CHAPTER 3
AVOIDING PITFALLS

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WHAT ARE PLANNING PITFALLS?

The planning and development process inherently contains potential problems. This section offers advice to help plan commissions and boards of zoning appeals avoid creating more pitfalls.

Simply put, avoiding pitfalls means being proactive about planning. Too often, plan commissions and boards of zoning appeals find themselves acting in a reactionary way. It may seem easier and more expedient at the time to stick to only addressing the cases before you, but spending more group time up front working on the "big picture" will help lay a good planning foundation. Having a good planning foundation in place can have a huge impact in improving the quality of planning in your community and reducing problems you may encounter down the road. Planning pitfalls most typically happen when things aren't well thought out and details aren't tied down.

Planning pitfalls can also happen when communities establish rules and regulations, but then don't follow them. The first piece of advice in this chapter is an obvious, but sometimes disregarded general principle: you are given a lot of freedom to craft the rules and regulations for your community, so your board or commission needs to make sure you follow them! Now, what else can you do to avoid pitfalls in your community?

TECHNIQUES FOR AVOIDING PITFALLS

Engage in Regular Communication and Coordination

COMMUNICATION, COMMUNICATION, COMMUNICATION! This practice is the number one technique for avoiding pitfalls. Too often in local communities, "the right hand doesn't know what the left hand is doing." Every department, board, commission, and elected official has its own job to do. In most cases, we’d all be much better off if we knew a little bit more about what everyone else does. Not only could this attitude improve the whole planning process by making it more user-friendly, it could also benefit by a sharing of knowledge and expertise, contributing toward a better product and making it less likely that you will be caught unaware. This sharing does not have to be only within the community, but can also be between adjacent communities.
Some basic steps that plan commissions and boards of zoning appeals can take to improve communication and coordination include:

- Consider appointing ex officio members from neighboring plan commissions (e.g., a county plan commission member becomes an ex-officio member of a city plan commission);
- Set up advisory committee(s) to review applications. This is a particularly successful way to increase communication between local government departments and to make use of "in-house" expertise that could result in a better product (e.g., a subdivision review committee or a technical advisory committee);
- Ask commission or board members who represent other bodies to give a short report on their body's activities at each meeting (e.g., park board member on the plan commission reports on park activities);
- Send planning requests that are near the jurisdictional boundary to the adjacent jurisdiction for review and comment -- this process could be formalized through the use of inter-local agreements; and
- Have an annual "Big Picture" retreat, involving a review of local planning activities during the past year, a comprehensive plan check-up and a setting of initiatives for the coming year. Include plan commission, BZA, legislative body and staff. While this will need to be advertised to comply with open door laws, it is not meant to be a public input session.

Refuse Incomplete Applications

Another big problem across the Hoosier state is the acceptance of incomplete planning applications. Once an incomplete application is accepted, the guessing game begins, setting your community up for pitfalls. Staff is unable to do appropriate review without all the required data, and even if it is submitted late, that review will be rushed or incomplete. The public won’t have a clear picture of what is being requested, if plans are incomplete or changing. Worst of all, local planning bodies can’t make the best decisions without complete applications. Accepting incomplete applications is a disservice to everyone involved in the planning process and often leads to unclear actions and records.

Many communities have a history of accepting incomplete applications because it is seen as business-friendly or politically popular. If you are going to change this practice, you will need to get support from your local elected officials. To get that support, you need plan commission and BZA members to be voices for change, in addition to staff and members of the public. You also need to be prepared with concrete examples from your community showing how this practice has caused issues. It will also help your case if you have examples or support of applicants who already follow the rules and submit complete applications – they will likely resent what they see as special treatment for others.
If you are going to accept only complete planning applications, you will need to have an application packet that contains a clear, detailed checklist of exactly what is required. The Area Plan Commission of Tippecanoe County produces “How to” pamphlets for each type of case that clarifies what constitutes a complete submission, states that an incomplete submission will not be put on the agenda, and promises a one-month delay. Their pamphlets are adopted as part of the bylaws. Dearborn County, Indiana doesn’t take any actions involving approval on incomplete applications. They also have a disclaimer that applicants must sign upon submittal that acknowledges they only have 90 days to complete their applications, after which Dearborn County can deny and force them to re-apply.

To make everyone’s job easier, you should require that the petitioners address all required criteria in writing as part of the application, even if they need pre-filing staff assistance to understand—which will also ease the administrative burden associated with adopting findings of fact. Avon, Indiana’s application forms ask the petitioner to complete or address each finding.

Another good practice to ensure complete and correct applications is to require or encourage a pre-filing meeting with staff. While this may seem like an extra step in the process, spending a bit more time preparing up front will result in a better application being filed, avoiding an incorrect or incomplete filing. For example, the City of Greenwood, Indiana requires a pre-application meeting at least one week prior to filing a commercial site development plan. Bloomington, Indiana sets deadlines annually for required pre-application meetings for plat committee, plan commission and board of zoning appeals cases.

Prepare for the Hearing

Before the Public Hearing or Public Meeting...
While it seems like common sense to prepare before a public hearing or public meeting, it never hurts to remind yourself what needs to be done. Some basic hints for making the most of your time before the public hearing are noted below.

7 Habits for Highly Effective Application Review:

1) Start with an open mind.
2) Seek pre-meeting expert review by multiple departments and organizations, preferably acting as a formal review committee. Note: direct staff to share written comments with the applicant before the public hearing or meeting.
3) Trust staff’s expertise and recommendations as part of the written staff report.
4) Read the staff report at least once before the meeting (ASAP is best), and note any questions or concerns – asking staff to do more research if necessary.
5) Unfold and review any maps or drawings.
6) Visit the site if at all possible, but avoid talking with the applicant (ex-parte contact). A ‘drive-by” site visit allows you to observe from the public right-of-way without entering private property.
7) Review the request with the applicable criteria in mind.
A Word About Public Hearings...
Public hearings and public meetings are not the same thing. Not all actions require a public hearing; sometimes a public meeting is all that is mandated. The public hearing is a legal requirement and also an obligation to your citizens. However, don’t fool yourself into thinking that they are the ideal forums for communication. By nature, public hearings must be more formal and structured than a public meeting. There are typically a minimum number of public hearings specified by law (i.e., the plan commission must hold one public hearing for a comprehensive plan per IC 36-7-4-507), but the reality is that they may not be enough. As with ethics, we want to do more than meet the minimum legal standards. The purpose of a public hearing is to hear testimony; the public hearing should not be a forum for a public debate. If you do it right, you can also use a public hearing for educational purposes. If you desire dialogue, discussion or negotiation, schedule a public meeting first.

Follow Due Process
One of the biggest pitfalls planning bodies face is a legal challenge. Remember, anyone can file suit, whether the case has merit or not. Even if you’ve had very few legal challenges, that does not mean that you shouldn’t be prepared. Procedural due process is where most plan commissions have the majority of their legal problems. This is a great topic for an in-house training session! Most citizen planners don’t understand due process. Get your plan commission attorney involved in this training. Indiana judges typically will initially review a planning case to see if the plan commission or BZA followed due process or “rules of fair play.” To make a defensible decision, you must do the following:

Give Adequate and Timely Notice
Interested or potentially interested citizens should receive clear notice far enough in advance to study the proposal and prepare their response. Indiana law and local rules of procedure cover the specifics as legal minimums, but generally newspaper legal adds (required by law) and certified mail (often required by your plan commission and BZA Rules) are not the best way to communicate. While we must follow the statute, there is no reason that your rules can’t go over and above the minimum state law requirements for providing notice. What kind of notice do you give? Many Indiana communities require “yard sign” type notices be posted on the subject property, with a telephone number or a web address listed for more information. Westfield, Indiana is an example of a community that requires Public Notice Signs for rezonings. The applicant is responsible for posting a public notice sign(s) on the property at least ten (10) days prior to the public hearing. The Westfield-Washington Economic and Community Development Department determines sign locations and makes signs available for the applicant.
Give Everyone an Opportunity to be Heard
This is the major and most sensitive part of due process. Space, time and procedure must be adequate so local citizens feel they have had their say. Beware of limitations on how many people can speak at a meeting, of arbitrary time limits for speakers, of limiting speakers to only those people who sign up to speak before the meeting, and of not being able to fit everyone in the room. Listen to the weak voice as well as the loud.

Disclose Everything (and Avoid "Ex Parte Contact")
Interested citizens should have an opportunity to see, hear, and examine all statements and evidence considered by the plan commission (or BZA). However, that does not mean they should have unlimited access to planning officials. Generally, you should refuse to meet privately or talk privately with anyone about a case before you. Ex parte contact is strictly illegal in Indiana for BZA members and, although not illegal, it is generally considered risky activity for plan commissioners. If contact cannot be avoided, disclose it at the public meeting. For more information on ex-parte contact, see Chapter 6, Ethics.

Avoid Conflicts of Interest or their Perception
Staff, plan commission and board members should not accept gifts, food, or travel costs from applicants, interested parties or their representatives. Even if it is innocent, it looks bad to others. You can use your rules of procedure to restrict these things. In any case, state law prohibits direct financial gain. Indiana Code 35-44-1-3 says that a public servant who knowingly or intentionally has a pecuniary interest in or derives a profit from a contract or purchase connected with an action by the governmental entity served by the public servant commits conflict of interest, a Class D felony. Note that in Indiana, indirect financial gain and inability to act in a non-prejudiced manner are also considered conflicts of interest. For more information on conflict of interest, see Chapter 6, Ethics.
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Make the Decision in a Reasonable Amount of Time
Make decisions promptly. If information is missing or in conflict, it is appropriate to continue the case until a specified future meeting, so that the commission can be adequately informed when making a decision. If necessary information is still not submitted after a couple of continuances, consider denying the case without prejudice, and let the applicant refile when he/she has all the necessary information. Beware that continuances may be used by an applicant to wear down the resistance on controversial cases. Your rules of procedure should limit how often and/or how long a continuance may be granted.

Prepare Findings
Decisions themselves are central to the practice of due process. Specific factual findings in support of a final decision made by the plan commission and all decisions made by the BZA are essential. Findings should always be done for these cases and are particularly important if the case is controversial, because it is more likely to end up in court. It is fine to direct staff or your legal counsel to prepare the findings, but don't make them guess what you were thinking. State for the public record at the hearing your reasoning regarding your decision and make sure to reference all of the applicable criteria.

Keep Complete Records
Make sure that everything important stays in the case file, and that the file is available for public review. Complete meeting minutes in a timely manner. Computerization is fine, just make sure you have electronic files for everything in the file, and that they remain accessible to the public.

Make Sure Your Rules are Clear and Follow Them
Think twice before using Robert's Rules of Order as the way to conduct your meeting. The rules are very complicated and if you make an honest mistake following them, the courts can still hold it against you! Consider instead spelling out a simple order of events in your rules. If you haven't reviewed your Rules of Procedure in a while, get them out and read them. Ask about things you don't understand and update them as needed. For more information on rules of procedure, see Chapter 5, Rules of Procedure.

Act In the Public Interest -- for "The Public Good"
While the public good is a somewhat elusive concept, and we may all have slightly different interpretations of what it is, it generally means that you must do what will benefit your community and your citizens in the long run. This should not be confused with a "majority rules" attitude.
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Be Fair
Be fair to everyone involved in the process. Especially if you don’t like an applicant, it is important to provide the opportunity for a fair hearing. It is totally inappropriate for a planning body to demonstrate its prejudice against even the worst developer. One California court found evidence that a developer was so unliked that he could not get a fair hearing in one community, and ruled that the city had made a taking of his property, even though he had never applied for a rezoning! It is okay to apply strong conditions and use extreme diligence in enforcing them, but don’t call a bad developer “out” before he/she ever gets to the plate. Due process is all about being fair to everyone involved in the planning process -- developer, citizens, etc.

Be Reasonable and Keep it in Context
Plan commission and BZAs are not making life or death decisions (although decisions may have big financial or life impacts for some individuals). Don’t ask for unreasonable things (i.e., an extreme example would be a traffic impact study for one new single-family home). Don’t allow attorneys or applicants for either side to rush you, bully you (or people who are speaking) or otherwise drive the process. Remember that the plan commission and BZA members’ jobs are to receive information about a proposal and to use their best judgement on behalf of the entire community. It is important to use not only the evidence you have received for a particular case, but also the plans and policies that have already been put in place to help you.

Be Consistent
If you have consistently made the same decision on the same type of request, don’t suddenly change that decision unless you have an excellent reason for doing so, and point out what is so markedly different about this request. For example, if you always grant a side yard setback variance for new accessory buildings on small lots in the historic district, don’t suddenly deny an application if one neighbor shows up in opposition. Rely on the applicable criteria and you will make the appropriate decision. Don’t get lazy though -- review the criteria anew for each case.

Stay in Control of the Meeting/Hearing
This section outlines some ideas for how to maintain control when running a public meeting or hearing. For additional tips, see Chapter 4, Communications.
Know your Role

Everyone has a role to play at the meeting or hearing. Do you know what your role is?

The President’s or Chairman’s role at the meeting:

- Welcome and introduction of body;
- Explain purpose of meeting and ground rules for conduct;
- Explain what is on the agenda and how the meeting will work (time limits, etc.)—providing warnings about any potential continuances, and stating clearly that there will be no additional notice for the continued meeting;
- Deliver a "play by play" or translation for the audience, when necessary (e.g., “That ends the applicant's presentation, now he/she may only respond to questions” or “NIMBY means Not In My Back Yard”) and repeat/replicate all questions;
- Keep control of the meeting -- be firm when necessary and make sure all remarks go through you (not between opponents and proponents); and
- At the end of the meeting say, "thank you" and tell them what’s next.

The role of the board or commission member at the meeting:

- Be familiar with the material -- don’t open your packet for the first time at the meeting;
- Have a public discussion -- don’t pass notes or whisper;
- Don’t use planning jargon or buzz words;
- Explain yourself -- why are you voting this way? State your findings of fact so the public and the staff understand you correctly;
- Make sure your input is meaningful; and
- Be willing to make or second a motion.

The staff’s role at the meeting:

- Make effective presentations that include a recommendation, and
- Have everything ready and organized.

The commission or board attorney’s role at the meeting:

- Keep the board on track regarding rules and consideration of appropriate criteria.

The applicant’s role at the meeting:

- Be responsible for proving that his/her request satisfies all of the criteria and ordinance standards.

The audience’s role at the meeting:

- You actually have several different audiences, all with different motivations and roles: surrounding property owners, regular meeting attendees, the press, etc. You need to recognize their right to public testimony, their duty to behave decorously, and their perception of what is happening.
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Make Sure You Are Set-up and Ready
Room set-up can make a huge difference in the success of a meeting. Try these tips for a better meeting:

- Make sure the room is big enough for everyone, and that there are an adequate number of comfortable chairs;
- Make sure the acoustics are good;
- Test all audio-visual equipment before the meeting;
- Make sure the temperature is comfortable -- better too cool than too hot;
- Post the criteria on the walls or put them on handouts, so everyone knows what should be considered; and
- Provide agendas for everyone in attendance.

Base your Decision on Legal Considerations
First of all, your decision must be based on applicable criteria from state law and local ordinances. There is no room for sentiment when it comes to planning decisions. State law is briefly discussed in the following sections for rezonings, subdivision plats, plat vacations, variances, special exceptions, and administrative appeals.

Rezonings
In considering zoning ordinances or petitions for change to the zoning map, IC 36-7-4-603 requires that the “plan commission and legislative body shall pay reasonable regard to:

- 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 adapted;
- The conservation of property values throughout the jurisdiction; and
- Responsible development and growth.”

The above criteria are somewhat subjective in nature and can mean different things to different people, even when viewing the same set of facts. A result of this subjectivity is wide discretion in the decision-making authority of a plan commission. For this reason, it is essential that all activities of a plan commission be conducted in an open, public forum and to make the public aware of all of the applicable procedures and options available to the board prior to the start of the hearing. For more information on zoning, see Chapter 8, Zoning Ordinances.
Subdivisions

IC 36-7-4-702 expects the review of a subdivision plat to be objective, acknowledging that the plan commission shall determine if the plat qualifies for approval based on the standards prescribed in your subdivision control ordinance. The ordinance must include standards for:

- Minimum width, depth, and area of lots in the subdivision;
- Public way widths, grades, curves, and the coordination of subdivision public ways with current and planned public ways; and
- The extension of water, sewer, and other municipal services.

The ordinance may also include standards for the allocation of areas to be used as public ways, parks, schools, public and semipublic buildings, homes, businesses, and utilities, and any other standards related to the purposes of the subdivision control chapter. For more information on subdivision control ordinances, see Chapter 9, Subdivision Control Ordinances.

Plat Vacations

Indiana planning law allows a plan commission to approve or deny a petition for vacation of land. The plan commission shall approve the petition for vacation of all or part of a plat pertaining to the land owned by the petitioner only upon a determination that:

- Conditions in the platted are have changed so as to defeat the purpose of the plat;
- It is in the public interest to vacate all or part of the plat; and
- The value of that part of the land in the plat not owned by the petitioner will not be diminished by vacation.
Remonstrance or objections to a proposed vacation may be filed or raised by any person aggrieved by the vacation only upon one or more of the following grounds:

- The vacation would hinder the growth or orderly development of the unit or neighborhood in which it is located or to which it is contiguous;
- The vacation would make access to the lands of the aggrieved person by means of public way difficult or inconvenient;
- The vacation would hinder the public’s access to a church, school, or other public building or place; or
- The vacation would hinder the use of a public way by the neighborhood in which it is located or to which it is contiguous.

If the plan commission approves a vacation of all or part of a plat, the plan commission is required to make written findings of the decision approving the petition and furnish a copy of the decision to the county recorder for recording. If the plan commission disapproves a vacation of all or part of a plat, the plan commission is required to adopt written findings that set forth its reasons for denying the petition and provide the petitioner with a copy.

**Variances**

According to IC 36-7-4-918.4 and IC 36-7-4-918.5, the BZA shall approve or deny variances based on the listed criteria. As part of the review procedures stipulated by state law, the board may impose reasonable conditions as a part of its approval. Review is somewhat subjective. For more information on variances, see Chapter 2, Board of Zoning Appeals Basics.

With respect to variances, there are two major types of variance petitions that may be considered by an advisory or metro board of zoning appeals under Indiana law—variances of use and variances of development standards. Area boards of zoning appeals may only hear variances of development standards. A variance of use from the terms of the zoning ordinance may only be approved by a board upon determination that:

- The approval will not be injurious to the public health, safety, morals, and general welfare of the community;
- The use and value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner;
- The need for the variance arises from some condition peculiar to the property involved;
- The strict application of the terms of the zoning ordinance will constitute an unusual and unnecessary hardship if applied to the property for which the variance is sought; and
- The approval does not interfere substantially with the comprehensive plan.
A variance of development standards from the terms of the zoning ordinance may only be approved by a board upon determination that:

- The approval will not be injurious to the public health, safety, morals, and general welfare of the community;
- 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
- The strict application of the terms of the zoning ordinance will result in practical difficulties in the use of the property.

Indiana Code says that your local ordinance may establish a stricter standard than the "practical difficulties" for developmental standards variances.

**Special Exceptions and Conditional Uses**

According to state statute, the BZA has the powers specified in the zoning ordinance to approve or deny special exceptions, special uses, contingent uses, or conditional uses. The decisions for each of these types of applications / requests must be based upon the terms and conditions set forth in the local zoning ordinance.

**Administrative Appeals**

For items and issues involving appeals, the BZA basically functions as the zoning administrator to determine if the terms of the zoning ordinance are being properly interpreted and applied.

In most cases, the board is also empowered to impose reasonable conditions on the grant of a petition. The ability of the board to consider and impose reasonable conditions is often a valid method of neutralizing the hostilities on both sides of an issue and establishing meaningful dialogue between opposing sides.

**Make a Good, Clear Motion**

This part is where things often break down. Your motion should reference applicable criteria. The president or chair should take a strong leadership role in bringing the group to a vote. Upon termination of the public hearing and any discussion between BZA or plan commission members, the president/chair should call for a motion on the matter. Even if you do not feel strongly, someone should make a motion simply for the purpose of bringing the issue to a vote. If the motion is unsuccessful, any member may then propose another motion to the contrary, again for the purpose of bringing the issue to a vote. If that motion is unsuccessful for a request that is a recommendation to the legislative body (i.e., a rezoning) the plan commission should have a final motion to forward the petition to the legislative body with no recommendation.

For BZA matters and matters where the plan commission makes the final decision (i.e., a subdivision plat), if all motions have failed to carry, the matter should be continued to the next meeting (either through motion or through provisions contained in the rules of procedure).
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Avoid Emotions

The topic of local land use planning can be highly charged in many communities. Emotions can run high from the perspective of the petitioner, remonstrators, and decision-makers. Typically, the investment an individual, family, or business makes in real estate represents the largest single investment they will ever make. This is especially true of individual homeowners and their families. Once things become emotionally charged for one or both sides of a planning issue, involved parties—including plan commission or BZA members—can get caught up in the emotion of the situation. These represent some of the most dangerous times for plan commission and board members in which they may be swayed by the emotions of the issue rather than the facts presented. Decisions made on the basis of emotional reactions are most likely to be flawed decisions, which are more likely to be challenged in court.

Planning requests tend to be emotionally charged when the public is unaware of basic planning and zoning issues and procedures, or when there is fear associated with the unknown impacts of a proposed development. In all public hearings, and especially at public hearings in which controversial matters will be presented, plan commission or board members must remain calm and deliberate in their actions. Members should not “play to the crowd” by intentionally making comments to invoke crowd reactions.

Members have a responsibility to educate those in attendance about the proceedings. In order to avoid confusion and misunderstanding at public hearings, make sure everyone present understands what is being requested and what the BZA or commission can legally consider under Indiana law and local law in making a decision. This should be done one or more ways:

- The president/chair can provide explanation at the beginning of the meeting;
- Staff can make this information part of their presentation;
- Large signs can be posted on the wall (e.g., list of criteria for granting a variance);
- Those in attendance can be provided with hand-outs in addition to an agenda; or
- The information can be included in the legally-required notification sent to surrounding property owners.

In making determinations or final actions, plan commission and BZA members are reminded that their position is one of a public trust and, as such, it is important to stay impartial in deliberations and make decisions based upon the facts.
Beware of Takings

Takings can generally be defined as seizure of private property or substantial deprivation of the right to its free use or enjoyment as a result of government action—for which the property owner must be compensated. In some cases, actions of a plan commission or BZA that have good intentions can be taken to court and determined to be takings, causing numerous problems. For example, plan commissions or BZAs may wish to request or require exactions or “donations” of money or land from a developer as a condition of development approval. These exactions must be carried out carefully, or they may be contested and judged as takings.

The legal ability to request or require exactions varies from jurisdiction to jurisdiction. Examples of exactions include cash contributions, donation of private lands for public use, or the installation or improvement of public infrastructure. The differences in exactions are typically based upon each local jurisdiction’s adopted comprehensive plan (content), zoning ordinance, and subdivision regulations.

**Basic Principles**

The basic principles that must be maintained in any effort to obtain donations are:

- The request must be related to the contents of an officially adopted plan;
- The request must be equitably applied throughout the jurisdiction; and
- The request must be in appropriate relationship to the impact of the particular development on the jurisdiction.

A practical application of the above may be found in a situation where there is a request for the dedication of public right-of-way for the future development of the roadway system. In many jurisdictions, such requests are commonly made and are commonly agreed to by the developer who recognizes the dedications as a “cost of business” and realizes that improved roadways in the future will benefit the proposed development. Problems tend to arise when:

- A developer is new to the jurisdiction and attempts to rely on the written plans and ordinances in the preparation of a development proposal and then finds out the common method of doing business bears little relationship to the written plans and ordinances;
- When a developer is denied her zoning approval because she would not agree to specific dedication request; or
- When the request bears little relationship to the proposed development.

To avoid problems of this nature, a jurisdiction has two primary options. It may:

- Adopt an Impact Fee Ordinance; or,
- Require or request written commitments in connection with the review and approval of a development plan.
**Impact Fees**

Impact fees are payments required by local jurisdictions of new development for the purpose of providing new or expanded infrastructure and services required to serve that development. In order to legally impose impact fees in Indiana, a major comprehensive and capital improvement planning effort is required.

Indiana Code establishes certain requirements for the imposition of impact fees. The items noted below are the minimum requirements for establishing impact fees:

1) A comprehensive plan adopted pursuant to IC 36-7-4-500 series;
2) An impact fee advisory committee;
3) An impact zone or set of impact zones for each infrastructure type covered by the proposed impact fee ordinance;
4) A zone improvement plan, including:
   - Description of existing infrastructure in zone;
   - Determination of current level of service;
   - Establishment of a community level of service;
   - Estimate of development in the zone over next 10 years;
   - Estimate of cost for infrastructure to support a community level of service of projected development; and
   - Description of sources of funds used to pay for infrastructure during the past 5 years.

Once the foundation outlined above is established for the adoption of an impact fee ordinance, Indiana Code then sets forth a series of procedures for the collection, use, and refunding of any fees so collected.

**Commitments / Conditions**

The impact fee legislation discussed above specifically does not prohibit:

“Imposing, pursuant to a written commitment or agreement and as a condition or requirement attached to a development approval or authorization (including permitting or zoning decisions), an obligation to dedicate, construct, or contribute goods, services, land or interests in land, or infrastructure to a unit or to an infrastructure agency.”

An example of the planning effort necessary to request contributions (e.g., dedication of right-of-way as described above) in connection with commitments or conditions may include:

- A comprehensive plan (that provides for the creation of public ways and the preservation of the routes necessary for the development of public ways);
- A thoroughfare plan which identifies specific roadway needs and alignment;
- A zoning ordinance which specifies the circumstances under which a written commitment may be made, modified or terminated; and
- A subdivision control ordinance, which requires the platting of the real estate.
Without the required planning efforts and public policy established by the legislative body through the adoption process, the request for the dedication of right-of-way may not be defensible, if challenged, by a developer. If a jurisdiction adopts an impact fee ordinance, IC 36-7-4-1313 provides that the person dedicating, contributing, or providing an improvement under this section is entitled to a credit for the improvement. The cost of complying with the conditions or requirements imposed by a jurisdiction may not exceed the impact fee that could have been imposed by the unit under IC 36-7-4-1321 for the same infrastructure.

**TOOLS FOR AVOIDING PITFALLS**

**Create a Plan for the Planners**

Just like the communities we serve, it helps if the plan commission and board of zoning appeals have their own plan to follow. Planning bodies need to be proactive in their planning efforts, which means following a set plan of work. Where do you start?

Many comprehensive plans contain an action plan in their implementation section that spells out assigned tasks, and this may be a good starting point for your community. However, even if your community has a comprehensive plan with recommended implementation tasks, it may not be detailed enough to cover what needs to be done. One way some Indiana planning bodies accomplish this is to hold at least one special meeting per year where they assess what happened the previous year and brainstorm what needs to be done in the current year, including plan updates, ordinance amendments, changes to rules, etc.

**Maintain Basic Planning Documents**

One of the most important ways to be proactive is to have, maintain, and utilize a current set of core planning documents. Those documents include a comprehensive plan, zoning ordinance, subdivision control ordinance (or a unified development ordinance), and rules of procedure for the plan commission and board of zoning appeals. It is not enough just to have these documents in place. If your documents are essentially the same as they were 20 years ago, then they need to be updated. There are new land uses, new technical materials and new community members that didn’t exist when these documents were first developed. If your community doesn’t address changes, then planning results will not only be less than they could be—but they may, in fact, be disastrous.
Sometimes things pop up before even the most diligent community can amend their ordinance or plan to address them. What should you do in this situation? First and most importantly, don’t disregard your current ordinance or plan, or you could find yourselves in legal trouble. Second, you can be honest with the applicant and ask for voluntary written commitments that reflect what will be incorporated into future amendments. Many applicants will agree to do this voluntarily in order to generate good will with local officials. It is important to note that a good ordinance or plan is already prepared for this contingency, with language that allows interpretation. For example, Hendricks County, Indiana’s zoning ordinance says, “Principal permitted uses or similar uses consistent with the purposes of this chapter (the zoning district) shall be as follows…”

**Comprehensive Plans**

A comprehensive plan is a guide to the future development of a community. It establishes a vision of what the community wants to look like in the future. The plan should provide a series of written recommendations, guidelines, policies, and/or strategies to help the community achieve its vision.

One simple way to avoid pitfalls is to utilize and maintain an up-to-date comprehensive plan that clearly outlines the goals and objectives for the community’s future development. This plan, its goals, and objectives should be referred to and referenced whenever land use decisions are made. For more information on comprehensive plans, see Chapter 7, Comprehensive Plans.

**Zoning Ordinances**

The basic rationale for a zoning ordinance is to protect the health, safety, and general welfare of the public; to implement the goals and policies of the comprehensive plan; and to preserve and protect property values. When properly coordinated, the zoning ordinance will contain districts, use groupings, and development standards that work together to help implement the land use policies outlined in the comprehensive plan. For more information on zoning ordinances, see Chapter 8, Zoning Ordinances.

**Subdivision Control Ordinances**

Subdivision control ordinances are intended to protect purchasers of real estate by assuring them that the platted property has been reviewed and determined to be developable by the jurisdiction—and to protect the jurisdiction by making sure that property is developed to its standards. For more information on subdivision control ordinances, see Chapter 9, Subdivision Control Ordinances.

**Rules of Procedure**

Both the plan commission and the board of zoning appeals need to adopt rules of procedure, which govern how they operate—including how meetings are run. For more information on rules of procedure, see Chapter 5, Rules of Procedure.
Use Conditions and Written Commitments

The use of conditions should theoretically help make a decision better, but conditions have often backfired in the past, causing plan commissions and BZAs problems. In many instances, the only record of long-term conditions was filed in the planning office; therefore, future land owners were not always aware of the conditions associated with their property. Indiana’s modern written commitment(s) law was developed to address these types of concerns. The intent of this law is to establish conditions as short-term items that must be resolved before final approval is granted (i.e., submit a revised drainage plan before the improvement location permit is issued). Written Commitments are meant to be established as long-term, permanent conditions (i.e., maintain a 6’ tall opaque screen along the west property line or prohibit drive-through businesses on this parcel).

Under Indiana Planning Law, the ability of a plan commission to permit or require written commitments under both the Advisory and Area Planning Law is tied directly to the zoning ordinance. If provided for in a zoning ordinance, a plan commission and BZA may permit or require the owner of property to enter into written commitments concerning the use or development of that property.

The validity of conditions and written commitments for certain planning and zoning functions is outlined in the proceeding sections:

**Rezonings**

Indiana Code doesn’t mention conditions for rezonings; however, the code provides an opportunity for the local legislative body to set up written commitments in the zoning ordinance and specify whether a written commitment may be used for a rezoning or planned unit development (PUD) proposal. The property owner of a development proposal is responsible for entering into written commitments, which are ultimately recorded in the County Recorder’s Office and are binding on future owners of the subject property. Written commitments formalize the long-term conditions attached to zoning approvals and do not affect the validity of any covenant or easement created in accordance with the law. Written commitments may be required by the plan commission, even if the owner does not volunteer commitments. If the written commitments are needed to meet the zoning criteria, but the applicant is opposed to the written commitments, it may make more sense to deny the application.

**Variances**

According to IC 36-7-4-918.4 for Use Variances and IC 36-7-4-918.5 for Variances from Development Standards, the BZA may impose reasonable conditions as a part of its approval. Once granted, a variance runs with the land. Therefore, if a board decides to grant a petition subject to certain conditions, those conditions must relate to the specific elements of the use or development standards applicable to that property and are not dependent upon who the petitioner is. Written commitments may also be employed for variances.
Subdivisions

IC 36-7-4-702 lists the acceptable conditions of primary approval of a plat:

- The manner in which public ways shall be laid out, graded, and improved;
- A provision for water, sewage, and other utility services;
- A provision for lot size, number, and location;
- A provision for drainage design; and
- A provision for other services as specified in the subdivision control ordinance.

While it is possible to ask the applicant to make long-term conditions part of the deed restrictions or covenants for subdivision, written commitments are generally a better idea. Remember, the City or County is not a party to private deed restrictions or covenants, so you may not enforce them; enforcement is up to the developer/homeowner's association.

Avoid Relying on PUDs

Many Indiana communities have been reliant on the use and institution of planned unit developments (PUDs) because their zoning ordinance has not been kept up to date. Since each planned unit development is essentially a "write your own" zoning district, any community that has a lot of PUDs makes administration and enforcement much more difficult for planning staff; each PUD becomes another zoning district, complete with unique standards and uses to learn. Additionally, it is much more difficult for everyone else (realtors, citizens, etc.) to know what is going on with a particular piece of property. It is possible to have a PUD ordinance with real performance standards—but unfortunately most Indiana communities don’t use PUDs that way. PUDs are a good tool when used appropriately to further goals such as allowing creative development (i.e., mixed-use development).
Chapter 3: Avoiding Pitfalls

Beware of Variances

Variances provide a needed relief valve for zoning; however, they can be misused. Beware of “back-door rezoning” that can occur when an applicant asks the BZA to allow a use not normally allowed in a district—or proposes changes to one or more standards in a district which could otherwise be resolved with a rezoning request. If the BZA follows the required criteria, this should not happen.

Keep Good Records

A long term problem that BZAs and plan commissions face is dealing with poor or incomplete records. It is essential that each case have an associated file that contains, at minimum: proof of legal notice, application forms, all related correspondence, minutes, and findings of fact (if applicable). As development efforts are typically long-term in nature, enforcement of decisions may be necessary years in the future. Even if all these things are included in the file, it may still not be enough to make the decision clear. Certain key records deserve more discussion:

**Minutes**

Minutes should be completed and adopted as soon as possible after the meeting. While some planning groups in Indiana may wait months to adopt their minutes, the longer you wait, the less clear your memory is. It is not necessary to create an actual transcript of the meeting to serve as minutes. Minutes should contain a summary of requests, a record of public testimony, a summary of commission or board discussion, a record of motions, and the final outcome—including the vote.

**Findings of Fact**

Not all cases require findings of fact, but for those that do, the advice is similar to that given for minutes. Complete and adopt findings as soon as possible. It is fine to direct staff to prepare the findings, but don’t make them guess what you were thinking. State for the public record (at the hearing) your reasoning regarding the applicable criteria.

**Zoning and Thoroughfare Maps**

Not only do the official zoning maps need to be updated each time there is a zone map change, it is also a good idea to annotate the maps—with references to variances, written commitments, etc. For GIS users, this might be a separate layer. This will provide a “heads up” to anyone checking on the property that there is additional important information to be researched. It is also important to keep the jurisdiction’s thoroughfare map up-to-date to reflect any changes in street classification, alignment, etc.
Chapter 3: Avoiding Pitfalls

Ordinance and Plan Amendments
There is no excuse for not keeping today's electronic documents up-to-date. Still, someone has to take responsibility for getting it done in a timely manner. Make sure that you update documents on your web site at the same time, so that you do not cause confusion or errors to the users. It is still a good idea to follow the old practice of "recodifying" the ordinances occasionally -- you may discover some "lost" amendments.

Plat Maps and Tax Rolls
While the official plat maps and tax rolls are not within the control of the plan commission or board of zoning appeals, it is important that these two things be kept up-to-date to ensure proper notification for planning cases. Forge a good relationship with the local auditor and assessor offices, and lend your support to their budget requests.

Paper Records
Traditionally case files have been kept in paper form, but more and more communities are turning to electronic records for a variety of reasons. Make sure you check with the State of Indiana's Public Access Counselor regarding the Indiana Access to Public Records Act (which governs access to records of public agencies), before you consider destroying any paper records. If you are allowed to destroy paper copies (through legal destruction orders, where applicable), remember that once something is gone, there is no getting it back—so make sure you have a copy of everything before you take that action.

Computer Software
One of the trickiest parts of planning administration is keeping track of deadlines and expiration dates (i.e., for bonds, etc.). Consider investing in computer software programs that will keep planning staff on top of these milestones.

Follow-Up and Enforcement
Even the best decisions will not be effective if they are not properly implemented. Part of every decision-making process should include follow-up, in the form of an on-site inspection to ensure that all requirements, including written commitments have been met. Ideally this would happen before issuance of a Certificate of Occupancy. Building inspectors may be trained to do site review, or planning staff may perform this function.

After implementation, if the property owner fails to maintain the site as required or if there are other violations, communities often begin a long saga of multiple enforcement letters and threats of court. These efforts are typically ineffective and costly of community resources. Consider implementing a more efficient ticketing system instead. The City of Greenwood, Indiana has used ticketing for zoning enforcement for many years, while Bloomington, Indiana uses ticketing to enforce subdivision standards (see Chapter 20.10 ENFORCEMENT AND PENALTIES of their Unified Development Ordinance).