Received: 4/21/2025 6:08 PM

IN THE
INDIANA SUPREME COURT

No. 23A-MI-1729

MONROE COUNTY BOARD OF ZONING APPEALS, Appellant, v. BEDFORD RECYCLING, INC., Appellee.	)	Appeal from the Monroe Circuit Court Trial Court Cause No. 53C06-2209-MI-1773 The Honorable Kara E. Krothe, Judge

BRIEF OF AMICUS CURIAE INSTITUTE FOR JUSTICE IN SUPPORT OF APPELLEE

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INTEREST OF AMICUS CURIAE

The Institute for Justice is a nonprofit, public-interest law firm dedicated to defending the foundations of a free society, including private property rights. As part of that mission, IJ established its Zoning Justice Project, which regularly challenges unjust and arbitrary zoning and land-use requirements that violate those foundational rights under the federal and state constitutions. *See, e.g.*, *Diagne v. City of South Fulton*, No. 24CV010646, 2024 WL 5466376 (Ga. Super. Ct. Dec. 16, 2024); *Flathead Warming Ctr. v. City of Kalispell*, 756 F. Supp. 3d 985 (D. Mont. 2024); *Catherine H. Barber Mem'l Shelter, Inc. v. Town of North Wilkesboro*, 576 F. Supp. 3d 318 (W.D.N.C. 2021); *see also infra* at 16, 18, 19.

SUMMARY OF ARGUMENT

This brief proceeds in three parts. Part I explains that the right to freely use private property is deeply embedded in both this state's and our nation's history. Part II describes how modern zoning inverts that tradition by allowing local governments to regulate even the smallest details of how we live and work. And Part III demonstrates how the wide-ranging power given to local governments by zoning laws—and particularly by the conditional-use permit process—opens the door to abuse.

All of this should inform the way that the Court views this case. The Court explained nearly two hundred years ago that protecting property rights "is one of the chief ends of government," "even where there is no constitutional requirement on the subject." *State v. Beackmo*, 8 Blackf. 246, 250 (Ind. 1846). Given this history, the Court of Appeals erred in expanding the immense power of zoning boards—thereby

diminishing property rights—by allowing the Monroe County Board of Zoning Appeals to revoke a conditional-use permit by simply labeling it an "error of law." Ultimately, when there is a question whether a property owner may lawfully use their property in the manner they choose, the tie should go to the free exercise of property rights. This is especially so when—as here—there is no evidence that the use would harm public health or safety.

ARGUMENT

I. The right to freely use property is deeply rooted in both this state's and this nation's history.

A. The right to use private property is fundamental.

Long before our federal and state constitutions were formed, private property was understood to be one of the three "great and primary rights," on par with personal liberty and personal security.[1] This "absolute" and "inherent" right included "the free use, enjoyment, and disposal" of property.[2] As John Locke explained, the right is one of the natural rights we retain after subscribing to the social compact. His words now appear in different forms in the Declaration of Independence and most state constitutions: "[A]ll men by nature are equal" and "[m]an being born, . . . hath by nature a power, . . . to preserve his property, that is, his life, liberty and estate."[3]

The Framers of the United States Constitution embraced that view. James Madison wrote that government was "instituted to protect property of every sort,"

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[1] 1 William Blackstone, *Commentaries* *141.
[2] *Id.* at *138.
[3] John Locke, *Second Treatise of Government* § 54, at 31; § 87, at 46 (C.B. Macpherson ed., 1980) (1690).

and "that alone is a *just* government, which *impartially* secures to every man, whatever is his own."[4] James Wilson explained that protecting property includes protecting the "right to possess, use, and to dispose of a thing."[5]

Indiana's history likewise shows deep respect for property rights. Its constitution, like that of many other states, begins with a Lockean natural rights provision enshrining "inalienable rights," including to "life, liberty, and the pursuit of happiness." Ind. Const. art. 1, § 1. Those rights embrace "the right to acquire and quietly enjoy private property." *New Albany & Salem R.R. Co. v. Tilton*, 12 Ind. 3, 8 (1859); *see also Dep't of Fin. Insts. v. Holt*, 108 N.E.2d 629, 634 (Ind. 1952) ("Property . . . includes the right to acquire, possess, use and dispose of it without diminution save by the law of the land."). Thus, in 1846, Justice Perkins wrote that "[i]n all enlightened nations, even where there is no constitutional requirement on the subject, . . . to maintain secure to the citizen the enjoyment of his private property is one of the chief ends of government and a most sacred obligation." *State v. Beackmo*, 8 Blackf. 246, 250 (Ind. 1846). Echoing Blackstone, this Court described "the right to property" as "absolute" and declared that it "must of necessity be protected from legislative interference, irrespective of constitutional checks and guards." *Andrews v. Russell*, 7 Blackf. 474, 477 (Ind. 1845).

[4] James Madison, *On Property* (Mar. 29, 1792).
[5] 2 *The Works of James Wilson* 711 (Robert G. McCloskey ed., 1967).

B. This Court and the U.S. Supreme Court have guarded this right by striking down zoning restrictions.

When zoning laws began to emerge in the twentieth century, courts maintained serious protections for property rights. In *Buchanan v. Warley*, for example, the United States Supreme Court struck down a racial zoning code because the "essential attributes" of property necessarily included "the right to acquire, use, and dispose of it." 245 U.S. 60, 74 (1917). And just two years after greenlighting zoning in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the Supreme Court decided *Nectow v. City of Cambridge*, 277 U.S. 183 (1928). In *Nectow*, a zoning law prevented the plaintiff from using a 100-foot strip of his land for commercial purposes. But, as here,[6] such commercial uses were consistent with surrounding uses, and the strip was ill-suited for residential purposes. *Id.* at 186–88. The Court determined that the zoning restriction did not "substantial[ly] relat[e]" to public health, safety, or welfare, and recognized that the restriction greatly diminished the property's value. As a result, the Court held that "the invasion of the property . . . was serious and highly injurious" and struck down the zoning restriction on Fourteenth Amendment due-process grounds. *Id.* at 188–89.

Nectow is still good law, and its holding and rationale have been applied by both the federal courts and the Indiana Supreme Court. This Court cited *Nectow* in *Board of Zoning Appeals v. Koehler* to invalidate a zoning ordinance that prevented the plaintiff from building a shopping center on her 20-acre property because it was

[6] *See* Appellant's App. Vol. III, p. 78 (planning commission report).

zoned residential. 194 N.E.2d 49 (1963). The record showed the proposed shopping center posed no harm to its residential district and would even enhance the value of the surrounding properties. *Id.* at 53. The Court therefore held the ordinance unconstitutional because it "invaded" the plaintiff's "property rights" by prohibiting a use that "would not adversely affect the public health, comfort, morals, safety or welfare." *Id.* at 54–55.

Similarly, this Court in *Board of Zoning Appeals v. La Dow* struck down a zoning ordinance that prohibited gas stations in areas where other commercial uses were permitted—because no evidence "indicat[ed] that the subject ordinance outlawing filling stations in the commercial districts of Mishawaka is in the interest of public safety, health, morals or welfare[.]" 153 N.E.2d 599, 601 (Ind. 1958); *see also Metro. Bd. Zoning Appeals v. Gateway Corp.*, 268 N.E.2d 736, 740 (Ind. 1971) (affirming reversal of board's denial of a variance to build townhomes on a property zoned single family residential and holding the zoning ordinance unconstitutional); *Metro. Bd. Zoning Appeals v. Sheehan Constr. Co.*, 313 N.E.2d 78, 83 (Ind. Ct. App. 1974) (affirming reversal of board's denial of a variance to build a shopping center in a residential district and holding zoning ordinance unconstitutional).

Both our nation's history and the high-court opinions of Indiana and the United States teach that the right to use property is fundamental and the government's power to restrict it is limited. Those principles are relevant "even where there is no constitutional" claim at play. *Beackmo*, 8 Blackf. at 250. And the deeply-rooted right to "possess, use and dispose of" property is at stake here, *Holt*, 108 N.E.2d

at 634, giving another reason this Court should scrutinize the BZA's revocation decision, *see* Pet. Trans. at pp. 7–8.

II. To everyone's detriment, modern zoning flies in the face of historical tradition.

Laws dictating how all private land in a jurisdiction may be used and what may be built on it "run[] directly counter to" the property rights that enjoy a rich tradition of protection.[7] Yet, that is exactly how modern zoning laws frequently work.

Zoning was a response to the industrial growth and population shifts in the early twentieth century. Though purportedly rooted in health and safety, some of the first zoning codes were designed, unabashedly, to prevent immigrants and minorities from establishing themselves in certain communities.[8] In a second wave of zoning in the 1970s, governments across the country "aggressively expanded use segregation, significantly tightened density rules, and imposed months of additional public review on development applications."[9]

The explosion of zoning in recent decades has made society as a whole less prosperous[10] in large part because zoning laws often unnecessarily hamstring or prohibit needed businesses. Entrepreneurs who want to start home-based businesses, for example, such as home bakers or tutors, are frequently restricted by outdated,

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[7] Howard Polsky, *Exclusionary Zoning: Will the Law Provide a Remedy?*, 8 Ind. L. Rev. 995, 996 (1975).
[8] *See* M. Nolan Gray, *Arbitrary Lines: How Zoning Broke the American City and How to Fix It* 24–25 (2022).
[9] Gray, *supra* note 8, at 64.
[10] Gray, *supra* note 8, at 139.

one-size-fits-all zoning regulations.[11] In many states, as was the case here, entrepreneurial property owners are also required to seek a conditional-use permit[12]—a long, complicated process that gives zoning authorities broad discretion to grant or deny the use, often based on input from members of the public, including existing competitors.[13] And new, innovative businesses that weren't contemplated by the drafters of a zoning code "often face substantial permitting hurdles"[14] if they are not outright banned. Even when businesses are permitted to operate, they are subject to red tape, delays, and skyrocketing costs. Especially for small businesses, "zoning rules . . . tend to be the most burdensome part[]" of getting off the ground.[15] These byzantine processes drive up costs and make us poorer as a nation. In a recent study, economists Gilles Duranton and Diego Puga explored the foregone wealth caused by zoning restrictions. According to their model, if just seven major U.S. cities abolished their zoning laws, the U.S. per capita income would rise by almost eight percent.[16]

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[11] *See generally* Nicole Stelle Garnett, *On Castles and Commerce: Zoning Law and the Home-business Dilemma*, 42 Wm. & Mary L. Rev. 1191 (2001).
[12] *See* Jennifer McDonald, Institute for Justice, ~~*Work*~~ *Entrepreneur From Home: How Home-Based Businesses Provide Flexibility and Opportunity—and How Cities Can Get Out of Their Way* 3 (2022), https://ij.org/wp-content/uploads/2022/01/entrepreneur-from-home.pdf.
[13] *See infra* at 13–20.
[14] Gray, *supra* note 8, at 38.
[15] Andrew Meleta & Alex Montgomery, Institute for Justice, *Barriers to Business: How Cities Can Pave a Cheaper, Faster, and Simpler Way to Entrepreneurship* 2 (2022), https://ij.org/wp-content/uploads/2021/12/Barriers-to-Business-WEB-FINAL.pdf.
[16] Gilles Duranton & Diego Puga, *Urban Growth and Its Aggregate Implications*, 91 Econometrica 2219, 2222 (2023).

III. Modern zoning opens the door for local governments to abuse broad power, especially in the context of conditional-use permits.

The modern zoning apparatus not only causes social and economic harm but also hands local officials the power to dictate the details of where and how people can live and businesses can operate. That power—and the potential for its misuse—is at its zenith in the conditional-use permit process, which gives officials nearly unlimited discretion over whether certain businesses may operate and the authority to impose the conditions for their operation. That discretion runs afoul of the Constitution when it arbitrarily interferes with vested property rights or is exercised at the behest of powerful local interest groups and existing businesses resistant to new entrants.

A. The conditional-use permit process entrusts zoning boards with unbridled power.

Typical zoning ordinances provide permissible uses, impermissible uses, and conditional uses. A conditional use (sometimes called a "special use") is a use that is permitted, but only if a zoning board determines that the property owner has met certain conditions and the board issues a conditional-use permit ("CUP"). *See Eberhart v. Ind. Waste Sys., Inc.*, 452 N.E.2d 455, 459 (Ind. Ct. App. 1983).[17] Those conditions can be enumerated in the relevant zoning code or crafted on an ad hoc basis by the reviewing zoning board.

This process confers "a significant amount of discretion" on zoning boards. *Wastewater One, LLC v. Floyd Cnty. Bd. of Zoning Appeals*, 947 N.E.2d 1040, 1049

[17] *See also* Jacob Green, Comment, *When Conditions Go Bad: An Examination of the Problems Inherent in the Conditional Use Permitting System*, 2014 BYU L. Rev. 1185, 1187–89 (2015).

(Ind. Ct. App. 2011) (citation omitted). Under Monroe County's zoning ordinance, for example, the Board of Zoning Appeals—the members of which are appointed, not elected, *see* Zoning Ordinance § 821-2—has the power to deny an application if it determines that the proposed conditional use:

- "conflict[s] with the general purposes of the Zoning Ordinance or with the goals and objectives [of] the Comprehensive Plan," *id.* § 813-5(C);
- would not be "harmonious" with surrounding properties and uses, *id.* § 813-5(F); or
- would not "produce a total visual impression and environment which is consistent with . . . the neighborhood," *id.* § 813-5(G).

The Board also enjoys further discretion to "impose" any additional "specific conditions" that it broadly deems necessary "to protect the public health, and for reasons of safety, comfort and convenience (e.g., to ensure compatibility with surroundings)." *Id.* § 813-6. Indiana law requires only that those additional conditions be "reasonable," without providing more specific guidance or limits. Ind. Code § 36-7-4-918.2. Failure to comply with those (extratextual) conditions can result in permit denial or revocation. *See* Zoning Ordinance § 813-6.

Given these extraordinarily capacious guidelines, the Monroe County BZA, like many other zoning boards nationwide, has "almost unbridled" authority to impose and enforce conditions related to almost any aspect of a proposed use.[18] With criteria so open to interpretation, it is nearly impossible for potential applicants to understand how to comply with the law.

[18] *See* Green, *supra* note 17, at 1196.

Such open-ended standards—and the power to impose additional, unknown conditions—also come with a host of potential constitutional infirmities. For example, they may violate equal-protection or substantive-due-process guarantees if the zoning board draws irrational distinctions or imposes arbitrary conditions. *See, e.g.*, *Koehler*, 194 N.E.2d at 54–55 (government may not impose "arbitrar[y]" zoning restrictions consistent with due process). Such standards could also be unconstitutionally vague if they encourage "resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). Or they could violate the nondelegation doctrine if a zoning board is left "absolutely unguided" in determining whether to issue a permit.[19] Finally, additional conditions can constitute monetary or real property exactions, allowing the government to hold a property owner hostage by withholding a permit until it accepts the additional condition.[20]

B. The conditional-use permit process can interfere with vested rights.

Additional constitutional issues emerge when zoning boards destroy the vested property right in a CUP by revoking or otherwise terminating the permit. Generally, a property owner acquires a "vested right" in his CUP if he, "(1) relying in good faith, (2) upon [the grant of a CUP], (3) . . . has made substantial changes or otherwise committed himself to his substantial disadvantage[.]" *Metro. Dev. Comm'n of Marion County v. Pinnacle Media, LLC*, 836 N.E.2d 422, 425–26 (Ind. 2005), *clarified on*

[19] Green, *supra* note 17, at 1199.
[20] Green, *supra* note 17, at 1201–04; *see also* Gray, *supra* note 8, at 43.

reh'g, 846 N.E.2d 654 (Ind. 2006). Property owners therefore have a vested right to continue a particular use if they have, as here, incurred substantial expenses in good-faith reliance on the issuance of a CUP. But zoning boards often abuse the CUP process to extinguish that right. That can happen in two different ways.

First, zoning boards often set expiration dates as one of the conditions attached to a CUP.[21] This gives zoning boards greater bargaining power to force property owners to accept new conditions during the renewal process that "could unduly burden the property."[22]

Second, zoning boards often unconstitutionally revoke CUPs arbitrarily. In a case remarkably similar to this one, the City Council of Kalispell, Montana voted unanimously to grant a CUP to a Warming Center that would provide warm and safe beds for homeless individuals during the winter. *See Flathead Warming Ctr. v. City of Kalispell*, 756 F. Supp. 3d 985, 988 (D. Mont. 2024). But three years later, the political winds changed. Growth in the homeless population in Kalispell led to public backlash against the Warming Center, and the City Council decided to revoke its CUP even though the Center had a vested right in the permit. Like the BZA here, Kalispell argued that the Center's CUP application hadn't been accurate and made general, unsubstantiated allegations of problems the Center had caused before ultimately revoking the CUP. *Id.* at 999–1000. After the Warming Center obtained a TRO to remain open, *id.* at 1007, the City restored the CUP.

[21] *See* Green, *supra* note 17, at 1204.
[22] *See* Green, *supra* note 17, at 1207.

This case is yet another example. The BZA revoked Bedford Recycling's permit almost a year after it issued it. *See* Pet. Trans. at pp. 4–5. In that time, Bedford Recycling relied on the CUP and spent "tens of thousands of dollars" preparing for the facility. Appellant's App. Vol. III, pp. 92, 150. That is enough to create a vested right in the CUP. *See, e.g.*, *City of New Haven v. Flying J, Inc.*, 912 N.E.2d 420, 426–27 (Ind. Ct. App.), *trans. denied*, 912 N.E.2d 560 (Ind. 2009) (holding that, although Flying J hadn't broken ground on its planned travel plaza, it nevertheless had a vested right to develop based on the "tens of thousands of dollars [it spent] on engineering and surveying" before the zoning ordinance was amended to prohibit the plaza). If the Court of Appeals' decision in this case stands, Indiana zoning boards will be empowered to revoke a CUP whenever they change their mind, as long as their official "explanation" includes a plausible "error of law," regardless of the board's true motivation and regardless of the reliance interests at stake. Ct. App. Op. pp. 2, 16–17.

C. The conditional-use permit process makes zoning decisions susceptible to political influence, including from existing businesses trying to keep out competitors.

Finally, the CUP procedure is emblematic of "one of the most serious criticisms of the zoning process": that it is "tainted by politics and the parochial interest of local pressure groups."[23] The process is particularly susceptible to those outside influences both because of the broad discretion it gives local zoning boards, *see supra* at 13–15,

[23] William F. LeMond, *Where Is Indiana Zoning Headed?*, 8 Ind. L. Rev. 976, 977 (1975).

and because a common requirement in the permit process is holding a public hearing where anyone may speak for or against any proposed project. *See, e.g.*, Monroe County Zoning Ordinance § 813-3(A), (D)–(G). Applicants are therefore placed at the mercy of special-interest groups and vocal minorities.

The result is often local governments putting the brakes on much-needed, but unpopular businesses. For example, in North Wilkesboro, North Carolina, the Board of Adjustment denied a CUP to a homeless shelter even though it satisfied all the criteria. It did so only because several neighbors testified against the shelter during the public hearing on its application. As the Board Chair acknowledged, the shelter complied with "the letter of the law," but that didn't "necessarily mean it belongs there." *Catherine H. Barber Mem'l Shelter, Inc. v. Town of North Wilkesboro*, 576 F. Supp. 3d 318, 326 (W.D.N.C. 2021). The same thing happened to the Kalispell Warming Center, where political backlash against the homeless—rather than compliance issues—caused the City Council to revoke its CUP. *See supra* at 16.

Established businesses also wield their influence to prevent competitors from opening. Over half a century ago, this Court warned of the dangers of this type of pressure on the zoning process. In *Town of Homecroft v. Macbeth*, an oil company applied for a variance to use a property as a gas station. 148 N.E.2d 563 (Ind. 1958). But "the vice-president of a neighboring competitive oil company" encouraged an "indignant protest," after which the Homecroft BZA denied the variance.[24] Holding

[24] LeMond, *supra* note 23, at 985.

the ordinance restricting the use of the property unconstitutional, this Court cautioned:

> [T]he power to restrict the uses of private property under the police power should be exercised with caution, and . . . when the power . . . is vested in municipal officers, who are not trained in the history and traditions of the law, *and who may be particularly subject to personal and political considerations*, there exist grave dangers that owners may be deprived of their constitutional rights in the use of their property.

Id. at 567 (emphasis added); *see also id.* at 566 ("The determination of a petition for a variance cannot be determined by a poll of the sentiment of the neighborhood.").

Decades later, though, local governments nationwide are still using zoning as a tool to tamp down competition. In South Fulton, Georgia, for example, Awa Diagne tried to open an African hair braiding salon in 2024. The city's planning and zoning commissions approved her special-use permit, but the City Council denied her application after the owner of a nearby salon complained about the competition that Awa's salon would create. The City Council explicitly based its decision on protectionist concerns about Awa's salon competing with existing businesses. *Diagne v. City of South Fulton*, No. 24CV010646, 2024 WL 5466376, at *2–3 (Ga. Super. Ct. Dec. 16, 2024). But after Awa appealed, the Fulton County Superior Court held that the "anticompetitive stance" underlying the City Council's vote was unconstitutional. *Id.* at *4.

A similar story is playing out in this case. Bedford Recycling's multi-billion-dollar competitor, Republic Services, Inc., owns property near the proposed recycling facility. That competitor belatedly objected to Bedford Recycling's CUP by petitioning for judicial review of the BZA's grant of the CUP. Appellant's App. Vol. II at 48–49.

In response, the BZA held two back-to-back meetings: first, a closed-door meeting to discuss "strategy with respect to pending litigation"; and second, a meeting "[t]o take action" regarding "Bedford Recycling's Conditional Use." *Id.* at 49.

This timeline warrants skepticism of the BZA's decision. Although the BZA itself did not explicitly discuss protectionist concerns, its reconsideration of the CUP was triggered by Republic's legal challenge. Only then did the BZA decide that it did not, after all, have the authority to issue the CUP. As one of Bedford's neighboring property owners pointed out at the revocation hearing (in which an attorney for Republic participated): "Bloomington needs more recycling facilities and [the] Republic lawyer is doing what [a] Republic lawyer does and tr[ying] to squish it. They do that coast to coast [to] kind of eliminate competition. As a resident of the county I want to say we need more competition not less." *Id.* Vol. III at 108. Republic's involvement thus highlights the importance of looking beyond the BZA's own "error of law" explanation to determine whether the agency properly revoked Bedford's CUP. *Contra* Ct. App. Op. pp. 2, 16–17. As the cases above show, allowing a local government to reverse course in response to an established business trying to stifle competition poses "grave danger[s]" to the free exercise of property rights. *Homecroft*, 148 N.E.2d at 567.

CONCLUSION

Hoosiers and all Americans have inalienable rights to freely use their property. Modern zoning practices—especially interference with property rights by powerful special interest groups—pose dangers to those fundamental rights. This Court should grant the petition to transfer to ensure that courts examining local zoning boards' decisions may look beyond the boards' own explanations for their actions.

Dated: April 21, 2025

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CERTIFICATE OF SERVICE

I certify that on April 21, 2025, a copy of the foregoing brief was filed electronically using the Indiana E-filing system (IEFS). I also certify that on April 21, 2025, the following persons were electronically served via IEFS with the foregoing document:

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