

Board of Zoning Appeals: In Depth & Up Close

2010 Land Use Update -- Purdue Video Series

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The Planning Workshop, Inc.

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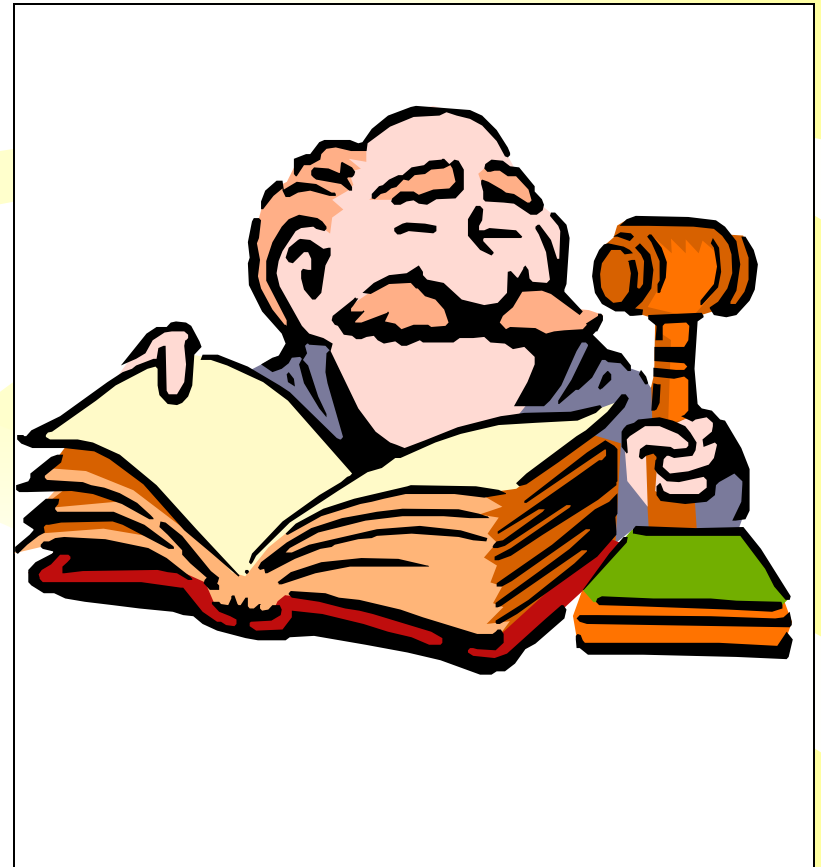
Disclaimers

- See IC 36-7-4-918.6 for counties with populations of 400,001 - 699,999 or 200,001 - 299,999
- Metropolitan Development Commissions have additional regulations related to the BZA. See IC 36-7-4-918.8

Test your BZA Knowledge:

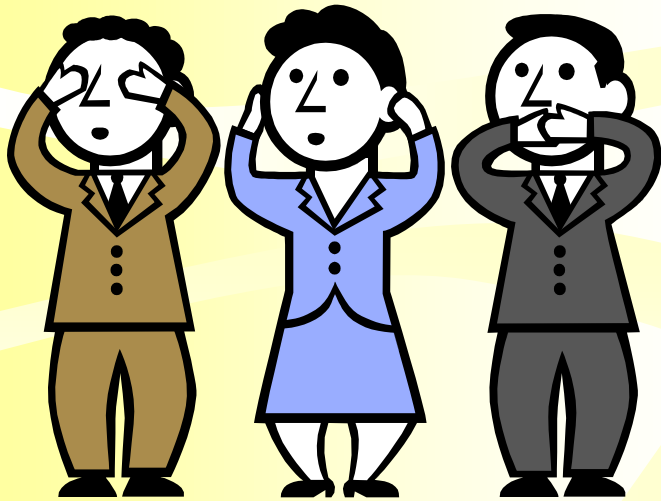
The Board of Zoning Appeals is a *quasi-judicial* body, meaning:

- a) they have to wear long black robes at the meetings
- b) the board's actions are similar to those conducted by courts
- c) every new member gets a gavel, and they can fix traffic tickets



BZA Powers and Duties

BZA has 3 duties:



- 1) Hear variance requests
 - Developmental standards variances
 - Variances of use (not available to area plan commissions)
- 2) Hear special exception /conditional use requests
- 3) Hear appeals from administrative decisions

BZA Responsibility #1: Variances

What is a variance? -- A variance literally means being allowed to vary from the standards of your zoning ordinance -- not having to do what the law requires.

Rules for VARIANCES

#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.

Rules for VARIANCES

#2 -- Caution: Variances are meant to be a safety valve, but may become a "back-door" way of thwarting the zoning ordinance.

Example: 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.

Rules for VARIANCES

#3 -- It is the applicant's responsibility to prove the request satisfies all the variance criteria; it is not the responsibility of the board of zoning appeals to make the case for them!

You should require that the applicant submit written evidence that they meet all the criteria.

Rules for VARIANCES

#4 -- While there is no maximum number of conditions 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.

Rules for VARIANCES

#5 -- Your job will be easier for you (and the applicant and the neighbors) if everyone understands what you must legally base your decision on -- read a brief explanation at the hearing and post a big sheet listing the criteria in the hearing room.

Are you Tough Enough?

- The BZA can not legally decide their requests based on compassion, only on whether the state law variance criteria are addressed.
- 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.

Developmental Standards Criteria

IC 36-7-4-918.5

(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 your community -- why or why not, and what harm can befall it?

Developmental Standards Criteria

IC 36-7-4-918.5

(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?

Developmental Standards Criteria

IC 36-7-4-918.5

(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 ordinance standards -- higher cost is not a practical difficulty

What is a Practical Difficulty?

Consider defining in your rules -- Monroe

County's BZA: *Significant economic injury that:*

(A) Arises from strict application of the Zoning Ordinance to the conditions of a particular, existing parcel of property;

(B) Is not as significant as the injury associated with hardship (it does not deprive the parcel owner of all reasonable economic use of the parcel)

(C) Is clearly more significant than compliance cost.

Adding Extra Criteria for Developmental Standards Variances

Indiana Code says your local ordinance may establish a stricter standard than the "practical difficulties" standard:

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

DANGER -- Not for Area Plan Commissions

Use Variance Criteria **IC 36-7-4-918.4**



(1) the approval will not be injurious to the public health, safety, morals, and general welfare of the community

- *This is same criterion used for developmental standards variances*
- *Consider whether granting the variance will hurt or potentially cause harm to the area -- why or why not, and what harm can befall them?*

DANGER -- Not for Area Plan Commissions

Use Variance Criteria **IC 36-7-4-918.4**



(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

- *This is same criterion used for developmental standards variances*
- *Consider whether neighboring property will suffer any major negative impacts -- what impacts can the neighbors realistically expect?*

DANGER -- Not for Area Plan Commissions

Use Variance Criteria
IC 36-7-4-918.4



(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?

DANGER -- Not for Area Plan Commissions

Use Variance Criteria

IC 36-7-4-918.4



(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? Note that court cases have established that economic opportunity may not be considered, only whether land can yield reasonable return



What is an "unnecessary hardship"?

Consider defining in your rules -- according to Monroe County:

Significant economic injury that:

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

DANGER -- Not for Area Plan Commissions

Use Variance Criteria
IC 36-7-4-918.4



(5) the approval doesn't interfere substantially with the adopted comprehensive plan

Consider whether there are any major conflicts with the comprehensive plan -- what are they?

DANGER -- Not for Area Plan Commissions



Adding Extra Criteria for Use Variances

Indiana Code does not allow your local ordinance
to establish any additional standards

Test your BZA Knowledge:

When can you approve a variance?

- 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 speaks against it



Test your BZA Knowledge:

When else can you approve a variance?

- a) when the board knows there will be some negative impact
- b) when it does not meet all of the variance criteria
- c) when people speak against it



But you better have a darn good reason!

Why approve a Variance if it doesn't meet all the Criteria?

Example: Use Variance Criteria #5: approval doesn't interfere substantially with the adopted comprehensive plan.

Your adopted comp plan is from 1968. (you are, of course, working on a new draft plan)

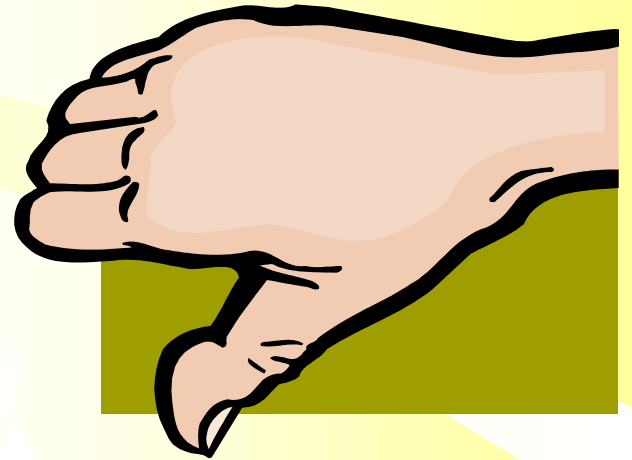


This could be an acceptable reason.

Test your BZA Knowledge:

When can you deny a variance?

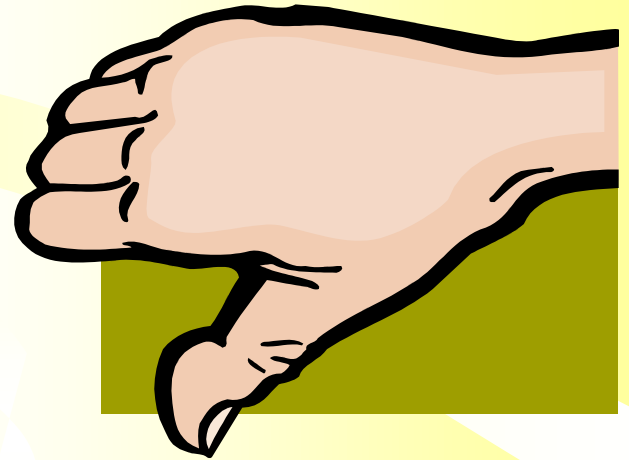
- a) when you don't have a quorum
- b) if the applicant is a jerk
- c) if all variance criteria haven't been met



Test your BZA Knowledge:

When else can you deny a variance?

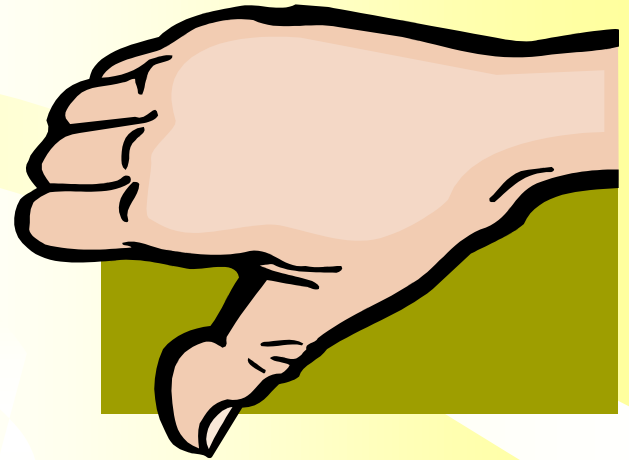
- a) if all variance criteria have been met
- b) if the applicant is a nice guy
- c) if the audience supports it



But you better have a darn good reason!

Why deny a Variance if it meets all the Criteria?

Example: if you are operating under the 3 Developmental Standards Criteria (no additional criteria adopted) and it is obvious that the applicant caused the hardship himself and/or is asking for more variance than necessary



This could be a good reason! Courts have upheld that BZA does not have to grant variance just because all criteria are met.

BZA Responsibility #2: Special Exceptions

- What is a special exception?
- AKA a special use, conditional use or contingent use
- No definition in Indiana Code, but it is generally understood to be a use of property that is allowed by a zoning ordinance under specified conditions -- something that needs to be considered on a site specific basis.

What can be a Special Exception?

- Indiana Code leaves it up to local government to define what uses in what zoning districts should be special exceptions
- Common examples include institutional uses (i.e., schools and churches), drive-through businesses, etc.

Special Exception Criteria

- Indiana Code does not specify criteria for special exceptions, 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 each special exception use.

Rules for SPECIAL EXCEPTIONS

#1 -- Your community needs to codify special exception criteria -- the better your criteria, the easier your decision will be

Rules for SPECIAL EXCEPTIONS

#2 -- One set of rules may not fit every special exception....



Sample General Special Exception Criteria

1. Safe vehicular and pedestrian access, including emergency vehicles
2. Adequate off street parking
3. Refuse and service areas are provided in appropriate locations
4. All utilities necessary for this use are available
5. Screening and buffering are appropriate

Sample General Special Exception Considerations

6. Proposed signs and exterior lighting don't cause safety problems (glare, etc.) and are compatible with other properties
7. The proposed use complies with minimum setbacks and other open space requirements
8. The proposed use is in harmony with the neighborhood, will not cause undue noise, traffic, odors, safety, or environmental hazards, and does not have an adverse effect on neighboring property.

BZA Responsibility #3:

Appeals from Administrative Decisions

- What is an administrative decision?
- BZA reviews appeals from other officials or staff related to an interpretation they made of zoning ordinance or a decision/action they took based on their understanding of the zoning ordinance.

Appeals From Administrative Decisions

IC 36-7-4-918.1

BZA reviews appeals from

- an official, hearing officer, or staff under the zoning ordinance;
- a board or other body (except a plan commission) in relation to the enforcement of the zoning ordinance;
or
- a 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.

Rule for APPEALS

#1 -- Hearing an occasional appeal is not a bad thing -- it forces you to re-examine some of the “gray areas”



Appeals From Administrative Decisions

- The BZA may reverse, affirm, or modify the order, requirement, decision, or determination being appealed.
- For this purpose, Indiana Code gives the BZA all the powers of the official, officer, board, or body from which the appeal is taken.

After appeal is decided, it is a good idea to go back and clarify your zoning ordinance!

BZA: Beware of Ex-Parte Contact

- Planning staff may file a staff report with the BZA relating to the case
- **No one else may contact any BZA member before the hearing** with intent to influence the member's action.



BZA is Required to Have Rules of Procedure

IC 36-7-4-916

- 1) filing of appeals;
- 2) application;
- 3) notice;
- 4) conduct of hearings; and
- 5) whether a variance is for use or development standards

Do you have a copy of your rules?

FYI -- Courts often look first to see if procedural requirements have been followed...

BZA is Required to Prepare Findings of Fact

IC 36-7-4-915

- In addition to minutes, all BZA actions require the preparation of **FINDINGS OF FACT** to support that decision.



Findings of Fact

- 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")

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

Findings of Fact

- The BZA must add a "because" to each of the criterion, with a corresponding explanation
- Trial courts are to remand appeals of BZA decisions back to the BZA to make findings if the BZA has not previously done so

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

Findings of Fact

- It isn't too late -- Indiana case law has held that it was acceptable for BZA to take over 3 months to adopt findings of fact after the hearing and decision

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

But it is better if you do it quicker!

Findings of Fact

- While this delay may have been acceptable to the court, the BZA should 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 or petitioner's written application to cite the findings), or
 - at the next BZA meeting, which have been prepared in the interim by planning staff, the BZA's legal counsel or a board member.

BZA Can Have Alternate Members

IC 36-7-4-909

- If a BZA member has a direct or indirect financial interest, Indiana code allows an alternate member to participate in that hearing or decision in place of the regular member.



RULES for Alternate Members

#1 -- Make appointments in advance and outline the process for alternates in the BZA's rules.

BZA Member Frustrations

- Do you have to “coach” the petitioner?
- Do you spend lots of time researching surrounding conditions, etc.?
- Have you ever had a waiting list to get on a BZA agenda?
- Do your BZA meetings last several hours?
- Do people get mad about the decisions you make?
- Are you scheduling special BZA meetings just to accommodate certain petitions?

BZA Proactive Solutions

- Make the petitioner responsible for proving their case -
- address criteria in writing as part of application
- Take advantage of staff reports
- Amend the Zoning Ordinance to reflect frequently granted variances -- consider sending an annual report to plan commission with recommendations
- Ensure everyone understands why you made decision -
- explain criteria and have discussion
- Appoint a Hearing Officer to hear some cases

What is a Hearing Officer?

- An appointed staff member, board member, or attorney who can conduct hearings on certain cases and approve or deny them.
- The hearing officer acts in place of the Board of Zoning Appeals.

Hearing Officers

- 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.

Hearing Officer Benefits

- Reduce the regular caseload of the BZA by removing minor, non-controversial cases
- Minor cases can be processed through the system much more quickly than if they went to the BZA
- Informal setting is more comfortable and user-friendly for petitioners

Implementing the Hearing Officer Process:

- Subject to Indiana Statutes: IC 36-7-4-923 and 924
- Adopt an amendment to the zoning ordinance which enables the Hearing Officer process
- Adopt an amendment to the Plan Commission/ BZA rules and procedures to enable the process (Hears cases in place of BZA, but subject to the rules & procedures of the Plan Commission)

Need Help But Don't Know Where to Turn?

- Ask your staff, ask your attorney
- Indiana Chapter of APA has a listserve available to members
- Indiana Chapter's *Citizen Planner Training Manual*
- Indiana Chapter Conferences (Fall Citizen Track)
- Nitty Gritty Training

Need Help But Don't Know Where to Turn?

- Indiana Planning Association's *Citizen Planner Training Manual*
 - FREE
 - DO IT YOURSELF (NO TRAINER)
 - DO IT WHEN & WHERE YOU WANT
- www.indianaplanning.org
 - click on education
 - click on citizen

Indiana Planning Association's *Citizen Planner Training Manual*

- Part 1: Plan Commission Basics
- Part 2: BZA Basics
- Part 3: Avoiding Pitfalls
- Part 4: Communications
- Part 5: Rules of Procedure
- Part 6: Ethics
- Part 7: Comprehensive Plans
- Part 8: Zoning Ordinance
- Part 9: Subdivision Control Ordinance
- Part 10: Site Plan Review

Questions?

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