SURVEY OF ADMINISTRATIVE LAW

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INTRODUCTION

Administrative law in Indiana is based upon the actions of numerous state and local agencies. This survey Article focuses on the statutory framework that covers many of these agencies: the Administrative Orders and Procedures Act ("AOPA");[1] the Administrative Rules and Procedures Act ("ARPA");[2] and the Open Door and Records Laws,[3] as well as common law standards that govern other regulatory agencies.

I. JUDICIAL REVIEW

AOPA applies to many, but not all, administrative agencies in Indiana. Indiana Code section 4-21.5-2-4 exempts several administrative agencies from AOPA, including the Utility Regulatory Commission ("IURC"), State Department of Revenue, and the Department of Workforce Development.[4] Therefore, there can be different standards of review for different agencies.

A. Standard of Review

The appropriate standard of review for the agency is frequently well settled law, being either prescribed by statute or long-standing case law. However, there were several cases during the review period which are notable for the application of these standards.

1. Standard of Review Under AOPA.—Kinnaird v. Secretary, Indiana Family and Social Services Administration[5] discussed the standard of review under AOPA.

> [A] court may provide relief only if the agency action is:
> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the 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.[6]

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1. IND. CODE §§ 4-21.5-1 to -7-9 (2005).
2. *Id.* §§ 4-22-1 to -9-7.
3. *Id.* §§ 5-14-1.5, -3.
4. *Id.* § 4-21.5-4.4.
5. 817 N.E.2d 1274 (Ind. Ct. App. 2004), *reh'g denied* (Ind. Ct. App.), *and trans. denied*, 831 N.E.2d 748 (Ind. 2005).
6. *Id.* at 1277 (citing IND. CODE § 4-21.5-5-14; Equicor Dev., Inc. v. Westfield-Washington Twp. Plan Comm'n, 758 N.E.2d 34, 36-37 (Ind. 2001)); *see also* Indiana-Kentucky Elec. Corp. v. Comm'r, Ind. Dep't of Envtl. Mgmt., 820 N.E.2d 771, 776 (Ind. Ct. App. 2005).

"In reviewing an administrative decision, a court is not to try the facts de novo or substitute its own judgment for that of the agency."[7] The court also commented on the amount of deference which should be given to the trial court. Issues of law are reviewed de novo.[8] "If the [agency] holds an evidentiary hearing, [the] Court defers to the trial court to the extent its factual findings derive from the hearing."[9] However, review is also de novo if the findings turn solely on a paper record.[10]

Kinnaird appealed a decision from the Indiana Family and Social Services Administration ("IFSSA") terminating his Section 8 Housing Assistance for failure to notify the agency when he was away from his apartment "for an extended period of time," which was required by the local housing agency's policies.[11] Kinnaird was absent because he was incarcerated for 130 days for failure to pay child support.[12] "During his incarceration, Kinnaird paid the rent on his apartment and he returned to that apartment upon his release."[13]

On appeal, Kinnaird claimed that the "extended period of time" requirement was vague and "that the trial court gave too much deference to the IFSSA's decision."[14] The court of appeals found that de novo was the proper standard of review to the extent the issue was an issue of law and because the trial court did not conduct an evidentiary hearing.[15]

The Indiana Court of Appeals did not reach the question of whether the extended period of time regulation was vague, because it determined that "a 130 day absence constitute[d] an extended period of time under any reasonable interpretation of the Housing Agency's policy."[16] Although the court discussed well established administrative law with regard to the requirement that "[a]dministrative decisions must be based upon ascertainable standards to ensure that agency action will be orderly and consistent[,]" the basis for the court's

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7. *Kinnaird*, 817 N.E.2d at 1277-78 (quoting *Equicor*, 758 N.E.2d at 37).
8. *Id.* at 1278.
9. *Id.* (quoting *Equicor*, 758 N.E.2d at 37).
10. *Id.*
11. *Id.* at 1275.
12. *Id.* at 1276.
13. *Id.* at 1275.
14. *Id.* at 1277. The case illustrates how lengthy the administrative review process can be. Kinnaird's case began when the Jasper County Housing Agency terminated his Section 8 Housing Assistance. Kinnaird first challenged the local housing agency's decision by requesting a hearing with an Administrative Law Judge ("ALJ"). *Id.* at 1275-76. The ALJ found in Kinnaird's favor. However, the IFSSA reversed the ALJ's decision on appeal by the local housing agency. *Id.* at 1277. Kinnaird sought judicial review, and the Jasper County court affirmed the IFSSA's final action, which Kinnaird appealed to the Indiana Court of Appeals. *Id.*
15. *Id.* at 1278. The trial court "based its decision on the parties' briefs and oral arguments." *Id.*
16. *Id.* at 1279.

decision did not rely upon these grounds.[17]

Indiana Department of Natural Resources v. Hoosier Environmental Council, Inc.,[18] presents a different result. In this case, the Indiana Court of Appeals determined that the reviewing trial court erred in substituting its judgment for that of the administrative agency.[19]

In discussing the principles of administrative law, the court commented that "agency principles are founded in the constitutional doctrine of separation of powers[.]"[20]

> As part of the judicial branch, a court has no authority to usurp or exercise the functions of an administrative agency during judicial review of the agency's order. A court may not substitute its judgment on the merits of an issue for that of an administrative body acting within its jurisdiction. The purpose of judicial review of an administrative order is "solely to determine whether or not the body was outside the limits and jurisdiction of such body. Once the matter of jurisdiction is determined the court has no further right to interfere with an administrative procedure which belongs to another department of the government—not the judiciary."[21]

The Indiana Court of Appeals remanded the matter to the administrative agency to conduct further proceedings.[22] The court also indicated that it would give "deference to the interpretation of a statute by the administrative agency that is charged with its enforcement in light of its expertise in its given area."[23]

Finally, in *Indiana-Kentucky Electric Corp. v. Commissioner, Indiana Department of Environmental Management*,[24] the Indiana Court of Appeals found that lower reviewing courts must also use a de novo standard of review with regard to issues of statutory interpretation.[25] Referencing Indiana Code section 4-21.5-3-27(a) and (b), the court found that an ALJ serves as the trier of fact in

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17. *Id.* at 1278 (quoting Taylor v. Ind. Family & Soc. Servs. Admin., 699 N.E.2d 1186, 1192 (Ind. Ct. App. 1998)). "The test to be applied in determining whether an administrative agency regulation can withstand a challenge for vagueness is whether it is so indefinite that persons of common intelligence must necessarily guess at its meaning and differ as to its application." *Id.* (quoting *Taylor*, 699 N.E.2d at 1192).

18. 831 N.E.2d 804 (Ind. Ct. App. 2005).

19. *Id.* at 811.

20. *Id.* (construing Med. Licensing Bd. v. Provisor, 669 N.E.2d 406 (Ind. 1996)).

21. *Id.* at 811-12 (quoting *Provisor*, 669 N.E.2d at 408).

22. *Id.* at 812.

23. *Id.* (quoting Ballard v. Book Heating & Cooling, Inc., 696 N.E.2d 55, 56 (Ind. Ct. App. 1998)). The court noted however, that whether NRC was entitled to fees under the Indiana Surface Mining Control and Reclamation Act was an issue of first impression and that a party must demonstrate eligibility and entitlement for an award of attorney fees under the statute.

24. 820 N.E.2d 771 (Ind. Ct. App. 2005).

25. *Id.* at 781.

an administrative hearing.[26] Accordingly, an ALJ "performs a duty similar to that of a trial judge sitting without a jury."[27]

2. Standard of Review—Non-AOPA Agencies.—Northern Indiana Public Service Co. v. Indiana Office of Utility Consumer Counselor[28] set forth the standard of review used for IURC (or "Commission") decisions:

> [T]he Commission's order is subject to appellate review to determine whether it is supported by specific findings of fact and by sufficient evidence, as well as to determine whether the order is contrary to law. A Commission finding can be set aside only when a review of the entire record clearly indicates that its decision lacks a reasonably sound basis of evidentiary support.[29]

In addition, on review, the court of appeals does not reweigh the evidence or substitute its judgment for that of the Commission.[30]

The court of appeals found that the Commission had not made a decision contrary to law and elaborated more on this standard.[31]

> [A] decision is contrary to law when the agency fails to stay within its jurisdiction and to abide by the statutory and legal principles that guide it. Issues that are reviewable under this standard include questions of legality of the administrative procedure and violations of fixed legal principles as distinguished from questions of fact or expert judgment or discretion. An appellate court may properly defer to the Commission's expertise both in finding the facts and in applying the law to the facts. The Commission has the authority to determine accounting practices for rate-regulated companies and, so long as they are within reason and prudence, courts may not interfere.[32]

Nextel West Corp. v. Indiana Utility Regulatory Commission[33] also illustrated the standard of review with regard to issues of law.[34] In *Nextel*, the Indiana Court

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26. *Id.* (quoting Ind. Dep't of Natural Res. v. United Refuse Co., 615 N.E.2d 100, 104 (Ind. 1993)).

27. *Id.* (citing *United Refuse*, 615 N.E.2d at 104).

28. 826 N.E.2d 112 (Ind. Ct. App. 2005).

29. *Id.* at 117-18 (citing Spring Hills Developers, Inc. v. Reynolds Group, Inc., 792 N.E.2d 955, 958 (Ind. Ct. App. 2003); U.S. Gypsum, Inc. v. Ind. Gas Co., 735 N.E.2d 790, 795 (Ind. 2000)).

30. *Id.* at 118 (citing N. Ind. Pub. Serv. Co. v. LaPorte, 791 N.E.2d 271, 279 (Ind. Ct. App. 2003)).

31. *Id.*

32. *Id.* (internal citations omitted).

33. 831 N.E.2d 134 (Ind. Ct. App. 2005), *reh'g denied* (Ind. Ct. App. 2006).

34. *See id.* at 141. The *Nextel* case is also noteworthy in that it presents a situation where the Commission approved a settlement agreement reached by less than all the parties in the case. Settlements by less than all the parties are permitted under the Commission's rules. 170 IND. ADMIN. CODE 1-1.1-17(b) (2006).

of Appeals determined that de novo was the proper standard of review regarding a question of whether the IURC had jurisdiction to establish a universal service fund.[35] The court rejected use of a deferential standard of review set forth in *IDEM v. Boone County Resource Recovery Systems, Inc.*[36] The court of appeals found that the Commission's jurisdiction was a legal question which the court reviews de novo.[37]

The appropriate standard of review for decisions from the Indiana Department of Workforce Development was discussed in *Abdirizak v. Review Board of the Indiana Department of Workforce Development.*[38] The Indiana Court of Appeals stated, "[w]hen reviewing a decision by the Review Board, our task is to determine whether the decision is reasonable in light of its findings."[39] The court of appeals described its review as a "substantial evidence" standard.[40] In such an analysis, the court does not reweigh the evidence or assess witness credibility, and it considers only the evidence most favorable to the agency's findings.[41] Finally, the court noted that it would "reverse the decision only if there is no substantial evidence to support the Review Board's findings."[42]

The standard applied in tax cases was described in *David R. Webb Co. v. Indiana Department of State Revenue.*[43] In *Webb Co.*, a manufacturing company appealed a final determination of income tax liability from the Indiana Department of State Revenue to the Indiana Tax Court. As prescribed by Indiana Code section 6-8.1-5-1(h), the Tax Court "reviews the Department [of Revenue's] final determinations de novo and is therefore not bound by either the evidence presented or the issues raised at the administrative level."[44]

3. Standard of Review—Issues of Fact.—Appellants in *Nextel* also challenged whether the Commission's order lacked findings of fact supported by substantial evidence.[45] Review of IURC decisions is "limited to whether the

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35. *Nextel*, 831 N.E.2d at 141.

36. *Id.* at 140 (discussing Ind. Dep't of Envtl. Mgmt. v. Boone County Res. Recovery Sys., Inc., 803 N.E.2d 267 (Ind. Ct. App.) (holding that "[w]hen a statute is subject to different interpretations, the interpretation of the statues by the administrative agency charged with the duty of enforcing the statute is entitled to great weight, unless that interpretation is inconsistent with the statute itself") (quoting Shaffer v. State, 795 N.E.2d 1072, 1076 (Ind. Ct. App. 2003)), *trans. denied sub nom.* Ind. Dep't of Envtl. Mgmt. v. Bankert, 803 N.E.2d 807 (Ind. 2004)).

37. *Id.* at 144.

38. 826 N.E.2d 148 (Ind. Ct. App. 2005).

39. *Id.* at 150 (citing Stanrail Corp. v. Unemployment Ins. Review Bd., 734 N.E.2d 1102, 1105 (Ind. Ct. App. 2000)).

40. *Id.* (citing Stanrail Corp. v. Review Bd. of Dep't of Workforce Dev., 735 N.E.2d 1197, 1202 (Ind. Ct. App. 2000)).

41. *Id.* (citing *Stanrail*, 735 N.E.2d at 1202).

42. *Id.* (citing *Stanrail*, 735 N.E.2d at 1202).

43. 826 N.E.2d 166 (Ind. Tax Ct. 2005).

44. *Id.* at 168 (citing IND. CODE ANN. § 6-8.1-5-1(h) (West 2005), *amended by* 2006 Ind. Legis. Serv. P.L. 111-2006 S.E.A. 362 (West)).

45. Nextel W. Corp. v. Ind. Util. Reg. Comm'n, 831 N.E.2d 134, 144 (Ind. Ct. App. 2005).

agency based its decision on substantial evidence, whether the agency's decision was arbitrary and capricious, and whether it was contrary to any constitutional, statutory, or legal principle."[46]

> Pursuant to Indiana Code section 8-1-3-1, [judicial] review of an order of the Commission is two-tiered: [(1)] determine whether the Commission's decision contains specific findings on all of the factual determinations material to its ultimate conclusions, and [(2)] determine whether there is substantial evidence in the record to support the agency's basic findings of fact. . . . To determine whether there was substantial evidence sufficient to support the agency's determination, [the court] must consider all evidence, including evidence that supports the determination as well as evidence in opposition to the determination.[47]

In *Nextel*, the Indiana Court of Appeals found that all of the Commission's determinations were supported by substantial evidence.[48] Relevant to one of the issues, the court of appeals found that the Commission could "properly accept the opinion of one expert over another."[49]

Another challenged part of the order concerned whether the Commission's order was supported by substantial evidence with regard to the mandatory pass-through of the Indiana Universal Service Fund ("IUSF") surcharge, even though the order contained no specific findings concerning the IUSF surcharge.[50] The appellants argued that there was sufficient discussion of the surcharge in a section titled "Statutory Overview" which referred to a competitively neutral "mechanism."[51] The Indiana Court of Appeals indicated "a more detailed factual finding by the Commission" would have aided its review but nonetheless found there was "substantial evidence in the record to support the Commission's approval of the surcharge."[52]

4. Standard of Review—Implementation of a Statute.—Whinery v. Roberson[53] did not arise under judicial review but is noted here for its discussion on the standard of review the court uses when reviewing an agency's actions in implementing a new statute.[54] The new statute required that the State Personnel

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46. *Id.* (citing PSI Energy, Inc. v. Ind. Office of Util. Consumer Counsel, 764 N.E.2d 769, 773 (Ind. Ct. App. 2002)).

47. *Id.* (citing *PSI Energy*, 764 N.E.2d at 773-74; Lincoln Utils., Inc. v. Office of Util. Consumer Counselor, 661 N.E.2d 562, 564 (Ind. Ct. App. 1996)).

48. *Id.* at 147.

49. *Id.* at 146-47 (citing Office of the Util. Consumer Counselor v. Citizens Tel. Corp., 681 N.E.2d 252, 258 (Ind. Ct. App. 1997)).

50. *Id.* at 144.

51. *Id.* at 151.

52. *Id.* The Settlement Agreement that the Commission approved as part of its order did contain a description of the mandatory contribution requirement. *Id.*

53. 819 N.E.2d 465 (Ind. Ct. App. 2004), *trans. dismissed* (Ind. 2006).

54. *Id.* at 471. The case was initiated when a group of Department of Natural Resources

Department ("SPD") conduct a survey comparing the salaries of Indiana natural resource employees to other Midwestern states and implement a salary schedule based on the survey.[55] After SPD's survey was complete, a group of Department of Natural Resources ("DNR") employees filed a complaint alleging the state had failed to comply with the statute.[56] The trial court entered summary judgment for the state and dismissed the employees' complaint.[57]

The court first ruled that even though

> administrative agencies are vested with considerable discretion when implementing a statute that calls upon the agency to effectuate the legislature's will, the question of whether [the new statute] create[d] contractual rights for the Employees [was] not a question the SPD was called upon to answer in its administrative capacity . . . .[58]

The court of appeals found that the question was a question of law which was entirely within the province of the court.[59] The court concluded that the "Employees [could] recover contractually for deprivations of actual rights conferred upon them by [the statute], but [could] not recover for the SPD's discretionary actions."[60]

By contrast, however, with regard to the statutory rights the employees had under the new law, SPD's decision was entitled to deference because the statute stated that the classification system should "reflect" the results of the survey.[61] Interpreting the word "reflect," the court found that the word suggested that the General Assembly vested the SPD with discretion to change the statute.[62] Accordingly, the court concluded that SPD's implementation "should not be

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employees filed suit in state court alleging that the State had failed to properly implement Ind. Pub. L. No. 70-1996. The trial court entered summary judgment in favor of the state and the employees appealed. *Id.* at 470-71.

55. *Id.* at 469.

56. *Id.* at 470.

57. *Id.* at 471.

58. *Id.* at 472.

59. *Id.* (citing Orr v. Westminster Vill. N., 689 N.E.2d 712, 721 n.16 (Ind. 1997)). The court noted,

> Though clever, the Employees' theory must be carefully examined so as not to divest the SPD, as an administrative agency, of discretion conferred upon it by the legislature. In this examination, courts must specifically delineate between actual rights conferred by a statute and agency discretion in implementing a statute. The former is governed by canons of contract construction; the latter is not.

Id. at 474 (citing Foley v. Consol. City of Indianapolis, 421 N.E.2d 1160, 1163 (Ind. Ct. App. 1981)). "[T]he terms of the contract include all 'relevant' statutory provisions." *Id.* (citing *Foley*, 421 N.E.2d at 1163).

60. *Id.* at 474.

61. *Id.* at 476.

62. *Id.*

vacated unless [it] exceeded its discretion."[63]

The employees also argued that the court was "not required to give deference to the SPD's decision because [it] had a prior inconsistent interpretation of [the statute]."[64] The court noted that

> an administrative agency is not disqualified from changing its mind; and when it does, the court still sits in review of the administrative decision and cannot approach the statutory construction issue de novo and without regard to the administrative understanding of the issues. On the other hand, [the court noted that when] an agency's interpretation of a relevant provision . . . conflicts with an earlier interpretation [the decision] is entitled to considerably less deference than a consistently held agency view.[65]

The court concluded that the language of the statute and the SPD's own conduct indicated the legislature intended to make all professional DNR employees at issue to be given salary increases.[66]

B. Arbitrary and Capricious Action

Regardless of whether the judicial review is under the AOPA or another standard, a question that is often addressed in administrative law decisions is what constitutes arbitrary and capricious action.

In *Borsuk v. Town of St. John*,[67] the Indiana Supreme Court reversed an Indiana Court of Appeals decision, finding that a town council decision was not arbitrary and capricious. A property owner whose rezoning request had been denied by the town council filed a writ of certiorari in trial court "alleging that the Town's denial had effected an unconstitutional taking and was arbitrary and capricious."[68] The trial court granted summary judgment in favor of the town.[69] The court of appeals reversed, finding that the town had failed to follow its comprehensive plan.[70] The Indiana Supreme Court, however, affirmed the trial court's decision because there was evidence in the record that the plan commission and town council paid reasonable regard to each of the statutory factors, even though their decision was contradictory to the comprehensive plan.[71]

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63. *Id.*

64. *Id.* at 477.

65. *Id.* (citing Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 417 (1993)).

66. *Id.*

67. 820 N.E.2d 118 (Ind. 2005). The standard of review applied in the case was "limited to constitutionality, procedural soundness, and whether the decision was arbitrary or capricious" because rezoning is a legislative process. *Id.* at 122 (citing Bd. of Comm'rs v. Three I Props., 787 N.E.2d 967, 976 (Ind. Ct. App. 2003)).

68. *Id.* at 120.

69. *Id.*

70. *Id.* at 120-21.

71. *Id.* at 122.

Indianapolis Downs, LLC v. Indiana Horse Racing Commission[72] presented another action that was challenged as being arbitrary and capricious. One of Indiana's two horse racing tracks appealed the decision of the Indiana Horse Racing Commission ("IHRC") regarding how to distribute riverboat gaming subsidy funds. The Indiana Court of Appeals determined that the IHRC's action was not arbitrary and capricious and cited three reasons.[73] First, "the decision was based on the application of a pre-existing rule."[74] Second, the decision was consistent with prior agency practice.[75] Third, the court reasoned that "to allow Indiana Downs to share equally in proceeds from calendar year 2002 could properly be viewed by the IHRC as unjust because Indiana Downs was only in operation for less than one month of that year."[76]

Finally, in *Whinery v. Roberson*,[77] the court held that "mathematical errors are, by definition, arbitrary, capricious, and a manifestation of a clear error."[78]

C. Burden of Proof

Kinnaird v. Secretary, Indiana Family & Social Services Administration[79] noted AOPA's requirement under Indiana Code section 4-21.5-5-14(a) that the burden of proof is on the party challenging the agency action.[80] "Section 4-21.5-5-14(a) further provides that 'the burden of demonstrating the invalidity of the agency action is on the party . . . asserting invalidity.'"[81]

D. Standing

An additional consideration relative to judicial review that was discussed in reported cases during the survey period is standing. *Indianapolis Downs* presented an issue of whether the party challenging the agency action had standing to obtain judicial review.[82]

> An entity has standing to obtain judicial review of an agency action if (1) it is the entity to which the agency action is specifically directed; (2) it was a party to the agency proceedings that led to the agency action; (3)

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72. 827 N.E.2d 162 (Ind. Ct. App. 2005).

73. *Id.* at 171.

74. *Id.*

75. *Id.*

76. *Id.*

77. 819 N.E.2d 465 (Ind. Ct. App. 2004), *trans. dismissed* (Ind. 2006).

78. *Id.* at 478.

79. 817 N.E.2d 1274 (Ind. Ct. App. 2004), *reh'g denied* (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 748 (Ind. 2005).

80. *Id.* at 1277; *see also* Indiana-Kentucky Elec. Corp. v. Comm'r, Ind. Dep't Envtl. Mgmt., 820 N.E.2d 771, 776 (Ind. Ct. App. 2005).

81. *Kinnaird*, 817 N.E.2d at 1277 (quoting IND. CODE § 4-21.5-5-14(a) (2004)).

82. Indianapolis Downs, LLC v. Ind. Horse Racing Comm'n, 827 N.E.2d 162, 169 (Ind. Ct. App. 2005).

it is eligible for standing under a law applicable to the agency action; or (4) it is otherwise aggrieved or adversely affected by the agency action.[83]

The Indiana Court of Appeals concluded that Indiana Downs had standing because it was a "party to the agency proceedings."[84] "The IHRC [had] invited both Indiana Downs and Hoosier Park to submit position statements regarding how the [funds] should be allocated between the two tracks."[85] In addition, the court of appeals found that "Indiana Downs was an entity to which the agency action was specifically directed."[86]

E. Statutory Interpretation

In *Story Bed & Breakfast LLP v. Brown County Area Plan Commission*,[87] the Indiana Supreme Court interpreted statutes regarding planned unit developments ("PUDs") and held that "conditions" imposed on a variance or rezoning of a PUD "need not be recorded," but must be obtained in the "records of the relevant agency" for public inspection.[88]

The Brown County Area Plan Commission sought to enforce conditions of a PUD regarding property containing a bed and breakfast.[89] The property owner maintained that the conditions were not enforceable because it was a subsequent property owner and the conditions were not recorded with the property.[90] The plan commission had drawn two legal conclusions, "[f]irst, it was permissible to have enforceable conditions without recording them, and, second, that these restrictions were in that category."[91]

The Indiana Supreme Court started its analysis by stating that "administrative construction of the agency's own documents and statute is entitled to weight."[92] The statute at issue used both the terms "conditions" and "commitments."[93] The Indiana Supreme Court stated that "[t]he wisdom of distinguishing conditions from commitments in this respect is a matter for the legislature."[94] The court

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83. *Id.* at 170 (citing IND. CODE § 4-21.5-5-3(a) (2005)); *cf.* Huffman v. Office of Envtl. Adjudication, 811 N.E.2d 806, 810 (Ind. 2004).

84. *Indianapolis Downs*, 827 N.E.2d at 170.

85. *Id.*

86. *Id.*

87. 819 N.E.2d 55 (Ind. 2004).

88. *Id.* at 62.

89. *Id.* at 59.

90. *Id.*

91. *Id.* at 63-64.

92. *Id.* at 64 (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984); Healthscript, Inc. v. State, 770 N.E.2d 810, 814 (Ind. 2002); LTV Steel Co. v. Griffin, 730 N.E.2d 1251, 1257 (Ind. 2000) ("An interpretation of a statute by an administrative agency charged with the duty of enforcing the statute is entitled to great weight, unless this interpretation would be inconsistent with the statute itself.")).

93. *Id.* at 61.

94. *Id.* at 64.

agreed with the trial court that the Indiana statutes governing PUDs did not require that conditions attached to approval of a PUD be recorded in the recorder's office to be effective against subsequent purchasers if the conditions are available as public records.[95] Instead, conditions are "in the nature of zoning ordinances which are effective against the public at large."[96]

Indiana-Kentucky presented a case in which the Indiana Court of Appeals determined the administrative agency had misconstrued the law, which in this case was an administrative rule.[97] The court started by stating that "[t]he interpretation of a statute is a question of law reserved for the courts, and is reviewed under a *de novo* standard."[98] The same principles are used to construe statutes and administrative rules.[99] Even under de novo review,

> [i]f a statute is subject to different interpretations, the interpretation of the statute by the administrative agency charged with the duty of enforcing the statute is entitled to great weight. However, an agency's interpretation that is incorrect is entitled to no weight. [Finally,] [i]f an agency misconstrues a statute, there is no reasonable basis for the agency's ultimate action, and, therefore, the trial court is required to reverse the agency's action as being arbitrary and capricious.[100]

At issue in *Indiana-Kentucky*, was an administrative rule that provided that applicants could seek a waiver of ambient monitoring of sulfur dioxide if the applicant could "demonstrate that the ambient monitoring [was] unnecessary to determine continued maintenance of the sulfur dioxide ambient air quality standards in the vicinity of the source."[101] On summary judgment, the Indiana Department of Environmental Management ("IDEM") argued that the only way to determine whether a source was in compliance with ambient air quality standards was through maintaining at least one ambient monitoring station.[102] The applicant, Indiana-Kentucky Electric Corporation ("IKEC"), argued that even though "the [r]ule provid[ed] that a source owner or operator may obtain a waiver of *all* of his or her monitoring requirements," that under IDEM's interpretation, an applicant would never be able to make the requisite showing.[103] Alternatively, IDEM argued that an applicant could obtain a waiver if it could show there was

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95. *Id.*

96. *Id.*

97. Indiana-Kentucky Elec. Corp v. Comm'r, Ind. Dep't of Envtl. Mgmt., 820 N.E.2d 771 (Ind. Ct. App. 2005).

98. *Id.* at 777 (citing Bourbon Mini-Mart, Inc. v. Comm'r, Ind. Dep't of Envtl. Mgmt., 806 N.E.2d 14, 20 (Ind. Ct. App. 2004)).

99. *Id.* (citing Ind. Dep't of Envtl. Mgmt. v. Schnippel Constr., 778 N.E.2d 402, 415 (Ind. Ct. App. 2002)).

100. *Id.* (internal citations omitted).

101. *Id.* at 774 (internal quotation marks omitted) (quoting 326 IND. ADMIN. CODE 7-3-2(d) (2005)).

102. *Id.* at 778.

103. *Id.*

some other entity within ten kilometers conducting ambient monitoring.[104] The Indiana Court of Appeals found that IDEM's "construction of the Rule [was] so overly narrow as to be unreasonable."[105] The court also reasoned that IDEM's interpretation of the Rule made the second sentence of the Rule obsolete.[106] Ultimately, the court concluded that the rule had two requirements—creating a combination of what each party advocated.[107]

The *Nextel* case also presented the Indiana Court of Appeals with an interesting statutory interpretation question from the IURC. The central issue in the *Nextel* case was whether the Commission had jurisdiction to create a universal service fund even though the statute did not explicitly authorize the Commission to do so. The statute under interpretation was an alternative regulatory statute which was designed to give the Commission flexibility to deviate from traditional ratemaking in light of an "increasingly competitive environment for telephone services."[108] The court relied upon its ruling in *Indiana Bell Telephone Co. v. Office of the Utility Consumer Counselor*,[109] in which the court of appeals found that the Alternative Regulatory Statute did not "by its language specifically grant ratemaking authority to the Commission[,]"[110] but still provided the Commission with the necessary authority to change a telephone utility's rates.[111] In reaching its decision in the *Nextel* case, the court concluded that "[w]e simply cannot believe the legislature would expressly charge the Commission with ensuring the continuing availability of universal service without also conferring the authority necessary to effectuate that goal."[112]

1. Regulation vs. Case Law.—In *David R. Webb Co. v. Indiana Department of State Revenue*, the Tax Court resolved a conflict between an agency regulation and case law.[113] Under the Indiana Administrative Code, if sales were completed

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104. *Id.*

105. *Id.*

106. *Id.* at 779.

107. *Id.*

> First, as IKEC [contended], an applicant seeking a waiver of all of the monitoring requirements under the Rule must show that it is likely to continue to maintain the sulfur dioxide ambient air quality standards in the future. Second, as IDEM contend[ed], the applicant must show that there is at least one or more alternative sources of data available, besides ambient monitoring at the source, from which IDEM can determine whether a source is continuing to maintain the sulfur dioxide ambient air quality standards in the vicinity of the source.

Id.

108. Nextel W. Corp. v. Ind. Util. Regulatory Comm'n, 831 N.E.2d 134, 143 (Ind. Ct. App. 2005).

109. 717 N.E.2d 613, 622 (Ind. Ct. App. 1999), *modifed on reh'g*, 725 N.E.2d 432 (Ind. Ct. App. 2000).

110. *Id.*

111. *Nextel*, 831 N.E.2d at 143.

112. *Id.*

113. 826 N.E.2d 166 (Ind. Tax Ct. 2005).

in Indiana, they were taxable.[114] The Tax Court found that "[i]f a regulation conflicts with a case law interpretation, little weight is afforded the regulation."[115] Additionally, an administrative interpretation that is incorrect is entitled to no weight.[116] The Tax Court concluded that to have force, the regulation must be consistent with the relevant case law[117] if the regulation exceeded the scope of the case law, it was invalid.[118]

The tax court resolved the case without going as far as to declare that the regulation was invalid. Based on the facts of the case, the court concluded that the sales were interstate sales.[119]

2. Legislative Acquiescence.—The doctrine of legislative acquiescence provides that "a longstanding publicly known administrative interpretation of a statute dating from the time of the statute's enactment with no substantial change made to the statute raises the strongly persuasive presumption that the legislature has acquiesced in the agency's interpretation."[120] The Indiana Court of Appeals rejected the application of the doctrine in *Whinery v. Roberson*.[121] The court stated that "in order to invoke properly the doctrine of legislative acquiescence, the administrative interpretation in question must be 'long standing.'"[122] In *Whinery*, the appellants filed their complaint two weeks after the statute's implementation; therefore, the court of appeals found that the doctrine of legislative acquiescence was inapplicable.[123]

F. Scope of Judicial Review

A group of affected persons challenged the Bureau of Motor Vehicles' ("BMV") implementation of new identification requirements in *Villegas v. Silverman*.[124] Upon judicial review, the trial court found "that even if it were to invalidate the identification requirements, the result would be the same" because the BMV had discretion "to issue licenses in the manner the Bureau considers necessary and prudent and that such prudence is incapable of judicial review."[125] The Indiana Court of Appeals found this conclusion to be erroneous. First, it

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114. *Id.* at 169; 45 IND. ADMIN. CODE 1-1-119(2)(b) (2005).

115. *Webb Co.*, 826 N.E.2d at 170 (citing Bethlehem Steel Corp. v. Ind. Dep't of State Revenue, 597 N.E.2d 1327, 1335 (Ind. Tax Ct. 1992), *aff'd*, 639 N.E.2d 264 (Ind. 1994)).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. Miller Brewing Co. v. Bartholemew County Beverage Co., 674 N.E.2d 193, 206 n.10 (Ind. Ct. App. 1996).

121. 819 N.E.2d 465, 476 (Ind. Ct. App. 2004), *trans. dismissed* (Ind. 2006).

122. *Id.* (quoting *Miller Brewing Co.*, 674 N.E.2d at 206 n.10).

123. *Id.*

124. 832 N.E.2d 598 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App. 2005), *trans. dismissed* (Ind. 2006).

125. *Id.* at 610.

noted that

> the rules implemented by the BMV are always judicially reviewable for constitutional implications. Second, the ARPA requires. . . . public input into any proposed rule changes. The duty of the BMV to issue licenses in a manner that it deems prudent does not supercede the mandate to allow the public to participate in the rule-making process.[126]

G. Exhaustion of Administrative Remedies

The number of Indiana Supreme Court decisions during the survey period with regard to exhaustion of administrative remedies was notable. As shown in many of these cases, failure to exhaust administrative remedies can be a critical flaw in a litigant's case.

In *State ex rel. Attorney General v. Lake Superior Court*,[127] taxpayers challenging a new state law regarding property tax assessments in Lake County filed for an injunction in state court. The State appealed the issuance of a preliminary injunction, and also petitioned for a writ of mandamus and prohibition because "the trial court lacked jurisdiction based on the plaintiff's failure to exhaust administrative remedies."[128] The court stayed the preliminary injunction and its order in the case addressed both the appeal and the writ of mandamus and prohibition.[129]

Writing for the majority, Justice Boehm agreed with the State that the plaintiffs had failed to exhaust their administrative remedies.[130] Referring to the relevant statutory framework, the court noted that it incorporated AOPA and its provisions "requiring exhausting of administrative remedies before judicial review may be initiated."[131] The court found that the challenge the plaintiffs sought to make—a constitutional challenge to the statutes creating the reassessment and a challenge to the way in which the assessment was conducted—must be made in the first instance to the Indiana Board of Tax Review, with judicial review to the Tax Court.[132] In this case, the plaintiffs filed their case directly with the state court and therefore failed to exhaust their administrative remedies.

The impact of failure to exhaust administrative remedies is fatal. It is "a defect in subject matter jurisdiction" and renders a judgment void.[133]

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126. *Id.* (internal citations and footnote omitted).

127. 820 N.E.2d 1240 (Ind.), *reh'g denied* (Ind.), *and cert. denied sub nom.* Miller Citizens Corp. v. Carter, 126 S. Ct. 398 (2005).

128. *Id.* at 1245-46.

129. *Id.*

130. *Id.* at 1246.

131. *Id.*

132. *Id.*

133. *Id.* at 1247 (citing M-Plan, Inc. v. Ind. Comprehensive Health Ins. Ass'n, 809 N.E.2d 834, 837 (Ind. 2004)); *see also* City of Marion v. Howard, 832 N.E.2d 528, 531 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App. 2005), *trans. denied* (Ind.), *cert. denied*, 126 S. Ct. 2358 (2006).

"Accordingly, the trial court was without jurisdiction to entertain [the] claim, and a writ of prohibition [was] properly requested."[134]

Justice Sullivan concurred in Justice's Boehm's opinion and discussed the policy behind the exhaustion of remedies doctrine.[135] He wrote that "it appears unwieldy if not unfair that taxpayers who believe they have been wrongly assessed—particularly, as in this case, where [the plaintiffs asserted constitutional challenges]—must go through several layers of administrative review before being allowed to appeal to the Tax Court."[136] However, Justice Sullivan noted that "it is up to the Legislature to determine the jurisdiction of Indiana trial courts" and there were sound policy reasons for requiring tax appeals.[137] First, he noted that tax protests are frequent but "taxes are needed to provide public safety and other public services."[138] "A system that channels tax protests through an orderly system of administrative and Tax Court review without risking abrupt stoppages in tax collections by order of any one of the state's hundreds of trial courts protects the interest of both taxpayers and all of us who rely on government services."[139] In addition, he noted that the statutory system allows the executive and legislative branches to effect compromises of tax controversies, rather than have the answers dictated by a variety of courts.[140]

Other policies that are cited in support of the doctrine of exhaustion of remedies are giving the administrative agency the opportunity to correct its own mistakes and develop of an adequate record for judicial review.[141]

The harshness of the application of the doctrine, discussed by Justice Sullivan, was illustrated in *City of Marion v. Howard*,[142] where the Indiana Court of Appeals applied the doctrine sua sponte and reversed a jury verdict in favor of the plaintiffs from the trial court.[143]

At trial, property owners prevailed on a § 1983 complaint that local officials persuaded the local Board of Zoning Appeals ("BZA") to vote against the pending matters regarding the property owners' land, which resulted in an unconstitutional taking of their property by the government.[144] On appeal, however, the court of appeals found that "the trial court lacked subject matter jurisdiction to enter judgment on the [property owner's] claim that the government unconstitutionally took their property when the BZA decided that

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134. *State of Indiana ex rel.*, 820 N.E.2d at 1247.

135. *Id.* at 1256 (Sullivan, J., concurring).

136. *Id.* at 1257.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. Advantage Home Health Care, Inc. v. Ind. State Dept. of Health, 829 N.E.2d 499, 503-04 (Ind. 2005).

142. 832 N.E.2d 528 (Ind..Ct. App.), *reh'g denied* (Ind. Ct. App. 2005), *trans. denied* (Ind.), *cert. denied*, 126 S. Ct. 2358 (2006).

143. *Id.* at 529.

144. *Id.* at 531.

[their business] was a junkyard."[145]

Unlike a case arising under AOPA, the framework for the requirement of exhaustion of administrative remedies resulted from application of the U.S. Supreme Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*[146] and the Indiana Supreme Court's decision in *Town Council of New Harmony v. Parker.*[147] After an extensive discussion of both cases, the court of appeals concluded that the "'finality requirement' affects a trial court's subject matter jurisdiction to hear a takings claim, and that failure to obtain a final decision from the appropriate agency regarding land use amounts to a failure to exhaust administrative remedies."[148]

However, the court held that the trial court did have subject matter jurisdiction to rule on the portion of the property owner's claim that related to the city attorney's padlocking of their business premises.[149] "The evidence at trial established that this event was unrelated to the BZA's rulings in this case, and was part of a separate nuisance abatement action the City wished to instigate against the [property owners]." [150]

1. Exceptions to the Requirement of Exhaustion of Remedies.—Plaintiff-appellant tried to avoid the exhaustion of remedies doctrine in *Johnson v. Celebration Fireworks, Inc.*[151] The Indiana Court of Appeals initially accepted these arguments, but the Indiana Supreme Court reversed.[152]

Plaintiff, Celebration Fireworks, brought a declaratory judgment and injunction action regarding a dispute whether state law required payment of a permit fee per location or per seller. Celebration had relied on the supreme court's decision in *Indiana Department of Environmental Management v. Twin*

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145. *Id.* at 534.

146. 473 U.S. 172 (1985).

147. 726 N.E.2d 1217 (Ind. 2000).

148. *Howard*, 832 N.E.2d at 534. Analyzing the effect of *Williamson*'s "final decision" requirement on Indiana procedure, the court noted:

> The *Williamson* opinion does state that its "final decision" requirement is not necessarily the same as requiring the exhaustion of administrative remedies, although "the policies underlying the two concepts often overlap . . . ."
>
> [T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.

Id. at 533-34 (internal citation omitted) (bracket in original) (quoting *Williamson*, 473 U.S. at 192-93).

149. *Id.* at 536.

150. *Id.*

151. 829 N.E.2d 979 (Ind. 2005).

152. *Id.* at 983-84.

Eagle LLC[153] as support for the contention that exhaustion of remedies was not required.[154] The court distinguished *Twin Eagle* because the issue in that case was "statutory construction, [and] whether any agency possesse[d] jurisdiction over a matter [as that] [was] a question of law for the courts."[155] In comparison, in the present case, it was clear that the Fire Marshal had legal authority to license fireworks wholesalers.[156]

The court also rejected Celebration's arguments under the futility exception to the doctrine of exhaustion of administrative remedies.[157] "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 under the circumstances.'"[158]

Celebration argued the futility exception was appropriate because it believed it was inevitable that the agency would rule against it.[159] The court rejected this argument. "[T]he mere fact that an administrative agency might refuse to provide the relief requested does not amount to futility."[160]

2. Exhaustion of Remedies and Primary Jurisdiction.—Sun Life Assurance Co. of Canada v. Indiana Comprehensive Health Insurance Ass'n[161] prompted the Indiana Court of Appeals to discuss the differences between the doctrine of exhaustion of remedies and primary jurisdiction. In *Austin Lakes Joint Venture v. Avon Utilities, Inc.*,[162] the court stated that under the doctrine of primary jurisdiction, "[i]f at least one the issues involved in the case is within the jurisdiction of the trial court, the entire case falls within its jurisdiction, even if one or more of the issues are clearly matters for exclusive administrative or regulatory agency determination."[163] "The doctrine of primary jurisdiction is not . . . jurisdictional, [like the doctrine of exhaustion of remedies,] but prudential."[164]

In *Sun Life*, the insurance provider argued that the question of whether it was required to be a member of the Indiana Comprehensive Health Insurance Association by statute was a mixed question of law and fact such that it was appropriate for the trial court to have jurisdiction under the doctrine of primary jurisdiction.[165] The court of appeals rejected this argument. It found that whether

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153. 798 N.E.2d 839 (Ind. 2003).

154. *Johnson*, 829 N.E.2d at 983.

155. *Id.* (internal quotation marks omitted) (first and third brackets in original) (quoting *Twin Eagle*, 798 N.E.2d at 844).

156. *Id.*

157. *Id.* at 984.

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

159. *Id.*

160. *Id.* (citing Spencer v. State, 520 N.E.2d 106, 110 (Ind. Ct. App. 1988)).

161. 827 N.E.2d 1206 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 186 (Ind. 2005).

162. 648 N.E.2d 641 (Ind. 1995).

163. *Id.* at 646.

164. *Id.* at 645.

165. *Sun Life*, 827 N.E.2d at 1210.

a particular provider falls within a statutory definition was a question that generally must be left to the agency.[166] In this case, the Association had found Sun Life to be a member, but that Sun Life failed to pursue its administrative remedies.[167]

II. AGENCY ACTION

A. In General

The principle that an agency's authority is limited by statute was demonstrated in *Indiana Office of Utility Consumer Counselor v. Lincoln Utilities, Inc.*[168] The Indiana Court of Appeals found that the IURC had exceeded its statutory authority in valuing a water utility including property contributed in the aid of construction ("CIAC").[169] Despite the IURC's technical expertise to administer regulatory schemes and deference to the IURC's rate-making methodology, the court of appeals found that "the IURC had improperly exceeded its statutory authority."[170] The Commission had interpreted the relevant statutes as giving it a range in which to value utilities, including whether to include CIAC.[171] However, the court of appeals rejected this interpretation. It found the statutes in question created "no spectrum of utility valuation."[172]

1. Official Board Action.—In *Borsuk v. Town of St. John*,[173] the property owner made a procedural contention that the trial court should not have considered an affidavit of the President of the Plan Commission, but rather relied solely on the minutes of the Plan Commission and Town Council.[174] The Indiana Supreme Court stated, "Generally, 'boards and commissions speak or act officially only through the minutes and records made at duly organized meetings.'"[175] Although "evidence outside of a commission meeting offered by members of the commission cannot *substitute* for the minutes of the meeting, evidence used to *supplement* the minutes is properly admissible."[176]

2. Open Door/Open Records Statutes.—During the survey period, there were no cases on Indiana's Open Records Law,[177] and only one case with regard to the

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166. *Id.* (citing State *ex rel.* Paynter v. Marion County Superior Court, 344 N.E.2d 846 (Ind. 1976)).

167. *Id.* at 1213.

168. 834 N.E.2d 137, 142 (Ind. Ct. App. 2005), *trans. denied* (Ind. 2006).

169. *Id.* at 146.

170. *Id.* at 145 (internal citations omitted).

171. *Id.* at 145-46.

172. *Id.* at 146 (internal quotation marks omitted).

173. 820 N.E.2d 118 (Ind. 2005).

174. *Id.* at 122-23.

175. *Id.* at 123 (quoting Brademas v. St. Joseph County Comm'rs, 621 N.E.2d 1133, 1137 (Ind. Ct. App. 1993)).

176. *Id.* (citing Peavler v. Bd. of Comm'rs, 528 N.E.2d 40, 48 (Ind. 1988)).

177. IND. CODE §§ 5-14-3-1 to -10 (2005).

Open Door Law.[178] During 2005, both statutes were amended slightly. The most significant changes were to exempt certain records of the Indiana economic development corporation,[179] Indiana Finance Authority,[180] and Office of Tourism Development from the Open Records Law.[181]

In *Markland v. Jasper County Planning & Development Department*,[182] the Indiana Court of Appeals rejected an argument that Indiana's Open Door Law applied to a Technical Advisory Committee of a local planning Commission.[183] The court noted that the committee examines "the 'street and utility' components of a proposed subdivision and reports . . . to the Commission, but the decision to grant approval to a subdivision plan is made by the Commission."[184] The Commission, not the committee, was the public agency to which the Open Door Law applied.[185]

3. Other Statutory Changes to ARPA or AOPA.—ARPA and AOPA are subject to frequent "fine-tuning" changes by the Legislature. 2005 was no exception. A new chapter was added to ARPA requiring agencies to specifically describe the economic impact of rules on small businesses.[186] The notice period for rulemaking was shortened from thirty days to twenty-eight days.[187] Also, legislation was passed that beginning on July 1, 2006, the Indiana Register shall be published in electronic form only.[188]

B. Adjudication

1. Whether Agency Actions Are Orders.—In *Advantage Home Health Care, Inc. v. Indiana State Department of Health*,[189] a home health care company brought a declaratory judgment action against the state board of health claiming that the inspection reports and accompanying requests for correction of deficiencies were appealable orders under AOPA.[190] As a requirement to maintain its state and federal certification, Advantage was subject to inspections by the state board of health.[191] Under the challenged inspection, the Board of Health's investigator produced two survey reports.[192] The Department sent the

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178. *Id.* §§ 5-14-1.5-1 to -8.
179. *Id.* § 5-14-3-4.5.
180. *Id.* § 5-14-3-4.7.
181. *Id.* § 5-14-3-4.8.
182. 829 N.E.2d 92 (Ind. Ct. App. 2005).
183. *Id.* at 98.
184. *Id.* at 97.
185. *Id.*
186. IND. CODE §§ 4-22-2.1-1 to -8 (2005); *id.* §§ 4-22-3-1 to -3.
187. *Id.* § 4-22-2-23.
188. *Id.* § 4-22-8-2.
189. 829 N.E.2d 499 (Ind. 2005).
190. *Id.* at 500.
191. *Id.* at 501.
192. *Id.*

reports and an accompanying letter that requested that the home health agency submit a "plan of correction" to detail how it would address the identified violations.[193] The home health agency also had an opportunity to challenge the deficiencies through an Internal Dispute Resolution ("IDR") process, which consisted of both a paper review and a "face-to-face" review of the statement of deficiencies.[194]

In a survey conducted in 2001, the Board of Health identified several violations of state and federal rules and regulations at Advantage.[195] Advantage filed a plan of correction and requested administrative review under AOPA.[196] "The Department responded . . . that the surveys did not constitute orders and were not subject to review under AOPA."[197] Advantage initiated a paper review of both the state and federal surveys through the IDR process, but only a "face-to-face" review of the federal survey.[198]

Advantage subsequently filed a declaratory judgment complaint seeking to reverse the Department's position that a survey was not an order subject to review under AOPA.[199] The trial court granted summary judgment in favor of the Department, concluding that the surveys were exempted from AOPA pursuant to the Indiana Code and also that the surveys were not orders "because they simply documented the findings of investigations."[200]

Although the court of appeals found the statement of deficiencies were orders requiring home health agencies "to file a plan of correction 'within a certain period of time and in a certain required manner,'" the Indiana Supreme Court disagreed.[201] The supreme court found that the statements were "little more than the initial summation of [the Department's] investigation."[202] The statements "produce[d] nothing that approach[ed] a 'formal agency mandate.'"[203]

The function of an administrative investigation is to "obtain information to govern future action, and is not a proceeding in which action is taken against anyone."[204] An investigation is "distinct from an adjudication" because the "purpose of an . . . investigation is to discover and procure evidence, and not to prove a pending charge or complaint."[205] The Indiana Supreme Court found that

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193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 502.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* (citing IND. CODE § 4-21.5-2-5(9), (10) (2005)).

201. *Id.* (quoting Advantage Home Health Care, Inc. v. Ind. State Dept' of Health, 792 N.E.2d 914, 917 (Ind. Ct. App. 2003), *vacated*, 829 N.E.2d 499 (Ind. 2005)).

202. *Id.* at 504.

203. *Id.*

204. *Id.* (internal quotation marks omitted) (quoting 73 C.J.S. *Public Administrative Law & Procedure* § 145 (2004)).

205. *Id.* (internal quotation marks omitted) (quoting 73 C.J.S. *Public Administrative Law &*

the statement of deficiencies were in the first category because they serve as the "starting point from which the Department may judge the compliance of the home health care agency."[206]

Although an order under AOPA is defined as "1) an administrative agency action of; 2) particular applicability; 3) that establishes definitely; 4) the duty to submit a plan of correction,"[207] the court found that the "'duty' to submit a plan of correction [was], at best, modest."[208] A home health care agency could file "nothing more than . . . a statement asserting that the . . . agency believes itself to be in compliance with the applicable state laws and regulations."[209] The court believed these were "minimal agency requirements" and found it hard to believe that the legislature intended to require "routine judicial oversight" of such actions.[210]

The court also looked to the reasoning of an analogous case from the D.C. Circuit, a frequent arbiter of administrative law disputes.[211] Though not identical, AOPA's definition of "order" and the federal definition of "final agency action" were comparable.[212] Referring to a D.C. Circuit opinion, the court found that the survey report was "preliminary" in the sense that the IDR process was available to Advantage and accordingly the results of the report were subject to challenge if the Department ever used the survey report as the basis for imposing sanctions against the home health care agency.[213]

Finally, the Indiana Supreme Court noted that "if such a minimal response would be enough to require review it would subject agencies to judicial oversight of relatively simple communications."[214]

Indianapolis Downs also presented an issue regarding whether agency action constituted an order.[215] Indiana Downs filed a Verified Petition for Review pursuant to the AOPA.[216] The trial court dismissed its complaint for lack of subject matter jurisdiction because 1) the IHRC decision did not constitute "agency action" subject to judicial review; and 2) the IHRC was not required to comply with formal rulemaking procedures because its decision was consistent

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Procedure § 145 (2004)).

206. *Id.*

207. *Id.* (internal quotation marks omitted) (citing IND. CODE § 4-21.5-1-9 (2005)).

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* In *Reliable Automatic Sprinkler Co. v. Consumer Product Safety Commission*, 324 F.3d 726 (D.C. Cir. 2003), the circuit court found that a preliminary determination that a sprinkler head manufactured by Reliable constituted a "substantial product hazard" was not an Order under the Federal Administrative Procedures Act. *Id.* at 731.

212. *Advantage*, 829 N.E.2d at 504 n.4.

213. *Id.* at 505.

214. *Id.*

215. Indianapolis Downs, LLC v. Ind. Horse Racing Comm'n, 827 N.E.2d 162, 163 (Ind. Ct. App. 2005).

216. *Id.* at 167.

with its own past and accepted practices.[217]

The Indiana Court of Appeals found that the IHRC's decision was an agency action subject to judicial review because it was an order.[218] AOPA defines an order "as an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one or more specific persons."[219]

> [A] rule is defined as the whole or any part of an agency statement of general applicability that has or is designed to have the effect of law and implements, interprets, or prescribes law or policy or the organization, procedure, or practice requirements of an agency. Case law has attempted to further draw a distinction between an administrative order and an administrative rule by recognizing that an order operates retrospectively upon events that have already occurred, whereas a rule has a prospective effect.[220]

Because the IHRC adopted the Staff Recommendation, which required the funds to be distributed on an accrual basis, the IHRC had determined the legal rights and interests of Indiana Downs.[221] The court of appeals also concluded that "the IHRC's decision had a retrospective application" which is also indicative of an order.[222] The court of appeals relied upon its decision in *Smith v. State Lottery Commission of Indiana*,[223] in which a lottery winner contested the Lottery Commission's failure to pay the prize for an instant winning ticket because it was submitted more than sixty days after the end of a game.[224] The court of appeals determined that the application of a lottery rule to an individual case was actually an order.[225]

2. *Due Process.*—Two similar fact scenarios produced different findings on due process issues in *Abdirizak v. Review Board of the Indiana Department of Workforce Development*[226] and *Ennis v. Department of Local Government Finance*.[227]

In *Abdirizak*, an applicant for unemployment benefits appealed the decision of the Review Board of the Indiana Department of Workforce Development's

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217. *Id.* at 163, 167.

218. *Id.* at 169.

219. *Id.* at 168 (citing IND. CODE § 4-21.5-1-9 (2005)).

220. *Id.* (citing IND. CODE § 4-21.5-1-14 (2005); Smith v. State Lottery Comm'n of Ind., 701 N.E.2d 926, 930 (Ind. Ct. App. 1998)); *see also* Miller Brewing Co. v. Bartholemew County Beverage Co., 674 N.E.2d 193, 202 (Ind. Ct. App. 1996).

221. *Indianapolis Downs*, 827 N.E.2d at 168.

222. *Id.* at 169.

223. 701 N.E.2d 926.

224. *Indianapolis Downs*, 827 N.E.2d at 169 (citing *Smith*, 701 N.E.2d at 930).

225. *Id.* (citing *Smith*, 701 N.E.2d at 931).

226. 826 N.E.2d 148 (Ind. Ct. App. 2005).

227. 835 N.E.2d 1119 (Ind. Tax Ct. 2005).

determination denying his claim for benefits.[228] The applicant argued that he had not received notice of the hearing.[229] He had initially returned a form indicating he would participate at the hearing, but there was no response to a form which was sent out after the hearing was continued to another date.[230]

The Review Board did not conduct a hearing on whether the applicant had received notice.[231] The Indiana Court of Appeals reasoned that if the applicant "is able to show that he did not receive notice . . . , then he was not afforded an opportunity to be heard, and, thus, he was not afforded due process on his underlying substantive claim."[232] The court of appeals found that the agency must conduct an evidentiary hearing on the applicant's claim of inadequate notice in order to determine whether the requirements of due process had been met.[233]

Ennis involved a taxpayer appealing a real property assessment from the Department of Local Government Finance to the Indiana Board of Tax Review ("Indiana Board").[234] The Indiana Board set a hearing on the matter and sent Ennis notice by regular U.S. mail.[235] It was uncontested that the Indiana Board sent the notice to Ennis, but he claimed that he did not receive the notice until after the hearing date.[236] In a letter to the Indiana Board, he suggested that there was another property in his area with a similar address and that mail frequently was misdelivered.[237] The Tax Court affirmed the Indiana Board's decision that Ennis had received adequate notice and dismissed Ennis' appeal.[238] However, the Tax Court found that the Indiana Board did not act arbitrarily, capriciously, or abuse its discretion in making the determination that Ennis had received adequate notice.[239]

The Tax Court noted that the Indiana Board, "while an administrative body, is vested with quasi-judicial powers" under Indiana Code sections 6-1.5-4-1 and 6-1.5-5-1 to 6-1.5-5-5.[240] "When an agency acts in a quasi-judicial capacity, it must accord due process to those parties whose rights will be affected by its actions."[241] "Due process generally requires notice and an opportunity to be heard."[242] The Tax Court even quoted *Abdirizak* to state "that a party required to

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228. *Abdirizak*, 826 N.E.2d at 149.

229. *Id.*

230. *Id.*

231. *Id.* at 151.

232. *Id.*

233. *Id.*

234. Ennis v. Dep't of Local Gov't Fin., 835 N.E.2d 1119, 1120 (Ind. Tax Ct. 2005).

235. *Id.* at 1120-21.

236. *Id.* at 1121.

237. *Id.*

238. *Id.* at 1123.

239. *Id.*

240. *Id.* at 1122.

241. *Id.* (citing City of Hobart Common Council v. Behavioral Inst. of Ind., LLC, 785 N.E.2d 238, 246 (Ind. Ct. App. 2003)).

242. *Id.* (citing Galligan v. Ind. Dep't of State Revenue, 825 N.E.2d 467, 472 (Ind. Tax Ct.),

be served notice must 'receive actual, timely notice.'"[243]

One important factual difference between *Abdirizak* and *Ennis* is that in *Ennis* it was undisputed that the administrative agency had actually sent the notice to the applicant at his correct address. Another difference is that the Indiana Board in *Ennis* did give Ennis a greater opportunity to present evidence on his lack of notice. After Ennis failed to appear at the hearing, the Indiana Board sent him a letter indicating he could submit a written request that the order be vacated including "supportive facts stating why [he] did not appear at the hearing and showing cause why [h]is appeal should not be dismissed."[244] Ennis only suggested that the mail had been misdelivered. The court noted he could have attached an affidavit or additional evidence instead.[245]

Another due process issue was presented by *In re Change to the Established Water Level of Lake of the Woods in Marshall County*.[246] The appellant argued that the panel of reviewers, which was functioning in the same manner as an administrative agency, was biased because the members "had previously formed an opinion on the [applicant's] petition during the original action, which was marred by deficient procedures."[247]

The Indiana Court of Appeals stated that "due process requires that a hearing be conducted before an impartial body."[248] "[W]hen a biased board or panel member participates in a decision, the decision will be vacated."[249] "Nevertheless, because many administrative boards or panels are usually composed of persons without legal training, courts are reluctant to impose strict technical requirements upon their procedure."[250] "[P]rior involvement in an investigation does not automatically bias or disqualify an administrative body, such as the viewers in [Lake of the Woods]."[251] The court of appeals found that the appellant failed to demonstrate any bias by the panel and that the court would presume that an administrative panel acted properly and without bias or prejudice.[252]

Another due process concept is discrimination between similarly situated parties. In a case from the IURC, the Indiana Court of Appeals stated the

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trans. denied, 841 N.E.2d 180 (Ind. 2005)).

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

244. *Id.* at 1121 (brackets in original).

245. *Id.* at 1123 n.5.

246. 822 N.E.2d 1032 (Ind. Ct. App.), *trans. denied sub nom.* Lake of the Woods Property Owners v. Ralston, 841 N.E.2d 177 (Ind. 2005).

247. *Id.* at 1041.

248. *Id.* (citing Kollar v. Civil City of South Bend, 695 N.E.2d 616, 623 (Ind. Ct. App. 1998)).

249. *Id.* (citing Ripley County Bd. of Zoning Appeals v. Rumpke of Ind., Inc., 663 N.E.2d 198, 209 (Ind. Ct. App. 1996)).

250. *Id.* (citing *Ripley*, 663 N.E.2d at 209).

251. *Id.* (citing Koeneman v. City of New Haven, 506 N.E.2d 1135, 1138 (Ind. Ct. App. 1987)).

252. *Id.*

Commission is "not required to afford identical relief to all utilities in every circumstance."[253] "[T]he relevant question is not the degree of consistency with prior orders but rather whether there is a reasonable basis for [the agency] decision in the particular case."[254]

3. Settlements.—A quote from the Indiana Court of Appeals summarizes the special nature of settlements in administrative law.

> Settlement carries a different connotation in administrative law and practice from the meaning usually ascribed to settlement of civil actions in a court. While trial courts perform a more passive role and allow the litigants to play out the contest, regulatory agencies are charged with a duty to move on their own initiative where and when they deem appropriate. Any agreement that must be filed and approved by an agency loses its status as a strictly private contract and takes on a public interest gloss.[255]

The court went on to note, "[t]o be sure, regulatory settlements are distinguishable from agreements that are governed purely by contract law."[256]

In commenting on a case arising from the IURC, the Indiana Court of Appeals stated "[The IURC] has broad authority to supervise settlement agreements . . . and to be proactive in protecting the public interest."[257] A reviewing court should give substantial deference to a decision made by the Commission regarding a prior settlement.[258] The court particularly noted that decisions regarding accounting practices followed by public utilities are policy determinations, which are committed to the sound discretion of the Commission.[259] In such situations, "judicial interference is inappropriate so long as the Commission acts within reason and prudence."[260]

The *Nextel* case discussed previously also discusses the nature of settlements. The court of appeals stated that "[A]n agency may not accept a settlement merely because the private parties are satisfied; rather, an agency must consider whether

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253. N. Ind. Pub. Serv. Co. v. Ind. Office of Util. Consumer Counselor (*NIPSCO*), 826 N.E.2d 112, 119 (Ind. Ct. App. 2005).

254. *Id.* (citing Ogden v. Premier Properties, USA, Inc., 755 N.E.2d 661, 671 (Ind. Ct. App. 2001)).

255. *Id.* at 118 (bracket omitted) (quoting Citizens Action Coalition of Ind., Inc. v. PSI Energy, Inc., 664 N.E.2d 401, 406 (Ind. Ct. App. 1996)); *see also* Nextel W. Corp. v. Ind. Util. Regulatory Comm'n, 831 N.E.2d 134, 155 (Ind. Ct. App. 2005), *reh'g denied* (Ind. Ct. App. 2006).

256. *NIPSCO*, 826 N.E.2d at 118 (citing Ind. Bell Tel. Co. v. Office of Util. Consumer Counselor, 725 N.E.2d 432, 435 (Ind. Ct. App. 2000)).

257. *Id.* at 119 (citing Citizens Action Coalition of Ind. v. N. Ind. Pub. Serv. Co., 796 N.E.2d 1264, 1267-68 (Ind. Ct. App. 2003)).

258. *Id.* (citing U.S. Gypsum, Inc. v. Ind. Gas Co., 735 N.E.2d 790, 803-04 (Ind. 2000)).

259. *Id.*

260. *Id.* (citing Ind. Gas Co. v. Office of Util. Consumer Counselor, 675 N.E.2d 739, 747 (Ind. Ct. App. 1997)).

the public interest will be served by accepting the settlement."[261]

The appellants argued that the settlement agreement which had been accepted by the IURC must be held to a higher burden of proof because the settlement agreement was opposed by the Office of the Utility Consumer Counselor ("OUCC"), an agency "mandated by statute to 'have charge of the interest of the ratepayers and consumers of the utility.'"[262] The Indiana Court of Appeals rejected this argument, although it noted that "the policies favoring settlement agreements are 'further enhanced'" when the OUCC is one of the parties supporting the settlement agreement.[263] The court referred to the statute that provides that "settlement agreements by some or all of the parties to a proceeding that are filed with the Commission must be supported by 'probative evidence.'"[264] Although probative evidence was not defined, the court found that any settlement supported by substantial evidence and found to be in the public interest by the Commission met the requisite standard.[265]

C. Rulemaking

1. Invalid or Improper Rule.—Agencies must comply with the ARPA if they are promulgating a rule.[266] "On the other hand, agency actions that result in resolutions or directives that relate to internal policy, procedure, or organization and do not have the effect of law are not subject to the same requirements."[267]

Indiana Code section 4-22-2-3(b) defines a "rule" as: "[T]he whole or any part of an agency statement of general applicability that: (1) has or is designed to have the effect of law; and (2) implements, interprets, or prescribes: (A) law or policy; or (B) the organization, procedure, or practice requirements of an agency."[268]

In *Villegas*, the Indiana Court of Appeals discussed this definition and the characteristics of a rule as described in *Blinzinger v. Americana Healthcare Corp.*[269] In *Blinzinger*, the court of appeals

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261. Nextel W. Corp. v. Ind. Util Reg. Comm'n, 831 N.E.2d 134, 155 (Ind. Ct. App. 2005), *reh'g denied* (Ind. Ct. App. 2006).

262. *Id.* (quoting IND. CODE § 8-1-1.1-5.1(e) (2005)).

263. *Id.* at 156.

264. *Id.* (citing 170 IND. ADMIN. CODE 1-1.1-17(d) (2005)).

265. *Id.*

266. Villegas v. Silverman, 832 N.E.2d 598, 609 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App. 2005), *trans. dismissed* (Ind. 2006). In this Article the designation AOPA has been used to stand for the Administrative Order and Procedures Act, IND. CODE § 4-21.5 (2005), and ARPA has been used to stand for the Administrative Rules and Procedures Act, IND. CODE § 4-22 (2005).

267. *Villegas*, 832 N.E.2d at 608-09 (citing Ind. Dep't of Envtl. Mgmt. v. Twin Eagle LLC, 798 N.E.2d 839, 847 (Ind. 2003); Indiana-Kentucky Elec. Corp. v. Comm'r, Ind. Dep't of Envtl. Mgmt., 820 N.E.2d 771, 780 (Ind. Ct. App. 2005)).

268. IND. CODE § 4-22-2-3(b) (2005).

269. *Villegas*, 832 N.E.2d at 609 (citing Blinzinger v. Americana Healthcare Corp., 466 N.E.2d 1371 (Ind. Ct. App. 1984)).

> found that a rate fee directive adopted by the Indiana Department of Public Welfare was a rule because: (1) it was an agency statement of general applicability to a class; (2) it was applied prospectively to the class; (3) it was applied as though it had the effect of law; and (4) it affected the substantive rights of the class.[270]

In *Villegas*, the court of appeals found the BMV's new requirements were in fact a rule subject to ARPA, meeting all the requirements set forth in *Blinzinger*.[271] The requirements were "agency statements of general applicability that are designed to have the effect of law."[272] The requirements acted prospectively.[273] The requirements also substantively changed the law because some applicants who were able to obtain a driver license before July 15, 2002 no longer qualified once the new requirements went into effect.[274] The Indiana Court of Appeals also found that the new identification requirements did not relate to the BMV's internal policies, procedures, or organization.[275] It further stated that "[t]he primary impact of the identification requirements is external and it is the primary impact that is paramount."[276]

Indiana-Kentucky[277] followed much the same analysis. IKEC argued that IDEM's ten kilometer rule was unpublished and invalid.[278] The affidavit of an IDEM employee submitted in support of summary judgment stated "IDEM requires ambient monitoring for purposes of [the Indiana Administrative Code] to be located no more than ten kilometers from the source of the [sulfur dioxide] emissions."[279] The court of appeals agreed that the rule was invalid.[280]

The Indiana Court of Appeals found that the ten kilometer policy was a rule subject to ARPA because it was "an agency statement of general applicability that is designed to have the effect of law and implements or interprets the Rule" and was not a policy that "relate[d] solely to IDEM's internal policies, procedures, or organization."[281] Because IDEM did not follow ARPA when it promulgated the rule, it did not have the effect of law and Office of Environmental Adjudication erred in applying the rule against IKEC.[282]

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270. *Id.* (citing *Blinzinger*, 466 N.E.2d at 1375).

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.* (citing Ind. Dep't of Envtl. Mgmt. v. AMAX, Inc., 529 N.E.2d 1209, 1213 (Ind. Ct. App. 1988)).

277. Indiana-Kentucy Elec. Corp. v. Comm'r, Ind. Dep't of Envtl. Mgmt., 820 N.E.2d 771 (Ind. Ct. App. 2005).

278. *Id.* at 779.

279. *Id.* (brackets in original).

280. *Id.*

281. *Id.*

282. *Id.*

CONCLUSION

During the survey period, there were several notable cases interpreting Indiana's administrative law. Although the cases are only a snapshot in time, they provide a good introduction to the law for beginning practitioners or a good supplement for those practitioners already familiar with the subject area.