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NEW JERSEY ADMINISTRATIVE LAW:
THE NATURE AND SCOPE OF JUDICIAL REVIEW

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PROCEDURES FOR OBTAINING REVIEW

NEW JERSEY'S 1947 Constitution makes judicial review of administrative determinations available "as of right." Article VI, Section V, paragraph 4 reads as follows:

Prerogative writs are superseded and, in lieu thereof, review, hearing and relief shall be afforded in the Superior Court, on terms and in the manner provided by rules of the Supreme Court, as of right, except in criminal causes where such review shall be discretionary.

The Supreme Court has promulgated rules governing proceedings in lieu of prerogative writs.¹ These rules establish procedures for the review of administrative decisions. Review of quasi-judicial or order-making action is available in the Superior Court, Appellate Division, under R.R. 4:88-8. Similar provision for the review of quasi-legislative or rule-making action is made by R.R. 4:88-10. The Supreme Court has held, however, that the distinction between adjudication and rule-making is not precise and therefore "litigants should not be prejudiced where they proceeded in timely fashion under one of the rules though they should properly have proceeded under the other."²

It is necessary that appeal be taken to the Appellate Division. In State v. New York Central Railroad Co.,³ the Superior Court, Chan-

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cery Division, held that the proper tribunal in which to challenge an order of the Board of Public Utility Commissioners is the Superior Court, Appellate Division. The Chancery Division refused, in a suit initiated by the state to enforce an order of the Board, to pass on the validity of the order. The railroad could not collaterally attack the order in the Chancery Division.

The Appellate Division may, upon appeal, direct that additional evidence be taken before the agency or before a judge of a trial division "if it appears that the additional evidence is material and that there were good reasons for failure to present it in the proceedings before the agency." In all proceedings in lieu of prerogative writs, the reviewing court is empowered "to review the facts and make independent findings thereon, which power may be exercised by it to such extent as the interests of justice require."

Although the rules in section 4:88 pertain specifically to practice in the Superior Court, Appellate Division, they also apply to the Supreme Court. The 1947 Constitution permits matters to be certified to the Supreme Court for decision while they are pending before the Superior Court, Appellate Division. Upon certification, the Supreme Court "assumes in their entirety the obligations of the Appellate Division." The rules of court also provide for the certification of appeals on petition after final judgment in the Appellate Division or a trial court.

The Legislature has enacted statutes governing procedures for appeal of administrative determinations. However, legislative enactments may not infringe upon the Supreme Court's power to make rules governing the administration of the courts and practice and procedure in the courts. Statutory provisions, enacted prior to the

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6. 1947 Constitution, Article VI, Section V, paragraph 1, clause (d).
8. R.R. 1:10-2. Certification of the Appellate Division is not a matter of discretion and will be allowed only under special circumstances. Included are: cases involving substantive questions not previously decided by the Supreme Court; cases where the decision of the Appellate Division is in conflict with other decisions of that court or the Supreme Court; and cases in which there is a dissent in the Appellate Division.
9. R.R. 1:10-3. Certification to the trial courts is limited to cases involving substantial constitutional questions or questions of great public importance that require prompt adjudication.
10. E.g., R.S. 48:2-46 providing for the review of decisions and orders of the Board of Public Utility Commissioners.
adoption of the 1947 Constitution that conflict with subsequently promulgated court rules are either superseded by the rules, or they must give way so far as is necessary to permit full scope to the rules.12

In Winberry v. Salisbury, the Supreme Court established the supremacy of its rules over any legislative attempts to regulate judicial procedure. In Fischer v. Township of Bedminster, decided shortly after Winberry, the court specifically held that the rules governing proceedings in lieu of prerogative writs were also exclusive:

By the clearest language, the Constitution commits to the Supreme Court the regulation of the new remedies provided in lieu of prerogative writs. Review, hearing and relief shall be on such terms and in such manner as the Supreme Court alone may provide by rule. In the administration of these remedies, there is to be no division of authority. It may well be that the framers of the Constitution were guided by what they considered the lessons of experience; but, whatever the reason, the provision is to be read and enforced in accordance with the plain terms of the grant. No distinction is made between the substantive jurisdiction to afford the relief theretofore available through the prerogative writs and the mode and manner of the exercise of the power. The whole is within the exclusive jurisdiction of the Supreme Court. Neither the exercise of the power inherent in the old Supreme Court by means of the prerogative writs nor the regulation of the remedy is subject to legislative control.13 [Emphasis added.]

Thus, the Supreme Court exercises exclusive power over judicial review procedures, including review of administrative decisions. No statute can supersede or alter any rule of court.

This ruling was not a startling innovation. The former New Jersey courts exercised broad powers of review under the common law writ of certiorari.14 Writing in 1891, Professor Goodnow stated that the New Jersey courts “have taken in almost every respect a more liberal view of the province of the writ [of certiorari] than the courts of other commonwealths.”15 Recently, Professor Jaffe asserted that “New Jersey has a history of the liberal use of prerogative writs, particularly certiorari, which goes back to the eighteenth century.”16

Both Corpus Juris and Corpus Juris Secundum, have reported that:

13. 5 N.J. 534, 541 (1950).
14. For an excellent summary of the use of certiorari under the former practice, see the opinion of the late Chief Justice Vanderbilt in Ward v. Keenan, 3 N.J. 298, 304-308 (1949).
In New Jersey, the application of the writ [of certiorari] has been extended further than in almost any state. The writ is used in that state, at least to some extent, both as a statutory substitute for a writ of error and as a common law writ. . . . It is a proper method of redress for an individual whose rights are invaded by the action of persons clothed with authority and who exercise that authority illegally. In this respect it is commonly used to review the acts of municipal or state officers, and it is often used to review municipal ordinances, in respect of which its scope is much broader than in other states.\textsuperscript{17}

The 1913 case of \textit{Public Service Gas Co. v. Public Utility Board},\footnote{18. 84 N.J.L. 463 (Sup. Ct. 1913).} in which the former Supreme Court interpreted Section 38 of the Public Utility Act of 1911,\footnote{19. L. 1911, c. 195, § 38. Now R.S. 48:2-46.} is illustrative of the strong certiorari tradition in New Jersey. It also foreshadowed by forty-seven years the holding in \textit{Fischer v. Township of Bedminster}, (supra), that the Legislature could not interfere with the rules of court governing proceedings in lieu of prerogative writs under the 1947 Constitution. Section 38, now R.S. 48:2-46, provided that the former Supreme Court could set aside an order of the Board of Public Utility Commissioners when it clearly appeared “that there was no evidence before the board to support the same reasonably or that the same was without the jurisdiction of the board.” Upon review, the court stated:

\begin{quote}
On its face this section confers jurisdiction upon this court, but a jurisdiction of a limited character, only to be exercised when it clearly appears that there was no evidence before the board to support their order, or where the order is without their jurisdiction. If this language be taken literally we should be powerless in any case within the jurisdiction of the board to set aside its order if there was any evidence to support it, no matter how overwhelming the evidence to the contrary might be. It is needless to say that such a literal construction of section 38 would bring it into conflict with our constitution. \textit{It needs no act of the legislature to confer on us the power to review the action of an inferior tribunal, and the legislature cannot limit us in the exercise of our ancient prerogative.} \footnote{20. 84 N.J.L. 463, 466 (Sup. Ct. 1913).}[Emphasis added.]
\end{quote}

The present Supreme Court reaffirmed this position as it regarded the statute, R.S. 48:2-46, and proceedings in lieu of prerogative writs.\footnote{21. Central Railroad Company of N.J. v. Department of Public Utilities, 7 N.J. 247, 259-260 (1915).}

The New Jersey courts potentially are able to accord a broader review of administrative action than the courts of any other Anglo-
American jurisdiction. As stated by the Supreme Court in 1949, "Nowhere is the right of judicial review of administrative determinations more strictly enforced than in this state. . . ." This situation is the result of three main factors: the strong certiorari tradition in New Jersey under the former practice; the broad powers of the courts to review administrative action by proceedings in lieu of prerogative writs, as granted by the 1947 Constitution and defined by rules of court; and the exclusive power of the Supreme Court to supervise and control review proceedings.

The Scope of Review: Announced v. Actual

The announced scope of review is often quite different from that accorded in practice. The reviewing court is presented with the whole record, as compiled by the agency, but it seldom announces, in other than general terms, the extent of its inquiry into the evidence. It is often necessary to look to the effect of the judicial decision rather than to the court's opinion to determine the scope of review.

The New Jersey courts usually announce a narrow and limited scope of review. According to the Superior Court, Appellate Division:

... The court concerns itself with whether there has been any violation of the State or Federal Constitutions, whether the result is within and in accordance with the legislative grant and the standards prescribed thereby, and whether there has been fraud, bad faith, or manifest abuse of discretion in the sense of unjustly discriminatory, arbitrary, or capricious action. . . .

Two decisions of the former Supreme Court are often cited in defining the scope of review of administrative action. In Fornarotto v. Public Utility Commissioners, the court stated that unless the Board arrived at its decision "by a manifest violation of the law or by a clear abuse of the discretion vested in it, it is not within the power of this court to disturb the conclusion thus reached where there is evidence apparent
upon which it can be reasonably supported."27 Similarly the Court declared in the case of *Rahway Valley Railroad Co. v. Board of Public Utility Commissioners,*28 that if the Board’s determination “has a reasonable basis in the evidence, and is free from the vice of arbitrariness, this court cannot substitute its judgment therefor.”29

The Superior Court, Appellate Division, stated in the case of *New Jersey Power & Light Co. v. Borough of Butler,* that it would not substitute its judgment for that of the Board of Public Utility Commissioners, but would “confine its inquiry to an ascertainment of whether the evidence before the Board furnished a reasonable basis for its determination . . . ”30 The Supreme Court will not disturb a judgment of the Division of Tax Appeals “unless the evidence is persuasive that the administrative tribunal erred.”31 In reviewing a decision of the Division of Alcoholic Beverage Control, the Superior Court, Appellate Division, stated that:

. . . The scope of appellate review does not possess such breadth as would permit a disturbance of the administrative finding unless the court is convinced that the evidence permits of no reasonable latitude of choice. The court canvasses the record, not to balance the persuasiveness of the evidence on one side as against the other, but in order to determine whether a reasonable mind might accept the evidence as adequate to support the conclusion and, if so, to sustain it.32

These pronouncements are merely restatements of the substantial evidence rule. The New Jersey rule holds that judicial review of administrative determinations of fact “must be confined to the question of whether they are supported by substantial evidence, i.e., such evidence as a reasonable mind might accept as adequate to support a conclusion.”33


31. Aetna Life Insurance Co. v. City of Newark, 10 N.J. 99, 104 (1952). See also, Atlantic City Transportation Co. v. Director, Division of Taxation, 12 N.J. 130, 141 (1953).


The courts will not substitute their judgment for that of administrative bodies if the decision is supported by substantial evidence. Nowhere have the courts provided a more precise definition of the scope of review. The substantial evidence rule is usually applied to limit the extent of the review accorded. However, it is sufficiently broad to leave the courts with considerable discretion regarding the scope of review.

In determining the scope of review they will accord an administrative decision, the courts are also guided by the nature of the function. A broader scope of review is accorded to quasi-judicial as opposed to quasi-legislative function. The courts recognize that administrative action often combines legislative, executive, and judicial powers. Nevertheless, the distinction they make between quasi-judicial and quasi-legislative functions is meaningful even though it may be somewhat on the fictional side. The courts have held that all action of a judicial character is covered by the requirements of procedural due process and they have accorded it a broader scope of review. Also, if legislative or executive functions of administrative agencies acquire judicial attributes, the requirements of procedural due process also apply.

The New Jersey courts' sharp differentiation of the quasi-powers contrasts with the general view that the terms are not susceptible of such distinction. Professor Davis believes that the "attachment of separation-of-powers labels is an evasion rather than a solution of the problem of determining whether or not a trial or other hearing should be required." In his dissent in the Rubberoid case, the late Justice Jackson sharply criticized the differentiation of administrative functions:

Courts have differed in assigning a place to these seemingly necessary bodies in our constitutional system. 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.
The sharp and meaningful distinction between quasi-powers made in New Jersey indicates that generalizations about the separation of powers theory in administrative law are not particularly useful.

The New Jersey courts have occasionally expanded the scope of review. Leading examples include public utility rate cases and the Railroad Safety Rules cases. Both classes of cases involve review of quasi-legislative actions. However, the review accorded was of the broader type that is usually reserved for quasi-judicial actions.

In the rate cases the courts held that the Board of Public Utility Commissioners could not fix "just and reasonable" rates without establishing a rate base. They undertook to "weigh the evidence under the pertinent legal principles and determine whether the issue of reasonableness had been properly considered and decided." Professor Glasser suggests that the broader scope of review accorded in the rate cases may be explained by two factors: (1) the judicial nature of rate hearings, which are conducted as adversary proceedings; and (2) the fact that "the quasi-legislative process of rate-making entails a judicial or quasi-judicial determination of a particularized property right.

The rate cases demonstrate the difficulty of using the law-fact distinction to predict the scope of judicial review. It is almost axiomatic in New Jersey that appellate courts are the final authority on questions of law and that administrative findings of fact shall be final if supported by substantial evidence. However, difficulty arises because most administrative determinations that result in litigation do not involve clearly distinct questions of law and fact but are by nature mixed questions of law and fact. That is, they involve the application of legal concepts, such as the statutory standard of "just and reasonable," to established facts. In rate cases the New Jersey courts have given extensive review to agency rulings of law based on facts determined quasi-legislatively.

The rate cases indicate that the scope of review where mixed questions are at issue is determined by policy considerations. The courts were guided by their belief that the "particularized property rights" and substantial public interests involved should be well protected.

41. Glasser, Administrative Law, 6 Rutgers L. Rev. 43, 67-68 (1951).
42. Id., at 76.
In the Railroad Safety Rules cases, the supreme court extended the procedural due process requirements for a full hearing to rule-making by the Board of Public Utility Commissioners. Normally those requirements are only applicable to quasi-judicial proceedings, unless statute provides otherwise. In addition, and more significantly, the court substituted its judgment on certain matters for that of the Board without providing for remand. In the opinion of one commentator, this was "uncalled for and ominous."44 The broadening of the normal scope of review of quasi-legislative functions is partly explained by the high standards of fair play in the administrative process maintained by the New Jersey courts.

The substitution of judgment without remand constituted judicial usurpation of administrative functions. It conflicted sharply with the court's position in the case of In re Plainfield-Union Water Co.,45 decided only three weeks before the Railroad Safety Rules cases. In the Plainfield-Union case, the court stated that:

. . . The measures taken to serve the [public] need are in no respect arbitrary or unreasonable, or an abuse of statutory power . . . we cannot in these circumstances substitute our judgment for the specialized judgment of the agency entrusted with the fulfillment of the legislative policy, for that would constitute the judicial exercise of the administrative function. . . . There is a vital distinction, related to the constitutional separation of powers, between the functions of judicial and administrative tribunals. . . . Care is to be taken that there shall be no encroachment by one upon the other. . . . 46

The court's substitution of its judgment for that of the Board is particularly objectionable where the subject matter involved proposed safety rules. The Board drafted the rules in the light of past experience and on the basis of its expert knowledge. The court was inadequately equipped to determine the reasonableness of the rules.

The courts have imposed high standards of fair play on administrative agencies. They want to know exactly what the agency did and why it was done.47 Consequently, procedural matters play a major role in the review of administrative determinations in New Jersey.

46. 14 N.J. 296, 308 (1954). It should be noted that Justice Heher, who wrote the Plainfield-Union opinion, dissented in the Railroad Safety Rules cases. He stated there that "it is of the essence of the doctrine of the separation of powers that the judiciary may not substitute its judgment on policy for that of the administrative agency." Heher, J., (dissenting in part), 14 N.J. 411, 438 (1954).
Litigants who cannot obtain review on substantive grounds often are able to upset or delay agency action because of procedural errors. However, it should not be concluded that the New Jersey courts indiscriminately substitute their judgment for that of administrative agencies. The cases discussed above simply point out that the courts can, and sometimes do, exercise a broad view of administrative decisions. There are strong indications in administrative review decisions that the courts generally defer to agency discretion.

Frequently the courts limit the scope of review by asserting that the Legislature has vested the function of making original findings of fact and the reaching of policy determinations in administrative agencies, not the courts. The supreme court, for example, has refused to make original valuations in tax appeal cases "except in very exceptional circumstances." In reviewing administrative decisions, the New Jersey courts seldom exercise their power to make independent findings of fact. The Superior Court, Appellate Division, has characterized the independent fact-finding power as a "permissive role invoked with the greatest circumspection in the necessary interest of justice and not to be deemed, through speculative perversion of that rule, the practical equivalent of a trial de novo." The courts prefer to remand cases in which the agency has not made adequate findings of fact. They will, however, resolve purely legal questions themselves.

The courts have also accorded a presumption of reasonableness to administrative findings of fact and to orders and regulations issued by an administrative body. The presumption stands until the evidence to the contrary is "definite, positive and certain in quality and quantity."


52. Atlantic City Transp. Co. v. Director, Division of Taxation, 12 N.J. 130 (1953); Abbotts Dairies v. Armstrong, 14 N.J. 319 (1954); Bailey v. Council of the Division of Planning, etc., supra.


The courts will not substitute their judgment for that of an administrative agency because of a "mere difference of opinion" concerning the persuasiveness of the evidence.\textsuperscript{55} Nor will they question the wisdom or prudence of a lawfully made delegation of legislative power to an administrative body.\textsuperscript{56} Finally, the courts have stated that they will not interfere with administrative action that "renders substantial justice." According to the Superior Court, Appellate Division:

Where an executive officer or agency fails to comply with the directions of a statute governing administrative procedure, but nevertheless renders substantial justice, the courts will not interfere, except in the unusual situation where it is really essential to insure future observance of a prescribed safeguard or the vindication of a fundamental principle.\textsuperscript{57}

They will not impose rigid procedural standards if good sense and the interests of justice do not so require.\textsuperscript{58}

The Superior Court, Appellate Division, has provided an excellent description of the nature and scope of judicial review of administrative action:

The action of an administrative agency . . . should not be subjected to the same close and technical scrutiny as is frequently applied in reviewing the judgment of a court. We look at what was done in the light of the statutory authority conferred; we inquire in a pragmatic way whether there was notice and fair hearing on the charges, and we do not interfere with the finding if it is supported by adequate evidence. . . . \textsuperscript{60}

Judicial review is concerned with the validity of the agency action and is based on the record compiled by the agency. It does not involve a trial de novo in which the court frequently substitutes its judgment for that of the agency.\textsuperscript{60} If the court believes that the agency honestly tried to reach a fair result, that it considered the evidence presented, and made findings of fact that are adequately supported by the record, the administrative decision will be upheld.


\textsuperscript{58} Pennsylvania Railroad Co. v. Department of Public Utilities, 14 N.J. 411, 427-429 (1954).


There is no question of the power of the courts to review questions of agency jurisdiction. This was a classical ground for review under the writ of certiorari. It is also elemental that the courts have final authority over questions of law.

The substantial evidence rule governs the scope of review of administrative findings of fact in New Jersey. The courts usually accord a narrow scope of review, deferring to the expert judgment of administrative agencies and determining only whether the agency’s conclusion is supported by evidence that a reasonable mind might consider adequate. The courts seldom exercise their power to accord a broad scope of review because of their respect for administrative expertise and the manifest difficulties involved in a broad review of all administrative decisions.

Review has been quite strict in cases involving procedural matters. The courts have reviewed administrative action far more often on procedural than on substantive grounds. It is argued that the standards of fair play imposed on administrative agencies are so strict that they impair the interest of the public in maintaining efficient and orderly administrative processes. Certainly effective monitoring of administrative procedural abuses is highly desirable, but “wisdom and restraint are necessary on the part of the reviewing courts to insure that they refrain from improper invasions into areas of substantive policy.”

In summary, the courts have generally limited the scope of their review to four major areas: they will act to curb excessive assumptions of power, i.e., manifest abuses of discretion; they will speak the final word on important questions of statutory construction; they will insist on fair play in administrative proceedings; and they will invalidate arbitrary or capricious action.

Ultimately, the question of the proper scope of review is a matter of perspective. Some persons may believe that the review accorded in a particular case was so narrow that it paved the way for administrative aggrandizement. On the other hand, other observers might conclude that the court’s decision constituted an improper usurpation of

62. Mistakes of law have been reviewable by certiorari since 1839, New Jersey Road & Tr. Co. v. Suydam, 17 N.J.L. 25.
63. It is highly doubtful that the courts could handle the increased workload resulting from broad review of all administrative decisions. Also, the assumption of administrative and legislative functions would subject the courts to political attacks and quite possibly damage their prestige.
64. See Davis, New Jersey’s Unique Conception of “Fair Play” in the Administrative Process, 10 Rutgers L. Rev. 660 (1956).
administrative functions. A broad scope of review is usually regarded as destructive of the flexibility and adaptability of administrative processes. However, Professor Jaffee has stated that a "Trial de novo may . . . be a way to promote administrative efficiency or to overcome administrative bias."67

WORKMEN’S COMPENSATION CASES

As distinguished from other administrative decisions, the scope of review in workmen’s compensation cases is quite broad. Unlike review of other agency determinations, appeals from judgments of the Workmen’s Compensation Division are initially heard in the County Courts. The rules of court provide that the County Court shall conduct a trial de novo on the record compiled by the agency. Appeal may then be taken, as a matter of right, to the Superior Court, Appellate Division, by means of a proceeding in lieu of a prerogative writ. The supreme court may hear appeals from final judgments of the Appellate Division at its discretion.

Two 1958 decisions of the supreme court illustrate the scope of review accorded in workmen’s compensation cases. In the Russo case, the court established a “simple formula” defining the scope of review of factual matters in workmen’s compensation proceedings:

It is the duty of the reviewing court to weigh the evidence and determine whether claimant has sustained the burden of proof of an accident arising out of and in the course of his employment by a preponderance of the evidence . . . .

From a study of the entire record, it is the function and duty of the reviewing court to make a determination according to its considered judgment, and in doing so it is mandatory only to give due regard to the opportunity of the hearer of the evidence to judge of the credibility of the witnesses. A finding of fact in the Division or appellate courts does not lessen the duty of the appeal court to determine the facts and evaluate them by full investigation and analysis of the evidence so as to adjudge whether the general finding is consistent therewith, i.e., if upon such total consideration of the record and views expressed below, it is believed the judgment both in fact and the applicable law from which the appeal is taken is correct, it should be affirmed; if the judgment is erroneous, it should be reversed or modified. 73

66. Ibid.
68. R.S. 34:15-66.
69. R.R. 5:2-5(d).
71. R.R. 1:10.
73. 26 N.J. at 435.
In the *Ricciardi* case, the court repeated the formula and stated explicitly that "'Substantial evidence' is not the guiding criterion for appellate review of factual issues in workmen's compensation proceedings in this State."74

**FACTORS THAT CONDITION THE SCOPE OF REVIEW**

The factors that determine the scope of judicial review of administrative determinations are seldom revealed in court opinions. As Professor Davis has stated:

... The extent of the judicial inquiry in any case depends not only upon legal formulas and theories but also upon judicial psychologies. When judges have confidence in agencies' thoroughness and integrity, a strong case is required to move the judges to dig deeply into the problem, whether the problem is regarded as one of law or fact or discretion. But when the agency's work seems slipshod or responsive to ulterior influence, conscientious judges are likely, irrespective of formulas and theories, to do what is necessary to assure that justice is done. This observation overshadows all other remarks that can be made about the scope of review.75

A variety of factors have influenced the scope of review accorded by the New Jersey courts. Each of these factors is, in turn, influenced by additional considerations and by some or all of the other factors. A few of the factors are articulated in court opinions, but most of them must be inferred from the circumstances surrounding each case. Six primary factors may be noted.

(1) *The character of the agency.* This factor involves several considerations. As a rule, if the agency's actions are quasi-judicial, rather than quasi-legislative, in nature, the courts will exercise a broader scope of review.76 Also, if prosecuting and deciding functions are concentrated in a single individual or agency, the scope of review will be broadened.77 The amount of discretion possessed by an agency is also considered. If the agency exercises a considerable degree of discretion, the courts will extend the scope of their inquiry. On the other hand, if the agency operates in a well-established area, has traditionally exercised broad powers, and has developed a substantial body of case law, the courts tend to limit the scope of review. The

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74. 26 N.J. at 447.
75. *Davis*, *op. cit. supra*, n. 36, at 905-906.
courts usually exercise close scrutiny of agencies that are regulating new areas of social and economic conduct. However, the courts have recognized the need to allow agencies a certain freedom of experimentation in implementing legislative policy.

(2) The comparative qualifications of the court and the agency to decide the question. Here the primary considerations are the nature of the regulatory field and the need for expertness in dealing effectively with the subject matter. The courts will accord a narrow scope of review when the regulatory sphere is highly technical and the judges doubt their ability to cope with it. In such instances, the courts usually announce their respect for the expertness of the agency. The courts are disinclined to perform regulatory functions for which they are ill-prepared because they realize that their performance will be judged by the political criteria applicable to the exercise of such discretion and that ultimately "there will be an impairment of the precious prestige needed to support the prime judicial functions." The supreme court expressed its respect for administrative expertise and its reluctance to disturb agency determinations based on specialized experience in the case of Delaware, Lackawanna & Western Railroad Co. v. City of Hoboken:

... Appellate courts should not inject themselves into the field of original valuation in such cases except in very exceptional circumstances. ... The valuation of property in railroad use particularly presents "highly technical" problems for experts. ... The coordination and evaluation of such expert evidence is often a matter of considerable difficulty because of the unique problems entailed in the valuation of properties in railroad use and the increment in value, if any, resulting from the assemblage and consolidation of several tracts. ... The task of coordination and evaluation of such evidence has been expressly committed by the Legislature to the Division of Tax Appeals, a body contemplated to bring an informed judgment from specialized experience to the nice balancing and ultimate resolution of the many complex factors involved. ... 81

In contrast, the courts are inclined to broaden the scope of review if they feel that a matter is not closely related to the agency's sphere of competence. They will also accord a broad scope of review if they consider the matter to be related to their own judicial expertness, e.g., common law, constitutional law, ethical questions, etc., or if they can

easily educate themselves about the subject. The Supreme Court has stated that:

\[\ldots \text{while it has always been recognized that due deference must be accorded to the expertise of the administrative official, the degree of deference to be accorded in a particular case must also depend on whether the issue clearly involves expertise. Since cases involving the disciplining of a public officer or employee ordinarily involve no expertise, we are returned to the fundamental premise of substantial justice as the standard for judicial review.}\]

(3) The effect of the agency's action on personal liberty and property rights. Where administrative action imposes penalties on individuals in the form of personal restraints or loss or suspension of the right to earn a living,\(^\text{83}\) the courts will enlarge the scope of review. They are also likely to accord a broad scope of review where substantial property rights are involved, \textit{e.g.}, public utility rate cases. According to the Superior Court, Appellate Division, "\ldots the agency will not be considered to have the power to curtail drastically important rights of the citizen, whether as regards person or property, unless the legislative intention to grant such power is plainly manifest."\(^\text{84}\)

In all cases, the courts will intervene to protect individuals and the public from arbitrary or capricious administrative action. The courts are likely to review order-making action affecting a single person more carefully than rule-making action that uniformly affects a large group. However, they always consider the effect of the action on the public interest.

(4) The desirability of having the court or the agency make the final decision in a case. This factor depends largely upon the importance of the issue. If a highly sensitive public question is involved, the prestige of a judicial decision is often valuable. It will place future administrative action in the same area on a more sound basis. It is often desirable, in the early stages of an agency's existence, to obtain judicial approval or correction of the new propositions of law established by the agency. Thus, the courts hope to provide clearly defined standards so that the regulation may be conducted without frequent recourse to the courts. It should be remembered, however, that such judicial efforts sometimes have the opposite effect, as was the case with \textit{Smyth v. Ames},\(^\text{85}\) which complicated the problem of public utility rate regulation for almost fifty years.

85. 169 U.S. 466 (1898).
An additional consideration is whether judicial review will either impair administrative efficiency or place an undue burden on the courts. Extensive judicial review may render administrative regulation ineffective. Also, an over-eager disposition to intervene can "encourage appeals in an area in which the public interest demands expeditious solution of the controversy." 86

The courts are unwilling to substitute their judgment for that of administrative agencies if it appears that such action might violate the principle of separation of powers. 87 In many cases they state explicitly that the Legislature has made the agency and not the courts responsible for the regulatory function. 88 They usually refuse to exercise their independent fact-finding power, but prefer, instead, to remand the matter to the agency. 89

(5) The legislative purpose in enacting the regulatory statute. If it clearly appears that the Legislature intended to commit the question to administrative discretion, the scope of review will be narrowly defined, probably in terms of the substantial evidence rule. However, if the court believes that the Legislature wishes to rely on substituted judicial judgment, as in workmen's compensation cases, it will conduct broad review, possibly including a trial de novo.

The degree of judicial agreement or disagreement with the legislative purpose conditions the scope of review. If the judges sympathize with the legislative design, they are more likely to uphold administrative action taken in pursuance of it. If their disagreement with the legislative purpose is sufficiently strong, they may either invalidate the administrative action on the ground that it lacked a rational basis or substitute their own independent judgment.

Legislative purpose is one of the more important factors conditioning the scope of judicial review. Professor Jaffe maintains that it should be the primary factor, even though the test it provides depends on the application of the particular judge. 90 The Superior Court, Appellate Division, has stated that:

... nowadays, in the interpretation of all classes of statutes, a greater emphasis than formerly is put on the legislative intent, to be sought in the statute as a whole. This careful attention to the policy of the legislation leads to a more liberal construction of the powers of administrative agencies. 91

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88. Supra, n. 49.
89. Supra, n. 50.
(6) **The court's appraisal of the competency of the agency.** This is an important, but seldom articulated factor. Judicial confidence in an agency derives in large part from past performance. If the agency has demonstrated its expertness and its ability to render clear and unambiguous rules and orders the courts usually will defer to its discretion. They are most favorably influenced by agency records that include all of the evidence taken and considered in reaching the decision and by logical, rationally-based decisions.

The degree to which an agency observes the standards of fair play also influences judicial confidence in it. The courts will exercise broad and sweeping powers of review if an agency has neglected or disregarded the requirements of procedural due process. Decisions made without adequate hearing on the basis of ex parte consultations are highly suspect.

In the final analysis, the scope of review is a question of the individual judge's estimate of the situation. In any one case, some or all of the factors discussed above will influence the judge who takes whatever action he thinks is just and right. A factor that is important in one case, such as legislative intent, may appear insignificant in another. Certain factors will continue to predominate over others. Chief Justice Weintraub summarized the situation in his concurring opinion in *Russo v. United States Trucking Corporation*:

> . . . I incline to believe that a judge will do what he thinks he should, no matter how we try to corral him. Whether he will disturb the findings depends upon what is really pivotal in the case as he sees it . . . The patterns vary. The most that can be said is that an appellate judge should and will sustain the factual findings unless he is persuaded upon the sundry aspects of the case that the trier of facts was wrong.  

There exists, then, a particular need for judicial self-restraint in the review of administrative actions. As Davis stated, "the strongest judge may be the one whose personal preferences concerning substantive results have the least effect upon the scope of his inquiry." At the same time, however, there is a need for the courts to guide "the excessive procedural hegemony of many agencies" into "lines of more effective democratic responsibility." In general, the New Jersey courts meet both of these requirements. They restrain themselves from unwarranted invasions of substantive policy areas while maintaining a constant guard against administrative aggrandizement.

93. *Davis, op. cit. supra n. 36, at 927.
94. *Glasser, op. cit. supra n. 65, at 72.