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Neice,Jessica

From:	Nation, Todd
Sent:	Sunday, March 10, 2024 4:40 PM
To:	Azar, George; Hinton,Kandace; DeBaun,Curtis; Edwards,Michelle; Mike Slagle; Boland,Tammy; Sakbun,Brandon; Thompson,Amanda; Wright,Michael
Cc:	Chalos,James; Loudermilk,Cheryl; Dinkel,Anthony
Subject:	EXTERNAL -Surface parking in C9
Attachments:	Kroger.parking.C9.pdf; ATT00001.htm; McGlone.parking.C9.pdf; ATT00002.htm

External Email. - Think Before You Click -- *Help Desk*

Hello again, fellow council members.

In preparation for our discussion of the proposed $3,000,000 ARPA allocation toward Downtown Infrastructure in support of the proposed hotel project at 7th and Wabash, I would like you to review the attached documents. They date from early 2020, when the CIB purchased the Vigo County School Corporation's property at the northwest corner of 7th and Wabash to provide parking for the Hilton Garden Inn.

At that time, HGI was providing their 35-spot surface parking lot east of the hotel for construction of the Convention Center, and plans to build a dedicated parking garage for HGI at the southeast corner of 7th and Cherry had been deemed too costly. The CIB, owners of the Convention Center, then moved to purchase the VCSC property at 686 Wabash to replace the parking spaces lost to Convention Center construction. This sparked a conversation about surface parking lots on Wabash Avenue in the C9 zoning district, which you will see is prohibited by both the spirit and letter of our C9 zoning rules — at least, that's what we thought we had done when we wrote the C9 code.

In preparation for tomorrow's discussion, you will probably want to review the C8 and C9 zoning standards in our City Code (C8 rules inform C9 rules). The preamble for C8 begins in Section 10-134q (which is on page 780 of our 908 page City Code). C9's preamble begins in section 10-140, on page 786.

As you probably know, the whole code is at www.terrehaute.in.gov

I understand that this is all confusing. To me, the bottom line is that developers of the proposed hotel(s) on the VCSC property should build commercial space along the ground floor frontage of the Wabash Avenue as part of this project — not surface parking, screened or otherwise.

Please review these materials and let's discuss your thoughts tomorrow. As you may know, the CIB has always been represented by former state legislator Brian Bosma, of Kroger et. al. in Indianapolis. The other opinion was written by local attorney Gerald McGlone, who was helping me back then.

Enjoy!

Todd
mobile 812-870-4986

KROGER GARDIS & REGAS, LLP
—ATTORNEYS—

MEMORANDUM

TO: Vigo County Capital Improvement Board of Managers

FROM: Kroger, Gardis & Regas, LLP

DATE: January 14, 2020

RE: General Ordinance No. 1 (2020).

On January 7, 2020, Councilperson Todd Nation filed General Ordinance No. 1 (the "Proposal") with the Clerk of the Common Council of Terre Haute, IN ("Council"). The Proposal seeks to amend Article 2 of the City of Terre Haute's Comprehensive Zoning Ordinance ("Zoning Ordinance") by removing the ability of the City Board of Zoning Appeals to grant variances from the current restriction on surface parking lots on parcels along Wabash Avenue or 7th Street in the C-9 District.[1] This Memorandum addresses the legality of the Proposal and details the procedures required to amend the text of the Zoning Ordinance.

1. May the Council legally restrict the ability of the Board of Zoning Appeals to grant variances?

Ind. Code § 36-7-4-918.5 provides that "[a] board of zoning appeals *shall* approve or deny variances from the development standards (such as height, bulk, or area) of the zoning ordinance."[2] Whether a municipality is permitted to curtail the power of a board of zoning appeals (BZA) to grant such variances was considered by the Indiana Court of Appeals in *Strange v. Bd. of Zoning Appeals of Shelby Cty.* In *Strange*, the Petitioner applied for a variance to establish a radio and television sales services shop in a building zoned as residential. The BZA refused to hear the evidence on the Petitioner's petition, stating that it did not have authority under the ordinance to grant the requested variance. A radio service shop was not a special use permitted in the residential district,

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[1] *See* Zoning Ordinance, Sec. 10-207hh.(2).

[2] Ind. Code § 36-7-4-918.5 (emphasis added). The current surface parking restrictions on Wabash and 7th should be considered "development standards," and not permitted "uses" for the following reasons. First, there are no restrictions for surface parking lots under the "use" categories (either primary or accessory) for the C-9 district; indeed, parking is specified as primary use under the C-9 district. Zoning Ordinance, 10-207 r.(2). Next, "surface parking lots not adjacent to the primary use" are a permitted special exception under C-9. Sec. 10-208e.(5). In order to harmonize the restrictions with the permitted special use, the restrictions must be considered development standards. Finally, the Zoning Ordinance currently allows the BZA to grant variances from the off-street parking restriction, which would not be permitted if a parking lot was not a permitted use. *See* Ind. Code § 36-7-4-918.3 ("Neither the area board of zoning appeals nor any other board of zoning appeals continued in existence under the area planning law may grant a variance from a use district or classification under the area planning law.").

and the ordinance at issue provided that "except a use which is not specified as a permitted or special use in any district shall not be permitted as a variance."[3]

On appeal, the Indiana Court of Appeals determined the ordinance conflicted with the enabling statute, which specifically granted the zoning board the authority to grant variances from the terms of the zoning ordinance.[4] Citing the doctrine of preemption, the Court held as follows:

> Zoning ordinances may not override state law and policy; enabling legislation is not merely precatory, but prescribes the parameters of conferred authority.
>
> . . .
>
> [T]he legislature in the enabling act intended to preempt the entire field of legislation with respect to the functions, powers, and authority of zoning boards. Thus, it follows that, any attempt to expand or contract those statutory powers by local governmental entities in an ordinance is ineffective.
>
> . . .
>
> It is easy under the preemption doctrine to reach the conclusion that the powers conferred by an ordinance upon a zoning board must not exceed those delegated by statute or they will be considered ultra vires. Under the same reasoning, however, it is less obvious why those powers may not be somewhat narrowed by the ordinance. Nevertheless, it has been explained that either expansion or contraction of the powers provided by the statute would not enable the board to function in the manner contemplated by the legislature.[5]

The Court further noted that "[l]iterally every jurisdiction which we found to have considered the question holds that a zoning ordinance may not in any way restrict the authority of a board of zoning appeals to grant a variance where the enabling statute endows such board with powers to authorize variances from the terms of any zoning ordinance."[6]

In this case, like in *Strange*, the Proposal would restrict the authority of BZA to grant development standard variances despite its express authority to do pursuant to Ind. Code § 36-7-4-918.5. Accordingly, the Proposal directly conflicts the enabling statute and is therefore void and unenforceable.

2. What is the procedure for amending the Zoning Ordinance?

A proposal to amend (or partially repeal) the text of a zoning ordinance may be initiated by either the Council or the area planning commission (the "Commission").[7] If the proposal is initiated by the Council it must then be referred to the Commission for consideration and recommendation before final action is taken.[8] Within sixty

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[3] *Strange v. Bd. of Zoning Appeals of Shelby Cty.*, 428 N.E.2d 1328, 1331 (Ind. Ct. App. 1981).
[4] Id.
[5] *Strange v. Bd. of Zoning Appeals of Shelby Cty.*, 428 N.E.2d 1328, 1332 (Ind. Ct. App. 1981) (internal citations omitted).
[6] Id.
[7] Ind. Code § 36-7-4-602.
[8] Ind. Code § 36-7-4-607(b).

(60) days of receiving the proposal from the Council, the Commission shall hold a public hearing.[9] The Commission must give notice of the hearing by publishing a notice one (1) time in two (2) newspapers within the political subdivision, at least ten (10) days prior to the hearing.[10] Following the public hearing, the Commission must certify the ordinance to the Council within ten (10) business days of the hearing[11], with either a favorable recommendation, an unfavorable recommendation, or no recommendation.[12]

The Council must consider the Commission's recommendation before acting on the proposal[13], and must hold the vote within ninety (90) days of the certification.[14] If the proposal receives a favorable recommendation from the Commission, the Council may adopt, reject or amend the proposal.[15] If the Council adopts the proposal, it takes effect in the same manner as other ordinances.[16] If the Commission rejects or amends the proposal, it is returned to the Commission for further consideration.[17] If the proposal receives an unfavorable or no recommendation from the Commission, the Council may also adopt, reject or amend the proposal.[18] If it adopts the proposal, it takes effect as other ordinances.[19] If the Council rejects or fails to act on the proposal within ninety (90) days, it is defeated.[20] If it is amended, it is returned to the Commission for further consideration.[21]

In considering the proposal, both the Commission and the Council must pay reasonable regard to: (1) the comprehensive plan; (2) current conditions and the character of current structures and uses in each district; (3) the most desirable use for which the land in each district is adapted; (4) the conservation of property values throughout the jurisdiction; and (5) responsible development and growth.[22]

If the proposal is ultimately adopted by the Council, then the Mayor has the right to veto the ordinance within ten (10) days of passage.[23] If the Mayor exercises the veto, it is defeated unless the Council, at its next meeting, passes the ordinance over the veto by a two-thirds (2/3) vote.[24]

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[9] Ind. Code § 36-7-4-607(c).
[10] Ind. Code § 5-3-1-2, -4.
[11] Ind. Code § 36-7-4-607(c).
[12] Ind. Code § 36-7-4-605.
[13] Ind. Code § 36-7-4-605(d).
[14] Ind. Code § 36-7-4-607(d).
[15] Ind. Code § 36-7-4-607(e)(1).
[16] Ind. Code § 36-7-4-607(e)(2).
[17] Ind. Code § 36-7-4-607(e)(4). The Commission then has forty-five (45) days to consider the rejection or amendment and report back to the Council. If it approves the Council's rejection or amendment, it takes effect as of the date of the Commission's report. If it disapproves the Council action, the Council must take another vote to confirm its rejection or amendment.
[18] Ind. Code § 36-7-4-607(f)(1).
[19] Ind. Code § 36-7-4-607(f)(2).
[20] Ind. Code § 36-7-4-607(f)(3).
[21] Ind. Code § 36-7-4-607(f)(4). The Commission then has forty-five (45) days to consider the amendment and report back to the Council. If it approves the Council's amendment, it takes effect as of the date of the Commission's report. If it disapproves the Council action, the Council must take another vote to confirm its amendment.
[22] Ind. Code § 36-7-4-603.
[23] Ind. Code § 36-7-4-609(d); Terre Haute City Code sec. 10-263.
[24] Terre Haute City Code sec. 10-263c.(13)(C).

The essential question is whether or not parking is considered a use or a development standard.

The case cited in the memo stands only for the proposition that the local zoning ordinance cannot overrule the state's statute which specifies the authority of the board of zoning appeals. I C36-7-4-918.5 grants the board of zoning appeals the right to approve or deny variances from development standards (such as height, bulk, or area). (For reasons I won't go into here, despite the fact that it apparently authorizes boards of zoning appeals to grant use variances, that reasoning does not apply to us and it does not appear that Kroger et al. are arguing that it does)

I reviewed the local ordinance and could find no instance where parking is designated as a permitted use in any zoning district. It is, however, a requirement that any zoning use have, as part of the use of any property, property devoted to use as parking. Section 10-137 (a) provides "to ensure the proper and uniform development of parking areas throughout the city, offstreet parking and loading spaces for every use shall be provided in accordance with the standards established in this Zoning Ordinance"

Section 10-137 (D) provides "For all uses of land including buildings and structures after the effective date of this zoning ordinance, offstreet parking and loading facilities shall be required as accessory uses in conformance with the regulations for the district..."

Thus, it seems to me that while the ordinance does not specify parking as a particular designated use for any particular zoning classification, parking is an accessory use for every zoning classification. Thus, it would be redundant to include it in the list of uses for any particular zoning district. It is a required use for every district It is not a development standard. You might

consider the number of spaces to be a development standard from which a variance can be granted, but parking is a use.

The memo indicates that the C9 district specifies parking as a primary use for that district. I do not know what they are referring to there. The specified uses for C9 are the same as for C8. None of the C8 uses is parking Parking garages are a permitted use, but surface parking and parking garages are clearly dealt with as separate uses under the ordinance.

C9 incorporates C8 accessory uses. C8 defines Accessory Uses as uses which are allowed when they are incidental and subordinate to an adjoining principal use. In light of the above language regarding accessory uses (10-137 (D) this would reinforce the concept that parking is an accessory use to a principal use.

C9 does allow surface parking lots (as a use) not adjacent to the parcel containing the primary use as a Special Use (10-208E) again, parking is considered a use. The memo says they are a special exception, but they are not a special exception, they are a special use.

The very provision involved in the amendment, 10-207hh 2 refers to parking as a use.

With all of these references to parking as a use it is almost nonsensical to say that the parking should be considered development standard and not a use. Throughout the ordinance parking is referred to and considered as a use.

This probably gets too far down into the weeds and is too complicated, but the case cited by Kroger... could stand for the proposition that insofar as 10-207 ii allows the board of zoning appeals to grant a variance from 10 207 hh2 regarding a parking as a primary use it conflicts with state law and is invalid. If that's

the case, the board of zoning appeals is already prohibited from granting the variance which appears to be authorized by the existing language of 10-207ii regarding parking.

10-207 hh 2 provides in part "under no circumstances shall surface parking be a primary use on the lot located along Wabash Avenue or 7th." 10 207ii then purports to grant the board of zoning appeals the right to grant variances from that provision. Since IC C36-7-4-918.5 grants the board of zoning appeals authority only over development standards, and not uses this provision appears to grant them more authority than the statute would allow. The court in the case cited by Kroger... specifically found that the local ordinance cannot expand or contract the statutory powers given by state statute:

> Thus, it follows that, any attempt to expand or contract those statutory powers by local governmental entities in an ordinance is ineffective. *Nucholls v. Board of Adjustment,* (1977) Okl., 560 P.2d 556; *Cole v. Board of Zoning Appeals*, (1973) 39 Ohio App.2d 177, 317 N.E.2d 65; [**12] *Langer v. Planning & Zoning Commission*, (1972) 163 Conn. 453, 313 A.2d 44; *Deardorf v. Board of Adjustment of Planning & Zoning Commission*, (1962) 254 Iowa 380, 118 N.W.2d 78; *Smith v. Paquin*, (1962) 77 N.J.Super. 138, 185 A.2d 673; *Waldorf v. Coffey*, (1957) 5 Misc.2d 80, 159 N.Y.S.2d 852; *Duffcon Concrete Products v. Borough of Cresskill*, (1949) 1 N.J. 509, 64 A.2d 347.