

NOTES

HOME RULES: THE CASE FOR LOCAL ADMINISTRATIVE PROCEDURE

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Administrative law is critical to the modern practice of governance. Administrative rules fill the gaps in statutes left open by lawmakers, allow agencies to exercise legislative grants of authority and discretion, and give agencies with subject-matter expertise and frontline experience the opportunity to promulgate detailed standards and requirements in their designated issue areas. Adjudication allows an agency to dispose of matters and disputes formally before it, whether under its rules or another source of law. While agencies at every level of government—federal, state, and local—engage in administrative action, legal scholarship on administrative law is almost exclusively focused on the federal realm, which is shaped by the Administrative Procedure Act. States can look to a Model State Administrative Procedure Act drafted by experts at the National Conference of Commissioners on Uniform State Laws, a document that was originally promulgated around the same time as the federal Administrative Procedure Act, for guidance on ordering the activities of their agencies. Local governments, however, have far fewer resources to draw upon.

This Note argues that the time has come for localities to embrace the codification of administrative procedures. The governments and agencies of localities have always played a prominent role in the everyday lives of residents, as well as regional and national economic structures, and their work will benefit from procedural statutes. Cities, in particular, have taken on an increasingly central role as political agents and policy entrepreneurs and this shift underscores the need for greater procedural guidance. To make the case, this Note briefly examines the purposes and history of modern administrative law, analyzes approaches taken by exemplar cities, lays out and probes some of arguments for and against more rigorous procedures at the local level, and proposes three methods to help localities and states undertake this project.

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INTRODUCTION

The average city dweller, and particularly the average business owner, interacts with local rules multiple times a day. Consider the example of an average small business in Chicago. The corner eatery that a commuter might visit for a pick-me-up coffee on the way to work or a quick lunch must be licensed as a Retail Food Establishment by the Department of Business Affairs and Consumer Protection, which imposes rules regulating refund policy postings and price labeling for goods.¹ The business must also comply with public health and sanitation rules promulgated by the Chicago Board of Health,² which cover such granular topics as the concentration of caustic soda required in certain cleaning solutions,³ the proper method for affixing required source identification tags to shellfish containers,⁴ and the legally permissible method for reheating custard.⁵

The administrative rules imposing these requirements are not always easy to find. If the business owner were to search online and locate the “City of Chicago Rules and Regulations Portal,” she would discover a warning posted on the site’s sidebar:

The City of Chicago Rules and/or any other documents that appear on this site may not reflect the most current Rules adopted by a City of Chicago Department. The City of Chicago provides these documents in one location for informational purposes. These documents should not be relied upon as the definitive authority for local administrative rules. The City of Chicago department that issued the Rules should be consulted prior to any action being taken in reliance upon a City of Chicago rule.⁶

Perhaps recognizing the potential for confusion, Chicago’s government created a “Restaurant Start-up Program”⁷ to help prospective entrepreneurs navigate the array of steps required for a new business to get up and running in a legally compliant fashion. At the other end of the administrative process, a business that wishes to contest a violation received for failing to comply with any of the rules mentioned might discover that the prosecutor and judge at its hearing are, in fact, the same person.⁸ The point of these examples is

1. CHI. DEP’T OF BUS. AFFAIRS & CONSUMER PROT., *RETAILER’S RULES* (2015), <https://www.cityofchicago.org/content/dam/city/depts/dol/rulesandregs/RetailersRules.pdf> [<https://perma.cc/VUN8-NAWZ>].

2. CHI. DEP’T OF PUB. HEALTH, *SANITATION PRACTICES IN FOOD ESTABLISHMENTS* (2014), <https://www.cityofchicago.org/content/dam/city/depts/dol/rulesandregs/FoodCodeCover5516.pdf> [<https://perma.cc/ZA5W-ZXNS>].

3. *Id.* at 14.

4. *Id.* at 10–11.

5. *Id.* at 7.

6. *City of Chicago Rules and Regulations Portal*, CITY CHI., <https://www.cityofchicago.org/city/en/depts/dol/rules-and-regulations-portal.html> [<https://perma.cc/6YY4-ACCC>] (last visited Oct. 4, 2018).

7. *Restaurant Start-up Program*, CITY CHI., <https://www.cityofchicago.org/city/en/depts/bacp/sbc/restaurantstartprogram.html> [<https://perma.cc/62F3-MTRT>] (last visited Oct. 4, 2018).

8. *See Stone St. Partners, LLC v. City of Chicago*, 91 N.E.3d 965, 972 (Ill. App. Ct. 2017). Relying on *Scott v. Department of Commerce & Community Affairs*, 416 N.E.2d 1082 (Ill. 1981), the court found that combining investigatory and adjudicatory roles in one

not to suggest that any of Chicago's regulations are unnecessary; rather, it is to demonstrate that local regulations are widespread and, consequently, the procedures by which they are promulgated, enforced, and adjudicated matter to people's lives. As Michael Lipsky put it in his seminal study of local bureaucracies in the 1980s, "The ways in which street-level bureaucrats deliver benefits and sanctions structure and delimit people's lives and opportunities. These ways orient and provide the social (and political) contexts in which people act."⁹

The experience of a restaurant owner in Chicago can be traced to the legal framework by which the city's agencies operate. Unlike some other large cities in the United States, Chicago does not have a local administrative procedure act (LAPA) that governs the process for agencies to promulgate and codify administrative rules and adjudicate alleged violations. This lack of uniformity at the lowest level of government stands in contrast to the state and federal structures: the federal Administrative Procedure Act (APA) became law in 1946,¹⁰ and today, all fifty states have some form of state administrative procedure act (SAPA).¹¹ Because there is no procedural statute, Chicago's agencies are free to promulgate rules without public input, and there is no centrally codified compilation of rules for businesses and individuals to consult. Chicago's lack of opportunities for meaningful public engagement in the rulemaking process puts it in the company of countries like the Dominican Republic, Guatemala, and Turkey.¹² Similarly, Chicago's agencies are free to adjudicate violations that can result in substantial fines using a system that collapses the roles of prosecutor and judge into one.

Chicago is not alone. Many other large American cities, including Los Angeles, Houston, and Phoenix, also lack a procedural statute. The rarity of local procedural statutes may be partly explained by the absence of a model statute that is crafted for the unique needs of municipalities for these local governments to imitate, adapt, and adopt. Since 1946, states have had such

administrative law judge did not violate the respondent's constitutional due process rights absent a showing that the official was biased or otherwise predisposed to rule against it.

9. MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICE* 4 (2010).

10. U.S. DEP'T OF JUSTICE, *ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT* 5 (1947).

11. Jim Rossi, *Politics, Institutions, and Administrative Procedure: What Exactly Do We Know from the Empirical Study of State Level APAs, and What More Can We Learn?*, 58 *ADMIN. L. REV.* 961, 976–80 (2006).

12. See Melissa Johns & Valentina Saltane, *Citizen Engagement in Rulemaking: Evidence on Regulatory Practices in 185 Countries* 30–33 (World Bank Grp., Working Paper No. 7840, 2016), <http://documents.worldbank.org/curated/en/462571475068174273/pdf/WPS7840.pdf> [<https://perma.cc/42SM-BQN8>]. Johns and Saltane use an inventory of six indicators to calculate a composite score for citizen engagement in rulemaking, with zero being the lowest and six being the highest scores possible. *Id.* at 20. Chicago would score one point on the publication of proposed regulations indicator because it posts proposed regulations on a unified website and would score zero on all other indicators, which relate to consultation with the public and regulatory-impact analyses. The federal government of the United States scores a six. *Id.* at 33.

a model—the Model State Administrative Procedure Act (MSAPA)—developed contemporaneously with the APA by the National Conference of Commissioners on Uniform State Laws (NCCUSL).¹³ Since then, the NCCUSL has revised or rewritten the MSAPA three times: in 1961, 1981, and most recently in 2010.¹⁴

This Note argues that it is time for cities and localities to embrace administrative procedure. The codification of administrative procedures for rulemaking and adjudication would enhance procedural protections for the public, result in fairer and more uniform outcomes, infuse those outcomes with greater legitimacy, and promote the creation of better informed and more effective rules. To understand the need for administrative procedure in government, it is necessary to reexamine the background of federal and state administrative law, explore existing local models, and analyze the particular needs of local governments. This Note begins by briefly examining the history, structure, purposes, and evolution of the APA and the MSAPA. Next, it surveys and analyzes the administrative approaches taken by New York, Philadelphia, and Seattle to illustrate the variety of administrative procedures that cities have already adopted. Third, it considers arguments for and against the adoption of robust administrative procedures at the local level. Finally, it sketches three ways in which local administrative procedure could be advanced: (1) development of a model local administrative procedure act in the vein of the MSAPA; (2) adapting the MSAPA to the needs of local governments; or (3) encouraging local governments to construct new procedural statutes from the ground up. Along the way, this Note highlights the growing importance of local administrative law, a field that is ripe for scholarly attention. An exploration of the issues surrounding local administrative law provides useful context for those interested in exploring the questions, challenges, and possibilities presented by agency action at the level of government closest to the people it represents.

I. ADMINISTRATIVE MACHINERY: APA AND MSAPA

Local administrative law has grown up in the shadow of federal and state administrative law. To see why administrative procedure is important to governments big and small, it is useful to examine how it evolved at these other levels of government. The APA¹⁵ governs the federal rulemaking and adjudicatory processes and was enacted in 1946 to “achieve relative uniformity in the administrative machinery of the Federal Government.”¹⁶ The statute serves as a baseline procedural guide for federal agencies, one that can be varied and customized by Congress to fit the particular needs of

13. Arthur Earl Bonfield, *The Federal APA and State Administrative Law*, 72 VA. L. REV. 297, 298–99 (1986).

14. *Id.* at 299–300; Ronald M. Levin, *Rulemaking Under the 2010 Model State Administrative Procedure Act*, 20 WIDENER L.J. 855, 858 (2011).

15. 5 U.S.C. §§ 551–54 (2012).

16. U.S. DEP’T OF JUSTICE, *supra* note 10, at 5.

different agencies.¹⁷ The 1946 MSAPA, which provided a model procedural statute governing rulemaking and adjudication for state governments, was developed at the same time.¹⁸ “[T]here was substantial communication between the drafters of the two acts.”¹⁹ The drafters of the MSAPA, recognizing that the details of administrative and agency procedure and jurisdiction vary greatly between states, focused on crafting a statute that captured “essential features” of administrative procedure so that it could be adapted and applied broadly.²⁰ Early drafters of the MSAPA articulated their goals as “fairness to the parties involved and creation of procedure that is effective from the standpoint of government.”²¹ Today, forty states and the District of Columbia have administrative procedure acts that were adopted in whole or in part from a version of the MSAPA.²²

A. *Federal Administrative Procedure Act*

The APA itself is relatively sparse, but a rich and complex body of administrative law, jurisprudence, and scholarship has grown up around the limited wording of the statute. In the most basic terms, the APA divides agency action into two buckets: rulemaking and adjudication. It also provides procedural requirements for both types of actions within two subcategories: formal and informal.

1. Rulemaking

Rules are the basic tool for agencies to set prospective directives, standards, or prohibitions that carry the force of law.²³ Formal rulemaking requires an agency to hold a public hearing at which agency leadership or an administrative law judge presides to take testimony, gather evidence, rule on procedural requests, and conduct a hearing in a manner that resembles a formal court proceeding.²⁴ Formal rulemaking has been in retreat since the 1970s and is only rarely used by federal agencies today.²⁵ Informal rulemaking, also known as “notice-and-comment” rulemaking, is much more

17. *See, e.g.*, 15 U.S.C. § 57b-3 (2012) (setting forth special rulemaking procedures for the Federal Trade Commission).

18. REVISED MODEL STATE ADMIN. PROCEDURE ACT prefatory note at 1 (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2010) [hereinafter 2010 MSAPA].

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* prefatory note at 1–2.

23. 5 U.S.C. § 551(4) (2012) (“[R]ule’ means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.”).

24. *Id.* §§ 556–57.

25. Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237, 241 (2014).

common. Notice-and-comment rulemaking in the APA requires an agency to follow a three-step procedure: (1) issue a general notice of proposed rulemaking; (2) allow interested persons an opportunity to participate by the submission of written data, views, or arguments; and (3) include a concise general statement of basis and purpose when the final rule is promulgated.²⁶

Agencies usually choose to prepare an Advanced Notice of Proposed Rulemaking (ANPRM) for publication in the Federal Register that invites the public to participate in the shaping of the rule at the conceptual stage by submitting comments, information, and studies, though this is not required.²⁷ An ANPRM is followed by a Notice of Proposed Rulemaking (NPRM) that contains the actual text of the proposed rule and is also published in the Federal Register for public comment.²⁸ When an agency publishes a final rule, it must “consider and respond to significant comments” in the statement of basis and purpose.²⁹

In practice, agencies fulfill the obligation to consider and respond to substantive comments by incorporating summaries of comment content with agency responses into the statement of basis and purpose that accompanies the final rule. For example, in 2016, the Consumer Financial Protection Bureau received more than 160 comments before adopting a final rule amending the regulations that govern certain aspects of mortgage financing.³⁰ In its statement of basis and purpose, the agency summarized concerns raised by these comments and explained its response to suggestions by consumer advocacy groups that the agency require disclosures in multiple languages in order to better inform consumers with limited English proficiency.³¹ Although the agency ultimately did not alter the rule to include this language requirement, the agency’s response served the purpose of informing the public of the reasons for that decision and assuring commenters that their concerns had been carefully considered.³² In this case, the agency noted that it had not had the opportunity to test the disclosure in multiple languages or seek comment from regulated entities about the operational challenges involved with providing multilingual disclosures.³³

Not all the procedural requirements for rulemaking are captured in the APA. Cost-benefit analysis has been a mandated part of the federal rulemaking process since President Reagan signed Executive Order 12,291 in 1982.³⁴ President Reagan’s order required that any “major rule”—defined

26. 5 U.S.C. § 553; *see also* *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1203 (2015).

27. Office of the Fed. Register, *A Guide to the Rulemaking Process*, FED. REG., https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf [<https://perma.cc/H75W-MCFD>] (last visited Oct. 4, 2018).

28. *Id.*

29. *Mortg. Bankers*, 135 S. Ct. at 1203.

30. Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 81 Fed. Reg. 72,160, 72,163 (proposed Nov. 20, 2014) (to be codified at 12 C.F.R. pts. 1024, 1026).

31. *Id.*

32. *Id.*

33. *Id.* at 72,164.

34. 46 Fed. Reg. 13,193 (Feb. 17, 1981).

as any regulation likely to result in an annual economic effect of \$100 million or more; a major effect on consumers, industries, or governments; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of American companies to compete with international counterparts—undergo review to ensure that “regulatory action . . . not be undertaken unless the potential benefits to society . . . outweigh the potential costs to society.”³⁵ The final word on cost-benefit analysis belongs to the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB), which functions as the “guardian of a well-functioning administrative process.”³⁶ President Reagan’s executive order was replaced by President Clinton’s Executive Order 12,866, which preserved the government’s commitment to cost-benefit analysis while expanding the scope of consideration to include costs and benefits that are not readily quantifiable in monetary terms.³⁷ Under this structure, OIRA reviews a portion of final rules and conducts more searching reviews of all major rules. From fiscal year 2007 through fiscal year 2016, OMB reviewed 2670 of the 36,255 final rules published in the Federal Register, of which 609 were considered major rules.³⁸

Put simply, cost-benefit analysis involves the quantification and monetization of the burdens imposed by an action as well as the reduction in risk of the targeted harm and a weighing of the resulting figures.³⁹ Proponents of cost-benefit analysis claim that it yields many advantages for agencies and the public. First and foremost, requiring cost-benefit analysis ensures that all regulations produce a net benefit to society, rather than simply imposing costly burdens on particular communities or industries. Scholars also claim a host of other secondary benefits—for example, that requiring cost-benefit analysis in the first instance compels agencies to think critically about the basis for a regulation and the effectiveness of its proposed measures rather than simply relying on “dogmas, intuitions, hunches, or interest-group pressures.”⁴⁰ In so doing, cost-benefit analysis purportedly promotes the

35. *Id.* at 13,193.

36. Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1841 (2013).

37. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993). President Obama supplemented the order with Executive Order 13,563 which, inter alia, encourages agencies to seek input from interested stakeholders before a NPRM is published and make rulemaking dockets available online at regulations.gov. 3 C.F.R. 215 (2011). Shortly after taking office, President Trump issued his own executive order instituting a “regulatory cap” that requires agencies to identify two regulations for repeal whenever they propose a rule for notice and comment. Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Feb. 3, 2017).

38. OFFICE OF MGMT. & BUDGET, 2017 DRAFT REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT 8 (2018).

39. John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882, 893 (2015).

40. Cass R. Sunstein, *Financial Regulation and Cost-Benefit Analysis*, 124 YALE L.J.F. 263, 263 (2015).

creation of rules that are more efficient, less burdensome, and more narrowly tailored to the problems that they are meant to address.⁴¹

2. Adjudication

Adjudication is the process by which an agency can issue a final, binding order to resolve a matter.⁴² Strictly speaking, the final disposition of any matter other than rulemaking is an adjudication.⁴³ The APA addresses itself primarily to formal adjudications. The statute provides detailed procedures for the conduct of formal adjudications and leaves it to the discretion of agencies to determine proper procedures for informal adjudications, subject to the ultimate constraints of constitutional due process and APA judicial review standards.⁴⁴

Section 554 of the APA sets out the requirements for adjudications.⁴⁵ The section applies to every case required by statute to “be determined on the record after an opportunity for a hearing”—a phrase that denotes the

41. Of course, cost-benefit analysis is not without its drawbacks or criticisms. Inevitably, cost-benefit analysis adds another step to an already time-consuming process for promulgating rules. Skeptics also point out that cost-benefit analysis as a tool of regulatory reform has its roots in conservative academia and that the requirement “has been used as a screen for ideologically driven attacks on regulation.” Daniel A. Farber, *Rethinking the Role of Cost-Benefit Analysis*, 76 U. CHI. L. REV. 1355, 1355 (2009). In addition, scholars have observed that both the framing of regulatory problems as market failures and the drive to maximize net benefits using economically quantifiable factors make cost-benefit analysis a poor tool for addressing, or even acknowledging, concerns of distributive justice, individual rights, and fairness in the rulemaking process. See, e.g., Susan Rose-Ackerman, *Putting Cost-Benefit Analysis in Its Place: Rethinking Regulatory Review*, 65 U. MIAMI L. REV. 335, 339 (2011). Despite these critiques, cost-benefit analysis remains deeply rooted in the federal regulatory firmament. Indeed, President Obama reaffirmed the primacy of cost-benefit analysis early in his first term by issuing his own executive order and appointing Cass Sunstein, a law professor who has authored several books and many law review articles about the importance of cost-benefit analysis, as the administrator of OIRA. See generally Sunstein, *supra* note 36. It remains to be seen how the tenure of President Trump’s OIRA Administrator, Neomi Rao, will impact the evolution of cost-benefit analysis and executive regulatory review more generally. See Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1525 (2015) (asserting that “[t]he vast and varied bureaucracy undermines both the unitary executive and the collective Congress.”). There is already evidence that President Trump’s administration has reduced the pace of regulatory action compared to previous governments. See Connor Raso, *Where and Why Has Agency Rulemaking Declined Under Trump?*, BROOKINGS INSTITUTION (June 29, 2018), <https://www.brookings.edu/research/where-and-why-has-agency-rulemaking-declined-under-trump/> [<https://perma.cc/L2KR-UWFA>] (finding that “total rulemaking fell significantly under Trump [in 2017] relative to 2001, 2009, and 2016”).

42. 5 U.S.C. § 551(6) (2012) provides that an “order,” the result of an agency adjudication, means “the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing.”

43. *Id.*

44. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 543 (1978) (“But this much is absolutely clear. Absent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.”) (quoting *FCC v. Schreiber*, 381 U.S. 279, 290 (1965)).

45. 5 U.S.C. § 554.

requirement of formal adjudication.⁴⁶ Section 554(b) requires that all persons entitled to notice of a hearing be timely informed of the time, place, and nature of the hearing, the legal authority and jurisdiction under which the hearing is to be held, and the matters of fact and law asserted.⁴⁷ Section 554(c) requires that agencies give all interested parties the opportunity to submit facts, arguments, offers of settlement, or “proposals of adjustment” of the matter at issue and empowers the agency to issue binding decisions should these attempts to resolve the matter fail.⁴⁸ Section 554(d) sets out restrictions on ex parte communications and conflict of interest standards for agency employees who preside over adjudications.⁴⁹ Section 554(e) empowers agencies to issue binding declaratory orders within their discretion.⁵⁰

APA requirements for hearings and decisions apply to both formal rulemaking and formal adjudication; though, as noted above, the former is rarely done today.⁵¹ These requirements are laid out in sections 556 and 557 of the APA. Section 556(b) requires that the agency head or an administrative law judge (ALJ) preside at the taking of evidence.⁵² Section 556(c) sets out the powers of presiding employees, which include administering oaths and affirmations, issuing subpoenas, ruling on evidence proffers, taking depositions, regulating the course of the hearing, holding settlement conferences, informing the parties of the availability of alternative dispute resolution, disposing of procedural requests, making or recommending decisions in accordance with section 557, and taking other actions as authorized by agency rules.⁵³ Section 556(d) places the burden of proof on the proponent of a rule or order and requires an agency to provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.⁵⁴ This provision also specifies that parties may present their case or defense by oral or documentary evidence, submit rebuttal evidence, and conduct cross-examinations.⁵⁵ Finally, section 556(e) declares that a record created pursuant to section 556 is the exclusive record for decision and requires that an agency make copies of the record available to the parties.⁵⁶

Section 557 of the APA governs agency decisions after hearings.⁵⁷ Section 557(b) provides that, unless an agency has promulgated a rule

46. *Id.* § 554(a). *But see* Nielson, *supra* note 25, at 240 (finding that formal rulemaking is rare in the modern era). The question of when, precisely, formal adjudication is required by the APA is complex and the ongoing debate prompted the MSAPA drafters to chart a different course for addressing the issue. *See infra* Part I.C.2.

47. 5 U.S.C. § 554(b)(1)–(3).

48. *Id.* § 554(c).

49. *Id.* § 554(d).

50. *Id.* § 554(e).

51. *Id.* § 556(a).

52. *Id.* § 556(b).

53. *Id.* § 556(c).

54. *Id.* § 556(d).

55. *Id.*

56. *Id.* § 556(e).

57. *Id.* § 557(a).

requiring otherwise, subordinate employees who preside over hearings may make initial decisions that become final in the absence of a party appeal or agency request for review.⁵⁸ Alternatively, an agency may require that subordinate employees recommend a decision to the agency head, who makes the final decision.⁵⁹ Section 557(c) provides that before an initial decision, recommended decision, or a final decision on agency review can be made, parties must have a chance to submit proposed findings and conclusions, exceptions to the decision, and supporting reasons for either of these items.⁶⁰ A decision must include findings and conclusions, with a statement of reasons and basis on all material issues of fact, law, or discretion, and clearly state the outcome of the adjudication.⁶¹ Section 557(d) provides restrictions on ex parte communications and conflict of interest standards for agency employees who are likely to be involved in the decisional process.⁶²

Federal agencies undertake a staggering number of adjudications. Just one agency, the Social Security Administration (SSA), issued more than 650,000 hearing decisions in the 2016 fiscal year alone.⁶³ Decisions in SSA adjudications can determine a party's eligibility to access important benefits, including retirement income for paid-in individuals or their survivors, disability insurance, and supplemental security income.⁶⁴ The SSA example demonstrates how the APA shapes millions of potentially high-stakes interactions between citizens and federal agencies every year.

B. *Model State Administrative Procedure Act*

The MSAPA, unlike the APA, has changed significantly since 1946. NCCUSL revised the MSAPA in 1961, 1981, and most recently in 2010.⁶⁵ This Note focuses on analyzing the 2010 revision of the MSAPA. Although no state has yet adopted the most recent MSAPA, it represents the NCCUSL's latest effort to capture evolutions in state administrative law and includes several innovations that would be of interest to a local government considering the codification of administrative procedure.⁶⁶

58. *Id.* § 557(b).

59. *Id.*

60. *Id.* § 557(c)(1)–(3).

61. *Id.* § 557(c)(3)(A)–(B); *see also* Iowa State Commerce Comm'n v. Office of Fed. Inspector of Alaska Nat. Gas Transp. Sys., 730 F.2d 1566, 1577 (D.C. Cir. 1984) (“[W]e believe that the [agency] does have an obligation to state sufficient findings and reasons supporting its decision to permit . . . judicial review . . .”).

62. 5 U.S.C. § 557(d)(1).

63. *National Hearing Decisions (FY 2014–FYTD 2018 Quarter 3)*, SOC. SECURITY ADMIN., https://www.ssa.gov/appeals/charts/National_Hearing_Decisions_FY2018_3rd_Qtr.pdf [<https://perma.cc/H93J-PNB2>] (last visited Oct. 4, 2018).

64. *Hearings and Appeals*, SOC. SECURITY ADMIN., https://www.ssa.gov/appeals/about_us.html [<https://perma.cc/HY5W-5S6V>] (last visited Oct. 4, 2018).

65. 2010 MSAPA, *supra* note 18, prefatory note at 1–2.

66. *Enactment Status Map*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/Act.aspx?title=State%20Administrative%20Procedure%20Act,%20Revised%20Model> [<https://perma.cc/C3WS-ZQSE>] (last visited Oct. 4, 2018).

1. Rulemaking

The MSAPA provides for notice-and-comment rulemaking that is broadly similar to that found in the APA but incorporates new options for agencies as well as additional procedural safeguards for the public. Agency rulemaking actions are not valid unless they are conducted in “substantial compliance” with procedural requirements.⁶⁷

The 2010 MSAPA first lays out several requirements for the public availability of certain rulemaking documents. For example, the statute contemplates that a state has either engaged a publisher or assigned a public official to: (1) establish a regulatory bulletin similar to the Federal Register in which rulemaking notices may be published and (2) compile and codify regulations in an official compendium.⁶⁸ Agencies must maintain rulemaking records and dockets, the latter of which must be copied and provided to members of the public upon request.⁶⁹ The purpose of these provisions is to “provide easy public access to agency law and policy that are relevant to agency process.”⁷⁰ Unlike previous versions of the MSAPA, the 2010 MSAPA requires that agencies also make rulemaking documents available online.⁷¹

An agency is authorized to “gather information relevant to the subject matter of a potential rulemaking proceeding and . . . solicit comments and recommendations from the public” using advance notices of proposed rulemaking, which are also a common tool in the federal context.⁷² Negotiated rulemaking, wherein an agency convenes a committee of stakeholders impacted by a proposed rule to achieve consensus before the notice of proposed rulemaking is published, is also authorized.⁷³

Notice of proposed rules must be published for public comment in advance of adoption, though the statute allows for adjustments in the length of the comment period.⁷⁴ Several elements must be included in the notice, including a short explanation of the proposed rule, citations to legal authority,

67. 2010 MSAPA, *supra* note 18, § 315.

68. *Id.* § 201.

69. *Id.* §§ 301–02.

70. *Id.* § 201 cmt.

71. *Id.* § 202.

72. *Id.* § 303(a).

73. *Id.* § 303(b). Negotiated rulemaking proceeds upon the theory that, through prepublication consensus, “the adversarial process would be supplanted by a cooperative process, and the delay involved in judicial challenges would be avoided.” William Funk, *Public Participation and Transparency in Administrative Law—Three Examples as an Object Lesson*, 61 ADMIN. L. REV. 171, 193 (2009). But note that negotiated rulemaking “never became generally accepted.” *Id.* Funk theorizes that this is because the benefits for agencies in terms of fewer hostile comments and decreased likelihood of judicial review failed to clearly materialize. See Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1309 (1997) (analyzing outcomes of negotiated rulemakings by the Environmental Protection Agency and finding that “[n]egotiated rulemaking saves no appreciable amount of time nor reduces the rate of litigation”).

74. 2010 MSAPA, *supra* note 18, § 304.

disclosure of relied-upon studies and technical analyses, a regulatory-impact analysis if one was prepared, and instructions for commenting.⁷⁵

The MSAPA includes a form of regulatory-impact analysis that approximates OIRA review of major rules at the federal level.⁷⁶ States are encouraged to set their own threshold for triggering these analyses before the publication of proposed rules as they deem appropriate.⁷⁷

After a proposed rule is published, an agency must take comments in an electronic or written format.⁷⁸ Agencies are not required to hold public hearings, but may choose to do so.⁷⁹ Importantly, the MSAPA specifies that an ongoing comment period does not “prohibit[] . . . an agency from discussing with any person at any time the subject of a proposed rule,”⁸⁰ which removes any potential cloud on an agency’s ability to communicate freely about a regulatory topic while a rulemaking proceeding is pending.

Agencies may not adopt a rule until after the public comment period ends.⁸¹ Within two years of the publication of a proposed rule, an agency must either adopt a final rule or terminate the rulemaking proceeding.⁸² Final rules may vary from those proposed rules only if the variance is a “logical outgrowth” of the proposed rule.⁸³ Final rules must include a concise explanatory statement laying out: (1) the agency’s reasons for adopting the rule and, if applicable, for not accepting substantial arguments made by the public; (2) the reasons for any variance between the proposed and final rules; and (3) the summary of any regulatory analysis performed.⁸⁴

The MSAPA provides agencies with two alternative rulemaking procedures for special circumstances. First, an agency may adopt an emergency rule, which can only be effective for an initial 180 days and may be renewed for another 180 days upon a finding that “an imminent peril to the public health, safety, or welfare or the loss of federal funding for an agency program” makes such an adoption necessary.⁸⁵ Second, an agency

75. *Id.* § 304(a)(1)–(7).

76. *Id.* § 305.

77. *Id.* § 305 cmt. (“States should set the dollar amount of estimated economic impact for triggering the regulatory analysis requirement of this section at a dollar amount so that as [sic] they deem appropriate or by other approach make the choice to prepare regulatory analyses carefully so that the number of regulatory analyses prepared by any agency are proportionate to the resources that are available.”).

78. *Id.* § 306(a).

79. *Id.* § 306(c).

80. *Id.* § 306(b).

81. *Id.* § 307(a).

82. *Id.* § 307(b).

83. *Id.* § 308; *see* *First Am. Disc. Corp. v. Commodity Futures Trading Comm’n*, 222 F.3d 1008, 1015 (D.C. Cir. 2000) (“The test for a ‘logical outgrowth,’ variously phrased, is whether a reasonable commenter ‘should have anticipated that such a requirement’ would be promulgated, or whether the notice was ‘sufficient to advise interested parties that comments directed to the’ controverted aspect of the final rule should have been made.” (citations omitted) (first quoting *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983); then quoting *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991))).

84. 2010 MSAPA, *supra* note 18, § 313.

85. *Id.* § 309.

may adopt a “direct final rule” that it expects to be noncontroversial without public comment unless an objection is received after publication, in which case the rule cannot be adopted and the agency must proceed under normal rulemaking procedures.⁸⁶

Members of the public may petition agencies for the adoption of a rule.⁸⁷ If such a petition is received, an agency must either initiate rulemaking or deny the petition and state its reasoning on the record within a specified time period.⁸⁸

The MSAPA provides agencies with two additional regulatory tools. First, agencies may issue guidance documents without going through the normal rulemaking procedure.⁸⁹ This provision is meant to “encourage an agency to advise the public of its current opinions, approaches, and likely courses of action.”⁹⁰ Second, agencies may, upon petition, make declaratory orders that specify how a rule will be applied to a particular party.⁹¹ These orders are binding as to the parties and facts at issue, and they are meant to serve as “convenient procedural device[s] that will enable parties to obtain reliable advice from an agency.”⁹²

Finally, the MSAPA includes a Legislative Rules Review Committee.⁹³ This committee, proposed to be made up of members of the legislature, has the power to approve, disapprove outright, or disapprove the rule with recommended modifications.⁹⁴ A similar mechanism, the Congressional Review Act, exists at the federal level but functions quite differently because it is an *ex post* legislative override rather than a pre-adoption review.⁹⁵

The MSAPA’s rulemaking procedures clearly evidence the drafters’ desire to provide flexibility to both agencies and interested parties while preserving a predictable structure for rulemaking and procedural safeguards for the public. On the whole, this approach seems to have succeeded—agencies have the tools to effectively make rules in a variety of circumstances. Agencies can negotiate highly technical rules with impacted stakeholders, quickly adopt noncontroversial regulations as direct final rules, or engage in standard notice-and-comment rulemaking with or without an actual public hearing. At the same time, agencies must share useful information with the public and state the reasons for their administrative choices in ways that are accessible, easy to understand, and susceptible to judicial review.

86. *Id.* § 310.

87. *Id.* § 318.

88. *Id.*

89. *Id.* § 311(a).

90. *Id.* § 311 cmt.

91. *Id.* § 204(e).

92. *Id.* § 204 cmt.

93. *Id.* § 702.

94. *Id.* § 703(a).

95. *See* 5 U.S.C. § 801 (2012).

2. Adjudications

The MSAPA divides agency adjudications into two categories: (1) adjudications where an opportunity for an evidentiary hearing is required by a federal or state constitution or statute, known as “contested cases”; and (2) all other processes by which agencies determine facts or apply law in order to formulate and issue an order.⁹⁶

Contested cases, which are roughly equivalent to formal adjudications under the APA, trigger much more exacting procedural requirements than other adjudications. An agency must appoint a presiding officer who is an administrative law judge and is not subject to the authority, direction, or discretion of anyone who has served as an investigator, prosecutor, or advocate in the case subject to disqualification for bias, prejudice, financial interest, ex parte communication, or any other factor that would cause a reasonable person to question his or her impartiality.⁹⁷ An agency must give parties timely notice, a public hearing, and the opportunity to file pleadings, motions, and objections as well as respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence.⁹⁸ The statute also sets out rules of evidence⁹⁹ and discovery¹⁰⁰ as well as requirements for notice,¹⁰¹ hearing records,¹⁰² ex parte communications,¹⁰³ intervention by other parties,¹⁰⁴ issuance of subpoenas,¹⁰⁵ entry of default judgments,¹⁰⁶ issuance of recommended, initial, or final orders,¹⁰⁷ agency review and reconsideration,¹⁰⁸ and stays of agency orders pending judicial review.¹⁰⁹ As a result, the procedural and agency resource requirements for an adjudication change dramatically depending on whether a case is contested or not.¹¹⁰

In contrast, other agency adjudications, roughly equivalent to informal adjudications under the APA, carry significantly fewer and less burdensome procedural requirements. Informal adjudications are subject to the general judicial review standards and provisions governing agency departure from

96. 2010 MSAPA, *supra* note 18, § 102(1), (7).

97. *Id.* § 402.

98. *Id.* § 403.

99. *Id.* § 404.

100. *Id.* § 411.

101. *Id.* § 405.

102. *Id.* § 406.

103. *Id.* § 408.

104. *Id.* § 409.

105. *Id.* § 410.

106. *Id.* § 412.

107. *Id.* § 413.

108. *Id.* §§ 414–16.

109. *Id.* § 417.

110. This “procedural cliff” is sometimes referred to as the “gateway problem.” The two basic approaches are the internal model, where the procedural statute attempts to define what kinds of circumstances should warrant formal procedures, and the external model, where the procedural statute relies on other sources of law for the trigger. Both the APA and the 2010 MSAPA take the latter approach. See Michael Asimow, *Contested Issues in Contested Cases: Adjudication Under the 2010 Model State Administrative Procedure Act*, 20 WIDENER L.J. 707, 713–14 (2011).

public guidance documents.¹¹¹ By adopting a structure that grants significant procedural protections for parties in contested cases and prescribes no process for informal adjudications, the statute balances the agency's interest in flexibility with the public's interest in predictable, formal, and procedurally rigorous proceedings where significant rights or penalties are at issue.¹¹²

The final element of the MSAPA's approach to adjudication is the establishment of an Office of Administrative Hearings to serve as a central panel for adjudications. When the 2010 MSAPA was adopted, twenty-four states and the District of Columbia already took such an approach.¹¹³ The 2010 MSAPA builds on an innovation initially included in the 1981 MSAPA in order to "balance due process concerns with administrative effectiveness while retaining administrative law independence."¹¹⁴ A Chief ALJ is appointed by the appropriate executive branch official and may only be removed for cause.¹¹⁵ Subordinate ALJs are appointed by the Chief and are similarly protected from dismissal without cause.¹¹⁶ Central panels are meant to increase efficiency and fairness by leveraging economies of scale and providing for uniform rules and independent adjudicators.¹¹⁷

Many of the default tools and protections that the MSAPA provides to state agencies and the public, both for rulemaking and adjudications, are not unique to that level of government and would no doubt be useful for local agencies as well. Other parts of the statute, such as the procedural requirements for contested-case adjudications or the central panel proposal, could serve as useful starting points for crafting local-level analogues.

C. Comparison

The APA and the MSAPA have both similarities and differences. Both statutes leave some degree of flexibility for agencies in the rulemaking and adjudication contexts for different but related reasons. The drafters of the APA had to account for the wide variety of procedures used and subject matter addressed across the administrative spectrum of the federal

111. 2010 MSAPA, *supra* note 18, § 401 cmt.

112. Contested-case provisions were first introduced in the widely adopted 1961 MSAPA and, as a result, most states have some form of them on the books today. *See* Rossi, *supra* note 11, at 976–80. However, much can turn on precisely how a state defines the phrase "contested case." *See generally* Jennifer Lumley-Hluska, Note, *The Contest over "Contested Cases": A Study on How the Connecticut Legislature's Reading of Two Words May Be Depriving You of Your Right to Judicial Review and Due Process of the Law*, 23 QUINNIPIAC L. REV. 1239 (2005).

113. 2010 MSAPA, *supra* note 18, § 601 cmt.

114. Ed. Schoenbaum, *A Brief History of the Model Act to Create a State Central Hearing Agency*, 17 J. NAT'L ASS'N ADMIN. L. JUDGES 309, 309 (1997).

115. 2010 MSAPA, *supra* note 18, § 602.

116. *Id.* § 603.

117. John Hardwicke & Thomas E. Ewing, *The Central Panel: A Response to Critics*, 24 J. NAT'L ASS'N ADMIN. L. JUDGES 231, 232 (2004) (pointing out, and attempting to rebut, common criticisms of the central panel model, including cost, loss of agency expertise, excessive formalization of administrative hearings, and creation of more state bureaucracy).

government, while the drafters of MSAPA had to account for the diverse structures and needs of state governments. The MSAPA has benefitted from more frequent and recent updates,¹¹⁸ while the APA has changed only incrementally since its enactment.¹¹⁹ An examination of the different choices made by the drafters of each statute will demonstrate how the goals and structure of an act's institutional audience can shape the way its procedures are crafted.

In the rulemaking context, the MSAPA provides agencies with more options and flexibility than the APA, but also more thoroughly codifies the steps involved in its wider array of procedures. For example, the MSAPA provides for direct final rule procedures for rules expected to be noncontroversial, an option that does not appear in the APA.¹²⁰ In addition, many of the elements of rulemaking at the federal level that have been overlaid on the APA statute by executive order or agency practice, such as advance notices of rulemaking and regulatory-impact review, are explicitly codified in the MSAPA.¹²¹

There are significant differences in the ways that the APA and the MSAPA approach adjudication. The first and most fundamental difference is the contested-case framework.¹²² While both the APA and MSAPA follow an external model that applies formal (or contested) adjudication procedures according to the mandates of external sources of law, the contested-case approach was deliberately developed as an alternative to the APA to avoid its pitfalls.¹²³ In particular, the contested-case provisions are meant to avoid the APA's ambiguity about when a formal hearing is required.¹²⁴ The APA simply states that formal adjudications apply "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing."¹²⁵ However, the statute provides no guidance for determining when a statute appropriately directs that a hearing must be held "on the record." As a result, courts are split on the question of when this threshold has been met: one line of cases holds that a statute must expressly require a hearing on the record, while another holds that, where the rights at issue are significant, a hearing must be on the record unless a statute expressly provides that it need not be.¹²⁶

118. *See supra* notes 14, 65 and accompanying text.

119. *Compare* Administrative Procedure Act, Pub L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at scattered sections of 5 U.S.C.), *with* Act of Sept. 6, 1966, Pub. L. No. 89-554, chs. 5–8, 80 Stat. 378, 380–93 (recodifying the APA), *and* Act of Mar. 27, 1978, Pub. L. No. 95-251, 92 Stat. 183 (amending the APA's adjudication procedures).

120. 2010 MSAPA, *supra* note 18, § 310.

121. *Id.* §§ 303, 305.

122. *See supra* Part I.B.2.

123. *See supra* note 110.

124. *See supra* note 110.

125. 5 U.S.C. § 554(a) (2012).

126. *Compare* *City of West Chicago v. U.S. Nuclear Regulatory Comm'n*, 701 F.2d 632, 644–45 (7th Cir. 1983) (holding that formal adjudications are only mandated where Congress has indicated its intent to require them in the statute at issue), *with* *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1264 (9th Cir. 1977) (holding that the question of when a hearing must be on the record can only be resolved by determining whether the "nature of the administrative

The MSAPA avoids this issue by making it clear that the default rule is that a formal hearing is required where the statute calls for *any* type of evidentiary hearing.¹²⁷ This scheme applies equally to evidentiary hearings required by statute or federal and state constitutions.¹²⁸ An “evidentiary hearing” is a hearing for the receipt of evidence regarding issues on which a decision of the presiding officer may be made in a contested case.¹²⁹ As a result, if a legislature wants to provide for a hearing that need not conform with contested-case procedures, it must state that preference expressly in the statute.¹³⁰ The contested-case approach is also intended to avoid sweeping in trivial matters for costly and time-consuming adjudication because it applies to only those rights that a legislature has already marked out as in need of the extra protection afforded by an agency hearing.

The point of this discussion is not to put a finger on the scale for one approach or the other. Rather, it is to highlight that the APA and MSAPA take very different approaches to the same issues. These differences create rich veins of varied experiences and carefully honed best practices, across federal agencies and state governments, for scholars and local governments interested in crafting robust administrative procedure to mine.

II. LOCAL APPROACHES TO ADMINISTRATIVE PROCEDURE

Several cities have already recognized the need for administrative procedure and taken action. An examination of existing city statutes provides useful information about the approaches these cities have already crafted and tested that can be probed for both best practices and, in some cases, precedents to avoid. This Part examines the procedural statutes of three cities: New York, Philadelphia, and Seattle. New York and Philadelphia were chosen because, of the top ten most populous cities in the United States, they are the only two that have procedural statutes. Seattle is included to add geographic diversity and because its statute is particularly robust.

A. New York City

In New York City, agency procedures are regulated by the City Administrative Procedure Act (CAPA), which comprises Chapter 45 of the

determination . . . fall[s] . . . within the category of proceedings Congress sought to address in the APA,” and that the absence of the words “on the record” is not dispositive). For further discussion, see Asimow, *supra* note 110, at 715 n.39 (examining the differences between these approaches) and William S. Jordan, III, *Chevron and Hearing Rights: An Unintended Combination*, 61 ADMIN. L. REV. 249, 297 (2009) (detailing the differing approaches to deference with respect to formal adjudication requirements and arguing that “it is inconceivable that Congress intended to delegate to agencies the question of whether the agencies themselves are governed by the requirement of a neutral decisionmaker, the prohibition on ex parte contacts, or the other procedural protections . . . of the APA”).

127. 2010 MSAPA, *supra* note 18, § 102 cmt.

128. *Id.*

129. *Id.* § 102(11).

130. Asimow, *supra* note 110, at 715 (“If the Legislature wants to depart from the default, it should say so.”).

New York City Charter (“Charter”).¹³¹ CAPA was proposed by the Charter Revision Commission (“Commission”) in 1988 and approved by referendum in November of that year.¹³² In its final report recommending CAPA to voters, the Commission outlined its guiding principles for the rulemaking structure: agency procedures must inform the public and seek its input, and rules must be accessible, up to date, and easy to understand for the layperson.¹³³ CAPA also defined the word “rule” in local law for the first time in an effort to standardize the form by which agencies promulgate prospective standards that directly affect the public.¹³⁴ While CAPA has been amended several times since its addition to the Charter, the procedure it established remains largely intact and still governs agency rulemaking and adjudication today. The fact that New York City’s administrative procedures are part of its foundational document points to the importance the Commission and, by extension, referendum voters placed on these provisions.

1. Rulemaking

CAPA defines a rule as “the whole or part of any statement or communication of general applicability that (i) implements or applies law or policy, or (ii) prescribes the procedural requirements of an agency including an amendment, suspension, or repeal of any such statement or communication.”¹³⁵ The Charter goes on to specifically include within the definition of “rule” any communication which sets a standard that may result in a penalty; establishes a fee; prescribes standards for the suspension or revocation of a license or permit; sets product, material, or service standards; regulates procedures for the procurement or disposition of public property; or sets standards for the granting of loans or other benefits.¹³⁶ Specifically exempted from the definition are communications related to internal management or personnel, merely explanatory clarifications of agency policy, arrangement of personnel or agency resources, traffic guidance and street closings, Districting Commission actions, and several categories of land-use actions.¹³⁷ Later case law honed the definition by holding that “only a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers constitutes a rule or regulation.”¹³⁸ Additionally, rules were described as “rigid, numerical polic[ies] invariably applied across-

131. N.Y.C., N.Y., CHARTER §§ 1041–47 (2018).

132. See 1 N.Y.C. CHARTER REVISION COMM’N, REPORT OF THE NEW YORK CITY CHARTER REVISION COMMISSION DECEMBER 1986–NOVEMBER 1988 32–36 (1989).

133. *Id.* at 32–33.

134. N.Y.C., N.Y., CHARTER § 1041(5).

135. *Id.*

136. *Id.* § 1041(5)(a).

137. *Id.* § 1041(5)(b).

138. N.Y.C. Transit Auth. v. N.Y. State Dep’t of Labor, 666 N.E.2d 1336, 1137–38 (N.Y. 1996).

the-board to all claimants without regard to individualized circumstances or mitigating factors.”¹³⁹

Once an agency determines that its statement qualifies as a rule, it must submit the proposed rule to the New York City Corporation Counsel (“Counsel”) and the Mayor’s Office of Operations (“Ops”) for review and certification. Counsel’s review is focused on situating the proposed rule within the framework of existing regulations and ensuring that the agency is not acting outside its authority,¹⁴⁰ while Ops’s review examines how the rule will impact members of the public and regulated communities.¹⁴¹ The New York City Council enacted the certification requirement to “ensure that, among other things, new or modified rules are not unduly burdensome and do not create unnecessarily high compliance costs for the regulated community.”¹⁴² In practice, the certifications provided by Counsel and Ops take the form of bare affirmations and do not provide substantive analysis of the questions enumerated in CAPA for review by interested members of the public.¹⁴³

After certification, proposed rules, including a statement of basis and purpose laying out the statutory authority for promulgation, must be sent to the City Record—a municipal publication similar in function to the Federal Register—for publication at least thirty days prior to the scheduled date of a

139. *Schwartfigure v. Hartnett*, 632 N.E.2d 434, 436 (N.Y. 1994). While both *New York City Transit Authority* and *Schwartfigure* interpret the New York State Administrative Procedure Act (SAPA) definition of a “rule,” codified at N.Y. A.P.A. Law section 102(2), the definition used by CAPA is substantively identical and courts frequently apply interpretations of substantively similar SAPA definitions to their CAPA equivalents. *See, e.g.*, *Council of N.Y. v. Dep’t of Homeless Servs.*, 3 N.E.3d 128, 129–30 (N.Y. 2013) (applying the *New York City Transit Authority* and *Schwartfigure* interpretations of the definition of “rule” under SAPA to same term under CAPA).

140. N.Y.C., N.Y., CHARTER § 1043(d)(1). Counsel is required to certify that the rule: (i) is drafted so as to accomplish the purpose of the authorizing provisions of law; (ii) is not in conflict with other applicable rules; (iii) to the extent practicable and appropriate, is narrowly drawn to achieve its stated purpose; and (iv) to the extent practicable and appropriate, contains a statement of basis and purpose that provides a clear explanation of the rule and the requirements imposed by the rule.

Id.

141. *Id.* Ops is required to state:

(a) whether such rule is understandable and written in plain language; (b) how the drafting process of the rule, to the extent practicable and appropriate, included analysis sufficient to minimize the compliance costs for the discrete regulated community or communities, to the extent one exists, consistent with achieving the stated purpose of the rule; and (c) why, in the event such rule involves the establishment of a violation, modification of a violation or modification of the penalties associated with a violation without also including a cure period, or other opportunity for ameliorative action by the party or parties subject to enforcement, such cure period or other opportunity for ameliorative action was not included.

Id.

142. N.Y.C. COUNCIL, REPORT OF THE GOVERNMENTAL AFFAIRS DIVISION ON PROPOSED INT. NO. 91-A, at 3 (2010) (on file with author).

143. *See, e.g.*, N.Y.C. DEP’T OF CONSUMER AFFAIRS, NOTICE OF PUBLIC HEARING AND OPPORTUNITY TO COMMENT ON PROPOSED RULES 6–7 (2017), http://rules.cityofnewyork.us/sites/default/files/proposed_rules_pdf/dca_proposed_rule_re_petroleum_product_signs_com_bined.pdf [https://perma.cc/KUA9-5V65].

hearing at which the public may comment.¹⁴⁴ Simultaneously, the agency must publish the proposed rule and hearing information on the New York City Rules website, an online portal that allows members of the public to comment easily online.¹⁴⁵ Agencies must also transmit the proposed rule to the City Council, Community Boards, news desks, and civic organizations.¹⁴⁶ These publications mark the start of the public comment period, during which members of the public can submit comments or feedback on the rule by fax, mail, email, or through the rules portal.¹⁴⁷

Public hearings are typically held at the conclusion of the comment period. Once the comment period closes, agencies must make public comments, including a summary of any oral testimony delivered at the hearing, available for inspection.¹⁴⁸ Agencies must consider “relevant comments,” and, while they are under no obligation to respond, they may revise the rule in response to comments without restarting the CAPA process.¹⁴⁹ An agency may adopt a final rule, which can only become effective thirty days after publication in the City Record.¹⁵⁰ Most rules take at least four to six months to progress through all of CAPA’s required steps, though the timeline can vary greatly due to factors like the complexity of the rule and the workloads of the promulgating agency, Counsel, and Ops. CAPA also includes an expedited emergency rulemaking procedure for cases where a rule is “necessary to address an imminent threat to health, safety, property or a necessary service.”¹⁵¹

Every agency must publish an annual regulatory agenda.¹⁵² The agenda must provide a brief description of subject areas in which the agency anticipates promulgating rules and explanations for the decision to make rules; a summary of rule contents; a summary of possibly duplicated, overlapping, or conflicting federal, state, and local laws; and an approximate schedule for rulemaking actions.¹⁵³ If an agency proposes or adopts a rule not on its regulatory agenda, the agency must state the reason for the rule’s absence from the agenda in its statement of basis and purpose.¹⁵⁴

2. Adjudication

CAPA provides considerably less guidance for adjudication procedures than it does for rulemaking procedures. The statute contemplates that more

144. N.Y.C., N.Y., CHARTER § 1043(b).

145. *Id.*; *see also* N.Y.C. RULES, <http://rules.cityofnewyork.us/> [<https://perma.cc/2Y9M-ALT6>] (last visited Oct. 4, 2018).

146. N.Y.C., N.Y., CHARTER § 1043(b).

147. *Id.*

148. *Id.* § 1043(h).

149. *Id.*

150. *Id.* § 1043(f).

151. *Id.* § 1043(i)(1).

152. *Id.* § 1042; *see, e.g.,* N.Y.C. Dep’t of Consumer Affairs Regulatory Agenda for FY 2018, N.Y.C. RULES (May 2017), http://rules.cityofnewyork.us/sites/default/files/downloads/dca_fy_2018_regulatory_agenda_4-25_clean.pdf [<https://perma.cc/4EDX-K7TL>].

153. N.Y.C., N.Y., CHARTER § 1042(a)(1)–(5).

154. *Id.* § 1042(c).

exacting procedures may be applied to agencies by stating that they “shall act, *at a minimum*, in accordance with the provisions set forth below.”¹⁵⁵ The term “adjudication” is defined as “a proceeding in which the legal rights, duties, or privileges of named parties are required by law to be determined by an agency on a record and after an opportunity for a hearing.”¹⁵⁶ The rest of the adjudication provision specifies minimum procedural requirements for notice and hearing.¹⁵⁷

Notice under CAPA requires that an agency provide a party with information about the nature, time, and location of the proceeding. In addition, agencies must provide a statement of the legal authority and jurisdiction under which the adjudication is to be held with references to particular sections of the laws and rules concerned as well as a “short and plain statement of the matters to be adjudicated,” again with references to particular sections.¹⁵⁸

CAPA provides for adjudicatory hearings overseen by an independent hearing officer.¹⁵⁹ Hearings must be provided within a reasonable time and parties must be given the opportunity to be represented by counsel, issue subpoenas or request that they be issued, call and cross-examine witnesses, and present oral and written arguments.¹⁶⁰ The burden of proof falls, by default, on the agency commencing the adjudication.¹⁶¹ With the exception of ministerial matters, *ex parte* communications are barred.¹⁶² Finally, CAPA expressly allows agencies and parties to, where not barred by law, informally dispose of matters by “methods of alternative dispute resolution, stipulation, agreed settlement, or consent order.”¹⁶³

The responsibility for carrying out adjudicatory hearings on behalf of agencies has largely been consolidated in the hands of a centralized body, the Office of Administrative Trials and Hearings (OATH).¹⁶⁴ This process has been ongoing since voters approved amendments to the Charter giving the mayor greater powers to consolidate scattered agency tribunals in 2010.¹⁶⁵

155. *Id.* § 1046 (emphasis added).

156. *Id.* § 1041(1).

157. *Id.* § 1046.

158. *Id.* § 1046(a)(1)–(3).

159. *Id.* § 1046(e).

160. *Id.* § 1046(c)(1).

161. *Id.* § 1046(c)(2).

162. *Id.* § 1046(c)(1).

163. *Id.* § 1046(d).

164. *Id.* § 1049(2)(a) (“The chief administrative law judge shall establish rules for the conduct of hearings, in accordance with the requirements of [CAPA].”).

165. N.Y.C. CHARTER REVISION COMM’N, FINAL REPORT OF THE 2010 NEW YORK CITY CHARTER REVISION COMMISSION 37 (2010), https://www1.nyc.gov/assets/charter/downloads/pdf/final_report_of_the_2010_charter_revision_commission_9-1-10.pdf [<https://perma.cc/DF8W-AVKA>] (“To accomplish consolidation, the Commission recommends that the Charter be amended to authorize the Mayor to transfer the adjudicatory functions of various tribunals . . . under the umbrella of a single tribunal/agency.”); *see, e.g.*, Transfer of Certain Tribunals and Adjudicatory Functions Consistent with Mayor’s Committee Report, Executive Order No. 148, at 2 (Office of the Mayor, City of N.Y. 2011), http://www.nyc.gov/html/ajc/downloads/pdf/eo_148.pdf [<https://perma.cc/ZF84-7VGE>]

The move toward consolidation in a central tribunal has been praised by those who argue that OATH's adjudication procedures have placed New York City on "the cutting-edge of access to justice for self-represented litigants and those with Limited English Proficiency"¹⁶⁶ and is responsive to the same set of concerns that underlies the central panel approach in the 2010 MSAPA.¹⁶⁷ In 2016, OATH's Trials Division, which oversees more complex issues and appeals from agency decisions, resolved 2611 cases.¹⁶⁸ The Hearings Division, which resolves routine summonses issued by other agencies, received more than 840,000 cases in 2016, more than half of which were filed by the Department of Sanitation.¹⁶⁹

B. Philadelphia

Philadelphia's administrative procedures are governed by a mix of state and local law. Like New York, Philadelphia enshrines rulemaking procedures in its city charter.

1. Rulemaking

The rulemaking process for Philadelphia's agencies is laid out in the city's Home Rule Charter. Departments, boards, and commissions are presumptively authorized to make "such reasonable regulations as may be necessary and appropriate in the exercise of [their] powers and performance of [their] duties under this charter or under any statute or ordinance."¹⁷⁰ Before regulations are promulgated, they must be submitted to the Law Department for approval "to assure that they are authorized, comply with basic legislation, and do not exceed constitutional limits."¹⁷¹ Once it is approved, the rule is submitted to the Department of Records and made available for public inspection for thirty days.¹⁷² The Department of Records must give public notice of a rule filing by advertising in the newspaper that has the largest paid circulation in the city, in the official legal newspaper, and on the city's official website.¹⁷³ During the filing period, any person affected by the rule may request a public hearing before the promulgating agency and the city solicitor by making a written request to the Department of

(transferring the administrative tribunals of the Department of Health and Mental Hygiene and the Taxi and Limousine Commission to OATH).

166. Sherry M. Cohen & Joanna Weiss, *Know Your Audience: How NYC Tribunals Have Addressed Self-Represented Litigants and Increased Access to Justice*, 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY 485, 486 (2009). See generally David B. Goldin & Martha I. Casey, *New York City Administrative Tribunals: A Case Study in Opportunity for Court Reform*, 49 JUDGES' J., Winter 2010, at 20.

167. See *supra* Part I.C.2.

168. OFFICE OF ADMIN. TRIALS AND HEARINGS, ANNUAL REPORT 7 (2016), <https://www1.nyc.gov/assets/oath/downloads/pdf/OATH-Annual-Report-2016.pdf> [<https://perma.cc/RFC5-NHJP>].

169. *Id.* at 9.

170. PHILA., PA., HOME RULE CHARTER § 8-407 (2018).

171. *Id.* § 8-407(a) annot. 4.

172. *Id.* § 8-407(a).

173. PHILA., PA. CODE § 21-1703(2)(b), (e) (2018).

Records.¹⁷⁴ If a hearing is requested and held, the promulgating agency must file a report with the Department of Records either reaffirming the regulations or modifying them with the approval of the Law Department.¹⁷⁵ Regulations become effective thirty days after publication if no hearing is held or ten days after the filing of a hearing report if a hearing is requested and held.¹⁷⁶ Like New York, Philadelphia's rulemaking procedure includes an expedited option for use in emergencies that affect public health or safety.¹⁷⁷

Philadelphia's rulemaking procedure differs from New York City's procedure in two major ways. First, Philadelphia's agencies are, by default, not required to accept comments or hold a public hearing. A hearing will only occur, and public comments will only be accepted, if the agency so chooses or an affected member of the public requests it.¹⁷⁸ Second, Philadelphia has a one-step promulgation process rather than New York City's two-step process. Instead of publishing a proposed rule, collecting comments, and then publishing and adopting a final rule, Philadelphia's agencies simply publish what they intend to be the final rule. If no affected member of the public files a written request for a hearing, the rule will become final with no further action on the agency's part.¹⁷⁹ If a request is filed, the agency must hold a public hearing, accept public comments, and then respond to those comments in a lengthy hearing report.¹⁸⁰

Philadelphia's rulemaking procedure appears designed to better align the expenditure of public resources by public agencies with the level of public interest or concern in a rule. It is easy to see how the default settings lessen the burden on agencies. Noncontroversial rules can be promulgated much faster in Philadelphia than in New York City, where an agency must hold a public hearing on a proposed rule and then adopt a final rule regardless of the level of public interest or engagement. Of the 178 rules listed on the public website maintained by the Philadelphia Department of Records, only fifteen of them were made subject to a public hearing.¹⁸¹ In other words, 92 percent of those rules became effective through the default settings specified in the Home Rule Charter with no public hearing. The link between public interest and procedural requirements is not perfect, however. Because agencies do not appear to take public comments unless a formal hearing is requested, the

174. PHILA., PA., HOME RULE CHARTER § 8-407(c).

175. *Id.*

176. *Id.*

177. *Id.*

178. *See supra* note 174 and accompanying text.

179. *See supra* note 174 and accompanying text.

180. *See, e.g.*, REPORT OF THE WATER COMMISSIONER ON THE PUBLIC HEARING WITH RESPECT TO PROPOSED AMENDMENTS TO THE WATER DEPARTMENT'S REGULATIONS (2017), <http://regulations.phila-records.com/pdfs/Philadelphia%20Water%20Department%20Regs%206-30-17.pdf> [<https://perma.cc/6WQB-FMXS>] (summarizing and responding in detail to eight comments made by a local legal services group).

181. *Regulations—List of Regulations Promulgated by the City*, CITY PHILA., <http://regulations.phila-records.com/> [<https://perma.cc/HN3N-B62D>] (last visited Oct. 4, 2018).

mechanism is binary—agencies must do everything or nothing. Therefore, a member of the public who wishes to submit substantial comments suggesting a total reworking of the regulation will trigger the same procedural response as a member of the public who wants to suggest adding a word to a definition. It is possible to imagine an approach that falls between these two poles by allowing members of the public to submit comments without triggering a full formal hearing unless they choose to do so.

2. Adjudication

The procedural requirements for adjudications by Philadelphia’s agencies are fixed by the Local Agency Law, a Pennsylvania state statute.¹⁸² The Pennsylvania Supreme Court has described the purpose of the statute as “provid[ing] a forum for the enforcement of statutory rights where no procedure otherwise exists.”¹⁸³ While the Local Agency Law provides a procedural floor, it does not prevent agencies from setting forth more specific procedures for the conduct of adjudications.¹⁸⁴ This section examines the minimum standard that Philadelphia’s agencies must comply with under state law.

The Local Agency Law provides that parties may be represented at adjudications.¹⁸⁵ Parties must be given reasonable notice of a hearing and an opportunity to be heard.¹⁸⁶ Testimony at a hearing may be stenographically recorded and a record kept either by the agency or at the request of one of the parties.¹⁸⁷ Agencies are not bound by rules of evidence, all relevant evidence of reasonably probative value may be admitted, and reasonable examination and cross-examination must be allowed.¹⁸⁸ Finally, adjudications must contain findings and reasons and be served upon all parties personally or by mail.¹⁸⁹ The statute also supplies the standard of judicial review—a court must affirm the adjudication unless it finds that the adjudication “is in violation of the constitutional rights of the appellant, or is not in accordance with law, or that [Local Agency Law procedural requirements] have been violated . . . or that any finding of fact by the agency and necessary to support its adjudication is not supported by substantial evidence.”¹⁹⁰

Philadelphia does not appear to have experienced the move toward consolidation seen in the 2010 MSAPA and in New York City. At present, the city’s Bureau of Administrative Adjudication only provides hearings for

182. 2 PA. CONS. STAT. §§ 551–55 (2018).

183. *Guthrie v. Borough of Wilkinsburg*, 478 A.2d 1279, 1283 (Pa. 1984) (quoting *Boehm v. Bd. of Educ.*, 373 A.2d 1372, 1375 (Pa. 1977)).

184. *See, e.g., Duncan v. City of Philadelphia*, No. 2230 C.D. 2015, 2016 WL 4506134, at *3 (Pa. Commw. Ct. Aug. 26, 2016) (observing that the Bureau of Administrative Adjudication “has promulgated regulations governing the conduct of its hearings”).

185. 2 PA. CONS. STAT. § 552.

186. *Id.* § 553.

187. *Id.*

188. *Id.* § 554.

189. *Id.* § 555.

190. *Id.* § 754(b).

people who wish to dispute parking tickets.¹⁹¹ Agencies conducting independent adjudications subject to the Local Agency Law include the Board of Pensions and Retirement,¹⁹² the Zoning Board of Adjustment,¹⁹³ and the Board of License and Inspection Review.¹⁹⁴

C. Seattle

Seattle's procedural statute appears to be strongly influenced by the 1961 MSAPA. Referred to as the "Administrative Code," the statute was first adopted in 1973.¹⁹⁵

1. Rulemaking

Seattle agencies must give at least fourteen days public notice of proposed rules by publishing a newspaper notice, and in some cases applicable trade, professional, or industry publications, and mailing materials to anyone with a standing request on file with the agency.¹⁹⁶ The public notice must include a description of the authority authorizing the rule, the substance of the rule or subjects and issues involved, and the prescribed process for commenting.¹⁹⁷ Agencies must give the public an opportunity to present data, views, or arguments, but they are not obligated to hold a public hearing and may limit public input to written presentations.¹⁹⁸ The Administrative Code directs that agencies "[g]ive appropriate consideration to economic values, along with any environmental, social, health and safety factors," in deciding to take any regulatory action but does not set forth a detailed process for regulatory review.¹⁹⁹ Like other jurisdictions, Seattle's Administrative Code (SAC) provides for an emergency rulemaking process in cases where immediate regulatory action is "necessary for the immediate preservation of the public peace, health or safety."²⁰⁰ Members of the public may petition an agency for regulatory action and agencies are required to respond within sixty days by either initiating rulemaking or denying the petition with an

191. *Bureau of Administrative Adjudication*, CITY PHILA., <https://beta.phila.gov/departments/bureau-of-administrative-adjudication/> [<https://perma.cc/57T7-WMSJ>] (last visited Oct. 4, 2018).

192. *Wiggins v. Phila. Bd. of Pensions & Ret.*, 114 A.3d 66, 69 (Pa. 2015).

193. *Batchelder v. Phila. Zoning Bd. of Adjustment*, No. 2376 C.D.2013, 2015 WL 5555339, at *5 (Pa. Commw. Ct. June 5, 2015).

194. *Soc'y Hill Civic Ass'n v. Phila. Bd. of License & Inspection Review*, 905 A.2d 579, 585 (Pa. 2006).

195. *See* Seattle, Wash., Ordinance 102,228 (May 5, 1978).

196. SEATTLE, WASH., MUNICIPAL CODE § 3.02.030(A) (2018).

197. *Id.*

198. *Id.* § 3.02.030(B). The language used in this statute is very similar to that used in the 1961 MSAPA: the agency shall "afford all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing." UNIF. LAW COMM'RS' MODEL STATE ADMIN. PROCEDURE ACT § 3(a)(2) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1961) [hereinafter 1961 MSAPA], <http://www.japc.state.fl.us/Documents/Publications/USAPA/MSAPA1961.pdf> [<https://perma.cc/7ZYJ-DYY7>].

199. SEATTLE, WASH., MUNICIPAL CODE § 3.02.030(C).

200. *Id.* § 3.02.050.

explanation.²⁰¹ Similarly, agencies are authorized to make declaratory rulings as to the application of any of their rules to particular cases in response to petitions.²⁰² Subject to the notice requirements described above, rules become effective upon filing with the city clerk.²⁰³

Seattle represents something of a middle ground between the approaches taken by New York and Philadelphia. Like Philadelphia, Seattle prescribes a one-step rulemaking process that does not require agencies to publish proposed and final rules separately and in sequence.²⁰⁴ Like New York, Seattle allows public comments by default rather than requiring a request for hearing as in Philadelphia.²⁰⁵ Seattle incorporates a regulatory-impact component in its requirement that agencies consider economic, environmental, social, health, and safety factors, though it is not clear how effective this is in the absence of a requirement that agencies explain their consideration of these factors or the establishment of insufficient consideration as a basis for judicial review. Making public hearings optional does not appear to have caused agencies to abandon them; at least in some cases, the agencies hold hearings voluntarily.²⁰⁶

2. Adjudication

The SAC incorporates the commonly adopted 1961 MSAPA model of contested cases.²⁰⁷ A contested case is defined as “any proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by ordinance to be determined after a hearing by a Hearing Examiner”—substantially the same as the 1961 MSAPA definition.²⁰⁸ The SAC also follows the 1961 MSAPA’s procedural rules for contested cases, with the exception that the rules of evidence are less exacting than those in the MSAPA, which largely imports judicial rules of evidence from state courts.²⁰⁹

Seattle, like New York, has an independent, centralized administrative tribunal.²¹⁰ The SAC creates the Office of the Hearing Examiner “for the conduct of hearings in rulemaking and contested cases.”²¹¹ The SAC sets

201. *Id.* § 3.02.040.

202. *Id.* § 3.02.080.

203. *Id.* § 3.02.060.

204. *See supra* Part II.B.1.

205. *See supra* Part II.B.1.

206. *See Notice of Proposed Rulemaking Hearing and Opportunity to Comment*, SEATTLE FIN. & ADMIN. SERVICES, <https://web.archive.org/web/20171107182945/http://www.seattle.gov/finance-and-administrative-services/directors-rules> [https://perma.cc/5W6Q-29BE] (last visited Oct. 4, 2018) (“The Department of Finance and Administrative Services has scheduled a public hearing on the proposed rule changes All interested persons are invited to present data, views or arguments, with regard to the proposed rules, orally at the hearing or in writing at or before the hearing.”).

207. 1961 MSAPA, *supra* note 198, § 9.

208. *Compare* SEATTLE, WASH., MUNICIPAL CODE § 3.02.020(B), *with* 1961 MSAPA, *supra* note 198, § 1(2).

209. 1961 MSAPA, *supra* note 198, § 10.

210. *See supra* Part II.A.2.

211. SEATTLE, WASH., MUNICIPAL CODE § 3.02.110(A).

forth a carefully prescribed method for filling the post of Hearing Examiner, candidates for which must be appointed by the City Council from a list of three names put forward by a committee composed of the Human Resources Director, the King County Ombudsman, and a private attorney selected by the local bar association.²¹² The Hearing Examiner is empowered to, among other things, administer oaths, examine witnesses, rule on evidence proffers, conduct discovery including depositions and interrogatories, serve subpoenas for the production of documents or attendance of witnesses, and preside over settlement conferences.²¹³ The Hearing Examiner makes decisions or recommendations for decisions to agency heads in contested cases, depending on what procedure is provided for in the statute that triggers the hearing.²¹⁴ In addition, the Hearing Examiner may hear appeals of decisions made by other agencies, such as those related to the issuance or denial of a license.²¹⁵ The Hearing Examiner manages an average caseload of about 500 cases annually, the majority of which are appeals of land use enforcement actions taken by the Department of Construction and Inspections.²¹⁶

All three cities have developed different approaches to administrative procedure. Seattle's statute is highly detailed and prescriptive, Philadelphia's is relatively minimalist, and New York City's is somewhere in the middle. Both New York City and Seattle take unique, though not clearly successful, approaches to regulatory-impact analysis. All three provide useful evidence that administrative procedure statutes can be crafted for, and successfully implemented by, local governments.

III. DUE CONSIDERATION: ARGUMENTS FOR AND AGAINST LOCAL ADMINISTRATIVE PROCEDURE

This Part discusses the case for codifying local administrative procedure and examines possible counterarguments. Weighing in favor of codification are a desire for legitimacy, uniformity and basic fairness, and the potential for deliberative procedures to produce better rules. Arguments against codification include concerns about local agency resources and fundamental questions about whether greater protections are even necessary at the local level.

A. Organizing the Administrative Machinery

The strongest argument for increased procedural rigor is that all the justifications marshalled for the APA and the MSAPA apply with equal force at the local level. The APA was meant to "achieve relative uniformity in the administrative machinery,"²¹⁷ while the MSAPA was aimed at fostering

212. *Id.* § 3.02.110(B).

213. *Id.* § 3.02.120.

214. *Id.* § 3.02.100.

215. *Id.* § 3.02.115.

216. SEATTLE OFFICE OF HEARING EXAM'R, 2015 ANNUAL REPORT 1, 6 (2016), <http://www.seattle.gov/examiner/docs/AR2015.pdf> [<https://perma.cc/68NJ-3DVY>].

217. U.S. DEP'T OF JUSTICE, *supra* note 10, at 5.

“fairness to the parties involved and [the] creation of procedure that is effective from the standpoint of government.”²¹⁸ Localities, no less than states or the federal government, grapple with hard issues of governance and service delivery and would benefit from clear procedural guidelines for administrative and regulatory work. In fact, in many respects, the actions of local governments can have an even more direct impact on the lives of residents than their state and federal counterparts.²¹⁹ The same residents, communities, and businesses who benefit from the fairness, predictability, and stability that flow from uniformity and accessibility of state and federal government procedure will stand to benefit if those same elements are instilled in their local governments. The same basic principles that drove the passage of the APA and the creation of the MSAPA militate in favor of administrative procedure requirements for local agencies.

1. Legitimacy

A robust, public, deliberative process would promote the legitimacy of administrative action at the local level. In order to articulate this point, it is useful to briefly describe the dominant model for understanding how federal agency actions are made theoretically legitimate: the “presidential control” model. This model emphasizes that agencies are “subject to the oversight and management” of the president.²²⁰ Accordingly, “[f]or legitimacy purposes, agency officials [stand] in the shoes of their boss; they [are] as accountable, faction-resistant, and efficacious as the president.”²²¹ A federal agency’s actions are viewed through the lens of the president’s authority.

This model is often difficult to adapt to the local level. Unlike the federal government and many states, which have single, accountable executives to exercise legislatively granted authority and oversee agencies, local governments may take any of a number of different structures.²²² Many, like council-manager cities, bear only passing resemblance to the state and

218. 2010 MSAPA, *supra* note 18, prefatory note at 1.

219. GERALD A. McDONOUGH, 38 MASSACHUSETTS PRACTICE, ADMINISTRATIVE LAW & PRACTICE § 1:14 (2017) (“Arguably, the decision-making of local governmental agencies and officials might well be more in need of the assurance of fair procedures brought about by the operation of administrative procedure acts because such decision-making oftentimes would have a direct, vital, and immediate impact upon the lives and fortunes of the citizens in the local community. To the extent that local government was the level of government closest to citizens, whose activities most directly impinged upon them, the necessity and desirability of a municipal administrative procedure act would appear to be apparent.”).

220. Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 53 (2006).

221. *Id.* The authors conducted an in-depth survey of federal agency officials to test the limits of the presidential control model and concluded that, in practice, “the presidential control model may not entirely succeed in enhancing agency legitimacy,” though they “do not suggest that the model lacks merit.” *Id.* at 99.

222. See Nestor Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 595–604 (2017) (discussing the “tremendous institutional diversity” of local governments and their agencies and identifying three dimensions by which local structural distinctions can be catalogued: vertical (state-local), horizontal (local fragmentation), and internal (differences in structure within local governments themselves)).

federal governmental structures.²²³ In many localities, it is much harder to draw a straight line between the authority of the executive and the legitimacy of the actions taken by his or her agencies than it is in the state or federal contexts. Of course, this concern is less pressing for large cities that have powerful executives.

The “deliberative” model provides a more satisfactory account of administrative legitimacy at the local level. This model “focuses on the obligation of public officials to engage in reasoned deliberation on which courses of action will promote the public good.”²²⁴ Decisions are legitimate not because they can be traced back to the authority of a popularly elected executive, but “because each interest and perspective is treated with equal respect and arbitrary decision making is prohibited.”²²⁵ In order to earn this legitimacy, agency officials “must engage in a decision-making process that considers all of the relevant interests and perspectives, and they must provide reasoned explanations for their decisions that could reasonably be accepted by free and equal citizens with fundamentally competing perspectives.”²²⁶ Of course, in order to satisfy the rigors of this framework, agencies must seek out and consider the input of the public—a process that is at the heart of procedural statutes.²²⁷ Agency officials must conduct rulemakings in the light of day and afford the public the opportunity to weigh in, and adjudications must be conducted according to standards of notice, proof, and judicial review. The deliberative model is preferable for local administrative action because it focuses on the quality of the procedures that produce a decision rather than the authority derived from a centralized executive. Even in large cities with structures that resemble the federal government, agencies can benefit from the legitimating function of a rigorous and publicly accountable deliberative process.

223. *Id.* at 601–03 (discussing structures of local government that depart from the federal model). See generally Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 *YALE L.J.* 2542 (2006) (discussing the council-manager system of local government, which Schragger also terms the “weak mayor” form of government).

224. Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 *IOWA L. REV.* 849, 857 (2012).

225. *Id.* at 858.

226. *Id.* at 857.

227. See *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027–28 (D.C. Cir. 1978) (“[Courts’] reliance on careful procedural review . . . derives from an expectation that if the Agency, in carrying out its ‘essentially legislative task,’ has infused the administrative process with the degree of openness, explanation, and participatory democracy required by the APA, it will thereby have ‘negate[d] the dangers of arbitrariness and irrationality in the formulation of rules.’” (second alteration in original) (quoting *Auto. Parts & Accessories Ass’n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968))); see also CARY COGLIANESE ET AL., *TRANSPARENCY AND PUBLIC PARTICIPATION IN THE RULEMAKING PROCESS: A NONPARTISAN PRESIDENTIAL TRANSITION TASK FORCE REPORT 17* (2008), <https://web.archive.org/web/20171228205952/https://www.law.upenn.edu/academics/institutes/regulation/transparencyReport.pdf> [<https://perma.cc/4ZNE-R6Z3>] (“[R]eforms that improve the degree and quality of public participation in the rulemaking process could contribute both to the creation of better rules and to the promotion of the underlying democratic values implicated in the administrative process.”).

2. Uniformity and Fairness

Local administrative procedure would promote efficiency and fairness by creating uniform procedures for rulemaking and adjudication. It is an “elemental dictate of legal reasoning . . . [that] like cases should be treated alike.”²²⁸ In the absence of a procedural statute, different agencies within the same locality may take vastly different approaches to adjudications. A proceeding conducted by one department may operate by entirely different rules of procedure, evidence, and disposition than a proceeding conducted by a different department housed in the same municipal building. The same is true of rulemaking: one agency may choose to have a sixty-day comment period concluding with a public hearing while another may opt to accept only written submissions for a two-week period. A member of the public will simply have to accept a more restrictive opportunity for input if the issue they care about is under the jurisdiction of the latter agency. Agencies are free to design whatever process they choose and are bound only by due process and the prospect of judicial review.

Local procedural statutes would provide a uniform procedural baseline for agencies. Members of the public would be assured of a minimum level of predictable procedure when interacting with agencies. Agencies would be made to adhere to similar procedures for rulemaking and adjudication and, potentially, cases would be heard by a central, independent adjudicatory body. At the same time, local governments could ensure that agencies would be free to supplement minimum procedures with additional measures as needed. If, for example, an agency plans to undertake a technically complicated rulemaking and wants to hold a series of public hearings with experts on the issue, a statute providing minimum, not maximum, procedural standards would allow it to do so. Alternatively, the enacting legislative body could specify more exacting procedural requirements for certain agencies. Greater codification of local administrative procedure would promote fairness by giving local governments the opportunity to make agency procedures for both adjudication and rulemaking more uniform and predictable for the public.

3. Utility

Clearer administrative procedure would enhance the growing role of local governments as entrepreneurial policymaking agents. Cities, the largest and most prominent of local governments, are increasingly taking the lead and experimenting with new programs and policies to serve their residents. For example, in 2015, New York City rolled out a program that allows residents fourteen years or older to apply for a municipal identification card, a significant benefit for those who may not be able to access identification

228. *Green v. Haskell Cty. Bd. of Comm'rs*, 574 F.3d 1235, 1249 (10th Cir. 2009) (Gorsuch, J., dissenting).

offered by other levels of government.²²⁹ The rules governing this program, now codified as Chapter 6 of Title 68 of the Rules of the City of New York, were promulgated through the CAPA process.²³⁰ Cities like New York, Seattle, and San Francisco are using rules to implement new laws that expand local regulation of labor practices, an area where the role of local governments was attenuated in recent years.²³¹ The “stunning revival of cities” and their newfound demographic and economic success stories suggest that urban local governments may seek to continue to act as policy entrepreneurs.²³² Crafting a procedural statute could itself be an opportunity for innovation. It is not so unrealistic to imagine a locality integrating new ideas like citizen rulemaking—where members of the public get a first crack at drawing up regulations on an issue for the agencies to respond to and revise—into its administrative procedure act.²³³ Others have proposed “democracy index” rulemaking, which applies a sliding scale for agency-side requirements like regulatory review depending on the robustness of public participation in the comment period.²³⁴ Uniform procedures and best practices for administrative law would benefit both policymakers and residents in America’s rebounding cities and localities as they seek to explore new areas of policy.

229. See *About IDNYC*, NYC, <http://www1.nyc.gov/site/idnyc/about/about.page> [<https://perma.cc/KRY2-9KMQ>] (last visited Oct. 4, 2018). For a more in-depth discussion of the program, its significance as an example of local policy entrepreneurship, and its interaction with federal law, see generally Amy C. Torres, Note, “*I Am Undocumented and a New Yorker*”: *Affirmative City Citizenship and New York City’s IDNYC Program*, 86 FORDHAM L. REV. 335 (2017). Rulemaking was frequently used by agencies during Michael Bloomberg’s mayoralty with mixed results. Probably the most well-known instance of innovative but ill-fated rulemaking is the “soda ban,” or Sugary Drinks Portion Cap Rule, which was struck down by the New York Court of Appeals. *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep’t of Health & Mental Hygiene*, 16 N.E.3d 538, 541 (N.Y. 2014). For a discussion of that case and other instances in which New York City agencies have used rulemaking to promote public health and environmental policy, see generally Jason J. Czarnetzki, *New York City Rules! Regulatory Models for Environmental and Public Health*, 66 HASTINGS L.J. 1621 (2015).

230. See 68 R.C.N.Y. §§ 6-01 to -12 (2018).

231. See, e.g., CITY & CTY. OF S.F. OFFICE OF LABOR STANDARDS ENF’T, FINAL RULES IMPLEMENTING THE FORMULA RETAIL EMPLOYEE RIGHTS ORDINANCES (FREROS) (2016), <http://sfgov.org/olse/sites/default/files/Document/FRERO%20Final%20Rules.pdf> [<https://perma.cc/A4XD-4FL7>].

232. RICHARD FLORIDA, *THE NEW URBAN CRISIS* 3 (2017). Florida, whose theories about the potential for a new creative class to drive urban revival contributed to this wave of “urban optimists,” has since turned to a deeper examination of the problems that our cities create, perpetuate, and exacerbate. *Id.* These include economic inequality, racial segregation through spatial sorting, and dwindling opportunities for residents of America’s suburbs. See Richard Voith & Susan Wachter, *The Return of America’s Cities: Economic Rebound and the Future of America’s Urban Centers*, PENN INST. FOR URB. RES. (Aug. 12, 2014), <http://penniuir.upenn.edu/publications/the-return-of-americas-cities> [<https://perma.cc/AM6S-P9HL>].

233. See, e.g., Brian Heaton, *Why Not Let Citizens Draft Their Own Legislation?*, GOVERNING (Mar. 18, 2014), <http://www.governing.com/news/headlines/why-not-let-citizens-draft-their-own-legislation.html> [<https://perma.cc/JG9T-SPUL>].

234. See David Fontana, *Reforming the Administrative Procedure Act: Democracy Index Rulemaking*, 74 FORDHAM L. REV. 81, 96 (2005).

In the rulemaking context, more robust public comment requirements could lead to better rules. It is uncontroversial to point out that no agency can claim to have complete information about, and fully understand every perspective on, any given issue. Notice-and-comment rulemaking allows the public to enhance the information available to an agency by submitting studies, data, and analyses as well as by responding to other public comments—what has been called the “multidirectional flow of information.”²³⁵ With better access to information, agencies can craft rules that are more responsive to public needs and easier to implement for the regulated communities who have a hand in supplying public officials with information. Literature on the subject shows a positive association between greater citizen engagement in rulemaking and economic prosperity.²³⁶ Conversely, “poorly designed regulation can stifle economic activities and ultimately reduce economic growth.”²³⁷ A robust process of informational exchange can only take place where there is adequate notice, a real opportunity to comment, and a requirement that records related to rulemaking, including comments by outside parties, be made available to the public.

B. Arguments Against Codifying Local Administrative Procedure

There are two main arguments against the expansion of local administrative procedure requirements: First, localities have comparatively few resources and the costs of implementing procedures outweighs their public benefit. Second, states could achieve a significant degree of uniformity by making their MSAPAs applicable to local agencies. This section outlines and responds to each of these arguments.

1. Resource Constraints

Enacting more extensive procedural requirements for rulemaking and adjudication will certainly cost cities and localities money. Local governments typically have access to fewer resources, both in terms of dollars and staff time, than their state counterparts. The average state budget is approximately \$39 billion and the median budget is approximately \$30 billion.²³⁸ In comparison, Seattle’s budget is \$5.3 billion²³⁹ and

235. COGLIANESE ET AL., *supra* note 227, at 17.

236. Johns & Saltane, *supra* note 12, at 4.

237. DAVID PARKER & COLIN KIRKPATRICK, MEASURING REGULATORY PERFORMANCE 42 (2012), http://www.oecd.org/gov/regulatory-policy/3_kirkpatrick%20parker%20web.pdf [<https://perma.cc/S9JQ-GCU7>].

238. NAT’L ASS’N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT 8 (2016), [https://higherlogicdownload.s3.amazonaws.com/NASBO/9d2d2db1-c943-4f1b-b750-0fca152d64c2/UploadedImages/SER%20Archive/State%20Expenditure%20Report%20\(Fiscal%202014-2016\)%20-%20S.pdf](https://higherlogicdownload.s3.amazonaws.com/NASBO/9d2d2db1-c943-4f1b-b750-0fca152d64c2/UploadedImages/SER%20Archive/State%20Expenditure%20Report%20(Fiscal%202014-2016)%20-%20S.pdf) [<https://perma.cc/8DC9-569X>] (detailing expenditure levels across state governments).

239. City Budget Office, *Mayor Murray’s 2017–2018 Proposed Budget*, SEATTLE.GOV 2 (Sept. 29, 2016), <http://www.seattle.gov/financedepartment/documents/2017-18ProposedBudgetOverview9-29-16.pdf> [<https://perma.cc/7B2M-HXCQ>].

Philadelphia's budget is approximately \$4.4 billion.²⁴⁰ New York City, with an almost \$85 billion budget that dwarfs that of most states, is an outlier.²⁴¹ As political subdivisions of states, it is not surprising that local governments are not as well resourced as their parent governments. Faced with this daunting disparity, skeptics may question whether localities need or can even justify more extensive procedural requirements for administrative action.

The objections that cities do not need rigorous administrative procedures, or that such procedures would be an unjustified drain on limited resources, can be answered in two ways. First, it is important to remember that local governments will and must engage in administrative processes even in the absence of codified procedures for doing so. Chicago, a city with an almost \$10 billion budget²⁴² and no administrative procedure act, lists almost one hundred rules on its official rulemaking portal.²⁴³ Codifying administrative procedures would not create governmental responsibilities and resource demands out of whole cloth, it would instead impose order and uniformity on processes in which agencies already engage. In some cases, the uniformity provided by codified administrative procedures could increase efficiency as agencies adopt best practices and share strategies among themselves.

Second, localities are free to adjust the level of administrative rigor to meet the resource constraints of their governments. It must be remembered that "local government" is not a synonym for "large cities"—suburbs, counties, towns, villages, and other local governmental units must fit into the rubric as well.²⁴⁴ The approach taken by the 2010 MSAPA, which is organized into articles dealing with discrete issues, is instructive. In addition, the MSAPA provides options for enacting bodies to choose from within particular provisions—for example, the section on regulatory analysis brackets out a dollar-amount impact threshold for enacting bodies to fill in.²⁴⁵ One government may choose to make the threshold very high because of the costs associated with careful regulatory analysis, and another may choose to omit the section to free agencies from the obligation altogether. As the prefatory note to the 2010 MSAPA explains, "[a] model act is needed because state administrative law in the 50 states is not uniform, and there are a variety of approaches used in the various states."²⁴⁶ The same principle would apply

240. City of Phila., *The Mayor's Operating Budget in Brief for Fiscal Year 2018*, PHILA.GOV i (Mar. 2017), http://www.phila.gov/finance/pdfs/FY18-22%20Budget%20in%20Brief_ALL.pdf [https://perma.cc/L6HZ-XUPR].

241. Mayor's Office of Mgmt. & Budget, *Budget Summary*, NYC 6 (2017), <http://www1.nyc.gov/assets/omb/downloads/pdf/sum4-17.pdf> [https://perma.cc/6JBS-9LY9].

242. Karen Pierog & Renita D. Young, *Chicago City Council Passes Mayor's 2017 Budget*, REUTERS (Nov. 16, 2016), <http://www.reuters.com/article/us-chicago-budget/chicago-city-council-passes-mayors-2017-budget-idUSKBN13B2E6> [https://perma.cc/5RW5-ZGSM].

243. See *supra* note 6 and accompanying text.

244. Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 348–50 (1990).

245. 2010 MSAPA, *supra* note 18, § 305.

246. *Id.* prefatory note at 2.

to the constellation of local governments that currently lack a codified administrative procedure.

2. Applying State Administrative Procedure Acts to Local Jurisdictions

It could be argued that states should simply make their procedural laws applicable to local agencies. Indeed, this is already the case for adjudication in Pennsylvania.²⁴⁷ That state is not alone, as at least eight states apply their SAPAs to local agencies in certain circumstances, usually where contested-case adjudications are involved.²⁴⁸ Despite the advances made in the home rule era, it is a fact of life for localities that they live in the shadow of state law. Put more bluntly, “it will be the rare local official that will not be concerned about the possibility that their preferred course of action will run into legal problems either because of a lack of authority to initiate it or the specter that existing state law conflicts with it.”²⁴⁹ Many (it appears most) localities have no procedural statute at all.²⁵⁰ If uniformity promotes fairness and efficiency, why not achieve it for all localities statewide in one go by changing state law?

Applying SAPAs to local jurisdictions could improve administrative processes and protections, but such an approach would rob localities of the flexibility to experiment and adapt processes to their own needs. This issue can be illustrated for both rulemaking and adjudication processes. In the case of adjudications, the stakes are often much higher for the parties involved, which is why the MSAPA and many SAPAs provide for quasi-judicial procedures in contested cases.²⁵¹ In states that have robust and efficient adjudication procedures, there is a strong argument for applying those procedures to local agencies. But a model statute could be structured to contain adjudication procedures in a stand-alone article that could be removed by enacting bodies in localities whose agencies are subject to SAPA with regard to adjudication. Alternatively, a local government could craft its own unique procedural statute that is responsive to the idiosyncrasies of state

247. *See supra* Part II.B.2.

248. *See Davidson, supra* note 222, at 605 n.190 (noting that Hawaii, Maryland, North Dakota, Oregon, South Carolina, Tennessee, Virginia, Wisconsin, and Wyoming apply SAPAs to local agencies in at least some circumstances). Tennessee, for example, subjects the decisions of county and municipal civil service boards affecting an employee’s employment status to the standard of judicial review supplied by the Tennessee SAPA. TENN. CODE ANN. § 27-9-114(b)(1) (West 2018).

249. GERALD E. FRUG & DAVID J. BARRON, *CITY BOUND: HOW STATES STIFLE URBAN INNOVATION* 35 (2008).

250. Of the top ten largest cities by population in the United States, only the two examined in this Note, New York City and Philadelphia, have administrative procedure acts.

251. *O Haleakalā v. Bd. of Land & Nat. Res.*, 382 P.3d 195, 227 (Haw. 2016) (“Given the importance of the issues and rights involved in agency contested cases, it is logical and fair to hold agency officials involved in quasi-judicial decision making to the same or a similar standard that governs judges.”); *see also* 2010 MSAPA, *supra* note 18, § 403 cmt. (“The important goal of this section is to protect citizens by a guarantee of minimum fair procedural protections.”).

and local law. Where the state statute does not preempt more protective measures, local governments may choose to enact a procedural statute for the purpose of adding additional procedural safeguards to the adjudication process. In states that do not apply SAPA adjudication requirements to local agencies or, like Pennsylvania, mandate only a minimum of procedure that those bodies must meet, a local procedural statute crafted from scratch or adapted from a model statute would be an opportunity to establish a uniform and comprehensive hearing process for the first time.

The argument for statewide uniformity is weaker in the case of rulemaking. It is not clear that any city has identified the ideal minimum procedures for rulemaking, as evidenced by the variation among the three cities examined in Part II. Moreover, flexibility is valuable for local governments. New York City's government probably has very different preferences regarding the length of notice, depth and frequency of regulatory-impact analysis, methods for receiving public comments and the obligation to respond, and the necessity of public hearings than Buffalo's government.²⁵² Providing for a lengthy comment period and drafting substantive responses to comments may be an unsustainable strain for a town or village sanitation department and an absolute necessity for a public health department in a city of several hundred thousand people. The absence of a state standard also allows cities to account for wide institutional variation by adapting procedural requirements to their particular governmental structure. The legislative bodies of localities are best equipped to adjust the levers and dials of administrative procedure to the particular situation of local agencies, just as state legislatures were, and are, best positioned to make those decisions for state agencies.

IV. TOWARD A REGULATORY AGENDA: PAVING THE WAY FOR LOCALITIES

For change to occur, localities must be given the tools to easily create robust administrative procedures. The drafters of the MSAPA recognized that one of the model statute's main benefits is that it "crystalliz[es] new concepts of best practices for the convenience of state lawmakers who do not have to reinvent the wheel."²⁵³ After all, administrative law is not always at the forefront of legislators' minds because "[v]ery few people have ever been elected to the state legislature . . . on a promise to revamp administrative procedure laws."²⁵⁴ The political and electoral incentives to invent cutting-edge administrative procedure laws from scratch are weak for both state and local elected officials. This Part sketches three ways this incentive problem could be solved. First, the legal community could draft a Model Local Administrative Procedure Act (MLAPA) similar to the MSAPA. Second, localities could be encouraged to adapt the MSAPA to their own purposes by

252. Some divergence is evident simply from the fact that Buffalo, unlike New York City, does not have a procedural statute.

253. Asimow, *supra* note 110, at 708.

254. *Id.* at 709.

mixing, matching, and adjusting its provisions. Finally, local governments could be encouraged to draft their own statutes from the ground up.

A. Model Local Administrative Procedure Act

The MSAPA provides a content and process roadmap for the development of a local model statute. The idea of producing an MLAPA in the style of the MSAPA is not new. In fact, the development of a local level analogue was proposed as early as 1966.²⁵⁵ An ideal model statute is flexible enough to be useful to the wide spectrum of local governments that vary in structure, size, and access to resources.²⁵⁶ The approaches already used by cities could inform the content of a statute. New York City and Philadelphia both generally have lighter procedural requirements than the APA or the MSAPA, most likely as a result of the resource constraints discussed in Part III.B.1. Lightweight procedures are likely to be even more important for localities that are not large cities like those examined here.

At a minimum, the MLAPA should provide procedures for rulemaking and adjudication. Within those categories, drafters should strive to provide the widest possible menu of options for local lawmakers. For example, a rulemaking article could include options for advance notices of rulemaking, standard notice-and-comment rules, direct final rules, negotiated rules, cost-benefit analysis, and perhaps even new proposals like citizen rulemaking.²⁵⁷ Articles addressing adjudication should separately provide for procedural safeguards and a central panel approach so that governments may adopt, adjust, or pass over the panel structure as best fits their needs. Both items should be considered in light of the solutions that have already been devised and tried in large cities, as discussed in Part II. For example, the Philadelphia approach that treats every rule, by default, like a direct final rule may be desirable for jurisdictions with limited resources to devote to long review and public comment processes. Similarly, New York's effort to make adjudication more easily understandable and accessible through OATH deserves consideration.²⁵⁸ Drafters should consult, but not constrain themselves to following precisely, the examples provided by the federal government, states, and localities. Creating a new statute is an opportunity to build upon past structures with the aid of recent scholarship and comparative analyses. These sources provide no shortage of models for measuring the effectiveness of administrative structures.²⁵⁹

The MLAPA could be a vehicle for innovations that make administrative processes more transparent and responsive to the public. The statute should include an article on public availability of documents, including official

255. See generally *A State Municipal Administrative Procedure Act*, 3 HARV. J. ON LEGIS. 323 (1966). The article includes a proposed model statute which, while dated in some respects, includes most of the essential features of an administrative procedure statute.

256. See generally Davidson, *supra* note 222.

257. See Heaton, *supra* note 233.

258. See *supra* note 166.

259. See generally Anne Meuwese et al., *The OECD Framework for Regulatory Policy Evaluation: An Initial Assessment*, 6 EUR. J. RISK REG. 101 (2015).

codification of rules and publication of adjudicatory decisions. This article should encourage localities to take advantage of new technologies by requiring, as a default, that information be made available online.

Finally, the statute should include mechanisms to encourage thoughtful consideration and efficiency in administrative action. New York's requirement that agencies publish a regulatory agenda is a good example.²⁶⁰ Like cost-benefit or regulatory-impact analysis, this requirement prods agencies to think carefully about what rules they plan to make and which rules already on the books are still serving useful purposes. None of the cities examined here appear to have reached the perfect balance of lightweight but meaningful regulatory-impact analysis. Unlike the federal government, localities most likely do not have an entity like OMB to examine rules and enforce an analysis requirement. The MLAPA could follow the approach of the 2010 MSAPA, which requires the agency to engage in regulatory-impact analysis if it estimates that a rule would have a certain level of economic impact.²⁶¹ Looking even further afield, the more generalized "impact assessments" done by European Union bodies are another alternative model.²⁶² Similarly, the MLAPA could include a mechanism for periodic retrospective review of adopted rules to ensure that regulations are achieving measurable policy goals. A limited version of this type of review exists in federal law, and it is becoming more common in countries around the world.²⁶³

This Note does not address standards for judicial review of agency action because, in many cases, the standard of review for local agency action is set by state law. In two of the three cities examined in Part II, state law supplies

260. *See supra* Part II.B.1.

261. 2010 MSAPA, *supra* note 18, § 305.

262. The European Commission's version of impact assessment encourages engagement with stakeholders to analyze possible policy approaches and weigh the positives and negatives of each alternative. The impact assessment process is guided by seven questions:

1. What is the problem and why is it a problem?
2. Why should the EU act?
3. What should be achieved?
4. What are the various options to achieve the objectives?
5. What are the economic, social, and environmental impacts and who will be affected?
6. How do the different options compare in terms of their effectiveness and efficiency (benefits and costs)?
7. How will monitoring and subsequent retrospective evaluation be organized?

Commission Staff Working Document: Better Regulation Guidelines, at 17 (July 7, 2017), <https://ec.europa.eu/info/sites/info/files/better-regulation-guidelines.pdf> [<https://perma.cc/9DCU-76WV>]. *See generally* Peter L. Strauss, *Rulemaking in the Ages of Globalization and Information: What America Can Learn from Europe, and Vice Versa*, 12 COLUM. J. EUR. L. 645 (2006).

263. Organisation for Economic Co-operation and Development [OECD], *Recommendation of the Council on Regulatory Policy and Governance*, at 4 (2012), <http://www.oecd.org/gov/regulatory-policy/49990817.pdf> [<https://perma.cc/2RE2-PT5X>] (recommending that member countries design regulatory policy to mandate "systematic programme reviews of the stock of significant regulation against clearly defined policy goals, including consideration of costs and benefits, to ensure that regulations remain up to date, cost justified, cost effective and consistent, and deliver the intended policy objectives").

the arbitrary and capricious standard of review for local agencies through provisions that replaced common-law writs in the nature of certiorari or mandamus.²⁶⁴ In Pennsylvania, by contrast, state law provides specific procedures and standards of review for local administrative decisions.²⁶⁵ While this appears to be a common approach by states, state law does not always provide a judicial review backstop for local administrative decisions. In fact, it seems likely that the application of judicial review standards established by state law to local agencies was, in some cases, an effort to give the public *ex post* administrative protections where no codified *ex ante* procedures existed. Drafters should explore this question more deeply to determine whether an article on judicial review would be useful. Even if most localities are similarly subject to state law standards of judicial review, the MLAPA could provide some guidelines for agency responses to the initiation of judicial review, as Seattle's statute does.²⁶⁶

The MLAPA should be crafted by bringing together scholars, practitioners, agency officials, and other experts on local administrative law. The process itself will serve as an opportunity to pool knowledge and insights on the growing field of local administrative law. In this way, drafting the MLAPA would advance scholarly development of the field while producing an end product that is useful to localities.

NCCUSL's process for developing the MSAPA is instructive as an example. NCCUSL appoints a drafting committee of commissioners to give proposals extensive and in-depth consideration.²⁶⁷ Members may survey approaches taken by other jurisdictions, confer with staff and officials that have relevant experience, or take other steps to gather information and flesh out a proposal. Once a draft is written, it must go through a rigorous review process that takes a minimum of two years and must be adopted by a majority vote of state representatives.²⁶⁸ Convening experts and adopting the kind of rigorous review process used by NCCUSL would be a lengthy endeavor and require a substantial investment of time and energy by those involved. But, ultimately, this process would yield the strongest and most useful MLAPA possible while also serving as a vehicle for the advancement of local administrative law more generally.

264. See N.Y. C.P.L.R. §§ 7801–06 (McKinney 2017); *City of Bellevue v. E. Bellevue Cmty. Council*, 983 P.2d 602, 605 (Wash. 1999) (“Judicial review [pursuant to a statutory writ of certiorari] is not full appellate review, but instead involves consideration only of whether, based on the administrative record, the tribunal’s decision was illegal or arbitrary and capricious.”).

265. 2 PA. CONS. STAT. §§ 751–54 (2018).

266. SEATTLE, WASH., MUNICIPAL CODE § 3.02.130 (2018) (allowing agencies to stay enforcement of orders pending judicial review, requiring agencies to produce certified copies of records for reviewing courts, and authorizing agencies to modify orders or decisions in accordance with court orders).

267. *ULC Drafting Process*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/Narrative.aspx?title=ULC%20Drafting%20Process> [<https://perma.cc/9TYX-WTG2>] (last visited Oct. 4, 2018).

268. *Id.*

Creating a model statute for localities would greatly increase the chances of local governments acting to create new procedures legislatively. Providing a “cheat sheet” of administrative law best practices crafted specifically for localities takes much of the work out of the project for officials and increases the chance that legislation will actually be enacted. This section is just a rough sketch of essential elements that an MLAPA should include. If experts come together to craft a statute, they will have many other items to contribute. The MLAPA should include the widest variety of options possible to encourage localities to choose what is best for them. Between the APA, MSAPA, existing local statutes, and even similar statutes from other countries, drafters will have a wealth of options to consider for inclusion.

B. Adapting the MSAPA for Local Governments

Localities already have a comprehensive and successful model statute in the MSAPA. Many of the concerns that motivated the drafting and revision of the MSAPA, including uniformity, ease of use by agency officials and the public, transparency, and bringing government procedures up to date with technology, apply with equal force at the local level. Localities could adopt the MSAPA in whole or use it as a template to build upon and customize. Under the latter approach, localities could pioneer many of the innovations discussed as possible inspiration for the MLAPA in Part IV.A. The MSAPA provisions could also be adapted for localities and applied through state law, though this is subject to many of the pitfalls discussed in Part III.B.2.

C. Home Brew Statutes

Localities can use the wealth of administrative law knowledge and experience to craft new statutes best suited for their purposes. Alternatively, states could engage with experts and their localities to develop a statute that can be applied through state law or given to localities to adapt and enact at their leisure. Of course, developing such statutes would require a careful process of consultation with stakeholders and experts. An expert on administrative law in Massachusetts recently suggested that the state needs a “detailed, thorough-going study on a local agency by agency basis to determine where uniformity can be achieved,” to produce a “uniform, comprehensive, standard local administrative procedure act that is specifically tailored to the realities of local administrative agency decision-making in Massachusetts.”²⁶⁹ A model statute is useful, but by no means necessary, for localities and states to begin the process of local administrative procedure reform in their own jurisdictions.

269. McDonough, *supra* note 219, § 1:14 n.21.

CONCLUSION

Fundamentally, what is right for a state government may not be right for a local government. The recognition that levels of government have distinct needs and respond to distinct pressures underlays the parallel development of the APA and the MSAPA as different statutes, and that principle applies to the state-local divide as well.²⁷⁰ Just as “the structural and institutional context of the states is not Washington’s,” so the structural and institutional context of local governments is often not the state’s.²⁷¹ States may well have a role to play by assisting localities to formalize their administrative procedures, or even mandating that they do so, but the unique needs of localities should remain paramount during this process.

For the reasons discussed in this Note, cities and localities should move to codify administrative procedure for rulemaking and adjudication. The legal community could assist this effort by drafting an MLAPA, encouraging localities to adapt the MSAPA to their purposes, or assisting localities in developing statutes responsive to their particular circumstances. Any of these approaches would benefit local governments across the country that currently have no procedural requirements guiding agencies. In addition, the process would bring together experts on local administrative law in a way that promises to promote the development of scholarly understanding of this area in new and useful ways. The fact that many large cities lack any kind of procedural statute indicates that there is a real opportunity to improve the administrative processes affecting millions of people across the country.

270. For an argument that the APA’s influence on the MSAPA during their parallel development was, in some areas, less than salutary, see generally Bonfield, *supra* note 13.

271. Aaron Saiger, *Chevron and Deference in State Administrative Law*, 83 *FORDHAM L. REV.* 555, 564 (2014).