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## Administrative Law—Licensing by Municipal Bodies: A Judicial Function—*Standow v. City of Spokane*, 88 Wn. 2d 624, 564 P.2d 1145 (1977)

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**ADMINISTRATIVE LAW—LICENSING BY MUNICIPAL BODIES: A JUDICIAL FUNCTION—*Standow v. City of Spokane*, 88 Wn. 2d 624, 564 P.2d 1145 (1977).**

Respondent Randy Standow applied for a municipal license to operate taxicabs for hire within the Spokane city limits. The Spokane city ordinance regulating the issuance of licenses to taxi operators proscribed, *inter alia*, granting a license to any applicant who had been convicted of violating a city ordinance, a state statute, or a federal law if such violations were “reasonably related to his fitness or ability to operate a vehicle for hire.”<sup>1</sup>

The Spokane Police Department Licensing Division refused to issue a license to respondent.<sup>2</sup> Standow had been convicted of five separate offenses in the year and a half preceding his application for a license; three of these were moving violations.<sup>3</sup> Although the Police Licensing Division did not issue any findings of fact, it was uncontroverted that the license was denied because of this series of convictions. Standow sought city council review of the police licensing action, but when the council finally issued findings of fact,<sup>4</sup> it determined that his prior convictions were related to his fitness and ability to operate a cab and therefore denied him an operator’s license.<sup>5</sup>

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1. SPOKANE, WASH., GEN. ORDINANCES ch. 14, C19415, § 3 (Dec. 11, 1967), states in pertinent part:

It shall be unlawful for any person to drive, operate or be in charge of any vehicle used in transporting passengers for hire unless such person be licensed therefor as herein provided. Every person so licensed shall

(f) Not have been previously convicted of the violation of any ordinance of the City of Spokane, or any law of the state of Washington or of the United States, reasonably related to his fitness or ability to operate a vehicle for hire.

2. *Standow v. City of Spokane*, 88 Wn. 2d 624, 627, 564 P.2d 1145, 1148 (1977). The ordinance states in pertinent part: “Every such license shall be issued by the city auditor upon the recommendation of the chief of police . . . .” SPOKANE, WASH., GEN. ORDINANCES ch. 14, C19415, § 3 (Dec. 11, 1967).

3. Standow had been convicted of two grand larceny charges in April 1975 involving theft of snowmobiles and burglary of a gas station. *Standow v. City of Spokane*, 88 Wn. 2d 624, 628 n.1, 564 P.2d 1145, 1148 n.1 (1977). He had also had three separate traffic convictions since 1974: speeding, January 11, 1974; improper turn, June 6, 1974; and a negligent driving accident, July 25, 1974. *Id.* at 628, 564 P.2d at 1148.

4. The city council initially upheld the police department’s decision but issued no findings of fact. Respondent then filed an action in superior court requesting mandamus relief as well as money damages. The court denied the requested relief but directed the city council to rehear the matter and “enter specific findings” to support its previous decision. *Id.* at 627, 564 P.2d at 1148.

5. *Id.* at 628 n.1, 564 P.2d at 1148 n.1.

Standow petitioned the superior court under R.C.W. § 7.16.040 for a writ of certiorari.<sup>6</sup> After granting the writ, the lower court found that the municipal ordinance was void for vagueness and that there was no reason to deny Standow's license. The court ordered that Standow be licensed to operate taxicabs.<sup>7</sup> On appeal to the Washington Supreme Court, the city argued in part<sup>8</sup> that the superior court erred in granting a writ of certiorari because R.C.W. § 7.16.040 only permits review of licensing decisions which are considered "judicial functions,"<sup>9</sup> and that municipal licensing decisions are legislative or administrative actions and thus, are not reviewable.<sup>10</sup>

In a unanimous decision, the supreme court reversed, and at the same time overruled prior decisions in holding that municipal licensing is a judicial function for purposes of R.C.W. § 7.16.040,<sup>11</sup> and that a writ of certiorari may be used to review such agency decisions. *Standow v. City of Spokane*, 88 Wn. 2d 624, 564 P.2d 1145 (1977).

In this note, the reasoning behind the court's decision will be examined and it will be urged that, despite flaws in the analysis, the result in this case is a sound one. Discretionary municipal action which cannot be reviewed under the Washington Administrative Procedure Act<sup>12</sup> but which "involves application of existing law to past or pres-

6. The statute provides,

A writ of review shall be granted by any court, except a police or justice court, when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law.

WASH. REV. CODE § 7.16.040 (1976).

7. *Standow v. City of Spokane*, 88 Wn. 2d 624, 629, 564 P.2d 1145, 1149 (1977).

8. The city also argued that the ordinance was not unconstitutionally vague. Brief of Appellants at 10-16, *Standow v. City of Spokane*, 88 Wn. 2d 624, 564 P.2d 1145 (1977). The issue of constitutionality is not relevant to a discussion of the court's determination of the certiorari question, and thus is beyond the scope of this note.

9. Brief of Appellants at 26.

10. Appellants' Reply Brief at 1-3.

11. *E.g.*, *Citizens Council Against Crime v. Bjork*, 84 Wn. 2d 891, 895, 529 P.2d 1072, 1075 (1975) (writ of prohibition which would prohibit the director of the State Gambling Commission from issuing certain licenses could not be granted because licensing is not a judicial function); *Tenny v. Seattle Elec. Co.*, 48 Wash. 150, 152, 92 P. 895, 896 (1907) (action of the Columbia City Council in granting a franchise to an electric company to maintain a street car line was held to involve legislative action only); *State ex rel. Aberdeen v. Superior Court*, 44 Wash. 526, 530-31, 87 P. 818, 819 (1906) (writ of review would not issue to review the Aberdeen City Council's decision to revoke a retail liquor license because the council was exercising legislative rather than judicial authority).

12. WASH. REV. CODE ch. 34.04 (1976 & Supp. 1977). The Act states in pertinent part: "For the purpose of this chapter: (1) 'Agency' means any state board, commis-

ent facts for the purpose of declaring or enforcing liability . . . resembles the ordinary business of courts” and should be susceptible to judicial review on petition for a writ of statutory certiorari.<sup>13</sup>

## I. THE COURT'S REASONING

The *Standow* court introduced the opinion with a brief explanation of the theory underlying its concern for the proper classification of a particular proceeding. The need to distinguish between the executive, legislative, and judicial functions grows out of the separation of powers doctrine embodied in our tripartite form of government.<sup>14</sup> There is no precise line separating the constitutional powers; rather, “[t]here is necessarily some mingling and overlapping of powers between the three separate departments of our government.”<sup>15</sup> “Elasticity” must be used in characterizing proceedings as judicial or quasi-judicial.<sup>16</sup> Despite a suggestion that characterization depends upon the facts of each case,<sup>17</sup> the court stated as a general rule that “municipal

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sion, department, or officer, authorized by law to make rules or to adjudicate contested cases, except those in the legislative or judicial branches.” *Id.* § 34.04.010 (1976).

13. 88 Wn. 2d at 631, 564 P.2d at 1150. Statutory certiorari was intended to enlarge the extent of review available under the common law writ. Larson, *Administrative Determinations and the Extraordinary Writs in the State of Washington*, 20 WASH. L. REV. 22, 31 (1945). However, judicial interpretation has since broadened the narrow review available under the common law writ so the extent of review available under the common law writ and statutory certiorari are similar. *Id.* Now, the most significant difference between them is that the common law writ may be used to review discretionary administrative action alleged to be arbitrary and capricious if such action infringes upon a fundamental right of the petitioner. See notes 26–41 and accompanying text *infra*.

14. 88 Wn. 2d at 629, 564 P.2d at 1149. See generally L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 28 (1965). The Washington Supreme Court has discussed the doctrine with respect to state government in the following cases: *In re Juvenile Director*, 87 Wn. 2d 232, 242, 552 P.2d 163, 169 (1976); *Household Fin. Corp. v. State*, 40 Wn. 2d 451, 455–56, 244 P.2d 260, 262–63 (1952).

15. *Household Fin. Corp. v. State*, 40 Wn. 2d 451, 455, 244 P.2d 260, 263 (1952). See L. JAFFE, *supra* note 14, at 28–33.

16. *Household Fin. Corp. v. State*, 40 Wn. 2d 451, 456, 244 P.2d 260, 263 (1952). *Batty v. Arizona State Dental Bd.*, 57 Ariz. 239, 112 P.2d 870 (1941), distinguishes judicial and quasi-judicial power. Judicial power is power which is vested only in a court. Quasi-judicial power, on the other hand, is described in this manner:

When, however, the power to hear and determine whether a certain state of facts which requires the application of a law exists is committed to an administrative or executive officer, although the particular power may be identical with one which is also exercised by a court, it is, strictly speaking, not “judicial” but “quasi-judicial” power.

112 P.2d at 873.

17. “In making such classifications, the role of the courts is not to attach arbitrary labels of convenience to the actions of other branches of government, but rather to

ipal licensing is a 'judicial function' as that term is utilized in RCW 7.16.040."<sup>18</sup> The court thus did not confine its decision to the *Standow* fact pattern.

The court's conclusion rests on a two-pronged analysis. First, the court reasoned that municipal licensing meets some of the criteria the court has developed for determining whether an agency proceeding is judicial.<sup>19</sup> Second, the court determined that, given the *Standow* facts, a court could exercise its inherent powers of review to issue a common law writ of certiorari, despite the statutory limitations of R.C.W. § 7.16.040.<sup>20</sup>

In addressing the licensing question, the supreme court outlined the cumulative criteria first collected in *Francisco v. Board of Directors*.<sup>21</sup> The *Standow* court cited *Francisco* as the source of the following four-part test for assessing the judicial nature of an agency proceeding:

- (1) whether the court could have been charged with the duty at issue in the first instance; (2) whether the courts have historically performed such duties; (3) whether the action of the municipal corporation involves application of existing law to past or present facts for the purpose of declaring or enforcing liability rather than a response to changing conditions through the enactment of a new general law of prospective application; and (4) whether the action more clearly resembles the ordinary business of courts, as opposed to those [*sic*] of legislators or administrators.<sup>22</sup>

The *Standow* court concluded that "[l]icensing is a hybrid activity

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establish, in a given factual setting, the appropriate scope of judicial review." *Standow*, 88 Wn. 2d at 630, 564 P.2d at 1149.

This language is not clear. It could be argued that the sentence implies that a court may not categorize a broad range of municipal actions as judicial, but it may, after reviewing a type of proceeding, classify that category as judicial. However, this language can also be interpreted to mean that a court should examine fact patterns on an individual basis to establish the appropriate scope of judicial review. In a statement preceding the "factual setting" sentence the court emphasized that a label often results in categorizing "a particular form of proceeding for a particular purpose in a manner which may subsequently appear artificial or inappropriate if applied to similar proceedings in a different context." *Id.* Thus, the latter interpretation of the phrase "factual setting" would seem to be closer to the court's meaning.

18. *Id.* at 632, 564 P.2d at 1150.

19. *Id.* at 631, 564 P.2d at 1150.

20. *Id.* at 632, 564 P.2d at 1150.

21. 85 Wn. 2d 575, 537 P.2d 789 (1975).

22. *Standow*, 88 Wn. 2d at 631, 564 P.2d at 1150 (citing *Francisco*, 85 Wn. 2d at 579, 537 P.2d at 792).

## Review of Municipal Licensing

not susceptible of rigorous classification.”<sup>23</sup> The court, however, did not explain its conclusion by applying the *Francisco* criteria.

To resolve the classification issue, the court went beyond application of the *Francisco* standards by adding more weight to the “judicial function” side of the balance. The court asserted that since the scope of review under both the statutory writ and the inherent power of the supreme court to review arbitrary and capricious action is “essentially the same” in fact situations similar to *Standow*, it is permissible to call licensing a judicial function for purposes of the statute.<sup>24</sup> This proposition seems to follow from an implied assumption that all municipal licensing may be subject to the arbitrary and capricious review standard; therefore, it is irrelevant whether a court of original jurisdiction issues a statutory writ of certiorari or grants a common law writ of certiorari under its inherent powers of review.<sup>25</sup>

A court’s power to review municipal licensing actions under its inherent powers of review, however, is limited to review of those arbitrary actions which infringe upon a fundamental right.<sup>26</sup> Because not every municipal action will infringe upon such a right,<sup>27</sup> the court’s reasoning concerning inherent powers of review is open to challenge. The court could have achieved the same result on sounder doctrinal

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23. 88 Wn. 2d at 631, 564 P.2d at 1150.

24. *Id.* at 632, 564 P.2d at 1150.

25. See notes 31–39 and accompanying text *infra*.

26. The court stated in *Standow* that “this court has defined arbitrary and capricious review as a search for substantial evidence, . . . the same standard applicable under RCW 7.16.120(5) [setting forth the questions to be determined by a court at a certiorari hearing].” 88 Wn. 2d at 631 n.3, 564 P.2d at 1150 n.3 (citations omitted).

It is well established, however, that before a court can review arbitrary nonjudicial agency action under its inherent constitutional power to issue the writ of certiorari, a plaintiff must assert that the agency action is not only arbitrary and capricious but that such action infringes upon a fundamental right. *Pan Pac. Trading Corp. v. Department of Labor & Indus.*, 88 Wn. 2d 347, 560 P.2d 1141 (1977); *Pettit v. Board of Tax Appeals*, 85 Wn. 2d 646, 538 P.2d 501 (1975); *State ex rel. Hood v. Washington State Personnel Bd.*, 82 Wn. 2d 396, 511 P.2d 52 (1973); *Citizens Against Mandatory Bussing v. Palmason*, 80 Wn. 2d 445, 495 P.2d 657 (1972); 47 WASH. L. REV. 707, 710 (1972). See note 39 *infra*.

The *Standow* court did not identify the fundamental right of respondent which was at stake in this case; however, respondent argued that the licensing ordinance was unconstitutionally vague and therefore violated fair notice requirements mandated by the fourteenth amendment. Brief of Respondent at 10–11.

27. Although the court could have determined that respondent had sufficiently demonstrated an infringement upon a fundamental right and that the standard of review in this instance would be the same regardless of the manner in which the case reached a court, it is conceivable that another applicant for a license could not have made the same argument (*e.g.*, a person who sought a taxi license at a time when the statutory maximum number of cabs were operating within the city).

ground by only applying the criteria set forth in *Francisco* to the facts of *Standow*.

## II. ANALYSIS OF THE CASE

Although the *Standow* court precisely identified the licensing issue, the court's analysis of the parameters of the question is abrupt and confusing. A conclusion that this particular licensing decision could be reviewed by the court without resort to R.C.W. § 7.16.040 does not support a broad holding that all municipal licensing is a judicial function within the context of that statute.

The key to the sound resolution of the question whether municipal licensing is a quasi-judicial action fulfilling the judicial function limitation of R.C.W. § 7.16.040 can be found in the application of the criteria the Washington Supreme Court has developed in recent years for evaluating whether an administrative proceeding is essentially judicial or nonjudicial.<sup>28</sup> The court set forth those criteria<sup>29</sup> but did not make a practical application of them.

Although the court in *Standow* referred to its power to grant common law certiorari,<sup>30</sup> it did so primarily to justify resort to its statutory certiorari power. It will aid analysis to examine the distinction between the two. Certiorari is an extraordinary writ of ancient origin<sup>31</sup> which a petitioner may use to seek judicial review of inferior ju-

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28. The Washington Supreme Court developed the criteria for assessing the judicial function of an agency action in a cumulative manner. *Okanogan County School Dist. v. Andrews*, 58 Wn. 2d 371, 374-75, 363 P.2d 129, 131 (1961) (whether the agency action resembles the ordinary business of courts); *Floyd v. Department of Labor & Indus.*, 44 Wn. 2d 560, 570-76, 269 P.2d 563, 568-71 (1954) (whether the court could have been charged with the duty in the first place, whether the agency function is one which courts have historically performed, and whether the agency enforces liability by applying existing law to present facts rather than enacting prospective rules); *Household Fin. Corp. v. State*, 40 Wn. 2d 451, 456, 244 P.2d 260, 263 (1952) (whether the agency could have been charged with the duty in the first place). In *Francisco*, the court used the foregoing cases to assemble the four criteria into one framework for evaluating the judicial nature of agency action. 85 Wn. 2d at 579, 537 P.2d at 792.

29. *Standow*, 88 Wn. 2d at 631, 564 P.2d at 1150, quoted at text accompanying note 22 *supra*.

30. *Id.*

31. The Crown created the prerogative writs of habeas corpus, prohibition, quo warranto, certiorari, and mandamus as a means of controlling inferior tribunals. Originally, the writs were considered writs of grace which could be issued only by the Crown and its advisers. After the King's Bench was organized in 1178, however, it gradually assumed total responsibility for their issuance. See L. JAFFE, *supra* note 14, at 166; Goodnow, *The Writ of Certiorari*, 6 POLITICAL SCI. Q. 493, 493-99 (1891);

dicial or quasi-judicial action<sup>32</sup> when no other adequate remedies are available. The common law writ emerged in England as a political tool of the King to control and supervise the functioning of inferior tribunals.<sup>33</sup> By petitioning the King's Bench for a discretionary<sup>34</sup> writ of certiorari, a litigant could have the highest court in England review the record of an inferior tribunal for errors in jurisdiction or errors in law which appeared on the face of the record.<sup>35</sup>

Washington is among those jurisdictions in which the judiciary has the inherent constitutional power to issue this common law writ as part of its original jurisdiction.<sup>36</sup> The superior courts,<sup>37</sup> as well as the supreme court,<sup>38</sup> may use the common law writ to review any discretionary, nonjudicial administrative action which is alleged to be ei-

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Weintraub, *English Origins of Judicial Review by Prerogative Writ: Certiorari and Mandamus*, 9 N.Y.L.F. 478, 478-86 (1963).

32. In the early history of the common law a judicial or quasi-judicial tribunal was one which made its determination on some type of record. L. JAFFE, *supra* note 14, at 166. The common law writ could be issued to "justices of assize, escheators, coroners, chief justices, treasurers and Barons of the Exchequer, mayors of boroughs, the clerk of the Common Bench, bidding them send records in their custody, or certify the contents thereof." Weintraub, *supra* note 31, at 479.

A more contemporary definition of a judicial or quasi-judicial tribunal is provided in *Batty v. Arizona State Dental Bd.*, 57 Ariz. 239, 112 P.2d 870 (1941). See note 16 *supra*. The statutory writ in Washington may not be used "to review or annul judgments or orders which are legislative, executive, or ministerial acts rather than judicial." *State ex rel. New Wash. Oyster Co. v. Meakim*, 34 Wn. 2d 131, 134, 208 P.2d 628, 630 (1949). See *Augustine v. Board of Police Pension Fund Comm'rs*, 44 Wn. 2d 732, 270 P.2d 475 (1954); *Tenny v. Seattle Elec. Co.* 48 Wash. 150, 92 P. 895 (1907); *Sweeney v. County Comm'rs*, 43 Wash. 138, 86 P. 200 (1906); *Lewis v. Bishop*, 19 Wash. 312, 53 P. 165 (1898).

33. See note 31 *supra*.

34. The writ was considered extraordinary and prerogative because it never issued as a matter of right but was used only in unusual situations "when some gross injustice was being done by other authorities." Goodnow, *supra* note 31, at 497.

35. Scholars assert that common law certiorari permitted review of errors of law as well as jurisdictional errors. L. JAFFE, *supra* note 14, at 167; Goldberg, *The Extraordinary Writs and the Review of Inferior Court Judgments*, 36 CALIF. L. REV. 558, 562-64 (1948); Comment, *Certiorari in Arkansas*, 17 ARK. L. REV. 163, 164 (1963). But see Larson, *supra* note 13, at 30; 14 U. CHI. L. REV. 270, 271 (1947).

36. WASH. CONST. art. IV, § 4; see *Reagles v. Simpson*, 72 Wn. 2d 577, 585, 434 P.2d 559, 564 (1967) (legislature may not abridge the courts' constitutional power to review administrative acts); *State ex rel. Shannon v. Sponburgh*, 66 Wn. 2d 135, 401 P.2d 635 (1965); *State ex rel. Cosmopolis Consol. School Dist. v. Bruno*, 59 Wn. 2d 366, 367 P.2d 995 (1962); *Kitsap County Transp. Co. v. Department of Pub. Works*, 170 Wash. 396, 16 P.2d 828 (1932); *North Bend Stage Line, Inc. v. Department of Pub. Works*, 170 Wash. 217, 16 P.2d 206 (1932); Larson, *supra* note 13, at 30-31.

37. WASH. CONST. amend. 28 states in pertinent part: "[Superior courts] and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus on petition by or on behalf of any person in actual custody in their respective counties."

38. WASH. CONST. art. IV, § 4 states in pertinent part: "The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, cer-



ther illegal or arbitrary and capricious when such action infringes upon a fundamental right of the petitioner.<sup>39</sup>

In contrast to common law certiorari, R.C.W. § 7.16.040 provides for a statutory writ which allows a court to review an action of "an inferior tribunal . . . exercising judicial functions." It is unnecessary for the petitioner to allege that the action is arbitrary and capricious or that it infringes upon a fundamental right.<sup>40</sup> The critical question for this writ then becomes "what is a judicial function for purposes of the statute?"

Various tests have been urged by commentators and adopted by courts as a means of differentiating an administrative function from a quasi-judicial exercise of power.<sup>41</sup> Professor Davis argues that to determine whether a particular municipal function is judicial, one should "compare the action in question with the ordinary business of courts: that which resembles what courts customarily do is judicial, and that which has no such resemblance is non-judicial."<sup>42</sup> The Washington Supreme Court utilized the test advocated by Davis<sup>43</sup> and incorporated it as one of the four criteria set forth in *Francisco*<sup>44</sup> to evaluate the nature of an agency function, *i.e.*, the initially charged test, the historical test, the application of existing law test, and the or-

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tiorari and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction."

39. This "fundamental right" doctrine has never been precisely defined. 47 WASH. L. REV. 707, 713-16 (1972). It has been suggested that the Washington courts would at the very least recognize those fundamental rights denoted as such by the United States Supreme Court. *Id.* This doctrine has only recently been cited consistently as a prerequisite to invoking a court's inherent power to issue a common law writ of certiorari. See *Pan Pac. Trading Corp. v. Department of Labor & Indus.*, 88 Wn. 2d 347, 353, 560 P.2d 1141, 1144 (1977); *Pettit v. Board of Tax Appeals*, 85 Wn. 2d 646, 648, 538 P.2d 501, 504 (1975); *Leschi Improvement Council v. Washington State Highway Comm'n*, 84 Wn. 2d 271, 278, 525 P.2d 774, 780-81 (1974); *State ex rel. Hood v. Washington State Personnel Bd.*, 82 Wn. 2d 396, 399, 511 P.2d 52, 55 (1973); *Citizens Against Mandatory Bussing v. Palmason*, 80 Wn. 2d 445, 448, 495 P.2d 657, 660 (1972); *State ex rel. Dupont-Fort Lewis School Dist. v. Bruno*, 62 Wn. 2d 790, 793, 384 P.2d 608, 610 (1963).

40. See notes 26, 27, & 39 and accompanying text *supra*.

41. The "hearing" test summarized by Professor Freund is one means of classifying agency action. If the action which is complained of required notice as well as an opportunity to be heard, the administrative action is quasi-judicial. E. FREUND, *ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY* 263-66 (1928). The second position courts have adopted is the "property" test. If an agency is deciding on the "property" rights of individuals, it is performing a judicial or quasi-judicial action. The third test, advocated by Davis, is the "ordinary business of courts" test. Professor Davis summarizes these tests in 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 24.02 (1958).

42. 3 K. DAVIS, *supra* note 41, § 24.02.

43. *Okanogan County School Dist. v. Andrews*, 58 Wn. 2d 371, 374, 363 P.2d 129, 131 (1961).

44. 85 Wn. 2d at 579, 537 P.2d at 792.

## Review of Municipal Licensing

dinary business of courts test.<sup>45</sup> The Spokane licensing decision did not meet two of these criteria: the superior court could not have been charged in the first place with granting the license,<sup>46</sup> and courts have not historically performed this function.<sup>47</sup>

The court has not identified any one of the criteria as determinative in assessing the judicial nature of the administrative body's action.<sup>48</sup> Nevertheless, there are only two recent decisions in which the court has found agency action to be nonjudicial.<sup>49</sup> In both of those cases, neither the "initially charged" nor the "historical" criteria were met.<sup>50</sup>

Although the municipal licensing decision at issue in *Standow* also failed to meet these criteria, it did meet the last two elements of the *Francisco* test. It is clear that the city council did not enact a new law of prospective application in denying *Standow* a taxi operator's license.<sup>51</sup> Instead, the council heard evidence, made findings of fact based on that evidence, and arrived at a final decision by examining its findings in light of the directive of the ordinance not to issue a license to anyone who had prior convictions which were "reasonably related to his fitness or ability to operate" a taxi.<sup>52</sup> This is an "application of existing law to past or present facts for the purpose of declar-

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45. *Francisco*, 85 Wn. 2d at 579, 537 P.2d at 792, cited in *Standow*, 88 Wn. 2d at 631, 564 P.2d at 1150. See text accompanying note 22 *supra*.

46. *Citizens Council Against Crime v. Bjork*, 84 Wn. 2d 891, 895, 529 P.2d 1072, 1075 (1975); *In re Harmon*, 52 Wn. 2d 118, 120, 323 P.2d 653, 655 (1958); *Household Fin. Corp. v. State*, 40 Wn. 2d 451, 456, 244 P.2d 260, 263 (1952).

47. See *In re Harmon*, 52 Wn. 2d 118, 120, 323 P.2d 653, 655 (1958).

48. See, e.g., *State ex rel. Hood v. Washington State Personnel Bd.*, 82 Wn. 2d 396, 400, 511 P.2d 52, 54 (1973). Nevertheless, the supreme court did state in *Hood* that "[i]n the case at hand, however, the most significant test for the distinction between judicial and nonjudicial functions is [the historical test and the initially charged test]." This is the only case in which the court has attached special value to any of the criteria it later collected in *Francisco*.

49. *State ex rel. Hood v. Washington State Personnel Bd.*, 82 Wn. 2d 396, 511 P.2d 52 (1973); *In re Harmon*, 52 Wn. 2d 118, 323 P.2d 653 (1958).

50. In *Harmon*, the court implied it was using the first three elements, although it applied only the "historical" and "initially charged" tests. 52 Wn. 2d at 120, 323 P.2d at 655. In *Hood*, the court alluded to all four criteria. 82 Wn. 2d at 400, 511 P.2d at 54. Because the four elements of the *Francisco* test were enunciated one by one and have only recently been assembled into a set of criteria, there are only three cases besides *Harmon* and *Hood* in which the court has used more than the first two elements of the test to evaluate the nature of an agency decision. *Francisco*, 85 Wn. 2d at 579-82, 537 P.2d at 792-93 (court applied all four criteria); *Ledgering v. State*, 63 Wn. 2d 94, 103-04, 385 P.2d 522, 528-29 (1963) (court set forth the three tests which were later formulated as the first three *Francisco* elements, although it applied only the "historical" test); *Floyd v. Department of Labor & Indus.*, 44 Wn. 2d 560, 571-76, 269 P.2d 563, 568-71 (1954) (court applied the three tests which were later formulated as the first three *Francisco* elements).

51. See 88 Wn. 2d at 631, 564 P.2d at 1150.

52. SPOKANE, WASH., GEN. ORDINANCES ch. 14, C19415, § 3(f) (Dec. 11, 1967).

ing or enforcing liability,"<sup>53</sup> the third element of the *Francisco* test. The final *Francisco* criterion is also met. Although legislators do conduct hearings, these bodies neither determine nor enforce liability. The licensing decision in *Standow* is representative of discretionary municipal licensing, which more closely resembles the ordinary business of courts than that of legislators or administrators. Having found that the decision fulfilled these two criteria, the supreme court should have declared that licensing, although a "hybrid activity" is a "judicial function" for the purposes of R.C.W. § 7.16.040, making it unnecessary to resort to its second ground of decision—the similarity between the statutory and common law writs of certiorari.

In situations such as *Standow*, where agency decisionmaking has never been performed by the judiciary, the final elements of the *Francisco* criteria should be determinative. It is only when the historical and the initially charged tests are not met that the final elements of the *Francisco* criteria operate as significant, independent criteria, rather than as surplus definitional terms. A particular form of agency decisionmaking is obviously quasi-judicial when, prior to the creation of the agency, a court performed or could have performed that task. The "enforcing liabilities" and the "ordinary business of courts" criteria at that point serve no independent function but are subsumed by the first two elements, providing nothing more than a functional definition of the type of decisionmaking courts have historically performed. However, because administrative agencies are a creation of twentieth-century political necessity and an amalgam of legislative, administrative, and judicial activity, in many cases the historical and initially charged tests are of limited utility in assessing the nature of agency activities.

### III. CONCLUSION

The *Francisco* criteria provide the only basis needed to decide whether licensing is a judicial function within the context of the "judicial function" limitation of R.C.W. § 7.16.040—the statutory writ of certiorari. Because administrative agencies are creatures of twentieth-century political necessities and thus may be exercising types of quasi-judicial decisionmaking unknown at common law, the last two *Fran-*

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53. 88 Wn. 2d at 631, 564 P.2d at 1150.

## Review of Municipal Licensing

*cisco* criteria should be accorded the most significance in characterizing the nature of most agency functions. Discretionary administrative agency action which is not encompassed by the review procedures of the Washington Administrative Procedure Act,<sup>54</sup> but in which personal liability is decided or enforced, should be susceptible to review by the judiciary on petition for a writ of certiorari as provided by R.C.W. § 7.16.040.

*Leila Taaffe*

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<sup>54</sup>. WASH. REV. CODE § 34.04.130 (Supp. 1977); see note 12 and accompanying text *supra*.