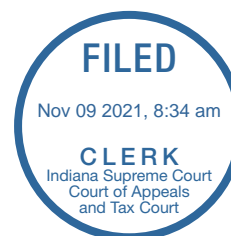


## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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## IN THE COURT OF APPEALS OF INDIANA

Indiana Department of  
Homeland Security,  
*Appellant-Respondent,*

v.

Gattitown Evansville,  
*Appellee-Petitioner.*

November 9, 2021

Court of Appeals Case No.  
21A-MI-495

Interlocutory Appeal from the  
Vanderburgh Circuit Court

The Honorable David Kiely, Judge

Trial Court Cause No.  
82C01-2009-MI-3832

**Bradford, Chief Judge.**

## Case Summary

[1] After reinspecting Gattitown’s premises, the Indiana Department of Homeland Security (“DHS”) issued Gattitown a \$500.00 civil penalty for failing to comply with an earlier order to fix certain violations, a penalty for which Gattitown requested an administrative review. On June 16, 2020, the administrative law judge (“ALJ”) affirmed the civil penalty. Gattitown filed a petition for judicial review, and forty-seven days later, DHS filed a motion to dismiss, arguing that Gattitown had failed to file an agency record or request an extension of time within thirty days of filing its petition as required by Indiana Code section 4-21.5-5-13. Gattitown then requested an extension of time and requested that DHS compile an agency record. The trial court granted the motion for extension of time on November 18, 2020, and denied DHS’s motion to dismiss on January 20, 2021. DHS filed a motion to certify the trial court’s order denying the motion to dismiss for interlocutory appeal on February 19, 2020, which the trial court certified. We accepted jurisdiction. Because Gattitown failed to satisfy the requirements of Indiana Code section 4-21.5-5-13, the trial court did not have discretion to deny DHS’s motion to dismiss, and so we reverse and remand with instructions.

## Facts and Procedural History

[2] Gattitown is a pizza and entertainment venue where guests can play arcade games, laser tag, and mini bowling and drive bumper cars. On October 28, 2019, DHS performed an inspection of Gattitown’s premises, revealing three

violations of Indiana’s building and fire safety laws; specifically, damaged or missing ceiling tiles, missing escutcheon<sup>1</sup> rings, and flexible cords that passed through the ceiling of the laser tag room. DHS ordered Gattitown to correct the violations by November 28, 2019.

- [3] When DHS reinspected Gattitown on December 3, 2019, DHS observed that Gattitown had not entirely corrected the violations. DHS issued Gattitown a \$500.00 civil penalty for failing to comply with the October 28 inspection order. Gattitown requested administrative review of the \$500.00 penalty and an ALJ conducted a hearing on December 20, 2019. DHS filed a motion for summary judgment, a supporting brief, and designation of evidence on January 28, 2020, and Gattitown filed their response on March 20, 2020, but failed to designate any evidence. On June 16, 2020, the ALJ issued a recommended order granting DHS’s motion for summary judgment and affirming the civil penalty.
- [4] Gattitown filed its petition for judicial review on September 9, 2020, and DHS filed its response on September 25, 2020, denying the allegations. On October 26, 2020, forty-seven days later, DHS filed a motion to dismiss, arguing that dismissal was required because Gattitown did not file the agency record or

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<sup>1</sup> An escutcheon may refer to “a protective or ornamental plate or flange (as around a keyhole)[.]” *Escutcheon*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/escutcheon> (last visited, October 14, 2021). In this context, our review of the record suggests that “escutcheon rings” likely refers to an escutcheon ring used in ceiling installation, such as a protective covering used to “visually enhance[] suspended ceiling installations by covering hole where [the] extension column passes through ceiling tile. [The escutcheon ring] is hinged to open, wrap around extension column and snap into place to cover hole in ceiling tile.” AMAZON, <https://www.amazon.com/Peerless-2045676-Escutcheon-Ring-Wht/dp/B0014VNW4K?th=1> (last visited October 14, 2021).

request an extension of time to do so within thirty days of filing its petition. The next day, the trial court set a hearing for the motion to dismiss. On November 13, 2020, Gattitown sent a letter to DHS requesting that it prepare the agency record and also requested an extension of time in which it could file the record. The trial court granted the motion for extension of time on November 18, 2020. The trial court held a hearing on DHS's motion to dismiss on December 14, 2020, and, on January 20, 2021, denied DHS's motion to dismiss. DHS filed a motion to certify the trial court's order denying the motion to dismiss for interlocutory appeal on February 19, 2020, which the trial court certified on February 23, 2020. We accepted jurisdiction on April 16, 2021.

## Discussion and Decision

- [5] We first note that Gattitown has not filed an Appellee's brief, and our standard of review is accordingly modified. "When an appellee does not file a brief, we have no obligation to undertake the burden of developing an argument on its behalf." *Ind. Dep't of Env't Mgmt. v. Constr. Mgmt. Assocs., L.L.C.*, 890 N.E.2d 107, 111 (Ind. Ct. App. 2008). "Rather, we will reverse the trial court's judgment if the appellant's brief presents a case of prima facie error." *Trinity Homes, LLC v. Fang*, 848 N.E.2d 1065, 1068 (Ind. 2006). "Prima facie error in this context is defined as, 'at first sight, on first appearance, or on the face of it.'" *Id.* (quoting *Santana v. Santana*, 708 N.E.2d 886, 887 (Ind. Ct. App. 1999)). "Where an appellant is unable to meet this burden, we will affirm." *Id.*

- [6] “A motion to dismiss for failure to state a claim upon which relief can be granted tests the legal sufficiency of the claims, not the facts supporting it.” *Thornton v. State*, 43 N.E.3d 585, 587 (Ind. 2015) (citation omitted). “Thus, our review of a trial court’s grant or denial of a motion based on Trial Rule (12)(B)(6) is de novo.” *Charter One Mortg. Corp. v. Condra*, 865 N.E.2d 602, 605 (Ind. 2007) (citation omitted).
- [7] Indiana Code section 4-21.5-5-13 requires a petitioner seeking judicial review of an agency decision to file the agency record, or a request an extension of time in which to file the record, within thirty days of filing their petition. “Failure to file the record within the time permitted by this subsection, including any extension ordered by the court, is cause for dismissal of the petition for review by the court on its own motion, or on the petition of any party of record to the proceeding.” Ind. Code. § 4-21.5-5-13(b). The Indiana Supreme Court described the exactness of the requirement in *Teaching Our Posterity Success, Inc. v. Indiana Department of Education*: “In sum we hold a petitioner for review cannot receive consideration of its petition where the statutorily-defined agency record has not been filed. In our view this bright-line approach best serves the goals of accuracy, efficiency, and judicial economy.” 20 N.E.3d 149, 155 (Ind. 2014).
- [8] DHS argues, and we agree that, because Gattitown failed to file the agency record or request an extension of time in order to procure and file an agency record within thirty days of filing its petition, the trial court was required to dismiss the case upon DHS’s request. Gattitown filed its petition for judicial

review on September 9, 2020, and DHS filed its response on September 25, 2020, denying the allegations. On October 26, 2020, forty-seven days later, DHS filed its motion to dismiss. Though Gattitown then tried to avoid dismissal by requesting that the agency prepare the record and requesting an extension of time from the trial court in order to procure and file the record, it was too late. Indiana Code section 4-21.5-5-13's "bright-line" requirements aim to preserve "accuracy, efficiency, and judicial economy[;]" because Gattitown did not file its agency record or request an extension of time within thirty days of filing its petition the trial court was bound to dismiss the case on DHS's motion. *Teaching Our Posterity Success, Inc.*, 20 N.E.3d at 155.

[9] The judgment of the trial court is reversed and remanded with instructions to grant DHS's motion to dismiss.

Robb, J., and Altice, J., concur.