

**BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA**

IN THE MATTER OF:

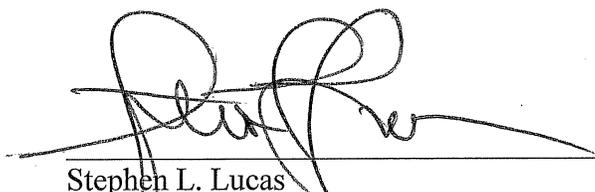
CONNIE G. COLLINS, GAYLA S.)	
PRESSNER, and CHARLIE COSTANZA,)	Administrative Cause
Claimants,)	Number: 13-195D
vs.)	
)	
TOWN OF OGDEN DUNES and)	(Special Purpose Deer
DEPARTMENT OF NATURAL RESOURCES,)	Control Permit)
Respondents,)	

**NOTICE OF FINAL ORDER
OF THE NATURAL RESOURCES COMMISSION**

You are notified the AOPA Committee of the Natural Resources Commission adopted the Findings of Fact and Conclusions of Law with Nonfinal Order of the administrative law judge. The AOPA Committee modified the Nonfinal Order to reflect the withdrawal as Claimants of Jon and Joan Machuca and made clerical and grammatical corrections.

The AOPA Committee for the Commission is the ultimate authority, and the action is its final determination. A person who wishes to seek judicial review must file a petition with an appropriate court within 30 days and must otherwise comply with Ind. Code § 4-21.5-5. Service of a petition for judicial review is also governed by 312 Ind. Admin. Code § 3-1-18.

Dated: April 24, 2014



Stephen L. Lucas
Administrative Law Judge
Natural Resources Commission
Indiana Government Center North
100 North Senate Avenue, Room N501
Indianapolis, IN 46204-2200

(317) 233-3322

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**FINDINGS OF FACT AND CONCLUSIONS OF LAW
WITH FINAL ORDER**

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Jurisdiction and Statement of the Proceeding

1. On November 11, 2013, Connie G. Collins (“Collins”) and Gayla S. Pressner (“Pressner”) filed by United States Priority Mail 2-Day™ their “Petition for review of the Special Control Deer Permit” (the “Petition”) with respect to a Special Purpose Deer Control Permit (the “Special Permit”) issued by the Department of Natural Resources (the “DNR”) to the Town of Ogden Dunes (the “Town”) on October 28, 2013. The Town and the DNR are collectively the “Respondents”. The Natural Resources Commission (the “Commission”) received the Petition on November 14. The Petition initiated a proceeding that is subject to Ind. Code § 4-21.5 (sometimes referred to as the “Administrative Orders and Procedures Act” or “AOPA”) and rules adopted by the Commission at 312 Ind. Admin. Code § 3-1 to assist with its implementation of AOPA. Under AOPA, the Commission is the “ultimate authority” for administrative reviews of special deer control permits issued by the DNR. *Howe v. DNR*, 13 Caddnar 20, (2012); Ind. Code § 4-21.5-1-15, Ind. Code § 14-10-2-3; and 312 Ind. Admin Code § 3-1-2.¹

¹ As provided in IC 4-21.5-3-32, an agency is required to index final orders and may rely upon indexed orders as precedent. In 1988, the Commission adopted Caddnar as its index of agency decisions.

2. The Petition included a request for a discretionary stay of effectiveness of the Special Permit pursuant to Ind. Code § 4-21.5-3-4(e). This subsection provides in part:

(e) If a petition for review of an order described in [Ind. Code § 4-21.5-3-4(a)] is filed within the period set by [Ind. Code § 4-21.5-3-7] and a petition for stay of effectiveness of the order is filed by a party..., an administrative law judge shall, as soon as practicable, conduct a preliminary hearing to determine whether the order should be stayed in whole or in part. The burden of proof in the preliminary hearing is on the person seeking the stay. The administrative law judge may stay the order in whole or in part. The order concerning the stay may be issued after an order described in subsection (a) becomes effective. The resulting order concerning the stay...must include a statement of the facts and law on which it is based.

3. Although not stated explicitly in the Petition, a reasonable inference was that Collins and Pressner asserted the Special Permit was issued wrongly by the DNR under Ind. Code § 4-21.5-3-4(a)(2) governing the grant of a noncommercial hunting license. Based on the inference, the stay request was set for a preliminary hearing in Chesterton on November 22, 2014.

4. The preliminary hearing was convened as scheduled. Collins², the Town, and the DNR tendered stipulations through a “Revised Agreed Joint Stipulations of the Parties for Purposes of the Stay of Effectiveness Hearing” (Stipulated Exhibit I). The stipulations included both exhibits and facts. Following the correction of scriveners’ errors, and applying defined terms from this Nonfinal Order, the stipulations of fact were admitted into evidence as follows:

1. The file of the [DNR’s] Division of Fish and Wildlife regarding the request of [the Town] for [the Special Permit], which consists of 53 pages and which [Collins and Pressner] and the Town have been provided copies by the [DNR], are true and accurate descriptions and representations of all documents contained in said file, and the file is hereby stipulated as admissible evidence at the [preliminary] hearing.

2. [The Town], by and through its Town Council President, Allen B. Johnson, sent a revised written application dated October 18, 2013 to Mr. Bob Porch, District 1 Wildlife Biologist for the [DNR] for the issuance of [the Special Permit] under IC 14-22-28-1.

3. The Town...is identified by the Porter County Assessor as the owner of parcel #64-02-35-003.017 and commonly referred to here as the...Fire Station.

4. The Town of Ogden Dunes Park and Recreation is identified by the Porter County Assessor as the owner of parcel #64-26-454-004.000-017 and commonly referred to as Hillcrest Park.

² Pressner did not appear for the preliminary hearing and has not appeared in person or by an attorney for any stage of the proceeding. She has filed occasionally pleadings or documents.

5. The Town...is identified by the Porter County Assessor as the owner of parcel #64-02-480-021.000-017 and commonly referred to as "Suerenity Park".
6. Indiana Code 14-22-28-1 provides that the director (of the Division of Fish and Wildlife) may issue to a person that owns or has an interest in property being damaged or threatened with damage by a wild animal protected by Title 14, Article 22 of the Indiana Code a free permit to take, kill, or capture the wild animal.
7. The [DNR] has the statutory authority to issue to the Town...a Special Purpose Deer Control permit under IC 14-22-28-1.
8. Ecologist John Ervin, of Valparaiso, Indiana conducted an updated assessment of the vegetation of the Town of Ogden Dunes, Indiana, and prepared a written report dated October 4, 2013 titled "Three Years of the Vegetation of the Town of Ogden Dunes, Indiana" containing observations and interpretations and effects of deer foraging.
9. On October 28, 2013, Mark Reiter, Director of the [DNR's] Division of Fish and Wildlife issued [the Special Permit] to the Town...with the effective date of that permit being November 15, 2013 and the expiration date being March 31, 2014.
10. The [Special Permit] provided that the authorized activity can be only at the locations of Suerenity Park, behind the Fire Station, and Hillcrest Park.
11. Pursuant to [the Special Permit], four (4) designated shooters whose names must be available upon request and on file at the Town office are authorized to shoot deer under the permit. The names of the shooters shall be given to the DNR District Wildlife Biologist (Bob Porch) and Indiana Conservation Officer District 10 headquarters prior to shooting any deer.
12. Pursuant to [the Special Permit], all authorized shooters must have a copy of the permit in their possession when taking and transporting deer under the authority of the permit, and the [Town] and shooters assume all responsibility for safety while carrying out the [Special Permit].
13. Pursuant to the [Special Permit], deer can only be killed with the following center-file rifles: .308 with a suppressor and .223 with a suppressor. Suppressors must be used in accordance with federal law.
14. Pursuant to the [Special Permit], the use of bait to concentrate deer at the approved shooting locations is permitted, and all shooting must take place from elevated stands.
15. Pursuant to the [Special Permit], no spotlight, searchlight, or other artificial light may be used, no shooting may be done from a motor-driven conveyance, and no shooting may be conducted within, into, upon or across a public highway.
16. Pursuant to the [Special Permit], shooting hours are from ½ hour before sunrise until ½ hour after sunset.
17. Pursuant to the [Special Permit], no more than 80 deer may be taken under the permit, and each deer taken must be utilized for human consumption. No part or portion of the

carcass may be sold. The “Authorization to Possess Deer Taken On A Deer Control Permit Form” must accompany all deer taken at all times.

18. Pursuant to the [Special Permit], for every deer that has a total of more than seven antler points, one antler must be removed from the skull and surrendered or disposed of as specified by a Conservation Officer or the District Biologist by the expiration date of the permit.

19. Pursuant to the [Special Permit], a log sheet must be completed that includes the date, time, and sex of each deer killed and disposition of each carcass. The log sheet must be returned to the District Wildlife Biologist by April 15, 2014.

5. Following entry of the stipulations on November 22, the “Notice of Motion and Motion to Intervene: Declarations of Jon Machuca and Joan Machuca” was considered. Jon Machuca and Joan Machuca are collectively the “Machucas”. Collins, the Town, and the DNR did not object to the motion. The Town stated its determination not to object was on condition the Machucas would be bound by all actions that occurred previously, including the stipulations described in Finding 4. The administrative law judge granted the Machucas’ motion to intervene, conditioned on them being bound by the stipulations and other actions that had occurred previously.³

6. During the preliminary hearing, testimony and other evidence was presented.

7. On November 27, the administrative law judge entered a “Final Order of Dismissal with Denial of Claimants’ Request”. *Collins v. Town of Ogden Dunes (Stay)*, 13 Caddnar 214 (2013). The “Final Order of Dismissal with Denial of Claimants’ Request” closed with the statement that a person that wished “to seek judicial review must file a petition for judicial review in an appropriate court within 30 days of this order and must otherwise comply with [Ind. Code § 4-21.5-5]. Service of a petition for judicial review” was also governed by 312 Ind. Admin. Code § 3-1-18.

8. Following the preliminary hearing, the Town requested orally to consolidate consideration of the stay request and the underlying administrative review. The administrative law judge denied the Town’s request because no authority was cited, but he indicated the request could be revisited following disposition of judicial review of the “Final Order of Dismissal with Denial of Claimants’ Request” or if no person sought judicial review.

³ On April 17, 2014, the Machucas requested to withdraw as Claimants. The request was granted on April 21, 2014.

9. No person sought judicial review of the “Final Order of Dismissal with Denial of Claimants’ Request”, and the time for seeking judicial review has expired.

10. On December 20, 2013, Collins filed a “Motion to Consolidate Stay Request with Merits of the Case”. The motion stated in part:

All actions, in the above matter, are between the same parties, pending in the same court, and involving substantially the same subject matter, issues, and defenses. Consolidation will assist in avoiding unnecessary costs or delays and will serve judicial economy and efficiency.

11. On January 2, 2014, the administrative law judge provided until January 16 to file and serve any response to the Collins’ motion.

12. On January 14, the Town filed its “Response and Concurrence with Claimants’ Motion to Consolidate Stay Request with Merits of the Case” citing Indiana Trial Rule 65.

13. On January 16, the DNR filed the following response:

The Department of Natural Resources (“Department”), through the Department of Fish and Wildlife, does not object to Collins’ “Motion to Consolidate Stay Request with Merits of the Case”, dated December 20, 2013.

Additionally, the Department received service of the Town’s “Response and Concurrence with Claimant’s Motion to Consolidate”, dated January 14, 2014. The Department does not object to the Town’s motion.

14. Also on January 16, Collins filed the “Claimants’ Objection to Request to Dismiss”. She indicated the December 20, 2013 motion “did not request nor imply a dismissal of the case.... The Claimants have not had an opportunity to present their case in its entirety.”

15. On January 30, the administrative law judge issued “Entries and Notice of Status Conference” (the “January 30 Entries”).

16. In the January 30 Entries, the administrative law judge observed that for consideration were a petition for administrative review and a petition for stay. Ind. Code § 4-21.5-3-4(a) describes a petition for administrative review in the circumstances applicable to this proceeding, and Ind. Code § 4-21.5-3-4(e) describes the resulting opportunity to petition for stay. Subsection (e) provides that “[i]f a petition for review... is filed..., and a petition for stay of effectiveness of the order is filed by a party..., an administrative law judge shall, as soon as practicable, conduct

a preliminary hearing to determine whether the order should be stayed in whole or in part.” The petition for stay is an adjunct to the petition for administrative review. Indeed, a petition for review under Ind. Code § 4-21.5-3-4(a) may be a condition precedent to seeking a stay under Ind. Code § 4-21.5-3-4(e).⁴

17. Although indicating reference to the Indiana Trial Rules may be unnecessary to consolidating the stay hearing with the hearing of the facts, the administrative law judge found persuasive the Town’s contention Trial Rule 65 offered insight for construing AOPA. In particular, Trial Rule 65(A)(2) provides in part:

Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial.

18. An order to consolidate under Trial Rule 65 may be made before, during, or after a hearing on the preliminary injunction, if the court provides notice of the decision to consolidate. Consolidation is not reversible error unless a party demonstrates prejudice. Prejudice is a showing of “admissible, material evidence that would be produced at trial and that would have likely changed the outcome on the merits, or a persuasive showing why available evidence was not accessible in the time between filing the complaint and the hearing.” *Roberts v. Community Hospitals of Indiana, Inc.*, 897 N.E.2d 458, 464 (Ind. 2008).

19. In the “Final Order of Dismissal with Denial of Claimants’ Stay Request”, the appropriate standard for determining whether to grant a stay was identified as the equitable standard for whether to grant a preliminary injunction. Any evidence received upon an application for stay under AOPA, which would be admissible upon a hearing of the facts, should become part of the record on the petition for administrative review and not repeated at hearing.

20. As described in the “Final Order of Dismissal with Denial of Claimants’ Stay Request”, the evidence adduced during the preliminary hearing was entirely consistent with issuance of the

⁴ Most licensure actions that come before the Commission on administrative review are subject to Ind. Code § 4-21.5-3-5 rather than Ind. Code § 4-21.5-3-4. A consideration of Ind. Code § 4-21.5-3-5 is beyond the scope of this proceeding, but it may be noteworthy the treatments of stay petitions differ in these statutory sections.

Special Permit. The Claimants participating in the preliminary hearing not only did not carry their burden of proof to support the stay request, they failed to provide any basis in fact or law on which the stay could have been granted. Even so, the Claimants should be accorded the opportunity to show admissible, material evidence that would be produced at a hearing of the facts on the petition for administrative review and that would have likely changed the outcome on the merits, or a persuasive showing why available evidence was not accessible in the time between filing the complaint and the stay hearing.

21. The administrative law judge ordered in the January 30 Entries:

(1) Any evidence received at or in conjunction with the stay hearing on November 22, 2013 is part of the record for any consideration of the petition for administrative review and need not be repeated at a hearing of the facts on the petition for administrative. No party sought judicial review of the Final Order of Dismissal with Denial of Claimants' Stay Request, and the Order is part of the record for any consideration of the petition for administrative review.

(2) The Claimants are provided until February 17, 2014 to (a) identify admissible, material evidence that would be produced at a hearing of the facts on the petition for administrative review and that would likely change the outcome on the merits; or (b) make a persuasive showing why available evidence was not accessible in the time between filing the complaint and the stay hearing.

22. Over objections by Collins, the January 30 Entries also granted a petition to intervene by Charlie Costanza ("Costanza") that was set forth in a January 1 email. For AOPA, intervention is governed by Ind. Code § 4-21.5-3-21:

Sec. 21. (a) Before the beginning of the hearing on the subject of the proceeding, the administrative law judge shall grant a petition for intervention in a proceeding and identify the petitioner in the record of the proceeding as a party if:

(1) the petition:

(A) is submitted in writing to the administrative law judge, with copies mailed to all parties named in the record of the proceeding; and

(B) states facts demonstrating that a statute gives the petitioner an unconditional right to intervene in the proceeding; or

(2) the petition:

(A) is submitted in writing to the administrative law judge, with copies mailed to all parties named in the record of the proceeding, at least three (3) days before the hearing; and

(B) states facts demonstrating that the petitioner is aggrieved or adversely affected by the order or a statute gives the petitioner a conditional right to intervene in the proceeding.

(b) The administrative law judge, at least twenty-four (24) hours before the beginning of the hearing, shall issue an order granting or denying each pending petition for intervention.

(c) After the beginning of the hearing on the subject of the proceeding, but before the close of evidence in the hearing, anyone may be permitted to intervene in the proceeding if:

(1) a statute confers a conditional right to intervene or an applicant's claim or defense and the main action have a question of law or fact in common; and

(2) the administrative law judge determines that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.

In exercising its discretion, the administrative law judge shall consider whether the intervention will unduly delay or prejudice the adjudication of the legal interests of any of the parties.

(d) An order granting or denying a petition for intervention must specify any condition and briefly state the reasons for the order. The administrative law judge may modify the order at any time, stating the reasons for the modification. The administrative law judge shall promptly give notice of an order granting, denying, or modifying intervention to the petitioner for intervention and to all parties.

23. Ind. Code § 4-21.5-3-21 provides a liberal opportunity for intervention before the beginning of a hearing, but the opportunity becomes ever more limited as the process advances. *Jansing v. DNR and Hawkins, et al.*, 11 Caddnar 8 (2007). Ind. Code § 4-21.5-3-21 does not provide an opportunity for intervention after the conclusion of a hearing.

24. In his individual capacity as a resident of the Town of Ogden Dunes, Costanza appeared similarly situated to Collins, Pressner, and the Machucas. But with the November 22 preliminary hearing completed and the time having passed for judicial review of the "Final Order of Dismissal with Denial of Claimants' Stay Request", Costanza was foreclosed from contesting any aspect of the preliminary hearing. His intervention did not apply retroactively. With these conditions stated as anticipated by Ind. Code § 4-21.5-3-21(d), Costanza was granted intervention.

25. Collins, Pressner, and Costanza are collectively the "Claimants". The Claimants, the Town, and the DNR are collectively the "Parties".

26. This Finding sets forth the testimony of the three witnesses at the preliminary hearing. Subject to evidence the Claimants might have offered pursuant to Part (2) referenced in Finding 21, the testimony also applies to this proceeding:

Robert Porch

.... The first witness called by the Claimants was Robert Porch. He is a private lands wildlife biologist with DNR's Division of Fish and Wildlife and has been employed there as a biologist for 37 years. He is very knowledgeable concerning the habits of white-tailed deer. His immediate supervisor is Patrick Mayer. Testimony of Robert Porch.

Over the last three years, Porch has discussed with the Town methods for controlling deer populations, other than shooting deer. His opinion is alternative methods are not reasonable and are ineffective. "There has been no major wildlife findings that would suggest that new alternatives" for deer population control, other than killing deer, "are now possible."⁵ DNR participates in identifying types of firearms to be used in a deer hunt governed by IC 14-22-28-1. The DNR requires firearms that can result in a "clean and efficient" kill. Porch Testimony.

Porch reviewed the Town's permit application. The Town contended in the application: "White-tailed deer population within the municipal boundaries of the Town of Ogden Dunes, Porter County, Indiana have damaged and continue to threaten with damage Town-owned other public and private property." DNR is aware of the general dynamics of the area of the Town, with the Indiana Dunes National Lakeshore and other nearby communities. Porch and his supervisor, Patrick Mayer, drove around the community and viewed "obvious deer damage", which included "browse lines". Mayer took images which help document the damage, but Porch also visually identified obvious deer damage in the Town. Porch Testimony.

Porch reviewed "Three Years of the Vegetation of the Town of Ogden Dunes, Indiana" (October 4, 2013), a report by ecologist, John Ervin. In the report, Ervin described browse lines attributed to deer, a dominance of invasive species, periodic herbivory resulting in growth habits in woody plants that are distinct from those of undisturbed plants, and areas of trampling of soil by repeated congregation or movement of deer. Porch observed conditions in the Town that are consistent with the report. Porch Testimony.

The largest landowner in extreme northern Porter County, which includes the Town, is the Indiana Dunes National Lakeshore. The Indiana Dunes National Lakeshore has documented the presence of "too many deer in this immediate area," but until 2012 it did not participate in deer culls. Again, in 2013 the Indiana Dunes National Lakeshore applied to the DNR for a permit to conduct a deer cull, and the permit was granted. Some areas to which the DNR permit to the Indiana Dunes National Lakeshore applies are contiguous to the Town. During the last decade, a grain farmer about one or two miles from the Town has received deer depredation permits "which reflect crop damage." The Shirley Heinze Land Trust, which has small holdings near the Town, has also approached the DNR seeking "deer harvest relief." With the loss of native predators, such as wolves, deer populations are excessive. In the absence of permits to control populations, damage results to flora. The DNR needs to work with communities "to keep this deer population at a level that the ecosystem can survive." If each community and entity took the number of deer authorized to be taken by the DNR through a special purpose deer control permit, and otherwise as authorized by the agency, "there is still going to be plenty of deer."

⁵ The court reporter has not been requested to prepare a transcript of the hearing. If a witness is shown as quoted in this Final Order, the statement is as nearly verbatim as could be determined by the administrative law judge. If a transcript is subsequently prepared that indicates different wording, the transcript shall be considered the official record and a quotation here as paraphrasing of witness testimony.

White-tailed deer have demonstrated they are a “resilient” species that is resistant to population control. Porch Testimony.

Porch said his professional opinion is that the Special Permit would help prevent some of the damage caused by deer to property owners in the Town. At the same time, “you need almost a cumulative-type effort. If, perhaps, the Indiana Dunes National Lakeshores starts culling deer, and Ogden Dunes does not, you’re almost promoting the safe haven and perhaps increasing the problem.” Documentation demonstrates areas surrounding the Town are over-populated with deer. If deer hunting activities increase in the surrounding areas, there may be an increase in populations within the Town if effectiveness of the Special Permit were stayed. “The only way to reduce deer depredation, deer overpopulation problem, is to remove some of the deer.... As sad as it is, killing deer is the solution.” Porch Testimony.

John Ervin

The second witness called by the Claimants was John Ervin. Ervin was employed by DNR’s Division of Entomology in 1988. He obtained a Bachelor of Science from Purdue University in 1991. He held a teaching assistantship from Ball State University between 1997 and 1999. Subjects included botany, invertebrate zoology, entomology, ecology, and evolution. He has engaged in independent study in entomology, ecology, chemistry, mathematics, physics, philosophy, and anthropology. From 1994 to 2000, Ervin was an ecologist aid to the Northeast Regional Ecologist of DNR’s Division of Nature Preserves. Ervin was employed as a land steward for Indiana Field Office of The Nature Conservancy from 2000 to 2005. He was the Lake Michigan Coastal Region Ecologist for the DNR’s Division of Nature Preserves from 2005 to 2011 and is currently doing business as “Primal Elegance-Sustainable Living Solutions” in Valparaiso. Testimony and Resume included in “Revised Agreed Joint Stipulations of the Parties for Purposes of the Stay of Effectiveness Hearing” (Stipulated Exhibit I).

The Town contracted with Ervin to perform a study of vegetation within the Town. Ervin has experience in animal and plant populations, specifically in Northwest Indiana. The experience includes the study of deer populations in Northwest Indiana. His first specific interest in the study of the effects of deer populations in the Town was in late 2011. The 2011 study was a quantitative study. His study in 2013 was similar to Porch’s, a qualitative visual study. Testimony of Ervin.

In 2011, Ervin observed an absence of vegetation on a variety of levels within a deer’s reach. “That included the herbaceous layer and the shrub and small tree layers.” Trees were stunted and plant mortality was demonstrated that he attributed to deer. Ervin Testimony.

In early September 2013, Ervin conducted a visual assessment of the level of damage to vegetation by deer compared to what he observed in 2011. As summarized in “Three Years of the Vegetation of the Town of Ogden Dunes, Indiana”:

Succinctly, there was no significant visual difference in the 2013 vegetation when compared to previous years. Observations were conducted on two directed visits, and additional observations were recalled from casual visits throughout 2013. Referring to the defined observations: (1) Browse lines are evident in both green spaces and residential plantings. (2) Invasive species are dominant throughout the Town. (3)

Multiple branching and root-suckering continue among wild trees, and significant stunting is evident on yews, arborvitae, holly, and deciduous shrubs in residential landscapes. (4) Trampling is significant along trails, and in resting areas.

These simple conclusions, while re-confirming deer impacts, do little to describe causality. Particularly troubling is the fact that many deer have been removed from the Town, yet there are no outstanding changes that would indicate that management ever occurred. The only reasonable inference is that a large population is still present—perhaps as large as when the hunts started.

Ervin Testimony and “Three Years of the Vegetation of the Town of Ogden Dunes, Indiana” included in “Revised Agreed Joint Stipulations of the Parties for Purposes of the Stay of Effectiveness Hearing” (Stipulated Exhibit I).

Following the September visual assessments that formed the basis for his written report, Ervin observed “some re-growth of plants trying to re-grow, and then it appeared that the deer had removed the fresher new more palatable growth.” He concluded deer will continue to damage both private and public property within the Town based upon current population levels. Ervin concurred with Porch the crux of the problem of excessive deer populations is a “region-wide issue” that requires cooperative culls from various jurisdictions, including prominently the Indiana Dunes National Lakeshore. If the Town ceased to participate in culls, the result would distract from the regional response and might cause the Town to become a “safe haven” for deer where populations become even more excessive. “It has to be a concerted effort for a long-term effect.” Ervin Testimony.

During his professional career, Ervin has observed efforts at other Indiana locations, including Pokagon State Park and Douglas Woods, to re-establish an ecological balance through the application of deer culls. “And whenever the culls have occurred..., over time there has been a positive response by the plant community and as well the rest of the biota. The return of the plant communities are the basis for the food chain.... If the culls were not to occur, would it be detrimental? Yes. I agree with that, and I further wish to state that if the culls do not occur it would be detrimental to the deer as well. The overpopulation will promote disease amongst the population, which we’ve seen at several places, chronic wasting and other diseases. So, we’re not just talking about the ecosystem itself, we’re talking about the animal specifically—the deer specifically being influenced negatively by overpopulations.” Ervin Testimony.

Ervin determined that leafy plants were eaten by deer rather than another mammal, such as a rabbit, squirrel, or chipmunk, because deer cause leaves to be torn off. “Deer do not have the front teeth that grazers have.” Deer “rip and tear”. To determine deer browse on twigs and other wood growth, they tend to be gnawed. “There’s a certain height deer browse to, so something six feet up is unlikely to be eaten by a rabbit.” Ervin Testimony.

Allen Johnson

The third and final witness called by the Claimants was Allen Johnson, President of the Town Council. He has served in the position since April 2012. Johnson has been a resident of the Town since 1974. With input from other members of the Town Council, he prepared the application for the Special Permit. The purpose for the application was to help “reduce the amount of damage that’s occurring in Town.” DNR provided him the

“number 80” for deer authorized to be culled. Although he has not observed the culling process, his belief is that the cullers (and perhaps the Town Marshall) determine whether a carcass is fit for human consumption. Prior to November 22, 2013, deer were culled under the Special Permit during one day. It was reported to Johnson eight deer were culled on that day. Johnson Testimony.

A task force was created in the early part of 2012, which met for about five months, to study the consequences of deer populations in the Town. The task force did not make recommendations as a group. “There were about six people on the task force, and they each wrote their own opinions of various subjects related to deer.” In August 2012, the Town Council authorized Johnson and his designee to apply to the DNR for a permit to conduct a deer cull in the fall and winter of 2013 and 2014:

Paul Panther made the motion that the Town Council President and/or his designees be permitted on behalf of the Town...to prepare and submit to the [DNR] a request for a permit to conduct a deer cull during the fall/winter of 2013-2014. Bill Gregory seconded the motion. The vote of the Council was as follows: Bill Gregory, yes; Allen Johnson, yes; Paul Panther, yes; Tom Clouser, yes; and Charlie Costanza, no. The motion was passed four to one. A motion was made by Tom Clouser authorizing various reasonable expenditures, if necessary, in conjunction with the preparation and submission of a cull permit request for the season 2013-2014 including reasonable costs for the services of the Town’s legal firm. Paul Panther seconded the motion. The vote of the Council was as follows: Bill Gregory, yes; Allen Johnson, yes, Paul Panther, yes; Tom Clouser, yes; and Charlie Costanza, no. The motion was passed four to one.

Johnson Testimony and “Ogden Dunes Town Council Meeting Monday, August 5, 2013” minutes included in “Revised Agreed Joint Stipulations of the Parties for Purposes of the Stay of Effectiveness Hearing” (Stipulated Exhibit I).

For the Special Permit, the deer cull can occur only at Suerenity Park, behind the Fire Station, and at Hillcrest Park. The Town owns the land at Suerenity Park and behind the Fire Station. Hillcrest Park is owned by the Town’s Park and Recreation Department. On September 25, 2013, the Park Department’s Board gave approval for deer culling under the Special Permit to occur at Hillcrest Park. Johnson gave the Town Marshall authority to begin the cull. Signs and yellow tape mark off Suerenity Park and Hillcrest Park to inform the public a deer cull is occurring, and notices have been published on the Town’s website and television channel. The Town Council’s policy is that culls will only occur days in which Portage Township Schools are operating. Johnson Testimony.

27. The Respondents questioned the Claimants’ witnesses. The Respondents did not call additional witnesses. The hearing was then adjourned.

28. In response to the portion of the January 30 Entries, Part (2) as set forth in Finding 21, the Claimants on February 17 filed their “Motion to Reconsider in Light of Newly-Discovered Evidence”. On page 2 of the filing, the Claimants set forth the elements asserted as newly-discovered evidence:

1. Communication between the DNR and the Ogden Dunes Town Council regarding the completion of the application for Special Deer Control permit as it pertains to the Policies and Procedures for [DNR's] Division of Fish and Wildlife.
2. Reports from Mr. Bob Porch, District Biologist[,] regarding a listing of proof of inspection and damaged plants during the growing season or browsing and antler rubbings.
3. Reports from Bob Porch, District Biologist[,] regarding his response to resident's complaints and concerns with recommendations resolving these concerns.
4. Reports from Bob Porch, District Biologist[,] discussing alternative methods such as non-lethal methods of during [*sic.* doing (?)] control.
5. Communication between the Town Council and the community regarding the following:
 - Public information Plan
 - The number of deer to be taken
 - Safety issues regarding the deer cull

29. On February 20, the "Town of Ogden Dunes' Response in Opposition to Claimants' Motion to Reconsider in Light of Newly-Discovered Evidence" was filed.

30. On February 28, a status conference was conducted as scheduled in Michigan City. A schedule was established for briefing the motion. On March 14, the "Town of Ogden Dunes' Response to Claimants' 'Newly-Discovered Evidence'" was filed. On March 17, the "Brief in Support of Claimants' Newly-Discovered Evidence" was filed.

31. The Commission has jurisdiction over the subject matter and over the persons of the Parties. The proceeding is ripe for a consideration of the Claimants' assertion of newly discovered evidence and for a final disposition of administrative review of the Special Permit.

B. Nature of Administrative Review of DNR Permitting Action

32. At each stage of a proceeding, the person requesting an agency take action has the burden of persuasion and the burden of going forward (sometimes collectively referred to as the "burden of proof"). Ind. Code § 4-21.5-3-14(c) and *Indiana DNR v. Krantz Bros. Const.*, 581 N.E.2d 935, 938 (Ind. App. 1991). The Claimants have the burden of proof to demonstrate the DNR's Division of Fish and Wildlife erred in issuing the Special Permit to the Town.

33. Typically, the measure for meeting the burden of proof under AOPA is by a “preponderance of the evidence”. *Indiana Dept. of Natural Resources v. United Refuge Company, Inc.*, 615 N.E.2d 100 (Ind. 1993) and *Sommers v. LaPorte Co. Conven. & Visitors Bur.*, 13 Caddnar 169, 171 (2013). “Preponderance of the evidence” refers to evidence which, when considered and compared with that opposed to it, has more convincing force, and which produces in the mind of the trier of fact, a belief that what is sought is more likely true than not. *Bivens v. State*, 642 N.E.2d 928 (Ind. 1994). The trier of fact must be convinced from a consideration of all evidence that the issue for which a party has the burden is more probably true than not true. *Ken Schaefer Auto Auction v. Trustison*, 198 N.E.2d 873 (Ind. App. 1964). The Claimants must demonstrate they have met the burden of proof by a preponderance of the evidence.

34. “[A]n administrative agency does not have the power to make decisions properly committed to another agency. An administrative agency has only those powers that the legislature has conferred to it, and unless [there exists] the grant of powers and authority in the statute..., no power exists.” [Court citations omitted.] *Musgrave v. Squaw Creek Coal Company*, 964 N.E.2d 891, 902 (Ind. App. 2012). An Indiana state administrative agency has only those powers conferred to it by the Indiana General Assembly. Powers not within the legislative grant may not be assumed by the agency nor implied to exist in its powers. *Bell v. State Board of Tax Commissioners*, 651 N.E.2d 816, 819 (Ind. Tax Ct. 1995). The Claimants must demonstrate the DNR (or the Commission on administrative review) has statutory authority to address any claimed grievance arising from issuance of the Special Permit.

35. An administrative law judge conducts a proceeding de novo. Ind. Code § 4-21.5-3-14(d). Rather than deferring to a DNR permitting determination, de novo review requires an administrative law judge to consider and apply proper weight to the evidence. *Sommers v. LaPorte Co. Conven. & Visitors Bur.* at 171 applying *DNR v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993). The administrative law judge must consider and give proper weight to the evidence rather than deferring to the initial determination by the DNR’s Division of Fish and Wildlife to issue the Special Permit.

36. The de novo hearing is conducted by the Commission’s administrative law judge. “The hearing is not a DNR proceeding, and the Commission is not governed by the actions of the

DNR. [Pursuant to AOPA for DNR permitting, the] Commission is the ‘ultimate authority’”. *Island Prop. Owners Ass’n, Inc. v. Clemens and DNR*, 12 Caddnar 56, 58 (2009) citing Ind. Code § 14-10-2-3 and Ind. Code § 4-21.5-1-15.

C. Evidence at Preliminary Hearing Supports Issuance of Special Permit

37. The stipulations entered by the Parties and described in Finding 4 are compatible with issuance of the Special Permit. All testimonies by Porch, Ervin, and Johnson referenced in Finding 26, and received at the preliminary hearing, are more-likely-than-not accurate and are persuasive. They support issuance of the Subject Permit. The Claimants called Porch, Ervin, and Johnson as witnesses and offered testimony from no one else. Taken individually or a whole, the stipulations and the testimonies of the Claimants’ witnesses were entirely consistent with issuance of the Special Permit. The Claimants offered no evidence before or during the preliminary hearing on which the Special Permit could be appropriately set aside or conditioned.

D. Disposition of Claimants’ Motion to Reconsider in Light of Newly-Discovered Evidence

38. Following the preliminary hearing, the Claimants moved the Commission to reconsider its order affirming the Special Permit based upon assertions of newly-discovered evidence. The motion cited Federal Rule 59 of Civil Procedure. The Claimants urged Federal Rule 59 may be invoked “if there are grounds that the newly-discovered evidence would probably change the results of the prior outcome; the newly-discovered evidence must have been discovered since the trial (in this case the Preliminary Hearing); the newly discovered evidence must be material; and the newly-discovered evidence must not be merely cumulative or impeaching.”

39. The proceeding is governed by AOPA and 312 Ind. Admin. Code § 3-1. 312 Ind. Admin. Code § 3-1-10 provides that unless otherwise inconsistent with AOPA and 312 Ind. Admin. Code § 3-1, an administrative law judge may apply the Indiana Rules of Trial Procedure. Application of the Federal Rules of Civil Procedure is not authorized by AOPA or 312 Ind. Admin. Code § 3-1. The Federal Rules of Civil Procedure do not apply to this proceeding.

40. To support a complete agency record, however, Federal Rule 59 is considered as if it were applicable. The assertions of newly-discovered evidence identified in Finding 28 are considered immediately below.

41. The first assertion by the Claimants of newly-discovery evidence is as follows:

1. Communication between the DNR and the Ogden Dunes Town Council regarding the completion of the application for Special Deer Control permit as it pertains to the Policies and Procedures for [DNR's] Division of Fish and Wildlife.

A 20-page document entitled "Policies and Procedures for Division of Fish and Wildlife", addressed to "Human Conflicts with White-Tailed Deer", was provided by the Claimants and attached to the "Report of Final Status Conference and Notice of Hearing" (March 3, 2014).

42. A rule is an agency statement of general applicability that has the effect of law. Ind. Code § 4-22-2-3(b). The Commission adopts permanent rules for DNR functions. Ind. Code § 14-10-2-4. "Policies and Procedures for Division of Fish and Wildlife" is not a rule adopted by the Commission for DNR functions.

43. A state agency may issue statements in the conduct of its affairs that interpret, supplement, or implement a statute. If the statements are not adopted as rules and are not intended to have the effect of law, they are required to be delivered to the Legislative Services Agency for posting in the *Indiana Register* as nonrule policy documents. Ind. Code § 4-22-7-7(a) and Ind. Code § 4-22-7-7(b). *Tiller v. DNR*, 10 Caddnar 5, 12 (2005).

44. As the policy-making body for the DNR, the Commission must approve a nonrule policy document before delivery to the Legislative Services Agency for posting under Ind. Code § 4-22-7-7. A party to an AOPA proceeding cannot rely on a nonrule policy document until posted in the *Indiana Register*. *Mega Oil, Inc. v. Department of Natural Resources*, 7 Caddnar 129, 130 (1996).

45. "Policies and Procedures for Division of Fish and Wildlife" appears to be a nonrule policy document that is governed by Ind. Code § 4-22-7-7. But nothing in the record indicates the Commission has approved the document for posting in the *Indiana Register*, and nothing in the

record identifies a posting in the *Indiana Register*.⁶ A party cannot rely upon the document in this proceeding.

46. Even if a party could rely upon “Policies and Procedures for Division of Fish and Wildlife”, the document would be no more than guidance and does not have the force of law. DNR compliance with every term is not a condition precedent to the Commission affirming the Special Permit following de novo review.

47. Standing alone, the document “Policies and Procedures for Division of Fish and Wildlife” proves nothing. The Claimants have made no showing agency personnel evaluating Special Permit application did not consider its guidance. The Claimants’ only showing is that agency personnel might not have.

48. Finally, the Claimants’ focus upon a “communication between the DNR and the Ogden Dunes Town Council” pertaining to the “Policies and Procedures for Division of Fish and Wildlife” ignores that the Commission provides de novo review. The Commission is concerned with the propriety of the Special Permit not the specifics of communications before issuance of the Special Permit. Even if the Claimants could provide a transcript of the referenced communication, and they have not offered even a general summary, there is no basis on which to determine the communication would cause the Special Permit to have been erroneously issued.

49. The first assertion does not provide newly-discovered evidence that bears significantly on the propriety of the Special Permit.

50. The second, third, and fourth assertions by the Claimants of newly-discovery evidence have similar imports and are as follows:

2. Reports from Mr. Bob Porch, District Biologist[,] regarding a listing of proof of inspection and damaged plants during the growing season or browsing and antler rubbings.

⁶ The Commission maintains a listing of its nonrule policy documents at www.ai.org/nrc/2375.htm. “Policies and Procedures for Division of Fish and Wildlife”, addressed to “Human Conflicts with White-Tailed Deer”, is not listed. If the DNR’s Division of Fish and Wildlife uses the document to interpret, supplement, or implement a statute, the DNR is admonished to tender to the Commission for consideration and approval and for subsequent posting in the *Indiana Register*. Lacking compliance with Ind. Code § 4-22-7-7, “Policies and Procedures for Division of Fish and Wildlife” is generally a legal nullity.

3. Reports from Bob Porch, District Biologist[,] regarding his response to resident's complaints and concerns with recommendations resolving these concerns.

4. Reports from Bob Porch, District Biologist[,] discussing alternative methods such as non-lethal methods of during [*sic*. doing (?)] control.

These assertions are directed to Robert Porch, one of three witnesses called by the Claimants for the preliminary hearing.

51. The Porch testimony appeared forthright and convincing. He demonstrated remarkable understanding as a biologist based on experience with free-ranging white-tailed deer, both as science general to the species and as applied specifically to Northern Porter County.

52. The Claimants offer nothing of substance on which a conclusion can be drawn that Porch's reports (or lack of reports) would cause his testimony to become less persuasive.

53. But even if the Commission were to speculate that the reports could call into question the veracity or persuasiveness of Porch's testimony, the effect would be no more than impeachment. As used in this context, "impeachment" may call into question veracity of a witness by proving the witness is unworthy of belief. BLACK'S LAW DICTIONARY, 6th Ed. (West Pub. 1990).

54. By the Claimants' own averments as set forth in Finding 38, to be actionable newly-discovered evidence must be more than impeaching. Giving the second, third, and fourth assertions their most vigorous application, they would merely impeach Porch's testimony. Even if the Commission were to speculate the assertions reduced the credibility of Porch's testimony to nil, the testimonies of John Ervin and Allen Johnson would still provide a factual basis to support issuance of the Special Permit. Again, in this proceeding, the Town and DNR are not obliged to prove issuance of the Special Permit was meritorious. The Claimants are obliged to prove it was not. The second, third, and fourth assertions cannot sustain the Claimants' burden of proving the DNR erred in issuing the Special Permit.

55. The final assertion by the Claimants of newly-discovery evidence is as follows:

5. Communication between the Town Council and the community regarding the following:

- Public information Plan
- The number of deer to be taken

- Safety issues regarding the deer cull

56. As indicated previously in these Findings, an Indiana state administrative agency has only the powers conferred on it by the Indiana General Assembly. Powers not within the legislative grant may not be assumed by the agency nor implied to exist in its powers. *Bell v. State Board of Tax Commissioners*, 651 N.E.2d 816, 819 (Ind. Tax Ct. 1995). The Claimants must demonstrate the agency has statutory authority to address any claimed grievance. *Markland v. Swistek d/b/a Crack of Dawn Hunt Club*, 13 Caddnar 194, 196 (2013). The only powers conferred on the Commission, and pertinent to this proceeding, are those governing licensure under Ind. Code § 14-22-28-1 and perhaps more broadly under Ind. Code § 14-22.

57. The Claimants have not cited authority in Ind. Code § 14-22 for the proposition the Commission is empowered to regulate or oversee communications between a municipality and its citizens. In general terms, local government is administered through Ind. Code § 36, and other statutory titles presumably apply. A disposition of what entity has jurisdiction over town communications is beyond the scope of this proceeding. But the Claimants have presented no legal basis to conclude the jurisdiction rests with the Commission, and no such jurisdiction is believed to exist.

58. The Claimants have not identified newly-discovered evidence with respect to communications between the Town Council and the community that would justify reconsideration of the Special Permit.

59. The Claimants motion to reconsider issuance of the Special Permit, based upon assertions of evidence newly-discovered following the preliminary hearing, was denied properly by the administrative law judge.

E. Ultimate Conclusions of Fact

60. The Claimants have not sustained their burden of proving by a preponderance of the evidence that the Special Permit should have been denied. While the Claimants have gone to some effort seeking to erode the foundations of the Special Permit, they have provided no evidence (either expert or lay) by which the Commission could deny the Special Permit. The core deficiency is

that the Claimants are either unable or unwilling to accept that the burden of proof rests with them and not the Town or the DNR.

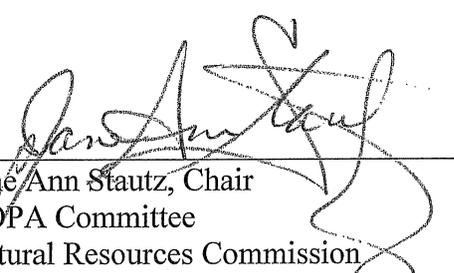
61. To the contrary, the unrefuted evidence (particularly stipulations and testimony during the preliminary hearing) supports issuance of the Special Permit.

62. The Claimants' motion to reconsider issuance of the Special Permit, based upon newly-discovered evidence received following the preliminary hearing, was denied properly. Even assuming the evidence would qualify as newly discovered, and that Federal Rule 59 would apply to this proceeding, the items identified in Finding 28 would not support denial of the Special Permit. Giving those items their most vigorous application, they would merely impeach one of the three witnesses called by the Claimants. Each of the three witnesses testified in support of issuance of the Special Permit. In other instances, the Claimants seek to invoke jurisdiction that does not reside with the Commission.

II. FINAL ORDER

Special Purpose Deer Control Permit issued by the Department of Natural Resources to the Town of Ogden Dunes on October 28, 2013 is affirmed.

Dated: April 24, 2013



Jane Ann Stautz, Chair
AOPA Committee
Natural Resources Commission

A copy of the foregoing was sent to the following persons. A copy of any pleading or document filed with the administrative law judge must also be served upon these persons or their attorneys.

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