

Bond Case Briefs

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ZONING & PLANNING - INDIANA

Department of Business and Neighborhood Services of Consolidated City of Indianapolis v. H-Indy, LLC

Court of Appeals of Indiana - March 19, 2021 - N.E.3d - 2021 WL 1047361

Two affiliated entities seeking to open retail store in city petitioned for judicial review of Board of Zoning Appeals' (BZA) decision finding proposed use of site was "adult entertainment business," which was not a permitted use in the zoning district and required variance, and declaratory judgment action against city department of business and neighborhood services (Department) alleging it violated entity's constitutional rights by imposing unauthorized litigation hold on permit applications related to site until judicial review was completed.

Actions were consolidated, and all parties filed motions for summary judgment. The Superior Court issued order reversing BZA decision, ordering Department to issue requested permits, and declaring entity's constitutional rights had been violated by imposition of litigation hold. City filed interlocutory appeal.

The Court of Appeals held that:

- Finding that proposed use was an adult bookstore was arbitrary, capricious, and unsupported by evidence;
- Finding that proposed use was an adult services establishment was arbitrary, capricious, and unsupported by evidence; and
- Due process rights of entity seeking to open retail store were violated by unauthorized litigation hold placed until completion of judicial review.

Board of Zoning Appeals' (BZA) finding that proposed use of site for retail store was an adult bookstore requiring variance was arbitrary, capricious, and unsupported by substantial evidence; city department of business and neighborhood services' (Department) license administrator made determination that proposed use was an adult bookstore without considering projected revenue data specific to proposed store, adult products were projected to make up a maximum of 18.1% of site's weekly expected revenue and take up 12.% of retail floor space, and city could not prove entity seeking to operate store intentionally mischaracterized merchandise in order to fall below 25% floor space and weekly revenue limits.

Board of Zoning Appeals' (BZA) finding that proposed use of site for retail store was an adult services establishment providing services in two or more specified categories requiring variance for operation was arbitrary, capricious, and unsupported by substantial evidence; city presented no evidence specific to proposed store that its proposed use was to provide services involving specified sexual activity or display of specified anatomical areas in any category other than the sale of books, magazines, periodicals, photos, films, cassettes, slides, tapes, or records.

Due process rights of entity seeking to open retail store in city were violated by unauthorized litigation hold placed by city department of business and neighborhood services (Department) until

completion of judicial review of Board of Zoning Appeals (BZA) decision finding affiliated entity's proposed use of site required variance, where entity had property interest in site, harm to entity occurred when department indicated it would not process any permit application, and any attempt by entity to submit applications would have been futile.