



## MEMORANDUM

TO: Members of the Fire Prevention and Building Safety Commission

FROM: Douglas Boyle  
Director, Fire Prevention and Building Safety Commission  
Indiana Department of Homeland Security

DATE: September 29, 2017

RE: Briefing Materials for October 2, 2017 Commission Meeting

### Discussion of Local Plan Review

As you are all aware, local plan review will again be an important topic of discussion in next week's meeting. Before this commission takes any further action on Local Plan Review, General Counsel Jonathan Whitham and I want to provide you with some background and recent history on Local Plan Review, and explain why the August vote certifying South Bend and Monroe County as Tier I local plan review units was legally insufficient. Due to its insufficiencies, the August vote will need to be rescinded and annulled at next week's meeting.

#### **History of Local Plan Review**

Before getting into the legal insufficiencies of the August vote, let me provide you with some overview history of local plan review over the last few decades. In 1987, IC 22-15-3-1 first established that "the office (office of the building commissioner) **shall** issue a design release for: (1) the construction of a Class 1 structure to an applicant who qualifies under section 2 or 3 [IC 22-15-3-2 or IC 22-15-3-3] of this chapter; or (2) the fabrication of an industrial building system or mobile structure under section 4 [IC 22-15-3-4] of this chapter. The precedence of local plan review was established under IC 22-15-3-1(e) which asserted: "... the office **may** issue a design release based on a plan review performed by a city, town, or county if: (1) the state building commissioner has certified that the city, town, or county is **competent**; and (2) the city, town, or county, has adopted the rules of the commission under IC 22-13-2-3." In February 1988, In accordance with statute, the Fire Prevention and Building Safety Commission adopted administrative rules under 675 IAC 12-7 that established administrative procedures for the submission of applications and administering of a written examination to determine competency by the office of the state building commissioner.

While IC 22-15-3-1 and 675 IAC 12-7 established local plan review as a possible option, the power to actually issue a construction design release still lied with the office of the state building commissioner. When the Indiana Department of Homeland Security and the Division of Fire and Building Safety were established in 2005, IC 22-15-3-1 was amended to place the power to issue design releases in the hands of a building law compliance officer employed by the Division of Fire and Building Safety. The processes for local plan review remained unchanged, and the power to certify a city, town or county still lied in the hands of the building law compliance officer. However, these powers were placed back in the hands of the state building commissioner, appointed by the governor, when IC-22-15-3-1 was amended again in 2014.

In addition to re-establishing the state building commissioner, the 2014 amendments to IC-22-15-3-1 removed the test approved by the commission as a means of determining competency, and required the commission (FPBSC) to establish “**objective criteria**” for certifying the competency of a city, town, or county by July 1, 2015. The commission developed and passed its “objective criteria” for local plan review in April 2015. However, the 2014 amendments to IC-22-15-3-1 created conflicts with administrative rule 675 IAC 12-7 in its current form. The agency submitted a proposal for updates to 675 IAC 12-7, and that proposal is still in the process of seeking an exemption to the current rule making moratorium.

In 2016, IC 22-15-3-1(a) was amended to its current form to establish that the state building commissioner or a city, town or county **certified by the commission** shall issue design releases for the construction of Class 1 Structures. IC 22-12-3-1(d) was also amended to establish that the commission **may** certify a city, town, or county as qualified to issue design releases, **if** the city, town, or county meets the commission’s “objective criteria” and has adopted the commission’s rules. While the current statute grants the commission the authority to certify a city, town, or county to review plans and issue design releases, the commission is by no means required by statute to do so.

### **Legal Insufficiencies of August vote on Local Plan Review**

Both IDHS legal and counsel for the Commission recommend annulling the August vote in which the Commission voted to certify both South Bend and Monroe County as eligible for Tier 1 Local Plan Review for the following reasons:

1. A proposed rule has been drafted and submitted for review. This process can take time, but it is the only option (currently) to establish binding and legally effective procedures for certifying a local and maintaining a central repository of the plans submitted and CDRs issued.
2. The “objective criteria” are not currently in statute or administrative code which means they are not binding on the commission, state, or applicants. So even if a local unit meets the “objective criteria,” any plans reviewed or CDRs issued could be challenged since the local would have no legal authority to review plans or issue a CDR. Adopting the “objective criteria”

into administrative code would solve this issue which is the reason the commission started the rulemaking process in 2016.

3. Even if the objective criteria were effective and binding, neither South Bend nor Monroe County has established an agreement with IDHS to review plans or issues CDRs—a requirement which is set forth in the objective criteria adopted by the Commission in 2015.

4. The last correspondence received from South Bend which requested that they be considered for local plan review indicated that they would only qualify for Tier II status. At the August Commission meeting, the commission voted to certify South Bend for Tier I Local Plan Review.

### **Recommendation for October Commission Meeting for Local Plan Review**

1. Rescind/annul the August Commission vote certifying South Bend and Monroe County
2. Allow IDHS to review the proposed draft rule on local plan review and provide updated recommendation to the commission at a later date.

### **Recommended Procedures for Tabling a Variance**

The list of variances which have been tabled continues to grow at each meeting. IDHS recommends that Commission members review each variance request and application on the agenda, and unless there is a specific request from a proponent or specific questions from commissioners that need to be addressed at a future meeting, vote on each application rather than table it until the next meeting. This will reduce the number of tabled variances which need to be discussed at each meeting and will also (hopefully) encourage applicants to pay very close attention to detail with their applications. If there is no proponent available to speak on behalf of an application, IDHS recommends that the Commission either approve or deny the request based on the information in front of them.