II. Administrative Law

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A. *Scope of Judicial Review*

The case most interesting to an observer of the administrative process and perhaps the most significant case of this review period is *City of Gary v. Gause.*[1] The Gary Police Department brought charges against Gause, a policeman, for various violations of Police Civil Service Commission Rules. The violations were related to Gause's alleged extortion of money from a citizen. The charges were heard by the Gary Police Civil Service Commission, which found Gause guilty as charged and ordered him dismissed from the police force. Gause then filed a complaint in Lake Superior Court appealing the decision.[2] The superior court found for Gause, ordering that he be reinstated and that all back wages be paid to him. The city appealed.[3] The Third District Court of Appeals, in reversing the Lake Superior Court, held that for trial courts substantial evidence constitutes the appropriate scope of judicial review of administrative agency decisions, despite the fact that the statute authorizing judicial review unambiguously states that the review shall be heard by the trial court de novo.[4] The court

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[1]317 N.E.2d 887 (Ind. Ct. App. 1974). *See* State Bd. of Tax Comm'rs v. Stove City Plaza, 317 N.E.2d 182 (Ind. Ct. App. 1974), in which the First District Court of Appeals recites in dicta the principles discussed in *Gause. Id.* at 183-84.

[2]IND. CODE § 18-1-11-3 (Burns 1974) provides, *inter alia,* that "[a]ll such appeals shall be tried by the court unless written request for jury be made not less than five [5] days before the date set for said hearing, and shall be heard de novo upon the issues raised by the charges . . . ."

[3]IND. CODE § 18-1-11-3 (Burns 1974) provides that "[t]he final judgment of the [superior or circuit] court shall be binding upon all parties and no further appeal therefrom shall be allowed." This legislative preclusion of appeal has been held to be unconstitutional. Hanson v. Town of Highland, 237 Ind. 516, 147 N.E.2d 221 (1958); City of Elkhart v. Minser, 211 Ind. 20, 5 N.E.2d 501 (1937).

[4]As to the scope of judicial review by the trial court, the court of appeals stated the following:

> [IND. CODE § 18-1-11-3 (Burns 1974)] provides that an appeal from an order dismissing a policeman shall be heard by the trial court *de novo.* However, it has been held that this is not literally true.

of appeals did not cite any persuasive authority supporting this disregard of the legislative command, and the opinion does not clearly reveal the court's reasons for refusing to apply the statute. As authority for its holding, the court cited *City of Mishawaka v. Stewart*[5] and *Kinzel v. Rettinger*.[6] However, neither case supports the decision of the court of appeals in *Gause*.

The supreme court in *Stewart* specifically said that it was deciding only two issues, neither of which dealt with the scope of judicial review in the trial court.[7] The court affirmed the trial court's order that the plaintiff be reinstated because the agency proceedings did not provide him due process. The scope of review in the trial court was not even remotely an issue in the case. *Kinzel* did not involve a statute mandating a de novo review in the trial court. It is not unusual for courts, as the court of appeals did in *Kinzel*, to establish substantial evidence as the appropriate scope of judicial review where there exists no legislation bearing on the issue. It is a far different matter to hold, as in *Gause*, that substantial evidence constitutes the appropriate scope of judicial review where a statute provides that review should be de novo.

Our Supreme Court in City of Mishawaka v. Stewart (1974), 310 N.E.2d 65, at 68-69, stated that: "This has been held to mean, not that the issues at the hearing before the board are heard and determined anew, but rather that new issues are formed and determined.

"'. . . a review or appeal to the courts from an administrative order or decision is limited to a consideration of whether or not the order was made in conformity with proper legal procedure, is based upon substantial evidence, and does not violate any constitutional, statutory, or legal principle. . . .' State ex rel. Public Service Commission v. Boone Circuit Court, etc. (1956), 236 Ind. 202, 211, 138 N.E.2d 4, 8.

"Insofar as the findings of fact by an administrative board are concerned, the reviewing court is bound by them, if they are supported by the evidence. It may not substitute its judgment for that of the board. Kinzel v. Rettinger (1972), Ind. App., 277 N.E.2d 913." 317 N.E.2d at 890.

[5]310 N.E.2d 65 (Ind. 1974), *noted in* Taylor, *Administrative Law, 1974 Survey of Indiana Law*, 8 IND. L. REV. 12, 17-19 (1974).

[6]151 Ind. App. 119, 277 N.E.2d 913 (1972).

[7]The court stated as follows the issues it felt to be pertinent:

I. Must a litigant . . . file a petition for rehearing within ten days of the decision of the trial court as a prerequisite to perfecting an appeal to the Court of Appeals?

II. Were the "due process" rights of the petitioner, as guaranteed by the Fourteenth Amendment to the Constitution of the United States and by Article I, Section 12 of the Constitution of Indiana, violated by virtue of the City Attorney, in his capacity as a member of the Board of Public Works and Safety, participating as a voting member thereof in determining the disciplinary issue before it, while

One Indiana Supreme Court case, *Uhlir v. Ritz*,[8] supports the conclusion reached by the court of appeals in *Gause*, but the rationale of the *Uhlir* opinion is no stronger than that of *Gause*. The Indiana Insurance Commissioner revoked a bail bondsman license. An Indiana statute provided that the commissioner's order could be appealed to the circuit court and that "such appeal shall be heard de novo."[9] The supreme court held that in conducting a review under the statute, a circuit court "may negate that finding only if, based upon the evidence as a whole, the finding of fact was (1) arbitrary, (2) capricious, (3) an abuse of discretion, (4) unsupported by substantial evidence or (5) in excess of statutory authority."[10] This statement of the test of the scope of judicial review comes from the Administrative Adjudication Act[11] despite the court's explicit recognition that the

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also presenting the case against the petitioner?

310 N.E.2d at 66.

[8]255 Ind. 342, 264 N.E.2d 312 (1970).

[9]IND. CODE § 35-4-5-24 (Burns 1975).

[10]255 Ind. at 345, 264 N.E.2d at 314.

[11]The Administrative Adjudication Act, IND. CODE §§ 4-22-1-1 *et seq.* (Burns 1974). Section 4-22-1-18 of the Act provides:

> On such judicial review such court shall not try or determine said cause de novo, but the facts shall be considered and determined exclusively upon the record filed with said court pursuant to this act [4-22-1-1 — 4-22-1-30].
>
> On such judicial review, if the agency has complied with the procedural requirements of this act, and its finding, 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:
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> (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
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> (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.
>
> Said court in affirming or setting aside the decision or determination of the agency shall enter its written findings of facts, which may be informal but which shall encompass the relevant facts shown by the record, and enter of record its written decision and order or judgment.

statute did not apply to the case.[12] As to why do novo does not really mean de novo, the court suggested that constitutional principles of separation of powers were involved.[13]

Public Service Commission v. City of Indianapolis[14] most clearly explains the court's rationale in *Uhlir*. A statute provided for a de novo appeal to the circuit court of rate-making decisions of the Public Service Commission.[15] The court held that a de novo review was constitutionally impermissible. Review should only determine whether the decision was supported by substantial evidence. The court reasoned that the statutory command should be disregarded because the principles of separation of powers do not allow the legislature constitutionally to delegate *legislative* power to the judicial branch.[16] The legislative

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[12]255 Ind. at 344, 264 N.E.2d at 313-14.

> While it does not apply in bail license cases, the Administrative Adjudication and Court Review Act, passed in part to provide a method of court review of certain *other* administrative actions, shows the legislature's awareness of our proper field of activity.

Id. (emphasis supplied by the court and citations omitted).

[13]The *Uhlir* court analyzed the constitutionality of de novo review as follows:

> In the case at hand a special statute on court review, [IND. CODE § 35-4-5-24 (Burns 1975)], was enacted. It states that a review "de novo" of a license revocation may be secured. It is the term "de novo" which must concern us. While in the usual sense of that phrase one might envisage a complete retrial of the issues involved, our constitutional relationship with the other branches of government precludes such a review. Our legislature is aware of our duty and its scope and we will not attach to its language the innuendo that it wishes our courts to exceed the bounds of proper re-examination. Even if such was clearly mandated, we could proceed only so far in such reviews as the dictates of constitutional law permit.

255 Ind. at 345, 264 N.E.2d at 314.

[14]235 Ind. 70, 131 N.E.2d 308 (1956), *cited in* Uhlir v. Ritz, 255 Ind. at 345, 264 N.E.2d at 314. In addition to *City of Indianapolis*, the *Uhlir* court cited two other cases in support of its decision. City of Evansville v. Nelson, 245 Ind. 430, 199 N.E.2d 703 (1964) (citing *City of Indianapolis*, and reciting the rule that de novo review of an administrative decision is constitutionally impermissible but not offering any further rationale); Department of Financial Inst. v. State Bank, 253 Ind. 172, 252 N.E.2d 248 (1969) (involving a review under the Indiana Administrative Adjudication Act which specifically provides that trial courts should not hear the review de novo). *See* note 11 *supra*.

[15]IND. CODE § 8-1-2-6(b) (Burns 1973).

> Any single municipality or any ten [10] consumers or any utility affected by a rate order may within thirty [30] days from the rendition thereof by the Commission take an appeal de novo to the circuit court . . . .

[16]Legislative power can be delegated to an administrative agency or the executive branch provided that the delegation is accompanied by ade-

power in question was the power to set utility rates. A de novo review implies judicial fact finding and a subsequent decree setting utility rates. These activities clearly are in the nature of rate making. When the legislature properly delegated these powers, it reserved them to the administrative agency. Therefore, the substantial evidence test properly limits the scope of review in such cases.[17]

Given the valid principle in *City of Indianapolis* that *legislative* functions may not be delegated to the judicial branch, it does not follow that *judicial* functions cannot be delegated to the judicial branch. Since separation of powers constitutes the source of the doctrine, the distinction between legislative and judicial functions is critical. The Indiana Constitution unequivocally provides that the legislature controls the jurisdiction of the courts. Several provisions in article 7 deal with this subject. Most directly on point with respect to *Gause* is section 8, which provides that "[t]he Circuit Courts shall have such civil and criminal jurisdiction as may be prescribed by law."[18] In construing article 7, section 8 of the Indiana Constitution, the supreme court has always declared the obvious: the General Assembly has the power to regulate the jurisdiction of the circuit courts.[19] Since the

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quate standards. *See* Orbison v. Welsh, 242 Ind. 385, 179 N.E.2d 727 (1962); Ennis v. State Highway Comm'n, 231 Ind. 311, 108 N.E.2d 687 (1952); Benton County Council v. State *ex rel.* Sparks, 224 Ind. 114, 65 N.E.2d 116 (1946); Kryder v. State, 214 Ind. 419, 15 N.E.2d 386 (1938); Blue v. Beach, 155 Ind. 121, 56 N.E. 89 (1900).

[17]The *City of Indianapolis* court analyzed the issue of separation of powers as follows:

> The "substantial evidence" rule, in statutory appeals of this kind, leaves the function of fact-finding and rate-making with the Commission, where it belongs, and does not attempt to make it a responsibility or duty of the court, where it does not belong.
>
> In the first place, rate-making is a legislative, not a judicial function, and even if a statute attempted to lodge such power in a court it would be unconstitutional. Although we have a constitutional system of government in which the judiciary is said to be supreme in determining the jurisdiction and limits on the powers of the other branches of the government, as fixed by the constitution and laws, yet this supremacy does not extend to the point where we may substitute our judgment for, or control the discretionary action of the executive or legislative branches, so long as their action is within the sphere and jurisdiction fixed by the statutes and constitution.

235 Ind. at 81, 131 N.E.2d at 312.

[18]Prior to an amendment which was effective on November 3, 1970, this section read: "The Circuit Courts shall each consist of one judge, and shall have such civil and criminal jurisdiction as may be prescribed by law."

[19]*See* State *ex rel.* Palmer v. Circuit Court, 244 Ind. 297, 192 N.E.2d 625 (1963); State *ex rel.* Bradshaw v. Probate Court, 225 Ind. 268, 73 N.E.2d

judicial function could be performed by the circuit court in the first instance where an administrative agency is not involved, surely separation of powers does not prohibit a legislative scheme, established under section 8, which contemplates a de novo judicial determination after an administrative proceeding.[20]

The court in *Gause* properly disallowed a de novo review only if the General Assembly required a de novo review in the circuit court of a legislative function. It seems clear that the activity being reviewed in *Gause* was actually a judicial function. In *In re Northwestern Indiana Telephone Co.*,[21] the Indiana Supreme Court had previously recognized the distinction between authorizing a judicial review de novo of a judicial function and a judicial review de novo of a legislative function, holding that the latter was unconstitutional. The court quoted from an opinion of the United States Supreme Court as properly stating the distinction between judicial and legislative functions: "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power."[22] Under this definition, the Gary Police Civil Service Commission undertook a judicial function regarding Glenn Gause. At issue were Gause's commission of specific violations of the rules of the Gary Police Department as they then existed and, if guilt was found, the penalty to be invoked. The circuit court could have made these kinds of decisions in the first instance.

The Indiana Supreme Court should recognize the distinction between review of legislative and review of judicial functions. When the subject of judicial review of an administrative decision

769 (1947); State *ex rel.* Gannon v. Lake Circuit Court, 223 Ind. 375, 61 N.E.2d 168 (1945); Board of Comm'rs v. Albright, 168 Ind. 564, 81 N.E. 578 (1907). *But cf.* State *ex rel.* County Welfare Bd. v. Starke Circuit Court, 238 Ind. 35, 39, 147 N.E.2d 585, 587 (1957) (the legislature may confer upon judges powers that are not strictly of a judicial character).

[20]Some of the opinions discussed herein give policy reasons for not providing de novo review of administrative decisions. There are in fact valid policy reasons, such as administrative and judicial efficiency, which make de novo review usually inappropriate. Such policy decisions, however, are properly left to the General Assembly. They cannot support a court's refusal to exercise the de novo jurisdiction required by the General Assembly. The constitutional provision of article 7, section 8, that the General Assembly can regulate the jurisdiction of the circuit court, overrides the court's views regarding the policy considerations of the appropriate scope of judicial review.

[21]201 Ind. 667, 171 N.E. 65 (1930).

[22]*Id.* at 684, 171 N.E. at 71, *quoting from* Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908).

involves a legislative function, separation of powers may properly preclude a de novo review. However, where the subject of the review involves a judicial function, clearly the scope of judicial review lies within the absolute control of the Indiana General Assembly under article 7, section 8 of the Indiana Constitution. The General Assembly's decision should be respected.[23]

B. Standing to Secure Review

The Second District Court of Appeals considered the requirements for standing to challenge Indiana administrative rulings in *Stout v. Mercer*.[24] *Stout* involved an appeal from a decision of the Clay County Board of Zoning Appeals.[25] The Stouts obtained a variance from the board to place a mobile home on land in a residential zone. The Mercers, owners of property adjoining that on which the mobile home was to be placed, filed a petition with the circuit court for a writ of certiorari; upon trial, the circuit court reversed the decision of the board. On appeal the Stouts argued that the Mercers lacked standing to challenge the board's action because of their failure to appear and object at the variance hearing.[26] The court rejected this contention, holding that, notwithstanding their failure to appear previously, the Mercers were persons aggrieved by the action of the board within the meaning of the statute.[27] The court reasoned that, as owners of adjoining property, the Mercers had a property interest which was legally affected by the grant of the variance, and thus they had standing to secure judicial review of the board's action.

In deciding that the Mercers had standing, the court ostensibly adhered to the doctrine of *McFarland v. Pierce*,[28] an 1897 case.

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[23]The 1975 Indiana General Assembly passed substantial amendments to the statutes which govern police and fire personnel in consolidated cities. The new amendments remove the "de novo" language from sections of the statutes which provide for appeal to the circuit or superior courts of a merit board decision. IND. CODE §§ 18-4-12-27, -28, -48 (Burns Supp. 1975), *amending id.* §§ 18-4-12-27, -28, -48 (Burns 1974).

[24]312 N.E.2d 515 (Ind. Ct. App. 1975).

[25]IND. CODE § 18-7-5-87 (Burns 1974) provides in part:

> Every decision of the board of zoning appeals shall be subject to review by certiorari.
>
> Any person or persons, firm or corporation jointly or severally aggrieved by any decision of the board of zoning appeals, may present to the circuit or superior court of the county in which the premises affected is [*sic*] located a petition duly verified, setting forth that such decision is illegal in whole or in part, and specifying the grounds of the illegality.

[26]312 N.E.2d at 517.

[27]*Id.* at 520.

[28]151 Ind. 546, 45 N.E. 706 (1897).

Under the *McFarland* test, in order to have standing to appeal an administrative procedure, an appellant must have a legal interest which would be enlarged or diminished by the outcome of the appeal.[29] However, since the *Stout* court did not elaborate upon its conclusion that the legal interest of adjoining or surrounding property owners may be affected by a variance, it is difficult to discern the character of the interest on which the court based its decision. Although a variance has no legal effect upon the manner or scope of exercise of the property interest of a neighbor, a variance can substantially affect the economic and aesthetic value in surrounding properties. It is arguable that the *Stout* court considered the possibility that economic injury to a property interest was the measure of standing, rather than the more demanding *McFarland* test that a legal interest must be enlarged or diminished.[30]

The court of appeals in *Stout* found it necessary to distinguish the instant appeal from *Fidelity Trust Co. v. Downing.*[31] In so doing, the court recognized an interest of neighboring property owners denied by the Indiana Supreme Court in *Fidelity.* In *Fidelity,* also a zoning appeal case, the court construed the "persons aggrieved" language in a similar zoning statute.[32] The defendant asked the Indiana Supreme Court to reverse a judgment obtained by the plaintiff below which enjoined reconstruction of a dilapidated restaurant stand. The stand, which the defendant sought to reconstruct following its collapse, was a nonconforming use established prior to enactment of the zoning ordinance.[33]

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> The word "aggrieved" in the statute refers to a substantial grievance, a denial of some personal or property right, or the imposition upon a party of a burden or obligation. To be "aggrieved" is to have a legal right, the infringement of which by the decree complained of will cause pecuniary injury. The appellant must have a legal interest which would be enlarged or diminished by the result of the appeal.

Id. at 548, 45 N.E. at 707, *quoted in* Stout v. Mercer, 312 N.E.2d 515, 518 (Ind. Ct. App. 1974) (citations omitted).

[30]"The use to which a tract of land is put may have a direct effect upon the value of surrounding properties." 312 N.E.2d at 520.

[31]224 Ind. 457, 68 N.E.2d 789 (1946).

[32]Ch. 225, § 5, [1921] Ind. Acts 660 (repealed 1947). The language of the 1921 statute under consideration in *Fidelity* is almost identical to that in IND. CODE § 18-7-5-87 (Burns 1974), quoted at note 25 *supra.*

[33]

> [The ordinance] provides among other things that a nonconforming use existing at the time of its passage may be continued, but that a building arranged or designed or devoted to a nonconforming use at the time of the passage of the ordinance may not be *reconstructed*

At issue was whether or not the plaintiff had exhausted his administrative remedy prior to seeking injunctive relief.[34] The court reasoned that since the administrative remedy was available only to persons aggrieved by the action of the building official, that remedy was not available to the plaintiff, who was merely a property owner within the same zoning district.[35] In holding that a property owner within the same zoning district is not necessarily a person aggrieved, the court expressly limited the breadth of the statutory term to persons directly affected by the action of the administrative official or board charged with enforcing the ordinance.[36]

The *Stout* court distinguished *Fidelity* as involving the mere ministerial act of issuing a building permit, whereas the challenged action in *Stout* was the granting of a variance. The granting of a variance was considered to be a legislative act which affected legal property interests differently and directly.[37] Such a distinction, however, appears more illusory than real from the vantage point of a property owner in the vicinity of the affected property. Regardless of how the administrative action is classified, the residential property owner in the one case finds a revived business operating in his residential zone and in the other a mobile home installed on an adjacent lot. If there is a diminution of a legal interest of the property owner in the one case, there is a diminution in the other.[38]

> or *structurally altered* to an extent exceeding in aggregate cost during any 10-year period 60 per cent of the assessed value of the building . . . .

224 Ind. at 459-60, 68 N.E.2d at 790 (emphasis supplied by the court).

[34] *Id.* at 462. *See* note 42 *infra.*

[35] The term "zoning district" refers to the character of use, not to a geographical region. "The word 'district,' as used in this act, does not necessarily mean contiguous territory, but several parts of the city may be classified as one district, although not contiguous." Ch. 225, § 1, [1921] Ind. Acts 660 (repealed 1947). The opinion does not reveal where appellees resided in the district relative to the premises in question.

[36] The pertinent language of the *Fidelity* court is as follows:

> The appellees were not parties to the building permit. . . . It would seem to us that the term *person aggrieved* is not broad enough to include anyone other than the person directly affected by the action of the administrative official or the board charged with the enforcement of the ordinance. To hold otherwise would be to hold that every property owner in any particular district would be compelled to take notice of every action of such officer or board.

224 Ind. at 463, 68 N.E.2d at 791 (emphasis in original).

[37] 312 N.E.2d at 519.

[38] *Fidelity* has been relied upon to deny standing to city officials. *See* City of Hammond v. Board of Zoning Appeals, 152 Ind. App. 480, 284 N.E.2d

It appears that the Second District Court of Appeals has expanded the standing doctrine in Indiana to encompass nonlegal interests.[39] Just as the United States Supreme Court rejected the "private legal interest" test for standing propounded in *Perkins v. Lukens Steel Co.*[40] in favor of more liberal requirements, the Indiana Court of Appeals may be embarking upon a similar course in state doctrine. The federal doctrine has developed considerably since *Perkins* was rejected, standing in recent years having been granted to parties sustaining injury to economic interests as well as to " 'aesthetic, conservational, and recreational' . . . values."[41] These economic and noneconomic interests are distinct from whatever legal interest of the parties is affected by the challenged administrative action. It is clear that the Mercers suffered economic and aesthetic injury as a result of the variance and, therefore, under the expanded federal notion of standing, would have had standing to challenge the action of the Board of Zoning Appeals.

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119 (1972); Metropolitan Dev. Comm'n v. Cullison, 151 Ind. App. 48, 277 N.E.2d 905 (1972).

[39] *Cf.* City of Hammond v. Board of Zoning Appeals, 152 Ind. App. 480, 284 N.E.2d 119 (1972). The Third District Court of Appeals denied standing to the city of Hammond to challenge a zoning ordinance because it failed "to demonstrate a personal or pecuniary interest which would qualify it as an 'aggrieved' party within the meaning of the statute." *Id.* at 489, 248 N.E.2d at 126. The statute involved, Indiana Code section 18-7-5-87, is quoted at note 25 *supra.*

[40] 310 U.S. 113 (1940). In *Perkins* the United States Supreme Court stated:

> Respondents, to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of law.

Id. at 125.

[41] Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 154 (1970), *quoting from* Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608, 616 (2d Cir. 1965), *cert. denied,* 384 U.S. 941 (1966); Barlow v. Collins, 397 U.S. 159, 164 (1970). The *Data Processing/Barlow* requirement for standing to obtain judicial review has two elements: (1) The appellant must suffer injury in fact, either economic or otherwise, and (2) the appellant must be "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 397 U.S. at 153. *Accord,* Stanton v. Ash, 384 F. Supp. 625 (S.D. Ind. 1974). The *Stanton* court held that the plaintiff, an Indiana motorist, did not have standing as a citizen, taxpayer, or person aggrieved under the Federal Administrative Procedure Act, 5 U.S.C. § 702 (1970), to challenge the impoundment of federal highway funds. Plaintiff's interest was no different from the generalized stake of all citizens in the improvement of highways and his alleged injury was not sufficiently concrete.

C. *Exhaustion of Administrative Remedies*

The Indiana Court of Appeals decided two cases involving the exhaustion of administrative remedies.[42] In *Brutus v. Wright*[43] a taxpayer brought a public action in circuit court to enjoin new construction at a public high school. The plaintiff challenged the actions of the defendant school board regarding the wisdom of appropriating funds for the new construction, the propriety of the bidding procedures utilized, and the legality of proposing to issue bonds to finance the project. Indiana Code section 34-4-17-8, a part of the chapter authorizing the public actions involved in *Brutus*, requires (1) that a plaintiff exhaust all administrative remedies before commencing a law suit and (2) that the plaintiff not raise any issue which he could have but did not raise at a public hearing.[44] The circuit court granted the defendant's motion for summary judgment on the grounds that the plaintiff had not exhausted his administrative remedies as required by the statute. The Third District Court of Appeals affirmed the summary judgment as to the plaintiff's challenges to the appropriation of funds for construction and the issuance of bonds but reversed the summary judgment on the claim of improper bidding procedures.

As required by statute, the school board held a public hearing on the appropriation to allow taxpayers an opportunity to be heard. A nay vote by one of the board members was the only objection shown by the minutes. The plaintiff asserted that this nay vote constituted an objection by a taxpayer which would satisfy the exhaustion of administrative remedies requirement. The court stated that a simple general objection without statement of reasons is insufficient to preserve an issue for a public law suit and that a vote by a board member cannot be deemed a remonstrance by a taxpayer. The plaintiff was required to challenge the appropria-

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[42]The principle that statutory administrative remedies must be exhausted before judicial review can be obtained has been frequently recognized in Indiana. Hooser v. Baltimore & O.R.R., 279 F.2d 197 (7th Cir. 1960) (grievance procedures of a collective bargaining agreement must be exhausted before judicial relief may be sought); City of East Chicago v. Sinclair Refining Co., 232 Ind. 295, 111 N.E.2d 459 (1953) (petitioner seeking a variance from a zoning ordinance must seek relief from the Board of Zoning Appeals); Evansville City Coach Lines v. Rawlings, 229 Ind. 552, 99 N.E.2d 597 (1951) (tariff complaints should be directed to the Indiana Public Service Commission which then is proper party to seek compliance). *See* Fuchs, *Judicial Control of Administrative Agencies in Indiana: II*, 28 IND. L.J. 293, 297 (1953).

[43]324 N.E.2d 165 (Ind. Ct. App. 1975).

[44]IND. CODE § 34-4-17-8 (Burns 1973).

tion at the public hearing; his failure to do so barred his suit attacking the appropriation.[45]

The Indiana Code provides upon the petition of ten or more taxpayers for an appeal to the State Board of Tax Commissioners challenging the issuance of bonds.[46] The *Brutus* court held that the plaintiff could not maintain his suit because the record did not show that he had attempted to exhaust this administrative remedy.[47] The court thus plainly requires some effort to obtain review by the State Board of Tax Commissioners of the issuance of bonds before judicial review will be allowed. However, the opinion leaves unanswered exactly what efforts are necessary. Since the appeal can be taken only by ten or more taxpayers, the remedy cannot be exhausted by an individual taxpayer. It is not a common requirement that a plaintiff exhaust administrative remedies which he cannot exhaust alone.[48] The opinion does not indicate whether failure to exhaust the statutory remedy by a single taxpayer, who sought but was unable to obtain nine other taxpayers to join the petition, would be a bar to judicial review. The appellate court reversed the summary judgment against the plaintiff's challenge to the bidding procedures.[49] Since the court did not discuss the exhaustion of administrative remedies with respect to this claim, it appears that the bidding procedures need not be challenged at the required public hearing or in any other administrative proceeding.

The second decision dealing with exhaustion of administrative remedies has a more general application. In *State v. Frye*[50] the First District Court of Appeals required that the plaintiff exhaust administrative remedies before seeking a court order that an agency comply with a request for discovery. Frye, a former chaplain at the Rockville Training Center, a Department of Corrections institution, was processing his grievance appeal before the State Employees' Appeals Commission.[51] In preparing the appeal, Frye's

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[45]324 N.E.2d at 168-69.

[46]IND. CODE § 6-1-1-25 (Burns 1972).

[47]324 N.E.2d at 169.

[48]An administrative remedy which requires for exhaustion the cooperative efforts of numerous individuals might be held to be inadequate and, therefore, not mandatory. *See* McNeese v. Board of Educ., 373 U.S. 668 (1963), in which the United States Supreme Court held inadequate an Illinois administrative remedy requiring that the lesser of 50 residents of a school district, or 10 percent, file a complaint alleging school segregation. *See also* K. DAVIS, ADMINISTRATIVE LAW TEXT § 20.97, at 392 (3d ed. 1972).

[49]324 N.E.2d at 171.

[50]315 N.E.2d 399 (Ind. Ct. App. 1974).

[51]The powers and duties of the State Employees Appeals Commission are codified at IND. CODE §§ 4-15-1.5-1 to -8 (Burns 1974). The commission

attorney submitted interrogatories to the Rockville Training Center pursuant to Indiana Rule of Trial Procedure 28(F),[52] which applies the civil discovery rules to administrative proceedings. When the training center refused to answer the interrogatories, the plaintiff obtained an order from the circuit court that the interrogatories be answered. The Center appealed.

The court of appeals reversed, holding that the circuit court had the power to issue the enforcement order to the Center but that the order was premature where the petitioner had not previously sought an order compelling discovery from the State Employees' Appeals Commission. The opinion suggests that the petitioner must seek answers to his interrogatories from the Department of Corrections before obtaining court-ordered discovery.[53] If this is the case, Frye may have failed to exhaust a second administrative remedy.

D. Administrative Procedures

In *Indiana Department of Public Welfare v. DeVoux*,[54] the Second District Court of Appeals held that the Indiana Department of Public Welfare, in ruling on the eligibility of an applicant for Aid to the Permanently and Totally Disabled (APTD),[55] must base its decision on the record adduced at the hearing[56] and must give the applicant an opportunity to confront all the evidence considered. The court found the absence of these requirements in the department's regulations to be a notable, but not significant, omission. The omission was not significant because these elements of a fair hearing were found to be required by the regulations of the

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is empowered to hear appeals from decisions by the state personnel director regarding employee complaints. The complaint procedure is set forth at IND. CODE § 4-15-2-35 (Burns 1974).

[52]IND. R. TR. P. 28(F) provides in part:

> Whenever a hearing before an administrative agency is required, parties shall be entitled to all the discovery provisions of Rules 26 through 37. Protective and enforcement orders shall be issued by a court of the county where discovery is being made or where the hearing is to be held.

[53]315 N.E.2d at 403.

[54]314 N.E.2d 79 (Ind. Ct. App. 1974).

[55]Act of Aug. 28, 1950, ch. 809, § 351, 64 Stat. 555 (repealed, effective 1974). Title III, section 303(a) and (b) of the Social Security Amendments of 1972 provided for the repeal of the APTD program, effective January 1, 1974. However, the repeal does not apply to the Virgin Islands, Puerto Rico, or Guam.

[56]At the time of DeVoux's application for aid, the state plan was required to grant "a fair hearing before the State agency to any individual whose claim for aid . . . is denied." Act of Aug. 28, 1950, ch. 809, § 351, 64 Stat. 555 (repealed, effective 1974).

United States Department of Health, Education, and Welfare.[57] The federal regulations governed the state hearing by reason of the supremacy clause of the United States Constitution.

The disposition of the case drew a divided court. The majority held that the superior court, where judicial review commenced, should dispose of the case by remanding it to the Department of Public Welfare for further consideration. The majority candidly based its decision on the Indiana Administrative Adjudication Act[58] despite their awareness of the explicit exclusion of the "*'determination of eligibility and need for public assistance under the welfare laws'*" from coverage of the Act.[59] Although no specific statute governed the scope of review in this type of case and although the Act did not apply, "the standard and scope of judicial review set forth in that Act circumscribes the judgmental authority of the immediate reviewing court in such situations."[60] Since the court chose to look to the Act for guidance, it might have gone further and cited the entire relevant language of the Act, which empowers the reviewing court to either remand the case or compel agency action unlawfully withheld.[61]

Although the majority's rationale is unusual, the decision is not a bad one. The error at the administrative level was procedural. The majority simply seems to be saying that where procedural error occurs the case should be remanded to afford the agency an opportunity to correct the error. Hopefully, though, it will not become common practice for Indiana courts to apply a statute to a situation specifically excluded from the coverage of the statute—especially where the court applies only a selected part of the statute.

Judge White based his dissent in *DeVoux* principally on the standard of review of the court of appeals. As noted above, the Act authorizes the immediate reviewing court to compel agency action unlawfully withheld as an alternative to remanding the case to the agency. Judge White stated that the superior court did compel agency action. If the superior court was governed by the Act, it acted in accordance with its terms.

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[57]45 C.F.R. § 205.10 (1974).

[58]IND. CODE §§ 4-22-1-1 *et seq.* (Burns 1974) [hereinafter referred to as the Act].

[59]314 N.E.2d at 86 n.5, *quoting from* IND. CODE § 4-22-1-2 (Burns 1974) (emphasis supplied by the court).

[60]314 N.E.2d at 86.

[61]IND. CODE § 4-22-1-18 (Burns 1974) provides in pertinent part: "The court may remand the case to the agency for further proceedings and may compel agency action unlawfully withheld or unreasonably delayed."

In *Taxpayers Lobby of Indiana, Inc. v. Orr*,[62] the Indiana Supreme Court considered a judicial challenge to Governor Bowen's tax package. The tax package increased the state sales tax from two percent to four percent and created a new exemption from the tax for sales of food for human consumption. The plaintiff alleged that the food exemption constituted an unconstitutional delegation of legislative authority because it did not contain adequate standards.[63] The court stated the general rule as follows:

> The only limitation on the delegation of authority to administrative bodies is that reasonable standards must be established to guide the administrative body. The standards, however, only need to be specific as the circumstances permit, considering the purpose to be accomplished by the statute.[64]

The opinion suggests that "workable" standards meet the specificity requirement. In *Orr* the court found as workable standards two lists, detailing food items which are included in the exemption and those which are excluded.[65] The lists apparently constituted standards by example. They serve as a guide as to whether a specific item should be included or excluded.

In *Jenkins v. Hatcher*[66] the plaintiff was demoted from battalion chief of the Gary Fire Department. He alleged that the demotion without a hearing violated his due process rights under the fourteenth amendment to the United States Constitution and a provision of the Indiana Code.[67] A divided Third District Court of Appeals affirmed the circuit court's summary judgment for the

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[62]311 N.E.2d 814 (Ind. 1974).

[63]*See* note 16 *supra*.

[64]311 N.E.2d at 819 (citations omitted).

[65]IND. CODE § 6-2-1-39(b)(20) (Burns Supp. 1975).

[66]322 N.E.2d 117 (Ind. Ct. App. 1975).

[67]Jenkins' complaint alleged that no evidence was presented supporting his demotion so that his demotion violated both the due process clause of the fourteenth amendment and Indiana Code section 18-1-11-3, which provides in relevant part:

> Every member of the fire and police forces . . . 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 . . . and after opportunity for hearing is given, if demanded, and the written reasons for such removal shall be entered upon the records of such board. . . . [U]pon a finding and decision of the board that any such member has been or is guilty of neglect of duty, or of the violation of rules . . . such commissioners shall have power to punish the offending party by reprimand, forfeiture, suspension without pay, dismissal, or by reducing him or her to a lower grade and pay.

IND. CODE § 18-1-11-3 (Burns 1974).

defendant. The majority held that the statute relied upon by the plaintiff applied to "removal" but not to demotion. Judge Staton, dissenting, contended that the plaintiff was statutorily entitled to a hearing before being demoted. More importantly, Judge Staton argued that the plaintiff's complaint properly alleged a due process issue, which the circuit court and the majority in the appellate court ignored. Judge Staton would have held that the plaintiff's interest in maintaining his position as battalion chief was an interest protected by the fourteenth amendment and that this interest could have been infringed upon only in a manner consistent with due process.[68]

E. Municipal Corporations

In *Ballard v. Board of Trustees*,[69] the plaintiff, a retired policeman, drew a disability pension from the Evansville police pension fund until the time of his conviction in Arizona on a charge of second degree murder. The board of trustees of the fund then terminated his pension under the Indiana Code provision which permits the board to discontinue or reduce the benefits of any person convicted of a felony.[70] Plaintiff challenged the provision, alleging that it constituted a "forfeiture of estate" in violation of article 1, section 30 of the Indiana Constitution.[71] Though the court of appeals agreed with the plaintiff, the Indiana Supreme Court reversed.

The court gave two reasons to support its holding that the provision did not constitute a forfeiture of estate. First, the individual employee had no choice but to contribute part of his salary to the pension plan. Under such an involuntary plan, an individual has no vested right in the money. Therefore, according to the qualifications in the statute, the trustee at his discretion could divest

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[68]"Jenkins' statutorily created right to be free from arbitrary state action adversely affecting his public employment is an interest protected by the Fourteenth Amendment." 322 N.E.2d at 124 (Staton, J., dissenting) (citations omitted). *See* Board of Regents v. Roth, 408 U.S. 564, 569-70 (1972) ("When protected interests are implicated, the right to some kind of hearing is paramount."); Bell v. Burson, 402 U.S. 535, 542 (1971); Boddie v. Connecticut, 401 U.S. 371, 379 (1971). *See also* note 78 *infra*.

[69]324 N.E.2d 813 (Ind. 1975).

[70]IND. CODE § 19-1-24-5 (Burns 1974). The provision reads in relevant part as follows:

> Whenever any person who shall have received any benefit from such fund shall be convicted of a felony . . . said board may upon notice to any such person discontinue or reduce in its discretion any payments that might otherwise accrue thereafter . . . .

[71]"No conviction shall work corruption of blood, or forfeiture of estate." IND. CONST. art 7, § 20.

the plaintiff of any interest he had in the plan.[72] The court based this part of its decision upon the antiquated and generally discredited right-privilege distinction.[73] Although the court called the pension a "gratuity," the same rationale would apply if the court had termed it a privilege. As is commonly found in right-privilege cases, the court stated that "[plaintiff] could have refused the proferred employment."[74] Since it is a gratuity-privilege, and not a right, the pension may be given or withheld on such terms as the state dictates.

As a second and sounder basis for its holding, the court found that the termination of the pension did not constitute a forfeiture of estate because the statute did not provide for forfeiture and because the pension probably did not constitute an estate at all.[75] This reasoning met the plaintiff's challenge squarely and sufficiently disposed of the case. The inclusion in the opinion of language characterizing the pension as a gratuity was thus unfortunate. It is a long outdated principle that a pension to which an employee has contributed throughout his career comprises a gratuity, to be granted or withheld according to conditions unilaterally imposed by the state, merely because the employee could refuse to accept proferred employment. The administration of the pension plan by a state agency should be subject to constitutional restraint under *Board of Regents v. Roth*[76] and *Perry v. Sindermann*.[77] This would require recognition that a plaintiff's interest in a pension constitutes property that is subject to the due process protections of the fourteenth amendment.[78] Such recognition would not change

[72]324 N.E.2d at 815.

[73]*See* Board of Regents v. Roth, 408 U.S. 564, 571 n.9 (1972), for a discussion obliterating the right-privilege distinction.

[74]324 N.E.2d at 816.

[75]*Id.* at 816-17.

[76]408 U.S. 564 (1972).

[77]408 U.S. 593 (1972).

[78]As the Supreme Court noted in *Roth*, "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." 408 U.S. at 569. The range of property interests is broad and extends well beyond ownership of real estate, chattels or money. *See, e.g.*, Perry v. Sindermann, 408 U.S. 593 (1972) (nontenured college professor); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare recipients). The property interest arises from "a legitimate claim of entitlement to [the benefit]." 408 U.S. at 577. But there must be "more than an abstract need or desire for [the benefit]. . . . more than a unilateral expectation . . . ." *Id.* As to the requirements of a hearing and the balancing of the interests involved, the *Roth* Court stated: "Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of hearing . . . " *Id.* at 570 n.7. " 'The formality and procedural requisites for the hearing can vary, depending upon the importance

the outcome of *Ballard* since the court found that the plaintiff had no property interest at all.

In *Ott v. Johnson*[79] the Supreme Court of Indiana interpreted a provision of a town ordinance defining a "mobile dwelling."[80] The court of appeals had affirmed the circuit court's holding that the unit in dispute did not come within the definition contained in the ordinance. The supreme court reversed, saying that since the language of the ordinance was "clear and unambiguous," it was improper for the circuit court and the court of appeals to look to the intent of the city council for assistance in interpreting the ordinance.

Two cases considered aspects of statutory annexation procedures. In *Harris v. City of Muncie*,[81] the Second District Court of Appeals held that Indiana Code section 18-5-10-25 requires that a remonstrance against an annexation must be sustained regardless of whether the affected area is rural or urban if the annexing city has not developed a fiscal plan and established a definite policy for providing services to that area.[82] The city contended that the statute

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of the interests involved and the nature of the subsequent proceedings.'" *Id.* at 570 n.8, *quoting from* Boddie v. Connecticut, 401 U.S. 371, 378 (1971).

[79]319 N.E.2d 622 (Ind. 1974).

[80]Pierceton, Ind., Town Ordinance No. 114 (1967), *quoted at* 319 N.E.2d 623, defines "mobile home" as follows:

> A mobile dwelling unit shall name [*sic*] living quarters such as house trailers . . . which may be moved by tractor, truck, automobile or horses or can be carried, transported or towed from one place to another without the use of regular house moving equipment . . . .

The mobile home in question was a unit 12 feet wide and 61 feet long and was constructed at the factory as a single and complete unit equipped with three axles, six automobile wheels, brakes, brake lights, traveling lights, and a tongue for towing. The unit so equipped was towed by a truck from the mobile home park to Appellee's lot, where the tongue, wheels and axles were removed and the unit placed on concrete block walls.

[81]325 N.E.2d 208 (Ind. Ct. App. 1975).

[82]*Id.* at 209-10. IND. CODE § 18-5-10-25 (Burns 1974) provides in part:

> The judge of the circuit or superior court shall, upon the date fixed, proceed to hear and determine the appeal without the intervention of jury, and shall, without delay, give judgment upon the question of the annexation according to the evidence which either party may introduce. If the evidence establishes that:
>
> (a) The resident population of the area sought to be annexed is equal to at least three [3] persons for each acre of land included within its boundaries or that the land is zoned for commercial, business or industrial uses or that sixty per cent [60%] of the land therein is subdivided; and

does not require such a fiscal plan when the area to be annexed meets the alternative statutory standard that the area be bordered on one-fourth of its boundaries by the city and be needed by the city for future development.[83] The court rejected that contention and held that the land could not be annexed unless the city had met the requirement of developing a fiscal plan and policy to provide services to that area.[84]

In *Ensweiler v. City of Gary*,[85] plaintiff petitioned the Third District Court of Appeals to affirm its appellate jurisdiction on the basis of the Indiana Code provision that "pending the appeal, and during the time in which the appeal may be taken, territories sought to be annexed shall not be deemed a part of the annexing city."[86] As seen by the court of appeals, the issue involved whether the term "pending appeal" encompassed only proceedings conducted in trial courts or whether the phrase embraced the entire appellate process. In denying the application for extraordinary relief on the ground that an appropriate case for relief had not been presented, the court nevertheless held for the broader interpretation of "pending appeal."

(b) At least one-eighth [1/8] of the aggregate external boundaries of the territory sought to be annexed coincide with the boundaries of the annexing city; and

(c) The annexing city has developed a fiscal plan and has established a definite policy to furnish the territory to be annexed within a period of three [3] years, governmental and proprietary services substantially equivalent in standard and scope to the governmental and proprietary service furnished by the annexing city to other areas of the city which have characteristics of topography, patterns of land utilization and population density similar to the territory to be annexed; the court shall order the proposed annexation to take place notwithstanding the provisions of any other law of this state.

If, however, the evidence does not establish all three [3] of the foregoing factors the court shall sustain the remonstrance and deny annexation unless the area although not meeting the conditions of factor (a) supra is bordered on one-fourth [1/4] of its aggregate external boundaries by the boundaries of the city and is needed and can be used by the city for its future development in the reasonably near future, the court may order the proposed annexation to take place notwithstanding the provisions of any other law of this state. . . . Pending the appeal, and during the time within which the appeal may be taken, the territory sought to be annexed shall not be deemed a part of the annexing city.

[83]325 N.E.2d at 209.

[84]*Id.* at 212.

[85]325 N.E.2d 507 (Ind. Ct. App. 1975).

[86]IND. CODE § 18-5-10-25 (Burns 1974). *See* note 82 *supra*.