SURVEY OF ADMINISTRATIVE LAW

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INTRODUCTION

Administrative law concerns how state and local agencies act, whether through rulemaking or adjudication, and whether they act within the scope of authority given to the agency by the legislature. In 1927, Justice Frankfurter called administrative law

> "filing [sic] in the details" of a policy set forth in statutes. But the "details" are of the essence; they give meaning and content to vague contours. The control of banking, insurance, public utilities, finance, industry, the professions, health and morals, in sum, the manifold response of government to the forces and needs of modern society, is building up a body of laws not written by legislatures, and of adjudications not made by courts and not subject to their revision. These powers are lodged in a vast congeries of agencies.[1]

This survey Article[2] focuses on the statutory framework that covers many of the state and local agencies: the Administrative Orders and Procedures Act ("AOPA");[3] the Administrative Rules and Procedures Act ("ARPA");[4] and the Open Door[5] and Records Acts.[6]

I. JUDICIAL REVIEW

AOPA applies to many, but not all, administrative agencies in Indiana. Indiana Code section 4-21.5-2-4 exempts several administrative agencies from AOPA, including the Indiana Utility Regulatory Commission ("IURC"), State Department of Revenue, and the Department of Workforce Development.[7] The statutory review for non-AOPA agencies is frequently similar to AOPA and the cases from the survey period will therefore be discussed together, but non-AOPA

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1. Stephen T. Maher, *The Continuing Task of Administrative Law*, ADMIN. L. SEC. NEWSL. (Admin. Law Section of the Fla. Bar), Mar. 1996, at 1, 2, http://www.usual.com/article2.htm (quoting Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 621 (1927)).

2. This Article reviews published Indiana decisions in the area of administrative law from October 2005 to September 2006.

3. IND. CODE §§ 4-21.5-1 to -7, -9 (2005). There were very few statutory changes to AOPA during the survey period. The only change of substance was to add "determination of status as a member of or participant in an environmental performance based program developed and implemented under IC 13-27-8." *Id.* § 4-21.5-2-5(17).

4. *Id.* § 4-22-1.

5. *Id.* § 5-14-1.5.

6. *Id.* § 5-14-3.

7. *Id.* § 4-21.5-4.4.

cases will be noted because of differences in judicial gloss on those standards.

A. Standard of Review

Indiana's AOPA provides the following standard of judicial review of agency actions: a court may provide relief only if the agency action is:

> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence.[8]

Judicial review of agency actions is generally very deferential to the agency. The same standard of review applies regardless of whether the administrative agency actively participates in the appeal.[9] Several cases during the survey period illustrate the bounds of the standard for review of administrative actions.

1. Arbitrary and Capricious Action.—In *Indiana State Board of Health Facility Administrators v. Werner* (*Werner I*)[10] the State Board of Health Facility Administrators ("Health Facility Board") sanctioned Werner, an administrator, by suspending her license and requiring her to pay costs of the disciplinary proceeding.[11] In the administrative proceeding, an administrative law judge ("ALJ") recommended a censure for Werner, a less severe punishment.[12] The issue was appealed to the Health Facility Board, who after receiving briefs and hearing oral arguments, rejected the ALJ's recommendation and imposed a sanction suspending Warner's license and assessing costs.[13]

Werner sought judicial review of the Board's decision, and the trial court found that the Health Facility Board's decision was arbitrary and capricious.[14] The court of appeals applied the standard that "[a] decision is arbitrary and capricious if it is made without any consideration of the facts and lacks any basis that may lead a reasonable person to make the same decision made by the administrative agency."[15] "A decision may also be arbitrary and capricious where only speculation furnishes the basis for a decision."[16] The court of appeals

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8. *Id.* § 4-21.5-5-14.

9. Hoosier Outdoor Adver. Corp. v. RBL Mgmt., Inc., 844 N.E.2d 157, 162 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 590 (Ind. 2006).

10. 841 N.E.2d 1196 (Ind. Ct. App.), *reh'g*, 846 N.E.2d 669 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 591 (Ind. 2006). The order on rehearing addressing other issues is discussed elsewhere in this Article and is referred to as *Werner II*.

11. *Werner I*, 841 N.E.2d at 1198.

12. *Id.* at 1202.

13. *Id.* at 1203-04.

14. *Id.*

15. *Id.* at 1206 (citing Ind.-Ky. Elec. Corp. v. Comm'r, Ind. Dep't of Envtl. Mgmt., 820 N.E.2d 771, 776 (Ind. Ct. App. 2006)).

16. *Id.* at 1206 (citing Ind. State Bd. of Registration & Educ. for Health Facility Adm'rs v.

stated that "[s]imply said, an agency decision is arbitrary and capricious where there is no reasonable basis for the decision."[17]

The court of appeals found the Health Facility Board's decision arbitrary and capricious because the Board failed to provide any explanation for why it decided to impose a significantly more severe sanction than that recommended by the ALJ.[18] The Health Facility Board "adopted the ALJ's findings and conclusions in their entirety" but imposed a different sanction without any explanation for why it reached a different conclusion.[19]

Agency action was also challenged as being arbitrary and capricious in *Indiana State Real Estate Commission v. Martin*.[20] In *Martin*, a real estate broker appealed the Indiana Real Estate Commission's decision suspending his license as a result of failure to obtain continuing education.[21] The trial court reversed the Real Estate Commission's decision, finding it had inconsistently applied the sanction and its decision was arbitrary, but the court of appeals reversed.[22]

Indiana Code section 25-1-11-16 specifically requires the Real Estate Commission to seek consistency in the application of sanctions against brokers.[23] It also requires the Commission to explain "[s]ignificant departures from prior decisions involving similar conduct."[24]

The resolution of the case revolved around discussion of several other disciplinary case proceedings. The trial court found that the facts in *Martin* were similar to another case, *State v. Jordan*[25] where a less severe sanction was imposed by the Commission.[26] However, the court of appeals distinguished the two cases because in *Jordan*, the Commission had specifically made a finding that it "believe[d] the explanation Jordan had offered."[27] In *Martin*, the Commission made no such finding, but the trial court stated, "there is nothing in the record that would reveal that [Martin's] continuing education transgression . . . was anything but a simple mistake."[28] This statement led the court of appeals to believe that the trial court had impermissibly re-weighed the evidence, "specifically witness testimony."[29]

The court of appeals flatly rejected an argument that agency action was

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Cummings, 387 N.E.2d 491, 495-96 (Ind. App. 1979)).

17. *Id.* at 1206-07 (citing Chesser v. City of Hammond, 725 N.E.2d 926, 930 (Ind. Ct. App. 2000)).

18. *Id.* at 1208.

19. *Id.* at 1207.

20. 836 N.E.2d 311 (Ind. Ct. App. 2005), *trans. denied*, 855 N.E.2d 1001 (Ind. 2006).

21. *Id.* at 312.

22. *Id.* at 312-13.

23. *Id*. at 314.

24. *Id.* (quoting IND. CODE § 25-1-11-16 (2004)).

25. Cause No. IREC 02-32.

26. *Martin*, 836 N.E.2d at 315-17.

27. *Id.* at 317.

28. *Id.*

29. *Id.*

arbitrary and capricious in *Evansville Outdoor Advertising, Inc. v. Princeton (City) Plan Commission*.[30] The challenger of the agency action argued that the Plan Commission's decision was arbitrary and capricious because it was "not related to the public health, safety, morals or general welfare of the community."[31] In rejecting the argument, the court stated "[a] rule or decision will be found to be arbitrary and capricious 'only where it is willful and unreasonable, without consideration and in disregard of the facts or circumstances in the case, or without some basis which would lead a reasonable and honest person to the same conclusion.'" [32]

2. Issues of Statutory Interpretation.—Agency interpretation of particular statutes is often challenged on judicial review as being erroneous, or not in accordance with the law. *Will's Far-Go Coach Sales v. Nusbaum*[33] presented such a case.

Will's Far-Go Coach Sales ("Will's Far-Go"), was a taxpayer who sold recreational vehicles ("RVs") in Fountain County.[34] The company frequently bought RVs from a manufacturer in Elkhart county. On March 1, the assessment date for personal property tax, Will's Far-Go had purchased several RVs, but they had not been transported to its premises.[35] The taxpayer paid personal property tax for the RVs in Fountain county, the county in which the taxpayer was located.[36] Elkhart county claimed that the taxpayer should have paid taxes for the RVs in its county and sent notices of assessment to Will's Far-Go.[37]

The taxpayer filed two Petitions for Correction of Error (Forms 133) with the Elkhart County Property Tax Assessment Board of Appeals ("PTABOA"), but Will's Far-Go did not file claims for refund in conjunction with the Forms 133.[38] "[T]he PTABOA denied [Will's Far-Go's] request for relief."[39]

Will's Far-Go appealed to the Indiana Board of Tax Review.[40] The Tax Board denied the appeal on several grounds, including that "Will's Far-Go's Forms 133 were not timely filed."[41] Will's Far-Go appealed to the tax court.[42]

The dispositive issue to the court of appeals was the time limit for filing a

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30. 849 N.E.2d 630 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 594 (Ind. 2006).

31. *Id*. at 635.

32. *Id.* at 635-36 (quoting Evansville Outdoor Adver., Inc. v. Bd. of Zoning Appeals of Evansville & Vanderburgh County, 757 N.E.2d 151, 161 (Ind. Ct. App. 2001)).

33. 847 N.E.2d 1074 (Ind. Tax Ct. 2006).

34. *Id.* at 1075.

35. *Id.*

36. *Id.*

37. *Id*.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 1076.

42. *Id.* Judicial review of decisions from the tax board has the same standard of judicial review as AOPA but has a separate statutory enactment at Indiana Code sections 33-26-6-6(e)(1)-(5).

Form 133. The court of appeals found that Indiana Code section 6-1.1-15-12, the statute providing for filing Form 133s, did not specify a time period in which the form must be filed.[43] It also found that the administrative regulation interpreting the statute was ambiguous.[44]

In resolving the ambiguity, the court looked to common law for guidance.[45] The court noted a 2005 Indiana Supreme Court decision which held that a Form 133 was due within three years from the date the taxes were first due.[46]

The court found it would be appropriate for it to construe the statute because the statute was subject to more than one interpretation.[47] The court applied the same rules of construction to administrative regulations as it applied to statutes.[48] The court also stated that the rules of construction required it "to give effect to the intent of the enacting administrative agency."[49] Finally, the court was guided by the presumption that the administrative agency intends for its regulations to be logical and avoid an unjust or absurd result.[50]

It was this later provision which guided the court. If the court adopted Will's Far-Go's argument a taxpayer who actually paid his taxes would only have three years to file a Form 133, but a taxpayer who had not paid its taxes would have an infinite amount of time to file a Form 133.[51] The court stated this result would "penalize taxpayers for paying their taxes."[52]

Despite many equities being in Will's Far-Go's favor, it lost its appeal. It had paid the taxes, just in the wrong county. The court of appeals agreed that the statute and regulation were ambiguous. The court did not address the merits of Will's Far-Go's argument, but it appeared the taxpayer had a very good argument that it had paid the taxes in the proper county.[53] The court of appeals stated it sympathized with Will's Far-Go that it may have to pay taxes twice; however, it

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43. *Id*. at 1077.

44. *Id.*

45. *Id.* at 1077-78 (citing Chrysler Fin. Co. v. Ind. Dep't of State Revenue, 761 N.E.2d 909, 912 (Ind. Tax Ct. 2002) ("[C]ourts presume that the Indiana Legislature understands and acquiesces in the common law of assignment absent a clear expression of contrary intent.")).

46. *Id.* at 1078 (citing Lake County Prop. Tax Assessment Bd. of Appeals v. BP Amoco Corp., 820 N.E.2d 1231, 1232-33 (Ind. 2005)).

47. *Id.* (citing Gundersen v. Ind. Dep't of State Revenue, 831 N.E.2d 1274, 1276 (Ind. Tax Ct. 2005); Harlan Sprague Dawley, Inc. v. Ind. Dep't of State Revenue, 605 N.E.2d 1222, 1229 (Ind. Tax Ct.1992)).

48. *Id.* (citing *Harlan*, 605 N.E.2d at 1229).

49. *Id*. (citing *Gundersen*, 831 N.E.2d at 1276).

50. *Id.* (citing Chavis v. Patton, 683 N.E.2d 253, 257 (Ind. Ct. App. 1997)).

51. *Id.*

52. *Id.*

53. *See id.* at 1077 n.4 ("Personal property that is owned by a resident of Indiana 'shall be assessed at the place where the owner resides on the assessment date of the year for which the assessment is made."). IND. CODE. § 6-1.1-3-1(a) (2006). Personal property is only assessed at the place where it is situated on the assessment date if it is "regularly used or permanently located where it is situated[.]" *Id.* § 6-1.1-3-1(c)(1).

faulted Will's Far-Go for ignoring the Elkhart County tax assessments.[54] The court noted that "Will's Far-Go had ample notice and time to challenge the assessments."[55]

Hoosier Outdoor Advertising Corp. v. RBL Management, Inc. ("*Hoosier*"),[56] also dealt with agency interpretation of relevant law, this time a zoning ordinance. Two billboard companies who each claimed to have rights to erect billboards in the same county disputed decisions from a County Board of Zoning Appeals ("BZA").[57]

The court recited the black letter law provisions that questions of law decided by an agency are generally reviewed de novo;[58] "however[,] an agency's construction of its own ordinance is entitled to deference."[59] When the ordinance has two reasonable interpretations, "one if which is supplied by [the] administrative agency charged with enforcing the ordinance, the court terminates its analysis and does not consider the reasonableness of the other party's interpretation."[60] The court employed that specific principle in resolving the issues in the case.

The appellee (who had received an unfavorable ruling from the BZA, but then prevailed in reversing that decision at the trial court) raised several arguments that the BZA's construction of the local zoning ordinance was incorrect.[61] However, with regard to each of the appellee's arguments, the court found that the BZA's construction of the local ordinance was reasonable.[62]

Indiana Department of Environmental Management v. Lake County Solid Waste Management District ("IDEM v. Lake County")[63] relied in part on *Hoosier* in reaching its result that an administrative agency's interpretation of a statute was reasonable. The case also illustrates what can happen when there is a struggle for authority between state and local authority.

In *IDEM v. Lake County*, the Lake County Solid Waste Management District ("District") challenged the Indiana Department of Environmental Management's ("IDEM") approval of a permit for solid waste processing of medical waste for Midwest Medical Solutions, LLC ("Midwest") before the District had made a determination of need for such a permit.[64]

After first writing to the executive director of the District in March 2001 to

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54. *Nusbaum*, 847 N.E.2d at 1078 n.5.

55. *Id.*

56. 844 N.E.2d 157 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 590 (Ind. 2006).

57. *Id.* at 160-61.

58. *Id.* at 163 (citing Huffman v. Office of Envtl. Adjudication, 811 N.E.2d 806, 809 (Ind. 2004)).

59. *Id.* (citing Story Bed & Breakfast, LLP v. Brown County Area Plan Comm'n, 819 N.E.2d 55, 66 (Ind. 2004)).

60. *Id.* (citing Shaffer v. State, 795 N.E.2d 1072, 1076-77 (Ind. Ct. App. 2003)).

61. *Id.* at 170.

62. *Id.* at 164, 167-69.

63. 847 N.E.2d 974 (Ind. Ct. App. 2006), *trans. denied*, (Ind. Feb. 1, 2007).

64. *Id.* at 976-82.

ask if the District would support Midwest's application, Midwest applied to IDEM for a permit in October 2001.[65] After two years to work through various issues, IDEM held a public comment period in early 2004, during which interested parties could "make written [or] oral technical comments regarding changes and additions to Midwest's permit application."[66] The District wrote to IDEM and stated it wanted "to become active and involved in making a needs determination for medical waste processing facilities within the District" and requested that IDEM "suspend any current or future applications for a medical waste processing facility" in the county until after the District had made its determination.[67] IDEM did not suspend its consideration of Midwest's permit and instead, issued a permit on May 7, 2004.[68]

The District sought administrative review of the issuance of the permit with the Office of Environmental Adjudication ("OEA").[69] The OEA upheld the issuance of the permit.[70] "The District petitioned for review of the OEA decision in the Lake Superior Court" and argued that IDEM must wait on the District's determination of need for a waste processing facility.[71] The superior court agreed with the District and reversed the OEA's decision.[72] The superior court faulted Midwest for not pursuing a determination of need from the District before instituting the permit process with IDEM.[73]

Although questions of law are reviewed de novo,[74] if a statute or "ordinance is subject to different interpretations, the interpretation chosen by the administrative agency charged with the duty of enforcing the ordinance is entitled to great weight, unless that interpretation is inconsistent with the ordinance itself."[75] All that is required under this analysis is a showing that the administrative agency's interpretation is reasonable.[76] The court of appeals also mentioned that the fact that the trial court adopted the District's proposed order verbatim with only minor formatting changes weakened its confidence that the trial court's findings were the result of considered judgment.[77]

The District argued that the legislature designated the District as the

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65. *Id.* at 977.

66. *Id.* at 978.

67. *Id.*

68. *Id.* at 979.

69. *Id.*

70. *Id.*

71. *Id.* at 980-81.

72. *Id.* at 982.

73. *Id.*

74. *Id.* at 983 (quoting Hoosier Outdoor Adver. Corp. v. RBL Mgmt., Inc., 844 N.E.2d 157, 163 (Ind. Ct. App. 2006)).

75. *Id.* (citing Kiel Bros. Oil Co. v. Ind. Dep't of Envtl. Mgmt., 819 N.E.2d 892, 902 (Ind. Ct. App. 2004)).

76. *Id.* (citing *Hoosier*, 844 N.E.2d at 163).

77. *Id.* (citing Safety Nat'l Cas. Co. v. Cinergy Corp., 829 N.E.2d 986, 993 n.6 (Ind. Ct. App. 2005)).

appropriate agency to determine solid waste needs within a waste district.[78] As evidence of that intent, the District was required to make a solid waste management plan, which had been approved by IDEM.[79] The court of appeals noted several statutes which generally supported this view.[80] Although the court also noted that Indiana Code section 13-20-1-2 stated applicants for a permit must demonstrate a *local or regional* need for the facility.[81]

The court noted its research had revealed no case law that adequately explained the relationship between the local and state authorities under the particular statutes relevant to this case.[82] It reviewed several cases under somewhat similar scenarios and concluded that solid waste districts "play a vital role in addressing, regulating and generally 'dealing with' solid waste management issues."[83] However, the districts do not "operate in a vacuum" but rather, operate as "part of the overall state system."[84]

The court of appeals noted that a plain reading of the statutes and regulations that govern the permitting process did not contain a requirement that "IDEM either solicit a district's local determination of need or suspect review of an application upon a district's request to perform" its own needs study.[85] The court also thought it was advantageous to vest IDEM with ultimate statewide permitting authority because it would enhance consistent application of criteria.[86]

The court of appeals responded to the concern that its interpretation might render a district's voice in the permitting process meaningless.[87] The court stated that districts may play an advisory role if they choose.[88] The court also noted that districts had many other duties and powers.[89] Although not figuring prominently in the court of appeals' decision, based on arguments the parties had raised, the court did express that the trial court had "usurped IDEM's power by reweighing evidence."[90] The court also agreed with the OEA that the District waived the issue of whether Midwest demonstrated a local or regional need for the facility

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78. *Id.* at 984.

79. *Id.*

80. *Id.* at 984-86.

81. *Id.* at 985 (emphasis in original).

82. *Id.* at 986.

83. *Id*. at 987 (citing Bd. of Comm'rs of LaPorte County v. Town & Country Utils., Inc., 791 N.E.2d 249, 257 (Ind. Ct. App. 2003), *trans. denied*, 812 N.E.2d 800 (2004)).

84. *Id.* (citing *Town & Country Utils.*, 791 N.E.2d at 257).

85. *Id.* at 988 (referring to Carter-McMahon v. McMahon, 815 N.E.2d 170, 175 (Ind. Ct. App. 2004) for the proposition "in construing a rule, it is just as important to recognize what it does not say as it is to recognize what it does say.").

86. *Id.* at 989.

87. *Id.* at 988-89.

88. *Id.* In this case the court noted that the District had not opposed the permit.

89. *Id.* at 989-90.

90. *Id.* at 991 (referring to Ind. Dep't of Envtl. Mgmt. v. Boone County Res. Recovers Sys. Inc., 803 N.E.2d 261, 273 (Ind. Ct. App. 2004)).

by failing to raise the issue earlier.[91]

Finally, *City of Fort Wayne v. Utility Center, Inc.*[92] is notable for its resolution of a statutory interpretation issue in a decision from the IURC, which is not governed by AOPA. Judicial review of decisions from the IURC follows a two-tiered standard of review.[93] "First, the court determines whether the decision is supported by specific findings of fact and by sufficient evidence," then the "court determines whether the Commission's decision is contrary to law."[94]

The court of appeals rejected Fort Wayne's claim that the IURC had used a hypothetical purchase price to determine the amount of the acquisition adjustment, finding that the IURC had not used a "hypothetical" number.[95] The court also rejected the city's argument that the IURC had included intangible property, which was contrary to the specific terms of Indiana Code section 8-1-2-6(b). The IURC had made a specific finding that there was a shortage of evidence proving that the purchase price included good will.[96] The court of appeals noted this lack of evidence and concluded that it could not say that the IURC abused its discretion in calculating the acquisition adjustment.[97]

3. Substantial Evidence.—Appeals based on lack of substantial evidence may be the toughest grounds to prevail upon, but *Rice v. Allen County Plan Commission*,[98] shows it is possible. In *Rice*, a county plan commission approved a development plan to construct a house but denied approval for a detached garage, which had already been constructed.[99] The decision was initially upheld on judicial review, but the court of appeals reversed.[100]

In addition to referring to the AOPA standard of review, the court noted with regard to zoning proceedings, "evidence is substantial 'if it is ore than a scintilla and less than a preponderance.'"[101] The court also stated the party asserting invalidity must establish as a matter of law that each criterion for approval of a

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91. *Id.* (citing Save the Valley, Inc. v. Ind.-Ky. Elec. Corp., 820 N.E.2d 677, 679 n.3 (Ind. Ct. App.), *reh'g granted on other grounds*, 824 N.E.2d 776 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 179 (Ind. 2005); and Turner v. Stuck, 778 N.E.2d 429, 432 (Ind. Ct. App. 2002)).

92. 840 N.E.2d 836 (Ind. Ct. App. 2006).

93. *Id.* at 839 (citing U.S. Gypsum v. Ind. Gas Co., 735 N.E.2d 790, 795 (Ind. 2000)). Appeals from the IURC are heard directly by the court of appeals. IND. APP. R. 2A, 5C.

94. *Id.* (citing Hancock County Rural Elec. Membership Corp. v. City of Greenfield, 768 N.E.2d 909, 911 (Ind. Ct. App. 2002)).

95. *Id.* at 841.

96. *Id.*

97. *Id.*

98. 852 N.E.2d 591 (Ind. Ct. App. 2006), *trans. denied*, 2007 Ind. LEXIS 34 (Ind. Jan. 3, 2007).

99. *Id.* at 593.

100. *Id.*

101. *Id.* at 597 (citing S & S Enters., Inc. v. Marion County Bd. of Zoning Appeals, 788 N.E.2d 485, 491 (Ind. Ct. App. 2003)).

zoning application has been fulfilled[102]—a standard that the concurrence thought settled the case.[103]

The court of appeals reviewed each of the plan commission's three reasons for denying the development plan and found there was lack of substantial evidence on each matter. Despite the fairly low standard to find substantial evidence, the court of appeals found it was improper to rely on some of the proffered evidence because of layperson observations by residents "who were opposed to the construction"[104] all along, assumptions which were not supported by the evidence, and review of an appraisal that the Commission relied upon to say that property values had declined.[105]

Evansville Outdoor Advertising, discussed supra, shows a more typical result of a challenge based on lack of substantial evidence.[106] EOA argued that the testimony of an adjacent property owner did not provide substantial evidence, because it was not supported by exhibits or photographs.[107] The court rejected this argument indicating that it was a request to reweigh the evidence.[108]

4. Limitation to the Agency Record.—Two cases during the survey period illustrated that judicial review is limited to the evidence of record. In *Bucko Construction Co. v. Indiana Dept. of Transportation*, the Indiana Department of Transportation ("INDOT") had contracted with Bucko Construction ("Bucko") to repave certain portions of highway and conduct bridge reconstruction.[109] During the course of that work, INDOT reviewed Bucko's performance and reduced Bucko's prequalification rating for highway construction projects by thirty percent.[110] Bucko sought judicial review of INDOT's administrative decision.[111]

While the judicial review was pending in Lake County Superior Court, breach of contract proceedings were conducted in Marion County.[112] Bucko sought to supplement the record in the judicial review proceeding with the Marion County judgment; however, the Lake County court refused to consider

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102. *Id.* (citing Town of Beverly Shores v. Bagnall, 590 N.E.2d 1059, 1061 (Ind. 1992)).

103. *Id.* at 604 (Sullivan, J., concurring).

104. *Id.* at 599.

105. *Id.* at 599, 600, 603.

106. Evansville Outdoor Adver., Inc. v. Princeton (City) Planning Comm'n, 849 N.E.2d 630, 635 (Ind. Ct. App. 2006), *trans. denied*, 2006 Ind. LEXIS 961 (Ind. 2006); *see also supra* notes 30-32 and accompanying text.

107. *Evansville Outdoor Adver.*, 849 N.E.2d at 635.

108. *Id.* "Courts that review administrative determinations, at both the trial and appellate level, are prohibited from reweighing the evidence or judging the credibility of witnesses and must accept the facts as found by the administrative body." Evansville Outdoor Adver., Inc. v. Bd. of Zoning Appeals of Evansville & Vanderburgh County, 757 N.E.2d 151, 158 (Ind. Ct. App. 2001).

109. 850 N.E.2d 1008, 1010 (Ind. Ct. App. 2006).

110. *Id.*

111. *Id.*

112. *Id.*

the Marion County judgment.[113] On appeal Bucko claimed the "Marion County judgment was controlling and should have been considered in the judicial review action."[114]

In review under AOPA, "[j]udicial review of disputed issues of fact must be confined to the agency record for the agency action supplemented by additional evidence taken under section 12 of this chapter. The court may not try the cause de novo or substitute its judgment for that of the agency."[115] The court also noted that "review of an agency's decision must be confined to the record that was before the agency, except in limited circumstances."[116]

The court of appeals concluded that it would not have been proper for the reviewing court to look outside the administrative record and include the Marion County judgment.[117] The court characterized Bucko's request as asking the judicial review court to substitute the Marion County court's judgment for the judgment of the administrative agency.[118]

Even though the court of appeals was faced with apparently conflicting decisions from the Marion County litigation and administrative action, the court reiterated the limited scope of judicial review of administrative actions.[119] The court went even further, however, and observed that even if the Marion County litigation had been considered, the judgment did not make a legal determination as to fault or responsibility for the problems incurred with the Bucko contract.[120]

The *Werner I* opinion also addressed an issue limiting the judicial review to items in the record. The court also found that the Health Facility Board's decision, which offered no explanation as to differences between its sanction and the ALJ's recommendation, was not consistent with Indiana Code section 4-21.5-3-28(g), which requires the Board's final order to "identify any differences between the final order and the nonfinal order issued by the administrative law judge."[121] The Health Facility Board argued comments one member of the Health Facility Board made during the hearing satisfied section 28(g); however, the court rejected this argument, stating AOPA requires written findings and Board member's comments at oral argument are outside the record on which the Board must base its decision.[122]

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113. *Id*.

114. *Id*.

115. *Id.* (citing IND. CODE § 4-21.5-5-11 (2005)).

116. *Id.* at 1016 (citing Ind. Educ. Employment Relations Bd. v. Tucker, 676 N.E.2d 773 (Ind. Ct. App. 1997)).

117. *Id.*

118. *Id.*

119. *Id.* at 1017-18.

120. *Id.* at 1018.

121. Ind. State Bd. of Health Facility Adm'rs v. Werner (*Werner I*), 841 N.E.2d 1196, 1208 (Ind. Ct. App.), *reh'g*, 846 N.E.2d 669 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 591 (Ind. 2006) (quoting IND. CODE § 4-21.5-3-28(g) (2005)).

122. *Id.*

B. Scope of Judicial Authority

If a reviewing court finds administrative agency action has been erroneous, what can a reviewing court can do? The court of appeals found that the lower court had exceeded the scope of its judicial review authority in *Werner I* by ordering the Board to affirm the ALJ's order and impose a censure.[123] The court started with Indiana Code section 4-21.5-5-15 which provides:

> If the court finds that a person has been prejudiced under section 14 of this chapter, the court may set aside an agency action and:
> (1) remand the case to the agency for further proceedings; or
> (2) compel agency action that has been unreasonably delayed or unlawfully withheld.[124]

The court of appeals stated even though the language of the statute appears "unequivocal," a string of cases interpreting the section showed that the court has frequently limited a trial court's ability to compel agency action directly.[125]

Likewise, in this case, the court of appeals found that remand, rather than compelling agency action, was the correct remedy.[126] The court considered whether it would be pointless to remand, and concluded it would not.[127] In Werner's case, the court indicated a variety of sanctions were available to the Health Facility Board and the record did not clearly require the imposition of a specific sanction against Werner.[128] For instance, the Health Facility Board could enter findings that would support its decision to impose a more severe sanction than what the ALJ recommended.[129]

A novel separation of powers argument was presented to the court with regard to its abilities to intervene in agency action in *Planned Parenthood of Indiana v. Carter*.[130] The case arose when the reproductive health services clinic sought injunctive relief in court, rather than judicial review, but is included in this section to the extent it addresses the ability of the courts to intervene with regard to agency actions.

When the Indiana Medicaid Fraud Control Unit demanded unlimited access to minor patients' medical records, Planned Parenthood sought an injunction against the agency.[131] One of the trial court's bases for denying the preliminary injunction was separation of powers, stating an injunction "would so excessively

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123. *Id.* at 1210.

124. *Id.* at 1209.

125. *Id.*

126. *Id.* at 1210.

127. *Id.* at 1209.

128. *Id.* at 1210.

129. *Id.*

130. 854 N.E.2d 853 (Ind. App. 2006). The case appeared headed to the Indiana Supreme Court, but the parties reached a settlement. *See* Diane Penner, *State Ends Battle for Girls' Health Records*, INDIANAPOLIS STAR, Dec. 1, 2006, at 1.

131. *Carter*, 854 N.E.2d at 856.

involve the Court in the judgments of executive investigatory authority as to threaten a separation of powers violation."[132] The court of appeals found the trial court's conclusion to be erroneous.[133] Noting "[i]t is elementary that the authority of the State to engage in administrative action is limited to that which is granted it by statute,"[134] the court agreed with Planned Parenthood that the trial court had authority to enjoin acts of the administrative agency that went beyond the agency's statutory boundaries.[135] "To maintain the proper balance between the departments of government, the courts have power to confine administrative agencies to their lawful jurisdictions."[136]

C. Subject Matter Jurisdiction—Exhaustion of Remedies

Exhaustion of remedies is a powerful doctrine and frequently appears in administrative law cases. In Indiana, failure to exhaust administrative remedies deprives the court of subject matter jurisdiction, rendering the trial court's judgment void.[137] Furthermore, lack of subject matter jurisdiction may be raised at any time, and courts are required to consider the issue *sua sponte* if it is not properly raised by the party challenging jurisdiction.[138] "The reasons for requiring the exhaustion of administrative remedies are well established: (1) premature litigation may be avoided; (2) an adequate record for judicial review may be compiled; and (3) agencies retain the opportunity and autonomy to correct their own errors."[139]

The doctrine of administrative remedies was used to dismiss *Hecht v. State*.[140] In *Hecht*, the court of appeals found that a taxpayer, who was bringing a class action lawsuit for damages against the Bureau of Motor Vehicles ("BMV") for the wrongful collection of excess license excise tax and for wrongful denial of refunds of excess tax, had failed to exhaust his administrative

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132. *Id.* at 862.

133. *Id.* at 865.

134. *Id.* at 864 (citing Ind. State Bd. of Public Welfare v. Tioga Pines Living Ctr., Inc., 622 N.E.2d 935, 939 (Ind. 1993)).

135. *Id.*

136. *Id.* (citing Wilmont v. City of South Bend, 48 N.E.2d 649, 650 (Ind. 1943)). The court of appeals found that the minor patients had a right of privacy in their medical records. It appears a significant element of the court's decision was that Indiana Medicaid Fraud Control Unit had less intrusive means of obtaining information regarding whether Planned Parenthood's minor patients were the victims of child abuse and neglect that the organization had failed to report. *Id.* at 883.

137. City of E. Chicago v. Copeland, 839 N.E.2d 737, 742 (Ind. Ct. App. 2005) (citing City of Marion v. Howard, 832 N.E.2d 528, 531 (Ind. Ct. App. 2005)).

138. *Id.* (citing Stewart v. Kingsley Terrace Church of Christ, Inc., 767 N.E.2d 542, 544 (Ind. Ct. App. 2002)).

139. *Id.* (citing Sun Life Assurance Co. of Can. v. Ind. Comprehensive Health Ins. Ass'n, 827 N.E.2d 1206, 1209 (Ind. Ct. App. 2005)).

140. 853 N.E.2d 1007 (Ind. Ct. App. 2006).

remedies.[141]

Indiana law provides that vehicles must be registered with the BMV annually, and the owner of a vehicle must pay an annual license excise tax on or before the regular annual registration date in each year.[142] In 2000, the BMV began splitting registration dates to expire either in the middle or the end of the month based on the last name of the vehicle's owner.[143] Hecht was a taxpayer who was required to renew his registration by the fifteenth of the month, rather than the end of the month.[144] Hecht alleged that the BMV's practice separated taxpayers into two different classes, which violated the equal privileges, special laws, and equal taxation clauses of the Indiana constitution and the equal protection clause of the U.S. constitution.[145]

The court of appeals' conclusion that Hecht had failed to exhaust his administrative remedies turned on its construction of Indiana Code sections 6-8.1-9-1 and 6-6-5-7.7. The court observed that Hecht had followed the procedure to obtain a refund of excise tax under Indiana Code section 6-6-5-7.7; however, it determined in this case, the proper procedure for seeking a refund was governed by Indiana Code section 6-8.1-9-1.[146] Because Hecht had failed to follow the correct procedure, the trial court was deprived of subject matter jurisdiction over his complaint.[147]

Exhaustion of remedies claims failed in *Rhines v. Norlarco Credit Union*[148] and *Indianapolis-Marion County Public Library v. Shook, LLC*.[149] In *Rhines*, the court of appeals summarily rejected a debtor's claim that his creditor failed to exhaust administrative remedies under the Fair Debt Collections Practices Act ("FDCPA").[150] The court indicated that the FDCPA is for the protection of consumers and does not provide an administrative remedy to debt collectors.[151]

In *Shook*, the court of appeals ruled that a contractual provision between the library and its general contractor did not create an obligation to exhaust administrative remedies.[152] The contract required the contractor to submit claims to the library's construction manager, who then had thirty days to approve or deny the claim or request additional information.[153] The provision also indicated that complying with the provision was a condition precedent to initiating any

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141. *Id.*
142. *Id.* at 1009 (citing IND. CODE § 6-6-5-6 (2006)).
143. *Id.*
144. *Id.*
145. *Id.* at 1009-10.
146. *Id.* at 1012-13.
147. *Id.* at 1013 (citing City of Marion v. Howard, 832 N.E.2d 528, 531 (Ind. Ct. App. 2005)).
148. 847 N.E.2d 233 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 595 (Ind. 2006).
149. 835 N.E.2d 535 (Ind. Ct. App. 2005).
150. *Rhines*, 847 N.E.2d at 236-37.
151. *Id.* at 237.
152. *Shook*, 835 N.E.2d at 539-40.
153. *Id.* at 536.

court or arbitration proceeding.[154]

These provisions did not create an obligation to exhaust administrative remedies, however.[155] The court reasoned that the library did not act in the capacity of an administrative agency responding to questions within the scope of its statutory competence when it received and acted on the general contractor's claims.[156] The court also noted that the claims submission process established by the contract was not statutorily based.[157] The court noticed that the only "non-statutory or non-administrative agency context in which the exhaustion doctrine has been found to apply involved the rules of a private association that had established a remedial procedure."[158]

1. Exceptions to the Exhaustion of Remedies Requirement.—A challenger who has failed to exhaust administrative remedies may be spared if he falls into an exception to the requirement. *City of East Chicago v. Copeland* illustrates the futility exception.[159] In *East Chicago*, nine city firefighters sued the city for denying them the vacation time required by city ordinance.[160] The trial court granted summary judgment in favor of the firefighters and accessed damages and attorney fees.[161] On appeal, the city alleged that the trial court lacked subject matter jurisdiction because the firefighters had not exhausted their administrative remedies.[162]

The court of appeals first observed that it was not clear that the relatively short periods the firefighters had for administrative review were applicable to a situation where vacation time had been denied to an employee over a period of several years.[163] But the court went on to conclude that one of the firefighters had exhausted his administrative remedies and that it would have been futile for the others to have sought to exhaust their administrative remedies.[164] Furthermore, because one of the firefighters had exhausted administrative remedies, the court concluded that administrative resolution prior to resorting to the courts had been sought and a record had been created, both reasons for requiring exhaustion of remedies.[165]

The court also recognized an exception to the exhaustion requirement where "administrative remedies had been exhausted on the same or closely related

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154. *Id.*

155. *Id.* at 539-40.

156. *Id.* at 539.

157. *Id.*

158. *Id.* at 538 (citing M-Plan, Inc. v. Ind. Comprehensive Health Ins. Ass'n, 809 N.E.2d 834, 840 (Ind. 2004)).

159. 839 N.E.2d 737 (Ind. Ct. App. 2005).

160. *Id*. at 739.

161. *Id.* at 741-42.

162. *Id.* at 742.

163. *Id.* at 743.

164. *Id.* at 743-44.

165. *Id.* at 744.

issues."[166] The court concluded that the firefighters had either met or been exempted from the requirement to exhaust administrative remedies.[167]

In *Title Services, LLC v. Womacks*, a title insurance agency sued the Marion County Auditor for damages due to negligent performance of ministerial duties, when the office failed to process or lost properly filed homestead exemptions and mortgage deductions.[168] As a result the title insurance agency's clients overpaid taxes because they did not receive homestead exemptions or mortgage deductions they were entitled to.[169]

The court of appeals found that the title insurance agency had failed to exhaust its administrative remedies. The title insurance agency argued that its complaint was a tort action, which would be exempt from the exhaustion of remedies requirement.[170] However, the court of appeals relied on past precedent which held all taxpayer challenges to property tax assessments, regardless of the reason for the challenge, are to be decided by the tax court after the taxpayer has appealed to the local board and the tax board.[171]

The court found that the taxpayer should have followed the procedure set forth in Indiana Code section 6-1.1-15 for review and appeal of property tax assessment and correction of errors, and that the section required exhaustion of remedies.[172] The title insurance agency had not followed the procedures available to it under Indiana Code section 6-1.1-15 and therefore, the court found that the agency's complaint should be dismissed for failure to exhaust administrative remedies.[173]

The title insurance agency claimed that it fell into an exception to the exhaustion rule that it had no adequate administrative remedies to exhaust.[174] Because there was no "public record" that the title insurance agency had attempted to file the exemptions, the title insurance agency argued that the local tax board might conclude that it lacked power to review the Auditor's negligent loss of applications.[175]

The court of appeals rejected this argument. The court cited Indiana Code section 6-1.1-15-16 which charges the tax board to "consider all evidence relevant to the assessment of the real property regardless of whether the evidence was submitted to the township assessor before the assessment of the property."[176]

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166. *Id.* (quoting Smith v. State Lottery Comm'n, 701 N.E.2d 926, 933 n.7 (Ind. Ct. App. 1998), *remanded after appeal*, 812 N.E.2d 1066 (Ind. Ct. App. 2004)).

167. *Id.*

168. 848 N.E.2d 1151, 1153 (Ind. Ct. App. 2006).

169. *Id.*

170. *Id.* at 1154 n.4.

171. *Id.* (citing Common Council of City of Hammond v. Matonovich, 691 N.E.2d 1326, 1330 (Ind. Ct. App.), *trans. denied*, 706 N.E.2d 166 (Ind. 1998)) (emphasis supplied).

172. *Id.* at 1156-57.

173. *Id.* at 1155-57.

174. *Id.* at 1156-57.

175. *Id*.

176. *Id.* at 1157 (quoting IND. CODE § 6-1.1-15-16 (2006), *amended by* 2007 Ind. Legis. Serv.

The court further stated that evidence the title insurance agency would have that it timely submitted applications to the Auditor appeared relevant to the question of whether the challenged assessments were correct.[177]

2. Primary Jurisdiction.—The interrelationship between primary jurisdiction and exhaustion of remedies was illustrated by *M.C. Welding and Machining Co. v. Kotwa*.[178] In *Kotwa*, an employee brought discrimination and retaliation claims against his former employer.[179] After trial to a jury, where a general verdict was entered in favor of the employee, the employer challenged the trial court's jurisdiction on the grounds that the employee had failed to exhaust administrative remedies with the Indiana Civil Rights Commission.[180]

The court of appeals applied the doctrine of primary jurisdiction to determine whether the employee was required to exhaust his administrative remedies. The doctrine of primary jurisdiction provides that "[i]f at least one of the issues involved in the case is within the jurisdiction of the trial court, the entire case falls within its jurisdiction, even if one or more of the issues are clearly matters for exclusive administrative or regulatory agency determination."[181] The court further cited *Austin Lakes* for the principle that the trial court "must invoke the doctrine of primary jurisdiction where one (but less than all) of the issues in the case requires exhaustion of remedies before judicial review can occur." [182]

The court determined that the Indiana Civil Rights Commission has jurisdiction over some retaliation claims, but not retaliation claims for exercising the right to apply for unemployment benefits.[183]

D. Other Jurisdiction Issues

Several cases arose during the survey period regarding whether the judicial review court has jurisdiction to hear an appeal if the record is not properly filed. The Indiana Supreme Court's decision in *Wayne County Property Tax Assessment Board of Appeals v. United Ancient Order of Druids-Grove*,[184] may have helped to settle the issue; however, it is also possible to limit that case to its facts, and as discussed in this section, it is not necessarily dispositive with regard to all other situations.

In *Werner I*[185] and *Werner II*,[186] the Board of Health Facility Administrators

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Pub. L. 219-2007 (West 2007)).

177. *Id.*

178. 845 N.E.2d 188 (Ind. Ct. App. 2006).

179. *Id.* at 191-92.

180. *Id.*

181. *Id.* at 193 (quoting Austin Lakes Joint Venture v. Avon Util., Inc., 648 N.E.2d 641, 646 (Ind. 1995)).

182. *Id.* (quoting *Austin Lakes*, 648 N.E.2d at 647).

183. *Id.*

184. 847 N.E.2d 924 (Ind. 2006).

185. Ind. State Bd. of Health Facility Admr's v. Werner (*Werner I*), 841 N.E.2d 1196, 1208 (Ind. Ct. App.), *reh'g*, 846 N.E.2d 669 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 591 (Ind. 2006).

argued that the trial court did not have subject matter jurisdiction over the case because Werner failed to timely file the record of the agency proceedings.[187] In *Werner I*, the court of appeals held that the Health Facility Board had waived this issue by not timely raising it with the trial court.[188] On rehearing the court affirmed its earlier opinion.[189]

In *Werner I* the court of appeals started its analysis by referring to a number of cases cited in favor of the contention that the trial court did not have jurisdiction.[190] However, the court distinguished the cases because they did not involve instances where the party challenging the judicial review had failed to raise the issue of jurisdiction with the judicial review court itself.[191] Because the Health Facility Board had not raised the issue below, Werner argued it had waived the issue.[192]

The court debated whether failing to comply with the time provisions of Indiana Code section 4-21.5-5-13 deprived the trial court of subject matter jurisdiction, which can be raised at any time, or was a challenge to the existence of jurisdiction, sometimes called jurisdiction of the parties or the particular cause, which could be waived if not raised at the time.[193] Ultimately, the court concluded that failure to timely file the record affected the trial court's jurisdiction over the case, and the board had waived its right to raise the argument.[194]

On rehearing, the Health Facility Board argued that there was no principled reason to distinguish the timely filing of an agency record from the exhaustion of administrative remedies.[195] The court of appeals rejected this argument. The court noted that the exhaustion of remedies requirement serves the purposes of avoiding premature litigation, ensuring an adequate record for judicial review is compiled and giving agencies the opportunity to correct their own errors.[196] The

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Werner I is also discussed *supra* notes 30-32 and accompanying text.

186. Ind. State Bd. of Health Facility Adm'rs v. Werner (*Werner II*), 846 N.E.2d 669 (Ind. Ct. App.), *trans. denied* 860 N.E.2d 591 (Ind. 2006).

187. *Werner I*, 841 N.E.2d at 1204.

188. *Id*. at 1206.

189. *Werner II*, 846 N.E.2d at 670.

190. *Werner I*, 841 N.E.2d at 1204 (citing Clendening v. Ind. Family & Soc. Servs. Admin., 715 N.E.2d 903, 904 (Ind. Ct. App. 1999); Park v. Med. Licensing Bd., 656 N.E.2d 1176, 1178 (Ind. Ct. App. 1995); Indianapolis Yellow Cab, Inc. v. Ind. Civil Rights Comm'n, 570 N.E.2d 940, 942 (Ind. Ct. App. 1991); Seattle Painting Co. v. Comm'r of Labor, 661 N.E.2d 596, 597 (Ind. Ct. App. 1996)).

191. *Id.*

192. *Id*.

193. *Id*. at 1205. The Indiana Supreme Court decision in *Kozlowksi v. Dordieski*, 849 N.E.2d 535, 537 n.1 (Ind. 2006) cites *Werner I* with some criticism over its jurisdiction terminology.

194. *Werner I*, 841 N.E.2d at 1206.

195. *Werner II*, 846 N.E.2d at 672.

196. *Id.* at 673 (citing Ind. Dep't of Envtl. Mgmt. v. Twin Eagle, LLC, 798 N.E.2d 839, 844 (Ind. 2003)).

court found that the requirement to timely file an administrative record was different and did not advance the same goals.[197]

The Indiana Supreme Court weighed in on a related issue in *Wayne County Property Tax Assessment Board of Appeals v. United Ancient Order of Druids-Grove*,[198] a case which arose after *Werner I and II*. *Wayne County* addressed an apparent conflict between AOPA (Indiana Code section 4-21.5-5-13) and Tax Court Rule 3, which specifies the timeframe appellants have to file the record for an appeal to the tax court.[199]

Indiana Code section 4-21.5-5-13 provides that "within thirty (30) days after filing the petition [for judicial review], or within further time allowed by the court or by other law, the petitioner shall transmit to the court the original or a certified copy of the agency record for judicial review of the agency action."[200] However, Tax Court Rule 3(E) provides "[t]he petitioner shall transmit a certified copy of the record to the Tax Court within thirty days after having received notification that the record has been prepared by the Indiana Board of Tax Review ["IBTR"]."[201] In *Wayne County*, the taxpayer had not filed the record within the thirty days after filing the petition as required by Indiana Code section 4-21.5-5-13, but had filed the record within thirty days after having received notification that the record had been prepared under Tax Court Rule 3(E).[202]

The Indiana Supreme Court found that Indiana Code section 4-21.5-5-13 and Tax Court Rule 3(E) did not conflict with each other. The court interpreted the AOPA provision for "further time allowed by the court" to include court rules, and held that a filing in compliance with Rule 3(E) is timely and confers Tax Court jurisdiction over the appeal.[203] The court rejected an argument that the court rules were "other law" under Indiana Code section 4-21.5-5-13.[204]

The court noted that the common purpose of both the AOPA provision and Tax Court Rule 3(E) is to ensure efficient, speedy appeals and to ensure that the Tax Court has access to the record before rendering its decision.[205] The court also noted that it may frequently be impossible for the IBTR to prepare a certified record within thirty days of the filing of a petition, because tax assessments are made at the same general times and can trigger a large volume of concurrent appeals.[206] The court recognized that by the Tax Court creating a rule to deal with this situation, requiring the record to be filed within thirty days after completion avoided unnecessary work for the Tax Court and unneeded expenses

197. *Id.*
198. 847 N.E.2d 924 (Ind. 2006).
199. *Id*. at 925.
200. *Id*. at 926-27 (quoting IND. CODE § 4-21.5-5-13 (2005)).
201. *Id*. at 926 (quoting IND. TAX R. 3(E)).
202. *Id.*
203. *Id.* at 928-29.
204. *Id.* at 928.
205. *Id.*
206. *Id.*

for the parties in requesting extensions of time.[207]

The court stated that "[t]he timing of filing the agency record implicates neither the subject matter jurisdiction of the Tax Court nor personal jurisdiction over the parties. Rather, it is jurisdictional only in the sense that it is a statutory prerequisite to the docketing of an appeal in the Tax Court."[208]

After *Wayne County* was decided, a related issue arose in *Izaak Walton League of America, Inc. v. DeKalb County Surveyor's Office*.[209] In *Izaak*, conservation groups challenged a permit issued by the Department of Natural Resources ("DNR") to remove two logjams from a creek.[210] The conservation groups sought administrative review from the Natural Resources Commission and then judicial review from the trial court.[211] The trial court, on its own motion, determined that it did not have jurisdiction because the conservation groups had failed to file a complete agency record.[212] In a two to one decision by the court of appeals, the court held that the conservation groups had filed a sufficient record to confer jurisdiction on the trial court, even though there were two items that arguably should have been included in record but were not included with the initial filing.[213]

The court of appeals first dealt with an argument, as in the *Werner* opinions, that failure to file the record divested the trial court of subject matter jurisdiction.[214] The court of appeals affirmed its holding in the *Werner* opinions and, for this case, also relied in part on the supreme court's decision in *Wayne County* to conclude that filing the agency record affected the trial court's jurisdiction over a particular case, not subject matter jurisdiction.[215]

When the conservation groups requested preparation of the agency record, they requested that the record include specific things, including a transcript of a hearing and all exhibits entered into evidence during that hearing, but not the entire agency record.[216] In construing Indiana Code sections 4-21.5-5-13 and 4-21.5-3-33(b), which the court deemed to be the relevant statutes in determining what constituted the agency record, the court stated "the record must include all that is necessary in order for the reviewing court to accurately assess the challenged agency action."[217] The court also stated that a party may not attempt to limit the record presented to the reviewing court by presenting only the materials and evidence which supports its position, nor may the party seek to

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207. *Id*.
208. *Id.* at 926.
209. 850 N.E.2d 957 (Ind. Ct. App. 2006).
210. *Id.* at 960-61.
211. *Id.*
212. *Id.* at 961.
213. *Id.* at 966-67.
214. *Id.* at 961-62.
215. *Id.*
216. *Id.* at 961.
217. *Id.* at 965.

introduce evidence which was not party of the agency proceeding below.[218]

The court stated, however, that the purpose of the statutes was not to require the inclusion of irrelevant and/or superfluous documents or to operate as a "trap" for litigants who failed to include materials as part of an agency record.[219] The court noted that the parties arguing to uphold the trial court's dismissal, the DNR and the DeKalb County Surveyor's Office, had not presented an argument showing that any of documents omitted from the record had any relevance to the issues to be decided on judicial review.[220] As such, the court characterized those parties' positions as a "strict . . . hyper-technical, construction of the statutes governing agency records."[221] The court noted that Indiana Code section 4-21.5-5-13(g) can also be fairly construed as allowing minor additions or corrections to the record after the time for filing as expired.[222]

In reaching its decision, the court had to deal with two prior decisions, *Medical Licensing Board v. Provisor*,[223] and *Indiana State Board of Education v. Brownsburg Community School Corp.*[224] The court found its decision to be consistent with *Provisor* and distinguishable from *Brownsburg*. At the end of its opinion, the court stated that even though the language in *Brownsburg* might be read as establishing a "strict rule that all documents created during the course of an administrative 'proceeding' must be made part of the agency record for purposes of judicial review" the court would not apply a strict rule in this case.[225]

Judge Mathias dissented from the opinion and stated that the legislature had already determined the "essential" parts of an agency record to be filed for judicial review in Indiana Code section 4-21.5-3-33.[226] He also stated "where a narrow statutory remedy is given, the time and manner of asserting such right must be strictly followed[.]"[227] He noted that the court had previously held that timely filing of an agency record is a prerequisite to the trial court obtaining jurisdiction and that he believed filing of a complete agency record must also be filed for the court to acquire jurisdiction.[228]

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218. *Id.*

219. *Id.*

220. *Id.* at 966.

221. *Id.*

222. *Id.* at 966-67 (citing Seattle Painting Co., Inc. v. Comm'r of Labor, 661 N.E.2d 596, 598 (Ind. Ct. App. 1996)).

223. 678 N.E.2d 814 (Ind. Ct. App. 1997).

224. 813 N.E.2d 330 (Ind. Ct. App. 2004).

225. *Izaak Walton League of Am.*, 850 N.E.2d at 968.

226. *Id.* at 968 (Mathias, J., dissenting).

227. *Id.* at 969 (quoting Shipshewana Convenience Corp. v. Bd. of Zoning Appeals, 656 N.E.2d 812, 814 (Ind. 1995)).

228. *Id.*

II. AGENCY ACTION

A. Scope of Agency Action

Whether administrative agencies act through adjudication or rulemaking, a common issue in administrative law is whether the agency has acted within the scope of its authority. In the Indiana Supreme Court's decision *Indiana Department of Environmental Management v. West*,[229] the court addressed whether the State Employee Appeals Commission ("SEAC") had acted within its scope of authority. Three state employees who, as a result of a consolidation within IDEM, received new job assignments that did not decrease their pay but did reduce their managerial responsibilities, alleged they had been victims of age discrimination.[230] The employees followed their administrative remedies by first filing complaints with the State Personnel Department and appealing those determinations to SEAC.[231] SEAC conducted an evidentiary hearing through a hearing officer and found that the employees had proven by a preponderance of the evidence that age bias had been a significant factor in their job changes.[232] SEAC's final order was that the employees be placed back in the supervisory positions they held before the department consolidation.[233] The effect of SEAC's order required IDEM to create new positions for the employees that did not previously exist.[234]

On judicial review, the trial court affirmed SEAC's order and the court of appeals affirmed the lower court's order.[235] The Indiana Supreme Court reversed, however, and unanimously found SEAC did not have authority to order the creation of new jobs.[236] IDEM argued that the State Personnel Act, Indiana Code sections 4-15-1-1 to -2-31, only allows SEAC to order reinstatement in this instance.[237] The Indiana Supreme Court agreed.

Interpreting Indiana Code section 4-15-1.5-6,[238] the court held that the proper

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229. 838 N.E.2d 408 (Ind. 2005).

230. *Id*. at 410-12.

231. *Id.* at 411.

232. *Id.* at 412.

233. *Id.*

234. *Id.*

235. *Id.* (referring to the court of appeals decision Ind. Dep. of Envtl. Mgmt. v. West, 812 N.E.2d 1099 (Ind. Ct. App. 2004)).

236. *Id.* at 417-18. In a 3-2 decision, the court also found that the employees had not proven their age discrimination claims. *Id*. at 417.

237. *Id.*

238. Indiana Code section 4-15-1.5-6 provides:

> The appeals commission is hereby authorized and required to do the following:
>
> (1) To hear or investigate those appeals from state employees is as set forth in IC 4-15-2, and fairly and impartially render decisions as to the validity of the appeals or the lack thereof. Hearings shall be conducted in accordance with IC 4-21.5.
>
> (2) To make, alter, or repeal rules by a majority vote of its members for the purpose of

emphasis should be placed on section (1), which in referring to Indiana Code section 4-15-2 limits SEAC's remedial authority and provides only for reinstatement where action is taken on the basis of politics, religion, sex, age, race, or membership in an employee organization.[239] Although section (3) of Indiana Code section 4-15-1.5-6 provides that SEAC may recommend policy to the personnel department, the court interpreted the statute to mean that SEAC's authority under section (3) was independent from its authority under section (1).[240]

An agency's implicit authority was discussed in *Clay Township of Hamilton County v. Clay Township Regional Waste District*.[241] In *Clay Township*, a Regional Waste District ("RWD") Board sought to change the municipalities that appointed the Board's members.[242] Clay Township ("Township"), who under the RWD Board's action, would have less appointees to the RWD Board under the reallocation, sought injunctive relief on the grounds that the RWD Board's action was an unlawful modification of the RWD's previously approved organizational plan.[243] The trial court denied the Township's request for a preliminary injunction.[244] The basis for the trial court's decision was that Indiana Code section 13-26-5-4 gave the board broad authority, including authority to "[p]rotect and preserve the works and improvements, and properties owned or controlled by the district."[245]

During the preliminary injunction hearing, a witness from IDEM testified that IDEM would not consider or act on a request by a RWD to reallocate the appointments because IDEM did not have legal authority to do so.[246] The supreme court sharply disagreed with this contention. The court stated that "it is a well-settled principle of law that an administrative agency, in addition to the express powers conferred by statute, also has such implicit power as is necessary to effectuate the regulatory scheme outlined by . . . statute."[247] The court also stated that "[l]aw is the province of the judiciary, and courts rather than administrative agencies are charged with the responsibility to resolve questions of statutory construction."[248] The court found that IDEM's interpretation would

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conducting the business of the commission, in accordance with the provisions of IC 4-22-2.

(3) To recommend to the personnel director such changes, additions, or deletions to personnel policy which the appeals commission feels would be beneficial and desirable.

239. *West*, 838 N.E.2d at 417.

240. *Id*. at 417-18.

241. 838 N.E.2d 1054 (Ind. Ct. App. 2005).

242. *Id.* at 1058.

243. *Id*. at 1058-59.

244. *Id.* at 1061-62.

245. *Id.* at 1065 (citing IND. CODE § 13-26-5-4(b)(1) (2004)).

246. *Id.* at 1060.

247. *Id.* at 1067 (citing Barco Beverage Corp. v. Ind. Alcoholic Beverage Comm'n, 595 N.E.2d 250, 254 (Ind. 1992)).

248. *Id.* (citing Mance v. Bd. of Dir. of Pub. Employees' Ret. Fund, 652 N.E.2d 532, 534 (Ind.

produce an absurd result, that a RWD board is only accountable to itself and that the legislature would not have intended such a result.[249]

Kankakee Valley Rural Electric Membership Corp. v. United Telephone Co. of Indiana[250] addresses the scope of the IURC's authority in the limited context of a pole attachment statute.[251] The court of appeals ruled that the IURC was within the scope of its authority to resolve a pole attachment dispute with two telephone companies.[252] The Rural Electric Membership Corporation ("REMC") argued that two statutes, Indiana Code sections 8-1-2-5 and 8-1-13-18.5, were in direct conflict with each other and that the IURC retained jurisdiction over only those issues specified by section 8-1-13-18.5.[253] The court of appeals found that the two statutes were not in conflict and read the opt-out statute, Indiana Code section 8-1-13-18.5, as preventing future "utility regulation" over the REMC.[254] The court found that the pole attachment statute was not "utility regulation" because it applied to any entity that owns poles, not just pubic utilities.[255]

Fox v. Green[256] deals with how an agency conducts its actions. Green had been appointed as a board member of a RWD.[257] Several months later he was told by a member of the town council that he had been replaced on the board.[258] Green filed suit against the town council alleging he had been improperly removed.[259] The trial court agreed that Green had been improperly removed and the court of appeals affirmed that decision.[260]

The court noted the well-settled principle that "boards and commissions speak or act officially only through the minutes and records made at duly organized meetings."[261] Accordingly, "[e]vidence outside of the board's minutes and records that the board presumed to act in its official capacity is not competent evidence to substitute for the minutes and records of regular board action."[262] The court indicated that minutes of the Town Council should speak for themselves and they did not demonstrate a belief of the Council that it could

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Ct. App. 1995)).

249. *Id.*

250. 843 N.E.2d 987 (Ind. Ct. App. 2006).

251. *Id.*

252. *Id.* at 989-90.

253. *Id.* at 991-92.

254. *Id.* at 992.

255. *Id.*

256. 856 N.E.2d 86 (Ind. Ct. App. 2006).

257. *Id.* at 87.

258. *Id.* at 88.

259. *Id.*

260. *Id.* at 88-89.

261. *Id.* (citing Borsuk v. Town of St. John, 820 N.E.2d 118, 123 (Ind. 2005) (quoting Brademas v. St. Joseph County Comm'rs, 621 N.E.2d 1133, 1137 (Ind. Ct. App. 1993))).

262. *Id.* at 88-89 (citing Scott v. City of Seymour, 659 N.E.2d 585, 590 (Ind. Ct. App. 1995)).

remove Green at any time from the RWD Board.[263]

B. Open Door/Open Records

Dillman v. Trustees of Indiana University[264] addresses Indiana's Open Door Act.[265] Dillman brought a suit against the university trustees for failing to follow Indiana's Open Door Act when it fired Indiana University men's basketball coach, Bobby Knight.[266] The trial court determined the Open Door law had not been violated and the court of appeals affirmed that decision.[267]

In September 1987, before problems with Knight arose, and while the university had a different president, the Board of Trustees passed a resolution which retained their authority to set policy, but delegated the authority to manage and administer the university to the president.[268] On May 14, 2000, the Trustees held an executive session, where they discussed possible sanctions and termination of Knight's employment with then president, Myles Brand.[269] On September 9, 2000, Brand met first with four trustees and then with the remaining four trustees to discuss other instances of Knight's misconduct, including an alleged battery of an Indiana University freshman.[270] Brand's meeting with only four trustees at a time was deliberate, in order "to exclude any impropriety with respect to the Open Door Act."[271]

The court of appeals stated "[t]he purpose of the Open Door law is to assure that the business of the State of Indiana and its political subdivisions be conducted openly so that the general public may be fully informed."[272] The court also noted that Indiana Code section 5-14-1.5-1 requires the Open Door Act to be liberally construed in order to give effect to the legislature's intention.[273] Finally, the court stated "[T]he Open Door Law requires that, except for those situations where an executive session is authorized, 'all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them.'"[274]

Indiana Code section 5-14-1.5-2(c) states a meeting is "a gathering of a majority of the governing body of a public agency for the purpose of taking

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263. *Id*.

264. 848 N.E.2d 348 (Ind. Ct. App. 2006).

265. IND. CODE §§ 5-14-1.5-1 to -8 (2005).

266. *Dillman*, 848 N.E.2d at 349.

267. *Id.*

268. *Id.* at 350.

269. *Id.*

270. *Id.*

271. *Id*. (quoting Brand's deposition testimony).

272. *Id.* (citing Frye v. Vigo County, 769 N.E.2d 188, 192 (Ind. Ct. App. 2002); IND. CODE § 5-14-1.5-1 (2005)).

273. *Id.* at 351 (citing IND. CODE § 5-14-1.5-1 (2005)).

274. *Id.* (citing IND. CODE § 5-14-1.5-3(a) (2005)).

official action on public business."[275] Dillman, who was challenging the trustee's action, argued that a "meeting" could include consecutive gatherings of less than a majority.[276] The court of appeals rejected this construction.[277]

The court listed a variety of reasons in reaching its conclusion. First, the court relied on the specific language of Indiana Code section 5-14-1.5-2(c) which defines meeting as a "gathering of a majority."[278] The court also agreed with the Trustees that a public agency cannot take official action subject to the Open Door Act without a quorum present, and cited case law from several other jurisdictions agreeing with this principle.[279] Finally, the court considered that the General Assembly had repeatedly declined to adopt amendments to the Open Door Act which would have changed the definition of a meeting to include a series of gatherings.[280] The court concluded that "[t]his repeated refusal to amend the definition makes clear the legislature's intent to preserve the meaning of the term 'meeting' as it is written."[281]

Dillman also argued that the 1987 delegation by the Trustees to the president was a delegation to the current University president, Thomas Erlich, personally, and that Brand did not therefore have authority to act.[282] The court rejected this argument by interpreting Indiana Code section 20-12-1-4.[283]

Dillman's final argument was that the Trustees' delegation of administrative authority to the university president should be subject to the Open Door law because the result of the Trustee's action created "a committee of one."[284] Dillman relied on *Riggin v. Board of Trustees of Ball State University*.[285] In *Riggin*, the court of appeals held that the Open Door Act applied to a five-member ad-hoc committee which reviewed a decision to discharge a tenured professor; however, the court distinguished that decision from Dillman's case.[286] The court of appeals concluded "the Open Door [Act] does not apply to the decisions of a properly-authorized individual university officer."[287]

The Indiana State General Assembly made one change of substance to the Open Door Act during the survey period. Indiana Code section 5-14-1.5-6.1 added "[t]o discuss information and intelligence intended to prevent, mitigate, or

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275. *Id.*

276. *Id.*

277. *Id*.

278. *Id.*

279. *Id.* at 351-52.

280. *Id.* at 352.

281. *Id.* (citing Miller Brewing Co. v. Bartholemew County Beverage Co., 674 N.E.2d 193, 206 (Ind. Ct. App. 1996)).

282. *Id*. at 352-53.

283. *Id.*

284. *Id.* at 353.

285. *Id.* (citing Riggin v. Bd. of Tr. of Ball State Univ., 489 N.E.2d 616 (Ind. Ct. App. 1986)).

286. *Id.*

287. *Id.*

respond to the threat of terrorism" as an exemption from the Open Door Act.[288]

There were also a couple of statutory changes to the Open Records Act during the survey period. Indiana Code section 5-14-3-3(f) prevents lists of names and addresses the agencies may be required to provide from being used for "political purposes." The section was amended this year to define "political purposes" as

> influencing the election of a candidate for federal, state, legislative, local, or school board office or the outcome of a public question or attempting to solicit a contribution to influence the election of a candidate for federal, state, legislative, local, or school board office or the outcome of a public question.[289]

Indiana Code section 5-14-3-4 was amended to exempt "intelligence assessments" related to terrorist attacks from disclosure.[290]

C. Adjudications

1. Due Process.—Due process issues can arise with regard to agency adjudications. Several cases during the survey period had such due process issues. *Evansville Outdoor Advertising, Inc. v. Princeton (City) Plan Commission*[291] discusses due process in the context of validity of a zoning ordinance.[292] "It is well-settled that zoning ordinances must be precise, definite and certain in expression so as to enable both the landowner and municipality to act with assurance and authority regarding local land use decisions."[293] "This requirement is dictated by due process considerations in that the ordinance must provide fair warning as to what the governing body will consider in making a decision."[294]

The court of appeals found that the zoning ordinance at issue in EOA's case was sufficiently specific.[295] The ordinance listed several factors, including landscaping, ease of access, light, air, costs and adjacent uses.[296]

In *P/S, Inc. v. Indiana Department of State Revenue*,[297] a taxpayer challenged whether he had received sufficient notice of agency action.[298] The taxpayer was

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288. IND. CODE § 5-14-1.5-6.1 (2005).

289. *Id.* § 5-14-3-3(f).

290. *Id.* § 5-14-3-4(b)(19)(F).

291. 849 N.E.2d 630 (Ind. Ct. App. 2006).

292. *Id.* at 634.

293. *Id.* (citing T.W. Thom Const., Inc. v. City of Jeffersonville, 721 N.E.2d 319, 327 (Ind. Ct. App. 1999)).

294. *Id.*

295. *Id.* at 635.

296. *Id.*

297. 853 N.E.2d 1051 (Ind. Tax Ct. 2006).

298. *Id.* at 1052. *Ennis v. Department of Local Government Finance*, 835 N.E.2d 1119, 1120 (Ind. Tax Ct. 2005) was decided during the survey period and addresses the sufficiency of notice

subject to the Indiana Underground Storage Tank Fee.[299] The fees for years 1995 through 2001 were not paid on time and the Department of Revenue eventually issued tax warrants to collect the unpaid fees.[300] The taxpayer paid the warrants in full, but then requested a refund for the portion of the fees that included interest, collection fees, and clerk costs.[301] The Department denied the refund request and the tax court upheld that decision.[302]

The taxpayer alleged that he had not received the annual notices regarding the Underground Storage Tank Fee, although it was undisputed that the Department of Revenue had mailed the notices.[303] "When an administrative agency sends notice through the regular course of mail, a presumption arises that such notice is received."[304] The presumption is rebuttable, but here the taxpayer presented no evidence in support of its claim, other than its conclusory statement.[305] This was not sufficient to rebut the presumption.

2. Hearsay Evidence.—Admission of hearsay evidence is proper in an administrative proceeding, but admission is not without limitation.[306] In *McHugh*,[307] an employee who alleged she had been wrongfully fired by employer applied for unemployment benefits.[308] The Indiana Department of Workforce Development ("IDWD") determined the employee was not discharged for just cause and the employer appealed.[309] An ALJ with the IDWD reversed the prior determination and the employee appealed.[310]

The employee appears to have had a very weak case, as she lied to her employer about needing time off to attend to personal matters and then went to Carburetion Day.[311] She admitted as much during the evidentiary hearing, but then challenged the IDWD's decision as being based only on hearsay evidence.[312] Because of the employee's admission, however neither the IDWD nor the court

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from an administrative agency. *Ennis* was discussed in Jennifer W. Terry, *Survey of Administrative Law*, 39 IND. L. REV. 749, 771 (2006).

299. *P/S, Inc.*, 853 N.E.2d at 1052.

300. *Id.*

301. *Id.*

302. *Id.* at 1055.

303. *Id.* at 1054.

304. *Id.* (citing Abdirizak v. Review Bd. of Ind. Dep't of Workforce Dev. 826 N.E.2d 148, 150 (Ind. Ct. App. 2005)).

305. *Id.*

306. McHugh v. Review Bd. of Ind. Dep't of Workforce Dev., 842 N.E.2d 436 (Ind. Ct. App. 2006) (citing Hinkle v. Garrett-Keyser-Butler Sch. Dist., 567 N.E.2d 1173, 1178 (Ind. Ct. App. 1991)).

307. *Id.* at 441.

308. *Id.* at 439.

309. *Id.*

310. *Id.* at 440.

311. *Id.* at 441.

312. *Id.* at 441-42.

of appeals had to base its decision on hearsay evidence.[313]

3. Other Issues.—Legacy Healthcare, Inc. v. Barnes & Thornburg,[314] raises some unusual other issues. The law firm prevailed in malpractice action brought against it by a client it had represented in Medicaid administrative proceedings.[315] One of the client/healthcare provider's grounds for alleging malpractice was that the law firm had failed to appeal an order and that a stay could have been obtained from the administrative agency if an appeal had been filed.[316] Neither party directed the court of appeals to the standard governing the issuance of a stay, but in seeming to indicate administrative stays are proper to grant, the court referred to the standard in Indiana Code section 4-21.5-5-9 governing the issuance of a stay upon judicial review of a final agency action.[317] Using that standard, the court indicated the litigant would have to show a reasonable probability that the order or determination appealed from was invalid or illegal, a showing that the healthcare provider could not make in this case.[318]

One of the healthcare provider's other arguments revolved around failure to appeal a decision disqualifying a particular ALJ.[319] The court characterized the healthcare provider's argument as being entitled to have a particular judge hear its case.[320] The court held that no party is entitled to a particular judge in any proceeding.[321]

D. Rulemakings

There were no reported cases during the survey period regarding agency rulemakings. There were, however, a few fairly minor changes to the statutory framework regarding rulemakings.[322]

Agencies are no longer required to send copies of proposed rules to the Indiana Secretary of State, but they must still send copies to the publisher of the Indiana Register and Indiana Administrative Code.[323] Indiana Code section 4-22-2-23.1 exempted agencies from soliciting public comments for emergency rulemaking proceedings.[324] Additional requirements for electronic notices were

313. *Id.*

314. 837 N.E.2d 619 (Ind. Ct. App. 2005).

315. *Id.* at 621-22.

316. *Id.* at 637.

317. *Id.*

318. *Id.* at 637-38.

319. *Id.* at 625-26.

320. *Id.* at 626.

321. *Id.* (citing Cornett v. Johnson, 571 N.E.2d 572, 575 (Ind. Ct. App. 1991)).

322. Changes which were made to statutes for changes in terminology, changes in statutory references, or other minor issues are not reported in this survey Article.

323. *See* IND. CODE §§ 4-22-2-20, -21, -34, -35, -38, -39, -40, -41; 4-22-2.5-4; 4-22-9-1 (2005).

324. *Id.* § 4-22-2-23.1.

added to Indiana Code sections 4-22-2-19 and 25.[325] Indiana Code section 4-22-2-28.1 clarified and limited the rulemakings that a small business regulatory coordinator must be assigned.[326]

CONCLUSION

Indiana's statutory AOPA, ARPA and Open Door and Records framework has now been in effect for over twenty years. As shown by the cases in this survey period, administrative agencies continue to "fill in the details" in areas of the environment, government, health care, taxation, utility law, and even basketball coaches. Indiana's administrative laws specify the often limited, but important role that the courts play in reviewing administrative action.

325. *Id.* §§ 4-22-2-19, 25.

326. *Id.* § 4-22-2-28.1.