Indiana Farm Bureau®

Landowner Toolkit

Guide to Zoning in Indiana

with Citations

Guide to Zoning in Indiana[1]

Brief History of Zoning in U.S. and Indiana

As early as colonial times, plans for cities and towns were created that included maps depicting layout of streets, parcel boundaries and open spaces. New York City adopted the first comprehensive zoning ordinance in 1916. In 1921 the Indiana General Assembly adopted the City Planning Act, which permitted city councils to create city plan commissions. 1921 Ind. Acts 209. These city plan commissions were authorized to prepare zoning ordinances and review and approve subdivision plats. In 1926, the United States Supreme Court upheld the constitutionality of zoning laws as valid police powers, and being consistent with the due process clause of the United States Constitution. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 43 S.Ct.158 (1926). Traditional zoning (also referred to as "Euclidean" zoning), divides governmental units into specific zoning districts that are dedicated to particular purposes or uses, which appear on a zoning map and are incorporated into a local zoning ordinance. *Story Bed & Breakfast, LLP v. Brown County Area Plan Com'n*, 819 N.E.2d 55 (Ind. 2004)

In 1935, the Indiana General Assembly adopted the County Planning Act, which allowed the creation of county plan commissions to prepare "master plans" for unincorporated areas in the counties, and required the county agricultural agent to be a member of the plan commission, in an effort to address agricultural interests in the state. 1935 Ind. Acts 209.

Also in 1935, the State Planning Board was created. 1935 Ind. Acts 74. Initially, the primary focus of this agency was at the county level. Following World War II, the State Planning Board was instrumental in the creation of three enabling statutes for administration of land use. The first was the Advisory Act adopted in 1947 that authorized local governmental units to create plan commissions, and required adoption of a master plan and an enforcement ordinance by the plan commissions and legislative bodies. 1947 Ind. Acts 174. The Metropolitan Planning Act was adopted in 1955, which combined all of the planning and zoning functions in Marion County into one agency. 1955 Ind. Acts 283. The Metropolitan Planning Act included some significant differences from the Advisory Act. In 1957, the Area Act was adopted that allowed a county and one or more municipalities to form one plan commission that would function for all of the units involved. 1957 Ind. Acts 138. The Area Act was similar in most respects to both of the earlier acts, but one major difference in the Area Act was that use variances were not authorized.

In 1979 and 1981, the three separate acts were merged into one enabling act, which was codified as Indiana Code § 36-7-4 (the "Enabling Act"). While this recodification created a

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single, legislative umbrella for land use law in Indiana, the three concepts of advisory, metropolitan, and area planning were retained. During the 1980s and 1990s, the General Assembly adopted various legislative acts that addressed single topics, including manufactured homes, satellite dishes, group homes, and childcare homes. In 1998, I.C. § 36-7-4-616, the Right to Farm Act, was adopted, which defined nonconforming agricultural uses, and prohibited local governmental units from restricting those uses. In 1997, the Hoosier Farmland Preservation Task Force was formed, and prepared a report to the Governor that discussed farmland preservation, retention of open space, and land development.

Structure of Land Use Regulation in Indiana

The Enabling Act employs the principles of Home Rule to provide a framework of land use laws and procedures that apply throughout the state, but gives local governmental units (counties, cities, and towns) the ability to craft their own, unique ordinances that describe specific planning and zoning requirements for development and the uses permitted in the various zoning districts. I.C. § 36-7-4-104. Home Rule was adopted by the General Assembly in 1980 in an effort to give local government more autonomy in making decisions, and to have all powers necessary for the effective operation of local affairs in government. I.C. § 36-7-3-2. Home Rule abrogated the long-standing "Dillon Rule" previously in effect in Indiana, which resolved any doubt as to the existence of a power of a governmental unit against its existence. I.C. § 36-7-3-3(a). Instead, Home Rule resolves any doubt in favor of existence of such a power, even if the power is not granted by statute, or a statute granting a power was repealed. I.C. § 36-7-3-3(b). Home Rule grants local governments any powers not expressly prohibited by the Indiana Constitution or by statute, or given to another entity. I.C. § 36-7-3-4(b). It also has been recognized that Home Rule demonstrates the legislative intent to give local governmental units expansive and broad-ranging authority to conduct their own affairs. *City of Carmel v. Martin Marietta Materials, Inc.*, 883 N.E.2d 781, 784 (Ind. 2008).

The Enabling Act has an organizational structure that uses the term "Series" to describe the different topics. I.C. § 36-7-4-104. For example, the provisions applicable to zoning ordinances are in the 600 Series, those to subdivision control are in the 700 Series, and those to the board of zoning appeals are in the 900 Series.

As noted above, the Enabling Act established three types of planning law – Advisory, Area, and Metro. The various sections in the Enabling Act indicate in their headings which type of planning law applies in each instance. If a specific planning type is not identified in the heading of a provision in the Enabling Act, then the provision applies to all three types. A unit establishes the type of planning applicable by adoption of an ordinance. Typically, this is done in the unit's zoning ordinance.

- Advisory planning applies within the jurisdiction of one, specific governmental unit (a county, a city, or a town), and is the most common type of planning jurisdiction found in Indiana. I.C. § 36-7-4-101. Another type of Advisory

jurisdiction is found in LaPorte County, where a joint zoning ordinance was adopted by the County, the City of LaPorte, and Michigan City, but each of those units has its own Advisory plan commission.

- Area planning applies to a group of units that are identified in a zoning ordinance, which typically includes the unincorporated areas of a county and one or more cities or towns. I.C. § 36-7-4-102. An example of an Area planning jurisdiction is Vanderburgh County and the City of Evansville. An Area plan commission has jurisdiction to act for all of the designated governmental units.

- Metro planning applies only to Marion County and Indianapolis. I.C. § 36-7-4-103.

- Joint District planning was created in 1989 by special legislation adopted by the General Assembly. I.C. § 36-7-4-202(a). The Advisory planning laws apply in a Joint District. I.C. § 36-7-5.1-3. One or more municipalities and one or more counties may establish a single, unified planning and zoning entity. I.C. § 36-7-5.1-4. A joint district is created by the adoption of identical ordinances by the legislative bodies of the units involved, which specify the legal name of the joint district commission, the boundaries of the joint district, and the duration of the commission, which once established, may not be changed. I.C. § 36-7-5.1-5.

    - The membership of a joint district commission consists of persons appointed by the legislative bodies of the county and each municipality, the city plan commission of each municipality, and the executive of each municipality. I.C. § 36-7-5.1-9. After the joint district commission is established, it has exclusive jurisdiction all planning, zoning, platting, and land use policy in the joint district, except for the limited powers of the joint district council. I.C. § 36-7-5.1-6.

    - The joint district commission is empowered to adopt a comprehensive plan that applies only in the joint district; however, until it does, the comprehensive plans previously adopted by each unit continue to apply. I.C. § 36-7-5.1-8.

    - A joint district council also is established for the joint district, with its membership comprised of named or appointed representatives of the legislative bodies of the county and each municipality. I.C. § 36-7-5.1-7(a) and (b).

- A joint district council must approve any ordinance adopted by the joint district commission, after a public hearing with notice by publication. A quorum of the joint council is a majority of its entire membership. I.C. § 36-7-5.1-7(c) and (d).

- The joint district commission also establishes a joint district board of zoning appeals consisting of five citizen members appointed by the commission, the most populous county, the most populous municipality, and the second most populous municipality. I.C. § 36-7-5.1-24. A member of the joint district board of zoning appeals must reside in the joint district, and may not hold an elective office. I.C. § 36-7-5.1-25. A joint district board of zoning appeals may not grant use variances. I.C. § 36-7-5.1-26.

- Delaware County, the City of Muncie, and the Town of Edinburgh used this statute to create a Joint District in which the units are jointly governed by the Bartholomew County zoning and subdivision control ordinances.

- "Fringe" or Extraterritorial Jurisdiction of a Municipality.

  - I.C. § 36-7-4-205 contains the statutory provisions that govern the ability of a municipality to have extraterritorial, or "fringe", planning and zoning jurisdiction of land outside of its municipal boundaries.

  - By statutory definition, an incorporated city and a town each is a "municipality" (I.C. § 8-1.5-6-1); and a "municipal plan commission" means both a city plan commission and a town plan commission (I.C. § 36-7-1-12).

  - Extraterritorial jurisdiction under I.C. § 36-7-4-205 is available to municipalities operating under Advisory planning law, but not to municipalities operating under Area planning law. *See*, I.C. § 36-7-4-205(d).

  - For a municipality to have extraterritorial jurisdiction:

    - It must have adopted a comprehensive plan in accordance with the 500 Series;

    - It must have an Advisory municipal plan commission; and

- The municipality's comprehensive plan must provide for the exercise of planning and zoning authority in the contiguous, unincorporated area of the county.

I.C. § 36-7-4-205(d).

- *Extraterritorial Jurisdiction Area.*

  - A municipality may extend its planning and zoning jurisdiction to any part of a contiguous area up to two miles from its municipal boundaries. I.C. § 36-7-4-205(e).

  - A municipalities fringe jurisdiction may be extended beyond two miles if any part of the corporate boundaries, or any part of the fringe area, encompasses the public waters or shoreline of a lake, then the fringe jurisdictional area can be extended to include all of the lake, and an area up to 2,500 feet from the shoreline of the lake. However, the lake must be wholly located within the State of Indiana. I.C. § 36-7-4-205(e)(1).

- Before a town may exercise extraterritorial jurisdiction, it must record a description or map that defines the limits of such jurisdictional area. I.C. § 36-7-4-205(f).

- There are different requirements and limits of extraterritorial jurisdiction that depend on the date a county comprehensive plan was adopted. I.C. § 36-7-4-205(c) and (d).

  - If a municipality adopted a comprehensive plan before July 1, 2019, and the comprehensive plan provides for extraterritorial jurisdiction, that jurisdiction may continue unless the county commissioners act to terminate that jurisdiction. I.C. § 36-7-4-205(b).

  - For a municipal comprehensive plan adopted after June 30, 2019, extraterritorial jurisdiction may not be acquired in a county that also has a comprehensive plan covering the same jurisdictional area unless the county commissioners adopt an ordinance authorizing the extension of the municipality's extraterritorial jurisdiction. I.C. § 36-7-4-205(c).

- In order for a municipality to acquire extraterritorial jurisdiction, an authorizing ordinance must first be adopted by the county's legislative body (which is the board of county commissioners). The ordinance may be

initiated either by the county commissioners, or by a petition of (i) not less than the 50 property owners that reside in the fringe area; (ii) the county plan commission; or (iii) the municipal plan commission. I.C. § 36-7-4-205(h).

- The county plan commission first must hold a public hearing on the proposed ordinance. If the county commissioners pass the ordinance, and the municipal plan commission accepts jurisdiction, the municipal plan commission then has exclusive jurisdiction over the extraterritorial area. I.C. § 36-7-4-205(h).

- If the municipality is located in a county without a comprehensive plan that includes an area contiguous to the municipality, and the municipality is providing municipal services to that area, the municipal plan commission may exercise jurisdiction over that area by filing a notice with the county recorder that includes a map or description defining the limits of the area. If the area is later revised, another similar notice must be recorded for the new area. I.C. § 36-7-4-205(j).

- To terminate a municipality's extraterritorial jurisdiction, an ordinance must be adopted at the discretion of the county commissioners to terminate that jurisdiction; however, the extraterritorial jurisdiction may only be terminated if the county's comprehensive plan for that area "is as comprehensive in scope and subject matter" as the municipality's comprehensive plan. I.C. § 36-7-4-205(h)(3)(i).

- *Jurisdiction and Membership of Board of Zoning Appeals in an Extraterritorial Area.*

    - If a municipality exercises extraterritorial jurisdiction in an unincorporated area of the county, either under I.C. § 36-7-4-205 or under I.C. § 36-7-4-1208 (township joinder), either one of the following must occur:

        - An additional division of the board of zoning appeals must be established that will have jurisdiction only in the unincorporated area, which consists of residents of the unincorporated area, or persons who reside in the county, and also own real property in the unincorporated area; provided, however, that a majority of the members appointed must reside in the unincorporated area; or

        - The municipal plan commission must designate as its appointment to the municipal board of zoning appeals one

of the members who was appointed to the municipal plan commission to serve the unincorporated area.

(I.C. § 36-7-4-903(1).

- *Potential Issues with §205*

  - §205(a) says a municipal plan commission shall adopt a comprehensive plan under the 500 Series. Instead, it should say a legislative body adopts a comprehensive plan.

  - §205 doesn't address how restated comprehensive plans are treated; are they considered "initial" comprehensive plans for purposes of the date of the applicable procedure?

  - §205(h) – petition to approve county's relinquishment of fringe jurisdiction signed by "50 property owners"; should this be the owners of 50 properties? Can they be 50 tax parcels, even if contiguous?

  - What is a BZA's jurisdiction in fringe area?

  - What "municipal services" are required to be provided by the municipality that desires to exercise extraterritorial jurisdiction? Is a single service, like fire protection, sanitary, or potable water, sufficient?

- <u>Township Joinder.</u>

  - The 1200 Series governs when a township may join a municipality for planning and zoning purposes. I.C. § 36-7-4-1200 *et seq*.

  - If the county in which the township is located has not established a county plan commission or a metropolitan plan commission, then the township may join a municipality for planning and zoning purposes. I.C. § 36-7-4-1202(b).

  - However, a township may not join a municipality for planning and zoning purposes in a county with a county plan commission or a metropolitan plan commission after the county has adopted both a zoning ordinance with districts for agricultural, residential, commercial, and industrial uses and certain development standards, and a subdivision control ordinance that has

restrictions at least equal to those in the zoning ordinance. I.C. § 36-7-4-1202(a).

- *Municipalities a Township May Join.*

  - A township may join a municipality with an advisory plan commission, and which has adopted a zoning ordinance and a subdivision control ordinance, if any part of the township is contiguous to (i) the corporate boundary of the municipality, or (ii) an extraterritorial area over which the municipality is exercising planning and zoning authority, or (iii) another township that has joined the municipality under the 1200 Series. I.C. § 36-7-4-1201.

  - If the township is contiguous to two or more municipalities, the township may elect which municipality it desires to join. I.C. § 36-7-4-1205.

  - If a township is partially in the corporate boundaries, or is partially within the extraterritorial limits, of a municipality, the township may only seek joinder with that municipality. I.C. § 36-7-4-1206(a).

  - If a township is within the jurisdictional limits of two municipalities, and one of the municipalities is exercising planning and zoning control in its jurisdiction, the township must seek joinder with that municipality. If both municipalities are exercising jurisdiction, the township may choose which one it desires to join. I.C. § 36-7-4-1206(b).

  - If a township located in another county is contiguous to a municipal or county boundary, an area over which a municipality is exercising extraterritorial jurisdiction, or another that township that has joined a municipality under the 1200 Series, the township may join either a continuous municipality or a contiguous county. I.C. § 36-7-4-1207.

- *Procedure to Adopt Township Joinder*.

  - For a township to join a municipality for planning and zoning purposes, a petition signed by 50 freeholders must be filed with the township executive. The township executive and the township

legislative body then jointly hold a public hearing on the joinder petition, with notice by publication given under I.C. § 5-3-1. I.C. § 36-7-4-1203(a).

- If there is a remonstrance signed by a majority of the freeholders in the township who reside outside the corporate boundaries of the municipality, and filed before the scheduled hearing on the joinder petition, the hearing cannot be held, and the petition is rejected. A joinder petition rejected for this reason cannot be refiled for at least one year after the remonstrance. I.C. § 36-7-4-1203(b).

- If such a remonstrance is not filed timely, then the township executive and legislative body sends the joinder petition to the municipal plan commission for consideration. I.C. § 36-7-4-1203(b). If the municipal plan commission is in favor, it recommends joinder to the municipal legislative body. If the municipal legislative body is in favor, it passes a resolution with the terms of the joinder, and sends copies of the resolution to the township executive, and to the county recorder for recording. If either the municipal plan commission or the legislative body rejects the joinder petition, the township executive must be notified. I.C. § 36-7-4-1204.

- If the joinder petition is accepted, the planning and zoning authority of the municipality or a contiguous county (if applicable) extends to the township joined for all purposes. If the county in which the township is located has not established a county plan commission or a metropolitan plan commission, then the township may join a municipality for planning and zoning purposes. I.C. § 36-7-4-1202(b).

- After a joinder petition is accepted, the township executive, with the approval of the township legislative body, appoints a number of additional members to the municipal plan commission that is proportional to the populations of the township and the municipality or county, as applicable, who serve for two-year terms. I.C. § 36-7-4-1210.

- Hamilton County has special requirements for membership of municipal plan commissions for which a township has joined. *See*, I.C. § 36-7-4-1210.5.

- A township may withdraw that joined a municipality may not withdraw from the joinder only if (i) the municipality or county has consolidated its planning and zoning authority on an area basis under other law, or (ii) a referendum petition signed by at least the number of voters a candidate is required to be placed on a ballot, is approved at the next general election for the township. If there is an affirmative vote of the majority at that election, and the township repays the required expenses, the township is permitted to withdraw. I.C. § 36-7-4-1212.

- Planning Bodies and Officials. The governmental organizations in a unit that are involved in planning and zoning are the legislative body, the plan commission, and the board of zoning appeals (the "BZA"). Each organization has its own, statutorily-prescribed powers and duties in the planning and zoning process, which are generally described as follows:

  - *Legislative Body.*

    - *Generally.* A legislative body is the board of commissioners in a county, the common council in a city, and the town council in a town. I.C. § 36-1-2-9. A legislative body has the power to give final approval to the adoption of a comprehensive plan (I.C. § 36-7-4-509), the initial adoption and replacement of a zoning ordinance (I.C. § 36-7-4-606) and a subdivision control ordinance (I.C. § 36-7-4-701), the text amendment of a zoning ordinance (I.C. § 36-7-4-607) and a subdivision control ordinance (I.C. § 36-7-4-701), a zone map change (or a "rezoning") (I.C. § 36-7-4-608), and approval of a planned unit development under the 1500 Series (unless such authority is delegated by the legislative body) (I.C. § 36-7-4-1505).

    - *Meetings and Notice.* All zoning decisions made by a legislative body must be made at a meeting open to the public. I.C. § 5-14-1.5-3. Notice under the Open Door Law of such meetings must be given. I.C. § 5-14-1.5-4. In addition, notice by publication must be given of meetings at which the legislative body will consider the adoption of an initial or replacement zoning ordinance if the legislative body does not vote on the proposal at its first meeting following plan commission certification of its recommendation. I.C. § 36-7-4-606(c). Notice to property owners of legislative body meetings is not required for any zoning proposal.

- *Plan Commission.*

  - *Recommendations.*

    - A plan commission has the duty to conduct public hearings on, and make recommendations to, the legislative body for the adoption of an initial comprehensive plan and amendments to it (I.C. § 36-7-4-508), the initial adoption or replacement of a zoning ordinance, (I.C. § 36-7-4-607) and a subdivision control ordinance (I.C. § 36-7-4-701(b)), as well as text amendments to them, and a change of a zone map (I.C. § 36-7-4-608) (commonly called a "rezoning").

    - Advisory and Area plan commissions may take the following types of action in zoning ordinance proceedings:

      - If the proposal is to adopt an initial or replacement zoning ordinance, the plan commission may certify the ordinance to the legislative body only if a favorable recommendation is made. I.C. § 36-7-4-605(a)(1).

      - If the proposal is either to amend the text of a zoning ordinance, or to change a zone map (a rezoning), the plan commission may make a favorable recommendation, an unfavorable recommendation, or no recommendation, to the legislative body. I.C. § 36-7-4-605(a)(2) and (3).

    - In the Metro planning jurisdiction, the metropolitan plan commission may certify action for adoption of an initial or replacement zoning ordinance, or to amend the text of a zoning ordinance, to a legislative body only if a favorable recommendation is made, but it must certify a proposed zone map change to the legislative body whether the recommendation is favorable or unfavorable, or if no recommendation is made. I.C. § 36-7-4-605(b) and (c).

  - *Final Decisions.* A plan commission also has the power to conduct public hearings and give final approval for a subdivision plat and

assignment of street names under the 700 Series (I.C. § 36-7-4-701(b)), development plans under the 1400 Series (I.C. § 36-7-4-1401.5), modification or termination of written commitments required or allowed by the plan commission in a zoning proceeding (I.C. § 36-7-4-1015), and secondary review of planned unit developments under the 1500 Series, if such authority is delegated to the plan commission by a legislative body (I.C. § 36-7-4-1511).

- *Street Names and Numbers.* An executive of a governmental unit (a mayor in a municipality, the board of commissioners in a county, and the town council in a town) is required to assign names to streets, unless an ordinance is adopted to give the plan commission the power to name streets. The plan commission is required to assign street numbers to lots and structures. I.C. § 36-7-4-405(b).

- *Prohibition of Rehearing Rezoning Proposals.* A plan commission may adopt a written rule that prohibits the refiling of a zone map change proposal for a period of up to one year from the date the proposal was first denied. I.C. § 36-7-4-608(h).

- *Membership.* Membership in plan commissions is prescribed in the Enabling Act, or by the Joint District statute if applicable, both in terms of number and composition. An Advisory plan commission in a municipality with a park board and city engineer has nine members, but a plan commission in a municipality without a park board and city engineer has seven members. I.C. § 36-7-4-207. A county Advisory plan commission has nine members. I.C. § 36-7-4-208. An Area plan commission consists of members from the county, each city, and each town designated in the land that comprises the Area. The number of Area plan commission members is determined by the population of the cities, the number of towns, the number of municipal representatives, and for purposes of the county representatives, the total number of municipal representatives. I.C. § 36-7-4-208(c) and (d), I.C. § 36-7-4-209, and I.C. § 36-7-4-210. The membership of plan commissions consists of a combination of citizen members who reside in a unit that are appointed by the governmental bodies involved, members of the governmental bodies or agencies identified in the Enabling Act, and persons who serve by virtue of

their offices (like an agricultural extension agent or a county surveyor in a county, or a city engineer in a city). *Id.*

- *Procedure for Review.* In order for a plan commission to make a recommendation or a final decision over which it has jurisdiction under the Enabling Act, the plan commission must hold a public hearing with notice, based on requirements established by the plan commission in written rules it must adopt. The Enabling Act also requires that notice of all plan commission public hearings be published in a local newspaper of general circulation at least 10 days before the hearing. I.C. § 36-7-4-507, I.C. § 36-7-4-604, I.C. § 36-7-4-706, and I.C. § 36-7-4-1404(c).

- *BZA.*

  - *Membership.* An Advisory BZA and a Metro BZA each have five members, while an Area BZA has seven members. I.C. § 36-7-4-902. The members of a BZA must be either citizens that reside in the jurisdiction, or citizens who reside in the county, but own real property in the jurisdiction. Members of the BZA are appointed by the various governmental bodies designated in the Enabling Act. A BZA must be established by the legislative body in the zoning ordinance, and may consist of one or more divisions. I.C. § 36-7-4-901.

  - *Review Powers.* A BZA is a quasi-judicial body to which the Enabling Act gives the exclusive power to review and approve a special exception or special use (which are essentially the same type of proceeding), a conditional use, a contingent use, a use variance, a development standard variance, and appeals of decisions by officials (like a plan commission director) or another board or body, which involve enforcement of a zoning ordinance.

  - The 900 Series of the Enabling Act governs the procedures and requirements for action to be taken by a BZA. A BZA is given the power in the Enabling Act to review the following types of zoning proceedings:

    - A special exception or special use, which is a use that is permitted under the zoning ordinance in a specific zoning district, but only if the BZA approves it after a public hearing

with notice. The zoning ordinance, rather than the Enabling Act, identifies specific requirements and the standard of review for a special exception or special use to be approved. I.C. § 36-7-4-918.2(1) and (2).

- A conditional use or contingent use, which is a use that is permitted in specified zoning districts by the zoning ordinance with the approval of the BZA, if the use satisfies conditions or contingencies stated in the zoning ordinance (e.g., a hospital or an airport). I.C. § 36-7-4-918.2(3) and (4).

- A use variance allows a specific use for a given area of land, which use is not permitted under the zoning ordinance in the zoning district where the land is located. I.C. § 36-7-4-918.4.

- A development standard variance to approve a different development standard than is required or allowed in a zoning ordinance. Examples of development standard variances are changes in building set back lines, structure height limits, parking requirements, and sign limitations. I.C. § 36-7-4-918.5.

- Appeals from decisions regarding an order, requirement, decision, or determination made by (i) an administrative official, hearing officer, staff member, or zoning administrator under the zoning ordinance; and (ii) an administrative board or other body (except the plan commission) relative to enforcement of a zoning ordinance, or any other ordinance requiring an improvement location permit or occupancy permit to be obtained. I.C. § 36-7-4-918.1.

▪ *Standard of Review for Use Variances.*

- In order for a use variance to be approved, the BZA must conduct a public hearing and make a written determination that finds, (i) the approval will not be injurious to the public health, safety, morals, and community general welfare, (ii) the use and value of property in the area adjacent will not be affected in a substantially adverse manner, (iii) the need for the

variance arises from a condition peculiar to the property, (iv) the strict application of the zoning ordinance will constitute an unnecessary hardship as applied to the property, and (v) the approval will not substantially interfere with the applicable comprehensive plan. I.C. § 36-7-4-918.4.

- An Area BZA is prohibited from granting use variances. I.C. § 36-7-4-918.3.

- *Standard of Review for Development Standard Variances.*

  - The statutory standard for review of a development standard variance is slightly different than for a use variance. In order for a development standard variance to be approved, the BZA , a determination must be made that (i) the approval will not be injurious to the public health, safety, morals, and community general welfare, (ii) the use and value of property in the area adjacent will not be affected in a substantially adverse manner, and (iii) the strict application of the zoning ordinance will result in practical difficulties in using the property. However, the Enabling Act allows a unit to adopt a provision in its zoning ordinance that requires a stricter standard than "practical difficulties" for approval of a development standard variance. I.C. § 36-7-4-918.5(a). If a stricter standard by a unit, it typically is the "hardship" requirement that applies in a use variance case.

- *Procedure for Review.* In order for a BZA to approve a use or variance over which it has jurisdiction under the Enabling Act, the BZA must hold a public hearing with notice, based on requirements established by the BZA in written rules it must adopt. The Enabling Act also requires that notice of all BZA public hearings be published in a local newspaper of general circulation at least 10 days before the hearing. I.C. § 36-7-4-920.

- *Special Rules for BZAs in Certain Cities and Counties.*

    - In cities located in counties with populations greater than 400,000 but less than 700,000 (which currently is only Lake County), and in counties with populations greater than 250,000 but less than 270,000, the Enabling Act requires a BZA in those jurisdictions to submit petitions for a special use, a special exception, and a use variance to the legislative body of the jurisdiction involved, for final approval, based on a recommendation from the BZA after a public hearing with notice. I.C. § 36-7-4-918.6.

    - Based on current populations in Indiana, Lake County is the only Indiana county with a population between 400,000 and 700,000, although the population of Allen County is approaching 400,000 based on the last census. Consequently, all municipalities in Lake County are subject to this requirement.

    - Prior to 2019, St. Joseph County had a population between 250,000 and 270,000, so it was subject to this requirement. However, in 2019 the U.S. Census Bureau estimated the population of St. Joseph County was 270,771, and in 2020 determined the population of St. Joseph County was 272,912. As a result, since those times, this special requirement for legislative review of BZA decisions has not applied to St. Joseph County, and it does not apply to any other Indiana county, based on current populations.

    - A decision of a legislative body under this provision in the Enabling Act may be appealed by judicial review in the same manner as a BZA decision is appealed. I.C. § 36-7-4-1003.

- *Other Bodies or Officials.* There also are other bodies or officers who are given various powers to take action on certain land use matters.

- *Hearing Officer*. The Enabling Act provides an alternate procedure that allows a hearing officer to either be designated in a zoning ordinance, or appointed by the plan commission, and given certain powers and duties for matters that otherwise would be heard by the BZA. I.C. § 36-7-4-923. Under the Metro planning law, the director of the department of metropolitan development is required to nominate a hearing officer, who then is appointed by the plan commission. I.C. § 36-7-4-923(f). The hearing officer may be a member of the BZA, a staff member, or any other person appointed by the plan commission, and more than one hearing officer may be designated or appointed. I.C. § 36-7-4-923(d). If a hearing officer alternate procedure is used, the plan commission may adopt rules of procedure that apply to the hearing process similar to those applicable to the plan commission or the BZA. I.C. § 36-7-4-923(e).

- *Plan Commission Executive Committee.* A plan commission may appoint an executive committee from its membership. The executive committee must be composed of between three and nine members. The appointment of the executive committee and adoption of rules that govern the powers, duties, and procedures of the executive committee, requires a two-thirds vote of the entire membership of the plan commission. I.C. § 36-7-4-408.

- *Plat Committee.* The plan commission also may appoint a plat committee consisting of between three and five persons, one of whom must be a member of the plan commission, to hold hearings and approve plats on behalf of the plan commission. I.C. § 36-7-4-701(e).

- *Employees of Advisory Plan Commissions.* An Advisory plan commission is permitted to appoint, prescribe duties, and fix compensation of employees necessary to discharge the commission's statutory duties. This would include the position of plan director or executive director and other planning personnel of an Advisory plan commission. I.C. § 36-7-4-311(a).

- *Executive Director of Area Plan Commission.* The Enabling Act requires an Area plan commission to appoint an executive director, who must have training and experience in the field of planning and zoning, but there can be no consideration of political affiliation given in the selection process. The Area plan commission also fixes the executive director's compensation. An executive director in an Area plan commission is given specific duties by the Enabling Act, including the appointment and removal of planning department employees (subject to the approval of the plan commission), and such other duties as the plan commission may direct. I.C. § 36-7-4-311(b).

- *Zoning Administrator.* In some jurisdictions, the zoning ordinance creates the position of Zoning Administrator, and gives the person so appointed the power to perform certain prescribed duties. Such duties often include the power to enforce and interpret the zoning ordinance. Decisions of a zoning administrator would be appealed to the BZA in the same manner as decisions of other officials or bodies are appealed.

Overview and Relationship of Zoning Procedures

- Comprehensive Plan.

  - In order for a zoning ordinance to be adopted by a jurisdiction, the legislative body must first adopt a comprehensive plan. I.C. § 36-7-4-601(a). The requirements for content and procedure for adoption of a comprehensive plan are found in the 500 Series of the Enabling Act. Historically, a comprehensive plan was called a "master plan" in the prior statutes, and that term sometimes continues to be used colloquially to describe a comprehensive plan.

  - When adopting or amending a land use ordinance, the governmental entity involved must give consideration to the general policy and pattern of development stated in a comprehensive plan. I.C. § 36-7-4-504(a); I.C. § 36-7-4-603. A comprehensive plan must contain a statement of objectives for future development, a policy statement for land use development, and a policy statement for development of public ways, places, lands, structures, and utilities. I.C. § 36-7-4-502. There are a number of other items authorized in the Enabling Act that may be included in a

comprehensive plan, such as studies for future growth, maps and charts showing historical population and site conditions, land use, areas needed for redevelopment and conservation, transportation or thoroughfare plans, parks, and land utilization. I.C. § 36-7-4-503.

- In order for a comprehensive plan to be adopted or amended, the plan commission of the jurisdiction involved must first hold a public hearing with the prescribed notice, and then approve the comprehensive plan. I.C. § 36-7-4-507. In Advisory and Area planning jurisdictions, a majority of the legislative body involved must adopt a resolution to approve, reject, or amend the comprehensive plan. I.C. § 36-7-4-509. If approved, the comprehensive plan becomes effective and applies to future land use decisions in the jurisdiction. If the plan is rejected or amended by the legislative body, it is returned to the plan commission for further consideration. If the plan commission then accepts the action of the legislative body, that action stands. If the plan commission disapproves of the rejection or amendment, the original action of the legislative body stands only if confirmed by another resolution. I.C. § 36-7-4-510. In the Metro jurisdiction, a decision of the metropolitan development commission in adopting a comprehensive plan is final, and no further approval of a legislative body is required. I.C. § 36-7-4-508(d).

- The land use maps in a comprehensive plan do not require the land shown on the map to be used or zoned only for the designated purpose; i.e., land designated as residential in a comprehensive plan land use map does not mean the land can only be zoned for residential and not any other purpose. Instead, the land use maps in a comprehensive plan are only policy statements for use, to which a plan commission and legislative body must pay "reasonable regard" when acting on a zoning matter. I.C. § 36-7-4-603.

- Zoning Ordinance.

  - *Procedures and Requirements for Adoption or Amendment of Zoning Ordinance Proposals.*

    - If a comprehensive plan is adopted by the legislative body of a jurisdiction, a zoning ordinance then may be adopted. I.C. § 36-7-4-601(a). The 600 Series of the Enabling Act governs the procedures and requirements for adoption of an initial or

replacement zoning ordinance, amendment of the text of a zoning ordinance, and a zone map change (i.e., a rezoning). There are different procedures that apply to each type of proceedings.

- To adopt an initial or replacement zoning ordinance, the plan commission must initiate the proposal. I.C. § 36-7-4-602(a).

- To amend the text of a zoning ordinance, the plan commission of the jurisdiction may initiate the zoning ordinance. Any participating legislative body (but only in Advisory and Area planning jurisdictions) also may initiate proposals to amend the text of a zoning ordinance. I.C. § 36-7-4-602(b).

- After a zoning ordinance is adopted, in order to change a zone map applicable to a certain tract of land, the proposal can be initiated, (i) by the plan commission, (ii) by the owners of at least 50% of the land involved, or (iii) in Advisory or Area planning jurisdictions, by a participating legislative body. I.C. § 36-7-4-602(c).

- A legislative body is required to act on a plan commission's recommendation on a proposal for adoption of an initial or replacement zoning ordinance at the first meeting of the legislative body following the plan commission's certification. However, the legislative body may decide to further consider the proposal, in which case the legislative body has up to 90 days from the plan commission's certification to make a decision on the proposal. A legislative body also has 90 days to make decisions on proposals to adopt a text amendment to a zoning ordinance, and for a zone map change. I.C. § 36-7-4-606(b).

- In any proceeding under the 600 Series, a plan commission and a legislative body must pay "reasonable regard" to the following:

  - The comprehensive plan;

  - Current conditions and the character of current structures and uses in each district;

- The most desirable use for which the land in each district is adopted;

- The conservation of property values throughout the jurisdiction; and

- Responsible development and growth. I.C. § 36-7-4-603.

- The purposes of a zoning ordinance are to:

  - Secure adequate light, air, convenience of access, and safety from fire, flood, and other danger;

  - Lessen or avoid congestion in public ways (which are public streets, roads, and alleys);

  - Promote the public health safety, comfort, morals, convenience, and general welfare; and

  - Otherwise accomplish the purposes of the Enabling Act. I.C. § 36-7-4-601(c).

- *Alternate Procedure for Action by Hearing Officer.* The Enabling Act authorizes use of an alternate procedure to allow a hearing officer to review and take action on certain types of zoning proposals.

  - The matters that may be assigned to a hearing officer for decision include:
    - A development standard variance;

    - A special exception, special use, contingent use, and conditional use; and

    - A use variance, but only if the Area planning law does not apply, and the use variance involves an expansion of a currently existing use on the land, and is consistent with the comprehensive plan. I.C. § 36-7-4-923(a).

  - A hearing officer may be appointed or removed by the plan commission. The hearing officer may be a member of the board, a

staff member, or any other person. More than one hearing officer may be appointed. I.C. § 36-7-4-923(d).

- The plan commission may adopt rules, or recommend an ordinance, to limit the type of zoning proceeding a hearing officer may consider, permit the hearing officer to transfer a petition to the BZA, require creation of minutes and records of action taken at a hearing to be public, and require the same level of conduct, including conflicts of interest that apply to a BZA. I.C. § 36-7-4-924(a).

- The staff (as defined in the zoning ordinance) may file a written objection to a proposed petition, but only if (i) it would be injurious to the public health, safety, morals, and general welfare of the community, or (ii) the use or value of the surrounding adjacent land would be affected in a substantially adverse manner. I.C. § 36-7-4-924(b).

- If a staff objection is made, or if conditions of approval are imposed by a hearing officer, but are not accepted by the petitioner, the proposal is considered either withdrawn, or if requested by the petitioner, transferred to the BZA for a public hearing on a *de novo* basis. I.C. § 36-7-4-924(c).

- *Development Plans.*

  - The 1400 Series was created by the Enabling Act to provide a specific and uniform framework for the creation and composition of development plans.

  - The zoning ordinance designates the zoning districts that require approval of development plans. The plan commission is required to approve and disapprove development plans, and has exclusive authority to do so, unless the legislative body designates the plan commission staff or a hearing examiner or committee to review and grant such approval. I.C. § 36-7-4-1401.5; I.C. § 36-7-4-1402(c).

  - The zoning ordinance must designate the development requirements, plan documentation and supporting information, development requirements that may be waived and the conditions for waiver, and procedures for

submission and review. I.C. § 36-7-4-1402(b). The development requirements listed in the zoning ordinance may include the various items listed in the statute. I.C. § 36-7-4-1403.

- If authority to review and approve a development plan is designated, the zoning ordinance must describe the duties of the reviewer, and the procedure for review and appeal. The designated reviewer may make a decision on a development plan without a public hearing if the decision may be appealed to the plan commission.

- The zoning ordinance may provide a hearing procedure similar to that applicable to subdivision plats under the 700 Series, including approval of a secondary development plan without a public hearing. The primary approval of a development plan is reviewable only by judicial review. I.C. § 36-7-4-1404.

- The plan commission may impose conditions of approval that are reasonably necessary to satisfy the development requirements, require a bond or other written assurance to guarantee timely completion of a public improvement, and permit or require a written commitment. I.C. § 36-7-4-1405. Written findings by a plan commission are required for decisions on development plans made by a plan commission. I.C. § 36-7-4-1406.

- *Planned Unit Development.*

  - A planned unit development, or "PUD", is a device that amends a zoning ordinance to create a special zoning district that permits certain specific uses for a specific parcel of land, and is governed by the 1500 Series. A PUD is a flexible approach to zoning, which accommodates a mix of uses on a parcel without having to delineate separate zoning districts for each area of use. *Story Bed & Breakfast , LLC v. Brown County Area Plan Com'n, Id.*

  - The 1500 Series was created in the Enabling Act to provide a specific framework for the creation of PUDs. In order for a PUD to be used in a jurisdiction, the text of the zoning ordinance must be amended to provide for and regulate planned unit development, which then becomes the exclusive means to exercise zoning control over it. I.C. § 36-7-4-1504. The text amendment must specify any limitations on planned unit development, and specify the standards, requirements, and procedures that

will govern establishment and administration of planned unit development districts. I.C. § 36-7-4-1506.

- For a PUD to be created for a specific parcel of land, a planned unit development district ordinance (a "PUD District Ordinance") must be adopted by the legislative body. The PUD District Ordinance is a legislative act (I.C. § 36-7-4-1507) that (i) designates a parcel of land as a planned unit development district, (ii) specifies the uses or range of uses permitted, (iii) specifies development requirements, (iv) specifies plan documentation and information required, (v) specifies any applicable limitation, and (vi) meets all other requirements of the 1500 Series. I.C. § 36-7-4-1503.

- A PUD District Ordinance must express in general or detailed terms what development requirements apply. Development requirements may use requirements and other provisions authorized in I.C. § 36-7-4-601(d)(2), and specify development requirements authorized under I.C. § 36-7-4-1404 (which are those requirements that apply to development plans under the 1400 Series). A PUD District Ordinance may employ written text, a plan or drawing, or a combination of the two, to specify the permitted uses and development requirements that apply to the PUD district. I.C. § 36-7-4-1510.

- If a PUD District Ordinance expresses development requirements in only general terms, a secondary review of the PUD District Ordinance is required of the plan documentation or supporting information required by the zoning ordinance or the PUD District Ordinance, as applicable. The secondary review may be conducted by the legislative body, or by the person or other body authorized in the zoning ordinance to conduct secondary review. The authority to conduct secondary reviews and grant or modify approvals of a PUD District Ordinance, may be delegated by the legislative body in the zoning ordinance to the plan commission, or a hearing examiner, a committee, or at least one employee, as designated by the plan commission. I.C. § 36-7-4-1509.

- Presumably, if the applicable development requirements expressed in general terms in the PUD District Ordinance, and the applicable requirements in the zoning ordinance, all are satisfied, secondary approval must be granted, which would be considered a ministerial act. I.C. § 36-7-4-1509(d)(2).

- If authority to conduct secondary review of a PUD District Ordinance is delegated in the zoning ordinance to the plan commission, decisions made by the plan commission may be appealed to the legislative body. If authority to conduct secondary review of a PUD District Ordinance is delegated in the zoning ordinance to a hearing officer, a committee, or an employee designated by the plan commission, secondary review decisions may be appealed as provided in the zoning ordinance to either the legislative body or the plan commission. The procedure for such appeals must be specified in the zoning ordinance. If the plan commission is designated to act, the decision of the plan commission is final, and may be appealed by judicial review. I.C. § 36-7-4-1511.

- When adopting or amending a PUD District Ordinance, the legislative body may impose reasonable conditions, make furnishing a bond or other assurance for completion of a public improvement a condition of issuance of an improvement location permit, and allow or require a written commitment. If the legislative body delegates authority to grant secondary approval to a person or another body, the person or body also may impose the same conditions and require or allow a written commitment. I.C. § 36-7-4-1512.

- Since adoption of a PUD District Ordinance is a legislative act, the decision may not be appealed as a judicial review under the 1600 Series. Instead, the decision must be appealed in the same manner as other decisions of a legislative body.

- *Overlay Zoning Districts.*

  - The Enabling Act does not specifically address or regulate overlay zoning.

  - Overlay zoning is a planning technique used to regulate zoning to address specific land use issues by creation of a special zoning district that is placed over, or "overlays", other existing, underlying zoning districts.

  - Overlay zoning creates certain additional zoning regulations that then apply to the mapped area in addition to those specified in the underlying zoning districts.

- *Uses of Overlay Zoning.*

    - Overlay zoning can be used to address issues of use, design, density, development requirements or restrictions, and protections for a particular geographic area.

    - Overlay districts (i) supplement, rather than replace, the underlying zoning districts, and (ii) address specific issues and objectives, rather than being just another layer of zoning regulations.

- *Examples of Overlay Zoning Districts.*

    - Highway commercial corridors – to prescribe driveway access management, landscape standards, compatible uses, signage, and design requirements.

    - Special development overlays – to prescribe density standards, lot sizes, vegetation requirements, and design to encourage mixed-use, transit-oriented, or traditional neighborhood development.

    - Historic preservation – to prescribe façade requirements, building form and character standards, and compatible uses.

    - Natural resource protection overlays – to prescribe setbacks, vegetation requirements, and various conservation protections along rivers, lakes, wetlands, waterfronts, steep slopes, dunes, and other environmentally-sensitive areas.

    - Airports – to prescribe height restrictions for buildings and other structures located within an airport runway approach, and bird mitigation requirements.

- Typically, overlay zoning is not employed to change types of permitted uses, or to create special uses; that instead is more appropriately done by creating a new zoning district, or modifying the uses specified in an underlying zoning district.

    - The text of the zoning ordinance amendment to create an overlay district should describe the restrictions and requirements within each of the zones designated on the overlay map.

- *Procedure to Adopt Overlay District.*

  - If an overlay district is to be created after a zoning ordinance is adopted, it is added as a text amendment to the ordinance, instead of a zone map change (or rezoning). I.C. § 36-7-4-602(b).

  - The text amendment of the zoning ordinance adopted to create an overlay zoning district identifies the requirements, restrictions, and area of the overlay district by text.

  - Although a zoning ordinance text amendment typically is used to adopt an overlay district, the amendment may include a map of the area that applies to the district.

  - The boundaries of an overlay zone can be identified by a radius distance from a particular use or point (like the end of an airport runway), or by creating a map that depicts the geographical boundaries of the overlay district.

  - To create an overlay zone, the text of the zoning ordinance is amended to (i) define the purpose of the overlay district by identifying specific issues and needs to be addressed by the overlay; (ii) identify the boundaries of the overlay district area; and (iii) establish the specific supplemental regulations that will apply to the overlay district to accomplish its stated purpose.

- *Notice of Hearing.*

  - Creating an overlay district by zoning ordinance text only requires notice by publication. Direct notice to the owners of land that will be subject to the requirements and restrictions of the proposed overlay district to be adopted by zoning ordinance text amendment is not required. I.C. § 36-7-4-604(b).

  - However, if an overlay district will impose use restrictions in addition to those permitted in the underlying zoning district, then it is tantamount to a change of a zone map (or "rezoning"), which arguably would require actual notice to the owners of properties that would be affected by the overlay use restrictions.

- *Hearings and Action.*

    - Creation of an overlay district by zoning ordinance text (whether in initial or replacement ordinance, or by text amendment) requires a public hearing by the plan commission, which makes a recommendation to the legislative body for final action. I.C. § 36-7-4-607.

- Subdivision Control Ordinance.

    - The 700 Series of the Enabling Act together with provisions in I.C. § 36-7-3, govern subdivision platting. The legislative body is required to identify in the zoning ordinance the zoning districts where subdivision of land may occur. I.C. § 36-7-4-701(a).

    - The plan commission makes a recommendation to the legislative body for adoption of a subdivision control ordinance that contains provisions to govern the subdivision of land. The procedure to adopt, amend, or replace a subdivision control ordinance is the same as applicable to a zoning ordinance. I.C. § 36-7-4-701(b).

    - What constitutes "subdivision" is left to local units to define in the subdivision control ordinance. Subdivision control ordinances in some jurisdictions say subdivision occurs, and platting is required, even if only a single land parcel is created from a larger parcel.

    - After a subdivision control ordinance is adopted and a certified copy of it is recorded, a plan commission has the power in all planning jurisdictions to review a subdivision plat and make a final decision whether to approve or deny it. I.C. § 36-7-4-701(b).

    - An Advisory municipal plan commission controls the approval of plats for land in unincorporated areas in its jurisdiction unless a subdivision control ordinance that includes such land is adopted by the legislative body of the county, in which case the county plan commission has that control. I.C. § 36-7-4-701(c).

    - If a subdivision control ordinance so provides, a plat committee appointed by the plan commission has the power to grant primary approval of a plat without notice or hearing, if the subdivision does not involve opening a

new public right of way, and it complies with the ordinance in all other respects, subject to appeal to the plan commission. I.C. § 36-7-4-701(d). A plan commission also may appoint a plat committee to hold hearings and approve all other plats. I.C. § 36-7-4-701(e). A decision of a plat committee on a primary plat may be appealed to the plan commission. I.C. § 36-7-4-708(a).

- In an Area planning jurisdiction, the legislative body may reserve the right in the subdivision control ordinance to waive any condition imposed by the plan commission in approving a primary plat, in which case the legislative body also shall identify the procedure to make such a waiver. I.C. § 36-7-4-701(f).

- A subdivision control ordinance must specify the standards for approval of a primary plat, which standards must include minimum lot size and configuration, public way requirements, and extension of utilities and other municipal services. Those standards may be waived by the plan commission, but only if the plat complies with applicable minimum standards in the zoning ordinance. I.C. § 36-7-4-702(b).

- A subdivision control ordinance may not regulate condominiums. I.C. § 36-7-4-702(e). Instead, regulation of condominiums is accomplished through the zoning ordinance.

- The procedure to apply for approval of a plat must be specified in the subdivision control ordinance. I.C. § 36-7-4-703. Fees for the filing of a plat are to be established by the plan commission, and must be based on the cost to check and verify the plat. I.C. § 36-7-4-704. Within 30 days of the filing of the application the plan commission's staff must announce the hearing date and give the required notice. Rules for setting hearing dates and the conduct of hearing must be adopted by the plan commission. I.C. § 36-7-4-705.

- Notice of hearings on a proposed plat must be given by staff to the applicant, by publication under I.C. § 5-3-1, and to those who are identified as "interested parties" in the plan commission's rules, at least ten days before the hearing. I.C. § 36-7-4-706.

- Written findings of fact and a decision must be made by the plan commission when primary approval is given, which decision also must include any condition imposed or waiver granted. I.C. § 36-7-4-707(a).

Written findings of fact and a decision also are required if approval of the plat is denied. I.C. § 36-7-4-707(b).

- The approval or disapproval of a plat is a "ministerial act," and the plan commission must approve a plat that satisfies the standards and requirements in the subdivision control ordinance. *Knutson v. State ex rel. Seberger*, 160 N.E.2d 200 (Ind. Sup. Ct. 1959).

- Secondary approval of a plat may be granted prior to completion of all required improvements if (i) the developer submits a bond or other proof of financial responsibility in accordance with the subdivision control ordinance, in an amount the plan commission or plat committee determines is sufficient to complete them, and with satisfactory surety, and satisfactory written evidence is submitted that shows the developer has entered into a contract for installation of utility services. I.C. § 36-7-4-709(a)(1) and (2). Detailed requirements for performance bonds are further specified in I.C. § 36-7-4-709(b) - (k).

- Secondary approval of a plat may be granted by the plan commission, or the plat committee if designated, after expiration of the 30-day appeal period, without notice or hearing. I.C. § 36-7-4-710(a) - (c). Secondary approval must be granted before a plat is filed with the auditor and recorded. I.C. § 36-7-4-710(d).

- Final decisions of a plan commission to approve or deny primary approval of a plat, and imposition of a condition of primary approval of a plat, may be appealed by judicial review. I.C. § 36-7-4-715(a) and (b); I.C. § 36-7-4-1016(b)(1).

- A rule may be adopted by the plan commission that limits further consideration of a disapproved plat for up to one year. I.C. § 36-7-4-715(b).

- Unified Development Ordinance. As noted, the Enabling Act provides for adoption or amendment of a zoning ordinance in the 600 Series, and for adoption or amendment of a subdivision control ordinance (which applies to subdivision platting) in the 700 Series. In recent years, a number of jurisdictions have adopted an ordinance called a Unified Development Ordinance, or a "UDO". A UDO is an ordinance that combines a unit's zoning ordinance and subdivision control ordinance into single book or pamphlet, or a code title, article, or chapter, or which employs a combination of maps, plats, charts, diagrams, tables, text and

images. I.C. § 36-7-4-610(h). The Enabling Act allows a unit to adopt a UDO to regulate zoning and planning in the unit's jurisdiction. *Id.*

- Rules. The Enabling Act requires the plan commission (I.C. § 36-7-4-401) and the BZA (I.C. § 36-7-4-916) to adopt written rules that govern the procedures for how and to whom they must give notice of public hearings, and how their hearings are to be conducted. The plan commission also may adopt rules identifying the types of proceedings that can be acted on by a hearing officer, and how those hearings are to be conducted, but those matters also can be identified in a zoning ordinance.

- Voting and Decisions.

    - In any zoning proceeding, in order for a plan commission (I.C. § 36-7-4-301), an Advisory legislative body (I.C. § 36-7-4-609(a)), an Area legislative body (I.C. § 36-7-4-609(b)), or a BZA (I.C. § 36-7-4-910) to take action on a zoning proposal, a majority of the entire body (and not just a majority of the members in attendance at a meeting) must vote either for or against the proposal.

    - For a Metro legislative body, at least three-fifths of the elected members of the body must vote.

    - If there is a tie vote as the result of a member being absent or abstaining from voting, the proceeding must be continued to another time to conduct another vote. I.C. § 36-7-4-609(c).

    - Each city in Advisory and Area planning jurisdictions determines by general ordinance whether the mayor has the power to veto decisions that are made by the city's common council on proposals to adopt initial or replacement zoning ordinances, to adopt text amendments of zoning ordinances, and to approve zone map changes. The mayor must exercise such veto within ten days of the date the common council adopts acts on the zoning proposal, or within 55 days in a case where a proposal is returned to the plan commission for consideration. If a zoning proposal is not so vetoed, the proposal takes effect without any further action by the mayor. If the proposal is vetoed by the mayor, the common council can override the veto by a two-thirds vote at its first regular or special meeting after receiving notice of the mayor's veto. I.C. § 36-7-4-609.

- Decisions of a BZA must be in writing, and findings of fact must be made to support those decisions. I.C. § 36-7-4-915.

- Conditions of Approval. A BZA is authorized to impose "reasonable conditions" when approving special uses, special exceptions, contingent uses, conditional uses, use variances, and development standard variances. I.C. § 36-7-4-918.2; I.C. § 36-7-4-918.4; and I.C. § 36-7-4-918.5. Similarly, a hearing officer may impose conditions in approving zoning proposals decided by the hearing officer. I.C. § 36-7-4-924(e).

- Written Commitments.

  - The Enabling Act authorizes a written commitment to be required or allowed as a condition of approving a rezoning, primary approval of a subdivision plat or development plan, vacation of a plat, a special exception, a special use, a contingent use, a conditional use, or a variance. I.C. § 36-7-4-1015(a).

  - Written commitments, which are in the nature or covenants that run with the land, must be signed by the owner of the land involved and recorded. Recorded written commitments bind the owner of, and others who subsequently acquire an interest in, the land involved. If a written commitment is unrecorded, the owner of land subject to it nevertheless is bound by it, but others who acquire an interest in the land are not bound unless they have actual knowledge of the written commitment. I.C. § 36-7-4-1015(b).

  - Written commitments may only be modified or terminated by a plan commission or a BZA after a public hearing with notice to all interested parties I.C. § 36-7-4-1015(b)(5)(A). A legislative body also may modify or terminate a written commitment made as part of a rezoning proposal or a PUD District Ordinance, but there is no corresponding requirement for a public hearing with notice. I.C. § 36-7-4-1015(b)(5)(B). A hearing officer may not modify or terminate a written commitment, but instead, if a hearing officer accepts or requires a written commitment, it may only be modified or terminated by the BZA. I.C. § 36-7-4-924(f).

  - The Enabling Act does not contain any reference to the standard of review or substantive requirements for a written commitment to be later amended. Unfortunately, this creates confusion and uncertainty as to what an owner

must prove or show in order to receive approval of an amended written commitment. *See*, I.C. § 36-7-4-1015.

- A written commitment often can be used to memorialize an agreement with objecting property owners or the planning staff, which would give the zoning body involved incentive to approve the proposal with conditions that are acceptable.

- Issues Involved in Zoning Proceedings.

  - Preemption.

    - Under Home Rule, the principle of preemption may apply to certain decisions made by a zoning body, or arguments raised by opponents of a proposed use. A governmental unit may not exercise any power it has if the power is expressly granted to another governmental entity. I.C. § 36-1-3-5(a)(2). Additionally, the power to regulate conduct regulated by a state agency is expressly withheld by Home Rule, unless the power is expressly granted by statute. I.C. § 36-1-3-8(a)(7).

    - In agricultural zoning cases, the concept of preemption often can be used to defend against a proposal to change the text of a zoning ordinance that attempts to regulate matters like fertilization, which the Office of State Chemist controls, or manure land application, which is controlled by the Indiana Department of Environmental Management ("IDEM"). The operation of a CFO or land application of manure from a CFO do not constitute unlawful conditions if the applicable state regulations are followed. If a state regulation is not followed, the proper authority to address that issue is the state agency with direct regulatory authority—not a local governmental unit department.

  - Conflicts of Interest. A member of a planning body may be disqualified for having a conflict of interest and may not participate in a hearing under the following circumstances:

    - A member of a legislative body is disqualified and may not participate as a member of a plan commission or legislative body in a hearing or recommendation if the member has a direct or indirect financial interest. I.C. § 36-7-4-223(b). A member of a plan commission (I.C. § 36-7-4-223(c)), or a member of a BZA (I.C. § 36-7-4-909(a)), is disqualified from participating in a zoning or other land use hearing if the member or

hearing officer (i) is biased, prejudiced, or otherwise unable to be impartial, or (ii) has a direct or indirect financial interest in the outcome of a zoning decision. An example of a disqualifying financial interest is if a BZA member is involved as a party in a real estate transaction that can be affected by the outcome of a zoning proceeding, but not merely because the member lives or owns property in the area of the land involved.

- A member of a legislative body or a plan commission may not directly or personally represent an applicant in a zoning proceeding concerning a zoning decision by the commission or a legislative act (e.g., a rezoning) by a legislative body. I.C. § 36-7-4-223(e).

- The plan commission may adopt rules to regulate conflicts of interest of a hearing officer. I.C. § 36-7-4-924(a)(4).

- *Ex Parte* Communications.

  - By statute, a person involved in a zoning proceeding before a BZA may not communicate with a member of the BZA before the hearing on a pending zoning case, with the intent to influence the member's action in the case. I.C. § 36-7-4-920(g).

  - While there is no corresponding statute prohibiting such communications with a plan commission member, some plan commissions have adopted rules that do prohibit communications related to a zoning proceeding that is pending before the plan commission.

  - There is no bar against a person involved in a zoning proceeding from communicating with a member of a legislative body (like a county commissioner or common council member) who will make a decision in the proceeding, because such communications are considered to be legislative acts, and properly part of the political process.

  - The plan commission may adopt rules to regulate communications with a hearing officer. I.C. § 36-7-4-924(a)(4).

- Governmental Estoppel.

  - When a governmental official or body makes a zoning decision, or takes action to issue a permit, and then later reverses the decision or revokes the permit, the issue of governmental equitable estoppel may arise. A party

claiming equitable estoppel must show "(i) lack of knowledge, (ii) reliance on the conduct of the party to be estopped, and (iii) action taken to change the party's position prejudicially." *Story Bed & Breakfast, LLC v. Brown County Area Plan Com'n,* 819 N.E.2d 55 (Ind. 2004); *citing with approval, City of Crown Point v. Lake County,* 510 N.E.2d 684, 687 (Ind. 1987).

- Generally, equitable estoppel does not apply to a governmental official or body. However, when a party asserting estoppel has detrimentally relied on the affirmative assertion or silence where the governmental official or body has a duty to speak, equitable estoppel may be found to apply. There must be clear evidence that a governmental agent made a representation upon which the party relied. *Story Bed & Breakfast, LLC v. Brown County Area Plan Com'n, Id.; Equicor Dev. v. Westfield-Washington Township,* 758. N.E.2d 34 (Ind. 2001).

- *"Spot Zoning".*

  - Frequently, a remonstrance or objection to a proposed rezoning argues that the proposal would be an illegal "spot zoning". A "spot zoning" has been held to mean the singling out of a property for different treatment than similar surrounding land that is indistinguishable in character, for the economic benefit of the land singled out. *Scalambrino v. Town of Michiana Shores,* 904 N.E.2d 673 (Ind. App. 2009). However, spot zoning is not illegal *per se*. *Id.* Even if the zoning action would be "spot zoning", if it bears a "rational relation to the public health, safety, morals, convenience or general welfare", then the action to rezone the land will be valid. *Id.* at 682.

- Zoning Moratorium.

  - A governmental unit may impose a moratorium on certain zoning proceedings, but only if certain requirements are met. Typically, a moratorium is imposed by adoption of an ordinance by the legislative body of the jurisdiction, to prevent or ban, on a temporary basis, the application of provisions in a zoning ordinance that otherwise would permit a particular use of real estate in a given zoning district.

  - When an ordinance is an attempt by government to regulate the type and location of a permitted land use, it is a "quintessential zoning" act, and it is a zoning

ordinance. *City of Carmel v. Martin Marietta Materials,* 883 N.E.2d 781, 787 (Ind. 2008).

- If a moratorium ordinance is considered to be a zoning ordinance, it must comply with all requirements and procedures, including prior adoption of a comprehensive plan, and hearing and action by the plan commission and the legislative body, in the same manner as specified in the Enabling Act for adoption or amendment of a zoning ordinance. If all of such requirements and procedures are not met, the moratorium ordinance is invalid and void. *Pro-Eco, Inc. v. Bd. Of Comm'rs of Jay County, Indiana,* 776 F. Supp. 1368 (S.D. Ind. 1990), *aff'd*, 956 F.2d 635 (7th Cir. 1992); *Bd. Of Comm'rs of LaPorte County v. Town & Country Utils., Inc.,* 791 N.E.2d 249 (Ind. App. 2003).

- If a complete application is submitted for a land use permit after an invalid moratorium ordinance is adopted, the applicable zoning ordinance provision in effect at the time the application was submitted would apply, and would not be prohibited by the moratorium. *Metro. Bd. Of Zoning Appeals Div. III of Marion Cnty. v. Traders Point Ass'n of Neighborhoods*, 81 N.E.3d 1120 (Ind. App. 2017); *Sagamore Park v. City of Indianapolis,* 885 F.Supp. 1146 (S.D. Ind. 1994).

- If an independent statute not part of the Enabling Act regulates the use of land, it is not considered a zoning ordinance that must be adopted in conformity with the 600 Series. *City of Carmel v. Martin Marietta Materials, Id.*

- Vacations.

  - *Public Ways and Public Places.*

    - A person who owns land adjacent to a "public way" (which is defined by statute as being a highway, street, avenue, boulevard, road, lane, or alley) (I.C. § 36-7-1-17), or a "public place (which is defined by statute as being a tract of land owned by a state or political subdivision, such as a county or city)(I.C. § 36-7-1-16), has the right to file a petition to vacate the public way or public place with the legislative body that has jurisdiction over the area involved. I.C. § 36-7-3-12(a).

    - Notice of the vacation petition must be given by publication and to the owners of all land that abuts the area proposed to be vacated. A hearing on the vacation petition must be held by the legislative body within 30 days of the filing. Any person who is "aggrieved" may object to the vacation at the hearing, and any person who is "aggrieved" by the

legislative body's decision (either for or against) has the right to appeal the decision by filing an action in the circuit court of the county within 30 days of the decision. I.C. § 36-7-3-12.

- A timely-filed remonstrance by an "aggrieved person" of a legislative body's decision to vacate a public way or public place may be made only on the grounds that the vacation would (i) hinder the growth or orderly development of the unit or neighborhood in which it is located or to which it is contiguous, (ii) make access to the lands of the aggrieved person by means of public way difficult or inconvenient, (iii) hinder the public's access to a church, school, or other public building or place, or (iv) hinder the use of a public way by the neighborhood in which it is located or to which it is contiguous. I.C. § 36-7-3-13(a).

- If a remonstrance to the vacation petition is filed because the land of an aggrieved person would be landlocked, the legislative body is required to deny the petition. I.C. § 36-7-3-13(b). If a vacation proceeding is terminated, a subsequent vacation proceeding applicable to the same land for the same relief may not be filed for two years. I.C. § 36-7-3-15.

- However, a public way (e.g., a street) that has not been improved in a subdivision plat may be vacated by the recording of an instrument signed by all of the owners of land in the plat, subject to the approval of the plan commission that has jurisdiction over the land, or if there is no plan commission, by the county commissioners if the land is in an unincorporated area. I.C. § 36-7-3-10(e) and (f).

- *Platted Easements.*

  - A platted easement may be vacated in the same manner that applies to public ways and public places. I.C. § 36-7-3-16(a).

  - However, by case law an easement in a plat may not be vacated unless the owners of all land benefited by the easement consent to the vacation. This requirement applies regardless whether a legislative body approves an easement vacation. *VanElla v. VanHorne Props., LLC,* 80 N.E.3d 273 (Ind. App. 2017).

  - With regard to a platted utility easement, the vacation of such easement does not deprive the utility using or occupying the easement of the right to

continue to use the easement and operate its facilities within it. However, this right can be waived by a utility. I.C. § 36-7-3-16(b).

- *Plats and Parts of Plats.*

  - A plan commission, or a plat committee acting on its behalf, has exclusive authority control over the vacation of subdivision plats or parts of plats. I.C. § 36-7-4-711(a). A public hearing must be held by the plan commission on the proposed plat vacation. I.C. § 36-7-4-711(d). If the plan commission approves the vacation, it may impose reasonable conditions for the vacation, and a copy of the decision must be recorded. I.C. § 36-7-4-711(g).

  - A plat vacation may be approved only if the plan commission finds and determines that (i) conditions in the platted area have changed so as to defeat the original purpose of the plat, (ii) the vacation of the plat is in the public interest, and (ii) the value of the land in the plat not owned by the vacation petitioner will not be diminished by the vacation. I.C. § 36-7-4-711(f).

  - The decision of a plan commission to vacate a plat is a final decision that may be appealed by judicial review. I.C. § 36-7-4-1016(b)(1).

  - *Metro.*

    - Under the *Metro* planning law, the plat committee has the exclusive control over the vacation of plat or parts of plats, public ways, easements, and public places, whether or not they are included in a plat. A vacation petition may be approved by the plat committee only on a finding that the vacation is in a public interest. A plat committee vacation may use the same procedures that apply to vacations in other jurisdictions. I.C. § 36-7-4-712(a).

    - A vacation decision by a plat committee may be appealed to the plan commission, and not by judicial review. I.C. § 36-7-4-712(b); I.C. § 36-7-4-402(d).

- *Plat Covenants.*

    - A petition to vacate all or part of a plat may include a request to the plan commission to vacate covenants that apply to the plat. I.C. § 36-7-4-711(c).

    - In order to approve the vacation of plat covenants, the plan commission must find, (i) the platted area is within an area needing redevelopment, and the covenant vacation would promote a recovery of property values in the area needing redevelopment by allowing or encouraging normal development and occupancy of the platted area, (ii) the vacation is needed to secure adequate light, air, convenience of access, or safety from fire, flood, or other danger, or (iii) the vacation is needed to lessen or avoid congestion in the public ways. I.C. § 36-7-4-714.

    - By case law, plat covenants are considered to be a constitutionally-protected property interest that cannot be taken by government from the owner of land in the plat without a proper public purpose. If that proper public purpose does not exist, the covenant cannot be vacated. *Daniels v. Area Plan Com'n of Allen County,* 306 F.3d 445 (7th Cir. 2002).

    - Even if a proper public purpose exists and the plan commission approves the vacation of the covenants, the vacation can be considered to be a "taking" of the property interest, and the other owners of land in the plat who are aggrieved by the decision may file a claim against the plan commission for inverse condemnation and damages. *Id.*

- **Enforcement of Zoning Decisions**

    - The plan commission, the BZA, or any enforcement official designated in the zoning ordinance may bring an action to enforce any ordinance adopted under the Enabling Act, as well as conditions imposed by the plan commission or BZA, or covenants made in connection with a plat, a development plan, or a PUD District Ordinance, and for any legal, equitable, or special remedy available, costs, and fines authorized by the zoning ordinance. A change of venue from the county may not be granted in any such action. I.C. § 36-7-4-1014.

    - If an appeal of a decision of an official or another board is filed with a BZA, proceedings and work on the land involved are automatically stayed unless the official or board certifies to the BZA that a stay would cause imminent peril to life or property, or if a restraining order is entered by a trial court prohibiting the

stay upon a showing of due cause. The official or board charged with enforcement in the zoning ordinance also may order the work related to an appeal stayed and call on the police power to make the stay effective. I.C. § 36-7-4-1001(a).

- **Appeals of Zoning Decisions.** The Enabling Act establishes the procedures for appealing decisions of various planning bodies and officers. Following is a brief summary of those appeals, as well as further appeals of court decisions:

  - Judicial Review.

    - Governing Law. Final decisions of a plan commission and a BZA, certificates of appropriateness made by a preservation commission, issuance of an improvement location permit within a flood plain area by a zoning administrator, and decisions on use variances made by a legislative body under I.C. § 36-87-4-918.6, all must be appealed using the judicial review procedure in the 1600 Series, which came into effect in 2011. I.C. § 36-7-4-1016. Under prior law, such appeals were made by the filing of what then was known as a petition for writ of certiorari. The 1600 Series was modeled after the Indiana Administrative Proceedings Act (or "AOPA"), which is a statutory mechanism that applies to court appeals of decisions made by state agencies. A legislative act is not subject to judicial review. I.C. § 36-7-4-1016(b).

    - Venue. A judicial review must be filed in the county where the land affected by the zoning decision is located, with the trial court that has proper jurisdiction. Each circuit court (which is a constitutional court that exists in each of the 92 Indiana counties) has such jurisdiction. Additionally, a superior court (which is a trial court created by statute in certain counties) would have jurisdiction to consider a judicial review if the statue authorizing the court does not limit such jurisdiction. In some counties that have both a circuit court and one or more superior courts, if a judicial of a zoning decision is filed, the court that will hear the case is assigned on a rotating basis or some other local assignment process, instead of a petitioner being able to select the court when the filing is made. The first person to file a petition for judicial review establishes the court where the case will be heard, and if another petition is later filed in a different court, that petition will be transferred to the court where the first filing was made, and the cases likely will be consolidated. I.C. § 36-7-4-1606.

- Procedural Rules. The rules of procedure that apply to regular civil actions also govern the types of pleadings and requests for change of venue from the county or the judge in judicial reviews. I.C. § 36-7-4-1606(c).

- Requirements for Judicial Review of Zoning Decisions.

    - *Proper Parties.* Each person who was a petitioner before the zoning body in the challenged zoning proceeding, or was a party aggrieved by the decision and entered an appearance as an adverse party in the zoning proceeding, may file a petition for judicial review. I.C. § 36-7-4-1606(d). Any person who has standing to file a petition for judicial review also has an unconditional right to intervene in judicial review proceedings filed by another person. I.C. § 36-7-4-1606(f).

    - *Requirements for Petition for Judicial Review.* The petition for judicial review must be filed with the court clerk, be verified as to the truthfulness and accuracy of the statements made in it by the party or parties filing the petition, and include the information specifically required by I.C. § 36-7-4-1607(b). Proper venue for a petition for judicial review is in the county where the affected land is located. I.C. § 36-7-4-1606(a).

    - *Notice.* The petitioner must serve a copy of the petition for judicial review that is filed with the court on the secretary, president, or chairperson of the zoning body involved, and give notice of the filing to all persons or entities named in the petition as opposing parties. However, just because a person is entitled to receive notice of the filing of a petition for judicial review does not mean that person must be named as a party in the court case. I.C. § 36-7-4-1608.

- Stay of Zoning Decision. The petitioner in a judicial review may seek a court order to stay a zoning decision until the court makes a final decision in the case if (i) the court finds there is a reasonable probability the decision involved is invalid or illegal, and (ii) a bond is filed with the court by the petitioner that is conditioned on due prosecution of the review proceedings, and which promises to pay all court costs and abide by the zoning decision if it is not set aside by the court. The court sets the amount of the bond, which must be at least $500, and could be considerably more in complex cases. I.C. § 36-7-4-1609.

- Persons Who Have Standing.

    - In order for a person to have what is known as "standing" to file a petition for judicial review, the person must be, (i) the party to whom the decision was specifically directed, and (ii) who was the petitioner of the zoning case involved at the zoning body's public hearing, or was a person who is "aggrieved" by the zoning decision and participated in the hearing in person, by agent, or by attorney and presented relevant evidence, or who filed a written statement identifying facts or opinions relating to the decision. I.C. § 36-7-4-1603(a).

    - Another person who is given statutory standing is someone who was otherwise "aggrieved or adversely affected" by the decision, but only if (i) the decision has prejudiced or is likely to prejudice the person's interests, (ii) the person was eligible to receive notice of the hearing, but was not so notified, and did not have actual notice of the hearing before the last date the person could have objected or intervened to contest the decision, (iii) the person's interests were of the type a BZA was required to consider, or (iv) a judgment if the person's favor would "substantially eliminate or redress the prejudice caused or likely to be caused by the decision. I.C. § 36-7-4-1603(b).

- Standing in Agricultural Zoning Cases. In judicial reviews filed by opponents of successful agricultural zoning cases, typically owners of other properties (usually, but not always, residential) in the area are involved as petitioners. Often this type of judicial review may be challenged by the agricultural owner for lack of standing of some or all of the petitioners. It is clear under Indiana case law that mere proximity of the land of a judicial review petitioner challenging a proposed agricultural use is not the determinative factor that establishes standing; and a petitioner who lived approximately a half mile from a proposed livestock operation was found by both the trial court and the Court of Appeals not to have standing just based on that distance. When there are multiple property owners who file a petition for judicial review, it may be possible to challenge the standing of some of them, which if successful could reduce the complexity and cost of defending the petition. *Thomas v. Blackford County Area Board of Zoning Appeals*, 907 N.E.2d 988 (Ind. App. 2009); *Reed v. Plan Commission,* 810 N.E.2d 1126 (Ind. App. 2005).

- Exhaustion of Administrative Remedies. Another requirement for the filing of a petition for judicial review is that the petitioner must exhaust all administrative remedies available before the BZA where the petition is pending. I.C. § 36-7-4-1604.

- Deadline to File Judicial Review. A zoning decision must be appealed by the filing of a petition for judicial review within 30 days of the date the decision was made. If the appeal is not so timely filed, the petitioner waives the right to have the decision reviewed, and the petition should be dismissed by the court where the judicial review is pending. I.C. § 36-7-4-1605.

- Scope of Judicial Review.

    - The court handling the judicial review cannot review the decision *de novo* (which means as a new case where the trial judge hears all evidence submitted in the case and makes a decision based on such evidence), or substitute its judgment for that of the zoning body. I.C. § 36-7-4-1611. Instead, the court's review is limited only to the facts in the record of the zoning body, together with supplemental evidence that relates to the decision when it was made and is needed to decide a disputed fact as to, (i) the improper constitution of the body or grounds for disqualification (e.g., a conflict of interest prohibited by statute), or (ii) the unlawfulness of the body's procedure or process making the challenged decision. I.C. § 36-7-4-1612(a).

    - An issue not raised in connection the zoning body public hearing may not be raised for the first time on judicial review unless, (i) the issue concerns someone who was required to be given notice of the hearing that substantially complied with the notice requirements, or (ii) the interests of justice would be served by the issue being resolved by the reviewing trial court because of a change in controlling law. I.C. § 36-7-4-1610.

    - A reviewing court may remand the case back to the zoning body before the court decides the case to investigate additional facts, or to prepare an adequate record for the court to use in the review if the body failed to prepare an adequate record, the board improperly excluded or omitted evidence in the record, or after the zoning decision was made, a change in the relevant law was made to could control the outcome. I.C. § 36-7-4-1612(b)

- Procedure for Judicial Review.

    - The petitioner in a judicial review is required to file with the court the record of the administrative proceedings of the zoning body that satisfies the statutory requirements for content within 30 days after the petition for judicial review is filed, which period may be extended by the court for good cause, including the inability to obtain the record from the body in a timely fashion. I.C. § 36-7-4-1613(a). If the administrative record is not timely filed, there is cause for the court to dismiss the judicial review either on its own motion or the motion of another party in the case. I.C. § 36-7-4-1613(b).

    - The required administrative record should include copies of all documents filed with the zoning body before and at the hearing, and a transcript of the evidence introduced at the administrative hearing. I.C. § 36-7-4-1613(a) and (c). The zoning body may be requested by the petitioner to prepare the required record, and may charge the petitioner for the reasonable cost of preparation. I.C. § 36-7-4-1613(d). The parties may stipulate to shorten, summarize, or organize the record, and the court may order the cost of preparing the record paid by a party who unreasonably refuses to so stipulate. I.C. § 36-7-4-1613(f).

    - The burden of proving the invalidity of the zoning body's decision is on the petitioner in the judicial review. I.C. § 36-7-4-1614(a).

    - The court is required to make findings of fact on each of the material facts involved in the judicial review. I.C. § 36-7-4-1614(c).

    - The court may grant the relief requested by the petition, but only if the zoning decision was:

        - Arbitrary, capricious, an abuse of discretion, or not in accordance with the law;

        - Contrary to a constitutional right, power, privilege, or immunity;

- In excess of the zoning body's statutory jurisdiction or authority;

- Without observance of a required legal procedure; or

- Unsupported by the evidence; and

- The court finds the petitioner was prejudiced by the zoning decision. I.C. § 36-7-4-1614(d).

▪ If the reviewing court grants relief, it may remand the case to the zoning body for further proceedings, or compel an unreasonably delayed or unlawfully withheld decision. I.C. § 36-7-4-1615.

o Further Appeals. A decision of a trial court in a judicial review case may be appealed to the Indiana Court of Appeals, and the appeal must satisfy the requirements of the Indiana Rules of Appellate as to procedure, in the same manner, and with the same content, applicable to civil actions. A further appeal of a decision of the Court of Appeals may be made to the Indiana Supreme Court, but acceptance of such appeal is discretionary. I.C. § 36-7-4-1616.

- Hearing Officer. Appeals of decisions of a hearing officer may not be appealed by means of the judicial review procedure, but instead must be made to the BZA, or a division of the BZA when there is more than one division. Final action taken by a BZA in such appeals is then subject to judicial review by court proceedings in the same manner as other final land use decisions. I.C. § 36-7-4-924(g).

- Zoning Decisions Not Subject to Judicial Review.

o Generally, zoning decisions made by a legislative body are considered legislative acts that are not subject to judicial. These include actions taken by a legislative body to adopt or approve a comprehensive plan, a zoning ordinance, an impact fee ordinance, and a PUD District Ordinance, as well as a zone map change (or rezoning). I.C. § 36-7-4-1016(f). Appeals of those actions are governed by the same law that applies to all other decisions of a legislative body, which require the filing of a complaint with a trial court that has jurisdiction, which often is in the form of a declaratory judgment action. Most decisions of a legislative body in zoning matters are not subject to a 30-

day deadline to file an appeal as in the case of zoning final decisions by a plan commission or a BZA; instead, the applicable statute of limitation applies.

- However, decisions of a legislative body to vacate a public way, public place, or platted easement must be filed with a trial court within 30 days of the date of the legislative body's decision (I.C. § 36-7-3-12), and decisions granting or denying use variances made by a legislative body under I.C. § 36-7-4-918.6 must be appealed by judicial review under the 1600 Series.

- **Nonconforming Uses and Structures**

  - A nonconforming use or structure is generally regarded in the law as a use or structure that is permitted on a given parcel of land because it was legally in effect or existed either under a prior zoning ordinance, or before there was a zoning ordinance in effect when the use first commenced or the structure was erected, even though a subsequently adopted zoning ordinance would make the use or structure not permitted or otherwise illegal.

  - Most zoning ordinances include provisions that define what constitutes a nonconforming use or structure, and determine when a nonconforming use is abandoned or terminated because of non-use for some prescribed period of time.

  - In an enforcement action brought against a landowner for violation of a zoning ordinance, the existence of a nonconforming use is an affirmative defense that must be alleged and proven by the landowner.

  - Agricultural Nonconforming Uses.

    - In 1998, I.C. § 36-7-4-616 was adopted by the Indiana General Assembly, which applies specifically to agricultural nonconforming uses. The term "agricultural use" is defined in this statute as the use of land before the most recent comprehensive plan or zoning ordinance was adopted, for the "production of livestock or livestock products, commercial aquaculture, equine or equine products, land designated as a conservation reserve plan, pastureland, poultry or poultry products, horticultural or nursery stock, fruit, vegetables, forage grains, timber, trees bees and apiary products, tobacco, or other agricultural crops …." I.C. § 36-7-4-616(b).

- The term "agricultural nonconforming use" is defined as meaning the agricultural use of land that is not permitted under the most recent comprehensive plan or zoning ordinance applicable to the land. I.C. § 36-7-4-616(c).

- This statute permits an agricultural use of land that is considered an agricultural nonconforming use to be changed to another agricultural use without losing its status as an agricultural nonconforming use.

    - By way of example, a farm on which livestock, regardless of number, was produced, can be changed to a CFO without having to comply with a current zoning ordinance.

- In order for an agricultural nonconforming use to be exempt from requirements under a current zoning ordinance, the agricultural use must have existed for any three-year period during a prior five-year period. I.C. § 36-7-4-616(c)(1).

- If the agricultural nonconforming use satisfies the time period requirement, the zoning authority cannot restrict the use, or require approval of a variance, special exception, special use, contingent use or conditional use in order for the use to continue; but the authority can require the agricultural use to comply with state environmental and health laws and rules, and requirements in the zoning ordinance applicable to conforming agricultural uses. I.C. § 36-7-4-616(c)(3).

- However, the right to continue or change an agricultural use under I.C. § 36-7-4-616 does not limit a governmental unit from requiring compliance with provisions in the zoning ordinance applicable to structures and development requirements. *County of Lake v. Pahl,* 28 N.E.3d 1092 (Ind. App. 2015).

- **<u>Other Statutes that Can Impact an Agricultural Zoning Case</u>**

    - *<u>Nuisance - Right to Farm Law.</u>*

        - A statutory injunctive action for nuisance can be brought to abate a condition or an act that is injurious to health, indecent, offensive to the senses, or an obstruction to the free use of property. I.C. § 32-30-6-6;

I.C. § 32-30-6-7(a). A zoning ordinance also may provide that a violation of the ordinance is a common nuisance. I.C. § 36-7-4-1012.

- Reasonable attorney fees can be recovered if the nuisance action is successfully brought by a county, city, or town, or a person successfully defends a nuisance action brought by any person or governmental unit. I.C. § 32-30-6-7(c) and (d).

- However, the nuisance statute was amended in 2005 to add a section that often is called the "Right to Farm Law", although the statute applies to industrial, forestry, and public use airport operations in addition to agricultural operations. Under this statute (which is codified at I.C. § 32-30-6-9), an action for public or private statutory nuisance does not exist against an agricultural operation by reason of any change in condition in the "vicinity" of the operation after it has operated for more than one year, provided (i) there is no significant change in type of the operation, and (ii) the agricultural operation would not have been a nuisance when it began at the same location.

    - A "significant change" in an agricultural operation does not occur because of (i) a change to another type of agricultural operation, (ii) the ownership or size of the agricultural operation changes, (iii) the enrollment, reduction or cessation in a governmental program, or (iv) a new technology is adopted. I.C. § 32-30-6-9(d)(1).

    - The term "vicinity" is not specifically defined for purposes of its application to an agricultural operation, although there is a statutory definition for this term as applied to a public use airport. I.C. § 32-30-6-10(c).

    - An "agricultural operation" is defined as being "any facility used for the production of crops, livestock, poultry, livestock products, poultry products, or horticultural products or for growing timber."

    - An agricultural operation is considered as "interrupted" if the operation is discontinued for a period of more than one year. I.C. § 32-30-6-9(c).

- The protections of "Right to Farm Law" do not apply if the claimed nuisance results from the negligent operation of an agricultural operation. I.C. § 32-30-6-9(a).

- There are special provisions for recovery of attorney fees applicable to agricultural operations involved in a nuisance action. I.C. § 32-30-6-9.5.

    - If an action for nuisance is brought against an agricultural operation, and the court finds there was no nuisance and the action was frivolous, reasonable attorney fees can be awarded to the agricultural operator.

    - However, if the court finds there was a nuisance by the agricultural operation and the defense was frivolous, reasonable attorney fees can be awarded against the agricultural operator.

    - Attorney fees can be awarded for only one attorney, no matter how many attorneys were employed.

    - A nuisance action is not considered frivolous merely because a party did not prevail in the action.

- There also is a claim for common law nuisance. I.C. § 32-30-6-7(a). If such a claim is made in the context of an existing agricultural use (e.g., a complaint is made by the owner of adjacent residential land of an unpleasant odor generated by a livestock operation), there is a defense called "coming to the nuisance" that is available to the owner of the agricultural land, provided the livestock use complained of existed before the complaining owner acquired the residential land.

- *Vested Rights.*

    - I.C. § 36-7-4-1109, which often is called the Vested Rights Statute, provides that if a person files a "completed application" for a permit as is required by applicable governmental ordinances and rules, the granting of the permit, as well as any subsequent secondary or other related permits and approvals, are governed by the statutes,

ordinances, rules and regulations in effect when the application was filed, for a period of at least three years from the application date, regardless whether there are any subsequent changes in them. I.C. § 36-7-4-1109(c).

- The term "permit" includes an improvement location permit, a building permit, a certificate of occupancy, or approval of a development plan, plat, contingent use, conditional use, special exception, special use, or planned unit development. I.C. § 36-7-4-1109(b).

- The protections of the vested rights statute do not apply if the development to which the permit or approval applies is not completed within ten years after the development commenced. I.C. § 36-7-4-1109(c) and (e).

- If a complete application is filed, the governmental agency involved must issue the required permit within 12 business days of the filing date. I.C. § 36-7-4-1109(i).

- *Open Door Law*.

  - I.C. § 5-14-1.5, the Indiana Open Door Law, applies to public meetings of a plan commission, a BZA, a hearing officer, a plat committee, and a legislative body taking action on a zoning matter.

  - The stated public purpose of the Open Door Law is to require official action by a public agency to be conducted openly and transparently, so the people can be "fully informed". I.C. § 5-14-1.5-1.

  - The Open Door Law requires that, with certain exceptions, all meetings of public agency governing bodies must be open at all times, so the public can observe and record the meetings. Secret ballots are expressly prohibited. I.C. § 5-14-1.5-3.

  - The exceptions from requirements of the Open Door Law include, among other things, an executive session of the governmental body, social or chance gatherings not intended to avoid this law, traveling to and attending meetings of organizations devoted to governmental betterment, a caucus, and orientations not resulting in official action. I.C. § 5-14-1.5-2(c) and (f); I.C. § 5-14-1.5-6.1(b).

- An authorized "executive session" includes a meeting authorized by federal or state statute, or a meeting discussing collective bargaining, litigation (either proposed or pending), or real property transactions by the governing body until a contract is fully executed. I.C. § 5-14-1.5-2(f); I.C. § 5-14-1.5-6.1(b).

- A "caucus" is a gathering of members of a political party to plan political strategy and to prepare members for taking official action. I.C. § 5-14-1.5-1(h).

- "Official action" means to receive information, deliberate, make recommendations, establish policy, make decisions, or take final action. I.C. § 5-14-1.5-2(d).

- Requirements for a meeting subject to the Open Door Law include posting of an agenda for the meeting at the entrance of the meeting location prior to its commencement, and giving "public notice" of the meeting at least 48 hours before the meeting. The term "public notice" means posting a copy of the notice at the governing body's office (or if there is no such office, at the building where the meeting will be held), and delivering the notice to news media that made a timely annual request. I.C. § 5-14-1.5-4; I.C. § 5-14-1.5-5.

- If a governmental body's meeting violates the Open Door Law, an action may be filed by any person to declare void a decision made or final action taken at the meeting involved. If the court declares the decision or action void, the governing body also may be enjoined from subsequently acting on the same subject matter until it gives "substantial reconsideration" at a meeting that complies with the requirements of the law. I.C. § 5-14-1.5-7.

- The court also may assess a civil penalty of $100 for the first violation, and $500 for each additional violation, against an individual who is an officer of a public agency or employed in a managerial position by the agency, and who specifically intends to violate the law by failing to give proper notice, taking final action outside a meeting, participating in a secret ballot, discussing ineligible matters in an executive session,

or failing to prepare a required meeting memorandum. I.C. § 5-14-1.5-7.5.

- **Federal Constitution, Statutes and Rules**

    - There are certain provisions in the United States Constitution that can apply to land use cases, which are:

        - The First Amendment, specifically the free exercise of religion clause and the free speech clause;

        - The Fifth Amendment, specifically the takings clause; and

        - The Fourteenth Amendment, specifically the equal protection clause, the procedural due process clause, and the substantive due process clause.

    - In certain instances, these constitutional provisions can be used by agricultural landowners to defend against unlawful conditions or exactions imposed by a governmental body or agency in connection with the permitting or approval of an agricultural development or use, exclusionary zoning, growth controls or moratoria, regulatory takings, "spot zoning", and violation of vested rights.

    - There also are a number of federal statutes and rules that have application to agricultural land use matters, e.g., environmental laws.

    - The Takings Clause of the Fifth Amendment to the U.S. Constitution applies to the states and local governments through the Fourteenth Amendment, which provides that private property shall not be taken without "just compensation". There are two types of takings – a *per se* taking and a regulatory taking. *Cedar Point Nursery v. Hassid,* 594 U.S.139, 141 S.Ct. 2063, 2071 (2021).

        - If government physically acquires or appropriates private property for a public use, there is a clear and categorical obligation for the government to provide the owner of the property with just compensation. Physical takings have been found to exist from flooding as the result of building a dam, low overflights of military aircraft in the air over a property the owner reasonable occupies for the owner's use, requiring landlords to allow cable companies to install equipment on their properties, and the imposition of a state law that

requires a fruit grower to allow union organizers access to the grower's property on a daily basis for a substantial number of days annually. *Id.* at 2071; *Loretto v. Teleprompter Manhattan CATV Corp.*, 438 U.S. 104 (1978). A physical appropriate or invasion of private property that qualifies as a *per se* taking occurs whether it is permanent or temporary, and even if the invasion is intermittent, rather than continuous. *Id.* at 2071.

- Regulatory takings exist when government imposes a regulation that restricts an owner's ability to use the owner's property, which "goes too far". Generally, the courts apply a flexible test that balances the regulation's economic impact, its interference with a property owner's "investment-backed expectations", and the character of the government's actions. If a regulation deprives an owner of all or substantially all economic or productive use of the owner's property, it is considered a regulatory taking. Like *per se* takings, regulatory takings can be permanent or temporary. *Id.* at 2073-2074*; Lucas v. S.C. Coastal Council,* 505 U.S. 1003 (1992); *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104 (1978); *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922)

- A more detailed discussion of the federal constitutional and statutory issues in agricultural zoning cases is beyond the scope of this article.

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