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Exhaustion of Administrative Remedies in Illinois: The State of the Law at the Close of An Active Decade

Dean Timothy Jost
Supervisory Attorney, Elderly Project, Legal Assistance Foundation of Chicago

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Exhaustion of Administrative Remedies in Illinois: The State of the Law at the Close of An Active Decade

DEAN TIMOTHY JOST*

INTRODUCTION

Administrative agencies in twentieth century America have greatly expanded in number, size, and power. With this growth, the power to adjudicate disputes increasingly resides, at least initially, with the executive branch. Nevertheless, our system of government has not abandoned a basic allegiance to the eighteenth century doctrine of separation of powers and to a far older notion that the ultimate authority for adjudicating rights and duties ought to reside in the judiciary. As a result, the problem of allocating the power to decide controversies between administrative agencies and the courts has become a major legal problem of our time. Illinois courts have addressed this problem under the rubric of exhaustion of administrative remedies.

The last decade has been very active for the development of exhaustion law in Illinois.1 Many of the cases evidence a growing tendency to consider the rational bases for exhaustion2 in making decisions. Courts have also become increasingly likely to apply principles developed in cases dealing with one administrative agency to cases involving another.3

This article will discuss the current state of exhaustion law in Illinois: the principle, its exceptions, and specific problems with its application. Throughout the article, an attempt will be made to understand the cases in terms of the underlying reasons for the exhaustion principle. This approach should contribute to the demise of parochialism in the application of the exhaustion principle and to the growth of uniform administrative law in Illinois.

THE EXHAUSTION PRINCIPLE: GENERAL CONSIDERATIONS

The exhaustion principle can be simply stated: if an issue of fact

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1. Nearly two hundred cases have considered exhaustion in the last ten years.
2. See note 7 infra and accompanying text.
3. See cases cited at note 7 infra.
or law should properly be raised in the first instance before an administrative agency, a court should not address the issue until all available administrative remedies have been exhausted.\(^4\) The exhaustion doctrine is generally a judicial creation. Although the Administrative Review Act (ARA),\(^5\) also provides for review only of final administrative decision, it merely restates case law, and has itself been the subject of extensive judicial construction.\(^6\) The exhaustion principle serves a number of purposes. First, it allows full development of a factual record before the agency, thus freeing the court from the burden of fact finding. Second, it allows the agency to apply its particular expertise to the facts. Then, if the dispute does end up in court, the reviewing court will have the benefit of the agency's specialized knowledge. A third benefit of exhaustion accrues where the aggrieved party succeeds before the agency. This result renders judicial review unnecessary. Finally, requiring exhaustion gives the agency a chance to correct its own errors, clarify its policies, and reconcile conflicts.\(^7\)

The exhaustion doctrine is not strictly jurisdictional.\(^8\) Except

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4. The rule is analogous to the general rule precluding appellate review until a final decision has been reached in a trial court proceeding. For other discussions of the exhaustion principle, see Grippo, Exhaustion of Administrative Remedies: Need or Nuisance, 50 ILL. BAR. J. 474 (1962); 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE §20 (1958 and Supp. 1971); 2 COOPER, STATE ADMINISTRATIVE LAW 572 (1965); JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 424 (1965); B. MEZINES, J. STEIN & J. GRUFF, ADMINISTRATIVE LAW ch. 49, at 49-1 et seq. (1979).


6. This judicial input has affected the law especially in the area of challenges to statutes, ordinances or administrative rules on grounds that they are unconstitutional on their face. See notes 17-46 infra and accompany text.


8. The distinction between primary jurisdiction and exhaustion of administrative remedies is frequently drawn by commentators. See K. DAVIS, ADMINISTRATIVE LAW TREATISE, §20.02 at 57 (1958); 2 COOPER, STATE ADMINISTRATIVE LAW 572-73 (1965); JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 121 (1965). Professor Davis distinguishes the two doctrines as follows:

The exhaustion doctrine is concerned with the timing of judicial review of administrative action. It is clearly distinguishable from the doctrine of primary jurisdiction, which guides a court in determining whether a court or an agency should take initial action. When a court holds that it cannot grant the substantive relief sought because only an agency has jurisdiction to grant such relief, the court is applying the doctrine of primary jurisdiction. When a court determines at what state of administrative action judicial review may be sought, the court is either applying the requirement of ripeness, the broad doctrine that governs the kinds of functions that courts may perform, or the relatively narrow doctrine of exhaustion, which focuses not upon the functions of courts but merely upon the completion or lack of completion of administrative action.
where statutes are interpreted to require exhaustion, courts may exercise their discretion to require or excuse exhaustion. Since the reasons for exhaustion do not always apply in the particular situation presented to the court, the doctrine admits to many exceptions. Exhaustion may be excused for challenges against statutes, ordinances, or rules on their face; challenges to agency jurisdiction; cases where exhaustion would be futile; and, perhaps, in cases where irreparable injury or fraud are threatened.

But many cases in which exhaustion has not been required do not easily fit any exception. Such aberrational decisions are often attributable to two factors: First, the courts have occasionally been willing to sacrifice uniform interpretation of the law to achieve a sympathetic result given the facts before them. Second, development of uniform administrative law in Illinois has been slow, and


While the distinction may be useful in theory, it seldom appears in Illinois cases. Generally, Illinois courts have subsumed considerations of both the timing of review and of the initial forum for presenting issues under the exhaustion principle.

The term “primary jurisdiction” appears in Illinois cases only under two circumstances. First, the issue is raised in several cases where it is claimed that jurisdiction is vested exclusively in federal administrative agencies and that state court jurisdiction is non-existent. Scott v. United States Steel Corp., 40 Ill. App. 3d 607, 352 N.E.2d 225 (1st Dist. 1976); Metropolitan Sanitary Dist. of Chicago v. United States Steel Corp., 30 Ill. App. 3d 360, 332 N.E.2d 426 (1st Dist. 1975), cert. denied, 424 U.S. 976 (1976). The problem in these cases is really one of federal preemption or supremacy, not of primary jurisdiction as that term is generally understood. “Primary jurisdiction” also appears in a series of cases involving actions for utility reparations under §72 of the Public Utilities Act. Ill. Rev. Stat., ch. 111-2/3, §75 (1977). The courts have long held that the Illinois Commerce Commission has exclusive jurisdiction to consider utility reparations. Therefore, courts dismiss reparation cases which attempt to bypass the Commerce Commission. See, e.g., Dvorkin v. Illinois Bell Tel. Co., 34 Ill. App. 3d 448, 452-53, 340 N.E.2d 98, 102 (1st Dist. 1975) and cases cited therein. The use of the term “primary jurisdiction” in these cases is closer to the usage of the commentators.

Attempts to raise primary jurisdiction arguments outside the utility regulation area have not caught the attention of the courts. Village of Wilsonville v. SCA Svcs., Inc., See notes 3d 396 N.E.2d 552 (4th Dist. 1979); Cushing v. Pittman, 56 Ill. App. 3d 930, 372 N.E.2d 714 (4th Dist. 1978); Foster v. Allphin, 42 Ill. App. 3d 871, 356 N.E.2d 963 (1st Dist. 1976). However useful the distinction between exhaustion and primary jurisdiction may be theoretically, it is a distinction which does not appear in the Illinois cases, and which must be imposed on the cases if its use is desired.

11. See notes 17-46 infra and accompanying text.
12. See notes 47-53 infra and accompanying text.
13. See notes 54-73 infra and accompanying text.
14. See notes 74-78 infra and accompanying text.
courts have been very parochial in their consideration of problems arising from different agencies. Courts still deal largely with cases as raising Commerce Commission, zoning, or tax problems. Courts do not usually view a case as involving an administrative law problem. Exhaustion law has thus developed very differently in cases concerning different agencies.16

THE EXHAUSTION PRINCIPLE: EXCEPTIONS

The Challenge To A Statute, Ordinance Or Rule On Its Face

Perhaps the most significant exception to the exhaustion doctrine applies where an administrative rule or a statute or ordinance authorizing administrative action is attacked on its face. The reasons for this exception are easy to understand. First, it would be useless for the agency to develop a factual record when it is alleged that the rule, ordinance or statute is void regardless of the facts. Also, in that situation there is little value in allowing the agency to apply its expertise. Moreover, there is little chance that a reconsideration by the agency will give the aggrieved party relief, because an agency cannot change an ordinance or statute and probably cannot change a rule through quasi-judicial action.

Although this exception seems straightforward, aspects of it have been the subject of recent debate. One unsettled area involves on-its-face challenges to rules or regulations of an agency subject to the Administrative Review Act, (ARA).17

This is an issue on which the ARA is unclear. The ARA provides for judicial review of "final administrative decisions."18 However, the term "administrative decision" is defined as not including a rule or regulation unless the provision is involved in a proceeding before the agency and its applicability or validity is in issue in such proceedings.19 Where a rule or a regulation is not a "decision," it would

19. The term 'administrative decision' or 'decision' does not mean or include rules, regulations, standards, or statements of policy of general application issued by an administrative agency to implement, interpret, or make specific the legislation enforced or administered by it unless such a rule, regulation, standard or statement of policy is involved in a proceeding before the agency and its applicability or validity is in issue in such proceeding, nor does it mean or include regulations concerning the internal management of the agency not affecting private rights or interests.

appear that exhaustion is not required under the ARA before a party may bring a challenge in court.

Nevertheless, a series of cases in the mid-1970's developed a very restrictive interpretation of the ARA which required exhaustion before any court challenge could be brought to an administrative rule or regulation. In People ex rel. Naughton v. Swank, several different plaintiffs challenged a public aid regulation. Their complaint comprised counts for administrative review, mandamus, and class declaratory relief. The plaintiff in the administrative review count, who had exhausted administrative remedies, prevailed. In the trial court the defendant's motion to dismiss the counts requesting mandamus and declaratory judgment was granted because the plaintiff failed to exhaust. The appellate court reversed, holding that the ARA did not apply and exhaustion was not necessary since the plaintiffs were not seeking review of a final administrative decision. The supreme court reversed, holding that regulations of agencies subject to the ARA could only be reviewed under the ARA.

In Ballew v. Edelman, which involved another challenge to a public aid regulation, the appellate court followed Naughton. The court observed that the Department of Public Aid had complete power to establish and amend its standards. Therefore, initial recourse to the department was necessary. In Kenilworth v. Mauck, the court squarely held that a plaintiff could not challenge an administrative rule until the matter had been presented to the agency for its consideration and correction. And in Cushing v. Pittman, the court stated that it could find "no decision extending the [attack-on-its-face] exception to the [exhaustion] doctrine to a case involving an internal administrative regulation."

In 1978, the supreme court made a sharp about-face on the issues. In Bio-Medical Laboratories, Inc. v. Trainor, a provider of services under the Medicaid program brought an action to enjoin its suspension from Medicaid participation. The action was based on a challenge to a public aid regulation. The department argued that in-

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21. Counts of other plaintiffs were dismissed because the parties lacked standing. Id. at 102-04, 317 N.E.2d at 504.
27. Id. at 932, 372 N.E.2d at 716.
junctive relief was improper and that the plaintiff should have first exhausted administrative remedies and then sought a writ of certiorari. The supreme court rejected the department's argument, holding that exhaustion is excused where an administrative rule is attacked on its face. Although the ARA did not apply to the program at issue in *Bio-Medical*, the court did not attempt to distinguish the earlier cases on this basis, and indeed completely ignored them.

Extension of *Bio-Medical* to include challenges to rules of agencies under the ARA was not long delayed. In *Health Resources Foundation v. Department of Health*, an Illinois Appellate Court allowed an on-its-face challenge without exhaustion even though the ARA applied. Similarly, in *United States Steel Corp. v. Pollution Control Board*, the court held that, at least as to the Pollution Control Board, the ARA only covers review of adjudicatory proceedings and not rule-making. In *Miller v. Illinois Department of Public Aid*, the appellate court again held that exhaustion is not necessary to challenge a rule on its face in non-ARA situations and strongly suggested that *Bio-Medical* overruled *Naughton* even in the ARA setting. Finally, in *Landfill, Inc. v. Pollution Control Board*, the supreme court held that where a rule asserting agency jurisdiction is challenged as not authorized by statute, ARA exhaustion is not necessary.

Together these cases establish that an administrative rule may be challenged as facially violative of a statute or the constitution without exhaustion regardless of whether the ARA governs review. This principle seems well grounded in the reasons for the exhaustion principle. As the court observed in *Landfill*:

Where an agency's statutory authority to promulgate a rule and exercise jurisdiction is in issue, no questions of fact are involved. The agency's particular expertise is not implicated in statutory construction. Further, there is virtually no chance the aggrieved party will succeed before an agency where the issue is the agency's own assertion of authority.

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29. *Id.* at 548, 370 N.E.2d at 227.
31. 64 Ill. App. 3d 34, 380 N.E.2d 909 (1st Dist. 1978).
33. 74 Ill. 2d 541, 387 N.E.2d 259 (1978); see also City of Chicago v. Illinois Commerce Comm'n, 70 Ill. App. 3d 655, 388 N.E.2d 1084 (1st Dist. 1979).
The considerations of judicial economy which underlie the exhaustion doctrine mandate in this instance that the formality of presenting the challenge to an administrative agency be excused.

While the *Bio-Medical* case and its progeny broaden the exception for on-its-face challenges, another recent case threatens to severely limit the exception's usefulness. In *Northwestern University v. City of Evanston*, the Illinois Supreme Court considered a constitutional challenge to a zoning ordinance. The court acknowledged that the plaintiff claimed to challenge the statute on its face in the complaint, but went on to state that one who merely alleges that an ordinance is unconstitutional on its face does not thereby avoid the exhaustion requirement. The court said that in order to come within the exception, a plaintiff must point to language in the ordinance which, without more, reasonably can be said to violate a specific constitutional guarantee.

The *Northwestern* case highlights an obstacle to use of the on-its-face challenge exception. Although the exception has long been recognized by Illinois courts, there has been little consideration in the cases of precisely how one challenges a statute, ordinance, or rule on its face. At least three distinguishable possibilities are conceivable: first, one might have to assert that independent of the individualized set of facts raised by the plaintiff, the provision could be shown to be impermissible; second, one might have to argue that as a matter of law, without considering any evidence, the provision could be demonstrated to violate the law; third, one might have to contend that the illegality of the provision is self-evident absent

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36. See note 7 *supra* and accompanying text.
37. An argument for excusing exhaustion in challenging a rule on its face can also be based on the Administrative Procedure Act. The APA forbids agencies from amending or abrogating rules without publication and opportunity for public comment. Ill. Rev. Stat. ch. 127, §§1005-07 (1977). Since there is no possibility of prevailing in a quasi-judicial action challenging a rule on its entirety before an administrative agency, there should be no requirement that a party bring the contention before the agency.
38. 74 Ill. 2d 80, 383 N.E.2d 964 (1978).
39. *Id.* at 87, 383 N.E.2d at 968.
40. *See, e.g.*, Bank of Lyons v. County of Cook, 13 Ill. 2d 493, 150 N.E.2d 97 (1958); Bright v. City of Evanston, 10 Ill. 2d 178, 139 N.E.2d 270 (1957).
41. An example of this approach might concern a zoning ordinance which totally forbids a certain type of use. It may be necessary to present evidence as to why the prohibition is arbitrary and capricious, but the challenge would not turn on the particular facts which the plaintiff presented.
42. An example of this would be a challenge brought against a state Medicaid regulation as violative of Title XIX of the Social Security Act. Extensive arguments might be needed as to the federal statutory and regulatory scheme, or perhaps as to the legislative history of a provision, but the arguments would be essentially legal.
any substantial legal argument. 43

The language of the Northwestern court seems to adopt the most restrictive possible meaning of this exception: a requirement of a challenge based on surface illegality. 44 The holding of the case, on the other hand, is less restrictive. Northwestern alleged that the ordinance was arbitrary and unreasonable. To prevail, Northwestern would have had to prove that its planned activities would not have significantly affected its neighbors. 45 The challenge thus was really one to the statute as applied, in the classic sense, and did not fit any definition of the on-its-face challenge exception as set out above. 46

However, if the court really meant to adopt a surface illegality requirement, the usefulness of the on-its-face attack exception will be greatly limited. There are many situations where the illegality or unconstitutionality of an ordinance, statute or rule could be established by a motion for summary judgment, but is not self-evident. In most of these cases there is little point in allowing the agency to review the facts or apply its expertise. It is unfortunate that the court used the Northwestern case, where a narrow holding was clearly called for, to make sweeping assertions about exhaustion law. These statements should be reconsidered in future cases with more consideration for the purposes of the exhaustion doctrine.

The Lack of Jurisdiction Exception

An exception to the exhaustion doctrine has also been recognized in cases where a party alleges that the agency lacks jurisdiction to decide the controversy. 47 In fact, some courts have held that exhaus-

43. An example of this possibility is harder to conceive. Perhaps an ordinance requiring segregation by race or one outlawing religious meetings would fit this requirement.

44. Compare the pleading requirements of the Northwestern case with those in Pierce v. Carpenter, 20 Ill. 2d 526, 169 N.E.2d 747 (1960), which required that the particular constitutional provision allegedly violated must be pleaded in a facial attack on a statute.

45. The court in the Northwestern case apparently had before it a full transcript from an administrative hearing (which Northwestern chose to ignore) which provided evidence proving to the court that Northwestern's arguments were certainly not factually self-evident.

46. The Northwestern case also disposed of a problem raised by the earlier cases discussing this exception. The court held that earlier cases requiring that an ordinance be challenged "as a whole" or "in its entirety" did not really require that every provision of the ordinance be attacked. A challenge need only be to some part of the ordinance on its face. 74 Ill. 2d at 86-87, 383 N.E.2d at 967-68.

Exhaustion of Administrative Remedies

Exhaustion of Administrative Remedies may not be excused for any other reason. This exception makes a great deal of sense as there is little point in requiring a person to endure the delay and expense of exhaustion if the agency's decision would be void for lack of jurisdiction.

While the exception and its rationale are clear, its application is not always simple. For example, since jurisdiction is a question of delegation of power by statute, jurisdiction may exist in an agency to consider some types of disputes but not others, though the subject matter is similar. Another uncertain area concerns whether an agency should be given an opportunity to consider a challenge to its own jurisdiction before a court action is brought. Possibly, where a procedure exists to move for dismissal for lack of jurisdiction, that procedure should be exhausted. Also, where a challenge to the jurisdiction of an agency is based on lack of procedural due process, the procedural defect may need to be raised first before the agency.

If a jurisdictional challenge fails, the cases and the rationale underlying the exhaustion doctrine indicate that the court should dismiss the case so that the plaintiff may proceed to exhaust. Therefore, if a jurisdictional challenge is weak, it may be wise to exhaust administrative remedies first and to raise the jurisdictional issue on appeal rather than to proceed without exhausting and risk having to exhaust later if the challenge fails.

The Futility Exception

Exhaustion will also not be required where it would be futile. Initial recourse to an administrative agency may be ineffectual, for example, where the agency lacks the power to grant a form of relief

49. The challenge-to-jurisdiction exception to the exhaustion doctrine may be closely related to the on-its-face challenge exception. See notes 17-46 supra and accompanying text. Often the statute or rule challenged on its face is the statute or rule giving the agency jurisdiction over the situation before the court. See Landfill, Inc. v. Pollution Control Bd., 74 Ill. 2d 541, 387 N.E.2d 258 (1978); Bio-Medical Laboratories, Inc. v. Trainor, 68 Ill. 2d 540, 370 N.E.2d 223 (1977).
requested,\textsuperscript{54} or where it has already shown clearly that it will decide against the plaintiff. Until recently, the futility exception had made little headway outside of the zoning area. For example, taxpayers had been compelled to exhaust remedies even though they had been denied administrative relief in previous years for the same taxes.\textsuperscript{55} Also, optometrists were not excused from exhaustion despite allegations that the board which would have heard their case was composed of competitors who were members of an association which opposed plaintiff’s method of doing business.\textsuperscript{56} The court held that absent a showing of prejudice or incompetence of individual members of the board, exhaustion was necessary.\textsuperscript{57}

In public utility cases the exception has fared even worse. Courts have required exhaustion despite claims that the same issue had lost before in Commerce Commission hearings or that decades of consistent Commission policy made the supposed administrative remedy “largely a fiction or illusion.”\textsuperscript{58}

Nevertheless, recent developments have indicated the willingness of the court to extend the futility doctrine beyond the zoning area. In \textit{Miller v. Department of Public Aid},\textsuperscript{59} the plaintiff challenged a public aid policy. Because the body responsible for providing an administrative hearing had no power to change the policy, exhaustion was excused as futile. Similarly, in \textit{Sanitary District v. Illinois Pollution Control Board},\textsuperscript{60} the court excused exhaustion because the administrative agency lacked the power to grant the particular form of relief sought.

There is no inherent reason why the futility exception should be limited to the zoning area. Courts properly refuse to consider claims of the predisposition or inclination of administrative bodies against petitioner. But if an agency has no power to decide an issue or previously has passed on the same issue raised by the same party,

\textsuperscript{54} The futility and challenge-to-jurisdiction exceptions to the exhaustion principle are closely related. One of the reasons for the challenge-to-jurisdiction exception is the futility in pursuing a remedy which can only result in a void order. The futility exception has been applied in cases where the agency lacked the power to provide a remedy appropriate to the needs of the aggrieved party, even though it had jurisdiction over the area of law in general. \textit{See} cases at notes 59 and 60 infra. \textit{People ex rel. Korzen v. Fulton Market Cold Storage Co.}, 62 Ill. 2d 443, 343 N.E.2d 450 (1976); \textit{People ex rel. County Collector of St. Clair v. Bostwick}, 33 Ill. 2d 74, 210 N.E.2d 189 (1965).

\textsuperscript{55} \textit{People ex rel. County Collector of St. Clair v. Bostwick}, 33 Ill. 2d 74, 210 N.E.2d 189 (1965).


\textsuperscript{57} \textit{Id.} at 325, 260 N.E.2d at 125.


\textsuperscript{59} 69 Ill. App. 3d 477, 387 N.E.2d 810 (1st Dist. 1979).

\textsuperscript{60} 66 Ill. App. 3d 251, 383 N.E.2d 996 (4th Dist. 1979).
exhaustion should be excused. The Miller and Sanitary District cases should indicate a willingness of the courts to expand the futility exception beyond zoning.

The most common variant of the futility exception permits a party to go directly to court for a remedy if another similar remedy has been denied by the agency. An early statement of this "multiple remedies" exception is found in Herman v. Village of Hillside. In Herman, the property owner had petitioned the Board of Appeals for an amendment of the zoning ordinance. After a hearing, he was denied relief. He then sued. The defendant moved to dismiss, arguing that the owner should have exhausted administrative remedies by applying for a variation. The supreme court noted that it would have been a useless exercise to apply to the same board for similar relief. That process would have wasted time and money. Therefore, it was unnecessary.

The multiple remedies exception has experienced the most vitality in the zoning area, where a variety of remedies are often available. It has been applied where an amendment was sought but not a variance, or a variance but not an amendment, where a plan was changed slightly after administrative remedies were pursued but before suit was filed, or where the zoning authorities otherwise took action which indicated that further exhaustion was useless.

61. 15 Ill. 2d 396, 155 N.E.2d 47 (1958).
62. The same board of appeal would have had jurisdiction over a variation [as over the amendment], and it is unreasonable to assume that it would reverse itself and grant practically the same relief. To insist on the additional useless step would merely give lip service to a technicality and thereby increase costs and delay the administration of justice, which is the very thing we are trying to avoid. The action here taken was a reasonable equivalent with the meaning and spirit of the cases above cited.
63. For an earlier interpretation of the zoning cases, see Fox, Exhaustion of Administrative Remedies in Zoning Disputes, 40 CHI. BAR REC. 119 (1958); Scott, Judicial Review of Zoning Decisions in Illinois, 59 ILL. BAR J. 228, 228-30 (1970).
64. Indeed, the exception has on occasion been described as only applicable to zoning cases. See Illinois Bell Tel. Co. v. Alphin, 60 Ill. 2d 350, 326 N.E.2d 737 (1975); GTE Automatic Elec. Inc. v. Alphin, 38 Ill. App. 3d 910, 349 N.E.2d 654 (1st Dist. 1976).
68. La Salle Nat'l Bank v. City of Evanston, 57 Ill. 2d 415, 312 N.E.2d 625 (1974); Van
Even in the zoning area, this exception has been subject to limits. At a minimum, the exception requires that at least one appropriate remedy of a similar nature has been fully exhausted. Thus, if the property owner pursues an improper remedy, or pursues a substantially different remedy than that denied earlier, exhaustion is still required. Further, where the claim of futility is based solely on the speculation of an administrative officer that the board of appeals will deny an application, exhaustion is not excused.

The multiple remedies variant of the futility exception appeals to common sense. Generally, it is unlikely that a body which denies one remedy will grant another to the same petitioner on the same facts. However, courts applying the exception often overlook the distinctions between different remedies. Where these distinctions are significant, an attempt to pursue a different administrative remedy may not be futile.

The Irreparable Injury And Fraud Exceptions

Two potential exceptions to the exhaustion principle are mentioned occasionally in cases but seldom appear as actual reasons for

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69. Additionally, Northwestern Univ. v. City of Evanston, 74 Ill. 2d 40, 383 N.E.2d 964 (1978), may have narrowed this exception. In the Northwestern case, the plaintiff initiated zoning proceedings but then went directly into court. Northwestern subsequently lost the administrative proceedings and argued to the court that further exhaustion would be futile. The court rejected this argument, holding that a party cannot pursue judicial and administrative remedies simultaneously and then claim futility if it loses the administrative proceedings before it receives a trial on the merits.


72. Bank of Lyons v. County of Cook, 13 Ill. 2d 493, 150 N.E.2d 97 (1956). But see Sinclair Pipe Line Co. v. Village of Richton Park, 19 Ill. 2d 370, 167 N.E.2d 406 (1960), where exhaustion was excused because the court's supposition that administrative relief was unlikely.

73. See, e.g., Bright v. City of Evanston, 10 Ill. 2d 178, 185-86, 139 N.E.2d 270, 274 (1956): A variance by its nature is a limited exception to be granted in a special case while an amendment, a much broader remedy, may in the same case be inappropriate. On the other hand, a unique hardship sufficient to justify a variance may not exist in a situation where an amendment may be acceptable to a zoning body.
Excising exhaustion. These exceptions permit initial recourse to the courts to prevent irreparable injury or because of fraud by an administrative agency.

The irreparable injury exception is analogous to the exception to the principle that equity will not assume jurisdiction in a case if there is an adequate remedy at law.74 Avoidance of irreparable injury is the classic ground for exercising equitable jurisdiction.75 When the irreparable injury exception is mentioned in the cases, however, it is almost inevitably only to state that irreparable injury has not been shown.76

In one case where the exception was applied, the court did not even mention irreparable injury. In Buege v. Lee,77 a police officer was allowed to bring a declaratory judgment action to challenge a departmental regulation because the only administrative remedy available was disciplinary proceedings consequential to refusing to obey the regulation. The court, in effect, held that the plaintiff might be irreparably injured if compelled to exhaust administrative remedies.

Cases frequently do mention fraud by the administrative body as grounds for avoiding exhaustion.78 However, it is difficult to conceive of a situation where allegations of fraud on the part of an agency would be accepted by a court. Accordingly, it is not surprising that this exception has gained nothing more than lip service.

Exhaustion: Other Considerations

Because of the exhaustion doctrine, practice in the administrative law area involves a consideration of many special problems. For example, procedural planning must embrace an awareness of the necessary timing of exhaustion, the means of solving problems caused by an uncooperative agency, the availability of judicial review and the effect of failure to exhaust on the ability to defend subsequent actions. Additionally, there are areas where the exhaustion doctrine's applicability will be uncertain, such as in declaratory
judgment actions, or unusual, as in tax cases. These potential problem areas will now be examined.

Procedural Considerations

Where the exhaustion doctrine applies, certain procedural problems need to be considered. Of primary importance is the timing of exhaustion and the ramifications of failing to meet statutory time limits. Where a statutory administrative hearing must be requested, a party who fails to seek administrative relief within the time limit loses the right to a hearing.79 Further, a court may not subsequently consider evidence which could have been offered at such a hearing.80 Similarly, where an appeal from an administrative decision is not brought within the time period set out by the review statute, the right to judicial review is forfeited.81 Somewhat less obviously, if an administrative agency grants a rehearing which is not permitted by statute, the petitioner forfeits his right to judicial review if the time limit for appeal from the initial decision runs out while the rehearing is progressing.82

Once administrative review is initiated, a problem may arise where the exhaustion attempt is stalled by a recalcitrant agency. Where an agency refuses to take action or unduly delays its proceedings, several cases indicate that a writ of mandamus may be appropriate. In People ex rel. Skokie Town House Builders v. Village of Morton Grove,83 a landowner tendered a revised plot plan to a building commissioner who refused to accept or examine the plan. The landowner petitioned for a writ of mandamus to compel action. The village argued that the court should dismiss for failure to exhaust administrative remedies through the zoning board of appeals. The supreme court, however, upheld issuance of the writ. The court held that the building commissioner's refusal to make a decision excused exhaustion since the board's jurisdiction was limited to review of decisions. Similarly, the more recent case of People ex rel. Shell Oil Co. v. City of Chicago,84 upheld the issuance of a writ of mandamus because of the city's "inordinate delay."

80. Id.
83. 16 Ill. 2d 183, 157 N.E.2d 33 (1959).
84. 9 Ill. App. 3d 242, 292 N.E.2d 84 (1st Dist. 1972).
These holdings are consistent with dicta in cases which observe that mandamus is available if a hearing is refused, or if a stay is inappropriately denied. The decisions would also seem correct as a matter of policy. If a statute establishes an administrative remedy, an agency should have a duty to provide the procedure necessary to obtain that remedy. If that procedure is refused or inordinately delayed, mandamus is the appropriate writ to compel execution of that duty.

Even where the agency does not delay deciding the matter, a party may have trouble securing judicial review. The availability of judicial recourse depends on whether the party adequately raised the appealed issues before the agency. In accord with the analogy to judicial appellate practice, arguments not raised before an administrative agency may not be relied on in a subsequent appeal. An exception to this requirement may exist for challenges to the jurisdiction of an agency or facial challenge to statutes, ordinances, or rules. It would be unfair to penalize the plaintiff for failing to make a particular argument in those areas since the challenges do not involve resolution of the factual issues presented in the dispute.

One final procedural consideration concerns whether failing to exhaust precludes defending a subsequent action brought by the agency. Failure to exhaust generally prohibits defending a collection or enforcement action. For example, in *People ex rel. Peterson v. Turner, Co.* the court held that unless a recognized exception to the exhaustion doctrine is raised as a defense, failure to exhaust administrative remedies and statutory forms of review precludes collateral attack through defense of enforcement proceeding.

In *Peterson*, the defendant was contesting a Fair Employment

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88. See notes 47-53 *supra* and accompanying text.
89. See notes 17-46 *supra* and accompanying text. See also Howard v. Lawton, 22 Ill. 2d 331, 175 N.E.2d 556 (1961).
90. People v. Koushiafes, 42 Ill. 2d 483, 248 N.E.2d 81 (1969), leaves open the question of whether failure to exhaust precludes defense in criminal proceedings.
92. Such as a constitutional attack to the ARA or an attack on the jurisdiction of an agency. See note 17-53 *supra* and accompanying text.
93. 37 Ill. App. 3d 450, 463 n.5, 346 N.E.2d 102, 113 n.5.
Practices Commission enforcement action without seeking review of the final administrative decision under the ARA. The trial court had nevertheless refused to strike the company's defenses. The appellate court reversed and remanded holding that the defenses raised issues which should have been raised through exhaustion of administrative remedies and through ARA review.

The *Peterson* decision is in accord with the majority of cases which previously addressed this question. It also comports with the purposes of the exhaustion doctrine. If a defendant could ignore administrative proceedings but then challenge administrative actions in court any time judicial proceedings were necessary to enforce the agency's decision, the exhaustion doctrine would be rendered meaningless.

 Nonetheless, courts have excused exhaustion and permitted assertion of the defense, using a variant of the futility doctrine. The courts reasoned that since the agency was willing to prosecute, it probably would not reconsider its decision through administrative proceedings. Thus, resort to those proceedings would be futile. Were this argument universally accepted, of course, it would eliminate the exhaustion requirement in all instances where enforcement proceedings exist.

### The Effect Of The Declaratory Judgment Act On The Exhaustion Principle

Application of the exhaustion doctrine is uncertain where parties seek declaratory judgments. The Declaratory Judgment Act gives courts the discretion to construe statutes, ordinances, and other governmental regulations. As such, the Act could be interpreted as creating a remedy independent of the exhaustion requirement for construing statutes, ordinances, or regulations as they apply to a particular controversy.

Although one court has held that the Act excuses exhaustion,
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courts generally reject this conclusion, though for varying reasons. Under principles of statutory construction, some courts hold that the more specific provisions of the ARA govern over the more general provisions of the Declaratory Judgment Act. Thus, exhaustion of administrative remedies with ARA review is an exclusive remedy where the ARA applies. A different approach was taken in Rasky v. Anderson. The Rasky court held that the trial court properly exercised its discretion when it dismissed a declaratory action brought to avoid exhaustion. This view vitalizes the exhaustion doctrine without foreclosing a trial court’s consideration of a non-exhausted declaratory judgment action in some cases.

In principle, the cases upholding the exhaustion requirement are correct. There is no inherent reason why the exhaustion doctrine should be any less applicable to cases subject to declaratory relief. The legislature should not be presumed to have overruled such a deeply entrenched doctrine unless that intention is clearly demonstrated. That purpose is not plainly expounded by the Declaratory Judgment Act.

Special Exhaustion Problems In Taxation Proceedings

A consideration of the exhaustion doctrine is incomplete without some attention to the peculiarities of its application in the taxation area. In tax cases, as elsewhere, administrative remedies ordinarily must be exhausted. This procedure is required as a precedent to equitable as well as legal remedies. Moreover, exhaustion is necessary even though the relief sought was denied the taxpayer in earlier years. There are exceptions to the exhaustion doctrine, however, which are recognized only in the tax area.

Until recently, one such exception existed for challenges to taxes unauthorized by law or imposed on exempt entities. This exception,

46. 278 N.E.2d 216 (1st Dist. 1972). Of course, declaratory judgment may be available as a means of relief if a case falls within one of the exceptions to the exhaustion doctrine. See Buege v. Lee, 56 Ill. App. 3d 793, 372 N.E.2d 427 (2d Dist. 1978); Herman v. Village of Hillside, 15 Ill. 2d 396, 155 N.E.2d 47 (1959).
as recognized in *Owens Illinois Glass v. McKibbin*,\(^\text{104}\) grew out of a group of rather complex exceptions to the doctrine that equity will not assume jurisdiction where there is an adequate remedy at law. The exception continued to be recognized until 1974. In *Calderwood Corp. v. Makin*,\(^\text{105}\) the supreme court held that a taxpayer's failure to request a hearing on an assessment within the twenty day statutory appeal period resulted in a final administrative decision reviewable only under the ARA, regardless of the *Owens* exceptions.

In *Illinois Bell Telephone Co. v. Allphin*,\(^\text{106}\) the supreme court went further and overruled the *Owens* doctrine as to all cases in which administrative decisions are reviewable under the ARA. Illinois Bell had brought an action for equitable relief to challenge an application of the Messages Tax to its business. Bell went directly to court, ignoring the provisions for administrative hearings and review provided by law. Bell claimed the impositions of the tax complained of were unauthorized by law and thus an injunction was appropriate under the *Owens* doctrine. The trial court tolled the twenty day review period, thus obviating the final administrative decision problem of *Calderwood*. The supreme court, however, recognized the irrationality of the *Owens* exception and overruled the *Owens* line of cases.\(^\text{107}\)

*Illinois Bell* has been followed in cases dealing with income taxes\(^\text{108}\) and exempt organizations.\(^\text{109}\) The problem of its application to property tax appeals in counties with a population not exceeding 1,000,000, where administrative remedies are provided by statute,\(^\text{110}\) has been raised but not decided.\(^\text{111}\) The *Owens* doctrine retains vital-

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104. 395 Ill. 245, 52 N.E.2d 177 (1943).
105. 57 Ill. 2d 216, 311 N.E.2d 691 (1974).
106. 60 Ill. 2d 350, 326 N.E.2d 737 (1975).
107. Although the court overruled *Owens* prospectively, it allowed Bell to proceed with its action for injunctive relief without exhaustion stating that "fundamental fairness" required that Bell's reliance on the *Owens* doctrine be honored. This action was followed in *Sta-Ra Corp. v. Mahin*, 64 Ill. 2d 330, 356 N.E.2d 67 (1976) and *Keystone Consol. Indus. Inc. v. Allphin*, 45 Ill. App. 3d 714, 359 N.E.2d 1202 (3d Dist. 1977). These cases may presage the creation of the new "fundamental fairness" exception to the exhaustion doctrine. See Gray, *Administrative Law in Illinois: Recent Trends and Developments*, 8 Loy. Chi. L.J. 511, 537-40 (1977). It is hoped that this exception will not grow beyond the situation at issue in the *Allphin* case where a party in good faith relies on another exception to the exhaustion principle which is prospectively overruled.
110. ILL. REV. STAT. ch. 120, §§592.1-592.5 (1977).
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ity as a basis for equitable jurisdiction,¹¹² but should be dead as an independent ground for avoiding exhaustion.¹¹³

A second narrow exception to the exhaustion principle in tax cases permits attack on equalization decisions concerning real property taxes without exhausting administrative and legal remedies.¹¹⁴ This exception is based on the language and history of the applicable statute.¹¹⁵ Moreover, equalization decisions are preeminently mathematical and legal in nature, not requiring the application of administrative expertise to factual situations.

Finally, additional exceptions to the exhaustion principle are found in the tax area because of the existence of multiple statutory remedies requiring varying degrees of exhaustion. Thus, the supreme court held¹¹⁶ that a taxpayer has the option of either choosing to exhaust administrative remedies under Department of Revenue procedures,¹¹⁷ or paying under protest and bringing a direct action for refund under the protest act.¹¹⁸ And in counties with a population under 1,000,000, a taxpayer may either pay his taxes under protest and object to collection,¹¹⁹ or appeal to the state Property Tax Appeals Board²⁰⁰ and seek review under the ARA.¹²¹

CONCLUSION

The development of an orderly and uniform administrative law in Illinois is still in its early stages. Courts continue to be more likely to decide a case with review only of precedent concerning the agency involved or to be swayed by the equities of the case. They are less likely to consider how the facts with which they are presented should be analyzed in terms of the broad exhaustion considerations set out in this article.

¹¹³. Of course, an issue formerly cognizable within an exception under the Owens doctrine might still fit into an exception to the exhaustion doctrine, for instance the void-on-its-face exception. See Illinois Bell Tel. Co. v. Alphin, 60 Ill. 2d 350, 358, 326 N.E.2d 737, 742 (1975).
¹¹⁵. ILL. REV. STAT. ch. 120, §619 (1977).
¹¹⁹. ILL. REV. STAT. ch. 120, §716 (1977).
¹²⁰. ILL. REV. STAT. ch. 120, §§592.1-592.5 (1977).
Nevertheless, recent development may presage a change in approach. For example, the on-its-face challenge exception has been extended to include attacks involving a variety of agencies under a short period of time. Also, the peculiar *Owens* exception has been eliminated in the taxation area as an exhaustion exception. Finally, the futility doctrine has been expanded beyond the zoning area.

The practitioner developing an exhaustion argument should still consider first the precedents directly concerning the agency which the case concerns. However, an increasing boldness in arguing from precedents involving other agencies or from the reasons underlying the exhaustion doctrine is also highly appropriate and may be well received.