to alienate real estate. Applying the foregoing principles of law to the questions propounded in your letter, it is my opinion that each of the questions should be answered in the negative. I am unable to see any reasonable connection between the public health, public safety, public welfare and an absolute right to sell, transfer and convey real estate, irrespective of the use to which such real estate may be devoted.

Therefore, it is my conclusion that the provisions found in Sections 48-2220 and 48-2223 (Sections 9 and 12, Chapter 268, Acts 1935), attempting to prohibit the right to sell, transfer and convey real estate without first securing the consent and approval of the planning commission to such sale, transfer and conveyance, are unconstitutional, null and void as constituting an unwarranted restriction and limitation upon the inherent property rights of the owners of the respective parcels of real estate referred to.

STATE CHEMIST: The action of an administrative officer, pursuant to authority delegated by statute, in denying the license to sell merchandise in this State, is subject to judicial review.

March 29, 1944.

Opinion No. 33

Hon. F. W. Quackenbush,
State Chemist,
c/o Purdue University,
Lafayette, Indiana.

Dear Sir:

Your letter of March 20, 1944, received requesting an official opinion, supplementing a previous opinion of this office under date of March 14, 1944, construing Ch. 281, Acts of 1937, same being Section 15-1901, et seq., the particular question now presented being as follows:

"When the State Chemist is satisfied that the claims are misleading and has refused to issue a permit, can he expect the courts to support him under the Act?"

In the case of Warren v. Indiana Telephone Company (1939), 217 Ind. 93, the court, in determining its jurisdiction
in the power to review orders or findings of the industrial board where the statute only authorized appeals to the Appellate Court, said on page 105 of the opinion:

"Strictly speaking, there is no such thing as an appeal from an administrative agency. It is correct to say that the orders of an administrative body are subject to judicial review; and that they must be so to meet the requirements of due process. *Such review is necessary to the end that there may be an adjudication by a court of competent jurisdiction that the agency has acted within the scope of its powers; that substantial evidence supports the factual conclusions; and that its determination comports with the law applicable to the facts found. * * *"

Again on pages 117 to 119 of the opinion the court, in part, said:

"This leads to a consideration of what is the province of a court when a review of an administrative order is sought. It must be conceded that it is the undoubted function of the court to determine the matter of jurisdiction, that is, the power of the administrative agency to decide the question which it has undertaken to decide. Jurisdiction is grounded upon constitutional or statutory authority, the existence of which is always a judicial question. All the other powers of the judiciary with respect to the review of administrative orders may be said to be embraced in the duty to determine if the requirements of due process have been met. The constitutional guaranty of due process is one of broad and comprehensive implications, not readily definable with precision. Among its elements are reasonable notice, an opportunity for a fair hearing, and the right to have a court of competent jurisdiction determine if the finding is supported by evidence.

"* * * In the final analysis, the finding of an administrative agency will not be disturbed when it is subjected to the scrutiny of a judicial review, upon the claim that it is not supported by the evidence, unless it is made to appear that the finding does not rest upon a substantial factual foundation. This may be deter-
mined from a re-examination of the evidence upon which the administrative agency acted, or by the original reviewing court hearing evidence, depending upon the legislative scheme under which the agency operates. * * *

"In ascertaining whether the finding of the administrative agency meets the requirement of due process, the court will look to the substance rather than the form. The mode by which the facts were found will be regarded as a means rather than an end, and the finding will not be set aside because the agency did not conform to the court-made formulas of proof. If, however, it should be made to appear that the evidence upon which the agency acted was devoid of probative value; that the quantum of legitimate evidence was so proportionately meagre as to lead to the conviction that the finding does not rest upon a rational basis; or that the result of the hearing must have been substantially influenced by improper considerations, the order will be set aside, not because incompetent evidence was admitted, but rather because the proof, taken as a whole, does not support the conclusion reached."

In determining the Supreme Court's inherent right of review, where a constitutional right may be violated, the court on page 114 of the above opinion stated:

"* * * Where a self-executing constitutional right is violated, no statutory remedy is necessary for its protection. Under such circumstances it would become the duty of this court to supply the procedure. This might be done by exercising the original jurisdiction of this court to mandate the Appellate Court to pass upon the questions presented to it, as was sought to be done in the Sluss case, supra, or, this court might, in the exercise of its constitutional appellate jurisdiction, order the record of the case to be brought up from the Appellate Court for review by certiorari. State ex rel. Daily v. Kime (1937), 213 Ind. 1, 11 N. E. (2d) 140. * * *"

The above case was approved by the Supreme Court in its decision of March 8, 1944, in the case of Indianapolis Life Ins.
Co. v. Lundquist, — Ind. —, 53 N. E. (2d) 338, where the court, in determining the procedure applicable on appeal, and the lower court's records were incomplete, said on page 342 of the opinion:

"In Warren v. Indiana Telephone Co., 1940 (217 Ind. 93), 26 N. E. (2d) 399, it was concluded, upon a careful consideration of the authorities, that the Constitution of Indiana guarantees an absolute right to a review by this court; that the Legislature has the right to regulate and provide procedure for obtaining a review, but not to curtail or deny the right.' Article 1 of section 12 of the Constitution of Indiana provides: 'All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law.' In a case similar in the facts to the case at bar, the Supreme Court of Nebraska said, in Zweibel v. Caldwell et al., 1904, 72 Neb. 47, 52, 99 N. W. 843, 845, 102 N. W. 84: 'Section 13 of article 1 of the Constitution, providing that the court shall be open to every person for any injury done, and that he shall have a remedy, has been held to be broader than the common law, and to entitle the courts to grant a remedy whenever a wrong has been done.' It was held that a showing of the loss of the right to an appeal is sufficient to warrant a new trial, and that prejudice will be presumed without the necessity of showing error in the judgment complained of. * * *"

In the case of Russell v. Johnson (1943), — Ind. —, 46 N. E. (2d) 219, the court, in passing upon the right of review of an order and finding of the industrial board, on page 222 of the opinion stated:

"* * * The Industrial Board is an administrative agency, not a court. The only function of a judicial review of its proceedings is to ascertain if, in the broad sense, the requirements of due process have been met. When the sufficiency of the evidence to support the finding of an administrative agency is challenged, the proper court will either conduct an independent inquiry to ascertain the facts upon which the agency acted or look to the evidence which was before it, depending
upon the legislative scheme under which the agency operates. Warren v. Indiana Telephone Co., supra.

* * *

In the case of State Board of Medical Reg. and Exam. v. Scherer (1943), — Ind. —, 46 N. E. (2d) 602, the court, in deciding the right and method of review of an order of the Medical Board revoking a license to practice naturopathy, said on page 603 of the opinion:

"The granting and revocation of licenses to engage in trades, businesses, or professions is a ministerial function. Ministerial boards act as fact-finding bodies to ascertain whether applicants conform to a legislative formula by which the right to a license is fixed. It is well settled that under the division of powers, these ministerial fact-finding duties may not be delegated to courts, and that the so-called appeal provisions of statutes which undertake to vest in courts jurisdiction to try and determine de novo the facts entitling an applicant to a license, or to continue to operate under a license, must be treated as merely providing procedure by which the proceeding may be brought before the court for an investigation to determine whether the ministerial body has acted legally and within its powers. In all of such cases, if the ministerial board has conformed to a statutory procedural method, and its decision is supported by substantial evidence, its findings and determination will not be disturbed. (Cases Cited.)

* * *

From the foregoing authorities, it is my opinion that a court of competent jurisdiction has an inherent power to review decisions made by administrative agencies on questions violating Constitutional rights of persons to engage in business in this State, to determine if the authority exercised by the administrative agency is within that power delegated to it by the statute, and to determine if substantial evidence supports such finding or decision.

As pointed out in the previous official opinion of this office, in the case of Wallace v. Dohner (1929), 89 Ind. App. 416, the court, in upholding the validity of the action of the Conservation Department of this State in quarantining an area of farm
land infected with the “European Corn Borer,” on page 420 of the opinion said:

“Courts have uniformly held, and the law is well settled, that valid rules and regulations, when adopted by an administrative body in accordance with the provisions of the act by which the administrative body was created, are, in effect, a part of the statute. Chicago, etc., R. Co. v. People (1907), 136 Ill. App. 2. However, a rule, to be valid, must be reasonable and within the authority delegated by the statute.”

As pointed out in said previous opinion, in the case of Sachs v. Blewett (1933), 206 Ind. 151, the court, in holding defendant not liable in failing to purchase real estate under an auction sale, where fraud was alleged, said on page 156 of the opinion:

“A fraudulent intent alone is no actionable. There must be some fraudulent, overt act, or failure to act when duty requires it, or a breach of trust or confidence, and such must be the efficient or proximate cause of injury.

‘Fraud cannot be predicated upon acts which the party charged has a right by law to do, nor upon the non-performance of acts which by law he is not bound to do, whatever may be his motive, design or purpose, either in doing or not doing the acts complained of.’ Franklin Insurance Co. v. Humphrey et al. (1879), 65 Ind. 549.”

As further pointed out in said official opinion, the court, in the case of Milk Control Board v. Pursifull (1941), 219 Ind. 396 at 405, in determining the Milk Control Act was a penal statute applying to persons engaged in carrying on a business, held that such Act should be strictly construed and all doubts and ambiguities in the Act resolved in favor of the person against whom said Board was attempting to apply the provisions of said Act. The statute there involved required a license for carrying on a dairy business under certain conditions.

Under the foregoing authorities, it is my opinion that a refusal of a license by the State Chemist to an applicant to sell Vitamin B₁ products in this State must be based upon
substantial evidence for such refusal, and that such action by the State Chemist would be subject to a right of review by a judicial court of competent jurisdiction to determine if the requirements of due process have been satisfied. The statute in question, being of a penal nature, would be strictly construed in favor of such applicant.

This office can only give opinions on questions of law and will not presume to predict what determination might be made by a judicial court on the question of fact as to the reasonableness of the refusal of such license, or as to the sufficiency of the facts necessary to support such refusal.

SOLDIERS' AND SAILORS' CHILDREN'S HOME: ADOPTION: The adoption of children from such institution is controlled by Chapter 182, Acts of 1933, and not by general adoption statute.

March 30, 1944.

Opinion No. 34

Hon. L. A. Cortner, Superintendent,
Indiana Soldiers' and
Sailors' Children's Home,
Knightstown, Indiana.

Dear Sir:

Your letter of March 24, 1944, received requesting an official opinion upon the following question:

"The question now comes as to whether the adoption law written specifically for this Institution in Chapter 182, in Indiana Acts of 1933, prevails or if this procedure must be changed because of the adoption law, Chapter 146, in Indiana Acts of 1941."

Chapter 182 of the Acts of 1933, being Section 22-2326, et seq., Burns' 1933, is a special statute giving to the board of trustees of the Indiana Soldiers' and Sailors' Children's Home authority to approve or reject the placing of children in the custody of such institution in private homes, and outlining in detail the procedure to be followed in case such children are thereafter later adopted. Among other things, such adopting parents are required to enter into a written agreement with the board of trustees of such home regarding the provisions