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Reviewability of Quasi-Legislative Acts of Public Officials in New York Under Article 78 of the CPLR

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INTRODUCTION

The public official is enjoined to act reasonably. Yet in his performance of the so-called legislative act, the law places him substantially beyond judicial review and in effect licenses his arbitrary and unreasonable conduct.

The Commissioner of Mental Hygiene of the State of New York selected 500 acres of land in the midst of residential communities for the construction of a school for retarded children. In an Article 78 proceeding seeking to set aside the determination, petitioners alleged that the institution would endanger the psychological and physical welfare of the community, would cause traffic hazards and other inconveniences, and would require increased police and fire protection; that land equally well suited to the purposes of the state was available in undeveloped areas, and that such a suitable alternative was adjacent to a state mental hospital and was already owned by the state. The court held that petitioners failed to state a cause of action because the determination was legislative and not subject to Article 78 review. ¹ Thus, the action of the Commissioner,

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¹ Brent v. Hoch, 13 App. Div. 2d 545, 211 N.Y.S.2d 953 (2d Dep't 1961) (memorandum decision). The appellate division affirmed the result reached by the court below, but based its decision on different grounds. The supreme court had held that the determination was reviewable under Article 78 but only to the extent that the taking was "based upon some corrupt, unworthy or malicious baseless motive, not in good faith, and not in the interest of the public." 25 Misc. 2d 1062, 1065, 205 N.Y.S.2d 66, 70 (Sup. Ct. 1960). The appellate division held that the selection of land was not subject to any review under Article 78 because it was legislative.
however arbitrary, was insulated by this practice of judicial non-interference.

Shortly thereafter, another state official made a selection of land which was also challenged. The Superintendent of the Department of Public Works of the State of New York, in connection with a federally subsidized highway program, selected a route for a projected interstate highway and proposed the location to federal officials for their approval. The federal officials refused to approve the route selected but suggested that a second highway location—the Chestnut Ridge Route—would meet with their approval. The Superintendent of the Department of Public Works, on the basis of evidence educed at hearings, from expert studies, and otherwise, strongly reacted against the Chestnut Ridge Route. He wrote to the Federal Highway Administrator declaring that the Chestnut Ridge Route "is glaringly deficient" in its ability to service commercial areas, and "would surely violate the cultural, aesthetic and conservation features of the immediate area"; that the federal government's insistence on that alignment "appears narrow, arbitrary and grossly unwarranted," and that decisions such as these prompt Congressional Committees to launch excursions into the realm of highway location and design and demand broader reviews of such matters to assure, generally, the protection of the public interest.\(^2\)

One month later the Superintendent submitted for federal approval the Chestnut Ridge Route. The federal officials approved the location and signed a contract with the state for its construction. In an Article 78 proceeding against the New York State Highway Department, petitioners attacked the selection on the ground that it was inconsistent with statutory standards protecting certain community interests from invasion by federally aided interstate high-

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ways, and that, since it would destroy wild-life sanctuaries and undermine other interests of the community and of the state, it was arbitrary, capricious and unreasonable. The court held that the challenged acts and determination were legislative and for that reason could not be reviewed under Article 78.3

In a third case, the Council of the City of New York and other city officials selected fully developed residential lands for an extension of Flushing Meadow Park and, pursuant to a statute providing for state and city financing, applied to the state for approval and state aid. Landowners sued under Article 78 to annul the determinations of the city, to set aside the approval of intermediate state officials, and to enjoin the state comptroller from giving final authorization to the plan. The selection, the petitioners alleged, was arbitrary, capricious and illegal because the lands were not "predominantly open or natural" as required by the "Standards for Acquisition" set forth in the controlling state statute. The court held that the petition stated a good cause of action against the state officials under Article 78.4

The extreme reluctance of the courts of the State of New York to adjudicate problems, other than public use, relating to selection of lands by public officers is reflected in the school and the highway cases discussed above. In

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3 Brown v. McMorran, supra note 2, at 740. The court, exercising its newly acquired power under CPLR 103(c), caused the proceeding to be continued as an action for declaratory and injunctive relief.

4 Mastrangelo v. State Council of Parks, 42 Misc. 2d 650, 249 N.Y.S.2d 19 (Sup. Ct.), aff'd mem., App. Div. 2d --, 251 N.Y.S.2d 788 (2d Dep't 1964). However, the court dismissed the proceeding against the city officials. It reasoned that even if the city presumed to select the non-qualifying land in connection with the state-aid program, it had the power and right to select any land for park purposes and to expend its own moneys to develop the area for park use. It would seem, therefore, that the action against the city officials was premature, and that no action would lie until the city committed itself, by contract or otherwise, to acquire the land only in connection with the state-aid program.

It should be noted that petitioners had alleged fraud. They alleged that at some time after the application was submitted by the city for state approval, the number of buildings recorded as being located on the land to be acquired was reduced from 80 to 14. The court below did not treat this allegation as a fact operative and necessary to its decision. But it is not clear from the limited opinion of the appellate division whether that court deemed the allegation of fraud essential.
the school case, petitioners were effectively held to have no judicial remedy for the arbitrary act which aggrieved them. (No remedy was available apart from Article 78, for they had not alleged fraud or bad faith or violation of statutory standards.) Again in the highway case, the court declared that petitioners had no remedy under Article 78, and no remedy at all for arbitrary action as such. Their remedy, if any, lay in an action for declaratory and injunctive relief based on their establishing that respondents exceeded their powers by violating statutory requisites, and it did not accommodate any showing that the acts of respondents were arbitrary, capricious or unreasonable.

The **Flushing Meadow Park** case stands nearly alone in its application of Article 78 to a selection-of-land situation. Yet the **Flushing Meadow Park** case reflects a proper application of the law. Perhaps it will lead the way to a more conscientious review. Perhaps it will bring understanding of the fact that all acts of public officials in the selection of land are not necessarily legislative, and that many are, consistent with precedent, appropriate subjects for the sufficiently broad and relatively rapid review provided by Article 78.

As for those acts which by definition legislative, and not confined by statutory limits, as in the school case, precedent declares Article 78 inappropriate. It allows for review in a plenary action only, and it limits review to questions of fraud, bad faith, and violation of the letter of the statute. Thus, precedent confers immunity on the "merely" capricious act. It considers that the requirements of due process are satisfied merely by the payment of just compensation for property appropriated.

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5 See cases cited in notes 47 and 51 infra.
6 Of course, even a holding that Article 78 is appropriate for purposes of determining whether an administrative official complied with statutory requisites is not a holding that the acts of such official may be scrutinized as otherwise arbitrary, capricious or unreasonable. There may be some ground for argument that jurisdiction under Article 78 for the first purpose would carry with it ancillary jurisdiction to entertain the latter issues. But this result has not yet been achieved.
This trend of the law should be corrected by the courts, for it is shockingly inconsistent with the stronger rule which requires that public officers act reasonably. But the courts have not shown willingness to resist the rules of law which insulate the acts of the administrative officer in the selection of land. The subject therefore becomes an appropriate one for legislation.

It is the purpose of this article to analyze the manner in which the courts of New York deal with the so-called legislative act of the administrative body or officer, to explain the evolution of this law, and to suggest a pragmatic synthesis. In drawing the distinction between the administrative act, which has traditionally been held subject to Article 78 review, and the legislative act, which has traditionally been held not subject to Article 78 review, the writer places particular emphasis on zoning law, with its variances and exceptions, and on the law relating to the selection of land for public use.

LEGAL BACKGROUND

Historically, the prerogative writs of certiorari, mandamus and prohibition were not available to annul, compel or review legislative acts of public officers. Article 78 of the New York Civil Practice Act, which abolished the nominal distinctions between the writs and codified the law pertaining to them, continued this limitation. It identified as reviewable thereunder only those acts or refusals to act in the exercise of “judicial, quasi-judicial, administrative or corporate functions.” The legislative act falls within none of these categories.

8 N.Y. JUDICIAL COUNCIL, THIRD ANN. REP. 181 (1937).
9 CPA 1284(2). Article 78 of the Civil Practice Act was, by its terms, available to determine whether a public officer failed to perform a duty specifically enjoined upon him by law, and whether a public officer, in making a determination, violated any rule of law affecting the rights of the parties. CPA 1296(1), (5). The review of a determination expressly related to “the relief heretofore available in a certiorari or a mandamus proceeding for the review of any act or refusal to act of a body or officer exercising judicial, quasi-judicial, administrative or corporate functions, which involves an exercise of judgment or discretion.” CPA 1284(2). Performance of a duty specifically enjoined by law encompassed “all other relief heretofore available in a mandamus proceeding.” CPA 1284(3).
Article 78 of the New York Civil Practice Law and Rules substantially codifies the corresponding provisions of the now superseded Civil Practice Act. It thus perpetuates the principle of law which excludes legislative acts from review by proceedings in the nature of the prerogative writs.

The certainty of the law that legislative acts are not subject to Article 78 is deceptive. The courts have achieved no uniformity in defining legislative acts. This article considers precisely that problem: What kinds of acts are legislative, and, as such, are not subject to judicial scrutiny by a proceeding in the nature of mandamus, certiorari or prohibition?

The law, as always, achieves clarity at its extremes. It is settled, for example, that in enacting or refusing to enact legislation, legislators are not subject to the prerogative writs. Arbitrary legislation can be annulled in plenary proceedings, such as actions for injunctive or declaratory relief, but failure to legislate is immune from judicial review.


11 But action by the legislature in excess of its powers can be set aside under Article 78. Policemen's Benevolent Ass'n v. Board of Trustees, App. Div. 2d _, 250 N.Y.S.2d 523 (2d Dep't 1964) (memorandum decision). The court held Article 78 the proper form of proceeding for a declaration of the invalidity of a local law governing appointment of patrolmen, and for an injunction cancelling appointments made pursuant to the law and forbidding further action under it. The court said: “Cases holding that [Article 78] proceedings cannot be invoked to review legislative acts are not here applicable, since petitioners do not question the propriety or the wisdom of the local law, but the power of the legislative body to enact it in the face of allegedly contrary provisions in the State Constitution and statutes.” Id. at ___.


See generally, as to the absolute discretion of the legislature in choosing
It is also widely recognized that delegation of powers substantially as broad as those possessed by the legislature (herein referred to as legislative powers) is unconstitutional and void. To satisfy constitutional requisites, the legislature must delegate something less than its plenary powers. It must formulate the administrative policy the recipient of the delegation is to carry out. By definition, the officer administers; he does not legislate.

There are exceptions to the rule that the legislature must not delegate its plenary powers. First, the legislature between conflicting policy considerations, Barton Trucking Corp. v. O'Connell, 7 App. Div. 2d 36, 180 N.Y.S.2d 686 (1st Dep't 1958), aff'd, 7 N.Y.2d 299, 165 N.E.2d 163, 197 N.Y.S.2d 138 (1959).

But failure of the legislature to perform a mandatory administrative act is subject to review by prerogative writ. Davidson v. Common Council, 40 Misc. 2d 1053, 244 N.Y.S.2d 385 (Sup. Ct. 1963).

Seignious v. Rice, 273 N.Y. 44, 6 N.E.2d 91 (1936). The court found unconstitutional a provision of the New York City Charter delegating the power to determine whether an applicant for renewal of a plumber's license must pass an examination. The court said: "The Legislature is free to choose among conflicting considerations, and mould the law according to its own will subject only to constitutional restrictions. It cannot delegate the same freedom of choice to an administrative officer. There it must erect guide posts which will enable the officer to carry out the will of the Legislature."

"We may assume that in the exercise of the powers which the Legislature has sought to confer on the Commissioner of Health he will act reasonably. Nonetheless, if the statute is valid, he may pick and choose among individuals without formulating a general standard to be used in classification and without being bound by any standard formulated by the Legislature. That is not the grant of an incidental power, it is the delegation of a legislative power . . . That the Legislature has no power to do." Id. at 50-51, 6 N.E.2d at 93. (Emphasis added.)


In Small v. Moss, the New York Court of Appeals called attention to the "distinction between the exercise of the law-making power by a legislative body and the exercise of powers delegated to or conferred upon an administrative officer or board by the legislative body. In the first case discretion may be plenary; in the second case, though the law-making body may confer a measure of discretion, it must at the same time define the limits of that discretion and fix the rules or standards which must govern its exercise." Id. at 295, 18 N.E.2d at 283.

The reason for the distinction was explained as follows: "This court has repeatedly pointed out that . . . such field of discretion conferred by law upon an administrative officer . . . must be defined by the Legislature. The Legislature must set bounds to the field, and must formulate the standards which shall govern the exercise of discretion within the field. Without the second rule as a corollary to the first rule there would be no effective restraint upon unfair discrimination or other arbitrary action by the administrative officer." Id. at 298-99, 18 N.E.2d at 285.
can delegate its legislative powers to a local legislative body. The local body can then legislate in the same manner and with the same broad discretion as the delegating body could have done if it had retained the power. Second, a local legislative body can, by its own legislation, delegate plenary powers to itself, that is, it can delegate to or reserve in itself the legislative power to establish policy. Third, the legislature can delegate its full legislative powers, to a body either legislative or administrative in character with respect to the selection and appropriation of land for public highways, parks and similar public uses.

An understanding of the nature of the delegation—whether legislative, administrative or judicial—is essential to the analysis of reviewability by proceedings in the nature of mandamus, certiorari and prohibition. Yet precise characterization has not been provided by the judiciary.

RETENTION OF POWERS BY A LEGISLATIVE BODY:
ADMINISTRATIVE OR LEGISLATIVE?

A subordinate legislative body, such as a town board, is customarily empowered to enact zoning ordinances. When it enacts such local legislation, it retains in some form the power to alter the zoning scheme. First, the board might enact a zoning ordinance and reserve, expressly or impliedly, the power to amend. Second, the board might enact the ordinance with the provision that, if specified standards are met, it may issue a special permit allowing variation. Third, the board might, by its ordinance, reserve to itself the plenary power to grant a special permit.

In the first instance, the variation, if any, is effected by the legislative action of the board. In the second instance,
instance, the board, in effect, delegates powers to itself as an administrative body, and its functions with respect to variations are administrative or quasi-judicial. In the third case, the function of the board in granting a variation involves a hybrid of legislative and administrative powers.¹⁹

A. Retention By Legislative Body Of Legislative Powers

When, as in the first instance specified above, the board enacts an ordinance and reserves the power to amend, the power of the board to vary the ordinance derives from the original delegation by the superior legislative body. This function being purely legislative, the underlying statute need not prescribe standards and the board can properly act pursuant to its own plenary powers.

Therefore, the board's action in legislating or in failing to legislate with respect to a modification of a zoning ordinance is not reviewable under Article 78. If the board declines to amend, no review at all is available. If the board amends, the amendment is subject to attack in a plenary action as arbitrary, capricious or not reasonably related to an end within the purview of the police power.²⁰

Non-availability of the prerogative writs to review acts of legislatures has long obtained. In People ex rel. Trustees of the Village v. Board of Supervisors,²¹ the relators attempted to attack by writ of certiorari an act of the board of supervisors providing for the improvement of certain public highways at the town's expense. The New York Court of Appeals held that certiorari did not lie. The act of the county board, said the court, "was as purely legislative as if it had been passed by the legislature itself."²² Indeed it was, being an ordinance of a local legislative body.

²⁰ See cases cited notes 12 and 13 supra.
²² People ex rel. Trustees of the Village v. Board of Supervisors, 131 N.Y. 468, 472, 30 N.E. 468, 489 (1892).
A quarter of a century later the court of appeals decided *Long I. R.R. v. Hylan*. The Board of Estimate was directed by statute to assess, on the opening of a street, only property within the area to be benefited by the new thoroughfare. A street was opened but the Long Island Railroad Company was not benefited. Nevertheless, the board passed a resolution assessing only the railroad. The board attempted to justify its action on the theory—that a contract between it and the railroad required this result. The railroad petitioned for a writ of certiorari. Holding the form of proceeding improper because the delegation was to a legislative body, the court of appeals dismissed. The *Hylan* case is of especial interest because of the nature of the powers delegated and the nature of the powers exercised. The activity directed to be performed by the board was severely confined to action of an almost mandatory nature. The activity which the board presumed to perform was judicial, being an interpretation of contractual rights. Yet the action of the board was legislative in manner since any action effected by legislation is legislative. As the court in *Hylan* accurately pointed out, the fact that a legislative body presumes to sit in a judicial capacity does not make available the writ of certiorari.

The distinction still obtains. A proceeding for a judgment in the nature of a prerogative writ will not lie to review or compel a legislative change. When, in

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24 The appellate division had declared certiorari appropriate because of the extraordinary nature of the case and the clear illegality of the act challenged. 210 App. Div. 761, 206 N.Y. Supp. 239 (1st Dep't 1924).
25 Under prior law an Article 78 proceeding terminated with an order. CPA 1300. Under present law, such a proceeding results in a judgment. CPLR 7806.
28 An attack on legislative action, which cannot be maintained under Ar-
a zoning ordinance there is no provision authorizing the local board to grant special exemptions or variances,

the board has no power to act in the premises except legislatively, namely, by amending the ordinance, and its failure to so act may not be made the basis of an article 78 proceeding. The court is without power to control or direct . . . [the] actions [of] . . . legislators.29

B. Delegation With Standards By Local Legislative Body To Itself

A delegation by a legislative body, with standards, to itself, is exemplified by a zoning ordinance enacted by a town board which allows variation by that board under specified standards and conditions. If a hearing is required and if the determination is to be made on the basis of the information elicited, the board has created for itself the power to act in a quasi-judicial capacity, and its determination is reviewable as such by a proceeding in the nature of certiorari.30 However, if the legislative body formulates a policy, specifies standards and conditions, makes no provision for a hearing, and retains in itself the power to administer the policy, its acts pursuant to its own legislative directives are administrative and subject to review by a proceeding in the nature of mandamus.31

article 78, must be distinguished from a collateral attack on administrative action made on the theory that the action was performed pursuant to an invalid law. The latter is an appropriate subject for Article 78 review. In fact, such a proceeding is generally the only available remedy to challenge administrative application of an invalid statute. See Berkshire Fine Spinning Associates, Inc. v. City of New York, 5 N.Y.2d 347, 359, 157 N.E.2d 614, 620, 184 N.Y.S.2d 623, 631 (1959). See also Bergerman v. Gerosa, 208 Misc. 477, 144 N.Y.S.2d 95 (Sup. Ct. 1955), aff'd mem., 2 App. Div. 2d 659, 152 N.Y.S.2d 363 (1st Dep't 1956), aff'd mem., 3 N.Y.2d 855, 145 N.E.2d 22, 166 N.Y.S.2d 306 (1957).

29 Pelham Jewish Center v. Board of Trustees, supra note 13, at 566, 170 N.Y.S.2d at 139.
C. Hybrid Action: Reservation Of Power To Vary Without Formulation Of Standards

The local legislative board might enact legislation and reserve or delegate to itself, without standards, the power to alter the effect of that legislation by other than legislative procedures. How does one characterize the exercise of such a power? The power need not be regarded as hybrid. Theoretically, it represents either (1) an unconstitutional delegation to an administrative body, such delegation being improper and void for lack of standards, or (2) retention of legislative powers, properly retained but, on exercise, not subject to review by proceedings in the nature of prerogative writs. The latter appears to be the course which would best satisfy both the Constitution and precedent. But neither alternative (1) nor (2) is the course chosen by the judiciary.

In the pre-Article 78 proceeding of Green Point Sav. Bank v. Zoning Appeals Bd., the court of appeals upheld the propriety of what amounted to a plenary delegation by the town board to itself to act in a non-legislative manner in granting zoning variances. The court said:

Where the approval is thus lodged in the local legislative body, and where the matter is one which may endanger the safety of persons and property, there need not be formulated standards for the dispensing power, and the ordinance is constitutional.

If the ordinance is constitutional, it is because the local legislative body is acting in a legislative capacity when it determines whether or not to grant approval for the building of gasoline service stations and the like. Acting legislatively, the board can consider what is or is not within the general welfare and safety. Since the board did act legislatively, the court, if it confined itself to the historical principles articulated, should have declared certiorari unavailable. But it did not.

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The outcome of the *Green Point* case has been endorsed by recent court of appeals' decisions. In *Rothstein v. County Operating Co.*, New York's highest court indicated that special exemptions, grants or denials, even though by a legislative body, were for court review purposes administrative with the result that they are subject to review "as to reasonableness" in an article 78 proceeding.

The result, and the present status of the law, is this: the hybrid action is a recognized and judicially approved concept; the delegation to oneself or the retention of powers, however conceptualized, is valid, and the action of the public officer pursuant thereto is treated as administrative for purposes of review.

This analysis does change prior law on the availability of prerogative writs. Previously, the act of the legislative body was reviewable only in a plenary action, and the failure to act of the legislative body was not reviewable at all. At present, however, what is in fact legislative action (as the alternative to an administrative delegation of doubtful constitutionality) is reviewable under Article 78.

The rule of the *Rothstein* case, whatever its inconsistencies with precedent, is a welcome judicial application of similar treatment to essentially similar functions. The similarities are inescapable between the acts of a local legislative body in varying its own ordinance by (1) exercise of its general legislative powers to act in the public interest and for the general welfare, and (2) exercise of administrative powers within an expressed scheme and policy which it, itself, has formulated according to its concept of legislative purpose.

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public interest and general welfare. But even more in-escapable are the similarities between (1) above and a variation granted by a town board by means of amendment to a zoning ordinance. Yet the latter, so purely legislative both in its method and in the character of the function, remains unimpeachable under Article 78.\textsuperscript{36}

One might tend to imply from the Rothstein case and those following it that an act of a public official, although legislative in character (properly based on broad considerations of public interest and general welfare), is nonetheless within the purview of the prerogative writs if administrative rather than legislative in method. Alternatively one might infer that, where standards are for one reason or another excused,\textsuperscript{37} the delegation to a public officer who is to act other than by the enactment of legislation is a delegation of administrative functions and must be treated as such for purposes of review.

But case law demonstrates that such principles cannot be educed. In fact, in the area of law to which the writer now turns, the judicial approach is exactly the converse.

**Delegation of Limited and of Unlimited Powers to a Non-Legislative Body: An Unexplored Area for Mandamus**

Frustration of residents and landowners in their attempts to annul the allegedly illegal selection of lands for public highways, parks and institutions began early in the history of American jurisprudence. The frustration was, however, attributable in a large part to the then

\textsuperscript{36} Cases decided as recently as 1961 have so held. Cf. notes 26 and 27 \textit{supra}. The Rothstein and Lemir Realty decisions seem not to alter this rule of law. The language of the two cases encompasses nothing more than the grant or denial of special exemptions, which are by definition not legislative amendments. The inclusion of legislative amendments within the theory of these cases is not justified. However close in effect the amendment and the special exemption may be, the purely legislative character of the first is beyond question.

\textsuperscript{37} Standards may be excused because of impracticability of formulation, or because the body to which the powers are delegated is legislative.
existing technicalities associated with the prerogative writs, rather than to the essence of the alleged wrong.

A body of cases arose, subsequently cited for the proposition, but not always holding, that the selection of land by a public official for given public purposes is purely legislative and is not within the scope of the prerogative writs.

In 1892, the court of appeals decided *People ex rel. Trustees of the Village v. Board of Supervisors.*\(^{38}\) As indicated in the discussion above, the relators sought to challenge an enactment of the county supervisors by writ of certiorari. The court properly pointed out that the act was legislative. When action is legislative, executive or administrative, said the court, certiorari does not lie.\(^{39}\)

Twenty years later a county court decided *In re Sherman.*\(^{40}\) The relators sought a writ of certiorari to review the location of a highway by the State Commissioner of Highways. This time the action challenged was clearly not legislative. The claim was based on a statutory command that the administrative official lay the highway in question to a given point, “thence westerly.” The relator alleged that the official laid the road from the given point, then north, then westerly. The court’s concern was whether the determination was judicial, for, if not, certiorari was inappropriate. The court pointed to the fact that no hearing was necessary; it recited the law that in judicial proceedings a hearing is a matter of right, and it declared the determination not a judicial one. Therefore, the petition was dismissed.

Other pre-Article 78 cases of a similar nature followed. Sometimes they indicated that the act of the public officer was administrative and not subject to review by certiorari;\(^{41}\) at other times, that the act was legislative and not subject

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\(^{38}\) *Subra* note 22.

\(^{39}\) The court further pointed out that a writ was not needed to prevent a failure of justice. As the claim was against a municipality, a taxpayer's action was available. *Ibid.*

\(^{40}\) 76 Misc. 45, 133 N.Y. Supp. 931 (Sup. Ct. 1912) (memorandum decision).

\(^{41}\) E.g., Mt. Hope Dev. Corp. v. James, 258 N.Y. 510, 180 N.E. 252 (1932) (per curiam).
to review by certiorari;\textsuperscript{42} but always that the determination was not judicial and therefore certiorari did not lie.\textsuperscript{43} When, on the other hand, a determination entailing ultimate appropriation of land was made in a quasi-judicial context, review by certiorari was held appropriate.\textsuperscript{44}

Of much significance in the cases referred to above is the fact that, in the early years of the development of the writ of mandamus, it was available only to compel the performance of ministerial acts. Whenever judgment or discretion was involved, mandamus could not be invoked.\textsuperscript{45} Only later did mandamus become available to challenge action or failure to act by a public official whose activity was predicated upon the exercise of discretion. Mandamus would then issue if the official acted arbitrarily, capriciously or otherwise in abuse of discretion or beyond the limits of his discretionary bounds.\textsuperscript{46} Thus, the unavailability of mandamus at the time of such actions as Sherman explains why relators, seeking to challenge an essentially administrative action, nevertheless sought a writ of certiorari.

After the scope of mandamus had been expanded, and Article 78 was enacted abolishing, at least nominally, the technical distinctions between the old prerogative writs, the courts were less accommodating than one might have expected to petitioners seeking to challenge a determination relating to the selection of land for public use. Combining the stereotyped analysis of such cases as Sherman (prerogative writs will not lie to review determinations in


\textsuperscript{43} See cases cited notes 41 and 42 \textit{supra}. Cf. People \textit{ex rel}. R. & J. Co. v. Wiggins, 199 N.Y. 382, 92 N.E. 789 (1910); People \textit{ex rel}. Schau v. McWilliams, 185 N.Y. 92, 77 N.E. 785 (1906); People \textit{ex rel}. North v. Featherstonhaugh, 172 N.Y. 112, 64 N.E. 802 (1902).


\textsuperscript{45} People \textit{ex rel}. Harris v. Commissioners, 149 N.Y. 26, 43 N.E. 418 (1896).

\textsuperscript{46} See Small v. Moss, 279 N.Y. 288, 18 N.E.2d 281 (1938). See also 1 \textsc{B}enjamin, \textsc{A}dministrative \textsc{A}djudication in the \textsc{S}tate of \textsc{N}ew \textsc{Y}ork 352-53 (1942).
locating a public thoroughfare) with law that developed in an area of eminent domain (the determination to take land is a political or legislative function impeachable only for conduct approaching the level of fraud) the courts have declared that since the petition in such a matter sounds in certiorari, and the action of the public official is legislative, certiorari does not lie as it is not available to review legislative action.

The syllogism is perfect but the premises are wrong. First, there is no basis for the contention that the petition sounds in certiorari. The fact that analogous claims have been presented to the courts in that form affords no reason why such a proceeding under an all-writs statute must be deemed to have been similarly fashioned. If the quasi-judicial aura is absent, it is incumbent upon the court to determine whether the claim is one for which prerogative relief nonetheless would previously have been granted; that is, whether the proceeding is in the nature of mandamus. If the action of the administrative official is properly characterized as administrative, then the action is subject to review by mandamus and may be set aside if arbitrary, capricious or unreasonable. Thus, analysis of the functions of the administrator in the context of the statutory delegation to him is a basic and indeed a preliminary step in resolving the problem.

Second, there is no logic in the statement that the action of the public official is necessarily legislative. Concededly, the legislature can properly delegate its broad

49 See BENJAMIN, op. cit. supra note 46.
legislative powers to select lands for given public uses.\textsuperscript{50} Whether the legal justification for the broad delegation lies in the impracticality of confining the administrative officer, or whether the problem is resolved merely by the semantic conception that the recipient of the delegation is a legislative body for purposes of the delegation, is essentially academic. When the legislature delegates its plenary powers the recipient has as full power to act as if the legislature itself had acted, and for this reason its activity is characterized as legislative.\textsuperscript{51}

Yet the legislature has, at all times, the power to delegate something less than its full legislative powers. It has the power to declare that a road shall be built between two given points, that a road shall be built in a given

\begin{quotation}
\textsuperscript{50} See cases cited note 17, \textit{supra}.

\textsuperscript{51} When the legislature delegates its powers to select land for a given public purpose, plenary only in the sense that the recipient of the delegation may consider as broadly and generally as the legislature the public interest and the general welfare, the delegation is generally characterized by the judiciary as legislative. Yet the legislature does not necessarily delegate powers quite so broad as those it possesses. For example, without specific authorization, the recipient of the delegation does not possess the power to delegate. Ontario Knitting Co. v. State, 205 N.Y. 409, 98 N.E. 909 (1912). Similarly, without statutory authorization, the recipient of the delegation cannot appropriate land which the legislature has reserved for another use. Society of N.Y. Hosp. v. Johnson, 5 N.Y.2d 102, 154 N.E.2d 550, 180 N.Y.S.2d 287 (1958).

In the latter action the legislature had reserved certain lands for hospital purposes. It subsequently authorized the Department of Public Works to take any land necessary for highways. As a matter of statutory construction the New York Court of Appeals held that the second authorization did not supersede the first and the Department of Public Works had no power to appropriate hospital lands. The determination of what lands were available for highways lay strictly within the judgment of the legislature.

The contrast between the nature of these delegated powers and the powers of a town board is a sharp one. The town board can formulate and carry out its own policies. It can determine, for example, what zoning restrictions shall be imposed on given property, and can subsequently, by exercise of its own inherent legislative powers, alter the affected area.

Since the recipient of the delegation in a land appropriation case (if not otherwise a legislative body) is not the repository of legislative functions, and since even a broad delegation is a delegation of something less than the full powers of the legislature, it would seem logical to treat such body as administrative for all purposes and to sanction the absence of standards on the basis of impracticability. But the writer recognizes the existing and firmly entrenched law that acts pursuant to a delegation of full powers in the selection of land are legislative, and the writer's suggestions for judicial clarification of the law relate only to the delegation of something less than the full powers to select.
direction, or that a road shall be built only if it complies with given standards determinative to a greater or lesser extent of location. When the legislature thus steps into the field and determines how or where a road shall be located, the delegation is no longer one of plenary powers. Rather, it is a delegation to an administrative official to carry out an administrative policy as declared and defined by the legislature.52

Clearly in Sherman, when the legislature declared that the highway shall be located to a certain point and “thence westerly,” it legislated with respect to the location of the route and did not delegate to any other person or body the plenary power to select a location. The acts of the administrative official in enforcing this statutorily declared policy were necessarily administrative.53 (The court held only that the acts were not quasi-judicial.)

52 See Boykin v. State Highway Dep't, 146 S.C. 483, 493-94, 144 S.E. 227, 230 (1927): “The State Highway Department is an administrative body, created by the Legislature, with certain fixed duties to perform, and has no authority to set at naught the explicit instructions of the Legislature. In Gaston v. State Highway Department, 134 S.C. 402, 132 S.E. 680, this Court, in considering the 1924 Act, said: ‘Where the language of the Act under consideration is clear and certain as to the routes to be followed, etc., the state highway department is bound to conform to the terms of the statute which, in such cases, neither the highway department nor the courts themselves have any authority to vary.’” And again: “The Legislature has the right, in providing for a system of state highways, to say just where the roads shall be built, just what kind of roads shall be constructed, how they shall be built, etc., and when such provisions in the statute are clear and certain the highway department is bound to obey the mandate of the law.”

53 Moreover, persons for whose benefit such administrative policy is declared—that is, all persons who reside on or own property in the area, regardless of whether their land will be condemned—probably have no remedy apart from prerogative writ to challenge the selection. A taxpayer’s suit is unavailable because New York does not authorize taxpayers’ suits against state officials. Schieffelin v. Komfort, 212 N.Y. 520, 530, 106 N.E. 675, 677-78 (1914). (There is much sentiment and good rationale for a rule allowing such suits.) See also discussion of proposed legislative revisions in Mastrangelo v. State Council of Parks, 42 Misc. 2d 650, 657, 248 N.Y.S.2d 19, 25 (Sup. Ct.), aff’d mem., — App. Div. 2d —, 251 N.Y.S.2d 788 (2d Dep’t 1964).

Condemnation proceedings provide an available forum only for those whose land is to be appropriated. There is authority that declaratory and injunctive relief is similarly limited. See Headley v. City of Rochester, 272 N.Y. 197, 5 N.E.2d 198 (1936); Doolittle v. Supervisors of Broome County, 18 N.Y. 155 (1858). The latter forms of action pose problems of sovereign immunity as well. See Niagara Falls Power Co. v. White, 292 N.Y. 472, 55 N.E.2d 742 (1944).

On the other hand, it is believed that all persons for whose benefit a
Similarly, in Brown v. McMorran, a proceeding in which petitioners challenged the location of a highway on the ground that the determination was made in disregard of statutory requisites directing selection in accordance with the economic, cultural and conservation interests of the affected community, the legislature had delegated something less than its full legislative powers. The recipient of the delegation was directed by law to administer the formulated policy, and therefore, the challenged action was, theoretically, not legislative but administrative in character. Nonetheless, the court held that the action was legislative and not subject to Article 78 review.

A case decided less than a year later reached a result which is in conformity with the above analysis. In Mastangelo v. State Council of Parks, wherein the statute required that the land selected for park purposes be open and natural land, the function of selecting the land was therefore administrative. The court so held.

In summary, the questions to be determined in the selection of lands to be taken should be deemed legislative,
except when they are otherwise fashioned by the legislature. When the legislature has formulated a policy with respect to the location or nature of lands to be taken, then the official directed to administer that policy necessarily exercises administrative functions, which should be considered reviewable under Article 78.

RELATIONSHIP BETWEEN LEGISLATIVE AND POLITICAL FUNCTIONS: THE ADMINISTRATIVE POLICY DECISION

The confusion between legislative and political functions arises frequently in the area of land-selection. It is sometimes said that decisions made in connection with the selection of land are political and for that reason not appropriate subjects for review. "Political," as it is used, is frequently ambiguous and misleading. The writer believes that the terminology "legislative" and "political" can be used meaningfully, especially with regard to scope of review. For this reason the writer turns to an analysis of the distinction between legislative and political acts and the practical effects of such distinction.

The official activity of the public officer extends beyond statutorily guided duties. It encompasses an area of administrative detail and matters of policy. The authority to act is plenary and not confining. It carries with it that flexibility which is essential to the efficient functioning of the public officer. The act in itself, not being directed, forbidden or otherwise circumscribed by legislation, might be characterized as legislative; but for purposes related to the scope of review it is best described as political.

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67 Cf. Guardian Life Ins. Co. v. Bohlinger, 308 N.Y. 174, 124 N.E.2d 110 (1954). The court of appeals there held that whenever the legislature prescribes standards it is the "power and duty of the courts" to see that those standards are followed; and this result obtains even though the statute declares that the acts of the administrative official are not subject to judicial review.

The determination to take a fee rather than an easement in connection with appropriating land for public use is exactly this kind of decision. The New York Court of Appeals so analyzed the problem in the often-cited *Ely Avenue* case. Precisely in answer to this challenge—that an easement was sufficient and a fee should not have been appropriated, the court of appeals said:

It is the established law by numerous decisions by this court that in the exercise of the power of eminent domain the opinion of the legislature or the tribunal upon which is conferred power to determine the questions of necessity or expediency in the acquisition of private property for public use is political, not judicial, in its nature.\footnote{Matter of City of New York (Ely Ave.), 217 N.Y. 45, 57, 111 N.E. 266, 270 (1916). The *Ely Avenue* case is frequently cited for the proposition that necessity of appropriation is a legislative question and is, therefore, not subject to review. \textit{E.g.}, Culgar v. Power Authority, \textit{supra} note 47, at 897, 163 N.Y.S.2d at 921; \textit{In re Joe's Downtown, Inc.}, 80 N.Y.S.2d 41 (Sup. Ct. 1947); Kip v. New York Cent. R.R., 140 Misc. 62, 66, 250 N.Y. Supp. 5, 9 (Sup. Ct. 1931), \textit{aff'd mem.}, 236 App. Div. 654, 257 N.Y. Supp. 919 (1st Dep't), \textit{aff'd mem.}, 260 N.Y. 692, 184 N.E. 148 (1932); Board of Hudson River Regulating Dist. v. Fonda, J. & G. R.R., 127 Misc. 866, 880, 217 N.Y. Supp. 781, 796 (Sup. Ct. 1926), \textit{aff'd}, 223 App. Div. 358, 228 N.Y. Supp. 686 (3d Dep't), \textit{modified}, 249 N.Y. 455, 164 N.E. 541 (1928). \textit{Cf.} Burda v. Palisades Interstate Park Comm'n, \textit{supra} note 58 (determination declared political and not reviewable); \textit{In re Seneca Ave.}, \textit{supra} note 58 (determination declared political and not reviewable).

The characterization (legislative) is not helpful, and the conclusion (non-reviewable) is not accurate. The problem can be better understood by comparison of the question of necessity with that of public use.

The courts draw a distinction between the necessity of the taking and the public nature of the appropriation. The former, as indicated, is labeled a legislative question. The latter is characterized as a judicial one. \textit{See} Saso v. State, 20 Misc. 2d 826, 194 N.Y.S.2d 789 (Sup. Ct. 1959) and cases cited therein. \textit{See also} Buell v. Genesee State Park Comm'n, 25 Misc. 2d 841, 206 N.Y.S.2d 65 (Sup. Ct. 1960).

"Judicial," as used in these cases, refers not to the nature and form of a proceeding labeled, in administrative law, quasi-judicial. Rather, it indicates a justiciable issue subject to the ordinary scope of review. On the other hand, "legislative" does not necessarily connote the absence of a justiciable issue. Rather, as used by the courts in these cases, it indicates a scope of review limited to such questions as bad faith and fraud. \textit{See} Saso v. State, \textit{supra}; Culgar v. Power Authority, \textit{supra} note 47.

The determination that an appropriation is made for a public purpose is as much a legislative determination as any other determination made by a body vested with the broad power to act in the general interests of the public. The fact that the determination is subject to be set aside in a plenary action as arbitrary or unreasonable, as is legislation, provides all the more reason why the public purpose question should be labeled legislative.
The decision, being political, is amenable only to limited review and is not amenable to the prerogative writs. The only question which can be raised is whether the determination was corruptly or baselessly made.60

The limitation on the scope of review accords with the practicalities demanded by governmental operation. In the interests of efficient government, decisions of policy are best left to the nearly absolute judgment of the public officer.

What decisions are political? The Ely Avenue case affords some basis for analysis. Although the case involves only legislative functions, the same decision—to take an easement or a fee—might be made by the administrative official acting within a sphere as confined as that in Sherman (to locate a route from X point westerly). In other words, the public officer who exercises essentially administrative functions, which functions are properly the subject of Article 78 review, also exercises incidental powers related to administrative detail and circumscribed by nothing more than .

The question of necessity, on the other hand, is judicially treated as something less than a legislative question. It is not favored with that scope of review accorded to legislation.

Thus, the writer conceives the question of public use to be a legislative one, the question of necessity, political, and both—although differing as to scope of review—justiciable.

60Kaskel v. Impellitteri, supra note 47. See Culgar v. Power Authority, supra note 47. Cf. Baker v. Carr, 369 U.S. 186 (1961), wherein the Supreme Court, addressing itself to the problem of legislative reapportionment, characterized the totally non-justiciable political issue:

"Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

"Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence." Id. at 267.

Perhaps because none of the above formulations is completely inextricable from the usual activities of an administrative officer, such activities are not, and should not be, totally beyond judicial oversight. Accordingly, the "political question" discussed in this article is semantically different from the "political question" of Baker v. Carr. It signifies a narrow scope of review, as opposed to no review at all.
than the fiduciary duty to act in the general interests of the people. The decisions so made are decisions of policy.\(^{61}\)

The determination by a board of supervisors to purchase a certain water supply system is such a decision.\(^{62}\) So, too, is the determination of the health commissioner not to include funds for mosquito control in the budget of the Department of Health.\(^{63}\) Location, dedication or discontinuance of a highway is also such a decision when the legislature was delegated its plenary powers,\(^{64}\) but not when it has, by structuring the area itself, stripped the determination of this character.\(^{65}\)

A general rule can be abstracted. The acts of public officers which, by statute, must be performed in accordance with specified standards are always administrative\(^{66}\) and therefore always subject to review under Article 78.\(^{67}\) The

\(^{61}\) Whether such decisions are political or legislative is academic with respect to Article 78 review, for in either case such review is not available. The distinction is apposite in ascertaining scope of review in a plenary action.

\(^{62}\) Cf. Nigocki v. Dennison, 219 N.Y.S.2d 109 (Sup. Ct. 1961). The controversy presented a legal question as to whether the seller had title to the water system it purported to sell. The expediency of the purchase, including the question and possible risk of title, was properly left to the judgment of the board of supervisors.

\(^{63}\) Cf. Modugno v. Baumgartner, 11 Misc. 2d 1022, 173 N.Y.S.2d 729 (Sup. Ct. 1958). Quoting from the New York Court of Appeals, the court declared: "The courts do not sit in judgment upon questions of legislative policy or administrative discretion. The taxpayer must point to illegality or fraud." (Campbell v. City of New York, 244 N.Y. 317, 328, 50 A.L.R. 1480.) Again, in Picone v. City of New York, 176 Misc. 967, 970, the court said: "The courts have no right to sit in judgment upon questions of administrative discretion, or interfere with the conduct of municipal officials in the absence of illegality, fraud, collusion, corruption or bad faith." Id. at 1023, 173 N.Y.S.2d at 731.

\(^{64}\) Cf. Smith v. Gagliardi, 144 N.Y.S.2d 800 (Sup. Ct. 1955).

\(^{65}\) Whether the public necessity of the appropriation of certain lands ought to have the effect of a political decision presents a debatable question but is beyond the point of advocacy in the New York courts. There is nonetheless appeal to the argument that the determination of necessity should at least be subject to the same scrutiny as a true legislative act. Indeed, public necessity and public use have overlapping implications, and the latter is accorded full review. See note 59 supra.

Compare, at the other extreme, the law of California, which declares that necessity is never a justiciable issue even though the determination is infected with fraud or bad faith. See People ex rel. Dept of Public Works v. Chevalier, 52 Cal. 2d 299, 307, 340 P.2d 598, 603 (Sup. Ct. 1959).

\(^{66}\) If not quasi-judicial.

\(^{67}\) Unless review is precluded by extraneous factors not discussed herein. For example, the underlying statute might provide that the public officer's exercise of discretion is absolute and unreviewable. See Sheridan v. McElligott, 278 N.Y. 59, 15 N.E.2d 398 (1938).
acts may be impeached on the ground that they are not predicated upon or are otherwise inconsistent with those standards, or are arbitrary, capricious or unreasonable. The incidental acts of administrative officials, performed pursuant to the plenary power to execute administrative detail in the best interests of the people, are political. The powers of political decision-making are practically and properly reposed in the public officer, whose discretion in matters of policy is unimpeachable except for corruption or fraud, and never impeachable under Article 78.

CONCLUSION

Legislative acts of legislative bodies are not subject to review by proceedings in the nature of mandamus, certiorari or prohibition. When local legislative bodies exercise administrative functions, pursuant to what is, in effect, a delegation to themselves, their acts are within the purview of Article 78 scrutiny. This result obtains and the action is deemed administrative, even though the powers delegated by the public body to itself are commensurate in scope with the plenary legislative powers underlying the delegation. The operative fact in such a case is that the manner of the action is not legislative (that is, not effected by enactment of, amendment of, or failure to enact or amend a law or ordinance).

The delegation of plenary legislative powers other than to a legislative body is, as a general rule, unconstitutional.

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68 Because the administrative official assigned to carry out a statutorily defined policy has no legislative powers as such, it must be assumed that his non-administrative acts are political. The distinction between the legislative and political functions of the non-legislative body acting legislatively (e.g., the Department of Public Works in cases in which it has plenary powers to select and appropriate land) is more difficult to draw. Because neither the legislative nor the political function comes within the scope of Article 78, the problem is not herein relevant. However, where case law has established that the basic function (e.g., selection of land) is political, it would seem that the lesser functions must necessarily be deemed political, for surely logic would not favor them with greater judicial scrutiny.

69 For a well considered analysis of acts of public officers which are political and hence unreviewable at the instance of a citizen or taxpayer, see Jaffe, Standing to Secure Judicial Review: Public Actions, 74 HARV. L. REV. 1265, 1292-1307 (1961).
Accordingly, the question of review of legislative acts of administrative bodies does not ordinarily arise. A notable exception to the rule proscribing delegation without standards and without a structured administrative policy lies in the area relating to the acquisition of land for public purposes. The legislature can delegate its plenary powers to determine where, when and how to lay a highway or build a school. When the legislature does delegate such broad powers and the public officer who is the recipient of the delegated powers acts pursuant to the delegation, he exercises a function legislative in character but administrative in manner. The case law declares that his action is legislative and not subject to Article 78 review.

Moreover, the case law, apart from Article 78, so severely limits review of questions concerning selection of land that no such selection will be set aside unless it is found to be fraudulent, in excess of statutory powers, or not for a public purpose. Thus, if a state official arbitrarily decides to appropriate developed land in a residential community for a public structure of nuisance-type proportions, notwithstanding the fact that the state owns undeveloped land in a nonresidential area of an even more suitable nature, neither the property owner nor the taxpayer has any judicial remedy.

This unwarranted result should be corrected by statute. Legislation should declare that all acts by an administrative body regarding the selection of land are administrative for purposes of Article 78 review. If reluctance to enact such legislation springs from the conception that the selection of land is necessarily arbitrary, then it should be recognized that although many results may be warranted, other results may be unwarranted. The law should not, for example, permit the state to appropriate land for a state institution in the middle of a bird sanctuary, when land equally well suited to the same purposes and causing little or no personal damage or dislocation is available outside

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70 People v. Adirondack Ry., 160 N.Y. 225, 238, 54 N.E. 689, 693 (1899), aff'd, 176 U.S. 335 (1900).
the sanctuary. The question is not one of better judgment; it is not a question of degree. It is not proposed that a court should balance competing interests. But, it is proposed that a court should test the determinations of the public officer by the traditional standards of arbitrariness, unreasonableness and capriciousness.

If, on the other hand, reluctance to enact the suggested legislation lies in the supposition that a multitude of lawsuits might be inspired, then it should be recognized that the nonexistence of standards is in itself a deterrent to prospective petitioners as they will find much difficulty in framing a good cause of action in the absence of a strong supporting factual basis.

Since it is clear in cases involving land appropriation that the legislature can delegate its plenary powers, the relevant question with respect to Article 78 reviewability is whether the legislature did delegate its plenary powers. When the legislature structures the area within which the public officer must act in order to carry out the statutorily declared policy, the officer's actions are, by definition, administrative both in character and in manner and should be the appropriate subjects of Article 78 review. In order to take advantage of this rule (which, although not firmly entrenched in the law, is urged as the only proper result), the draftsman of the Article 78 petition should take much care to frame his allegations in terms of how the public officer violated statutory standards if any and otherwise exceeded statutorily imposed limitations. He should at the same time preserve the argument that the acts challenged were otherwise arbitrary, capricious and unreasonable, in anticipation of a rule of law which may yet declare arbitrary legislative acts of an administrative officer vulnerable to judicial attack.