# Administrative Law: When Agencies Don't Play By the Rules

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## I. Introduction

Complex societies require a legal system capable of and dedicated to handling highly specialized legal functions. For this reason, federal and state legislatures have created a multitude of administrative agencies, each to regulate specific activities and each vested with a variety of executive, legislative, and judicial powers. Administrative agencies issue permits, grant variances, conduct investigations, subpoena records, determine eligibility for special benefits, impose fines, and in innumerable other ways affect peoples' lives. As a result of the enormous breadth of their regulatory authority, administrative agencies have tremendous potential to advance the public good. But when an agency's action is improperly motivated or unconstitutional, the traditional processes of administrative appeal and judicial review may not provide an effective remedy for the party injured by the agency or the agency's employees. In those instances, a variety of extra-administrative actions may be available to the aggrieved party. These actions include, for example, the filing of an action under the Indiana Tort Claims Act,[1] a section 1983 action, an action for a taking without just compensation, or an action for mandate.[2]

During the survey period,[3] the Indiana Supreme Court and the Indiana appellate courts handed down a number of decisions directly affecting the availability of extra-administrative remedies. In the wake of the Indiana Supreme Court's 1988 decision in *Peavler v. Board of Commissioners of Monroe County*,[4] the majority of these cases concerned

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1. Ind. Code §§ 34-4-16.5-1 to -21 (1988).

2. This is not an exclusive list of extra-administrative remedies. This list only covers extra-administrative remedies acted on during the survey period.

3. The survey period is January 1, 1989 through November 30, 1990.

4. 528 N.E.2d 40 (Ind. 1988).

tort actions filed by an individual against the state, its agencies, or political subdivisions. But the courts also reconsidered regulatory takings, inverse condemnation, and actions for mandate. This Article will examine some of the important decisions in each of these areas.

## II. The Traditional Remedy

Under Indiana's Administrative Orders and Procedures Act (AOPA), Indiana Code section 4-21.5, the legislature has codified a traditional administrative remedy available to the party adversely affected by an agency action. The AOPA controls the bulk of administrative practice in Indiana. However, Indiana Code section 4-21.5-2-4 makes the Act inapplicable to certain *agencies*.[5] In addition, Indiana Code section 4-21.5-2-5 exempts certain agency *actions* from AOPA procedures.[6] The AOPA provides that individuals who are adversely affected by an agency action may seek review of that action before an administrative law judge (ALJ). The review is in the form of an adjudicatory hearing.[7] At the hearing's conclusion, the ALJ prepares findings of fact, conclusions of law, and the recommended order for submission to the ultimate authority

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5. Ind. Code § 4-21.5-2-4 (1988 & Supp. 1990): This Article does not apply to any of the following agencies:

(1) The governor.
(2) The state board of accounts.
(3) The state educational institutions (as defined by IC 20-12-0.5-1(b)).
(4) The department of employment and training service.
(5) The employment insurance service board of the department of employment and training services.
(6) The workers' compensation board.
(7) The military officers or boards.
(8) The utility regulatory commission.
(9) The department of state revenue (excluding an agency action related to the licensure of private employment agencies).
(10) The state board of tax commissioners.

These agencies generally have promulgated their own hearing procedures that, although different from the AOPA in many respects, are nonetheless subject to judicial review and the extra-administrative remedies discussed in this Article. *See, e.g.*, Ind. Admin. Code tit. 170, r. 1-1-1 to -22 (1988) (the administrative procedure observed by the Indiana Utility Regulatory Commission).

6. Ind. Code § 4-21.5-2-5 (1988 & Supp. 1990) lists 13 agency actions that are exempt from AOPA procedure. Subsection (5) is particularly relevant: The act does not apply to "[a] resolution, directive, or other action of any agency that relates solely to the internal policy, organization, or procedure of that agency or another agency and is not a licensing or enforcement action . . . ." *Id.*

7. Ind. Code §§ 4-21.5-3-25 to -26 (1988) govern the conduct of administrative hearings.

for the agency.[8] In Indiana, the ultimate authority can be an individual or a panel of individuals vested by law or executive order with final authority.[9] The ultimate authority will consider the ALJ's recommendation and decide whether it should affirm, modify, or dissolve the ALJ's "order."[10] When the ultimate authority issues a final order, that order can then be appealed in the circuit or superior courts of Indiana.[11]

Indiana courts recognize the general rule that a party must "exhaust" all administrative remedies before pursuing an appeal in court.[12] In addition, the AOPA provides that failure to exhaust administrative remedies will result in the waiver of the party's right to judicial review.[13] The intent of this general rule is to discourage the courts' interference in an agency's performance of special functions given to it by the legislature, to encourage finality in decision making, to maintain an orderly judicial process, to avoid multiplicity of suits, to afford the parties and the courts the benefit of an agency's experience and expertise, and to economize judicial resources.[14] There are, however, well recognized exceptions to the general rule that administrative remedies must be exhausted.[15]

A party can avoid the doctrine of exhaustion when (1) the administrative action raises significant constitutional issues; (2) the plaintiff can demonstrate that administrative review would be futile; (3) the applicable administrative procedural statute is void; or (4) the plaintiff would suffer irreparable harm if compelled to exhaust administrative remedies.[16] In addition, other types of administrative "actions" simply

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8. *Id.* § 4-21.5-3-27.

9. *Id.* § 4-21.5-1-15. *See also Id.* § 4-21.5-3-28(b), which provides that "[t]he ultimate authority or its designee shall conduct proceedings to issue a final order."

10. *Id.* § 4-21.5-3-29(b).

11. *Id.* §§ 4-21.5-5-1 to -16.

12. *See, e.g.*, East Chicago v. Sinclair Refining Co., 232 Ind. 295, 111 N.E.2d 459 (1953); Marion Trucking Co. v. McDaniel Freight Lines, Inc., 231 Ind. 514, 108 N.E.2d 884 (1952); Evansville City Couch Lines, Inc. v. Rawlings, 229 Ind. 552, 99 N.E.2d 597 (1951).

13. IND. CODE § 4-21.5-5-4 (1988).

14. *See generally* Uniroyal, Inc. v. Marshall, 579 F.2d 1060, 1064 (7th Cir. 1978); Indiana State Bldg. & Constr. Trades Council v. Warsaw Community School Corp., 493 N.E.2d 800, 805-06 (Ind. Ct. App. 1986).

15. In addition to the exceptions established by common law, IND. CODE § 4-21.5-5-2(c) (1988) specifically provides that a "person is entitled to judicial review of a nonfinal agency action only if the person establishes both . . . [i]mmediate and irreparable harm . . . [and] [n]o adequate remedy exists at law."

16. *See, e.g.*, Greene v. Meese, 875 F.2d 639 (7th Cir. 1989) (civil rights plaintiff is normally not required to exhaust administrative remedies); Consolidated Rail Corp. v. Smith, 664 F. Supp 1228 (N.D. Ind. 1987) (court need not await conclusion of administrative review of controversy that can only be resolved by determination of the constitutionality

do not fit into the traditional scheme of administrative review. For example, when an agency does not act on a matter and the applicable statute provides no time period during which the agency must act, is the party dealing with the agency simply obligated to wait? If not, what degree of "inactivity" will trigger administrative review?[17] Further, the administrative forum seems particularly unsuited for reviewing the malfeasance or misfeasance of agency officials. In these contexts, counsel may wish to consider an extra-administrative remedy such as the filing of an action under the Indiana Tort Claims Act (ITCA).[18]

## III. Tort Claims Against the State

### *A. Introduction*

Traditionally, recovery against the state in tort has been severely limited by the ancient doctrine of sovereign immunity.[19] The English common law held that "the king could do no wrong," and therefore the sovereign was immune to actions in court.[20] This doctrine of sovereign immunity was adopted in the United States after the American Revolution, primarily as a means to protect the limited financial resources of the fledgling republic and its independent states.[21] Since that time, however, the doctrine has eroded. In most jurisdictions, with limited exceptions,[22] states no longer enjoy the broad immunity originally granted

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of a statute or ordinance if the agency lacks the power to adjudicate the constitutional claim); Jones v. Blinziner, 536 F. Supp. 1181 (N.D. Ind. 1982) (when the administrative remedy is futile, exhaustion will not be required); Bartholomew County Beverage Co. v. Barco Beverage Corp., 524 N.E.2d 353 (Ind. Ct. App. 1988) (doctrine of exhaustion does not apply when the administrative remedy is impossible or fruitless and of no value under the circumstances); New Trend Beauty School, Inc. v. Indiana State Bd. of Beauty Culturist Examiners, 518 N.E.2d 1101 (Ind. Ct. App. 1988). *See also* Ind. Code § 4-21.5-5-2(c) (judicial review on nonfinal agency actions).

17. *See* Ind. Code § 4-21.5-1-4 (1988), which defines agency action as "[a]n agency's performance of, *or failure to perform*, any other duty, function, or activity under this article." *Id.* (emphasis added). This provision of the AOPA appears to provide an administrative alternative to the action for mandate. However, as of this writing, the authors are not aware of any reported instances when this provision has been used to redress agency inaction.

18. Ind. Code §§ 34-4-16.5-1 to -21 (1988).

19. The doctrine of sovereign immunity also traditionally covered employees of the state acting within the scope of their employment.

20. *See, e.g.*, Campbell v. State, 254 Ind. 55, 57, 284 N.E.2d 733, 734 (1972).

21. *See generally* Campbell v. State, 254 Ind. 55, 284 N.E.2d 733 (1972) (discussion of sovereign immunity).

22. *See* Kellogg v. City of Gary, 562 N.E.2d 685, 703 (Ind. 1990) (a qualified immunity is preserved for judges and, to a lesser extent, for nonjudicial public officers in their discretionary policy-making acts).

by the common law, but instead rely upon a limited immunity preserved by statute. Such is the case in Indiana. The legislature has "preserved" a limited degree of governmental immunity in the ITCA.[23]

In 1972, the Indiana Supreme Court decided in *Campbell v. State*[24] that there was no longer any basis "for the continuation of the doctrine of sovereign immunity" under the common law and that "[t]he proper forum" for determining whether any immunity should survive is "in the legislature."[25] The *Campbell* decision held that the state in most cases would no longer enjoy immunity from tort actions unless and until the state legislature established such immunity by statute.[26] Two years later, the legislature passed the ITCA.[27]

Central to the present version of the ITCA is a list of seventeen situations, occurrences, actions, or inactions for which the state, its agencies, political subdivisions,[28] or employees[29] shall not be liable in tort.[30] Of the seventeen "immunities," most are very specific or limited in scope. For example, the state shall not be liable for a loss that results from the "adoption and enforcement of or failure to adopt or enforce a law (including rules and regulations),"[31] the "natural condition of unimproved property,"[32] the "temporary condition of a public thoroughfare which results from weather,"[33] the "initiation of a judicial or administrative proceeding,"[34] or "misrepresentation if unintentional."[35] Although the ITCA is rather specific, at least one Indiana court has held that the list of immune acts enumerated in the ITCA is not exclusive.[36]

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23. IND. CODE § 34-4-16.5-1 to -21 (1988).

24. 259 Ind. 55, 284 N.E.2d 733 (1972).

25. *Id.* at 62-63, 284 N.E.2d at 737.

26. *Id.*

27. 1974 Ind. Acts 142.

28. IND. CODE § 34-4-16.5-2 (1988) defines "political subdivision" to include counties, townships, cities, towns, separate municipal corporations, special taxing districts, state colleges or universities, city or county hospitals, school corporations, boards, or commissions of any of the foregoing entities.

29. ITCA as it relates to employees only pertains to employees acting within the scope of their employment. *Id.*

30. *Id.* § 34-4-16.5-3.

31. *Id.* § 34-4-16.5-3(7).

32. *Id.* § 34-4-16.5-3(1).

33. *Id.* § 34-4-16.5-3(3).

34. *Id.* § 34-4-16.5-3(5).

35. *Id.* § 34-4-16.5-3(13).

36. Coghill v. Badger, 418 N.E.2d 1201, 1211 (Ind. Ct. App. 1981). However, arguably, *Coghill* should be limited to holding only that the notice-of-claim provisions of the ITCA are applicable to all tort actions regardless of whether the state is actually immune from liability arising from the specific tort.

The legislature preserved a general kind of immunity by providing that the state shall not be liable if a loss results from "[t]he performance of a discretionary function."[37] By its inclusion of the "discretionary function" provision in the ITCA, the legislature apparently codified the traditional analysis that had been used as the basis for granting the state immunity in Indiana since the early 1900s.

In 1919, the Indiana Appellate Court used a "discretionary/ministerial" analysis to determine whether the state would be liable in tort. The court in *Adams v. Schneider*[38] held:

> A duty is discretionary when it involves on the part of the officer to determine whether or not he should perform a certain act, and, if so, in what particular way, and in the absence of corrupt motives in the exercise of such discretion he is not liable. His duties, however, in the performance of the act, after he has once determined that it shall be done, are ministerial, and for negligence in such performance, which results in injury, he may be liable in damages.[39]

Except in those rare instances when the actor, the individual employee, exercised absolutely no judgment in the performance of the act, the *Adams* analysis of governmental liability effectively shielded the state from tort actions for several decades.[40]

In 1988, however, the Indiana Supreme Court finally rejected the "discretionary/ministerial" analysis in *Peavler v. Board of Commissioners of Monroe County*.[41] *Peavler* marked a turning point in Indiana tort claims jurisprudence, and provides the backdrop against which more recent tort actions against the state must be viewed.

In *Peavler*, the court decided whether a county could be held liable for its allegedly negligent failure to erect warning signs on a particular portion of road.[42] The county argued that its failure to erect the signs was protected under the "discretionary act" immunity granted by the

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37. IND. CODE § 34-4-16.5-3(6) (1988).

38. 71 Ind. App. 249, 124 N.E. 718 (1919).

39. *Id.* at 255-56, 124 N.E. at 720 (citing Bates v. Horner, 65 Vt. 471, 27 A. 134 (1893)).

40. *See generally* Rodman v. Wabash, 497 N.E.2d 234 (Ind. Ct. App. 1986); Coghill v. Badger, 418 N.E.2d 1201 (Ind. Ct. App. 1981). *But see* Mills v. American Playground Device Co., 405 N.E.2d 621 (Ind. Ct. App. 1980) (court held that negligent installation of playground equipment was a ministeral act not entitled to immunity).

41. 528 N.E.2d 40 (Ind. 1988).

42. The court took this case on transfer to resolve a conflict between two divisions of the court of appeals: Peavler v. Board of Commr's of Monroe County, 492 N.E.2d 1086 (Ind. Ct. App. 1986), and Hout v. Board of Commr's of the County of Steuben, 497 N.E.2d 597 (Ind. Ct. App. 1986).

ITCA.[43] The Indiana Supreme Court, however, determined that "[d]iscretionary immunity must be narrowly construed because it is an exception to the general rule of liability."[44] The court then replaced the traditional discretionary/ministerial analysis with a "planning/operational" test as the basis for determining whether an action of the state is discretionary. [45]

The planning/operational analysis that the court borrowed from federal case law[46] limits the grant of discretionary act immunity to "[p]lanning activities [which] include acts or omissions in the exercise of a legislative, judicial, executive or planning function which involves formulation of basic policy decisions characterized by official judgment or discretion in weighing alternatives and choosing public policy."[47] Further, the court held:

> The discretionary function exception insulates only those significant policy and political decisions which cannot be assessed by customary tort standards. In this sense, the word discretionary does not mean mere judgment or discernment. Rather, it refers to the exercise of political power which is held accountable only to the Constitution or the political process.[48]

The court held that immunity will be afforded only upon an affirmative showing by the governmental entity that the "challenged decision was discretionary because it resulted from a policy oriented decision-making process."[49] In other words, the governmental entity must be able to show that it engaged in a conscious "balancing of risks and benefits," resulting in the making of a policy decision.[50]

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43. *Peavler*, 528 N.E.2d at 42.

44. *Id.* at 46 (citing Larson v. Indiana School Dist. No. 314, 289 N.W.2d 112, 121 (Minn. 1979)).

45. *Id.*

46. *See generally* Blessing v. United States, 447 F. Supp. 1160 (E.D. Pa. 1978).

47. *Peavler*, 528 N.E.2d at 45 (citing Marreck v. Cleveland Metroparks Bd. of Commr's, 9 Ohio St. 3rd 194, 459 N.E.2d 873 (1984)).

48. *Id.* (citing Miller v. United States, 583 F.2d 857, 866-67 (6th Cir. 1978)).

49. *Id.* at 47.

50. *Id. See also* Cromer v. City of Indianapolis, 540 N.E.2d 663 (Ind. Ct. App. 1989). In *Cromer*, the plaintiff brought a wrongful death action against the City of Indianapolis, alleging that her husband's death was caused by the City's failure to set a proper speed limit, failure to redesign the highway on which the accident occurred, and failure to place appropriate warning signs along the highway. Reversing the trial court's summary judgment in favor of the City, the court of appeals held — on the issue of the warning signs — that the city "ha[d] not consciously balanced the risks and benefits to arrive at a decision not to place warning signs . . . ." *Id.* at 666. *Cf.* Mullen v. City of Mishawaka, 531 N.E.2d 229 (Ind. Ct. App. 1988).

The *Peavler* court offered a list of factors which, under the planning/operational analysis, would indicate immunity:

1. The nature of the conduct —
   a) Whether the conduct has a regulatory objective;
   b) Whether the conduct involved the balancing of factors without reliance on a readily ascertainable rule or standard;
   c) Whether the conduct requires a judgment based on policy decisions;
   d) Whether the decision involved adopting general principles or only applying them;
   e) Whether the conduct involved establishment of plans, specifications and schedule; and
   f) Whether the decision involved assessing priorities, weighing of budgetary considerations or allocation of resources.
2. The effect on governmental operations —
   a) Whether the decision affects the feasibility or practicability of a government program; and
   b) Whether liability will affect the effective administration of the function in question.
3. The capacity of the court to evaluate the propriety of the government's action — Whether tort standards offer an insufficient evaluation of the plaintiff's claims.[51]

Justice Pivarnik, in his dissent, stated that "[t]he affect [sic] of the holding of the majority [in *Peavler*] is to virtually wipe out all governmental immunity . . . ."[52] A review of the cases decided since *Peavler*, however, suggests that Justice Pivarnik's prediction was somewhat overstated. At best, Indiana's post*Peavler* decisions offer a "mixed bag" of opportunities and pitfalls for the potential plaintiff.

The several Indiana Supreme Court cases that have considered the ITCA since *Peavler*[53] have dealt primarily with the notice provisions of

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51. *Peavler*, 528 N.E.2d at 46.

52. *Id.* at 51.

53. One of these cases, Indiana State Highway Comm'n v. Morris, 528 N.E.2d 468 (1988), was decided prior to the survey period. In *Morris*, the plaintiff — who had been seriously injured in an auto accident on a one lane state highway bridge — filed an action against the state "alleging negligence in construction, maintenance and traffic engineering of the bridge." *Id.* at 469-70.

Within the 180 days prescribed by statute, the plaintiff served notice of her complaint with the Indiana State Highway Commission, but she did not serve notice of her complaint upon the state's Attorney General. However, an employee at the Highway Commission

the Act.[54] One case dealt with section 1983.[55] The Indiana appellate courts, however, have provided the majority of the decisions directly addressing the issues raised by *Peavler*.[56]

### *B. The Relationship Between Policy-making and ITCA Discretionary Act Immunity*

In 1989, the Court of Appeals for the First District had occasion to apply the *Peavler* analysis. In *City of Seymour v. Onyx Paving Co.*,[57] Onyx met with the Building Commissioner of the city of Seymour to inquire into zoning classifications concerning a piece of property Onyx wanted to buy. Onyx intended to build a bituminous asphalt batch plant on the site. The Building Commissioner consulted the zoning code and informed Onyx that the plant could be built on the site selected by Onyx. Relying on the Commissioner's word, Onyx bought the property and obtained an Improvement Location Permit from the Commissioner. Onyx acquired other necessary permits and began construction of the plant.

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made a copy of the notice and forwarded it to the Attorney General's office pursuant to standard operating procedures at the Commission. That copy was received in the Attorney General's office within the 180-day notice period.

Vacating the court of appeals decision, the Indiana Supreme Court held that the notice provision of the Tort Claims Act had been substantially complied with even though the plaintiff had not actually sent notice to the Attorney General. *Id.* at 470. The court reasoned that the "language of the statute, literally applied, simply requires that the tort claim notice be filed with the Attorney General and the state agency. It does not designate who must file the notice." *Id.* Consequently, the fact that the Highway Commission employee sent a copy of the notice to the Attorney General's office within the 180-day period allowed by statute was sufficient for the court to find that the plaintiff had substantially complied with the Act's notice requirements. *Id.* at 470-71.

Another of the five cases determined since *Peavler* is Boger v. Lake County Commr's, 547 N.E.2d 257 (Ind. 1989) (Indiana Supreme Court remanded a summary judgment in favor of the government).

54. IND. CODE § 34-4-16.5-7 (1988) concerns the notice requirements for claims against political subdivisions; IND. CODE § 34-4-16.5-8 (1988) concerns the notice requirement to be given by incapacitated plaintiffs; IND. CODE § 34-4-16.5-9 (1988) concerns the form of statement of the notice requirement; and IND. CODE § 34-4-16.5-11 (1988) deals with service of the notice.

55. Werblo v. Hamilton Heights School Corp., 537 N.E.2d 499 (Ind. 1989).

56. In addition to those cases discussed in detail below, see Huntley v. City of Gary, 550 N.E.2d 790 (Ind. Ct. App. 1990) and Borne v. N.W. Allen County School Corp., 532 N.E.2d 1196 (Ind. Ct. App. 1989). In *Huntley*, the court held that under the planning/operational test announced in *Peavler*, an ambulance driver's exercise of professional judgment in driving through an intersection did not rise to the level of a policy-making decision and was not therefore protected by ITCA immunity. *Huntley*, 550 N.E.2d at 792. In *Borne*, the court held that under the planning/operational test, a teacher's exercise of professional judgment in allowing students to use a public restroom, unchaperoned, did not rise to the level of a policy decision. *Borne*, 532 N.E.2d at 1200-01.

57. 541 N.E.2d 951 (Ind. Ct. App. 1989).

During construction, the Commissioner issued a stop work order at the site pursuant to the mayor's direction. Onyx complied with the order. The Commissioner, the mayor, and the city attorney requested that Onyx provide proof of exemption from the State Building Commission, and requested that Onyx provide a better site plan. Onyx provided the requested information. The city then requested Onyx to obtain a Special Exception Permit.[58]

At that point, Onyx filed suit in the Jackson Circuit Court and requested injunctive relief and damages. Concurrently, Onyx filed an appeal with the Seymour Board of Zoning Appeals which was denied. Onyx then filed a notice of tort claim with the city which was never honored or denied. The trial court found in favor of Onyx.[59] It granted Onyx's request for an injunction, and denied the city's request for injunctive relief.[60]

On appeal, the city asserted that its act of issuing the stop work order was immune from suit by virtue of the protection afforded under the ITCA. Principally, the city relied upon Indiana Code section 34-4-16.5-3(6), which immunizes a governmental entity or employee acting within the scope of employment if the loss results from the performance of a discretionary function.[61] The court of appeals reversed and remanded the trial court's decision.[62]

In its discretionary function analysis, the court acknowledged *Peavler* and the planning/operational test as a means of determining whether conduct is entitled to discretionary act immunity.[63] The court of appeals determined that the appropriate post*Peavler* analysis required an "inquiry into the nature of the governmental act and the decision making process involved. It is not enough to merely inquire as to whether judgment was exercised, but rather one must inquire as to whether the *judgment* calls for policy considerations."[64]

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58. The Special Exception Permit was requested because the city believed that the asphalt batch plant could manufacture tar or tar products or engage in the process of oil processing, refining, and manufacturing.

59. The jury awarded Onyx damages in the amount of $121,600, in addition to injunctive relief. *Onyx*, 541 N.E.2d at 953.

60. *Id.*

61. Seymour also pleaded immunity under three other sections of the ITCA: IND. CODE § 34-4-16.5-3(7) (1988), concerning the adoption and enforcement of a law; IND. CODE § 34-4-16.5-3(10) (1988), concerning the issuance, denial, or revocation of a permit; and IND. CODE § 34-16.5-3(11) (1988), concerning the failure of the government to inspect property to determine whether the property is in compliance with the law. *Id.* at 956. The court held that Seymour was entitled to immunity under each of these other sections as well as under section 6 providing for discretionary immunity. *Id.* at 957-58. This Article discusses only the court's discretionary immunity analysis.

62. *Id.* at 959.

63. *Id.* at 956-58.

64. *Id.* at 957 (emphasis added).

Under the court's preliminary analysis, very few government actions would seem to be protected by tort claims immunity by virtue of their discretionary nature. Only actions arising to government policy-making would be protected. Nevertheless, the *Onyx* court concluded in purportedly applying the planning/operational test of *Peavler* that the city was immune from damage claims arising from the issuance of its stop work order.[65] The court held that the city's goal in issuing the stop work order was to enforce a regulation, and the decision whether to issue the order was a "judgment based upon policy decisions."[66]

> The [building commissioner's] decision also involved the balancing of several factors without the opportunity to rely on a readily ascertainable rule or standard. . . . Moreover, the imposition of liability would certainly affect the building commissioner's ability to effectively enforce the zoning code. Finally, the traditional tort standards of reasonableness do not provide an adequate basis for evaluating the act challenged here.[67]

Thus, the court of appeals found the existence of several *Peavler* "factors" that the supreme court stated could, "under most circumstances, point to immunity."[68]

The court of appeals, however, appears to have treated the presence of those factors as dispositive in determining whether the stop work order was the type of policy-making function intended to be protected from tort claims. The essential step in *Peavler's* planning/operational test is finding whether the discretionary act rises to the level of "the essence of governing,"[69] and whether the act "involves formulations of basic policy decisions."[70] In zoning cases such as *Onyx*, the only act that would rise to that policy-making level would be the city's initial creation of zoning districts. The issuance of the stop-work order was purely operational. Seymour was attempting to stop the siting of Onyx's facility, claiming the possible violation of an *existing* city zoning ordinance. Because the city could not demonstrate that it had entered into a deliberative policy-making process in issuing the stop work order, the wrongful issuance of the order should not have been protected by the ITCA's discretionary act immunity. The mere presence of one or even several of the *Peavler* factors does not dispense with the need for a

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65. *Id.*
66. *Id.*
67. *Id.*
68. *Peavler*, 528 N.E.2d at 46.
69. *Id.* at 45.
70. *Id.*

court to take the additional step of determining whether the governmental entity actually engaged in *policy-making* in the performance of the objectionable act.[71]

### C. *Immunity Arising from the Enforcement of Law*

The Indiana Court of Appeals for the Third District decided *Van Keppel v. County of Jasper*,[72] which interpreted Indiana Code section 34-4-16.5-3(7).[73] Van Keppel owned a farm in Jasper County. Two drainage ditches controlled by the Jasper County Drainage Board were located on his property. Prior to 1985, Van Keppel made improvements to this water control system without approval of the Board. Later, the Board determined the drainage ditches were not properly functioning, and the Board ordered Van Keppel to return them to their original condition. Van Keppel failed to follow the order. The Board hired a contractor to complete the work.

After the work was completed, Van Keppel filed a complaint in the Jasper County Circuit Court against the Board and the contractor, alleging that the contractor, under direction of the Board, negligently removed and destroyed his property.[74] Van Keppel also alleged an improper taking of his property.[75] The trial court dismissed all governmental entities from the case based on governmental immunity.[76]

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71. *Onyx* raises other questions about the *Peavler* analysis. For example, in *Peavler*, the Indiana Supreme Court arguably listed only three "factors" to be considered when determining whether ITCA immunity should be permitted: the nature of the conduct, the effect on governmental operations, and the capacity of the court to evaluate the propriety of the government's action — "[w]hether tort standards offer an insufficient evaluation of the plaintiff's claims." *Peavler*, 528 N.E.2d at 46. Under the first two factors, the court listed several subfactors linked together with a conjunctive "and." The *Onyx* court relied on several, but not all, of the subfactors listed by the court under the first factor. Should the court have been required to demonstrate the existence of each subfactor because of the conjunction? Further, what exactly is the relationship between the three main factors? Will the existence of any one factor be sufficient to find immunity or must a court find that all three factors are present? The answer to these questions is probably that the factors were not intended by the Indiana Supreme Court to be talismanic. But if the courts are permitted to rely on the *Peavler* factors without making the essential "policy-making" analysis, such questions will become quite important.

72. 556 N.E.2d 333 (Ind. Ct. App. 1990).

73. A governmental entity or an employee acting within the scope of his employment is not liable if a loss results from "[t]he adoption and enforcement of or failure to adopt or enforce a law (including rules and regulations), unless the act of enforcement constitutes false arrest or false imprisonment . . . ." IND. CODE § 34-4-16.5-3(7) (1988).

74. *Van Keppel*, 556 N.E.2d at 335.

75. *Id.*

76. *Id.*

Van Keppel admitted on appeal that the Board was empowered to order the ditches to be reconstructed.[77] However, he argued that immunity did not exist because the order and contract were carried out under the control of the County Surveyor. In essence, Van Keppel argued that although the Surveyor is immune from the decision to enforce the Drainage Code, the Surveyor is not immune from the losses resulting from the implementation of the decision.[78]

The court of appeals noted that there is no distinction between deciding to enforce a law and implementing that decision.[79] The court found the losses occurred during the decision's implementation, and therefore immunity may have existed.[80] However, the Indiana Drainage Code required the Surveyor, "*to the extent possible, [to] use due care to avoid damage to crops . . . outside of [the county's] right-of-way.*"[81] Ultimately, the court reversed the trial court's decision because the appellant had succeeded in raising an issue of fact concerning whether the Surveyor exercised "due care" in the performance of his duty.[82]

*Van Keppel* is interesting because the court of appeals recognized that "due care," or rather the lack of due care, would be sufficient to remove a governmental act from the shield of immunity provided by the ITCA.[83] Although *Van Keppel* may be properly limited to its facts (that is, the existence of a statute explicitly requiring that due care be exercised), the case provides a starting point for arguing that equitable considerations should always be taken into account when discussing the scope of protection afforded under the ITCA. The appellate courts recently have considered this argument in other cases involving claims of governmental bad faith and outrageous conduct.

### *D. Bad Faith and the ITCA*

In *Indiana Department of Correction v. Stagg*,[84] the Indiana Court of Appeals for the Fourth District held that there is no requirement to show good faith to qualify for immunity under the ITCA.[85] The facts are as follows: Stagg was an attorney who occasionally represented

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77. The Board's power exists pursuant to the Indiana Drainage Code, IND. CODE § 36-9-27-1 to -113 (1988 & Supp. 1990).

78. *Van Keppel*, 556 N.E.2d at 336.

79. *Id.* The court relied on Cain v. Board of Commr's of Cass County, 491 N.E.2d 544, 548 (Ind. Ct. App. 1986).

80. *Van Keppel*, 556 N.E.2d at 336.

81. *Id.* (emphasis by the court).

82. *Id.*

83. *Id.*

84. 556 N.E.2d 1338 (Ind. Ct. App. 1990).

85. *Id.* at 1341.

criminal defendants on a court-appointed basis. In 1986, she was appointed to represent a prisoner who was incarcerated at the Indiana State Farm prison. Stagg met with the prisoner in January, February, and March of 1986 to prepare his defense.[86] The prisoner entered a guilty plea in April 1986.[87]

In June 1986, Stagg received a letter from the prisoner that included a memorandum that had been placed in his prison file when he was transferred from the Indiana State Farm to the Indiana Reformatory. The memorandum stated that the prisoner had employed an attorney who was romantically involved with the prisoner. Stagg brought a small claims action against the Department of Correction and its employees. The trial court found for Stagg, adopted Stagg's proposed conclusions of law, and stated that the defendants were not entitled to immunity because they did not act in good faith in writing the memorandum.[88]

The defendants appealed and contended they were immune from suit under Indiana Code section 34-4-5.6-3. The court of appeals reversed the trial court and held that "there is no requirement of a showing of good faith in order to qualify for the immunity" afforded under the ITCA.[89] The court stated that "although the matter was poorly handled, we do not find the defendants' conduct rises to the level of 'outrageous conduct,' nor do we find they acted outside the scope of their employment."[90] The court seemed to suggest that bad faith could not be demonstrated if the defendants were acting within the scope or their employment, absent a finding of outrageous behavior.

However, Judge Staton, quoting *Campbell v. State* in his dissent,[91] stated that the ITCA was merely a codification of the common law doctrine of sovereign immunity.[92] Under the common law, "[t]hree considerations are foremost in a determination as to the applicability of this qualified privilege."[93] The third such consideration is "whether the action was *made in good faith* (improper motives or a malicious purpose in exercising the discretion would, at common law, vitiate the immunity

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86. Stagg always met with the prisoner at the maximum security unit of the prison. She complied with all the regulations and submitted to all searches of her person and briefcase.

87. *Stagg*, 556 N.E.2d at 1340.

88. *Id.* at 1341.

89. *Id.*

90. *Id.* at 1344.

91. 259 Ind. 55, 284 N.E.2d 733 (1972). *See supra* notes 19-21 and accompanying text.

92. *Stagg*, 556 N.E.2d at 1345 (Staton, J., dissenting).

93. *Id.* (Staton, J., dissenting) (quoting Note, *Sovereign Immunity in Indiana — Requiem?*, 6 IND. L. REV. 92, 104 (1972)).

privilege).''[94] The dissent suggested that the issue of bad faith goes directly to the question of whether the actors were acting within the scope of their employment.

The dissent in *Stagg* persuasively argued that a governmental defendant should be required to demonstrate good faith in order to preserve ITCA immunity.[95] Under the majority's holding in *Stagg*, if an employee is technically acting within the scope of his employment, the employee enjoys ITCA discretionary act immunity absent outrageous conduct.[96] As suggested by the dissent, the existence of bad faith (not ''outrageous conduct'') should necessarily be taken to demonstrate that the governmental employee was acting outside of the scope of his employment.[97] In such cases, immunity should be denied.[98] As demonstrated by the uniqueness of the next case, if a court must find outrageous conduct to deny ITCA immunity, there will be few instances in which such immunity is denied.

### *E. Outrageous Conduct*

The most recent case decided by the court of appeals since *Peavler* is *City of Wakarusa v. Holdeman*.[99] In *Holdeman*, a deputy marshall was involved in a motor vehicle accident with Holdeman. The marshall was traveling northbound checking license plates of trucks traveling southbound. He was checking the license plates by looking in his rearview mirror and looking over his shoulder. He failed to see that the traffic ahead of him had stopped, and he hit Holdeman's vehicle. The marshall admitted that he was not paying attention. The case went before the court on the defendant's motion for summary judgment. The defendant argued that his conduct did not amount to ''outrageous conduct'' as a matter of law. The trial court held that the question of whether the conduct was outrageous — and, therefore, unprotected by the ITCA — was one of fact.[100] Summary judgment was denied and the marshall appealed; the appellate court affirmed the denial of the summary judgment.[101]

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94. *Id.* (Staton, J., dissenting) (emphasis added).
95. *Id.* at 1344-46 (Staton, J., dissenting).
96. *Id.* at 1344.
97. *Id.* at 1345 (Staton, J., dissenting).
98. In Kellogg v. City of Gary, the Indiana Supreme Court recognized that public officials must be able to demonstrate the existence of a reasonable good faith belief in the correctness of their action in order to preserve the qualified immunity to nonjudicial public officers exercising discretionary, policy-making acts. 562 N.E.2d 685, 707 (Ind. 1990) (citing Harlow v. Fitzgerald, 452 U.S. 800, 818 (1982)).
99. 560 N.E.2d 109 (Ind. Ct. App. 1990).
100. *Id.* at 110.
101. *Id.* at 111.

The appellate court determined that the very nature of the activity could be considered "a disregard for the safety of others."[102] The court noted that the disregard may not have been conscious, but reckless to the point of outrageousness.[103] The court relied on *Seymour National Bank v. State*,[104] which stated that acts may be so outrageous that they are incompatible with the performance of the duty and therefore are beyond the scope of employment.[105]

The progression of appellate decisions from *Van Keppel* to *Stagg* to *Holdeman* suggests that immunity under the ITCA may be susceptible to challenge through the use of a variety of well-reasoned equitable arguments. Other Indiana Supreme Court post*Peavler* decisions concerning the ITCA's notice provisions are additional evidence suggesting a favorable judicial climate in which to challenge the ITCA.

### *F. ITCA Notice Provisions*

In *Collier v. Prater*,[106] the Indiana Supreme Court considered for the first time[107] the question of substantial compliance with the ITCA's notice provisions based purely on content. Alleging that two officers used excessive force in the appellant's arrest, the appellant's attorney sent a tort claim notice to the Indianapolis Police Department within the statutory 180-day period. The question for the court concerned the content of the notice and whether it "afforded the city an opportunity to investigate the impending claim."[108] The court found that the claim "stated an intent to seek damages, noted that the damages were for injuries received during an arrest, identified the persons involved in that arrest, and explained that the full extent of . . . [the] damages could not be ascertained." [109] However, the appellant's notice did not include the place or date of the event.

Vacating the court of appeals, the Indiana Supreme Court ruled that the plaintiff's notice substantially complied with the Tort Claims Act.[110] The court held that the absence of any reference to the place or date in the claim was not important; the appellees had the necessary

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102. *Id.* at 110.

103. *Id.* This is the first Indiana case finding that a governmental employee's act could be outrageous enough to fall outside of the employee's scope of employment.

104. 428 N.E.2d 203 (Ind. 1981), *appeal dismissed*, 457 U.S. 1127 (1982).

105. *Id.* at 204.

106. 544 N.E.2d 497 (Ind. 1989).

107. "The issue of what constitutes substantial compliance where the content of the notice is being challenged has not been squarely before this Court." *Id.* at 499.

108. *Id.* at 500-01.

109. *Id.* at 500.

110. *Id.*

information to make an adequate investigation.[111] The only information necessary in a tort claim notice is that which will afford the state "an opportunity to investigate the impending claim." [112] Further, the court held that "substantial compliance [with the Act], while not a question of fact but one of law, is a fact-sensitive determination."[113] Considering all the facts, the court reasoned that the City of Indianapolis had received more than enough information in the plaintiff's notice to investigate and prepare for legal action.[114] The court concluded by stating that "[j]ust as the notice statute should not become a trap for the unwary, neither should it become a refuge for the unconscientious."[115]

### *G. Loss, Property Rights, and the ITCA*

In its most recent post*Peavler* decision, the Indiana Supreme Court held that lost wages and fringe benefits are property rights for purposes of the ITCA.[116] In *Holtz v. Board of Commissioners of Elkhart County*, the supreme court analyzed the issue of whether an action for retaliatory discharge is based in tort or in contract. It held that the claim was

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111. *Id.*
112. *Id.* at 500-01.
113. *Id.* at 499.
114. *Id.* at 499-500.
115. *Id.* at 500 (citations omitted).
116. Holtz v. Board of Commr's of Elkhart County, 560 N.E.2d 645 (Ind. 1990). The Indiana Supreme Court, in holding lost wages and fringe benefits to be property rights, overruled the Indiana Court of Appeals for the Fourth District. *Id.* at 648. The court of appeals held that a claim for retaliatory discharge is not a "loss" under the ITCA. Holtz v. Board of Commr's of Elkhart County, 548 N.E.2d 1220, 1222 (Ind. Ct. App. 1990). The court of appeals also held that an employee at will does not have a property interest in his employment. *Holtz*, 560 N.E.2d at 646-47.

Holtz filed a complaint for retaliatory discharge alleging the Board of Commissioners terminated his employment because he took actions to notify the Attorney General and the Indiana Department of Highways of certain deficiencies in the bridge inspection procedure used by the county. *Id.* at 646. Holtz did not file a notice of tort claim with the Board. The trial court entered summary judgment in favor of the Board. The trial court concluded that mandatory discharge was a tort rather than a contract claim, and Holtz's claim was therefore barred because he did not provide notice as required by the ITCA. *Id.* The court of appeals did not discuss whether the claim was one of tort or contract because it found the claim did not fall within the Tort Claims Act. *Id.* at 647. The court of appeals looked to the ITCA definition of loss. The definition is "injury to or death of a person, or damage to property . . . ." IND. CODE § 34-4-15.5-1(4) (1988).

The court of appeals also relied upon the Indiana Supreme Court's holding in Collier v. Prater, 544 N.E.2d 497 (Ind. 1989): the Tort Claims Act is in "derogation to common law rights and should be strictly construed against limitations on a claimant's right to bring suit." *Holtz*, 548 N.E.2d at 1222. The court of appeals in *Holtz* thus held that the Tort Claims Act does not apply to retaliatory discharge, and therefore the notice provisions did not apply. *Holtz*, 560 N.E.2d at 647.

tortious in nature because the act of discharge is intended to cause an "intentional invasion."[117] The court concluded that the plaintiff's claim was subject to the ITCA because it could not interpret the ITCA as "applying only to some torts."[118] Further, the court held that the damages sought by the plaintiff were property *rights* cognizable as "loss" under the ITCA.[119] The court held that the legislature intended all torts committed against either persons or property to be included in the definition.[120]

Justice Dickson and Justice DeBruler dissented, and stated that the majority failed to strictly construe the ITCA as it acknowledged it should.[121] The *Holtz* dissent relied on the court's decision in *Collier* which held that the ITCA was to be strictly construed "against limitations on a claimant's right to bring suit."[122] In addition, the dissent found the ordinary meaning of the term "loss" to apply to nothing more than harm to a *person* or *property*. It found that to define "loss" to apply to a property right is contrary to the plain meaning of the term "loss" and contrary to the holdings in *Collier* and *Morris*.[123]

## IV. Section 1983 and the ITCA

Administrative agency employees are not immune from their own personal or political predilections, or from those of their superiors. When agency action is materially influenced by ill will, prejudice, or politics, what can an aggrieved party do? Recent Indiana appellate decisions suggest that one remedy may be to sue under 42 U.S.C. § 1983[124] for

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117. *Holtz*, 560 N.E.2d at 646.

118. *Id.* at 647.

119. *Id.*

120. *Id.* at 645-46.

121. *Id.* at 648 (Dickson, J., dissenting) (citing Collier v. Prater, 544 N.E.2d 497, 498 (Ind. 1989)).

122. *Id.* (Dickson, J., dissenting) (quoting *Collier*, 544 N.E.2d at 498). *See also* Indiana State Highway Commr's v. Morris, 528 N.E.2d 468, 473 (Ind. 1988) (ITCA "must be strictly construed and narrowly applied.").

123. *Holtz*, 560 N.E.2d at 648 (Dickson, J., dissenting). It should be noted that the majority's definition of property, though relatively inclusive, does not preclude use of the argument advanced by the court of appeals — that individuals can suffer losses other than to their property or as personal injury, and therefore fall outside the scope of the ITCA. Perhaps one of the clearest examples of such a loss would be when, as in the case of an environmental permit, a statute and a regulation clearly indicate that such a permit is not property and conveys no property rights. In such instances, when the loss of a permit or the failure to obtain a permit is caused by a tortious act of the state or one of the state's employees, it seems clear that the court of appeals holding in *Holtz* may yet have some vitality despite the Indiana Supreme Court's decision.

124. 42 U.S.C. § 1983 (1988) states as follows:

deprivation of the party's constitutionally guaranteed due process rights. Since 1982, the United States Supreme Court has held that plaintiffs need not exhaust state court remedies prior to bringing a section 1983 action in federal court.[125] In 1988, the Court extended this exception to the exhaustion doctrine by holding that plaintiffs need not exhaust state administrative remedies prior to filing a suit in *state* court.[126] In *Felder v. Casey*, the Court reasoned that

> there is simply no reason to suppose that Congress meant 'to provide . . . [§ 1983 plaintiffs] immediate access to the federal courts notwithstanding any provision of state law to the contrary, . . . yet contemplated that those who sought to vindicate their federal rights in state courts could be required to seek redress in the first instance from the very state officials whose hostility to those rights precipitated their injury.[127]

The *Felder* Court also held that section 1983 actions brought in state court are exempt from the notice of claim provisions usually found in a state's tort claims act.[128] In Wisconsin,[129] the state's tort claims act provided that

> no action may be brought or maintained against any state governmental subdivision, agency, or officer unless the claimant either provides written notice of the claim within 120 days of the alleged injury, or demonstrates that the relevant subdivision, agency, or officer had actual notice of the claim and was not prejudiced by the lack of written notice.[130]

The Court held that Wisconsin's notice-of-claim statutes undermined the "uniquely federal remedy" provided by section 1983 by (1) condi-

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> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

125. Patsy v. Board of Regents of Fla., 457 U.S. 496 (1982).

126. Felder v. Casey, 487 U.S. 131 (1988).

127. *Id.* at 147 (citations omitted).

128. *Id.* at 151-53.

129. Wisconsin is the state in which *Felder* originated.

130. *Felder*, 487 U.S. at 136 (citing WIS. STAT. § 893.80(1)(a) (1983 & Supp. 1987)). Indiana has a similar statute. However, in Indiana, claims must be filed within 180 days and there is no provision for showing that lack of written notice was not prejudicial. IND. CODE § 34-4-16.5-6 to -7 (1988).

tioning plaintiffs' recovery under section 1983 upon compliance with a state statute of which the sole purpose (to minimize government liability) is "manifestly inconsistent" with the purpose of the federal statute, by (2) discriminating against a federal right, and by (3) operating "in part, as an exhaustion requirement."[131] All of these factors contributed to the Court's holding:

> [T]he enforcement of such statutes in § 1983 actions brought in state court will frequently and predictably produce different outcomes in federal civil rights litigation based solely on whether that litigation takes place in state or federal courts. *States may not apply such outcome-determinative law when entertaining substantive federal rights in their courts.*[132]

The court added that "a state law that immunizes government conduct otherwise subject to suit under § 1983 is preempted, even where the federal civil rights litigation takes place in state court, because the application of the state immunity law would thwart the congressional remedy."[133]

The immunity that *Felder* held to be preempted by section 1983 was granted by state law under a tort claims act. Those cases in no way diminished a state's immunity to section 1983 suits brought in federal courts under the eleventh amendment to the United States Constitution.[134] Eleventh amendment immunity can only be lost by a clear waiver of the immunity by the state.[135] In Indiana, the legislature has preserved eleventh amendment immunity by statute[136] and, consequently, a section 1983 action against the state or agencies of the state will not lie in federal court.[137]

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131. *Felder*, 487 U.S. at 141-42 (citation omitted).

132. *Id.* at 141 (emphasis added). *See also* Kellogg v. City of Gary, 562 N.E.2d 685, 690 (Ind. 1990), wherein the Indiana Supreme Court quotes this same passage from *Felder*.

133. *Felder*, 487 U.S. at 139 (citing Martinez v. California, 444 U.S. 277, 284 (1980).

134. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

135. Hendrix v. Indiana State Pub. Defender Sys., 581 F. Supp. 31, 32 (N.D. Ind. 1984).

136. IND. CODE § 34-4-16.7-3 (1988) provides that "[n]othing contained in this chapter shall be construed as a waiver of the eleventh amendment to the Constitution of the United States, as consent by the state of Indiana or its employees to be sued in any federal court, or as consent to be sued in any state court beyond the boundaries of the state of Indiana."

137. *Hendrix*, 581 F. Supp. at 32.

However, after *Felder*, a section 1983 claimant who chooses to bring an action in a state court clearly should not be required to exhaust administrative remedies prior to such filing, nor should the action be precluded either on substantive or procedural grounds by a state's tort claims act.

The Indiana Supreme Court followed *Felder* in *Werblo v. Hamilton Heights School Corp.*[138] In that decision, the Indiana Supreme Court addressed the issue of whether a section 1983 action is subject to the ITCA notice provision. The plaintiff, a school teacher who was dismissed for insubordination, filed a three-count complaint in the trial court, the first count alleging that the school corporation had violated her civil rights under 42 U.S.C. § 1983. The trial court dismissed the section 1983 claim because the plaintiff had failed to comply with the 180-day notice provision of the ITCA. The court of appeals upheld the trial court's determination regarding the section 1983 claim.[139]

The court of appeals decision was handed down prior to the United States Supreme Court decision in *Felder*. The Indiana Supreme Court consequently overruled the court of appeals, and held that a section 1983 action is not subject to the ITCA notice requirement.[140] Although *Werblo* marked the Indiana Supreme Court's first opportunity to follow *Felder*, the Indiana court of appeals first recognized *Felder* in a 1988 decision, *George v. Hatcher*.[141]

Thus, in Indiana, section 1983 claims are no longer subject to the notice provisions of the ITCA. Additionally, the Indiana Supreme Court has held that *Felder* is applicable to more than just the notice provisions in the ITCA.[142] In *Kellogg v. City of Gary*, the court of appeals found that the "failure of the citizens to wait until their claim had been denied in whole or part before bringing suit against the city violated section 12 of the Indiana Tort Claims Act, Indiana Code section 34-4-16.5-12, and was fatal to their claim."[143] The Indiana Supreme Court reversed, holding that the lower court's decision "contravenes that of the United States Supreme Court in *Felder v. Casey*."[144] The *Kellogg* decision suggests that section 1983 preempts all of those portions of the ITCA contrary to the remedial purposes of the federal civil rights statute.

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138. 537 N.E.2d 499 (Ind. 1989).

139. *Id.* at 500.

140. *Id.* at 501.

141. 527 N.E.2d 199 (Ind. Ct. App. 1988).

142. *See* Kellogg v. City of Gary, 562 N.E.2d 685 (Ind. 1990).

143. *Id.* at 688. IND. CODE § 34-4-16.5-12 (1988) provides that "[a] person may not initiate a suit against a governmental entity unless his claim has been denied in whole or in part."

144. *Kellogg*, 562 N.E.2d at 688.

In addition to their impact on the ITCA, *Werblo* and *Felder* may have significantly altered the relationship between the exhaustion doctrine and section 1983. "Pre*Felder*" Indiana cases uniformly held that when a plaintiff had a remedy under the state's Administrative Adjudication Act (AAA),[145] "the provisions of the AAA supersede the provisions of § 1983 in actions brought in *state* court."[146] Those cases probably have been overruled by *Felder* to the extent that they require the exhaustion of AOPA procedures prior to filing a section 1983 action in a state court.

## V. Compensation for the Regulatory Taking of Private Property

### *A. Introduction*

The power of eminent domain is one of the government's most potent tools to promote the safety, health, morals, and general welfare of the public at large. However, when the government chooses to exercise this power, it must compensate individual owners for the "taking."[147] The fifth amendment's prohibition against takings has been applied to the states through the fourteenth amendment.[148] Additionally, article 1, section 21 to the Indiana Constitution provides that "[n]o person's property shall be taken by law, without just compensation . . . ."[149] Thus, the government clearly has the right to take private property for the public good, but it must reimburse the private property owner with appropriate compensation.

When the government physically occupies private property, there can be little question that a compensable taking has occurred.[150] Questions do arise, however, when governmental action simply *restricts* the use of certain property to the detriment of the property owner *without compensation*. The United States Supreme Court has long recognized that when an agency restricts the use of private property, a taking can occur

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145. The AAA is an earlier version of the AOPA.

146. May v. Blinzinger, 460 N.E.2d 546, 550 (Ind. Ct. App. 1984) (emphasis added). *See also* State v. Taylor, 419 N.E.2d 819, 824 (Ind. Ct. App. 1981); Thompson v. Medical Licensing Bd. of Ind., 180 Ind. App. 333, 347-48, 398 N.E.2d 679, 680 (1979), *cert. denied*, 449 U.S. 937 (1980).

147. The fifth amendment of the United States Constitution reads in pertinent part: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

148. *See, e.g.*, Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158 (1896).

149. Ind. Const. art. I, § 21.

150. *See, eg.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

if the restriction is not reasonably necessary to effect a substantial government purpose.[151] When the taking occurs, the government must provide compensation.[152]

Actions for inverse condemnation are particularly appropriate in permit situations when an agency either refuses or fails to issue an appropriate permit notwithstanding that all permit requirements have been satisfied. The Indiana Supreme Court addressed the issue of such regulatory takings in *Department of Natural Resources v. Indiana Coal Council, Inc.*[153] In that case, the Department of Natural Resources (DNR) prohibited a landowner — the Huntington Machinery & Equipment Rental, Inc. (HUMER) — from strip mining the 6.57 acre tract of its land that contained the archaeologically significant "Beehunter's Site."[154] DNR designated the tract unsuitable for surface coal mining pursuant to its authority under Indiana Code section 13-4.1-14-2.[155] As part of its final order, however, DNR included a "mitigation plan" that would allow the designation of an "area unsuitable" to be removed from the final order.[156] In holding that DNR's action did not amount to a regulatory taking, the Indiana Supreme Court relied upon the two-prong test provided by the United States Supreme Court in *Nollan v. California Coastal Commission*.[157]

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151. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 127 (1978).

152. *See* Pennsylvania Coal v. Mahon, 260 U.S. 393, 413 (1922). Recently, the United States Supreme Court reconsidered the "takings" question in Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987). The Court held that when a regulation provides that "individuals are given a permanent and continuous right to pass to and from, so that the real property may continuously be traversed even though no particular individual is permitted to station himself permanently," a permanent physical occupation has occurred and just compensation must be provided. *Id.* at 832.

153. 542 N.E.2d 1000 (Ind. 1989), *cert. denied*, 1104 S. Ct. 1130 (1990).

154. Both HUMER and the Indiana Coal Council challenged the DNR decision in the Dubois Circuit Court. The circuit court ruled that the statute relied upon by DNR was unconstitutional. *Id.* at 1001-02. The Indiana Supreme Court took the case on transfer to decide the constitutionality of the state statute.

155. The court determined that the tract was unsuitable because such mining would "affect fragile and historic lands in which the operation could result in significant damage to important historic, cultural, scientific, and aesthetic values and natural systems." *Coal Council*, 542 N.E.2d at 1002 (quoting IND. CODE § 13-4.1-14-4 (1987)).

156. The court pointed out that the mitigation plan called for site testing and data recovery conducted by a DNR-approved archaeological contractor. *Coal Council*, 542 N.E.2d at 1002. The plan did not require HUMER to carry out the plan, to expend any money, or to convey any property or property right to the state. The court noted that the designation did not prevent HUMER from mining so long as the coal lying underneath the 6.57 acre Beehunter Site was extracted by means other than strip mining. *Id.* For these reasons, the court held that DNR's order designating the Beehunter Site as an area unsuitable for surface coal mining and providing the mitigation plan did not amount to a taking of property. *Id.*

157. 483 U.S. 825, 1834 (1987).

The United States Supreme Court held that a land use regulation is not a taking if it "*substantially* advances a legitimate state interest and does not deprive an owner of economically viable use of his property."[158] In *Nollan*, the Court chose the "substantial advancement" standard but made clear that a standard had not finally been settled on for all situations.[159] Although the Indiana Supreme Court chose to follow the *Nollan* two-prong test, it did not follow the substantial *advancement* standard. Instead, the Indiana Supreme Court held in *Coal Council* that a "substantial *relationship*" is the necessary nexus between state action and state interest.[160] As applied, however, the court found this to be the same standard used in *Nollan*.[161]

Because removal of the archaeological information from the site prior to mining did not require actual conveyance of the property, this condition was not subject to the same heightened scrutiny as a land use restriction, and consequently it did not amount to a taking.[162] The court held that DNR's action was merely a regulation — rather than a taking — because the intrusion was minimal from an economic standpoint.[163] Even so, the Indiana court made clear that the conditions requiring the removal of the restrictions were in accord with *Nollan*.[164]

Considering the second prong of the taking test — deprivation of use in an economically viable manner[165] — *Coal Council* also established guidelines for determining what is considered an economically viable use. Specifically, the court considered why HUMER originally bought the property and how the regulation affected the value of the property.[166] The court also inquired as to whether the designation of the Beehunter's Site as an area unsuitable for surface coal mining interfered with the present use of the property.[167] HUMER did not expect to mine coal when it purchased the property. Because the property owner in *Coal Council* had originally purchased the property for farming purposes, the court held that the designation did not interfere with HUMER's "distinct investment-backed expectation."[168] The court was not persuaded that HUMER's loss of less than two percent of its coal reserves at the site

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158. *Coal Council*, 542 N.E.2d at 1002 (emphasis added) (citing *Nollan*, 483 U.S. at 834).
159. *Nollan*, 483 U.S. at 834, 841-42.
160. *Coal Council*, 542 N.E.2d at 1005.
161. *Id.*
162. *Id.* at 1006.
163. *Id.*
164. *Id.*
165. *Id.* at 1004.
166. *Id.*
167. *Id.*
168. *Id.*

would have a significant impact on the value of the total property. The court reaffirmed that a property owner is not entitled to the best, highest use of his property.[169]

HUMER's final argument, that the director's order for mitigation was arbitrary, capricious, and an abuse of discretion, did not persuade the court.[170] In finding against HUMER, the supreme court adopted the court of appeals' rule that "an administrative act is 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."[171]

*Coal Council* does not expand the concept of regulatory takings in Indiana significantly beyond the guidelines established by the United States Supreme Court. However, *Coal Council* does succeed in clearly establishing that there must be a substantial relationship between the state's action and the state's interest in order to avoid a regulatory taking.[172] *Coal Council* provides the framework through which future Indiana claimants will have to proceed in order to recover under the theory of regulatory taking.

## VI. Actions for Mandate

Actions for mandate[173] are extraordinary civil remedies that are equitable in nature.[174] The purpose of such actions is to empower courts to compel the performance of a legal duty that an inferior court has not performed. An action for mandate will only lie when the lower court or agency has failed to act in the face of a clear legal duty.[175]

By statute, an action for mandate may be prosecuted against an inferior tribunal, corporation, public or corporate officer, or person.[176] The scope of mandate actions has been interpreted to encompass actions against administrative agencies.[177] A court has jurisdiction to order an

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169. *Id.*

170. *Id.* at 1007.

171. *Id.* (citing Metropolitan School Dist. of Martinsville v. Mason, 451 N.E.2d 349 (Ind. Ct. App. 1983)).

172. *Id.* at 1005-07.

173. Ind. Code § 34-1-58-1 (1988 & Supp. 1990). An action for mandate was formerly known as a writ of mandate.

174. *See generally* Cleary v. Board of School Commr's of City of Indianapolis, 438 N.E.2d 12 (Ind. Ct. App. 1982).

175. *See, e.g.*, Marcrum v. Marion County Superior Court, 403 N.E.2d 806 (Ind. 1980).

176. Ind. Code § 34-1-58-2 (1988).

177. *See generally* Indiana Bd. of Fin. v. Marion County Superior Court, 396 N.E.2d 340 (Ind. 1979).

administrative agency to perform a statutory duty that is clear and imperative.[178] However, the jurisdiction is not all-encompassing. The court may not properly order an agency to accomplish a discretionary act in a particular manner.[179]

In *Lake Station v. Moore Real Estate, Inc.*,[180] the Indiana Supreme Court broadened its jurisdiction over actions in mandate in the administrative agency arena. The court held that resort to the court is appropriate when the agency refuses to act, thereby denying the injured party an appealable decision.[181]

In *Lake Station*, Moore Real Estate brought an action for mandate and damages against the city building commission alleging the commission failed to decide whether to grant a building permit. Moore had applied for the permit on March 12, 1985. The building commission discussed the application two days later and determined it needed more information. The next month, the application was again discussed, but the commission tabled the decision until receiving approval and legal advice from the city attorney.[182] Finally, after no further action, Moore mailed the city a notice of tort claim on October 12, 1985, and one week later filed a complaint for mandate and damages.[183]

The Indiana Supreme Court held that when an agency refuses to act, resort to the courts is appropriate.[184] In so holding, the court discussed the doctrine of exhaustion of administrative remedies. In Indiana, when an administrative remedy is provided it generally must be exhausted

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178. *See generally* State v. Board of Trustees of Spring Valley School Corp., 430 N.E.2d 791 (Ind. Ct. App. 1982).

179. *See generally* State v. Stateler, 424 N.E.2d 150 (Ind. Ct. App. 1981).

180. 558 N.E.2d 824 (Ind. 1990).

181. *Id.* at 828.

182. Moore's attorney attempted to contact the city attorney by letters and phone calls. Moore's attorney even met with the city's counsel. Finally, in early October 1985, Moore's attorney spoke with the city attorney who informed Moore's attorney that Moore did not comply. The commission did not take any action on the application.

183. Lake Station v. Moore Real Estate, Inc., 537 N.E.2d 61 (Ind. Ct. App. 1989), resolved an interlocutory appeal brought by Lake Station when its motion to dismiss the claim, because Moore untimely filed the tort claim notice, was denied. The court of appeals reversed the trial court and held Moore filed its tort claim notice more than 180 days after the omission causing the alleged loss. *Id.* at 62-63. The notice requirement applied only to the damages portion of the complaint filed against Lake Station. In Lake Station v. Moore Real Estate, Inc., 558 N.E.2d 824 (Ind. 1990), the Indiana Supreme Court held that there was a continuing wrong because the building commission failed to ever deny, grant, or otherwise act on the application. *Id.* at 827. The supreme court overruled the court of appeals and held the tort claims notice was timely filed. *Id.* at 828.

184. *Lake Station*, 558 N.E.2d at 828.

before judicial review may be sought.[185] The court explained that the doctrine of exhaustion of administrative remedies "places responsibility for administrative decisions with administrative bodies, where they belong."[186] The court then noted that the commission ignored its responsibility by not ruling or taking any action that could be appealed to the Building Department Review Board.[187] Therefore, the supreme court held that resort to the courts is appropriate when a governmental entity will not act.[188]

The *Lake Station* decision and the prior decisions of the Indiana Supreme Court clearly show that if an agency does not take the action it has a statutory duty to take, or if an agency unreasonably delays such actions or refuses to issue any appealable order, a court through an action for mandate can compel the agency to act in accordance with its legal duty.[189] *Lake Station* takes a significant step toward forcing administrative agencies to make the determinations or rulings that are in their power. After *Lake Station*, those who are confined by administrative inaction will have an alternative when an agency puts them on indefinite hold.

## VII. Conclusion

Administrative agencies affect virtually all aspects of daily life. Administrative law was developed to provide cost-effective remedies to peoples' problems. The administrative bureaucracy, however, does not provide an effective solution when administrative agencies act — or fail to act — for improper purposes. In those cases, aggrieved persons have

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185. *See supra* notes 11-14 and accompanying text for a general discussion of exhausion of remedies. *See generally* East Chicago v. Sinclair Refining Co., 232 Ind. 295, 111 N.E.2d 459 (1953). The Municipal code of the City of Lake Station provides: "Any person adversely affected by any such ruling, action or determination by the Building Commissioner may appeal to the Building Department Review Board." Lake Station, Ind. Code § 1355.03 (1981).

186. *Lake Station*, 558 N.E.2d at 828.

187. *Id.* at 827-28.

188. *Id.* at 828. The road for the *Moore* decision was paved in 1958 when Town of Homecroft v. Macbeth, 238 Ind. 57, 148 N.E.2d 563 (1958), was decided. In that case, the town board of zoning appeals argued that courts did not have authority to order the granting of a variance. The court rejected the argument and reasoned that "it is for the courts to protect ultimately the owner's rights and decide the judicial question presented." *Id.* at 64, 148 N.E.2d at 567. The principle of *Macbeth* was affirmed in Knutson v. Seberger, 239 Ind. 656, 157 N.E.2d 469, *reh'g denied*, 160 N.E.2d 200 (1959). In *Knutson*, the supreme court affirmed a trial court's order that directed a town board to approve a proposed plat. The court in *Knutson* stated that "it cannot be said that the court abused its discretion in ordering the appellants to perform the duty imposed upon them by statute." *Id.* at 664, 157 N.E.2d at 473.

189. *See supra* note 188.

a largely untapped arsenal of litigative weapons, including tort claims, actions for inverse condemnation, and actions for mandate. The cases from and immediately prior to this survey period suggest that the Indiana Supreme Court may be willing to open the door a bit further to those parties seeking extra-administrative remedies. Yet some appellate decisions from the same period demonstrate a reluctance to follow the higher court's lead. Even so, would-be litigants will find that all of these cases, when taken together, provide fertile (though uneven) ground for pursuing extra-administrative remedies to administrative actions or inactions.