

LEGISLATIVE AND ADMINISTRATIVE APPROVAL PROCEDURES

Zoning Ordinance Adoption and Amendment

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- The authority and procedures relating to zoning ordinance adoption and amendment are set forth in I.C. Chapter 36-7-4-600, et seq (600 Series).
- The 600 series describes three distinct types of ordinance adoption processes: the adoption of the initial zoning ordinance or a comprehensive replacement of the initial ordinance; the subsequent amendment of ordinance text; and the subsequent amendment of zoning maps.
- IC 36-7-4-603 (“Section 603”) and IC 36-7-4-604 (“Section 604”) apply to each type of ordinance adoption process.
- Section 603 states:

In preparing and considering proposals under the 600 series, the plan commission and the legislative body shall pay reasonable regard to:

 - (1) The comprehensive plan;
 - (2) Current conditions and the character of current structures and uses in each district;
 - (3) The most desirable use for which the land in each district is adapted;
 - (4) The conservation of property values throughout the jurisdiction; and
 - (5) Responsible development and growth.

Zoning Ordinance Adoption and Amendment continued

- While the plan commission and the legislative body must consider each of the foregoing factors, a proposed ordinance is not required to comply with or satisfy each of the factors. *Borsuk v. Town of St. John*, 820 N.E.2d 118, 122 (Ind. 2005).
- For example, in *Ogden v. Premier Properties, USA, Inc.*, 755 N.E.2d 661, 671 (Ind. Ct. App. 2001), the Indiana Court of Appeals held that a deviation from the comprehensive plan, standing alone, does not establish arbitrary action, especially in light of other evidence considered by the city council, relating to traffic impact, economic impact, and statements of engineers and real estate appraisers.
- Section 603 only requires that the proposed ordinance reflects a reasonable balancing of the factors and is rationally related to the purposes of zoning.
- The purposes of zoning, as set forth in IC 36-7-4-201(b), are to improve the public health, safety, convenience and welfare and to plan for future development so that, among other things: communities grow with adequate public way, utility, health, educational, and recreational facilities; the needs of agriculture, forestry, industry, and business be recognized in future growth; and, residential areas provide healthful surroundings for family life.

Zoning Ordinance Adoption and Amendment continued

- Under Section 604, each type of proposal must be considered by the plan commission during at least one public hearing on the proposal.
- The hearing must be advertised in accordance with IC 5-3-1 at least ten (10) days prior to the hearing and “interested parties” must be given notice at least ten (10) days prior to the hearing.
- By rule, the plan commission determines who are interested parties and how notice is to be given.
- Strict compliance with the notice and hearing requirements is not required - substantial compliance is sufficient.
- After taking final action on the proposal, the plan commission must certify the preposal to the legislative body. IC 36-7-4-602(a)(5).

Adopting the initial zoning ordinance or a omprehensive replacement

- A proposal to adopt the initial or replacement zoning ordinance must be initiated by the plan commission. IC 36-7-4-602(a)(1).
- Following a public hearing, the proposal may be certified to the legislative body only if the proposal receives a favorable recommendation from the plan commission. IC 36-7-4-605(a)(1) and (b).
- The legislative procedures applicable to the adoption of an initial or comprehensive replacement zoning ordinance are set forth in IC 36-7-4-606 (Area and Metro) and IC 36-7-4-606.5 (Advisory).
- Notification of the adoption of initial or comprehensive replacement zoning ordinances must be published once within thirty (30) days after ordinance adoption. IC 36-7-4-610(a) and IC 5-3-1-2(h).
- The notifications must summarize the subject matter of the ordinance, state the date of adoption, specify the scope of the ordinance, specify penalty provisions, and specify two locations where the public may view the text of the ordinance. IC. 36-7-4-610(a).

Legislative procedures applicable to Area and Metro recommendations on Initial or Comprehensive Replacement Ordinance

- The legislative approval procedures for proposals certified by Area and Metro plan commissions differ from proposals certified by Advisory Plan Commissions.
- Regarding Area and Metro recommendations, the legislative body is required to **address** the certified proposal during its first regular meeting after receiving the certification, and to post notice of its intent to address the proposal at least forty-eight (48) business hours prior to the meeting. IC 36-7-4-606(b) and (c).
- During the meeting, the legislative body may either adopt, reject, or amend the proposal, or schedule an additional hearing on the proposal. IC 36-7-4-606(b).
- If the legislative body decides to schedule an additional hearing, it must advertise the hearing in accordance with IC 5-3-1. IC 36-7-4-606(b)(2).
- The hearing and the vote on the proposal must take place within ninety (90) days of plan commission certification. IC 36-7-4-606(b)(2).
- If the legislative body adopts the proposal or fails to vote on the proposal within the ninety (90) day period, the proposal takes effect. IC 36-7-4-606(f).
- If the proposal is rejected or amended, it must be returned to the plan commission with a written statement of reasons for the rejection or amendment. IC 36-7-4-606(g).

Area and Metro Procedures continued

- The plan commission must respond to the statement within forty-five (45) days. IC 36-7-4-606(g).
- If, within that period, the plan commission approves the legislative amendment or takes no action, the amendment takes effect. IC 36-7-4-606(g)(1).
- If the plan commission disapproves of the legislative body's amendment or rejection, the amendment or rejection stands only if the legislative body affirms its amendment or rejection of the proposal within forty-five days of the plan commission's certified rejection. IC 36-7-4-606(g)(2).
- If the legislative body fails to act within the forty-five-day period, the ordinance is effective as originally certified. IC 36-7-4-606(g)(2).

Legislative procedures applicable to Advisory recommendations on Initial or Comprehensive Replacement Ordinance

- The process relating to Advisory Plan Commission certifications involves less back and forth.
- The legislative body need not take action during its first post-certification meeting, but it must conduct a hearing on whether to adopt, reject, or amend the proposal. IC 36-7-4-606.5(b), (c), and (d).
- A notice of the meeting during which the hearing will be conducted must be posted forty-eight business hours prior to the meeting. IC 36-7-4-606(c).
- If, after the hearing, the legislative body adopts or amends the proposal, it takes effect. IC 36-7-4-606.5(e).
- If the legislative body rejects the proposal, further consideration of the proposal is prohibited for one (1) year after the date of the proposal's rejection. IC 36-7-4-606.5(e).

Text Amendments

- Under Area and Advisory law, a proposal to amend the text of a zoning ordinance may be initiated by the plan commission or by the legislative body. Under Metro law, the proposal may be initiated by the plan commission. IC 36-7-4-602(b).
- Plan commissions must hold a hearing on the proposals in accordance with Section 604 within sixty (60) days of proposal receipt or initiation, shall vote on the proposals within sixty (60) days of the hearing, and shall certify their recommendations to the legislative body within ten (10) business days. IC 36-7-4-607(c); IC 36-7-4-607.5(c).
- Area and Advisory Plan Commissions may certify proposed text amendments to the legislative body with a favorable, unfavorable, or no recommendation. IC 36-7-4-605(a)(2).
- Metro Plan Commissions may only certify proposed text amendments with a favorable recommendation. IC 36-7-4-605(b).
- The legislative procedures applicable to zoning ordinance amendment are set forth in IC 36-7-4-607 (Area and Metro) and IC 36-7-4-607.5 (Advisory).

Procedures - Area and Metro text recommendations

Favorable Recommendation

- If a proposal is favorably recommended by an Area or Metro Plan Commission, the legislative body shall vote on the proposal within ninety (90) days of certification and may adopt, reject or amend the proposal. IC 36-7-4-607(d) and (e)(1).
- Notice of the meeting during which the body intends to vote on the proposal must be given at least forty-eight (48) business hours prior to the meeting. IC 36-7-4-607(e)(1).
- If the legislative body adopts the proposal or fails to take action on the proposal within ninety (90) days of certification, the ordinance takes effect.
- If the proposal is rejected or amended, it must be returned to the plan commission with a written statement of reasons for the rejection or amendment. IC 36-7-4-607(e)(4).
- The plan commission must respond to the statement within forty-five (45) days. IC 36-7-4-607(e)(4).
- If the plan commission approves the legislative amendment or takes no action, the amendment takes effect. IC 36-7-4-607(e)(4)(A).
- If the plan commission disapproves of the legislative amendment or rejection, the proposal stands only if the legislative body affirms its amendment or rejection of the proposal within forty-five (45) days of the plan commission's certification of its disapproval. IC 36-7-4-607(e)(4)(B).
- If the legislative body fails to act within the forty-five (45) day period, the ordinance takes effect as originally certified by the plan commission. IC 36-7-4-607(e)(4)(B).

Procedures - Area continued

Unfavorable or No Recommendation

- If the Area Plan Commission certifies a proposal with an unfavorable or no recommendation, the legislative body shall vote on the proposal within ninety (90) days of certification and may adopt, reject or amend the proposal. IC 36-7-4-607(f)(1).
- Notice of the meeting during which the body intends to vote on the proposal must be given at least forty-eight (48) business hours prior to the meeting. IC 36-7-4-607(f)(1).
- If the legislative body adopts the proposal, the ordinance takes effect. IC 36-7-4-607(f)(2).
- If the legislative body rejects or fails to act on the proposal within the ninety (90) day period, the proposal is defeated. IC 36-7-4-607(f)(3).
- If the proposal is amended, it must be returned to the plan commission with a written statement of reasons for the rejection or amendment. IC 36-7-4-607(f)(4).
- The plan commission must respond to the statement within forty-five (45) days. IC 36-7-4-607(f)(4).
- If the plan commission approves the amendment or takes no action, the proposed amendment takes effect. IC 36-7-4-607(f)(4)(A).
- If the plan commission rejects the amendment or rejection, the amendment or rejection stands only if the legislative body affirms its amendment or rejection within forty-five (45) days of the plan commission's certification of its disapproval. IC 36-7-4-607(f)(4)(B).
- If the legislative body fails to act within the forty-five (45) day period, the proposal is defeated. IC 36-7-4-607(f)(4)(B).

Legislative procedures applicable to Advisory recommendations on Text Amendment Proposals

- With respect to a proposal certified by an Advisory plan commission,
- the legislative body shall vote on the proposal during a regular meeting conducted within ninety (90) days of certification. IC 36-7-4-607.5(d) and (e)(1).
- Notice of the meeting during which the body intends to vote on the proposal must be given at least forty-eight (48) business hours prior to the meeting. IC 36-7-4-607.5(e)(1).
- If the proposal is certified with a favorable recommendation, and the legislative body adopts or amends the proposal, the ordinance takes effect as adopted or amended. IC 36-7-4-607.5(e)(2).
- If the legislative body rejects the proposal, reconsideration of the proposal is prohibited for one (1) year. IC 36-7-4-607.5(e)(2).
- If the proposal receives an unfavorable or no recommendation from the Advisory plan commission, the legislative body may adopt, reject, or amend the proposal. IC 36-7-4-607.5(f)(1).
- If the legislative body adopts or amends the proposal, the ordinance takes effect as adopted or amended. IC 36-7-4-607.5(f)(2).
- If the legislative body rejects the proposal, reconsideration of the proposal is prohibited for one (1) year. IC 36-7-4-607.5(f)(2).

Zoning Map Amendment

- A zoning map amendment proposal may be initiated by the plan commission, by a petition signed by property owners who own at least fifty percent (50%) of the land involved, or, under advisory and area planning law, by any participating legislative body. IC 36-7-4-602(c)(1)(A) and (B).
- The plan commission shall hold a hearing on the proposal in accordance with Section 604 within sixty (60) days of proposal receipt or initiation, shall vote on the proposal within sixty (60) days of the hearing, and shall certify its recommendation to the legislative body within ten (10) business days. IC 36-7-4-608(b).
- The plan commission's recommendation may be favorable, unfavorable, or no recommendation 36-7-4-605(a) and (c)..
- The legislative procedures applicable to zoning map amendments are set forth in IC 36-7-4-608 (Standard Procedure) and IC 36-7-4-608.7 (Alternate Procedure).

Standard Map Amendment Procedure - Metro

- With respect to recommendations received from a Metro plan commission, at its first regular meeting following certification, the legislative body may schedule and post notice of a hearing on the proposal to take place during its next regular meeting. IC 36-7-4-608(c)(1)(B).
- If the legislative body fails to schedule the proposal for a hearing, the ordinance takes effect as if it had been adopted at the first regular meeting of the legislative body following certification. IC 36-7-4-608(c)(2).
- If the legislative body schedules a hearing but fails to conduct the hearing, the ordinance takes effect on the later of the scheduled hearing date or the date thirty (30) days from certification, unless the thirty-day action period is extended by the legislative body, with the consent of the commission or the petitioning property owners. IC 36-7-4-608(c)(3).
- If the legislative body fails to act on the proposal within the extended period, the ordinance takes effect as certified. IC 36-7-4-608(c)(3).
- If the legislative body conducts the hearing and approves the proposal, the ordinance takes effect.
- If the legislative body conducts the hearing and rejects the proposal, it is defeated. IC 36-7-4-608(c)(5).
- The plan commission may adopt a rule to limit reconsideration of a rejected proposal for one (1) year. IC 36-7-4-608(d).

Standard Map Amendment Procedure – Area and Advisory

- With respect to certified recommendations from Advisory and Area plan commissions, the legislative body shall vote on the proposal within ninety (90) days of certification. IC 36-7-4-608(e)(1).
- Notice of the meeting during which the legislative body intends to take action must be posted at least forty-eight (48) business hours prior to the meeting. IC 36-7-4-608(f)(B)(ii).
- If the proposal is certified with a favorable recommendation, the legislative body may adopt or reject the proposal during any regular meeting within the ninety (90) day period. IC 36-7-4-608(f)(2)(3).
- If the legislative body fails to timely act on the proposal, the ordinance takes effect as certified. IC 36-7-4-608(f)(4).
- If the proposal receives either an unfavorable recommendation or no recommendation from the Advisory or Area plan commission, the legislative body may adopt or reject the proposal during any of its regular meetings within the ninety (90) day period. IC 36-7-4-608(g)(1).
- The legislative body must post forty-eight business hour notice of the meeting during which it intends to act on the proposal. IC 36-7-4-608(g)(1).
- If the legislative body fails to act on the proposal within ninety (90) period, the ordinance is defeated.
- The plan commission may adopt a rule to limit reconsideration of the proposal for up to one (1) year. IC 36-7-4-608(h).

Zoning Map Amendment – Alternate Procedure

- Counties and municipalities may adopt, by ordinance, an alternate procedure for amending zoning maps. IC 36-7-4-608.7(a).
- Under both the standard and the alternate procedure, the plan commission shall hold a hearing on the proposal in accordance with Section 604 within sixty (60) days of proposal receipt or initiation, shall vote on the proposal within sixty (60) days of the hearing, and shall certify its recommendation to the legislative body within ten (10) business days. IC 36-7-4-608.7(b).
- The plan commission's recommendation may be favorable, unfavorable, or no recommendation. IC 36-7-4-605(a) and (c); IC 36-7-4-608.7(b).
- Yet, unlike the standard procedure, if the plan commission's recommendation is favorable, the ordinance takes effect thirty (30) days after the date of certification, or sooner if specified in the alternate procedure ordinance, unless within twenty-nine (29) days of proposal certification, or sooner if specified in the alternate procedure ordinance, either an aggrieved person or the legislative body requests that a final determination be made by the legislative body. IC 36-7-4-608.7(b), (c), and (d).
- If such a request is timely filed with the plan commission, the legislative body shall make the final determination, in accordance with the standard procedure (modified to accommodate the foregoing timelines). IC 36-7-4-608.7(c); IC 36-7-4-608(c)(2)(B), (c)(3), (e)(2), (f)(1)(B), and (f)(5).

Zoning Map Amendment – Alternate Procedure

continued

- If the plan commission certifies an unfavorable or no recommendation, the ordinance is defeated thirty (30) days after the date of certification, or sooner if specified in the alternate procedure ordinance, unless within twenty-nine (29) days of proposal certification, or sooner if specified in the alternate procedure ordinance, either an aggrieved person or the legislative body requests that a final determination be made by the legislative body. IC 36-7-4-608.7(b), (c), and (d).
- -If such a request is timely filed with the plan commission, the legislative body shall make the final determination, in accordance with the standard procedure (modified to accommodate the foregoing timelines). IC 36-7-4-608.7(c); IC 36-7-4-608(c)(2)(B), (c)(3), (e)(2), (f)(1)(B), and (f)(5).

BOARD OF ZONING APPEALS (“BZA”) DECISIONS

Administrative Appeals

IC 36-7-4-918.1 states:

A board of zoning appeals shall hear and determine appeals from and review:

- (1) Any order, requirement, decision, or determination made by an administrative official, hearing officer, or staff member under the zoning ordinance;
- (2) Any order, requirement, decision, or determination made by an administrative board or other body except a plan commission in relation to the enforcement of the zoning ordinance; or
- (3) Any order, requirement, decision, or determination made by an administrative board or other body except a plan commission in relation to the enforcement of an ordinance adopted under this chapter requiring the procurement of an improvement location or occupancy permit.

➤ Administrative appeal’s might relate to application matters (e.g., whether approval applications are complete, are being refiled too soon after a previous denial, or are seeking the wrong type of variance), permit matters (e.g., whether improvement location permits, certificates of occupancy, sign permits, etc., should be issued), land use classification decisions (e.g., whether a home for elderly individuals with dementia may be established in a single-family zone), non-conforming use decisions (e.g., has the use been established, abandoned, or expanded), and hearing officer decisions made under the alternate procedures authorized by IC 36-7-4-923.

Administrative Appeals continued

- BZA's are required to adopt rules regarding the filing of administrative appeals. IC 36-7-4-916.
- Appeals filed with the BZA must specify the grounds of the appeal and must be filed in the form and within the deadline set forth in the rules. IC 36-7-4-919(a).
- Administrative appeal filing deadlines generally range from 15 (e.g., St. Joseph, Tippecanoe) to 45 days (e.g., Brown County). The most common filing deadline is 30 days from the date of the decision being appealed (e.g., Fort Wayne, Carmel, Monroe County, Columbus).
- I.C. 36-7-4-919(d) states that on appeal, the BZA has the same powers as the original decision maker and may reverse, affirm, or modify the order, requirement, decision, or determination appealed from. The statute describes what is known as “de novo” review, which means that the BZA starts from scratch, makes its own findings and conclusions, and need not give deference to the original decision.
- However, the Indiana Court of Appeals has held that the BZA is free to adopt a different review standard, for example, reviewing whether the administrative decision was arbitrary, capricious, illegal or contrary to state law or the provisions of the ordinance. *City of New Haven v. Chemical Waste Mgmt. of Indiana, LLC*, 701 N.E.2d 912, 920 (Ind. Ct. App. 1998).

Variances

- There are two types of variances – use variances and development standards variances.
- A use variance is a requested variation of the zoning ordinance that, if granted, would permit a specific use that is not otherwise permitted in a particular district by the Zoning Ordinance. *City of Crown Point v. Misty Woods Props., LLC*, 864 N.E.2d 1069, 1082 (Ind. Ct. App. 2007).
- A development standards variance is a requested variation of the zoning ordinance that, if granted, would authorize deviations from standards relating to the design, construction, and placement of structures, including height, lot area, and setback standards. *Id.*, at 1082.
- Advisory and Metro BZAs are authorized to approve use variances. IC 36-7-4-918.4. Area BZAs are not. IC 36-7-4-918.3.
- In Lake and St. Joseph Counties, Area and Advisory BZAs must submit their recommendations on use variances to the legislative body for final approval. IC 36-7-4-918.6.
- Advisory, Metro, and Area BZAs are authorized to approve development standards variances. IC 36-7-4-918.5.
- BZAs are required to adopt rules concerning “the determination of whether a variance application is for a variance of use or for a variance from the development standards (such as height, bulk, or area).” Ind.Code § 36-7-4-916(a)(5).

Use Variances

➤ The criteria or elements applicable to use variance decisions are set forth in IC 36-7-4-918.4 as follows:

A variance may be approved under this section only upon a determination in writing that:

- (1) The approval will not be injurious to the public health, safety, morals, and general welfare of the community;
- (2) The use and value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner;
- (3) The need for the variance arises from some condition peculiar to the property involved;
- (4) The strict application of the terms of the zoning ordinance will constitute an unnecessary hardship if applied to the property for which the variance is sought; and
- (5) The approval does not interfere substantially with the comprehensive plan adopted under the 500 series of this chapter.

➤ The applicant bears the burden of producing substantial evidence demonstrating compliance with all five elements, and the failure to establish even one is sufficient to defeat the variance request. *Beaver Gravel Corp. v. Valdovich*, 269 N.E.3d 879, 884 (Ind. Ct. App. 2025).

➤ The use variance criteria “are very restrictive, and it is extremely difficult for a petitioner to establish all five as a matter of law.” *Maxey v. Board of Zoning Appeals*, 480 N.E.2d 589, 594 (Ind. Ct. App. 1985).

Use Variances continued

- Element 3 requires the petitioner to demonstrate that the need for the requested variance arises from some condition peculiar to the property involved.
- A peculiar condition “must relate to the specific features of the property, such as unusual shape or relatively small acreage . . . not merely the owner’s desired use of the property.” *I-465, LLC v. Metro. Bd. of Zoning Appeals Div. II*, 36 N.E.3d 1094, 1100 (2015).
- It must “relate to the uniqueness of the property” when compared to other properties in the surrounding area or neighborhood. *Sam’s East, Inc. v. United Energy Corp.*, 927 N.E.2d 960, 964-965 (2010).
- In *Metro. Sch. Dist. Of Washington Twp., Marion County v. Jansen*, 302 N.E.2d 541, 543 (1973), the court affirmed the BZA’s finding that the need for the variance arose from some condition peculiar to the property where there was evidence that the unusual shape and relatively small acreage, when viewed in conjunction with the adjoining commercial use and railroad tract, made the property unsuitable for development as either an apartment complex or an agricultural.
- In *Vogelgesang v. Shackelford*, 146 Ind. App. 248, 263-64, 254 N.E.2d 205, 214 (1970), the variance was affirmed where the location of the parcel was located on a major thoroughfare and adjacent to a gas station and riding stable, making the site unsuitable for the single-family residential use for which it was zoned.

Use Variances continued

➤ Element 4 requires the applicant to demonstrate that “unnecessary hardship” would result from a strict application of the ordinance.

➤ Indiana appellate courts describe unnecessary hardship as follows:

The determination of the existence of an unnecessary hardship is governed by all the relevant factors which, when taken together, indicate that the property cannot reasonably be put to a conforming use because of limitations imposed upon it by the ordinance. It must also be shown that the land involved cannot yield a reasonable return if used only for the allowed zoned purpose, and that the use authorized by the variance will not alter the essential character of the locality. *I-465, LLC v. Metro. Bd. of Zoning Appeals Div. II*, 36 N.E.3d 1094, 1102 (2015).

➤ The existence of unnecessary hardship is a question of fact for the BZA. *Id.* at 1102.

➤ In *I-465, LLC*, the court affirmed the BZA’s finding that it would constitute an unnecessary hardship to permit commercially intense uses (including adult entertainment, car washes, gas stations, boarding houses, bars, etc.), but not permit what is “essentially a hotel for pets.” *Id.*, at 1102.

➤ In *Beaver Gravel Corp. v. Valdovich*, 269 N.E.3d 879 (2025), the BZA granted a variance for a sand and gravel operation on a residentially zoned parcel that was being put to a permitted agriculture use. The court reversed concluding that the BZA’s finding of unnecessary hardship was unsupported by substantial evidence demonstrating that the property could not continue to be used for agriculture uses or for other permitted uses such as single-family homes. *Id.*, at 886.

Development Standards Variances

- The criteria or elements applicable to development standards variance decisions are set forth in IC 36-7-4-918.5(a) as follows:

A variance may be approved under this section only upon a determination in writing that:

- (1) the approval will not be injurious to the public health, safety, morals, and general welfare of the community;
- (2) the use and value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner; and
- (3) the strict application of the terms of the zoning ordinance will result in practical difficulties in the use of the property. However, the zoning ordinance may establish a stricter standard than the “practical difficulties” standard prescribed by this subdivision.

- Each of the foregoing elements must be established by the applicant. *Boyle v. Kosciusko County*, 565 N.E.2d 1157, 1161 (1991).

Development Standards Variances continued

- Element 3 requires the applicant to demonstrate that the requested variance is necessary to avoid practical difficulties in the use of the property.
- There is no fixed definition of practical difficulties. *Edward Rose of Ind., LLC v. Metro. Bd. of Zoning Appeals*, 907 N.E.2d 598, 605 (2009).
- However, reviewing courts generally require a showing: that significant economic injury will result from the enforcement of the zoning ordinance; that the injury is not self-created or self-imposed; and, that there are no feasible alternatives available under the ordinance which achieve the landowner's goals. *Town of Munster Bd. of Zoning Appeals v. Abrinko*, 905 N.E.2d 488, 492 (2009).
- Counties, cities, and towns may and have adopted a stricter standard than practical difficulties. IC 36-7-4-918.5(a)(3).
- Monroe County has done so by retaining the practical difficulties standard but adopting its own definition of the term "practical difficulties" which includes elements more restrictive than those applied by the courts.
- Reviewing courts are bound by zoning ordinance definitions. *Déjà Vu, Inc. v. City of Lake Station*, 681 N.E.2d 1168, 1172 (Ind. Ct. App. 1997) ("in construing the Ordinance, we are bound by the definitions provided by its drafters.").
- The Court of Appeals expressly acknowledged and applied a local definition of practical difficulties in *Burton v. Bd. of Zoning Appeals of Madison Cty.*, 174 N.E.3d 202, 218 (Ind. Ct. App. 2021).
- Please note that development standards established exclusively in a subdivision control ordinance may be waived by the plan commission, not by the BZA. IC 36-7-4-918.5(c).

Special Exceptions, Special Uses, Conditional Uses, and Contingent Uses

- IC 36-7-4-918.2 (“Section 918.2”) states that a BZA shall approve or deny all special exceptions, special uses, contingent uses, and conditional uses from the terms of the zoning ordinance, but only in the classes of cases or in the particular situations specified in the zoning ordinance. The foregoing uses may also be granted by plan commissions under the alternate procedure set forth in IC 36-7-4-923, subject to transfer or appeal to the BZA. IC 36-7-4-924(c), (d), (e), or (g).
- There are no statutory definitions of the uses. Section 918.2 leaves that to local legislative bodies. However, courts have treated the uses synonymously and generally describe them as permitted uses under the zoning ordinance so long as specified conditions are met. *Network Towers, LLC v. Bd. of Zoning Appeals*, 770 N.E.2d 837, 843 (2002) (conditional use); *Merrillville Bd. of Zoning Appeals v. Public Storage, Inc.*, 568 N.E.2d 1092, 1094 (1991) (special exception).
- Depending on the language of the applicable zoning ordinance, approval may be ministerial or discretionary:
 - ... while some special exception ordinances are regulatory in nature and require an applicant to show compliance with certain regulatory requirements (e.g. structural specifications), providing the zoning board with no discretion, require an applicant to show that its proposed use will not injure the public health, welfare, or morals). *Midwest Minerals Inc. v. Bd. of Zoning Appeals*, 880 N.E.2d 1264, 1268-1269 (2008).
- In either case, the petitioner bears the burden of demonstrating compliance with the ordinance criteria. *Wastewater One, LLC v. Floyd County Bd. of Zoning Appeals*, 947 N.E.2d 1040, 1051 (2011).
- In Lake and St. Joseph Counties, special exceptions and special uses must be submitted to the legislative body for final approval. IC 36-7-4-918.6

Conditions – Variances, Special Exceptions, Etc.

- BZAs may impose reasonable conditions as a part of their approvals. IC 36-7-4-918.4; IC 36-7-4-918.5; and, IC 36-7-4-918.3.
- To be deemed reasonable:

Conditions or restrictions must be clearly stated so that the landowner and his neighbors are not left in doubt as to the nature or extent of the use permitted. Restrictions must also be constitutional and may not themselves exceed the scope of authority delegated to the BZA by the relevant ordinance or statute. They should (1) not offend any provision of the zoning ordinance; (2) require no illegal conduct on the part of the permittee; (3) be in the public interest; (4) be reasonably calculated to achieve a legitimate objective of the zoning ordinance; and (5) impose no unnecessary burdens on the landowner. *Metropolitan Dev. Comm'n v. Schroeder*, 727 N.E.2d 742, 754 (2000).
- Conditions may be subject to statutory limitations.
- For example, IC 36-7-2-5.5 states that a unit may not require that a lawfully erected sign be removed or altered as a condition of issuing a permit, variance, or other order concerning land use development, unless the owner consents or is compensated.
- IC 36-7-2-11 states that a land use approval may not be conditioned upon a requirement that restricts residential or commercial rent amounts or sale prices or that reserves real property for lease or sale to groups or individuals based on income or assets, or that charges a fee to be used to accomplish those objectives.

BIAS AND CONFLICT OF INTEREST

Bias

- Due process requires that administrative and quasi-judicial proceedings be conducted by impartial decision makers and fact finders, i.e., those who are not biased or prejudiced. *City of New Haven v. Chemical Waste Mgmt. of Indiana, L.L.C.*, 701 N.E.2d 912, 921 (1998).
- This requirement is also statutory.
- With respect to plan commission members, IC 36-7-4-223(c) states that a member is disqualified and may not participate in a hearing concerning a zoning matter if the member is biased or prejudiced or otherwise unable to be impartial.
- IC 36-7-4-909(a)(1) sets forth the analogous limitation for BZA members.
- Bias or prejudice is usually directed toward the nature of the petition requested or the identity of the petitioner and reflects extreme philosophical, political, or personal antipathy. *City of Hobart Common Council v. Behavioral Inst. Of Ind., LLC*, 785 N.E.2d 238, 253 (Ind. Ct. App. 2003).
- The existence of bias or conflict is a question of fact. *Osborne Revocable Family Trust v. Town of Long Beach*, 78 N.E.3d 680, 699 (2017).
- The party claiming bias bears the burden of establishing that the decision maker should have been disqualified. *Id.*

Bias continued

- However, even if a member of an administrative board or panel is biased, courts presume that the board or panel will act properly and without bias or prejudice, with or without the recusal of the allegedly biased member. *Lockerbie Glove Factory Town Home Owners Ass'n, Inc. v. Indianapolis Historic Preservation Comm'n*, 106 N.E.3d 482, 490 (Ind. Ct. App. 2018), *trans. denied*.
- Courts will not interfere with the administrative process unless actual bias is demonstrated. *Id.*
- To determine the existence of actual bias, courts frequently consider whether, under similar circumstances, a judicial officer would have been obligated to withdraw from the case.
- for judicial recusal purposes, actual bias exists only where there is an undisputed claim or where the judge has expressed an opinion on the merits of the pending controversy. *Burton v. Bd. of Zoning Appeals of Madison Cty.*, 174 N.E.3d 202, 214 (2021)
- Recusal is generally not required where the judge has made adverse rulings against the party in the pending matter, or in previous matters, or where the judge has expressed impatience, dissatisfaction, annoyance, or even anger with one of the parties during a proceeding. *Rondeau v. State*, 48 N.E.3d 907, 912-913 (2016).
- Without more, a decision maker's friendship with one of the petitioners would not amount to actual bias. *Burton*, at 214.
- The bias rules apply to the following types of zoning decisions: administrative appeals, variances, special and conditional uses, appeals of commitment modification or termination decisions made by the BZA; subdivision decisions, development plan decisions, and final planned unit development decisions made by the plan commission. IC 36-7-4-1016.

Bias continued

- Legislative decisions are not subject to the due process requirement of an unbiased decision maker. *Perry-Worth Concerned Citizens v. Board of Comm'rs of Boone County*, 723 N.E.2d 457, 460 (Ind. Ct. App. 2000).
- -Legislative processes are political processes that do not involve fact finding. *Ogden v. Premier Props.*, 755 N.E.2d 661, 668 (2001); *City of Hobart Common Council v. Behavioral Inst. Of Ind., LLC*, 785 N.E.2d 238, 246 (Ind. Ct. App. 2003).
- There is nothing illegal about an individual legislator meeting with citizens, lobbyists, or businessmen prior to voting on an issue." *Ogden*, at 669.
- Legislative decisions include approving comprehensive plans, plan commission certifications, adopting and amending zoning ordinances, adopting impact fee ordinances, and modifying or terminating commitments associated with zoning ordinance and planned unit development approvals. IC 36-7-4-1016(c).

Conflict of Interest

- Conflict of interest is a different matter, and plan commission, board of zoning appeals, and legislative body members are disqualified from acting on matters in which they have a direct or indirect financial conflict of interest. IC 36-7-4-223 and IC 36-7-4-909.
- A conflict based on a direct financial interest might exist where a decision could impact the decision maker monetarily.
- An indirect conflict might exist where a decision could impact a family member or business partner of the decision maker monetarily.

Bias and Conflict continued

- Courts encourage claimants to raise any concerns they may have regarding bias or conflict before the decision-making body so that the agency has the opportunity to correct or prevent error, without judicial interference. *Osborne*, at 699.
- If the error cannot be corrected, it provides the decision makers with an opportunity to involve alternate members in the decision-making process. IC 36-7-4-223(d)(2); IC 36-7-4-909(b)(2).
- The failure to raise the issue of bias or conflict before the decision-making body can result in the waiver of the issue. *Lockerbie Glove Factory Town Home Owners Ass'n v. Indianapolis Historic Pres. Comm'n*, 106 N.E.3d 482, 489 (2018), citing IC 36-7-4-1610.
- It is useful for staff to periodically review bias and conflict requirements with plan commissions and BZAs. Most claims of bias and conflict are supported by speculation rather than fact. Self-recusal in the face of unfounded claims is not necessarily an admission of bias or conflict. It is an opportunity for a decision maker to avoid public doubt and a potential issue for judicial review.