ATTORNEYS FOR PETITIONER
John H. Brooke
John M. Stevens
Muncie, Indiana

ATTORNEYS FOR RESPONDENT
Chelsea E. Smith
Pamela M. Walters
Indianapolis, Indiana

**STATE OF INDIANA**
**BEFORE THE FIRE PREVENTION AND BUILDING SAFETY COMMISSION**

| | | |
|---|---|---|
| IN RE: | ) | ADMINISTRATIVE CAUSE NO. |
| | ) | |
| JAKE'S FIREWORKS, INC. | ) | DHS-1515-FPBSC-010 |
| | ) | |
| | ) | |
| | ) | |

# NON-FINAL ORDER

The Respondent in this matter, the Indiana Department of Homeland Security, has filed a motion for summary judgment arguing that no genuine issue of material fact exists and it is therefore entitled to judgment as a matter of law. By its response, the Petitioner, Jake's Fireworks, Inc., likewise argues that it is entitled to summary judgment. For the reasons set forth below, the undersigned Administrative Law Judge hereby **DENIES** the Respondent's motion and **GRANTS** summary judgment in favor of the **PETITIONER**.

## Procedural Background

In early July 2015, the Petitioner filed an application with the Respondent, seeking a Certificate of Compliance for Retail Sale of Consumer Fireworks. On July 2, 2015, the Respondent issued the Petitioner a Certificate of Compliance. On July 3, 2015, the Petitioner filed a petition for administrative review of the category of Certificate of Compliance the Respondent had issued and also sought a stay of enforcement. The Petitioner's appeal was granted on July 8, 2015, and the matter assigned to the undersigned ALJ for adjudication.

After several months attempting informal resolution, the parties informed the ALJ during an October 14, 2015, status conference that they were unable to reach an agreement. The ALJ therefore set this matter for an evidentiary hearing on December 15, 2015.

On October 20, 2015, the undersigned ALJ issued a Notice of Hearing and Prehearing Order in the above-captioned matter. That Prehearing Order set a deadline of November 18, 2015, for the parties to file any dispositive motions in this matter.

On November 18, 2015, the Respondent filed a motion for summary judgment with supporting memorandum seeking summary judgment as to all issues in this matter identified in the Prehearing Order. The parties agreed that the Petitioner could have until December 7, 2015, to file its response. The Petitioner filed its response and supporting affidavit on December 7, 2015. Both parties then filed supplementary briefs.

Believing the issues presented by these motions to be dispositive in this matter, the parties requested to hold a hearing and oral arguments on the Respondent's motion on December 15, 2015, in lieu of the evidentiary hearing. Both parties appeared for the hearing by counsel and presented arguments.[1]

## Standard of Review

The Indiana Administrative Orders and Procedures Act provides that a party may move for summary judgment as to any or all, or any part of, the issues in an administrative appeal. Ind. Code § 4-21.5-3-23(a). Such a motion will be considered by the ALJ in the same manner as a trial court considering a similar motion under Indiana Trial Rule 56. Ind. Code § 4-21.5-3-23(b).

[1] The ALJ is very grateful for the presentations at the hearing, from both sides. The arguments were thoughtful, well-reasoned, and informative.

Under Trial Rule 56, "[s]ummary judgment is only appropriate when the moving party shows that there are no genuine issues of material fact with respect to a given issue or claim." Bleeke v. Lemmon, 6 N.E.3d 907, 917 (Ind. 2014). "A fact is 'material' if its resolution would affect the outcome of the case, and an issue is 'genuine' if a trier of fact is required to resolve the parties' differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences." Hughley v. State, 15 N.E.3d 1000, 1003 (Ind. 2014). Summary judgment shall not, however, "be granted as of course because the opposing party fails to offer opposing affidavits or evidence, but the court shall make its determination from the evidentiary matter designated to the court." Ind. Trial Rule 56(C).

In other words, it is not enough for the moving party to show that evidence is lacking—or will be lacking—as to a particular element or claim; the moving party must instead meet the relatively higher bar of affirmatively negating that element or claim. Hughley, 15 N.E.3d at 1003–04. Only then does "[t]he non-moving party . . . bear[] the burden of coming forward with evidence designated to show that a genuine issue of material fact does exist." Bleeke, 6 N.E.3d at 917. The non-moving party "may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in [Trial Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Ind. Trial Rule 56(E).

In reviewing the motion, "[a]ll designated evidence and reasonable inferences drawn therefrom must be construed in favor of the non-moving party, and doubts resolved against the moving party." Bleeke, 6 N.E.3d at 917. But "[w]here, as here, the relevant facts are not in dispute and the interpretation of a statute is at issue, such statutory interpretation presents a pure question of law for which summary judgment disposition is particularly appropriate." Sanders v. Bd. of Comm'rs of Brown Cnty., 892 N.E.2d 1249, 1252 (Ind. Ct. App. 2008), trans. denied.

## Undisputed Material Facts

Upon examination of the party's submissions, the ALJ finds that the following material facts are not in dispute in this matter:

1. The Petitioner is a retailer that operates a consumer fireworks store at 7720 Old Trails Road, Indianapolis, Indiana 46219 (the "Old Trails Road Store"). The Petitioner acquired full ownership of the Old Trails Road Store in 2012. Consumer fireworks have been sold at that location—by the Petitioner and previous owners—since at least 2003.

2. On July 2, 2015, an agent of the Respondent inspected the Old Trails Road Store and found that the Petitioner did not have a Certificate of Compliance at that location for the year 2015, in violation of Indiana Code § 22-11-14-11. The Petitioner had a Certificate of Compliance for the year 2013 for the Old Trails Road Store.

3. The 2013 Certificate of Compliance identified the Old Trails Road Store with the retail type of "B1/Unlimited," a reference to Indiana Code § 22-11-14-4.5(b)(1).

4. The Petitioner had likewise failed to apply for or seek a Certificate of Compliance for the year 2014 for the Old Trails Road Store.

5. Retail sales of consumer fireworks occurred at the Old Trails Road Store in 2014, notwithstanding the lack of a Certificate of Compliance.

6. The Petitioner applied for, and was issued, a Certificate of Compliance for the year 2015 for the Old Trails Road Store on July 2, 2015. The 2015 Certificate of Compliance identified the Old Trails Road Store with the retail type of "New," reflecting categorization under Indiana Code § 22-11-14-4.5(b)(4).

7. The Old Trails Road Store meets the requirements set forth in Indiana Code § 22-11-14-4.5(b)(1), in that it complies with the rules for a B-2 or M building occupancy classification under the Indiana Building Code established by the Commission before July 4, 2003; consumer fireworks were sold or stored there on or before July 4, 2003; and no subsequent intervening nonfireworks sales or storage use has occurred.

8. The Respondent has, in the past, issued a "New" Certificate of Compliance to fireworks retailers and later, after the retailers filed additional documentation demonstrating compliance with Indiana Code § 22-11-14-4.5(b)(1), issued a "B1/Unlimited Certificate."

These instances—Freebies Fireworks in Fort Wayne, Indiana, Boomtown Fireworks and North Central Industries in Muncie, Indiana, and Emporium Fireworks in Columbus, Indiana—occurred in 2006.

**Analysis**

Based only on the undisputed material facts above as applied to the law specified below, the ALJ reaches the following conclusions of law:

1. The State Fire Marshal is appointed by the Governor of Indiana to oversee the Indiana Department of Homeland Security's Division of Fire and Building Safety. Ind. Code § 22-14-2-2(a). The Division of Fire and Building Safety, at the State Fire Marshal's direction, is tasked with administering a number of statutes including Indiana Code article 22-11. Ind. Code § 10-19-7-2(2). Indiana Code chapter 22-11-14 specifically governs the regulation of fireworks by the State Fire Marshal.[2]

2. Indiana Code § 22-11-14-4.5 sets forth the requirements that a fireworks retailer's structure or tent must meet. It states, in pertinent part:

> **(b)** A retailer may sell consumer fireworks . . . from a Class 1 structure . . . if that Class 1 structure meets the requirements of any of the following subdivisions:
>
> > **(1)** The structure complied with the rules for a B-2 or M building occupancy classification before July 4, 2003, under the Indiana building code adopted by the fire prevention and building safety commission established under IC 22-12-2-1:
> >
> > > **(A)** in which consumer fireworks were sold or stored on or before July 4, 2003; and
> > > **(B)** in which no subsequent intervening nonfireworks sales or storage use has occurred.
> >
> > * * *
> >
> > **(4)** The structure complies with the rules adopted after July 3, 2003, by the fire prevention and building safety commission established under IC

[2] Because the State Fire Marshal is now an employee within the Indiana Department of Homeland Security, for clarity the ALJ will refer only to "the Respondent" unless absolutely necessary.

> 22-12-2-1 for an M building occupancy classification under the Indiana building code.
>
> A registration under section 11(a) of this chapter is required for operation in 2006 and following years.

Ind. Code § 22-11-14-4.5(b).[3] This section of the Indiana Code was enacted in 1986. See Act of Mar. 27, 2006, P.L. 187-2006, § 5, 2006 Ind. Acts 3919, 3927–29. And the two subdivisions above operate to identify two distinct categories of structures from which a retailer may sell consumer fireworks:

- those that complied with pre-July 4, 2003, building codes under either a B-2 or M-category use and occupancy classification, and from within which consumer fireworks had been continuously and exclusively sold or stored ("Subdivision (b)(1) structures"); and
- those that complied with the building codes as of July 4, 2003, or later under an M-category use and occupancy classification ("Subdivision (b)(4) structures").

The Subdivision (b)(1) structures are permitted to maintain on-site an unlimited quantity of fireworks. The Subdivision (b)(4) structures, however, are limited to only five hundred pounds of stock.[4] So retailers operating out of Subdivision (b)(4) structures are at a distinct disadvantage in selling fireworks because of the quantity

---

[3] Subdivisions (b)(2) and (b)(3) are not relevant to this matter. Subdivision (b)(2) applies to Class 1 structures that met the B-2 or M building occupancy classification prior to July 4, 2003, and in which consumer fireworks were sold or stored, but in which the retailer's primary business was not the sale of consumer fireworks and where the retailer was registered as a wholesaler. Subdivision (b)(3) applies to buildings that satisfy the requirements for an H-3 building occupancy classification.

[4] The origin of this distinction in stock on-hand is not apparent to one not well-versed in the seemingly arcane lore of fireworks laws in Indiana. The relevant provision—Indiana Code § 22-11-14-4.5(b)—does not, a reader will note, contain any language that might be interpreted to distinguish stock quantities in this way, nor will such a categorization be found through a fairly thorough search of the current provisions of the Indiana Administrative Code, the current Indiana Building or Fire Codes, or any other legal authority.

At the summary judgment hearing, counsel for the Petitioner articulated that the distinction originates in the shift from the standards used in the Uniform Building Code then-applicable in this state to the International Building Code currently in use (and adopted in 2003). The permissible storage quantities are apparently contained in those different Codes, and the enactment of Subdivision (b)(1) in 2006 reflects a statutory grandfathering opportunity for those structures that had been used to sell or store consumer fireworks under the Uniform Building Code—and had continued to do so without an intervening use— in order to maintain their greater storage quantity.

At any rate, the parties (and the industry as a whole, it seems) mutually accept that this is how Indiana Code § 22-11-14-4.5 operates. And eligibility for this distinction between an unlimited designation under Subdivision (b)(1) and a new/five-hundred-pound designation under Subdivision (b)(4)—but not the legal *existence* of the distinction itself—is the critical issue in this matter. So for purposes of this appeal this tangled backstory presents as more a question more of academic curiosity than dispositive concern.

of stock they can have on-hand, and thus why the Petitioner is appealing the Old Trails Road Store's change in designation.

3. But with either category of structure—Subdivision (b)(1) or Subdivision (b)(4)—the retailer is still required by Subsection (b) to register in accordance with Indiana Code § 22-11-14-11 in order to operate.

4. Indiana Code § 22-11-14-11 requires a retailer to annually file an application with the Respondent for each location from which it seeks to sell consumer fireworks, and pay a fee. Ind. Code § 22-11-14-11(a).[5] Once this is done, the Respondent will issue the retailer a Certificate of Compliance for that year. Id.

   If the retailer is seeking a Certificate of Compliance for a structure qualifying under Subdivision (b)(1), it must also submit "an affidavit executed by a responsible party with personal knowledge, establishing that consumer fireworks were sold at retail or wholesale from a structure at the same location" as of July 4, 2003, and include proof of sales of consumer fireworks from the location. Ind. Code § 22-11-14-11(b).

5. Here, it is undisputed that the Petitioner failed to satisfy this registration requirement in 2014, and in fact did not do so in 2015 until after the Respondent's inspection. The essence of the Respondent's motion is that this failure—the 2014 gap specifically—effectively breaks the chain of continuous fireworks sales or storage at the Old Trails Road Store and takes that structure out of eligibility for Subdivision (b)(1).

   Therefore, the Respondent claims summary judgment is appropriate "because Petitioner bears the burden of proof and, based on all of the available evidence thus far, the Petitioner will not be able to demonstrate that it satisfies all of the requirements for classification as a (b)(1) store under Indiana law, as Petitioner cannot satisfy the requirements under Ind. Code § 22-11-14-4.5(b)." (Resp. Mot. at 6.)[6]

   The Petitioner's response is three-fold.

6. First, it argues that unlike other parts of Indiana Code § 22-11-14-4.5, the specific elements for Subdivision (b)(1) classification do not themselves include an annual registration requirement; that requirement is contained in the broader Section (b) and "simply notes that a registration is required for retail operation." (Pet. Resp. at

---

[5] This statute was also enacted in 2006. See Act of Mar. 27, 2006, P.L. 187-2006, § 11, 2006 Ind. Acts 3919, 3935–36.

[6] Although again, "while federal practice permits the moving party to merely show that the party carrying the burden of proof *lacks* evidence on a necessary element, we impose a more onerous burden: to affirmatively 'negate an opponent's claim.'" Hughley, 15 N.E.3d at 1003.

3.) But while it is true that Subdivisions (a) and (c) of Indiana Code § 22-11-14-4.5 contain the registration requirement in an enumerated list of specific elements for those subdivisions, see Ind. Code §§ 22-11-14-4.5(a)(10), -4.5(c)(4), the registration requirement still applies equally to *all* of the Subsection (b) categories—just not specifically to any one of them and exclusive of others.[7] So this alone does not vitiate the need for Subdivision (b)(1) structures to have a Certificate of Compliance in order to operate, just as Subdivision (b)(2), (b)(3), and (b)(4) structures must do.

7. Second, the Petitioner points to the language of Indiana Code §§ 22-11-14-4.5 and -11 and argues that the Certificate of Compliance requirement applies only to retailers seeking to *sell* fireworks from a particular structure, whereas Subdivision (b)(1) categorization hinges on continuous *use*—be it for sales *or* storage—and therefore a Certificate of Compliance is not required for years when *only* storage takes place. (Pet. Resp. at 6–7.)

   This may or may not be a correct interpretation of the statute.[8] But here, it is undisputed that the Petitioner did not have a Certificate of Compliance for the Old

---

[7] Continuing to highlight the nebulous nature of the quantities at issue, it is interesting to note that Subsections (a) and (c) *do* contain express stock limitations—of three thousand pounds. See Ind. Code § 22-11-14-4.5(a)(8), -4.5(c)(3).

[8] That is to say, it might be that a correct interpretation that the purpose of the Certificate of Compliance is to allow the *sale* of consumer fireworks from a given location but is not necessary for the *storage* of fireworks within a structure. Certainly that reflects the word the General Assembly chose to use in the registration statute. See Ind. Code § 22-11-14-11(a) ("[a] retailer may not *sell* consumer fireworks until" retailer has filed for Certificate of Compliance (emphasis added)), -11(b) (person seeking Certificate of Compliance "authorizing the *sale* of consumer fireworks" from a Subdivision (b)(1) structure must file additional items showing sales occurred at that location in prior years (emphasis added)), -11(c) ("person may not *sell* consumer fireworks at retail" without Certificate of Compliance for location (emphasis added)). Under that perspective, a Subdivision (b)(1) structure would only need a Certificate of Compliance for the years it is used for sale of fireworks, but not for those years when it might be used only for the storage of fireworks.

But by the same token, Subsection (b)'s Certificate of Compliance requirement is not limited to sales; it is a requirement "for operation." Ind. Code § 22-11-14-4.5(b). That the legislature chose a different word might reflect inartful drafting, or it could demonstrate intent to mean something else entirely. The latter is presumed to be more likely. Cf. Gallagher v. Marion Cnty. Victim Advocate Program, Inc., 401 N.E.2d 1362, 1364 (Ind. Ct. App. 1980) ("it is presumed that all language in a statute was used intentionally").

The plain and ordinary meaning of the word used—operation—incorporates a broad range of activities, including both sales and non-sales usages. See id. ("Words of a statute should be given their plain, ordinary and usual meaning, but not taken out of context."); Merriam-Webster Dictionary, available at www.merriam-webster.com ("operation" means "performance of a practical work or of something involving the practical application of principals or processes"). And this lends credence to the notion that the General Assembly in fact did use "operation" intentionally in Subsection (b) so as to include both the sales *and* storage activities permissible under Subdivision (b)(1), as well as the sales-only function referred to elsewhere—because while none of the other subsections in Section 4.5 specify that the Certificate of Compliance is required *only* for sales, it is also true that none of those other subsections encompass a use *other* than sales.

"Statutes relating to the same general subject matter are *in pari materia* and should be construed together so as to produce a harmonious statutory scheme." Sanders v. Bd. of Comm'rs of Brown Cnty., 892 N.E.2d 1249, 1252 (Ind. Ct. App. 2008), trans. denied. And "[w]hen two statutes or two sets of statutes are apparently inconsistent in some

Trails Road Store in 2014 and the Petitioner utilized the Old Trails Road Store for sales in 2014—not storage.[9] So resolution of this question is not necessary for this appeal.

8. Third, the Petitioner has submitted evidence—which is undisputed—showing that the Respondent has, in the past, initially provided "New" Certificates of Compliance to locations when the retailer had not obtained a Certificate of Compliance for the prior year, but later granted "B1/Unlimited" Certificates of Compliance once those retailers provided proof that they met the Subdivision (b)(1) requirements. It argues this represents "a long-standing tradition and interpretation; an interpretation with which the [Respondent], until this year, has readily agreed." (Pet. Resp. at 7–8.)

   An agency's decision to change its mind on a standard or guideline is not necessarily improper, though. Just because an agency's past interpretation or application of a statute or regulation it is charged with enforcing was reasonable "does not foreclose the possibility that a different (and even opposite) interpretation might be equally reasonable." Natural Res. Def. Council v. Poet Biorefining—North Manchester, LLC, et. al, 15 N.E.3d 555, 564 (Ind. 2014); cf. In re L.M. Zeller, et. al, 14-12-FPBSC at *16 (September 1, 2015). Problems arise, however, when an agency appears to randomly change its mind on that interpretation or application, or changes its mind respect only to particular parties and then changes its mind right back. See id.

   But while there has apparently been a shift in position here, there is no evidence that other retailers of consumer fireworks were treated differently *after* that shift in a way that would be problematic. Cf. id. There is only the fact that in *this* case, the "B1/Unlimited" Certificate of Compliance was not issued in 2015 because of the failure to obtain a Certificate of Compliance in 2014. Standing alone, that evidence does not present an obvious problem.

9. But it certainly cuts to the ultimate question(s): does the failure to possess a Certificate of Compliance for a Subdivision (b)(1) structure in a given year—and when retail sales of consumer fireworks nevertheless occur—mean that future registrations for the same structure are no longer eligible for that categorization; i.e., does noncompliance with the registration requirement break the chain of continuous use required by Subdivision (b)(1)(B)? When reduced to their most

---

respects, and yet can be rationalized to give effect to both, then it is [a court's] duty to do so." Lake Cent. Sch. Corp. v. Hawk Dev. Corp., 793 N.E.2d 1080, 1085 (Ind. Ct. App. 2003), trans. denied. The same is true for an ALJ interpreting a statutory scheme. And given that guidance on statutory interpretation, it is more reasonable to interpret Indiana Code §§ 22-11-14-4.5 and -11 to mean that a Certificate of Compliance is required for Subdivision (b)(1) structures to *operate*, whether that operation is for retail sales of consumer fireworks or storage of the same. To find otherwise would be to replace the General Assembly's specific word—operation—with one it intentionally elected not to use—sales.

[9] The Petitioner's counsel conceded this factual question at the hearing on summary judgment.

basic forms, the Respondent's answer to this question is "Yes," whereas the Petitioner's is obviously "No."

10. The statutory scheme by its express terms does not prescribe (or proscribe) an answer, making this a question of statutory interpretation, the foremost goal of which is to

> determine, give effect to, and implement the intent of the General Assembly. The legislature is presumed to have intended the language used in the statute to be applied logically and not to bring about an unjust or absurd result. Statutes relating to the same general subject matter are *in pari materia* and should be construed together so as to produce a harmonious statutory scheme. To determine legislative intent, we read the sections of an act together so that no part is rendered meaningless if it can be harmonized with the remainder of the statute. We also examine the statute as a whole.

Sanders, 892 N.E.2d at 1252 (internal citations omitted). For several reasons, the Respondent's answer cannot stand.

11. For one thing, the clear language of Subsection (b) indicates that the General Assembly intended to set out the requirements for the retail sale of consumer fireworks from particular buildings. To do that, the General Assembly stated that "[a] retailer may sell consumer fireworks . . . from a Class 1 structure . . . *if the Class 1 structure meets the requirements of any of the following subdivisions*." Ind. Code § 22-11-14-4.5(b) (emphasis added). In other words, the General Assembly set out requirements aimed at the *structure* and the *structure's* use—a distinction that makes logical sense, when those subdivision requirements are framed in terms of particular use and occupancy classifications set forth in different building codes.

12. It is true, though, that Subsection (b) contains the statement that "[a] registration under section 11(a) of this chapter is required for operation in 2006 and following years." But that statement does *not* contain the consequence the Respondent effectively engrafts onto it—that failure to comply with the registration requirement means a previously designated Subdivision (b)(1) structure is now a Subdivision (b)(4) structure.

13. Had the General Assembly wished such language to be in the provision, it could have accomplished this. It could have specifically required a registration every year under Subdivision (b)(1) in addition to continuous sales or storage use. Or it could have framed the stand-alone registration sentence to include something like the consequence in Conclusion 12, above. Or it could have defined "use" to mean "operation in compliance with the annual registration requirement."

But adding such language imparts a logical absurdity and creates a legal fiction that is apparent in this very case. Here, no-one disputes that the Old Trails Road Store is a Class 1 structure; complies with the rules for a B-2 or M building occupancy classification before July 4, 2003; in which consumer fireworks were sold or stored on or before July 4, 2003; and in which no subsequent intervening nonfireworks-related sales or storage use has occurred.

Those are fixed, undisputed facts that non-compliance with the registration requirement cannot obviate or wish away. Non-compliance does not retroactively alter the structure or otherwise erase from history the way it has been used.[10]

14. This is not to say that non-compliance with the registration requirement carries no consequences at all. In fact—and in a way that cuts further against the Respondent's interpretation that a consequence of non-compliance is a loss of the "B1/Unlimited" classification—the General Assembly expressly provided several potential punitive/corrective measures which may be pursued by the Respondent.

15. First, the statutory scheme provides that "[a] person who recklessly, knowingly, or intentionally violates section . . . 4.5 . . . or 11(c) . . . of this chapter commits a Class A misdemeanor." Ind. Code § 22-11-14-6(a). This code section was amended to include Sections 4.5 and 11(c) through the same piece of legislation that created those two provisions. Act of Mar. 27, 2006, P.L. 187-2006, § 7, 2006 Ind. Acts 3919, 3931. So at precisely the same time that the General Assembly instituted the registration requirement and the grandfathering scheme of Section 4.5, it specifically established criminal liability for non-compliance.[11]

16. And second, the statutory scheme provides another (more implicit) consequence. It provides that the Respondent "shall remove at the expense of the owner, all stocks of fireworks or combustibles possessed, transported, or delivered in violation of this chapter." Ind. Code § 22-11-14-5(a). This provision existed before the 2006 legislative enactments and was left unchanged. Act of Mar. 27, 2006, P.L. 187-2006, § 6, 2006 Ind. Acts 3919, 3929. The Respondent "therefore has the power to confiscate inventories of sellers who violate the fireworks statutes." Ind. Fireworks Distributors Ass'n. v. Boatwright, 764 N.E.2d 208, 211 (Ind. 2002).

17. "[I]n construing a statute, it is just as important to recognize what the statute does *not* say as it is to recognize what it *does* say." City of Evansville v. Zirkelbach, 662 N.E.2d 651, 654 (Ind. Ct. App. 1996), trans. denied. And here, the General Assembly created criminal liability for a retailer who sells consumer fireworks at

[10] Similarly, the Respondent's position would also mean that a structure which met the pre-July 4, 2003, building code requirements now instantly meets the post-July 3, 2003, building code requirements as Subdivision (b)(4) mandates—a determination that seems like it would require more extensive inspection and investigation.

[11] This might have been in response to an earlier view that the State Fire Marshal, while charged with enforcing the fireworks regulations, felt powerless to actually do so. See Ind. Fireworks Distributors Ass'n. v. Boatwright, 764 N.E.2d 208, 211, 211 n.3 (Ind. 2002).

retail without a certificate of compliance from the Respondent. It also left in place a provision obligating the Respondent to seize the stocks of fireworks possessed by such a retailer. It did *not*, however, provide for a disqualification from any of the subdivisions of Subsection (b), though it easily could have done so.

18. This omission carries additional force in the context of an administrative action because generally speaking, requiring administrative agencies to execute or enforce statutory programs "necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly," by the legislature. NRDC, 15 N.E.3d at 563 (quoting Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 843 (1984)).[12] And "[i]t is a well-settled principle of law that an administrative agency, in addition to the express powers conferred by statute, also has such implicit power

---

[12] On that note, however, the Respondent's interpretation hews perilously close to being an unpublished rule—and perhaps not just an *unpublished* rule, but an entirely *unwritten* rule, see Ind. Dept. of Envtl. Mgmt. v. AMAX, Inc., 529 N.E.2d 1209, 1212 (Ind. Ct. App. 1988) ("in order to satisfy due process . . . administrative decision-making must be done in accordance with previously stated, ascertainable standards . . . written with sufficient precision to give fair warning as to what the agency will consider in making its decision")—should the Respondent prevail here and choose to carry this new policy forward and apply it to other similarly situated retail sellers of consumer fireworks.

This is because a "rule" is defined as "'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.'" Ind. Dept. of Envtl. Mgmt. v. Twin Eagle LLC, 798 N.E.2d 839, 847–48 (Ind. 2003) (quoting Ind. Code § 4-22-2-3). And when establishing a rule or regulation, administrative agencies must follow the formal rulemaking procedures laid out in the Administrative Orders and Procedures Act. Id.; see Ind. Code 4-22-2. The exception, however, is when an agency's rule is a "resolution or directive that relates solely to internal policy, internal agency organization, or internal procedure, and does not have the effect of law." Ind. Code § 4-22-2-13(c)(1); see also Twin Eagle, 798 N.E.2d at 848.

And here, it is obvious that the Respondent's policy is not related *solely* to its own internal policies, procedures, or organizations; rather, "[t]he impact of the [policy] falls outside the agency" upon a class of fireworks retailers to deny those retailers eligibility for the unlimited fireworks stock to which they had previously been entitled. Blinzinger v. Americana Healthcare Corp., 466 N.E.2d 1371, 1375 (Ind. Ct. App. 1984). In fact, "[t]he internal impact of the [policy], upon the agency, is of less significance." Id.; cf. Ind.-Ky. Elec. Corp. v. Comm'r, Ind. Dept. of Envtl. Mgmt., 820 N.E.2d 771, 779–80 (Ind. Ct. App. 2005); AMAX, 529 N.E.2d at 1212–13. It is hard to imagine, actually, that the impact of this policy to the Respondent's internal operations would be anything more than minimal.

Instead, the Respondent defends a policy that "possesses qualities which are typical of administrative rules." Blinzinger, 466 N.E.2d at 1375. Specifically, the Respondent's policy is intended to have the force and effect of law by impacting and defining the substantive legal rights of similarly situated fireworks retailers by barring them from Subdivision (b)(1) classification, cf. id. ("directive has been applied as though it had the effect of law, and it affects the substantive rights of . . . providers"); would apparently be generally applicable to all similarly situated fireworks retailers and structures who have previously held "B1/Unlimited" Certificates of Compliance and now receive "New" Certificates of Compliance as a result of a year without registration, cf. id. (directive "is an agency statement of general applicability to a class—i.e., all certified healthcare providers in the State of Indiana who seek increased Medicaid reimbursement rates during the pendency of an administrative decertification proceeding"); and clearly aims at interpreting, implementing, and enforcing Indiana Code §§ 22-11-14-4.5 and -11.

And while there is authority for the Commission—though not the Respondent—to adopt rules in order to carry out the statutes regulating fireworks, Ind. Code § 22-11-14-15, none of the rules previously adopted reflect the position presented by the Respondent here, see 675 Ind. Admin. Code 12-9-1 thru -9. And it is not apparent that the AOPA requirements were followed as the Respondent developed, adopted, or implemented its new policy. This was not, however, an issue raised by the Petitioner in this administrative action so fuller analysis is unnecessary.

as is necessary to effectuate the regulatory scheme outlined by the statute." Barco Beverage Corp. v. Ind. Alcoholic Beverage Comm'n, 595 N.E.2d 250, 254 (Ind. 1992).

Here, however, there are no gaps to fill—either implicit or explicit—in the statutory scheme. The statutes provide explicit and implicit powers by which the Respondent may carry out its duties and effectuate the purposes of the fireworks laws, and, specifically, enforce the registration requirement. See Ind. Dept. of State Revenue, et. al. v. Colpaert Realty Corp., 231 Ind. 463, 479–80, 109 N.E.2d 415, 422 (1952).

In the absence of any such gaps that must be filled, and with the Respondent no longer "powerless" to carry out its duties thanks to action by the General Assembly, the Respondent's interpretation of Indiana Code § 22-11-14-4.5 operates only to engraft a substantive legal consequence onto the statutory scheme established by the legislature. This it cannot do. Colpaert Realty Corp., 231 Ind. at 480, 109 N.E.2d at 423 (agency "may not by its rules and regulations add to or detract from the law as enacted"); Ind. Dept. of State Revenue v. Bulkmatic Trans. Co., 648 N.E.2d 1156, 1160 (Ind. 1995) ("An administrative agency may not promulgate regulations which add to the law as enacted or extend its powers."); Bradley v. Bankert, 616 N.E.2d 18, 22 (Ind. Ct. App. 1993) ("Administrative agencies . . . are created by the legislature, and their powers are strictly limited to those granted by their authorizing statute.").

In other words, the Respondent may inspect fireworks retailers for violations of Ind. Code chapter 22-11-14. And if it finds a violation, the Respondent may pursue the punitive/corrective avenues identified above—but it may not create a new one.

19. In sum, the Respondent's interpretation (and application) of Indiana Code § 22-11-14-4.5(b) cannot prevail. It is counter to the language of the statute and the intent reflected in that language, and would produce absurd results. It also reflects a step the General Assembly could have taken, but did not—though the General Assembly elected to take other, related, actions. And finally, the Respondent's interpretation impermissibly adds to the statutory scheme, reflecting (at best) a matter of agency overreach or (at worst) an example of an unpublished administrative rule.

20. It is undisputed that the Old Trails Road Store satisfies the requirements of Subdivision (b)(1) and the Petitioner's failure to obtain a Certificate of Compliance in 2014 did not preclude it, under the facts of this appeal, from receiving a "B1/Unlimited" Certificate of Compliance in 2015. There is therefore no genuine issue of material fact in this proceeding and the Petitioner is entitled to judgment as a matter of law.

    The remedy that results, though, is at this point intangible. Under this order's analysis, the Petitioner should have been issued a "B1/Unlimited" Certificate of Compliance for 2015 for the Old Trails Road Store. Applications for Certificates of Compliance, however, "must be filed on an annual basis," Ind. Code § 22-11-

14-11(a)(1), and the Petitioner's 2015 Certificate of Compliance for the Old Trails Road Store expired on December 31, 2015. But while this order apparently will therefore have no practical effect on that previously issued Certificate of Compliance, it should be equally apparent that neither the 2014 gap in registration compliance nor the Respondent's incorrect categorization of the Old Trails Road Store as a Subdivision (b)(4) structure in 2015 can be reasons to disqualify the Old Trails Road Store from categorization as a Subdivision (b)(1) structure in 2016 should the Petitioner properly apply.

**Decision and Order**

When the Respondent discovered that the Petitioner was engaged in the retail sale of consumer fireworks in 2015 without a Certificate of Compliance, and had done so in 2014 as well, the Respondent could have taken one or more of several actions including pursuing criminal charges under Indiana Code § 22-11-14-6(a) and/or seizing the Petitioner's stock of fireworks pursuant to Indiana Code § 22-11-14-5(a).

What the Respondent could not do, however, was use the fact of non-compliance with the registration requirement as the basis for changing the Petitioner's structure from a "B1/Unlimited" structure to a "New" structure. A retailer's failure to obtain a Certificate of Compliance for Retail Sale of Consumer Fireworks in accordance with Indiana Code § 22-11-14-11, in a given year and with respect to a given structure, cannot—on its own—impact that same structure's designation under Indiana Code § 22-11-14-4.5(b) in future years.

The Respondent's Motion for Summary Judgment is therefore **DENIED** and summary judgment is hereby **GRANTED** in favor of the Petitioner.

The Fire Prevention and Building Safety Commission is the ultimate authority in this matter. It will consider this non-final order in accordance with the provisions of Indiana Code §§ 4-21.5-3-27 thru -29 and the terms of the Notice of Non-Final Order also issued today.

Date: January 21, 2016

_____

HON. JUSTIN P. FORKNER
Administrative Law Judge
Indiana Department of Homeland Security
302 W. Washington Street
Indiana Government Center South, Rm E208
Indianapolis, Indiana 46204
Telephone: (317) 234-8917
E-mail: jforkner@dhs.in.gov