

August 8, 2013

OFFICIAL OPINION 2013-5

The Honorable Matt Pierce
Indiana House of Representatives
200 W. Washington St.
Indianapolis, IN 46204

RE: Process for Creation of Historic Preservation Districts

Dear Representative Pierce:

You have requested an opinion on the relationship between Ind. Code Chpt. 36-7-11-1 and the general Home Rule powers of a municipality. Specifically, you asked whether a city council is allowed to “pass an ordinance, which requires specific, affirmative action by the city council, after the first, three-year phase referenced in state law, in order for a full historic district to be created or must the ordinance strictly follow the procedures outlined in Ind. Code § 36-7-11-19?

BRIEF ANSWER

If a city council has established a historic preservation commission and chooses to establish a historic district using the two-step method, then it must follow the procedures under Ind. Code § 36-7-11-19, which does not require affirmative action on the part of the council before the second phase can begin.

ANALYSIS

Home Rule

“In 1980, the legislature adopted the Home Rule Act. Under the Act, a local unit of government is granted broad authority, with few exceptions, to adopt any local law needed ‘for the effective operation of government as to local affairs.’” 2003 *Ind. Att’y Gen. Op.* No. 07 (quoting Ind. Code § 36-1-3-2.¹ To this end, a “unit may exercise any power it has to the extent that the power:

- (1) is not expressly denied by the Constitution or by statute; and
- (2) is not expressly granted to another entity.”

Ind. Code § 36-1-3-5(a).

The manner in which a unit may exercise its powers can be limited. Specifically, “[i]f there is a constitutional or statutory provision requiring a specific manner for exercising a power, a unit wanting to exercise the power must do so in that manner.” Ind. Code § 36-1-3-6(a). Courts have interpreted “statutory provision[s] requiring a specific manner for exercising a power” to include those statutes that confer a power to a unit but then require the unit to take certain steps in order to

¹ See also 2003 *Ind. Att’y Gen. Op.* No. 01 (recognizing a unit’s home rule rights in the distribution of the county option income tax), and 2003 *Ind. Att’y Gen. Op.* No. 06 (recognizing a unit’s rights in passing smoking bans).

exert that power. *See e.g. Gaudin v. Austin*, 921 N.E.2d 895 (Ind. Ct. App. 2010) (finding that the County Commissioners did not have the authority to dissolve a fire protection district by ordinance because Ind. Code § 36-8-11-24 provided the proper manner for dissolving such a district); *City of Evansville v. Fehrenbacher*, 517 N.E.2d 111 (Ind. Ct. App. 1987) (finding that the City Council failed to act on an ordinance when its vote resulted in an equal number of votes on either side since the statute governing the type of action provided that any action taken including a denial must be by a majority of the council.); *Pro-Eco, Inc. v. Bd. of Comm'rs of Jay Cty., Ind.*, 776 F. Supp. 1368 (S.D. Ind. 1990) (finding that Ind. Code § 36-7-4-100, governing zoning law, was a “statutory provision requiring a specific manner for exercising a power”). Additionally, a statute need not state that it is the exclusive manner for exercising the power. *Gaudin* held that Ind. Code § 36-8-11-24 was the exclusive means of dissolving a fire protection district. *Gaudin*, 921 N.E.2d at 898. Neither Ind. Code § 36-8-11-24 nor the chapter in which it is located contain any language stating that it is the exclusive manner for exercising that power.

Historic Districts

Ind. Code § 36-7-11-4 gives local units the authority to establish a historic preservation commission. The commission must be established by an ordinance. *Id.* In order to establish a historic district, the commission must “conduct a survey to identify historic building, structure, and sites located within the unit.” Ind. Code § 36-7-11-6. Once the survey is completed the commission must prepare and submit to the legislative body a “map describing the boundaries of a historic district or historic districts.” *Id.* The historic district is established once the legislative body approves, by ordinance, the map submitted by the commission. Ind. Code § 36-7-11-7.

Ind. Code Chpt. 36-7-11 provides for two methods of establishing a historic district. Using the first method, the local unit may establish by ordinance a full historic district upon approval of the commission’s map. The second method a local unit may use is the two phase method found in Ind. Code § 36-7-11-19.

If the unit desire to establish its historic district in two phases, the ordinances establishing the district must provide for the two phases. Ind. Code § 36-7-11-19. Ind. Code § 36-7-11-19 provides as follows:

- (a) In an ordinance approving the establishment of a historic district, a unit may provide that the establishment occur in two (2) phases. Under the first phase, which lasts three (3) years from the date the ordinance is adopted, a certificate of appropriateness is required only for the activities described in section 10(1)(A), 10(1)(B), and 10(1)(D) of this chapter. At the end of the first phase, the district becomes fully established, and, subject to subsection (b), a certificate of appropriateness must be issued by the commission before a permit may be issued for or work may begin on an activity described in section 10 of this chapter.
- (b) The first phase described in subsection (a) continues and the second phase does not become effective if a majority of the property owners in the district object to the commission, in writing, to the requirement that certificates of appropriateness be issued for the activities described in section 10(1)(C), 10(2)(A), and 10(2)(B) of this chapter. The objections must be received by the commission not earlier than one

hundred eighty (180) days or later than sixty (60) days before the third anniversary of the adoption of the ordinance.

In summary, the first phase is to last three (3) years from the date the ordinance is approved. *Id.* During this phase, certificates of appropriateness are only needed on a limited number of activities. *Id.* At the end of the three (3) years the district becomes fully established unless “a majority of the property owners in the district object to the commission, in writing,” to the requirement that certificates of appropriateness be issued for all the activities listed under Ind. Code § 36-7-11-19. *Id.* If a majority of the property owners do object, then the first phase continues.

Bloomington Statute

Your request for an opinion included a copy of the City of Bloomington’s Municipal Code (BMC) Title 8, Chapter 8.08. That chapter states in relevant part:

The commission may recommend, and the council may provide that the establishment of an historic district shall occur in two phases. Under the first phase, to be called a conservation district, a certificate of appropriateness is required for the following activities: the demolition of any building; the moving of any building; and any new construction of a principal building or accessory building, or structure to view from a public way.

- (1) After a conservation district has been in effect for three years, the common council shall decide whether or not to pass an ordinance to elevate the district to historic district status.
- (2) Once established a conservation district shall continue, unless removed by ordinance.

BMC § 8.08.010(b) (version in effect prior to adoption of Ord. No. 13-21, §§ 6-8, 11-6-2013).

Under the Bloomington ordinance, if a historic district is formed using the two-phase method affirmative action by the city council is necessary before the second phase begins. After the three-year time period as a “conservation district,” the Bloomington Historic Preservation Commission (Commission) conducts a referendum of the district’s property owners the responses to the referendum must be received within the statutory time period. *See* City of Bloomington Website (http://bloomington.in.gov/sections/viewSection.php?section_id=629); *see e.g.* City of Bloomington Common Council Resolution 11-05. Once the referendum is complete, the city council votes as to whether the district should remain a conservation district or become a full historic district.

In determining the validity of an ordinance, courts begin with the presumption that the ordinance is valid and “the party challenging an ordinance bears the burden of proving invalidity” *Hobble By and Through Hobble v. Basham*, 575 N.E.2d 693, 697 (Ind. Ct. App. 1991). This presumption can be rebutted by showing that the ordinance is in conflict with state law. *See City of Indianapolis v. Sablica*, 342 N.E.2d 853, 854 (Ind. 1976) (quoting *Medinas v. City of Indianapolis*, 23 N.E.2d

590, 594 (Ind. 1939) (“If a city ordinance undertakes to impose regulations which are in conflict with rights granted reserved by the legislature, such ordinance must be held invalid.”)).

Ind. Code Chpt. 36-7-11 applies to all units. Units include municipalities. *See* Ind. Code § 36-1-2-23. Specifically, Ind. Code Chpt. 36-7-11 provides the “exclusive method for operation of a historic preservation agency in the unit.” Ind. Code § 36-7-11-2(a), (b). The operation of a historic preservation agency goes hand in hand with the establishment of historic districts since a unit may not establish a historic district without a map being presented to the legislative body of the unit. Ind. Code § 36-7-11-7. Therefore, Ind. Code Chpt. 36-7-11 is a “statutory provision requiring a specific manner for exercising a power.” Ind. Code § 36-1-3-6(a). Thus, a unit wanting to establish a historic district must do so in the manner described in Ind. Code Chpt. 36-7-11.

Bloomington’s process varies from the state law requirement in two ways. First, while the referendum requires property owners to respond within the statutorily defined time period, the results of the referendum are based on the majority of those responding rather than all property owners as required by Ind. Code § 36-7-11-19. Second, in order for a conservation district to become a full historic district, the city council must take affirmative action establishing the district. This is different from state law where phase two automatically begins unless the property owners object.

Since the ordinance is in conflict with state law, Bloomington’s ordinance is invalid. Nevertheless, this does not mean that all of BCM Chapter 8.08 should be invalid as well. “A basic rule of construction is that if one section of a city ordinance or legislative act can be separated from the other sections and upheld as valid, it is the duty of the court to do so.” *Hobble*, 575 N.E.2d at 699 (citing *Smith v. George*, 103 N.E. 949 (Ind. 1914)). In this case, only BMC § 8.08.010(b) conflicts with state law, the remaining sections of chapter 8.08 fit within the state statutory frame work, and no other section references the invalid section. Therefore, the invalid section may be separated from the rest of the chapter.

CONCLUSION

Ind. Code Chpt. 36-7-11 grants local units the authority to create historic districts, and it details how such a district would be created. Units wanting to establish a historic district must do so in the manner described by the state statute. Therefore, if a city council chooses to establish a historic district using the two-step method, then it must follow the procedures under Ind. Code § 36-7-11-19 which requires the majority of property owners to object in order to remain under the first phase and does not require an affirmative action on the part of the council before the second phase can begin.

Sincerely,

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