

VESTED RIGHTS

DEFINITION AND RATIONALE

- Generally speaking, “[a] vested right is a firm, secured, legal entitlement that is so fixed and certain it cannot be arbitrarily taken away by new laws or conditions; it’s a guaranteed claim for present or future benefit, protecting individuals and businesses who have made significant investments or changes based on existing rules, like a developer building under old zoning.” Black’s Law Dictionary, 5th Ed. 1979, p. 1402.
- The concept of vested rights “is borne out of the notion that certain actions of property owners, and the local governments which permit those actions, may give rise to an expectation of a use which may not be equitably foreclosed.” State & Local Government Land Use Liability, Michael A. Zizka, et al., 2023 edition, Vol. 1, §2:11, p. 70, Thomson Reuters.
- In the context of land use, vested or accrued rights are **protected** from the retroactive application of a change in zoning law under the common law zoning principle known as “nonconforming use.” *Metro. Dev.Comm’n v. Pinnacle Media, LLC*, 836 N.E.2d 422, 425 (Ind. 2005).
- A nonconforming use is a use of property that **lawfully existed prior** to the enactment of a zoning ordinance that **continues in use** after the ordinance’s effective date even though it does not comply with the ordinance’s restrictions.

FEDERAL DUE PROCESS PROTECTION

- The protection extended to nonconforming uses is constitutionally based.
- “An ordinance prohibiting any continuation of an existing lawful use within a zoned area is unconstitutional as a taking of property without **due process** of law and as an unreasonable exercise of police power.”
Jacobs v. Mishawaka Bd. Of Zoning Appeals, 395 N.E.2d 834, 836 (Ind. Ct. App. 1979).
- With respect to due process, the Fifth Amendment to the United States Constitution states, in part:

Nor shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
- Because the original US Constitution was established as a limitation on the federal government and not on the individual states, *Barron v. Baltimore*, 32 U.S. 243 (1833), the Fourteenth Amendment was adopted in 1868 to make state actions subject to the due process requirements set forth in the Fifth Amendment.
- The Fourteenth Amendment states, in part:

nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

STATE “DUE PROCESS” PROTECTION

- The term “due process” does not appear in the Indiana Constitution. However, in 1851, prior to the adoption of the Fourteenth Amendment, Indiana amended its constitution to add Sections 12 and 21, which come close to using the term, and which respectively state, in part:

Every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law.

No person’s property shall be taken by law, without just compensation

- In recognition of due process/due course protections, Indiana zoning ordinances typically include “nonconforming use” provisions that acknowledge and provide limited protections to nonconforming uses and structures.
- These provisions are commonly referred to as “grandfather clauses” (A provision in a new law or regulation exempting those already in or a part of the existing system which is being regulated. Black’s Law Dictionary. 5th Ed. 1979, p. 629).

CANNOT PROHIBIT BUT CAN LIMIT

- Zoning ordinances must allow nonconforming uses to continue; however, they may impose restrictions and obligations on those uses that could result in the eventual elimination of the uses.
- The United States Supreme Court has held:

Even with respect to vested property rights, a legislature generally has the power to impose new regulatory constraints on the way in which those rights are used, or to condition their continued retention on performance of certain affirmative duties. As long as the constraint or duty imposed is a reasonable restriction designed to further **legitimate objectives**, the legislature acts within its powers in imposing such new constraints or duties. *United States v. Locke*, 471 U.S. 84, 104 (1985).
- The Indiana Supreme Court has held that limiting nonconforming uses furthers a legitimate governmental objective:

[t]he ultimate purpose of zoning ordinances is to confine certain classes of uses and structures to designated areas. Because nonconforming uses by definition detract from the fulfillment of that purpose, zoning ordinances properly seek to restrain them. *Ragucci v. Metropolitan Dev. Comm'n*, 702 N.E.2d 677, 679 (Ind. 1998).
- Ordinance restrictions on nonconforming uses might include registration requirements and prohibiting: the expansion of the use; the resumption of the use after its abandonment; the rebuilding or alteration of nonconforming structures; a change from one nonconforming use to another; or the compulsory termination of a nonconforming use at the expiration of a specified time.

LOCAL REGULATION OF NONCONFORMING USE – EXPANSION

Stuckman v. Kosciusko County Bd. of Zoning Appeals, 506 N.E.2d 1079 (Ind. 1987).

FACTS – Stuckman

- The Stuckmans purchased Lots A through K of the Lake Papakeeche Subdivision in the 1950's and started an automobile graveyard on Lots E through K.
- Occasionally, an auto was placed within the area of Lots A through K.
- In 1975, Kosciusko County adopted a zoning ordinance.
- The ordinance zoned the Stuckman's property residential.
- An automobile graveyard was not a permitted use in the residential zone, but the Stuckman's use was deemed a lawful, preexisting, nonconforming.
- The ordinance permitted the continuation of nonconforming uses, but provided that such uses may not be extended, expanded or changed.
- During the early 1980's, the Stuckmans leveled and cleared brush from Lots A through D and began stacking a significant number of autos on those lots.
- The Stuckmans left some of the autos on Lots E through K.
- Neighbors complained about the move to Lots A through D.
- Based on those complaints, the BZA initiated an enforcement action against the Stuckmans on the grounds that the Stuckmans had expanded their pre-existing nonconforming use in violation of the zoning ordinance.

DISCUSSION – Stuckman

- The trial court agreed with the BZA and ordered the Stuckmans to cease their automobile graveyard operations.
- On appeal, the Indiana Court of Appeals cited authorities from other states for the proposition that prohibitions against nonconforming use expansion concern the area of use and not the intensity of the use, as long as the nature and character of the use remain the same.
- The Court regarded the entirety of the Stuckman's property – Lots A through K, rather than just Lots E through K – as the “area of use” and found that moving salvage autos from Lots E through K to lots A through D did not change the nature or character of the use.
- The Court reversed the trial court concluding that the Stuckmans had not impermissibly enlarged their use, but rather, had merely **intensified** the use within the bounds of their original property – similar to a grocery store rearranging the shelving within its walls and placing additional inventory on the shelves.
- The Indiana Supreme Court granted transfer.

OTHER EXAMPLES OF IMPERMISSIBLE EXPANSIONS

- *Wastewater One, LLC v. Floyd County Bd. of Zoning Appeals*, 947 N.E.2d 1040 (Ind. Ct. App. 2011) (expansion of a nonconforming sewage treatment plant onto an entirely different tract);
- *Ragucci v. Metro. Dev. Comm'n of Marion Cnty.*, 702 N.E.2d 677 (Ind. 1998) (conversion of nonconforming 5 unit apartment building into an 8 unit apartment building, which included the establishment of a unit in a previously uninhabited attic);
- *Berkey v. Kosciusko Cnty. Bd. of Zoning Appeals*, 607 N.E.2d 730 (Ind. Ct. App. 1993) (nonconforming junkyard could not be expanded beyond the land being so used at the time the restrictive ordinance was adopted);
- *Metro. Dev. Comm'n v. Goodman*, 588 N.E.2d 1281 (Ind. Ct. App. 1992) (nonconforming two-unit carriage house apartment building could not be expanded into three units); and,
- *Chizum v. Elkhart County Plan Comm'n*, 263 N.E.2d 654 (1970) (poles and lights for night racing could not be erected at nonconforming daytime drag racing track); **QUESTION:** an expansion of hours of operation rather than area of operation?

WARNING!

- It is important to bear in mind that the foregoing decisions relate to specific facts, circumstances, and ordinance provisions.
- As noted by the Indiana Supreme Court:
 - . . . the language of the ordinance is the primary concern. Drawing conclusions from the cases is dangerous because the zoning regulations governing nonconforming uses vary widely from jurisdiction to jurisdiction. This is true both from state to state and also from municipality to municipality within this state. . . . the right to alter or extend a nonconforming structure depends primarily on the terms of the applicable zoning ordinance and the nature or extent of the alteration or extension. Differences in applicable zoning regulations, and in the circumstances under which the question arose, have led to different conclusions as to the right to enlarge or extend an existing nonconforming use. *Ragucci v. Metropolitan Dev. Comm'n*, 702 N.E.2d 677, 680-681 (1998).

LOCAL REGULATION OF NONCONFORMING USE – REGISTRATION

Board of Zoning Appeals v. Leisz, 702 N.E.2d 1026 (Ind. 1998)

FACTS – Leisz

- For some time prior to 1985, two residential units in Bloomington were being rented to more than three unrelated adults.
- In 1985, the Bloomington adopted a new zoning ordinance.
- The 1985 zoning ordinance limited occupancy of rental units in certain neighborhoods to a maximum of three unrelated adults.
- The two residential units were located in one of the restricted neighborhoods.
- The ordinance also contained a grandfathering provisions that permitted owners of dwellings occupied by more than three unrelated adults prior to ordinance adoption to continue as nonconforming uses provided the uses were registered with the city as nonconforming uses by a specific date. Failure to timely register resulted in the use losing its protected, grandfathered status.

FACTS – Leisz continued

- Notice of the occupancy limitation and the registration provision was published in the local newspaper during the summer of 1985.
- A separate provision of the Bloomington rental housing code required the registration of rental units in order to facilitate their inspection for compliance with health and safety regulations.
- Notice of the occupancy limitation and the registration provision was also mailed to the owners of rental units registered under the rental housing code.
- However, because the owners of the two rental units involved in the case had failed to register their rentals under the rental housing code, they were not mailed notice of the occupancy limitation and the registration requirement.
- The owners did not register their nonconforming rental uses.
- Four years later, the two properties were sold to the Leiszes.
- Four years after that, the City notified the Leiszes that their use of the properties violated the 1985 zoning ordinance.
- The Leiszs requested an administrative ruling that their properties were exempt from the ordinance as pre-existing, lawful, nonconforming uses.
- The planning director denied the request, and the Leiszes appealed to the BZA, which affirmed the director's decision.
- The Leiszes sought judicial review of the BZA's decision.
- The trial court's decision reversing the BZA's decision was affirmed by the Court of Appeals.
- The Indiana Supreme Court granted transfer.

DISCUSSION – Leisz per se analysis

- The Indiana Supreme Court addressed the issue of whether the application of the occupancy limitation and registration requirement resulted in a **taking** of the Leiszes vested right to rent their units to more than three unrelated adults.
- A takings analysis involves two general considerations - first, whether the government action constitutes a “per se” taking, and second, whether the action constitutes a taking under an “ad hoc” analysis.
- A per se taking occurs when an ordinance requires property owners to put up with a physical invasion of their property or where the ordinance deprives the owners of all economically beneficial use of their property.
- The Court concluded that the ordinance did not require or involve a physical invasion of the property. It only limited the number of permitted occupants. The Court further concluded that the ordinance did not deny the Leiszes all economically beneficial or productive use of their land because the Leiszes could still rent each of their properties to at least three unrelated adults.
- With respect to a loss of economically beneficial use, in two takings cases, the US Supreme Court has held that losses of 75% and 87% in value did **not** constitute a taking. The occupancy limitation cost the Leiszes around 25 % to 40% in rental income.
- The occupancy limitation and registration requirement did not constitute a “per se” taking.

DISCUSSION – Leisz ad hoc analysis

- To pass constitutional muster, regulations must advance a legitimate governmental interest while not going too far.
- For that reason, the “ad hoc” takings analysis involves weighing the public interests reflected in the government action against the economic interests of the property owners to ensure that a fair balance exists.
- So, first, the Court considered whether the registration requirement substantially advanced a legitimate state interest.
- One of the purposes of the registration requirement was to establish a process and a deadline for making a one-time determination of pre-existing status that would protect both the owner and the zoning authority from later lengthy disputes and extensive proof problems related to the validity of a nonconforming use.
- The Court concluded that promoting certainty and avoiding lengthy disputes over land use issues was a legitimate governmental interest and that the registration requirement would advance that interest.
- In support of its conclusion, the Court observed that the lengthy administrative and judicial proceedings between the city and the Leiszes highlighted the very real problem associated with proving the existence of a nonconforming use several years in the past.
- The Court also found that without the forfeiture provision, nonregistration could continue indefinitely and render the legitimate registration process and deadline futile.

LEISZ – Ad hoc analysis continued

- Having acknowledged a legitimate interest, the Court weighed the interest against (1) "the economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action."
- With respect to economic impact, the Court noted that because the Leiszes could still rent each of their units to at least three unrelated adults, their property retained economic use and value, even if somewhat diminished.
- Next, because, by law, property owners are charged with knowledge of the ordinances affecting the control and disposition of the property they purchase, the Court held that any investment-backed expectations the Leiszes harbored out of ignorance of the registration requirement were entitled to no weight. *Id.*, at 1030-1031.
- Finally, with respect to the character of the governmental action, the Court held:

The registration requirement takes nothing from the landowner. Rather, it merely requires the filing of a form by a designated date. Noncompliance with the regulation, not the regulation itself, results in the forfeiture of a vested property right. The power to protect the property interest rests solely with the landowner. The Supreme Court has . . . never required the payment of just compensation to a landowner "for the consequences of his own neglect." The landowners' property loss could have been avoided with minimal burden; it was their failure to file on time . . . that caused the property right to be extinguished
- The registration and forfeiture provisions did not constitute a taking under the ad hoc analysis.

AMORTIZATION

- The *Leisz* Court also addressed the amortization of nonconforming uses.
- Under an amortization provision, an owner's property right is absolutely extinguished at some point in time.
- Most states allow local zoning authorities to phase out nonconforming uses with amortization provisions.
- However, in *Ailes v. Decatur Court Area Planning Commission*, 488 N.E.2d 1057 (Ind. 1983), the Indiana Supreme Court held that:

an ordinance prohibiting any continuation of an existing lawful use within a zoned area regardless of the length of time given to amortize that use is unconstitutional as the taking of property without due process of law and an unreasonable exercise of the police power.
- In *Leisz*, the Court concluded that *Ailes*, in holding that amortization provisions are unconstitutional **per se**, incorrectly decided an issue of federal constitutional law.
- By so holding, the *Leisz* Court appears to have concluded that amortization provisions do not constitute a physical occupation of the property and do not automatically deprive the owner of all economically beneficial use of the property.
- Which suggests that in Indiana, amortization provisions can be constitutional, if they survive an **ad hoc** analysis – this has been acknowledged by the Indiana Court of Appeals. *Hoosier Outdoor Adver. Corp. v. RBL Mgmt.*, 844 N.E.2d 157, 168 (Ind. Ct. App. 2006).

AMORTIZATION– continued

- The “legitimate state interest” part of the ad hoc analysis is satisfied by the Court’s acknowledgment that nonconforming uses are contrary to legislative policies and that nonconforming use limitations reasonably further those policies by reducing or eventually eliminating the nonconforming uses.
- The next part of the ad hoc analysis involves weighing the economic impact of the amortization provision, including whether the property owners have been able to achieve their investment backed expectations.
- So, the length of the amortization period established would be the primary focus.
- If property owners are unhappy with an amortization period, they would need to seek a use variance and demonstrate that the economic impact of the regulation constitutes an ad hoc taking.

BURDEN OF ESTABLISHING NONCONFORMING USE

- Before protections and ordinance limitations may be applied and enforced, nonconforming use status must be established.
- Nonconforming use status is a defense to an enforcement action. *Wesner v. Metropolitan Dev. Com.*, 609 N.E.2d 1135, 1138 (Ind. Ct. App. 1993).
- IC 36-7-4-1019(c) states that: In an enforcement action . . . the party alleging the existence of a legal, nonconforming use . . . has the burden of proof on that issue. The nonexistence of a non-conforming use need not be proved.
- By definition, protection is given to uses (and structures) that satisfy the following three elements: (1) the use **existed prior** to the date of zoning ordinance adoption; (2) the use was **otherwise lawful** when established; and, (3) the use has existed **continuously** before and after ordinance adoption. *Metro. Dev. Comm'n v. Pinnacle Media, LLC*, 836 N.E.2d 422, 425 (Ind. 2005); *Uniontown Retail #36, LLC v. Board of Comm'rs of Jackson Cnty*, 950 N.E.2d 332, 339 (Ind. Ct. App. 2011).
- For purposes of NCU analysis, the term “existence” has been defined as “[t]he utilization of the premises so that they may be known in the neighborhood as being employed for a given purpose; i.e., the conduct of a business.” *Lutz v. New Albany City Plan Comm.*, 101 N.E.2d 187, 189 (Ind. 1951).
- The following types of evidence might help establish a use’s existence: testimony of the landowners, former owners, neighbors, clients, suppliers, real estate agents, appraisers, assessors, contractors, post office workers; and documents such as tax statements, photographs, aerial photographs, licenses, approvals, insurance policies and claims, advertisements, newspaper references, police reports, utility bills, etc.

ELEMENT 1 - PRIOR EXISTENCE

Bd of Pub. Works & Safety v. Alcantar, 47 N.E.3d 1276 (Ind. Ct. App. 2015)

FACTS - Alcantar

- In 2004, the Alcantars purchased a residential property that was built in 1914.
- It is not known whether a zoning ordinance was in effect in 1914.
- The building was divided into three separate apartments: one on the first floor, one on the second floor, and one in the third floor attic, and was assessed as a three unit rental.
- The Alcantars continued the use of the property as a three bedroom rental and annually registered it with the City of Hammond as a rental.
- The property was likely built as a single-family dwelling but converted to a three-unit rental property at some unknown, later time.
- Permits were not issued for the conversion.
- A zoning ordinance was in effect in 1931.
- The property is located in an area zoned as single-family residential.
- In the mid-1990s, a Hammond city official told a previous owner that he could not continue to rent the third floor unit because it only had one exit via an interior staircase at the entrance to the building.
- The previous owner obtained a permit from the city and added an exterior staircase to provide a second entrance to the third floor.
- Hammond had issued other permits to the previous owner for repairs to the three unit rental.

DISCUSSION – Alcantar

- In 2010, Board of Public Works and Safety determined that the Alcantar’s property, including the second and third floor apartments, did not constitute a pre-existing legal non-conforming use and that the building must be converted back to a single family home.
- The Alcantar’s sought review in the circuit court, which reversed the Board of Public Works’ decision and order.
- The circuit court found that the City of Hammond had no records prior to 1923 regarding the usage or zoning of any property and that the city zoning ordinance required the building commissioner to ensure that buildings complied with the zoning ordinance prior to issuing permits.
- The circuit court concluded that the city could not demonstrate that the building had not been constructed as a three unit rental in 1914 and, that because the city issued permits with full knowledge of the use of the building, it was estopped from denying the current owners that use.
- On appeal, the Court of Appeals noted that the Alcantar’s were required to prove that their property was a three-unit rental property before the area was zoned single family residential. And while theAlcantars presented evidence that the property was used as a three-unit rental at least since the late 1940s, they failed to prove that the property existed as a three-unit rental prior to the Hammond zoning ordinance that took effect in 1931.
- The Court of Appeals further held that estoppel cannot be applied against a governmental entity unless necessary to protect a public interest.The Alcantar’s rental income was a private interest that could not be protected by estoppel.
- The Court of Appeals reinstated the Board of Public Works order.

ELEMENT 2 – OTHERWISE LAWFUL

- The second element – otherwise lawful - was also discussed in *Alcantar*.
- The Alcantars maintained that their building could have been built as a three unit rental, but they failed to present any evidence to demonstrate that it had been built as a three unit rental.
- Moreover, the building commissioner testified that even if the building could have been built as a three-unit rental property, it had not been built according to the building codes in effect in 1914 for multi-unit family residences.
- The Court concluded that the building commissioner’s testimony supported the Board’s determination that the property had never been a **legal** non-conforming use.
- Likewise, in *Dandy Co. v. Civil City of S. Bend*, 401 N.E.2d 1380 (Ind. Ct. App. 1980), the court stated that the use must be established “while violating **no** law.” *Id.*, at 1384.
- These cases support the position that a violation of a non-zoning law is sufficient to prevent a pre-existing use from being deemed otherwise lawful.
- However, as the Indiana Supreme Court warned in *Stuckman*, non-conforming use issues are resolved according to the language of the applicable zoning ordinance. The non-conforming use provisions of a particular ordinance might define a non-conforming use as a use that existed prior to ordinance adoption while violating no zoning law or no county ordinance, etc.

ELEMENT 3 – CONTINUATION OF EXISTENCE

Dandy Co. v. Civil City of S. Bend, 401 N.E.2d 1380 (Ind. Ct. App. 1980)

FACTS – Dandy

- In 1972 Serkes rented her property to Balanow who used it to operate an adult bookstore.
- In May of 1974 Balanow vacated the property.
- The lease was assumed by the Sappenfields who operated the business until the lease expired in November of 1974 .
- Serkes posted for rent signs on the property but was not able to secure another tenant until Dandy leased the property for an adult bookstore operation in December of 1976.
- South Bend adopted an ordinance, effective, January 1, 1977, that prohibited an adult bookstore use at the property's location.
- On February 14, 1977, Dandy opened its bookstore for business.
- Two days later, the city sought injunctive relief.
- Dandy raised a nonconforming use defense on the grounds that the prior use of the property as an adult bookstore had not been abandoned.
- The trial court found that the prior adult bookstore use expired in 1974 when the Sappenfield's lease ended and did not exist on January 1, 1977 when the ordinance went into effect. It rejected the Dandy's defense and entered a preliminary injunction against Dandy.
- Dandy appealed.

DISCUSSION - Dandy

- The South Bend ordinance, like many zoning ordinances, stated:

The lawful use of land existing at the time of the passage of this ordinance, although such use does not conform to the provisions hereof, may be continued, but if such non-conforming use is **discontinued**, any future use of said premises shall be in conformity with the provisions of this ordinance.
- The burden of proving the termination of the use by discontinuance rests on those opposing the non-conforming use.
- The Court of Appeals noted that if a **particular** use of property is discontinued before the rezoning, the right to resume it afterwards is lost since the use was not existing when the ordinance was enacted.
- However, the Court further noted that the “**existence**” of a nonconforming use is not necessarily the same as the “**exercise**” of the use. Thus, a previously established nonconforming use may be deemed to be in existence at the time of zoning even though it is not being exercised on the very day of zoning ordinance adoption.
- The Court explained the difference between a “discontinuance of the existence of a use” and a “suspension of the exercise of a use.”
- Discontinuance of a nonconforming use is synonymous with abandonment of the use.
- To establish the abandonment of a nonconforming use, it is necessary to demonstrate the concurrence of the intent to abandon and some voluntary act or failure to act that signifies abandonment.

DISCUSSION – Dandy continued

- A suspension of the exercise of a use is a period of inactivity that might result from a failure to timely secure a new tenant or from a delay in securing financing for renovations.
- To establish a suspension of use, the intent to later resume the exercise of the use must be evident from actions taken by the owner of the use or structure.
- The burden of establishing suspension of use rests on the owner of the use or property.
- The Court of Appeals affirmed the trial court's conclusion of use discontinuance or abandonment noting that the existence of a use for business typically combines the construction or adaptation of a structure or property for the particular purpose and the employment of the structure or property for that purpose – so that the existence of the use may be known in the neighborhood.
- Dandy's execution of the lease and cleaning up the interior of the building were not deemed sufficient to make the existence of an adult bookstore use known in the neighborhood at the time of ordinance adoption.
- Even though Serkes posted a for rent sign on the property, she did not demonstrate that she specifically advertised the property for adult bookstore use or that she actively sought tenants for that particular type of business.
- The lack of obvious business activity on the effective date of the ordinance, the lack of targeted effort by Serkes, and the lapse of two years supported the trial court to find abandonment rather than suspension.

EXISTENCE OF INTENDED USES

- There are situations in which a specific nonconforming use is deemed to exist, under the common law, even if it does not satisfy the definition of “existence,” that is, even if it is not yet known in the neighborhood that the property is being employed for that given purpose.
- For example, in *Metro. Dev. Comm’n v. Pinnacle Media, LLC.*, 836 N.E.2d 422 (Ind. 2005) (Pinnacle I), the Indiana Supreme Court resolved a conflict between two of its earlier decisions.
- The Court overruled its decision in *Knutson v. State ex rel. Seberger*, 160 N.E.2d 200 (Ind. 1959), which held that merely applying for a building permit for a project established a vested right to proceed with the project that could not be overcome by a subsequent zoning ordinance change.
- The Court then affirmed its decision in *Lutz v. New Albany City Plan Comm’n*, 230 Ind. 74, 101 N.E.2d 187 (1951), which held:
 - . . . where no work has been commenced, or where only **preliminary work** has been done without going ahead with the construction of the proposed building, there can be no vested rights. The fact that ground had been purchased and plans had been made for the erection of the building before the adoption of the zoning ordinance prohibiting the kind of building contemplated, is held not to exempt the property from the operation of the zoning ordinance. Structures in the course of construction at the time of the enactment or the effective date of the zoning law are exempt from the restrictions of the ordinance.
- The Court rejected Pinnacle’s nonconforming use defense noting that the zoning ordinance provision in question had been in place for 11 months prior to the commencement of construction.

INTENDED USES - Continued

- On rehearing, *Metro. Dev. Comm’n v. Pinnacle Media, LLC.*, 846 N.E.2d 654 (Ind. 2006) (Pinnacle II, the Court acknowledged that vested rights can accrue prior to construction, but did not describe the circumstances in which that might be the case, that is, the circumstances in which the work performed would not be considered mere “preliminary” work.
- Those circumstances were more fully addressed by the Court of Appeals in *City of New Haven v. Flying J, Inc.*, 912 N.E.2d 420 (Ind. Ct. App. 2009).
- In *Flying J*, the BZA contended that New Haven’s recently amended zoning ordinance applied to Flying J because construction on Flying J’s proposed travel plaza had not commenced and the trial court agreed.
- On appeal, the Court stated that whether a landowner has engaged in pre-application work that is more than preliminary is a fact-sensitive question for the trial court.
- Flying J demonstrated that it had spent tens of thousands of dollars for engineering and surveying work on its proposed travel plaza before the zoning ordinance was amended.
- The Indiana Court of Appeals deemed the engineering and surveying work and expenses more than mere preliminary work and, thus, sufficient to establish a vested right in the proposed travel plaza use. *Flying J*, 912 N.E.2d 426-427.
- In an unpublished opinion issued in 2024, the Court of Appeals, citing *Flying J*, held that obtaining a variance, standing alone, is insufficient to establish vested rights – under the common law. *Chirico Media, LLC v. Ind. DOT*, 2024 Ind. App. Unpub. LEXIS 372, *4 (2024)
- The *Chirico Media* decision was undone by PL 202-2025, §16.

STATUTORY VESTED RIGHTS

- Vested rights may also be conferred by statute.
- Presumably, Pinnacle I did not sit well with the General Assembly because shortly after that decision, the legislature adopted IC 36-7-4- 1109 (“Section 1109”), which essentially resurrected the *Knutson* ruling that vested rights accrue at the time of permit application.
- Section 1109 has been amended and expanded nine times since 2006. But its core provision has always been this:
 - (g) If a person files with the appropriate local authority a complete application for a permit, as required by the legal restrictions of a local unit of government or a local authority, the granting of:
 - (1) the permit; and
 - (2) any secondary, additional, or related permits or approvals required from the same local authority with respect to the general subject matter of the application for the first permit;are governed, for a period of at least three (3) years after the date the person files a complete permit application, by the legal restrictions in effect and applicable to the property at the time the complete application is filed.

STATUTORY VESTED RIGHTS continued

- Subsection (o) of Section 1109 expressly states that Section 1109 does not impair or abrogate any vested rights established under the common law. As noted in *Pinnacle II* and *Flying J*, actions taken **prior** to permit application can result in the establishment of a vested right to an intended, future use. That is still the case. The last sentence of subsection (o) states that “rights considered vested under this subsection [i.e., common law vested rights] are not affected by a subsequent amendment to a zoning ordinance.”
- There are other statutes protecting nonconforming uses as vested rights. For example, IC 36-7-4-616 states that agricultural nonconforming uses may be changed to another agricultural use without losing nonconforming use status. The statute further states that counties and municipalities may use their zoning authority to:
 - (1) terminate an agricultural nonconforming use if the agricultural nonconforming use has been maintained for at least any three (3) year period n a five (5) year period;
 - (2) restrict an agricultural nonconforming use; or
 - (3) require any of the following for the agricultural nonconforming use of the land:
 - (A) a variance for the land;
 - (B) a special exception for the land;
 - (C) a special use for the land;
 - (D) a contingent use for the land; or
 - (E) a conditional use for the land.

STATUTORY VESTED RIGHTS continued

➤ In keeping with the General Assembly's recently expressed concerns regarding the availability of affordable housing, IC 36-7-4-1019(d) states, in part, that:

whenever a legal, nonconforming structure on a parcel of real property used for residential purposes within a mobile home community or on other private property is damaged, destroyed, or removed, the owner of the parcel shall be permitted to reconstruct, repair, renovate, or replace the structure without losing the status of the structure or parcel, or any part of the parcel, as a legal, nonconforming structure or use if . . . the structure will continue to be used for residential purposes [and] the new foundation of the reconstructed, repaired, renovated, or replaced structure may not exceed the square footage of the foundation of the damaged, destroyed, or removed structure.