be remembered. The courts that handle the "less glamerous" cases, the everyday cases, are the courts closest to the people. These courts should be designed to serve the people and to handle their complaints because the people deserve no less.

II. Administrative Law

*Rodney Taylor**

A. Administrative Findings of Fact

Transport Motor Express, Inc. v. Smith[1] was the most significant administrative law case decided in the past year. The Indiana Supreme Court reversed the court of appeals[2] and sustained an award of workmen's compensation benefits by the Industrial Board. The significance of *Transport Motor III* is its effect on the determination of the proper scope of judicial review of administrative action. Although the supreme court noted that the court of appeals "correctly stated the law, but . . . failed to apply the law in the case at bar,"[3] the decision can be more accurately described as a relaxation of the standard, developed by the court of appeals in *Transport Motor II*, regarding review of agency findings of fact.

The court of appeals, in *Transport Motor II*, sought to establish a minimum level of specificity with regard to the findings of disputed issues of fact made by state administrative agencies.[4] The thrust of the opinion was that the agency should state "all relevant and underlying or basic facts."[5] For example, in a workmen's compensation case, if the Industrial Board awards benefits to the claimant, "minimum specificity"[6] would require that the Board explain why the claimant's evidence tends to show facts which prove the

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[1]311 N.E.2d 424 (Ind. 1974) [hereinafter referred to as *Transport Motor III*].

[2]289 N.E.2d 737 (Ind. Ct. App. 1972) [hereinafter referred to as *Transport Motor II*]. In Transport Motor Express, Inc. v. Smith, 279 N.E.2d 262 (Ind. Ct. App. 1972) [hereinafter referred to as *Transport Motor I*], the court of appeals remanded the case to the Industrial Board, stating that its findings of fact were insufficient, and directed that additional findings of fact be made so that the court could intelligently review the award.

[3]311 N.E.2d at 425.

[4]See *Administrative Law, 1973 Survey of Indiana Law*, 7 IND. L. REV. 2, 6-11 (1973) [hereinafter cited as *1973 Survey of Indiana Law*], in which *Transport Motor I* and *II* are extensively discussed.

[5]289 N.E.2d at 747.

[6]*Id.* at 746.

elements of claimant's case and why the opposing party's evidence fails to show facts which disprove the elements of the claimant's case.[7] It was felt that only by requiring such findings could the reviewing court avoid the necessity of making presumptions as to whether the Board reached certain results in its weighing of the evidence.[8] The court of appeals relied extensively upon secondary authority[9] criticizing administrative agency findings that are conclusionary in nature[10] or that merely summarize the evidence presented.[11] In essence, the Board, and not the reviewing court, was required to supply the "factual theory" underlying the Board's actions.[12]

The supreme court's decision in *Transport Motor III* seems to signal a return to the pre-*Transport Motor I* standard of judicial review.[13] The decision can be read as standing for the proposition that a reviewing court may imply factual inferences and supply the factual theory underlying the administrative agency's action.[14] This runs counter to the intent of *Transport Motor II*. The supreme court felt that the lower court was confused when it used "the terminology 'factual inferences' when . . . actually referring to legal conclusions which may be drawn from the facts as stated by the Industrial Board."[15] Impliedly rejecting the second element of "minimum specificity," the court held that the reviewing court should not concern itself with "facts" argued below but omitted from the Board's findings.[16]

The dissenting opinion stated that three elements were missing from the findings of fact submitted by the Industrial Board. In substance, the dissent complained that the findings did not specify the facts which produced the basis for the Board's award, the factual inferences drawn from such facts, or the factual theory underlying the Board's determination. Such factual theorizing was

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[7] *Id.* at 747-49. *See generally 1973 Survey of Indiana Law* 9.

[8] 289 N.E.2d at 747.

[9] 2 F. COOPER, STATE ADMINISTRATIVE LAW 477-78 (1965); 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 16.01, at 436 (1958).

[10] *Accord,* Public Serv. Comm'n v. Fort Wayne Union Ry., 232 Ind. 82, 111 N.E.2d 719 (1953); Wabash Valley Coach Co. v. Arrow Coach Lines, Inc., 228 Ind. 609, 94 N.E.2d 753 (1950).

[11] *Accord,* American Transp. Co. v. Public Serv. Comm'n, 239 Ind. 453, 154 N.E.2d 512 (1958).

[12] 311 N.E.2d at 429 (DeBruler, J., dissenting).

[13] *See, e.g.,* Bell v. Goody, Goody Prod. Co., 116 Ind. App. 181, 63 N.E.2d 147 (1945); Goodwin v. Calumet Supply Co., 107 Ind. App. 487, 23 N.E.2d 602 (1939); Payne v. Wall, 76 Ind. App. 634, 132 N.E. 707 (1921).

[14] 311 N.E.2d at 428-29 (DeBruler, J., dissenting).

[15] *Id.* at 427.

[16] *Id.* at 428. *But cf. 1973 Survey of Indiana Law* 9.

deemed by the dissent to be solely the province of the Board and not a function of the reviewing court.[17]

In *Indiana State Board of Tax Commissioners v. Pappas*,[18] the court of appeals held that a trial court is prohibited from substituting its judgment for that of the Indiana State Board of Tax Commissioners. After a determination that the Board's action with regard to the assessed value of respondent's property was "arbitrary, capricious or unlawful,"[19] the trial court assessed the property on its own volition. In reversing the trial court's action, the appellate court found that the lower court exceeded its authority, since the applicable statute[20] required the matter to be remanded to the Board for reassessment. The trial court's scope of review is limited to the determination of whether there was sufficient evidence to sustain the Board's findings and whether there was an abuse of discretion by the agency.[21]

In another recent decision, somewhat similar to *Pappas*, the court of appeals clarified another aspect of the relationship between the determining agency and the reviewing trial court. In *Indiana Alcoholic Beverages Commission v. Johnson*,[22] the court held that the Commission, not the trial court, determines the issues of fact presented. Furthermore, it was held that the reviewing trial court cannot reevaluate conflicting evidence appearing in the record if there is substantial evidence on the record as a whole to support the Commission's findings.[23] The issue arose when the trial court set aside a Commission order rejecting renewal of respondent's liquor permit. The lower court reevaluated the evidence presented to the Commission and found, in direct contrast to the Commission's findings, that respondent's tavern had a "high and fine reputation."[24] The court of appeals found that the trial court had ignored substan-

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[17]311 N.E.2d at 428-29 (DeBruler, J., dissenting).

[18]302 N.E.2d 858 (Ind. Ct. App. 1973).

[19]*Id.* at 860.

[20]IND. CODE § 6-1-31-4 (Burns 1972) provides as follows:

> Whenever a final determination by the state board of tax commissioners regarding the assessment of any real or tangible personal property which is taxable under this act . . . or any prior or other act, shall have been vacated, set aside or adjudged null and void pursuant to the finding, decision or judgment of any court of competent jurisdiction, the matter of the assessment shall, in all instances, be remanded to the state board of tax commissioners for reassessment and further proceedings in accordance with law.

[21]Department of Financial Inst. v. State Bank, 253 Ind. 172, 252 N.E.2d 248 (1969); Public Serv. Comm'n v. City of Indianapolis, 235 Ind. 70, 131 N.E.2d 308 (1956).

[22]303 N.E.2d 64 (Ind. Ct. App. 1973).

[23]*Id.* at 68.

[24]*Id.* at 66.

tial evidence presented to the Commission and had arbitrarily substituted its judgment for that of the Commission. In support of its decision reversing the trial court, the appellate court noted that "[a]dministrative fact finding is a sacred cow . . . [and] that weighing evidence is forbidden fruit to the reviewing court."[25]

The court of appeals then held that the trial court was in error when it ordered the Commission to "forthwith issue" a renewal permit to the applicant.[26] The court held that the express intent of the Administrative Adjudication Act[27] was to limit the reviewing court's authority such that, after a determination that the agency's action was contrary to law, the court's only power is to remand for further proceedings. Under the Act, the court may compel agency action by direct order only after the agency has withheld or unreasonably delayed the redetermination of the case.[28] Absent such action by the agency, the trial court lacks the authority to compel agency action as part of the initial review.[29]

It is generally held that an agency hearing officer "occupies an inferior position; and that the agency, acting through its staff employee, may redetermine de novo the facts found by the hearing officer and rewrite his proposed decision."[30] This proposition was reaffirmed by the Indiana Court of Appeals in *Odle v. Public Serv-*

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[25]*Id.* at 68.

[26]*Id.* at 69.

[27]IND. CODE § 4-22-1-18 (Burns 1974) provides in pertinent part:

> On . . . judicial review, if the agency has complied with the procedural requirements of this act, and its findings, decision or determination is supported by substantial, reliable and probative evidence, such agency's finding, decision or determination shall not be set aside or disturbed.
>
> If such court finds such finding, decision or determination of such agency is:
>
> (1) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; or
>
> (2) Contrary to constitutional right, power, privilege or immunity; or
>
> (3) In excess of statutory jurisdiction, authority or limitations, or short of statutory right; or
>
> (4) Without observance of procedure required by law; or
>
> (5) Unsupported by substantial evidence,
>
> the court may order the decision or determination of the agency set aside. The court may remand the case to the agency for further proceedings and may compel agency action unlawfully withheld or unreasonably delayed.

[28]*Id.*

[29]303 N.E.2d at 69.

[30]1 F. COOPER, STATE ADMINISTRATIVE LAW 337 (1965). *See generally* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 10.04 (1958).

ice Commission.[31] The court held that fact-finding and decision-making powers, with regard to certificates of public convenience and necessity, reside solely in the Commission. A hearing examiner's findings and suggested order are advisory only and may be altered or otherwise modified by the Commission.[32]

B. Procedural Aspects of Administrative Rulings

1. Constitutional Principles

Significant developments in administrative procedure centered around four decisions. In *King v. City of Gary,*[33] a policeman was suspended from the police force by the Gary Police Civil Service Commission for attending a gaming house and for other conduct unbecoming an officer. On appeal to the Indiana Supreme Court from a decision of the trial court affirming the suspension, the appellant-policeman presented three contentions: (1) the Commission denied him due process by improperly limiting the scope of his cross-examination of a witness, (2) the Commission denied him equal protection in that it failed to punish other policemen for alleged acts of misconduct and, by such failure, was discriminatorily punishing him, and (3) the trial court erroneously failed to order an exchange of the names of witnesses and the general nature of the expected testimony of each as provided under Indiana Rule of Trial Procedure 16.

In the majority opinion, Justice Givan first addressed himself to the question of the discretion granted the Commission to control the scope of cross-examination in disciplinary proceedings. He stated that, since the matters about which the appellant sought to question the witness would have only reiterated a previously admitted challenge to the witness' credibility, the Commission could properly limit the scope of cross-examination to exclude the further inquiry as being unproductive. On the second issue, Justice Givan held that the Commission was not engaging in invidiously discriminatory prosecution by failing to punish other policemen against whom charges of alleged acts of misconduct had been lodged by appellant. To hold otherwise would "make it impossible for a Commission [which] had operated inefficiently in the past to clean up its operation or increase its efficiency."[34] Moreover, even if the Commission had neglected its duty to prosecute all misconduct, such neglect would "be no bar to prosecuting a disciplinary action

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[31] 297 N.E.2d 453 (Ind. Ct. App. 1973).

[32] *See* IND. CODE § 8-2-7-6 (Burns 1973).

[33] 296 N.E.2d 429 (Ind. 1973).

[34] *Id.* at 431.

against the appellant for his misconduct."[35] On the third issue, Justice Givan ruled that, since the appellant was complaining about the testimony of two witnesses whom he had first called at trial, he could not thereafter complain if the city subsequently called the same witnesses, without first notifying appellant, to pursue matters raised in the first examination. Not only was the trial court absolved of abuse of discretion, but Trial Rule 16 was found not applicable when appellant first called the witnesses.[36]

City of Mishawaka v. Stewart[37] likewise involved an appeal from disciplinary action taken by an administrative board.[38] A

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[35]*Id.*

[36]The issue was not presented on appeal as to whether the two witnesses should have been allowed to testify at the trial. The scope of judicial review of administrative findings of fact does not permit a reviewing court to examine anew the merits of the underlying factual controversy adjudicated in the administrative proceeding. The reviewing court is, instead, limited to an inquiry into (1) whether the action of the administrative body was arbitrary, capricious, fraudulent or otherwise illegal, (2) whether the administrative board exceeded its authority, and (3) whether there is substantial evidence to support the administrative findings of fact. *See* Evansville v. Nelson, 245 Ind. 430, 199 N.E.2d 703 (1964). Despite the fact that they had not appeared before the Commission, these two witnesses testified at the trial as to the merits of the charges against the appellant-policeman. This clearly exceeded the proper scope of judicial review and this testimony should not have been admitted at the trial.

It is possible that the trial court misconstrued the meaning of the procedural statute, IND. CODE § 18-1-11-3 (IND. ANN. STAT. § 48-6105, Burns Supp. 1974), wherein it states that a trial court reviewing administrative disciplinary proceedings shall hear the appeal "de novo on the issues." The use of the phrase "de novo" does not authorize the trial court to expand its scope of judicial review to admit new facts not before the administrative body. It merely authorizes the trial court to review the administrative actions within a new framework of issues, although limited to the same facts as found by the agency. *See, e.g.*, City of Washington v. Boger, 132 Ind. App. 192, 176 N.E.2d 484 (1961). *See also* Kinzel v. Rettinger, 277 N.E.2d 913 (Ind. Ct. App. 1972).

[37]310 N.E.2d 65 (Ind. 1974).

[38]*Id.* at 68. The court was presented with the question of which of two statutory procedures was sufficient to perfect a judicial review of administrative agency actions. The court held that the motion to correct errors, provided under Trial Rule 59(G), superseded the requirement of filing a petition for rehearing with the administrative agency, as provided under IND. CODE § 18-1-11-3 (IND. ANN. STAT. § 48-6105, Burns Supp. 1974). This statute provided that the filing of a petition for rehearing would stay the judgment of a reviewing court pending an administrative decision on the petition. This procedure was intended to be used in lieu of an appeal from a trial court judgment since the statute also provided that the judgment of the trial court was final and no appeal therefrom was allowed. However, the Indiana Supreme Court had ruled in City of Elkhart v. Minser, 211 Ind. 20, 5 N.E.2d 501 (1937), that an appeal to the supreme or appellate court is always allowed, notwithstanding express statutory language to the contrary. Thus, the petition for rehearing was held to no longer serve a useful purpose.

tenured fireman was dismissed for having knowingly received stolen property. The circuit court ordered the fireman reinstated on the ground that he was denied due process of law, because the city attorney, in the administrative hearing before the Board of Public Works and Safety, acted both as the advocate of the city and as a member of the Board. Justice Prentice stated on behalf of a bare majority of the court that, despite the fact that the city attorney was obligated under two separate statutes to act as both advocate and member of the Board,[39] the principles of due process, as enunciated by the United States Supreme Court in *Boddie v. Connecticut*,[40] require the city attorney to decline participation as a fact finder on the Board when he has first acted as counsel for an interested party.

The court reasoned that tenure rights are to be legally protected as if they were contract or property rights[41] and that such rights are entitled to protection by both state and federal due process provisions. Though administrative proceedings are not required to be conducted in accordance with the standards demanded of courts, it is indisputable that "[t]here are . . . standards below which we should not go . . . [and] [t]hese standards . . . should be at the highest level that is workable under the circumstances."[42] The court noted that this principle, coupled with the binding nature of administrative findings of fact when supported by substantial evidence, demands that a "strict test of impartiality be applied to the fact finding procedure."[43] Not only must such procedures comport with due process requirements but even the mere appearance of impropriety must be avoided.[44]

This result is not dependent upon the possibility that the vote cast by a compromised administrative fact finder be the deciding vote. There is "no way which we know of whereby the influence of one upon the others can be quantitatively measured."[45] It is sufficient that there be dual participation by one individual, or a number of individuals so closely connected as to represent indistinguishable

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[39]IND. CODE § 18-1-6-13 (IND. ANN. STAT. § 48-1801, Burns 1968) requires the city attorney to represent the city in proceedings before administrative bodies. *Id.* § 18-2-1-4.2 (IND. ANN. STAT. § 48-1215, Burns Supp. 1974) requires the city attorney to be a member of the Board of Public Works and Safety.

[40]401 U.S. 371 (1971).

[41]*Accord*, State *ex rel.* Felthoff v. Richards, 203 Ind. 637, 180 N.E. 596 (1932).

[42]310 N.E.2d at 68.

[43]*Id.* at 69.

[44]ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule No. 9-101.

[45]310 N.E.2d at 70, *quoting from* Cinderella Career & Finishing Schools, Inc. v. FTC, 425 F.2d 583, 592 (D.C. Cir. 1970).

interests, in order to make out a prima facie case of a due process violation in an administrative proceeding. To this extent, the majority opinion expressly overrules *Guido v. City of Marion*,[46] decided just two years ago.

The dissent of Chief Justice Arterburn, in which he was joined by Justice Givan, focused on the standards to be observed in administrative proceedings that would be consistent with the city's need to conduct its business unfettered by unreasonable restraints. He concluded that the dual participation of the city attorney did not amount to such a denial of due process as would warrant reversing the Board on its findings of fact, especially since the findings were supported by substantial evidence on the record, a fact conceded by the majority. The Chief Justice would have required the fireman to show, in addition, that the city attorney was actually biased.[47] Absent such a showing, he concluded, the statutory provision that, on appeal, the decision of the Board is to be deemed "*prima facie* correct"[48] should be interpreted to include a presumption that no procedural due process violations exist.

In *State ex rel. Todd v. Hatcher*,[49] a third appeal from administrative disciplinary proceedings, the Indiana Supreme Court construed two Indiana statutes regulating the disciplinary procedures affecting firemen and policemen and found them to be in irreconcilable conflict. The Board of Public Works and Safety indefinitely suspended the appellant-fireman without calling any witnesses or receiving and transcribing any testimony. The Gary Fire Civil Service Commission amended the Board's findings so as to provide a determinate suspension. Appellant sought relief from the judgment of the trial court affirming the Commission's action.

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[46]280 N.E.2d 81 (Ind. Ct. App. 1972). The court of appeals held in *Guido* that no violation of procedural due process was demonstrated when the attorney representing the city attempted to persuade the Board, a member of which was the attorney's immediate superior, as to Guido's guilt. The court said, however, that determining guilt or innocence was not the Board's duty. The Board was instead merely to determine the facts concerning Guido's fitness to serve as a police officer. Therefore, no conflict of interest was shown.

[47]It was not clear whether Chief Justice Arterburn would have also required a showing that the city attorney's bias was prejudicial to the fireman. A necessary implication of a showing of prejudice is that the prejudice must constitute such an inherent defect in the administrative proceedings as to amount to a prima facie denial of due process.

[48]IND. CODE § 18-1-11-3 (IND. ANN. STAT. § 48-6105, Burns Supp. 1974).

[49]301 N.E.2d. 766 (Ind. Ct. App. 1973).

Appellant contended that the Commission's actions were in violation of Indiana Code sections 19-1-37.5-7[50] and 18-1-11-3.[51] Without precisely specifying appellant's objections, the lower court noted a manifest conflict between these two statutes. The issue presented was whether the hearing provisions of the civil service statute had been superseded by the fire and police force statute. A precise reading of the two statutes revealed that the civil service statute provides for removal only after an opportunity for a hearing has been afforded; however, the fire and police force statute provides for suspension pending confirmation by the regular appointing power and for a hearing by the Commission after suspension. The statutes provide for hearings before different administrative bodies. The court concluded that, because of the conflict, the "former and more generally applicable statute must yield to the provisions of the latter."[52]

Having concluded that the fire and police force statute was controlling, the court sought compliance with its provisions in the records of both agencies. Appellant contended that the Commission

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[50]IND. CODE § 19-1-37.5-7 (IND. ANN. STAT. § 48-6249h, Burns Supp. 1974) [hereinafter referred to as the civil service statute] provides in pertinent part:

> No person in the classified civil service who shall have been permanently appointed or inducted into civil service under the provisions of this chapter . . . shall be removed, suspended, demoted or discharged except for cause, and only upon the written accusation of the appointing power, or any citizen or taxpayer, a written statement of which accusation, in general terms, shall be served upon the accused, and a duplicate filed with the commission. The chief of the fire department may suspend a member pending the confirmation of the suspension by the regular appointing authority under the chapter which must be within three [3] days. Any person so removed, suspended, demoted or discharged, may, within ten [10] days from the time of his removal, suspension, demotion, or discharge, file with the commission a written demand for an investigation, whereupon the commission shall conduct such investigation.

[51]*Id.* § 18-1-11-3 (IND. ANN. STAT. § 48-6105) [hereinafter referred to as the fire and police force statute] provides in pertinent part:

> Every member of the fire and police forces, including police radio operators and police signal and fire alarm operators, appointed by the mayor, the commissioners of public safety or the board of metropolitan police commissioners, shall hold office until they are removed by said board. They may be removed for any cause other than politics, after written notice is served upon such member in person or by copy left at his last and usual place of residence, notifying him or her of the time and place of hearing, and after an opportunity for a hearing is given, if demanded, and the written reasons for removal shall be entered upon the records of such board.

[52]301 N.E.2d at 769. *See generally* Payne v. Buchanan, 238 Ind. 231, 148 N.E.2d 537 (1958); State v. Doversberger, 288 N.E.2d 585 (Ind. Ct. App. 1972).

had failed to timely file a transcript of the proceedings below with the trial court, thus rendering such proceedings void and entitling him to judgment as a matter of law.[53] The court rejected this contention and noted that, in *Hamilton v. City of Indianapolis*,[54] it had been previously held that it was not essential that the provisions of a statute which refer to the time limits for filing a transcript be strictly complied with, provided that such transcript is filed in time to be of service to all interested parties.

Appellant next argued that the procedures prescribed in the fire and police force statute violated the due process requirements of the federal and state constitutions.[55] More specifically, the appellant argued that he was entitled to a hearing before the implementation of any disciplinary action. The court rejected this argument by referring to *Cafeteria Workers v. McElroy*,[56] which held that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."[57] Moreover, the court reasoned that the public interest could not tolerate incompetent fire and police personnel. The public interest would be seriously jeopardized if incompetents were permitted to continue their employment pending disposition of charges leveled against them.[58]

The *Todd* decision reaffirms that, while the requirements of due process are applicable to administrative proceedings, the procedural safeguards to be observed can, nonetheless, be tailored to the individual circumstances of particular administrative actions.[59]

2. *Statutory Construction*

Ball Stores, Inc. v. State Board of Tax Commissioners[60] involved the applicability of statutory notice of appeal provisions to administrative proceedings. The taxpayer appealed to the circuit court from a Board determination of a tax assessment. The circuit court dismissed the complaint for failure to give timely notice of

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[53]301 N.E.2d at 770.

[54]116 Ind. App. 342, 64 N.E.2d 303 (1964). This case involved a suit for reinstatement by a member of the Indianapolis Police Department on the grounds that his dismissal was capricious, fraudulent and illegal.

[55]U.S. CONST. amend. XIV, § 2; IND. CONST. art. 1, §§ 12-13.

[56]367 U.S. 886 (1961). This was an action to compel the return of an employee's identification badge so that the employee could enter a military installation and resume work.

[57]*Id.* at 895.

[58]*Accord*, McElroy v. Trojak, 21 Misc. 2d 145, 189 N.Y.S.2d 824 (Sup. Ct. 1959) (an action against the chief of police seeking the revocation of an order of suspension).

[59]*See also* Boddie v. Connecticut, 401 U.S. 371 (1971).

[60]307 N.E.2d 106 (Ind. 1974).

the appeal to the Board under the relevant statute.[61] Judge Robertson, writing for the court of appeals, held that, if the thirtieth day after the Board gave notice of its determination fell on a Sunday, and the notice of appeal, mailed on the preceding Thursday, was not received by the Board until the following Monday, the taxpayer had failed to comply with the thirty day time limit for notice of appeal. In so holding, the court concluded that the trial rules are not applicable to proceedings before administrative agencies, nor are they applicable to proceedings requisite to invoking the jurisdiction of a court to review an agency's action.[62] The court could not, therefore, apply Trial Rule 6(A)[63] which would validate the notice given here. Left with the bare notice statute, the court, following a line of recent cases,[64] reluctantly held that the thirty day notice requirement was to be strictly construed despite its undeniably harsh result to the taxpayer.

Judge Lybrook, in an incisive concurring opinion, stated that he and his colleagues were constrained to apply the strict interpretation to the time of notice statute only because of an apparent legislative oversight. In a strongly worded statement, addressed more to the Indiana General Assembly than to the litigants in the instant case, he urged a cure of these inequities in a vein similar to that wrought by Trial Rule 6(A) and the comparable federal rule. These rules toll the time periods on a Saturday or Sunday and are thus invested with a desirable modicum of common sense. Observing that the Board had not been harmed in any way by receiving notice the day after the technical tolling of the time period, Judge Lybrook implied that failure to deal with this problem legislatively could, by logical extension of the strict construction interpretation, work bizarre results. The Board could, he noted, avoid the consequences of an appeal by simply closing its doors to business, leaving "the taxpayer's fate to the mercy of the office hours of the State Board of Tax Commissioners."[65]

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[61] IND. CODE § 6-1-31-4 (Burns 1973).

[62] *Accord*, Clary v. National Friction Prods., Inc., 290 N.E.2d 53 (Ind. 1972).

[63] IND. R. TR. P. 6(A) provides that if the last day of a computed period is a Saturday, a Sunday, a legal holiday, or "a day the office in which the act is to be done is closed during regular business hours," then the period runs until the end of the next day which is not a Saturday, a Sunday, a legal holiday, or a day on which the office is closed.

[64] Weatherhead Co. v. State Bd. of Tax Comm'rs, 281 N.E.2d 547 (Ind. Ct. App. 1972); Raab v. Indiana Bd. of Tax Comm'rs, 143 Ind. App. 139, 238 N.E.2d 697 (1968).

[65] 307 N.E.2d at 108.

C. *Separation of Functions in Local Government*

In *State ex rel. Michigan City Plan Commission v. LaPorte Superior Court,*[66] the Indiana Supreme Court held that an injunction could not issue to prospectively restrain legislative action by the Michigan City Common Council. This issue arose when an amendment to a local zoning ordinance was proposed by the Council. This proposal was referred to the city's Plan Commission for notice and public hearing. Even though the Plan Commission disapproved the proposed zoning change and refused to commend it to the Council, the Council chose to proceed with consideration of the zoning amendment. The Superior Court then enjoined passage of the amendment.

While conceding that trial courts have jurisdiction to entertain suits challenging the validity of an amendment to a zoning ordinance, the supreme court held that no such power exists prior to the actual adoption of the amendment.[67] To hold otherwise, the court noted, would give rise to the "mischievous consequences that may result from the attempts of courts of equity to control proceedings of municipal bodies."[68] This decision, firmly rooted in principles of jurisdiction, assures municipal legislative bodies of the power to consider changes without unrestrained judicial interference.

This is not to say, however, that courts are restrained from exercising otherwise proper authority over municipal affairs. In *Noble v. City of Warsaw,*[69] the court of appeals declared an annexation statute constitutional. Following the annexation of territory to a city, an appeal may be taken if the affected landowners, within sixty days, file a remonstrance thereto in the circuit or superior court of the appropriate county. The statutory provision at issue states that the circuit or superior court "*may* order the proposed

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[66]297 N.E.2d 814 (Ind. 1973). This was an original action brought by the Michigan City Common Council against the LaPorte Superior Court. The petitioners sought a writ of prohibition to prevent the respondent court from exercising further jurisdiction in a suit for injunctive relief brought by the opponents of a proposed zoning ordinance.

[67]*Id.* at 815-16. *See also* State *ex rel.* Development Co. v. Circuit Court, 240 Ind. 648, 167 N.E.2d 470 (1960); State *ex rel.* City of South Bend v. St. Joseph Superior Court, 238 Ind. 88, 148 N.E.2d 558 (1958).

[68]297 N.E.2d at 816, *quoting from* New Orleans Water Works Co. v. City of New Orleans, 164 U.S. 471, 482 (1895). In *New Orleans Water Works,* suit was brought by the water company seeking a decree restraining the lessee of a hotel, acting under the authority of a city ordinance, from laying pipes for the purpose of conveying water from the Mississippi River to his hotel. The Court held that a court of equity cannot properly interfere with, or in advance restrain, the discretion of a municipal body while it is in the exercise of powers that are legislative in their character.

[69]297 N.E.2d 916 (Ind. Ct. App. 1973).

annexation . . . notwithstanding the provisions of any other law."[70] The appellants contended that the statute unconstitutionally vested legislative power in the courts by permitting discretionary control over municipal action. The court rejected appellant's argument and held that the statute did not vest legislative power in the courts but, rather, authorized the courts to determine whether the city had complied with all the statutory requirements for annexation.

Although the statute provides that courts "may" order annexation, it was given a mandatory construction. The court of appeals reasoned that, although "may" normally implies discretion, it will be construed to mean "shall" when its ordinary meaning would defeat the objective of the statute and the intent of the legislature. Thus, if the court finds compliance with the annexation statute, it must order the annexation.[71]

III. Business Associations

*Paul J. Galanti**

The following survey of developments in the corporate area during the past year should be considered an overview rather than an extensive analysis.[1]

A. Securities Fraud

A somewhat unusual securities fraud case was before the First District Court of Appeals in *Soft Water Utilities, Inc. v. LeFevre.*[2] The court affirmed a judgment for plaintiff entered by the Putnam County Circuit Court. The suit arose out of LeFevre's April 8, 1959, purchase of 2,080 shares of what he believed was a new issue of 50,000 common shares of Soft Water Utilities [SWU]. In fact,

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[70] IND. CODE § 18-5-10-25 (IND. ANN. STAT. § 48-722, Burns Supp. 1974) (emphasis added).

[71] 297 N.E.2d at 919.

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[1] A case worth noting in passing is Lindenborg v. M & L Builders & Brokers, Inc., 302 N.E.2d 816 (Ind. Ct. App. 1973), in which the court restated the well established principle that changing the name of a corporation does not affect its liability for indebtedness previously incurred. *See, e.g.*, Rice v. Fletcher Savings & Trust Co., 215 Ind. 698, 22 N.E.2d 809 (1939).

[2] 308 N.E.2d 395 (Ind. Ct. App. 1974) (Robertson, J.).