

first and second degree murder. Likewise, the new code does include new provisions such as the general attempt statute and the unlawful confinement statute which were enacted to fill certain apparent gaps or voids in the existing law.

When all of these changes and improvements are considered together, they appear to be sufficient to outweigh the various arguments that can be made against the new code. The code does contain a number of difficulties, as discussed above, but many of these can be remedied and the General Assembly has specifically deferred the effective date of the new code to provide for appropriate amendments. When these have been enacted and the code is finally effective, the General Assembly should then consider establishing an agency such as the Indiana Criminal Law Study Commission to continue the process of review and revision of the state's criminal laws. In this way, the state can keep its criminal code up to date and avoid the need to recodify the code again during the celebration of the nation's tricentennial.

II. Administrative Law

*Lewis A. Shaffer**

A. Scope of Judicial Review

One of the more interesting cases in the area of administrative law during the survey period was *City of Evansville v. Southern Indiana Gas & Electric Co.*,¹ which may indicate a new trend in the judicial review of administrative agency decisions in Indiana. Prior to *City of Evansville*, Indiana courts had adopted as the appropriate test of an agency's factual determination, whether there was substantial evidence in the administrative record to support the agency's finding.² However, many of the decisions which had explicitly discussed the method of determining substantiality had stated that the only evidence to be considered was that most

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The author wishes to thank Kathryn Wunsch for her assistance in preparing this discussion.

¹339 N.E.2d 562 (Ind. Ct. App. 1975).

²See, e.g., *Boone Co. Rural Elec. Membership Corp. v. Public Serv. Comm'n*, 239 Ind. 525, 159 N.E.2d 121 (1959); *Knox Co. Rural Elect. Membership Corp. v. Public Serv. Co.*, 139 Ind. App. 547, 213 N.E.2d 714 (1966); *Pennsylvania R.R. v. Town Bd. of Trustees*, 139 Ind. App. 216, 218 N.E.2d 171 (1966); *City of Terre Haute v. Terre Haute Water Works Corp.*, 133 Ind. App. 232, 180 N.E.2d 110 (1962).

supportive of the agency's findings.³ The language of these opinions indicated that the Indiana courts were at odds with the federal courts which, pursuant to *Universal Camera Corp. v. NLRB*,⁴ reviewed the record as a whole for substantial evidence, considering evidence opposing as well as supporting the agency's findings of fact.

In *City of Evansville*, the Second District Court of Appeals, deciding an appeal from a Public Service Commission order granting a rate increase to the petitioner electric company, carefully reviewed Indiana decisions⁵ construing the statutory standard of judicial review of Public Service Commission factual determinations.⁶ On the strength of these decisions, the court of appeals concluded that in reviewing Public Service Commission findings Indiana courts have indeed looked to the entire record, rather than merely to evidence supporting the agency findings.⁷ Recognizing

³See, e.g., *Ind. Educ. Emp. Relations Bd. v. Board of School Trustees*, 355 N.E.2d 269 (Ind. Ct. App. 1976); *Leonard v. Kraft Foods Co.*, 122 Ind. App. 131, 102 N.E.2d 512 (1951); *Kemble v. Aluminum Co. of America*, 120 Ind. App. 72, 90 N.E.2d 134 (1950). Cf. *Kelly v. Walker*, 316 N.E.2d 695 (Ind. Ct. App. 1974); *Kinzel v. Rettinger*, 151 Ind. App. 119, 277 N.E.2d 913 (1972). Many of the pre-*Kinzel* decisions holding that a reviewing court should consider only evidence most favorable to the agency's decision were workmen's compensation cases. Fuchs, *Judicial Control of Administrative Agencies In Indiana*: II, 28 IND. L.J. 293, 328 (1953). See IND. CODE § 22-3-4-8 (Burns 1974), which governs the review of workmen's compensation cases and provides that the Industrial Board's findings of fact are binding on the reviewing court. *But see Warren v. Indiana Tel. Co.*, 217 Ind. 93, 26 N.E.2d 399 (1940), a workmen's compensation appeal in which the court stated "the order will be set aside . . . the proof, taken as a whole, does not support the conclusion reached." *Id.* at 119, 26 N.E.2d at 409 (emphasis supplied).

⁴340 U.S. 474 (1951).

⁵See cases cited note 2 *supra*.

⁶IND. CODE § 8-1-3-1 (Burns 1971).

⁷339 N.E.2d at 571-72, citing cases cited at note 2 *supra*. It must be noted that in each of these cases, the courts merely stated the general rule that the standard of judicial review of administrative agency decisions is substantial evidence, without discussing whether the reviewing court should examine the record as a whole. See *Boone Co. Rural Elec. Membership Corp. v. Public Serv. Comm'n*, 239 Ind. at 530, 159 N.E.2d at 124; *Knox Co. Rural Elec. Membership Corp. v. Public Serv. Comm'n*, 139 Ind. App. at 554, 213 N.E.2d at 718; *Pennsylvania R.R. v. Town Bd. of Trustees*, 139 Ind. App. at 219, 218 N.E.2d at 173; *City of Terre Haute v. Terre Haute Water Works Corp.*, 133 Ind. App. at 244, 180 N.E.2d at 116. However, in each case the court actually considered evidence in opposition to as well as in support of the commission's findings. See *Boone Co. Rural Elec. Membership Corp. v. Public Serv. Comm'n*, 239 Ind. at 531, 159 N.E.2d at 125-26; *Knox Co. Rural Elec. Membership Corp. v. Public Serv. Comm'n*, 139 Ind. App. at 549, 213 N.E.2d at 715; *Pennsylvania R.R. v. Town Bd. of Trustees*, 139 Ind. App. at 223, 218 N.E.2d at 176; *City of Terre Haute v. Terre Haute Water Works Corp.*, 133 Ind. App. at 237, 180 N.E.2d at 113.

that “[j]udicial attempts to define the meaning of substantial evidence have met with less than unqualified success,”⁹ the court noted that the Indiana Supreme Court had adopted the pre-*Universal Camera* federal standard of substantial evidence in 1956.⁹ Then, relying on *Universal Camera*, the court concluded “that the substantial evidence standard authorizes a reviewing court to set aside Commission findings of fact when a review of the whole record clearly indicates that the agency’s decision lacks a reasonably sound basis of evidentiary support.”¹⁰

In assessing the potential impact of *City of Evansville* on Indiana law, several considerations are relevant. First, the court of appeals did not limit the *City of Evansville* scope of review to Public Service Commission decisions, since the opinion clearly states that under Indiana law the substantial evidence test is generally applicable to judicial review of administrative agencies.¹¹ Therefore, *City of Evansville* may affect the entire field of administrative law in the state. Secondly, the court of appeals did not address the issue of whether its holding alters the standard of review ostensibly followed by Indiana courts in the past.¹² The tenor of the opinion suggests that this was not an oversight,¹³ but an at-

⁹339 N.E.2d at 572. The court cites Professor Davis as possibly providing the “best analysis”:

The meaning of ‘substantial evidence’ is about as clear and about as vague as it should be; the main inquiry is whether on the record the agency could reasonably make the finding. . . . Despite the theory, the judges as a matter of practical fact have a good deal of elbow room to vary the intensity of review as they deem necessary or desirable in particular cases.

4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.01, at 118 (1958).

⁹339 N.E.2d at 572, quoting from *Public Serv. Comm’n v. City of Indianapolis*, 235 Ind. 70, 80-81, 131 N.E.2d 308, 312 (1956). In *City of Indianapolis* the Indiana Supreme Court relied on *Florida v. United States*, 292 U.S. 1 (1934), for the proposition that an agency’s “findings of fact supported by substantial evidence are not subject to review.” *Id.* at 12, quoted in 235 Ind. at 80-81, 131 N.E.2d at 312. Neither the United States Supreme Court in *Florida v. United States* nor the Indiana Supreme Court in *City of Indianapolis* discussed whether the reviewing court should look at the record as a whole in determining the substantiality of evidence.

¹⁰339 N.E.2d at 572. In a case decided after the survey period, the court of appeals reprinted in its opinion the entire section of *City of Evansville* dealing with the scope of review. See *L. S. Ayres & Co. v. Indianapolis Power & Light Co.*, 351 N.E.2d 814 (Ind. Ct. App. 1976).

¹¹339 N.E.2d at 572.

¹²The court, quite to the contrary, stated that: “It is . . . well settled that in determining the “substantiality” of the evidence, the reviewing court must consider the evidence in opposition to the challenged finding of fact as well as the evidence which tends to support the finding.” *Id.* at 573 (emphasis added).

¹³See *id.* at 572-73.

tempt to explicitly recognize what the court viewed as the form of judicial review practiced by many courts in the state for several years.¹⁴ Finally, *City of Evansville* is the first reported Indiana decision expressly relying on *Universal Camera*. The scope of review adopted by the United States Supreme Court in *Universal Camera* was dictated by the Court's construction of the judicial review provisions in the federal Administrative Procedure Act¹⁵ and the Taft Hartley Act,¹⁶ both of which specifically direct the reviewing body to consider the record as a whole.¹⁷ In contrast, neither the Indiana Administrative Adjudication Act¹⁸ nor the provisions for judicial review in the Public Service Commission Act¹⁹ specifically require review of the whole record.²⁰ The specific statutory basis for the *Universal Camera* decision is therefore absent from the Indiana statutes, although the language of both Acts is broad enough to allow a consideration of the whole record. It will be interesting to see whether *City of Evansville* will be followed, ignored, or limited to its facts.

B. Findings of Fact

In reviewing the inferences drawn by an administrative agency from basic facts, the courts will attempt to determine whether the agency's inferences are reasonable. An agency's findings of fact must be sufficiently specific to permit an intelligent judicial review of the agency's decision.²¹ Two cases from the Second District Court of Appeals during the survey period dealt with the specificity of an administrative board's findings

¹⁴See note 7 *supra*.

¹⁵U.S.C. § 706 (1970) provides, in pertinent part, "In making the . . . determination, the court shall review the whole record . . ." (Emphasis supplied).

¹⁶29 U.S.C. § 160(e) (1970) provides, in pertinent part, "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." (Emphasis supplied).

¹⁷See notes 16 and 17 *supra*.

¹⁸IND. CODE §§ 4-22-1-1 through -30 (Burns 1974).

¹⁹*Id.* §§ 8-1-3-1 through -12 (Burns 1973).

²⁰*Id.* § 8-1-3-4 contemplates that the reviewing court shall have available the entire Public Service Commission record, but section 8-1-3-7 merely mandates the reviewing court not to consider evidence beyond the record. Similarly, section 4-22-1-4 contemplates that a reviewing court shall have available the entire agency record, but section 4-22-1-18 merely states that "the facts shall be considered and determined exclusively upon the record filed with the court."

²¹*Transport Motor Express, Inc. v. Smith*, 289 N.E.2d 737 (Ind. Ct. App. 1972), *rev'd on other grounds*, 311 N.E.2d 424 (Ind. 1974), *discussed in Administrative Law, 1973 Survey of Recent Developments in Indiana Law*, 7 IND. L. REV. 2, 6-11 (1973).

and the reasonableness of the board's inferences. In *DeMichaeli & Associates v. Sanders*,²² the court found that the Industrial Board's findings of fact, while "hardly a model of specificity," were sufficient to indicate the factual bases of the board's conclusion.²³ The board had concluded that the appellee's deceased had died as the result of injuries sustained in an automobile collision, and that the injuries were not proximately caused by his commission of a misdemeanor—a finding which would have barred recovery.²⁴ The specific factual bases for the board's conclusion were: (1) Betty Estes, the driver of the other automobile involved in the fatal collision, was traveling north and had the right of way; (2) the decedent was traveling west toward a stop sign; (3) Betty Estes believed that the decedent's automobile was braking at the intersection; (4) Betty Estes did not see the decedent fail to stop at the intersection. The board found that there was an "inference . . . that the decedent did not stop . . . at the posted stop sign . . . or, if he did stop, he did not grant the right-of-way to the vehicle driven by Betty L. Estes"²⁵ but awarded compensation to the appellee because "the defendant has failed to prove that this misdemeanor, even if shown, proximately caused the decedent's death."²⁶

The court of appeals, with Judge Buchanan writing the majority opinion, held that the board had rejected the only reasonable inference: that the decedent had committed a misdemeanor which was the proximate cause of his death.²⁷ Consequently, the court substituted judgment.²⁸

In *Board of Commissioners v. Dudley*,²⁹ the court of appeals

²²340 N.E.2d 796 (Ind. Ct. App. 1976). This case is also discussed in *Workmen's Compensation*, *infra*.

²³340 N.E.2d at 801.

²⁴IND. CODE § 22-3-2-8 (Burns 1974) provides, in pertinent part, that "no compensation shall be allowed for any injury or death due to the employee's . . . commission of a . . . misdemeanor."

²⁵340 N.E.2d at 800.

²⁶*Id.*

²⁷The court stated,

The Board's findings are remarkable. Reading them one is reminded of a trained horse who has methodically cleared each jump in the obstacle course and would logically be expected to sail over the last easy hurdle, but suddenly veers off on a frolic of his own.

Id. at 801.

²⁸Indiana courts have held that the reviewing court may vacate an incorrect agency action, but does not have the power to compel agency action by a direct order. The court must instead remand the cause for rehearing. *Indiana State Teachers Retirement Bd. v. Smock*, 332 N.E.2d 800 (Ind. Ct. App. 1975); *Indiana Alcoholic Beverage Comm'n v. Johnson*, 303 N.E.2d 64 (Ind. Ct. App. 1973).

²⁹340 N.E.2d 808 (Ind. Ct. App. 1976).

initially followed the same course. The board had found that the plaintiff-employee was entitled to compensation for injuries sustained in an automobile collision notwithstanding evidence that a blood sample drawn by a police officer at the scene of the accident revealed an alcohol content of .41 percent.³⁰ The court of appeals, reiterating the familiar rule that when the only reasonable inference from the evidence is contrary to the board's conclusion the question of fact is transformed into a question of law which the reviewing court may decide,³¹ substituted judgment.³² Judge White dissented from the rationale of the majority's opinion but concurred in the reversal because "the Industrial Board made no findings of fact, either general or special," but merely "recited the evidence relevant thereto."³³

On rehearing,³⁴ the court of appeals vacated its first decision. The court, through Judge Sullivan, held that since the board did not make findings of fact on the claimant's intoxication, the case should be remanded to the board for a finding on that issue. Judge Buchanan, author of the first opinion, vigorously dissented. Stating that the decision of the board clearly implied a finding that the plaintiff was intoxicated, Judge Buchanan saw no reason to remand since the board's decision to grant compensation was clearly a conclusion contrary to the board's implied finding of intoxication.³⁵

The board's findings in *Dudley* did not expressly state a conclusion that the plaintiff-employee was or was not intoxicated. To that extent, the *Dudley* findings were not as specific as those of the board in *DeMichaeli*. One may conclude from these cases that the Second District Court of Appeals is continuing to adhere to its strict requirement of specific findings of fact enunciated

³⁰IND. CODE § 9-4-1-56 (Burns 1973) recognizes that a blood alcohol level of .10 percent is "prima facie evidence" that the defendant is under the influence of alcohol. IND. CODE § 22-3-2-8 (Burns 1974) provides that no compensation shall be allowed when injury is caused by an employee's intoxication.

³¹4 K. DAVIS, *supra* note 8, § 29.05, at 139-41.

³²340 N.E.2d at 814. The court in reaching its conclusion repeatedly cited *DeMichaeli* and *Assoc. v. Sanders*, 340 N.E.2d 796 (Ind. Ct. App. 1976), discussed at text accompanying notes 22-28 *supra*.

³³340 N.E.2d at 814 (White, J., concurring and dissenting).

³⁴344 N.E.2d 853 (Ind. Ct. App. 1976).

³⁵*Id.* at 856 (Buchanan, J., dissenting). Judge Buchanan, in the original decision, had also indicated his belief that "[t]he Board necessarily concluded that *Dudley's* blood alcohol level was .41%." 340 N.E.2d at 814.

in *Transport Motor Express, Inc. v. Smith*,³⁶ in spite of the Indiana Supreme Court's subsequent reversal of *Transport*.³⁷ The supreme court did not specifically disapprove of the court of appeals' requirement of specificity in *Transport*,³⁸ but reversed because the court of appeals demanded specific facts which could not legally change the conclusion of the Industrial Commission.³⁹ Since the board on remand in *Dudley* could change its decision, the court of appeals' remand is technically consistent with the supreme court opinion in *Transport*. However, *Transport* can be read to stand for the proposition that a reviewing court may make factual inferences.⁴⁰ With this interpretation, the court of appeals' decision in *Dudley* is questionable.

In *City of Indianapolis v. Nickel*,⁴¹ the Second District Court of Appeals held that the findings of a board of public improvement, unlike those of other administrative agencies, may be supported solely by evidence developed outside of formal proceedings. The court's precedent for the decision was the 1910 Indiana Supreme Court decision in *Johnson v. City of Indianapolis*⁴² that in determining public improvement benefit assessments boards of public improvement may rely on their own expertise as well as evidence formally presented to them. In *Nickel*, the court extended the *Johnson* rule to the adoption of the final assessment roll.

C. Exhaustion of Administrative Remedies

Before relief can be sought in the courts, the plaintiff must first take advantage of any available administrative remedy.⁴³ An exception to the Indiana statute requiring exhaustion of administrative remedies as a prerequisite to judicial review of public

³⁶289 N.E.2d 737 (Ind. Ct. App. 1972), discussed in *Administrative Law, 1973 Survey of Recent Developments in Indiana Law*, 7 IND. L. REV. 2, 6-11 (1973), and Taylor, *Administrative Law, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 12, 12-13 (1974).

³⁷311 N.E.2d 424 (Ind. 1974), discussed in Taylor, *supra* note 36, at 12-13.

³⁸"The Court of Appeals has correctly stated the law, but has failed to apply that law to the facts in the case at bar." 311 N.E.2d at 425.

³⁹"[N]either this Court nor the Court of Appeals should concern itself with 'facts' which had been presented and argued by the trucking company [which are irrelevant as a matter of law to the decision of the Board.]" *Id.* at 428.

⁴⁰Taylor, *supra* note 36, at 13.

⁴¹331 N.E.2d 760 (Ind. Ct. App. 1975).

⁴²174 Ind. 691, 93 N.E. 17 (1910). The rationale for the rule is that the purpose of the statutory provision is to permit the board on its own judgment to plan and carry out local improvements [IND. CODE § 19-2-16-1 (Burns 1974)] would be defeated if the board could not decide the question of benefits from its own expertise. 174 Ind. at 703, 93 N.E. at 23.

⁴³See generally K. DAVIS, *supra* note 8, § 20.01, at 56.

improvement contracts was clarified by the Third District Court of Appeals in *Broomes v. City of East Chicago*.⁴⁴ In *Broomes*, taxpayers brought a public lawsuit alleging that a contract between the defendant-appellees and a construction company was procured through the company's fraud and failure to follow appropriate bidding procedures. Plaintiff-appellants sought injunctive relief to prevent the performance of the construction contract and a declaratory judgment holding the contract illegal and void. The trial court held for the defendants, finding that the plaintiffs had failed to exhaust their administrative remedies. The court of appeals construed the statutory requirement that a plaintiff must exhaust the administrative remedies available to him before bringing a public lawsuit⁴⁵ to be applicable only when some statutory remedy is available before the municipal body.⁴⁶ Finding that there is no remedy applicable to the submission of bids,⁴⁷ the court of appeals reversed the decision of the trial court.

The statutory prohibition against putting in issue at a public lawsuit any substantive or procedural matters which the plaintiff "could have but did not raise" at a required administrative hearing⁴⁸ was also considered in *Broomes*. Noting that there was "no contention that the City was required to hold a public hearing on the subject of the reception of bids for the improvements,"⁴⁹ the court of appeals held that the issue of the legality of the contract was properly before the court.

The court of appeals faced a similar question and implied a similar result during the previous survey period. In *Brutus v. Wright*,⁵⁰ a required hearing had been held but there had been no discussion of bidding procedure at the hearing.⁵¹ The court of

⁴⁴342 N.E.2d 893 (Ind. Ct. App. 1976).

⁴⁵IND. CODE § 34-4-17-8(b) (Burns 1973).

⁴⁶The statute specifically requires exhaustion of "administrative remedies available . . . under applicable law . . ." *Id.*

⁴⁷The court stated that the reception of bids by a municipal body is "arguably a ministerial act under [IND. CODE § 19-7-4-21(b) (Burns 1974)] notwithstanding the requirement of [IND. CODE § 5-16-2-1 (Burns 1974)], that such reception be made at an open and public meeting." 342 N.E.2d at 895.

⁴⁸IND. CODE § 34-4-17-8(c) (Burns 1974) states in pertinent part:

Where as a condition precedent to the construction, financing or leasing of a public improvement the municipal corporation is required to hold a public hearing . . . the plaintiff in a public lawsuit shall not be entitled to raise any issue in the public lawsuit which he could have but did not raise at such hearing

⁴⁹342 N.E.2d at 895.

⁵⁰324 N.E.2d 165 (Ind. Ct. App. 1975). For a discussion of this case, see Marsh, *Administrative Law, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 14, 24-25 (1975).

⁵¹See 324 N.E.2d at 167, 168.

appeals carefully considered the requirement of exhaustion of administrative remedies and upheld the trial court's summary judgment against the plaintiff on the issues of emergency school construction appropriations and bond issues. However, summary judgment on the issue of bidding procedures was reversed without discussion of the exhaustion requirement. In light of *Brutus* and *Broomes*, it is clear that there is no exhaustion requirement when bids are challenged.⁵²

*State ex rel. Paynter v. Marion County Superior Court*⁵³ was an original action seeking a writ to prevent the superior court from enforcing an order prohibiting the Indiana Health Facilities Council of the State Board of Health from conducting an investigation to determine whether a health facility was being operated in violation of the Health Facilities Licensing and Regulation Act.⁵⁴ The supreme court, in granting the writ, first stated the general rule that an administrative process which adequately provides for judicial review must be allowed to run its course before judicial intervention is appropriate.⁵⁵ The court then determined that the statutory provision for investigations⁵⁶ is jurisdictional in nature⁵⁷ and is therefore subject to judicial review pursuant to the Administrative Adjudication Act.⁵⁸ The court therefore held that the legal question of whether the health facility was being operated in violation of law must be determined initially by the council.⁵⁹ *Paynter* demonstrates that the supreme court will not allow the equitable powers of a court to circumvent the requirement of exhaustion of administrative remedies.⁶⁰

The court also extended the rule of *State v. Frye*,⁶¹ in which the First District Court of Appeals held that a petitioner must seek enforcement of a discovery order from the agency as a prerequisite to seeking judicial enforcement. *Paynter* held that an individual cannot challenge in court an agency's discovery

⁵²*Cf. Marsh, supra* note 50, at 25.

⁵³344 N.E.2d 846 (Ind. 1976).

⁵⁴IND. CODE §§ 16-10-2-1 to -19 (Burns 1973).

⁵⁵*Public Serv. Comm'n v. City of Indianapolis*, 235 Ind. 70, 131 N.E.2d 308 (1956); *Ballmon v. Duffecy*, 230 Ind. 220, 102 N.E.2d 646 (1952); *State ex rel. White v. Hilgemann*, 218 Ind. 572, 34 N.E.2d 129 (1941).

⁵⁶IND. CODE § 16-10-2-7 (Burns 1973).

⁵⁷*See* 344 N.E.2d at 849.

⁵⁸IND. CODE § 4-22-1-14 (Burns 1974).

⁵⁹344 N.E.2d at 846.

⁶⁰The court cited the leading federal case on exhaustion, *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), for the proposition that "this principle cannot be circumvented by merely asserting that the investigation by the administrative agency is groundless." 344 N.E.2d at 851.

⁶¹315 N.E.2d 399 (Ind. Ct. App. 1974), *discussed in Marsh, supra* note 50, at 25-26.

order on the grounds that the order violates the individual's "privilege" unless the individual has first asserted the privilege in the agency's proceedings.⁶²

D. *Standing To Secure Judicial Review*

A litigant cannot obtain judicial review by Indiana courts of an agency's action unless the litigant has suffered an injury as a result of the agency's action or is authorized by statute to sue. During the survey period, a restrictive view of standing was taken in three Indiana cases. In *Sekerez v. Youngstown Sheet & Tube Co.*⁶³ the plaintiff, alleging that the defendant was discharging chemicals into the air and polluting the environment, sought relief pursuant to Indiana Code section 13-6-1-1, which permits a private party to bring an action for declaratory and equitable relief in the name of the state to protect the state's environment from "significant pollution." The act further provides that a private plaintiff must, as a condition precedent to bringing the action, give notice to the state attorney general, who is then required to notify the agency having jurisdiction over the protection of the environment. Then, "[i]f the agency fails to hold a hearing and make a final determination within one hundred eighty [180] days after receipt of notice by the attorney general . . . an action may be maintained."⁶⁴

The plaintiff in *Sekerez* gave the requisite notice; and the agency, although it did not hold a hearing, issued a formal order compelling Youngstown to take certain actions. The Third District Court of Appeals affirmed the trial court's dismissal of the action, holding that the agency's failure to conduct a hearing did not confer standing to sue on plaintiff. Section 13-6-1-1, the court of appeals explained, requires *both* the failure to hold a hearing *and* the failure to make a final determination within 180 days. Therefore, since the agency had issued a final order, the plaintiff could not sue under that statute.

The court of appeals also held that the plaintiff did not have standing to sue under Indiana Code section 13-7-11-2(b), which confers standing if the agency has either "failed to proceed" or to make a final determination.⁶⁵ This section thus differs from

⁶²344 N.E.2d at 849-50.

⁶³337 N.E.2d 521 (Ind. Ct. App. 1975).

⁶⁴IND. CODE § 13-6-1-1 (Burns 1973).

⁶⁵

Any person who has filed a complaint pursuant to IC 1971, 13-6-1-1 to, and including, 13-6-1-6 may, if the board or agency has either (a) refused to proceed, or (b) one hundred eighty [180] days have elapsed from the filing of the complaint without a final determination,

Indiana Code section 13-6-1-1, which requires both conditions to be satisfied. The court gave a liberal definition to the term "failed to proceed," construing it to mean failure to take any action. The court's decision is puzzling because it renders meaningless the second condition of the section, the failure to reach a final determination. Under this view the second condition would seem to be encompassed by the broader first condition, "failed to proceed."

The court, by so defining "failed to proceed," denied the plaintiff his opportunity to proceed under the environmental statutes. The court noted that the plaintiff was not left without a remedy since he was free to seek relief pursuant to the provisions of the Administrative Adjudication Act.⁶⁶ What the court did not note, however, was that Sekerez was left without any right of recourse to the courts since the Act requires a petition for judicial review to be filed within fifteen days after receiving notice of the agency's order, decision, or determination.⁶⁷ In addition, even if judicial review of the agency's action were available, it would be a more limited review than would be available in a judicial action brought under the environmental statutes.⁶⁸

In a different case involving the same plaintiff, *State ex rel. Sekerez v. Lake Superior Court*,⁶⁹ the Indiana Supreme Court indicated its displeasure with vexatious actions brought pursuant to the public lawsuit statute.⁷⁰ The public lawsuit statute grants standing to individuals to challenge, on behalf of all citizens, the location, feasibility, and validity of public improvements.⁷¹ The plaintiff had three times filed suits under the statute challenging the construction of a sewage treatment center and three times had his suit dismissed—twice for failure to post bond.⁷² The

proceed against the alleged violator

Id. § 13-7-11-2(b).

⁶⁶337 N.E.2d at 521.

⁶⁷IND. CODE § 4-22-1-14 (Burns 1974) provides in pertinent part: Said petition for review shall be filed within fifteen [15] days after receipt of notice that such order, decision or determination is made by any such agency Unless a proceeding for review is commenced by so filing such petition within fifteen [15] days any and all rights of judicial review and all rights of recourse to the courts shall terminate.

⁶⁸See text accompanying notes 1-20 *supra*.

⁶⁹335 N.E.2d 199 (Ind. 1975).

⁷⁰IND. CODE §§ 34-4-17-1 to -8 (Burns 1973).

⁷¹*Id.* § 34-4-17-1(b).

⁷²*Id.* § 34-4-17-5 permits the court to require the posting of a bond "payable to defendant for the payment of all damages and costs which may accrue by reason of the filing of the lawsuit in the event the defendant prevails." The statute further provides: "In the event no bond is filed . . . the public

supreme court, denying the plaintiff's motion for a writ prohibiting the enforcement of a superior court order enjoining him from initiating a similar action or appealing the third lawsuit, spoke of the dangers of a public lawsuit. The court stated:

The grant of standing to one who has no legal injury in fact is not without its downside risks. The General Assembly was aware that Machiavellians—who would use the public lawsuit machinery to serve these ends while purportedly suing on behalf of their fellow citizens—live in Utopian communities. The General Assembly was also aware that those with pure hearts but empty heads might bring such lawsuits⁷³

The supreme court also noted the dangers of the public lawsuit in *State ex rel. Eastern Pulaski Community School Corp. v. Pulaski Circuit Court*.⁷⁴ In holding that a public lawsuit must be brought within ten days after the first published notice of the sale of bonds,⁷⁵ the court conceded that the ten-day limitation on bringing an action was restrictive, but found that the legislature's provision of the limitation was necessitated by the "extreme financial burden which may accrue to local taxing districts because of delays in construction necessitated by the pendency of a public lawsuit."⁷⁶ It appears, therefore, that the provisions of the public lawsuit statutes, which grant standing to an individual without a showing of legal injury, will be strictly construed to avoid what the supreme court perceives to be the dangers of such suits.

E. Due Process

While it has been said that an administrative agency is not a court, the agency nonetheless is compelled to comply with minimum standards of due process.⁷⁷ During the survey period

lawsuit shall be dismissed and no court shall have further jurisdiction of the public lawsuit or any other public lawsuit involving any issue which was or could have been raised therein."

⁷³335 N.E.2d at 200.

⁷⁴338 N.E.2d 634 (Ind. 1975).

⁷⁵IND. CODE § 34-4-17-8(a) provides, in pertinent part:

No public lawsuit shall be brought, and no trial court shall have jurisdiction of any public lawsuit which is brought, more than ten [10] days after first publication required by law for the sale of bonds of a municipal corporation, or in the case of a lease, under Acts 1947, c. 273 [21-5-11-1—21-5-11-16 . . .] more than ten [10] days after first publication of notice by any school building corporation for the sale of its bonds

⁷⁶338 N.E.2d at 636.

⁷⁷*State ex rel. Paynter v. Marion County Superior Court*, 344 N.E.2d 846, 850 (Ind. 1976).

the courts of appeals discussed the due process rights of probationary and special policemen and firemen. In *City of Frankfort v. Logan*,⁷⁸ the Second District Court of Appeals upheld the statutory authority of a municipality to discharge a special police officer without cause⁷⁹ even though the officer had been in the city's employ for seventeen years. Special police officers do not have the statutory protection of regular policemen, who can be removed only for cause and after written notice.⁸⁰ The court also held that the city did not have authority to hire the plaintiff as a regular policeman because he was over the statutorily defined age limit of thirty-five at the time of his special appointment,⁸¹ citing *American Jurisprudence* as authority for the proposition that an ultra vires employment contract by a municipal body is void and unenforceable.⁸² The court quoted *American Jurisprudence's* statement that a fully performed municipal contract is unassailable by either party⁸³ but held that, despite the respondent's long years of service, "[n]o act by the City or by Logan could have transformed . . . [a] void (not voidable) contract into a valid express or implied contract employing him as a regular policeman."⁸⁴

In *Town of Speedway v. Harris*⁸⁵ the court of appeals held that the Rules and Regulations of the Speedway Fire Department require notice and a hearing prior to dismissal of any fireman, regular or probationary.⁸⁶ The appellee, a probationary fireman, had been discharged without notice or hearing. Finding that the appellant's rules made no distinction between regular and probationary firemen, the appellate court found that the rules gave Harris a "legitimate claim of entitlement" to continued employ-

⁷⁸341 N.E.2d 510 (Ind. Ct. App. 1976).

⁷⁹IND. CODE § 18-1-11-5 (Burns Supp. 1976).

⁸⁰*Id.* § 18-1-11-3 (Burns 1974).

⁸¹*Id.* § 19-1-15-1 prohibits the appointment as policeman, in any first through fifth class city, of any individual who has reached his or her 35th birthday.

⁸²341 N.E.2d at 514. The rationale for this rule is that every person who deals with a municipal body is expected to know the scope of its statutory authority. 56 AM. JUR. 2D *Municipal Corporations* § 503 (1971).

⁸³341 N.E.2d at 514, quoting from 56 AM. JUR. 2D *Municipal Corporations* § 503, at 554-56.

⁸⁴341 N.E.2d at 514.

⁸⁵346 N.E.2d 646 (Ind. Ct. App. 1976).

⁸⁶Article X, Rules and Regulations of the Speedway Fire Department, reprinted at 346 N.E.2d at 647, provides, in pertinent part: "[A]ny member found guilty after a hearing shall, in the discretion of the Board of Town Trustees, be subject to reprimand, suspension from duty, dismissal from the service, or such other penalties as may be determined."

ment.⁸⁷ The court distinguished *City of Frankfort* on the basis that the appellee in that case had no property interest protectable by due process.⁸⁸ The court then held that due process requires that a hearing be held at a time "when the deprivation [of the appellee's protected property interest] can still be prevented."⁸⁹ The court recognized, however, that the prior hearing requirement is not absolute, and that in "extraordinary situations" notice and hearing may be provided subsequent to dismissal.⁹⁰ The court stated that such emergency-type situations are limited and must be truly unusual; they exist "only when some valid governmental interest substantially prevails over the individual's constitutional rights involved."⁹¹ The court rejected Speedway's contention that an emergency situation was presented by the public's need for efficient fire protection because no evidence was offered in support of that conclusion.

The court, however, held that since the plaintiff had declined an offer for a hearing the day following dismissal, he had waived his due process rights,⁹² and was entitled only to those damages which accrued on the single day between dismissal and the proffered hearing.⁹³

Prior to *Town of Speedway*, the First District Court of Appeals held in *Lueken v. City of Huntingburg*⁹⁴ that even though Indiana Code section 19-1-3-2 requires a hearing prior to suspension of a fifth-class city policeman, the defendant-city's failure to provide a hearing until after the suspension was not reversible error. The officer was suspended with pay and the city moved quickly to provide notice and to hold a hearing to determine his competency. The court of appeals' decision rested on the Trial Rule 61 mandate that a court must disregard procedural errors not affecting the substantial rights of the parties and on the public

⁸⁷346 N.E.2d at 650. The court relied on the property interest definitions of the United States Supreme Court in *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Connell v. Higginbotham*, 403 U.S. 207 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Flemming v. Nestor*, 363 U.S. 603 (1960); *Slochower v. Board of Educ.*, 350 U.S. 551 (1956); *Wieman v. Updegraff*, 344 U.S. 183 (1952).

⁸⁸346 N.E.2d at 650 n.9.

⁸⁹346 N.E.2d at 651, quoting from *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

⁹⁰346 N.E.2d at 652, quoting from *Fuentes v. Shevin*, 407 U.S. at 82.

⁹¹346 N.E.2d at 652, citing *Fuentes v. Shevin*, 407 U.S. 67; *Boddie v. Connecticut*, 401 U.S. 371 (1971).

⁹²346 N.E.2d at 653, citing *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972); *Boddie v. Connecticut*, 401 U.S. 371 (1971).

⁹³346 N.E.2d at 654.

⁹⁴335 N.E.2d 239 (Ind. Ct. App. 1975).

policy need to protect the community from the ill effects of having an officer of questionable ability on duty.⁹⁵

The court of appeals acknowledged that the plaintiff had property and liberty interests at stake,⁹⁶ both of which are entitled to fourteenth amendment protection.⁹⁷ Therefore, the court's reliance on Trial Rule 61 is questionable, since procedures affecting fourteenth amendment interests surely affect substantial rights within the meaning of the rule. The court's failure to discuss the constitutional issue of whether the plaintiff was entitled to due process at a meaningful time⁹⁸ is also questionable. The only factual distinction between *Lueken* and *Town of Speedway* is that Lueken was suspended with pay and the plaintiff in *Town of Speedway* was dismissed, a distinction which could not have been clear enough to warrant lack of consideration of a constitutional issue by an appellate court.

Prior to this survey period, it had been held that probationary police officers and firemen were entitled to the full protection of Indiana Code section 18-1-11-3.⁹⁹ This section entitles a fireman or police officer to notice and a hearing prior to dismissal and for appeal of the agency's decision to dismiss. If the board's decision is reversed, the officer is entitled to withheld salary without mitigation or setoff for amounts earned from other employment. In contrast, if dismissal was not within the scope of section 18-1-11-3, the common law doctrine of mitigation of damages applies.¹⁰⁰ The Third District Court of Appeals in *Town of Highland v. Powell*¹⁰¹ applied this prior law in affirming a trial court's judgment for a probationary policeman who had been dismissed without the statutory procedure. The town argued that the lawsuit was not an appeal within the meaning of the statute but was a common law breach of contract suit calling for a common law remedy. The appellate court rejected this argument, concluding that the decision of the board to dismiss was the only requirement necessary to establish the statutory right to judicial review and

⁹⁵*Id.* at 241.

⁹⁶*Id.*

⁹⁷See, e.g., cases cited note 87 *supra*.

⁹⁸See text accompanying notes 89-91 *supra*.

⁹⁹*Morris v. City of Evansville*, 152 Ind. App. 50, 57, 281 N.E.2d 910, 915 (1972). However, this protection does not extend to special police officers, who are governed by IND. CODE § 18-1-11-5 (Burns Supp. 1976). See *City of Frankfort v. Logan*, 341 N.E.2d 510 (Ind. Ct. App. 1976), discussed at text accompanying notes 78-84 *supra*.

¹⁰⁰See, e.g., *Coates v. City of Evansville*, 149 Ind. App. 518, 273 N.E.2d 862 (1971); cf. *City of Frankfort v. Logan*, 341 N.E.2d 510 (Ind. Ct. App. 1976).

¹⁰¹341 N.E.2d 804 (Ind. Ct. App. 1976).

the statutory remedy.¹⁰² The court distinguished *Coates v. City of Evansville*,¹⁰³ in which the common law doctrine was applied, on the basis that *Coates* was an appeal from a decision favoring reinstatement, which is not an appealable order.¹⁰⁴

In two decisions during the survey period, courts refused to extend the holding of *City of Mishawaka v. Stewart*¹⁰⁵ that an administrative board denied a fireman his due process rights when the city attorney, who had served as the fire department's advocate in proceedings before the municipal board determining the fireman's alleged misconduct, also participated as a "judge" in the board's final disposition of the issue. The rationale of the supreme court's decision in *City of Mishawaka* was that the fact-finding process before an administrative board should be free of suspicion or appearance of impropriety.¹⁰⁶ In *Lueken v. City of Huntingburg*,¹⁰⁷ the court held that although the board had prior knowledge of the evidence to be presented against the plaintiff, there was not the obvious display of impropriety present in *City of Mishawaka*. The court stated, "[A] combination of the investigatory and adjudicative functions, without more, comport with due process."¹⁰⁸ As support for its decision, the court of appeals relied upon the recent decision of the United States Supreme Court in *Winthrow v. Larkin*,¹⁰⁹ in which the Court held that due process was not violated when a state medical board was allowed to investigate as well as to adjudicate the revocation of a medical license.

In *State ex rel. Paynter v. Marion County Superior Court*¹¹⁰ the Indiana Supreme Court held that the appointment as hearing officer of a member of the administrative council which would ultimately decide the case did not "raise such a specter of partiality" as to violate due process under the *City of Mishawaka*

¹⁰²*Id.* at 809.

¹⁰³152 Ind. App. 50, 273 N.E.2d 862 (1971).

¹⁰⁴341 N.E.2d at 808-09 n.8. IND. CODE § 18-1-11-3 (Burns 1974) provides, in pertinent part: "Any member of such fire or police force . . . shall have the right to appeal . . . from such decision of dismissal or suspension by said board, but shall not have the right to appeal from any other decision . . ." In *Coates*, the plaintiff was merely suspended pending disposition of a criminal charge. *Coates* was subsequently reinstated by the board, and the court therefore held that the decision to reinstate was not appealable under the statute. 341 N.E.2d at 809-10 n.8.

¹⁰⁵310 N.E.2d 65 (Ind. 1974).

¹⁰⁶*Id.* at 69.

¹⁰⁷335 N.E.2d 239 (Ind. Ct. App. 1975), discussed at text accompanying notes 94-98 *supra*.

¹⁰⁸335 N.E.2d at 242.

¹⁰⁹421 U.S. 35 (1975).

¹¹⁰344 N.E.2d 846 (Ind. 1976).

decision¹¹¹ since the hearing officer did not perform in an adversary capacity. The court also held that Indiana Attorney General's service as advisor to the council in both its investigative-prosecuting and decision-making roles did not violate due process, since the council was the decision-making body and the Attorney General served only in an advisory capacity.

These cases, when read together with a case from the previous year, *City of Gary v. Gause*,¹¹² indicate a tendency to limit *City of Mishawaka* to the advocate-judge factual situation. Thus, the administrative board is given more discretion in deciding how to conduct its hearings.

In *Whirlpool Corp. v. State Board of Tax Commissioners*,¹¹³ the First District Court of Appeals was confronted with the issue of whether a three-month tax assessment investigation conducted by the board constituted an administrative hearing. Finding that the investigation was essentially an audit, the court relied on *State Board of Tax Commissioners v. Oliverius*¹¹⁴ to hold that the investigation did not constitute a hearing for due process purposes. Due process, it was held, requires at a minimum that the taxpayer be provided an "opportunity to meet and rebut adverse evidence or to cross-examine adverse witnesses."¹¹⁵

In *City of Evansville v. Southern Indiana Gas & Electric Co.*¹¹⁶ the court discussed the statutory requirement of public notice of Public Service Commission proceedings. The Public Service Commission Act provides that when a public utility files a petition requesting a rate increase, the utility must "publish a notice of such petition or complaint in a newspaper."¹¹⁷ The notice filed by the utility and approved by the Commission in *City of Evansville* revealed only that the utility sought a rate increase. The city argued that this was not adequate because the notice did not specifically state that the utility sought a change in depreciation rates.

The Commission's usual practice, which had been followed in this case, was to approve the publication of the caption of the case, describing "in general terms all the relief being sought in the

¹¹¹*Id.* at 850.

¹¹²317 N.E.2d 887 (Ind. Ct. App. 1974). The court in *Gause* held that a city attorney could present evidence to a board in support of an employee's discharge as long as he did not participate in the making of the final decision.

¹¹³338 N.E.2d 501 (Ind. Ct. App. 1975). For a discussion of other issues in this case, see Allington, *Taxation, infra*.

¹¹⁴294 N.E.2d 646 (Ind. Ct. App. 1973).

¹¹⁵338 N.E.2d at 505.

¹¹⁶339 N.E.2d 562 (Ind. Ct. App. 1975). See text accompanying notes 1-10 *supra*.

¹¹⁷IND. CODE § 8-1-2-61 (Burns 1973).

petition."¹¹⁸ The court affirmed this practice, explaining that the matter of notice is left to the Commission's discretion, and approved the Commission's case-by-case method of determining the sufficiency of notice. The court further stated that the "succinct notice" approved by the Commission was preferable to a statement "couched in the technical jargon of the public utility field" which might confuse the public.¹¹⁹

F. *Municipal Corporations*

Municipal power to regulate was discussed in two cases from the First District Court of Appeals. Advocates for the passage of the Uniform Residential Landlord and Tenant Act suffered a setback in *City of Bloomington v. Chuckney*.¹²⁰ The Bloomington Common Council had enacted an ordinance which included some provisions of the uniform act.¹²¹ The court held that portions of Ordinance 72-76 were in conflict with Indiana Code section 18-1-1.5-19. That section, part of the 1971 Power of Cities Act,¹²² provides that the enactment of laws "governing private or civil relationships except as an incident to the exercise of an independent municipal power" is reserved exclusively to the state.¹²³ The court found that, while parts of the ordinance could be upheld as city housing and safety codes incident to the city police powers, many of the ordinance terms did not come within the exception and were thus invalid. Specific examples discussed by the court were provisions mandating inclusion in leases clauses affecting apartment entry, limiting amounts of security deposits, and creating a presumption of preexistent damages from the lessor's failure to execute an inventory or damage list.¹²⁴ *City of Bloomington* must be viewed as a limitation of municipal power in light of Indiana Code section 18-1-1.5-23, which calls for a liberal construction of the powers of cities under the Act.¹²⁵

¹¹⁸IND. ADMIN. RULES & REGS. Rule (8-1-2-47) -8(b) (Burns 1976).

¹¹⁹339 N.E.2d at 579. The court also stated: "The complexity and varied nature of regulatory proceedings militate against the adoption of a more particularistic notice standard." *Id.* at 578.

¹²⁰331 N.E.2d 780 (Ind. Ct. App. 1975).

¹²¹*Id.* at 781-82.

¹²²IND. CODE §§ 18-1-1.5-1 to -30 (Burns 1974).

¹²³*Id.* § 18-1-1.5-19.

¹²⁴331 N.E.2d at 783-84.

¹²⁵IND. CODE § 18-1-1.5-23 (Burns 1974) provides in pertinent part: The powers of cities as defined in this chapter shall be construed liberally in favor of such cities It is the intention of this chapter and the policy of the state to grant to cities full power and right to exercise all governmental authority necessary for the effective

In *City of Richmond v. S.M.O., Inc.*,¹²⁶ the court of appeals, relying on prior case law,¹²⁷ found that if the power to regulate an activity is not vested exclusively in the state, a municipality may regulate the activity if it does not impose a less stringent standard than the state.¹²⁸ The court then held that both the state and municipalities have the statutory power to regulate curb cuts,¹²⁹ but that primary authority rests with the state.¹³⁰ Since the appellee had obtained state permission, the appellate court affirmed the trial court's order enjoining the city from barricading the curb cut.¹³¹ *City of Richmond* appears to extend previous law, since the decision indicates that the municipality may not impose standards more stringent than those of the state.

In *Angel v. Behnke*,¹³² the Third District Court of Appeals concluded that competitive bidding was not required for a county's lease of data processing equipment. The court "reluctantly" reached this decision, although it recognized that "large rental fees, as in the present case, should be covered by competitive bidding requirements."¹³³ The court nonetheless found that the lease did not fall within the statutes requiring competitive bidding for leases.¹³⁴

operation and conduct of government with respect to their municipal and internal affairs.

¹²⁶333 N.E.2d 797 (Ind. Ct. App. 1975).

¹²⁷*Hollywood Theater Corp. v. City of Indianapolis*, 218 Ind. 556, 34 N.E.2d 28 (1941); *Medias v. City of Indianapolis*, 216 Ind. 155, 23 N.E.2d 509 (1939); *Spitler v. Town of Munster*, 214 Ind. 75, 14 N.E.2d 579 (1938); *Cooper v. City of Greenwood*, 169 Ind. 14, 81 N.E. 56 (1907).

¹²⁸333 N.E.2d at 798.

¹²⁹The court found that Indiana Code section 9-4-1-119 (Burns 1973), mandating the state highway commission to promulgate "regulations and requirements," was the "genesis" of the state's authority to regulate curb cuts. 333 N.E.2d at 798. The city's power to regulate was found in IND. ADMIN. RULES & REGS. Rule (9-4-1-119) -12 (Burns 1976).

¹³⁰*Id.*

¹³¹*Id.* The court also held that municipal ordinances requiring permits for work to be done on municipal streets and making the obstruction or injury of streets an unlawful act were insufficient to satisfy the due process requirement that the city must inform the property owner of the standards utilized in granting or denying a curb cut. *Id.*

¹³²337 N.E.2d 503 (Ind. Ct. App. 1975).

¹³³*Id.* at 509.

¹³⁴IND. CODE § 5-16-1-1 (Burns 1974) provides, in pertinent part:

When any public building or any other public work or improvement of any character whatsoever is to be constructed, erected, altered or repaired at the expense of the state or at the expense of any county . . . and when the estimated costs of such work or improvement will be five thousand dollars [\$5,000] or more, it shall be the duty of the board . . . to adopt plans and specifications and award a contract for such public work or improvement to the lowest and best bidder who submits a bid for the performance thereof Provided, however, that notwithstanding any other provisions of law, the board of county

The court also decided not to construe the Public Purchases Act¹³⁵ to include leases as a matter of public policy, although other jurisdictions have done so,¹³⁶ because a study of the legislative history of the Act and of other competitive bidding statutes indicated no legislative intent to require competitive bidding for leases.¹³⁷

The Indiana Supreme Court, in *Board of Commissioners v. Kokomo City Plan Commission*,¹³⁸ discussed the standing of municipalities and counties to challenge state legislation. The court reversed a Second District Court of Appeals decision¹³⁹ holding that a statute allowing cities in counties of less than 84,000 residents to exercise extraterritorial jurisdiction without the consent of the county¹⁴⁰ violated article 4, section 23 of the Indiana Constitution.¹⁴¹ The supreme court did not decide the merits of the constitutional issue, but held that the county, having suffered no injury, did not have standing to sue.¹⁴²

commissioners, acting on behalf of any county . . . may purchase materials in the manner provided by law and perform any work by means of its own workmen and owned or leased equipment in the construction, maintenance, and repair of any highway, bridge, or culvert without awarding a contract therefor When the work involves the rental of equipment with an operator furnished by the owner . . . such work shall be deemed to be public work and subject to the provisions of this section

The court reasoned that the data processing equipment was not a "public building or any other public work or improvement," nor did the lease involve a "highway, bridge, or culvert," and that the statute therefore was inapplicable in the present case. 337 N.E.2d at 509.

¹³⁵IND. CODE §§ 5-17-1-1 to -9 (Burns 1974). *Id.* § 5-17-1-1 provides, in pertinent part: "Any person, officers, board, commissioner . . . duly authorized . . . to make purchase of material or materials, equipment, goods and supplies . . . shall comply with [IND. CODE § 5-17-1-2 (Burns 1974), requiring competitive bidding]"

¹³⁶337 N.E.2d at 510, *citing* Galloway v. Road Improvement Dist. No. 4, 143 Ark. 338, 220 S.W. 450 (1920); *State ex rel. Small v. Hughes County Comm'n*, 81 S.D. 238, 133 N.W.2d 228 (1965).

¹³⁷337 N.E.2d at 510-11.

¹³⁸330 N.E.2d 92 (Ind. 1975).

¹³⁹*Board of Comm'rs v. Kokomo City Plan Comm'n*, 310 N.E.2d 877 (Ind. Ct. App. 1974).

¹⁴⁰IND. CODE § 18-7-5-34 (Burns 1974).

¹⁴¹"In all the cases enumerated in the preceding Section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State." IND. CONST. art. 4, § 23.

¹⁴²330 N.E.2d at 100-01. For a discussion of the constitutional issues in this case, see Marsh, *Constitutional Law, infra*.