

Judicial Review of BZA Decisions

What do you need to do to be prepared?

Alan S. Townsend

atownsend@boselaw.com

Bose McKinney & Evans LLP

111 Monument Circle, Suite 2700

Indianapolis, IN 46204

317-684-5225





I. Board of Zoning Appeals

- *Powers.* A Board of Zoning Appeals (“BZA”) is a quasi-judicial body with 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.



I. Board of Zoning Appeals (con't.)

- *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. 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.

I. Board of Zoning Appeals (con't.)

- *Procedure for Review.* In order for a BZA to approve a petition over which it has jurisdiction, the BZA must hold a public hearing with notice, based on requirements established by the BZA in written rules it must adopt. 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.

I. Board of Zoning Appeals (con't.)

- 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).

I. Board of Zoning Appeals (con't.)

- 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. 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.

I. Board of Zoning Appeals (con't.)

- A development standard variance allows a different development standard than what is required or allowed in a zoning ordinance. In order for a development standard variance to be approved, 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. I.C. § 36-7-4-918.5.

I. Board of Zoning Appeals (con't.)

- A development standard variance allows a different development standard than what is required or allowed in a zoning ordinance. In order for a development standard variance to be approved, 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. I.C. § 36-7-4-918.5.

I. Board of Zoning Appeals (con't.)

- A development standard variance allows a different development standard than what is required or allowed in a zoning ordinance. In order for a development standard variance to be approved, 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. I.C. § 36-7-4-918.5.

I. Board of Zoning Appeals (con't.)

- A development standard variance allows a different development standard than what is required or allowed in a zoning ordinance. In order for a development standard variance to be approved, 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. I.C. § 36-7-4-918.5.**

Special Exceptions

- A special exception or special use allows 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 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)

Special Exceptions (Blackford County)

504 Special Exceptions: The Board of Zoning Appeals shall have the power to authorize special exceptions if the following requirements are met:

- 504.1 the Special Exception shall be listed as such in Table A of this Ordinance for the District requested.
- 504.2 the Special Exception can be served with adequate utilities, access roads, drainage and other necessary facilities.
- 504.3 the Special Exception shall not involve any element or cause any condition that may be dangerous, injurious or noxious to any other property or persons and shall comply with the performance standards of Section 312.
- 504.4 the Special Exception shall be sited, oriented and landscaped to produce a harmonious relationship of buildings and grounds to adjacent buildings and properties.

Special Exceptions (Blackford County)

- 504.5 the Special Exception shall produce a total visual impression and environment which is consistent with the environment of the neighborhood.
- 504.6 the Special Exception shall plan vehicle access and parking to minimize traffic congestion in the neighborhood.
- 504.7 the Special Exception shall preserve the purpose of this Ordinance.

II. Judicial Review

- Governing Law and Deadline to File Judicial Review. Final decisions must be appealed using the judicial review procedure in the 1600 Series. I.C. § 36-7-4-1016. 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 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.



II. Judicial Review (con't.)

- 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).

II. Judicial Review (con't.)

- 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 in 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).

II. Judicial Review (con't.)

- Standing in Agricultural Zoning Cases. In judicial reviews filed by opponents of successful agricultural zoning cases, typically owners of other properties 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. In Indiana, case law provides that mere proximity of the land of a judicial review petitioner challenging a proposed agricultural use is not the determinative factor that establishes standing. 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).

II. Judicial Review (con't.)

- 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).

II. Judicial Review (con't.)

- 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).

II. Judicial Review (con't.)

- 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.
- The court may grant the relief requested by the petition, but only if the zoning decision was:
 - (1) Arbitrary, capricious, an abuse of discretion, or not in accordance with the law;
 - (2) Contrary to a constitutional right, power, privilege, or immunity;

II. Judicial Review (con't.)

- (3) In excess of the zoning body's statutory jurisdiction or authority;
- (4) Without observance of a required legal procedure; or
- (5) Unsupported by the evidence; and
- (6) The court finds the petitioner was prejudiced by the zoning decision. I.C. § 36-7-4-1614(d).

III. Appeals

- 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.