JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS IN OHIO

I. THE PROBLEM

The expansion of state agencies and the powers which they exercise, as well as the potentially far-reaching effects of many of their decisions, make it essential that those affected by agency decisions have a clear-cut and effective means of timely judicial review once all administrative remedies have been exhausted. Moreover, an individual adversely affected by an agency decision in order to obtain timely relief must be able to easily determine which legal mechanism is available to him for that purpose. Yet, despite the existence of statutes providing for appeal from and review of agency decisions, the case law in this area defines no clear criteria for deciding which mechanism of review is available. In addition, the effectiveness of the relief that is available has been undermined by the consistent refusal of courts to allow pre-enforcement review\(^1\) of agency rules in situations where a decision or the promulgation of a rule or order results automatically in an injury to those affected. It is the thesis of this note that such a situation need not continue to exist and that a recent decision of the Ohio supreme court has taken an initial—though uncertain—step towards providing timely review and an identifiable mechanism for obtaining that review.\(^2\) To demonstrate the evolution of the present situation and to place it in perspective, the note will briefly discuss the creation of administrative agencies in Ohio and the statutory means set forth to review their decisions. In addition, there will be a preliminary look at the administrative rule-making process and a clarification of basic concepts involved, in order to prepare the reader for a discussion of the case law under both the Administrative Appeals Act\(^3\) and the Administrative Procedure Act.\(^4\) The note closes by examining the most recent Ohio supreme court opinion in the area and includes the suggestion that the Ohio Declaratory Judgment Act\(^5\) can be used to obtain the effective and timely relief unavailable in the past.

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\(^1\) Because it is used throughout this note and to avoid confusion, the term "pre-enforcement review" ought to be defined at this point. It refers to the question of whether a rule or regulation of an agency, at either the state or municipal level, may be attacked in court upon being promulgated, and if so, under what circumstances. The kind of situation to which it refers is aptly illustrated by Burger Brewing Co. v. Liquor Control Commission of Ohio, 34 Ohio St. 2d 93, 296 N.E.2d 261 (1973), discussed in text accompanying notes 80 to 91 infra.

\(^2\) Burger Brewing Co. v. Liquor Control Commission of Ohio, 34 Ohio St. 2d 93, 296 N.E.2d 261 (1973).


II. Creation of Administrative Agencies: Their Theory and Operation

A. The Theory

It has been stated that our democracy's "chief contribution to the science of government is the principle of the complete separation of the three departments of government, executive, legislative and judicial." However, the Ohio constitution does not contain an express provision preventing each branch of government from exercising the powers allocated to the others, and, indeed, the doctrine of separation of powers in Ohio is not total. For example, the governor is usually a legislative leader of sorts, with the power to convene the General Assembly as well as the power to exercise a veto over legislation. One major reason for the partial relaxation of the doctrine is that the functions of government have rapidly expanded and have grown exceedingly technical and complex.

The Ohio constitution provides that no law shall be passed to take effect upon the approval of any authority other than that of the General Assembly. However, increased government complexity and expansion have made it necessary for the various branches to delegate some of their powers. Initially, this delegation is distinguished from the actual power to enact laws as follows:

The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

The basic rationale for delegation is in large part the belief that agencies, which in Ohio include municipalities and other political subdivisions

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7 This is also true of the United States Constitution. Ex Parte Grossman, 267 U.S. 87, 119 (1925).
8 The General Assembly is, however, prohibited from exercising judicial power not expressly conferred by the Constitution. OHIO CONST. art. II, § 32.
11 "It would not be necessary to go beyond the confines of Ohio to find scores of instances wherein one branch of government has been invested with the powers of another." Ex parte Bevan, 126 Ohio St. 126, 135, aff'd sub nom. Bevan v. Krieger, 289 U.S. 459 (1933).
12 Cincinnati, W. & Z. RR. v. Commissioners, 1 Ohio St. 77, 88-89 (1852). However, this sharp distinction may have blurred somewhat with the passage of time as "[g]radually our legislative bodies developed the system of legislating only the main outlines of programs requiring constant attention, and leaving to administrative agencies the tasks of working out subsidiary policies." K. DAVIS, ADMINISTRATIVE LAW TEXT § 1.05 (3d ed. 1972). Indeed it has been said that "... the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight." Address by Senator Root, American Bar Association Annual Meeting, August 30, 1916, 2 A.B.A.J. 736, 749 (1916).
as well as the state administrative agencies, would bring more expertise
to bear on a problem in highly technical or highly localized situations,
thus giving rise to wiser, more responsive, and more efficient government
at both the state and local level.\textsuperscript{18} Often these agencies are hybrid organizations\textsuperscript{14} in that they sometimes function in a legislative capacity, sometimes in a judicial capacity, and sometimes in both capacities simultaneously.\textsuperscript{15} They promulgate rules, pass ordinances, issue orders, administer statutes and make other decisions which affect large numbers of people in diverse areas and occupations. The primary focus of this note will be on judicial review of their rule-making functions. When these functions operate to deprive a person of his rights, properties, or freedoms, the General Assembly has provided various mechanisms through which an injured party can challenge both the procedure of the rule-making process and the substance of the rule itself.\textsuperscript{16}

B. The Operation

1. Political Subdivisions Within The State

The Ohio constitution provides that "Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government."\textsuperscript{17} Section 3 states that, "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."\textsuperscript{18}

The purpose of these home rule provisions in the Ohio constitution is to add to the governmental stature and capability of Ohio municipal governments.\textsuperscript{19} The premise of these provisions is that local matters can be better handled by local government, since the local government is closer to the needs of the electorate than is the state legislature, and presumably has a superior knowledge of the problems peculiar to the locality.\textsuperscript{20} As

\textsuperscript{15} This ability to act in more than one capacity seemingly violates the doctrine of separation of powers. \textit{Id.}
\textsuperscript{17} \textbf{OHIO CONST. art. XVII, § 7.}
\textsuperscript{18} \textbf{OHIO CONST. art. XVIII, § 3.}
a result, these sections of the Ohio Constitution vest in municipalities broad power and discretion to make decisions and enact ordinances.\textsuperscript{21} The expressed legislative intent as well as the interpretive case law makes it clear that municipal ordinances and decisions are to be given the force and effect of law.\textsuperscript{22} Since the promulgators of municipal ordinances act in a legislative capacity, their actions are classified as quasi-legislative.\textsuperscript{23} However, not all municipal actions are “quasi-legislative” in function; some are “quasi-judicial,” involving the determination of various matters in an adjudicative proceeding of some kind. In 1957, the General Assembly enacted Revised Code § 2506.01 to provide for review of all municipal decision-making. Revised Code § 2506.01 provides:

\begin{quote}
Every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department or other division of any political subdivision of the state may be reviewed by the common pleas court . . . .

The appeal . . . is in addition to any other remedy of appeal provided by law.

A final order, adjudication, or decision does not include . . . any order which does not constitute a determination of the rights, duties, privileges, benefits, or legal relationships of a specified person . . . .\textsuperscript{24}
\end{quote}

2. State Administrative Agencies

Whenever the General Assembly enacts legislation to enable the creation of a new state agency,\textsuperscript{25} it will generally define the parameters of the duties of the agency in the legislation itself, in order to provide the agency with an operational framework. The rules and decisions of these agencies have come more and more to dominate many aspects of our day-to-day lives. Mr. Justice Jackson has made this observation:

\begin{quote}
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At this point no attempt will be made to define either “quasi-legislative” or “quasi-judicial.” Suffice it to note that: Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution. The mere retreat to the qualifying “quasi” is implicit with confession that all recognized classifications have broken down, and “quasi” is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.
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\textsuperscript{24} OHIO REV. CODE ANN. § 2506.01 (Page Supp. 1972).
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\textsuperscript{25} There are currently some eighty agencies covered by the Administrative Procedure Act. Note, \textit{A Survey of the Ohio Administrative Procedures Act}, 22 CLEV. ST. L. REV. 320 (1975).
The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart.\(^{26}\)

However, with this expansion of power and responsibility comes a concomitant need to guard against a parallel expansion of potential abuse of power. The concepts of separation of powers and of checks and balances within our system of government are not readily applied to administrative agencies, which at times function in a quasi-judicial fashion and at times in a quasi-legislative fashion and at times in neither. Speaking to this problem, Elihu Root warned that “If we continue a government of limited powers, these agencies of regulation must themselves be regulated. . . . The rights of a citizen against them must be made plain.”\(^{27}\)

In Ohio, attempts to make these rights “plain” are found in several places. The Ohio constitution provides that “the courts of common pleas have original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.”\(^{28}\) The Ohio Administrative Procedure Act \([\text{APA}]\)\(^{29}\) specifically allows appeal from adverse orders of agencies in “adopting, amending, or rescinding a rule . . . on the ground that said agency failed to comply with the law . . . or that the rule as adopted or amended by the agency is unreasonable or unlawful . . . .”\(^{30}\) Revised Code \(\S\) 119.11 further provides that the filing of a notice of appeal operates “as a stay of the effective date” of the order of the agency.\(^{31}\) The hearing is “based upon the arguments, briefs of counsel, and the transcript of the record of proceedings as transmitted by the agency.”\(^{32}\) The Ohio APA also provides for appeal by “any party adversely affected” by an agency order “issued pursuant to an adjudication.”\(^{33}\)

\(^{26}\) FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952); “the administrative process affects nearly every one in many ways nearly every day.” K. Davis, Administrative Law Text \(\S\) 1.02 (3d ed. 1972).


\(^{28}\) Ohio Const. art. IV, \(\S\) 4(B).


\(^{31}\) Id.

\(^{32}\) Id.

\(^{33}\) The court may affirm the order of the agency, complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law.

III. AGENCY ACTIONS:
THE PROCESS AND SOME BASIC PRINCIPLES

A. The Process: A Hypothetical

A small group of men enters a municipal government office; each man takes his seat around a conference table. A staff aid enters the room and hands each participant in the conference a report summarizing the views presented at a recent public hearing. In addition to the summary, each member of the group is given the staff aid's recommendation that service of the county's public transportation system be cut in half. The summary of views states that of 100 people testifying at the public hearing, only one was in favor of cutting the service and that the one was a county official who testified that economic reasons necessitated a cutback. The group reads the report, takes a vote, and publishes its finding. The vote is in favor of the cut-back.

That segment of the public which depends upon public transportation is outraged. Looking to the courts for relief, one of these persons aggrieved challenges the cut-back by way of appeal. As will be seen, for the plaintiff to convince a court to hear the appeal is no easy task; however, we shall assume that this plaintiff was luckier than some. In its hearing, the court will look to determine if the small group of men has abused its discretion. The rule which the court will apply to make this determination limits the court's power to questioning whether the action was arbitrary or whether it was not supported by substantial evidence. The court then rules that because the action taken by these men is quasi-legislative in nature, relief cannot be granted to the plaintiff at this proceeding. In

34 The following model was adapted from Comment, Quasi-Legislative Acts of Local Administrative Agencies: Judicial Review, 7 S. Fran. L. Rev. 111 (1972). It is not intended as an all-inclusive example of how agency decisions are reached. Rather, it is presented merely as an illustration depicting the possible abuses in the rule-making process.

35 Not all rule-making is preceded by a public hearing. The form of the proceeding, if any, in the municipality area is delineated by the municipal charter. State agencies are required by statute to provide for a public hearing, OHIO REV. CODE ANN. § 119.03 (Page 1969). The Federal APA provides only for notice and comment before promulgation of rules, 5 U.S.C. § 553 (1970).

36 It is questionable whether even this rule has been applied in those few instances where the Ohio courts have reviewed agency rule-making. Long v. Division of Watercraft, 118 Ohio App. 369, 195 N.E.2d 128 (1963); In re Board of Liquor Control's Amendments, 115 Ohio App. 243, 184 N.E.2d 767 (1961). Indeed it may be that a court will not make the determination at all, see State ex rel. Park Inc. Co. v. B.T.A., 31 Ohio St. 2d 183, 285, N.E.2d 356 (1972); and State ex rel. Lynch v. Rhodes, 176 Ohio St. 251, 199 N.E.2d 393 (1964). It may be that the question is properly addressed to an executive authority like the attorney general or the civil service board, rather than the court of common pleas, State ex rel. Draper v. Wilder, 145 Ohio St. 447, 62 N.E.2d 156 (1945), because there is no defendant. It may also be a rule that is not subject to appeal, Craun Transp. v. P.U.C., 162 Ohio St. 9, 120 N.E.2d 436 (1954), or a rule that is reviewed and upheld, Kroger Baking v. Glander, 149 Ohio St. 120 (1948), 77 N.E.2d 921, or a rule that is reviewed and held inapplicable, Pottery Inc. v. County 149 Ohio St. 89, 77 N.E.2d 608 (1948). Thus it may be untimely to ask any questions. The scope of review may be for abuse of discretion or for error of law, including defect in procedure, such as no evidence to support the agency's rule.
effect, the court has told the person aggrieved by the agency action that the single county official gave sufficient evidence, despite the 99 people who opposed his position, to affirm the action taken in cutting back the service.

The hypothetical just presented is perhaps overdrawn in some respects. However, it is not intended to describe the entirety of agency decision-making in the state; rather its purpose is to introduce the reader in a preliminary fashion to a procedure that may take place and to the extremely difficult problems a person aggrieved faces in challenging any agency decision. A more detailed look at the basic concepts in the area will give more precise meaning to the events in the hypothetical and will also serve to give the reader the background necessary to understand the discussion of the case law which follows.

B. The Basic Principles

This note discusses problems in challenging the rule-making decisions of a municipal agency and of a state administrative agency. While the two methods of challenge are embodied in different statutes and are discussed separately in this note, the difficulties faced by the challenger under each statute are interrelated to a large extent, with only a change in focus as one moves from the municipality's rule-making to the state administrative agency's rule-making.

Like the problem faced by the challenger of a state administrative agency rule, the difficulty with respect to the challenge of a municipal agency's rule is not the absence of an opportunity to challenge but something more subtle. At the center of the difficulty is a lack of clarity as to what the challenger must do to invoke the subject matter jurisdiction of the common pleas court and to state a claim for relief cognizable in that court. If a person wants to challenge any agency ruling, his ability to do so turns upon whether or not the court labels the agency's decision-making proceeding as quasi-legislative or quasi-judicial. If the classification is quasi-legislative, then the court will not undertake to review the agency decision, unless the action has first been challenged at the municipal level in a "judicial" proceeding. However, the elements which qualify a decision for classification as quasi-legislative are less than clear. In addition, not all municipalities have a review proceeding available. If the municipality does not provide such a remedy, the aggrieved party's avenues...
of challenge are limited either to some form of general equitable relief or to the use of the Ohio Declaratory Judgment Act.\textsuperscript{38} The most significant problem for such a challenger is not the absence of a method of invoking the jurisdiction of the court but rather the difficulty in choosing the proper method of stating a claim for relief. In other words, the focus in the municipal area is the absence of any workable criteria telling a plaintiff what kind of relief to ask for to obtain the judicial review which is—somewhere—available. The absence of such functional criteria has the effect of rendering the review process, in a large number of cases, almost illusory, since the plaintiff is often forced to start down several roads before he finds the proper avenue to relief. Such a Kafkaesque state of affairs is inefficient because there is no certain procedure to precisely allocate time, money, and judicial resources. It is also frustrating and unnecessary.

When a state administrative agency's rule is being attacked in court; the focus is not so much on finding the proper method of challenge as on the timing of the relief which is available to the aggrieved party and the lack of an effective method of pre-enforcement challenge. The problem is not that there is no review of a state administrative agency's rule-making; there will be, sooner or later. To be sure, if the rule is actually enforced, the party against whom it was enforced can immediately seek relief.\textsuperscript{39} However, there are a number of situations in which the mere promulgation of the rule results in an irreparable injury to those affected. Here there is a need for pre-enforcement review because of the time lag between the injury caused by the rule and the ability of the plaintiff to seek relief from that injury. The affected party needs to have the rule's applicability to him clarified so that he may structure his conduct accordingly. In a given case, the plaintiff may or may not know if his actions would place him in violation of the rule. It may be that he would have to break the rule to determine its scope, or he may be forced to refrain from acting in what would be a perfectly legal fashion because he does not know what is proscribed. Taken to its extremes, this latter proposition may be the most damaging, as the sanctions imposed for violation of the rule may be so onerous in the view of the class of persons affected that no one will want to risk imposition of the rule to determine its scope. In such a case, there would be no challenge at all, due to the lack of an effective pre-enforcement review mechanism.\textsuperscript{40}

\textsuperscript{39} OHIO REV. CODE ANN. § 119.12 (Page 1969).
\textsuperscript{40} The above discussion has used the terms "review" and "appeal." When a court determines the legality of agency action through review, it functions as a court of first impression and is, as such, not limited in the scope of its review to any record compiled by any other authority. Appeal on the other hand presupposes some kind of prior proceeding giving review at a lower level — here review at the administrative level. The reviewing court must depend upon the record presented to it from that lower body.
IV. THE CASE LAW

A. The Beginning Point: Zangerle v. Evatt

On June 27, 1939, the Tax Commissioner adopted Rule Number 2, establishing the classification of property used in the refining of petroleum. This rule would have reclassified refinery structures belonging to several major oil companies from real property to personalty. The auditors of the counties where the properties of the oil companies were situated applied to the Board of Tax Appeals of the Department of Taxation for review of the rule. That Board found that Rule Number 2 was reasonable; thereafter, the auditors invoked revisory jurisdiction and appealed to the Ohio supreme court.

The supreme court dismissed the appeal and refused to review the legality of the rule. Although the actual basis for the decision is unclear, the court's opinion does contain two separate rationales: first, the court stated that passage of the rule in question was a quasi-legislative act and therefore not appealable; second, the court indicated that the parties appealing the rule, the county auditors, did not have standing, and that there was thus no "justiciable case or controversy." The court, in part, based the distinction between quasi-judicial and quasi-legislative actions on statutory language. However, a clearly articulated reason for why the conclusion that appeal is precluded should follow from the distinction never appears. In addition, the factors requiring the distinction itself never appear with sufficient clarity to allow one to identify in a given case whether or not the action arose out of a quasi-judicial or quasi-legislative proceeding.

The court also held that the proper parties, the companies whose properties were to be reclassified, were not before the court. Given this ratio-

41 139 Ohio St. 563, 41 N.E.2d 369 (1942).
42 The supreme court shall have "such revisory jurisdiction of the proceedings of administrative officers as may be conferred by law. . . ." OHIO CONST. art. IV, § 2. This provision was the predecessor of OHIO CONST. art. IV, § 4(B). See text accompanying note 28 supra.
43 Appeal was specifically allowed from the Board's decision by statute:
   The proceeding to obtain reversal, vacation, or modification shall be by appeal to the supreme court of Ohio.
   . . .
   Appeals from decisions of the board of tax appeals determining appeals from final determinations by the tax commissioner . . . may be instituted: . . . by the county auditor . . .
44 These concepts are not easily definable. Both the concepts of "standing" and "justiciable case or controversy" are used to permit a court to refuse to entertain jurisdiction. The reasons for such refusals include: political question; ripeness; mootness; lack of adequate presentation of the issues; public policy; exhaustion of remedies. The most recent pronouncements have broadened the concepts by requiring only that: (1) the challenged action has caused the plaintiff injury in fact; and (2) that the interest sought to be protected by the complainant is arguably within the zone to be protected or regulated by the statute or constitutional guarantee in question. Barlow v. Collins, 397 U.S. 159 (1970); Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970).
nale for the opinion, Zangerle could be explained on the basis of a lack of standing. If so, it would then be possible to consider the court's inarticulate distinction between quasi-legislative and quasi-judicial agency actions as dictum. However, in Zangerle, the appeal was taken by the auditors under General Code § 5611-2, and although the court makes no mention of it, the auditors were in fact specifically named in that statute as the proper parties to bring the appeal. Therefore, the decision does not clearly rest upon a lack of standing either. In short, the opinion is less than a model of clarity, and much of the uncertainty which exists today arises out of the confusion as to what Zangerle says and why.

Subsequent to Zangerle, it was assumed that only quasi-judicial proceedings could be appealed and that rule-making was quasi-legislative and, therefore, not appealable. However, the possibility that the Administrative Appeals Act or the Administrative Procedure Act did authorize pre-enforcement review of the validity of rules was a very real one. What happened to that possibility is discussed next.

B. Review Under the Administrative Appeals Act

1. Tuber v. Perkins

Tuber concerned an appeal from an amendment of a zoning plan by the Board of Township Trustees of Boardman Township. The appeal was taken pursuant to R.C. § 2506.01. The majority of the court, citing Zangerle, held that the enactment of zoning regulations was a "legislative" action. The concurring opinions in Tuber reached the same result as the was an application of the first rationale of Zangerle to municipal agency action. The concurring opinions in Tuber reached the same result as the majority; however, they based their conclusion in part on the lack of a justiciable case or controversy. Furthermore, they stated that "The resolution . . . did not affect a 'specified person' or persons," and that "the resolution changing the zone did not, in itself, adversely affect the rights of the appellants. . . . In other words, the attempted appeal . . . was premature."

Therefore, Tuber made it clear that "legislative" actions were not to be reviewable under the Administrative Appeals Act. However, it remained to be seen what the court meant by the term "legislative" action in this context.

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46 6 Ohio St. 2d 155, 216 N.E.2d 877 (1966).
47 Id. at 158, 216 N.E.2d at 879-80.
48 Id., 216 N.E.2d at 880.
49 Id., 216 N.E.2d at 880.
The Cleveland City Council enacted Ordinance Number 1779-69, effective November 11, 1969, authorizing the Director of Public Utilities to contract for improvements and additions to certain utility facilities. The ordinance said the contract was to go to the "lowest responsible bidder under competitive bidding." Ordinance Number 1.4501 of Cleveland required that contracts over $3,500 could be awarded only with the approval of the Board of Control, which consisted of the mayor and the directors of the several city departments. On May 20, 1970, the Board of Control adopted Resolution Number 246-70 authorizing the Director of Public Utilities to contract with Henry B. Sherman, Inc. for a bid of $154,690. Kelly Co. had submitted a bid for $123,029 and, therefore, objected to the award of the contract to Sherman, Inc. As a result, Kelly Co. appealed pursuant to R.C. § 2506.01.

The Kelly opinion began with an express reference to the first branch of Zangerle:

Inasmuch as only quasi-judicial proceedings of administrative officers and agencies are now appealable pursuant to Section 4(B), Article IV, it follows that in order for an administrative act to be appealable under R.C. § 2506.01 such act must be the product of quasi-judicial proceedings.

It must be stressed that there was no doubt here that a case or controversy existed or that Kelly Co. had standing. Therefore, the court's inquiry was limited to deciding whether or not the municipal action was legislative or quasi-judicial in nature.

In deciding that question, the court adopted a test from a Colorado case in an attempt to define a quasi-judicial act. That test consisted of determining "whether the function under consideration involves the exercise of discretion and requires notice and hearing," all elements being required to constitute a quasi-judicial act. The court then found that the Board was not required to give notice to the bidders, who were also not required to be present at the meeting. No testimony was required, and no formal hearing had to be held. In fact, no notice had been given, Kelly Co. had not been present, no witnesses had been examined, and no hearing had been held. The court concluded that "such a procedure...
obviously lacks elements which are essential to a quasi-judicial proceeding." Therefore, since the action of the Board of Control did not result from quasi-judicial proceeding, it was not appealable under the Administrative Appeals Act.

Assuming that a distinction between quasi-legislative and quasi-judicial acts of agencies makes sense as a basis for denying review by appeal, the method which Kelly adopted to make that distinction cannot withstand close scrutiny. The Kelly court misapplied the test it appropriated from the Colorado decision. Since Kelly Co. was the lowest bidder, the only "apparent" reason for its not receiving the contract was that it was not a "responsible bidder." Such a determination is clearly a question of fact, best determined in an adversary contest. Therefore, the due process principles applicable to adversary hearings ought to have been required in deciding whether Kelly Co. was responsible. The court, in giving its answer to the question before it, looked only to the form by which the decision was made and not to whether or not the due process elements ought to have been present. Even assuming such an approach is proper, the focus should be on whether the procedure has the necessary safeguards. And if it does not, as it did not in this case, judicial scrutiny should be intensified rather than withheld. In Kelly, the court found that the determination was made in the absence of any elements of due process, and the clear inference is that, as a result of that fact, the Board was acting in a legislative capacity. The court therefore felt it could not intervene. However, if the court is inclined to defer to agency discretion, it would be more logical to do so only when the agency itself provides some internal safeguards from possible arbitrary and unlawful decisions. A proceeding in which an agency disclaims all due process requirements—i.e. notice, witnesses, a record, and a hearing—does not give rise to circumstances in which a court should automatically acquiesce in the agency's determination. Indeed, the primary motivation in Ohio for the passage of statutes providing for judicial review of administrative decisions was to prevent denials of due process due to agency abuse of power.

However, while the decision in Kelly does indirectly increase the potential for abuse of agency power, it is not so much the potential for abuse (which will always exist) that matters for purposes of this discussion as it is the failure of the opinion in Kelly to articulate a sensible and workable

57 Id. at 154, 290 N.E.2d at 565.
58 Id., 290 N.E.2d at 565.
59 "Even when the procedure is wholly informal and even when the action is directed to a single party, the difference between fair informal procedure and lack of it should be taken into account." K. Davis, Administrative Law Text § 2.06 (3d ed. 1972). See also id. at § 2.08 indicating that "state courts are moving toward more emphasis on safeguards."
60 Id. at § 2.08.
61 Chicago, M. & St. P. Ry. v. Minnesota, 134 U.S. 418 (1889); Hocking Valley Ry. v. Public Utilities Comm'n, 92 Ohio St. 9, 14, 110 N.E. 521, 523 (1915).
standard which tells an aggrieved party when appeal is his remedy and when it is not. The Kelly standard is neither sensible nor workable because it looks to whether the elements of due process accorded in a judicial proceedings were *in fact* present and not to whether, because of the kind of situation facing the municipal agency, those procedural safeguards *ought* to have been present.

3. *Haught v. Dayton*\(^{62}\)

Dayton Civil Service Rule 24 provides that "whenever . . . for any reason a layoff is necessary . . . the employees to be laid off shall be those . . . who have the least service time in positions affected." When the operating revenue of the City of Dayton declined in 1971, it became necessary to lay off 52 firefighters in September. They were reinstated subsequently, but a further decline in revenues made it necessary to lay off 15 firefighters the following February. These 15 were selected despite their seniority, while the original 52 were kept on the job. Ten of the 15 sued to enjoin their being laid off. They relied upon the above rule requiring layoff by seniority, but this rule had been amended on February 9 to protect the 52.

The City Charter provides for an appeal from a dismissal to the Civil Service Board, and R.C. § 2506.01 provides for an appeal from the Board to the court of common pleas. It was held that an injunctive suit would not lie because the Charter appeal and R.C. § 2506.01 constitute an adequate remedy at law. Thus, the 15 were required to seek a hearing before the Board to review their dismissal pursuant to the amendment of the rule before any appeal could be taken under R.C. § 2506.01.

The result in *Haught* is not a bad result, given the facts before the court. There is nothing wrong with conserving judicial resources by requiring exhaustion of all administrative remedies before taking an appeal to the courts. What *Haught* does is instruct the lawyer that he must make a trial record before the agency in a quasi-judicial proceeding—if the agency is competent to hold such a trial—and not make that record initially in the court of common pleas. This may, viewed abstractly, be a derogation of "judicial" power. However, the courts derogate the judicial power with respect to other specialized competence, *e.g.*, in the workmen's compensation area, and there is no reason not to adopt a similar procedure here. But a more difficult question—for which there is no immediate answer—is what has happened to the judicial power and its availability to the aggrieved party if the agency has no duty to provide a trial hearing record? The question cannot be readily answered because the present set of precedents (*Kelly* and *Haught*), if read together, have left such a confusing legacy that a person aggrieved cannot identify, unless his facts fit

\(^{62}\) 34 Ohio St. 2d 32, 295 N.E.2d 404 (1973).
squarely within the factual patterns of these precedents, where his relief lies.

This confusion regarding the proper method of seeking relief is both illustrated and compounded by Haught. In Haught, the plaintiffs challenged the validity of the amended rule itself, not their dismissal under the rule. The court of appeals recognized that the plaintiffs' challenge was to the rule, and said that equitable relief was the proper remedy to seek because, under Kelly, R.C. § 2506.01 does not present a procedure by which an amendment of the civil service rules may be challenged. However, the Ohio supreme court, while agreeing that R.C. § 2506.01 cannot be used to challenge such a rule, said that due to the existence of the quasi-judicial remedy available at the administrative level, it was improper to challenge the amended rule itself. Rather, the court stated that the plaintiffs ought to have challenged the dismissal pursuant to the amended rule.63

This holding would have presented no problems if there in fact had been a principled way for a plaintiff to determine whether he ought to challenge the rule or the dismissal. However, the real difficulty is that there were really no guidelines prior to Haught, and no really clear standards after Haught, for the plaintiff to use to decide whether to challenge the rule or the dismissal. He is left to guesswork, with no definite criteria on which to base his guess. In Haught, the proceedings in which the rule was amended were, according to the Kelly formulation, quasi-legislative, because there were none of the elements which, under Kelly, must in fact be present to have a quasi-judicial proceeding. Therefore, since the amendment process in Haught was quasi-legislative, Zangerle, Tuber, and Kelly all indicate that R.C. § 2506.01 is not available as the procedural mechanism for relief.

The challenger's problem thus arises in a situation in which the Haught facts are slightly altered, and it arises because Haught is unclear as to how broad or narrow the contours of its holding are. This is so because it is unclear under Haught when the remedy at law would be inadequate, thus allowing the challenger to seek equitable relief. Furthermore, if equitable relief is not available through injunctive proceedings and a remedy at law under R.C. § 2506.01 is not available, the plaintiff does not know how to proceed in order to state his claim. In addition, there is a further unanswered question, perhaps more frustrating than the rest. It is clear under Haught that if the enabling statute or the ordinance provides for some form of "judicial" review at the administrative level, the plaintiff must first exhaust that remedy before he can invoke the jurisdiction of a common pleas court. However, it remains unclear whether or not a plaintiff must follow this procedure if the agency, absent a man-

63 Id. at 35, 295 N.E.2d at 406.
date from its enabling charter, independently established a review mechanism at the administrative level. Whether such "judicial" proceedings fall with the scope of Haught is left unanswered, and again the plaintiff is without a clearly defined way to proceed.

The list of unanswered questions could go on, depending upon how one reads Kelly, or how one reads Haught, or how one reads Kelly and Haught together. That the courts have, in an unprincipled application of the unclear holdings found in the case law, exalted form over substance is unarguable. At best such a method of adjudication ignores the underlying value in Ohio Civil Rule 2, which states that substance is to be emphasized over form when a party seeks relief. The practical result of this confusing set of precedents is that a party attempting to challenge a municipal agency action is presented with a frustrating trial and error method of determining how to seek his relief. The more difficult it is for the party aggrieved to determine the proper method for seeking relief, the more difficult it becomes to obtain effective relief. The more difficult it is to obtain effective relief, the greater the chance that abuses of agency power will go unchecked. While at present there is no evidence of widespread abuse of agency power, the situation after Kelly-Haught presents unneeded roadblocks to checking such abuse if and when it arises.

C. Review Under the Administrative Procedure Act

As has been discussed, the uncertainty caused by Zangerle's application to the municipal agency area is significant. In many ways, the disorder caused by Zangerle's application and the way in which that disorder has evolved present more serious difficulties in the area of state administrative agency rule-making because the legislature initially provided for an express mechanism for review of such rules. However, the statute which was intended to accomplish this review makes no distinction, on its face, between quasi-legislative and quasi-judicial rule-making. Nevertheless, as mentioned at the beginning of this note, the Ohio supreme court has placed a significant limiting gloss on this statutory language; in addition that gloss itself may well have been, through judicial interpretation, incorporated into an amendment to the Ohio constitution.

1. Fortner v. Thomas

On April 12, 1966, the Ohio Liquor Control Commission adopted Regulation LGc-1-52 which amended Regulation 52. This amendment imposed responsibility on a permit holder for acts of "his agent, or em-

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64 Ohio Civ. Rule 2.
ployee” in allowing “improper conduct of any kind” on or about the licensed premises. Violation of the regulation could result in the suspension or revocation of a holder’s liquor permit.

Fortner, the challenger of the rule, was never subjected to the imposition of the regulation. If he had been charged with a violation of the regulation, he undoubtedly could have challenged its validity in an enforcement proceeding. Furthermore, assuming he was convicted of a violation, he could have appealed the conviction to the courts and challenged the conviction pursuant to R.C. § 119.12.68 However, the amended regulation left substantial doubt as to what conduct constituted a violation of the regulation.69 Therefore, until the regulation was interpreted (most likely through enforcement proceedings) a “chilling effect” existed which operated on the permit holders uncertain of the conduct proscribed. Fortner, a holder of a permit issued by the Department of Liquor Control, challenged the lawfulness, reasonableness, and constitutionality of the regulation by way of appeal pursuant to R.C. § 119.11.70

The reasoning in Fortner was two-fold: first, that R.C. § 119.11 could not be used to review quasi-legislative proceedings of state administrative agencies; and, second, that the case did not present a justiciable case or controversy. In other words, Fortner adopts both branches of Zangerle and applies them expressly to state administrative agency rule-making. Indeed, in approving and following Zangerle, the Fortner opinion quotes extensively from Zangerle.

In addition to the two-fold rationale already discussed, the Zangerle court’s opinion also gave special significance to the use of the word “proceedings” in the Ohio constitution. It concluded that “proceedings” meant quasi-judicial proceedings only. Similarly the court in Fortner focused upon the use of the word “proceedings” in the 1968 amendment to article IV, section 4(B) of the Ohio constitution, which was interpreted to mean that “the framers of the constitutional amendment intended to maintain the impact of . . . [Zangerle] and following decisions in the area of judicial review of proceedings of administrative officers and agencies.”71

The court, however, had still to deal in a forthright fashion with the specific language of R.C. § 119.11, providing appeal from agency rule-making, which was admittedly a quasi-legislative function. However, the court’s opinion never clearly focuses on this question, maintaining only that, “We doubt that the statute ever gave such authority to the Court

69 Counsel for the Department maintained that the statute imposed strict liability on the employer for any act of the agent or employee. This interpretation is not readily discernible from an inspection of the regulation and indeed, the court of appeals rejected that interpretation. Fortner v. Thomas, No. 8714 (Franklin Co. Ct. App., Dec. 26, 1968).
of Common Pleas of Franklin County, and the amendment to Section 4 of Article IV of the Constitution is supportive of that doubt." Despite the absence of articulated reasons to provide support for the court's "doubt," the opinion in *Fortner* concluded that "R.C. 119.11 may not be employed to obtain judicial review of quasi-legislative proceedings of administrative officers and agencies . . . ."73

Thus, the initial impression given by *Fortner* is that R.C. § 119.11 has been entirely negated, leaving in its place a void in which no means of pre-enforcement review is available to parties adversely affected by agency rule-making. However, the second holding in *Fortner* casts some doubt upon that initial impression, because it is unclear, as it was with *Zangerle* before it, which rationale was relied upon by the court to support the result and why. *Fortner* had never been subjected to the application of the amended regulation. This state of affairs formed the basis for the court's second holding regarding justicability. The court stated:

> It has become settled judicial responsibility for courts to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advice upon potential controversies.74

Furthermore, it was the court's contention that R.C. § 119.11 could not be "used as a method of challenging the lawfulness of an administrative regulation in a vacuum. . . ."75

The possibility of negating use of R.C. § 119.11 is one logical result of the *Fortner* holding. However, as the concurring opinion readily recognized, the statute could well have been specifically intended as a means of appeal from decisions in quasi-legislative proceedings. This inference is possible because once a rule is enforced, R.C. § 119.12 provides the basis upon which a party would appeal the rule's validity—an appeal from a quasi-judicial action. Therefore, the concurring opinion noted "I can conceive of no situation other than the review of a quasi-legislative proceeding to which § 119.11 would be relevant."76 The concurring opinion then went on to suggest:

> Since I perceive the purpose for R.C. § 119.11 . . . in part, to be an attempt to grant jurisdiction to review quasi-legislative proceedings and since such a grant is prohibited by the actual controversy requirement as contained in the Constitution and as construed by this court, I believe that

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74 22 Ohio St. 2d at 14, 257 N.E.2d at 372.

75 22 Ohio St. 2d at 17, 257 N.E.2d at 373.

76 22 Ohio St. 2d at 21, 257 N.E.2d at 376.
there is no cognizable way to avoid holding R.C. 119.11 unconstitutional insofar as judicial review of quasi-legislative rules is involved.\textsuperscript{77}

However, \textit{Fortner} does not expressly hold R.C. § 119.11 unconstitutional. Indeed, one could argue that if the court believed that the statute conferred upon the courts more power than was constitutionally permissible, by granting the power to review quasi-legislative acts, it would have done one of two things. Either it would have expressly declared R.C. § 119.11 unconstitutional, as suggested by the concurring opinion, or it would have followed the statute and voiced displeasure for doing so to signal the legislature to repeal the statute. Instead the court did neither of these things and left itself open to the charge that it had, in effect, substituted its judgment for that of the legislature, in violation of the doctrine of separation of powers. As a result, a question concerning the constitutional status of R.C. § 119.11 and its availability to a challenger persists after \textit{Fortner}.\textsuperscript{78}

Since the plaintiff in \textit{Fortner} was held to lack standing to challenge the rule, the possibility remained that the case could and would be distinguished on that ground in subsequent litigation where a plaintiff in fact had standing. Furthermore, despite the concurring opinion's inability to conjure up an appropriate situation where R.C. § 119.11 would be applicable, such a situation seems entirely feasible. If an overbroad and vague rule were promulgated by an agency and that rule were self-executing, a challenger of the rule would have the requisite standing because the passage of the rule would cause injury to the plaintiff. The court would then be faced with alternatives of either following the first rationale in \textit{Fortner} and rendering R.C. § 119.11 entirely inoperative or retreating from that rationale and allowing the challenge to rule-making under R.C. § 119.11. However, when finally confronted with such a case, the court at the same time grasped both and neither of these options, and a third "alternative" appeared.\textsuperscript{79}

\textsuperscript{77}22 Ohio St. 2d at 22, 257 N.E.2d at 376.

\textsuperscript{78}One final point should be made. Rules promulgated by state agencies must comport with various requirements laid out in Chapter 119. These requirements include notice, a hearing, and the taking of evidence. These are clearly elements contained in the concept of due process. Furthermore, these elements are also the elements the court in \textit{Kelly} claimed were the basis for having an adjudicatory hearing — \textit{i.e.}, a quasi-judicial proceeding. Had the \textit{Kelly} test been applied here as it was in \textit{Kelly}, and had the court focused on the manner of promulgating a rule as it did in \textit{Kelly}, all rule-making by state agencies under Chapter 119 would have to be quasi-judicial in nature and therefore appealable. However, perhaps to its credit, but certainly to an increase of confusion over what constitutes a quasi-legislative proceeding, the court focused on the agency's function, that of rule-making. Therefore, despite the formalities attending that function and the result in \textit{Kelly}, the \textit{Fortner} opinion focused on the function being performed, and not on the procedure used to perform it, to make the distinction between quasi-legislative and quasi-judicial agency actions.

2. *Burger Brewing Co. v. Liquor Control Commission of Ohio* 80

In this case the Liquor Control Commission adopted a Regulation LCc-1-73, purporting to control beer prices and the manner and amount of price differential between manufacturers and wholesalers and between manufacturers and retailers. The regulation was self-executing in that, for example, on the effective date the regulation controlled existing pricing and marketing systems, forcing a state-wide change. It also limited further price changes which the court found resulted in economic loss and adversely affected business operations. 81 A violation could result in either the suspension or revocation of a license; furthermore it was clear that the Department intended to and would enforce the regulation. 82 The plaintiffs, nine breweries manufacturing and distributing beer in Ohio, appealed the regulation under R.C. § 119.11 and R.C. § 119.12, 83 and brought an action under the Ohio Declaratory Judgment Act. 84

It must be stressed that for purposes of deciding the applicability of R.C. § 119.11, the court had before it a situation which left no doubt that there was a case or controversy and that plaintiffs clearly had standing. This regulation was self-executing, and the court recognized that they were "not asked to adjudicate rights and obligations in a 'vacuum.' " 85 However, despite the existence of the above-mentioned factual situation, the court nonetheless held *Fortner* dispositive of the issue of judicial review pursuant to R.C. § 119.11. 86 Therefore, *Burger Brewing* clearly sounds the final death knell for that section.

*Burger Brewing* could also have been the final point in the unhappy life span of pre-enforcement judicial review of agency rule-making in Ohio. However, the court in *Burger Brewing* did not allow the execution. It held that pre-enforcement judicial review could be obtained in this instance through the Declaratory Judgment Act, thereby distinguishing *Fortner*. 87 The court stated that:

Relief sought in the nature of a declaratory judgment is distinctly different from the relief sought in an administrative review. . . . It is the very purpose of declaratory judgment actions to provide a determination as to the validity of a statute, ordinance, or agency regulation. 88

Thus, while reaffirming prior decisions limiting appeals from agency rule-

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80 34 Ohio St. 2d 93, 296 N.E.2d 261 (1973).
81 Brief for Appellant at 5.
82 Id.
83 The lower court found § 119.12 not applicable and this question was not presented on appeal. 34 Ohio St. 2d 93, 94, 296 N.E.2d 261, 263 (1973).
84 Declaratory Judgment Act, OHIO REV. CODE ANN. ch. 2721.
86 34 Ohio St. 2d 93, 96, 296 N.E.2d 261, 263 (1973).
87 Id. at 99, 296 N.E.2d at 265-66.
88 Id., 296 N.E.2d at 265-66.
making, *Burger Brewing* suggests a new vehicle, the Declaratory Judgment Act, to do exactly what is precluded under the APA. The court expended little effort attempting to indicate how any difference between the two modes of review would justify this result. And aside from the court's pronouncement that there was a difference, no clear reasoning is presented to delineate the logical path to the court's conclusion.

After assuming that there is a distinction, the *Burger Brewing* opinion listed three elements as prerequisites for obtaining a declaratory judgment:

1. a real controversy between the parties;
2. a controversy which is justiciable in character; and
3. a situation where speedy relief is necessary to preserve the rights of the parties.

These elements were found to exist in *Burger Brewing*. However, what is more interesting is that they are the elements of justiciability announced as early as *Zangerle* and found lacking in *Fortner*. In fact the inference that the presence of these three elements would allow the use of Revised Code § 119.11 to invoke the subject matter jurisdiction of the common pleas court was possible from *Fortner*. Furthermore, no mention is made in *Burger Brewing* of the fact that the rule-making functions remain quasi-legislative in nature, despite the means used to review those functions.

If the court was engaged in maintaining what it considered to be the consistency of precedent, the *Burger Brewing* opinion ought to be viewed as a tortured effort to avoid seeming to overrule precedent and yet to indicate the existence of a remedy for irreparable injury. Not only did *Burger Brewing* affirm *Fortner*, it also clarified that *Fortner* was intended to prohibit appeals from rule-making under Revised Code § 119.11, even when justiciability, standing, and ripeness were present. However, at the same time, *Burger Brewing* could be read to overrule *Fortner*, because *Burger Brewing* allows pre-enforcement challenges to rule-making via the Declaratory Judgment Act. Why pre-enforcement review of quasi-legislative actions is proper under Revised Code § 2721.03 but not permissible under Revised Code § 119.11 is left unexplained. This procedure sidesteps the issues raised in the concurring opinion in *Fortner*. Indeed, if in fact the court believed that R.C. § 119.11 is an unconstitutional delegation of power, an explicit indication of that belief would better enable the court to deal with demands for the review of agency action. However, in allowing review by way of a declaratory judgment of quasi-legislative proceedings, the court has left the clear implication that such a judicial function is not necessarily unconstitutional. Therefore, the question arises: Why has

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89 *Id.* at 97, 296 N.E.2d at 264.
90 "Any person interested under a . . . rule as defined in section 119.01 of the Revised Code, municipal ordinance . . . may have determined any question of construction or validity arising under such . . . rule, ordinance . . . and obtain a declaration of rights, status, or other legal relations thereunder." OHIO REV. CODE ANN. § 2721.03 (Page Supp. 1972).
the court chosen the declaratory judgment as the means to review agency rule-making?

There can be no doubt that in Burger Brewing the court properly granted relief, as it was faced with plaintiffs who had suffered irreparable injury. Furthermore, it is suggested that the method which it used to extricate itself from its prior consistent precedent may provide an effective means for aggrieved parties to obtain pre-enforcement judicial review of agency rule-making. After Burger Brewing an individual can, presumably with court approval, use the Declaratory Judgment Act without having first to decide whether to comply with a rule or to defy it and face possible penalties. Perhaps the mechanism for effective pre-enforcement review has been uncovered. Certainly pre-enforcement review is needed because it has the advantages of providing for a central source of regulatory interpretation, of providing certainty in business and agency planning, and of avoiding unnecessary costs of compliance by affected parties.91 It remains, of course, to be seen if these goals can be effectively achieved by use of the declaratory judgment procedure.

V. THE "NEW" APPROACH: THE DECLARATORY JUDGMENT ACT92

The pronouncement in Burger Brewing that rule-making can be challenged via the declaratory judgment route and not by R.C. § 119.11, suggests that a principled distinction can be made between the two modes of pre-enforcement review. Initially it was thought that a declaratory judgment could only be used if no other court proceeding was possible. However, the Declaratory Judgment Act was later interpreted more liberally and can now be used despite the availability of alternative remedies. However, its use under such circumstances is limited to the exercise of sound discretion by the court where the court feels speedy relief is necessary.93 The Act was amended in 1961 to specifically provide for declaratory judgments of "rules" as defined by R.C. § 119.11. Section 2721.03 also provides for review of municipal ordinances. To that extent the allowance of a declaratory judgment by the Burger Brewing court was but the first judicial recognition of an already available legislative remedy.

The most basic difference between a R.C. § 2721.03 proceeding and a R.C. § 119.11 proceeding is that the former is not an appeal but rather a plenary action. This means that the challenger of a rule will now be able to present his objections to the rule in court, whereas under R.C.

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93 American Life & Accident Ins. Co. v. Jones, 152 Ohio St. 287, 89 N.E.2d 301 (1949); Radaszewski v. Keating, 141 Ohio St. 489, 49 N.E.2d 167 (1943); Schaefer v. First Nat'l Bank, 134 Ohio St. 511, 18 N.E.2d 263 (1938).
§ 119.11 he was limited to the record made at the agency hearing. While this opportunity will not necessarily help or hinder a challenger, it may have an impact on the presentation of evidence by the agency at the public hearing. Taking, for the moment, a pessimistic view, it may be that the existence of the declaratory judgment remedy will encourage an agency not to present evidence supportive of its view as to the enactment, amendment, or rescission of a rule or regulation in order to better survive court review in a close situation. However, since it is not clear that agencies have presented evidence of their viewpoint in the past, this may not be a step backwards.

Despite the absence of the necessity or requirement to do so under Chapter 119, some agency justification ought to appear on the record to survive a challenge under § 119.11. The limited treatment given this issue under Chapter 119 is illustrated by the following:

The administrative agency has no obligation to support the reasonableness of its proposal—except in the sense of the practical desirability of rebuttal, especially in the light of the limitation on evidence on an appeal under Section 119.11, Revised Code. . . .

. . . The former [R.C. § 119.11] does not require the court to affirmatively find that the action is supported by reliable, probative and substantial evidence. It requires only that the court determine whether the procedure was proper and whether the rule adopted is reasonable and lawful. However, the test the court was to use to determine the reasonableness or lawfulness of the rules is not set forth. In any event, it is clear that under an action for declaratory judgment there is no incentive for an agency to introduce evidence at the hearing to show that the rule is reasonable or lawful. This in turn seems to subvert the public participation aspect of the hearing required by R.C. § 119.03, whereby the agency would subject its rationale to public scrutiny.

It is difficult to state with precision what the standard will be under a declaratory judgment action, but perhaps it will be different. In Edge v. Morraine, plaintiff challenged a denial by the city council to change an existing zoning ordinance. The following standard was applied:

The wisdom of a zoning ordinance and its relation to public health, safety, morals and to general welfare is, in the first instance, left to the judg-

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96 OHIO REV. CODE ANN. § 119.03 (Page 1969).
ment and discretion of the legislative body which creates it and judicial judgment is not to be substituted for legislative judgment in any case where the validity of the zoning ordinance is fairly debatable. . . . Moreover, the Plaintiff has the burden of proving that an ordinance is unreasonable and arbitrary by clear and convincing evidence where he seeks a declaration of its invalidity. 98

In Edge, plaintiff failed to meet that burden, and the council's action was upheld. The standard enunciated above may be just another way of phrasing the substantial-evidence rule. This rule predominates in both state and federal courts, 99 and it is logical to expect that it would be adopted by the Ohio courts.

A second distinction between appeal under R.C. § 119.11 and review pursuant to R.C. § 2721.03 is that the latter does not operate as a stay of the effective date of the agency rule. This factor may have been the prime motivation for the distinction made in Burger Brewing. Appeal under R.C. § 119.11 had the effect of staying the implementation of the challenged rule. This in turn had the effect of delaying the implementation of the rule in Fortner for four years and in Burger Brewing for three years. However, such delay will no longer automatically occur in an action for a declaratory judgment. A plaintiff will now undoubtedly have to accompany his petition with a request for injunctive relief consisting of a temporary restraining order. In turn the courts will thus have more leeway and discretion to individually examine the merits of the challenge and make a preliminary determination as to the rule's legality. While such flexibility is desirable, once again the court has subverted the legislative judgment and substituted its own. For where the presumption was clearly in favor of the challenger under R.C. § 119.11, inasmuch as the rule was automatically stayed, the use of the Declaratory Judgment Act will reverse that presumption in favor of the immediate implementation of the rule unless plaintiff obtains a temporary restraining order.

Assuming that the court's decision to negate the automatic stay was a rational decision to prevent undue interference with agency operations in enforcing its rules, it does not automatically follow that this was a sufficient reason to reverse the presumption. Indeed, the argument was made to the United States Supreme Court that "to permit resort to the courts in this type of case may delay or impede effective enforcement of the Act." 100 Although this contention was made in an appeal under the Federal APA which did not "by itself stay the effectiveness of the challenged regulation," 101 the court noted that

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98 id. at 223-24.
101 Id. at 155.
if the agency believes that a suit of this type will significantly impede enforcement or will harm the public interest, it need not postpone enforcement of the regulation and may oppose any motion for a judicial stay on the part of those challenging the regulation. . . . It is scarcely to be doubted that a court would refuse to postpone the effective date of an agency action if the government could show, as it made no effort to do here, that delay would be detrimental to the public health or safety. If it was the “stay” feature of R.C. § 119.11 that the Burger Brewing court was concerned about, that concern could have been effectively assuaged by the above procedure.

One final distinction between R.C. § 119.11 and R.C. § 2721.03 is that judicial review pursuant to a declaratory judgment action is left to “the sound discretion” of the court. However, the courts no doubt will be limited in their discretion by the tests enunciated in Burger Brewing for allowing such an action. Under the Burger Brewing tests, a plaintiff must have standing and must be in danger of suffering irreparable harm, thus necessitating speedy relief. Despite these guidelines, however, “sound discretion” by its very nature defies precise definition, and in the final analysis, it is the wise use of this sound discretion which will determine the efficacy of the declaratory judgment action to achieve effective pre-enforcement review of agency rules. In addition, it is suggested—with the limitation of discretion—that the clear signal of Burger Brewing is for an aggrieved party to use this mode of review, as Burger Brewing indicates the court’s recognition that pre-enforcement review is desirable.

Therefore, although there are slight differences between an appeal under R.C. § 119.11 and review under R.C. § 2721.03, those differences do not answer the question of why R.C. § 2721.03 is permissible and R.C. § 119.11 is not. However, regardless of the absence of a clear distinction, the current reality is that R.C. § 119.11 is no longer viable and R.C. § 2721.03 is. It is suggested that this result is a realization by the Burger Brewing court that a very real need exists to provide an effective and timely means for an aggrieved party to get pre-enforcement review of agency rules. It is certainly probable that the court recognizes the need to provide certainty in business regulations and the need to remove the “chilling effect” attendant to some regulations. Burger Brewing may also be an implicit recognition of the potential for abuse by unchecked and not easily reviewed governmental agencies, and ought to represent at least

102 Id. at 156.
104 See text at note 89 supra.
105 It may still be possible to challenge procedural irregularities under OHIO REV. CODE ANN. § 119.11.
a tentative step toward providing the needed check and easier review. At the same time the decision avoids being tied down with the traditionally troublesome problems regarding the court's role in review of agency actions. Given the history of administrative review in Ohio, and spurred, perhaps, by the suggestion in the concurring opinion in *Fortner*, the court as a matter of technique may have been inclined to embrace an alternative mode of pre-enforcement review rather than to attempt to overrule 30 years of precedent.

The implications and potential uses of *Burger Brewing* are not limited to the area of state administrative agency action. *Burger Brewing* can effectively be applied to the area of municipal agencies as well, as R.C. § 2721.03 is equally applicable to that area and offers a way to bypass the *Kelly-Haught* dilemma. If the *Kelly-Haught* problem, as well as the problem raised by *Fortner*, can be obviated through the use of a declaratory judgment action, then *Burger Brewing* does indeed constitute a significant advance in the area of the judicial review of governmental agency actions. However, whatever the motivation for the result reached by the court in *Burger Brewing* the court should quickly dispel the residual confusion left by that opinion. The court should, at the earliest opportunity, delineate specific standards and allocate the burdens of proof necessary to the use of the declaratory judgment procedure. The time has come (perhaps it is long passed) to end the ambiguity which has plagued this area of the law and to formulate a procedure which gives certain and timely relief to a person aggrieved by agency action.

**VI. Conclusion**

To be sure, governmental agencies at whatever level play an important role in our society. They provide expertise in their various fields and are responsible for the day-to-day regulation and diverse activities to which the legislature cannot directly attend. Therefore, they have been delegated power to promulgate rules, and to enact and implement orders, ordinances, and regulations. However, there must be an effective and timely way to review abuses of power by these agencies. In the area of review of municipal actions, the courts, by imprecisely distinguishing between quasi-legislative and quasi-judicial acts, have made it next to impossible for a person aggrieved to know how to proceed to invoke court jurisdiction and state a claim for relief. They have forced a party to assume the substantial burden of having to either guess as to the label the court will give to a municipal action or to combine numerous actions in a costly and time-consuming effort to ensure an avenue of relief. In the area of review of state administrative agency actions, the uncertainty just described is present to a lesser degree. However, here the challenger's problem is compounded by the lack of timely relief when irreparable injury has
been suffered. The *Burger Brewing* opinion, despite lack of clarity, has taken a first step towards much-needed change in both the municipal agency area and the state administrative agency area. *Burger Brewing* recognizes that the time has come for the judiciary to act, and it signals a step in the right direction. If past treatment by the courts is any indication of the future, *Burger Brewing* clearly does not mean that these "headless" agencies are to be decapitated by unchecked access to the courts to challenge agency actions. However, *Burger Brewing* should mean that the possibility of giving the agency a haircut when and if needed is now going to be much easier than before.

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