Agency or Officer in the Executive Branch

Another group of statutes that confer original jurisdiction in the reviewing court governs quasi-administrative actions taken by government entities that are *not* agencies or officers in the state executive branch. For purposes of applying the APA, section 150B-2(1a) defines “agency” as “an agency or officer in the executive branch of the government of this State,” but specifically excludes any “local unit of government” and implicitly excludes any departments of the legislative or judicial branches.¹⁵³ Thus, licensing, registration, or other decisions made initially at the county level are not subject to the contested case requirements of the APA. However, because the conferral of original jurisdiction commits judicial resources, it is appropriate to discuss these statutes in the context of other administrative appeals.

¹⁵¹ N.C. GEN. STAT. §§ 90-14.1, 90-14.10; *see supra* note 140 and accompanying text.

¹⁵² *See supra* Part III.A.1.a.

¹⁵³ *See* N.C. GEN. STAT. § 150B-2(1a). Three statutes provide for original jurisdiction in the superior court of decisions made initially by a district court or the clerk of the superior court. *See* N.C. GEN. STAT. § 20-28.5(e) (review of district court’s entry of forfeiture of a motor vehicle is heard in the superior court *de novo*); N.C. GEN. STAT. § 108A-37(c) (review of clerk of court’s appointment of a personal representative for a recipient of public assistance is made by superior court, “*de novo* without a jury”); N.C. GEN. STAT. § 111-30 (review of clerk of court’s appointment of a personal representative for a recipient of aid to the blind is made by superior court, “*de novo* without a jury”). Because these statutes deal with decisions made wholly within the judicial department of the state, they are outside the scope of this Article.

The following statutes provide for original jurisdiction over appeals from decisions not made in the first instance by agencies of the state:

- Section 7A-250(c)¹⁵⁴—vesting original jurisdiction in the district court over appeals from the rulings of county game commissions;
- Section 67-4.1¹⁵⁵—appeals from a local animal control board declaring a dog to be “potentially dangerous.”

The rationale for giving original jurisdiction to the judicial branch in appeals from these matters is presumably¹⁵⁶ to ensure that the aggrieved party receives at least one hearing with strong procedural safeguards, as decisions made by the lower tribunal are not governed by APA procedures. For several reasons, these statutes should be revised to vest appellate, not original, jurisdiction in the superior court.

First, as noted above, section 7A-250(c) is obsolete.¹⁵⁷ It was enacted in 1965; it predates the APA and the 1979 reorganization of the state’s wildlife laws, which stripped all but two county governments (Dare and Currituck) of control over wildlife management and vested control in the North Carolina Wildlife Resources Commission, a state agency.¹⁵⁸ The two remaining functional county game commissions issue licenses for duck hunting blinds.¹⁵⁹ Arguably, the licenses implicate important individual

¹⁵⁴ N.C. GEN. STAT. § 7A-250(c); *see supra* note 137 and accompanying text.

¹⁵⁵ N.C. GEN. STAT. § 67-4.1(c) (“The appeal shall be heard *de novo* before a superior court judge sitting in the county in which the appellate Board whose ruling is being appealed is located.”); *Caswell Cnty. v. Hanks*, 462 S.E.2d 841, 842–43 (N.C. Ct. App. 1995) (trial court reversed for not conducting *de novo* trial).

¹⁵⁶ There is no relevant legislative history for most of these statutes and thus the reasons for the prescribed judicial review standard must be presumed in most cases. Legislative history will be cited where available and relevant.

¹⁵⁷ *See supra* Part III.A.1.a.

¹⁵⁸ N.C. GEN. STAT. § 113-133.1. *See generally About North Carolina Wildlife Resources Commission*, N.C. WILDLIFE RESOURCES COMMISSION, <http://www.ncwildlife.org/about.aspx> (last visited Oct. 24, 2013).

¹⁵⁹ *About the Commission*, CURRITUCK CNTY. GAME COMM’N, <http://www.currituckgamecommission.org/About%20The%20Commission.html> (last visited Oct. 24, 2013); *Game and Wildlife Commission*, DARE CNTY., http://www.darenc.com/gov/brdlist_gw.asp (last visited Oct. 24, 2013).

interests—the ability to shoot ducks from behind a duck blind¹⁶⁰—and the consequences of erroneous deprivation are severe—the potential loss of a season of duck hunting. However, given that the applications for such licenses have no discretionary elements,¹⁶¹ there is only a small chance that a *de novo* trial in the district court will add significantly to a more accurate result. Finally, while trials *de novo* of the orders of these two game commissions are unlikely to cause a significant drain on the resources of the court, it makes little sense, in the context of objective licensing decisions, to provide for original, rather than appellate, jurisdiction.

Second, the statutes build costly redundancy into the system without justifying the cost of duplicative superior court proceedings. For example, section 67-4.1 vests original jurisdiction in the superior court over appeals from the order of a local animal control board declaring a dog to be “dangerous” or “potentially dangerous.”¹⁶² The statute anticipates a two-stage process at the local level: an initial determination following an investigation, and in the event of an appeal by the dog owner, a final determination following a hearing before a board.¹⁶³ Thus, by the time the owner files an appeal in the superior court, she has already had the benefit of two administrative determinations and it is not clear that a new trial in the superior court is justified. Weighing in favor of original jurisdiction, the owner has a strong interest in avoiding the additional burden of owning a dog

¹⁶⁰ See, e.g., Joe Balog, *Part Three: Interview with Phil Robertson, WATERFOWL & RETRIEVER* (Nov. 18, 2010), <http://www.grandviewoutdoors.com/duck-hunting/articlecontent/11/2010/1481/part-three:-interview-with-phil-robertson> (conveying eponymous advice from Phil Robertson, duck hunting guru).

¹⁶¹ See, e.g., *2013/2014 Blind License Application*, DARE CNTY., available at http://www.darenc.com/gov/brdlist_gw_license.pdf (requiring the applicant to verify her name, address, and North Carolina hunting license number, to provide a description of the requested location of the duck blind, and pay a fee).

¹⁶² N.C. GEN. STAT. § 67-4.1 (“The appeal shall be heard *de novo* before a superior court judge sitting in the county in which the appellate Board whose ruling is being appealed is located.”); *Caswell Cnty. v. Hanks*, 462 S.E.2d 841, 842–43 (N.C. Ct. App. 1995) (trial court reversed for not conducting *de novo* trial).

¹⁶³ N.C. GEN. STAT. § 67-4.1(c); see, e.g., *Guide to Dangerous and Potentially Dangerous Dog Classification*, ORANGE CNTY. ANIMAL SERVS., <http://www.ocfl.net/Portals/0/Library/Animals-Pets/docs/DangerousDogs.pdf> (last visited Nov. 10, 2013) (describing the procedures in Orange County, which involve a hearing prior to the initial determination and a hearing before the board, before appeal to the district court).

that has been adjudged dangerous or potentially dangerous. Furthermore, since this kind of determination is likely to have a contested factual record, the additional truth-finding procedures of a superior court may improve the accuracy of the outcome.

On the other side of the balance, the consequences of the local board decision are not severe. A dog owner incurs some costs if the dog is labeled dangerous (e.g., for microchipping the dog and taking a class on responsible ownership), but does not necessarily lose ownership of the dog.¹⁶⁴ Furthermore, the costs of original jurisdiction to the court system may be significant. These costs include the time and expense of conducting a trial *de novo* and also the confusion caused by an anomalous statute.¹⁶⁵ Unlike many of the statutes vesting original jurisdiction in the superior court, section 67-4.1 resulted in one appellate court decision, which overturned and remanded a case to the superior court for failing to review the decision of the animal control board *de novo*.¹⁶⁶ That litigation, which required a written opinion from the appellate court and two hearings before a superior court judge, is perhaps the “poster child” of needlessly costly and duplicative proceedings that are avoidable by authorizing the superior court to engage in appellate review of the order, rather than conduct a *de novo* hearing.

Accordingly, these statutes should be changed, eliminating the provision for original jurisdiction in the reviewing courts and replacing it with appellate jurisdiction.

d. Agency Decision Made Without an Opportunity for In-Person Hearing

Four statutes confer original jurisdiction over decisions initially made by the Department of Transportation (DOT) and its Division of Motor Vehicles (DMV), in circumstances where the aggrieved party was denied a license or permit without an opportunity for a hearing:

¹⁶⁴ See, e.g., *Guide to Dangerous and Potentially Dangerous Dog Classification*, *supra* note 163 (describing the consequences of having a dog adjudicated as “potentially dangerous” or “dangerous”).

¹⁶⁵ N.C. GEN. STAT. § 67-4.1.

¹⁶⁶ *Caswell*, 462 S.E.2d at 842–43 (trial court reversed for not conducting *de novo* trial).

- Section 136-134.1¹⁶⁷—appeals from denial or revocation of an outdoor advertising permit;
- Section 136-149.1¹⁶⁸—appeals from denial or revocation of a permit for a junkyard located near a highway;
- Section 20-25¹⁶⁹—appeals from a discretionary revocation of a driver’s license; and
- Section 20-279.2¹⁷⁰—appeals from the suspension or revocation of an uninsured motorist’s license.

The DOT is exempt from the contested case requirements of the APA,¹⁷¹ and thus the rationale for vesting original jurisdiction to the superior court is presumably to ensure that the aggrieved party eventually gets a hearing with procedural safeguards. Under the Outdoor Advertising Control Act, for example, the Secretary has the power to issue, deny, or revoke permits for building or maintaining billboards along DOT-controlled roads.¹⁷² An engineer makes an initial determination on all permit applications; denials and revocations can be appealed to the Secretary, who makes a final determination based on the individual’s written application, the

¹⁶⁷ N.C. GEN. STAT. § 136-134.1 (“The review of the decision of the Secretary of Transportation under this Article shall be conducted by the court without a jury and shall hear the matter de novo pursuant to the rules of evidence as applied in the General Court of Justice.”); *Powell v. N.C. Dep’t of Transp.*, 704 S.E.2d 547, 556 (N.C. Ct. App. 2011) (affirming that the superior court has original jurisdiction and is “not bound by the agency’s findings and conclusions”).

¹⁶⁸ N.C. GEN. STAT. § 136-149.1 (“The review of the decision of the Secretary of Transportation under this Article shall be conducted by the court without a jury and shall hear the matter de novo pursuant to the rules of evidence as applied in the General Court of Justice.”).

¹⁶⁹ N.C. GEN. STAT. § 20-25; *see supra* note 138 and accompanying text.

¹⁷⁰ N.C. GEN. STAT. § 20-279.2(b) (“Any person aggrieved by an order or act of the Commissioner requiring a suspension or revocation of his license under the provisions of this Article, . . . may file a petition in the superior court of the county in which the petitioner resides for a review At the hearing upon the petition the judge shall sit without the intervention of a jury and shall receive such evidence as shall be deemed by the judge to be relevant and proper. . . . The matter shall be heard de novo”); *see State v. Martin*, 186 S.E.2d 647, 648 (N.C. Ct. App. 1972) (noting that “ample” review of revocation is provided by statute).

¹⁷¹ N.C. GEN. STAT. § 150B-1(e)(8).

¹⁷² N.C. GEN. STAT. § 136-130.

engineer's decision, and any supporting documents.¹⁷³ There are no provisions for an oral hearing at the agency level and thus a trial in the superior court is the litigant's first opportunity to contest the agency's decision in person. Similarly, there is no opportunity for a hearing before the Commissioner of the DMV before one's license is, for example, revoked because of a conviction in another state,¹⁷⁴ or suspended under the Motor Vehicle Safety and Financial Responsibility Act.¹⁷⁵

These DOT statutes, which accord no agency-level hearings, are inconsistent with the way that most licensing and permitting decisions by state agencies are made and should be carefully reviewed to see whether the anomaly is worth preserving.¹⁷⁶ A license to conduct business or to drive generally implicates important individual interests; the significance of these interests is reflected in the APA's general grant of agency-level hearings to applicants and licensees.¹⁷⁷ In a more typical licensing regime—for example, for pharmacists—a person whose license is revoked or whose application is denied can challenge the agency's action in a contested case, which results in a final decision. The aggrieved party then appeals the final decision to the superior court, invoking its appellate jurisdiction.¹⁷⁸

¹⁷³ 19A N.C. ADMIN. CODE 2E.0213 (2013). The Secretary has not yet promulgated rules regarding his control of junkyards.

¹⁷⁴ N.C. GEN. STAT. § 20-23 (“The Division *may* revoke the license of any resident of this State upon receiving notice of the person's conviction in another state of an offense set forth in G.S. 20-26(a).”) (emphasis added).

¹⁷⁵ See N.C. GEN. STAT. § 20-279.5(b) (“The Commissioner *shall*, within 60 days after the receipt of such report of a motor vehicle accident, suspend the license of each operator and each owner of a motor vehicle in any manner involved in such accident . . .”) (emphasis added).

¹⁷⁶ Compare N.C. GEN. STAT. § 20-279.5(b), with N.C. GEN. STAT. § 150B-3.

¹⁷⁷ N.C. GEN. STAT. § 150B-3 (setting limits on an agency's ability to deny or revoke a license in the absence of specific statutory requirements).

¹⁷⁸ See, e.g., N.C. GEN. STAT. § 90-85.38 (authorizing the Board of Pharmacy to revoke or refuse to grant a license, consistent with the provisions of 150B). While the statute does not specify that the aggrieved party can appeal the decision, the party may petition for review in the superior court. See *CVS Pharmacy, Inc. v. N.C. Bd. of Pharmacy*, 591 S.E.2d 567, 569–70 (N.C. Ct. App. 2004) (noting that CVS filed a petition for review of the Board's decisions and that the superior court correctly applied whole record review).

There are several reasons that counsel in favor of changing the DOT statutes to reflect more typical state licensing practices. First, two of the DOT statutes predate the enactment of the APA.¹⁷⁹ The legislature should consider whether this outdated statutory scheme—and perhaps even the DOT’s blanket exemption from the APA—has continued validity. Second, as previously noted, licenses generally implicate important individual interests; the consequences of erroneous deprivation, particularly of a driver’s license, can be severe (for example, for anyone who relies on their driver’s license for their employment). Accordingly, the more typical licensing scheme, which includes an appeal from the initial determination and a hearing at the agency level,¹⁸⁰ would provide additional procedural protections for the aggrieved party without straining judicial resources. Finally, because the superior courts have the inherent authority to give appellate review to agency licensing decisions, such a revision would be consistent with the long tradition of North Carolina law to vest appellate, not original, jurisdiction in the courts over the review of DOT decisions.¹⁸¹

Accordingly, these statutes should be revised for consistency with other state licensing schemes, and to vest appellate, not original, jurisdiction in the superior courts.

e. Review Provisions in the North Carolina Business Corporations Act and North Carolina Business Nonprofit Act

Another group of statutes that confer original jurisdiction on the superior courts appears in the North Carolina Business Corporations Act (BCA), the Business Nonprofit Act (BNA), and the Filings, Names and Registered Agents Act¹⁸²:

¹⁷⁹ See *supra* Part III.A.1.a.

¹⁸⁰ See, e.g., N.C. GEN. STAT. § 150B-3.

¹⁸¹ See, e.g., N.C. GEN. STAT. § 150B-1(e)(8). Appellate review of agency licensing decisions is a well-established norm. Long before the APA was enacted, the North Carolina courts reviewed petitions regarding certain licensing decisions based on their “inherent authority to review the discretionary action of any administrative agency, whenever such action affects personal or property rights, upon a prima facie showing, by petition for a writ of certiorari, that such agency has acted arbitrarily, capriciously, or in disregard of law.” *In re Wright*, 46 S.E.2d 696, 698 (N.C. 1948) (reviewing the suspension of a driver’s license).

¹⁸² See Appendix and accompanying text for language of statutes.

- Sections 55-15-32(a) and 55A-15-32(a)—appeals of a foreign corporation or nonprofit from the Secretary of State’s revocation of a license to do business in the state;
- Sections 55-14-23(b) and 55A-14-23(b)—appeals of a foreign corporation or nonprofit from the Secretary of State’s denial of an application to be reinstated; and
- Section 55D-16(a)—appeals from the Secretary of State’s refusal to file documents submitted by a corporation or nonprofit organization.

These statutes all provide, in similar language, “The appeal to the superior court shall be determined by a judge of the superior court upon such further evidence, notice and opportunity to be heard, if any, as the court may deem appropriate under the circumstances.”¹⁸³ While the statutes do not use the phrase “*de novo*,” and have not yet been construed in a reported opinion, they appear to mandate original jurisdiction because they direct the superior court to make its determination “upon such *further evidence*, notice and opportunity to be heard” as the court deems appropriate, and the power to take new evidence is the hallmark of original jurisdiction.¹⁸⁴ The statutes also give the superior court power to order the Secretary to take the requested action.¹⁸⁵

These statutes have not yet resulted in a reported case and thus it is unlikely that they are causing a strain on judicial resources. They nevertheless merit review for conformity with the APA for two reasons. First, it is not clear that *de novo* jurisdiction is warranted in the circumstances addressed by the statute. On the one hand, the Secretary makes her initial decision on a paper record, without an in-person hearing, and original jurisdiction in the superior court provides procedural safeguards for the aggrieved party. On the other hand, the consequences of erroneous deprivation are not severe because the corporation or nonprofit can correct the mistakes in its application and re-file.¹⁸⁶ Further, the additional procedures

¹⁸³ N.C. GEN. STAT. § 55-15-32(a).

¹⁸⁴ *In re Dunn*, 326 S.E.2d 309, 311–12 (N.C. Ct. App. 1985); N.C. GEN. STAT. § 55-15-32(a) (emphasis added).

¹⁸⁵ N.C. GEN. STAT. §§ 55-15-32(b), 55A-15-32(b), 55-14-23(c), 55A-14-23(c), 55D-16(b).

¹⁸⁶ *See, e.g.*, N.C. GEN. STAT. § 55-14-05 (describing the effect of administrative dissolution of a corporation); N.C. GEN. STAT. § 55-14-22

available in the superior court are not likely to provide a significant improvement in accuracy for this kind of determination: the Secretary has very little discretion in revoking a business license, denying reinstatement of a business license, or refusing to file documents,¹⁸⁷ and because the statute requires objective information about the applicant, decisions of this kind are unlikely to involve disputed facts. Thus the superior court's power of mandamus (to order the secretary to grant reinstatement, for example), in combination with the power to remand if the Secretary's decision is arbitrary and capricious, is likely adequate to protect the aggrieved party's rights.

Second, the statutory language in the BCA and BNA is, apparently, *sui generis*; it has never been construed by a court, there is no similar language in comparable statutes from this state or others, and, because it is anomalous, untried, and untested, it is potentially confusing and could lead to protracted litigation.¹⁸⁸ Even if it is advisable for the superior courts to have original jurisdiction in these appeals, the statute should be revised to more clearly confer original jurisdiction.

(permitting corporation that has been administratively dissolved to apply for reinstatement); N.C. GEN. STAT. § 55-15-31 (permitting Secretary to grant a new certificate of authority to a corporation that has corrected all of the grounds for revocation of its prior certificate); N.C. GEN. STAT. § 55D-15(d) (specifying that the Secretary's refusal to file a document does not, in most cases, affect the validity of the document).

¹⁸⁷ See, e.g., N.C. GEN. STAT. § 55-14-22(a)(2). The Secretary must grant the application for reinstatement if the corporation has correctly provided its name, its date of administrative dissolution, and stated that the grounds for dissolution "either did not exist or have been eliminated."

¹⁸⁸ There is an echo of the language in a 1953 Motor Vehicles statute conferring original jurisdiction. N.C. GEN. STAT. § 20-279.2(b) ("At the hearing upon the petition the judge shall sit without the intervention of a jury and shall receive such evidence as shall be deemed by the judge to be relevant and proper."); see *supra* Part III.A.1.d. The Uniform Commercial Code uses similar language in its judicial review statute, but omits the word "evidence," suggesting that it contemplates appellate jurisdiction in the reviewing court. In an interview, however, the chairman of the BCA Drafting Committee indicated that the committee did not use existing statutory language as a model for the 1989 revisions to the BCA. Telephone Interview with Russell M. Robinson, II, Founding Partner, Robinson, Bradshaw & Hinson, P.A. and Author, ROBINSON ON NORTH CAROLINA CORPORATION LAW (Permanent Edition, 2002) (July 17, 2012).

2. No Revision Recommended

Two of the statutes that confer original jurisdiction in the superior courts implicate the rights of voters or candidates for political office. Because of the significant rights at stake in all matters involving voting and ballot access, no change is recommended to these statutes:

- Section 163-82.18¹⁸⁹—appeals from a denial of voter registration by the county board of election; and
- Section 163-278.26¹⁹⁰—appeals from the denial of a declaration of nomination or certificate of election by the State Board of Elections.

County boards of election, which are exempt from the APA, must follow statutorily mandated procedures before denying a voter registration application.¹⁹¹ Section 163-82.18 specifically protects an individual's right to notice and a "prompt and fair" hearing before the board and also gives subpoena power to the board.¹⁹² The superior court reviews the county board's denial of registration *de novo*.¹⁹³ While an argument can be made against original jurisdiction of such appeals, because the frustrated applicant for registration is entitled to a hearing before the county board, the balance here tips in favor of original jurisdiction in the superior court because of the fundamental right at stake—the individual's right to vote—and because the

¹⁸⁹ N.C. GEN. STAT. § 163-82.18(c) ("Any person aggrieved by a final decision of a county board of elections denying registration may at any time within 10 days from the date on which he receives notice of the decision appeal to the superior court of the county in which the board is located. . . . [T]he matter shall be heard *de novo* in the superior court in the manner in which other civil actions are tried and disposed of in that court.").

¹⁹⁰ N.C. GEN. STAT. § 163-278.26 ("Any candidate for nomination or election who is denied a declaration of nomination or certificate of election, pursuant to G.S. 163-278.25, may . . . appeal to the Superior Court of Wake County for a final determination of any questions of law or fact which may be involved in the Board's action" and "[o]n appeal, the cause shall be heard *de novo*.").

¹⁹¹ See N.C. GEN. STAT. § 163-82.18(a)–(b).

¹⁹² *Id.* (giving the individual the right to appeal from an initial denial of registration, requiring a *de novo* hearing before at least two members of the county board, and requiring the board to issue a written order within five days of the hearing).

¹⁹³ N.C. GEN. STAT. § 163-82.18(c).

consequences of an erroneous denial are significant (the individual may be wrongfully denied the right to vote in an upcoming election).

There is also a good argument for the superior courts to have original jurisdiction over denials by the State Board of Elections of a declaration of nomination or certificate of election for a candidate for political office, based on the candidate's failure to file required financial and organizational statements with the board.¹⁹⁴ Applicants are not entitled to a hearing before the Board prior to a final denial and thus a *de novo* hearing in the superior court does not duplicate the proceedings before the Board. Further, there is a significant interest at stake—the individual's interest in running for political office¹⁹⁵—and the consequences of an erroneous denial are significant (the individual may be wrongfully prevented from running as a candidate in an upcoming election). Accordingly, original jurisdiction in the superior court should be preserved in these statutes.

B. Agency-Specific Judicial Review Statutes Conferring Appellate Jurisdiction on the Superior Courts

Finally, there are numerous agency-specific statutes that confer appellate jurisdiction over administrative appeals in the superior courts.¹⁹⁶ These statutes confer appellate jurisdiction in one of several ways: by either explicitly referencing the APA,¹⁹⁷ by using

¹⁹⁴ See N.C. GEN. STAT. § 163-278.25 (providing that the Board will not issue a declaration of nomination or certificate of election until the candidate has filed required statements); see also N.C. GEN. STAT. § 163-278.24 (requiring the Board to determine that statements conform to “law and to the truth” within four months of their submission); N.C. GEN. STAT. § 163-278.9 (listing some of the statements that must be filed with the Board of Elections).

¹⁹⁵ The right to run for office is not clearly established as a fundamental constitutional right. However, scholars, and some courts, have argued that it should be established as such, given that it implicates the first amendment rights of voters, candidates, and political parties. See, e.g., Dennis W. Arrow, *The Dimensions of the Newly Emergent, Quasi-Fundamental Right to Political Candidacy*, 6 OKLA. CITY U. L. REV. 1 (1981); James S. Jardine, *Ballot Access Rights: The Constitutional Status of the Right to Run for Office*, 1974 UTAH L. REV. 290 (1974).

¹⁹⁶ See Appendix.

¹⁹⁷ E.g., N.C. GEN. STAT. § 113A-123 (“Any person directly affected by any final decision or order of the Commission under this Part may appeal such

language that is similar to or compatible with the jurisdiction conferred by the APA,¹⁹⁸ or through silence—by not mentioning any right or standard of review¹⁹⁹—and thereby defaulting to the APA. For the sake of consistency, these statutes should be revised to make crystal clear that the jurisdiction conferred is appellate.

The simplest way to accomplish consistency might be to remove all references to the appellate jurisdiction of the superior courts in agency-specific statutes; in that event, the APA would provide the standard of review by default.²⁰⁰ But short of removing all references to appellate jurisdiction, the statutes that specifically provide for appellate review should be revised to use language that mimics or specifically references the APA. For example, an agency-specific statute can confer jurisdiction with a citation to section 150B, Article 4, as in section 90–210.69: “Judicial review shall be pursuant to Article 4 of Chapter 150B of the General Statutes.”²⁰¹

There are several problems with the use of inconsistent terminology in agency-specific review statutes. First, in the statutes conferring original jurisdiction, it is easy to confuse the court’s power to hear a case “*de novo*”—i.e., to take new evidence in the case—with the court’s power to review an agency decision “*de novo*”—i.e., to give a non-deferential review to the record. As previously noted, to invoke the superior court’s original jurisdiction, a statute must specifically use language that directs the superior court to take new evidence or examine evidence anew.²⁰² Some agency-specific statutes invoke original jurisdiction in just that manner, by instructing that on appeal the superior court must “take testimony and

decision or order to the superior court . . . pursuant to the provisions of Chapter 150B”); N.C. GEN. STAT. § 53C-2-6(c) (specifying that the standard of review “shall be as provided in G.S. 150B-51(b)”).

¹⁹⁸ *E.g.*, N.C. GEN. STAT. § 58-63-35 (specifically stating that “findings of the Commissioner as to the facts, if supported by substantial evidence, are conclusive”); N.C. GEN. STAT. § 58-2-75 (specifying that the appeal shall be heard “as a civil case upon transcript of the record for review of findings of fact and errors of law only”); N.C. GEN. STAT. § 115C-45 (listing grounds for appeal similar to those in the APA).

¹⁹⁹ *E.g.*, N.C. GEN. STAT. § 106-500 (“Any party may appeal to the superior court from any final order of the Commissioner [of Agriculture].”).

²⁰⁰ N.C. GEN. STAT. § 150B-43.

²⁰¹ N.C. GEN. STAT. § 90-210.69.

²⁰² *See supra* Part II.A.

examine into the facts.”²⁰³ Other agency-specific statutes confer original jurisdiction by requiring that the matter shall be heard *de novo*²⁰⁴ in the superior court, or *de novo* “without a jury.”²⁰⁵ The use of the term *de novo* in the statutes conferring original jurisdiction is potentially confusing because, whereas in this context it refers to *original* jurisdiction and the power to find the facts of the case as if they had never been tried before, in other contexts (such as section 150B-51), the term describes one of the standards of review within the superior court’s *appellate* jurisdiction.²⁰⁶ If the legislature continues to confer *original* jurisdiction over administrative appeals, it would be preferable for the statutes that confer such jurisdiction on the superior courts to avoid the term *de novo* and instead instruct the superior court to take new testimony in the case.

Second, the variety of statutory language used to confer appellate jurisdiction in the superior courts, and the judicial construction of such statutes, can cause uncertainty about the standards the court must apply. For example, under section 58-2-75, the orders and decisions of the Commissioner of Insurance are reviewed “by the trial judge as a civil case upon transcript of the record for review of findings of fact and errors of law only.”²⁰⁷ Six other statutes²⁰⁸ specify that the judicial review of agency action is

²⁰³ *E.g.*, N.C. GEN. STAT. § 20-25 (in appeal from denial, cancellation, or suspension of a motor vehicle license, superior court is authorized to “take testimony and examine into the facts of the case”); N.C. GEN. STAT. § 108A-79 (in appeal from social services agency, superior court is authorized to “take testimony and examine into the facts of the case”).

²⁰⁴ *E.g.*, N.C. GEN. STAT. § 20-28.5 (appeal from forfeiture of impounded motor vehicle or funds).

²⁰⁵ *E.g.*, N.C. GEN. STAT. § 136-134.1 (appeal from final decision of Secretary of Transportation); N.C. GEN. STAT. § 163-82.18 (1957) (appeal from denial of voter registration).

²⁰⁶ *See supra* Part II.B.2.

²⁰⁷ *See* N.C. GEN. STAT. § 58-2-75 (2013). Section 58-2-75 was enacted in 1945. 1945 N.C. Sess. Laws 383.

²⁰⁸ N.C. GEN. STAT. § 58-19-70 (“Any person aggrieved by any order made by the [Insurance] Commissioner pursuant to this Article may appeal in accordance with G.S. 58-2-75.”); N.C. GEN. STAT. § 58-28-20(e) (“Any person required to cease and desist violating G.S. 58-28-5 by an order issued after notice and a hearing under subsection (a) or (d) of this section may seek judicial review of that order under G.S. 58-2-75.”); N.C. GEN. STAT. § 58-40-25 (“The insurance public protection classifications established by the [Insurance] Commissioner issued pursuant to the provisions of this Article shall be subject to appeal as

governed by section 58-2-75; one of those statutes even specifies that review should be made pursuant to section 58-2-75 and that “Chapter 150B [the APA] . . . does not apply” to appeals from that section.²⁰⁹ Section 58-2-75 essentially provides for appellate review of the Commissioner’s orders and, according to section 150B-43, should control unless it prescribes an inadequate form of review.²¹⁰

But the courts have held otherwise.²¹¹ Despite finding that the jurisdiction conferred by section 58-2-75 and the type of review it prescribes is “virtually identical” to that in section 150B-51,²¹² the Court of Appeals has held that the APA is the controlling judicial review statute in appeals from decisions of the Insurance Commission and that it will apply section 58-2-75 only to the extent that it “adds to and is consistent with the judicial review function of [section] 150B-51.”²¹³ However, it is not evident that section 58-2-75 adds anything to or is in any way inconsistent with section 150B-51, as it is “virtually identical” to the APA.²¹⁴ This treatment of section 58-2-75 is unduly complicated and contradicts the mandate in section 150B-43 that the APA controls “unless adequate procedure for judicial review is provided by another statute, in which case the review shall be under such other statute.”²¹⁵ In other words, the APA should control only if the judicial review provided in section 58-2-75 is inadequate.

provided in G.S. 58-2-75, et seq.”); N.C. GEN. STAT. § 58-45-50 (“All persons or insureds aggrieved by any order or decision of the [Insurance] Commissioner may appeal as is provided in G.S. 58-2-75.”); N.C. GEN. STAT. § 58-65-132 (“An appeal from a final decision and order of the [Insurance] Commissioner under this section shall be conducted pursuant to G.S. 58-2-75. Chapter 150B of the General Statutes does not apply to the procedures of G.S. 58-65-131, this section, and G.S. 58-65-133.”); N.C. GEN. STAT. § 97-196 (“Appeals of the [Industrial] Commissioner’s orders under this section shall be governed by G.S. 58-2-75.”).

²⁰⁹ N.C. GEN. STAT. § 58-65-132.

²¹⁰ N.C. GEN. STAT. § 150B-43 (providing that judicial review shall be under the APA “unless adequate procedure for judicial review is provided by another statute, in which case the review shall be under such other statute”).

²¹¹ See *N.C. Reinsurance Facility v. Long*, 390 S.E.2d 176, 178 (N.C. Ct. App. 1990).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

The North Carolina Supreme Court has also indicated that it will treat statutes enacted before and after the APA differently.²¹⁶ When an agency-specific review statute was enacted prior to the APA and confers jurisdiction comparable to section 150B-51, the Supreme Court has found that section 150B-51 controls; but when the comparable agency-specific review statute was enacted *after* the APA, the Court has found that the specific statute controls.²¹⁷

Regarding section 58-2-75 and the statutes that refer to it, the legislature should amend the statute to clarify whether it or section 150B-51 controls. The legislature should also amend all statutory provisions that confer, in different language, jurisdiction that is virtually identical to the APA. The legislature should either clarify that the statute should be construed as being fully consistent with the APA—and therefore provides for adequate review and controls—or should provide that review be in accordance with Article 4 of the APA.

Finally, the legislature should review and consider amending all of the statutes that refer to “any competent evidence.”²¹⁸ To the extent that this standard applies to agencies that are subject to the APA, the standard is likely superseded by the substantial evidence test of section 150B-51. A legislative amendment will help to avoid confusion and protracted litigation.

IV. CONCLUSION

In its current form, Article 4 of the North Carolina APA envisions a uniform and simple model of judicial review: by default, all appeals from administrative decisions or orders are reviewed in the superior court, invoking its appellate jurisdiction, under either the *de novo* or whole record standard of review, depending on the type of errors asserted by the aggrieved party.²¹⁹ But there are currently too many deviations from this norm, mostly created by agency-specific judicial review statutes. The costs imposed by confusing or

²¹⁶ See *In re Appeal of McElwee*, 283 S.E.2d 115, 120 (N.C. 1981).

²¹⁷ *Id.* (finding that judicial review provision in section 105-345.2, enacted six years *after* the enactment of the APA, is equal to that under the APA and the controlling judicial review statute for appeals from the Property Tax Commission).

²¹⁸ See *supra* Part II.B.3.a.

²¹⁹ N.C. GEN. STAT. §§ 150B-43 to -57.

unnecessarily stringent judicial review statutes burden judges, agencies, and litigants alike.

The legislature should follow through with its goal of creating “a uniform system of administrative rulemaking and adjudicatory procedure for agencies”²²⁰ by reviewing and amending the general statutes to promote consistency with the APA. This Article has argued that the legislature should amend all but two of the statutes that confer original jurisdiction on the reviewing courts, conferring appellate jurisdiction instead, and should also amend the current array of agency-specific review statutes to use language that more clearly and simply confers APA-style appellate jurisdiction on the reviewing court.

Most of these changes are not radical; the legislature could significantly improve the uniformity of judicial review statutes just by updating obsolete statutes, modernizing archaic language, and standardizing the statutory language used to confer jurisdiction on the superior courts. Some of the changes—such as revising the jurisdiction of DOT appeals from original to appellate—are more radical and should be made only after a careful study of the entire context of the DOT’s administrative procedure. Any changes made should ultimately facilitate the orderly judicial review process envisioned by the APA and desired by the North Carolina Supreme Court.

²²⁰ N.C. GEN. STAT. § 150B-1.

APPENDIX

Chapter of General Statutes ²²¹	Section	Jurisdiction-Confering Language	Type of Jurisdiction	Discussion in Article
7A: Judicial Department	7A-250(c): Review of decisions of administrative agencies	Appeals from rulings of county game commissions shall be heard in the district court division. The appeal shall be heard de novo before a district court judge sitting in the county in which the game commission whose ruling is being appealed is located.	Original	III(A)(1) (a), (c)
20: Motor Vehicles	20-25: Right of appeal to court	Any person denied a license or whose license has been canceled, suspended or revoked by the Division, except where such cancellation is mandatory under the provisions of this Article, shall have a right to file a petition within 30 days thereafter for a hearing in the matter in the superior court of the county wherein such person shall reside, . . . and such court or judge is hereby vested with jurisdiction and it shall be its or his duty to set the matter for hearing upon 30 days' written notice to the Division, and thereupon to take testimony and examine into the facts of the case, and to determine whether the petitioner is entitled to a license or is subject to suspension, cancellation or revocation of license	Original	III(A)(1) (a), (d)

²²¹ All references are made to the 2013 version of the North Carolina General Statutes.

		under the provisions of this Article.		
20: Motor Vehicles	20-279.2(b): Commissioner to administer Article; Appeal to court	The matter shall be heard de novo and the judge shall enter his order affirming the act or order of the Commissioner, or modifying same, including the amount of bond or security to be given by the petitioner.	Original	III(A)(1) (a), (d), (e)
55: North Carolina Business Corporation Act	55-14-23(b): Appeal from denial of reinstatement	The appeal to the superior court shall be determined by a judge of the superior court upon such further evidence, notice and opportunity to be heard, if any, as the court may deem appropriate under the circumstances.	Original	III(A)(1) (e)
55: North Carolina Business Corporation Act	55-15-32(a): Appeal from revocation	The appeal to the superior court shall be determined by a judge of the superior court upon such further evidence, notice and opportunity to be heard, if any, as the court may deem appropriate under the circumstances.	Original	III(A)(1) (e)
55A: North Carolina Nonprofit Corporation Act	55A-14-23(b): Appeal from denial of reinstatement	The appeal to the superior court shall be determined by a judge of the superior court upon such further evidence, notice, and opportunity to be heard, if any, as the court may deem appropriate under the circumstances.	Original	III(A)(1) (e)
55A: North Carolina Nonprofit Corporation Act	55A-15-32(a): Appeal from revocation	The appeal to the superior court shall be determined by a judge of the superior court upon such further evidence, notice, and opportunity to be heard, if any, as the court may deem appropriate under the circumstances.	Original	III(A)(1) (e)

55D: Filings, Names, and Registered Agents for Corporations, Nonprofit Corporations, and Partnerships	55D-16(a): Appeal from Secretary of State's refusal to file document	The appeal to the superior court is not governed by Chapter 150B of the General Statutes, the Administrative Procedure Act, and shall be determined by a judge of the superior court upon such further notice and opportunity to be heard, if any, as the court may deem appropriate under the circumstances.	Original	III(A)(1)(e)
67: Dogs	67-4.1(c): Definitions and procedures	The appeal shall be heard de novo before a superior court judge	Original	III(A)(1)(c)
90: Medicine and Allied Occupations	90-14.1: Judicial review of Board's decision denying issuance of a license	Upon appeal the case shall be heard by the judge without a jury, upon the record, except that in cases of alleged omissions or errors in the record, testimony may be taken by the court. The decision of the Board shall be upheld unless the substantial rights of the applicant have been prejudiced because the decision of the Board is in violation of law or is not supported by any evidence admissible under this Article, or is arbitrary or capricious.	Hybrid	II(B)(3)(a) III(A)(1)(a), (b)
90: Medicine and Allied Occupations	90-14.10: Scope of review	Upon the review of the Board's decision taking disciplinary action on a license, the case shall be heard by the judge without a jury, upon the record, except that in cases of alleged omissions or errors in the record, testimony thereon may be taken by the court.	Hybrid	II(B)(3)(a) III(A)(1)(a), (b)
90: Medicine and Allied	90-210.94: Right of	Upon the revocation or suspension of any license	Original	III(A)(1)(a)

Occupations	appeal upon revocation or suspension of license (Board of Funeral Service)	or authority by the Board of Funeral Service, under any of the provisions of this Article, the said association or individual whose license or authority has been revoked or suspended shall have the right of appeal. . . . Within 30 days after receipt of the notice of appeal, the Board of Funeral Service shall file with the clerk of the superior court of the county in which the appeal is to be heard the decision of the Board of Funeral Service. Upon receipt of such decision, the clerk of superior court shall place the matter upon the civil issue docket of the superior court and the same shall be heard de novo.	Hybrid	III(A)(1)(b)
108A: Social Services	108A-79(k): Appeals	Any applicant or recipient who is dissatisfied with the final decision of the Department may file, within 30 days of the receipt of notice of such decision, a petition for judicial review in superior court of the county from which the case arose. . . . The hearing shall be conducted according to the provisions of Article 4, Chapter 150B, of the North Carolina General Statutes. The court shall, on request, examine the evidence excluded at the hearing under G.S. 108A-79(e)(4) or G.S. 108A-79(i)(1) and if the evidence was improperly	Hybrid	III(A)(1)(b)

		excluded, the court shall consider it. Notwithstanding the foregoing provisions, the court may take testimony and examine into the facts of the case, including excluded evidence, to determine whether the final decision is in error under federal and State law, and under the rules and regulations of the Social Services Commission or the Department of Health and Human Services.		
136: Transportation	136-134.1: Judicial review	The review of the decision of the Secretary of Transportation under this Article shall be conducted by the court without a jury and shall hear the matter de novo pursuant to the rules of evidence as applied in the General Court of Justice.	Original	III(A)(1) (d)
136: Transportation	136-149.1: Judicial review	The review of the decision of the Secretary of Transportation under this Article shall be conducted by the court without a jury and shall hear the matter de novo pursuant to the rules of evidence as applied in the general court of justice.	Original	III(A)(1) (d)
163: Elections and Elections Laws	163-82.18(c): Appeal from denial of registration	Appeal to Superior Court. - Any person aggrieved by a final decision of a county board of elections denying registration may at any time within 10 days from the date on which he receives notice of the decision appeal to the superior court of the county in which the	Original	III(A)(2)

		<p>board is located. Upon such an appeal, the appealing party shall be the plaintiff and the county board of elections shall be the defendant, and the matter shall be heard de novo in the superior court in the manner in which other civil actions are tried and disposed of in that court.</p>		
<p>163: Elections and Elections Laws</p>	<p>163-278.26: Appeals from State Board of Elections; early docketing</p>	<p>Any candidate for nomination or election who is denied a declaration of nomination or certificate of election, pursuant to G.S. 163-278.25, may, within five days after the action of the Board under that section, appeal to the Superior Court of Wake County for a final determination of any questions of law or fact which may be involved in the Board's action. . . . It shall be placed on the civil docket of that court and shall have precedence over all other civil actions. . . . On appeal, the cause shall be heard de novo.</p>	<p>Original</p>	<p>III(A)(2)</p>