

INDIRECT PROHIBITION OF LAND USES

When land uses are made unavailable or unviable by standards, omission, or repeal

Permission on paper is not the same as permission in practice. The operative ordinance text, the administrative record, timing, and superior-law constraints usually control.

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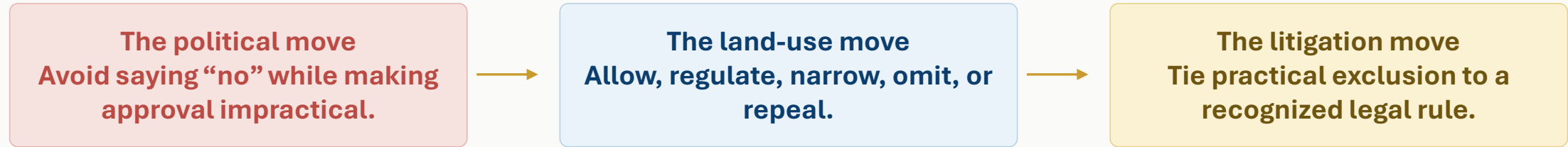
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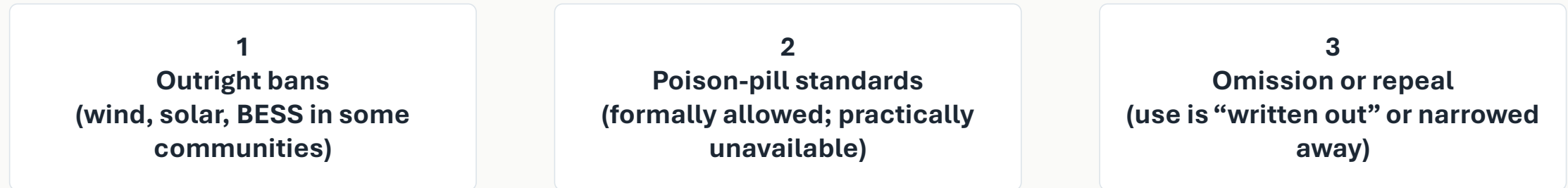
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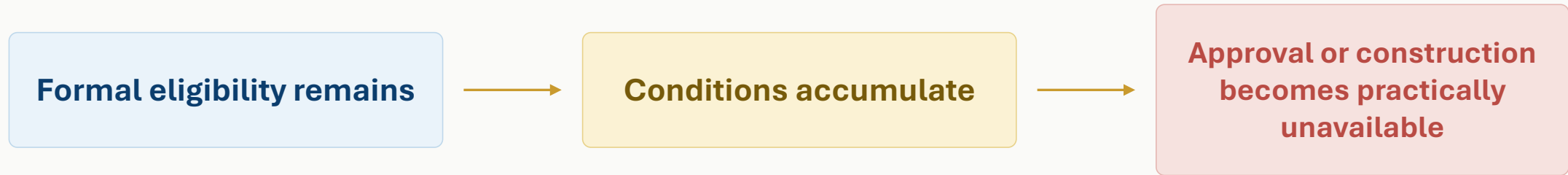
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Three recurring forms



Formal eligibility is not the same thing as a buildable, financeable entitlement.

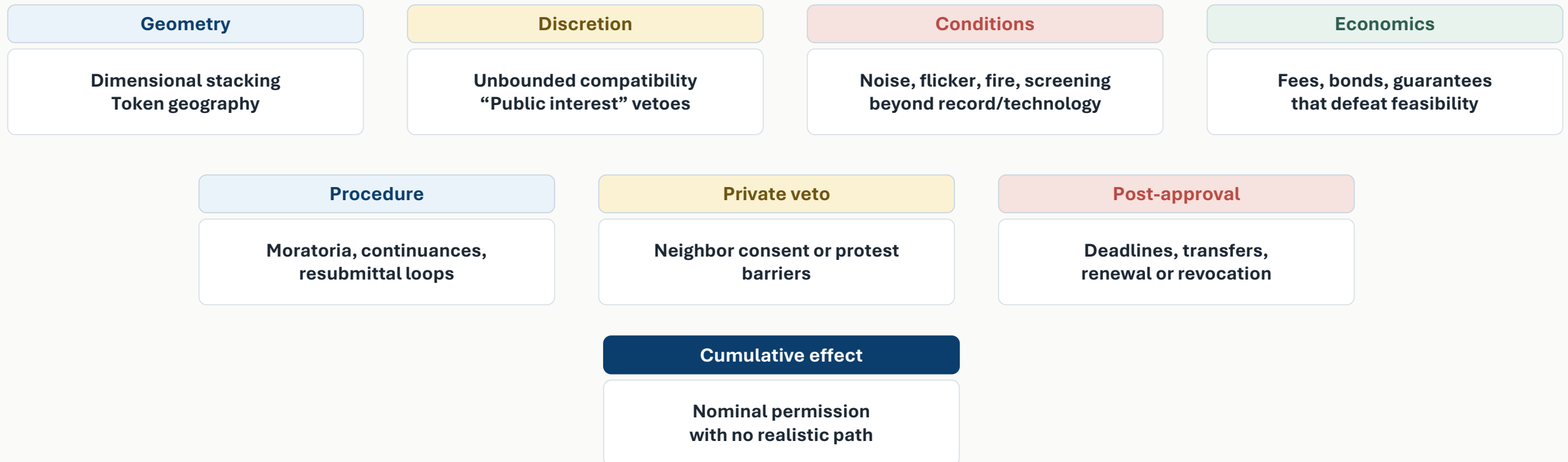


Typical ingredients

- Setbacks and buffers
- Token zoning districts
- Discretionary findings
- Operating conditions
- Cost burdens
- Process delays

The concept applies to uses permitted as of right, by special exception or conditional use, and to state/federal siting regimes that still include local participation.

**Do not argue the “poison pill” label.
Prove the mechanism and connect it to an enforceable legal constraint.**



The practical argument is cumulative: each standard may look ordinary in isolation, but the combined ordinance may leave no buildable site or no financeable project.

Urban settings

**High-density housing
Accessory dwelling units**

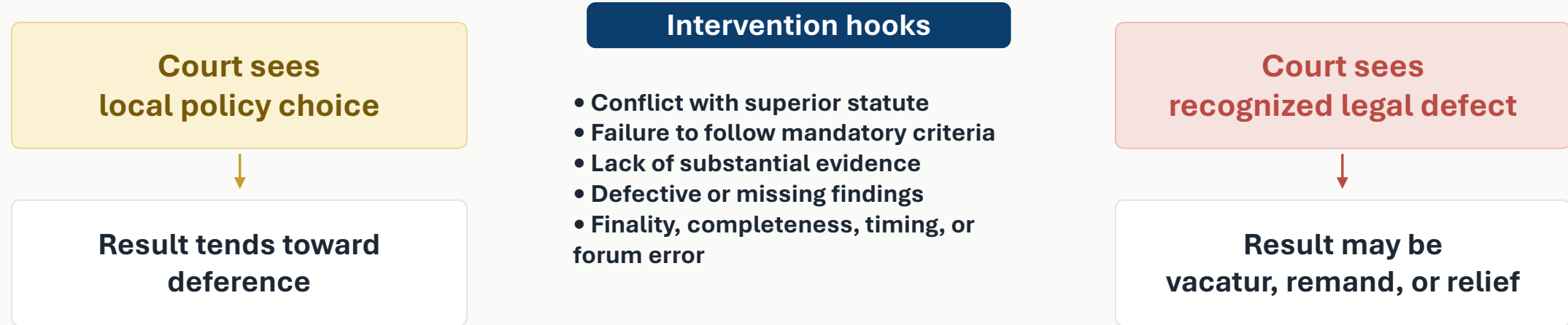
- Minimum off-street parking
- Minimum floor-area ratios
- Lot-coverage or similar dimensional limits

Rural settings

**Renewable energy
Data centers**

- Setbacks and separation distances
- Noise, glare, fire-access, screening
- Escrow, decommissioning, utility upgrades

**Same legal question:
Does the ordinance merely regulate impacts, or does it effectively make the use impossible?**



**The ordinance text and administrative record are not background.
They are often the case.**

Flat Rock Wind, LLC v. Rush Cnty. Area BZA
70 N.E.3d 848 (Ind. Ct. App. 2017)

Poison-pill posture

Wind developer attacked a 2,300-foot setback from turbine center to nonparticipating property lines.

Result

Unsuccessful. Minimum setbacks, BZA conditions, and evidence on health, safety, and property values supported affirmance.

Mammoth Solar a/k/a Starke Solar LLC v. Ehrlich
196 N.E.3d 221 (Ind. Ct. App. 2022)

Posture

Opponents challenged solar special-exception approval where required application information was missing.

Result

Successful for opponents. Approval was reversed as arbitrary and capricious because mandatory content was absent.

Practice lesson:
severe standards can survive with authority and evidence;
approvals can fail when threshold ordinance requirements are skipped.

Lone Oak Solar Energy LLC v. IURC
243 N.E.3d 1179 (Ind. Ct. App. 2024)

Developer accepted the local forum and permit conditions, then sought IURC reassertion after deadline problems.

Unsuccessful: state utility jurisdiction was not revived after adverse local-permit consequences.

Wike v. Grandview Solar Project, LLC
281 N.E.3d 529 (Ind. June 24, 2026)

Objectors later collaterally attacked town BZA approval based on alleged extraterritorial-jurisdiction defects.

Unsuccessful for late challengers: defect treated as avoidable, not void; zoning-review deadline enforced.

Practice lesson:
Preserve forum objections, permit-condition objections, and review deadlines early.
Finality is often dispositive.

Town of Merrillville BZA v. Public Storage
568 N.E.2d 1092 (Ind. Ct. App. 1991)

**Approval emphasized where relevant criteria
were met.**

Crooked Creek Conservation & Gun Club
677 N.E.2d 544 (Ind. Ct. App. 1997)

**Discernable discretionary standards can
preserve board judgment.**

“Shall approve if”



is not



**“May approve if
compatible”**

Carrot

Ind. Code chs. 4-3-23.1, 8-1-41, 8-1-42
Renewable-ready community certification for model solar/wind standards and approval processes; incentives currently \$1 per MWh.

Stick

Ind. Code § 36-7-4-1109.5
Limits certain local prohibitions on specified electricity-generation projects to one year after June 30, 2025; targeted, with exclusions.

BESS safety

Ind. Code ch. 22-14-8
State safety review for utility-scale battery energy storage systems, including IDHS/fire-safety approval; not framed as broad zoning preemption.

The Indiana model is targeted guardrails, not full renewable-siting preemption.

TCA

Timely, written, substantial-evidence decisions; no effective prohibition; RF limits.

RLUIPA

Substantial burden, unequal treatment, discrimination, total exclusion, unreasonable limits.

FHA / ADA

Group living and disability-related housing may require reasonable accommodation.

ICCTA

Rail transportation jurisdiction is exclusive; local permitting/zoning may be preempted.

Manufactured housing

Federal construction/safety standards preempt nonidentical local standards.

Transmission

FERC backstop for certain interstate transmission; not generation siting.

Pattern:
Congress rarely displaces zoning wholesale;
it usually bars exclusion, unreasonable discrimination, substantial burden, conflict,
or infeasible conditions for protected categories.

1
Clean source of law

2
**Precisely define the
challenged act**

3
No-feasible-site model

4
Cost and efficiency proof

Record ingredients

- GIS and parcel ownership
- Environmental constraints
- Interconnection, road access, dimensions

Mitigation evidence

- Noise, glare, shadow
- Fire and drainage
- Visual impacts and conditions

Preservation / remedy

- Request findings
- Object before record closes
- File protective review if needed

**A poison-pill argument without
GIS, cost, mitigation, finality, and remedy discipline
is just rhetoric.**

Local-government strategy: draft regulations that can be defended

GIS test first

If no representative project can satisfy the combined standards, revise or make exclusion transparent.

Objective where predictability is intended

Use “shall” and measurable standards when approval should follow compliance.

Tie numbers to impacts

Use engineering, fire, noise, glare, drainage, emergency-response, and land-use evidence.

Provide waiver or alternative compliance

A real path undercuts effective-prohibition arguments.

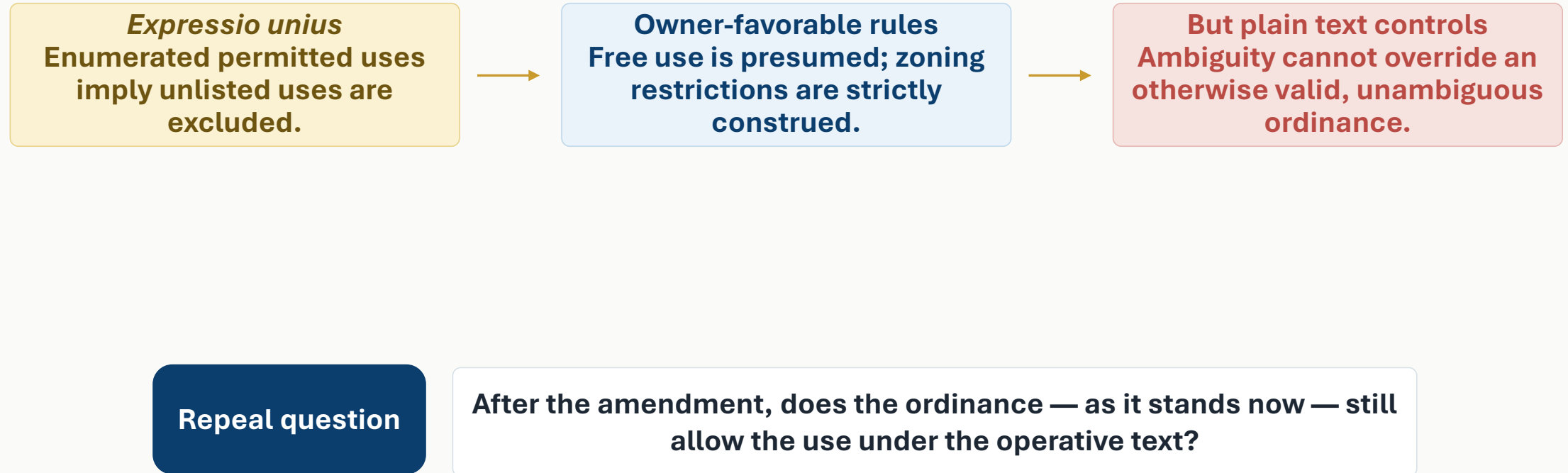
Separate baseline from case-specific

Define findings needed for stricter conditions; avoid hidden second-stage vetoes.

Write contemporaneous findings

Explain accepted/rejected evidence and connect it to each criterion.

**Annual audit:
renewable siting statutes change quickly;
use severability and automatic compliance language for superseding law.**



Day v. Ryan
560 N.E.2d 77 (Ind. Ct. App. 1990)

The ordinance mattered: except as provided, no building or premises could be used for any purpose other than those permitted in the district.

Noblesville v. FMG Indianapolis, LLC
217 N.E.3d 510 (Ind. 2023)

Strict construction and ambiguity favor the owner, but that rule cannot override specific language of a valid, unambiguous ordinance.

**Practice point: start with the current operative text.
Then argue whether the proposed use fits the listed category, not whether the policy seems fair.**

When omission does not prohibit: broader categories and practices

Test

1. Identify the allowed general category.



2. Apply the plain, ordinary, and dictionary meaning.



3. Confirm the use is not otherwise expressly prohibited.

Flying J, Inc. v. City of New Haven
855 N.E.2d 1035 (Ind. Ct. App. 2006)

Broader category
“automobile services” or “service stations” may include truck/RV fueling where those vehicles fit the permitted category.

Associated practices
Outside sales or merchandise storage tied to a retail store cannot be prohibited merely because not listed.

Limit: mere similarity is not enough if the proposed use cannot reasonably be included in the permitted use.

Indianapolis-Marion County example

**Blank cell in Use Table = prohibited in that primary zoning district.
Unlisted use = prohibited unless administrator determines
substantial similarity.**

**Accessory uses may also be approved if similar in nature and no
more adverse in impact.**

**Similarity determination asks whether the use is included
in a listed definition or is consistent in:**

size

scale

operations

external impacts

AREA planning jurisdiction

BZA cannot grant a use variance. Adding a use to a district generally requires legislative action by ordinance amendment.

Advisory / Metro jurisdiction

BZA may grant use variance, but only if statutory criteria are met.

Vanderburgh County example

Area plan commission may add a use to the most similar group, but county commission approval is required as a code amendment.

Practical consequence: in multi-unit AREA jurisdictions, omission/repeal is a legislative-amendment problem, not a variance problem.

Repeal of express permission

No direct Indiana authority.
General analysis asks whether the post-repeal ordinance still allows the use under interpretive principles.

Default practical outcome

If a provision permitting a specified use is repealed, the use is prohibited unless already established and protected.

Legal nonconforming use

The use must have lawfully existed before the new ordinance and continue after it, despite noncompliance.

**Historical common-law vesting events:
no vested rights where no work has commenced, or only preliminary work has occurred,
without moving forward with construction.**

BUT IN 2006 . . .

Trigger

Filing a complete permit application locks in the law then applicable to broad project elements.

Covered project elements include

permitted uses

residential density

nonresidential intensity

fees / dedications

mitigation / conditions

design standards

phasing

review procedures

Timing

**Law remains effective for 3 years after complete application;
can continue up to 10 years after the development or activity begins.**

**Statute does not change nonconforming-use burden:
Regardless of trigger or timing
claimant proves the use was legal and existed before the change;
opponents then prove abandonment or discontinuance.**

Transparent purpose is useful

But intent should be clear in the operative ordinance language.

Recitals are limited

They cannot conflict with, control, or expand the plain operative language.

**Hobbs v. State
451 N.E.2d 356 (Ind. Ct. App. 1983)**

Drafting rule: if the use is prohibited, allowed, similar, vested, or subject to a waiver path, say so in the codified text.

For proponents

- Map feasible sites and constraints
- Preserve forum, timing, and condition objections
- Offer narrower mitigation supported by experts

For local units

- Choose regulation or prohibition transparently
- GIS-test cumulative standards
- Tie restrictions to evidence and findings

For counsel

- Begin with the operative text
- Identify the decision-maker and remedy
- Do not rely on recitals to carry legal weight

**Indirect prohibition cases are won or lost
at the intersection of text, proof, timing, and superior law.**

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