

The Right of Appeal By Administrative Authority From Adverse Judicial Rulings

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The Supreme Court of Ohio in a recent decision unanimously ruled that the Ohio Department of Liquor Control, its Director, and the Board of Liquor Control are without authority to appeal from a decision of the Court of Common Pleas which reversed the Board's order.¹

Two cases were involved in that decision. The Director caused a citation to issue against Corn, the holder of certain liquor permits, to show cause why such permits should not be revoked. Subsequently, the Director rejected Corn's application for renewal of the permits which were the subject of dispute in the citation case. The hearing on the citation and the appeal from the order of the Director refusing renewal were considered by the Board on the same day and the order entered by it in each instance was adverse to Corn.

The Court of Common Pleas reversed the Board on both rulings, whereupon the Director, the Department, and the Board appealed to the Court of Appeals which resulted in a reversal of the lower court's decision. Then Corn appealed to the Ohio Supreme Court. The Supreme Court held that the Court of Appeals erred in overruling Corn's motion to dismiss the appeals by the administrative representatives inasmuch as leave to appeal must be conferred by the Constitution or by statute and an examination of those sources failed to disclose that the appellees were empowered with the requisite authority. In construing the Administrative Procedure Act of Ohio,² which is applicable to proceedings before the Board, the Supreme Court decided that the right of appeal granted by the Act is limited to those persons whose interests are subject to adjudication by the Board. The Court concluded that neither the Director, the Board, nor the Department was aggrieved by the adverse ruling and that since the Board is essentially a quasi-judicial body, comparable to a court, it is without the necessary interest to appeal from a reversal of its rulings. The Court emphasized that numerous Ohio agencies have been granted the right to appeal

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¹ Corn, D.B.A. Colonial Inn Restaurant, v. Board of Liquor Control, 160 Ohio St. 9 (1953).

² OHIO REV. CODE §§ 119.01 to 119.13, inc. (1953).

whereas no similar measures have been enacted with respect to the Department of Liquor Control or its related divisions.

The *Corn* decision is of particular significance locally since its effect is to deny any claim to a right of appeal that might be asserted by other state agencies which come under the Administrative Procedure Act but which, like the Liquor Department, are unable to point to specific statutory authorization for appeal from adverse judicial rulings.

Aside from its local import, the decision is noteworthy for it adds to the growing list of cases of state courts which have denied the right of administrative agencies to seek a review of reversals of their rulings or orders. Obviously, the issue does not arise if the legislature grants the power of appeal to an agency in clear and explicit terms, for then the courts are prone to recognize the legislative mandate.

The area of conflict manifests itself in those statutes which are silent as to the matter of appeal or are couched in such ambiguous terms that the legislative intent is unclear or unascertainable. Judicial interpretation of such legislation has resulted in a divergence of opinion. The result has been that slightly more than one half of the courts of the several states have refused to grant an agency the opportunity to defend its rulings in an appellate proceeding.³

In determining whether an agency is entitled to appeal, the courts looked initially to the common law for a solution. Since it is axiomatic that there was no right to appeal at common law, the privilege must be evidenced by constitutional grant or legislative enactment. To those courts which have denied the right, the absence of a specific grant is conclusive since they are unwilling to find the agency a "party aggrieved" or a "person interested" within the meaning of general appellate statutes.⁴

Modern appeal procedure has been needlessly constricted by some courts to the narrow limits of the adversary system, thus limiting the resolution of conflicts to those of private litigants whose interests are directly affected. Those courts have refused to recognize the unique and distinctive nature of the administrative agency, holding firm to the view that its adjudicative functions give it the controlling characteristics of a judicial body. Therefore,

³ The annotation in 117 A.L.R. 216 (1938), on the right of public boards and officials to appeal from adverse rulings indicates that a majority of the courts have denied the right. It lists 14 decisions against, and 6 in favor of appeal. Taking into account the decisions which were not included in the annotation and those rendered after 1938, a more accurate statement now would be that the decisions denying the right maintain an almost negligible majority.

⁴ *Corn v. Board of Liquor Control*, *supra* note 1.

they reason that since a court has no interest in maintaining its decisions at the appellate level, the agency is similarly bound.

On the other hand, those courts which sanction appeals by agencies have not forced them into a Procrustean mold designed initially for other purposes. They conceive of the administrative body as a distinct organ of government only superficially analogous to a court in its quasi-judicial functions. Thus, they have held that although the agency's interest is not the same as the private litigants', the administrative unit is sufficiently "aggrieved" as a representative of the public interest to seek review of adverse rulings under the general law governing appeals. Therefore, in the absence of specific statutory prohibition, administrative appeals have been allowed by them.⁵

ZONING BOARDS

The decisions of courts which have adjudicated the right of a zoning board of appeals or adjustment to appeal from a reversal of its order or ruling are especially representative of this judicial conflict. This is true primarily because the statutes or ordinances which create the zoning boards are relatively uniform from one jurisdiction to another, and secondarily, because these decisions articulate the cogent reasons favorable or unfavorable to the granting of such appeals.

It is the standard practice for a legislative body which promulgates zoning regulations to incorporate a provision for the establishment of a zoning board of appeals or adjustment.⁶ The board's primary function is to review the actions of the officials charged with the administration and enforcement of the zoning regulations.⁷ As a general rule, it is also within the province of the board to allow deviations from the requirements of the zoning statute, if the board, after due deliberation, concludes that adherence to the strict letter of the regulations would result in unnecessary or unreasonable hardship to an individual.⁸

With minor variations, the statutes provide that any person aggrieved by a decision of the zoning board may appeal to a specific

⁵ An irrigation district was entitled as a person aggrieved to maintain an appeal from an adverse ruling in the case of *In re Heart River Irr. Dist. Stark et al v. Heart River Irr. Dist.*, 77 N.D. 827, 47 N.W. 2d 126 (1951). The court said at page 832, "An intention on the part of the legislature to deny the right of appeal because of a failure or omission to provide therefor in a special act will not be lightly assumed or inferred. The right to appeal is a substantive right, and while it is purely statutory, a statute will not be construed as taking away the right of appeal unless the language used clearly shows such an intent."

⁶ 8 McQUILLIN, MUNICIPAL CORPORATIONS § 25.223 et seq. (3rd ed. 1949).

⁷ *Id.*, § 25.232.

⁸ *Id.* § 25.233.

court which has authority to reverse, affirm, or modify the ruling.⁹ Generally, the statutes do not name the board as a party to the appeal in the lower court by the person aggrieved or provide that the board or the person aggrieved may appeal adverse rulings to the higher courts.

Two cases have been repeatedly cited as authority for denying zoning boards the right to appeal, namely, *Miles v. McKinney*,¹⁰ and *Appeal of Board of Adjustment, Lansdowne Borough*.¹¹ In each case the decision of the zoning board to grant a building permit or exempt property owners from zoning restrictions was reversed and each board was unsuccessful in its attempt to obtain a review of the reversal.

The zoning statute in the *Miles* case contained a unique provision that "an appeal may be taken to the Court of Appeals from *any decision* of the said court of Record reviewing the decision of the Board of zoning appeals."¹² (Italics added). In consonance with the plain meaning of the statute, as this principle of legislative interpretation was applied by the Maryland court, the provision would seem to cover a decision adverse to the board as well as one adverse to the private litigants. However, this language was ignored by the court and its ruling, denying the agency a right to appeal, was founded on the provision which authorized an appeal by the person aggrieved. The court concluded that the board, as a quasi-judicial body, is not "aggrieved" by a reversal of its rulings.¹³

⁹ The enabling act of Connecticut is typical. It provides:

"Any person or persons severally or jointly aggrieved by any decision of said board, or any officer, department, board or bureau of any municipality, charged with the enforcement of any order, requirement or decision of said board, may . . . take an appeal to the court of common pleas of the county in which such municipality shall be located, which appeal shall be made returnable to such court in the same manner as that prescribed for civil actions brought to such court. . . . The court, upon such appeal, and after hearing thereon, may reverse or affirm, wholly or partly, or may modify or reverse the decision appealed from. . . ." 1 CONN. GEN. STAT. § 844 (1949).

¹⁰ 174 Md. 551, 199A 540, 117 A.L.R. 207 (1938). This decision is supported by *Boeder v. Brown*, 65 A. 2d 333 (Md. Sup. Ct. 1949) and *Knox v Mayor and City Council of Baltimore*, 180 Md. 88, 23 A. 2d 15 (1941).

¹¹ 313 Pa. 523, 170 Atl. 867 (1934).

¹² Md. CODE 1939 (Flack's 1951 ed.); Art. 66 B, § 7 [Acts 1935, Ch. 448, p. 952].

¹³ In the *Miles* case, *supra* note 10 at 560, the Maryland Court said of the function of the zoning board, "Such a function involves the exercise of discretion and judgment and is in its nature judicial."

In the later case of *Dal Maso v. Board of County Commissioners of Prince George's County*, 182 Md. 200, 34A, 2d 464 (1943), where the issue was not the right of a zoning board to appeal but whether the board could rescind one order and substitute another, the court rejected the judicial analogy and held that the first order was not *res judicata* since the decisions of the board

In the *Lansdowne* case, the Pennsylvania Supreme Court decided that the zoning board was not injuriously affected by the decision which reversed its order, although several years earlier the Court had held that a zoning board of the City of Pittsburgh was entitled to be heard in court or to appear as a party to an appeal.¹⁴

Other jurisdictions have espoused the reasoning articulated in these two decisions. Their denials of the right to appeal have been based on one of the two following reasons:

1. The enabling act which provides for the creation of the board does not list the right to appeal among its enumerated powers.¹⁵

2. The general law governing appeals applies only to persons aggrieved and therefore does not include the board which acts as an impartial arbiter with no interest in the proceedings other than to decide the question presented for determination.¹⁶

In contrast to the opinions which have denied the right of zoning boards to appeal are the decisions in *Board of Adjustment of City of Fort Worth v. Stovall*¹⁷ and *Rommell v. Walsh*.¹⁸

In the *Stovall* case the Texas Court of Civil Appeals held that the board was not entitled to appeal¹⁹ but its decision was reversed on the ground that the board is a proper representative of the pub-

are not judgments or decrees. The court said at page 205, "Administrative boards and officials are arms and instrumentalities of the Legislature, and are not judicial at all. . . ."

¹⁴ In *Appeal of Ward*, 289 Pa. 458, 137 Atl. 630 (1927), the court stated that in view of the statute allowing costs to be assessed against the board on disposition of an appeal from its ruling, that it was entitled to be heard. The statute under which the Pittsburgh zoning board was created has the following provision as to costs: "Costs shall not be allowed against the board, unless it shall appear to the court that it acted with gross negligence or in bad faith or with malice in making the decision appealed from." PURDON'S PA. STAT. ANN. 1938 TRT. 53, § 10759 [Act of 1923, P.L. 122, § 9].

The statute involved in the *Lansdowne* case has the same provision as to costs, PURDON'S PA. STAT. ANN. 1931, TRT. 53, § 15737 [Act of 1923, P.L. 957, § 7], yet, the *Lansdowne* decision contains no reference to *Appeal of Ward* or any suggestion that the board might be pecuniarily aggrieved on that basis.

¹⁵ State ex rel. *Bringhurst v. Zoning Board of Appeal and Adjustment*, 198 La. 758, 4 So.2d 820 (1941); *Minnis v. Hamilton County Board of Zoning Appeals*, 89 Ohio App. 289, 101 N.E. 2d. 388 (1951); *A. DiCillo and Sons, Inc., v. Chester Zoning Board of Appeals*, 158 Ohio St. 302, 109 N.E. 2d. 8 (1952); *Kearney v. Hazelton*, 84 N. H. 228, 149 A. 78 (1930).

¹⁶ State ex rel. *Bringhurst v. Zoning Board of Appeal and Adjustment*, 198 La. 758, 4 So. 2d. 820 (1941); State ex rel. *Hurley v. Zoning Board of Appeal and Adjustment*, 198 La. 766, 4 So. 2d. 822 (1941).

¹⁷ 216 S. W. 2d. 171 (Tex. Sup. Ct. 1949).

¹⁸ 127 Conn. 16, 15 A. 2d. 6 (1940).

¹⁹ 211 S. W. 2d. 303 (1948).

lic interest in zoning proceedings. The Supreme Court of Texas stated, "In determining whether a permit applied for under the quoted ordinance shall be granted or denied, the board is engaged in a delegated policy-making function, and is not merely adjudicating private rights. . . . The public, as well as affected private parties, has an interest in upholding the order of the board, if it is valid, and the board itself is the proper party to represent the public interest where its order is under review."²⁰

The Connecticut Court, in the *Rommell* case, also rejected the judicial analogy, indicating that in some instances the public interest may not be directly involved but even then a court would not be justified in dismissing the board as a party to the appeal because it is a proper defendant at the institution of the proceedings and therefore continues as a party even though it takes no active part in the litigation. The position assumed here is unique, going farther than other courts in allowing administrative appeal.

A number of courts which have denied the right of a zoning board to appeal have recognized the power of the municipality to seek a review of a reversal of the board's order.²¹ This is true even though the municipality was not a party to the lower court proceeding. A building inspector, however, was denied similar recognition.²²

²⁰ Board of Adjustment of City of Fort Worth v. Stovall, 216 S. W. 2d. 171, 173 (1949).

²¹ Mayor and City Council of Baltimore v. Shapiro, 187 Md. 623, 51 A 2d. 273 (1947); Gilliam v. Etheridge, 67 Ga. App. 731, 21 S. E. 2d. 556 (1942); Perelman v. Board of Adjustment of Borough of Yeadon, 144 Pa. Super. 5, 18 A. 2d. 438 (1941).

In the Perelman case the court stated that the board of adjustment is "sufficiently distinct from the legislative body of the borough as to prevent the anomaly of a borough appealing from a reversal of its own ruling." *Id.* at 8.

²² In *A. Di Cillo and Sons, Inc. v. Chester Zoning Board of Appeals*, 158 Ohio St. 302 (1952), the Supreme Court of Ohio after denying the zoning board the right to appeal stated at page 305 that, "Sufficient partisan representation of any interest of the public in warding off appellate attacks on the decisions of the board can be furnished . . . by the administrative officer, from whose decision an appeal to the board is authorized by statute. . . ."

Later, in *Corn v. Board of Liquor Control*, *supra* note 1, the same court said at page 19, "However, in the opinion in the *Di Cillo* case there is no indication that an administrative officer has a right of appeal in the absence of a provision of the Constitution or statutes giving him one."

On the basis of the *Corn* decision, the Ohio Court of Appeals, Second District, held that the duties of the building inspector are comparable to those of the Director of Liquor Control who is not authorized to prosecute an appeal from a judgment of the common pleas court. *Union Cemetery Association v. Franklin County Board of Zoning Appeals*, No. 4948, July 1, 1953; In the Matter of the Appeal of the Union Cemetery Association from the Decision of the Franklin County Building Inspector, No. 4949, July 1, 1953.

It is interesting to observe that the courts indulge in protracted reasoning when denying a zoning board the privilege of defending its decision, yet they freely bestow the same privilege on a municipality with little or no explanation.²³ Why a municipality is assumed to be a proper party for appeal, while its subdivision, with like administrative responsibilities, is not, is difficult to fathom, except for the emphasis given the adjudicative functions of the board. Since the municipality and the board share in initiating and implementing policy, each appears equally entitled to appellate review. In all probability, public interest would be better served if the agency which administers the zoning regulations were permitted to appear and justify its actions in appellate proceedings.

LABOR AGENCIES

When a labor agency administering a fund attempts an appeal from an adverse judicial ruling, the public interest involved is fairly obvious. This view is supported also by the contention that the agency is pecuniarily aggrieved since a decision which denies a claimant's rights to benefits may be *res judicata* of the employer's liability for contribution in any subsequent action brought by the agency.²⁴

However, as in the zoning cases, courts have reached conflicting conclusions when construing labor statutes which were identical in all save minor details. To illustrate, the state unemployment compensation agencies of Washington and North Carolina allowed claims which were reversed. The statute in each instance provided that the agency should be a party to any judicial review of its de-

However, in a later decision, the same Court of Appeals overruled a zoning board's motion to dismiss the appeal of a property owner from the judgment of the court of common pleas which had affirmed the board's order. Previously, it had been decided in the *Di Cillo* case that the zoning statutes contain no provision authorizing an appeal by a board of zoning appeals from an adverse judgment of the court of common pleas. Since the zoning statutes are equally silent as to the right of appeal by a property owner from an unfavorable ruling by the court of common pleas, the board in the instant case logically maintained that the property owner should also be bound by the lower court's judgment. The Court of Appeals rejected this reasoning and held that the board had been denied the right to appeal because it cannot be considered injuriously affected, whereas there could be no question that the property owner was a "party aggrieved" and therefore authorized to prosecute an appeal under the general appellate statutes. *Ohio State Students' Trailer Park Co-op., Inc., v. County of Franklin, Ohio*, No. 4937, August 14, 1953.

²³ In *Miles v. McKinney*, 174 Md. 551, 199 Atl. 540 (1938), at page 562, the Maryland Court stated, "Moreover, apart from statute, the general rule is that a municipality has the same right to appeal as any other litigant."

²⁴ Goetten, *Unemployment Compensation—Right of Administrative Agency to Appeal from Court Reversal*, 30 *Geo. L.J.* 277 (1942).

termination and that appeals should be allowed to aggrieved parties as in other civil disputes.²⁵ In both cases the appeals were taken by the agencies and not by the claimants. The North Carolina court held that the agency had no right to appeal since the real party in interest is the claimant and nothing in the statute, which makes the commission a party to any judicial action involving its decisions, constitutes it a guardian or trustee for the claimant.²⁶ However, the Washington Court reached the contrary result and found that the agency has the right of an "aggrieved party" to appeal from judgments adverse to its rulings in matters involving interpretation of the compensation act.²⁷ The court said, "If the commission cannot by appeal present the question to this court, the decision of an important question may be indefinitely postponed to the great prejudice of the public."²⁸

Protection of a pooled account from possible depletion due to erroneous decisions has been held sufficient justification for an appeal by a state commissioner of labor who administered the state unemployment compensation law.²⁹ Permission was granted a compensation board to appeal independently of the parties to the action as a representative of the public interest and on the theory that a statute which allowed the board to appear in proceedings questioning its decisions carried with it the right to defend such decision in the higher courts.³⁰

When the agency does not administer a fund but operates in the field of labor relations, it has been held either that the agency is charged in the public interest with the prevention of unfair labor practices and therefore is authorized and under a duty to pro-

²⁵ WASH. REV. CODE 1951, Tit. 50, § 50.32.120 [WASH. REV. STAT. (REMINGTON, SUPP. 1939) §§ 9998-106 (h) (i)]; N.C. GEN. STAT. 1943, § 96-15h [N.C. Pub. Laws, Extra Sess. 1936, ch. 1 §§ 6 (h) (i), N.C. CODE § 632 (Michie, 1935)].

²⁶ *In re Mitchell*, 220 N. C. 65, 16 S.E. 2d. 476 (1941). Basis for dismissal of appeal in *Phillips, Claimant; West. U. Tel. Co., Employer; State of N.C. on relation of Employ. Security Comm. of N.C.*, 234 N.C. 453 (1951).

²⁷ *In re Foy*, 10 Wash. 2d. 317, 116 P. 2d. 545 (1941). This decision is supported by *Oak Woods Cemetery Association v. Murphy, Director of Labor*, 383 Ill. 301, 50 N.E. 2d. 582 (1943).

²⁸ *In re Foy*, *supra* note 27 at 325.

²⁹ *Woodmen of the World Life Ins. Co. v. Olsen, Commissioner of Nebraska State Dept. of Labor*, 141 Neb. 12, 2 N. W. 2d. 353 (1942).

³⁰ *Workmen's Compensation Board v. Abbott*, 212 Ky. 123, 278 S. W. 553 (1925). *Contra*, *Board of Review Created by Okla. Security Act v. Coddling*, 199 Okla. 281, 185 P. 2d. 702 (1937); *Pearce v. N.D. Workmen's Compensation Bureau*, 68 N.D. 78, 276 N.W. 917 (1947). In the *Pearce* case, the judgment of the court was not adverse to the board but the board appealed for the reason that the court erred in its findings of fact.

tect its rulings on appeal,³¹ or that the agency as a quasi-judicial body should not be permitted to become a litigant and the advocate of one or other of the parties which has appeared before it.³²

LIQUOR AGENCIES

Similar differences of opinion have been expressed by the courts in liquor agency cases. The liberal theory has been followed in Arkansas where a county judge, whose denial of a liquor license was reversed by a circuit court, was allowed to appeal from the reversal as a representative of the county's interest.³³

Similarly, the State Comptroller of Texas was permitted an appeal from an adverse decision as to the vacating of a liquor license. Although the statute in question contained no provision relating to appeal, the court allowed it under the general law.³⁴

This theory was more recently followed by an Ohio court of appeals when, on two occasions, it ruled that the Ohio Board of Liquor Control may appeal from an adverse ruling of the court of common pleas.³⁵ The court pointed out that the statute which provides for appeal by an aggrieved person from the Board's decision also states that the trial "shall proceed as in the trial of a civil action and the courts shall determine the rights of the parties in accordance with the statutes or other laws applicable to such action."³⁶ The court then concluded that since the general law confers the right to the appeal upon the parties to a civil action, the Board, having been a party to the proceeding in the lower court, fulfilled the statutory requirements.

However, this proposition was rejected by the Supreme Court of Ohio in the *Corn* case.³⁷ In that decision the Court held that the agency could not look beyond the Administrative Procedure Act to find a right to appeal. The Supreme Court observed that granting the right to appeal rests with the Ohio General Assembly since, in its opinion, the problem is legislative rather than judicial.

³¹International Union, United Automobile Aircraft and Agricultural Implement Workers of America v. Wisconsin Employment Relations Board, 245 Wis. 417, 14 N.W. 2d. 872 (1949).

³²Pa. Labor Relations Board v. Heinel Motors, Inc., 344 Pa. 238, 25 A. 2d. 306 (1942).

The Pennsylvania Supreme Court said at page 240, "For the board to become a litigant is repugnant to the traditional common law heritage of judicial detachment and freedom from interest."

See also Note, 90 U. PA. L. REV. 969 (1942).

³³Ouachita County v. Rolland, 60 Ark. 516, 31 S. W. 144 (1893).

³⁴Lane, Comptroller v. Hewgley, 155 S. W. 348 (Tex. Civ. App. 1913).

³⁵Barn Cafe and Restaurant, Inc., v. Board of Liquor Control, 63 Ohio L. Abs. 348, 107 N. E. 2d. 631 (App. 1952).

State v. Tancer, 62 Ohio L. Abs. 367, 107 N.E. 2d. 532, (App. 1952).

³⁶OHIO REV. CODE § 119.12 (1953). [OHIO GEN. CODE § 154-73].

³⁷*Corn v. Board of Liquor Control*, *supra* note 1.

SCHOOL AND TAX AGENCIES

School Agencies

The Minnesota Supreme Court in *Moede v. Board of County Com'rs of Stearns County*,³⁸ ruled that a board of county commissioners, as the representative of the public to whom is entrusted the matter of forming school districts, may appeal from an order of the district court reversing its action in establishing a new district. However, in a later decision,³⁹ the court recognized that it had taken a contrary position in *Kirchoff v. Board of Com'rs of McLeod County*.⁴⁰ In the *Kirchoff* case, the Supreme Court held that the Board of County Commissioners, acting as the tribunal to hear and pass upon a petition to detach land from one school district and attach it to another, has no interest in the litigation and is not an aggrieved party entitled to appeal. No attempt is made to reconcile these decisions, although the conflict is noted.

In the *Bricelyn* case,⁴¹ the court relied on the *Kirchoff* decision in support of its ruling that on appeal the Board of County Commissioners was not a party sufficiently interested to question the constitutionality of the School District Reorganization Act. An exception has been declared to exist when the public interest is involved.⁴² The Minnesota Supreme Court held, however, that an interest of a board in the proper exercise of its official functions does not constitute a public interest.⁴³ The court, while narrowly restricting the meaning of public interest, neglected to explain the circumstances or conditions which must be met to come within its definition. It is difficult to conceive of situations involving the public interest which do not bear a significant relationship to the exercise of official duties. The interdependence of activities as well as the interconnecting relations between policy and functions are such as to make the distinction voiced by the Minnesota court untenable.

Tax Agencies

In tax cases, in the absence of an explicit statutory authorization of a right of appeal, the view also has been maintained that a board is without authority to request the review of an adverse

³⁸ 43 Minn. 312, 45 N.W. 435 (1890). This decision is supported in *Board of Com'rs. of Carter County v. Woodford Consol. School Dist. No. 36*, 165 Okla. 227, 25 P. 2d. 1057 (1933).

³⁹ *Bricelyn School Dist. No. 132 v. Board of County Com'rs. of Faribault County*, 55 N. W. 2d. 602 (Minn. Sup. Ct. 1952). See footnote 2, p. 604.

⁴⁰ 189 Minn. 226, 248 N. W. 817 (1933).

⁴¹ *Supra* note 39.

⁴² *Id.* at 604.

⁴³ *Ibid.*

judicial ruling.⁴⁴ Thus, the Supreme Court of Arkansas ruled that the entry of a decree for costs against a board of assessors of a waterworks district did not justify an appeal by the board in the absence of any other interest.⁴⁵ However, the high court of Maryland took the contrary position as to review when it allowed an appeal of its state tax commission from a reversal of assessments made by the commission.⁴⁶

A Louisiana court denied the right of appeal to a sheriff when he acted as an *ex officio* tax collector.⁴⁷ The same jurisdiction declared that a person who named a tax collector as a party to a suit for the revocation of a tax title, made by the collector to the state, was estopped by her judicial admission of his competency to question his power to appeal from a reversal of his action.⁴⁸

The West Virginia Supreme Court, in construing a statute which provided that a taxpayer who feels aggrieved by the assessment of his land may appeal to the county court and then to the circuit court, held that the statute contained no language recognizing the county court as a party to the appeal or indicating that the court is authorized to seek a review of the circuit court's decision.⁴⁹

MISCELLANEOUS AGENCIES AND OFFICIALS

A discursive examination reveals that this judicial conflict prevails also as to appeals by other agencies and officials. A common council,⁵⁰ a county board of supervisors,⁵¹ and a former commissioner of public safety⁵² were held not to be sufficiently interested in the proceedings to entitle them to appeal from judgments reinstating officials removed by them. However, a mayor was allowed to appeal from a decision reinstating the chief of police because the responsibility for the chief's conduct must be borne by the executive department.⁵³

⁴⁴ Board of Assessors of Waterworks Dist. No. 2 of Texarkana v. Texarkana Water Corp., 125 Ark. 323, 188 S. W. 808 (1916).

⁴⁵ *Ibid.*

⁴⁶ State Tax Comm. v. Western Md. Ry. Co., 188 Md. 240, 52 A. 2d 615 (1947).

⁴⁷ State ex rel. Young v. Sanders, Sheriff, 111 La. 188, 35 So. 509 (1903).

⁴⁸ Smith v. City of New Orleans, 43 La. 726, 9 So. 773 (1891).

⁴⁹ Mackin v. Taylor County Court, 38 W. Va. 338, 18 S.E. 2d 632 (1893).

⁵⁰ State ex rel. Kempster v. Common Council of City of Milwaukee, 90 Wis. 487, 63 N.W. 751 (1895).

⁵¹ McCarty v. Board of Sup'rs of Ashland County, 61 Wis. 1, 20 N.W. 654 (1884).

⁵² Rox v. Doherty, 284 N.Y. 550, 32 N.E. 2d 549 (1940).

⁵³ Gray, Mayor v. State ex rel. Putnam, Chief of Police, 24 Ohio App. 445, 157 N.E. 905 (1927).

Ordinarily a judge⁵⁴ or a justice of the peace⁵⁵ is not deemed aggrieved by a reversal of his ruling, but where a statute provided that the judge shall defend in appeals as the representative of the county, the judge was allowed to appeal.⁵⁶

Pecuniary interest was the basis for the allowance of an appeal by a county board from a judgment for costs⁵⁷ and a judgment requiring the board to pay out money under a contract canceled by the court,⁵⁸ whereas public interest justified an appeal by land commissioners⁵⁹ and an irrigation district.⁶⁰

A highway commissioner who refused to issue a driver's license,⁶¹ a registration commission which would not register a voter,⁶² and commissioners of a department of agriculture and markets who refused a showman's license⁶³ were held to have no personal interest warranting an appeal from decisions reversing their rulings, but a recorder of mortgages was allowed to appeal even though the court found that his only interest was that of sustaining his interpretation in matters affecting property in which he had no personal interest.⁶⁴

A statute which required a public service commission to file an answer to an appeal taken from its action made it a party to the record entitling it to appeal⁶⁵ and the absence of a provision

⁵⁴ *Mackin v. Taylor County Court*, 38 W. Va. 338, 18 S.E. 2d. 632 (1893); *Sumpter County Judge v. Buchanan*, 88 Ark. 118, 113 S. W. 809 (1908); *Bowles v. Dannin*, Judge of Probate, 2 A. 2d. 892 (R.I. Sup. Ct. 1938); *People ex rel. Breslin v. Lawrence*, Justice of Supreme Court, 107 N.Y. 607, 15 N.E. 187 (1888); *Coupland v. Tullar*, 21 Tex. 523 (1858).

⁵⁵ *Onion, Justice of Peace v. Cain*, 64 S.W. 2d. 418 (Tex. Civ. App. 1933); *McCloskey v. Kenfro*, 47 Ariz. 534, 57 P. 2d. 1140 (1936).

⁵⁶ *Ouachita County v. Rolland*, 60 Ark. 576, 31 S.W. 144 (1895); *Cleburne County v. Morton*, 69 Ark. 48, 60 S.W. 307 (1900).

⁵⁷ *Fitch v. Hay*, 112 App. Div. 736, 93 N.Y.S. 1090 (1906).

⁵⁸ *Board of Com'rs. of Dubois County v. Cave*, 192 Ind. 152, 132 N.E. 631 (1921).

⁵⁹ *People ex rel. Burnham v. Jones, Land Commissioners*, 110 N.Y. 509, 18 N.E. 432 (1888).

⁶⁰ *In re Heart River Irr. Dist. Stark v. Heart River Irr. Dist.*, 47 N.W. 2d. 126 (N.D. Sup. Ct. 1951).

⁶¹ *Helland v. Jones*, 37 N.W. 2d. 513 (N.D. Sup. Ct. 1949).

⁶² *In re Moskowitz*, 329 Pa. 183, 196 A. 498 (1938).

⁶³ *Clark v. Hill*, 208 Wis. 575, 243 N.W. 502 (1932).

In this case the trial was favorable to the commissioners but they appealed because they disagreed with the reasons for the judgment.

⁶⁴ *Carrere v. Reddix*, 210 La. 776, 28 So. 2d. 267 (1946).

⁶⁵ *Public Service Commission v. B. and O. R.R. Co.*, 260 Pa. 323, 103 Atl. 724 (1918); and companion cases, *Public Service Commission v. Phil. and R.R. Co.*, 260 Pa. 327, 103 Atl. 725 (1918); *Public Service Commission v. Central R.R. Co.*, 260 Pa. 328, 103 Atl. 725 (1918).

See also *People ex rel. South Share Traction Co. v. Willcox, Public Service Commission, First District*, 196 N.Y. 212, 89 N.E. 459 (1909).

for appeal in the act creating a railroad commission did not give rise to an inference against the right sufficiently strong to prevent the commission from prosecuting an appeal under the general law.⁶⁶ In the latter case, the court found that the public is in effect the plaintiff in an investigation by the commission.

THE LEGAL PROCESS

Although the decisions of courts which have adjudicated the right of an agency to appeal from an adverse ruling divide on the issue of strict or liberal construction of the statutes which govern specific proceedings, the issue involved is far more fundamental, penetrating the core of our legal process.

In primitive society, the law dealt only with activities which threatened breach of peace. Today it assumes a more compelling role since it is charged with implementing social policy. Thus, where law, in earlier times, concerned itself only with prohibitive and adjudicative functions, it now also has affirmative responsibilities in satisfying human wants and expectations.⁶⁷ This has meant the transmutation of the fundamental elements of the common law which the judiciary and the bar have often found disturbing.

Thus, modern law is more than a medium for dealing with disputes or a guide as to what officials will do. Its growing concern is with implementing social policy, too often as not, the policy being inarticulated and elusive. There is little wonder, then, for the increasing growth in judicial discrepancies and conflicts.

The need for precise study of the trends in decision and the factors which influence legal results is becoming increasingly evident. The shortcomings of the present practices have been described by many writers, more recently by Professor Myres McDougal. McDougal states that "Little effective effort is made to relate decisions to basic community values or, when discrepancies are observed, to clarify values and adopt a creative attitude in the invention and adaption of new means."⁶⁸

⁶⁶ *State ex rel. Great Northern Ry. Co. v. R.R. Commission of Washington*, 60 Wash. 218, 110 Pac. 1075 (1910).

⁶⁷ Professor Hurst described the more recent developments as follows: "The stock nineteenth-century model of a legal rule was the admonition to be good, coupled with the penalty for being bad. Twentieth-century law saw a major shift toward preventive, positive, framework-building use of the power of the political community. This was a natural corollary both of the social facts that pressed us to rationalize social institutions and of the value that experience with rationalization taught us to put upon it."

Hurst, *Changing Popular Views About Law and Lawyers*, 287 ANNALS, 1, 5 (1953).

⁶⁸ McDougal, *The Comparative Study of Law for Policy Purposes*, 61 YALE L. J. 915, 920 (1952).

At an earlier date, Professor Kocourek, noting this limitation of the ju-

The inability of the judiciary to cope effectively with modern social and economic issues and its failure to weigh and articulate policy adequately, influenced the rapid development of legislative and administrative law. Notwithstanding their incapacity to cope with many current problems, the courts have been unwilling to make room for the other legal processes. The judicial hostility to administrative law, which still persists, is characteristic of the earlier attitude towards legislation. There was a time when the judges seemed to disfavor all statute law. Sir Frederick Pollock relates that the English judges in construing a statute operated "on the theory that Parliament generally changes the law for the worse, and that the business of the judges is to keep the mischief of its interference within the narrowest possible bounds."⁶⁹ This antagonism to legislation has also prevailed among the American judges. But despite such fulmination, the legislative and administrative processes have assumed increasing responsibility over the satisfaction of social demands and requirements.

Apparently, the judicial opposition to administrative appeal is another illustration of this hostility. Many American judges look askance upon the agencies and their overlapping of legislative, judicial, and executive functions, in what appears as shocking conflict with the traditional concept of the separation of powers.

This judicial sentiment has found support among many practicing attorneys who contend that agency appeal would be tantamount to granting the state and local government an undue advantage over the private litigant. To what extent this opposition is based on a fear of adverse appellate rulings to their clients is indeterminable. They show little or no concern, when a right of appeal is disallowed, over the resulting postponement of decisions to the likely detriment of the public. This attitude is a sequel to that voiced against the state when the prosecution has attempted to appeal in criminal cases.

In fairness to the attorneys, however, it should be noted that their fear is not without some foundation. The agencies generally have adequate personnel and funds to appeal each adverse decision regardless of its merit or importance, whereas the private litigant, even when he feels that his rights are unfairly invaded,

diciary, stated, "For the larger part, in the application of law, inquiry into purpose is foreign to the judicial process."

KOCOUREK, AN INTRODUCTION TO THE SCIENCE OF LAW, 169 (1930).

Even the skeptic, Mr. Justice Holmes, looked to the time "when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them." Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 474 (1897).

⁶⁹ POLLOCK, ESSAYS IN JURISPRUDENCE AND ETHICS, 85 (1880).

may be unable to meet the expenses of appellate proceedings. This could place the private litigant in an unfair position and force him to submit to what in his opinion is unreasonable or arbitrary administrative action. But abuses arising from administrative review could be forestalled or controlled by legislative investigation and action. An awareness of possible legislative discipline should discourage administrative misuse of authority.

A balancing of interests seems to favor administrative appeal, since the agency's existence bespeaks a social need or demand. An agency should be allowed to appeal like any private litigant, for, as a representative of the many, it is charged with a public responsibility and interest. The structure of a social organization provides little reason for penalizing the group it represents. Nor should the judicial functions of the agency, which have no direct bearing on its substantive operations, preclude the full review of administrative interpretation, whether sustainable or not. Its functions which relate to the administration of a public program, should not be likened to those of the judiciary, the latter being without affirmative power. Where the judicial operations of an agency are incidental to its positive, administrative program, the former should not be assigned a relationship out of line with its import. Even in the absence of rule-making authority, the adjudicative functions of an agency, guided by legislative policy, assume a pattern unlike private litigation. There the agency performs an affirmative role through the enforcement of statute law. To allow full and complete review of its interpretation of the legislation, an agency with adjudicative responsibilities should also have equal right to appeal. The administration of a public program, whether through the rule-making or the adjudicative process, transcends the narrow limits of disputes and the essentially negative judicial duties.

Further, where a statute is silent or unclear as to administrative appeal, permitting review is in keeping with the more modern legal tenets. The era of formalism has long since passed. Procedural matters, except for jurisdictional and other issues which go to the heart of a controversy, should not be the basis for disallowing an appeal by an administrative agency. The right of an agency to defend a suit should carry with it a right of review.

The right to appeal should rest with an administrative agency to reduce the conflicts stemming from unreviewed agency decisions and subsequent reversals of policy by the courts involving the same subjectmatter but different parties. In the event that appeal is not allowed, the administrative rule remains unsettled and the rights of interested parties uncertain.

The exercise of judicial review over administrative agencies has not infrequently raised questions as to the qualifications of the

lower courts to consider such matters. The officials of an agency develop an expertise with respect to its delegated functions which the judiciary, with its wide range of other litigation, cannot possibly emulate. When judicial review is general to many lower courts, it is not unlikely that they may render diverse, conflicting decisions. In that event, a uniformity of administrative policy is absent from the program and the complexities of overall administration are substantially increased. While it is beyond the scope of this discussion to consider the merits of an administrative court with singular authority to review agency decisions, the confusion resulting from judicial discordancies and conflicts should be minimized by granting the right of review to all disputants, public or private, regardless of the appellate court structure.

LEGISLATION IN OHIO

The courts have repeatedly claimed that the solution to this controversy rests with the legislatures since the administrative process is created by statute. While some courts have seen the efficacy of administrative appeal and have liberally interpreted legislation to allow review, other jurisdictions have adhered strictly and literally to the statutory texts.

As indicated by the *Corn* case,⁷⁰ Ohio falls within the latter group. Inspired by that decision, on July 18, 1953, just thirty-eight days after the *Corn* ruling, the Ohio General Assembly, recognizing its serious implications, partially resolved the problem by allowing appeal to those agencies which are covered by the Administrative Procedure Act. The Assembly amended the Act to provide that:

"The judgment of the court (of common pleas) shall be final and conclusive unless reversed, vacated or modified on appeal. Such appeals may be taken either by the party or the agency and shall proceed as in the case of appeals in civil actions as provided in Sections 2505.1 to 2505.45, inclusive of the Revised Code."⁷¹

This Ohio legislation undoubtedly clarifies the appeal process of those state agencies responsible to the Administrative Procedure

⁷⁰ *Corn v. Board of Liquor Control*, *supra* note 1.

⁷¹ OHIO REV. CODE § 119.12 (1953), as amended in S.B. No. 342, 100th General Assembly, Regular Session, (1953-1954).

The remainder of the amendment provided:

"Such appeals by the agency shall be taken on questions of law relating to the constitutionality, construction, or interpretation of statutes and rules and regulations of the agency and in such appeal the court may also review and determine the correctness of the judgment of the court of common pleas that the order of the agency is not supported by any reliable, probative and substantial evidence in the entire record.

"Such appeals may be taken regardless of the fact that a proceeding was pending prior to the amendment of this section expressly authorizing such appeals, provided such appeals are perfected by the filing of notice of appeal within the time prescribed by section 2505.07 of the Revised Code."

Act but leaves unsettled the right of review by zoning boards. In the absence of explicit legislative permission, such boards must continue to administer their programs without the benefit of review from adverse judicial decisions.

It is recommended that the Ohio Legislature, consistent with its recent action, broaden the scope of administrative review to include the zoning boards and the other agencies which are still without the appeal authority.⁷²

⁷² Recently, the Maryland legislature amended its zoning statute to provide that:

"The Court shall grant the Board and other proper parties a reasonable time to answer and shall require either the original paper or certified copies thereof, which constituted the entire record before the Board, to be filed with the Board's answer." Acts 1953, ch. 696, p. 1569.

This legislation should leave no doubt that the board is a proper party to the initial appeal from its decision by the party aggrieved, but does not answer the question of the board's right to appeal from a reversal by a lower court. It would appear that more explicit legislative language is necessary to overrule the Miles case, *supra* note 10.