STATE OF INDIANA	)	IN THE BOONE SUPERIOR COURT 2
	) SS:	
COUNTY OF BOONE	)	CAUSE NO.: 06D02-2104-PL-000522
CITY OF LEBANON, INDIANA,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
BOONE COUNTY, INDIANA BOARD OF ZONING APPEALS,	)	
	)	
Respondent.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT GRANTING PETITIONER'S PETITION FOR JUDICIAL REVIEW OF ZONING DECISION

This cause is before the Court on the *Petition for Judicial Review of Zoning Decision* ("Petition") filed April 21, 2021 by City of Lebanon, Indiana ("City"). This case has been briefed and oral argument was held on October 20, 2021. Having considered the evidence, the oral arguments of counsel, the parties' respective briefs, and the applicable law, the Court, being duly advised, now hereby enters the following findings of fact, conclusions of law, and judgment:

FINDINGS OF FACT

1. The City is a municipal corporation located in Boone County, Indiana, with a principal address of 401 South Meridian Street, Lebanon, Indiana 46052.

2. Respondent Boone County, Indiana Board of Zoning Appeals (the "BZA") is a governmental body with a principal address of 116 West Washington Street, Lebanon, Indiana 46052.

3. The property at issue is located at 4005 North US 52, Lebanon, Indiana 46052 (the "Property").

4. The City intends to develop its Stone Eater Bike Project upon the Property, which will transform the Property into an outdoor recreational facility – more particularly, a bike park (the "Project").

5. The City and BZA do not dispute the following:

a. The Property is publicly-owned;
b. The Property is zoned R1; and
c. The Project will constitute a recreational facility.[1]

6. The Boone County Zoning Ordinance ("Ordinance") specifies: (a) which uses are permitted as of right, and (b) which uses are permitted only after further scrutiny or oversight.

7. Specifically, the Ordinance's Use Table 2 (the "Use Table") categorizes property owners, proposed uses, and zoning classifications. (Record at 000156-000166).

8. If an "S" appears in a Use Table column, the use may be permitted "only as a Special Exception." (Record at 000156).

9. However, when an "X" appears in a Use Table column, the "use is permitted." (Record at 000156).

10. The "Government" Use Table is shown below:

Non-Industrial Farm, Agricultural, Animal Related Uses

	C	AP	AG	RE	R1	R2	R3	R4	MF	AB	LB	GB	UB	PB	I1	I2	AZ
@ Sale Barn for Livestock		S	X												S	X	
@ Veterinary Animal Hospital			S									X	X	X	X	X	
Farm	X	X	X	X	X	X	X	X	X	X	X	X		X	X	X	
Hay, Grain, Feed Stores		X	X								X	X			X	X	
Landscape Contractor		S	S								S	S			S	S	
Plant Nursery		S	X								X	X			X	X	
Government																	
@ Penal or Correctional Institutions												S			S	S	
@ Police, Postal, or Fire Station			D		X	X	X	X	X	X	X	X	X	X	X	X	
Municipal or Government Buildings			D		S	X	X	X	X	X	X	X	X	X	X	X	
Publicly Owned Park or Recreational Facility	X	X	D		X	X	X	X	X	X	X	X	X	X	X	X	

(Record at 000157) (highlighted emphasis added).

[1] More accurately stated, BZA waived an untimely contention that the project constitutes something other than a recreational facility. See findings herein at para 39-43; and conclusions herein at para 90-98.

11. On or around January 15, 2021, the Executive Director of staff ("Director") of the Boone County Area Plan Commission ("APC") issued her Order and Determination Letter ("Order and Determination Letter").

12. The Order and Determination Letter demanded the City seek a special exception for the Project.

13. The Order and Determination Letter did not indicate ***any*** Use Table that supported the Director's demand for a special exception.

14. The City timely appealed the Director's Order and Determination Letter to the BZA.

15. Before the BZA hearing, the Director submitted her Written Response ("Written Response").

16. The Written Response was a near carbon copy of the Order and Determination Letter, with a couple of exceptions:

a. The Written Response included examples of *other* recreational land uses in which the APC required a special exception; and
b. The Written Response concluded that (i) a park has never been permitted by right, (ii) lack of special exception review removes certain review criteria, and (iii) "No public hearing = No voice."

(Record at 000055-000057).

17. The *other* recreational land uses cited in the Director's Written Response are shown below.

History of Outdoor Recreational/Sports Facility Land Uses under the Area Plan Jurisdiction			
Petitioners:	**Date:**	**Project Acreage:**	**Brief Summary of Project Narrative for APC's Director Determination of Land Use:**
Petitioners: Attorney Andreoli representing Dewees Family	4/25/2001	5 Acres	**Project: Outdoor Motor Bike Track** An Outdoor Motor Bike Track Practice Facility was required to apply for a Special Exception for an Outdoor Recreation Facility.
Petitioners: Tom Dull's Outdoor Sporting Venue	9/27/2006	19 Acres	**Project: Sugar Tree Conservation Retreat Park** A Special Exception was applied for an Outdoor Conservation Park requested the following activities be allowed on the property: 1) Fishing 2) Swimming 3) Boating 4) Primitive Camping 5) Hiking 6) Picnicking 7) Hunting 8) Shooting and Hunting
Petitioners: Town of Advance Park	08/02/2006	10 Acres	**Project: Town of Advance Park** This was approved for the public to enjoy outdoor passive recreation and open space for leisure time activities.
Petitioners: Zionsville Golf Practice Facility	5/23/2007	24 Acres	**Project: Outdoor Golf Practice Facility and Driving Range** An outdoor recreational use, specifically designed for the users to practice the sport of golf. A Special Exception was granted by the Boone County Board of Zoning Appeals.

(Record at 000056).

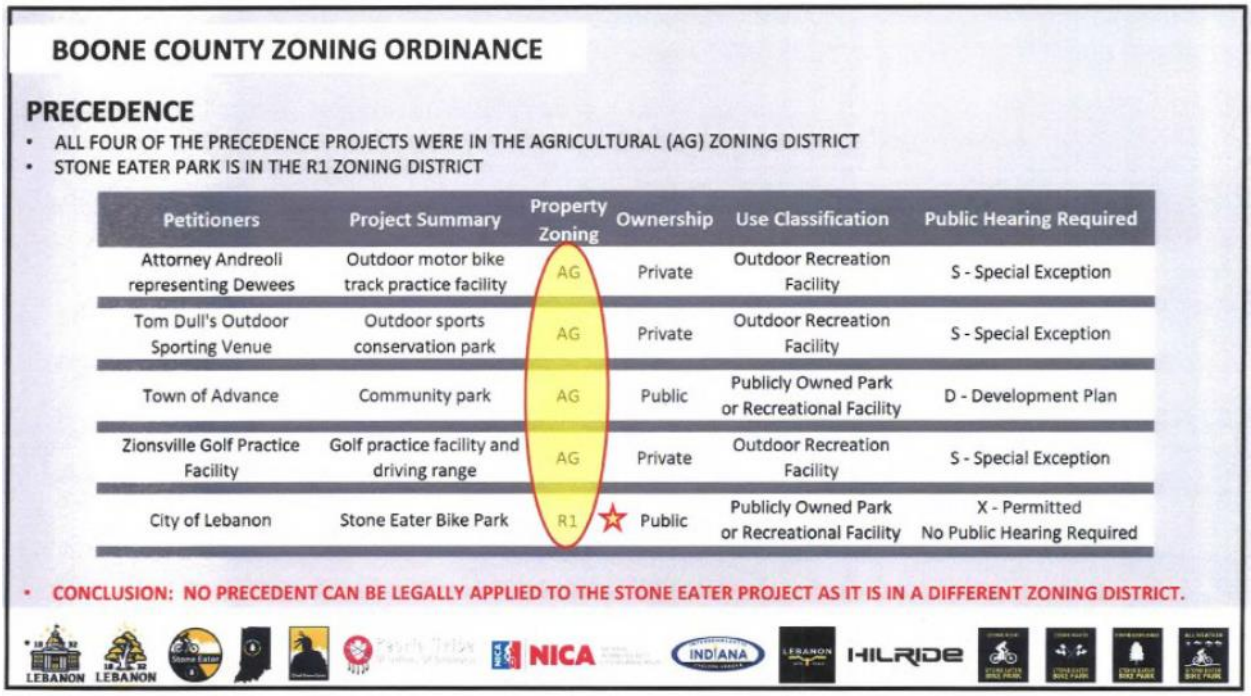
18. The City's appeal was heard by the BZA on March 24, 2021.

19. At the hearing, the Director read nearly verbatim her Written Response and provided no other information to the BZA. (Record at 000300-000304).

20. At the hearing, the Director did not indicate why the "Government" Use Table did not apply to the Property. (Record at 000300-000304).

21. At the hearing, the City presented evidence and argument.

22. During the BZA hearing, the City presented evidence to the BZA, including the information shown below, distinguishing each of the four (4) *other* projects marshalled by the Director as justification for her actions:



BOONE COUNTY ZONING ORDINANCE

PRECEDENCE

- ALL FOUR OF THE PRECEDENCE PROJECTS WERE IN THE AGRICULTURAL (AG) ZONING DISTRICT
- STONE EATER PARK IS IN THE R1 ZONING DISTRICT

Petitioners	Project Summary	Property Zoning	Ownership	Use Classification	Public Hearing Required
Attorney Andreoli representing Dewees	Outdoor motor bike track practice facility	AG	Private	Outdoor Recreation Facility	S - Special Exception
Tom Dull's Outdoor Sporting Venue	Outdoor sports conservation park	AG	Private	Outdoor Recreation Facility	S - Special Exception
Town of Advance	Community park	AG	Public	Publicly Owned Park or Recreational Facility	D - Development Plan
Zionsville Golf Practice Facility	Golf practice facility and driving range	AG	Private	Outdoor Recreation Facility	S - Special Exception
City of Lebanon	Stone Eater Bike Park	R1	Public	Publicly Owned Park or Recreational Facility	X - Permitted No Public Hearing Required

- CONCLUSION: NO PRECEDENT CAN BE LEGALLY APPLIED TO THE STONE EATER PROJECT AS IT IS IN A DIFFERENT ZONING DISTRICT.

23. The BZA failed to deliberate, ask questions, or otherwise address the City's evidence. (Record at 000334-000340).

24. Instead, the BZA contemplated legislating right then and there at the hearing because, in the BZA's words, "tonight we probably need to set a precedent for an R-1 special exception." (Record at 000336-000337).

25. At the conclusion of the hearing, the BZA voted unanimously to deny the City's BZA appeal. (Record at 000339-000340).

26. On or around March 26, 2021, the BZA issued its Written Order and Findings of Fact ("Written Order and Findings of Fact"), memorializing its decision.

27. On April 21, 2021, the City filed its Petition with the Court.

28. On July 16, 2021, the City timely tendered the certified BZA record in this matter (the "Record").

29. The City and BZA have fully briefed this matter, including the BZA's Response filed on or around September 15, 2021 (the "BZA Response").

30. The BZA Response references the term "passive" (BZA Response, pp. 7, 9).

31. The Record confirms that throughout this entire matter, the Director's sole reference to the term "passive" was when she summarized a staff report from 2006 concerning a *different* project – the Town of Advance's proposed community park.

32. The Record confirms that the Director never used the term "passive" (or "non-passive") in her Order and Determination Letter. (Record at 000010-000011).

33. The Record confirms that the Director never used the term "passive" (or "non-passive") in her Written Response. (Record at 000055-000057).

34. The Record confirms that the Director did not testify as to the "passive" (or "non-passive") nature of the *City's* Project during her BZA hearing testimony. (Record at 000300-000304).

35. The term "passive" does not appear in the Use Table, including the "Government" and "Recreation, Amusement Tourism" Use Tables. (Record at 000157, 000159).

36. The term "passive" does not appear in the Ordinance's definition of "Recreation Facility, Outdoor." (Record at 000267).

37. The Record confirms that the BZA never used the term "passive" (or "non-passive") during the BZA hearing. (Record at 000334-000340).

38. The Record further confirms that the BZA never used the term "passive" (or "non-passive") in its Written Order and Findings of Fact. (Record at 000132).

39. The Record further confirms that the Director referred to the Project as a Recreation**al** Facility or a place where recreation**al** activities will take place. (Record at 000301-000304).

40. The BZA also referred to the Project as a Recreation**al** Facility.

41. For instance, the BZA's own Written Order and Findings of Fact, which forms the basis of the City's Petition for Judicial Review, confirmed that the Director viewed the Project as an "Outdoor Recreation**al** Facility." (Record at 000132) (emphasis added).

42. The BZA's Written Order and Findings of Fact then memorialized the BZA's motion to uphold the Director's decision requiring a special exception for an "Outdoor Recreation**al** Facility" by a vote of 5-0. (Record at 000132) (emphasis added).

43. The only place the term "Recreation**al** Facility" appears in the Use Table is in the "Government" Use Table. (Record at 000157).

44. These findings of fact are based on evidence that was properly before this Court.

45. Any conclusion of law that is more properly denominated as a finding of fact is hereby incorporated into these findings as if it were fully stated herein, and vice versa.

CONCLUSIONS OF LAW

Standard of Review

46. This Court should grant the City's relief if the Court determines the BZA's decision was (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence. Indiana Code § 36-7-4-1614.

47. The burden of demonstrating the invalidity of a zoning decision is on the party asserting invalidity. *Id.*

48. This Court may not try the facts de novo or substitute its own judgment for that of the BZA, and courts must accept facts as found by the zoning board. *Metro. Bd. of Zoning Appeals Div. III of Marion Cty. v. Traders Point Ass'n of Neighborhoods*, 81 N.E.3d 1120, 1124 (Ind. Ct. App. 2017).

49. However, because zoning Ordinances limit the free use of property, they are in derogation of the common law and must be strictly construed. Indeed, "our courts interpret an ordinance to favor the free use of land and will not extend restrictions by implication." *Cracker Barrel Old Country Store, Inc. v. Town of Plainfield ex rel. Plainfield Plan Comm'n*, 848 N.E.2d 285, 290 (Ind. Ct. App. 2006).

50. Construction of a zoning ordinance is a question of law. *Essroc Cement Corp. v. Clark Cty. Bd. of Zoning Appeals*, 122 N.E.3d 881, 891 (Ind. Ct. App. 2019), *transfer denied*, 134 N.E.3d 1024 (Ind. 2019).

51. In interpreting the Ordinance, this Court should apply ordinary rules of statutory construction. Therefore, this Court must interpret the Ordinance as a whole, each word in the Ordinance should be given effect and its plain, ordinary, and usual meaning, and the goal is, whenever possible, to harmonize the provisions in the Ordinance. *Broad Ripple Property Group, LLC v. City of Indianapolis*, 87 N.E.3d 1112, 1116 (Ind. Ct. App. 2017).

52. If an ordinance is ambiguous, the ordinance should be construed in favor of the property owner. *Cracker Barrel*, 848 N.E.2d at 290 (citing *Story Bed & Breakfast, LLP v. Brown County Area Plan Com'n*., 819 N.E.2d 55, 66 (Ind. 2004)).

53. An agency decision is arbitrary and capricious where it is patently unreasonable, without consideration and in disregard of the facts and circumstances of the case, or without some basis that would lead a reasonable and honest person to the same conclusion. *Dep't of Bus. & Neighborhood Servs. of Consol. City of Indianapolis v. H-Indy, LLC, 166 N.E.3d 347, 356-57 (Ind. Ct. App. 2021).*

54. A decision is unsupported by substantial evidence if there is no relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *Id.*

The Director's Order and Determination Letter and the BZA's Decision Thereon Were Improper, Illegal, and are Hereby Reversed

55. This Court's analysis begins with the undisputed characteristics of the Property and the Project:

a. The Property is owned by the City, a municipal corporation. Therefore, the Property is "publicly owned." (BZA's Response, pp. 4, 9; Record, *passim*).
b. The Property is zoned R1. (BZA's Response, p. 4; Record, *passim*).
c. The Project will constitute a recreational facility. (BZA's Written Order and Findings of Fact, Record at 000132).

56. The Ordinance Use Table contains a "Government" table, shown below:

Non-Industrial Farm, Agricultural, Animal Related Uses

	C	AP	AG	RE	R1	R2	R3	R4	MF	AB	LB	GB	UB	PB	I1	I2	AZ
@ Sale Barn for Livestock		S	X												S	X	
@ Veterinary Animal Hospital			S									X	X	X	X	X	
Farm	X	X	X	X	X	X	X	X	X	X	X	X		X	X	X	
Hay, Grain, Feed Stores		X	X								X	X			X	X	
Landscape Contractor		S	S								S	S			S	S	
Plant Nursery		S	X								X	X			X	X	
Government																	
@ Penal or Correctional Institutions												S			S	S	
@ Police, Postal, or Fire Station			D		X	X	X	X	X	X	X	X	X	X	X	X	
Municipal or Government Buildings			D		S	X	X	X	X	X	X	X	X	X	X	X	
Publicly Owned Park or Recreational Facility	X	X	D		X	X	X	X	X	X	X	X	X	X	X	X	

(Record at 000157) (highlighted emphasis added).

57. An "X" appears in the column corresponding to a (1) publicly owned (2) park or recreational facility (3) located in a R1 zoning district.

58. According to the Ordinance, an "X" means "the use is permitted," (Record at 000156), and no special exception requirement or other restrictions apply.

59. The Director and BZA disregarded the clear terms of the Ordinance as applied to the City's Property and Project because the undisputed variables (proposed recreational facility located on publicly owned property zoned R1) required application of the "Government" Use Table.

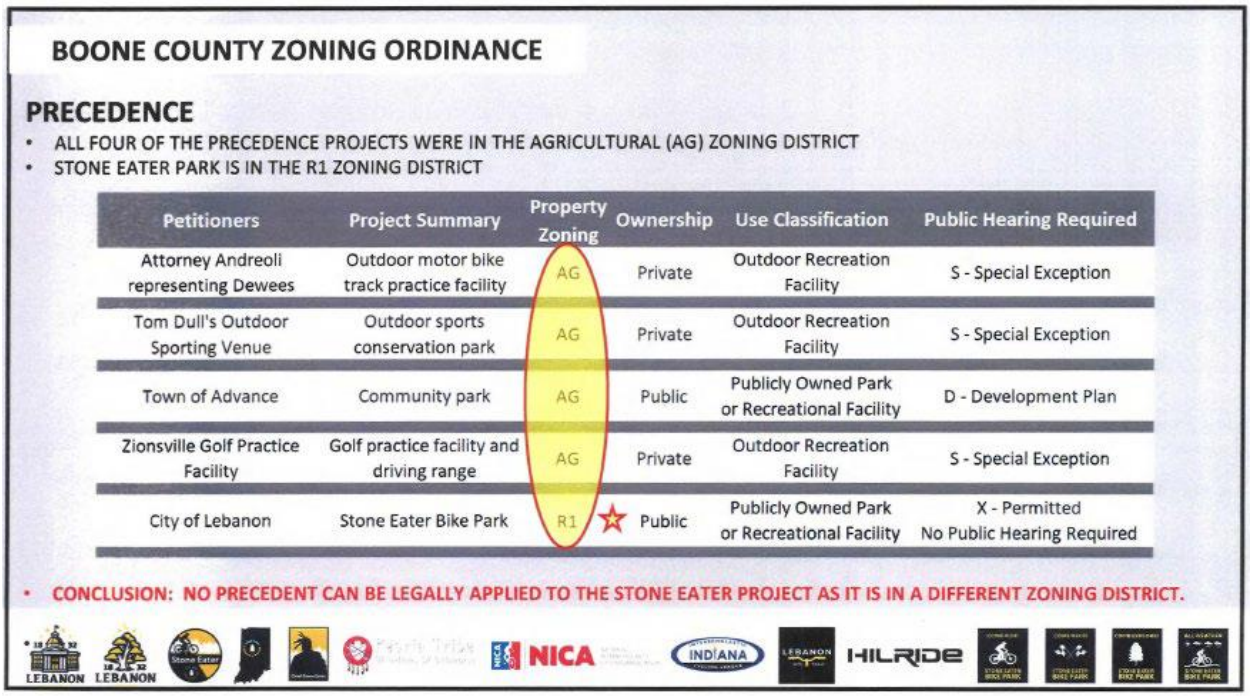
60. Among other shortcomings, the Director's Order and Determination Letter did not indicate why the "Government" Use Table did not apply to the Property (*i.e.* Property owned by the City, a "Government" entity).

61. In fact, the Order and Determination Letter did not indicate ***any*** Use Table that supported the Director's demand for a special exception.

62. After issuing her Order and Determination Letter, but before the BZA's hearing, the Director issued her Written Response.

63. The Director's Written Response was a near carbon copy of the Order and Determination Letter, with a few exceptions, such as reference to four (4) *other* projects dating back to 2001.

64. During the BZA hearing, the City presented the following evidence, distinguishing each of the four (4) *other* projects marshalled by the Director as justification for her actions.



BOONE COUNTY ZONING ORDINANCE

PRECEDENCE

- ALL FOUR OF THE PRECEDENCE PROJECTS WERE IN THE AGRICULTURAL (AG) ZONING DISTRICT
- STONE EATER PARK IS IN THE R1 ZONING DISTRICT

Petitioners	Project Summary	Property Zoning	Ownership	Use Classification	Public Hearing Required
Attorney Andreoli representing Dewees	Outdoor motor bike track practice facility	AG	Private	Outdoor Recreation Facility	S - Special Exception
Tom Dull's Outdoor Sporting Venue	Outdoor sports conservation park	AG	Private	Outdoor Recreation Facility	S - Special Exception
Town of Advance	Community park	AG	Public	Publicly Owned Park or Recreational Facility	D - Development Plan
Zionsville Golf Practice Facility	Golf practice facility and driving range	AG	Private	Outdoor Recreation Facility	S - Special Exception
City of Lebanon	Stone Eater Bike Park	R1	Public	Publicly Owned Park or Recreational Facility	X - Permitted No Public Hearing Required

- CONCLUSION: NO PRECEDENT CAN BE LEGALLY APPLIED TO THE STONE EATER PROJECT AS IT IS IN A DIFFERENT ZONING DISTRICT.

(Record at 000103).

65. It is clear the four (4) *other* projects referenced in the Director's Written Response provided no legal justification for the Director's demand for a special exception.

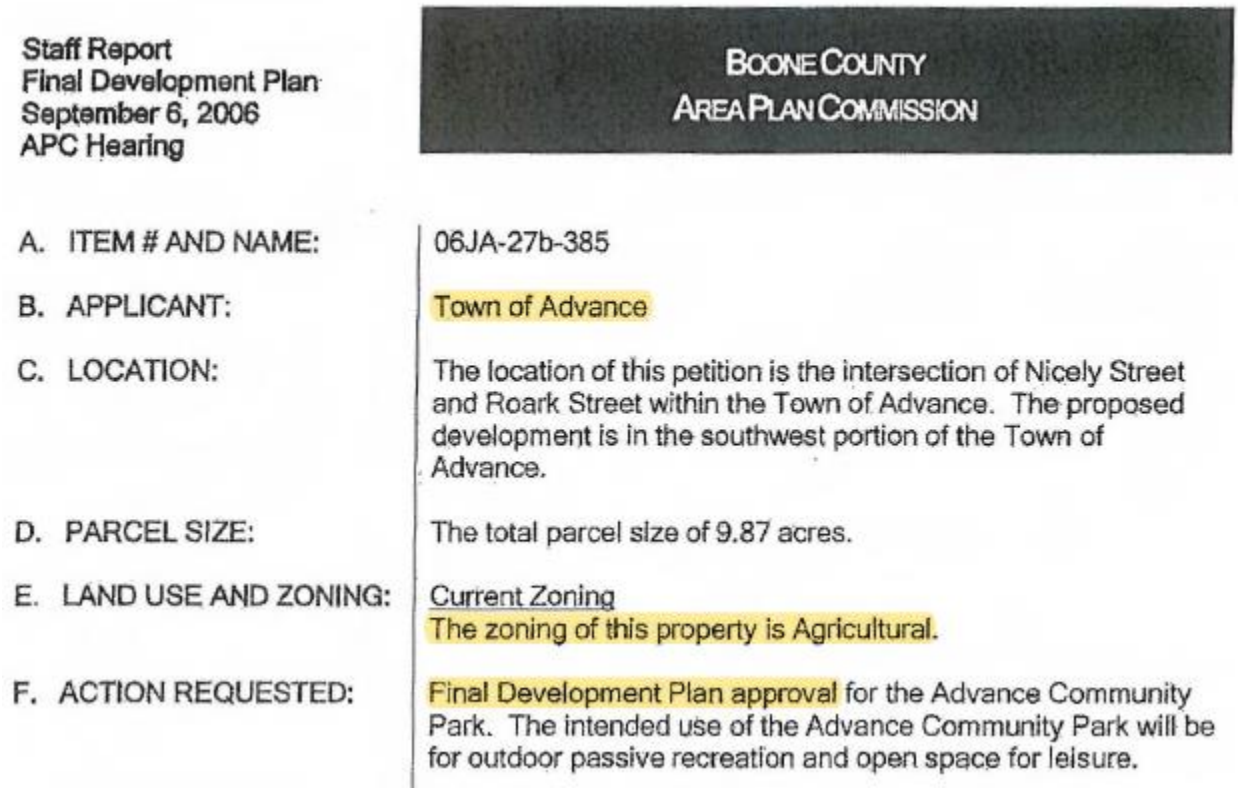
66. For instance, the majority of the *other* projects cited by the Director were completely distinguished; they were privately owned, meaning *another* table, the "Recreation, Amusement Tourism" Use Table, applied.

67. As to the remaining project, the Town of Advance Community Park, that project was publicly owned, situated on publicly owned property. However, that project, too, was distinguished – it was located in an AG zoning district, not R1 zoning district.

68. In all, the City completely refuted the Director's other projects, and demonstrated each provided no support for the Director's demands.

69. The City also illustrated another reality – the Director and/or her predecessors actually applied the "Government" Use Table to publicly owned property in the past, even though the Director and BZA willfully refused to do so in this matter.

70. Specifically, the Director required Town of Advance to obtain development plan approval, as evidenced by the Director's documentation, shown below:



Staff Report
Final Development Plan
September 6, 2006
APC Hearing

BOONE COUNTY
AREA PLAN COMMISSION

A. ITEM # AND NAME:	06JA-27b-385
B. APPLICANT:	Town of Advance
C. LOCATION:	The location of this petition is the intersection of Nicely Street and Roark Street within the Town of Advance. The proposed development is in the southwest portion of the Town of Advance.
D. PARCEL SIZE:	The total parcel size of 9.87 acres.
E. LAND USE AND ZONING:	Current Zoning The zoning of this property is Agricultural.
F. ACTION REQUESTED:	Final Development Plan approval for the Advance Community Park. The intended use of the Advance Community Park will be for outdoor passive recreation and open space for leisure.

(Record at 000282) (highlighted emphasis added).

71. However, development plan approval for a publicly-owned park in an AG district means the Director only applied the "Government" Use Table, shown below (with a "D" signifying development plan approval required).

	C	AP	AG	RE	R1	R2	R3	R4	MF	AB	LB	GB	UB	PB	I1	I2	AZ
@ Sale Barn for Livestock		S	X												S	X	
@ Veterinary Animal Hospital			S									X	X	X	X	X	
Farm	X	X	X	X	X	X	X	X	X	X	X	X		X	X	X	
Hay, Grain, Feed Stores		X	X								X	X			X	X	
Landscape Contractor		S	S								S	S			S	S	
Plant Nursery		S	X								X	X			X	X	
Government																	
@ Penal or Correctional Institutions												S			S	S	
@ Police, Postal, or Fire Station			D		X	X	X	X	X	X	X	X	X	X	X	X	
Municipal or Government Buildings			D		S	X	X	X	X	X	X	X	X	X	X	X	
Publicly Owned Park or Recreational Facility	X	X	D		X	X	X	X	X	X	X	X	X	X	X	X	

(Record at 000157) (highlighted emphasis added).

72. Otherwise, Town of Advance's project, located in an AG district, would have required a special exception, indicated by a "S," pursuant to the following "Recreation, Amusement Tourism" Use Table.

Recreation, Amusement, Tourism

	C	AP	AG	RE	R1	R2	R3	R4	MF	AB	LB	GB	UB	PB	I1	I2	AZ
@ Fairgrounds			X												X	X	
@ Golf & Country Clubs					X	X	X	X	X						X	X	
@ Golf Driving Range & Miniature Golf Course										X		X			X	X	
@ Hotel or Motel										X		X	X		X		
@ Outdoor Recreation Facility		S	S		S	S	S	S							S	S	

(Record at 000159) (highlighted emphasis added).

73. Thus, the Director or her predecessors clearly applied the "Government" Use Table to the Town of Advance's publicly owned park or recreational facility, while failing to do so in this case.

74. Overall, without a legal basis or justification, starting with her Order and Determination Letter, the Director failed to apply the applicable "Government" Use Table in this matter.

75. The Director's Written Response provided no legal basis or justification for failing to apply the applicable "Government" Use Table in this matter.

76. The Director's BZA hearing testimony provided no legal basis or justification for failing to apply the applicable "Government" Use Table in this matter.

77. The BZA provided no legal basis or justification for failing to apply the "Government" Use Table in this matter.

78. Instead, among other shortcomings, the BZA failed to deliberate, ask questions, or otherwise address the City's evidence. (Record at 000334-000340).

79. Instead, the BZA considered legislating right then and there at the BZA hearing when it considered setting "a precedent for an R-1 special exception." (Record at 000336-000337).

80. Ultimately, the BZA wrongfully opted to simply "stand behind" the Director's unsupported and unsubstantiated decision. (Record at 000336, 000338).

81. The parties do not dispute:

a. The Property is publicly-owned;
b. The Property is zoned R1; and
c. The Project will constitute a recreational facility.[2]

82. The Ordinance contains a "Government" Use Table that permits, as of right, a publicly owned recreational facility on publicly owned property zoned R1.

[2] More accurately stated, BZA waived an untimely contention that the project constitutes something other than a recreational facility. See findings herein at para 39-43; and conclusions herein at para 90-98.

83. Taking into consideration the undisputed facts, the Director and BZA's decisions were patently unreasonable, without consideration and in disregard of the facts and circumstances of the case before it, and were without some basis that would lead a reasonable and honest person to the same conclusion. Therefore, the Director and BZA's decisions were arbitrary and capricious. *Dep't of Bus. & Neighborhood Servs. of Consol. City of Indianapolis v. H-Indy, LLC*, 166 N.E.3d 347 (Ind. Ct. App. 2021) (BZA reversed because it misapplied the ordinance to the zoning and use of the property).

84. There was also no relevant evidence which a reasonable mind would accept as adequate to support the Director and BZA's conclusions. Therefore, the Director and BZA's decisions were unsupported by substantial evidence. *Id. See also Monster Trash, Inc. v. Owen Cty. Council*, 152 N.E.3d 630 (Ind. Ct. App. 2020), *decision clarified on reh'g*, 158 N.E.3d 1272 (Ind. Ct. App. 2020) (BZA reversed because it wrongly ignored the clear provisions of its ordinance); *Boone Cty. Area Plan Comm'n v. Kennedy*, 560 N.E.2d 692, 696-97 (Ind. Ct. App. 1990) (Boone County Director reversed because Director misapplied the ordinance).

85. The Director and BZA were "required to follow the provisions of [the Ordinance]." *Essroc*, 122 N.E.3d at 896. The Director and BZA refused or otherwise failed to do so. Therefore, the Director and BZA's decisions were in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

86. The Court shall provide judicial relief if just one (1) of the five (5) grounds for invalidity is demonstrated. Indiana Code § 36-7-4-1614(d).

87. The Court finds multiple grounds for invalidity have been demonstrated.

88. Specifically, the Director's Order and Determination Letter and the BZA's decision thereon was (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with

law; (2) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; and (3) unsupported by substantial evidence.

89. Therefore, the City is entitled to relief.

The BZA's New Arguments Were Waived --
Waiver Notwithstanding, the BZA's Decision was and Remains Illegal and Invalid

90. The BZA's Response raises several new theories including the Ordinance's use of the term "Recreation" versus "Recreation**al**," the "passive" (or not "passive") nature of the Project, and ownership concepts.

91. These theories were not raised by the Director or the BZA prior to the BZA's Response. (*See* Record, *passim*).

92. The Indiana Code requires: "Judicial review of disputed issues of fact must be confined to the board record for the zoning decision supplemented by additional evidence taken under section 1612 of this chapter." Indiana Code § 36-7-4-1611. No additional evidence was taken under Indiana Code § 36-7-4-1612 in this matter. Therefore, the BZA's untimely theories were waived.

93. Waiver notwithstanding, none of the BZA's new arguments change the illegality and invalidity of the Director and BZA's decisions.

94. As to "Recreation" versus "Recreational," the Director and BZA both referred to the Project as a proposed "recreation**al**" use. (Record at 000301-000304 (Director's reference to the Project as a recreation**al** facility or a place where recreation**al** activities will take place); Record at 000132 (BZA's Written Order and Findings of Fact, which confirmed the Director's view of the Project as a recreation**al** facility and upheld the Director's decision to require a special exception for an "Outdoor Recreation**al** Facility")).

95. The BZA urges the Court to apply the "Recreation, Amusement, Tourism" Use Table because it contains the term "Recreation Facility." (BZA Response, pp. 6, 10).

96. However, as demonstrated by the Record, the Director and BZA actually referred to the Project as a "recreation**al**" facility.

97. The only place where the term "recreation**al** facility" exists is in the "Government" Use Table. (Record at 000157).

98. Therefore, even under the BZA's new reasoning, the "Government" Use Table applied, and the City's Project was permitted as of right. (Record at 000157).

99. The BZA's Response also focuses on the term "passive."

100. However, "passive" (or "non-passive") is not defined in the Ordinance.

101. Moreover, the "Government" Use Table does not distinguish between "passive" or "non-passive" uses (Record at 000157).

102. Likewise, the "Recreation, Amusement, Tourism" Use table does not distinguish between "passive" or "non-passive" uses (Record at 000159).

103. Finally, the Ordinance's "recreation facility" definition is also silent as to "passive" or "non-passive" uses (Record at 000267).

104. The Director never used the term "passive" (or "non-passive") in her Order and Determination Letter. (Record at 000010-000011).

105. The Director never used the term "passive" (or "non-passive") in her Written Response. (Record at 000055-000057).

106. The Director never used the term "passive" (or "non-passive") in connection with the *City's* Project during her BZA testimony. (Record at 000300-000304).

107. The BZA never used the term "passive" (or "non-passive") during the BZA hearing. (Record at 000334-000340).

108. The BZA never used the term "passive" (or "non-passive") in its Written Order and Findings of Fact. (Record at 000132).

109. Based on the foregoing and other evidence, it is clear the Director and BZA did not consider the "passive" (or "non-passive") use of the Project to develop their earlier decisions and demand for a special exception.

110. Instead, the BZA's "passive" / "non-passive" argument is just now raised, after-the-fact.

111. As such, the "passive" or "non-passive" nature of the Project, if any, could not have formed any legal basis or justification for the Director or BZA's earlier actions and demands.

112. Even if the BZA *did* determine the "Government" Use Table did not apply based on the Project's "passive" or "non-passive" nature, doing so was contrary to the Ordinance.

113. Injecting terms and land use limitations based on language not found in the Ordinance amounts to extending the Ordinance by implication – an act prohibited by Indiana Law. *See, e.g., Essroc,* 122 N.E.3d at 891.

114. Instead, it is the express language of the Ordinance that controls the Court's interpretation. *Monster Trash,* 158 N.E.3d at 1273.

115. There are zero (0) land use restrictions based on "passive" or "non-passive" uses contained in the "Government" Use Table.

116. Similarly, there are zero (0) land use restrictions based on "passive" or "non-passive" uses contained in the "Recreation, Amusement Tourism" Use Table (or elsewhere in the Ordinance).

117. As to "ownership," the BZA now contends the "Recreation Facility, Outdoor" definition somehow proves public or private ownership is irrelevant for the purpose of applying Use Tables.

118. However, what the Ordinance actually says dictates otherwise.

119. Specifically, as to "ownership," only the "Government" Use Table explicitly mandates that publicly "owned" recreational facilities located in a R1 zoning district are permitted as of right. (Record at 000157).

120. During this Court's October 20, 2021 hearing, the BZA's counsel seemingly argued that NICA, Hilride, or others would have an interest in the Project, perhaps indicating the Property and Project were not publicly owned.

121. However, nothing in Record supports that conclusion, either.

122. Instead, the Property is owned by the City (Record at 000124-000125 (Property Record Card); 000126-000130 (Warranty Deed in favor of the City)).

123. While NICA and Hilride will be involved as the City's "Technical Design Partner" and "Bike Park Designer," respectively (Record at 000095), neither NICA nor Hilride have any ownership or operational authority in connection with the Project.

124. Instead, the City was and remains the "Project Owner." (Record at 000095). The Director and BZA have never disputed this, including in front of this Court. *See* BZA Response, p. 4 (the Property is owned by the City)).

125. Based on all of the foregoing facts, circumstances, and evidence, the plain language of the Ordinance controls, and the City's proposed recreational facility located on publicly owned property zoned R1 is governed by the "Government" Use Table, and is permitted as of right. (Record at 000157).

126. This result is required because every word of the Ordinance must be given its plain and ordinary meaning. *Cracker Barrel*, 848 N.E.2d at 290 (citing *Metro Dev. Comm'n of Marion County v. Pinnacle Media, LLC*, 836 N.E.2d 422, 425 (Ind. 2005)).

127. Additionally, no part of the Ordinance (such as the "Government" Use Table) may be rendered meaningless. *Cty. of Lake v. Pahl*, 28 N.E.3d 1092, 1103 (Ind. Ct. App. 2015); *Cracker Barrel Old Country Store, Inc. v. Town of Plainfield ex rel. Plainfield Plan Comm'n*, 848 N.E.2d 285, 290 (Ind. Ct. App. 2006).

128. What that means is that in addition to the reasons provided above, this Court will not (and cannot) ignore the plain language shown below, in the "Government" Use Table – which clearly permits, as of right, a "Publicly Owned Park or Recreational Facility" on property zoned R1. To do otherwise would render the BZA's own "Government" Use Table meaningless, contrary to Indiana Law. *Cracker Barrel*, 848 N.E.2d at 290.

Government																	
@ Penal or Correctional Institutions												S			S	S	
@ Police, Postal, or Fire Station			D		X	X	X	X	X	X	X	X	X	X	X	X	
Municipal or Government Buildings			D		S	X	X	X	X	X	X	X	X	X	X	X	
Publicly Owned Park or Recreational Facility	X	X	D		X	X	X	X	X	X	X	X	X	X	X	X	

(Record at 000157) (highlighted emphasis added)

129. Should any ambiguity exist in the Ordinance, such ambiguity must be construed in favor of the property owner. *Cracker Barrel*, 848 N.E.2d at 290 (citing *Story Bed & Breakfast, LLP v. Brown Cty. Area Plan Comm'n*, 819 N.E.2d 55, 66 (Ind. 2004)).

130. The Court does not find an ambiguity exists – rather – the plain language of the Ordinance, as applied to the facts of this matter, mandates the application of the "Government" Use Table, which permits the City's Project as of right, with no special exception requirement or other limitations.

JUDGMENT

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment shall be and hereby is granted in favor of the City and against Respondent. The Director's Order and Determination Letter and the BZA's Written Order and Findings of Fact are hereby set aside.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the BZA shall issue a new written order and findings of fact within thirty (30) days of this Order finding that no special exception is required for the City's Project.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that there is no just reason for delay and this judgment is an express final judgment in favor of Petitioner City of Lebanon, Indiana and against Respondent Boone County, Indiana Board of Zoning Appeals.

ENTERED THIS 23rd day of November, 2021.

Honorable Justin H. Hunter
Special Judge, Boone Superior Court 2

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