

CHAPTER 2

BOARD OF ZONING APPEALS BASICS

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WHAT IS THE BOARD OF ZONING APPEALS?

The board of zoning appeals (BZA) is the local government body that is empowered by State Law to consider granting relief from the requirements of the zoning ordinance. From a practical standpoint, it is almost impossible to create zoning regulations that universally make sense on all parcels of land. The board of zoning appeals allows property owners with unique conditions on their parcels to seek relief.

The BZA is considered an administrative board that is quasi-judicial in nature. A quasi-judicial entity operates more like a court than a legislative body and uses many standards and procedures like the courts. BZA decisions are required by state law to be guided by specific criteria, and made based upon the facts, not opinions. The primary role of the board of zoning appeals is to rule on the application of the existing zoning laws as opposed to passing new laws, and therefore it is considered an administrative body.

Powers and Duties

The BZA's duties fall into three categories:

- 1) Granting of variances;
 - Developmental standards variances; and
 - Variances of use (not available to boards with an area plan commission).
- 2) Granting of special exceptions/conditional uses; and
- 3) Appeals from administrative decisions.

These powers and duties are explained in more detail later in this Chapter.

Structure

There are three different structures for BZAs, depending on the type of plan commission that the local government employs. A board of zoning appeals (BZA) is either:

- 1) An advisory board of zoning appeals (under the advisory planning law);
- 2) An area board of zoning appeals (under the area planning law); or
- 3) A metropolitan board of zoning appeals (under the metropolitan development law).



Credit: WTHITV 10

The board of zoning appeals is typically composed of one (1) division. The zoning ordinance may be amended to establish an additional one (1), two (2), or three (3) divisions. A division refers to a geographic sub-area of the planning jurisdiction. The zoning ordinance must describe the limits of that division's territorial jurisdiction and specify whether that division has exclusive or concurrent jurisdiction within that territory.

A board of zoning appeals has territorial jurisdiction over all the land subject to the zoning ordinance. If the board has more than one (1) division, all divisions have concurrent jurisdiction within that territory, except that a division of an advisory or area board of zoning appeals, may have only limited territorial jurisdiction (such as a historic district). The zoning ordinance must describe the limits of that division's territorial jurisdiction and specify whether that division has exclusive or concurrent jurisdiction within that territory. Refer to the Indiana Code for more information regarding communities with Metropolitan plan commissions.

Membership

Area, advisory, and metro BZAs typically have five members. The exceptions are as follows:

- If an area BZA was established before January 1, 1984, as a seven (7)-member board, it continues with 7 members; and
- If a municipal plan commission exercises jurisdiction outside the incorporated area of the municipality, there is one additional member appointed to the advisory BZA to represent the extra-territorial jurisdiction, resulting in a six (6) member board.

Other Offices: None of the members of a board of zoning appeals may hold other elective office, which includes a federal office, state office, legislative office, school board office, or local office (such as County Commissioner, City or Town Council, County Surveyor, etc.). Political party offices (i.e., precinct committeeman) are not considered elected offices. BZA members may also not hold appointive office (such as County Highway Engineer, City Fire Chief, etc.), except as permitted by IC-36-7-4-902, in municipal, county, or state government.

Non-Resident Appointments: Before 2011, all BZA members had to be residents of the jurisdiction they served. A state law change in 2011 now allows non-resident appointments to the BZA if the individual owns property within the jurisdiction and lives within the same county where the jurisdiction is located. Section 36-7-4-905 (b) goes on to state that a majority of the members must still be members of the board's jurisdiction. This provision was designed to help small communities that experience difficulty in finding enough citizens to serve on their BZA, resulting in unfilled vacancies.

Terms: When an initial term of office expires, each new advisory or area BZA appointment is for a term of four (4) years, thereafter expiring on the first Monday of January with the exception of metro BZA divisions, which is for a term of one (1) year. Note that if there is a delay in appointments, a board of zoning appeals member serves until his/her successor is appointed and qualified. BZA members are eligible for reappointment, and there are no term limits within state law.

See IC 36-7-4-902 for appointment details

IC 36-7-4-902 (c)

IC 36-7-4-205, IC 36-7-4-208, and IC 36-7-4-903 et. seq.

IC 36-7-4-905 et. seq. IC 3-5-2-17 et. seq.

IC 36-7-4-906 (g)

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See Board of Commissioners of Morgan County v. Wagoner, App. 1998, 699 N. E. 2d 1196

IC 36-7-4-907 (b)

IC 36-7-4-907 (a)

In the case where a BZA member has a direct or indirect financial interest, or a lack of impartiality (IC 36-7-4-909(a) was amended in 2011 to add bias, prejudice or lack of impartiality as a conflict of interest), that member may not participate in the hearing or decision of the board. Indiana code allows an alternate member to participate in the hearing or decision in place of the regular member, counting toward the required quorum. See IC 36-7-4-909 for more information. If the BZA wishes to use alternate members, it is advisable to make appointments in advance and outline the process for using alternates in the BZA's rules.

Removal: The appointing authority of a metro BZA may remove a member for any reason, without appeal. The appointing authority of an advisory or area BZA may remove a member from the board of zoning appeals only for “cause”, citing written reasons for the removal (such as poor attendance or unethical conduct). An advisory or area BZA member who is removed may appeal the removal to the county’s circuit or superior court within 30 days, but due process does not confer a right to a hearing before removal.

Additionally, if a BZA member misses three consecutive regular meetings, the appointing authority may choose to treat the absences as if the member had resigned. While there may be BZA members who desire to spend the winter in Florida or the summer at a lake house, it makes it difficult for the rest of the group to function when that “snowbird” or summer traveler is absent (i.e., even numbers may result in tie votes, etc.). A BZA member has a responsibility to notify the Planning Director and BZA Attorney in advance of the scheduled meeting if he/she will be absent. Regardless of the cause, if a vacancy occurs, the appointing authority shall appoint a member for the unexpired term of the vacating member.

Alternates: In addition, the appointing authority may appoint an alternate member to participate with the board in any hearing or decision if a regular member has a conflict of interest or is unavailable to participate in the hearing or decision. Alternate members have all of the powers and duties of a regular member while participating in the hearing or decision. In order to avoid quorum issues at BZA meetings, the best practice is to prepare by appointing an alternate member for each regular member, and to include the alternates in BZA training and encourage their attendance at BZA meetings in advance of their being called into service.

Conflicts of Interest

Indiana has state laws regarding conflicts of interest for BZA members. IC 36-7-4-909(a) states that a board of zoning appeals member may not participate in a hearing or decision of that board concerning a zoning matter in which he/she has a conflict of interest, which includes the following:

- The member is biased or prejudiced or otherwise unable to be impartial (added to Indiana Code in 2011); or
- The member has a direct or indirect financial interest in the outcome of the decision.

For more information on conflicts of interest, see Chapter 6, Ethics. Note that the intention is that the member with a conflict of interest may not participate in the hearing or decision in any way. The member should state for the record that there is a conflict and then leave his/her seat with the commission before that agenda item is opened. Because the member with the conflict is banned from participating in the hearing or decision, he/she is not allowed to testify during the public hearing portion of the meeting.

Per IC 36-7-4-920 (g), persons may not communicate with any BZA member before the hearing with intent to influence the member's action — this is often referred to as ex parte contact. See Chapter 6, Ethics, for more information on ex parte contact. Since conflict of interest is self-determined, it is possible that a BZA member could feel prejudiced after experiencing (unavoidable) ex-parte contact, and decide to recuse himself/herself from the case as a result.

Whenever a BZA member has a conflict of interest, he/she has a responsibility to notify the Planning Director and BZA Attorney in advance of the scheduled meeting that the conflict that will bar participation, so that their alternate member may be notified.

COMMON BZA ACTIVITIES

Variances

A variance, if granted, allows a change from a zoning ordinance requirement. There are two types of variances allowed in Indiana:

- 1) Variances from Developmental Standards (includes modifications of required setbacks, building heights, parking requirements, landscaping or other physical standards).
- 2) Use Variances (allows a land use that is not permitted in the district where the property is located). Note that Use Variances are not allowed for local governments that are part of an area plan commission per IC 36-7-4-918.4.

BZA members often fall into two extreme camps: those that believe that variances should never be granted because everyone should play by the same rules and those who have listened to attorneys for the petitioner tell them that it is the BZA's job to grant variances! In this case, a happy medium is the best attitude: variances should be granted, but only when warranted.

Yes, most of the BZA's caseload is devoted to variance requests, but the BZA is under no obligation to grant those variance requests. The board is under an obligation to hear the request and then make a decision based on the facts of the case and the applicable criteria.

Variances can sometimes significantly change the character of an area, and should be carefully considered. Variances are intended to "run with the land", not with ownership, so a variance may essentially last forever. Besides being almost permanent, variances can potentially derail implementation of parts of the community's comprehensive plan by allowing standards or uses that do not represent community norms!



Rule #1 — A variance is not automatically a bad thing! It is a way a community can solve problems created by applying the generalities of the zoning ordinance to specific situations — it introduces some needed flexibility to zoning regulations.

Rule #2 — Caution: Variances are meant to be a safety valve, but may become a "back-door" way of thwarting the zoning ordinance. Examples of this are asking for a variance to allow more density in a residential zoning district, instead of asking for the property to be rezoned to a district with a higher density.

See IC 36-7-4-918.4 for Use Variances and IC 36-7-4-918.5 for Variances from Development Standards. Both sections state that the BZA shall approve or deny variances and may impose reasonable conditions as a part of its approval.

These two sections also say that both variances of developmental standards and use variances may be approved only upon a determination in writing (findings of fact) that the petition meets all of the required legal criteria.

So what are the required legal criteria for approval of a variance?

Developmental Standards Variance Criteria per IC 36-7-4-918.5 are as follows:

- 1) The approval will not be injurious to the public health, safety, morals, and general welfare of the community;
- 2) The use and value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner; and
- 3) The strict application of the terms of the zoning ordinance will result in practical difficulties in the use of the property.

What exactly are “practical difficulties”? Some Indiana communities have attempted to clarify the criterion. Several years ago, Monroe County, Indiana’s Board of Zoning Appeals decided to define practical difficulties with the help of their attorney. Monroe County still uses this definition, although there have been attempts to make the criterion a bit more stringent, so that it relies less on economic considerations. According to Monroe County’s BZA, practical difficulties are significant economic injury that:

- Arises from the strict application of the Zoning Ordinance to the conditions of a particular, existing parcel of property;
- Is not as significant as the injury associated with hardship, that is, it does not deprive the parcel owner of all reasonable economic use of the parcel; and
- Is clearly more significant than compliance cost.

Shelbyville, Indiana’s Unified Development Ordinance clarifies the practical difficulty criteria by stating, “The practical difficulty shall not be self-imposed, nor based on a perceived reduction of, or restriction on, economic gain.”

Use Variance Criteria per IC 36-7-4-918.4, which apply only to Advisory and Metro BZAs, are as follows:

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

Rule #3 — It is the applicant’s responsibility to prove the request satisfies all the variance criteria; it is not the responsibility of the BZA to make the case for them! You should require that the applicant submit written evidence that they meet the criteria.

Exercise: Look up the variance criteria in the state law, then look at the criteria that your board uses — are they the same? Is anything missing from the state law list of criteria? If there are any missing criterion, then you have a problem that needs to be fixed! Do you have extra criteria that aren’t listed in state law?

What is an “unnecessary hardship”? Monroe County’s Board of Zoning Appeals also decided to define unnecessary hardship with the help of their attorney. According to Monroe County’s BZA, hardship or unnecessary hardship is a significant economic injury that:

- Arises from the strict application of this ordinance to the conditions of a particular, existing parcel of property;
- Effectively deprived the parcel owner of all reasonable economic use of the parcel; and
- Is clearly more significant than compliance cost or practical difficulties.

Crawfordsville’s Zoning Ordinance includes the following definition:

“HARDSHIP (as related to variance of this Ordinance). The exceptional hardship that would result from a failure to grant the requested variance. The Common Council requires that the variance is exceptional, unusual, and peculiar to the property involved. Mere economic or financial hardship alone is NOT exceptional. Inconvenience, aesthetic considerations, physical handicaps, personal preferences, or the disapproval of one’s neighbors likewise cannot, as a rule, qualify as an exceptional hardship. All of these problems can be resolved through other means without granting a variance, even if the alternative is more expensive, or requires the property owner to build elsewhere or put the parcel to a different use than originally intended.”

Test your Knowledge of the BZA:

When may a variance be approved?

- (a) when the board determines it meets the “no harm-no foul” test
- (b) when it meets all of the variance criteria**
- (c) when no one shows up to speak against it

When may a variance be denied?

- (a) when you don’t have a quorum
- (b) if the applicant is a jerk
- (c) if all variance criteria haven’t been met**

Can a variance be conditionally approved?

- a) Yes**
- b) No
- c) I’m going to Google the answer

The board of zoning appeals may stipulate any number of conditions as part of their approval. They may also require the property owner to enter into written commitments, which are recorded in the County Recorder’s Office and are binding on future owners of the subject property. Written commitments formalize the conditions attached to a variance. See IC 36-7-4-615 and Chapter 3, Avoiding Pitfalls, for more information on using Written Commitments.

Use Variances: If there are extra criterion for use variances, you have a problem that needs to be fixed!

Variances from Developmental Standards:

If there is an extra criterion (or two) for developmental standards, it is all right! Indiana Code says that for developmental standards ... *your local ordinance may establish a stricter standard than the “practical difficulties” standard prescribed by state law.*

Examples of extra developmental standards criterion:

The variance granted is the minimum necessary, and the variance granted does not correct a hardship caused by an owner, previous or present, of the property.

Discussion: Should your community follow a stricter standard for developmental standards variances than the state’s “practical difficulties”?

Rule #4 —While there is no maximum number of conditions or commitments that can be attached to a variance approval, if there are a great number, you may want to reexamine whether the proposed variance is really justified.

Sample Variance Request Worksheet — Development Standards

(1) the approval will not be injurious to the public health, safety, morals, and general welfare of the community (Consider whether granting the variance will hurt or potentially cause harm to the city or county — why or why not, and what harm can befall them?)

Criterion #1 met? No Yes If yes, any conditions or commitments?

(2) the use and value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner (Consider whether neighboring property will suffer any major negative impacts — what impacts can the neighbors realistically expect?)

Criterion #2 met? No Yes If yes, any conditions or commitments?

(3) the strict application of the terms of the zoning ordinance will result in practical difficulties in the use of the property (Consider what difficulties the owner would have developing the property according to the zoning ordinance standards — remember, higher cost is not an adequate justification for a variance)

Criterion #3 met? No Yes If yes, any conditions or commitments?

(4) (Add additional criterion here)

Criterion #4 met? No Yes If yes, any conditions or commitments?

If ANY of the criteria have been checked as “no”, the developmental standards variance request may not be approved.

If ALL criteria have been checked as “yes”, then a variance from developmental standards is justified.

Proposed Motion:

Conditions:

Committments:



Sample Variance Request Worksheet — Use

(1) the approval will not be injurious to the public health, safety, morals, and general welfare of the community (Will granting the variance potentially cause harm to the city or county — why or why not, and what harm can befall them?)

Criterion #1 met? No Yes If yes, any conditions or commitments?

(2) the use and value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner (Will neighboring property suffer any major negative impacts — what impacts can realistically be expected?)

Criterion #2 met? No Yes If yes, any conditions or commitments?

(3) the need for the variance arises from some condition peculiar to the property involved (Consider whether there is some unique problem with the site that makes it unable to meet ordinance standards — what is it?)

Criterion #3 met? No Yes If yes, any conditions or commitments?

(4) the strict application of the terms of the zoning ordinance will constitute an unnecessary hardship if applied to the property for which the variance is sought (Consider what it would be like if the site were developed under the terms of the zoning ordinance — what would the difficulties be?)

Criterion #4 met? No Yes If yes, any conditions or commitments?

(5) the approval doesn't interfere substantially with the comprehensive plan
(Consider whether there are any major conflicts with the comprehensive plan — what are they?)

Criterion #5 met? No Yes If yes, any conditions or commitments?

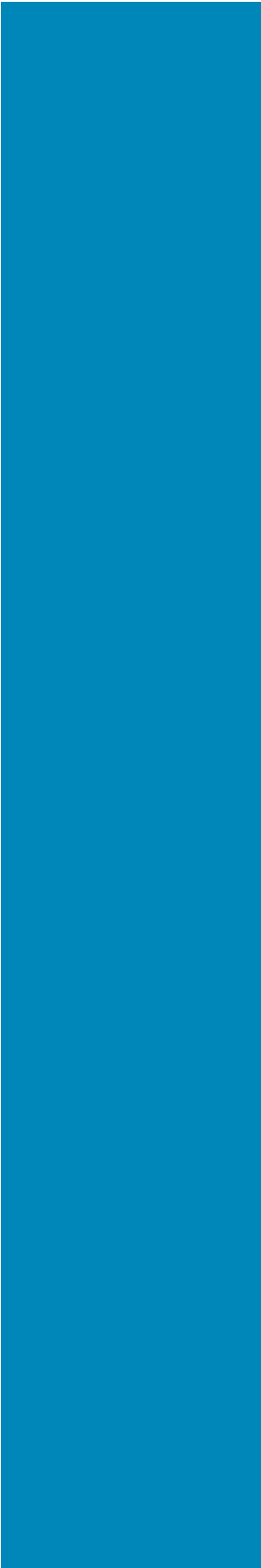
If ANY of the criteria have been checked as “no”, the use variance request may not be approved.

If ALL criteria have been checked as “yes”, then a use variance is justified.

Proposed Motion:

Conditions:

Committments:



IC 36-7-4-918.2 et. seq.

Special Exceptions

After variances, the second most common BZA application is for a special exception. Indiana Code does not define the term “special exception”, but it is generally understood that they are uses of property that may be allowed under specified conditions. Special exceptions also called special uses, contingent uses and conditional uses are intended to be considered on a site-specific basis. State statute specifies that a board of zoning appeals shall approve or deny special exceptions “from the terms of the zoning ordinance, but only in the classes of cases or in the particular situations specified in the zoning ordinance. The board may impose reasonable conditions as a part of its approval.” Note that the BZA may also require written commitments for special exceptions.

What exactly is a special exception?

Indiana Code leaves it up to local government to define what uses in what zoning districts should be special exceptions, but examples might include institutional uses (i.e., schools), drive-through businesses, etc. Indiana Code does not specify a set of criteria for use in considering special exceptions, again leaving it to the discretion of local government. Some communities use a general set of criteria for most, if not all, special exceptions, while others establish a separate set of criteria for some special exception use, such as for Wind Energy Systems or Bed and Breakfasts.



Special Exception Criteria Example:

Hendricks County, Indiana’s Zoning Ordinance requires that in order to grant a Special exception, the board of zoning appeals find adequate evidence showing that the use:

- 1) Is in fact a permitted Special Exception use as listed in each zoning district...;
- 2) Will be harmonious and consistent with the character of the zoning district and in accordance with the general objectives, or with any specific objective of the County’s Comprehensive Plan and the Zoning Ordinance;
- 3) Will be designed, constructed, operated, and maintained so as to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity and that such use will not change the essential character of the same area;
- 4) Will be served adequately by essential public facilities and services such as highways, streets, police and fire protection, drainage structures, refuse disposal, water and sewer, and schools; or that the persons or agencies responsible for the establishment of the proposed use shall be able to provide adequately any such services;

- 5) Will not create excessive additional requirements at public cost for public facilities and services and will not be detrimental to the economic welfare of the community;
- 6) Will not involve uses, activities, processes, materials, equipment and conditions of operation that will be detrimental to any persons, property, or the general welfare by reason of excessive production of traffic, noise, smoke, fumes, glare, or odors;
- 7) Will have vehicular approaches to the property, which shall be so designed as not to create an interference with traffic on surrounding public thoroughfares; and
- 8) Will not result in the destruction, loss, or damage of a natural, scenic, or historic feature of major importance.

The Hendricks County Zoning Ordinance goes on to state, “When considering a special exception use request the board of zoning appeals may examine the following items as they relate to the proposed use:

- Topography and other natural site features;
- Zoning of the site and surrounding properties;
- Driveway locations, street access, and vehicular and pedestrian traffic circulation;
- Parking (including amount, location, and design);
- Landscaping, screening, and buffering of adjacent properties;
- Open space and other site amenities;
- Noise, loading areas, odor, and other characteristics of a business or industrial operation;
- Design and placement of any structures;
- Placement, design, intensity, height, and shielding of lights;
- Traffic generation; and
- General site layout as it relates to its surroundings.”

Exercise:

Create a Special Exception Request Worksheet using your community’s criteria.

Look up special exceptions (or special uses, conditional uses, or contingent uses) in your zoning ordinance. Are there any criteria that your board must consider in making their decision?

Discussion:

Are existing special exception criteria adequate? What changes should be made? If your community does not have criteria for special exceptions, draft a list of possible criteria for further discussion.

Appeals from Administrative Decisions

The terms appeal and variance may be used interchangeably in conversation, but are really two very different things. A variance grants dispensation from a particular requirement of the zoning ordinance on a particular property. With an appeal, someone made a zoning-related decision and another person disagrees with it.

According to IC 36-7-4-918.1, the BZA shall review appeals from any order, requirement, decision, or determination made by:

- An administrative official, hearing officer, or staff member under the zoning ordinance;
- An administrative board or other body (except a plan commission) in relation to the enforcement of the zoning ordinance; or
- An administrative board or other body (except a plan commission) in relation to the enforcement of an ordinance adopted under this chapter requiring the procurement of an improvement location or occupancy permit.

An example of an appeal from an administrative decision would be if someone disagrees with how the planning staff interprets a provision of the zoning ordinance, and appeals that interpretation to the board. BZAs do not typically hear many appeals. If the Board does get an appeal, it may be an indicator that certain language in the Zoning Ordinance is unclear. The need to clarify this “grey area” should be conveyed to the plan commission. If the BZA hears a lot of appeals, a close look should be taken to see if the community needs a new zoning ordinance or if staff needs additional training.

IC 36-7-4-919 says that if an appeal is filed with the BZA, it must specify the grounds of the appeal and must be filed within the time limit and in the format prescribed by the BZA’s rules. The body being appealed (administrative official, hearing officer, administrative board, or other body) shall transmit all documents, plans, and papers constituting the record of the action in question to the BZA.

The BZA may reverse, affirm, or modify the order, requirement, decision, or determination that is being appealed. For this purpose, Indiana Code gives the board all the powers of the official, officer, board, or body from which the appeal is taken. The BZA shall make a decision either at the meeting at which that matter is first presented or at the conclusion of the hearing, if it is continued.

THE DECISION-MAKING PROCESS

Public Hearing

All actions of the BZA (variances, special exceptions and appeals from administrative decisions) require public hearing. IC 36-7-4-920 requires the BZA to make public notice in accordance with IC 5-3-1-2 and IC 5-3-1-4 and give due notice to interested parties at least ten (10) days before the date set for a hearing. The party making the appeal may be required to assume the cost of notice.

At the hearing, each party may appear in person, by agent, or by attorney or other representative. The planning staff and any other persons may appear before the board at the hearing and present evidence in support of or in opposition to the request.

BZA Contact

The intent is that all BZA contact regarding a request occurs within the official public hearing. State law allows planning staff to give the BZA a written statement (a staff report) setting forth any facts or opinions relating to a BZA case, including a recommendation, prior to the public hearing. Per Indiana State Statute, other persons may not communicate with any BZA member before the hearing with intent to influence the member's action — this is often referred to as *ex parte* contact. To help prevent this from happening, application packets and the community's website should include a warning, citing Indiana Code. If the local government's website includes a list of BZA members, make sure there is also the same warning attached. See Citizen Planner's Guide, Part 6, Ethics for more information on *ex parte* contact.

Rules of Procedure

IC 36-7-4-916 requires the board of zoning appeals to adopt rules, which may not conflict with the zoning ordinance.

These rules shall address:

- 1) The filing of appeals;
- 2) The application for variances, special exceptions, special uses, contingent uses, and conditional uses;
- 3) The giving of notice, including what type of mail is used to deliver the notice and who the interested parties are;
- 4) The conduct of hearings (do not rely on Robert's Rules of Order, it is much too complicated for local government public hearings); and
- 5) The determination of whether a variance application is for a variance of use or for a variance from the development standards (such as height, bulk, or area).



IC 36-7-4-920 (g)

The BZA's rules may also address other issues, including, but not limited to:

- 1) Any divisions of the board of zoning appeals (i.e., an area plan commission that has a BZA for each participating community); and
- 2) Schedule and location of meetings (typically adopted annually).

Once the rules are adopted by the board of zoning appeals, they are to be made available to all applicants and other interested persons (and they should also be available and used by the staff and BZA).

Exercise:

Review the adopted Rules of Procedure for your BZA. Are all the items listed in IC 36-7-4-916 addressed? Does your BZA follow these rules? Mark up the rules to indicate areas of possible changes, and discuss these with fellow board members and staff.

If staff or BZA members are unable to produce a copy of the rules, it is important that a set of rules be written and adopted by the board as soon as possible!

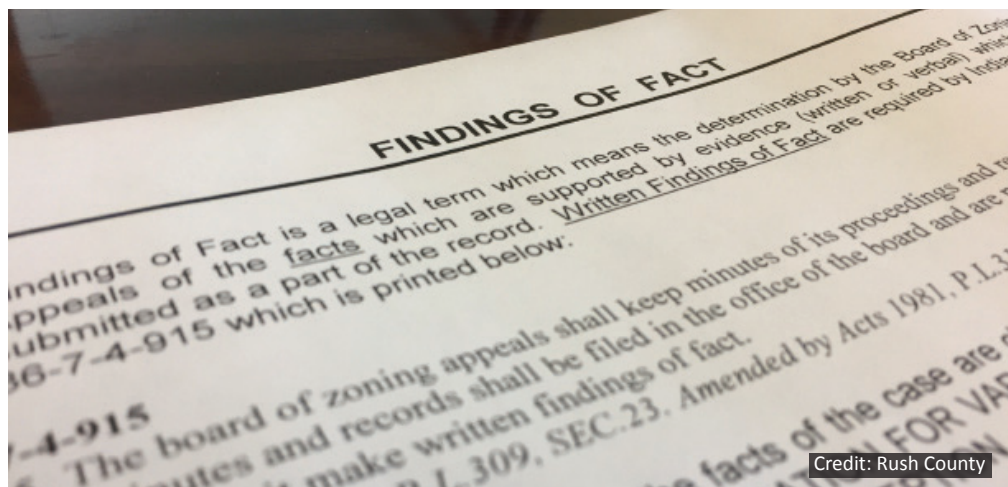
PREPARING FINDINGS OF FACT

In addition to keeping minutes of its proceedings and a record of the vote, all BZA actions require the preparation of findings of fact to support that decision. Indiana case law has established that it is not enough to make the required statutory determinations in the words of the ordinance (e.g., stating, "the approval will not be injurious to the public health, safety, morals, and general welfare of the community"), but that the BZA must make findings that support those determinations.

In effect, the board must add a "because" to each criterion, with a corresponding explanation, (e.g., "the approval will not be injurious to the public health, safety, morals, and general welfare of the community because..."). Case law has further established that trial courts are to remand appeals of BZA decisions back to the BZA to make findings of fact if the BZA has not previously done so.

Carlton v. BZA of City of Indianapolis, 1969, 245 NE2d 337, 252 Ind. 56

Habig v. Harker, App. 1 Dist.1983, 447 NE2d 1114



Indiana case law has also held that it was acceptable for the BZA to take over three months to adopt findings of fact after the hearing and decision. While this delay may have been acceptable to the court, the best action is for the board to stay current. This can be done by either:

- Adopting findings as part of the motion on the case (either prepared by staff in advance to support the staff recommendation or proposed by a BZA member with the motion, using a self-prepared worksheet, amended staff prepared findings or petitioner’s written application to cite the findings); or
- Adopting findings at the next BZA meeting, which have been prepared by planning staff, the BZA’s legal counsel or a board member, based on the actions at the previous meeting.

Discussion:

Does your BZA adopt findings of fact for each action? If so, what process is used? How well does that process work? How could it be improved? If your BZA does not currently adopt findings, immediately put a plan in place to remedy this.

TAKING ACTION

Several things should happen for the BZA to make a defensible decision.

- 1) Adequate notice must have been given for the public hearing;
- 2) BZA members need to do their homework before the meeting (read staff report, do a “drive-by” site visit);
- 3) Members must abstain from ex-parte contact or declare it at the meeting;
- 4) BZA members must declare any conflicts and excuse themselves if there is a conflict;
- 5) The public hearing must be conducted in accordance with the board’s rules and state law;
- 6) There must be a quorum (a majority of the BZA’s membership, not a majority of those in attendance in order to authorize any action as official (IC 36-7-4-910 and IC 36-7-4-911));
- 7) The BZA should have a discussion among themselves about the criteria and may ask questions of the applicant or others before making a motion – the applicant and the audience deserve to know why members are voting as they are; and
- 8) Findings must be adopted for the case.

Additional Regulations for Some Counties

In some Indiana communities, the board of zoning appeals does not make final determinations. IC 36-7-4-918.6 requires that BZAs for municipalities in counties with populations of 400,001 – 699,999 or BZAs in a county with a population between 250,001 - 269,999, shall submit special exceptions, special uses and use variances to the legislative body for approval or disapproval, along with the BZA’s recommendation (favorable, unfavorable or none). See Indiana Code for further details on timelines and action. Note that if the legislative body approves a petition, it must make the determination in writing.

McBride v. BZA of
Evansville-Vanderburgh
Area Plan Commission,
App. 1 Dist.1991, 579
NE2d 1312

Additional Regulations for Metropolitan Development Commissions

Metropolitan development commissions have additional regulations related to the BZA. IC 36-7-4-918.8 outlines how the metropolitan development commission may act as the BZA to approve or deny developmental standards variances or special exceptions.

JUDICIAL REVIEW

Per IC 36-7-4-1615, if the court finds that a person has been prejudiced, the court may set aside a zoning decision and remand the case to the BZA for further proceedings or compel a decision that has been unreasonably delayed or unlawfully withheld by the BZA.

In 2011, Indiana law changed the way that appeals of BZA decisions are made. BZA decisions are no longer subject to review by certiorari, but are treated as zoning decisions per IC 36-7-4-1016, just like plan commission decisions. That section states that final decisions of the board of zoning appeals under both the IC 36-7-4-900 series (administrative appeals, exceptions, uses, and variances); or the IC 36-7-4-1015 series of this chapter (appeals of commitment, modifications or terminations); are considered zoning decisions for purposes of this chapter and are subject to judicial review in accordance with the IC 36-7-4-1600 series. The board must cooperate by providing the petitioner with the “board record” for the case within 30 days (or longer if allowed by the Court). The board record includes:

- 1) Any board documents expressing the decision (e.g., Minutes, Transcript, etc.);
- 2) Other documents identified by the board as having been considered before its decision and used as a basis for its decision (i.e., photo exhibits, traffic reports, etc.); and
- 3) Any other material described in law as the board record for the type of decision at issue (e.g., Findings of Fact).

It is up to the party appealing the BZA’s decision to prove their case, not the BZA per IC 36-7-4-1614(a). The court will review the BZA’s decision in accordance with the standards listed below, as applied to the decision at the time it was made. Expect the court to make findings of fact on each material issue on which the court’s decision is based. Note that the court shall grant relief under IC 36-7-4-1615 only if the court determines that the BZA’s decision is:

- 1) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- 2) Contrary to constitutional right, power, privilege, or immunity;
- 3) In excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- 4) Without observance of procedure required by law; or
- 5) Unsupported by substantial evidence.

ENFORCEMENT

The 2011 state law amendments also impacted enforcement, so it is important to make sure your community is following current legal standards. State Statute allows the board of zoning appeals to bring an action to enforce the Zoning Ordinance or the BZA's decisions. The BZA may also bring an action to enforce conditions or written commitments they imposed. This same section on Indiana Code also enables plan commission and your enforcement official to engage in enforcement.

The board of zoning appeals may invoke any legal, equitable, or special remedy in these actions. An action for fines or penalty for enforcement of the Zoning Ordinance may be brought in any court located within the jurisdiction of your board of zoning appeals, and if the BZA is successful, the respondent bears the costs of the action. Note that a change of venue to another county may not be granted.

When an appeal has been filed with the board of zoning appeals, proceedings and work on the premises affected shall be stayed, unless the stay would cause imminent peril to life or property (in that case, proceedings or work may not be stayed except by a restraining order).

Your Zoning Ordinance may still provide that a structure erected, raised, or converted, or land or premises used in violation of this chapter or an ordinance or regulation made under this chapter, is a common nuisance and that the owner or possessor of the structure, land, or premises is liable for maintaining common nuisance.

ALTERNATIVES TO CONSIDER

- Do you find yourself hearing what seems like the same case over and over?
- Do you see a difference between the types of cases you get (i.e., the “no-brainers” vs. the tough calls)?
- Is there a waiting list to get on a BZA agenda?
- Do your BZA meetings last until the wee hours of the next morning?
- Are you asked to schedule special BZA meetings just to accommodate important/fast-track petitions?

If you answered “YES!” to any of the above questions, your BZA could probably benefit from one or both more of the following actions:

Amending the Zoning Ordinance for Frequently Granted Requests

If it seems you are granting the same type of variance request frequently, ask the plan commission to consider whether an amendment to the zoning ordinance is appropriate. This not only would save you time, but would also make the citizens of your community very happy.

IC 36-7-4-1014 et. seq. &
IC 36-1-6 et. seq.

IC 36-7-4-1001 (a)

IC 36-7-4-1012 et. seq.

Example: Ordinance regulations are typically written to fit new development, not older neighborhoods. When it is time to replace the old, structurally challenged garage with a nice new one, the property owner is told that they can't put it back in the same place, because the side and rear setbacks are now larger than when the first garage was built. Wouldn't a better solution be to amend the zoning ordinance to address standards for older development, instead of requiring everyone in the neighborhood to get variances?

Appointing a Hearing Officer to Hear Cases

What is a hearing officer? An appointed staff member, board member, or attorney who can conduct hearings on certain variances or conditional uses / special exceptions and approve or deny them. The hearing officer acts in place of the BZA. This works best on "routine" cases where there is little public opposition or no need to burden the petitioner or BZA with the full process.

How does the hearing officer process work?

- Petitioner files case, just like any other case for the BZA. Filing fees and public notice are still required.
- Staff prepares a case report, complete with recommendations and any appropriate conditions of approval and written commitments. Approval must meet criteria that any variance or conditional use/special exception petition would have to meet at the BZA level.
- Hearing officer conducts a formal public hearing, subject to all of the public notice rules of the BZA. Staff, petitioner, public, and hearing officer all have opportunity to comment on the case.
- Hearing officer has three options: approve petition, as submitted or with conditions; deny petition, which can be appealed to the BZA; or forward petition to the next hearing of the BZA for more public scrutiny.



Hearing Officer Benefits:

- Reduces the regular caseload of the BZA by removing minor, non- controversial cases;
- Frees up time to concentrate on more significant cases;
- Shortens the length of the full BZA hearings;
- Cases can be processed through the system more quickly than if they went to the full BZA;
- Hearing officer setting is more comfortable and user-friendly for non-experienced petitioners; and
- Option to set hearings more frequently or at more convenient times than the (typical) once monthly BZA hearings held in the evening.

Implementing the Hearing Officer Process:

- Do your homework first!
 - As a board, discuss with staff what types of cases would be appropriate for a hearing officer and whether it is optional or mandatory for those cases.
- Float the idea with the plan commission.
 - A joint meeting would be a good venue for discussion.
- If the plan commission is supportive, representatives should preview the hearing officer idea with the legislative body.
- If there is interest in the hearing officer:
 - The plan commission holds a public hearing and the legislative body adopts an amendment to the zoning ordinance which enables the hearing officer process;
 - The plan commission adopts an amendment to their rules to enable the process. Note that according to Indiana Law, the hearing officer hears cases in place of BZA, but is subject to the rules & procedures of the plan commission. It makes sense to reference the hearing officer alternate process in the BZA's rules also; and
 - Set up the hearing officer process, including appointing a hearing officer.

Adopting a Combined Procedure

In 2011, Indiana law changed to allow developments that require more than one hearing to be considered by either a committee of the plan commission or a hearing officer, meaning that the powers of the BZA may be exercised by another. This process must first be authorized by your zoning ordinance, and the plan commission may designate a hearing examiner or committee of the commission to conduct a single combined hearing for developments that require hearings by multiple bodies (BZA, Hearing Officer, Plat Committee, plan commission). If a combined hearing process is adopted as an amendment to the Zoning Ordinance, it must be an optional choice for the applicant, not mandatory, and the plan commission must also make rules governing the hearing of cases.

This combined process is most appropriate when there is a desire to expedite projects (i.e., for economic development purposes) and/or to allow larger, more complicated cases to be considered all at once, in a more coordinated “big picture” review. The St. Joseph County Area Plan Commission uses the Combined Hearing Procedures for South Bend, unincorporated St. Joseph County, New Carlisle, and Osceola. They have had enough success with the combined process that the other Area Plan Commission jurisdictions are incorporating the process in their Zoning Ordinances as they adopt revisions.

IC 36-7-4-923 &
IC 36-7-4-924 et. seq.

IC 36-7-4-403.5 et. seq.

Personal Reflection

It is tough to be a board of zoning appeals member, because you have to act on facts and legal criteria, not just empathy and sympathy. The BZA cannot legally decide their requests based on compassion, only on whether the variance criteria are met. This will be easier for you (and the applicant) to bear if the applicant understands what you must legally base your decision on. This does not mean that a BZA member should be cold, mean, or rude with an applicant; just that your compassion should not guide your decision. It is difficult not to be moved by tears and tragedy — if you are susceptible, it may be best to leave the BZA membership to someone else.

SUGGESTED RESOURCES

APA Guide for Planning Commissions and Boards. <http://planning.org/education/commissions/>

The Board of Adjustment, by Gail Easley and David Theriaque, APA Planners Press, 2005