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## A LOOK BACK: DEVELOPING INDIANA LAW POST-BENCH REFLECTIONS OF AN INDIANA SUPREME COURT JUSTICE

### SELECTED DEVELOPMENTS IN INDIANA ADMINISTRATIVE LAW (1989-2012)

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For almost a quarter-century—from 1989 until mid-2012—I actively participated in the development of Indiana administrative law, first as the State Budget Director and then as a Justice on the Indiana Supreme Court.<sup>1</sup> In this Article, I will describe some selected developments in Indiana administrative law during this timeframe. I will not attempt to cover everything, but instead I will identify and detail the evolution of two key administrative law doctrines: exhaustion of administrative remedies and standing, interspersed with two ancillary topics that I find of particular interest: administrative law as common law and the importance of the record in judicial review.

I ask the reader to appreciate that this Article contains some highly personal reflections—most of the matters I will discuss are ones in which I participated as a judge and a few others as Budget Director. It is not an argument, but neither is it entirely objective.

#### I. EXHAUSTION OF ADMINISTRATIVE REMEDIES

The first topic is the exhaustion canon: the requirement of the Indiana Administrative Orders and Procedures Act (“AOPA”) that “[a] person may file a petition for judicial review . . . only after exhausting all administrative remedies available within the agency whose action is being challenged and within any

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This Article is adapted from remarks delivered to the Indiana Association of Administrative Law Judges in Indianapolis on October 18, 2012. I salute the Association’s members for their critical contribution to the rule of law.

1. Throughout this Article, the “Court” or “Supreme Court” refers to the Indiana Supreme Court unless the context otherwise requires.

other agency authorized to exercise administrative review.”<sup>2</sup> When I came to the Statehouse in 1989, there were two cases—one from the Indiana Court of Appeals and one from the Indiana Supreme Court—that stood in contradistinction to the exhaustion canon.

The first of these cases, *Ahles v. Orr*, came from the Indiana Court of Appeals.<sup>3</sup> The case grew out of the fiscal crisis of 1982. By executive order, Governor Robert Orr suspended all state employee salary increases, including certain “merit increases” that some state employees would otherwise have received.<sup>4</sup>

A group of these employees filed a lawsuit seeking “declaratory judgment[s] that the Governor’s suspension of their merit increases was contrary to law,” and that they were entitled to their merit increases.<sup>5</sup> The Governor sought to have the lawsuit dismissed on grounds that the employees had failed both to exhaust their administrative remedies under the State Personnel Act and to request judicial review per the Administrative Adjudication Act (the precursor of today’s AOPA).<sup>6</sup>

Writing for a panel that included Judge Robertson and Judge Neal, Judge Ratliff rejected the Governor’s contention on alternative grounds.<sup>7</sup> First, he reasoned that the challenge was to the action by the Governor himself, and that, by its terms, the Administrative Adjudication Act did not apply to the Governor.<sup>8</sup> Because the challenged action was not “within the purview of the State Personnel Act or the Administrative Adjudication Act[,] . . . the requirement of exhaustion of administrative remedies” did not apply.<sup>9</sup>

Second, and more pertinent to the topic of this discussion, Judge Ratliff wrote that even assuming that the action challenged was within the scope of administrative procedures, the employees would still be able to bring forth their action under one of the exceptions to the exhaustion requirement.<sup>10</sup> “Well recognized exceptions to the general rule requiring exhaustion of administrative remedies exist where the administrative remedy is inadequate or would be futile.”<sup>11</sup>

The other case involving an exception to the exhaustion rule is the Indiana Supreme Court case of *Wilson v. Board of the Indiana Employment Security Division*.<sup>12</sup> Mrs. Wilson was a former Steak ‘n Shake employee who sought

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2. IND. CODE § 4-21.5-5-4(a) (2013).

3. 456 N.E.2d 425 (Ind. Ct. App. 1983).

4. *Id.* at 426.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 426.

12. 385 N.E.2d 438 (Ind. 1979).

unemployment benefits through the Board of Indiana Employment.<sup>13</sup> The Board denied her request, finding that she “had refused an offer [for] suitable work without good cause.”<sup>14</sup> In addition to appealing the Board’s ruling, Mrs. Wilson filed a separate lawsuit challenging the constitutionality of the Board’s procedures on due process grounds.<sup>15</sup> The trial court dismissed the lawsuit without providing its reason.<sup>16</sup> When the case reached the Indiana Supreme Court, it was assigned to Justice Pivarnik who took a rather relaxed attitude towards the exhaustion canon. “It is true, as a general rule, that no one is entitled to judicial relief for an alleged or threatened injury until the prescribed administrative remedy has been exhausted,” Justice Pivarnik wrote for the Court.<sup>17</sup> “However, this rule should not be applied mechanically.”<sup>18</sup>

In this case the Court said, “[T]he question presented is of constitutional character. With all due respect, we think that the resolution of such a purely legal issue is beyond the expertise of the . . . administrative channels and is thus a subject more appropriate for judicial consideration.”<sup>19</sup>

The Court went on to discuss at some length whether the Board’s procedures comported with constitutional requirements of due process and concluded, over Justice DeBruler’s dissent, that they did.<sup>20</sup> But the key holding for purposes of this Article was the apparently unanimous agreement that where, in the course of an administrative proceeding, a question of constitutional character is presented, judicial review is permissible notwithstanding a failure to exhaust administrative remedies.

So as I began my professional life in the Statehouse almost a quarter-century ago, the exhaustion requirement had two quite substantial judge-made exceptions: first, for claims that would be futile and, second, those that involved the constitution.

*A. What Has Happened to the Futility and Constitutional Exceptions in the Subsequent Twenty-Four Years?*

The discussion starts with my very first administrative law opinion, *Austin Lakes Joint Venture v. Avon Utilities, Inc.*<sup>21</sup> The case itself is not about either the futility or constitutional claims exceptions; instead, it mostly discusses a relatively arcane doctrine called “primary jurisdiction.”<sup>22</sup> But the opinion did lay down a new and strong precedent: an unambiguous declaration that the doctrine

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13. *Id.* at 440.

14. *Id.* at 440, 443.

15. *Id.* at 440-41.

16. *Id.* at 441.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 443-46. *See id.* at 446 (DeBruler, J., dissenting).

21. 648 N.E.2d 641 (Ind. 1995).

22. *Id.* at 643.

of exhaustion of remedies is jurisdictional.<sup>23</sup> “[W]hether an agency or a private party makes the ‘exhaustion defense,’ the claim is in fact one that the court is without subject matter jurisdiction and therefore *without the power* to hear the case brought before it.”<sup>24</sup>

As the following sections of this Article will show, once *Austin Lakes* declared that exhaustion of remedies was jurisdictional, Indiana Supreme Court cases recognizing exceptions to the exhaustion canon all but disappeared.

1. *Futility*.—As to the futility exception, a good place to start is *Town Council of New Harmony v. Parker*.<sup>25</sup> Shirley Parker owned undeveloped land on the edge of New Harmony that she wanted to either sell or develop.<sup>26</sup> In the course of pursuing her plans, the town-zoning administrator informed Parker’s husband that he could not provide the improvement permit Parker sought, as he believed that Parker would be unable to comply with the applicable zoning ordinance.<sup>27</sup> Parker subsequently filed a lawsuit, contending *inter alia* that what she called the “administrator’s ‘moratorium’” was an unconstitutional taking.<sup>28</sup>

Parker argued that it would have been futile to apply for a permit or appeal to the Board of Zoning Appeals.<sup>29</sup> Specifically, she contended, “It [was] undisputed that the moratorium would have made application for an improvement permit a useless exercise since the application would be dead on arrival.”<sup>30</sup> In a unanimous opinion for the Indiana Supreme Court, Chief Justice Shepard wrote that Parker’s lawsuit was barred because she failed to exhaust all administrative remedies before filing an action with the trial court.<sup>31</sup> “The law contemplates,” the Court said, “that Parker should seek an improvement permit and, if the application was denied, appeal the denial to the Board of Zoning Appeals, or request a variance from the applicable zoning ordinance.”<sup>32</sup>

Furthermore, the Court recognized the existence of the futility exception, but it held that it is a high threshold to meet. “Courts have said that exhaustion of administrative remedies may be excused where the remedy would be futile. This case illustrates well, however, that the exhaustion requirement is much more than a procedural hoop and that it should not be dispensed with lightly on grounds of ‘futility.’”<sup>33</sup>

First, when the landowner has never actually sought a permit, neither the local administrator nor the town board nor the reviewing courts can say

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23. *Id.* at 645.

24. *Id.*

25. 726 N.E.2d 1217 (Ind.), *amended on reh'g in part* by 737 N.E.2d 719 (Ind. 2000).

26. *Id.* at 1220.

27. *Id.*

28. *Id.* at 1223.

29. *Id.* at 1224.

30. *Id.*

31. *Id.* at 1223, 1225.

32. *Id.* at 1223.

33. *Id.* at 1224 (citation omitted).

with certainty what would have been approved or disapproved. . . .  
.Second, it is not plain at all in this case that pursuing relief with the Board of Zoning Appeals would have necessarily been futile.<sup>34</sup>

An even stronger repudiation of the futility exception occurred in *M-Plan, Inc. v. Indiana Comprehensive Health Insurance Ass'n*.<sup>35</sup> The Indiana Comprehensive Health Insurance Association (“ICHIA”) is an entity established by the legislature to provide health insurance for otherwise uninsurable individuals at premiums about 50% higher than normal.<sup>36</sup> Because the population so insured is, by definition, extremely high-risk, “ICHIA incurs substantial losses [each] year.”<sup>37</sup> These losses are paid for by “assessments” on all health insurance companies and health maintenance organizations (“HMOs”) in Indiana.<sup>38</sup> In return, they are entitled to tax credits.<sup>39</sup> The HMOs argued that because they were unable to benefit from the tax credits as much as regular insurance companies, the ICHIA assessments “allocate[d] a disproportionate share of ICHIA’s losses to [them].”<sup>40</sup> The HMOs sought a declaratory judgment stating that ICHIA’s assessments were contrary to law, violated various provisions of the Indiana Constitution, and were an unconstitutional taking of their property.<sup>41</sup> In a unanimous opinion authored by Justice Boehm, the Indiana Supreme Court held that the lawsuit should have been dismissed for failure to exhaust administrative remedies.<sup>42</sup>

The HMOs had argued that they were not required to exhaust their administrative remedies because it would be a futile exercise.<sup>43</sup> Specifically, the president of one HMO cited conversations that he had with the ICHIA president and State Insurance Commissioner. He claimed that the Commissioner did not demand that the HMOs pursue administrative appeal and told him that legal action may be the only option for the HMOs.<sup>44</sup> The Court did not find this argument persuasive:

Even if accepted at face value, this conversation does not rise to the status of an act of the Department of Insurance. The HMOs were aware of the administrative remedy in the plan of operation and do not claim lack of notice of the procedure. To prevail upon a claim of futility, “one must show that the administrative agency was powerless to effect a remedy or that it would have been impossible or fruitless and of no value

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34. *Id.*

35. 809 N.E.2d 834 (Ind. 2004).

36. *Id.* at 835-36.

37. *Id.* at 836.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 836-37.

42. *Id.* at 839.

43. *Id.* at 837.

44. *Id.* at 839-40.

under the circumstances.”<sup>45</sup>

The *New Harmony* and *M-Plan* decisions were further reinforced in *Johnson v. Celebration Fireworks, Inc.*<sup>46</sup> Johnson was the State Fire Marshal.<sup>47</sup> Under a statute in force at the time, fireworks wholesalers were required to pay \$1000 for a wholesaler’s “Certificate of Compliance.”<sup>48</sup> “The Fire Marshal . . . consistently interpreted this provision to require payment of the \$1,000 fee for each wholesale location a fireworks wholesaler operates within the state.”<sup>49</sup>

From 1991 to 1994, Celebration’s operations more than doubled, from forty-five locations to ninety-six.<sup>50</sup> During these years, Celebration complied with the mandate of the Fire Marshal to obtain a Certificate of Compliance for each location.<sup>51</sup> In 1995, “Celebration tendered only one application and fee for its central warehouse.”<sup>52</sup> Without seeking administrative review, Celebration filed a complaint against both the Fire Marshal and the State, asserting that applicable law “only required that it obtain one Certificate of Compliance for all its wholesale locations” and seeking “a refund of what it considered excess fees it paid in previous years.”<sup>53</sup> Celebration acknowledged that it did not exhaust its administrative remedies.<sup>54</sup> Rather, it contended that to pursue administrative remedies would have been “futile.”<sup>55</sup> The unanimous opinion that I authored for our Court reiterated the limitations on the futility exception set forth in the *M-Plan, Inc.* and *New Harmony* opinions: that “[t]o prevail upon a claim of futility, ‘one must show that the administrative agency was powerless to effect a remedy or that it would have been impossible or fruitless and of no value under the circumstances.’”<sup>56</sup>

Celebration did not argue “that the agency was ‘powerless’ to provide relief but rather appear[ed] to invoke the ‘impossibility’ prong of the futility test, arguing there [wa]s no ‘formal mechanism in place for the review of the Fire Marshal’s policies of general applicability.’”<sup>57</sup> But the Court was satisfied with the agency’s affirmative representations that it had procedures for administrative

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45. *Id.* at 840 (quoting *Smith v. State Lottery Comm’n*, 701 N.E.2d 926, 931 (Ind. Ct. App. 1998)).

46. 829 N.E.2d 979 (Ind. 2005).

47. *Id.* at 981.

48. *Id.* See IND. CODE §§ 22-11-14-7, -5 (2013).

49. *Johnson*, 829 N.E.2d at 981.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 983.

55. *Id.* at 983-84.

56. *Id.* at 984 (quoting *M-Plan, Inc. v. Ind. Comprehensive Health Ins. Ass’n*, 809 N.E.2d 834, 840 (Ind. 2004)).

57. *Id.* (quoting *Boatwright v. Celebration Fireworks, Inc.* 810 N.E.2d 766 (Ind. Ct. App. 2004), *opinion vacated by Johnson*, 829 N.E.2d at 979).

review of Celebration's claims.

"The principal thrust of Celebration's futility argument" was that it was "inevitable that the agency would rule against it."<sup>58</sup> But the Court showed little patience for this contention: "[T]he mere fact that an administrative agency *might* refuse to provide the relief requested does not amount to futility."<sup>59</sup>

2. *Constitutionality; Pure Questions of Law.*—The question of whether a challenge to the constitutionality of an agency action requires exhaustion of administrative remedies prior to seeking action in court was addressed by *State v. Sproles*.<sup>60</sup> In this case, an individual owed taxes for possession of a controlled substance.<sup>61</sup> The Indiana Department of Revenue sought to collect approximately \$155,000 in unpaid controlled substance excise tax ("CSET") from Stephen A. Sproles.<sup>62</sup> Under the applicable statutes and regulations, Sproles filed a timely protest of the CSET assessment and requested an administrative hearing.<sup>63</sup> Additionally, the Department recorded a judgment lien against Sproles "that clouded title to all of [his] real estate interests."<sup>64</sup> Two individuals who owned property as tenants in common with him filed a lawsuit to partition the property and named the Indiana Department of Revenue as a necessary party.<sup>65</sup> "Apparently impatient with the Department's delay in responding to his protest, . . . Sproles filed a cross-claim against the State . . . seeking declaratory relief based on several state and federal constitutional violations[.]" including a claim that the CSET violated the U.S. Constitution's Double Jeopardy Clause.<sup>66</sup>

Our Court acknowledged that, notwithstanding the exhaustion requirement generally in tax cases, there are additional considerations when the challenge is brought on constitutional grounds. Using language reminiscent of the *Wilson* case, Justice Boehm wrote,

Construing the state and federal constitutions is not the job, nor an area of expertise, of the Department of State Revenue. Constitutional cases may not implicate statutory construction. Rather, the issue can turn on whether a settled interpretation of a tax provision runs afoul of constitutional protections—an entirely different analysis often well beyond the scope of the Department's expertise.<sup>67</sup>

Justice Boehm recited Sproles's argument that it was "sensible to allow taxpayers to bypass the administrative process when making constitutional challenges, especially of a facial nature, to the tax laws. It is also true," he wrote, "that the

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58. *Id.*

59. *Id.* (emphasis added).

60. 672 N.E.2d 1353 (Ind. 1996).

61. *Id.* at 1355; IND. CODE §§ 6-7-3-1 to -20 (2013).

62. *Sproles*, 672 N.E.2d at 1355.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 1360.

Department has no authority to strike down a tax statute.”<sup>68</sup> The Court, however, went on to hold,

Whether the exhaustion requirement in constitutional cases is a wise idea is a matter for legislative determination. And the Legislature, in the form of numerous amendments to the administrative review process this century, has spoken. In light of Indiana’s well-established policy favoring exhaustion of remedies, especially in tax cases, we hold that the “protest” and “refund” avenues for contesting a listed tax are not only adequate but exclusive.<sup>69</sup>

Justice Boehm spent a great deal of time in *Sproles* tying the exhaustion requirement to the prescribed mechanism of the tax statutes. The same result occurred outside of the tax sphere in *New Harmony*. Among Parker’s allegations in *New Harmony* was that her property had been subject to an unconstitutional regulatory taking.<sup>70</sup> The fact that Parker made a constitutional claim, however, did not inhibit our holding that she was required to exhaust her remedies before the Board of Zoning Appeals prior to seeking judicial review.<sup>71</sup>

Also outside the tax sphere was *Turner v. City of Evansville*.<sup>72</sup> Bradley A. Turner was an Evansville police officer who had been suspended from the force for three separate incidents of alleged misconduct.<sup>73</sup> While Turner’s three cases were pending before the Evansville Merit Commission, he “filed a lawsuit challenging the past and present [police] Chiefs’ right to office” on the grounds that the Indiana Constitution required the police chief to reside within the Evansville city limits.<sup>74</sup> Chief Justice Shepard, in an opinion joined in relevant part by all members of the Court, held that Turner could only pursue his constitutional claims by raising them in the disciplinary proceedings.<sup>75</sup> “To preserve these issues for judicial review, Turner must first present them at the administrative hearing.”<sup>76</sup> Because “Turner was required to pursue his administrative remedies and may not avoid doing so through this collateral action[,]” the Court said, “the trial court lacked subject matter jurisdiction to address the merits of Turner’s amended complaint.”<sup>77</sup>

What about a mass protest against the constitutionality of a property tax statute? That was the question the Court faced in the high-profile case of *State*

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68. *Id.* (citing IND. CONST. art. III, § 1).

69. *Id.* at 1362.

70. 726 N.E.2d 1217, 1221-22 (Ind. 2000), *amended on rehearing in part by* 737 N.E.2d 719 (Ind. 2000).

71. *Id.* at 1223-24.

72. 740 N.E.2d 860 (Ind. 2001).

73. *Id.* at 861.

74. *Id.*

75. *Id.* at 862.

76. *Id.* (citing *Sullivan v. City of Evansville*, 728 N.E.2d 182 (Ind. Ct. App. 2000)).

77. *Id.*

*ex rel. Attorney General v. Lake Superior Court*.<sup>78</sup> As part of its reaction to court decisions declaring portions of the Indiana property tax system unconstitutional, the Legislature passed two statutes in 2001 concerning property taxes that applied only to residents of Lake County.<sup>79</sup> A group of taxpayers filed a lawsuit in Lake County seeking to prevent the mailing of the bills for the property taxes due in 2003 on the grounds that the 2001 statutes violated the Indiana Constitution in several respects.<sup>80</sup>

In an opinion authored by Justice Boehm, and joined in relevant part by the other four members of the Court, the Court held that the taxpayers' lawsuit should have been dismissed for failure to exhaust administrative remedies.<sup>81</sup> In this regard, the *Sproles* case was unambiguous precedent;<sup>82</sup> just as in *Sproles*, the exclusive avenue for the taxpayers in *Lake Superior Court* was to protest their assessments was through the administrative process.

3. *An Exception Remains.*—Little remains of the futility and constitutionality exceptions to the exhaustion rule. But the Supreme Court has not rejected all attempts to avoid imposition of the exhaustion requirement. The exception is found in *Indiana Department of Environmental Management v. Twin Eagle LLC*.<sup>83</sup> Twin Eagle had plans for a residential development in Fort Wayne that included filling in some ponds and wetlands on the property.<sup>84</sup> Issues related to the regulation of filling in the ponds and wetlands were very uncertain at the time, in part, because of a recent U.S. Supreme Court decision limiting federal regulatory power to navigable waterways and to “tributaries of or wetlands adjacent to navigable waterways.”<sup>85</sup> As a result of this decision, some of Twin Eagle's plans did not require federal environmental permits, and it filed a lawsuit for a declaratory judgment to prevent IDEM from enforcing Indiana's environmental laws.<sup>86</sup> Twin Eagle took the position that state government had no authority to regulate the ponds and wetlands in question and that the interim regulatory process IDEM had adopted was invalid.<sup>87</sup>

In an opinion written by Justice Boehm and joined by now-Chief Justice Dickson and Justice Rucker, the Court rejected IDEM's contention that Twin Eagle had failed to exhaust its administrative remedies. The Court's majority said that exhaustion of remedies was not required because the “issues turn[ed] on issues of law”: IDEM either had or did not have the regulatory authority in

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78. 820 N.E.2d 1240 (Ind. 2005).

79. *Id.* at 1243.

80. *Id.*

81. *Id.* at 1246-47.

82. *Id.*

83. 798 N.E.2d 839 (Ind. 2003).

84. *Id.* at 841 (citing *Solid Waste Agency v. U.S. Army Corps. of Eng'rs*, 531 U.S. 159, 171, 174 (2001)).

85. *Id.* at 842.

86. *Id.*

87. *Id.* at 843.

question.<sup>88</sup>

The Court then went to the merits and concluded that, in fact, IDEM had the regulatory authority that *Twin Eagle* contended that it did not.<sup>89</sup> Chief Justice Shepard and I took the position that *Twin Eagle* should have been required to exhaust administrative remedies before proceeding to court.<sup>90</sup>

*B. What Can We Conclude About Exceptions to the Exhaustion Canon as of Today?*

The futility exception will only apply in situations like Judge Ratliff's decision in *Ahles v. Orr*: where the administrative agency is simply without power to act.<sup>91</sup> The constitutionality exception, however, while having been rejected in the CSET case, the *New Harmony* case, the Evansville police chief case, and the Lake County property taxpayer revolt, seems to retain some viability under *Twin Eagle*. The majority's justification for excusing exhaustion in *Twin Eagle* was that the issues at stake turn on issues of law.<sup>92</sup> The issues there happened to be statutory in nature, but it is hard to see why a different rationale would apply if they were constitutional.

I think the answer is provided in *Johnson v. Celebration Fireworks, Inc.*<sup>93</sup> In addition to the futility analysis discussed above, *Celebration Fireworks* also discussed *Twin Eagle*.<sup>94</sup> *Celebration* had argued that *Twin Eagle* supported its position that it was not required to exhaust its administrative remedies.<sup>95</sup> This argument, however, had no basis in our previous holdings. In *Johnson*, the Court said that exhaustion of administrative remedies in *Twin Eagle* had been

unnecessary "to the extent the issue turn[ed] on statutory construction, [and] whether an agency possess[e]d jurisdiction over a matter [as that] is a question of law for the courts." It was in this context that [the Court] concluded that exhaustion of administrative remedies "may not be appropriate if an agency's action is challenged as being ultra vires and void," or otherwise beyond the scope of the agency's authority.<sup>96</sup>

The Court contrasted *Johnson* with *Twin Eagle* on the following grounds:

Unlike the state agency in *Twin Eagle*, there is absolutely no question in the present case of the Fire Marshal's legal authority to license fireworks wholesalers; the question here is at most a mixed question of law and

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88. *Id.* at 844

89. *Id.* at 845-46.

90. *Id.* at 849-50 (Sullivan, J., concurring).

91. 456 N.E.2d 425, 426 (Ind. Ct. App. 1983).

92. *Twin Eagle*, 798 N.E.2d at 844.

93. 829 N.E.2d 979 (Ind. 2005).

94. *Id.* at 983.

95. *Id.*

96. *Id.* (second and fourth alterations in original) (quoting *Twin Eagle*, 798 N.E.2d at 841-42) (citation omitted).

fact—and, quite likely in our view, a pure question of fact—as to whether each of the individual outlets selling fireworks is itself a wholesaler.<sup>97</sup>

As I noted earlier, I did not agree with *Twin Eagle*. But fairly read, I think that *Twin Eagle* stands for the proposition that a court might excuse exhaustion where the only issue for the court is whether an agency's action is *ultra vires* and void. Where such an issue of law is mixed with any questions of fact, however, exhaustion of administrative remedies is still required.

## II. ADMINISTRATIVE LAW AS COMMON LAW

The discussion begins with *M-Plan, Inc. v. Indiana Comprehensive Health Insurance Ass'n*,<sup>98</sup> a case also discussed in the preceding section. One interesting aspect of the case was that the HMOs had contended that ICHIA was not a government agency subject to the AOPA, and, because it was not subject to the AOPA, the AOPA's exhaustion requirement did not apply to them.<sup>99</sup> But Justice Boehm's opinion took the position that “even if ICHIA [wa]s viewed as a private association, exhaustion of internal dispute mechanisms may be required[,]” citing a number of cases that required exhaustion of internal association remedies.<sup>100</sup>

If the Supreme Court is willing to impose an exhaustion of remedies requirement in situations where the AOPA does not apply, is it willing to go even further and declare that the policies and procedures of the AOPA are part of Indiana common-law, not just statutory law? In point of fact, the Court did just that in at least two cases that I consider among the most important of the decisions in which I participated.

The first is *Indiana High School Athletic Ass'n v. Carlberg by Carlberg*,<sup>101</sup> an opinion I authored for a four-justice majority. The IHSAA's “Transfer Rule” provided that a high school athlete who changes schools without a corresponding change in parents' residents is not eligible to participate in varsity sports for one year.<sup>102</sup> When the IHSAA attempted to enforce the Transfer Rule in respect of a Carmel High School swimmer, a trial court judge enjoined the IHSAA and the school from enforcing the rule.<sup>103</sup>

Claims like this were not unusual. While the Indiana Supreme Court held in 1959 that the IHSAA was a private membership organization not subject to

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97. *Id.*

98. 809 N.E.2d 834 (Ind. 2004).

99. *Id.* At 837.

100. *Id.* at 837-38.

101. 694 N.E.2d 222 (Ind. 1997).

102. *Id.* at 226.

103. *Id.* at 227.

judicial review,<sup>104</sup> it reversed itself in 1972,<sup>105</sup> and in the intervening two decades, approximately a dozen federal and state opinions reported decisions relating to such disputes.<sup>106</sup>

In the *Carlberg* case, the IHSAA once again raised the issue on which it had prevailed back in 1959. It argued that it was “a voluntary, not-for-profit corporation comprised of members including” both public and private schools throughout the state, the members of which adopt rules—like the Transfer Rule—to govern their internal affairs.<sup>107</sup> For Indiana courts to review the IHSAA’s internal decisions, the Association maintained, violated the long-standing rule in Indiana that courts do not interfere with the internal affairs and rules of a voluntary membership association.<sup>108</sup> Our Court agreed with this contention—to an extent:

As to its member schools, the IHSAA is a voluntary membership association. Those members have the internal procedures of their own association available to them to adjudicate disputes and, if necessary, change rules or leadership; there is no need for courts to micro-manage these matters. . . . [J]udicial review of IHSAA decisions with respect to its member schools will be limited to those circumstances under which courts review the decisions of voluntary membership associations—fraud, other illegality, or abuse of civil or property rights having their origin elsewhere.<sup>109</sup>

That, to reiterate, would be the rule with respect to the IHSAA’s *member schools*. However, *Carlberg* involves an appeal not from a member school but from a student.<sup>110</sup> As Judge Cummings of the Seventh Circuit had recently written, “[F]or a student athlete in public school, membership in IHSAA is not voluntary, and actions of the IHSAA arguably should be held to a stricter standard of judicial review.”<sup>111</sup>

What should be the standard of review for a student’s complaint? The Court noted certain factors that made IHSAA decisions similar to those of government agencies.<sup>112</sup> For example, the IHSAA’s “very existence is entirely dependent

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104. *State ex rel. Ind. High Sch. Athletic Ass’n v. Lawrence* Cir. Ct., 162 N.E.2d 250, 255 (Ind. 1959), *overruled in part by* *Haas v. S. Bend Cmty. Sch. Corp.*, 289 N.E.2d 495 (Ind. 1972), *abrogated by* *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994).

105. *Haas*, 289 N.E.2d at 495.

106. *See, e.g.*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *La. High Sch. Athletic Ass’n v. St. Augustine High Sch.*, 396 F.2d 224 (5th Cir. 1968).

107. *Carlberg*, 694 N.E.2d at 226 n.1.

108. *Id.* at 229-30 (citing *State ex rel. Givens v. Super. Ct.*, 117 N.E.2d 553, 555 (Ind. 1954)).

109. *Id.* at 230 (citing *Ind. High Sch. Athletic Ass’n v. Reyes*, 694 N.E.2d 249, 256-57 (Ind. 1997)).

110. *Id.* at 226.

111. *Id.* at 231 (quoting *Freeman v. Sports Car Club of Am., Inc.*, 51 F.3d 1358, 1363 (7th Cir. 1995)).

112. *Id.* at 230-31.

upon the absolute cooperation and support of the public school systems of the State of Indiana.”<sup>113</sup> That cooperation and support is derived from the lawful delegation from public schools to the IHSAA of authority, conferred upon public schools by the Legislature.<sup>114</sup> In addition, the court noted that: (1) the salaries of most of the principals and coaches involved in interscholastic athletics are paid out of tax funds; (2) most of the athletic events occur on or in “athletic facilities which have been constructed and maintained with tax funds”; and (3) tax supported schools adopt the IHSAA rules, and their enforcement “may have a substantial impact upon the rights of students enrolled in these tax supported institutions.”<sup>115</sup> Thus, if IHSAA decisions are like government agency decisions, courts should review these decisions in approximately the same way as those of government agencies—that is, by using the procedures found in administrative law. At the same time, the Court recognized that “[t]he analogy between IHSAA decisions and government agency action is not a perfect one.”<sup>116</sup> “[T]he IHSAA is not a government agency[,] . . . [and] the analogy can become attenuated depending upon the nature of the IHSAA action being challenged.”<sup>117</sup> The IHSAA is not subject to the AOPA, and the Court explicitly refused to hold that it was.<sup>118</sup> But the Court did find substantial justification for use of the administrative law “arbitrary and capricious” standard of review for IHSAA decisions.<sup>119</sup> In summary, the Indiana Supreme Court imported administrative law procedures into state common law for purposes of reviewing challenges to IHSAA rules and enforcement decisions applicable to a particular student when those challenges are brought by non-IHSAA members with standing. In accordance with standard administrative law procedures, the Court held that IHSAA rules and decisions would “not be reviewed *de novo* but in a manner analogous to judicial review of government agency action.”<sup>120</sup>

A more recent example of a similar approach is *A.B. v. State*.<sup>121</sup> The *A.B.* case was an epic clash between the power and authority of an Indiana juvenile court and the Indiana Department of Child Services (“DCS”), which is the executive branch agency responsible for enforcing the state’s laws against child abuse and neglect.<sup>122</sup> Relevant to our discussion, the General Assembly, in 2008, gave DCS the responsibility of financing the costs of placement and treatment not only of abused and neglected children but also of children who had been

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113. *Haas v. S. Bend Cmty. Sch. Corp.*, 289 N.E.2d 495, 498 (Ind. 1972), *abrogated by Collins v. Day*, 644 N.E.2d 72 (Ind. 1994).

114. *Id.* at 520-21.

115. *Id.* at 497-98.

116. *Carlberg*, 694 N.E.2d at 231.

117. *Id.*

118. *Id.*

119. *Id.* at 228, 231.

120. *Id.* at 231.

121. 949 N.E.2d 1204 (Ind. 2011).

122. *See* IND. CODE § 31-25-2 (2013).

adjudicated “delinquent.”<sup>123</sup> In 2009, the legislature amended the statute to provide that DCS was not required to pay a juvenile court judge’s out-of-state placement of a child unless the DCS Director or Director’s designee approved or recommended the placement.<sup>124</sup>

That is what happened in *A.B.* After the judge determined the child was delinquent, the judge made an out-of-state placement for the child, and the Director of DCS refused to approve the placement.<sup>125</sup> While the legislature gave DCS the authority to override a juvenile court with respect to the costs of out-of-state placements and services, it did not provide any standard for appellate review of such DCS action.<sup>126</sup> Furthermore, it remained unclear whether the DCS Director’s disapproval was subject to the process due under the AOPA.

One of the most important cases in Indiana Supreme Court history, *Warren v. Indiana Telephone Co.*,<sup>127</sup> held that in such circumstances, the Court has a constitutional duty to provide for an appeal.<sup>128</sup> But what standard of appellate review is appropriate? Without the legislature providing any procedural machinery for an appeal or review, how should the Court proceed to assure that its review of the DCS Director’s decision is guided by principled and clear standards?

In an opinion authored by Justice David, and joined in relevant part by the other four members of the Court, the Court held that regardless of whether the DCS Director’s decision was subject to the AOPA, the appropriate standard of appellate review was that provided by the AOPA.<sup>129</sup> The

AOPA specifies five instances under which judicial relief should be granted due to prejudice by an agency action: 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.<sup>130</sup>

Thus, *A.B.* stands for the principle that, even in cases not controlled by statute, the Indiana Supreme Court will refer to Indiana administrative law in general, and the AOPA in particular, as the “common law” that provides the requisite rules of decision.

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123. *A.B.*, 949 N.E.2d at 1211-12.

124. *Id.* at 1212-13, 1215 (citing IND. CODE § 31-40-1-2(f) (2013)).

125. *Id.* at 1208-10.

126. *Id.* at 1215.

127. 26 N.E.2d 399 (1940).

128. *Id.* at 407-08.

129. *A.B.*, 949 N.E.2d at 1216-17.

130. *Id.* at 1217.

## III. IMPORTANCE OF THE RECORD IN JUDICIAL REVIEW

Two bookend cases make a particular point about judicial review of administrative agency decisions. The first of these cases is *Medical Licensing Board of Indiana v. Provisor*.<sup>131</sup> On judicial review, the trial court reversed the Medical Licensing Board's suspension of a physician's license to practice medicine.<sup>132</sup> The Board appealed, contending that the trial court committed reversible error when it allowed discovery on the physician's claims that the Board's decision did not comport with statutory requirements as to the consistency in its rulings and that the Board considered factors outside the record.<sup>133</sup>

The Court agreed with the Board in a unanimous opinion,<sup>134</sup> offering the following analysis:

The AOPA requires that judicial review "must be confined to the agency record," . . . "not some new record made initially in the reviewing court." . . . "The court may not try the cause *de novo* or substitute its judgment for that of the [board.]" Allowing the discovery sought here would violate this mandate.<sup>135</sup>

The next case is *Board of School Commissioners of the City of Indianapolis v. Walpole*.<sup>136</sup> After being suspended, a public school teacher was notified that the Superintendent had recommended that the School Board cancel the teacher's contract.<sup>137</sup> The teacher exercised his statutory right under the Teacher Tenure Act and requested a hearing.<sup>138</sup> In preparation for the hearing, the teacher sought discovery with respect to the allegations of misconduct underlying the termination recommendation.<sup>139</sup>

His request for discovery was denied, and our Court reviewed that decision on interlocutory appeal.<sup>140</sup> Indiana Trial Rule 28(F) explicitly provides for discovery in proceedings before administrative agencies: "Whenever an adjudicatory hearing, including any hearing in any proceeding subject to judicial review, is held by or before an administrative agency, any party to that adjudicatory hearing shall be entitled to use the discovery provisions of . . . the Indiana Rules of Trial Procedure."<sup>141</sup>

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131. 669 N.E.2d 406 (Ind. 1996).

132. *Id.* at 408.

133. *Id.* at 407-08.

134. *See id.* at 411 (Selby, J., not participating).

135. *Id.* at 410 (last alteration in original) (quoting IND. CODE § 4-21.5-5-11 (2013); *Camp v. Pitts*, 411 U.S. 138, 142 (1973)).

136. 801 N.E.2d 622 (Ind. 2004).

137. *Id.* at 623.

138. *Id.*

139. *Id.*

140. *Id.* at 623-24.

141. *Id.* at 624 (quoting IND. T. R. 28(f)).

However, in an opinion authored by Justice Boehm for a four-justice majority, the Court agreed with the school corporation that Trial Rule 28(F) did not apply in these circumstances because the rule only applies to proceedings governed by the AOPA and “does not apply to arms of local government” such as school corporations.<sup>142</sup> Rather, the Court said that the rules of procedure for proceedings under the Teacher Tenure Act are governed by the Act itself, and the Teacher Tenure Act “does not provide for formal discovery procedures of the kind found in the Trial Rules.”<sup>143</sup>

I disagreed with the Court majority. The mandate of the AOPA is that when a matter is on judicial review, the trial court functions as an appellate court and “does not try the cause de novo or substitute its judgment for that of the . . . [B]oard.”<sup>144</sup> Indeed, *Provisor* held that a court on judicial review is so bound by the findings of the administrative agency that it is barred from conducting any discovery of its own.<sup>145</sup> But if, as *Walpole* says, no formal discovery procedures are required in any local government level administrative proceeding, a court on review may well be examining an administrative proceeding in which a party was unable to present its case.

There is nothing in the language of Trial Rule 28(F) that limits it to the AOPA or state level proceedings, and I was of the view that it was not so limited. I argued that Trial Rule 28(F) exists to ensure that, in return for judicial deference to administrative agency fact-finding, the parties will have a full and fair opportunity to develop the evidence that the administrative agency will consider.

#### IV. STANDING

“Standing” is a big, sprawling topic that reaches into virtually every kind of litigation. During the past twenty-five years, the Indiana Supreme Court has looked at standing from many perspectives.

##### *A. Judicial Doctrine of Standing*

One perspective on this topic is what is sometimes referred to as the “judicial doctrine of standing.”<sup>146</sup> This doctrine dictates “whether the complaining party [in a lawsuit] is the proper person to invoke the court’s power.”<sup>147</sup> In a classic David v. Goliath proceeding, *Huffman v. Indiana Office of Environmental Adjudication*,<sup>148</sup> Rosemary Huffman filed a petition for administrative review of an IDEM decision that renewed a pollution permit for Eli Lilly and Company.<sup>149</sup>

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142. *Id.* at 624-25.

143. *Id.* at 625.

144. *Id.* at 626 (Sullivan, J., dissenting).

145. *Med. Licensing Bd. v. Provisor*, 669 N.E.2d 406, 410 (Ind. 1996).

146. *Huffman v. Office of Env'tl. Mgmt.*, 811 N.E.2d 806, 808 (Ind. 2004).

147. *Id.* at 809 (alteration in original) (quoting *State ex rel. Cittadine v. Ind. Dep't Transp.*, 790 N.E.2d 978, 979 (Ind. 2008)).

148. *Id.* at 808.

149. *Id.*

The Office of Environmental Adjudication (“OEA”) and the trial court held that in order to file the petition, Huffman had to meet the requirements of both the judicial doctrine of standing and those of the AOPA.<sup>150</sup> However, both the Court of Appeals and the Supreme Court concluded that the question of whether Huffman had standing to file a lawsuit was not relevant; the only question was whether she was a proper person to invoke OEA’s power of administrative review under the AOPA.<sup>151</sup> “Subject to constitutional constraints, . . . the Legislature may dictate access to administrative review on terms the same as or more or less generous than access to file a lawsuit.”<sup>152</sup> The Court found “imposition of the ‘judicial doctrine of standing’ inappropriate . . . because AOPA itself identifies who may pursue an administrative proceeding.”<sup>153</sup>

Of some consequence in this regard was a rejection of Huffman’s contention that she was entitled to bring her claim utilizing the common law doctrine of “public standing.”<sup>154</sup> The year before *Huffman*, our Court had issued a unanimous opinion authored by Justice Dickson reaffirming that there are

certain situations in which public rather than private rights are at issue and hold that the usual standards for establishing standing need not be met. . . . [W]hen a case involves enforcement of a public rather than a private right the plaintiff need not have a special interest in the matter.<sup>155</sup>

Turning to the statute, our Court concluded that the “language of AOPA does not allow for administrative review based on a generalized concern as a member of the public. The statute says ‘aggrieved or adversely affected’ and this contemplates some sort of personalized harm.”<sup>156</sup> The bottom line is that standing for administrative review is solely determined by statute and not by doctrines like “public standing” that dictate the standing required to file lawsuits.

*B. Once the Administrative Agency has Acted, What Standing Is Required to Invoke Judicial Review?*

One case examining this question in the context of local land use proceedings was *Bagnall v. Town of Beverly Shores*.<sup>157</sup> This rather straightforward case involved the Bagnalls, property owners who sought judicial review of zoning variances, which the local zoning board had granted to neighboring property owners.<sup>158</sup> The Bagnalls lived near, but not adjacent to, the property in

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150. *Id.* at 808-09.

151. *Id.* at 809.

152. *Id.*

153. *Id.*

154. *Id.* at 812.

155. *State ex rel. Cittadine v. Ind. Dep’t of Transp.*, 790 N.E.2d 978, 980 (Ind. 2003) (quoting *Schloss v. City of Indianapolis*, 553 N.E.2d 1204, 1206 n.3 (Ind. 1990)).

156. *Huffman*, 811 N.E.2d at 812.

157. 726 N.E.2d 782 (Ind. 2000).

158. *Id.* at 783.

question.<sup>159</sup> The zoning board sought to have the Bagnalls' petition dismissed on grounds that they were not "aggrieved" as required by the statute, contending that, in this context, to be "aggrieved" they must be adjacent property owners.<sup>160</sup>

Our Court was not willing to accept such a restricted definition of "aggrieved" when the prior case law had permitted petitions from owners of property that was both adjacent to and surrounding the property at issue.<sup>161</sup> Rather, the Court was willing to confer standing on those "who own property that is not adjacent to, but is in the vicinity of, the property involved in variance requests."<sup>162</sup> The Court also took the position that it was an appropriate matter for "judicial determination [as to] whether a petitioner's property is sufficiently close to the variance property that its owner is 'aggrieved' under the statute."<sup>163</sup>

In the Bagnalls' situation, the trial court had found that their lots were 150 feet from the subject property, and that this distance was sufficiently great so as to not constitute surrounding property.<sup>164</sup> On the basis of the trial court's finding that the Bagnalls were not aggrieved under the statute, the Court affirmed in a unanimous opinion, which I authored.<sup>165</sup>

Taken together, *Huffman* (which held that granting a motion to dismiss without allowing Huffman the opportunity to present evidence that she was aggrieved) and *Bagnall* (which found that the Bagnalls were not aggrieved only after examining the trial court's specific findings of fact in that regard) stand for the proposition that some factual investigation is required before a petition for review of an administrative agency decisions can be dismissed on grounds that the petitioner does not meet the standing requirement of being "aggrieved."

The Court spoke to another aspect of standing to seek judicial review of an agency's action in *Indiana Ass'n of Beverage Retailers, Inc. v. Indiana Alcohol & Tobacco Commission*.<sup>166</sup> This case was part of the continuing war over the authority of various kinds of retailers to sell alcoholic beverages. Here, a convenience store that sold gasoline sought a permit also to sell beer and wine.<sup>167</sup> The Indiana Association of Beverage Retailers—the organization of package liquor stores—appeared as a remonstrator and opposed the permit at the county level.<sup>168</sup> The County Board voted against the request, and the Indiana Alcohol and Tobacco Commission initially affirmed.<sup>169</sup> However, the convenience store sought administrative review, and the Commission subsequently issued the

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159. *Id.* at 786.

160. *Id.* at 784, 786.

161. *Id.* at 786.

162. *Id.*

163. *Id.*

164. *Id.*

165. *See id.* at 787 (Rucker, J., not participating).

166. 836 N.E.2d 255 (Ind. 2005).

167. *Id.* at 256.

168. *Id.*

169. *Id.*

requested permit.<sup>170</sup>

The package store Association then sought judicial review of the Commission's decision.<sup>171</sup> The Court, in a unanimous opinion authored by Justice Boehm, held that the Association's appearance as a remonstrator was not sufficient to confer standing upon it in order to seek judicial review.<sup>172</sup> The Court noted that the AOPA specifically lists those who have standing to obtain judicial review and that they include: "(1) a person to whom the agency action is specifically directed; or (2) a person expressly designated in the record of the proceeding as a party to the proceeding."<sup>173</sup> While the package store members of the Association might fall into the second of those categories, the Association fell into neither.<sup>174</sup> And while the AOPA also permits a person who was a party to the agency proceedings to obtain judicial review, the law is clear that a remonstrator alone is not a party.<sup>175</sup>

Here is the key: "A remonstrator must become an 'intervening remonstrator' in order to seek administrative review of the initial agency action. A 'remonstrator' seeking to become an intervening remonstrator, and therefore a 'party' is subject to the 'aggrieved or adversely affected' requirement."<sup>176</sup> As noted, the Association was neither aggrieved nor adversely affected by the Commission's decision.<sup>177</sup>

The subject of standing to seek judicial review of an administrative determination produced one highly unusual case with which I will conclude: *Peabody Coal Co. v. Indiana Department of Natural Resources*.<sup>178</sup> What makes the case so unusual is that the administrative agency lost at the administrative level. Could its own director seek administrative review?

Peabody Coal had sought review by an administrative law judge of a DNR inspector's notice that the company was in violation of the Surface Mining Coal and Reclamation Act ("Surface Mining Act").<sup>179</sup> Contrary to ordinary practice in which either the agency director or a commission has final responsibility for agency decisions, the Surface Mining Act designated the ALJ as the "ultimate authority" of the department in cases like this and further provided that the ALJ's decisions are subject to judicial review under the AOPA.<sup>180</sup> Thus, the fact that an ALJ is the "ultimate authority" under the Surface Mining Act indicates that the ALJ's decision is subject to judicial review.<sup>181</sup> But the question presented by the

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170. *Id.* at 256-57.

171. *Id.* at 257.

172. *Id.* at 258-59.

173. *Id.* at 257 (quoting IND. CODE § 4-21.5-1-10 (2013)).

174. *Id.*

175. *Id.* at 258.

176. *Id.*

177. *Id.* at 257.

178. 664 N.E.2d 1171 (Ind. 1996).

179. *Id.* at 1172.

180. *Id.* at 1173.

181. *Id.*

case was whether the director of the DNR could properly petition for judicial review.<sup>182</sup>

As I mentioned in discussing *Beverage Retailers*, “[t]he AOPA authorizes petitions for judicial review . . . by, *inter alia*, ‘a person who was a party to the agency proceedings that led to the agency action.’”<sup>183</sup> In a unanimous opinion authored by then-Chief Justice Shepard, the Court found that the DNR director was “‘a person who was a party to the agency proceedings,’ entitling him to judicial review of the ALJ’s ruling.”<sup>184</sup>

The analysis was that, under the traditional arrangement, a commission reviews a director’s decision, and

the director sits on both sides of the question . . . appear[ing] before the commission as an advocate and sit[ting] as a member of the commission resolving the matter. When the commission decides against the director, [the director] simply has failed to convince his [or her] fellow commissioners that his [or her] view was correct. Judicial review therefore would not be appropriate. By contrast, when the director issues a notice of violation and the respondent requests review by an ALJ, the director stands as an adversary to the alleged violator. In this situation, the director’s role as an adverse party in the adjudication entitles [the director] to petition for judicial review under the Surface Mining Act and AOPA. To hold otherwise would prevent the chief political officers of the government, the Governor and [the Governor’s] appointed director, from fully executing their statutory obligation to enforce the Surface Mining Act.<sup>185</sup>

#### CONCLUSION

The Indiana Supreme Court decided many more administrative law cases over the last two decades than could be discussed in this Article. Among the highlights have been the cases described above about exhaustion of administrative remedies; about how administrative law principles have been incorporated into state common law; about the importance of the evidentiary record at the administrative level given the deference that administrative agencies are accorded on judicial review; and about standing in administrative proceedings and in the judicial review thereof.

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182. *Id.*

183. *Id.* at 1174 (quoting IND. CODE § 4-21.5-5-3 (2013)).

184. *Id.*

185. *Id.* (citations omitted).