2023

County Commissioners Handbook

INDIANA COUNTY COMMISSIONERS

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2023 BOARD OF DIRECTORS OF THE INDIANA COUNTY COMMISSIONERS

EXECUTIVE BOARD - 2023

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Vice President	Kellie Streeter	Knox County
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S.W. District	Vice President- Mark Flint	Pike County
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S.E. District	Vice President- John Schellenberger	Floyd County

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FORWARD

The boundaries of Indiana's 92 counties have remained stable over many years, but unlike these boundaries, precious little in local government remains unaltered over time. Each year the Indiana General Assembly enacts laws which modify and refine, often times in haphazard fashion, the mechanics of local government. With this patchwork quilt of legislation in mind, the purpose of this Handbook is to assist County Commissioners in understanding how county government is intended to operate and to assist them in discharging their statutory responsibilities.

The various sections of this Handbook are intended to provide a summary of the particular topic and not intended to be an exhaustive analysis of the area. Citations to the appropriate sections of the Indiana Code are used throughout with the expectation that the reader may, from time to time, desire a more comprehensive review of particular subjects.

This Handbook was drafted, edited and produced by the law firm of Barnes & Thornburg LLP. As General Counsel to the Indiana County Commissioners, the firm has provided invaluable assistance to County Commissioners throughout the State of Indiana. Barnes & Thornburg LLP has become the leader in counseling County Commissioners and other county officials.

Special thanks are given to the members of the Board of the Indiana County Commissioners, the Executive Director, Stephanie Yager, and the Editor of this Handbook, Richard J. Hall, Barnes & Thornburg LLP.

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TABLE OF CONTENTS

APPROVED ON
APRIL 13, 2023

CONSTITUTION AND BYLAWS OF THE INDIANA ASSOCIATION OF COUNTY COMMISSIONERS

ARTICLE I
Name and Objectives

Section 1. Name. The name of the Association shall be the Indiana Association of County Commissioners, Inc., hereafter referred to as the Association.

Section 2. Incorporation. The Association shall be incorporated as a non-profit organization in the State of Indiana, with a mailing address in Indiana.

Section 3. Objectives. The objectives of the Association are: to promote the preservation and improvement of the County Commissioner form of County Government; to promote cooperation of the county unit with all other units of local government (cities, towns, township, etc.) and with state and federal agencies; and to promote the improvement and efficiency in the delivery of county government services.

Section 4. Methods. The Association shall endeavor to fulfill these goals and objectives: through legislative and educational programs developed in cooperation with state, federal and local agencies; through the compilation and dissemination of guideline materials on the functions and responsibilities of county commissioners and county government; and through District Meetings, the Annual Conference, the annual Purdue Road School, County Government Day and other national, state and regional meetings.

ARTICLE II
Association Membership

Section 1. Membership Grades. The membership of this Association shall consist of the following membership grades: Commissioner Member, Past-President Member, Associate Member, Honorary Member, and Former Commissioner Member.

Section 2. Commissioner Member. This membership grade is reserved for duly elected and qualified persons serving on a Board of County Commissioners.

Section 3. Past-President Member. This membership grade is reserved for a person who has served as President of the Association.

Section 4. Associate Member. This membership grade is reserved for persons who demonstrate their support of the goals and objectives of the Association through their contributions to the Association.

Section 5. Honorary Member. This membership grade is reserved for those persons who, by Association designation, is a person of outstanding ability in the area of county government or county public works.

Section 6. Former Commission Members. This membership grade is reserved for those persons who have previously served, but are not currently serving on a Board of County Commissioners.

ARTICLE III
Association Districts

Section 1. Six (6) Districts. The Association shall have six (6) district organizations in the State of Indiana, consisting of:

North-East District	-	15 counties
North-West District	-	16 counties
East-Central District	-	15 counties
West-Central District	-	14 counties
South-East District	-	15 counties
South-West District	-	17 counties

Section 2. North-East District. The Association North-East District shall consist of the following list of counties with alphabetical number prefix:

1. Adams	27. Grant	57. Noble
2. Allen	35. Huntington	76. Steuben
5. Blackford	38. Jay	85. Wabash
17. DeKalb	43. Kosciusko	90. Wells
20. Elkhart	44. LaGrange	92. Whitley

Section 3. North-West District. The Association North-West District shall consist of the following list of counties with alphabetical number prefix:

4. Benton	37. Jasper	56. Newton
8. Carroll	45. Lake	64. Porter
9. Cass	46. LaPorte	66. Pulaski
25. Fulton	50. Marshall	71. St. Joseph
34. Howard	52. Miami	75. Starke
		91. White

Section 4. East-Central District. The Association East-Central District shall consist of the following list of counties with alphabetical number prefix:

18. Delaware	33. Henry	70. Rush

21. Fayette	41. Johnson	73. Shelby
24. Franklin	48. Madison	80. Tipton
29. Hamilton	49. Marion	81. Union
30. Hancock	68. Randolph	89. Wayne

Section 5. West-Central District. The Association West-Central District shall consist of the following list of counties with alphabetical number prefix:

6. Boone	54. Montgomery	79. Tippecanoe
11. Clay	55. Morgan	83. Vermillion
12. Clinton	60. Owen	84. Vigo
23. Fountain	61. Parke	86. Warren
32. Hendricks	67. Putnam	

Section 8. South-East District. The Association South-East District shall consist of the following list of counties with alphabetical number prefix:

3. Bartholomew	22. Floyd	58. Ohio
7. Brown	31. Harrison	69. Ripley
10. Clark	36. Jackson	72. Scott
15. Dearborn	39. Jefferson	78. Switzerland
16. Decatur	40. Jennings	88. Washington

Section 7. South-West District. The Association South-West District shall consist of the following list of counties with alphabetical number prefix:

13. Crawford	47. Lawrence	65. Posey
14. Daviess	51. Martin	74. Spencer
19. Dubois	53. Monroe	77. Sullivan
26. Gibson	59. Orange	84. Vanderburgh
28. Green	62. Perry	87. Warrick
42. Knox	63. Pike	

ARTICLE IV
District Meetings, Annual Conference, Officers, Elections, Duties

Section 1. District Meetings. During each calendar year, the Association may organize one (1) or more District Meetings. Each District Meeting may be structured to provide for the participation of one (1) or more Districts and shall be held at a site to be determined by the participating Districts. The President of each District may organize such additional meetings of his or her District as desired.

Section 2. Annual Conference. As used herein, the term "Annual Conference" shall mean that meeting organized by the Association each year, to be held in late November or December of each year.

Section 3. District Officers - Elections. The district officers shall consist of a President, Vice-President and Secretary-Treasurer. These three officers shall be elected as a slate for a term of one (1) year at the Annual Conference. The slate of three officers shall be presented by a three-member Nominating Committee appointed by the District President.

Section 4. District President - Duties. The District President shall be the presiding officer at the District Meetings and may appoint a Nominating Committee (three members) to develop a slate of nominees for the annual election of officers. The District President is a member of the State Board of Directors and shall report county commissioner problems and issues in his or her District to the State Board of Directors.

Section 5. District Vice-President - Duties. The District Vice-President shall be the presiding officer and shall perform such other duties as may be required at District Meetings when the District President is unable to attend. The District Vice-President shall record the minutes when the District Secretary-Treasurer is unable to attend a District Meeting. The District Vice President is a member of the State Board of Directors and shall report county commissioner problems and issues in his or her District to the State Board of Directors.

Section 6. District Secretary-Treasurer - Duties. The District Secretary-Treasurer shall record the minutes of the District Meetings and report same at the District Meeting next following. The District Secretary-Treasurer may attend any meeting of the Board of Directors. If the District Secretary-Treasurer attends and the District Vice-President or the District President does not attend a meeting of the Board of Directors, the District Secretary-Treasurer shall be considered a member of the Board of Directors for purposes of the quorum requirement of Article VII, Section 4, and may vote on any matter presented at such meeting.

Section 7. District Officers - Terms of Office. The term of office of each of the President, Vice President and Secretary-Treasurer of each of the Districts shall begin with the January 1 immediately following the Annual Conference at which he or she is elected and shall continue through the following December 31 or such later date on which his or her successor is elected and qualified.

ARTICLE V
State Officers, Elections, Duties

Section 1. State Officers. The State Officers of the Association shall consist of a President, Vice-President, Secretary, Treasurer, and the Past President. The President, Vice-President, Secretary, and Treasurer shall be elected for a one-year term, either as a

slate or individually, at the Annual Conference. Subject to the Association's annual election process, it is the intent that the State Officers, who remain duly-elected County Commissioners, serve progressively as Treasurer, Secretary, Vice-President, President, and Past President.

Section 2. State Officers - Selection. The outgoing State President shall preside over the election of State Officers at the Annual Conference. The outgoing President shall appoint a three-member Nominating Committee to canvass the membership for candidates willing to serve in the offices open for election. The Nominating Committee shall present a slate of candidates for the open offices to the membership present at the Annual Conference. The President may provide for the nomination of other candidates for the open offices. Each of the President, Vice-President, Secretary, and Treasurer shall be elected by a majority vote of the membership present at the Annual Conference, and shall serve a one-year term commencing with the January 1 immediately following the Annual Conference at which he or she is elected and continuing through the following December 31 or such later date on which his or her successor is elected and qualified.

The outgoing State President shall serve a one-year term as Past President commencing with the January 1 immediately following the Annual Conference at which the new President is elected and continuing through the following December 31 or such later date on which his or her successor is qualified. The outgoing President shall only serve as Past President in the event that he or she has been duly elected to serve as County Commissioner for the following calendar year. In the event that the outgoing President has not been duly elected to serve as a County Commissioner for the following year, the Board of Directors' shall select another individual, who has been duly elected to serve as a County Commissioner for the following year, to serve on the Board of Directors as a substitute for the outgoing President.

Section 3. President - Duties. The President shall preside at the Board of Directors' Meetings, at the Annual Conference, at the annual Business Session of Purdue Road School and at any other state or regional meeting called by the Board of Directors. The President is responsible for implementing the policies of the Association. Appointments to Standing Committees or any special committees as needed shall be made by the President. The President shall be an ex-officio member of all committees. To the extent possible, the President shall attend each of the District Meetings scheduled by the Association. Upon the approval of the Board of Directors, the President may be reimbursed for his or her travel expenses incurred for attending the District Meetings.

Section 4. Vice President - Duties. The Vice-President shall be the presiding officer and shall perform such other duties as may be required at Board Meetings or other state meetings when the State President is unable to attend. If the office of President becomes vacant or the President declares himself or herself unable to serve, the Vice-President shall assume the duties of the office of President.

Section 5. Secretary - Duties. The Secretary shall record the minutes of all Association and Board of Director's Meetings, and distribute such minutes to the Board of Directors

after such meetings are held. The Secretary shall serve as the Executive Director in the absence of a duly appointed person for this office.

Section 6. Treasurer - Duties. The Treasurer shall, with the assistance of the Executive Director and the Controller, receive membership dues, funds and grants of the Association; account for same and audit all bills and payments. The Treasurer, with the assistance of the Controller, shall present a statement of financial condition at least once a year and other times specified by the Board of Directors.

Section 7. District Presidents - Duties. The District Presidents shall assist the President, Vice-President, Secretary and Treasurer in such manner as requested by them and promote a communication program among the counties in their respective Districts. They shall review and recommend approval or disapproval of Associate Membership applications when referred to them.

Section 8. Vacancies. In the event of a vacancy in the office of President, Vice-President or Secretary, the succeeding officer would assume the vacant position, each moving up in turn, and a new Treasurer would then be chosen by the Board of Directors. In the event of a vacancy in the office of Treasurer or Past President, the Board of Directors shall appoint a successor.

ARTICLE VI
Board of Directors, Staff, Policies, Committees

Section 1. Board of Directors. The Board shall consist of seventeen (17) Directors. The President, Vice-President, Secretary, Treasurer, six (6) District Presidents, six (6) District Vice Presidents and the Past President (or its substitute) of the Association shall constitute the Board of Directors, and the President shall be Chairman. Any vacancy shall be filed by a majority vote of the Board. The member elected to fill a vacancy of a District President or Vice President shall come from the same District as the member he or she is replacing.

Section 2. Executive Committee; Additional Committees - Appointments. The President, Vice-President, Secretary, Treasurer, and the Past President shall comprise the Executive Committee. The Board of Directors may establish the following additional committees to concentrate on specific areas of Association activity:

(a) Committee on Legislation

(b) Committee on Membership and Finance

(c) Committee on Newsletters and Publications

(d) Committee on Annual Conference and other Meetings

(e) Committee on Intergovernmental Cooperation

(f) Committee on Effective County Government Services

(i) Other ad hoc committees as deemed needed by the Board of Directors.

The Board of Directors shall establish the size of such Committees and make committee appointments of Commissioner Members who are willing to serve from the various Districts. The Board of Directors shall give general direction and guidance to each such Committee established as to its assigned mission.

Section 3. Association Policies. The Board of Directors shall establish the policies of the Association and advise and assist the President in their execution. The Board of Directors shall adopt policies and give direction to the following items of Association activity:

(a) Establish a schedule of membership dues and fees for various member classifications.

(b) Provide for the compensation, remuneration and reimbursement of employees, agents, firms or others as necessary and desirable to further the objectives of the Association.

(c) Appoint Commissioner Members to represent the Commissioners Association on the Board of Directors for the Association of Indiana Counties, Inc., with the number and term of appointments to be determined by the Commissioners Association.

(d) Approve Associate and Honorary Membership recommendations.

(e) Establish procedures and requirements for Association affiliation and cooperation with other agencies and association groups.

(f) Meet at least six (6) times each calendar year and at the call of the President.

(g) Complete an annual review of the Association's finances, including its membership dues and other revenues and its expenses, and make a report the financial condition of the Association available to its Commissioner Members.

(h) Authorize the Executive Director and/or President to enter into agreements, contracts, etc. which further the goals and objectives of the Association.

(i) Review District boundaries, regional or population grouping of counties and establish such organization groups as may be deemed in the best interest of the Association.

(j) Authorize the Executive Director or other Association staff members to organize and/or develop such fundraising programs as deemed appropriate to further the goals and objectives of the Association.

Section 4. Executive Director - Appointment. The Board of Directors shall appoint an Executive Director to administer and execute the policies adopted by the Board. The term of the appointment of the Executive Director shall be for one year terms to begin each June 1. This date may be extended or modified at the discretion of the Board of Directors.

Section 5. Executive Director - Duties. The Board of Directors may assign the Executive Director duties that are included in, but not limited to, the following list of administrative functions:

(a) Maintain a headquarters mailing address and telephone in Indiana.

(b) Assist the District President in organizing District Commissioner meetings, organize information programs for District Meetings, and provide for District Meeting notices to be mailed to the District Commissioners and vendors.

(c) Assist the Board of Directors in organizing the Annual Conference, organize information programs for Annual Conference, and provide for Annual Conference registration materials to be mailed to the Commissioner Members and vendors.

(d) Attend all District Meetings, the Annual Conference and Board of Directors Meetings.

(d) Assist the Board of Directors in developing policies and positions on administrative and legislative issues affecting county government.

(e) Maintain a legislative liaison with Standing Committees in the General Assembly that normally review legislation affecting county commissioners and county government.

(f) Maintain a public relations liaison with other agencies and associations that are active in the public and legislative sectors.

(k) Represent the Board of Directors and present their policy positions to legislative committees and other public forums.

(l) Perform such other actions as may be requested by the Board of Directors or the President.

Section 6. Controller - Appointment. The Board of Directors shall hire or contract with an individual or firm to serve as the Controller of the Association and perform certain financial duties with respect to the operation of the Association.

Section 7. Controller - Duties. The Board of Directors may assign the Controller duties that are included in, but not limited to, the following list of financial functions:

(a) Maintaining the financial records of the Association;

(b) Assisting the Board of Directors and Finance Committee in the preparation of an annual budget;

(c) Preparing monthly and annual financial statements and such other financial reports as may be requested from the Board;

(d) Preparing and distributing invoices to county and associate members of the Association, and receiving and depositing the receipts of the Association;

(e) Preparing for approval by the Board and paying the expenses of the Association;

(f) Preparing and filing, or arranging for the preparation and filing, of the annual tax return of the Association and such other tax filings as may be required by federal or state law; and

(g) Such other duties as may be agreed to between the Association and the Controller.

Section 8. Finance Committee - Members. The Finance Committee shall consist of the President, the Vice-President, the Secretary, and the Treasurer, with the Executive Director and Controller serving ex-officio as non-voting members of the committee.

Section 9. Finance Committee - Duties. The Finance Committee shall receive and review the Controller's monthly financial reports on Association income and expenses. The Finance Committee shall also review the income and expenses of each separate fund-raising activity authorized by the Board of Directors. The financial accounts can have the Controller, Executive Director, and any member of the Executive Board deemed necessary as an authorized signer, as directed by the Executive Committee. All Association receipts shall be deposited by the Controller and/or the Treasurer with a depository approved by the Board of Directors, and verified claims shall be paid in accordance with the Financial Processes.

Section 10. Additional Staff. The Board of Directors may also authorize from time to time, the employment or contracting for services of such individuals, agents, firms and associations whose services are needed to further the goals and objectives of the Association.

Section 11. Associate Member Advisory Committee. The Associate Member Advisory Committee shall consist of six (6) members appointed by the President of the Board of Directors. The members shall be appointed by the newly-elected President following the Association's Business Session conducted at the Annual Conference for a one-year term. The President of the Board shall designate one of the members to serve as Chairman. The Board of Directors may assign the Associate Member Advisory Committee the following responsibilities:

(a) Meet at least two (2) times each year to discuss ways to increase the number of associate members and discuss ways to enhance the involvement of associate members in Association activities.

(b) Assist the Board of Directors and Executive Director with the development of policies regarding the associate membership program.

(c) At the request of the District Officers, assist with the planning of District meetings.

(d) Assist the Executive Director in the administration of the associate member program.

(e) At the request of the President, attend Board of Directors meetings to discuss Associate Member Advisory Committee recommendations.

ARTICLE VII
Meetings and Quorum

Section 1. Call of Meetings. All meetings of the Board of Directors are to be called by the President.

Section 2. Number of Meetings. The Board of Directors shall meet at least six (6) times during each calendar year for the purpose of reviewing the business affairs of the Association, county commissioner problems and issues in the Districts, and legislative programs to further the goals of the Association.

Section 3. Quorum. The President (or Vice-President) plus eight other members of the Board of Directors must be present in order for the Board of Directors to conduct Association business.

ARTICLE VIII
Amendments

Section 1. Approval. A proposed amendment to this Constitution shall be submitted to a vote by each member of the Board of Directors. If approved by two-third (2/3) of the members on the Board of Directors, the amendment shall become effective immediately or on a date certain set forth in the amendment.

Section 2. Notice of Amendment. The President shall give notice to all County Commissioner Members of the Association of each amendment duly approved by the Board of Directors. Such notice may be given by publication of the Constitution on the Association's website.

I. COUNTY EXECUTIVE & LEGISLATIVE BODY -- POWERS AND DUTIES

In 91 of Indiana's 92 counties, the Board of County Commissioners is designated as the County Executive for purposes of conducting county business. (IC 36-2-2-2). Generally, while the Board of Commissioners act as the county executive, the County Council will act as the county legislative body and fiscal body. (IC 36-2-3.5-4). However, in Marion County, the Mayor is the county executive, while the county treasurer, auditor and assessor serve ex officio, as County Commissioners and possess minimal powers and duties. (IC 36-3-3-10).

In addition to performing executive powers and duties, the Board also exercises the legislative powers and duties of the County (except in Lake County, St. Joseph County, and Marion County). In Lake County and St. Joseph County, the County Council serves as both the fiscal and legislative body for the county.

A. Election and Qualification.

1. Term.

a. Length of Term.

The term of office begins January l of the year following election and continues for the greater of four years or until a successor is elected and qualified. (IC 36-2-2-3).

b. Qualifications Needed for Office.

To be eligible to run for commissioner, a person must have resided in the county for at least one year and resided in the district from which the person seeks election for at least six months. Once elected, a commissioner forfeits his office if he does not remain a resident of the county and district after taking office. (IC 3-8-1-21).

c. Resignation.

Any member who forfeits or wishes to resign his or her office must send written notice to the president of the County Council and the County Council shall declare the office vacant. (IC 5-8-3.5-1).

2. Redistricting.

a. General Rule.

Except in Lake County and St. Joseph County, the Board of Commissioners must divide the county into three (3) districts that are composed of contiguous territory and are reasonably compact. The district boundaries drawn by the Board of Commissioners must not cross precinct

boundary lines and must divide the townships only when a division is clearly necessary to accomplish the redistricting. (IC 36-2-2-4(a)). More information on how and when to draw election districts can be found in IC 3-5-10.

b. Lake County.

In Lake County, a county redistricting commission shall divide the county into three-single member districts that:

(i) are compact, subject only to natural boundary lines;
(ii) contain, as nearly as possible, equal population; and
(iii) do not cross precinct lines.

c. St. Joseph County.

In St. Joseph County, the Board of Commissioners must divide the county into three single-member districts that comply with the three requirements of subsection (b) listed above. (IC 36-2-2-4).

B. Powers.

1. Hiring and Appointment of Individuals.

a. General.

The Board of Commissioners may hire an individual to perform a duty required of a county officer by statute or on a commission or percentage basis if such arrangement is found by the Board of Commissioners to be necessary to the public interest. If the individual's employment is not expressly authorized by statute, then his contract must be filed with the Circuit Court for that county, and he must file claims for compensation with the Court. Any taxpayer can contest such claims. A member of a Board of Commissioners who recklessly violates this section is guilty of a Class C misdemeanor and forfeits his office. (IC 36-2-2-13).

Appointments made by the Board of Commissioners shall be certified by the county auditor, under the seal of the Board of Commissioners. (IC 36-2-2-12).

The county auditor, or a member of the Board of Commissioners, may administer all oaths required by chapter IC 36-2-2. (IC 36-2-2-15).

The Board of Commissioners may employ and fix the compensation of an attorney to represent and advise the Board of Commissioners. For the purposes of Section 9, Article 2 of the Constitution of the State of Indiana, employment by a Board of Commissioners as an attorney does not constitute a lucrative office. (IC 36-2-2-30).

b. Appointment of a County Administrator.

The Board of Commissioners may appoint a county administrator to be the administrative head of the county. The Board of Commissioners may assign any office, position, or duties under its control to the administrator who serves at the pleasure of the Board of Commissioners.

The Board of Commissioners must prescribe the duties of the administrator by resolution. Upon adoption of a resolution, the administrator may:

(i) assist in the administration and enforcement of policies and resolutions of the Board of Commissioners;
(ii) supervise activities of county government subject to the control of the Board of Commissioners;
(iii) attend meetings of the Board of Commissioners;
(iv) recommend measures for adoption to the Board of Commissioners;
(v) prepare and submit reports that he considered advisable or that the Board of Commissioners require;
(vi) keep the Board of Commissioners fully advised on the financial condition of the county;
(vii) prepare and submit a budget for each fiscal year; and
(viii) perform other duties that the Board of Commissioners request by resolution.

If the administrator is absent from his office due to illness, death, vacation, resignation, or removal, the President of the Board of Commissioners may, or the Board of Commissioners may appoint a person to, act as administrator until the administrator returns to his duties or the Board of Commissioners appoint a new administrator. (IC 36-2-2-14).

2. Enforcement of Orders.

The Board of Commissioners may:

(a) punish contempt by a fine of three dollars ($3) or less or by imprisonment for not more than twenty-four (24) hours; and
(b) enforce its orders by attachment or other compulsory process.

Fines assessed by the Board of Commissioners shall be executed, collected, and paid over in the same manner as other fines.

The county sheriff or county police officer shall attend the meetings of the Board of Commissioners, if requested, and shall execute the orders of the Board of Commissioners. (IC 36-2-2-15).

3. Administering County Funds and Financial Management.

The Board of Commissioners may approve bills and accounts chargeable against the county and direct the raising of money necessary for county expenses. (IC 36-2-2-16). The Board of Commissioners may audit the accounts of any officer who deals with money belonging to or appropriated for the benefit of the county. (IC 36-2-2-17).

In January of each year, the Board of Commissioners and county treasurer shall make a settlement for the preceding calendar year with a copy of the settlement sheet placed in the order book of the Board of Commissioners. (IC 36-2-2-18).

At its second regular meeting each year, the Board of Commissioners must prepare an accurate statement of the county's receipts and expenditures during the preceding calendar year. The statement must include the name of, and total compensation paid to, each county officer, deputy, and employee. The Board of Commissioners is required to post this statement at the courthouse door and two (2) other places in the county and must publish it in the manner prescribed by IC 5-3-1. (IC 36-2-2-19).

4. Transactions Involving County Property.

a. General.

The Board of Commissioners may authorize the following:

(i) the sale of the county's public buildings and the acquisition of land upon which to build new public buildings; and
(ii) the acquisition of land for a public square and the maintenance of that square.

However, if the value of the property exceeds $1,000, then the transaction must be authorized by an ordinance of the County Council fixing the terms and conditions of the transaction. (IC 36-2-2-20).

b. Licenses and Permits.

The Board of Commissioners may grant licenses, permits, or franchises for the use of county property if they:

(i) do not exclude any individual;
(ii) only last for a definite period of time; and
(iii) are assignable only with the consent of the Board of Commissioners.

Special rules apply in the case of regulated utilities. (IC 36-2-2-23).

5. Maintenance of Courthouse, Jail, and Other Public Offices.

The Board of Commissioners must establish and maintain a county courthouse, county jail, and public offices for the county clerk, the county auditor, the county recorder, the county treasurer, the county sheriff, and the county surveyor.

The offices for the surveyor and superintendent of schools (if applicable) must be located in the courthouse or at the county seat. Offices for the sheriff may be located:

(a) in the courthouse;
(b) inside the corporate limits of the county seat; or
(c) outside the corporate limits of the county seat but within county limits. (IC 36-2-2-24).

6. Cost of Publication for Notice, Report or Statement.

Whenever publication of a notice, report, or statement of any kind is required and a county is liable for the cost of that publication, the Board of Commissioners may not make or pay for the publication in more than one (1) newspaper unless the publication in two (2) newspapers is required. A person who violates this section commits a Class C infraction. (IC 36-2-2-25).

C. Administration of Powers.

1. Receipt of Claims Against County and Review By Board of Commissioners.

A person who has a claim against a county must file an invoice or a bill with the county auditor. The auditor must present the claim to the Board of Commissioners, which shall examine the merits of the claim. The Board of Commissioners may then allow any part of the claim that it finds to be valid. (IC 36-2-6-2).

A person aggrieved by a decision of the Board of Commissioners with respect to the allowance of a claim may appeal that decision to the circuit or superior court of the county or bring an action against the county. An appeal must be taken within thirty (30) days of the Board of Commissioners' action and must be accompanied by a bond covering court costs and payable to the Board of Commissioners. If the appeal does not result in an increase of the Board of Commissioners' original allowance, the person shall pay the costs of the appeal. (IC 36-2-6-9).

2. Review and Payment of Claims.

a. General.

The Board of Commissioners may allow a claim or order the issuance of a county warrant for payment of a claim only at a regular or special meeting of the Board of Commissioners. In addition, the Board of Commissioners may allow a claim only if:

(i) there is a fully itemized invoice or bill for the claim;
(ii) the invoice or bill is verified by the officer or person receiving the goods and services;
(iii) the invoice or bill is filed in the county auditor's office;
(iv) the county auditor audits and certifies that the invoice or bill is true and correct; and
(iv) it is placed on the claim docket by the auditor at least five (5) days prior to the meeting at which the Board of Commissioners is to consider the claim.

A member of the Board of Commissioners who considers a claim before complying with the foregoing commits a Class C infraction.

If, within sixty (60) days after the Board of Commissioners allows a claim, a taxpayer of the county demands that the Board of Commissioners refund that allowance to the county, and the Board of Commissioners refuses to do so, the taxpayer may bring an action to recover an illegal, unwarranted, or unauthorized allowance for the benefit of the county. A person who brings an action under this section shall give security for costs, and the court shall allow a reasonable sum, including attorney fees, out of the money recovered as compensation for his trouble and expense of bringing the suit. The compensation shall be specified in the court's order. (IC 36-2-6-4).

b. Claim Payments in Advance of Board Allowance

The Board of Commissioners may adopt an ordinance allowing money to be disbursed for lawful county purposes pursuant to the following provisions. If the Board of Commissioners has adopted such an ordinance, notwithstanding the requirements outlined in subsection (a) above, the county auditor may, with the prior written approval of a county board having jurisdiction over the allowance of such claims, make claim payments in advance of board allowance for the following kinds of expenses:

(i) property or services purchased or leased from the United States government, its agencies, or its political subdivisions;
(ii) license or permit fees;
(iii) insurance premiums;
(iv) utility payments or utility connection charges;

(v) general grant programs where advance funding is not prohibited and the contracting party posts sufficient security to cover the amount advanced;
(vi) grants of state funds authorized by statute;
(vii) maintenance or service agreements;
(viii) leases or rental agreements;
(ix) bond or coupon payments;
(x) payroll;
(xi) State or federal taxes;
(xii) expenses that must be paid because of emergency circumstances; and
(xiii) expenses described in an ordinance.

Each payment of expenses under this section must be supported by a fully itemized invoice or bill and certification by the county auditor.

The Board of Commissioners, or the county board having jurisdiction over the allowance of the claim, must review and allow the claim at its next regular or special meeting following the preapproved payment of the expense. (IC 36-2-6-4.5).

c. Claims Based on Delivery of Supplies.

A county officer or employee authorized to receive supplies contracted for by the county shall review the invoice or bill for the supplies item by item and certify in writing on the invoice or bill:

(i) the fact that the supplies listed on the invoice or bill have been delivered to him in compliance with the contract; or
(ii) the facts showing a breach of contract.

If the officer or employee discovers a breach of contract on receipt of the supplies, he shall deduct a just amount from the invoice or bill. The officer or employee shall immediately file his certificate and the bill or invoice with the county auditor. (IC 36-2-6-5(a)).

The Board of Commissioners may approve a claim on a contract for supplies only if:

(i) it finds that the claimant has complied with the contract; and
(ii) the county auditor certifies in writing that the invoice or bill for the supplies corresponds with the contract as to quality and price.

The Board of Commissioners may not use a county auditor's certificate as the sole basis for this finding. (IC 36-2-6-5(b)).

The Board of Commissioners may make an allowance for printed blanks or stationery for a county officer only if they are used for the benefit of the county. (IC 36-2-6-5(c)).

d. Claims Based on Services Performed for County.

The Board of Commissioners may allow a contract claim for services rendered under the supervision of the county surveyor, architect, engineer, superintendent, or inspector only if that supervisor certifies in writing that the work has been performed according to the contract, and that the claim is presently due. The supervisor's certificate must be filed with the claim.

The Board of Commissioners may not allow a claim on a contract covered under this section solely on the basis of the supervisor's certificate. (IC 36-2-6-6).

e. Services for Which Officers and Employees May Not Be Compensated.

The Board of Commissioners may not make an allowance to a county officer for services rendered in a criminal or civil action or extra services rendered in his capacity as a county officer. However, the Board of Commissioners may make an allowance to the clerk of the circuit court, county auditor, county treasurer, county sheriff, township assessor (if any), or county assessor, or to any of those officers' employees, only if:

(i) the allowance is specifically required by law; or
(ii) the Board of Commissioners finds, on the record, that the allowance is necessary in the public interest.

A member of the Board of Commissioners who recklessly violates this section commits a Class C misdemeanor and forfeits the member's office. (IC 36-2-6-8).

3. Recovery of Money Paid Unlawfully.

The Board of Commissioners may recover money unlawfully paid from the county treasury by instituting an action in the State's name against the officer who made or assisted in the illegal payment and/or the person who received the money.

If the Board of Commissioners fails to initiate an action within thirty (30) days after the illegal payment, then a citizen or taxpayer may make a written demand on the Board of Commissioners to bring the action and may then bring the action in the name of the state for the benefit of the county if the Board of Commissioners fails to comply with his demand

If an action brought under this section is successful, the court shall award the amount of money paid out of the treasury illegally, plus interest at the rate of six percent (6%) per year to the county and shall award reasonable attorney's fees and expenses to the plaintiff. (IC 36-2-6-13).

4. Procedure for Purchasing Supplies and Materials.

a. General

In general, the Public Purchasing Law (set forth in IC 5-22) applies to every expenditure of public funds by a governmental body. The Board of Commissioners is generally the purchasing agency for a county with the authority to award contracts and enter into contracts for the procurement of goods and services. In addition, as the executive and legislative body of the County under State law, the Board of Commissioners may also designate other bodies or individuals as a purchasing agency for the county. (IC 5-22-4-5) Further details governing public purchasing are discussed in Chapter IV of this Handbook.

b. Procurement Agents.

The Board of Commissioners and County Council, through identical ordinances, may designate a procurement agent to buy, purchase, lease or otherwise acquire materials, supplies, or services (other than professional services) with public funds. (IC 36-2-20-1, 36-2-20-2, 36-2-20-3). Such ordinances must also accept the applicability of the statutes governing procurement agents. (IC 36-2-20-1).

An official or employee who wants a county to acquire an item must forward a written requisition to the procurement agent, that must include the following information concerning the item: specifications, quantity, type, purpose for which the item is needed, office or place the item will be used, date when needed, and evidence that sufficient funds were appropriated and are available to pay for the item. (IC 36-2-20-4). After consultation with the person submitting the requisition, the procurement agent must acquire the item through the public purchasing procedures set forth in IC 5-22 or other applicable statutes (as further discussed in Chapter IV of this Handbook). (IC 36-2-20-5).

A claim by an official or employee for an item that was acquired in violation of the foregoing provisions may not be approved for payment by the Board of Commissioners, and it is the personal responsibility of the person who acquired the item. (IC 36-2-20-6).

c. Purchase of Supplies and Materials for County Institutions.

In connection with the purchases of supplies used for the maintenance and subsistence of persons confined to, living in, or treated at county institutions, such supplies shall be contracted for and shall be purchased by the business manager or purchasing agent of each county institution. However, the Board of Commissioners shall make contracts for:

(i) meat;
(ii) groceries;
(iii) dry goods;

(iv) fuel; and
(v) furniture and equipment,

at stated prices, but leaving the quantity to vary with the needs of the county. (IC 36-2-6-17).

5. Bonds or Warrants.

The County Council, as the fiscal body for the county, may adopt ordinances to authorize loans for the purpose of procuring money to be used: in the exercise of county powers and for the payment of county debts other than current running expenses; to issue bonds or other county obligations to refund those loans; and to authorize temporary loans to meet current running expenses, in anticipation of and not in excess of county revenues for the current fiscal year, which shall be evidenced by tax anticipation warrants of the county. (IC 36-2-6-18).

All bonds, notes, or tax anticipation warrants of the county must be signed by the Board of Commissioners and attested by the county auditor. (IC 36-2-6-20). Facsimile signatures and electronic signatures are authorized in many instances. (IC 5-1-3-2).

A member of a Board of Commissioners who:

(i) recklessly issues a bond, certificate, or warrant for the payment of money that would require the county to exceed its appropriation for the bond, certificate, or warrant; or
(ii) enters into an agreement that would require the county to exceed its appropriation for a particular purpose

commits a Class B misdemeanor and is liable on his official bond to any person injured by this conduct.

Additionally, an agreement entered into by the Board of Commissioners that requires the county to exceed its appropriation for a particular purpose is void. (IC 36-2-6-12).

6. Payments in Settlements with a County, Township or School Officer.

a. General.

A settlement made by the Board of Commissioners with a county, township, or school officer is binding on the state or county only if the officer has accounted for all money he has collected by virtue of his office and has performed every duty required of him by law. However, if the settlement is not binding, the officer and his sureties are liable as if no settlement occurred. (IC 36-2-6-15).

b. Overpayments.

If the Board of Commissioners find that through mistake or any other cause, a county, township, or school officer has paid over or accounted to the Board of Commissioners for more money than he owed, the Board of Commissioners may:

(i) order that the officer be repaid out of the proper fund and be given the proper credit by the county auditor; or
(ii) if the money has not yet been paid by the officer, release the amount of his debt that is mistaken. (IC 36-2-6-15).

D. Duties.

1. Meetings.

a. General.

The Board of Commissioners shall hold a regular meeting at least once each month and when necessary to conduct additional business. Dates of regular meetings must be established by resolution at or before the first meeting in February of each year. (IC 36-2-2-6). The Board of Commissioners may adopt rules for conducting the business during its meetings; however, there is no legal requirement that the Board do so. (IC 36-2-4-10). The Board of Commissioners may select a location other than the county courthouse for its meetings only if the courthouse is not suitable, is inconvenient, or has been replaced or supplemented by other buildings to house county government offices. (IC 36-2-2-9). The county auditor shall attend all meetings and record the entire meeting. (IC 36-2-2-11). The Board of Commissioners shall use a common seal. (IC 36-2-4-11).

b. Special Meetings.

If the public interest requires a special meeting of the Board of Commissioners, then such a meeting may be called by:

(i) a member of the Board of Commissioners;
(ii) the county auditor;
(iii) the county clerk, if the office of county auditor is vacant; or
(iv) the county recorder, if the offices of county auditor and county clerk are both vacant.

There must be at least forty-eight (48) hours notice of the meeting unless the meeting is called to deal with an emergency under IC 5-14-1.5-5. The notice must also include the purpose of the meeting, and the Board of Commissioners may not conduct any unrelated business at the meeting. (IC 36-2-2-8).

2. Consultation Hours.

The Board of Commissioners must keep its office open during normal business hours, but a member of the Board of Commissioners is not required to be present. (IC 36-2-2-10).

3. Legislative Procedures That Must Be Followed.

a. General Procedures.

As the legislative body for the county, the Board of Commissioners must follow certain legislative procedures. A majority of all the elected members of the Board of Commissioners constitutes a quorum for transacting business. However, the County Council may, by a two-thirds (2/3) vote, adopt a rule specifying that a certain number of members greater than a majority constitutes a quorum. (IC 36-2-4-3). A requirement that an ordinance, resolution, or other action be passed by a majority vote means at least a majority vote of all the elected members. (IC 36-2-4-4). A majority vote is required to pass an ordinance, resolution or other action, unless a statute requires a greater number. (IC 36-2-4-5). In addition, unanimous consent of the members present is required to pass an ordinance on the same day or at the same meeting at which it is introduced, except for an ordinance of a county fiscal body for additional appropriations or a zoning ordinance or amendment thereto under IC 36-7. (IC 36-2-4-7). If only two members of a Board of Commissioners attend a meeting and they disagree on a question that is before the Board, then the question must be continued until the next meeting (*i.e.*, by definition, there would not be a majority of the elected members of the Board of Commissioners present to vote either way on the question). (IC 36-2-4-6).

An ordinance or resolution is considered adopted when it is signed by the presiding officer, but a statute may require it to be promulgated or published before it takes effect. (IC 36-2-4-8(a)).

In addition, in the cases of St Joseph, Lake and other counties opting to use IC 36-2-3.5, an ordinance passed by the County Council is considered adopted only if it is:

(i) approved in writing by a majority of the Board of Commissioners;
(ii) neither approved nor vetoed by a majority of the Board of Commissioners within ten (10) days after passage by the County Council; or
(iii) passed by a two-thirds vote of the County Council within sixty days of a veto by signature of a majority of the Board of Commissioners.

After an ordinance or resolution passed by the County Council (in the cases of St Joseph, Lake and other counties opting to use IC 36-2-3.5) has been signed by the presiding officer, the county auditor shall present it to the Board of Commissioners and record the time of the presentation. Within ten (10) days after the ordinance or resolution is presented to them, the Board of Commissioners shall:

(i) approve the ordinance or resolution, by signature of a majority of the Board of Commissioners, and send the County Council a message announcing its approval; or
(ii) veto the ordinance or resolution, by returning it to the County Council with a message announcing its veto and stating the reasons for the veto. (IC 36-2-4-8).

Within a reasonable time after an ordinance is adopted, the county auditor must record it in a book kept for that purpose. The record must include the signature of the presiding officer and the attestation of the auditor. The record, or a certified copy of the record, is presumptive evidence that the ordinance was adopted and took effect. (IC 36-2-4-9).

The foregoing legislative procedures and the procedures described below do not apply to a zoning ordinance or amendment to a zoning ordinance, or a resolution approving a comprehensive plan, that is adopted under IC 36-7 (which governs the procedures and requirements for Planning and Zoning). (IC 36-2-4-8(f)).

b. Procedures for Specific Types of Ordinances.

An ordinance prescribing a penalty or forfeiture for violation must be published before it takes effect. This publication may be either once each week for two consecutive weeks pursuant to IC 5-3-1, or once each week for two consecutive weeks where the first week is pursuant to IC 5-3-1 and the second week is pursuant to IC 5-3-5 and on the official website of the county. However, in the cases of St. Joseph, Lake and other counties opting to use IC 36-2-3.5 (*i.e.*, authorizing a county council to serve as both legislative and fiscal body of the county), if the ordinance is adopted by the County Council and there exists an urgent necessity mandating its immediate effectiveness, then it need not be published if:

(i) the Board of Commissioners declare the urgent necessity; and
(ii) copies of the ordinance are posted in three public places in each of the districts of the county before it takes effect.

If the Board of Commissioners (or the County Council, in the cases of St Joseph, Lake and other counties opting to use IC 36-2-3.5) adopts an environmental restrictive ordinance, certain additional requirements apply. For such ordinances, the legislative body shall:

(i) give written notice to IDEM not later than sixty (60) days *before* amendment or repeal of an environmental restrictive ordinance (unless notice is waived by the director of IDEM upon the written request of the legislative body); and
(ii) give written notice to department of environmental management (IDEM) not later than thirty (30) days *after* passage, amendment, or repeal of an environmental restrictive ordinance;

An environmental restrictive ordinance passed or amended after 2009 by the legislative body must state the foregoing notice requirements; however, the failure of an environmental restrictive ordinance to comply with this requirement does not void the ordinance. (IC 36-2-4-8(c)).

An ordinance increasing a building permit fee on new development must be published one (1) time in accordance with IC 5-3-1, not later than thirty (30) days after the ordinance is adopted by the legislative body in accordance with IC 5-3-1. The ordinance must delay the implementation of the fee increase for ninety (90) days after the date the ordinance is published. (IC 36-2-4-8(f)).

E. Home Rule.

1. General.

Prior to enactment of Indiana's Home Rule Law (see IC 36-1-3), the powers of Indiana municipalities were somewhat limited by the legal concept referred to as "Dillon's Rule." Under that legal doctrine, municipal corporations possessed only those powers expressly granted, powers necessarily implied or incident to express powers and powers essential to the stated purposes of a municipality. Moreover, according to Dillon's Rule, any doubt as to the existence or non-existence of a power was to be resolved in favor of the non-existence of the power. See, e.g., Local 26 Nat'l. Bro. of Op. Paths, v. City of Kokomo, 211 Ind. 72 (1937); Southern Ky. Co. v. Harpe, 223 Ind. 124 (1944).

The Home Rule Law applies to all counties (IC 36-1-3-1; IC 36-1-2-23) and is intended to confer upon counties all the powers needed for the effective operation of local government as to local affairs. (IC 36-1-3-2).

2. Resolution of Doubt as to Existence of Power.

The rule of law (i.e., "Dillon's Rule) that any doubt as to the existence of a power of a unit shall be resolved against its existence has been abolished. Any doubt regarding the existence of a power of a county is to be resolved in favor of its existence. This rule applies even if a statute specifically granting the power has been repealed. (IC 36-1-3-3).

3. Powers of a County.

a. General.

Pursuant to the Home Rule Law, each county has (a) all powers expressly granted to it by statute, and (b) all other powers necessary or desirable in the conduct of its affairs, whether or not such powers are expressly granted by statute. (IC 36-1-3-4(b)).

b. Omitted Powers.

The omission of a power from a statute does not imply that a county lacks that power. (IC 36-1-3-4(c)).

4. Exercise of Powers.

a. General.

A county may exercise any power it has to the extent that the power (a) is not explicitly denied by the Indiana Constitution or by any statute; and (b) is not expressly granted to another entity. (IC 36-1-3-5).

b. Specific Manner.

However, if there is a constitutional or statutory provision requiring a specific manner for exercising a power, a county must exercise the power in accordance with such provision. (IC 36-1-3-6(a)).

If there is no constitutional or statutory provision requiring a specific manner for exercising the power, a county must either: (a) adopt an ordinance prescribing the specific manner for exercising the power, or (b) comply with a statutory provision permitting a specific manner for exercising the power. (IC 36-1-3-6(b)).

An ordinance prescribing a specific manner for exercising the power must be adopted by the Board of Commissioners for the county (except in Marion County, Lake County, or St. Joseph County in which case the legislative body for the county shall adopt such an ordinance). (IC 36-1-3-6(c)).

c. Review.

A state or local agency may review or regulate the exercise of powers by a county only to the extent prescribed by statute. (IC 36-1-3-7).

5. Powers Specifically Withheld.

Despite the broad grant of authority conferred by the Home Rule Law, there are certain powers which the Indiana General Assembly has specifically prohibited political subdivisions from exercising (IC 36-1-3-8(a)). Specifically, a county does not have the power to:

a) Condition or limit its civil liability, except as expressly authorized by statute;

b) Prescribe the law governing civil actions between private persons;

c) Impose duties on another political subdivision, except as expressly authorized by statute;

d) Impose a tax, except as expressly authorized by statute;

e) Impose a license fee greater than reasonably related to the administrative costs of exercising a regulatory power;

f) Impose a service charge or user fee greater than that reasonably related to reasonable and appropriate rates for services;

g) Regulate conduct that is regulated by a state agency, except as expressly authorized by statute;

h) Prescribe a penalty for conduct constituting a crime or infraction under statute;

i) Prescribe a penalty of imprisonment for an ordinance violation;

j) Prescribe a penalty of a fine as follows: (a) more than $10,000 for the violation of an ordinance or a regulation concerning air emissions adopted by a county that has received approval to establish an air program under IC 13-17-12-6, or (b) for violation of any other ordinance, (i) more than $2,500 for a first violation of the ordinance, and (ii) (except for traffic or parking tickets) more than $7,500 for a second or subsequent violation of the ordinance;

k) Invest money, except as expressly authorized by statute;

l) Adopt an ordinance, a resolution, or an order concerning an election described by IC 3-5-1-2, or otherwise conduct an election, except as expressly authorized by statute. An ordinance, a resolution, or an order concerning an election described by IC 3-5-1-2 that was adopted before January 1, 2023, is void unless a statute expressly granted the unit the power to adopt the ordinance, resolution, or order;

m) Adopt or enforce an ordinance that requires or would have the effect of requiring a landlord to participate in a Section 8 program of the federal Housing Act of 1937 or a similar program concerning housing;

n) Regulate or adopt or enforce an ordinance or resolution regulating (i) the manufacture, distribution, sale, provision, use or disposition or disposal of auxiliary containers or (ii) a manufacturer of auxiliary containers, distributor of auxiliary containers, or food retail facility that sells, provides or otherwise makes us of auxiliary containers (“auxiliary container” means a bag, box, cup, bottle, or similar container that is reusable or disposable, made of cloth, paper, plastic, extruded polystyrene or similar material, and designed for one time use or transporting merchandise or food from food or retail facilities).

o) Dissolve a political subdivision, except (i) as expressly granted by statute or (ii) under the procedure set forth in IC 36-1-8-17.7, if applicable.

p) The power to enact an ordinance requiring a solid waste hauler or a person who operates a vehicle in which recyclable material is transported for recycling to collect fees authorized by IC 13-21 and remit the fees to: a unit or; the board of a solid waste management district established under IC 13-21.

6. Territorial Jurisdiction.

a. General.

All of the area inside the boundaries of a county—including areas within the corporate boundaries of cities and towns located within the county—comprises its territorial jurisdiction. (IC 36-1-3-9(a)).

b. Exceptions.

A municipality has exclusive jurisdiction over bridges (subject to IC 8-16-3-1), streets, alleys, sidewalks, waterways, sewers, drains, and public grounds inside its corporate boundaries, unless a statute provides otherwise. (IC 36-1-3-9(a)). However, if the Board of Commissioners establishes a cumulative bridge fund under IC 8-16-3-1, then the Board of Commissioners is responsible for providing funds for all bridges, including those in municipalities, within the county, except those bridges on the state highway system. (IC 8-16-3-1).

Whenever a statute authorizes a municipality to exercise a power in areas outside its corporate boundaries, the power may be exercised in a county other than the county in which the municipal hall is located, but not inside the corporate boundaries of another municipality, only if both the municipality and the other county, by ordinance, enter into an interlocal agreement under IC 36-1-7. (IC 36-1-3-9(c)). If the municipality and such county cannot reach an agreement, either unit may petition the circuit or superior court of the county to hear and determine the matters at issue. The clerk of the court shall issue notice to the other unit as in other civil actions, and the court shall hold the hearing without a jury. There may be a change of venue from the judge but not from the county. The petitioning unit shall pay the costs of the action. (IC 36-1-3-9(d)).

II. OPEN DOOR LAW AND ACCESS TO PUBLIC RECORDS ACT

A. Indiana Open Door Law.

1. Introduction.

The Board of Commissioners must conduct its meetings in compliance with the Indiana Open Door Law which is set forth in IC 5-14-1.5-1 et seq. (the "Open Door Law"). The Open Door Law requires that "official action" of the Board of Commissioners be conducted in a manner open to the public, unless expressly provided otherwise by the Open Door Law. The basic purpose of the Open Door Law is that deliberations of public agencies are to be conducted openly so that citizens may be fully informed. See Turner v. Town of Speedway, 528 N.E.2d 858, 862 (Ind. Ct. App. 1988). The consequences of failing to abide by the Open Door Law may result in certain actions, policies or decisions of the Board of Commissioners being declared void by a court, an award of attorney fees, and in extreme cases, findings of contempt and jail time.

2. Definitions.

a. "Public Agency."

The Open Door Law applies only to public agencies. Under the Open Door Law, each of the following entities, among others, is a public agency:

(i) any board, commission, department, agency, authority, or other entity, by whatever name designated, exercising a portion of the executive, administrative, or legislative power of the state;

(ii) any county, township, school corporation, city, town, political subdivision, or other entity, by whatever name designated, exercising in a limited geographical area the executive, administrative, or legislative power of the state or a delegated local governmental power;

(iii) any entity which is subject to either:

  (a) budget review by either the department of local government finance or the governing body of a county, city, town, township, or school corporation; or

  (b) audit by the state board of accounts by statute, rule or regulation;

(iv) any building corporation of a political subdivision of the state of Indiana that issues bonds for the purpose of constructing public facilities;

(v) any advisory commission, committee, or body created by statute, ordinance, or executive order to advise the governing body of a public agency, except medical staffs or the committees of any such staff; and

(vi) The Indiana gaming commission established by IC 4-33, including any department, division, or office of the commission, and the Indiana horse racing commission established by IC 4-31, including any department, division, or office of the commission. (IC 5-14-1.5-2(a)).

b. "Governing Body."

Under the Open Door Law, a governing body means two (2) or more individuals who are any of the following:

(i) a public agency that:

(a) is a board, commission, authority, council, committee, body, or other entity; and
(b) takes official action on public business;

(ii) the board, commission, council, or other body of a public agency which takes official action upon public business (provided however, an agent or agents appointed by the governing body to conduct collective bargaining on behalf of the governing body does not constitute a governing body); or

(iii) any committee appointed directly by the governing body or its presiding officer to which authority to take official action upon public business has been delegated. (IC 5-14-1.5-2(b)).

The Board of Commissioners is a governing body under the Open Door Law.

c. "Meeting."

To fall within the scope of the Indiana Open Door Law, a meeting must be a gathering of the majority of the governing body of a public agency for the purpose of taking official action upon public business. Under the Open Door Law, a meeting does not include:

(i) any social or chance gathering not intended to avoid the Open Door Law;
(ii) any on-site inspection of any project, program, or facilities of applicants for incentives or assistance from the governing body;
(iii) traveling to and attending meetings of organizations devoted to the betterment of government;
(iv) a caucus;
(v) any gathering to discuss an industrial or a commercial prospect that does not include a conclusion as to recommendations, policy, decisions, or final action on the terms of a request or an offer of public financial resources;
(vi) an orientation of members of the governing body on their role and responsibilities as public officials, but not for any other official action;

(vii) a gathering for the sole purpose of administering an oath of office to an individual; or

(viii) Collective bargaining discussions that the governing body of a school corporation engages in directly with bargaining adversaries. (IC 5-14-1.5-2(c)).

d. "Official Action."

Official action is broadly defined as: (a) receiving information; (b) deliberating; (c) making recommendations; (d) establishing policy; (e) making decisions; or (f) taking final action. (IC 5-14-1.5-2(d)).

e. "Public Business."

Public business means any function upon which the public agency is empowered or authorized to take official action. (IC 5-14-1.5-2(e)).

f. "Executive Session."

Executive session means a meeting from which the public is excluded, except the governing body may admit those persons necessary to carry out its purpose. The governing body may also admit an individual who has been elected to the governing body but has not been sworn in as a member of the governing body. (IC 5-14-1.5-2(f)).

g. "Final Action."

Final action means a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order. (IC 5-14-1.5-2(g)).

h. "Caucus."

A caucus is defined as a gathering of members of a political party or coalition which is held for purposes of planning political strategy and holding discussions designed to prepare the members for taking official action. (IC 5-14-1.5-2(h)).

i. "Deliberate."

Deliberate means a discussion which may reasonably be expected to result in official action establishing policy, making decisions or taking final action. (I.C. 5-14-1.5-2(i)).

j. "News Media."

News media means all newspapers qualified to receive legal advertisements under IC 5- 3-1, all news services (as defined in IC 34-6-2-87), and all licensed commercial or public radio or television stations. (IC 5-14-1.5-2(j)).

k. "Person."

Person means an individual, a corporation, a limited liability company, a partnership, an unincorporated association, or a governmental entity. (I.C. 5-14-1.5-2(k)).

3. Basic Requirements.

The Open Door Law requires that unless the Board of Commissioners' meeting is an "executive session" (a meeting which, under the Open Door Law, can be closed to the public only if it meets one of eleven statutorily defined criteria), it must be open at all times for the purpose of permitting members of the public to observe and record them. The word "record" includes "the reasonable use of recorders, cameras and any other reasonable means of recording." Berry v. Peoples Broad. Corp., 547 N.E.2d 231, 234 (Ind. 1989). In addition, Boards of Commissioners are prohibited from using secret ballot voting at their meetings. (IC 5-14-1.5-3(a) and (b)).

Generally speaking, the Open Door Law and its amendments are not applied retroactively. Turner v. Town of Speedway, 528 N.E.2d 858, 863 (Ind. Ct. App. 1988).

4. Member Participating Electronically.

Electronic participation by a member of the governing body of a public agency must be governed by a policy adopted by the governing body which conforms to minimum requirements set out in statute which are discussed below. (IC 5-14-1.5-3.5(d)).

A member of the governing body of a public agency who is not physically present at a meeting of the governing body but who participates in the meeting by electronic means of communication will be considered present at the meeting if the electronic means of communication (1) allows all participating members of the governing body to simultaneously communicate with each other, and (2) allows the public to simultaneously attend and observe the meeting (this second requirement does not apply to a meeting held in executive session). A member participating by electronic communication may participate in final action taken at the meeting only if the means of communication allows the member to be both seen and heard. (IC 5-14-1.5-3.5(b)). However, no electronic participation is permitted at any meeting at which the governing body is considering final action on any of the following: (1) adoption of a budget, (2) making a reduction in personnel, (3) initiation of a referendum, (4) establishing or increasing a fee, (5) establishing or increasing a penalty, (6) engaging the eminent domain authority of the governing body, or (7) establishing, renewing, or raising a tax. (IC 5-14-1.5-3.5(i)).

When one or more members are participating electronically in accordance with the above discussed requirements and there is a technological failure that disrupts or prevents (1) the simultaneous communication between a member who is not physically present and those that are physically present or (2) the ability of a member of the public who is not physically present to attend and observe the meeting then the meeting may continue and valid actions of the governing body can still be taken if the sum of the governing body members participating in person or by functional electronic communication is sufficient to constitution a quorum and to satisfy the voting requirements of the governing body. (IC 5-14-1.5-3.5(c)).

The governing body is required to adopt a policy to govern participation by electronic communication by a member of the governing body. The policy must outline the following requirements:

(i) all votes taken during a meeting at which a member is participating by electronic communications must be taken by roll call vote (IC 5-14-1.5-3.5(f));
(ii) at least fifty percent (50%) of the members of the governing body must be physically present at a meeting (IC 5-14-1.5-3.5(g));
(iii) a member of the governing body may not attend more than fifty percent (50%) of the governing body's meetings through electronic communication unless the member's electronic communication is due to (a) military service, (b) illness or other medical condition, (c) death of a relative, or (d), an emergency involving actual or threatened injury to persons or property (IC 5-14-1.5-3.5(h));
(iv) that no electronic participation shall be permitted at any meeting at which the governing body is considering final action on any of the following: (a) adoption of a budget, (b) making a reduction in personnel, (c) initiation of a referendum, (d) establishing or increasing a fee, (e) establishing or increasing a penalty, (f) engaging the eminent domain authority of the governing body, or (g) establishing, renewing, or raising a tax. (IC 5-14-1.5-3.5(i)).

The policy adopted by the governing body may also include policies more restrictive than those laid out in the state related to:

(i) limits on the numbers of members who may participate by electronic communications at any one meeting;
(ii) limits on the number of meetings in a calendar year at which the governing body may conduct meetings by electronic communication;
(iii) requirements for members to notify the president of the governing body within a certain specified time period to permit arrangements for a meeting by electronic communication (except in cases of a meeting called to deal with an emergency as described at IC 5-14-1.5-5). (IC 5-14-1.5-3.5(d)).

The policy adopted by the governing body may not prohibit a member of the governing body from attending consecutive meetings by electronic communication. However, a member of any governing body may only attend two (2) consecutive meetings (a "set of meetings") by electronic communication. A member is required to physically attend at least one (1) meeting between each set of meetings attended electronically unless the member's absence is due to: (a)

military service, (b) illness or other medical condition, (c) death of a relative, or (d) an emergency involving actual or threatened injury to persons or property. (IC 5-14-1.5-3.5(h) and (j)).

The memoranda (produced pursuant to IC 5-14-1.5-4) of any meeting of the governing body at which a member participates by electronic communication must:

(i) State the name of each member of the governing body who: (a) was physically present at the place where the meeting was conducted, (b) participated in the meeting using any electronic means of communication, and (c) was absent.
(ii) Identify the electronic means of communication by which (a) members of the governing body participated in the meeting, and (b) identify the electronic means of communication by which the public attended and observed the meeting (if the meeting was not an executive session). (IC 5-14-1.5-3.5(e).

A special exception is given to allow for full electronic meetings during a disaster emergency. A "disaster emergency" means either: (1) an emergency declared by the governor under IC 10-14-3-12; or a local disaster emergency declared by the executive of a political subdivision under IC 10-14-3-29. If a disaster emergency is in effect for all or part of the area within the governing body's jurisdiction, the members of a governing body are not required to be physically present at a meeting:

(i) if meeting in person would present an imminent risk to the health or safety of the members of the public and the governing body who attend the meeting because of the particular danger, threat, or emergency conditions that are the basis for the declaration of the disaster emergency; and
(ii) if the members are of the governing body of a school corporation or charter school, one (1) or more schools within the jurisdiction of the governing body of the school corporation or the charter school are closed at the time of the meeting because of the particular danger, threat, or emergency conditions that are the basis for the declaration of the disaster emergency.

The members of a governing body may meet by any means of electronic communication, if the following are satisfied:

(i) At least a quorum of the members of the governing body participate in the meeting by means of electronic communication or in person.
(ii) The public is able to simultaneously attend and observe the meeting. However, this subdivision does not apply to a meeting held in executive session. (IC 5-14-1.5-3.7).

5. Serial Meetings.

The governing body of a political subdivision violates the Open Door Law if members of the governing body participate in a series of at least two (2) gatherings of members and the series of gatherings meets all of the following criteria: (a) one (1) of the gatherings is attended by at least three (3) members but less than a quorum of the members of the governing body, and the other gatherings include at least two (2) members of the governing body; (b) the sum of the number of different members of the governing body attending any of the gatherings at least equals a quorum of the governing body; (c) all the gatherings concern the same subject matter and are held within a period of not more than seven (7) consecutive days; and (d) the gatherings are held to take official action on public business. For purposes of the rules regarding Serial Meetings, a governing body member attends a gathering if the member is present at the gathering in person or if the member participates in the gathering by telephone or other electronic means, excluding electronic mail. (IC 5-14-1.5-3.1(a)). The restrictions regarding serial meetings do not apply to a Board of Commissioners because it could not satisfy (a) above – three Commissioners could not gather without there being a quorum present.

6. Location of Meetings.

The Board of Commissioners may not hold a meeting at a location that is not accessible to an individual who has a temporary or permanent physical disability. "Accessible" means the design, construction, or alteration of the facilities in conformance with federal law, including the Americans with Disabilities Act. (IC 5-14-1.5-8).

7. Documents That Must Be Made Available to the Public.

a. Agenda.

It is not a requirement that the Board of Commissioners use an agenda, but if it does, it must post a copy at the entrance to the location of the meeting prior to the meeting. Any rules, regulations, ordinances or other final actions adopted by merely referring to the agenda number or item alone are void. (IC 5-14-1.5-4(a)).

b. Memoranda of Meetings.

As the meeting progresses, the Board of Commissioners must keep memoranda listing:

(i) the date, time and place of the meeting;
(ii) the members of the governing body recorded as either present or absent;
(iii) the general substance of all matters proposed, discussed or decided;
(iv) a record of all votes taken, by all individual members if there is a roll call; and
(v) any additional information required under a statute authorizing a meeting by electronic means (which would not apply to a Board of Commissioners meeting).

The memoranda are to be available for public inspection and copying within a reasonable period of time after the meeting for the purpose of informing the public of the Board of Commissioners' proceedings. (IC 5-14-1.5-4(b) and (c)).

8. Notice of Meetings.

a. General.

The Board of Commissioners must give public notice of the date, time, and place of any meetings, executive sessions, or of any rescheduled or reconvened meeting, at least forty-eight (48) hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. Forty-eight (48) hours' notice is not required for reconvened meetings (excluding executive sessions) where the date, time, and place of the reconvened meeting is announced at the original meeting and recorded in the memoranda and minutes thereof, and there is no change in the agenda.

The Board of Commissioners must give public notice by:

(i) posting a copy of the notice at the principal office of the Board of Commissioners, or, if no such office exists, at the building where the meeting is to be held;.

(ii) delivering notice to all news media which deliver an annual written request for the notices not later than December 31 for the next succeeding calendar year to the governing body of the public agency. The governing body shall give notice by one (1) of the following methods, which shall be determined by the governing body:

a) Depositing the notice in the United States mail with postage prepaid.
b) Transmitting the notice by electronic mail, if the public agency has the capacity to transmit electronic mail.
c) Transmitting the notice by facsimile (fax). (IC 5-14-1.5-5(a) and (b))

b. Notice of Regular Meetings.

Notice of regular meetings is required only once each year, except that an additional notice shall be given where the date, time or place of a regular meeting is changed. This provision does not apply to executive sessions, for which separate notice must be provided. (IC 5-14-1.5-5(c)).

c. Emergency Meetings.

If a meeting is called to deal with an emergency involving actual or threatened injury to person or property or actual or threatened disruption of the governmental activity under the jurisdiction of the Board of Commissioners by any event, then the time requirements of notice shall not apply, but:

(i) news media which have requested notice of meetings must be given the same notice as is given to the members of the Board of Commissioners; and

(ii) the public must be notified by posting a copy of the notice according to the Open Door Law. (IC 5-14-1.5-5(d)).

This is only an exception to the notice requirements; emergency meetings remain public and subject to all other requirements under the Open Door Law.

d. Notice by Publication Required by Other Laws.

The general notice requirements do not apply where notice by publication is required by another statute, ordinance, rule, or regulation. (IC 5-14-1.5-5(e)).

e. Notice of Administrative Functions.

The general notice requirements also do not apply to the Board of Commissioners or the legislative body of a town if the meetings are held solely to carry out the administrative functions related to the county executive or town legislative body's executive powers. (IC 5-14-1.5-5(f)). "Administrative functions" means only routine activities that are reasonably related to the everyday internal management of the county or town including conferring with, receiving information from, and making recommendations to staff members and other county or town officials or employees. (IC 5-14-1.5-5(f)). "Administrative functions" does not include: taking final action on public business, the exercise of legislative powers, or awarding or entering into contracts or any other action creating an obligation or otherwise binding the county or town. (IC 5-14-1.5-5(f)).

f. Unreasonable Notice.

Notice has not been given in accordance with the Open Door Law if the Board of Commissioners convenes a meeting at a time so unreasonably departing from the time stated in the public notice that the public is misled or substantially deprived of the opportunity to attend, observe, and record the meeting. (IC 5-14-1.5-5(h)).

9. Executive Sessions.

a. General.

A meeting of the Board of Commissioners qualifying as an "executive session" is not required to be generally open to the public. The Board of Commissioners may, however, admit those persons necessary to carry out the specific purpose of the executive session that is permitted under the Open Door Law. The decision to hold an executive session is within the discretion of the public agency. Thus, the Board of Commissioners cannot be compelled under the Open Door Law to hold a private meeting when they have chosen a public one. Berry v. Peoples Broad. Corp., 547 N.E.D. 231, 233 (Ind. 1989).

b. When May an Executive Session Be Held.

IC 5-14-1.5-6.1(b) lists fifteen specific situations that permit a public agency to hold an executive session, which are narrowly construed. However, only the following categories of meetings are pertinent to Boards of Commissioners:

(i) where authorized by federal or state statute;

(ii) for discussion of strategy with respect to:

  (a) collective bargaining (provided, all such strategy discussions must be necessary for bargaining reasons and must not include competitive or bargaining adversaries);
  (b) initiation of litigation or litigation which is either pending or has been threatened specifically in writing;
  (c) the implementation of security systems; or
  (d) real property transactions by the governing body including; purchases, leasing as lessor or lessee, transfers, exchanges, or sales up to the time a contract or option is executed by the parties;

(iii) interviews and negotiations with industrial or commercial prospects or agents of industrial or commercial prospects by the governing body of a political subdivision (such as the Board of Commissioners), the Indiana economic development corporation, the Indiana destination development corporation, the Indiana finance authority, the ports of Indiana, an economic development commission, the Indiana state department of agriculture, the Indiana White River state park development commission, a local economic development organization that is a nonprofit corporation established under state law whose primary purpose is the promotion of industrial or business development in Indiana, the retention or expansion of Indiana businesses, or the development of entrepreneurial activities in Indiana; However these discussions cannot be in regard to research on cloning as prohibited under IC 16-34.5-1-2.

(iv) to receive information about and interview prospective employees;

(v) with respect to any individual over whom the governing body has Jurisdiction, to receive information concerning the individual's alleged misconduct and to discuss, before any determination, that individual's status as an employee, student, or independent contractor who is a physician;

(vi) for discussion of records classified as confidential by state or federal statute;

(vii) to discuss a job performance evaluation of individual employees, but excluding any discussion of the salary, compensation, or benefits of employees during the budget process;

(viii) to discuss information and intelligence intended to prevent, mitigate, or respond to the threat of terrorism;

(ix) when considering the appointment of a public official, to:

(a) develop a list of prospective appointees;
(b) consider applications; and
(c) make one (1) initial exclusion of prospective appointees from further consideration.

Notwithstanding IC 5-14-3-4(b)(12) of the Public Records Act the Commissioners may release and make available for inspection and copying in accordance with IC 5-14-3-3 identifying information concerning prospective appointees not initially excluded from further consideration. No initial exclusion of prospective appointees from further consideration shall reduce the number of prospective appointees to fewer than three (3) unless there are fewer than three (3) prospective appointees. Interviews of prospective appointees must be conducted at a meeting that is open to the public. (IC 5-14-1.5-6.1(b)).

c. Final Action.

Regardless of any discussion in executive session, any final action must still be taken at a meeting open to the public. (IC 5-14-1.5-6.1(c)).

d. Public Notice and Memoranda of Executive Sessions.

The Board of Commissioners, when giving public notice of executive sessions, must state the subject matter of the session by specific reference to the enumerated instance or instances for which executive sessions may be held. Memoranda and minutes of executive sessions must be kept and made available to the public. However, the requirement is modified in that instead of identifying in detail the subject matters discussed, the minutes simply must identify the subject matter considered by specific reference to the enumerated instance or instances for which public notice was given. The Board of Commissioners shall certify by a statement in its memoranda and minutes that it discussed no subject in the executive session other than the subject matter specified in public notice. (IC 5-14-1.5-6.1(d).

e. Executive Sessions During a Meeting.

The Board of Commissioners may not conduct an executive session during a meeting, except as otherwise permitted by applicable statute. A meeting may not be recessed and reconvened with the intent of circumventing this prohibition. (IC 5-14-1.5-6.1(e)).

10. Meetings With Employee Organizations.

The Open Door Law contains a special provision relating to collective bargaining negotiations with employee organizations. IC 5-14-1.5-6.5 permits either party to inform the public of the status of collective bargaining as it progresses by release of factual information and

expression of opinion based on factual information. If a mediator is appointed, any report the mediator files at the conclusion of the mediation is a public record. If a factfinder is appointed, any hearings the factfinder holds must be open to the public, and any findings and recommendations are public record. This section applies whenever a governing body or its representative meets with an employee organization or representative for collective bargaining or discussion. This provision specifically states that it "supplements and does not limit any other provision of this Chapter." The practical effect of this last sentence is that if a governing body or a majority of the governing body meets with an employee organization, that meeting must be open to the public, under the general definition of meeting under IC 5-14-1.5-2(c), and must comply with notice requirements under IC 5-14-1.5-5.

11. Consequences of Violating the Open Door Law.

a. General.

The consequences of violating the Indiana Open Door Law can be significant. The Open Door Law allows a person to sue the public agency and obtain a declaratory judgment or to enjoin continuing, threatened, or future violations of the Open Door Law. Common Council of City of Peru v. Peru Daily Tribune, Inc., 440 N.E.2d 726, 733 (Ind. Ct. App. 1982). A person may also sue to declare void any policy, decision or final action:

(i) unlawfully taken at an executive session;
(ii) taken at any meeting of which notice is not given in accordance with section 5 of the Open Door Law;
(iii) that is based in whole or in part upon official action taken at any: (i) executive session in violation of the Open Door Law; (ii) meeting of which notice is not given in accordance with the Open Door Law; or (iii) series of gatherings in violation of the Open Door Law; or
(iv) taken at a meeting held in a location in violation of the Open Door Law.

The plaintiff bringing legal action against the public agency does not need to establish that he personally suffered special harm different from that suffered by the public at large in order to maintain his suit. (IC 5-14-1.5-7(a)).

A plaintiff who alleges a violation of the Open Door Law may file either a complaint or an informal inquiry with the public access counselor under IC 5-14-5-6. If a formal complaint is filed, the public access counselor shall issue an advisory opinion on the complaint within thirty days. (IC 5-14-5-9). The statutes set forth no specific time period within which the counselor shall respond to an informal inquiry. A plaintiff is not required to file a formal complaint with the Office of the Public Access Counselor before filing an action which alleges a violation of the Open Door Law. IC 5-14-5-4. However, in order to be awarded fees and costs, a plaintiff must first seek and receive an informal inquiry response or advisory opinion from the public access counselor. Gary/Chi. Airport Bd. of Auth. v. Maclin, 772 N.E.2d 463, 470-71 (Ind. Ct. App. 2002).

b. Violations; Remedies; Limitations; Costs and Fees.

Any action to declare any policy, decision, or final action of the Board of Commissioners void, or to enter an injunction which would invalidate any policy, decision, or final action of the Board of Commissioners, based on violation of the Open Door Law occurring before the action is commenced, shall be commenced:

(i) prior to the delivery of any warrant, notes, bonds, or obligations if the relief sought would have the effect, if granted, of invalidating the notes, bonds, or obligations; or

(ii) with respect to any other subject matter, within thirty (30) days of either:

(a) the date of the act or failure to act complained of; or

(b) the date that the plaintiff knew or should have known that the act or failure to act complained of had occurred;

whichever is later. If the challenged policy, decision, or final action is recorded in the memoranda or minutes of the Board of Commissioners, a plaintiff is considered to have known that the act or failure to act complained of had occurred not later than the date that the memoranda or minutes are first available for public inspection. (IC 5-14-1.5-7(b)).

In determining whether to declare any policy, decision or final action void, a court shall consider, among other relevant factors:

(i) the extent to which the violation affected the substance of the policy, decision or final action, denied or impaired access to any meetings that the public had a right to observe and record, and prevented or impaired public knowledge or understanding of the public's business;

(ii) whether voiding of the policy, decision or final action is a necessary prerequisite to a substantial reconsideration of the subject matter;

(iii) whether the public interest will be served by voiding the policy, decision or final action by determining which of the following factors outweighs the other:

(a) the remedial benefits gained by effectuating the public policy of the state; or

(b) the prejudice likely to accrue to the public if the policy, decision or public policy is voided, including the extent to which persons have relied upon the validity of the challenged action and the effect declaring the challenged action void would have on them; and

(iv) whether the defendant in compliance with informal inquiry response or an advisory opinion issued by the public access counselor concerning the violation. (IC 5-14-1.5-7(d)).

c. Taking Final Action Alone Will Not Cure Violations.

If a court determines that the Board of Commissioners has violated the Open Door Law, the court will not allow the Board of Commissioners to correct the violation by merely taking final action at a meeting that complies with the Open Door Law. (IC 5-14-1.5-7(c)).

d. Reconsideration of Matters Declared Void.

If a court declares a policy, decision or final action of the Board of Commissioners void, the court may enjoin the Board from subsequently acting upon the subject matter of the voided act until it has been given substantial reconsideration at a meeting or meetings that comply with the Open Door Law. (IC 5-14-1.5-7(e)).

e. Attorney's Fees.

In any legal action filed under the Indiana Open Door Law, a court may award reasonable attorney's fees, court costs, and other reasonable expenses of litigation to the prevailing party if the plaintiff prevails or if the Board of Commissioners prevails and the court finds the lawsuit was frivolous or vexatious. The plaintiff is not eligible for the awarding of attorney's fees, court costs, and other reasonable expenses if the plaintiff filed the action without first seeking and receiving an informal inquiry response or advisory opinion from the public access counselor, unless the plaintiff can show the filing of the action was necessary to prevent a violation of this chapter. (IC 5-14-1.5-7(f)).

f. Civil Penalties

An officer of a public agency (including a County Commissioner) or employee in a management level position in a public agency becomes subject to a civil penalty by:

(i) failing to give proper notice of a regular meeting, special meeting, or executive session;
(ii) taking final action outside a regular meeting or special meeting;
(iii) participating in a secret ballot during a meeting;
(iv) discussing in an executive session subjects not eligible for discussion in an executive session;
(v) failing to prepare a memorandum of a meeting; or
(vi) participating in at least one (1) gathering of a series of unlawful serial meetings.

A court may not impose a civil penalty unless the Public Access Counselor has issued prior to the filing of the judicial complaint, an advisory opinion that finds that individual or public agency violated the Open Door Law. It is a defense to the imposition of a civil penalty that the individual relied upon an opinion of the public agency's legal counsel or the Attorney General.

The court may impose against each defendant civil penalties not more than one hundred dollars ($100) for the first violation and not more than five hundred dollars ($500) for each

additional violation. An individual is personally liable for a civil penalty imposed again the individual, and a civil penalty imposed against a public agency must be paid from the public agency's budget. (IC 5-14-1.5-7.5).

B. Indiana's Access to Public Records Act.

1. General.

The Board of Commissioners as a "public agency" is also subject to Indiana's Access to Public Records Act, which is set forth in IC 5-14-3-1 et seq. (the "Public Records Act"). The policy of the Public Records Act is that "all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees." To ensure the broad policies of the Public Records Act are carried out, the burden is on the public agency to justify refusing to disclose a public record and not on the person who wants to inspect and copy the record.

Generally speaking, the Public Records Act and its amendments are not applied retroactively. Indianapolis Convention & Visitors Ass'n, Inc. v. Indianapolis Newspapers, Inc., 577 N.E.2d 208, 215 (Ind. 1991).

2. Definition of Public Record.

The Public Records Act broadly defines public record to mean "any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with the public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics." (IC 5-14-3-2(r)).

3. Basic Requirements.

a. Proper Exercise of the Right of Inspection.

Any person may inspect and copy the public records of the Board of Commissioners during regular business hours. A request for inspection or copying must:

(i) identify with reasonable particularity the record being requested; and
(ii) at the discretion of the agency, be in writing or on a form provided by the agency.

No request may be denied because the person making the request refuses to state the purpose of the request, unless such condition is required by other applicable statutes. (IC 5-14-3-3(a)).

A request to copy a law enforcement recording must be in writing and must provide the date, approximate time, and location of the law enforcement activity, as well as the name of at

least one individual, other than a law enforcement officer, who was directly involved in the law enforcement activity. (IC 5-14-3-3(i)).

The County must not only provide access to public records, but also must protect records from loss, alteration, mutilation, or destruction. (IC 5-14-3-7). Notwithstanding this provision and IC 5-14-3-4(d), public records subject to IC 5-15 may be destroyed only in accordance with record retention schedules under IC 5-15, or public records not subject to IC 5-15 may be destroyed in the ordinary course of business. (IC 5-14-3-4(h)).

b. Denial or Interference with the Right to Inspect.

The Board of Commissioners may not deny or interfere with the exercise of the public's right to inspect and copy public records. If the Board of Commissioners does not deny the request, within a reasonable time after the request is received by the agency the Board of Commissioners shall either:

(i) provide the requested copies to the person making the request; or
(ii) allow the person to make copies:

(a) on the agency's equipment; or
(b) on his own equipment. (IC 5-14-3-3(b)).

c. Duplication of Records Contained on Computer Tapes, Computer Discs, Microfilm or Similar Records.

Notwithstanding the general right to inspect and copy public records, the Board of Commissioners may or may not, permit a person to inspect and copy through the use of enhanced access public records containing information owned by or entrusted to the public agency and permit a governmental entity to use an electronic device to inspect and copy public records containing information owned by or entrusted to the County. (IC 5-14-3-3(c)).

If the Board of Commissioners maintains or contracts for the maintenance of public records in an electronic data storage system, the Board of Commissioners shall make reasonable efforts to provide to a person making a request a copy of all disclosable data contained in the records on paper, disk, tape, drum, or any other method of electronic retrieval if the medium requested is compatible with the agency's data storage system. This requirement does not apply to an electronic map as defined by the Public Records Act. (IC 5-14-3-3(d)).

The Board of Commissioners is required to provide an electronic copy or a paper copy of a public record that is kept in an electronic format at the option of the person making the request for the public record but the Commission is not required to change the format of the public record to provide such a copy. This requirement does not apply to public records recorded in the office of the County Recorder. (IC 5-14-3-3(j)).

The Board of Commissioners may enact an ordinance prescribing the conditions under which a person who receives information on disk or tape may or may not use the information

for commercial purposes, including to sell, advertise, or solicit the purchase of merchandise, goods, or services, or sell, loan, give away, or otherwise deliver the information obtained by the request to any other person (as defined in IC 5-14-3-2) for these purposes. Use of such information in connection with the preparation or publication of news, for nonprofit activities, or for academic research is not prohibited. A person who uses information in a manner contrary to a rule or an ordinance adopted by the Board of Commissioners may be prohibited from obtaining a copy or any further electronic data. (IC 5-14-3-3(e)).

Notwithstanding the other provisions of this section, a public agency is not required to create or provide copies of lists of names and addresses (including electronic mail account addresses), unless the public agency is required to publish such lists and disseminate them to the public under a statute. However, if a public agency has created a list of names and addresses (excluding electronic mail account addresses), it must permit a person to inspect and make memoranda abstracts from the list unless access to the list is prohibited by law.

Lists of employees of a public agency may not be disclosed by the Board to any individual or entity for political purposes and may not be used by any individual or entity for political purposes. A list of employees of a public agency may also not be disclosed by the Board to commercial entities for commercial purposes. (IC 5-14-3-3(f)).

The Board of Commissioners may not enter into or renew a contract or an obligation:

(i) for storage or copying of public records; or
(ii) that requires the public to obtain a license or pay copyright royalties for obtaining the right to inspect and copy the records unless otherwise provided by applicable statute;

if the contract, obligation, license, or copyright unreasonably impairs the right of the public to inspect and copy the agency's public records. (IC 5-14-3-3(g)).

4. Enhanced Access to Public Records.

As additional means of inspecting and copying public records, the Board of Commissioners may provide enhanced access to public records. (IC 5-14-3-3.6(b)).

The Board of Commissioners may provide a person with enhanced access to public records if any of the following apply:

(a) The Board of Commissioner provides enhanced access to the person through its own computer gateway and provides for the protection of public records (as described below).

(b) The Board of Commissioner has entered into a contract with a third party under which the Board of Commissioners provides enhanced access to the person through the third party's computer gateway or otherwise, and the contract between the Board of Commissioners and the third party

provides for the protection of public records (as described below). (IC 5-14-3-3.6(c)).

The County must take precautions that protect the contents of public records from unauthorized enhanced access, unauthorized access by electronic device, or alteration. (IC 5-14-3-7(b)). An enhanced access contract and any other provision of enhanced access must provide that the third party and the person will not engage in the following:

(a) Unauthorized enhanced access to public records.
(b) Unauthorized alteration of public records.
(c) Disclosure of confidential public records. (IC 5-14-3-3.6(d)).

An enhanced access contract or any provision of enhanced access may require the payment of a reasonable fee to either the third party to a contract or to the public agency, or both, from the person. (IC 5-14-3-3.6(e) & 5-14-3-8). With respect to such fees, the County Council must adopt an ordinance establishing an enhanced access fund, which constitutes a dedicated fund for the purposes of the replacement, improvement, and expansion of capital expenditures and the reimbursement of operating expenses incurred in providing enhanced access to public information. (IC 5-14-3-8.3).

The Board of Commissioners may provide enhanced access to public records through the computer gateway administered by the office of technology established by IC 4-13.1-2-1.

5. Public Records Exempt from Indiana's Public Records Act.

a. Confidential Records.

IC 5-14-3-4(a) lists categories of public records which are exempt from Indiana's Access to Public Records Act. These records may not be disclosed by the public agency, unless access is specifically required by state or federal statute or ordered by a court under the rules of discovery. However, these confidential records may be disclosed seventy-five (75) years after they are created. (IC 5-14-3-4(d)). The following exceptions are pertinent to Board of Commissioners:

(i) Those declared confidential by state statute;
(ii) Those declared confidential by rule adopted by a public agency under specific authority to classify public records as confidential granted to the public agency by statute;
(iii) Those required to be kept confidential by federal law;
(iv) Confidential financial information obtained, upon request, from a person, provided, however, this does not include information that is filed with or received by a public agency pursuant to state statute;
(v) Those declared confidential by or under rules adopted by the supreme court of Indiana;
(vi) A social security number contained in the records of a public agency.

Further, a public agency, such as the Board of Commissioners, must maintain the confidentiality of a confidential public record received from another public agency. (IC 5-14-3-6.5).

b. Penalties for Disclosure of Confidential Information.

Public officials, public employees or employees or officers of a contractor or subcontractor of a public agency who knowingly or intentionally disclose confidential information protected by state law may be disciplined or charged with a Class A misdemeanor. (IC 5-14-3-10).

A public employee, a public official, or an employee or officer of a contractor or subcontractor of a public agency who unintentionally and unknowingly discloses confidential or erroneous information in response to a request under IC 5-14-3-3(d) or who discloses confidential information in reliance on an advisory opinion by the public access counselor is immune from liability for such a disclosure. (IC 5-14-3-10).

This section does not apply to any provision incorporated into state law from a federal statute.

c. Records Exempt Pursuant to the Commissioners' Discretion.

The Public Records Act also lists categories of public record which may be exempted from disclosure at the discretion of the public agency. Unless specifically exempted by IC 5-14-3-4(a), the following public records (which are pertinent to the Board of Commissioners) shall be, pursuant to IC 5-14-3-4(b), exempted from disclosure at the discretion of the Board of Commissioners:

(i) Investigatory records of law enforcement agencies; however, certain law enforcement records must be made available for inspection and copying as provided in IC 5-14-3-5. A law enforcement recording is not an investigatory record. (IC 5-14-3-4(b)). A law enforcement agency may share investigatory records with a victim advocate or victim services agency for purposes of providing or describing services for a victim, or to a school corporation or private school for purposes of enhancing the safety or security of a student or school facility without losing the discretion to keep those records confidential from other requesters. However, the name and age of a victim less than eighteen (18) years of age may not be disclosed (except to the department of child services) unless a parent, guardian, or custodian of the victim consents in writing to public disclosure of the records and has not been charged with or convicted of committing a crime against the victim. (IC 5-14-3-4(b)).

Investigation records accumulated in the course of a missing person's investigation rather than in the course of an investigation of a crime are not investigatory records. Scales v. Warrick Cty. Sheriff's Dep't, 122 N.E.3d 866, (Ind. Ct. App. 2019).

(ii) The work product of an attorney representing (pursuant to state employment or an appointment by a public agency):

(a) a public agency;
(b) the state; or
(c) an individual.

(iii) Records relating to negotiations between the Board of Commissioners with industrial, research or commercial prospects, if the records are created while negotiations are in progress. However this does not apply to records regarding research on cloning that is prohibited under IC 16-34.5-1-2.

(iv) Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with the public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

(v) Diaries, journals, or other personal notes that are the functional equivalent of a diary or journal.

(vi) Personnel files of public employees and files of applicants for public employment, except for:

(a) the name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first and last employment of present or former officers or employees of the agency;
(b information relating to the status of any formal charges against the employee; and
(c) information concerning disciplinary actions in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged; however, all personnel file information shall be made available to the affected employee or his representative. This subdivision does not apply to disclosure of personnel information generally on all employees or for groups of employees without the request being particularized by employee name.

(vii) Administrative or technical information that would jeopardize a recordkeeping, voting system, voter registration system or security system.

(viii) Computer programs, computer codes, computer filing systems and other software that are owned by the public agency or entrusted to it, and portions of electronic maps entrusted to a public agency by a utility.

(ix) Records specifically prepared for discussion or developed during discussion in an executive session under the Indiana Open Door

Law; however, this does not apply to that information required to be available for inspection and copying regarding personnel files of employees and applicants.

(x) The identity of a donor of a gift to the public agency if the donor or a member of his family requires nondisclosure as a condition of the gift or after the gift is made.

(xi) A record or a part of a record, the public disclosure of which would have a reasonable likelihood of threatening public safety by exposing a vulnerability to terrorist attack. A record described under this subdivision includes:

(a) a record assembled, prepared, or maintained to prevent, mitigate, or respond to an act of terrorism under IC 35-47-12-1 (before its repeal), an act of agricultural terrorism under IC 35-47-12-2 (before its repeal), or a felony terrorist offense (as defined in IC 35-50-2-18);
(b) vulnerability assessments;
(c) risk planning documents;
(d) needs assessments;
(e) threat assessments;
(f) intelligence assessments;
(g) domestic preparedness strategies;
(h) the location of community drinking water wells and surface water intakes;
(i) the emergency contact information of emergency responders and volunteers;
(j) infrastructure records that disclose the configuration of critical systems such as communication, electrical, ventilation, water, and wastewater systems; and
(k) detailed drawings or specifications of structural elements, floor plans, and operating, utility, or security systems, whether in paper or electronic form, of any building or facility located on an airport (as defined in IC 8-21-1-1) that is owned, occupied, leased, or maintained by a public agency. A record described in this clause may not be released for public inspection by any public agency without the prior approval of the public agency that owns, occupies, leases, or maintains the airport. The public agency that owns, occupies, leases, or maintains the airport:

(1) is responsible for determining whether the public disclosure of a record or a part of a record has a reasonable likelihood of threatening public safety by exposing a vulnerability to terrorist attack; and

(2) must identify a record described under item (i) and clearly mark the record as "confidential and not subject

to public disclosure under IC 5-14-3-4(b)(19)(J) without approval of (insert name of submitting public agency)".

This subdivision does not apply to a record or portion of a record pertaining to a location or structure owned or protected by a public agency in the event that an act of terrorism under IC 35-47-12-1 (before its repeal), an act of agricultural terrorism under IC 35-47-12-2 (before its repeal), or a felony terrorist offence (as defined in IC 35-50-2-18) has occurred at that location or structure, unless release of the record or portion of the record would have a reasonable likelihood of threatening public safety by exposing a vulnerability of other locations or structures to terrorist attack. (IC 5-14-3-4(b)).

d. Records Containing Disclosable and Nondisclosable Information.

If a record contains disclosable and nondisclosable information, the Board of Commissioners shall separate and make available the disclosable information. If this information is available only on computer, the Board of Commissioners may charge the requesting party their direct cost of reprogramming the computer if reprogramming is necessary to separate the disclosable information from nondisclosable information. (IC 5-14-3-6).

If public records are made available to a person by enhanced access or to a governmental entity by an electronic device, before making the record available, the county must separate and make available only the disclosable information. Nonetheless, the county is not required to reprogram a computer system to provide enhanced access or access to a governmental entity by an electronic device. (IC 5-14-3-6).

6. Copying Fees and Procedures.

The Board of Commissioners may not charge any fee to inspect a public record or to search for, examine, to review a record to determine whether the record may be disclosed, or to provide an electronic copy of a public record by electronic mail unless a fee is authorized by some other statute or ordered by a court. The Board of Commissioners may, however, collect a fee for the certification or copying of documents, as described below.

If a person is entitled to a copy of a public record under this chapter, and the Board of Commissioners is in possession of the record and has reasonable access to a machine capable of reproducing the public record, then the Board must provide at least one (1) copy of the public record to the person. However, if the Board does not have reasonable access to a machine capable of reproducing the record or if the person cannot reproduce the record by use of enhanced access under the Public Records Act, the person is only entitled to inspect and manually transcribe the record.

The Board shall establish a fee schedule for the certification or copying of documents. The fee for certification of documents may not exceed five dollars ($5) per document. The fee for copying documents may not exceed the greater of ten cents ($0.10) per page for copies that are not color copies or twenty-five cents ($0.25) per page for color copies, or the actual cost to the Board of copying the document. As used in this subsection, "actual cost" means the cost of paper and the per-page cost for use of copying or facsimile equipment and does not include labor costs or overhead costs. A fee established under this subsection must be uniform to all purchasers and may be required by the Board of Commissioners in advance of making the copies.

Notwithstanding the above subsections, the Board of Commissioners shall collect any certification, copying, facsimile machine transmission, or search fee that is specified by statute or is ordered by a court.

Except when providing enhanced access to a public record, if the Board of Commissioners provides a duplicate of a computer tape, computer disc, microfilm, or similar or analogous record system containing information owned by the Board or entrusted to it, the Board may charge a fee, uniform to all purchasers, that does not exceed the sum of either (1) the Board's direct cost of supplying the information in that form, or (2) the standard cost for selling the same information to the public in the form of a publication if the agency has published the information and made the publication available for sale.

When providing enhanced access to a public record, the Board of Commissioners may charge any reasonable fee agreed on in the contract under the Public Record Act for providing enhanced access to public records.

The Board of Commissioners may charge any reasonable fee for a governmental entity to inspect the Board's public records by means of an electronic device, or the Board may waive any fee for the inspection.

The Board of Commissioners may charge a fee, uniform to all purchasers, for providing an electronic map that is based upon a reasonable percentage of the agency's direct cost of maintaining, upgrading, and enhancing the electronic map and for the direct cost of supplying the electronic map in the form requested by the purchaser. The fee may be waived by the Board of Commissioners if the electronic map for which the fee is charged will be used for a noncommercial purpose, including the following: (1) public agency program support; (2) nonprofit activities; (3) journalism; or (4) academic research. (IC 5-14-3-8).

7. What Constitutes a Denial of Access Under the Public Records Law.

A denial of access to public records occurs when the person making the request is physically present in the office of the Board of Commissioners, makes the request by telephone, or requests enhanced access to a document, and:

(a) The person, who is designated by the Board of Commissioners as being responsible for public records release decisions, refuses to permit inspection and copying of a public record when a request has been made; or

(b) Twenty-four hours after any employee of the Board of Commissioners refuses to permit inspection and copying of a public record when a request has been made; whichever occurs first.

If a person mails or faxes a request for copies of a public record, a denial of disclosure does not occur until seven (7) days after the Board of Commissioners receives the request.

If a request is made orally, the Board of Commissioners may deny the request orally. However, if a request is initially made in writing, by facsimile, or through enhanced access, or if an oral request that has been denied is renewed in writing, the Board of Commissioners may deny the request if:

(a) The denial is in writing or by facsimile; and
(b) The denial includes:

(i) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and
(ii) the name and title or the position of the person responsible for the denial. (IC 5-14-3-9(a)-(d)).

8. Consequences of Violating Indiana's Access to Public Records Act.

A person denied the right to inspect or copy a public record may file an action in the circuit or superior court of the county in which the denial occurred to compel the Board of Commissioners to permit the person to inspect and copy the public record. When such an action is filed, the Board of Commissioners must notify each person who supplied any part of the record sought (i) that a request for release of the public record has been denied, and (ii) whether the denial was in compliance with an informal inquiry response or advisory opinion of the public; such persons can intervene in the lawsuit. The person denied the right to inspect or copy does not need to allege or prove any special damage to him personally which is different than that suffered by the public at large. (IC 5-14-3-9(e)).

In an action to compel disclosure of a public record, the Board of Commissioners has the obligation to prove that the denial of access was proper. Where the Board of Commissioners has denied access to a public record because the record is exempted under IC 5-14-3-4(a), the Board of Commissioners can sustain the burden of proof by establishing the content of the record with adequate specificity in their response and not by relying on a conclusory statement or affidavit. Only in so doing may the Board of Commissioners claim that the record is exempted. (IC 5-14-3-9(f)). Where the Board of Commissioners has denied access to a public record because the record is exempted under IC 5-14-3-4(b), the Board of Commissioners can sustain the burden of proof by proving that the record falls within one of the discretionary exemption categories under section 4(b) of the Public Records Act and establishing the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit, and a person requesting access to a public record meets the person's burden of proof by proving that the denial of access is arbitrary and capricious. (IC 5-14-3-9(g)(1-2)).

In any action to compel disclosure of a public record, a court may award reasonable attorney fees, court costs, and other reasonable expenses of litigation to the person compelling disclosure if he substantially prevails, or to the Board of Commissioners if it substantially prevails and the court finds the lawsuit was frivolous or vexatious. (IC 5-14-3-9(i)) The plaintiff is not eligible for the awarding of attorney's fees, court costs and other reasonable expenses if the plaintiff filed the action without first seeking and receiving an information inquiry response or advisory opinion from the public access counselor, unless the plaintiff can show the filing of the action was necessary because the denial of access to a public record under the Public Records Act would prevent the plaintiff from presenting that public record to a public agency preparing to act on a matter of relevance to the public record whose disclosure was denied. If the court finds that the public agency's refusal to disclose is not in bad faith, this finding may be a proper factor in the decision to not award attorney fees to plaintiff. Ind. Civil Liberties Union v. Ind. Gen. Assembly, 512 N.E.2d 432, 434-35 (Ind. Ct. App. 1987).

A County Commissioner who knowingly or intentionally discloses information classified as confidential by state statute commits a Class A infraction. A public employee, a public official, or an employee or officer of a contractor or subcontractor of a County Commission who unintentionally and unknowingly discloses confidential or erroneous information in response to a request from an electronics data storage system or who discloses confidential information in reliance on an advisory opinion by the public access counselor is immune from liability for such a disclosure. This penalty provision does not apply to any provision incorporated into state law from a federal statute. (IC 5-14-3-10).

III. BUDGETING

A. General.

The process of budgeting for a county is delegated largely to the county auditor (as the fiscal officer of the county) and the county council (as the fiscal body of the county). The county auditor accumulates estimated budgets for the next calendar year from various elected officials, departments, boards, and commissions and compiles the individual pieces into a single combined proposed county budget. The county council is then responsible for passing a budget within certain statutory guidelines at which time many of the individual budget requests are reduced. Counties with a consolidated city may have different provisions than outlined herein.

B. Commissioners Role.

The role of the Board of Commissioners is crucial to the successful completion of the budget process for county government in a timely manner. The Board of Commissioners must identify costs of a historical nature (e.g., contract payments, routine payments, reoccurring expenses) as well as project any increased costs of operating the county and anticipate all unforeseen costs that are likely to be incurred during the next calendar year.

On or before July 2 of each year, each officer, board, commission, and agency must file with the county auditor a statement that shows in detail the positions for which compensation will be requested in the annual budget for the next year and the amount or rate of compensation proposed for each full-time or part-time position. The statement must be on a form prescribed by the state board of accounts. (IC 36-2-5-4).

The county auditor then must present these statements to the Board of Commissioners at its July meeting. The Board of Commissioners reviews these statements and makes its recommendations. Before August 20, the Board of Commissioners must present the statements and recommendation to the county fiscal body. (IC 36-2-5-4).

Before the Thursday after the first Monday in August of each year, the Board of Commissioners must prepare an itemized estimate of all money to be drawn by the members of the Board of Commissioners and all expenditures to be made by the Board of Commissioners or under its orders during the next calendar year. The Board of Commissioners' budget estimate must include:

(1) the expense of construction, repairs, supplies, employees, agents and other expenses at each building or institution maintained in whole or in part by money paid from the county treasury;

(2) the expense of constructing and repairing bridges, itemized by the location of and amount for each bridge;

(3) the compensation of the attorney representing the county;

(4) the compensation for attorneys for indigents;

(5) the expenses of the county board of health;

(6) the expense of repairing county roads, itemized by the location of and amount for each repair project;

(7) the estimated number of precincts in the county and the amount required for expenses, including compensation of election commissioners, inspectors, judges, clerks and sheriffs, rent meals, hauling and repairing of voting booths and machines, advertising, printing, stationery, furniture and supplies;

(8) the amount of principal and interest due on bonds and loans itemized for each loan and bond issue;

(9) the amount required to pay judgments, settlements, and court costs;

(10) the expense of supporting inmates of benevolent or penal institutions;

(11) the expense of publishing delinquent tax lists;

(12) the amount of compensation of county employees that is payable out of the county treasury;

(13) the expenses of the multiple county tax assessment board of appeals under IC 6-1.1-28.0.1 or a county property tax assessment board of appeals under IC 6-1.1-28-1; and

(14) other expenditures to be made by the commissioners or under their orders, specifically itemized. (IC 36-2-5-7).

The Board of Commissioners must then verify the accuracy of the estimates prepared above by attaching a certificate, verified by the officer preparing it and stating that in his or her opinion the amount fixed in each item of the budget estimate will be required for the purpose indicated. (IC 36-2-5-8) The certificate must be attached to the budget estimate and submitted to the county auditor before the Thursday after the first Monday in August of each year. (IC 36-2-5-9).

C. Budget Process.

1. General.

The total budget process—including appeals, petitions for excess levies and approval by the Indiana Department of Local Government Finance ("DLGF") is complicated at times and could take hundreds of pages to describe in detail. Set forth below is an overview of the key aspects of the budget process and other information useful in understanding the overall process. Specific

details have been reserved for analysis of the statutory provisions and have been identified by statutory citation for quick reference.

2. Budget Calendar and Procedures.

January 1	Real and personal property in the State is assessed each year as of January 1. (IC 6-1.1-4).
Prior to July 2	Each officer, board, commission, and agency must file with the county auditor a statement showing the employee positions and amount or rate of compensation proposed for each full or part-time employee from next year's budget. The statement must be on a form prescribed by the state board of accounts. The county auditor shall present these statements to the Board of Commissioners at its July meeting. The county executive shall review the statements and make its recommendations on them. (IC 36-2-5-4).
On or before August 1	The county auditor will send a certified statement to the department of local government finance, in the manner prescribed by the department. The statement will contain (1) information concerning the assessed valuation in the county for the next calendar year; (2) an estimate of the taxes to be distributed to the county during the last six (6) months of the current year; (3) the current assessed valuation in the county as shown on the abstract of charges; (4) the average growth of the county's assessed valuation over the preceding three (3) budget years; and (5) any other information that the county auditor has that might affect the assessed value used in the budget process. The statement shall exclude the amount of assessed value for any property located in the county for which (1) an appeal has been filed under IC 6-1.1-15 and (2) there is no final disposition of such appeal as of the date the county auditor submits the certified statement, provided however, the county auditor may appeal to the department of local government finance to include the amount of assessed value under appeal within a taxing district for that calendar year. The county auditor has until September 1 submit the certified statement. The county auditor may amend the statement before the September 1 deadline. (IC 6-1.1-17-1).
Prior to the Thursday following the first Monday in August	The Board of Commissioners shall prepare and submit (along with all other county officials, boards, commissions, and agencies) to the county auditor an itemized budget estimate. The estimate shall include all expenditures to be made by the commissioners or under their orders during the next calendar

	year. (IC 36-2-5-5, IC 36-2-5-7). Also attached to the budget estimate is a certificate verifying that, in the commissioners' opinion, the estimates are accurate. (IC 36-2-5-8). The Auditor shall file this budget estimate in his or her office and make it available for inspection by county taxpayers. (IC 36-2-5-9).
Prior to August 20	The Board of Commissioners shall present the budget statements received at its July meeting and make recommendations regarding those statements to the county council. (IC 36-2-5-4). Note: Following the recommendation by the Board of Commissioners, the county council must hold a public hearing on the proposed budget. Notice of the proposed tax rate and tax levy, and public hearing, must be published in accordance with IC 6-1.1-17-3. A public hearing on the proposed budget must be held at least ten (10) days prior to the county council meeting at which the final tax rate and levy are to be approved. (IC 6-1.1-17-5).
Not later than November 1	The county council must hold its meeting to: (1) fix the county rate of taxation for taxes to be collected in the next calendar year, and (2) make appropriations by items for the next calendar year for the various purposes for which budget estimates are required. (IC 6-1.1-17-5). The county shall file the adopted budget with the DLGF no later than (5) five business days after the budget is adopted. (IC 6-1.1-17-5(d).
By December 31	Not later than December 31 of the year preceding the budget year, the DLGF certifies the county's budget, tax rate and tax levy for the budget year. Such deadline is extended to not later than January 15 of the budget year if any of the following are true: (i) a taxing unit in a county intends to issue debt after December 1 in the year preceding the budget year and has indicated its intent to issue debt after December 1 in the year preceding the budget year; (ii) a taxing unit intends to file a shortfall appeal under IC 6-1.1-18.5-16 and has indicated its intent to file a shortfall appeal; or (iii) the deadline for a city in the county to fix the budget, tax rate, and tax levy has been extended due to the executive's veto of the ordinance fixing the budget, tax rate, and tax levy. (IC 6-1.1-17-16)

D. Special Considerations.

1. Appropriations for Budgeted Expenditures.

The primary product of the budget process is the legal authorization to make expenditures of county moneys. The legal authority to expend public moneys for a certain purpose is referred to as an "appropriation." Generally, the county's budget will provide authority for expenditures for the entire ensuing calendar year. The county fiscal body must fix (1) the rate of taxation for county purposes, and (2) the rate of taxation for other purposes whenever the rate is not fixed by statute and is required to be uniform throughout the county. The county fiscal body must appropriate money to be paid out of the treasury, and money may be paid out of the treasury only under an appropriation made by the fiscal body, except as otherwise provided by law. (IC 36-2-5-2).

2. Budget Estimates.

The budget estimates required of all other county officials (excluding the Board of Commissioners), boards, commissions and agencies and township assessors (if any) may be found at IC 36-2-5-5. Budget estimates required from the clerk of each court may be found at IC 36-2-5-6. Both provisions require the estimates to be completed before the Thursday after the first Monday in August. Each estimate must also be certified to the county auditor.

3. Compensation Established - Salary Ordinance.

The county council must fix the compensation of officers, deputies, and other employees whose compensation is payable from the county general fund, county highway fund, county health fund, county park and recreation fund, aviation fund, or any other fund from which the county auditor issues warrants for compensation. This includes the power to:

(1) fix the number of officers, deputies and other employees;

(2) describe and classify positions and services;

(3) adopt schedules of compensation; and

(4) hire or contract with persons to assist in the development of schedules of compensation.

Despite its authority to fix compensation, the county council must provide for a county assessor or elected township assessor who has attained a level two or level three certification (under IC 6-1.1-35.5) to receive $1,000 annually, which is in addition to and not part of the annual compensation of the assessor. In addition, the county council must provide for a county or township deputy assessor who has attained a level two or level three certification (under IC 6-1.1-35.5) to receive $500 annually, which is in addition to and not part of the annual compensation of the county or township deputy assessor. (IC 36-2-5-3(b)).

Notwithstanding the foregoing, each county board of health can prescribe the duties of all of its officers and employees, recommend the number of positions, describe and clarify positions and services, adopt schedules of compensation, and hire and contract with persons to assist in the development of schedules of compensation for the board of health. (IC 36-2-5-3(c)).

Moreover, the foregoing authority of the county council to fix compensation and describe and classify positions do not apply to community correction programs (as defined in IC 11-12-1-1 and IC 35-38-2.6-2). (IC 36-2-5-3(c)).

4. Change in Compensation.

In this section, "compensation" means the total of all money paid to an elected county officer for performing duties as an elected county officer, regardless of the source of funds from which money is paid. The term includes all employee benefits paid to an elected county officer, including life insurance, health insurance, disability insurance, retirement benefits, and pension benefits. The term doesn't include any of the following for purposes of determining increases or decreases in an elected county officer's compensation:

(1) Payment of an insurance premium.

(2) Payments in recognition of:

(A) longevity,

(B) professional certifications; or

(C) educational advancements

these are separately identified on a salary ordinance or resolution. (IC 36-2-5-13(a)).

Compensation shall be established using an annual, monthly, or bi-weekly salary schedule. An elected county officer isn't required to report the hours work and may not be compensated based on the number of hours worked. (IC 36-2-5-13(b)).

Except as described below, the compensation of an elected county officer may not be changed in the year for which it is fixed. The compensation of other county officers, deputies, and employees or the number of each may be changed at any time on: (1) the application of the county council or the affected officer, department, commission, or agency; and (2) a majority vote of the county council. (IC 36-2-5-13(c)).

In the year in which a newly elected county officer takes office, the county fiscal body may at any time change the compensation for holding the county office for that year if: (1) the county officer requests the compensation change or, in the case of the Board of Commissioners, a majority of the Board of Commissioners requests the change; and (2) the county council votes to approve the change. ((IC 36-2-5-13(d)).

5. Statutory Salaries.

The statutory salaries of judges, officers of courts, prosecuting attorneys, deputy prosecuting attorneys, and county sheriffs whose minimum salaries are fixed by statute may not be reduced by the county council. However, the county council may make appropriations to pay them more than the minimum fixed by statute. This appropriation may not exceed $5,000 for each judge or full-time prosecuting attorney in any calendar year. (IC 36-2-5-14).

6. Additional Compensation for President of Commissioners.

The County Council may establish a salary schedule that includes compensation for a presiding officer or secretary of a body that is greater than the compensation for other members of the body, if all of the following are satisfied: (1) all applicable general requirements are satisfied with respect to the salary schedule that includes the additional compensation; (2) the additional compensation is being provided because the individual holding the position of presiding officer or secretary has additional duties or attends additional meetings on behalf of the body; as compared to other members of the body; (3) the additional compensation amount applies only for time periods during which the individual serves in the capacity as presiding officer or secretary and handles additional duties or attends additional meetings on behalf of the body; as compared to other members of the body. (IC 36-2-5-3.7).

This authority would allow for additional compensation to be paid to the president of the Board of Commissioners or County Council.

7. Additional Appropriations.

Upon determining that an emergency requiring additional appropriations exists, the county council may make additional appropriations in a special meeting. Estimates of the necessary amount of additional appropriations must be prepared and presented in an ordinance as prescribed for the passage of the county's budget. Except as described below, an ordinance making an additional appropriation must be passed by at least a majority vote of all elected members of the county council. (IC 36-2-5-12(a)-(b)).

Notwithstanding the general requirement that a majority vote is required to pass an ordinance unless a greater vote is required by statute (see IC 36-2-4-5), a county council may adopt a general ordinance which requires that any ordinance making an additional appropriation must be passed by an affirmative vote of a certain number of members greater than a majority of all elected members of the county council. In such case, a general ordinance requiring an affirmative vote of a certain number of members greater than a majority of all elected members of the county council to pass an ordinance making an additional appropriation must be adopted or repealed by a majority vote of all elected members of the county council. (IC 36-2-5-12(c)-(d)).

Prior to adopting an ordinance making an additional appropriation, the county council is required to hold a public hearing and to publish a notice of public hearing (in accordance with IC 5-3-1-2(b)) at least ten (10) days before the hearing. Following an additional appropriation, the county auditor is required to report the additional appropriation to the DLGF in the manner

prescribed by the DLGF, which is an online application that can be found here: https://www.in.gov/dlgf/gateway/additional-appropriations/. (IC 6-1.1-18-5).

8. Transfers within Budget Classifications.

The proper officer of a political subdivision may transfer money from one major budget classification to another within a department or office if: (1) they determine the transfer is necessary, (2) the transfer does not require expenditure of more money than the total amount set out in the budget, (3) the transfer is made at a regular public meeting and by ordinance or resolution, and (4) the transfer is certified by the county auditor. A transfer may be made without notice to or approval of the DLGF. (IC 6-1.1-18-6).

9. Rainy Day Funds.

Whenever the purposes of a tax levy have been fulfilled and an unused and unencumbered balance remains in the fund, the county council shall order the balance of that fund to be transferred to the general fund or rainy day fund of the county (unless a statute requires that it be transferred otherwise). Transfers to a county's rainy day fund may be made at any time during the county's fiscal year. (IC 36-1-8-5).

A county council may establish a rainy day fund by adopting an ordinance to provide for the same. Such an ordinance must specify: (1) the purposes of the rainy day fund; and (2) the sources of funding for the rainy day fund. A rainy day fund is subject to the same appropriation process as other funds that receive tax money.

In any fiscal year during the period from January 1, 2021 to December 31, 2024, the county council may transfer not more than fifteen percent (15%) of the county's total annual budget for that fiscal year to the rainy day fund. On or after January 1, 2025 the county council may transfer not more than ten percent (10%) of the county's total annual budget for that fiscal year to the rainy day fund. The DLGF may not reduce the actual or maximum permissible levy of the county as a result of a balance in the county's rainy day fund. (IC 36-1-8-5.1).

E. Department of Local Government Finance.

1. Structure.

The structure of the Department of Local Government Finance ("DLGF") (formerly known as the State Board of Tax Commissioners) including the establishment, composition, meetings, employees, authority, power and duties are found at IC 6-1.1-30.

2. Duties.

The DLGF shall review and may revise, reduce or increase the budget, tax rate or tax levy of the county pursuant to the process set forth in IC 6-1.1-17-16.

If requested in a written request signed by twenty-five (25) or more taxpayers of the county, prior to reviewing or altering the budget, tax rate or tax levy, the DLGF must conduct a public hearing, either in the county or by electronic means after publishing notice at least five (5) days prior to the date fixed for the public hearing in newspapers of general circulation in the county. (IC 6-1.1-17-16.1).

The DLGF is required to certify the county's budget, tax rate and tax levy not later than December 31 of the year preceding that budget year. However such deadline is extended to not later than January 15 of the budget year if any of the following are true: (A) a taxing unit in a county intends to issue debt after December 1 in the year preceding the budget year and has indicated its intent to issue debt after December 1 in the year preceding the budget year; (B) a taxing unit intends to file a shortfall appeal under IC 6-1.1-18.5-16 and has indicated its intent to file a shortfall appeal as specified in section 5 of this chapter; (C) the deadline for a city in the county to fix the budget, tax rate, and tax levy has been extended, due to the executive's veto of the ordinance fixing the budget, tax rate, and tax levy. (IC 6-1.1-17-16(k)).

F. Relief from Levy Limitations.

Any county that determines that it cannot carry out its governmental functions for an ensuing calendar year under the levy limitations imposed by the maximum levy calculated under IC 6-1.1-18.5-3 can, before October 20, appeal to the DLGF for relief from the levy restrictions. The county must state that it will be unable to carry out the governmental functions committed to it by law unless it is given the authority requested. The county must support these statements by reasonably detailed statements of fact. In addition, the county can before December 31 appeal to the DLGF for relief from the levy restrictions if there exists errors in the calculation of assessed valuations. (IC 6-1.1-18.5-12).

The DLGF will consider the request of the county and examine the types of relief authorized by IC 6-1.1-18.5-13. Upon making a finding under IC 6-1.1-18.5-13 or -14, the DLGF will then issue a final order setting forth its final determination of the matter. (IC 6-1.1-18.5-15). A county may petition for judicial review of the final determination made by the DLGF. The petition must be filed in the tax court not more than forty-five (45) days after the DLGF enters its final order on the matter. (IC 6-1.1-18.5-15).

G. Excessive Levy Appeal.

A county may request permission from the DLGF to impose a property tax levy that exceeds the maximum levy limitations imposed by IC 6-1.1-18.5-3. The county must show that (1) the county experienced a property tax revenue shortfall that resulted from erroneous assessed valuation figures being provided to the county, (2) erroneous assessed valuation figures were used by the county in determining it's total property tax rate, and (3) the error was found after the county's tax rate was finally approved by the DLGF. The county may also request permission from the DLGF to impose a property tax levy that exceeds the limits imposed by IC 6-1.1-18.5-3 if the county experienced a property tax revenue shortfall because of the payment of refunds that resulted from appeals under this 6-1.1 and IC 6-1.5. (IC 6-1.1-18.5-16).

H. General References.

The various components of the property taxation system required to develop the tax rate and budget are set forth in a variety of statutory provisions. To aid in understanding those provisions your attention is directed to those specific statutory references since space limitations and complexity of the issue do not permit detailed discussion herein:

Budget limitation	IC 6-1.1-18-1
Limitation on tax rates	IC 6-1.1-18-3
Additional appropriation	IC 6-1.1-18-5
Transfer of funds within budget	IC 6-1.1-18-6
Liability of officers for exceeding appropriation	IC 6-1.1-18-10
Computation of maximum tax levy	IC 6-1.1-18.5
Exemptions for tax levies	IC 6-1.1-18.5-7 to through 10.4
Relief from levy limitations	IC 6-1.1-18.5-13
Correction of errors (i.e. advertising, mathematical errors in data)	IC 6-1.1-18.5-14
Imposition of excess tax levy	IC 6-1.1-18.5-16

IV. PUBLIC PURCHASES

A. Applicability.

1. General Rule.

The Public Purchasing Law set forth in IC 5-22 applies to every expenditure of "public funds" by a "governmental body." (IC 5-22-1-1).

Public funds means money: (1) derived from the revenue sources of the governmental body; and (2) deposited into the general or a special fund of the governmental body. However, the term does not include: (1) money received by any person managing or operating a public facility under an authorized public-private operating agreement under IC 5-23; or (2) proceeds of bonds payable exclusively by a private entity. (IC 5-22-2-23).

A governmental body means an agency, a board, a branch, a bureau, a commission, a council, a department, an institution, an office, or another establishment of any of the executive, judicial, and legislative branches of State government and a political subdivision. (IC 5-22-2-13).

2. Exceptions for Certain Entities.

The Public Purchasing Law does not apply to the following entities, among others:

(a) The commission for higher education.

(b) A state educational institution (however, IC 5-22-5-9 and IC 5-22-15 apply to a state educational institution).

(c) Military officers and military and armory boards of the state.

(d) An entity established by the general assembly as a body corporate and politic (however, IC 5-22-15 applies to a body corporate and politic).

(e) A local hospital authority under IC 5-1-4.

(f) A municipally owned utility under IC 8-1-11.1 or IC 8-1.5.

(g) Hospitals established and operated under IC 16-22-1 through IC 16-22-5, IC 16-22-8, IC 16-23-1, or IC 16-24-1.

(h) A library board under IC 36-12-3-16(b).

(i) A local housing authority under IC 36-7-18.

(j) Tax exempt Indiana nonprofit corporations leasing and operating a city market owned by a political subdivision.

(k) A person paying for a purchase or lease with funds other than public funds.

(l) A person that has entered into an agreement with a governmental body under IC 5-23.

(m) A municipality for the operation of municipal facilities used for the collection, treatment, purification, and disposal in a sanitary manner of liquid and solid waste, sewage, night soil, and industrial waste.

(n) The department of financial institutions established by IC 28-11-1-1.

(o) The insurance commissioner in retaining an examiner for purposes of IC 27-1-3.1-9.

(p) The department of natural resources for the procurement of supplies purchased for resales at properties owned or managed by the department of natural resources.

(q) The Indiana horse racing commission, in making an expenditure, under IC 4-31-3-15(b).

(r) An entity that has entered into a memorandum of understanding with the department of education under IC 20-20-38.5-2(a)(2). (IC 5-22-1-2).

3. Exceptions for Certain Types of Activities.

In general, the Public Purchasing Law does not apply to the following activities:

(a) A contract between governmental bodies except for a contract authorized under the Public Purchasing Law.

(b) A public works project (which is governed by IC 36-1-12).

(c) A collective bargaining agreement between a governmental body and its employees.

(d) The employment relationship between a governmental body and an employee of the governmental body.

(e) An investment of public funds (which is governed by IC 5-13).

(f) A contract between a governmental body and a body corporate and politic.

(g) A contract for social services.

(h) A contract with a body corporate and politic.

However, notwithstanding the fact that the activities in the above-described list are otherwise exempt from the Public Purchasing Act, any contract, project, agreement, employment relationship, or investment related to the activities described above is required to include a

certification by every contractor regarding compliance with Indiana's telephone marketing and privacy laws. (IC 5-22-1-3).

B. General Provisions.

1. Oversight of Purchasing Process.

The purchasing process is implemented by "governing bodies," "purchasing agencies" and "purchasing agents."

A **governmental body** means an agency, a board, a branch, a bureau, a commission, a council, a department, an institution, an office, or another establishment of any of the executive, judicial, and legislative branches of State government and a political subdivision. (IC 5-22-2-13).

A **purchasing agency** means a governmental body that is authorized to enter into contracts by this article, rules adopted under this article, or by another law. (IC 5-22-2-25).

A **purchasing agent** means an individual authorized by a purchasing agency to act as an agent for the purchasing agency in the administration of the duties of the purchasing agency. (IC 5-22-2-26).

The Board of Commissioners is generally the purchasing agency for the County. In addition, as both the executive and legislative body of the County, the Board of Commissioners also may designate other bodies or individuals as a purchasing agency for the County. (IC 5-22-4-5). The individuals designated by the purchasing agency are the purchasing agents for the Board of Commissioners, which is a governmental body under the Public Purchasing Laws. This summary describes the role of the Board of Commissioners in the purchasing process as both a governmental body and a purchasing agency.

2. Rules Regulating Purchases.

A governmental body, including the Board of Commissioners, may adopt rules to regulate purchases. The rules adopted may supplement, but may not be inconsistent with the public purchasing law. In addition, a purchasing agency (including the Board of Commissioners) may establish written policies for purchases. These written policies may apply to all purchases or to a specific purchase. A written policy may supplement the public purchasing law and may not be inconsistent with it. (IC 5-22-3-3).

3. Purchasing Agents.

The individuals designated by the purchasing agency are the purchasing agents for the governmental body. (IC 5-22-4-5). The purchasing agency, such as the Board of Commissioners, can have more than one purchasing agent. (IC 5-22-4-6). The Board of Commissioners may enter into an interlocal agreement with other governmental bodies (pursuant to IC 36-1-7) to form a cooperative purchasing organization. (IC 5-22-4-7).

4. Notice.

If there is a requirement that notice or other material be sent by mail, the material may be sent by electronic means as stated in any of the following: (1) the rules adopted by the governmental body, (2) the written policies of the purchasing agency, or (3) in the solicitation regarding such proposed purchase. (IC 5-22-3-4(a)).

The Board of Commissioners may receive electronic offers if both (1) the solicitation indicates the procedure for transmitting the electronic offer, and (2) the Board of Commissioners receives the offer on a fax machine, by electronic mail, or by means of another electronic system that has a security feature that protects the content of an electronic offer with the same degree of protection as the content of an offer that is not transmitted by electronic means. (IC 5-22-3-4(c)).

A governmental body conducting a reverse auction must receive electronic offers for supplies through an Internet purchasing site. (IC 5-22-3-4(d)).

5. Property Interest in Award of Contract.

An offeror (*i.e.*, the person bidding on a public contract) does not gain a property interest in the award of a contract unless the offeror is awarded the contract and the contract is completely executed. (IC 5-22-3-6).

C. Specifications.

1. General.

The Board of Commissioners, as a governmental body, may adopt rules for the preparation, maintenance, and content of specifications. (IC 5-22-5-1). A "specification" means a description of the physical or functional characteristics of a supply or service or the nature of a supply or service. The term includes a description of any requirements for inspecting, testing, or preparing a supply or service for deliver. (IC 5-22-2-35).

A purchasing agent shall prepare, issue, revise, maintain, and monitor the use of specifications. (IC 5-22-5-2). The Board of Commissioners, as a purchasing agency, must maintain an indexed file of specifications prepared by each purchasing agent. (IC 5-22-5-4).

A specification must promote overall economy for the intended purpose and encourage competition in satisfying the Board of Commissioners' needs. (IC 5-22-5-3).

2. Request for Specifications.

A purchasing agent may request assistance from private parties in the development of specifications when (1) the purchasing agent makes a written determination that the development of the specifications by the Board of Commissioners is not feasible, and (2) the Board of Commissioners approves the use of such request. (IC 5-22-5-5(a)).

The request for specifications must include the following:

(a) the factors or criteria that will be used in evaluating the specifications;

(b) a statement concerning the relative importance of evaluation factors;

(c) a statement concerning whether discussions may be conducted with persons proposing specifications to clarify the specification requirements. (IC 5-22-5-5(b)).

The purchasing agent must give notice of the request for specifications under IC 5-3-1 and the purchasing agent may discuss proposed specifications with persons proposing specifications to clarify the requirements. The persons proposing specifications must be given fair and equal treatment with respect to any opportunity for discussion and revisions of proposed specifications. (IC 5-22-5-5(c), -(d), and -(e))

D. Purchase of Services.

Unlike the purchase of "supplies," the Board of Commissioners, as a purchasing agency, may purchase services using any procedure that it considers appropriate. (IC 5-22-6-1). The Board of Commissioners may adopt rules governing the purchase of services. (IC 5-22-6-2). For purposes of the Public Purchasing Law, the term "services" means the furnishing of labor, time, or effort by a person, not involving the delivery of specific supplies other than printed documents or other items that are merely incidental to the required performance. (IC 5-22-2-30). In contrast, the term "supplies" means any property, including equipment, goods, and materials, but excluding an interest in real property. (IC 5-22-2-38).

E. Contracts for Ministerial Services or Collection Services.

The Board of Commissioners, as a purchasing agency, may make a contract with a public or private person for the performance of any ministerial service that it must have done under its direction that is necessary or desirable in the public interest. (IC 5-22-6.5-3(a)). For purposes of such a contract, a ministerial "service" is defined as an action or actions to be performed under authority of the County, or an agency of the County permitted by law to be done by the Board of Commissioners for the convenience or necessity of its citizens, but not including any action that constitutes the exercise of its discretionary powers, or the taking of legislative, or quasi-legislative action. (IC 5-22-6.5-2).

The Board of Commissioners may contract with a collection agency to collect any amount owed to the County and authorize a collection agency in a contract for collection services to collect from the debtor a collection fee. (IC 5-22-6.5-3(b)).

F. Purchase of Supplies—In General.

Unless another purchasing method is required or authorized under the Public Purchasing Law (*e.g.*, small purchases or request for proposals), the purchasing agent must follow the competitive bidding procedures described below in awarding a contract for supplies. (IC 5-22-7-1). The term "supplies" means any property, including equipment, goods, and materials. The term does not include an interest in real property, and does not include services. (IC 5-22-2-38).

1. Invitation for Bids.

A purchasing agent must issue an invitation for bids, which invitation must include the following information:

(a) a purchase description;

(b) all contractual terms and conditions that apply to the purchase;

(c) a statement of the evaluation criteria that will be used, including any of the following:

(i) inspection;
(ii) testing;
(iii) quality;
(iv) workmanship;
(v) delivery;
(vi) suitability for a particular purpose;
(vii) requirement that any offer submitted by a trust must identify each beneficiary of the trust and each settler empowered to revoke or modify the trust;

(d) the time and place for opening the bids;

(e) a statement concerning whether the bid must be accompanied by a certified check or other evidence of financial responsibility that may be imposed in accordance with rules or policies of the governmental body;

(f) a statement concerning the conditions under which a bid may be canceled or rejected in whole or in part as authorized under IC 5-22-18-2. (IC 5-22-7-2).

The evaluation criteria that affect the bid price and are considered in the evaluation for an award must be objectively measurable. (IC 5-22-7-3).

Moreover, only the evaluation criteria specified in the invitation for bids may be used in bid evaluation. (IC 5-22-7-4).

2. Notice of Invitation and Public Opening of Bids.

The Board of Commissioners, as a purchasing agency, must give notice of the invitation for bids in the manner required by IC 5-3-1. The Board of Commissioners may also provide electronic access to the notice through the computer gateway administered by the office of technology or through any other electronic means available to the County. (IC 5-22-7-5). The Board of Commissioners is required to open bids publicly in the presence of one or more witnesses at the time and place designated in the invitation for bids. (IC 5-22-7-6).

3. Evaluation, Acceptance and Award of Bids.

Bids must be: (1) unconditionally accepted without alteration or correction, except as provided in IC 5-22-7-11 through IC 5-22-7-13, and (2) evaluated based on the requirements provided in the invitation for bids. (IC 5-22-7-7). A contract must be awarded with reasonable promptness by written notice to the lowest responsible and responsive bidder. (IC 5-22-7-8).

In connection with the public purchase, the purchasing agency shall maintain the following information: (1) the name of each bidder; (2) the amount of each bid; and (3) other information required by the Public Purchasing Law and rules adopted thereunder. (IC 5-22-7-9).

The information described above is subject to public inspection under the Access to Public Records Act (see Chapter II herein) after each contract award. (IC 5-22-7-9).

4. Correction or Withdrawal of Bid.

The Board of Commissioners, as the governmental body, may adopt rules or establish policies to allow any of the following:

(a) correction or withdrawal of inadvertently erroneous bids before or after award;

(b) cancellation of awards or contracts based on a mistake described in (a).

Except as provided in such a rule or policy, the Board of Commissioners, as a purchasing agency, must make a written decision to:

(a) permit the correction or withdrawal of a bid; or

(b) cancel awards or contracts based on bid mistakes. (IC 5-22-7-10).

A purchasing agency may not permit changes in bid prices or other provisions of bids prejudicial to the interest of the governmental body or fair competition after bid opening. (IC 5-22-7-11).

5. Additional Terms to the Contract Proposed by Bidder.

If a bidder inserts contract terms or bids on items not specified in the invitation for bids, the purchasing agent shall treat the additional material as a proposal for addition to the contract and may do any of the following:

(a) declare the bidder nonresponsive;

(b) permit the bidder to withdraw the proposed additions to the contract in order to meet the requirements and criteria provided in the invitation for bids;

(c) accept any of the proposed additions to the contract (subject to the limitation described in the paragraph below). (IC 5-22-7-12).

The purchasing agent may not accept proposed additions to the contract that are prejudicial to the interest of the governmental body or fair competition. A decision of the purchasing agent to permit a change to the requirements of the invitation for bids must be supported by a written determination by the Board of Commissioners, as a purchasing agency. (IC 5-22-7-13).

G. On-Line Reverse Auctions.

In addition to the traditional solicitation of bids described above, a purchasing agency may conduct a reverse auction for the purchase of supplies by using an Internet purchasing site to: (1) issue an invitation for bids; and (2) receive bids. Except where otherwise provided, a purchasing agency and a bidder must comply with the requirements of the Public Purchasing Law when participating in a reverse auction. (IC 5-22-7.5-1).

1. Necessity for Written Policies.

Before conducting a reverse auction, the purchasing agency must adopt written policies that do the following:

(a) Establish procedures for all the following:

(i) Transmitting notices, solicitations, and specifications.
(ii) Receiving offers.
(iii) Making payments.
(iv) Protecting the identity of a bidder or an offeror.
(v) For a reverse auction, providing for the display of the amount of each offer previously submitted for public viewing.
(vi) Establishing the deadline by which offers must be received and will be considered to be open and available for public inspection.
(vii) Establishing the procedure for the opening of offers.

(b) Require the purchasing agency to maintain adequate documentation regarding reverse auctions so that the transactions may be audited as provided by law. (IC 5-22-7.5-2).

Written policies that comply with rules for an Internet public purchasing site adopted by the Indiana department of administration (under IC 4-13-17-4) satisfy the foregoing requirements. (IC 5-22-7.5-2).

2. Bids in a Reverse Auction.

If a purchasing agency issues an invitation for bids using a reverse auction conducted through an Internet purchasing site under the foregoing provisions, then a bid may be evaluated by the purchasing entity at the close of bidding only if such bid was made: (1) in accordance with the adopted policies described above; and (2) through the Internet purchasing site. (IC 5-22-7.5-3).

3. Requirements of Internet Purchasing Site for Reverse Auction.

When used for a reverse auction, an Internet purchasing site must do the following:

(a) Provide information that the purchasing entity considers necessary or beneficial to potential bidders.

(b) Display the amount of all bids previously submitted regarding the reverse auction for public viewing.

(c) Conceal information that identifies a bidder.

(d) Otherwise comply with the Public Purchasing Law. (IC 5-22-7.5-4).

4. Bidder Fees, Opening Reverse Auction Bids, & Non-Collusion Affidavits.

The purchasing agency may charge a bidder in a reverse auction a fee set in the written policies adopted by the purchasing agency as a prerequisite to engaging in reverse auctions. (IC 5-22-7.5-5).

For purposes of IC 5-22-7-6 (*i.e.*, general requirement that competitive bids by opened in public), a bid made through an Internet purchasing site is considered to be opened when a computer generated record of the information contained in all bids for a proposed purchase that were received by the site not later than the posted bid deadline is reviewed publicly by the purchasing agency in the presence of one (1) or more witnesses at the time and place designated in the invitation for bids. (IC 5-22-7.5-6).

The requirement that an offeror must certify that his or her offer is made without reference to any other offer set forth in IC 5-22-16-6(a)(2) (i.e., a non-collusion affirmation) does not apply to a reverse auction. (IC 5-22-7.5-7).

H. Small Purchases.

If the purchasing agent expects a purchase to be less than $150,000, then the purchasing agent may use certain abbreviated methods for purchasing supplies. However, purchase requirements may not be artificially divided so as to constitute a small purchase the Public Purchasing Laws. (IC 5-22-8-1).

1. Purchases Less Than $50,000.

This applies only if the purchasing agent expects the purchase to be less than $50,000. A purchasing agent may make a purchase under small purchase policies established by the Board of Commissioners, as a purchasing agency and governmental body. (IC 5-22-8-2).

2. Purchases Between $50,000 and $150,000.

This applies only if the purchasing agent expects the purchase to be:

(a) at least $50,000; and

(b) not more than $150,000.

A purchasing agent may purchase supplies by inviting quotes from at least three (3) persons know to deal in the lines or classes of supplies to be purchased. The purchasing agent shall mail an invitation to quote to the persons at least seven (7) days before the time fixed for receiving quotes. If the purchasing agent receives a satisfactory quote, the purchasing agent shall award a contract to the lowest responsible and responsive bidder for each line or class of supplies required.

The purchasing agent may reject all quotes. If the purchasing agent does not receive a quote from a responsible and responsive bidder, the purchasing agent may make a special purchase of the supplies without further solicitations or invitations to bid, as authorized by IC 5-22-10-10. (See Special Purchasing Methods below). (IC 5-22-8-3). However, a special purchase must be made with competition as is practicable under the circumstances. (IC 5-22-10-2).

I. Requests for Proposals.

As an alternative to using the competitive sealed bid procedure outlined above, a purchasing agent may award a contract using a request for proposal procedure, subject to the policies of the purchasing agency. (IC 5-22-9-1).

The Board of Commissioners, as the governmental body, may provide by rule or policy that: (1) it is either not practicable or not advantageous to purchase specified types of supplies by competitive sealed bidding, and (2) receiving proposals is the preferred method for purchase of that type of supply. (IC 5-22-9-8).

1. Content for Request for Proposals.

The purchasing agent shall solicit proposals through a request for proposals, which must include the following:

(a) the factors or criteria that will be used in evaluating the proposals;

(b) a statement concerning the relative importance of price and the other evaluation factors;

(c) a statement concerning whether the proposal must be accompanied by a certified check or other evidence of financial responsibility, which may be imposed in accordance with rules of the governmental body; and

(d) a statement concerning whether discussions may be conducted with responsible offerors, who submit proposals determined to be reasonably susceptible of being selected for award. (IC 5-22-9-2).

The purchasing agency shall give public notice of the request for proposals in the manner required by IC 5-3-1. The purchasing agency for a political subdivision may also provide electronic access to the notice through the electronic gateway administered by the office of technology. (IC 5-22-9-3). Following the submission of proposals, the proposals must be opened in a manner so as to avoid disclosure of contents to competing offerors during the process of negotiation. (IC 5-22-9-4).

2. Register of Proposals.

A register of proposals must be prepared and open for public inspection after a contract is awarded. (IC 5-22-9-5(a)). The register of proposals must contain the following:

(a) a copy of the request for proposals;

(b) a list of all persons to whom copies of the request for proposals were given;

(c) a list of all proposals received, which must include the names and addresses of all offerors, the dollar amount of each offer and the name of the successful offeror and the dollar amount of that offeror's offer;

(d) the basis on which the award was made; and

(e) the entire contents of the contract file except for proprietary information included with an offer, such as trade secrets, manufacturing processes, and financial information that was not required to be made available for public inspection by the terms of the request for proposals. (IC 5-22-9-5).

As provided in the request for proposals or the rules or policies of the Board of Commissioners, discussions may be conducted with, and best and final offers obtained from, responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award. (IC 5-22-9-6).

3. Award of Contract Based on Proposals.

The only factors or criteria that may be used in the evaluation of proposals are those specified in the request for proposals. (IC 5-22-9-10).

A contract award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the Board of Commissioners, as a governmental body, taking into consideration price and the other evaluation factors set forth in the request for proposals. If provided in the request for proposals, a contract may be awarded to more than one offeror whose proposals are determined in writing to be advantageous to the Board of Commissioners, as the governmental body, taking into consideration price and other evaluation factors set forth in the request for proposals. (IC 5-22-9-7).

Offerors must be accorded fair and equal treatment with respect to any opportunity for discussion and revisions of proposals. In conducting discussions with an offeror, information derived from proposals submitted by competing offerors may be used in discussion only if the identity of the offeror providing the information is not disclosed to others. The purchasing agency must provide equivalent information to all offerors with which the purchasing agency chooses to have discussions. (IC 5-22-9-9).

J. Special Purchasing Methods.

The Public Purchasing Law recognizes that in certain situations a competitive sealed bid process or a request for proposal process should not be required before a public agency purchases certain supplies. Notwithstanding anything else in the Public Purchasing Laws to the contrary, if one of the special purchasing methods is available, a purchasing agent may make a "special purchase" under IC 5-22-10 without soliciting bids or proposals. (IC 5-22-10-1). A special purchase must be made with competition as is practicable under the circumstances. (IC 5-22-10-2). Any purchase made under these provisions is deemed a "special purchase." (IC 5-22-2-34).

1. Contract Records.

A purchasing agent must maintain the contract records for a special purchase in a separate file. A purchasing agent must include in the contract file a written determination of the basis for the special purchase and the selection of a particular contractor. (IC 5-22-10-3(a) and (b)).

Notwithstanding any other law, the Board of Commissioners, as a governmental body, shall maintain a record listing all contracts made by special purchasing methods for a minimum of five (5) years. The record must contain each contractor's name, the amount and type of each contract and a description of the supplies purchased under each contract. The contract records for a special purchase are subject to audit by the state board of accounts. (IC 5-22-10-3(c) and (d)).

2. When Special Purchases Allowed.

A purchasing agent may make a special purchase when:

(a) there exists, under emergency conditions, a threat to public health, welfare, or safety. The governor's security council established by IC 10-19-8.1-2 may make a purchase under this section to preserve security or to act in emergency as declared by him. (IC 5-22-10-4);

(b) there exists a unique opportunity to obtain supplies or services at a substantial savings (IC 5-22-10-5);

(c) at an auction (IC 5-22-10-6);

(d) purchasing data processing contracts or license agreements for software programs (IC 5-22-10-7);

(e) purchasing data processing contracts or license agreements for supplies or services, when only one (1) source meets the using agency's reasonable requirements (IC 5-22-10-7);

(f) the compatibility of equipment, accessories, or replacement parts is a substantial consideration in the purchase and only one (1) source meets the using agency's reasonable requirements (IC 5-22-10-8);

(g) purchase of the required supplies or services under another purchasing method would seriously impair the functioning of the using agency (IC 5-22-10-9);

(h) the purchasing agency has solicited for a purchase under another purchasing method and has not received a responsive offer (IC 5-22-10-10);

(i) the evaluation of supplies or a system containing supplies for the purpose of (a) obtaining functional information or comparative data, or (b) for a purpose, which in the judgment of the purchasing agent will advance the long term competitive position of the governmental body (IC 5-22-10-11);

(j) the market structure is based on price but the Board of Commissioners is able to receive a dollar or percentage discount of the established price (IC 5-22-10-12);

(k) subject to IC 5-22-10-14 and IC 5-22-10-15, a purchasing agent may award a contract for a supply when there is only one (1) source for the supply and the purchasing agent determines in writing that there is only one (1) source for the supply (IC 5-22-10-13);

(l) the purchasing agent determines in writing that supplies can be purchased from a person or the person's authorized representative at prices equal to or less than the prices stipulated in current federal supply service schedules established by the federal General Services Administration, and it is advantageous to the Board of Commissioners' interest in efficiency and economy (IC 5-22-10-14);

(m) a purchasing agent may purchase supplies if the purchase is made from a person who has a contract with a federal or state agency and the person's contract with the federal or state agency requires the person to make the supplies available to the state or political subdivisions (IC 5-22-10-15);

(n) a purchasing agent may acquire supplies if the purchasing agent determines that the governmental body can obtain the transfer of the supplies from the federal government under IC 4-13-1.7 at a cost less than would be obtained from purchase of the supplies by soliciting for bids or proposals (IC 5-22-10-16); and

(o) A purchasing agent may acquire supplies by accepting a gift for the purchasing agent's governmental body. (IC 5-22-10-17).

K. Purchases from Other Persons or Entities.

1. Purchases from the Department of Correction.

The Board of Commissioners must purchase from the Department of Correction supplies and services produced or manufactured by the Department under IC 11-10-6 as listed in the

department's printed catalog unless the supplies and services cannot be furnished in a timely manner. However, such supplies and services only must be purchased if they meet the specifications and needs of the Board of Commissioners and can be purchased at a fair market price. (IC 5-22-11-1).

2. Purchases from Non Profit Agency for Disabled Persons.

The Board of Commissioners may purchase supplies and services without advertising or calling for bids from a nonprofit agency for persons with severe disabilities that meets certain conditions, under the same conditions as supplies produced by the Department of Correction are purchased. (IC 5-22-13-2).

3. Purchase from State Rehabilitation Center.

The Board of Commissioners must purchase articles produced by the Indiana State Rehabilitation Center under the same conditions as articles produced by the Department of Correction, unless similar articles are produced by the governmental body. (IC 5-22-12-4).

4. Small Business Set-Aside Purchases.

The Board of Commissioners may adopt rules to provide for a purchase in which the solicitation states that offers will be accepted only by small businesses. The rules adopted by the Board of Commissioners must establish criteria for determining qualifications for a small business in addition to those qualifications established by IC 5-22-14. In establishing criteria, the rules may use any standards established for determination of small business status that are used by an agency of the federal government. A governmental body may also receive assistance from the Indiana economic development corporation to establish criteria or to implement the rules. (IC 5-22-14-3).

L. Purchasing Preferences.

Under IC 5-22-15, the specific products described below may receive preferences in the public purchasing process. Most, but not all, preferences are discretionary and the governmental body may adopt rules for their implementation.

1. Mandatory Preferences.

a. Supplies Manufactured in the United States.

The Board of Commissioners, as a governmental body, must adopt rules to promote the purchase of supplies manufactured in the United States. Such rules must provide that supplies manufactured in the United States shall be specified and purchased unless the Board of Commissioners determines that any of the following apply:

(i) The supplies are not manufactured in the United States in reasonably available quantities.
(ii) The price of the supplies manufactured in the United States exceeds by an unreasonable amount the price of available and comparable supplies manufactured outside the United States.

(iii) The quality of the supplies is substantially less than the quality of comparably priced available supplies manufactured outside the United States.

(iv) The purchase of supplies manufactured in the United States is not in the public interest. (IC 5-22-15-21).

b. Steel Products Manufactured in the United States.

Unless the head of the purchasing agency makes a written determination otherwise, a solicitation by a purchasing agent must require that if any steel products are used in the manufacture of the supplies required under the contract or supplies used in the performance of the services under the contract by the contractor or a subcontractor of the contractor, such steel products must be manufactured in the United States. "Steel products" are defined to include products that are rolled, formed, shaped, drawn, extruded, forged, cast, fabricated, or otherwise similarly processed, or processed by a combination of two or more such operations, by the open hearth, basic oxygen, electric furnace, Bessemer, or other steel making process. (IC 5-22-15-25).

However, this requirement does not apply if:

(i) the head of the purchasing agency determines in writing that:

(a) the cost of the contract with such requirement would be greater than 115% of the cost of the contract without the requirement to use steel manufactured in the United States; and

(b) failure to impose the requirement would not in any way harm the business of a facility that manufactures steel products in Indiana, or result in the reduction of employment or wages and benefits of employees of a facility that manufactures steel products in Indiana; or

(ii) the purchase is less than $10,000 and made under the small purchase policies (as described in IC 5-22-8-2(b)) established by the purchasing agency or under rules adopted by the governmental body. (IC 5-22-15-25).

c. Indiana Coal.

Whenever a purchasing agent purchases coal for use as fuel, the purchasing agent must give an absolute preference to coal mined in Indiana. (IC 5-22-15-22).

d. Indiana Veteran Owned Small Businesses.

A governmental body shall give a 15% preference for supplies to an Indiana small business (as defined in IC 5-22-14-1) or a veteran owned small business (defined in IC 4-13-16.5-1) that submits an offer for purchase under the Public Purchasing Law. The governmental body may adopt rules to establish criteria to carry out this section. (IC 5-22-15-23).

2. Optional Preferences.

a. Recycled Products.

There is a price preference of at least 10%, but no more than 15%, for supplies that contain recycled materials or post-consumer materials. The amount of the price preference and the recycled materials' composition of the supplies must be set by one (1) of the following:

(i) Rules adopted by the governmental body.
(ii) Policies established by the purchasing agency.
(iii) The solicitation sent to potential bidders. (IC 5-22-15-16).

b. Soy Products.

There is a price preference of 10% for the purchase of fuel of which at least 20% by volume is soy diesel/bio diesel. (IC 5-22-15-19).

c. Indiana Businesses.

The Board of Commissioners may adopt rules to give a preference to an Indiana business that submits an offer for a purchase if:

(i) An out-of-state business submits an offer for the purchase; and
(ii) The out-of-state business is a business from a state that gives purchase preferences unfavorable to Indiana businesses. (IC 5-22-15-20).

Rules adopted, which give preference to an Indiana business that submits an offer for purchase, may not give a preference to an Indiana business that is more favorable to the Indiana business than the other state's preference is to the other state's businesses. These rules also must provide that a contract shall be awarded to the lowest responsive and responsible offeror, regardless of the preference provided under this section, if:

(i) the offeror is an Indiana business; or
(ii) the offeror is a business from a state bordering Indiana and the offeror's home state does not provide a preference to the home state's businesses more favorable than is provided by Indiana law to Indiana businesses.

d. High Calcium Foods.

Whenever a purchasing agent, purchases food or beverages to be processed and served in a building or room owned or operated by a governmental entity, the purchasing agent must give preference to foods and beverages that contain a higher level of calcium than products of the same type and quality and are equal in price to or lower in price than products of the same type and quality. (IC 5-22-15-24).

e. Goods Made Using Forced Labor.

If an offeror offers to furnish supplies made in a country other than the United States, a governmental body may not award a contract to the offeror for those supplies if the supplies were made using forced labor. A governmental body shall inform offerors in the solicitation of this forced labor provision. (IC 5-22-15-24.2).

3. Claim for Preference.

An offeror who wants to claim a preference for a given supply must indicate in the offer what supply item in the offer is a preferred supply. A purchasing agent may require an offeror who claims a preference for a given supply item to certify that the supply offered meets the qualifications set for preferred supplies under this chapter. (IC 5-22-15-9).

4. Computation for Preference.

If an offeror offers a preferred supply for a given supply item, the purchasing agent shall compute an adjusted offer for that item according to the following formula:

STEP ONE: Determine the price preference percentage for the supply item under this chapter.

STEP TWO: Multiply the offeror's offer for the supply item by the percentage determined under STEP ONE.

STEP THREE: Subtract the number determined under STEP TWO from the offeror's offer for the supply item. (IC 5-22-15-10(b)).

5. Award of Preference.

Notwithstanding any statute requiring the award of a contract to the lowest offeror (but subject to the requirements noted below), a purchasing agent must award a contract to the offeror whose total adjusted offer is lower than the total adjusted offer of each other offeror. (IC 5-22-15-11). The award of a contract is subject to the following:

(a) a requirement of an applicable statute to award a contract to a responsible and responsive bidder;

(b) a requirement of an applicable statute to award a contract:

  (i) to the best bidder; or
  (ii) in the case of a purchase governed by the request for proposal procedures, to the offeror whose offer is most advantageous to the governmental body; and

(c) the authority of the purchasing agent under IC 5-22-17-12 to award contracts separately or for a combination of a line or class of supplies. (IC 5-22-15-12).

6. Price Paid for Preferences.

The price paid for preferred supplies purchased under a contract awarded shall be the price offered for the supplies and not the adjusted offer price of the supplies used to award such contract. (IC 5-22-15-14).

M. Qualifications and Duties of Offerors and Contractors.

1. General.

If a purchasing agent determines that an offeror is not responsible, that determination must be made in writing by the purchasing agent. If an offeror fails to provide information required by the purchasing agent concerning a determination of whether the offeror is responsible, that offeror may not be considered responsible. Information furnished by an offeror shall not be disclosed outside the purchasing agency without the offeror's prior written consent. (IC 5-22-16-1(a), (b), and (c)).

2. Responsible and Responsive Offerors.

In determining whether an offeror is responsible, a purchasing agent may consider the following factors:

(a) the ability and capacity of the offeror to provide the supplies or service;

(b) the integrity, character, and reputation of the offeror; and

(c) the competency and experience of the offeror. (IC 5-22-16-1(d)).

In determining whether an offeror is responsive, a purchasing agent may consider the following factors:

(a) whether the offeror has submitted an offer that conforms in all material respects to the specifications;

(b) whether the offeror has submitted an offer that complies specifically with the solicitation and the instructions to offerors; and

(c) whether the offeror has complied with all applicable statutes, ordinances, resolutions, or rules pertaining to the award of a public contract. (IC 5-22-16-2).

3. Prequalification of Contractors.

Prospective contractors may be prequalified for particular types of supplies. Solicitation mailing lists of potential contractors may include any or all of such prequalified persons. (IC 5-22-16-3).

4. Foreign Corporation; Registration with Secretary of State.

An offeror that is a foreign corporation must be registered with the secretary of state to do business in Indiana in order to be considered responsible. (IC 5-22-16-4(a)). The purchasing agent may award a contract to an offeror pending the offeror's registration with the secretary of state. If, in the judgment of the purchasing agent, the offeror has not registered within a reasonable period, the purchasing agent shall cancel the contract. An offeror has no cause of action based on the cancellation of a contract under this subsection. (IC 5-22-16-4(c)).

5. Evidence of Financial Responsibility.

A purchasing agent may specify in a solicitation that an offeror must provide evidence of financial responsibility in order to be considered responsible. The evidence of financial responsibility may be a bond, certified check, or other evidence specified by the purchasing agent in the solicitation. If a bond or certified check is required as the evidence of financial responsibility, the amount of the bond or certified check may not be set at more than 10% of the contract price. The bond, certified check, or other evidence of financial responsibility shall be made payable to the Board of Commissioners. A performance bond may be used in addition to the bid bond, certified check, or other evidence of financial responsibility if the amount of the performance bond is stated in the solicitation. (IC 5-22-16-5).

The check of an unsuccessful offeror shall be returned to the offeror by the purchasing agent upon selection of successful offerors. The check of a successful offeror shall be held until delivery or until completion of the contract. (IC 5-22-16-5).

6. Evidence of Noncollusion.

An offeror must file with the purchasing agent an affirmation, made under the penalties for perjury, which states in substance the following:

(a) The offeror has not entered into a combination or an agreement:

  (i) relative to the price to be offered by a person;
  (ii) to prevent a person from making an offer; or
  (iii) to induce a person to refrain from making an offer.

(b) The offeror's offer is made without reference to any other offer. (IC 5-22-16-6(a)).

The purchasing agent may require the affirmation to be made in the contract documents. The purchasing agent shall reject an offer that the purchasing agent finds to be collusive. (IC 5-22-16-6(b) and (c)).

N. Specific Contract Provisions.

1. Cost Plus Percentage of Cost.

The Board of Commissioners, as a governmental body, may not enter into a cost plus a percentage of cost contract. (IC 5-22-17-1).

2. Cost Reimbursement.

The Board of Commissioners, as a governmental body, may enter into a cost reimbursement contract if the purchasing agent determines in writing that the contract is likely to be less costly to the Board of Commissioners than any other contract type, or that it is impracticable to obtain the supplies required except under such a contract. (IC 5-22-17-2). A "cost reimbursement contract" means a contract that entitles a contractor to receive: (1) reimbursement for costs that are allowable and allocable in accordance with the contract terms and the provisions of the public purchasing law; and (2) a fee, if any. (IC 5-22-2-5).

3. Term of Contract for Supplies.

Except as provided below, a contract for supplies may be entered into for a period not to exceed four (4) years. County and municipal hospitals may contract for the purchase of supplies for more than one (1) year but not more than five (5) years if the supplies are purchased using a competitive sealed bidding process. (IC 5-22-17-3).

The contract must specify that payment and performance obligations are subject to the appropriation and availability of funds. The County must have available a sufficient appropriation balance or an approved additional appropriation before a purchasing agent may award a contract. (IC 5-22-17-3).

4. Renewal of Contracts.

A contract that contains a provision for escalation of the price of the contract may be renewed under this section if the price escalation is computed using a commonly accepted index named in the contract or a formula set forth in the contract. Subject to IC 5-22-17-5, with the agreement of the contractor and the purchasing agency, a contract may be renewed any number of times. The term of a renewed contract may not be longer than the term of the original contract. (IC 5-22-17-4).

5. Insufficient Appropriation; Cancellation of Contract.

When the County Council makes a written determination that funds are not appropriated or otherwise available to support continuation of performance of a contract, the contract is considered canceled. A determination by the County Council that funds are not appropriated or otherwise available to support continuation of performance of a contract is final and conclusive. (IC 5-22-17-5).

6. Increased or Decreased Compensation Based on Performance Date.

The purchasing agent may specify in a contract that early performance of the contract will result in increased compensation. Alternatively, the purchasing agent may specify in a contract that completion of the contract after the termination date of the contract will result in a deduction from the compensation in the contract. Notice of inclusion of such provisions in a contract must be included in the solicitation. (IC 5-22-17-6).

7. Contracts for Petroleum Products.

A purchasing agent may award a contract for petroleum products to:

(a) the lowest responsible and responsive offeror; or

(b) all responsible and responsive offerors.

"Petroleum products" include gasoline, fuel oils, lubricants and liquid asphalt. Such a contract may allow for the escalation or de-escalation of price.

If the contract is awarded to all responsible and responsive offerors, the purchasing agent must purchase the petroleum products from the lowest of the responsible and responsive bidders. The contract must provide that the bidder from whom petroleum products are being purchased shall provide five (5) business days written notice of any change in price. Upon receipt of written notice, the purchasing agent shall request current price quotes in writing based upon terms and conditions of the original offer (as awarded) from all successful responsible and responsive offerors. The purchasing agent shall record the quotes in minutes or memoranda. The purchasing agent shall purchase the petroleum products from the lowest responsible and responsive offeror, taking into account the price change of the current supplier and the price quotes of the other responsible and responsive offerors. (IC 5-22-17-10).

8. Contracts for Remediation of Hazardous Waste.

Under IC 5-22-17-7, a contract for remediation of a hazardous waste site may be entered into for a period not to exceed ten (10) years.

9. Contracts for Sand, Gravel, Asphalt, Paving Materials or Crushed Stone.

A county may award a sand, gravel, asphalt paving materials, or crushed stone contract to more than one (1) responsible and responsive offeror if: (1) the specifications allow for offers to be based upon service to specific geographic areas; and (2) the contracts are awarded by geographic area. The county is not required to describe the geographic areas in the specifications. (IC 5-22-17-11).

O. Other Procedures Governing Purchasing.

1. Notice.

Whenever public notice is required under the Public Purchasing Law, notice shall be given by publication in the manner prescribed by IC 5-3-1. The purchasing agent may give such further notice (other than that required by IC 5-3-1) if the purchasing agent considers such additional notice will increase competition. (IC 5-22-18-1(a) and (b)).

The purchasing agent shall schedule all notices to provide a reasonable amount of time for preparation and submission of responses after notification. At a minimum, the purchasing agent must provide at least seven (7) calendar days between: (1) the last publication, mailing, or posting of notices required by the IC 5-3-1; and (2) the final date set for submitting offers. (IC 5-22-18-1(c)).

2. Cancellation of Solicitation.

When the purchasing agent determines it is in the best interests of the Board of Commissioners, a solicitation may be canceled or offers may be rejected, in whole or in part as specified in the solicitation. The reasons for a cancellation of a solicitation or rejection of offers must be made a part of the contract file. (IC 5-22-18-2).

3. Offers Opened After Time Stated in Solicitation.

Notwithstanding any other law, offers may be opened after the time stated in the solicitation if both of the following apply:

(a) The Board of Commissioners, as a governmental body, makes a written determination that it is in the best interest of the Board of Commissioners to delay the opening.

(b) The day, time, and place of the rescheduled opening is announced at the day, time, and place of the originally scheduled opening. (IC 5-22-18-3).

4. Contract and Purchasing Records; Availability for Public Inspection

Except as provided by another law, contract and purchasing records are public records subject to public inspection under the Access to Public Records Act (IC 5-14-3; see Chapter II herein) a governmental body may establish policies or adopt rules for the protection of documents submitted to the governmental body in response to a solicitation. (IC 5-22-18-4).

Within thirty (30) days after the acceptance of an offer, the purchasing agent must:

(a) Deliver the original of each purchase order or lease to the successful offeror, either in person or by first class mail;

(b) Retain a copy of the purchase order or lease for the purchasing agent's records; and

(c) File a copy of the purchase order or lease for public record and inspection with the county auditor. (IC 5-22-18-5).

P. Judicial Review of Determinations.

Determinations by a purchasing agency under the Public Purchasing Law are final and conclusive, and are subject to judicial review as described herein. (IC 5-22-19-1).

A person aggrieved by a determination under the Public Purchasing Law may file a petition for judicial review of that determination in a court of appropriate jurisdiction. (IC 5-22-19-2). The burden of demonstrating the invalidity of the determination is on the person asserting the invalidity. (IC 5-22-19-3). The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by a determination that is any of the following:

(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. (IC 5-22-19-2).

If the court finds that a person has been substantially prejudiced by a determination, the court may set aside the determination. The court may also remand the case to the governmental body for further proceedings and compel an action by the governmental body that has been unreasonably delayed or unlawfully withheld. However, a court may not award damages in an action under this provision. (IC 5-22-19-4).

An Indiana taxpayer has standing to challenge a determination that the preference for steel products manufactured in the United States should not be applied in awarding a contract (made under IC 5-22-15-25(d)), and to enforce a contract provision requiring the use of steel products manufactured in the United States (as required by IC 5-22-17-14) if the contract is related to steel products or supplies manufactured by steel products. (IC 5-22-19-5).

Q. Modification of Contracts.

The Board of Commissioners, as a governmental body, may establish policies or adopt rules permitting or requiring the inclusion of clauses providing for adjustments in prices or time of performance. (IC 5-22-20-1(1)).

In addition, the Board of Commissioners, as a governmental body, may establish policies or adopt rules permitting or requiring the inclusion of contract provisions dealing with either of the following:

(1) the unilateral right of the governmental body to order, in writing either of the following: (i) changes in the work within the scope of the contract; or (ii) temporary stopping of the work or delaying performance; or

(2) variations occurring between estimated quantities of work in a contract and actual quantities. (IC 5-22-20-1).

In the event that the Board of Commissioners has established policies or adopted rules permitting or requiring the inclusion of clauses providing for adjustments in prices, the adjustments in price under such a contract provision may be computed in the following ways:

(1) By agreement on a fixed price adjustment before the beginning of the pertinent performance or as soon after the beginning of the performance as practicable;

(2) By unit prices specified in the contract or subsequently agreed upon;

(3) By the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as specified in the contract or subsequently agreed upon;

(4) In such other manner as the contracting parties may mutually agree; or

(5) In the absence of agreements by the parties, by a unilateral determination by the Board of Commissioners of the costs attributable to the events or situations under such clauses, with adjustment of profit or fee, all as computed by the Board of Commissioners in accordance with applicable rules adopted by the Board of Commissioners. (IC 5-22-20-2).

R. Disposition of Surplus Personal Property.

1. General

The Board of Commissioners may sell property that: (1) has been left in the custody of an officer or employee of the Board of Commissioners and has remained unclaimed for more than one (1) year; or (2) belongs to the Board of Commissioners but is no longer needed or is unfit for the purpose for which it was intended. (IC 5-22-22-3).

2. Exclusion for Certain Types of Property.

The provisions governing the disposition of property apply only to personal property owned by the County. Moreover, it does not apply to disposition of the County's interests in real property. There is also a list of certain entities and certain types of personal property which are not covered by the general disposition statute. See IC 5-22-22-1 for a complete listing of the entities and types of property excluded from these provisions. (IC 5-22-22-1).

3. Manner of Sale.

a. Auctions.

If the property to be sold is: (1) one item, with an estimated value of $1,000 or more; or (2) more than one item, with an estimated total value of $5,000 or more, the Board of Commissioners may engage an auctioneer licensed under IC 25-6.1 to advertise the sale and conduct a public auction. The advertising by an auctioneer under this section must include a detailed description of the property to be sold. The purchasing agency shall pay an auctioneer who conducts a sale under this section from the gross proceeds of the sale received before other expenses and liens are paid. (IC 5-22-22-4).

The purchasing agency may also sell surplus property using an Internet auction site that is approved by the office of technology established by IC 4-13.1-2-1, and is linked to the electronic gateway administered under IC 4-13.1-2-2(a)(6) by the State office of technology. The purchasing agency's posting of the sale on the Internet auction site must include a detailed description of the surplus property to be sold. The purchasing agency may pay the costs of conducting the auction on the Internet site as required by the person maintaining the auction site. (IC 5-22-22-4.5).

In addition to any notice given by an auctioneer or an Internet auction site, a notice of a sale must be given by publication of the time, place, and terms of the sale, as provided in IC 5-3-1 in the county where the property is located. The publication shall be made at least fifteen (15) days before the date of the sale. (IC 5-22-22-11).

b. Public Sale or Sealed Bids.

If an auctioneer is not engaged or if the surplus property is not sold through an Internet auction site, the Board of Commissioners must sell the property at a public sale or by sealed bids delivered to the office of the Board of Commissioners before the date of sale. All sales shall be made to the highest responsible bidder. (IC 5-22-22-5). Notice of a sale must be given by publication of the time, place, and terms of the sale, as provided in IC 5-3-1 in the county where the property is located. The publication shall be made at least fifteen (15) days before the date of the sale. (IC 5-22-22-11).

c. Public Sale, Private Sale or Transfer Without Advertising.

If the property to be sold is: (1) one item, with an estimated value of less than $1,000; or (2) more than one item, with an estimated total value of less than $5,000, the Board of Commissioners may sell the property at a public or private sale or transfer the property, without advertising. (IC 5-22-22-6).

d. Recyclable or Worthless Property.

If the property to be sold is material that may be recycled and has been collected in conjunction with a recycling program, the purchasing agency may, without advertising, sell the property at a public or private sale or transfer the property. (IC 5-22-22-7).

If the property is worthless, it may be demolished or junked. Property is considered worthless or of no market value if the value of the property is less than the estimated costs of the sale and transportation of the property. (IC 5-22-22-8).

4. Exchange of Property with Another Governmental Body.

A purchasing agency may exchange property with another governmental body upon terms and conditions agreed upon by the governmental bodies as evidenced by adoption of a substantially identical resolution by each entity. A transfer under this provision may be made for any amount of property or cash as agreed upon by the governmental bodies. (IC 5-22-22-10).

5. Requirements Regarding Disposal of Law Enforcement Vehicles.

There certain requirements for the repainting of law enforcement vehicles prior to or following disposal by a purchasing agency. The requirements depend upon the person to whom the vehicle is transferred and whether the person intends to operate the vehicle on a public highway in Indiana. Please refer to IC 5-22-22-9 for the specific requirements.

Before a purchasing agency disposes of a law enforcement vehicle, the purchasing agency must provide a copy of IC 5-22-22-9 to the prospective purchaser of the vehicle. (IC 5-22-22-9(b)).

A person who violates IC 5-22-22-9 commits a Class C infraction. (IC 5-22-22-9(c)).

V. PUBLIC CONSTRUCTION

A. General.

A county desiring to undertake a public work project must comply with the Public Construction Law (IC 36-1-12). A "public work" means the construction, reconstruction, alteration, or renovation of a public building, airport facility, or other structure that is paid for out of a public fund or out of a special assessment. The term includes the construction, alteration, or repair of a highway, street, alley, bridge, sewer, drain, or other improvement that is paid for out of a public fund or out of a special assessment. The term also includes any public work leased by a political subdivision under a lease containing an option to purchase. (IC 36-1-12-2).

The Public Construction Law applies to all public works regardless of whether the work is performed on property owned or leased by the county. (IC 36-1-12-1(a)). The Public Construction Law sets forth the procedures that a board for a political subdivision must follow in completing a public work project. The term "board," when used in the context of the Public Construction Law, means the board or officer of a political subdivision or an agency having the power to award contracts for public work, which in most instances with respect to a county is the Board of Commissioners.

B. Exceptions.

The Public Construction Law does not apply to:

(1) An officer or agent, who, on behalf of a municipal utility, maintains, extends, and installs services of the utility if the necessary work is done by the employees of the utility. (IC 36-1-12-1(b)).

(2) An officer or agent, who, on behalf of a conservancy district described in IC 14-33-1-1(a)(4) or IC 14-33-1-1(a)(5), maintains, extends, and installs services of the conservancy district if the necessary work is done by the employees of the conservancy district. (IC 36-1-12-1(b)).

(2) Hospitals organized or operated under IC 16-22-1 through IC 16-22-5 or IC 16-23-1, unless the public work is financed in whole or in part with cumulative building fund revenue. (IC 36-1-12-1(c)).

(3) Tax exempt Indiana nonprofit corporations leasing and operating a city market owned by a political subdivision. (IC 36-1-12-1(d)).

(4) A person that has entered into a public-private operating agreement with the county under IC 5-23. (IC 36-1-12-1(f)).

As an alternative to the requirements of the Public Construction Law, the Board of Commissioners, as governing body for the county, may do the following:

1. Enter into a design-build contract as permitted under IC 5-30.

2. Participate in a utility efficiency program or enter into a guaranteed savings contract as permitted under IC 36-1-12.5. (IC 36-1-12-1(e)).

3. Enter into a build, operate, transfer, and public-private agreement under IC 5-23-4.

4. After June 30, 2017, employ a construction manager as constructor under IC 5-32.

In addition, the Public Construction Law to the extension or installation of utility infrastructure by a private developer of land if all the following apply: (1) A municipality will acquire for the municipality's municipally owned utility all of the utility infrastructure that is to be extended or installed. (2) Not more than fifty percent (50%) of the total construction costs for the utility infrastructure to be extended or installed, including any increased costs that result from any construction specifications that: (A) are required by the municipality; and (B) specify a greater service capacity for the utility infrastructure than would otherwise be provided for by the private developer; will be paid for out of a public fund or out of a special assessment. (3) The private developer agrees to comply with all local ordinances and engineering standards applicable to the construction, extension, or installation of the utility infrastructure. (IC 36-1-12-1(g)).

C. Contracts for Professional Services.

1. General.

The board is not required to comply with the public bidding requirements of the Public Construction Law for awarding and entering into contracts for professional services. However, a county may wish to provide notice through advertising or posting of notice for fee proposals on public works projects. (IC 5-16-11.1-4(a)).

When the Board of Commissioners elects to provide notice that professional services are required for a project and those professional services fall within one of the following categories:

(a) Architect, as specified in IC 25-4;

(b) Professional Engineer, as specified in IC 25-31;

(c) Land Surveyor, as specified in IC 25-21.5

then the board must comply with IC 5-16-11.1-4 regarding such notice. (IC 5-16-11.1-2). Generally, the notice must include the location and general description of the project, the general criteria to be used in selecting professional services, the location at which additional project descriptions or specifications are available for the project, the hours of business for the county and the last date for accepting statements of qualifications from interested parties. (IC 5-16-11.1-4(b)).

The board may make all contracts for professional services on the basis of competence and qualifications for the type of services to be performed and negotiate compensation that it determines to be reasonable. (IC 5-16-11.1-5).

2. Limitations.

In general, a board may not employ the architect or engineer, or an affiliate thereof, who provided design services on a public construction project, to be the construction manager on the project he designed. A county may not let a general contract, or any separate trade contract, to perform work on a public construction project to the construction manager of the project. (IC 5-16-10-2).

However, this limitation does not apply to highway or bridge construction projects, as such are not included within the definition of a "public construction project." An "affiliate" of the architect or engineer means a parent, descendant spouse, spouse of a descendant, brother, sister, spouse of a brother or sister, employee, director, officer, partner, limited liability company manager or member, joint venturer, a corporation subject to common control with the architect, engineer or construction manager, a shareholder or corporation who controls the architect, engineer or construction manager or a corporation controlled by the architect, engineer or construction manager. Other definitions may be found at IC 5-16-10-1.

D. Construction of Public Works Using County Work Force.

1. General.

If the cost of a public work project is estimated to be less than $250,000, a board may perform such work without awarding a contract under the Public Construction Law by using the provisions of IC 5-22 (See Public Purchases, Chapter IV herein) to purchase or lease materials and using its own workforce to undertake the project. (IC 36-1-12-3).

2. Limitations.

Unless the county satisfies all of the following requirements, it is required to comply with the public bidding requirements of the Public Construction Law:

(a) The cost of the public work including the actual cost of materials, labor, equipment, rental, a reasonable rate for use of county trucks and heavy equipment, and all other expenses incidental to the performance of the project must be estimated to be less than $250,000. (IC 36-1-12-3(a)).

(b) The county must have a group of employees on its staff that are capable of performing the construction, maintenance, and repair work required by the project. (IC 36-1-12-3(a)).

(c) If the public project is estimated to cost more than $100,000, the board must publish a notice under IC 5-3-1 that describes the work the board intends to perform and

sets forth the projected cost of that public work, and they must determine at a public meeting that it is in the public interest to perform the public work with the board's own workforce. (IC 36-1-12-3(b)).

(d) When the project involves the rental of equipment with an operator furnished by the owner or with the installation or application of materials by the supplier of materials (in such event, the project is considered a public work). However, the purchase of such services or rental of equipment, and the installation of materials, may be awarded pursuant to an annual contract if the proposed project is included in the bid specifications. (IC 36-1-12-3(c)).

(e) If a public works project involves a structure, an improvement, or a facility under the control of a public highway department that is under the political control of a unit (as defined in IC 36-1-2-23) and involved in the construction, maintenance, or repair of a public highway (as defined in IC 9-25-2-4), the department may not artificially divide the project to bring any part of the project under this section. (IC 36-1-12-3(f)).

The board of aviation commissioners or an airport authority board may perform such public work, using materials purchased or leased pursuant to IC 5-22 and its own workforce including owned or leased equipment, in the construction, maintenance, and repair of any airport roadway, runway, taxiway, or aircraft parking apron where such cost is estimated to be less than $150,000. (IC 36-1-12-3(d)).

Municipal and county hospitals may perform such public works by purchasing materials and using the hospital's workforce and owned or leased equipment where such cost is estimated to be less than $50,000. (IC 36-1-12-3(e)).

E. Contracts for Professional Services Without an Appropriation.

When any public work is proposed to be performed and the board determines by a two-thirds (2/3) vote that it is expedient and in the best public interest to employ professional engineering, architectural, or accounting services for the planning and financing of the public work and the preparation of plans and specifications, then the limitations and restrictions in the general statutes with respect to invalidity of contracts without an appropriation therefor, payment of fees solely from the proceeds of bonds or assessments when and if issued, and payment of fees solely from a special fund or funds to be provided in the future, do not apply to contracts for those professional services to the extent that such limitations and restrictions might otherwise prevent the payment of fees for services actually rendered in connection with those contracts or affect the obligation to pay those fees. (IC 36-1-12-3.5).

F. Public Works Projects Costing Less Than $50,000.

1. General.

The county may award a contract under the public bidding provisions of the Public Construction Law or may choose to invite quotes for public works projects costing less than $50,000. (IC 36-1-12-5(a)).

2. Limitations.

Special provisions apply to local boards of aviation commissioners operating under IC 8-22-2 and local airport authorities operating under IC 8-22-3. See IC 36-1-12-5(g) and IC 36-1-12-5(h) for those provisions.

The board may not elect the provisions allowing quotation for the resurfacing of a road, street or bridge unless: (1) the weight or volume of the materials is capable of accurate measurement and verification, and (2) the specifications define the geographic points at which the project begins and ends. (IC 36-1-12-5(c)).

The board must consider all contiguous sections of a road, street or bridge to be resurfaced in a calendar year as a single public work project for purposes of the $50,000 limitation. (IC 36-1-12-5(d)).

The board may purchase or lease supplies pursuant to IC 5-22 and use its' own workforce to perform the public work without awarding a public work contract. (See Construction of Public Works Using Country Work Force) (IC 36-1-12-5(e)).

3. Procedures.

A board electing to award a contract by invitation to quote may proceed under the following provisions.

a. Quotes.

The board must invite quotes from at least three (3) persons known to deal in the class of work proposed to be done by mailing them a notice stating that plans and specifications are on file in a specified office. The notice must be mailed not less than seven (7) days before the time fixed for receiving quotes. (IC 36-1-12-5(b)(1)).

The board may not require a person to submit a quote before the meeting at which quotes are to be received. The meeting for receiving quotes must be open to the public. All quotes received must be opened publicly and read aloud at the time and place designated and not before. (IC 36-1-12-5(b)(2)).

b. Award.

The board must award the contract for the public work to the lowest responsible and responsive quoter. The board may reject all quotes submitted. (IC 36-1-12-5(b)(3) and (4)) If the board rejects all quotes, then the county may negotiate and enter into agreements for the work in the open market without inviting or receiving quotes if they establish in writing the reasons for rejecting the quotes. (IC 36-1-12-5(b)(5)).

G. Public Works Projects Costing $150,000 or More.

1. General.

If a public work project will cost the county at least $150,000, then the board must prepare detailed plans and specifications and the contract must be awarded to the lowest responsible and responsive bid upon public notice and receipt of bids. (IC 36-1-12-4(a)).

2. Procedures.

A board that is required to follow the public bidding requirements of the Public Construction Law must comply with the following procedures in awarding a contract.

a. Specifications.

The board must prepare general plans and specifications describing the kind of public works required but should avoid specifications which might unduly limit competition. If the project involves the resurfacing (as defined in IC 8-14-2-1) of a road, street or bridge, the specifications must show how the weight or volume of the materials will be accurately measured and verified. (IC 36-1-12-4(b)(1)).

The board must file the plans and specifications in a place reasonably accessible to the public, which shall be specified in the notice to bidders. (IC 36-1-12-4(b)(2)). The specifications should incorporate and include the general provisions described herein and the non-collusion affidavit provisions described in subsection “c” below.

b. Notice of Receipt of Bids.

(i) Notice.

The board must publish notice in accordance with IC 5-3-1 calling for sealed proposals for the public work needed. (IC 36-1-12-4(b)(3)). If the board receives an electronic bid, as set forth by the following provision, it shall provide electronic access to the notice of bid solicitation through the computer gateway administered under IC 4-13.1-2-2(a)(6) by the office of technology. Notwithstanding the previous provision, a board may receive electronic bids for the public work if (1) the solicitation for bids indicates the procedure for transmitting the electronic bid to the board and (2) the board receives the bid on a facsimile machine or system with a security feature that protects the content of the bid with the same degree of protection as a bid not transmitted by a

facsimile machine. The notice must specify the place where the plans and specifications are on file and the date for receiving bids. (IC 36-1-12-4(b)(4)). The board may not require the bidder to submit a bid before the meeting at which bids are to be received. The meeting for receiving bids must be open to the public. All bids received must be opened publicly and read aloud at the time and place designated and not before. Notwithstanding any other law, bids may be opened after the time designated if both of the following apply: (A) the board makes a written determination that it is in the best interest of the board to delay the opening; and (B) the day, time, and place of the rescheduled opening are announced at the day, time, and place of the originally scheduled opening. (IC 36-1-12-4(b)(7)).

The board must require the bidder to submit a financial statement, a statement of experience, his proposed plan or plans for performing the public work, and the equipment that he has available for the performance of the public work. The statement must be submitted on forms prescribed by the state board of accounts. (IC 36-1-12-4(b)(6)).

If the cost of the project is estimated to be more than $200,000, the county must require a bond or certified check to be filed with each bid by a bidder in the amount determined and specified by the board in the notice of the letting. If the cost of the project is estimated to be not more than $200,000, the county may require a bond or a certified check to be filed with each bid by a bidder in the amount determined and specified by the board in the notice of the letting. In either case, the bond or certified check shall be made payable to the county, and the amount of the bond or certified check determined by the board may not be set at more than 10% of the contract price. (IC 36-1-12-4.5).

(ii) Advertising.

The board must publish the notice two (2) times, at least one (1) week apart, with the second publication made at least seven (7) days before the date the bid will be received. (IC 5-3-1-2(e)). The publications must be made in two (2) newspapers or as otherwise provided by IC 5-3-1-4. However, the first of the two (2) publications may be made by publication in newspapers while the second publication may be electronic as provided by IC 5-3-5 on the official website of the county. (IC 5-3-1-2(l)).

The period of time between the date of the first publication and the date of receiving bids is governed by the size of the contemplated project in the discretion of the county. The period of time between the date of the first publication and receiving bids may not be more than:

(a) six (6) weeks if the estimated cost of the public works project is less than $25,000,000; and

(b) ten (10) weeks if the estimated cost of the public works project is at least $25,000,000. (IC 36-1-12-4(b)(5)).

c. Award of Bid.

(i) General.

Except for certain types of county contracts noted below, the board may either (a) award the contract to the lowest responsible and responsive bidder, or (b) reject all bids submitted. (IC 36-1-12-4(b)(8)). If the contract is awarded to a bidder other than the lowest bidder, the board must state in the minutes or memoranda of the meeting at the time the award is made, the factors used to determine which bidder is the lowest responsible and responsive bidder and to justify the award. The minutes or memoranda shall be retained and be made available for public inspection. (IC 36-1-12-4(b)(9)).

In determining whether a bidder is responsive, the board may consider the following factors:

(A) Whether the bidder has submitted a bid or quote that conforms in all material respects to the specifications.

(B) Whether the bidder has submitted a bid that complies specifically with the invitation to bid and the instructions to bidders.

(C) Whether the bidder has complied with all applicable statutes, ordinances, resolutions, or rules pertaining to the award of a public contract. (IC 36-1-12-4(b)(10)).

In determining whether a bidder is a responsible, the board may consider the following factors:

(A) The ability and capacity of the bidder to perform the work.

(B) The integrity, character, and reputation of the bidder.

(C) The competence and experience of the bidder. (IC 36-1-12-4(b)(11)).

(ii) Non-Collusion Affidavit.

The board must require the bidder to submit an affidavit (*i.e.*, a "non-collusion affidavit") that the bidder has not entered into a combination or agreement (A) relative to the price bid by a person; (B) to prevent a person from bidding; or (C) to induce a person to refrain from bidding, and that his bid is made without reference to any other bid. (IC 36-1-12-4(b)(12)).

(iii) Notice to Proceed; Failure to Award.

In general, the board must award the contract and shall provide the successful bidder with written notice to proceed within sixty (60) days after the date on which bids are opened (IC 36-1-12-6(a). However, if general obligation bonds are sold to finance the project, the county must make the award and issue the notice to proceed within ninety (90) days of opening of the bids (IC

36-1-12-6(b)). Similarly, if revenue bonds are to be issued, when approved by the utility regulatory commission, or if special taxing district, special benefit or revenue bonds are to be issued and sold to finance the construction, then award and notice to proceed must occur within one hundred fifty (150) days of bid receipt. (IC 36-1-12-6(c)).

A failure to award and execute the contract and to issue notice to proceed within the time required above entitles a successful bidder to (1) reject the contract and withdraw his bid without prejudice; or (2) extend the time to award the contract and provide notice to proceed at an agreed later date. If the election is made to reject the contract and withdraw the bid, notice of the election must be given to the county in writing within fifteen (15) days of the expiration of the time period described above or any other extension date. (IC 36-1-12-6(d)).

(iv) Exceptions.

A county may award a sand, gravel, asphalt paving materials or crushed stone contract to more than one (1) responsible and responsive bidder if the specifications allow for bids to be based upon the service to specific geographic areas and the contracts are awarded by geographic area. The geographic areas do not need to be described in the specifications. (IC 36-1-12-4(c)).

(v) Return of Certified Check.

If the county required bidders to submit a bid bond or certified check pursuant to the notice to bidders (as described upon), all checks of unsuccessful bidders must be returned upon selection of the successful bidder. Checks of successful bidders must be held until delivery of the performance bond. (IC 36-1-12-4.5)

d. Contracts for Less than Specified Amount.

Projects costing at least $50,000 but less than $150,000 must comply with the following procedures:

(1) The board must invite quotes from at least three (3) persons known to deal in the class of work proposed to be done by mailing them a notice stating that plans and specifications are on file in a specified office. The notice must be mailed not less than seven (7) days before the time fixed for receiving quotes.

(2) The board may not require a person to submit a quote before the meeting at which quotes are to be received. The meeting for receiving quotes must be open to the public. All quotes received must be opened publicly and read aloud at the time and place designated and not before.

(3) The board must award the contract for the public work to the lowest responsible and responsive quoter. However, the board may reject all quotes submitted. (IC 36-1-12-4.7).

H. Certain Public Works Costing Less than $150,000.

If a public work project consists of the routine operation, routine repair, or routine maintenance of existing structures, buildings, or real property and the cost of the public work is estimated to be less than $150,000, then the board may award such contract in the manner provided in IC 5-22 (See Public Purchases, Chapter IV herein). (IC 36-1-12-4.9).

I. Contracts Upon Declaration of Emergency.

The board, upon a declaration of emergency, may contract for a public work project without advertising for bids if bids or quotes are invited from at least two (2) persons known to deal in the public work required to be done. The minutes of the board must show the declaration of emergency and the names of the persons invited to bid or provide quotes. (IC 36-1-12-9).

J. Special Considerations.

The following provisions should be considered in addition to the procedural requirements itemized above.

1. Compliance with Plans and Specifications.

The county may undertake a public work for a public building, the cost of which exceeds $100,000 only if plans and specifications have been approved by a licensed architect or engineer (licensed pursuant to IC 25-4 or IC 25-31) and such public work is performed or constructed in accordance with such plans and specifications. (IC 36-1-12-7).

Public works at any level should comply with the plans and specifications, and such plans and specifications should incorporate all provisions required by the statute. Indiana case law has looked to the plans and specifications for contractual requirements even though statutory provisions required otherwise.

2. Approval and Filing of Plans and Specifications for Public Buildings.

All plans and specifications for public buildings must be approved by the state department of health, the department of homeland security, and other agencies designated by statute. (IC 36-1-12-10).

If a public work project involves a public building and costs $100,000 or more, the board must file with the department of homeland security a complete set of final record drawings for the public work project within sixty (60) days of completion of such project. The department of homeland security must provide a depository for all final record drawings filed and retain them for inspection, use or storage. (IC 36-1-12-11).

3. Contracts for Road, Street or Bridge Work.

The county may award a public work contract for road, street, or bridge work subject to the open price provisions of IC 26-1-2-305. The contract may provide that prices for construction materials are subject to price of materials adjustments. When price adjustments are part of the contract, the method of price adjustments must be specified in the contract. However, this provision does not authorize the expenditure of money above the total amount of money appropriated by the county for such road, street or bridge contracts. (IC 36-1-12-8).

4. Payments to Contractors.

The board must comply with the following provisions when entering into a contract and when providing payments to the contractor pursuant to the contract.

a. Contract Terms.

The contract for public work must contain a provision for the payment of subcontractors, laborers, material suppliers, and those performing services. The board shall withhold money from the contract price in a sufficient amount to pay the subcontractors, laborers, material suppliers, and those furnishing services. (IC 36-1-12-13).

b. Payment Bond.

If the cost of the project is estimated to exceed $200,000, the county must require the contractor to execute and deliver a payment bond to the county, in form to be approved by and for the benefit of the county, in an amount equal to the contract price. However, if the cost of the project is estimated to be not more than $200,000, the county has the option to require the contractor to execute a payment bond to the county, approved by and for the benefit of the county, in an amount equal to the contract price. In either case, the payment bond must be binding on the contractor, subcontractor and their successors and assigns for the payment of all indebtedness to a person for labor and service performed, material furnished or services rendered. The payment bond must state that it is for the benefit of the subcontractors, laborers, material suppliers, and those performing services. (IC 36-1-12-13.1(a)).

The payment bond must be deposited with the board and must specify that neither (i) a modification, omission or addition to the terms and conditions of the public work, plans, specifications, drawings, or profile, (ii) a defect in the public work contract, nor (iii) a defect in the proceedings preliminary to the letting and awarding of the public work contract, discharges the surety. The surety of the payment bond may not be released until one (1) year after the board's final settlement with the contractor. (IC 36-1-12-13.1(b)).

A person to whom money is owed for labor performed, materials or services furnished must, not later than sixty (60) days after that person finished the labor or service or after that person furnished the last item of material, file with the board signed duplicates of the amount due and deliver a copy of the statement to the contractor. The board must forward to the surety one (1) of the signed duplicate statements. Failure of the board to forward such duplicate does not affect the

rights of a person to whom money is due nor does it operate as a defense for the surety. (IC 36-1-12-13.1(c)).

An action may not be brought against the surety before thirty (30) days after the filing of the signed duplicate statements with the board and the delivery of a copy of the statement to the contractor. If the indebtedness is not paid in full at the end of that thirty (30) day period, the person may bring action in court. The court action must be brought not later than sixty (60) days after the date of the final completion and acceptance of the public work. (IC 36-1-12-13.1(d)).

c. Performance Bond.

In general, if the cost of a public work project is estimated to exceed $200,000 and is not a project for highways, roads, streets, alleys, bridges, and appurtenant structures situated on streets, alleys, and dedicated highway rights-of-way, then the county must require a performance bond to be supplied by the contractor on projects. (IC 36-1-12-14(a)).

In such case, the performance bond must be equal to the contract price, be for the benefit of the county and specify that neither, (i) a modification, omission or addition to the terms and conditions of the public work contract, plans, specifications, drawings or profile, (ii) a defect in the public work contract, nor (iii) a defect in the proceedings preliminary to the letting and award of the public work contract, discharges the surety. (IC 36-1-12-14(e)).

The performance bond may provide for incremental bonding in the form of multiple or chronological bonds, that, when taken as a whole, equal the contract price. The surety may not be released until one (1) year after the date of the county's final settlement with the contractor. Any actions against the surety on the performance bond must be brought within one (1) year after the county's final settlement with the contractor. (IC 36-1-12-14(e)).

If a performance bond would otherwise be required, but the cost of the public work is estimated to be less than $250,000, the board may waive the performance bond requirement and accept from a contractor an irrevocable letter of credit for an equivalent amount from an Indiana financial institution approved by the department of financial institutions. However, a letter of credit submitted in place of a performance bond must satisfy the requirements of a performance bond described above. (IC 36-1-12-14(h))

d. Retainage.

In general, if the cost of a public work project is estimated to exceed $200,000 and is not a project for highways, roads, streets, alleys, bridges, and appurtenant structures situated on streets, alleys, and dedicated highway rights-of-way, then the board, in the contract documents with contractors, and contractors that subcontract parts of the contract, each must provide for retainage in their respective contracts in order to insure payment of subcontractors. Contractors shall have similar provisions in their contracts with subcontractors. (IC 36-1-12-14(b)). However, if the cost of the public work is estimated to be not more than $200,000, then the county has the option to require a contractor and subcontractor to include contract provisions for retainage as described herein. (IC 36-1-12-14(a)).

At the discretion of the contractor, the retainage shall be held by the board or shall be placed in an escrow account with a bank, savings and loan institution, or the state as escrow agent. The escrow agent shall be selected by mutual agreement between the county and contractor, and contractor and subcontractor, under a written agreement among the bank or savings and loan institution and the county and contractor or contractor and subcontractor. The board shall not be required to pay interest on the amounts of retainage that it holds under this section. (IC 36-1-12-14(b)).

In determining the amount of retainage to be withheld, the board must withhold: (i) no more than 10% nor less than 6% of the dollar value of all work satisfactorily completed until the public work 50% completed, and nothing further after that; or (ii) no more than 5% nor less than 3% of the dollar value of all work satisfactorily completed until the public work is substantially completed. If upon substantial completion of the public work minor items remain uncompleted, an amount equal to 200% of the value of each item as determined by the architect-engineer shall be withheld until those items are completed. (IC 36-1-12-14(c)).

The board or escrow agent shall pay the contractor within sixty-one (61) days after the date of substantial completion, subject to the satisfaction of the other requirements of IC 36-1-12-11 and IC 36-1-12-12. Payment by the escrow agent shall include all escrowed principal and escrowed income. If within sixty-one (61) days after the date of substantial completion there remain uncompleted minor items, an amount equal to 200% of the value of each item as determined by the architect-engineer shall be withheld until the item is completed. Required warranties begin not later than the date of substantial completion. (IC 36-1-12-14(f)).

The escrow agreement must contain the following provisions:

(i) The escrow agent shall invest all escrowed principal in obligations selected by the escrow agent;

(ii) The escrow agent shall hold the escrowed principal and income until receipt of notice from the board and the contractor, or the contractor and the subcontractor, specifying the part of the escrowed principal to be released from the escrow and the person to whom that portion is to be released. After receipt of the notice, the escrow agent shall remit the designated part of escrowed principal and the same portion of the escrowed income to the person specified in the notice; and

(iii) The escrow agent shall be compensated for the agent's services from the escrow income. The parties may agree on a reasonable fee comparable with fees being charged for the handling of escrow accounts of similar size and duration.

The escrow agreement may include other terms and conditions consistent with the above-referenced matters including provisions authorizing the escrow agent to commingle the escrowed funds with funds held in other escrow accounts and limiting the liability of the escrow agent. (IC 36-1-12-14(d)).

e. Final Payment.

Final payment to the contractor should be withheld by the board until the contractor has paid the subcontractors, material suppliers, laborers, and those furnishing services. However, if there is not a sufficient sum owed to the contractor to pay those bills, the sum owed to the contractor should be prorated in payment of the bills among the claimants entitled to payment. To receive payment from the board, a subcontractor, material supplier, laborer, or person furnishing services must file a claim with the board not later than sixty (60) days after that person performed the last labor, furnished the last material, or performed the last service. If there is no dispute among the claimants, the board must pay all claims from the money due the contractor and deduct the amount of the claims from the contract price. The board shall take a receipt for each payment made on a claim. (IC 36-1-12-12).

The procedures for payment of claims to subcontractors, laborers, material suppliers and those furnishing services, where such claims are disputed, may be found at IC 36-1-12-12(d).

f. Prompt Payment

The county shall pay interest on amounts due on public works contracts if such amounts are not paid at the time specified in the contract document or thirty-five (35) days after the receipt of a properly completed claim. Any amount required to be withheld under federal or state law is deemed to be timely paid if mailed or delivered on the date the amount is released under said law. Payment by the county shall be deemed timely if (i) there is no date specified in the contract for payment (ii) a claim for payment of services is submitted to the Board of Commissioners and is required to be approved by the Board of Commissioners and (iii) the county pays the claim within thirty-five (35) days following the first regularly scheduled meeting held at least ten (10) days after receipt of the claim. (IC 5-17-5-1).

A late payment penalty shall be payable at 1% per month on amounts due on written contracts for public works, personal services, goods and services, equipment, and travel when the board fails to make timely payment. (IC 5-17-5-1).

Various exceptions to the prompt payment provisions exist and are itemized at IC 5-17-5-2, but consist mainly of interagency or intergovernmental transactions, amounts payable to employees as reimbursement of expenses, and amounts in dispute.

Each contract between county and contractor for road or street work must contain provision that final payment will be made within one hundred twenty (120) days of final acceptance and completion of the contract, not including amounts in dispute. Payments not made within the time specified above shall be subject to interest payments, at an annual rate of twelve percent (12%). (IC 36-1-12-17).

Any contractor receiving late payment penalties from the county must make interest payments to the subcontractor at the same rate of interest. (IC 5-17-5-4).

5. Change Orders.

Change orders for addition, deletion or change of an item may be issued as an addendum to the contract when approved by the board and contractor. When a licensed architect or engineer is assigned to the project, the change order must be prepared by them. A change order may not be issued prior to commencement of the actual work, except in cases of emergency. In such event, the board must make a declaration, and the board's minutes must show the nature of the emergency.

In addition, the total of all change orders that increase the scope of the project may not exceed 20% of the amount of the original contract. However, a change order issued as a result of circumstances that could not be reasonably foreseen will not be deemed to increase the scope of the project. Change orders must be directly related to the original public work. If additional units of materials included in the original contract are needed, the cost of these units in the change order must be the same as those shown in the original contract. (IC 36-1-12-18).

6. Contractor Tier Structure.

A contract by the board for public work must conform to IC 5-16-13, which requires that contractors make contributions to training and apprenticeship programs, retain payroll and related records, and comply with certain other statutes. (IC 36-1-12-15(a)).

7. Trench Safety Systems.

The county must incorporate into contract documents the IOSHA regulations 29 C.F.R. 1926, Subpart P, for trench safety systems when the project requires creation of a trench of at least five (5) feet in depth. The contract shall specify that the cost of the trench safety systems shall be paid as (a) a separate pay item, or (b) in the pay item of the principal work with which the safety system is associated. (IC 36-1-12-20).

8. Plumbing Permits.

The person selected under a public works project to install plumbing must submit evidence that the person is a licensed plumbing contractor under IC 25-28.5-1. Failure to meet such requirements shall void the contract. (IC 36-1-12-21).

9. Wage Scale Prohibited.

Unless federal or state law provides otherwise, the county may not establish, mandate, or otherwise require a wage scale or wage schedule for a public works contract awarded by the County. (IC 36-1-12-15(a); IC 5-16-7.2-5).

10. Antidiscrimination Laws.

A contract entered into by the county must conform to the antidiscrimination provisions of IC 5-16-6. The county may consider failure to comply as a material breach of contract. (IC 36-1-12-15(b)).

11. Minority Business Certification.

Contracts entered into by the county that require a minority business certification must consider IC 5-16-6.5. Contractors are subject to various penalties for failure to comply with the provisions of the minority business certification including the suspension of payments under the contract, breach of the contract and resulting damages and suspension of bidding privileges. (IC 5-16-6.5).

12. Indiana Steel Products.

The county shall require the use of Indiana steel products unless the cost is unreasonable. Specific exclusions and penalties for noncompliance are found at IC 5-16-8.

13. Parking Facilities for Physically Handicapped Persons.

The county must make provisions in public parking facilities for handicapped parking. Specific numbers, identification and penalties for non-compliance are found at IC 5-16-9.

14. Drug Testing.

If the estimated cost of the public works contract is at least $150,000, then the contract must comply with IC 4-13-18, which requires that the contractor submit with the bid a written plan for a program to test the contractor's employees for drugs. An employee drug testing program submitted to the board must have been effective and applied at the time of the solicitation for bids. A contractor who has previously filed a copy of the contractor's employee drug testing program with the board in the current calendar year or within the past 2 calendar years satisfies the requirement for submitting an employee drug testing program, unless the program has been revised. (IC 36-1-12-24). A public works contract may not be awarded to a contractor whose bid does not include a written plan for an employee drug testing program that complies with IC 4-13-18. (IC 4-13-18-5(b)).

K. Penalties.

Various provisions within IC 36-1-12 and IC 5-16 contain separate penalties for non-compliance. Generally, two (2) penalties exist for general non-compliance with the Public Construction Law.

1. Dividing Projects into Multiple Projects to Avoid Bidding.

The project for consideration of the estimated cost is a compilation of the cost of materials, labor, equipment rental and all other expenses incidental to the performance of the project. The cost of a single project may not be divided into two (2) or more projects for the purposes of avoiding the requirements to solicit bids. A bidder or quoter who is a party to a public work contract, who knowingly violates this section, commits a Class A infraction and may be precluded from being a party to any contract under the Public Construction Law for two (2) years from the date of conviction. Any board member or officer of the county who knowingly violates this provision commits a Class A infraction. (IC 36-1-12-19).

2. Void Contract.

Any contract for public work not let in accordance with the Public Construction Law is void. (IC 36-1-12-16).

VI. PUBLIC SAFETY

A. General.

The Indiana General Assembly has granted counties certain powers with respect to public safety. A county may, among other things:

1. Establish, maintain and operate a police and law enforcement system to preserve public peace and order, and provide facilities, equipment, and supplies for that system (IC 36-8-2-2);

2. Establish, maintain and operate a firefighting and fire prevention system and provide facilities and equipment for that system (IC 36-8-2-3); and

3. Regulate conduct, or use or possession of property, that might endanger public health, safety, and welfare. (IC 36-8-2-4).

Counties have those powers with respect to public safety which are expressly granted to them by statute, together with such other powers with respect to public safety as are necessary or desirable in the conduct of their affairs. (IC 36-1-3-4(b)). While counties' powers with respect to public safety are broad, they are not unlimited.

B. County Police Protection.

A county may establish, maintain and operate a police and law enforcement system to preserve public peace and order, and provide facilities, equipment, and supplies for that system. (IC 36-8-2-2).

1. County Sheriff.

The Indiana constitution requires that there be elected, in each county by the voters thereof, at the time of holding general elections, a county sheriff, who will hold office for four years. No person is eligible to serve as county sheriff more than eight years in any twelve-year period. (IND. CONST. art. 6, §2; IC 36-2-13-2(b)). The sheriff must reside within the county. (IC 36-2-13-2(a)).

a. Salary Contract Without Tax Warrant Fees.

The county sheriff, the Board of Commissioners, and the County Council may enter into a salary contract for the county sheriff. Such a contract must contain the following provisions:

i. A fixed amount of compensation for the county sheriff in place of fee compensation.

ii. Payment of the full amount of the county sheriff's compensation from the county general fund in the manner that salaries of other county officials are paid.

iii. Deposit by the county sheriff of the county sheriff's tax warrant collection fees in the county general fund for use for any general fund purpose.

iv. A requirement that the county sheriff shall file an accounting of expenditures for feeding prisons with the county auditor on the first Monday of January and the first Monday of July each year.

v. An expiration date that is not later than the date that the term of the county sheriff expires.

vi. A procedure for financing prisoners' meals that uses either appropriations from the general fund or meal allowances, but does not allow the county sheriff or his officers, deputies or employees to profit from such funds.

vii. Other provisions concerning the county sheriff's compensation to which the county sheriff, the Board of Commissioners, and the County Council agree. (IC 36-2-13-2.5 (a) & (b)).

The county sheriff's salary contract must be approved by resolution of both the County Commissioners and the County Council, and signed by the county sheriff. (IC 36-2-13-2.5 (c)). Contracts for sheriffs elected or re-elected after November 1, 2010 are subject to salary maximums provided in IC 36-2-13-17. (IC 36-2-13-2.5(d)).

b. **Limited Salary Contract and Warrant Fees.**

In place of a salary contract for the county sheriff, a county may pay its sheriff from the county general fund in the manner other county officials are paid in the amounts described below. However, subject to salary maximums described in IC 36-2-13-17 (described below), the sheriff may retain the sheriff's tax warrant collection fees (IC 36-2-13-2.8). If a county chooses to pay its sheriff from the general fund it shall do so by making an appropriation from the general fund for feeding prisoners, however a profit may not be made from the appropriation.

A county that pays a sheriff's compensation under this section shall pay the sheriff as follows:

i. In a county having a population of not more than twenty thousand (20,000), the county must pay the sheriff an annual salary that is equal to at least fifty percent (50%) of the annual minimum salary that would be paid by the state to a full-time prosecuting attorney in the county.

ii. In a county having a population of more than twenty thousand (20,000) and not more than forty thousand

(40,000), the county must pay the sheriff an annual salary that is equal to at least sixty percent (60%) of the annual minimum salary that would be paid by the state to a full-time prosecuting attorney in the county.

iii. In a county having a population of more than forty thousand (40,000) and not more than sixty-five thousand five hundred (65,500), the county must pay the sheriff an annual salary that is equal to at least seventy percent (70%) of the annual minimum salary that would be paid by the state to a full-time prosecuting attorney in the county.

iv. In a county having a population of more than sixty-five thousand five hundred (65,500) and not more than one hundred thousand (100,000) the county must pay the sheriff an annual salary that is equal to at least eighty percent (80%) of the annual minimum salary that would be paid by the state to a full-time prosecuting attorney in the county.

v. In a county having a population of more than one hundred thousand (100,000) and not more than two hundred thousand (200,000), the county must pay the sheriff an annual salary that is equal to at least ninety percent (90%) of the annual minimum salary that would be paid by the state to a full-time prosecuting attorney in the county.

vi. In a county having a population of more than two hundred thousand (200,000), the county must pay the sheriff an annual salary that is equal to at least one hundred percent (100%) of the annual minimum salary that would be paid by the state to a full-time prosecuting attorney in the county. (IC 36-2-13-2.8).

c. **Salary Maximums**

Contracts or other forms of compensation are subject to the following salary maximum. The total amount of a sheriff's compensation from the county general fund, any tax warrant collection fees retained by the sheriff under IC 6-8.1-8-3 and any public source may not exceed the sum of:

(1) The annual minimum salary that would be paid by the state to a full-time prosecuting attorney in the county, and

(2) The amount of any additional annual salary paid by the county from county sources to a full-time prosecuting attorney in the county.

For purposes of this subsection, "any other public source" does not include retirement or disability benefits from a federal, a state, or another state's local governmental retirement or disability program, whether the retirement or disability benefit is based on prior employment by the sheriff or another individual, nor does it include worker's compensation benefits paid to the sheriff. (IC 36-2-13-17).

d. **Duties and Offices.**

The county sheriff has the following statutory duties:

(a) Arrest without process persons who commit an offense within his view, take them before a court of the county having jurisdiction and detain them in custody until the cause of the arrest has been investigated (IC 36-2-13-5(a)(1));

(b) Suppress breaches of the peace, calling the power of the county to his aid if necessary (IC 36-2-13-5(a)(2));

(c) Pursue and jail felons (IC 36-2-13-5(a)(3));

(d) Execute all process directed to him by legal authority (IC 36-2-13-5(a)(4));

(e) Serve all process directed to him from a court or the county commissioners (IC 36-2-13-5(a)(5));

(f) Attend and preserve order in all courts of the county (IC 36-2-13-5(a)(6));

(g) Take care of the county jail and the prisoners there (IC 36-2-13-5(a)(7));

(h) Take photographs, fingerprints and other identification data as he may prescribe of persons taken into custody for felonies or misdemeanors (IC 36-2-13-5(a)(8));

(i) On or before January 31 and June 30 of each year, provide to the department of correction the average daily cost of incarcerating a prisoner in the county jail as determined under the methodology developed by the department of correction under IC 11-10-13 (IC 36-2-13-5(a)(9));

(j) Register offenders as defined by IC 11-8-8, immediately update, including the posting of a photograph, the Indiana Sex and Violent Offender registry website, notify every law enforcement agency with jurisdiction in the county in which the offender resides and update the Crime Information

Center National Sex Offender Registry database via the Indiana data and communication system, of offender's registration, and if the offender moves, notify the offender's new county or municipality. (IC 11-8-8); and

(k) The sheriff may supervise and inspect, or may authorize any deputy in writing to do so, all pawnbrokers, vendors, junkshop keepers, cartmen, expressmen, dealers in secondhand merchandise, intelligence offices, and auctions (IC 36-2-13-5(c)).

A county sheriff and his deputies may enforce county ordinances, as well as state and federal laws, within the cities and towns located within the county. The sheriff is responsible to respond to calls from the public in incorporated areas, except for violations of city or town ordinances. (Op. Att'y Gen. No. 85-9 (July 12, 1985)).

The county sheriff must attend meetings of the Board of Commissioners and County Council, if requested, and must execute their orders. (IC 36-2-2-15(d), 36-2-3-6(c), 36-2-13-3, 4).

The Board of Commissioners must establish and maintain public offices for the county sheriff, which offices may be located anywhere in the county. (IC 36-2-2-24(c)).

2. Sheriff's Department.

Each county has a county police force. The members of the county police force are employees of the county, and the county sheriff assigns their duties. The expenses of the county police force are part of the sheriff s department budget. The sheriff's merit board (described below) may recommend the number and salary of the personnel, but the County Council determines the budget and salaries. (IC 36-8-10-4).

The County Council of each county must, by ordinance, establish a sheriff s merit board. The board consists of five members, three of whom are appointed by the sheriff and two of whom are elected by a majority vote of the members of the county police force. No active county police officer, relative of an active county police officer or relative of the sheriff may serve on the board. This prohibition extends to both the appointed and the elected positions. Not more than two members appointed by the sheriff nor more than one appointed by the officers may be of the same political party. All members must reside in the county. Members serve for four-year terms, but may be removed for cause duly adjudicated by the circuit court, superior court, or probate court of the county. (IC 36-8-10-3)

3. County Law Enforcement Continuing Education.

Each county has a county law enforcement continuing education program. (IC 5-2-8-1) The program is funded with funds appropriated from deferral program or pretrial diversion user fees. (IC 33-37-8-4, IC 33-37-8-6).

Funds received by county law enforcement agency from the county law enforcement continuing education fund must be used for the continuing education or training of law enforcement officers employed by the agency or for equipment and supplies for law enforcement purposes. (IC 5-2-8-6) Distribution of money from the county law enforcement continuing education fund may be made to a county law enforcement agency without the necessity of first obtaining an appropriation from the County Council. Money in excess of one hundred dollars ($100) that is unencumbered and remains in a county law enforcement continuing education fund for at least one year from the date of its deposit must, at the end of a county's fiscal year, be deposited by the county auditor in the law enforcement academy fund established under IC 5-2-1-13. (IC 5-2-8-1).

C. Corrections.

1. County Jails.

a. **General Maintenance**.

The county commissioners must establish and maintain a county jail. (IC 36-2-2-24).

The location of a county jail is within the discretion of the county commissioners. (Pritchett v. Bd. of Comm'rs. 85 N.E. 32, 34 (Ind. 1908)). The county commissioners have the sole power to determine the propriety of building a new county jail, and its determination is final in the absence of fraud. Rabling v. Bd. of Comm'rs, 40 N.E. 1079, 1081 (Ind. 1895).

b. **Construction of Jail Facilities.**

The plans and specifications for the construction of a county jail must be approved by the Indiana Department of Correction, the Indiana Department of Health, the Department of Homeland Security and other state agencies designated by statute. (IC 36-1-12-10, 11-12-4-5).

A county may not begin the construction or reconstruction of a county jail or submit final plans and specifications for the construction or reconstruction of a county jail to the department of correction, unless the board of commissioners first prepares or causes to be prepared a feasibility study of possible alternatives to the construction or reconstruction of the county jail, and holds a public hearing and allows public comment on the feasibility study. The feasibility study must include the following information: (1) the feasibility of housing inmates in the county jail of another county or in a multicounty jail established by two (2) or more counties; (2) a projection of the county's future jail needs and an estimate of the number and characteristics of future inmates, and (3) an estimate of the costs, tax rates, and debt service amounts that would result from each of the alternatives addressed by the feasibility study. (IC 36-1-8-19).

Conditions such as overcrowding or gross deficiencies in medical facilities or "deliberate indifference to serious medical needs" in a county jail may constitute violations of a prisoner's constitutionally protected right to be free from cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution. Estelle v. Gamble, 429 U.S. 97, 104 (1976); Murphy v. Lane, 833 F.2d 106, 107 (7th Cir. 1987)).

The county sheriff has a duty to take care of the prisoners in the county jail. (IC 36-2-13-5(a)(7)) The sheriff must take reasonable precautions under the circumstances to preserve the life, health and safety of prisoners. St. Mary's Med. Ctr. of Evansville, Inc. v. Warrick County, 671 N.E.2d 929, 931 (Ind. Ct. App. 1996); Johnson v. Bender, 369 N.E.2d 936, 939 (Ind. Ct. App. 1977). The sheriff has a duty to take care of prisoners, to summon aid, to make arrangements for a designated hospital emergency room, and to send a prisoner he and the jail physician believe needs out-of-jail treatment to the hospital. Health and Hosp. Corp. of Marion County v. Marion County., 470 N.E.2d 1348, 1359 (Ind. Ct. App. 1984), rehearing denied, 476 N.E.2d 887 (Ind. Ct. App. 1985). This includes the duty to pay for medical treatment. Id. Deliberate indifference to the serious medical needs of a prisoner, rather than mere inadvertent failure to provide medical care, may give rise to a cause of action against the responsible officers or employees under Section 1983 of the federal Civil Rights Act. Daniels v. Gilbreath, 668 F.2d 477, 480 (10th Cir. 1982); see also Estelle v. Gamble, 429 U.S. 97, 104 (1976).

The county sheriff must file with the Board of Commissioners an annual report of the condition of the county jail and any recommended improvements in its maintenance and operations. The report shall be filed with the county auditor and maintained as public record. (IC 36-2-13-12(b)).

The Indiana Department of Correction has adopted minimum standards for county jails governing (a) general physical and environmental conditions, (b) services and programs to be provided to confined persons, (c) procedures for the care and control of confined persons that are necessary to insure the health and safety of confined persons, the security of the jail and public safety, and (d) the restraint of pregnant inmates (consistent with IC 11-10-3.5). (IC 11-12-4-1). The Department of Correction will inspect each county jail at least annually to determine whether it is complying with these standards. If the Department of Correction determines that a jail is not complying with these standards, it will give written notice to the county sheriff, the county commissioners, the prosecuting attorney, the circuit court, superior court, or probate court, and all courts having criminal or juvenile jurisdiction in the county. If after six months the Department of Correction determines that the county is not making a good faith effort toward compliance with the standards specified in the notice, the Department may petition the circuit court, superior court, or probate court for an injunction prohibiting the confinement of persons in all or any part of the jail or otherwise restricting the use of the jail or may recommend, in writing, to the prosecuting attorney and each court with criminal or juvenile jurisdiction that a grand jury be convened to tour and examine the jail under IC 35-34-2-11. In addition, the county sheriff may, upon his receipt of the notice, bring an action in the circuit court, superior court, or probate court against the Board of Commissioners and County Council for appropriate mandatory or injunctive relief. (IC 11-12-4-2).

c. **Reimbursement of Medical Expenses**.

A county inmate can be, with some exceptions, required to make a copayment of up to $15 for each provision of medical, dental, eye care or other health care related services. Money collected must be deposited into the county medical care for inmates fund. The Board of Commissioners must approve any rules for the implementation of such a requirement. (IC 11-12-5-5).

A county sheriff is not obligated to pay for health care services rendered to an individual while in the lawful detention of the sheriff to the extent that payment for the services is available under: (i) an accident and sickness insurance policy under which the individual is insured, or (ii) a health maintenance organization under which the individual is an enrollee.

If an individual to whom health care services are rendered while subject to a lawful detention by a county sheriff fails or refuses to file a claim for payment of expenses resulting from the health care services, a claim for payment of the expenses may be filed by:

(1) The sheriff; or
(2) The health care provider that rendered the services;

on behalf of the individual with the accident and sickness insurance policy under which the individual is insured or the health maintenance organization under which the individual is an enrollee. (IC 36-2-13-14).

d. **Reimbursement of Housing Expenses.**

If the Board of Commissioners elects by ordinance to implement a county prisoner reimbursement program, then prisoners may be required to reimburse the county for the sum of the following amounts:

(1) the lesser of (A) the per diem amount set by the County Council; or
(B) thirty dollars ($30), multiplied by each day or part of a day that the person is lawfully detained in a county jail or lawfully detained under IC 35-33-11-3 for more than six (6) hours;
(2) the direct cost of investigating whether the person is indigent; and
(3) the cost of collecting the amount for which the person is liable under the reimbursement program.

Only the following may be required to pay such reimbursement:

(1) individuals sentenced for a felony or a misdemeanor;
(2) individuals subject to lawful detention in a county jail for a period of more than seventy-two (72) hours;
(3) individuals not a member of a family that makes less than 150% of the federal income poverty level; and
(4) individuals not detained as a child subject to the jurisdiction of a juvenile court.

The County Council must fix the per diem in an amount that is reasonably related to the average daily cost of housing a person in the county jail. If the county transfers the person to another county or the department of correction under IC 35-33-11-3, the per diem is equal to the per diem charged to the county under IC 35-33-11-5.

The county sheriff shall collect the amounts due in conformity with the procedures specified in an ordinance adopted by the Board of Commissioners. If the county sheriff does not

collect the amount due to the county, the county attorney may collect the amount due. (IC 36-2-13-15).

All amounts collected under this program must be deposited in the county prisoner reimbursement fund by the county only for the operation, construction, repair, remodeling, enlarging, and equipment of:

(1) a county jail; or
(2) a juvenile detention center to be operated under IC 31-31-8 or IC 31-31-9.

For a county that has a balance in the fund in excess of the amount needed for the above purposes, the county may use the fund for the costs of care, maintenance, and housing of prisoners, including the cost of housing prisoners in the facilities of another county. (IC 36-2-13-16).

On this topic, it is noteworthy that one court has held that before a trial court can make the payment of such reimbursement a condition of a prisoner's probation, it must inquire into the prisoner's ability to pay. Miller v. State, 884 N.E.2d 922, 929 (Ind. Ct. App. 2008).

2. Juvenile Detention Facilities.

Counties (other than Marion County) are not authorized to lease, construct or operate juvenile detention facilities, except as an agent for a juvenile court. (Att'y Gen. Op. No. 89-15 (June 30, 1989)). Rather, juvenile courts are authorized to establish juvenile detention facilities for children. (IC 31-31-8-3) All expenses, including expenses for the construction of juvenile detention facilities, must be paid by the county. (IC 31-31-8-3, Att'y Gen. Op. No. 89-15 (June 30, 1989)).

A juvenile court may, however, contract with other agencies to provide juvenile detention facilities. (IC 31-31-8-3). Thus, a juvenile court may contract with a county, through its board of commissioners, to provide such facilities. (Att'y Gen. Op. No. 89-15 (June 30, 1989)). A county which so contracts with a juvenile court may provide the juvenile detention facilities either itself or through a building corporation. (See "Financing Public Safety--Lease Financing.").

The County Council and Board of Commissioners may adopt by ordinance a multiple county juvenile facility authority. The agreement between the counties must include (a) a formula to determine the amount of money to be contributed to the authority by each county; and (b) the provisions concerning the construction of a facility or the operation and maintenance of a facility. (IC 36-7-24-4).

The multiple county juvenile facility authority (a) has the power of eminent domain with the approval of the Board of Commissioners of the county affected; (b) may adopt, amend and repeal by-laws for the conduct of the authority; (c) accept gifts and grants; (d) enter into contracts; (e) sue and be sued; (f) acquire, own, sell, convey, lease or transfer property; (g) cooperate with public and private organizations to carry out the purpose of the authority; and (h) contract, purchase, lease, or pay operating and maintenance costs of a facility. (IC 36-7-24-8 through 10).

3. Community Corrections Programs.

A county, by itself or in combination with another county, city, town or private organization, may establish and operate "community corrections programs" for:

a. The prevention of crime or delinquency;

b. Persons ordered to participate in community programs as a condition of probation

c. Persons sentenced to imprisonment in a county or local penal facility, other than a state owned or operated facility; or

d. Committed offenders. (IC 11-12-1-2).

A "community corrections program" means a community-based program that provides preventive services, services to offenders, services to persons charged with a crime or act of delinquency, services to persons diverted from the criminal or delinquency process, services to persons sentenced to imprisonment, or services to victims of crime or delinquency, and is operated under a community corrections plan of a county and funded at least in part by a state subsidy. (IC 11-12-1-1). Community corrections programs shall use evidence based services, programs, and practices that reduce the risk for recidivism among persons who participate in the community corrections program. The community corrections board may also provide employment, educational, mental health, drug or alcohol abuse counseling, and housing programs, and may include housing or supervision as a part of any of these programs. Any drug or alcohol abuse counselling programs may include addiction counseling, inpatient detoxification, and medication assisted treatment. (IC 11-12-1-2.5).

To provide necessary funding for the establishment and operation of community corrections programs, a county may use unexpended funds, appropriate tax funds, accept gifts, grants and subsidies from any lawful source, and apply for and accept federal funds. (IC 11-12-1-3(b)).

D. Fire Protection.

1. Firefighting.

Counties have authority to establish, maintain and operate a firefighting and fire prevention system and provide facilities and equipment for that system. (IC 36-8-2-3).

2. Fire Protection Districts.

The Board of Commissioners may establish fire protection districts for the following purposes:

a. Fire protection, including the capability for extinguishing all fires that might be reasonably expected because of the types of

improvements, personal property and real property within the boundaries of the district;

b. Fire prevention, including identification and elimination of all potential and actual sources of fire hazard; or

c. Other purposes or functions related to fire protection and fire prevention. (IC 36-8-11-4).

Any area may be established as a fire protection district, but one part of a district may not be completely separate from another part. A municipality may not be included in a district, unless it consents by ordinance or a majority of the freeholders of the municipality have petitioned to be included in the district. The territory of a district may consist of one or more townships and parts of one or more townships in the same county, or all of the townships in the same county. The boundaries of a district need not coincide with those of other political subdivisions. The territory may consist of a municipality that is located in more than one county. (IC 36-8-11-4).

Freeholders who desire the establishment of a fire protection district may initiate proceedings by filing a petition in the office of the county auditor. The petition may also be filed by a municipality, under an ordinance adopted by its Board of Commissioners. The petition must be signed by the lesser of (a) at least 20%, with a minimum of 500, of the freeholders owning land within the proposed district, or (b) a majority of those freeholders owning land within the proposed district. (IC 36-8-11-5).

E. Other Protection.

1. Emergency Management and Disasters.

Each county must maintain a county emergency management advisory council and a county emergency management organization, or participate in an interjurisdictional disaster agency. (IC 10-14-3-17(b)).

As used herein, "emergency management" means the preparation for and the coordination of all emergency functions, other than functions for which military forces or other federal agencies are primarily responsible, to prevent, minimize and repair injury and damage resulting from disasters. These functions include firefighting services, police services, medical and health services, rescue, engineering and warning services, communications, radiological, chemical and other special weapons defense, evacuation of persons from stricken areas, emergency welfare services, emergency transportation, plant protection, temporary restoration of public utility services, and other functions related to civilian protection, together with all other activities necessary or incidental to the preparation for and coordination of the foregoing functions. (IC 10-14-3-2).

As used herein, "disaster" means occurrence or imminent threat of widespread or severe damage, injury or loss of life or property resulting from any natural or manmade cause, including but not limited to fire, flood, earthquake, wind, storm, wave action, oil spill, other water contamination requiring emergency action to avert danger or damage, air contamination, drought,

explosion, riot, hostile military or paramilitary action, an act of terrorism, or any other public calamity requiring emergency action. (IC 10-14-3-1).

The county emergency management advisory council must consist of the following individuals or their designees:

a. The president of the Board of Commissioners.

b. The president of the County Council.

c. The mayor of each city located in the county.

d. An individual representing the legislative bodies of all towns located within the county.

e. Representatives of such private and public agencies or organizations which can be of assistance to emergency management as an organizing group considers appropriate, or as may be added later by the county emergency management advisory council.

f. One commander of a local civil air patrol unit in the county or the commander's designee. (IC 10-14-3-17(c)).

If the governor finds that two or more adjoining counties would be better served by an interjurisdictional arrangement than by maintaining separate disaster agencies and services, he may with the concurrence of the affected counties delineate by executive order or regulation an interjurisdictional area adequate to plan for, prevent or respond to disaster in that area and direct steps to be taken as necessary, including the creation of an interjurisdictional relationship, a joint emergency operations plan, mutual aid or an area organization for emergency management planning and services. (IC 10-14-3-16(c)).

The governor may require a county or other political subdivision to establish and maintain a disaster agency jointly with one or more contiguous political subdivisions with the concurrence of the affected political divisions, if he finds that the establishment and maintenance of an agency or participation in one is made necessary by circumstances or conditions that make it unusually difficult to provide disaster prevention, preparedness, response or recovery services. (IC 10-14-3-17(e)).

The county emergency management and disaster director and other personnel of the State Emergency Management Agency may be provided with appropriate office space, furniture, vehicles, communications, equipment, supplies, stationery and printing in the same manner as provided for personnel of other county agencies. (IC 10-14-3-17(g)).

The county emergency management organization or interjurisdictional disaster agency must prepare and keep current a disaster emergency plan for its area. It must prepare and distribute to all appropriate officials in written form a clear and complete statement of the emergency responsibilities of all local agencies and officials and of the disaster chain of command. (IC 10-14-3-17 (h), (i)).

Each county may:

a. Appropriate and expend funds, make contracts, and obtain and distribute equipment, materials and supplies for emergency management and disaster purposes; provide for the health and safety of persons and property, including emergency assistance to the victims of any disaster resulting from enemy attack; provide for a comprehensive insurance program for its emergency management volunteers; and direct and coordinate the development of an emergency management program and emergency operations plan in accordance with the policies and plans set by the federal and state civil defense agencies and the department of homeland security;

b. Appoint, employ, remove or provide, with or without compensation, rescue teams, auxiliary fire and police personnel, and other emergency management and disaster workers;

c. Establish a primary and one or more secondary control centers to serve as command posts during an emergency;

d. Subject to the order of the governor, or the chief executive of the county, assign and make available for duty the employees, property or equipment of the county relating to firefighting, engineering, rescue, health, medical and related services, police, transportation, construction, and similar items or services for emergency management and disaster purposes, within or outside of the physical limits of the county; and

e. In the event of a national security emergency or disaster emergency, waive procedures and formalities otherwise required by law pertaining to the performance of public work, the entering into of contracts, the incurring of obligations, the employment of permanent and temporary workers, the utilization of volunteer workers, the rental of equipment, the purchase and distribution of supplies, materials and facilities, and the appropriation and expenditure of public funds. (IC 10-14-3-17(j)).

The president of the County Council and the president of the Board of Commissioners of each county may, in accordance with the emergency management program and emergency operations plan of the county:

(a) Enter into a contract or lease with the state, or accept any loan, or employ personnel, and a county may equip, maintain, utilize and operate, any property and employ necessary personnel in accordance with the purposes for which the contract is executed; and

(b) Do all things and perform acts which the governor considers necessary to effectuate, the purpose of the contract. (IC 10-14-3-21(b)).

The political subdivisions and agencies designated or appointed by the governor may make, amend, and rescind orders, rules, and regulations as necessary for emergency management purposes that are not inconsistent with orders, rules, or regulations adopted by the governor or by a state agency exercising a power delegated to it by the governor; and the: emergency management program and emergency operations plan of the county in which the political subdivision is located. (IC 10-14-3-22(a)).

Whenever any person, firm or corporation offers to a county services, equipment, supplies, materials or funds by way of gift, grant or loan, for purposes of emergency management, the county, acting through its Board of Commissioners, may accept such offer. Upon such acceptance, the Board of Commissioners may authorize any officer of the county to receive such services, equipment, supplies, materials or funds on behalf of the county and subject to the terms of the offer. (IC 10-14-3-25).

The governor may declare a disaster emergency anywhere within the state. (IC 10-14-3-12).

A local disaster emergency may be declared only by the principal executive officer of a county or other political subdivision. It may not be continued or renewed for a period in excess of seven days except by or with the consent of the governing board of the political subdivision. Any order or proclamation declaring, continuing or terminating a local disaster emergency must be given prompt and general publicity and must be filed promptly in the office of the county clerk. The effect of a declaration of a local disaster emergency is to activate the response and recovery aspects of any and all applicable local or interjurisdictional disaster emergency plans and to authorize the furnishing of aid and assistance under them. If a local disaster is declared under this section, the political subdivision may not prohibit individuals engaged in employment necessary to provide or maintain emergency public service, emergency first response broadcasters, or first response communications service providers from traveling on the highways during the disaster emergency. (IC 10-14-3-29).

Whenever there is a declared disaster emergency, whether declared by the governor or by the principal executive officer of a county or other political subdivision, the state and/or the political subdivision may not impose restrictions on the operation of a religious organization or religious services that are more restrictive than the restrictions imposed on other businesses and organizations that provide essential services to the public. Generally applicable health, safety, or occupancy requirements that are neutral towards religious organizations and equally applicable to any organization or business that provides essential services can be applied to religious organizations as a result of a disaster emergency. However, the state and/or a political subdivision may not enforce any health, safety, or occupancy requirements that impose a substantial burden on a religious service unless the state or political subdivision demonstrates that applying the burden to the religious service in the particular instance is essential to further a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. (IC 10-14-3-12.5). Neither the state nor a political subdivision may restrict the right to religious worship, including the right to worship in person during a disaster emergency. (IC 10-14-3-12.7).

Whenever the employees of a county or other political subdivision are rendering aid in another political subdivision, such employees have the same powers, duties, rights, privileges and immunities as if they were performing their duties in the political subdivisions in which they are normally employed. (IC 10-14-3-18).

Neither any county or other political subdivision nor any agencies of the county or other political subdivision, nor, except in cases of willful misconduct, gross negligence or bad faith, any emergency management worker, will be liable for the death of or injury to persons, or for damage to property, as a result of any emergency management activities. Any requirement for a license to practice any professional, mechanical or other skill will not apply to any authorized emergency management worker who, in the course of performing his duties as such, practices such professional, mechanical or other skill during a disaster emergency. (IC 10-14-3-15).

2. Emergency Telephone System.

The State collects 911 fees from telephone users, and deposits them in the statewide 911 fund. The statewide 911 board distributes these funds to the counties, who in turn distribute the funds to the Public Safety Answering Points (PSAPs). (IC 36-8-16.7-37). The PSAPs are restricted in what they may use the funds for. (IC 36-8-16.7-38). The county treasurer must establish a separate county 911 fund in which the statewide 911 fund dollars are deposited. (IC 36-8-16.7-38) Counties may be restricted from having more than two PSAPs. (IC 36-8-16.7-47).

The county may also establish an emergency notification system under IC 36-8-16.7-40.

3. Indiana Criminal Justice Institute.

A county may apply for and receive from the Indiana Criminal Justice Institute federal and state funds available to counties and other local governmental units for the following purposes, among others:

a. Evaluation of county programs associated with the prevention, detection and solution of criminal offenses, law enforcement and the administration of criminal and juvenile justice;

b. Participate in statewide collaborative efforts to improve all aspects of law enforcement, juvenile justice, and criminal justice in this state;

c. Stimulation of criminal and juvenile justice research;

d. Development of new methods for the prevention and reduction of crime;

e. Preparation of applications for funds under the federal Omnibus Crime Control and Safe Streets Act of 1968 and the federal Juvenile Justice and Delinquency Prevention Act of 1974;

f. Administration of victim and witness assistance funds;

g. Administer the traffic safety functions assigned to the institute under IC 9-27-2.

h. Compile and analyze information and disseminate the information to persons who make criminal justice decisions in this state.

i. Serve as the criminal justice statistical analysis center for this state.

j. Identify grants and other funds that can be used by the department of correction to carry out its responsibilities concerning sex or violent offender registration under IC 11-8-8.

k. Administer the application and approval process for designating an area of a consolidated or second class city as a public safety improvement area under IC 36-8-19.5.

l. Administer funds for the support of any sexual offense services, domestic violence programs, assistance to victims of human sexual trafficking offenses as provided in IC 35-42-3.5-4

m. Administer the domestic violence prevention and treatment fund under IC 5-2-6.7.

n. Administer the family violence and victim assistance fund under IC 5-2-6.8.

o. Monitor and evaluate criminal code reform under IC 5-2-6-24.

p. Administer the enhanced enforcement drug mitigation area fund and pilot program established under IC 5-2-11.5.

q. Administer the ignition interlock inspection account established under IC 9-30-8-7.

r. Identify any federal, state, or local grants that can be used to assist in the funding and operation of regional holding facilities under IC 11-12-6.5.

s. Coordinate with state and local criminal justice agencies for the collection and transfer of data from sheriffs concerning jail: populations and statistics for the purpose of providing jail data to the management performance hub established by IC 4-3-26-8.

To be eligible for such funds, a county must make proper application for the funds, agree to provide the required matching funds, and be in compliance with the following provision in this chapter. (IC 5-2-6-10).

If a county accepts funds under the former provision that the institute has designated as public funds and fails to comply with any requirement of the grant or funding, the institute shall deobligate funds to the entitlement jurisdiction, eligible entity, or local government entity. (IC 5-2-6-10.5).

Any (2) two or more local governmental units or counties may enter into agreements with one another for joint or cooperative action for the purposes of applying for, receiving, disbursing, allocating and accounting for grants of funds made available under the federal Justice System Improvement Act of 1979 (Section 402(a)(5)), and for any state funds made available for that purpose. Such agreements must include the proportion of the amount of required local funds that will be supplied by each such local governmental unit and must include provisions for the appointment of an officer or employee of (1) one of the units of jurisdiction to serve as the collection/disbursement officer for all the units. (IC 5-2-6-11).

A county may apply for and receive money from the Indiana Criminal Justice Institute's victim and witness assistance fund. Such money, whether received under a grant from or contract with the Indiana Criminal Justice Institute, must be used for the support of a program in the office of a prosecuting attorney or in a local law enforcement agency designed to:

a. Help evaluate the physical, emotional and personal needs of a victim resulting from a crime, and counsel or refer the victim to those agencies or persons in the community that can provide the services needed;

b. Provide transportation for victims and witnesses of crime to attend proceedings in the case when necessary; or

c. Provide other services to victims or witnesses of crime when necessary to enable them to participate in criminal proceedings without undue hardship or trauma. (IC 5-2-6-14).

4. Domestic Violence Prevention and Treatment.

A county may, by application, receive grants from or enter into a contract with the Indiana Domestic Violence Prevention and Treatment Council. (IC 5-2-6.7-10).

Moneys received through a grant from or contract with the Indiana Domestic Violence Prevention and Treatment Council must be used for the support of a program designed to:

a. Establish or maintain a domestic violence prevention and treatment center offering the services described in the following paragraph;

b. Develop and establish a training program for professional, paraprofessional and volunteer personnel who are engaged in areas related to the problems of domestic violence;

c. Conduct research necessary to develop and implement programs for the prevention and treatment of domestic violence; or

d. Develop and implement other means for the prevention and treatment of domestic violence. (IC 5-2-6.7-11).

A county may not receive funds for the purposes of establishing and maintaining a domestic violence prevention and treatment center, unless the center furnishes or agrees to furnish or arranges with a third party to furnish all of the following services:

a. Emergency shelter, provided either at the center or by arrangement at temporary residential facilities available in the community, which is available to a person who fears domestic or family violence;

b. A 24-hour telephone system to provide crisis assistance to a person threatened by domestic or family violence;

c. Emergency transportation services, if necessary to aid spouses or former spouses who are victims of domestic or family violence; and

d. Information, referral and victim advocacy services in the areas of health care assistance, social and mental health services, family counseling, job training and employment opportunities, legal assistance and counseling for dependent children. (IC 5-2-6.7-12).

5. Planning and Zoning.

A county desiring to exercise planning and zoning powers must do so in accordance with Indiana's local planning and zoning statute, IC 36-7-4. That statute is designed to encourage counties to, among other things, improve the health, safety, convenience and welfare of their citizens and to plan for future development of their communities to the end:

a. That highway systems be carefully planned;

b. That new communities grow only with adequate public way, utility, health, education and recreational facilities;

c. That the needs of agriculture, industry and business be recognized in future growth;

d. That residential areas provide healthful surroundings for family life; and

e. That the growth of the community is commensurate with and promotive of the efficient and economical use of public funds. (IC 36-7-4-201).

6. Interlocal Agreements.

A county may exercise its powers with respect to public safety through one or more other governmental entities acting on behalf of the county or jointly with other governmental entities. To do so, the county must, by ordinance or resolution, enter into a written interlocal agreement with such other governmental entity. (IC 36-1-7-2(a)). If the county was only to buy, sell or exchange services, supplies or equipment among itself and other governmental entities may enter contracts to do this without an ordinance or resolution and no notice by publication or posting when the seller has complied with applicable statutes governing public bids and state purchasing law by the original purchasing unit. (IC 36-1-7-12).

If such an interlocal agreement concerns the provision of law enforcement or firefighting services, visiting law enforcement officers or firefighters have the same powers and duties as corresponding personnel of the entities they visit, but only for the period they are engaged in activities authorized by the entity they are visiting, and are subject to all provisions of law as if they were providing services in their own jurisdiction. However, a law enforcement officer that visits one state after receiving a request from that state does not have the power to arrest unless specifically authorized by the state requesting assistance. Also, an entity providing visiting personnel remains responsible for the conduct of its personnel, for their medical expenses, for worker's compensation, and if the entity is a volunteer fire company, for all benefits provided by IC 36-8-12. (IC 36-1-7-7(a), (c)).

A law enforcement or fire service agency of a governmental unit, including a county, or of the state may request the assistance of another such agency, even if no interlocal agreement for such assistance is in effect. In such a case, the provisions described in the preceding paragraph apply, the agency requesting assistance must pay all travel expenses, and all visiting personnel must be supervised by the agency requesting assistance. (IC 36-1-7-7(b)).

F. Financing Public Safety

1. General Obligation Bonds.

The County Council may, by ordinance, borrow money and issue bonds or other obligations of the county for the purpose of procuring money to be used in the exercise of county powers, including its powers relating to public safety and the construction of jail, community corrections or public safety facilities. (IC 36-2-6-18).

2. Lease Financing.

To finance public safety facilities, the county commissioners may, after receipt of a taxpayer petition and public notice and hearing lease a building used in connection with the operation of the county from any not-for-profit or for-profit corporation, partnership, association, firm, limited liability company or individual who has financed the acquisition or construction of such building. (IC 36-1-10). Such leases could be payable from property taxes, income taxes or other revenues.

The county commissioners may, after public notice and hearing, execute a lease for all or part of any structure used for governmental and public activities or detention of prisoners from a county building authority which has financed the acquisition or construction of such structure. Notice of the approval of the lease shall be published and taxpayers are given the opportunity for objecting to such lease. (IC 36-9-13).

3. Correctional Facilities Income Tax.

The County Council may adopt an ordinance to impose a tax rate for correctional facilities and rehabilitation facilities in the county. The tax rate must be in increments of either (1) one-hundredth of one percent (0.01%) and may not exceed three-tenths of one percent (0.3%) in a county with bonds or lease agreements outstanding on July 1, 2023 for which the tax rate for correctional facilities and rehabilitation facilities is pledged or (2) one-hundredth of one percent (0.01%) and may not exceed two-tenths of one percent (0.2%) in a county with no bonds or lease agreements outstanding on July 1, 2023 for which the tax rate for correctional facilities and rehabilitation facilities is pledged. The tax rate may not be in effect for more than twenty-two (22) years, if it was adopted before January 1, 2019. If the tax rate was adopted after January 1, 2019, then it may not be in effect for more than twenty-five (25) years. If an ordinance is adopted to impose a tax rate under this section, not more than two-tenths of one percent (0.2%) of the tax rate under this section may be used for operating expenses for correctional facilities and rehabilitation facilities in the county. (IC 6-3.6-6-2.7).

The revenue generated by a tax rate imposed under this section must be distributed directly to the county before the remainder of the expenditure rate revenue of the local income tax is distributed. The revenue shall be maintained in a separate dedicated county fund and used by the county only for paying for correctional facilities and rehabilitation facilities in the county. (IC 6-3.6-6-2.7).

4. Other Local Income Taxes.

Local income taxes levied and collected under IC 6-3.6-6 may be allocated for public safety purposes, which include:

(1) A police and law enforcement system to preserve public peace and order.
(2) A firefighting and fire prevention system.
(3) Emergency ambulance services (as defined in IC 16-18-2-107).
(4) Emergency medical services (as defined in IC 16-18-2-110).
(5) Emergency action (as defined in IC 13-11-2-65).
(6) A probation department of a court.
(7) Confinement, supervision, services under a community corrections program (as defined in IC 35-38-2.6-2), or other correctional services for a person who has been: (A) diverted before a final hearing or trial under an agreement that is between the county prosecuting attorney and the person or the person's custodian, guardian, or parent and that provides for confinement, supervision, community corrections services, or other correctional services instead of a final action described in clause (B) or (C); (B) convicted of a crime; or (C) adjudicated as a delinquent child or a child in need of services.
(8) A juvenile detention facility under IC 31-31-8.

(9) A juvenile detention center under IC 31-31-9.
(10) A county jail.
(11) A communications system (as defined in IC 36-8-15-3), an enhanced emergency telephone system (as defined in IC 36-8-16-2, before its repeal on July 1, 2012), or the statewide 911 system (as defined in IC 36-8-16.7-22).
(12) Medical and health expenses for jailed inmates and other confined persons.
(13) Pension payments for any of the following: (A) a member of a fire department (as defined in IC 36-8-1-8) or any other employee of the fire department; (B) a member of a police department (as defined in IC 36-8-1-9), a police chief hired under a waiver under IC 36-8-4-6.5, or any other employee hired by the police department; (C) a county sheriff or any other member of the office of the county sheriff; and (D) other personnel employed to provide a service described in this section.
(14) Law enforcement training.

5. Cumulative Capital Development Fund.

Pursuant to IC 6-1.1-41, the county commissioners may, after public notice and hearing and with the approval of the department of local government finance, establish a cumulative capital development fund to provide money for certain purposes for which property taxes may be imposed within the county, including the following public safety purposes:

a. To construct, repair, remodel, enlarge and equip a county jail;

b. To purchase, construct, equip and maintain buildings for public purposes;

c. To acquire the land, and any improvements on it, that are necessary for the construction of public buildings;

d. To demolish any improvements on land so acquired, and to level, grade and prepare the land for the construction of a public building;

e. To acquire land or rights-of-way to be used as a public way or other means of ingress or egress to land acquired for the construction of a public building;

f. To improve or construct any public way or other means of ingress or egress to land acquired for the construction of a public building;

g. To purchase, lease or pay all or part of the purchase price of motor vehicles for the use of the police or fire department, or both, including ambulances and firefighting vehicles with the necessary equipment, ladders and hoses. (IC 6-1.1-41-1).

Expenditures from the cumulative capital development fund may be made only after an appropriation thereof has been made in the manner provided by law for making other appropriations. (IC 6-1.1-41-14)

6. Cumulative Building or Sinking Fund or Cumulative Capital Improvement Fund.

The county commissioners may, after public notice and hearing and with the approval of the department of local government finance, establish a cumulative building or sinking fund or cumulative capital improvement fund to provide money for any of the following purposes:

a. To purchase, construct, equip and maintain buildings for public purposes;

b. To acquire the land, and any improvements on it, that are necessary for the construction of public buildings;

c. To demolish any improvements on land so acquired, and to level, grade and prepare the land for the construction of a public building;

d. To acquire land or rights-of-way to be used as a public way or other means of ingress or egress to land acquired for the construction of a public building; or

e. To improve or construct any public way or other means of ingress or egress to land acquired for the construction of a public building. (IC 36-9-16-2).

In addition, a cumulative capital improvement fund may be used to purchase body armor for active members of a police department. (IC 36-9-16-2).

In addition to a variety of other purposes, the county commissioners may, after public notice and hearing and with the approval of the department of local government finance, establish a cumulative capital improvement fund to provide money to purchase, lease or pay all or part of the purchase price of motor vehicles for the use of the police or fire department, or both, including ambulances and fire fighting vehicles with the necessary equipment, ladders and hoses. (IC 36-9-16-3).

The County Council may levy a tax, at a rate approved by the Department of Local Government Finance, not to exceed $0.33 on each $100 of taxable property within the taxing district to provide for a cumulative building fund or cumulative capital improvement fund. The tax may be levied annually for any period not to exceed ten years and may be increased or decreased from year to year, except that the tax may not be increased above the levy approved by the department of local government finance. Expenditures from the cumulative building fund or cumulative capital improvement fund may be made only after an appropriation thereof has been made in accordance with applicable law. (IC 36-9-16-5, 6).

7. Cumulative Building Fund, Sinking Fund and Debt Service Fund for County Jail.

The County Council may, after public notice and hearing and with the approval of the Department of Local Government Finance, establish cumulative building or sinking funds under IC 6-1.1-41 for the construction, repair, remodeling, enlarging and equipment of a county jail or juvenile detention center. The County Council may, each year for the number of years fixed in the proposal, levy taxes on all taxable property within the county to provide money for the funds. (IC 36-9-15-2).

The County Council may establish a debt service fund for the payment of a debt or other obligation arising out of money borrowed or advanced for a jail that it purchases from the proceeds of a bond issue for capital construction or a lease with a building corporation to provide capital construction. The County Council must levy a tax each year in an amount sufficient to pay all debt service obligations for jails for that year. (IC 36-9-15-10).

8. Fire Protection Districts.

Fire protection districts may issue bonds to pay for the construction, operation and maintenance of district programs and facilities. The bonds are payable from a property tax levied within the district. (See "Fire Protection--Fire Protection Districts" in this chapter.)

9. Prisoner Reimbursement.

All amounts collected under county prisoner reimbursement program described above must be deposited in the county prisoner reimbursement fund by the county only for the operation, construction, repair, remodeling, enlarging, and equipment of:

(1) a county jail; or

(2) a juvenile detention center to be operated under IC 31-31-8 or IC 31-31-9. (IC 36-2-13-15).

VII. PUBLIC HEALTH

A. General.

The Indiana General Assembly has expressly granted counties certain powers with respect to public health. A county may, among other things:

(1) Regulate conduct, or use or possession of property, that might endanger public health, safety, or welfare (IC 36-8-2-4);

(2) Provide medical care or other health or community services to persons (IC 36-8-2-5);

(3) Impose restrictions upon persons or animals that might cause other persons or animals to be injured or contract diseases (IC 36-8-2-5);

(4) Establish, aid, maintain and operate hospitals (IC 36-8-2-5);

(5) Capture and destroy animals if necessary and establish, maintain and operate animal shelters (IC 36-8-2-6);

(6) Regulate any business use of a watercourse (IC 36-8-2-7);

(7) Regulate the introduction of any substance or odor into the air, or any generation of sound (IC 36-8-2-8);

(8) Regulate public gatherings, such as shows, demonstrations, fairs, conventions, sporting events and exhibitions (IC 36-8-2-9);

(9) Regulate the operation of businesses, crafts, professions and occupations (IC 36-8-2-10);

(10) Regulate solicitation by person offering goods or services to the public or solicitation for charitable causes (IC 36-8-2-11); and

(11) Establish, maintain and operate a weights and measures standards control system (but a county may not establish fees for inspections or tests relating to weights and measures). (IC 36-8-2-12).

Counties have those powers with respect to public health which are expressly granted to them by statute, together with such other powers with respect to public health as are necessary or desirable in the conduct of their affairs. (IC 36-1-3-4(b)). While counties' powers with respect to public health are broad, they are not unlimited.

First, counties' powers with respect to public health are limited by certain state and federal statutes, which expressly or impliedly deny that power or grant that power to another entity. (IC 36-1-3-5). For example, a county does not have the following powers:

(1) The power to condition or limit its civil liability, except as expressly granted by statute;

(2) The power to prescribe the law governing civil actions between private persons;

(3) The power to impose duties on another political subdivision, except as expressly granted by statute;

(4) The power to impose a tax, except as expressly granted by statute;

(5) The power to impose a license fee greater than that reasonably related to the administrative cost of exercising a regulatory power;

(6) The power to impose a service charge or user fee greater than that reasonably related to reasonable and just rates and charges for services;

(7) The power to regulate conduct that is regulated by a state agency, except as expressly granted by statute;

(8) The power to prescribe a penalty for conduct constituting a crime or infraction under statute;

(9) The power to prescribe a penalty of imprisonment for an ordinance violation;

(10) The power to prescribe a penalty of a fine as follows;

(A) More than ten thousand dollars ($10,000) for the violation of an ordinance or a regulation concerning air emissions adopted by a county that has received approval to establish an air permit program under IC 13-17-12-6.

(B) For a violation of any other ordinance:

(i) more than two thousand five hundred dollars ($2,500) for a first violation of the ordinance; and

(ii) except as provided in subsection (c), more than seven thousand five hundred dollars ($7,500) for a second or subsequent violation of the ordinance.

(11) The power to invest money, except as expressly granted by statute; or

(12) The power to adopt an ordinance, a resolution, or an order concerning an election described by IC 3-5-1-2 or otherwise conduct an election, except as expressly granted by statute. An ordinance, a resolution, or an order concerning an election described by IC 3-5-1-2 that was adopted before January 1, 2023, is void unless a statute expressly granted the unit the power to adopt the ordinance, resolution, or order. (IC 36-1-3-8)

(13) The power to adopt or enforce an ordinance described in section 8.5 of this chapter.

(14) The power to take any action prohibited by the chapter on the regulation of reusable or disposable auxiliary containers.

(15) The power to dissolve a political subdivision, except:
(A) as expressly granted by statute; or
(B) if IC 36-1-8-17.7 applies to the political subdivision, in accordance with the procedure set forth in IC 36-1-8-17.7.

Second, counties' powers with respect to public health are limited by certain state and federal constitutional restraints designed to protect personal liberties. These constitutional restraints include individuals' rights to substantive and procedural "due process", protection from abridgment of "privileges and immunities" of United States citizenship, "equal protection of the laws", protection from taking of property or limiting the use thereof without just compensation, freedom of speech and assembly, freedom of religion, protection from impairment of contract, protection from interference with interstate or foreign commerce, and protection from unreasonable searches and seizures. An examination of such constitutional restraints on counties' powers with respect to public health is beyond the scope of this text. However, Board of Commissioners should be mindful that their powers with respect to public health, on the one hand, and individuals' rights, on the other hand, are only relative.

B. County Health Services.

A county may provide medical care or other health or community services to persons. (IC 36-8-2-5).

1. County Health Department

Each county by ordinance of the Board of Commissioners must establish and maintain a local health department. (IC 16-20-2-2).

a. County Board of Health.

A county board of health must manage each county health department. (IC 16-20-2-3). The Board of Commissioners and County Council of a county share the power to appoint the members of the county board of health, with the County Council appointing one member of the county board of health. (IC 16-20-2-5).

In Counties with a population of at least 200,000, the board consists of nine members, not more than five of whom may be of the same party. Five of the members, appointed by the Board of Commissioners, must be knowledgeable in public health (at least two of whom must be licensed physicians and the other three of whom may be a registered nurse,

pharmacist, dentist, hospital administrator, social worker, attorney with expertise in health matters, school superintendent, veterinarian, engineer or environmental scientist, physician assistant, or public health professional including an epidemiologist. One member, appointed by the County Council, must be a member of the general public. One member, appointed by the Board of Commissioners, must be either a member of the general public or be a person with public health knowledge. Two members, appointed by the Board of Commissioners, must be selected, one from each list, from a list of three recommendations prepared by the executives of the two most populous municipalities in the county. (IC 16-20-2-5).

In a county with a population of less than 200,000, the county board of health must be composed of seven members, no more than four of whom may be from the same political party. (IC 16-20-2-4) Five of the members, appointed by the Board of Commissioners, must be knowledgeable in public health (at least one of whom must be a licensed physician and the other three of whom may be a physician, registered nurse, pharmacist, dentist, hospital administrator, social worker, attorney with expertise in health matters, school superintendent, veterinarian, engineer or environmental scientist, physician assistant, or public health professional including an epidemiologist). One member, appointed by the County Council, must be a member of the general public or be a person with public health knowledge. One member must be selected from a list of three recommendations prepared by the executive of the most populous municipality in the county. (IC 16-20-2-5).

Members are appointed for staggered four-year terms, must serve staggered terms, and receive such compensation as the county council determines. Each member of the county board of health serves until a successor is appointed and qualified. (IC 16-20-2-9 and IC 16-20-2-10).

A member of a local board of health must be a citizen of the United States and reside in a county to which the local board of health provided health services. (IC 16-20-2-12). An individual who has a vested interest or stands to gain financially from any activity of the local health department or a policy decision of the board is ineligible to serve on the board. (IC 16-20-2-13).

As an alternative to a single-county health department, the Board of Commissioners of two or more adjacent counties may establish and maintain a multiple-county health department, subject to approval by the State Department of Health (IDOH) and approving ordinances adopted by the Board of Commissioners of each county. (IC 16-20-3-1).

The county board of health must prescribe the duties of all officers and employees of the county health department. (IC 16-20-1-9). The county council must fix the compensation of the employees of the county health department, after consideration of the recommendations of the county board of health. (IC 16-20-1-15).

The county board of health may enter into contracts with the IDOH, other local boards of health, other units of government, or private individuals or corporations for the rendering of health services within the county. The private contracts are subject to approval by the Board of Commissioners. (IC 16-20-1-8).

The county board of health may, with the approval of the Board of Commissioners, establish and collect fees for specific services and records, as established by local ordinances and state law. However, such fees may not exceed the cost of services rendered. Such fees must be transferred to the county health fund (described below). (IC 16-20-1-27).

The county board of health may adopt procedural rules for the board's guidance and to establish administrative and personnel policies of the county health department that are consistent with the general administrative operating policies of the county. (IC 16-20-1-3).

The county board of health has the responsibility and authority to control communicable diseases and may make sanitary and health inspections that are necessary to carry out this purpose. (IC 16-20-1-21).

The county board of health must provide, equip and maintain suitable offices, facilities and appliances for the health department. (IC 16-20-1-6).

The county board of health has the responsibility and authority to take any action authorized by statute or rule of the State Department to control communicable diseases. The board or a designated representative may make sanitary and health inspections to carry out this chapter and IC 16-20-8. (IC 16-20-1-21).

The county board of health must submit an annual budget to the Board of Commissioners and county council for their approval at the regular time for consideration of annual budgets. (IC 16-20-1-5).

The county board of health must submit an annual report showing the sums of money received from all sources, giving the name of any donor, how all moneys have been expended and for what purpose, and such other statistics and information in regard to the work of the county health

department as it may deem of general interest to the IDOH, which will make the annual report available to the public. (IC 16-20-1-7).

A multiple county health department must maintain at least one physical office in each represented county. Each physical office must at least offer consumer accessible services including vital records, environmental inspections and permit services. (IC 16-20-3-1.5).

b. County Health Officer.

The county board of health must appoint a county health officer that meets the requirements set out in IC 16-20-1-9.5 for a four-year term, the county health officer shall serve until a successor is appointed and qualified. Under IC 20-1-9.5, in order to serve as a county health officer, an individual must: be a physician licensed under IC 25-22.5 or have at least a master's degree in public health, five years of experience in public health, and be approved in accordance with IC 16-20-2-16. Beginning July 1, 2023, any individual listed in subsection (a) who is newly appointed to the position of a local health officer shall complete a public health foundation training course developed and approved by the state department. The nominee chosen by the county board of health must be approved by the Board of Commissioners (or the County Council in a county subject to 36-2-3.5). If the Board of Commissioners (or the County Council in a county subject to 36-2-3.5) fails to approve the nominee on two (2) separate occasions, the nominee is barred from further consideration for the position. If the Board of Commissioners (or the County Council in a county subject to 36-2-3.5) approves the nominee then the nominee's appointment must be certified by the Board of Commissioners and recorded with the IDOH. If the local board of health chooses a nominee who is not a licensed physician but is otherwise qualified under IC 16-20-1-19.5(a)(2), the local board of health must (1) obtain the approval of the Board of Commissioners, and (2) submit a request to the executive board of the Indiana Department of Health for approval of the County Commissioner's approved nominee including a detailed plan for clinical oversight for any provided medical services. The health officer is eligible for reappointment. A health officer may service simultaneously for more than one local board of health. (IC 16-20-2-16).

The county health officer is the executive officer of the county health department and secretary of the county board of health. County health officers may be removed for failure to perform their statutory duties, failure to enforce the rules of the IDOH, or for other good cause and generally may be removed only by the board that appointed the health officer. In these cases, the health officer is entitled to at least 5 days' notice, an open hearing and representation by counsel. (IC 16-20-1-28). In certain circumstances, the county health officer may also be removed by the IDOH. (IC 16-19-3-13).

The county health officer must enforce, within the county, the health laws, ordinances, orders, rules and regulations of the county and IDOH. (IC 16-20-1-19).

Any enforcement action taken by a county health officer to enforce the health laws, ordinances, rules, and regulations of the county and IDOH in response to a declared local public health emergency determined by a local health department or local health officer or a disaster emergency declared by the governor under IC 10-14-3-12 is appealable under IC 16-20-5.5. (IC 16-20-1-19). An enforcement action is defined to include; an order, mandate, citation, administrative notice, business closure, or other action taken by the local board of health or the local health officer. (IC 6-18-2-114.8).

Under IC 16-20-5.5, *et seq* the following appeal rights apply to any enforcement action taken by a county board of health or county health officer: a recipient of an enforcement action issued or taken by a county board of health or county health officer under 16-20-1 in response to (1) a declared local public health emergency determined by a county board of health of a county health officer or (2) a disaster emergency declared by the governor under IC 10-14-3-12 may appeal to the Board of County Commissioners (or to the County Council in a county subject to IC 36-2-3.5) in a manner prescribed by the Board of County Commissioners (or by the County Council in a county subject to IC 36-2-3.5).

The recipient of an enforcement action must file an appeal with the appropriate body not later than seven (7) days from the issuance of an enforcement action. If an appeal is properly filed the Board of Commissioners (or County Council in a county subject to IC 36-2-3.5) may stay the enforcement action until final disposition of the appeal. Within fifteen days (15) days of the proper filing of an appeal the relevant legislative body must determine whether or not to hear the appeal and may issue a denial at any time after the filing of an appeal. Any appeal granted consideration must be heard at a public meeting not later than fifteen (15) days after the date the Board of Commissioners (or County Council in a county subject to IC 36-2-3.5) decides to hear the appeal.

If the Board of Commissioners (or County Council in a county subject to IC 36-2-3.5) has not placed an appeal on its agenda for a meeting within fifteen (15) days of the filing of the appeal then the appeal is considered denied and the relevant legislative body shall inform the appellant in writing that the appeal will not be heard and is considered denied. Such a denial is final disposition of the appeal.

If the Board of Commissioners (or County Council in a county subject to IC 36-2-3.5) chooses to hear an appeal, the appellant or a representative of the appellant must be present at the public hearing on the appeal. The failure of the county board of health or county health officer that issued the enforcement action to appear at the hearing is not a cause to postpone the hearing unless the county board of health or county health officer has requested a continuance. The granting of a continuance does not modify any time requirements for the disposition of an appeal laid out in statute.

The Board of Commissioners (or County Council in a county subject to IC 36-2-3.5) must issue a written decision for any appeal that receives a hearing, such a decision must be filed in the written records of the relevant legislative body. A decision is appealable to the circuit or superior court in the relevant county. If the appellant is denied an appeal or loses the appeal to the county board of health or county health officer then actions to enforce the enforcement action under IC 16-20-1-26 can be taken.

The Board of Commissioners (or County Council in a county subject to IC 36-2-3.5) is required to develop procedures for the review, consideration, and hearing of appeals which must include the following:

(i) Standards for evaluating an enforcement action that is appealed.
(ii) A procedure for consolidating appeals if there are at least two appeals filed from the same order or involving a common question of law or fact.
(iii) A procedure for providing notice to the appellant and the county board of health or county health officer that issued the enforcement action of the appeal of that action, and the date, time, and location of any hearing concerning the appeal.
(iv) Procedures for sharing information between parties and the relevant legislative body concerning the circumstances resulting in the enforcement action.
(v) Procedures for the order of the proceedings
(vi) Procedures for the issuance of a ruling on the appeal following the public hearing by the relevant legislative body not later than fifteen (15) days from the date of the hearing
(vii) Procedures for the maintenance of records concerning a request for an appeal and any documentation resulting from the investigation or hearing on such a request. (IC 16-20-5.5).

The county health officer must collect, record and report to the Department Board of Health the vital statistics of and within the county. The county health officer is the registrar of births and deaths. (IC 16-20-1-17). The county health officer must keep full and permanent records of the county public health work and make a monthly report of the work done to the county board of health. (IC 16-20-1-10 & 11). Reports of county health department activities must be made to IDOH. (IC 16-20-1-12). The county health officer may make sanitary inspections and surveys of all public buildings and institutions. (IC 16-20-1-22). The county health officer or its designee may enter upon showing official identification after receiving consent of the owner except in special circumstances described under IC 16-20-1-23(b)(1-4) and inspect private property in regard to the possible presence, source and cause of disease and, in connection therewith, order what is reasonable and necessary for prevention and suppression of disease and in all reasonable and necessary ways protect the public health. (IC 16-20-1-23).

Subject to state law and State Department rules, the county health officer may order schools closed and forbid public gatherings when deemed necessary to prevent and stop epidemics. The county health officer may order a religious organization closed if such an order complies with IC 10-14-3-12.5 through IC 10-14-2-12.7. (IC 16-20-1-24).

Limitations on the operations or religious services of religious organizations may not be more restrictive than restrictions imposed on other businesses and organizations that provide essential services to the public. The county health officer may require religious organizations to comply with generally applicable health, safety, or occupancy requirements that are religiously neutral and equally applicable to all essential service providing organizations or businesses, however, the county must be able to show that any generally applicable requirement that poses a substantial burden on religious services is essential to further a compelling government interest and is the least restrictive means of furthering that compelling government interest. An individual may raise the IC 10-14-2-12.5 limitation on requirements for religious organizations as a claim against the county in any judicial or administrative proceeding or as a defense in any judicial or administrative proceeding without regard to whether the proceeding is brought by or in the name of the state, political subdivision, or any other party. (IC 10-14-2-12.5). Additionally, no officer or employee of the county may restrict the right of the people to worship or the right to worship in person during a disaster emergency. (IC 10-14-2-12.7).

The county health officer has the power to, subject to approval by the Board of Commissioners, hire requisite staff to complete and discharge the duties of the county health department. The county health officer may,

with the approval of the county board of health, delegate to such employees any duties of the county health officer, on the basis of an agent-principal relation. The public health personnel of the county health department must meet the minimum qualification requirements of the county board of health and, by local ordinance, become a part of the county classification system for their respective positions and must perform such additional duties as may be prescribed by the rules and regulations of the IDOH and county board of health under the general supervision of the county health officer. (IC 16-20-1-14).

Indiana law prohibits persons from instituting, permitting or maintaining any conditions which may transmit, generate or promote disease. The county health officer, upon hearing of the existence of such unlawful conditions within the county, must verify the information and then must order their abatement. Upon refusal or neglect of any person to obey the order, the county attorney, upon receiving the information from the county health officer, must institute court enforcement proceedings. If the action concerning public health is a criminal offense, the county prosecutor must be notified. (IC 16-20-1-25).

The county board of health or the county health officer may enforce its orders by an action in circuit or superior court. In the action, the court may take appropriate action:

(1) Issuing an injunction.
(2) Entering a judgment.
(3) Issuing an order and conditions under IC 16-41-9.
(4) Ordering the suspension or revocation of a license.
(5) Ordering an inspection.
(6) Ordering that a property be vacated.
(7) Ordering that a structure be demolished.
(8) Imposing a penalty within statutory limitations.
(9) Imposing court costs and fees.
(10) Ordering the respondent to take appropriate action in a specified time to comply with the order of the local board of health or local health officer.
(11) Ordering a local board of health or local health officer to take appropriate action to enforce an order within a specified time.

The county attorney must represent the county board of health or the county health officer in the action, unless the board or officer employs other legal counsel or the matter has been referred through law enforcement authorities to the county prosecutor.

There is however, a major exception to a county board of health or county health officer's ability to file an action to enforce an order, citation,

or administrative notice that is issued or taken in response to a declared local public health emergency determined by the county department of health or a disaster emergency declared by the governor under IC 10-14-3-12. If the county board of health or the county health officer is filing an action in response to a declared disaster emergency they may only do so with the approval of the Board of Commissioners (or the County Council in counties subject to IC 36-2-3.5). Without this legislative approval the county board of health or county health officer may not file an action to enforce an order, citation, or administrative notice in response to the declared disaster emergency.

In the event that a county board of health or county health officer files an action in response to a declared disaster emergency as described above, the recipient of that enforcement action shall have a right to appeal either (a) to the appropriate county legislative body pursuant to IC 16-20-5.5 or (b) directly to the circuit or superior court (if the recipient of the enforcement action brings an action in circuit or superior court they waive any right to appeal under IC 16-20-5.5 and any ongoing appeal under IC 16-20-5.5 will be immediately dismissed as a matter of law upon filing in the circuit or superior court. (IC 16-20-1-26).

c. Financing a County Health Department.

(i) Tax Levy.

The county council must assess a levy annually on the assessed valuation of taxable property of the county for the maintenance of the county health department. The taxes must be paid into the county treasury and placed in a special fund to be known as the county health fund, which fund may be used only for the public health purposes and may be drawn upon by the proper officers of the county upon the properly authenticated vouchers of the county health department. The county council must appropriate from the county health fund money necessary to maintain the county health department. Such a tax levy may not be made upon property within the corporate limits of any city maintaining its own full-time health department. Money in the fund at the end of a fiscal year does not revert to the county's general fund (IC 16-20-2-17).

(ii) Donations for Building.

The Board of Commissioners may accept gifts, devises and bequests, whether in trust or otherwise, for the purpose of erecting and equipping a suitable building for the county health department. The building may contain the offices of county health officer,

county board of health and other facilities and equipment that will serve to promote the efficient operation of county health officer and county board of health and to best serve the community's public health administration. (IC 16-20-6-1).

(iii) State Board of Health Grants.

IDOH grants may be available to county boards of health for deposit in a special county health fund. (IC 16-46-1-13). In order to qualify for such financial support, a county board of health must submit an acceptable plan of community health services to the IDOH. (IC 16-46-1-11). Whenever a county board of health qualifies for state financial assistance, such assistance will be based upon (i) an annual fixed amount not to exceed $10,000 plus (ii) a pro rata share of the total amount appropriated by the General Assembly for this purpose, determined in accordance with rules adopted by IDOH. (IC 16-46-1-14).

The IDOH is also authorized to make grants from state appropriated funds to counties operating local clinics or dispensaries, or to sanatoriums, or hospitals providing out-patient care, or in a small community, a private physician for treatment of persons suffering from tuberculosis, the contacts of such persons, positive reactors, and associates of reactors, in accordance with regulations adopted by IDOH. (IC 16-46-9-1).

(iv) Local Public Health Fund.

The State has established a local public health fund for the purpose of providing local boards of health, including county boards of health, with funds to provide public health services. The fund is administered by IDOH, and consists of appropriations from the General Assembly, penalties paid and deposited in the fund from medical care savings accounts under IC 6-8-11-17, and amounts, if any, that are required to be distributed to the fund from the Indiana tobacco master settlement agreement fund. (IC 16-46-10-1).

Effective July 1, 2023, each county is required to establish a separate fund known as the "local public health services fund" to receive local board of health funding. Money disbursed as described below may only be deposited in the local public health services fund. The fund may only be used for appropriating money and allocating expenditures for core public health services, any statutorily required actions for a local health department, and certain evidence based programs designed to prevent or reduce prevalence of health issues

or improve the health and behavioral health of Indiana residents (as outlined in the joint report prepared by IDOH and the State Family and Social Services Administration for the state General Assembly's interim study committee on public health, behavioral health, and human services). (IC 16-46-10-1.5 and IC 16-46-10-3).

Beginning July 1, 2023, and for all subsequent fiscal years, the IDOH shall provide funding each year from the local public health fund to each local board of health in one of the following ways:

(a) If the Board of Commissioners for a county votes in favor of accepting additional funding from the State in order to provide core public health services to the public by collaborating with local entities to identify gaps in core public health services in the county and developing a plan to address those gaps, then IDOH shall distribute funds to the local board of health for the first fiscal year in an amount that equals the average amount of funds distributed to that local board of health in the immediately three (3) preceding years. For all subsequent fiscal years, the IDOH shall distribute funds to each local board of health as calculated below:

i. First, the local board of health must determine the "base" amount of funding for which the local board of health is eligible. The local board of health's base eligibility amount is equal to (A) $26 per capita, (B) in the case of a county having a population greater than 15,000, a minimum of $450,000, (C) in the case of a county having a population greater than 10,000 but less than 15,000, a minimum of $400,000, or (D) in the case of a county having a population less than 10,000, a minimum of $350,000 (whichever is greatest among sub-clauses (A) through (D) above). For those counties in the highest quartile of the social vulnerability index (as published by the federal Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry) or whose average life expectancy is more than two (2) years less than the statewide average, the "per capita" figure outlined in sub-clause (A) above is increased to $31 per capita. For those counties in the second highest quartile of the social vulnerability index

or whose average life expectancy is one (1) to two (2) years less than the statewide average, the "per capita" figure outlined in sub-clause (A) above is increased to $29 per capita.

ii. Second, the base eligibility amount determined above is multiplied by 1.25.

iii. Third, subtract the base eligibility amount from the figure calculated in subsection (ii) above.

The local health funding described above may only consist of funds attributable to taxes and miscellaneous revenue that are deposited in the county health fund and may not include fees collected by the local health department, federal funds or private funds. In the first fiscal year in which a local board of health receives funding under this formula, the local board of health must submit a proposed spending plan to IDOH by September 1. In each subsequent fiscal year, the local board of health, in partnership with the County Council, must submit a financial report to IDOH by June 1 with an accounting of how funds were spent in the prior fiscal year along with an updated proposed spending plan for the upcoming fiscal year. The local board of health must ensure that the core public health services are provided in the county in accordance with the financial report it submits to IDOH.

To help effectuate the provision of these core public health services, a local board of health may also employ one (1) full-time public health nurse, one (1) full-time or part-time school liaison, and one (1) part-time preparedness employee. A school liaison may be employed to partner with schools and school nurse, upon the request of school corporation, develop education programming concerning only nutrition, physical activity, drug prevention, tobacco and nicotine prevention and cessation, required school hearing and vision screening, dental hygiene and oral health and first aid training.

For counties with a city health department established for second class cities under IC 16-20-4-3, funding under this subsection (a) shall be disbursed to the county health department. The County Council and the second class

city fiscal body shall, in good faith, enter into an interlocal agreement to determine the amount of funding to be disbursed to the city health department. The county health department and the city health department shall submit a joint plan to IDOH that demonstrates the core public health services that will provide by each in serving the county. (NOTE: With the passage of Senate Enrolled Act 4 (2023), second class cities may no longer establish city health departments; however, previously established health departments in second class cities may continue to operate in accordance with IC 16-20-4.)

For those counties that have an existing health department cooperative that was formed by an interlocal cooperative agreement before December 31, 2022, and as authorized by IC 36-1-7, funding under this subsection (a) shall be disbursed to the health department cooperative. The health department cooperative shall follow the same rules and guidelines that are required by the local board of health under this subsection (a).

The Board of Commissioners may vote to stop accepting funding under this section at any time. The County Council may adopt an ordinance to allocate the funds received under this subsection (a). The ordinance must provide that each local board of health in the county may receive an allocation of funds received under this subsection (a). The County Council shall file a copy of the ordinance with the IDOH before May 1 of each year. (IC 16-46-10-2.2).

(b) For all other local boards of health that don't receive funding as outlined above, they shall receive an amount of state funds equal to the allocation of state funds the county received in state fiscal year 2023 (i.e., the fiscal year ending June 30, 2023) from the IDOH through the local maintenance fund (as it previously existed) and the Indiana local health department trust account (before its repeal). In order to receive funds under this subsection, the local board of health must submit a proposed spending plan to the IDOH by June 1 prior to the fiscal year in which the local board of health wishes to receive funding. In each subsequent year, the local board of health must submit a financial report to the IDOH by June 1 with an accounting of how the prior fiscal year's funds were spent and an updated proposed spending plan

for the upcoming fiscal year. (IC 10-46-10-2.3).

IDOH shall allocate money as described above to each eligible local public health fund by January 1 of each year. (IC 16-46-10-2.4). If a county has more than one local health department, IDOH shall determine the county's share of funding and distribute the funds to the county. (IC 16-46-10-2.1). A county may not use more than 10% of the funding it receives for its local public health services fund during a fiscal year for capital expenditures, including the purchase, construction, or renovation of a buildings or other structures, land acquisition, and the purchase of vehicles and other transportation equipment. Before funds may be used to hire or contract for the provision or administration of core public health services, the local health department shall post the position or contract to the public for at least thirty (30) days. (IC 16-46-10-3).

If two or more local boards of health cooperate in providing any of the services that may be funded from a local public health services fund, those local boards of health shall file a joint financial report that must be approved by IDOH. The joint financial report must include the services to be provided, the cost of each service, and the percentage of the total cost of services to be provided by each local board of health. The report must be submitted to the state budget committee each year. (IC 16-46-10-3.5).

The services funded from the local public health fund must be provided without cost to a recipient, except that (i) recipients may be required to assign certain insurance benefits to the county board of health, (ii) individuals may be charged for services on a sliding fee schedule based on income, as adopted by the IDOH, and (iii) corporations, partnerships and other commercial concerns may be charged for services. Any fees collected under subsections (ii) and (iii) must be used only for public health purposes and must be used in addition to, and not in place of, funds previously allocated for public health purposes. (IC 16-46-10-4).

To remain eligible for funding from the State local public health fund, a local board of health must maintain compliance with the financial report it submits to IDOH (as well as any other reporting requirements set forth under state law). If IDOH determines there are reasonable grounds to believe that a local board of health is not complying with the local board of health's financial report, statutory directives, or other rules adopted by IDOH, IDOH shall provide written notice of noncompliance to the local board of health, the Board of Commissioners, the County Council, and local health department administrator. The local board of health shall

have at least thirty (30) days to demonstrate compliance or provide a plan for compliance that is approved by the state department. If, after thirty (30) days, the local board of health has not demonstrated compliance or provided a plan for compliance, IDOH may suspend funding to the local board of health from the State local public health fund until compliance is achieved, as determined by IDOH. IDOH must report to the state budget committee each local board's funding that is suspended under this section within thirty (30) days of the suspension. (IC 16-46-10-6).

(v) Core Public Health Services, Contracts, and Grants.

These requirements apply to any local health department that is approved to receive additional funding for core public health services after an affirmative vote of the Board of Commissioners under IC 16-46-10-2.2 (as described under Section VII(B)(1)(c)(v)(a) herein).

As used in this subsection (vi), "person" means an individual, employer, employer association, nonprofit organization, for-profit organization, institution of higher education, health insurance plan, health ministry, or any combination of these.

A local health department may contract with, or establish a grant for the purpose of providing core public health services by a person to Indiana residents. A local health department that receives additional funding under IC 16-46-10-2.2 that establishes a core public health services grant program must administer the local health department's own grant program.

A person seeking a grant or contract under this chapter must submit a proposal to a local health department in the manner prescribed by the local health department. A proposal for a contract or grant under this chapter must include proposed measurable and specific improvement in Indiana in one or more core public health services. A local health department must consider working collaboratively with another local health department in awarding a contract or grant under this chapter.

A local health department shall award a contract or grant under this chapter primarily for the purpose of improving health outcomes and preventing or reducing the prevalence of the health issues related to core public health services. In awarding the contracts or grants, the local health department must prioritize (i) currently operational local health care providing entities, including hospitals, clinics, physicians, pharmacies, and home health

agencies, (ii) multiple-county initiatives that contract with proven outcomes based health improvement providers, and (iii) evidence-based practices to achieving desired health outcomes, including the use of behavioral incentives.

A person awarded a contract or grant must report de-identified, aggregate information concerning the implementation of the core public health services contract or grant and metrics concerning the core public health services to the local health department that approved the contract or grant for the core public health services.

Before a local health department may hire or enter in contract for the provision or administration of core public health services, the local health department must post the position or contract to the public for at least thirty (30) days. (IC 16-46-16.7).

(vi) Other Assistance.

Upon the approval of the Board of Commissioners and the county health department, the county health officer may, on behalf of the county health department, receive financial assistance from an individual, organization or the State or federal government. (IC 16-20-1-18).

2. Area Boards of Health.

If a multiple-county sewer, water, wastewater or similar district has been established, the affected counties may by concurrent resolutions of each Board of Commissioners establish an area board of health for the sole purposes of administering and enforcing all state and local environmental laws, rules and ordinances relative to the maintenance of a high quality environmental level in the district. (IC 16-20-5-1).

Area boards of health created under this chapter have jurisdiction with the board established under IC 13-13-8 and the department of environmental management within the uniform inspection and enforcement area.

3. Prevention and Control of Communicable Diseases.

All counties must supply without charge diphtheria, scarlet fever and tetanus (lockjaw) antitoxin and rabies vaccine to persons financially unable to purchase them, upon the application of a duly licensed physician. (IC 16-41-19-2).

If a county health officer has reason to believe an individual has been infected with or has been exposed to a serious communicable disease or outbreak

and the individual is likely to cause the infection of an uninfected individual if the infected individual is not restricted in the individual's ability to come into contact with the uninfected individual, the county health officer may petition the circuit or superior court for an order imposing isolation or quarantine on the individual. A petition for isolation or quarantine filed under this subsection must be verified and include a brief description of the facts supporting the public health authority's belief that isolation or quarantine should be imposed on an individual, including a description of any efforts the public health authority made to obtain the individual's voluntary compliance with isolation or quarantine before filing the petition. Except in emergency situations, any such individual is entitled to notice and an opportunity to be heard. (IC 16-41-9-1.5) In the event of a quarantine, a county health officer may distribute info to the public concerning the risks of the disease, instruct the public concerning social distancing, request that the public inform the county health officer or a law enforcement authority if a family member contracts the disease, instruct the public on the use of masks, gloves, disinfectants, etc., and close schools, athletic events and other nonessential gatherings. (IC 16-41-9-1.6). The county health officer may exclude from school a student who has a serious communicable disease that is transmissible through normal school contacts and poses a substantial threat to the health and safety of the school community. (IC 16-41-9-3).

With respect to an immunization program established by a county health officer to combat a public health emergency involving a serious communicable disease, IDOH must develop and distribute or post information concerning the risks and benefits of immunization. No immunization program established by the county health officer may require a person to receive an immunization without that person's consent. (IC 16-41-9-1.7).

In carrying out its duties related to the prevention and control of communicable diseases, a county health officer must attempt to seek the cooperation of cases, individuals with a communicable disease, contacts, or suspected cases to implement the least restrictive but medically necessary procedures to protect the public health. (IC 16-41-9-15). The court must determine what part of the cost of care or treatment ordered by the court, if any, the individual with a communicable disease can pay and whether there are other available sources of public or private funding. If the individual with a communicable disease cannot pay the full cost of care and other sources of public or private funding are not available, the county is responsible for the cost. (IC 16-41-9-13).

4. County Drug Free Community Fund.

Each county has a county drug free community fund to promote comprehensive local alcohol and drug abuse prevention initiatives by supplementing local funding for treatment, education and criminal justice services and activities. The fund consists of amounts deposited from drug abuse, prosecution, interdiction and connections fees and alcohol or drug counter-measures fees. (IC 5-2-11-2, 33-37-7-2(c)(2)).

The county auditor administers the county drug free community fund. (IC 5-2-11-3). The county council must annually appropriate from the fund amounts allocated by the Board of Commissioners for the use of persons, organizations, agencies and political subdivisions designated by the Board of Commissioners to carry out the purposes of the fund. At least 25% of the money must be allocated to each of (i) prevention and education, (ii) intervention and treatment, and (iii) criminal justice services and activities. The County Council shall allocate the remaining 25% of the money in the fund to persons, organizations, agencies, and political subdivisions to provide services and activities under subdivisions (i) through (iii) based on the comprehensive drug free community plan submitted by the local coordinating council and approved by the criminal justice institute. (IC 5-2-11-5).

The fund may not be used to replace other funding for substance use services provided to the county. (IC 5-2-11-6). Money in the fund at the end of the fiscal year does not revert to any other fund. (IC 5-2-11-4).

C. Hospitals.

A county may establish, aid, maintain and operate hospitals. (IC 36-8-2-5).

1. County Hospitals.

In 1993, the General Assembly repealed Indiana Code 16-12-1 (the "1903 County Hospital Act"), 16-12-2 (the "1917 County Hospital Act"), 16-12-4 (the "1919 County Hospital Act") and 16-12.1-1 (the "1971 County Hospital Act"), and reorganized the statutes governing county hospitals under Indiana Code 16-22 (the "County Hospital Law").

a. Establishment of Hospital.

The Board of Commissioners may establish a hospital by promptly determining the buildings and the estimated cost of the buildings needed to serve the needs of the county, the method of financing the hospital buildings, and the estimated amount of money to be raised by the sale of general obligation bonds of the county or revenue bonds of an authority, and then entering an order establishing the hospital. (IC 16-22-2-1).

b. Composition of the Governing Board.

(i) Hospitals Established Under the County Hospital Law and the 1971 County Hospital Act.

County hospitals organized under the reorganized County Hospital Law or the 1971 County Hospital Act, IC 16-12.1, before its repeal, are generally under the management of a governing board consisting of four members appointed by the Board of Commissioners. All four members must be residents of the county in which the hospital is located, and one member may be a licensed physician who is a member of the medical staff of the hospital. Members are appointed for staggered four-year terms, and the Board of Commissioners generally fill vacancies. (IC 16-22-2-2).

(ii) Hospitals Established Under the 1917 County Hospital Act.

County hospitals organized under the 1917 County Hospital Act, Acts 1917, c. 144, s. 1, before its repeal, are governed by a board consisting of four members appointed by the Board of Commissioners. Members hold staggered, four-year terms. One member of the board may be a licensed physician, all members must be residents of the county. (IC 16-22-2-6).

(iii) Hospitals Established Under the 1903 County Hospital Act.

County hospitals organized under the 1903 County Hospital Act, IC 16-12, before its repeal, operate under a governing board consisting of eleven members. Three of the members must be members of the Board of Commissioners. If the hospital is acquired or equipped without the aid of a hospital association, three members of the governing board must be appointed by the Board of Commissioners and five members of the governing board, one of whom may be a licensed physician, must be appointed by the county council. If the hospital is acquired or equipped with the aid of a hospital association, four members of the governing board, one of whom may be a licensed physician, shall be appointed by the hospital association, two members of the governing board must be appointed by the Board of Commissioners and two members of the governing board shall be appointed by the county council. Members generally serve two-year terms. Not more than two members of a governing board appointed under this section may reside in a county other than the county in which the hospital is located. A member who is not a resident of the county in which the hospital is located must be an Indiana resident and be appointed by the governing board of the hospital to the appointing authority. (IC 16-22-2-3).

(iv) Hospitals Established in Certain Counties.

In Rush County, the governing board has seven members consisting of the three Board of Commissioners, two persons appointed by the Board of Commissioners, and two persons appointed by the county council, one of whom may be a licensed physician. (IC 16-22-2-5). In Knox County, the governing board of trustees has seven members, consisting of the three Board of Commissioners and four persons appointed by the judge of the circuit court, one of whom must be a licensed physician (IC 16-22-2-4). In Jackson County, the governing board consists of nine members, three of whom are the Board of Commissioners and the other six of whom are appointed by the Board of Commissioners, one of whom may be a licensed physician and at least four of the six members must live in the county. (IC 16-22-2-3.1).

(v) Vacancies and Expansion.

A vacancy occurs on the governing board of a county hospital, the hospital governing board is required to submit a list of one but not more than three candidates for such vacancy to the appointing authority, from which a selection to fill the vacancy may be chosen. The candidates provided on the list must meet the statutory requirements for the position. The appointing authority may appoint a candidate from the list, may reject the list and request that the governing board of the hospital submit an additional list of three candidates, or may appoint an individual who meets the requirements and who was not named on the initial list submitted by the governing board. Each selection is required to be made within sixty days of submission of the original list of candidates to the appointing authority. When vacancies on the board occur by reason of the expiration of a member's term, the Board of Commissioners must appoint a new member under the procedure described below within 60 days or the member whose term expired is automatically reappointed for an additional term. (IC 16-22-2-11). In Randolph, Jackson and Rush Counties, the appointing authority must fill a vacancy on the governing board within sixty (60) days after the vacancy occurs. (IC 6-22-2-12).

Upon the petition of a four-member hospital board, the Board of Commissioners may increase the size of the hospital board to five, six, seven, eight or nine in accordance with certain statutes governing the procedures for increasing the size of the board and the qualifications of new members. (IC 16-22-2-7).

Except as otherwise provided by state law, a member of an

appointing authority for the governing board of a hospital established and operated under the County Hospital Law, except a hospital under 16-22-8 (concerning county hospitals established in counties with an existing city hospital) may not serve on the hospitals governing board. (IC 16-22-2-13).

(vi) Compensation.

Each governing board member must be reimbursed for his expenses and may receive annual compensation not to exceed $6,000. (IC 16-22-2-9(e)). A county hospital may provide its board members with group health and life insurance benefits paid by the hospital. The provision of such benefits to board members is not considered compensation subject to the per annum compensation limitation currently set out in the County Hospital Law. However, such benefits may constitute compensation for income tax purposes and also require the issuance of a Form 1099. County hospitals and their board members receiving this benefit should consult their tax advisors on the proper treatment of this benefit. (IC 16-22-2-9(g)).

Board members may attend meetings and seminars for the benefit of the hospital, the cost of which may be paid by the hospital. Any payment made by the hospital for the purpose of sending board members to meetings or seminars is not considered compensation for purposes of limits on compensation under the County Hospital Law. (IC 16-22-2-9(h)).

(vii) Interested Transactions.

An individual is not prohibited from serving as a member of any hospital board if the member has a pecuniary interest in, or derives a profit from, a contract or purchase connected with the hospital. However, the member must disclose that interest or profit in writing to the hospital board and provide a copy to the State Board of Accounts. The member must abstain from voting on any matter that affects that interest or profit. The hospital board must adopt a written conflict of interest policy conforming to these requirements. (IC 16-22-2-10).

c. Powers of the Governing Board.

(i) General Powers and Purpose.

The governing board is the supreme authority in the hospital, responsible for the management and control of the hospital and all functions of the hospital. The board has the authority and power granted to boards of not-for-profit corporations under IC 23-17,

including the authority and power to do any acts and things necessary, convenient or expedient to carry out the purposes for which it is formed. (IC 16-22-3-1). The governing board may take the form of a board of trustees, board of directors or any other body responsible for governing a hospital. (IC 16-18-2-149).

Hospital purposes includes providing inpatient or outpatient diagnostic and treating facilities and services generally recognized as hospital services to the public, and the provision of services to other health care entities and other health care services, including the provision of acute care in hospital inpatient units to patients with extended lengths of stay, that the board considers appropriate. This expanded definition removes any question that the board of a county hospital has the authority to provide not only services to other health care entities, but any other health care services that the board wishes to provide. (IC 16-18-2-182).

(ii) Acquisition of Property and Power to Contract.

The hospital board may purchase, construct, remodel, repair, enlarge or acquire in any lawful manner a building or buildings and real or personal property for hospital purposes, within or outside the county, upon terms and conditions acceptable to the board. (IC 16-22-3-2).

The board also may mortgage all or any part of an interest in real or personal property owned by the hospital and may enter into sale and leaseback of hospital property upon terms and conditions acceptable to the board. The hospital board generally may dispose of real and personal property by public sales. The proceeds from such sales of real property are a part of the hospital fund or funds to be held and used for the use and benefit of the hospital. However, with respect to disposition of real or personal property subject to a mortgage or sale and leaseback arrangement, or any real or personal property in which the hospital has an ownership interest in a joint venture arrangement or as a tenant in common, such property may be disposed of by any lawful means on terms and conditions acceptable to the board. (IC 16-22-3-17).

The hospital board has the power to purchase or acquire in any lawful manner all materials, services, equipment and supplies required for the operation and maintenance of the hospital at such prices as are considered reasonable by the board. (IC 16-22-3-4).

On terms and conditions it finds reasonable, the hospital board may contract for the services of consultants, architects,

engineers or other professional persons or firms including, but not limited to, shared services or purchasing organizations. The board also may contract for other services reasonably required for the operation and maintenance of the hospital, including the management of the hospital, on such terms and conditions as are considered reasonable by the board. (IC 16-22-3-6).

The hospital board must take, hold, disburse and dispose of, for the benefit of the hospital, all real or personal property or other property of any nature that is a part of the hospital fund or funds. The board may accept gifts, devises, bequests or grants upon such limitations and conditions as may be directed by the donor so long as such limitations and conditions are not contrary to law. The board may transfer a part of the hospital fund or funds to a hospital foundation that is organized and operated for the exclusive benefit of the hospital or a related or controlled entity that is a nonprofit corporation organized under the laws of the State of Indiana. The board may make such transfers if adequate provision is made for working capital and other known and anticipated hospital needs. If a transfer includes any public funds of the hospital, the public funds transferred to the foundation or related or controlled entity are subject to audit by the State Board of accounts unless the hospital foundation or related or controlled entity files annually with the treasurer of the hospital a copy of an audit prepared by an independent certified public accountant and the audit is made available to the State Board of Accounts. (IC 16-22-3-14).

The hospital board may contract for and purchase for the protection of the hospital all types of insurance provided for in the Indiana insurance law in such amount or amounts and with such provisions and conditions and limitations as the board may deem reasonable and necessary, including liability or malpractice coverage for the members of the board, officers, employees, volunteers and members of medical staff committees while they are performing services for the hospital. The board may, for the purpose of acquiring malpractice coverage, assist in the formation of a non-assessable mutual insurance company under IC 27-1-6 and 27-1-7-19. The board may enter into a group purchasing agreement to purchase medical malpractice insurance with one or more hospitals organized or operated under IC 16-27 or 16-23. (IC 16-22-3-21).

The hospital board may lease a part of the hospital buildings if the board determines that the use of the leased premises will aid the hospital in the performance of the hospital's services. The lease must be in writing, be for definite periods, and require payment of lease rentals at least monthly. (IC 16-22-3-22).

The hospital board may permit the hospital to provide services for the mentally disordered. The board may contract for or may establish and maintain a training school for nurses, and a training school for paramedical personnel, and in connection therewith acquire suitable facilities for the housing of graduate and student nurses in training or employed by the hospital. The board may provide suitable facilities for the temporary detention and examination of persons in preparation for admission to hospitals for the insane. (IC 16-22-3-23).

d. Medical Staff.

The hospital board may determine appointments and reappointments to the medical staff and delineate privileges of the members of the medical staff. All physicians possessing an unlimited license to practice medicine and surgery issued by the medical licensing board of Indiana are eligible for membership on the medical staff of a county hospital, subject, however, to the power of the hospital board to establish and enforce reasonable standards and rules concerning the qualifications for admission to the medical staff and to practice in the hospital and reasonable rules for retention of such membership and for the granting of medical staff privileges within the hospital. (IC 16-22-3-9).

The hospital board has the authority to appoint and specify the privileges of the medical staff, with the advice and recommendations of the medical staff. The medical staff is responsible to the board for the clinical and scientific work of the hospital must advise the board regarding professional problems and policies. (IC 16-22-3-1(d)).

e. Executive Director.

The hospital board must appoint an executive director as the administrative head of the hospital. The executive director is the executive agent of the board in the administration of its policies, and acts as the liaison officer between the board and the medical staff. The executive director must employ hospital personnel, and such other powers, authorities and responsibilities as are delegated to him by the board or specifically assigned to him by law. (IC 16-22-3-8). The executive director may be referred to as the president, the chief administrative officer or other title. (IC 16-18-2-121).

f. Other Personnel.

Upon the recommendation of the executive director, the governing body must fix the compensation, including incentives for productivity, of all hospital employees and adopt personnel and management policies

consistent with the governing boards of other hospitals in Indiana. (IC 16-22-3-10).

g. Accounting.

The accounting records of the county hospital must be kept in the manner prescribed or approved by the State Board of Accounts, and the State Board of Accounts is responsible for auditing the records of the hospital unless the hospital has elected to have its audit performed by an independent Indiana certified public accounting firm experienced in hospital matters. The State Board of Accounts may also approve forms for use by all hospitals or groups of hospitals. A hospital which has received a financial subsidy from the county for hospital operations, excluding mental health or ambulance services, during the preceding year must file with the Board of Commissioners and the county council an annual report showing the income and expenses of the operating fund for the preceding year. Any information concerning the specific salaries paid to individual employees of a hospital may be withheld by the hospital from disclosure under IC 5-14-3. However, the information must be provided to the state board of accounts upon request. (IC 16-22-3-12).

h. Patient Charges.

The hospital board must establish reasonable charges for the patient care and other hospital services for the residents of the county. The board may, in its discretion, provide patient care and other hospital services to nonresidents of the county upon such terms and conditions and charges as the board may establish by its rules. The board may give appropriate discounts to patients. (IC 16-22-3-13).

In establishing charges, the hospital board may include a reasonable charge for depreciation and obsolescence of property, plant and equipment The charges for depreciation and obsolescence, or any part thereof, may be transferred periodically to a fund to be used by and at the discretion of the board only for the purpose of building, remodeling, repairing, replacing or making additions to the hospital building or buildings. However, in any year in which there is a tax levy for the general operation and maintenance of the hospital, the board must not make a transfer to the fund. Further, in an emergency, the board may borrow from the fund for the operating fund of the hospital, but must provide for the reimbursement of the amount borrowed within a period of two years. (IC 16-22-3-13).

i. Financing County Hospitals

Funds may be received by appropriation, tax levy or grant from the county in which the hospital is located, an adjoining county or counties if

otherwise permitted by law, the State of Indiana, or any agency or instrumentality of the United States government. (IC 16-22-5-18).

(i) Appropriation from General Fund or Separate Tax Levy.

The hospital board may request support from the county, either by appropriation from the county general fund or by a separate tax levy, by filing with the Board of Commissioners on or before August 1 of each year a written budget of the amount estimated to be required to maintain, operate or improve the hospital for the ensuing year. The board may not provide funds derived from a county tax levy to another organization, association, partnership or corporation for more than three years. After three years, all funds, with interest, must be repaid in no more than ten years. If the board enters into a lease or sublease or loan agreement with the Indiana Finance Authority, the board may request the county to adopt a separate tax levy to support the board's obligations thereunder. (IC 16-22-3-27).

(ii) Cumulative Building Fund.

A cumulative building fund for the establishment, enlargement, construction, acquisition, equipping or remodeling of county hospital building or buildings or the equipping of existing buildings, may be established. To provide such a fund, the hospital board may petition the Board of Commissioners to levy a tax to establish such fund, setting out in the petition the amount of the proposed tax levy and the number of years for which the tax is to be levied. The Board of Commissioners must thereupon approve or disapprove the petition and, if approved, establish the amount of the tax levy and the period over which it is to be levied. (IC 16-22-5-3) Such a tax may be levied annually for not more than (12) twelve years and may not exceed eleven and sixty-seven hundredths cents ($0.1167) on each one hundred dollars ($100) of assessed valuation of property in the county. (IC 16-22-5-4).

As such tax is collected, all such levies become a part of the hospital funds without further appropriation by the county council and may be invested in accordance with IC 16-22-3-20. The levies must be separately accounted for as a hospital cumulative building fund and may not be used for any purposes other than that for which it was established, except that: (i) a lease that has been entered into with a hospital authority or the Indiana Finance Authority, may provide the payment of lease rentals in whole or in part from the hospital cumulative building fund; and (ii) if a loan has been obtained for the same purposes for which the cumulative building

fund was established, amounts in the fund may be used for payment of the principal and interest on the bonds, notes or other evidences of indebtedness of the hospital. (IC 16-22-5-15).

(iii) General Obligation Bonds.

The Board of Commissioners may issue and sell general obligation bonds of the county to finance the costs of hospital buildings or the enlargement or remodeling thereof in such amount as the hospital board may certify to the Board of Commissioners to be necessary for such purposes. Such bonds must be authorized, issued and sold in accordance with the general laws governing the authorization, issuance and sale of general obligation bonds by counties, and the county council must appropriate the proceeds of sale of such bonds to the hospital board for the purposes for which the bonds have been sold. Provisions for the payment of such bonds must be made in the county budget, and the county council must annually levy a tax sufficient to produce each year the necessary funds for payment of the principal and interest on the bonds according to their terms. (IC 16-22-5-16).

(iv) Revenue Bonds and Other Loans.

The hospital board may borrow money and may secure such borrowing by a pledge of amounts from the cumulative building fund or by other security, including accounts receivable, a security interest in the capital equipment for which the proceeds of the loan is being used and the excess of unobligated revenues over operating expenses. A loan may be made for a term not to exceed 35 years. (IC 16-22-5-17).

The hospital board may obtain loans for hospital expenses in amounts and upon terms and conditions agreeable to the board, and may secure such loans by pledging accounts receivable or other security in hospital funds. If the board enters into a loan agreement for the borrowing of funds from the Indiana Finance Authority, the board may pledge as security funds the board receives from a tax levy of the county. In addition to other methods authorized for hospitals to borrow money, the hospital board may sell or factor accounts receivable. (IC 16-22-3-26).

The hospital board may finance or refinance the acquisition of real or personal property by means of a mortgage or a sale and leaseback of hospital property. (IC 16-22-3-17).

(v) Lease Financing.

Hospital building or buildings may be leased or purchased from a county building authority (see "County Hospital Building Authorities"). (IC 16-22-6-13).

The hospital board may lease from others real or personal property, with or without an option to purchase, on reasonable terms and conditions. If a lease agreement gives the hospital an option to purchase the property and if any part of the lease rental is to be applied on the purchase price in the event the option is exercised, the agreement must be treated as a purchase and is subject to the other provisions of the laws of the State of Indiana relating to purchases by county hospitals. The governing board may also authorize the purchase or lease of a hospital building from the Indiana Finance Authority. (IC 16-22-3-3).

(vi) Federal Assistance.

Agreements may be entered into with the United States of America or any department, agency or instrumentality thereof with respect to loans or guarantees of loans. In addition, the hospital board, the Board of Commissioners and the county council have the authority to enter into agreements with the United States of America or any department, agency or instrumentality thereof to permit the hospital or the county to accept subsidy or payment of all or part of the interest payable on obligations issued and sold for hospital purposes. (IC 16-22-5-19).

(vii) Donations.

The hospital board may accept contributions, gifts, devises or bequests, with any lawful limitations, provisions or conditions for the use thereof established by the donor. (IC 16-22-5-20).

j. Management, Enlargement, Remodeling or Renovation of Hospital by Nonprofit Corporation.

If it is determined by the hospital board, the Board of Commissioners and the county council that the community the hospital serves can best be provided with hospital services through management, enlargement, remodeling or renovation of the hospital by a nonprofit hospital corporation, the hospital board, the Board of Commissioners and the county council, after publication of notices and conducting a public hearing in accordance with certain procedures, may by joint resolution agree to transfer the assets of the hospital, including the hospital building or buildings and the hospital fund or funds, to the nonprofit corporation. The

transfer agreement must require the nonprofit corporation to assume and agree to pay any indebtedness attributable to the hospital building or buildings. If there are any proceeds from the transfer, the Board of Commissioners must deposit those proceeds into: (i) a nonexpendable trust fund from which county hospital claims for the indigent are paid or any other fund that the Board of Commissioners and county council designate; or (ii) the county general fund. If the nonprofit corporation ceases doing business, or is terminated or dissolved, any funds or property remaining after payment of all lawful debts become the property of the county, and a provision to this effect must be included in the arts of incorporation of the nonprofit corporation and may not be amended or deleted without written approval from the commissioners. (IC 16-22-3-18).

k. Dissolution of County Hospitals.

The hospital board, the Board of Commissioners and the county council may, by joint resolution, determine that: (i) the hospital should cease doing business as a county hospital; (ii) the hospital should be terminated and dissolved; and (iii) the entire hospital building or buildings should be sold or leased to a for-profit corporation, partnership or entity. Such sale or lease shall be considered publically under the procedures of IC 16-22-6-18, including the requirement of public notice and hearing. The hospital board may sell, convey or otherwise transfer real property from the hospital to an entity related to or controlled by the hospital for constructing buildings on behalf of the hospital on terms the board determines appropriate, such transfer is not subject to the notice and appraisal requirements otherwise required. (IC 16-22-3-17).

l. County Hospital in Counties with Existing City Hospitals.

In any county where a city hospital is operated, a county hospital may be created by an order of the Board of Commissioners. Upon the establishment of a county hospital by the Board of Commissioners, an appointing board must be formed to appoint the members of the county hospital board. The appointing board must consist of the mayor of the city where the city hospital is located, the judge of the circuit court of the county, and a member of the Board of Commissioners chosen by the Board of Commissioners of the county. The governing board appointed must consist of seven members. The hospital board may operate the county hospital jointly with the city hospital operated in the same county. The joint operation may include joint employment of an administrator and other personnel, joint policies, joint purchases, joint services, and other programs to deliver health care at a reduced cost. The hospital board of the county hospital may contract with the hospital board of the city hospital to provide for the manner of allocation of revenues and expenditures and the administration of the hospitals but, in any joint operation, records must be

kept which reflect the separate ownership, financial obligations and existence of the county hospital and the city hospital. (IC 16-22-2-8).

2. Tuberculosis Hospitals.

The Board of Commissioners of any county have the power to establish a county hospital for the care and treatment of persons suffering from tuberculosis. (IC 16-24-1-2).

3. County Hospital Building Authorities.

The Board of Commissioners of any county owning and operating only one county hospital may, upon request in writing by the governing board of such hospital, adopt a resolution for the creation of a county hospital authority. The authority is a body corporate and politic, created for the purpose of financing, acquiring, constructing, renovating, equipping and leasing to the county land and a building, including an existing building or buildings, for hospital purposes. (IC 16-22-6-2).

The board of Board of Commissioners must appoint five residents of the county as directors of the county hospital building authority. After the initial term, directors serve for staggered four-year terms. (IC 16-22-6-3). Any director may be removed from office for neglect of duty, incompetency, inability to perform his duties or any other good cause, by an order of the circuit, superior, or probate court in the county in which such authority is located. (IC 16-22-6-6). No director may have any pecuniary interest in any contract, employment, purchase or sale made by the authority, and any transaction made in which any director has a pecuniary interest is void. (IC 16-22-6-10).

The governing board of the authority has the power to finance and construct or renovate a building for hospital use on land owned by such authority, and to lease said land and building to the county. The board may sue and be sued and plead and be impleaded, but an action against the authority must be brought in the circuit or superior courts of the county in which the authority is located. The board also has the power, acting in the name of the authority, among other things, to condemn, appropriate, purchase and hold any real estate useful in connection with a building constructed or renovated or to be constructed or renovated; and to acquire by gift, devise or bequeath real estate, and personal property, and hold, use, expend or dispose of such real and personal property for authorized purposes. The board may enter upon lots or lands to examine or determine the location of a building, may design, order, contract for and construct or renovate a building and make all necessary or desired improvements to the grounds and premises the board acquires, and may make and enter contracts and agreements necessary or incidental to the performance of the board's duties and the execution of the boards powers. (IC 16-22-6-12).

The governing board of the authority may enter into a lease with the county and collect rentals payable under the lease. (IC 16-22-6-12 (7)). A lease may not be entered into for more than 40 years but may be renewed for a like or lesser term. (IC 16-22-6-13) Any lease between a county hospital building authority and the county may provide for the payment of the lease rental in any one of the following ways: (a) entirely from a levy of taxes (described below); (b) entirely from the net revenues of the hospital of which the leased building or buildings is or are a part; (c) in part from such levy of taxes and in part from such net revenues, as set forth in the lease; or (d) from a cumulative building fund. (IC 16-22-6-15).

For the purpose of procuring funds to pay the cost of any building or buildings to be built, acquired, renovated, or acquired and renovated, and to repay any advances for preliminary expenses made to the authority by the county, the board of directors of the authority may issue revenue bonds of the authority, which bonds are payable solely from the income and revenues of the particular building or buildings financed from the proceeds of such bonds. (IC 16-22-6-29(a)). The bonds may be secured by a trust indenture which may mortgage the land or building for which the bonds are being issued. All moneys received from any such bonds, after reimbursement and repayment to the county of all amounts advanced for preliminary expenses, must be applied to the payment of the costs of acquisition, construction or renovation of the building or buildings on account of which such bonds are issued, including incidental expenses and interest prior to acquisition or during construction or renovation. (IC 16-22-6-30).

The county council of any county which has entered into a lease contract with the authority must annually levy a tax sufficient to produce each year the necessary funds which, with other funds available, if any, are sufficient to pay the lease rental provided to be paid in such lease from taxes. Net revenues of the hospital of which the leased building is a part, must, if any of the lease rental is payable from taxes, be transferred to a fund used for the payment of lease rental to be paid from taxes. However such transfer may not occur if the revenues are required to pay lease rental, or to be retained as a reserve for such purpose or if the revenues are required to be kept in reserve for additional construction, equipment, betterment, maintenance or operation. In fixing and determining the amount of the necessary levy to pay lease rental payable from taxes, the county council must take into consideration such amounts as may have been transferred from the net revenues of the hospital. This does not, however, relieve the county from the obligation to pay from taxes any lease rental payable if other funds are not available for such purpose. (IC 16-22-6-32).

If a county enters into a lease with a county hospital building authority, under which the lease rental is payable in whole or in part solely from the net revenues of the hospital of which the leased buildings are a part, and if the governing board covenants in such lease to establish and maintain and must establish and maintain rates, fees and charges for the use of such hospital sufficient

in each year to pay the proper and reasonable expense of operation, repair, replacements and maintenance of the hospital, to pay the lease rental which is payable solely from the net revenues of the hospital, and to establish such reserve fund as may be provided for in such lease, then the revenues collected are the revenues of the hospital. (IC 16-22-6-33).

The handling and expenditure of funds coming into possession of the authority are subject to audit and supervision by the State Board of Accounts. (IC 16-22-6-35).

The county or the governing board of the hospital may remodel or construct an addition to a leased hospital building. To provide funds for such purpose, the county may issue general obligation bonds or appropriate money from its general fund, or from other available funds which could be used for such purposes if the hospital building were owned, instead of leased, by the county. The governing board of a hospital may use any funds available which could otherwise be used by such board if the hospital building were owned by the county. (IC 16-22-6-37).

In a county where a city hospital is operated, the Board of Commissioners may, upon written request by the governing board of the city hospital, adopt a resolution for the creation of a county hospital authority for the purpose of financing, acquiring, constructing, equipping and leasing to the county or the city in that county, land and buildings for the use and benefit of the city hospital. The statutes governing a county hospital authority with respect to a city hospital are substantially similar to those described above with respect to a county hospital. (IC 16-22-7-5).

An authority may be liquidated after the authority's securities are redeemed, debts are paid, and leases are terminated if the board of directors files a report with the circuit court, superior court, or probate court showing the facts and stating that the liquidation is in the best public interest. The court shall find the facts and make an order book entry ordering the authority liquidated. (IC 16-22-6-36).

4. Cumulative Building or Sinking Funds for Hospitals.

Counties may provide cumulative building or sinking funds for the erection of new hospital buildings, the repairing, remodeling and enlarging of old hospital buildings, and the equipment of new, enlarged and old hospitals, which are owned and operated by the county, a voluntary non-profit association or a nonprofit corporation. (IC 16-22-4-1).

The cumulative building or sinking fund may not be used for any other purpose than the purpose for which the tax was levied. (IC 6-1.1-41-14). If any money has been raised for the fund and the action for the creating the fund is rescinded, then the money in the fund must be transferred to the general fund of the counties involved. (IC 6-1.1-41-15).

5. County Aid to Other Hospitals.

a. Aid to Nonprofit Hospital Corporation.

If there is no other city or public hospital in the county, the county may appropriate money to aid a nonprofit hospital corporation that meets certain requirements. (IC 16-22-13-3). Among other conditions, the hospital must be established in or within one mile of a city, have articles of incorporation, constitution or bylaws that provide the qualifications for establishing a board of trustees and their general corporate powers. The hospital's revenue is derived from the care of persons able to pay for services and from all other sources are insufficient to support and maintain the hospital and enable the hospital to supply the demand for hospital care and nursing. (IC 16-22-13-1). If the Board of Commissioners and county council of a county without a general county hospital determine that the county has insufficient hospital facilities, the county may give financial aid for the construction, equipment, and improvement of a nonprofit hospital that meets the following conditions: (1) is operated for charitable purposes; (2) is owned and operated by at least one hospital association or owned by a governmental unit in the county and operated by a hospital association; (3) does not limit the membership and officers of the hospital association to residents of a certain section of the county; (4) has a governing board of the hospital association that is nonsectarian and nonpolitical, is chosen by election by the members of the association, and includes one member designated by the Board of Commissioners, one member designated by the county council, and one member who may be a licensed physician. (IC 16-22-11-1). To provide such funds the county may issue bonds or make appropriations from the county treasury under the general laws governing the issuance of bonds and the making of appropriations by counties. (IC 16-22-11-2). A hospital receiving financial assistance must be operated for the benefit of all of the inhabitants of the county without discrimination, must have reasonable rates and charges for service that apply to all inhabitants of the county, and may extend the privileges and use of the hospital to persons residing outside of the county upon terms and conditions the board prescribes by rules and regulations. (IC 16-22-11-4).

b. Aid to Private or Municipal Hospitals in County.

If a county does not operate a hospital or provide adequate hospital care, has a private or municipal hospital, and the revenue derived from the care of such hospital's patients and from all other sources is insufficient to pay the total cost of the operation, maintenance, repair, alteration and enlargement of the hospital, and of its furnishings and equipment, the county council may annually make an appropriation from the county treasury to pay a part of the cost of the operation, maintenance, repair, alteration, enlargement furnishing and equipment of the hospital. The county council may annually levy a special tax for that purpose, in an

amount to be fixed by the county council, upon all of the taxable property located in the county. (IC 16-22-12-3).

c. Aid to Hospitals in Other Counties.

The Board of Commissioners of any county without a county hospital (the "contributing county") may, with the approval of the county council, agree to reimburse a contiguous county (the "lessee county") for needed hospital services. The contributing county and the lessee county may enter into a contribution agreement prepared by the Board of Commissioners of the contributing county. The Board of Commissioners must hold a public hearing after publishing notice, and the agreement must be approved by a majority of the county council and a majority of the Board of Commissioners of the contributing county and a majority of the Board of Commissioners of the lessee county. The contributing county must annually levy a tax sufficient to produce each year the funds necessary to make such reimbursement. (IC 16-22-6-27). The citizens of any such contributing county must be accorded the same rights and privileges in such hospital as are the citizens of the county wherein the hospital is or is to be located. (IC 16-22-6-28).

6. Federal Aid to County Hospitals.

Any county or health and hospital corporation owning and maintaining or leasing one or more hospitals or related facilities, any county hospital association, and any county building authority may enter into agreements with the United States of America, or department, agency or instrumentality thereof, with respect to loans or guaranties of loans for hospital or related purposes and may borrow money upon the terms and conditions of the agreement. Such loans may be evidenced by bonds, notes, contractual agreements or other evidences of indebtedness and may be secured, in whole or in part, by pledge of the full faith and credit as a general obligation of the borrower, the income and revenues of the hospital or related facilities, rental from the lease of hospital facilities, or any combination of the foregoing, and may be additionally secured by a mortgage or deed of trust of the real or personal property constituting the hospital and related facilities, or any part thereof. (IC 16-22-3-26).

D. Sanitation.

The General Assembly has adopted certain standards of sanitation for various activities, and has charged IDOH with adopting rules to implement these standards and to enforce these standards and rules. These standards are applicable to, among other things, food establishments (IC 16-42-5), food handlers (IC 16-42-5.2), dwellings (IC 16-41-20), water (IC 16-41-24) and pests (IC 16-41-33). The county health officer and the IDOH share responsibility in enforcing these standards and rules.

1. Food Establishments.

For purposes of enforcing state sanitation laws, the county health officer is a food environmental health specialist subordinate to IDOH. (IC 16-42-5-24). A county board of health has no authority to adopt rules or regulations governing the operation of food establishments within the county. That authority is vested solely in the IDOH. (Op. Atty Gen. No. 67-69 (1967)).

The State Department must provide to the county health officers, who are food-environmental health specialists, guidelines concerning the interpretation of the State Department's rules concerning food handling and food establishments so that enforcement of state laws and rules is uniform throughout the state. (IC 16-42-5-24).

2. Dwellings.

A dwelling, including any part of any building or its premises used as a place of residence or habitation or for sleeping by any person, is "unfit for human habitation" when it is dangerous or detrimental to life or health because of want of repair, defects in the drainage, plumbing, lighting, ventilation or construction, infection with contagious disease, or existence on the premises of an insanitary condition likely to cause sickness among occupants of the dwelling. (IC 16-41-20-1). Whenever it is determined by the county board of health or county health officer that a dwelling is unfit for human habitation, the county board of health or county health officer may issue an order requiring all persons living in the dwelling to vacate it within not less than five days no more than fifteen days. The order must mention at least one reason for the order. (IC 16-41-20-4). The county board of health or county health officer may declare a public nuisance and order dwelling, structure, excavation, business, pursuit or thing in or about a dwelling or its lot, or the plumbing, sewerage, drainage, light or ventilation of the dwelling, unfit for human habitation, to be removed, abated, suspended, altered, improved or purified. (IC 16-41-20-6). The county board of health or county health officer may order any dwelling, excavation, building, structure, sewer, plumbing, pipe, passage, premises, ground or thing in or about a dwelling or its lot that is found to be unfit, to be purified, cleansed, disinfected, renewed, altered, repaired, decontaminated, or improved. (IC 16-41-20-7). The order must be served on the tenant and owner or his rental agent. (IC 16-41-20-8). Any person aggrieved by the order may, within ten days after the order, file with the circuit court or superior court a petition praying a review of the order. The court shall hear the appeal and its decision is final. (IC 16-41-20-9).

The IDOH may not exercise any such power without first giving to the county board of health or county health officer having jurisdiction a notice setting forth the conditions which have been certified to it or of which it has knowledge.

Upon failure of the county board of health or county health officer to act within three days after the notice, the IDOH may exercise such powers. (IC 16-41-20-3).

3. Pest Eradication.

a. Vector Abatement.

The Board of Commissioners of a county that has formed a county health department and the Board of Commissioners of the county and the city council of a city that have formed a joint county-city health department may, as an alternative, on their own initiative or after a petition by five percent (5%) of the registered voters within the jurisdiction of the health department, by ordinance establish and maintain a vector (i.e. insect or feral animal responsible for the transmission of pathogens from a host to another animal or human) abatement program in that health department. (IC 16-41-33-3). The county council or the governing board of a health and hospital corporation may, on the council's board of trustees' own initiative or after a petition signed by five percent (5%) of the registered voters within the jurisdiction of the health department, make an annual appropriation specifically for the purpose of vector control to be used by the health department solely for that purpose and levy a tax of not more than sixty-seven hundredths of one cent ($0.0067) on each one hundred dollars ($100) of assessed value of taxable property in the county. (IC 16-41-33-4).

b. Rats.

A person owning, leasing, occupying, possessing or having charge of any land, place, building, structure, stacks or quantities of wood, hay, corn, wheat, or other grains or materials, or any vessel or water craft who permits it to become rat infested or fails to endeavor in good faith to exterminate the rats commits a class C infraction. (IC 16-41-34-7). The county health officer or the county board of health or inspectors may at one cause the nuisance to be abated by exterminating the rats, at the charge of the county. (IC 16-41-34-5).

The county health officer and appointed inspectors have authority and are permitted to enter into and upon all lands, places, buildings, structures, vessels or watercraft for the purpose of ascertaining whether the same are infested with rats and whether these requirements as to extermination and destruction thereof are being complied with. (IC 16-41-34-3).

Any county health officer or any inspector is entitled, without a warrant, to enter upon or into any land, place, building, structure or premises suspected of being rat infested for the discovery or destruction of rats. (IC 16-41-34-6).

E. Emergency Medical Services.

The Board of Commissioners may establish, operate and maintain emergency medical services. (IC 16-31-5-1(1)). The Board of Commissioners may authorize, franchise or contract for emergency medical services, except that no county may provide, authorize or contract for emergency medical services within the limits of any city without the consent of such city, and no city or town may provide, authorize, franchise or contract for emergency medical services outside the limits of such city or town without the approval of the governing body of the area to be served. (IC 16-31-5-1(3)). A county may not adopt an ordinance that restricts a person from providing ambulance services in the county if: (1) the person is authorized to provide ambulance services in any part of another county; and (2) the person has been requested to provide ambulance services: (A) to the county in which the person is authorized to provide ambulance services, and those services will originate in another county; or (B) from the county in which the person is authorized to provide ambulance services, and those services will terminate in another county. (IC 16-31-5-2).

The Board of Commissioners may levy a county income tax under IC 6-3.6, and expend appropriated funds of the county, to pay the costs and expenses of establishing, operating, maintaining or contracting for emergency medical services. In addition, the Board of Commissioners may establish and provide for the collection of reasonable fees for the ambulance services it provides and pay the fees or dues for membership in any regularly organized volunteer emergency medical services association. Also, the Board of Commissioners may apply for, receive and accept gifts, bequests, grants-in-aid, state, federal and local aid, and other forms of financial assistance for the support of emergency medical services. (IC 16-31-5-1).

F. Mass Gathering Licenses.

A county may regulate public gatherings, such as shows, demonstrations, fairs, conventions, sporting events and exhibitions. (IC 36-8-2-9).

G. Vital Statistics.

The IDOH maintains a system of vital statistics, including factual data concerning births, deaths and stillbirths. The state department shall provide to the local vital records offices guidelines concerning the interpretation of laws and the state department's rules concerning vital statistics to assure uniform application of the state laws and rules. (IC 16-37-1-1). The county health officer is a local registrar for this information, and reports the information to IDOH. (IC 16-37-1-6 & 7).

VIII. TRANSPORTATION

A. General.

A county may establish, aid, maintain and operate transportation systems. (IC 36-9-2-2 (a)).

B. Roads and Bridges.

1. General.

A county may establish, vacate, maintain and operate public ways, including highways, streets, avenues, boulevards, roads, lanes and alleys. (IC 36-9-2-5 & 36-9-1-7). A county may regulate the use of public ways. (IC 36-9-2-7).

The area inside the boundaries of a county comprises its territorial jurisdiction, except that a municipality has exclusive jurisdiction over bridges (subject to certain limitations described under IC 8-16-3-1: "Financing Roads and Bridges--Cumulative Bridge Fund"), streets, alleys, sidewalks, watercourses, sewers, drains, and public grounds inside its corporate boundaries unless a statute provides otherwise. (IC 36-1-3-9). The Board of Commissioners of a county and a municipality within the county may enter into interlocal agreements concerning highway construction and maintenance and related matters. (IC 36-1-7-9).

2. Construction, Land Acquisition, Maintenance and Administration.

a. General.

The Board of Commissioners may construct, reconstruct, improve and maintain all public highways (including roads, streets, bridges, tunnels and approaches) and culverts in the county, including highways and culverts under the supervision of the Indiana Department of Transportation, if approved by the Indiana Department of Transportation, or located in municipalities, as provided by law. (IC 8-17-1-1 & 8-17-1-1.2). Each county is responsible for the construction, reconstruction, maintenance, and operation of the roads making up its southern and eastern boundaries. (IC 8-17-1-45(a)).

The Board of Commissioners of two (2) adjoining counties may enter into an agreement under IC 36-1-7 for the construction, reconstruction, maintenance, or operation of any road or part of a road that makes up the boundary between the two (2) counties. In addition to the requirements of IC 36-1-7-3, the agreement must provide for the: (i) division of costs between the counties; (ii) schedule for the work; (iii) method of resolving disputes concerning the agreement if any arise; and (iv) other terms the counties consider necessary. (IC 8-17-1-45(b)).

b. Construction.

The Board of Commissioners may construct new public highways (including roads, streets, bridges, tunnels and approaches) or may reconstruct and improve any existing public highways or parts of those highways with road paving materials. The Board of Commissioners may establish, lay out, alter, widen, vacate, straighten or change public highways (including roads, streets, bridges, tunnels and approaches) in connection with the improvement and may build all necessary bridges, culverts or approaches in the improvement of highways. In addition, the Board of Commissioners must provide easements necessary for drainage and utilities. (IC 8-17-1-2 & 8-17-1-1.2).

The Board of Commissioners may temporarily close or relocate a road or portion thereof that is part of the county's road system for a period not exceeding five years. The order to temporarily close or relocate may be extended in increments of not more than two years. (IC 8-20-8-1). Any person controlling land contiguous to a road may file a petition with the Board of Commissioners to permanently or temporarily close a road pursuant to the procedures set forth in IC 8-20-8. (IC 8-20-8-2).

A county highway right-of-way may not be laid out that is less than twenty (20) feet on each side of the centerline, exclusive of additional width required for cuts, fills, drainage and public safety. (IC 8-20-1-15).

The Board of Commissioners may establish the apparent right-of-way of a county highway for use and control by the Board of Commissioners. "Apparent right-of-way" means the location and width, up to twenty feet on each side of the center line, of county highway right-of-way for purposes of use and control of the right-of-way by the county commissioners. (IC 8-20-1-15.5).

A county executive that desires to establish the apparent right-of-way of a county highway must do the following:

(1) Make a preliminary finding of the apparent right-of-way by using the best available evidence, including physical observation from the ground or air.

(2) From the preliminary finding of the apparent right-of-way;
   (A) Prepare a map and a written description of the apparent right-of-way;
   (B) Give notice of the preliminary finding by publishing the map and the written description in the manner provided by law; and
   (C) Give notice of the preliminary finding by certified mail to the owners of land, according to the records of the county auditor, that abuts the apparent right-of-way.

(3) Conduct a public hearing at which owners of land in the county may:
   (A) Object to the preliminary finding;
   (B) Present evidence in support of or in opposition to the preliminary finding; and

(C) Propose changes to the preliminary finding.

(4) After such public hearing, revise the preliminary finding of the apparent right-of-way, if necessary.

(5) Adopt an ordinance to establish the revised finding as the apparent right-of-way.

(6) Record with the county recorder a map and a written description of the apparent right-of-way as established by the ordinance. (IC 8-20-1-15.5(c)).

If the apparent right-of-way exceeds the legal right-of-way, then the county must acquire the apparent right-of-way by eminent domain. (IC 8-20-1-15.5(e)).

Whenever, in the judgment of the Board of Commissioners, it is necessary to bridge any highway or public street across any navigable water, the Board of Commissioners may construct a tunnel underneath the navigable water, instead of a bridge. (IC 8-16-11-1). If the Board of Commissioners determines it is necessary to construct a tunnel instead of a bridge, then the construction of the tunnel shall be completed under the laws for the construction of bridges on public highways and public streets by the Board of Commissioners. (IC 8-16-11-2).

A county may erect, repair or purchase a bridge that spans a stream which requires a bridge of more than twenty feet in length, which either (i) forms a county boundary line or (ii) crosses a public highway that forms a county boundary line. Adjacent counties may, by concurrent resolutions of their respective Boards of Commissioners, agree to joint participation in such a project. If one county refuses to join in the project, the other county may proceed with the project and, when the cost does not exceed $10,000, recover from the refusing county a portion of the project costs. (IC 8-20-1-35).

c. Land and Right-of-Way Acquisition.

If a highway (including a street, road, bridge, tunnel or approach) is constructed by a county, the right-of-way or any required drainage courses, approaches or any land necessary for the construction of the highway, or land necessary to build a bridge or a culvert, must be acquired by the county. The land may be acquired (i) either by donation by the owners of the land through which the highway passes or by agreement between the owner and the Board of Commissioners, (ii) through eminent domain, or (iii) the public may acquire the property as is necessary in the same manner as provided for the construction of public highways. The entire cost of the right-of-way must be paid by the county. (IC 8-17-1-3).

The Board of Commissioners may acquire the lands and rights necessary to widen, straighten or change the route of any county highway. If it is unable to agree with the owner of the land or right on damages or the purchase price, the Board of Commissioners may exercise eminent domain to condemn the land or right. (IC 8-20-3-1).

d. Maintenance; County Highway Supervisor.

The Board of Commissioners must appoint a supervisor of county highways, who has general charge of the repair and maintenance of county highways. The Board of Commissioners must fix the compensation of the county highway supervisor, and must pay the supervisor when a personal vehicle is used for necessary travel, a sum for mileage at a rate determined by the County Council. The Board of Commissioners must provide all tools and equipment and the housing and repair of the tools and equipment for the maintenance of county highways. (IC 8-17-3-1). Before entering upon the discharge of official duties, a county highway supervisor must execute a bond (under IC 5-4-1) conditioned on the faithful discharge of all duties required of the county highway supervisor. (IC 8-17-3-10).

e. Regulation of Traffic.

The Board of Commissioners, as the legislative body for the county, may adopt ordinances regulating traffic on any highway in the county highway system, subject to IC 9-21. (IC 8-17-1-40).

The Board of Commissioners, as legislative body for the county, may pass an ordinance regulating the operation of off-road vehicles or snowmobiles on certain roads and highways in the county road system if the ordinance meets substantially the minimum requirements of IC 14-16-1. However, such an ordinance may not do any of the following:

(1) Impose a fee for a license.
(2) Specify accessory equipment to be carried on the vehicles.
(3) Require a vehicle operator to possess a driver's license issued under IC 9-24-11 while operating an off-road vehicle or snowmobile.
(4) Imposes a dry weight limitation of less than 2,000 pounds. (IC 14-16-1-22).

f. Administration and Annual Reports.

The Board of Commissioners must set up and maintain an adequate system of records, as prescribed by the State Board of Accounts, for the county's department having road and street responsibilities. (IC 8-17-4.1-2).

No later than April 15 of each year, the Board of Commissioners is required to prepare an operational report for the prior calendar year of the department within the county that has road and street responsibilities. (IC 8-17-4.1-5). This report must be on forms prescribed by the State Board of Accounts and must disclose all information considered necessary by the State Board of Accounts to reflect the financial condition and operations of the department. (IC 8-17-4.1-6). The annual operational report must be completed and a copy filed with the State Board of Accounts, the Board of Commissioners, and the county highway department by June 1 following the operational report year, and is required to be made available to the public. (IC 8-17-4.1-7). On June 15 following the operational report year, the State Board of Accounts is required to prepare a certified list of counties that have complied with the foregoing provisions. The State Board of Accounts shall immediately

apprise the Auditor of the State when this list is initially certified or revised for an operational report year. The Auditor of the State is required to withhold the distribution of motor vehicle highway account funds from any county not appearing on the State Board of Accounts certified list until its annual operational report is certified. (IC 8-17-4.1-8).

g. Highway Engineer.

The Board of Commissioners (or any two or more counties entering into an interlocal agreement under IC 36-1-7) may employ a full-time county highway engineer who is responsible for supervising the design, construction, planning, traffic and other engineering functions of the county highway department under the direction of the Board of Commissioners. (IC 8-17-5-1). The county highway engineer must be a registered engineer, licensed by the state board of registration for professional engineers, experienced in highway engineering and construction and a resident of Indiana during the engineer's employment. (IC 8-17-5-2).

h. Road School.

Each member of the Board of Commissioners elected for the first time after October 31, 2020 must attend the Purdue road school not later than two (2) years after the date of the member's election to the Board of Commissioners. A member of the Board of Commissioners elected prior to October 31, 2020 may attend the Purdue road school. The County Council shall appropriate sufficient funds to pay each member of the Board of Commissioners a per diem for expenses related to attending road school and mileage for each mile traveled to attend road school. (IC 8-17-7-7).

In addition, a county highway supervisor is also required to attend all the sessions of the annual Purdue road school during every year of the supervisor's term. The expenses of the county highway supervisor, including the actual expenses of transportation to and from road school, together with the expense of lodging and tuition, shall be paid from the county highway maintenance fund. (IC 8-17-3-10).

3. Planning and Zoning.

A county desiring to authorize, construct, alter or abandon any public way (including any highway, street, avenue, boulevard, road, lane or alley) must do so in accordance with Indiana's local planning and zoning statute, Indiana Code 36-7-4. (IC 36-7-4-504).

4. Financing Roads and Bridges.

a. General Maintenance.

All expenses incurred in the maintenance of county highways must first be paid out of funds from the gasoline tax, special fuel tax and motor vehicle registration fees that are paid to the county by the State. In addition the county may use funds derived from the county vehicle excise tax, county wheel tax, local income tax, riverboat admission tax, riverboat wagering tax, or property taxes and miscellaneous revenue deposited in the county general fund. (IC 8-18-8-5).

b. County Motor Vehicle Excise Surtax and County Wheel Tax

An Indiana county may impose the Motor Vehicle Excise Surtax (the "Surtax") pursuant to IC 6-3.5-4 and the Wheel Tax pursuant to IC 6-3.5-5. While these are separate taxes, both must be in effect in the county. That is, a county cannot impose one and not the other. The Surtax is imposed on passenger cars, motorcycles, smaller trucks (declared gross weight that does not exceed11,000 pounds), motor driven cycles, collector vehicles, trailer vehicles with a declared gross weightof 9,000 pounds or less, mini-trucks, and military vehicles. (IC 6-3.5-4-2(e)). With certain statutory exceptions, the Wheel Tax is imposed on buses, recreational vehicles, semi-trailers, trailers with a declared gross weight of more than 9,000 pounds, and tractors and trucks with a declared gross weight of more than 11,000 pounds. (IC 6-3.5-5-3).

The Surtax and Wheel Tax may be imposed by the adoption of an ordinance by the County Council of a county or the local income tax council established by IC 6-3.6-3-1 (the "adopting entity") (such ordinances, the "Surtax Ordinance" and the "Wheel Tax Ordinance", respectively, and together, the "Ordinances"). A County Council or local income tax council must concurrently adopt the Surtax Ordinance and the Wheel Tax Ordinance, and the initial Surtax and Wheel Tax rates must be included in the Ordinances imposing the taxes. (IC 6-3.5-4-2/IC 6-3.5-5-2).

If an adopting entity adopts an ordinance imposing the surtax after December 31 but before September 1 of the following year, a vehicle is subject to the tax if it is registered in the county after December 31 of the year in which the ordinance is adopted. If an adopting entity adopts an ordinance imposing the surtax after August 31 but before the following January 1, a vehicle is subject to the tax if it is registered in the county after December 31 of the year following the year in which the ordinance is adopted. However, in the first year the surtax rate or amount is effective, the surtax rate or amount does not apply to the registration of a vehicle for the registration year that commenced in the calendar year preceding the year the surtax rate or amount is first effective. However, in the first year the surtax is effective, the surtax does not apply to the registration of a vehicle for the registration year that commenced in the calendar year preceding the year the surtax is first effective. (IC 6-3.5-4-3, 5/IC 6-3.5-5-5). The increase or decrease in the Surtax or the Wheel Tax would have the same effective date based on the timing of adoption described above. (IC 6-3.5-4-5/IC 6-3.5-5-3).

The Surtax may be imposed annually at the following rates. If a county does not use a transportation asset management plan approved by the Indiana department of transportation, the adopting entity of the county may impose the surtax either: (1) at a rate of not less than two percent (2%) nor more than ten percent (10%); or (2) at a specific amount of at least seven dollars and fifty cents ($7.50) and not more than twenty-five dollars ($25).

If a county uses a transportation asset management plan approved by the Indiana department of transportation, the adopting entity of the county may impose the Surtax either: (1) at a rate of at least two percent (2%) and not more than twenty percent (20%); or (2) at a specific amount of at least seven dollars and fifty cents ($7.50) and not more than fifty dollars ($50).

In either case, the Surtax on a vehicle may not be less than seven dollars and fifty cents ($7.50). The adopting entity shall state the Surtax rate or amount in the ordinance that imposes the tax, which amount may be the same for each vehicle or different for different classifications of vehicles. (IC 6-3.5-4-2).

The Wheel Tax may be imposed at a different rate for each of the classes of vehicles, and the adopting entity may establish different rates within the classes of buses, semitrailers, trailers, tractors, and trucks based on weight classifications of those vehicles that are established by the bureau of motor vehicles for use throughout Indiana. However, the Wheel Tax rate for a particular class or weight classification of vehicles: (1) may not be less than five dollars ($5) and may not exceed forty dollars ($40), if the county does not use a transportation asset management plan approved by INDOT; or (2) may not be less than five dollars ($5) and may not exceed eighty dollars ($80), if the county uses a transportation asset management plan approved by INDOT. The adopting entity shall state the initial wheel tax rates in the ordinance that imposes the tax. (IC 6-3.5-5-2).

After January 1 but on or before September 1 of a year, the adopting entity may by ordinance rescind both the Surtax and Wheel Tax. If the adopting entity adopts such an ordinance, the surtax does not apply to a vehicle registered after December 31 of the year the ordinance is adopted. However, the adopting entity may not rescind or decrease the Surtax or Wheel Tax if any portion of a loan obtained by the county from the State's Distressed Road Fund is unpaid or if any bonds issued in the name of the county by its local county road and bridge board are outstanding. (IC 6-3.5-4-4/IC 6-3.5-5-6).

The County Council is not required to amend an ordinance subject to this section as a result of subsequent statutory amendments concerning vehicle type or weight class for purposes of determining vehicles that are subject to the Surtax or Wheel Tax. The bureau of motor vehicles shall apply an ordinance adopting the Surtax or Wheel Tax as if the ordinance is in compliance with the applicable statute concerning vehicle type or weight class for purposes of determining vehicles that are subject to the Surtax or Wheel Tax. (IC 6-3.5-4-0.1/IC 6-3.5-5-.05).

c. Cumulative Capital Improvement Fund.

The Board of Commissioners may, after public notice and hearing and with the approval of the Indiana Department of Local Government Finance ("DLGF"), establish a cumulative capital improvement fund to provide money for any of the following purposes, among others:

(i) To acquire land or rights-of-way to be used for public ways (including highways, streets, avenues, boulevards, roads, lanes or alleys) or sidewalks;

(ii) To construct and maintain public ways (including highways, streets, avenues, boulevards, roads, lanes or alleys) or sidewalks;

(iii) To purchase or lease equipment and other non-consumable personal property needed by the county for any public transportation use; or

(iv) To purchase or lease equipment to be used to illuminate a public way (including highways, streets, avenues, boulevards, roads, lanes or alleys) or sidewalk; or

(v) To retire (in whole or in part) any general obligation bonds of the county that were issued for the purpose of acquiring or constructing improvements or properties that would qualify for the use of cumulative capital improvement funds (full list of fund's purposes at IC 36-9-16-3).

The County Council may levy a tax, at a rate approved by the DLGF, not to exceed $0.33 on each $100 of taxable property. The tax may be levied annually for any period not to exceed 10 years and may be decreased or increased from year to year, except that the tax may not be increased above the levy approved by the DLGF. (IC 36-9-16-6(a)).

Surplus money in other accounts of the county or other sources, and money acquired from other activities of the county or other sources, may, by resolution of the Board of Commissioners, as legislative body for the county, and with the approval of the department of local government finance, be added to the cumulative capital improvement fund. (IC 36-9-16-6(b)).

Expenditures from the cumulative capital improvement fund may be made only after an appropriation thereof has been made in accordance with applicable law. (IC 36-9-16-6(c)).

The full list of procedures required to establish a cumulative capital improvement fund are found at IC 36-9-16-4.

d. Cumulative Bridge Fund.

The Board of Commissioners may, after public notice and hearing and with the approval of the DLGF, provide a cumulative bridge fund to provide funds for the cost of construction, maintenance and repair of bridges, approaches and grade separations. In those counties in which a cumulative bridge fund has been established, the Board of Commissioners is responsible for providing funds for all bridges— including those in municipalities—within the county, except those bridges on the state highway system. This fund may be used for making county-wide bridge inspection and safety ratings of all bridges in the county not on the state highway system. (IC 8-16-3-1).

To provide for the cumulative bridge fund, the Board of Commissioners may levy a tax, at a rate approved by the DLGF, not to exceed $0.10 on each $100 assessed valuation of taxable property. Expenditures from the cumulative bridge fund may be made only after an appropriation thereof has been made in the manner provided by law for making other appropriations. (IC 8-16-3-3). Also, appropriations may be made without the approval of the DLGF if: (1) the Board of Commissioners requests the appropriation; and (2) the appropriation is for construction, maintaining, or repairing bridges, approaches, or grade separations. (IC 8-16-3-3).

The full list of procedures required to establish a cumulative bridge fund and to levy taxes for such fund are found at IC 6-1.1-41, et seq. (IC 8-16-3-3(a)).

e. Major Bridge Fund.

The Board of Commissioners of any county that (i) has a population of more than 100,000 and less than 700,000, and (ii) has a "major obstruction" between commercial or population centers which is capable of causing an economic hardship because of excess travel required to conduct a normal level of commerce between the two centers, may, after public notice and hearing and with the approval of the DLGF, provide a major bridge fund to make available funding for the construction of "major bridges." A major obstruction which is a part of a county boundary or a State boundary does not qualify for the purpose of establishing a major bridge fund. (IC 8-16-3.1-1 & IC 8-16-3.1-4).

"Major bridges" are defined as:

(1) structures that are 200 or more feet in length and that are erected over a depression or an obstruction for the purpose of carrying motor vehicular traffic or other moving loads. (IC 8-16-3.1-1). However, the structure shall be 100 or more feet in length in certain cities.

(2) an underpass of any length that is designed to carry motor vehicle traffic or other moving loads. (IC 8-16-3.1-1(b)).

"Major obstructions" are defined as physical barriers to the passage of motor vehicle traffic that inhibits the use of the customary highway construction techniques to bridge the barrier without use of a grade separation structure. (IC 8-16-3.1-1(c)).

The Board of Commissioners of an eligible county may levy a tax, at a rate approved by the DLGF and in compliance with IC 6-1.1-41, not to exceed $0.0333 on each $100 assessed valuation of all taxable personal and real property within the county, to provide for a major bridge fund to be used for the construction of major bridges. (IC 8-16-3.1-4).

In Allen County, the Board of Commissioners may levy a tax, at a rate approved by the DLGF, not to exceed $0.0333 on each $100 assessed valuation of all taxable personal and real property within the county, to provide for a major bridge fund to be used for: (i) the construction of major bridges, and (ii) the construction, maintenance, and repair of bridges, approaches, and grade separations with respect to structures other than major bridges. After June 30, 2009, the Board of Commissioners in Allen County are responsible for providing funds for (i) all bridges in unincorporated areas of the county, and (ii) all bridges in each municipality in the county that has entered into an interlocal agreement under IC 36-1-7 with the county to provide bridge funds. This does not apply to providing funds on the state highway system. (IC 8-16-3.1-4).

The full list of procedures required to establish a major bridge fund and to levy taxes for such fund are found at IC 6-1.1-41, et seq. (IC 8-16-3.1-4(a)).

f. Cumulative Capital Development Fund.

The Board of Commissioners (as the legislative body for the county) may, after public notice and hearing and with the approval of the DLGF, establish a cumulative capital development fund to provide money for any of the following purposes, among others, for which property taxes may be imposed within the county:

(i) To (A) acquire land or rights-of-way to be used for public ways (including highways, streets, avenues, boulevards, roads, lanes or alleys) or sidewalks, (B) construct or maintain public ways (including highways, streets, avenues, boulevards, roads, lanes or alleys) or sidewalks, (C) purchase or lease equipment and other non-consumable personal property needed by the county for any public transportation use, (D) purchase or lease equipment to be used to illuminate a public way (including highways, streets, avenues, boulevards, roads, lanes or alleys) or sidewalk, or (E) retire (in whole or in part) any general obligation bonds of the county that were issued for the purpose of acquiring or constructing improvements or properties that would qualify for the use of cumulative capital improvement funds (see "Cumulative Capital Improvement Fund" IC 36-9-16-3).

(ii) To construct, maintain and repair bridges, approaches and grade separations (see "Cumulative Bridge Fund" IC 8-16-3-1); or

(iii) To construct "major bridges" (see "Major Bridge Fund" IC 8-16-3.1-4). (IC 36-9-14.5-2).

The County Council may provide money for the cumulative capital development fund by levying a tax on the taxable property in the county. For purposes of this section, a county in which only the county economic development income tax (IC 6-3.5-7, repealed) was in effect on January 1, 2016, is considered a county in which the local income tax is not in effect unless the county increases, after 2015, the allocation of its local income tax revenue to property tax relief, public safety, or certified shares by an amount that is at least equal to the revenue raised from an income tax rate of twenty-five hundredths percent (0.25%). (IC 36-9-14.5-6).

The maximum property tax rate that may be imposed for property taxes first due and payable during a particular year in a county in which the local income tax is in effect on January 1 of that year, depends upon the number of years the county has previously imposed a tax under this chapter and is determined under the following table:

NUMBER OF YEARS	TAX RATE PER $100 OF ASSESSED VALUATION
0	$0.0167
1 or more	$0.0333

The maximum property tax rate that may be imposed for property taxes first due and payable during a particular year in a county in which the local income tax is not in effect on January 1 of that year depends upon the number of years the county has previously imposed a tax under this chapter and is determined under the following table:

NUMBER OF YEARS	TAX RATE PER $100 OF ASSESSED VALUATION
0	$0.0133
1 or more	$0.0233

Money held in the cumulative capital development fund may be spent for purposes other than specifically enumerated statutory purposes, if the purpose is to protect the public health, welfare or safety in an emergency situation that demands immediate action or to contribute to multiple county infrastructure authority established under IC 36-7-23. Money may be spent for such purposes only if the Board of Commissioners (i) issues a declaration that the public health, welfare, or safety is in immediate danger that requires the expenditure of money in the fund, or (ii) certifies in the minutes of the Board of Commissioners that money is contributed to the authority for capital development purposes. (IC 36-9-14.5-8).

The full list of procedures required to establish a cumulative capital development fund and to levy taxes for such fund are found at IC 6-1.1-41, et seq. (IC 36-9-14.5-2).

g. County Road and Bridge Bonds.

Upon the request of the Board of Commissioners, the County Council may borrow money and issue bonds in the name of the county to provide funds for the purpose of raising money to pay for the construction, reconstruction or improvement of highways, roads, streets, bridges, tunnels or approaches. (IC 8-17-1-13, 8-18-22-3). The costs which may be financed include the costs of the project, costs of issuance and related costs of financing, the payment of interest on the bonds, the

establishment of reserves to secure the bonds, and other expenditures of the county incident to, necessary and convenient to carry out the foregoing. The costs of more than one project may be included in one issue of bonds. (IC 8-18-22-3).

The bonds must be authorized by ordinance of the County Council. (IC 8-18-22-4). The County Council may pledge revenues for the payment of principal and interest on the bonds and for other purposes under the bond ordinance, including revenues from the following sources:

(i) motor vehicle highway account;

(ii) local road and street account;

(iii) county motor vehicle excise surtax;

(iv) county wheel tax;

(v) the local income tax (IC 6-3.6)

(vi) assessments; or

(vii) any other unappropriated or unencumbered money. (IC 8-18-22-6(a)).

However, the County Council may not pledge to levy *ad valorem* property taxes for the payment of principal and interest on the bonds or for other purposes under the ordinance, except for revenues from a cumulative bridge fund tax levy or a major bridge fund tax levy. (See "Cumulative Bridge Fund" and "Major Bridge Fund."). (IC 8-18-22-6(b)).

Indiana Code 6-1.1-20, which allows taxpayers to initiate a petition-remonstrance or referendum process for certain types of bonds payable from *ad valorem* property taxes, does not apply to the issuance of such bonds. (IC 8-18-22-14).

h. Barrett Law Assessments and Financings.

Through the Barrett Law process, a county may undertake to provide sanitary sewers and sanitary sewer tap-ins, sidewalks, curbs, streets, storm sewers, and any other structures necessary or useful for the collection, treatment, purification, and sanitary disposal of the liquid waste, sewage, storm drainage, and other drainage of a municipality. (IC 36-9-36-2). In exchange for undertaking to provide such improvements, a county is authorized to levy annual assessments to pay for the costs of the improvements. An improvement may be made only in unincorporated areas of the county that contain residential or business buildings, and an improvement may not be made on a tract of land that: (a) consists of at least ten (10) acres and contains only one (1) building that is used for residential purposes; or (b) is used solely for agricultural purposes. (IC 36-9-36-3).

Prior to undertaking such improvements and imposing such assessments, the Board of Commissioners must proceed through several steps including the adoption of a preliminary resolution, the filing of an estimate of costs and the publication of notice and the conducting of a hearing. (IC 36-9-36-4 through 10). At the hearing, the Board of Commissioners must determine whether the benefits that will accrue to the property liable to be assessed for the improvement will equal the maximum estimated cost of the improvement. If the Board of Commissioners finds that the benefits will not equal the estimated cost of the improvement, the Board must determine the aggregate amount of special benefits that will accrue to the property liable to be assessed for the improvement. (IC 36-9-36-10). The Board's determination is subject to remonstrances and appeals by a majority of the assessed property owners. (IC 36-9-36-14). The assessment is imposed on each benefitted parcel according to statutory formulas, subject to remonstrances (IC 36-9-36-29 through 34). The county has a lien against each parcel for the assessment. (IC 36-9-36-40).

The Board of Commissioners is required to establish a procedure to permit owners of real property benefitted by the improvements to elect whether to pay assessments in: (i) 10, 20 or 30 annual installments, or (ii) a number of monthly installments that correspond to 10, 20 or 30 annual installments. A person who elects to pay the their assessment in installments under must enter into a written agreement stating that, in consideration of that privilege, the person (i) will not make an objection to an illegality or irregularity regarding the assessment against the person's property, and (ii) will pay the assessment as required by law with specified interest. Such installment agreements are required to be filed in the county auditor's office. An assessment of less than $100 may not be paid in installments. (IC 36-9-36-9.5).

The Board of Commissioners may issue bonds in anticipation of the collection of assessments for an improvement. (IC 36-9-36-44). The Bonds are secured by the county's interest in the assessments and liens upon the parcels. (IC 36-9-36-47).

Any difference between the total assessments for an improvement and the cost of the improvement must be paid by the county. (IC 36-9-36-62(a)). If the county is unable to pay this amount from its general fund, it may issue bonds or certificates of indebtedness to the contractor for the difference. (IC 36-9-36-62(b)). For the purpose of raising money for the payment of certificates of indebtedness, the County Council may levy a special tax on all property in the county, issue or sell bonds of the county or appropriate money from the general fund of the county or from any other source. (IC 36-9-36-64).

i. Distressed Roads.

The Indiana Department of Transportation administers a distressed road fund to provide financial assistance to counties, cities and towns which have serious road and street deficiencies. Qualified counties may apply to the Indiana Department of Transportation for a loan from the distressed road fund. Only the following counties may apply for funding from the distressed road fund: Warrick, DuBois, Gibson, Daviess, Posey, Perry, Spencer, Pike, Martin, and Crawford. (IC 8-14-8).

j. Leases of Bridges.

A county may lease a bridge and pay the lease rental from the cumulative bridge fund and the tax levy for such fund. (See "Cumulative Bridge Fund.") (IC 8-16-3.5-1). Such arrangements permit the lessor, rather than the county, to sell bonds to finance the acquisition and construction of a bridge so that the county need not become "indebted" for constitutional or statutory purposes.

The total annual obligation under all contracts of lease for bridges made by a county may not exceed the county's estimated annual revenue from a cumulative bridge fund levy of $0.20 on each $100 on all taxable personal and real property within the county. (IC 8-16-3.5-1).

A county may enter into a contract of lease with either a for-profit or not-for-profit corporation. (IC 8-16-3.5-3). A not-for-profit corporation may assist the county, before execution of a contract of lease, in the preparation and acquisition of plans, specifications and estimates for the bridge. (IC 8-16-3.5-5). A contract of lease with a for-profit corporation is subject to competitive bid and may only be entered into after compliance with bidding procedures set forth by statute. (IC 8-16-3.5-5.5).

A county may enter into a contract of lease for a bridge only after (i) receipt of a petition for a lease signed by fifty (50) or more taxpayers, (ii) the Board of Commissioners has determined that a need exists for the bridge, (iii) public notice and hearing, and (iv) authorization by the Board of Commissioners. (IC 8-16-3.5-1, 8). Pursuant to IC 6-1.1-18.5-8, the approval of the DLGF is no longer required prior to entering into such a lease. (IC 8-16-3.5-7 and -8).

k. Local County Road and Bridge Boards.

The County Council of a qualified county may establish a local county road and bridge board and a special taxing district comprising the county. (IC 8-14-9-3). The board consists of three members who are appointed by the president of the County Council. (IC 8-14-9-4).

The local county road and bridge board may construct, reconstruct or operate roads or bridges within the district. (IC 8-14-9-5). Whenever it determines that such projects are necessary for the general welfare of persons residing within the district, the board shall (1) adopt preliminary or final plans and specifications for the entire project; and (2) determine the estimated cost of all work and all acquisitions necessary to carry out the project. (IC 8-14-9-6, -7). Following publication of notice, a public hearing and approval by the County Council, the local county road and bridge board shall, for purposes of carrying out the project: (1) let contracts, in accordance with IC 5-17-1; (2) acquire real estate; and (3) employ persons by special contract to render professional or consulting services. (IC 8-14-9-8).

The local county road and bridge board is prohibited from issuing bonds under IC 8-14-9-10 in order to pay for such improvements. (IC 8-14-9-10).

l. Interstate Bridges.

A county bordering on a river or stream which forms the boundary line between Indiana and any adjoining state, through the Board of Commissioners, may build and maintain a bridge across the river or stream, in cooperation with any contiguous governmental unit of the adjoining state. The contiguous unit must join in building and maintaining the bridge, and must pay one-half of the expense. (IC 8-16-5-1).

The County Council must appropriate, out of the money raised by taxation or realized from the sale of county road and bridge bonds, one-half of the necessary money to build and maintain the bridge. (See "County Road and Bridge Bonds."). (IC 8-16-5-3).

m. County Toll Road Authorities.

A county may establish a county toll road authority for the purpose of acquiring land and financing, constructing, reconstructing and operating county "toll roads." (IC 8-18-20-4). A "toll road" is defined to include the land required for a toll road right-of-way and any highway constructed by a county toll road authority, including all bridges, tunnels, interchanges, entrance plazas, approaches, tollhouses and buildings required for administrative and maintenance purposes. (IC 8-18-20-3).

Establishment of a county toll road authority requires public notice and hearing and a concurrent resolution by the Board of Commissioners, the County Council and the municipal fiscal body of the county seat. (IC 8-18-20-5). A board of trustees is then appointed by the Board of Commissioners, the County Council and the municipal fiscal and executive bodies of the county seat. (IC 8-18-20-6). The board of trustees appoints a board of directors, which controls the county toll road authority. (IC 8-18-20-11).

The board of directors of a toll road authority, acting in the name of the authority, may, among other things, finance, construct, reconstruct, operate, maintain and manage any toll road project acquired or financed by the authority. (IC 8-18-21-3).

The board of directors of a county toll road authority may issue revenue bonds of the authority for the purpose of obtaining money to pay the cost of: (i) constructing toll road facilities, (ii) acquiring land, (iii) repaying any advances of preliminary expenses made to the authority, or (iv) refinancing certain loans (described below). The bonds are payable solely from the income and revenues of the toll road facilities for which the bonds were issued. (IC 8-18-21-5).

In lieu of authorizing and selling bonds, the board of directors of a county toll road authority may negotiate a loan or loans for the purpose of obtaining the required money. (IC 8-18-21-10).

C. Watercourses.

A county may establish, vacate, maintain and control watercourses, including lakes, rivers, streams and any other body of water. (IC 36-9-2-8). A county may change the channel of, dam, dredge, remove an obstruction in, straighten and widen a watercourse. (IC 36-9-2-9). A county may regulate any business use of a watercourse. (IC 36-8-2-7).

The County Council may, by ordinance, borrow money, and, subject to IC 5-11-14(c) issue bonds or other obligations of the county for the purpose of procuring money to be used in the exercise of county powers, including its powers with respect to watercourses. (IC 36-2-6-18).

D. Public Transportation.

1. General.

A county may establish, aid, maintain and operate airports, bus terminals, railroad terminals, wharves and other transportation facilities. (IC 36-9-2-3). A county may regulate the services offered by persons who hold out for public hire the use of vehicles. This power includes the power to fix the price to be charged for that service. A county may not regulate a transportation network company (see IC 8-2.1-17-18) or a TNC driver (see IC 8-2.1-17-18). (IC 36-9-2-4).

2. Financing Public Transportation.

a. Cumulative Capital Improvement Fund.

The Board of Commissioners may, after public notice and hearing and with the approval of the DLGF, establish a cumulative capital improvement fund to provide money to purchase or lease equipment and other nonconsumable personal property needed for any public transportation use. (IC 36-9-16-3 (11)).

The County Council may levy a tax, at a rate approved by the DLGF, not to exceed $0.33 on each $100 of taxable property. The tax may be levied annually for any period not to exceed ten (10) years. Expenditures from the cumulative capital improvement fund may be made only after an appropriation thereof has been made in accordance with applicable law. (IC 36-9-16-6).

b. General Obligation Bonds.

The County Council may, by ordinance, borrow money and issue bonds or other obligations of the county for the purpose of procuring money to be used in the exercise of county powers, including its powers with respect to airports, bus terminals, railroad terminals, wharves and other transportation facilities (other than highways, roads, streets, bridges, tunnels or approaches). (See "County Road and Bridge Bonds"). (IC 36-2-6-18).

a. Tax Increment Financing.

The County, acting through it redevelopment commission, may establish tax increment allocation area and use tax increment revenues (TIF) to finance road improvements located in or directly serving or benefitting an economic development area. (IC 36-7-14, IC 36-7-25).

b. Other Financing.

For a discussion of financing for certain airports and common carriers, see "Airports," "Regional Transportation Authorities" and "Commuter Transportation Districts" below.

3. Airports.

a. County Boards of Aviation Commissioners.

The County Council may, by adopting an ordinance or resolution in favor of and declaring a necessity for the acquisition, improvement, operation or maintenance of an airport or landing field for the county, establish a department of aviation as an executive department of the county. The department of aviation is under the control of a four member board of aviation commissioners appointed by the Board of Commissioners, as specified by statute. (IC 8-22-2-1). In St. Joseph County, the County Council and the mayors of the two cities in the county with the largest population may each appoint one additional member. In certain counties (Clark and Putnam Counties), the Board of Commissioners may add one additional member to the board. (IC 8-22-2-1). Except in certain counties, the County Council may adopt an ordinance or a resolution providing that the board of aviation commissioners consists of five (5) members. If the board consists of five (5) members, not more than three (3) members may be of the same political party. (IC 8-22-2-1(g)).

A county board of aviation commissioners is empowered, among other things, to acquire, establish, construct, improve, equip, maintain, control, lease, and regulate municipal airports and landing fields and other air navigation facilities, for the use of airplanes and other aircraft, either inside or outside the corporate limits of the county, subject to statutory limitations. (IC 8-22-2-5).

If, at the time of the creation, appointment, and qualification of a county board of aviation commissioners, the county owns or controls an airport, landing field, or other air navigation facilities, then the exclusive control, management, and authority over the airport, landing field, or other air navigation facilities at once transfers to the board. Any unexpended balance of any fund or funds appropriated by the county for aviation purposes becomes a part of the aviation fund of the department of aviation. (IC 8-22-2-5).

In addition to other taxes of the county, a tax may be levied annually by the County Council for aviation purposes, which tax must be collected as other taxes are collected. These taxes must be deposited in the treasury of the county in a separate "aviation fund." Only one tax levy for aviation purposes may be imposed upon the assessed property in a county, city or town unless that unit approves by ordinance the levy of more than one tax for aviation purposes. (IC 8-22-2-7).

The County Council may appropriate and transfer to the aviation fund any sum or sums out of the general funds of the county, in accordance with statutes providing for additional appropriations for the county. Subject to certain exceptions, all funds received by the board of aviation commissioners must be deposited in the aviation fund. All monies in the aviation fund are to be used for aviation purposes. (IC 8-22-2-7).

The County Council may borrow money and issue bonds of the county for aviation purposes. Proceeds from such bonds must be deposited to the aviation fund of the county. (IC 8-22-2-7).

Counties, cities, towns or other municipal corporations or districts may jointly acquire, construct, develop, improve, equip or extend airports or property to be used for aviation purposes, maintain, operate, manage and control it, and levy and collect taxes for this purpose. Two or more such entities may cooperate for this purpose by contributing to the total cost and sharing from it on terms that they agree upon. (IC 8-22-2-14).

The County Council may issue and sell revenue bonds to provide for the payment of the costs of the following: (i) airport capital improvements, including the acquisition of real property; (ii) construction or improvement of revenue producing buildings or facilities owned and operated by the county; and (iii) payment of any debt instrument (other than a revenue or general obligation bond). Such bonds are payable only out of a fixed proportion of the income and revenues of the buildings or facilities set aside into a separate fund for that purpose and are not a general obligation of the county. The remaining income and revenue must be used for operation and maintenance and for depreciation. Bondholders have a statutory mortgage lien upon the buildings or facilities for which the bonds are issued. (IC 8-22-2-18).

With the approval of County Council, a board of aviation commissioners may borrow money from any source for the payment of costs of airport capital improvements, including the acquisition of real property or construction or improvement of revenue producing buildings or facilities located on an airport and owned and operated by the county. Such borrowings are payable solely from revenues of the board that are derived from either airport operations or from revenue bonds, and may not be paid by a tax levied on property located within the county. (IC 8-22-2-18.5). After a board enters into a loan contract, the board may use funds received from state or federal grants to satisfy the repayment of part or all of the loan contract. (IC 8-22-2-18.5(c)).

b. County Airport Authorities.

The County Council may, individually or jointly with one or more other counties, cities, towns or other municipal corporations or districts, by ordinance or resolution, establish an airport authority. The authority has jurisdiction over a district with boundaries coterminous with the jurisdictional boundaries of the entity or entities adopting the ordinance or resolution. (IC 8-22-3-1). An airport authority is established in Allen County by statute. (IC 8-22-3-1.1).

The establishment of an airport authority is subject to a remonstrance by petition of registered voters within a district, and may be submitted to the voters of the district at the next primary or general election if at least the number of registered voters of the district required to place a candidate on the ballot under IC 3-8-6-3 remonstrate. (IC 8-22-3-2).

The executive and legislative powers of a county airport authority are exercised by a board appointed by the Board of Commissioners and other participating governmental entities, if any, as specified by statute. (IC 8-22-3-3, 4). In addition, except for certain boards, the County Council may adopt an ordinance or a resolution providing that the board of an aviation authority consists of five (5) members. If the board consists of five (5) members, not more than three (3) members may be of the same political party. (IC 8-22-3-4(g)).

If an airport authority is established by Clark County, the board must consist of four (4) members. Three (3) of the members of the board shall be appointed by the county executive of Clark County; and one (1) of the members of the board shall be appointed by the legislative body of the town of Sellersburg. The board may consist of five (5) members if the fiscal body of Clark County adopts an ordinance or resolution to that effect. (IC 8-22-3-4(h)).

The board supersedes all boards of aviation commissioners within the district. The board has exclusive jurisdiction within the district. (IC 8-22-3-11).

The board of an airport authority may do all acts necessary or reasonably incident to carrying out its purposes. This includes the power to acquire, establish, construct, improve, equip, maintain, control, lease, and regulate municipal airports, landing fields and other air navigation facilities, either inside or outside the district. (IC 8-22-3-11).

With the approval of the County Council, the board of a county airport authority may issue general obligation bonds of the county airport authority for the purpose of procuring funds to pay the cost of acquiring real property or constructing, enlarging, improving, remodeling, repairing or equipping buildings, structures, runways or other facilities, for use as or in connection with or for administrative purposes of the airport. In order to issue such general obligation bonds, the board must comply with Indiana Code 6-1.1-20 and 5-1, relating to the filing of a petition requesting the issuance of bonds, notices, approval of appropriations by the DLGF, taxpayer, remonstrances and public sale of the bonds. These general obligation bonds are an indebtedness of the authority, not the county. (IC 8-22-3-16).

For the purpose of raising money to pay such general obligation bonds, the board of a county airport authority must levy each year a special tax upon all of the property, both real and personal, located within the district The tax must be collected by the treasurer of the county, paid to the treasurer of the authority, held in a separate fund known as the "Airport Authority Bond Fund" and applied to the payment of the bonds, and the interest on them as they severally mature and to the payment of lease rentals and to no other purposes. (IC 8-22-3-17).

The board of a county airport authority may finance capital improvements (including the acquisition of real estate), refund any bonds or pay any loan contract by borrowing money and issuing revenue bonds. The revenue bonds are special obligations of the authority and are payable solely from and secured by a lien upon the revenues of all or part of the facilities of the authority, as specified by ordinance of the board of the county airport authority. Subject to the constitution and to the prior or superior rights of any person, the board of the county airport authority may by ordinance pledge or assign for the security of the bonds all or part of the gross or net revenues of the enterprise. (IC 8-22-3-18.1(a) and (f)).

Temporary loans may be made by the board of an airport authority in anticipation of the collection of taxes of the authority actually levied and in course of collection for the fiscal year in which the loans are made. (IC 8-22-3-19).

With the approval of the board, an airport authority may negotiate terms and borrow money from any source under a loan contract. The loan contract must state that the indebtedness is that of the authority and is payable solely from a cumulative building fund, revenues of the authority that are derived from either airport operations or from revenue bonds, or both, and they may not be paid by a general operation fund tax levied on property located within the district. (IC 8-22-3-19). After the board of an authority enters into a loan contract, the board may use funds received from state or federal grants to satisfy the repayment of part or all of the loan contract. (IC 8-22-3-19(d)).

The board of an airport authority must annually prepare a budget and calculate the tax levy necessary to provide funds for its operations. The budget is subject to the same reviews by the county tax adjustment board (if so existing in the county) and the DLGF as exist for budgets of other governmental units. The County Council may review and modify the budget and tax levy. (IC 8-22-3-23). The maximum permissible amount of the tax rate is subject to certain statutory limitations. (IC 8-22-3-11). The tax levy must be assessed and collected as other taxes are levied and collected and must be remitted to the airport authority. Each year the board may transfer to the authority's cumulative building fund an amount not to exceed five (5%) percent of the taxes under this section in that year. (IC 8-22-3-24).

The board of an airport authority may, after public notice and hearing and approval of the DLGF, provide a cumulative building fund to provide for the acquisition of real property and the construction, enlarging, improving, remodeling, repairing or equipping of buildings, structures, runways or other facilities for use in connection with the airport and needed to carry out the purposes of the authority. The amount of the tax levied to fund the cumulative building fund is subject to certain statutory limitations. (IC 8-22-3-25).

c. Airport Development Zone.

An airport development zone may be created by Marion, Vigo, Allen, Clark, Vanderburgh and Delaware Counties. (IC 8-22-3.5-1). Under IC 8-22-3.5, businesses locating in an airport development zone are entitled to certain benefits.

d. Cumulative Capital Development Fund.

The Board of Commissioners may, after public notice and hearing and with the approval of the DLGF, establish a cumulative capital development fund to provide money for the acquisition of real property and the construction, enlarging, improving, remodeling, repairing or equipping of buildings, structures, runways or other facilities for use in connection with the airport of a county airport authority. See "County Airport Authorities." (IC 36-9-14.5-2).

The County Council may provide money for the cumulative capital development fund by levying a tax on the taxable property in the county. The tax rate must be approved by the DLGF. The County Council may provide money for the cumulative capital development fund by levying a tax on the taxable property in the county. The tax rate must be approved by the DLGF. For purposes of this section, a county in which only the county economic development income tax (IC 6-3.5-7, repealed) was in effect on January 1, 2016, is considered a county in which the local income tax is not in effect unless the county increases, after 2015, the allocation of its local income tax revenue to property tax relief, public safety, or certified shares by an amount that is at least equal to the revenue raised from an income tax rate of twenty-five hundredths percent (0.25%). (IC 36-9-14.5-6).

The maximum property tax rate that may be imposed for property taxes first due and payable during a particular year in a county in which the local income tax is in effect on January 1 of that year, depends upon the number of years the county has previously imposed a tax under this chapter and is determined under the following table:

NUMBER OF YEARS	TAX RATE PER $100 OF ASSESSED VALUATION
0	$0.0167
1 or more	$0.0333

The maximum property tax rate that may be imposed for property taxes first due and payable during a particular year in a county in which the local income tax is not in effect on January 1 of that year depends upon the number of years the county has previously imposed a tax under this chapter and is determined under the following table:

NUMBER OF YEARS	TAX RATE PER $100 OF ASSESSED VALUATION
0	$0.0133
1 or more	$0.0233

e. Airports in Localities on State Border.

Governmental units in each of two party states may, with the approval of the respective aeronautics commissions of the party states, combine in the creation of an airport authority for the purpose of jointly supporting and operation an airport terminal and all attached properties. (IC 8-22-4-1, -7).

The airport authority must be composed of an equal number of members from each party state, designated or appointed by the legislative body of the participating governmental unit. (IC 8-22-4-1).

An airport authority may, among other things, construct, lease, operate and conduct an airport. (IC 8-22-4-4).

A party state is not obligated to appropriate funds of the state for the development, support and maintenance of the airport authority. All revenue received from the air facility and the property, both real and personal, within the jurisdiction and control of the airport authority must be applied to the maintenance and development of the air facility. (IC 8-22-4-3).

Revenue bonds to be retired exclusively from income received from the operation of the air facility may be issued by the airport authority and in the name of the authority in accordance with the statutes of the state in which the air facility is located that prescribe the terms and conditions for the issuance of revenue bonds by airport authorities. (IC 8-22-4-3).

The airport authority may secure loans from private financing and offer as collateral those assets, real, personal or mixed, in accordance with the statutes of the state in which the airport is located. (IC 8-22-4-3).

Each year the airport authority shall prepare a budget of its estimated expenditures. The estimated expenditures must be allocated and prorated equally between the various combining governmental units. To provide funds to pay its share of the proposed expenditures, each combining governmental unit may annually levy a tax on property located within the governmental unit at a rate

sufficient to raise funds to pay its prorated share of estimated expenditures. The tax must be levied and collected in the same manner as other property taxes are levied and collected by the governmental unit and in accordance with the statutes of the state in which the unit is located. The money raised by the tax levy must be appropriated and distributed to the airport authority by the governmental unit Funds so appropriated must be used exclusively for the development and maintenance of the air facility. (IC 8-22-4-3).

f. Local Participation in Interstate Airports.

The Board of Commissioners may acquire, establish, construct, own, control, lease, equip, improve, maintain and operate airports, landing fields or other air navigation facilities in an adjoining state if the statutes of the adjoining state permit that action, subject to statutes, rules and regulations of the adjoining state applicable to its own political subdivisions in aeronautical projects, but subject to Indiana law in matters relating to the financing of such projects. (IC 8-22-5-3).

4. Regional Transportation Authorities.

The County Council or the fiscal body of a municipality may, by ordinance, establish a regional transportation authority for the purpose of acquiring, improving, operating, maintaining, financing and generally supporting a "public transportation system" that operates within the boundaries of an area designated as a transportation planning district by the Indiana Department of Transportation. (IC 36-9-3-2). A "public transportation system" is defined as "any common carrier of passengers for hire." (IC 36-9-1-6). The authority may be expanded to include one or more additional counties or municipalities within the same planning district if resolutions approving the expansion are adopted (i) by the fiscal bodies of the counties and municipalities to be added to the authority and (ii) a majority of the fiscal bodies of the counties and municipalities already in the authority. (IC 36-9-3-3).

A regional transportation authority is under the control of a board that includes members appointed by the Board of Commissioners and certain municipalities within the county, as specified by statute. (IC 36-9-3-5).

The board of the regional transportation authority may, among other things, acquire, establish, construct, improve, equip, operate, maintain, subsidize and regulate public transportation systems within the jurisdiction of the authority. (IC 36-9-3-13).

The county or municipality that establishes the authority is required to pay the expenses incurred in the organization of the authority; however, the amount of expenses paid may not exceed the amount for authority expenses set by the fiscal body of the establishing county or municipality. If two or more counties or municipalities cooperate to establish the authority, the division of the costs incurred in the organization must be included in the agreement entered into by the counties or municipalities. The board shall, from time to time, certify the items of expense to the county auditor, according to the terms of the agreement. The authority shall fully reimburse each county or municipality out of the first proceeds of any special taxes levied. (IC 36-9-3-30).

5. Central Indiana Public Transportation Projects.

One or more of Delaware County, Hamilton County, Hancock County, Hendricks County, Johnson County, Madison County or Marion County may establish a public transportation system through a public transportation project authorized and funded under IC 8-25. The county must establish fares and charges that cover at least 25% of the operating expenses of the public transportation system. Operating expenses include only those expenses incurred in the operation of fixed route services that are established or expanded as a result of a public transportation project authorized and funded under IC 8-25. The county needs to report the county's compliance with this annually, no later than 60 days after the close of the county's fiscal year. This needs to include information on fare increases necessary to achieve compliance. The report needs to be submitted to the department of local government finance and it must be made available on the Indiana transparency Internet website. (IC 36-9-2-2(b)).

6. Commuter Transportation Districts.

Qualifying counties which so opted prior to January 1, 1987, are members of a commuter transportation district. Each commuter transportation district includes all territory of the counties that are served by the system and through which the system passes and shall be coterminous with such counties. (IC 8-5-15-2). These districts were established to support "commuter transportation systems," defined as "any rail common carrier of passengers for hire, the line, route, road or right-of-way of which crosses one or more county boundaries and one or more boundaries of the state and serves residents in more than one county." This system is limited to commuter passenger railroads. (IC 8-5-15-1).

A commuter transportation district is supervised and managed by a board of trustees, which is made up by the INDOT commissioner, or the commissioner's designee, who serves as the chair, and 4 members appointed by the governor, consisting of 1 elected official from each county served by the system and through which the system passes. (IC 8-5-15-3).

The board of trustees of a commuter transportation district has all powers reasonably necessary to carry out its purposes. This includes the power to purchase, acquire, lease, construct, maintain, repair, police and operate a railroad. However, the board of trustees of a commuter transportation district does not have the power to levy taxes. (IC 8-5-15-5).

With the approval of the Indiana Department of Transportation, the board of trustees of a commuter transportation district may issue revenue bonds of the commuter transportation district for the purpose of paying all or any part of the cost of a railroad project, including any facilities, adjuncts and appurtenances necessary to operate a railroad. (IC 8-5-15-5.4). The revenue bonds are payable solely from the revenues specifically pledged to the payment thereof. (IC 8-5-15-5.4). The board may pledge all or any portion of the revenues received or to be received by the board, except such part as may be necessary to pay the board's administrative expenses, operation, maintenance and repair of the railroad, and to provide a reserve for the bonds. (IC 8-5-15-5.5). If bonds are outstanding, the board must deposit in a separate and distinct fund all amounts distributed to the

district from the commuter rail service fund and the electric rail service fund to pay debt services on the bonds. (IC 8-5-15-5.7).

Any financial or operating agreements between a district and a system must conform to certain statutory standards and must be approved by the Indiana Department of Transportation. (IC 8-5-15-20 through 23).

IX. TORTS CLAIMS ACT

A. Introduction.

The doctrine of sovereign immunity once protected all levels of Indiana government from suit or liability. The enactment of the Indiana Tort Claims Act in 1974 was a legislative response to the decision of the Indiana Supreme Court that abolished sovereign immunity for the State and its political subdivisions. Although this statute authorizes suits against Indiana governmental units, it imposes a number of procedural and substantive limits on suit against local governments. The Tort Claims Act establishes a uniform body of law to govern the prosecution of tort claims against the State and other governmental entities. See Gonser v. Bd. of Comm'rs for Owen County, 378 N.E.2d 425 (Ind. App. 1978). The Act is also intended to protect the fiscal integrity of state governmental entities and their political subdivisions by limiting their liability for tort claims resulting from actions of public employees. J.A.W. v. State, 650 N.E.2d 1142, 1153 (Ind. Ct. App. 1995).

Indiana's Tort Claims Act applies only to State-law tort claims, and the Tort Claims Act is not to be applied retroactively. Irwin Mortg. Corp. v. Marion Cty. Treasurer, 816 N.E.2d 439, 447 (Ind. Ct. App. 2004). The Tort Claims Act does not affect an individual's federal rights under, for instance, 42 U.S.C. § 1983, the federal Civil Rights Act. Thus, the notice requirements of Indiana's Tort Claims Act do not apply to a civil rights claim based on 42 U.S.C. § 1983. Meury v. Eagle–Union Cmty. School Corp., 714 N.E.2d 233, 242 (Ind. Ct. App. 1999). Accordingly, a plaintiff may pursue State and federal remedies at the same time. (IC 34-13-3-1)

The Tort Claims Act is not be construed as: (1) a waiver of the Eleventh Amendment to the United States Constitution, (2) consent by the State of Indiana or its employees to be sued in any federal court, or (3) consent to be sued in any state court beyond the boundaries of Indiana. (IC 34-13-3-5(f))

B. Definitions.

In order to fully understand the scope of the Tort Claims Act, the following definitions may be helpful:

1. Governmental Entities.

For the purposes of the Tort Claims Act, "governmental entities" include, among others, counties and their respective boards and commissions. (IC 34-6-2-49)

2. Employee.

"Employee" or "public employee" means a person presently or formerly acting on behalf of a governmental entity, including members of boards, committees, commissions, authorities, and other instrumentalities of governmental entities, volunteer firefighters, and elected public officials. A person may qualify as an "employee" under the Tort Claims Act regardless of whether the employment is temporary or permanent, or with or without compensation. (IC 34-6-2-38); see also Teague v. Boone, 442 N.E.2d 1119 (Ind. Ct. App. 1982) (county commissioner is employee as defined by Tort Claims Act).

The term "employee" does not include: (1) an independent contractor; or (2) an agent or employee of an independent contractor; however, the term "employee" includes attorneys at law employed by a governmental entity as an employee or independent contractor, or a physician or optometrist providing health care to confined offenders. (IC 34-6-2-38(b))

3. Persons or Entities Considered Political Subdivisions.

In addition to the obvious entities (*i.e.*, counties, cities, towns, special taxing districts, etc.), for purposes of the Tort Claims Act, the following are also treated as political subdivisions: (1) a community action agency, as defined in IC 12-14-23-2; (2) an individual or corporation rendering public transportation services under a contract with a commuter transportation district created under IC 8-5-15; (3) a volunteer fire department, as defined in IC 36-8-12-2, that is acting under either a contract with a unit or a fire protection district, or IC 36-8-17.

Whether a board, department or other entity is a separate political subdivision subject to the Tort Claims Act is frequently determined by whether the General Assembly has designated it as an entity that may "sue or be sued." S.E. by Next Friend Glaser v. City of Carmel, Cause No. 22A-CT-520 (Ind. Ct. App. Nov. 22, 2022).

4. Scope of Employment.

The Tort Claims Act applies to the acts of employees within the scope of their employment. Celebration Fireworks, Inc. v. Smith, 727 N.E.2d 450, 452 (Ind. 2000). "Scope of employment' is difficult to define that is generally applied on a case-by-case determination of the facts. It generally refers to "acts which are so closely connected with what the [employee] is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods of carrying out the objectives of the employment." W. Keeton, Prosser and Keeton on the Law of Torts § 70 (5th ed. 1985).

For example, the Tort Claims Act applies to certain persons who administer medications to pupils at school. (IC 34-30-14-2) The Act also applies to licensed teachers who perform cardiopulmonary resuscitation or the Heimlich maneuver on, remove a foreign body that is obstructing the airway of, or uses an automatic external defibrillator on, another person, in the course of employment as a teacher, unless the teacher's act or omission constitutes gross negligence or willful and wanton misconduct. (IC 34-30-14-7)

Unauthorized conduct and even criminal misconduct can be within the scope of employment if the government employee uses his or her authority to commit the act. Cox v. Evansville Police Department, 107 N.E.3d 453 (Ind. 2018). For instance, cases have held that a police officer who sexually assaulted a plaintiff was acting within the scope of his employment because he was on duty at the time and used his authority as a police officer to detain the plaintiff prior to the assault. Id.; Ingram v. City of Indianapolis, 759 N.E.2d 1144 (Ind. Ct. App. 2001).

5. Loss.

The term "loss" means injury to or death of a person, or damage to property. (IC 34-6-2-75) This term has been broadly construed to include all torts, including retaliatory discharge. Holtz v. Bd. of Comm'rs, 560 N.E.2d 645 (Ind. 1990).

6. Discretionary Acts.

One of the primary policies underlying the Tort Claims Act is to protect public officials in the performance of their duties by preventing the threat of civil litigation over decisions they make in the course of employment. Bd. of Comm'rs of Hendricks County v. King, 481 N.E.2d 1327 (Ind. Ct. App. 1985). (IC 34-13-3-3(a)(7)).

A duty of a governmental entity or employee is "discretionary" within the purview of the Tort Claims Act when it requires an individual to determine whether he or she should perform a certain act, and, if so, in what particular way. Maroon v. State, Dep't of Mental Health, 411 N.E.2d 404 (Ind. Ct. App. 1980). Thus, a governmental employee or official who performs discretionary functions will enjoy immunity for acts within the scope of his or her employment and will not be held liable for any error, mistakes of judgment or unwise decisions he or she may make in the exercise of that decision. Foster v. Pearcy, 387 N.E.2d 446 (Ind. 1979), cert. denied, 445 U.S. 960 (1980). However, providers of medical or optical care to confined offenders within the course of their employment by or contractual relationship with the department of correction are considered to be engaged in ministerial acts. The critical inquiry is not merely if judgment was exercised, but if the nature of the judgment called for policy considerations. Greathouse v. Armstrong, 616 N.E.2d 364, 366-67 (Ind. 1993). Although there is no need for the entity to demonstrate that it considered and rejected the specific actions alleged in order to be entitled to discretionary function immunity, a governmental entity must demonstrate that conscious balancing and deliberation took place. City of Beech Grove v. Beloat, 50 N.E.3d 135 (Ind. 2016). For example, a city was immune in a lawsuit involving a sidewalk in disrepair because the schedule for repairs was established by a city policy and the city had the sidewalk scheduled to be repaired pursuant to that policy. City of Indianapolis v. Duffitt, 929 N.E.2d 231 (Ind. Ct. 2010).

On the other hand, there is no immunity for ministerial functions. Thus, the decision to construct a county road is a discretionary function protected under the Act, whereas the actual installation, maintenance, and repair of the road are ministerial functions, for which the governmental entity may be liable for negligence. Chandradat v. Ind. Dep't of Transp., 830 N.E.2d 904 (Ind. Ct. App. 2005); County of Laporte v. James, 496 N.E.2d 1325 (Ind. Ct. App. 1986). Similarly, INDOT's enactment of a policy as to where highway u-turns would be located was protected by the immunity but the decision not to use a protective barrier on a specific jobsite was not protected. Indiana Dept. of Transp. v. Sadler, 33 N.E.3d 1187 (Ind. Ct. App. 2015).

C. Actions or Conditions Resulting in No Liability.

A governmental entity or an employee acting within the scope of his or her employment is not liable if a loss results from:

(1) The natural condition of unimproved property.

(2) The condition of a reservoir, dam, canal, conduit, drain, or similar structure when used by a person for a purpose which is not foreseeable.

(3) The temporary condition of a public thoroughfare or extreme sport area which results from weather. The condition being temporary is determined by whether the

governmental body has had the time and opportunity to remove the obstruction but failed to do so. See Catt v. Bd. of Comm'rs of Knox County, 779 N.E.2d 1 (Ind. 2002). The window in which the governmental body has been found to not have had time and opportunity to remove the obstruction extends for at least until the weather condition has stabilized. Bules v. Marshall County, 920 N.E.2d 247, 248 (Ind. 2010). The cause of the injury must be the temporary weather condition and not actions of the government entity. Staat v. Indiana Department of Transportation, 177 N.E.3d 427 (Ind. 2021).

(4) The condition of an unpaved road, trail, or footpath, the purpose of which is to provide access to a recreation or scenic area.

(5) The design, construction, control, operation, or normal condition of an extreme sport area, if all entrances to the extreme sport area are marked with:

(a) a set of rules governing the use of the extreme sport area;

(b) a warning concerning the hazards and dangers associated with the use of the extreme sport area; and

(c) a statement that the extreme sport area may be used only by persons operating extreme sport equipment.

This provision is not be construed to relieve a governmental entity from liability for the continuing duty to maintain extreme sports areas in a reasonably safe condition.

(6) The initiation of a judicial or administrative proceeding.

(7) The performance of a discretionary function; however, the provision of medical or optical care as provided in IC 34-6-2-38 shall be considered a ministerial act.

(8) The adoption and enforcement of or failure to adopt or enforce a law (including rules and regulations), unless the act of enforcement constitutes false arrest or false imprisonment.

(9) An act or omission performed in good faith and without malice under the apparent authority of a statute which is invalid, if the employee would not have been liable had the statute been valid.

(10) The act or omission of someone other than the governmental entity or the governmental entity's employee.

(11) The issuance, denial, suspension, or revocation of, or failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, approval, order, or similar authorization, where the authority is discretionary under the law.

(12) Failure to make an inspection, or making an inadequate or negligent inspection, of any property, other than the property of a governmental entity, to determine whether the property complied with or violates any law or contains a hazard to health or safety.

(13) Entry upon any property where the entry is expressly or implicitly authorized by law.

(14) Misrepresentation if unintentional.

(15) Theft by another person of money in the employee's official custody, unless the loss was sustained because of the employee's own negligent or wrongful act or omission.

(16) Injury to the property of a person under the jurisdiction and control of the department of correction if the person has not exhausted the administrative remedies and procedures provided by IC 34-13-3-7.

(17) Injury to the person or property of a person under supervision of a governmental entity and who is either (a) on probation, or (b) assigned to an alcohol and drug services program under IC 12-23, a minimum security release program under IC 11-10-8, a pretrial conditional release program under IC 35-33-8, or a community corrections program under IC 11-12.

(18) Design of a highway (as defined in IC 9-13-2-73), toll road project (as defined in IC 8-15-2-4(4)), tollway (as defined in IC 8-15-3-7, or project (as defined in IC 8-15.7-2-14), if the claimed loss occurs at least twenty (20) years after the public highway, toll road project, tollway, or project was designed or substantially redesigned; except that this provision is not be construed to relieve a responsible governmental entity from the continuing duty to provide and maintain public highways in a reasonably safe condition.

(19) Development, adoption, implementation, operation, maintenance, or use of an enhanced emergency communication system.

(20) Injury to a student or a student's property by an employee of a school corporation if the employee is acting reasonably under a discipline policy adopted under IC 20-33-8-12.

(21) An act or omission performed in good faith under the apparent authority of a court order described in IC 35-46-1-15.1 that is invalid, including an arrest or imprisonment related to the enforcement of the court order, if the governmental entity or employee would not have been liable had the court order been valid.

(22) An act taken to investigate or remediate hazardous substances, petroleum, or other pollutants associated with a brownfield (as defined in IC 13-11-2-19.3), unless

(a) the loss is a result of reckless conduct; or

(b) the governmental entity was responsible for the initial placement of the hazardous substances, petroleum, or other pollutants on the brownfield.

(23) The operation of an off-road vehicle (as defined in IC 14-8-2-185) by a nongovernmental employee, or by a governmental employee not acting within the scope of the employment of the employee, on a public highway in a county road system outside the corporate limits of a city or town, unless the loss is the result of an act or omission amounting to:

(a) gross negligence;

(b) willful or wanton misconduct; or

(c) intentional misconduct.

This provisions is not be construed to relieve a governmental entity from liability for the continuing duty to maintain highways in a reasonably safe condition for the operation of motor vehicles licensed by the bureau of motor vehicles for operation on public highways.

For causes of action that accrue during a period of state disaster emergency declared under IC 10-14-3-12 to respond to COVID-19, if the state of disaster emergency was declared after February 29, 2020, and before April 1, 2022 the county or any employee of the county acting within the scope of the employee's employment is not liable for an act or omission arising from COVID-19 unless, the act or omission constitutes gross negligence, willful or wanton misconduct, or intentional misrepresentation. If a claim otherwise covered by this COVID-19 disaster emergency provision is a claim for injury or death resulting from medical malpractice, or not barred by the immunity provided by the COVID-19 disaster emergency provision the claimant shall be required to comply with all provisions of IC 34-18 (the medical malpractice act). (IC 34-13-3-3)

Additionally, the Tort Claims Act applies to the bureau of motor vehicles commission established by IC 9-14-9-1, a member of the bureau of motor vehicles commission established under IC 9-15-1-1 and to an employee of the bureau of motor vehicles commission who is employed at a license branch under IC 9-16, except for an employee employed at a license branch operated under a contract with the commission under IC 9-16. (IC 34-13-3-2)

If a loss results from conditions or actions not included in the above list or the defense of immunity is not raised by the governmental entity, governmental entities and employees must conform themselves to the same standard of conduct which applies to any citizen or corporation of the State. Hopkins v. Indianapolis Public Schools, 183 N.E.3d 308 (Ind. Ct. App. 2022).

Courts have taken steps to limit the immunity applied under the law enforcement exception. That immunity only applies where the actor is engaging in activity related to or similar to an arrest. Qualkenbush v. Lackey, 622 N.E.2d 1284 (Ind. 1993) (officer could be liable for negligent driving while responding to incident); Tittle v. Mahan, 582 N.E.2d 796 (Ind. 1991) (guard's supervision of prisoners not "enforcement of the law"). The law enforcement immunity does not extend to claims of government negligence in operating emergency vehicles. Smith v. Ciesielski, 975 F. Supp. 2d 930 (S.D .Ind. 2013). A government entity's failure to enforce its own policies or rules is not protected by the immunity. Hopkins v. Indianapolis Public Schools, 183 N.E.3d 308 (Ind. Ct. App. 2022).

The law enforcement immunity does not extend to claims of false arrest and false imprisonment. Twomey v. Land, 2020 WL 6048138, at *4 (N.D. Ind. Oct. 13, 2020).

D. Common Law Immunity

Indiana law preserves common law sovereign immunity for three specific local government activities: (1) failure to provide adequate police or fire protection; (2) the appointment of an official whose incompetent performance gives rise to a suit alleging negligence on the part of the official for making such an appointment; and (3) judicial decision-making. Lamb v. City of Bloomington, 741 N.E.2d 436, 439 (Ind. Ct. App. 2001).

Sovereign immunity also precludes claims for damages under statutes unless the General Assembly has "unequivocally expressed" its intent to allow for damages under the statute. Esserman v. Indiana Department of Environmental Management, 84 N.E.3d 1185 (Ind. 2017).

E. Notice Requirement.

1. Notice Must be Timely.

A claim against the State is barred unless notice is filed with either (1) the Indiana Attorney General, or (2) the State agency involved, within 270 days after the loss occurs. However, if notice to the State agency involved is filed with the wrong state agency, that error does not bar a claim if the claimant reasonably attempts to determine and serve notice on the right state agency.

The Indiana Attorney General is required to prescribe a claim form to be used to file a notice against the State under the Tort Claims Act. The claim form must specify (1) the information required, and (2) the period of time that the potential claimant has to file a claim. Copies of the claim form are required to be available from each State agency and operator of a State-owned vehicle. (IC 34-13-3-6)

A claim against a political subdivision is barred unless notice is filed with both (1) the governing body of that entity, and (2) unless IC 27-1-29 has expired under IC 27-1-29-29, the Indiana political subdivision risk management commission (created under IC 27-1-29), within 180 days. (IC 34-13-3-8) Failure to comply with the requirement will bar the claim. Town of Cicero v. Sethi, 189 N.E.3d 194 (Ind. Ct. App. 2022). The later requirement only applies if the political subdivision was a member of the political subdivision risk management fund established under IC 27-1-29-10 at the time the act or omission took place. (IC 34-13-3-8(b))

Although the Act does not expressly state so, a claim against a governmental employee is also barred unless notice is filed with the governmental entity. Poole v. Close, 476 N.E.2d 828 (Ind. 1985).

Lack of notice is an affirmative defense and must either be asserted in a motion to dismiss or in an answer. City of Evansville v. Magenheimer, 37 N.E.3d 965, 968 (Ind. Ct. App. 2015).

In determining whether a notice is timely, the courts apply a "discovery rule" that looks to when the claimant could have – with reasonable diligence – discovered that the loss had occurred. Lyons v. Richmond Community School Corp., 19 N.E.3d 254 (Ind. 2014). Under this rule, the notice is due 180 days after the claimant could have discovered the loss and not necessarily precisely when the loss occurred. Snyder v. Town of Yorktown, 20 N.E.3d 545 (Ind. Ct. App. 2014).

The 180-period does not begin to run until the loss actually occurred. For instance, the Court of Appeals held that a claimant did not need to give notice of a claim for refund under a landlord registration ordinance until the landlords actually paid the unlawful fee under the ordinance, not when the ordinance was enacted. 6232 Harrison Ave. LLC v. City of Hammond, 181 N.E.3d 379 (Ind. Ct. App. 2021).

If a person cannot give the requisite notice concerning either a claim against the State or against a governmental entity because he or she is incapacitated, the claim is barred unless notice is filed within 180 days after the incapacity is removed. (IC 34-13-3-9); See IC 29-3-1-7.5 for a detailed definition of incapacitated.

Actual knowledge on the part of the governmental entity of a claimant's particular loss does not relieve the claimant's duty to give timely notice of the claim. Daugherty v. Dearborn Cty., 827 N.E.2d 34, 36 (Ind. Ct. App. 2005). The claimant is not excused from providing a Tort Claims Notice even if they rely on statements from the government entity that a notice is not necessary. Town of Cicero v. Sethi, 189 N.E.3d 194 (Ind. Ct. App. 2022).

2. Form of Notice Statement.

The notice statement must describe the facts on which the claim is based in a short and plain written statement which must include the following:

(a) the circumstances which brought about the loss;

(b) the extent of the loss;

(c) the time and place the loss occurred;

(d) the names of all persons involved (if known);

(e) the amount of the damages sought; and

(f) the residence of the person making the claim at the time of the loss and at the time of filing the notice. (IC 34-13-3-10)

Indiana courts tend to interpret the requirements pertaining to the form of the notice statement liberally. See, e.g., Putnam County v. Caldwell, 505 N.E.2d 85 (Ind. Ct. App. 1987). For instance, the Indiana Supreme Court has written that such notice requirements "are in derogation of the common law and are to be strictly construed against limitations on a claimant's right to bring suit." Collier v. Prater, 544 N.E.2d 497, 498 (Ind. 1989).

Correspondence with a political subdivision will be insufficient to satisfy the notice requirement if it does not expressly assert a claim against the entity. Kerr v. City of S. Bend, 48 N.E.3d 348, 356 (Ind. Ct. App. 2015). In order to comply with the Act, "the notice must not only inform the State of the facts and circumstances of the alleged injury but must also advise of the injured party's intent to assert a tort claim." Ricketts v. State, 720 N.E.2d 1244, 1246 (Ind. Ct. App. 1999) In other words, if a communication is "no more than an ordinary complaint letter," it is insufficient as a matter of law. City of Indianapolis v. Satz, 377 N.E.2d 623, 625 (Ind. 1978). Without an express statement that the claimant intends to pursue the claim, it cannot satisfy the mandatory requirements of the Act. Fowler v. Brewer, 773 N.E.2d 858, 863 (Ind. Ct. App. 2002). The crucial consideration is whether the notice supplied by the claimant of his intent to take legal action contains sufficient information for the city to ascertain the full nature of the claim against it so that it can determine its liability and prepare a defense. Town of Cicero v. Sethi, 189 N.E.3d 194 (Ind. Ct. App. 2022).

3. Service of Notice.

The notice must be delivered in person or by registered or certified mail. (IC 34-13-3-12) If mailed by registered or certified mail, the notice is deemed filed on the date of mailing. Wallis v. Marshall County Comm'rs, 546 N.E.2d 843 (Ind. 1989). The notice must be served on the political subdivision itself, not an agent such as an insurance carrier. Schoettmer v. Wright, 992 N.E.2d 702, 709 (Ind. 2013).

4. Claimant's Failure to Comply.

Failure of a claimant to give the required notice is a complete defense and must be asserted in the political subdivision's answer or responsive pleading. See Thompson v. City of Aurora, 325 N.E.2d 839 (Ind. 1975); Palmer v. State, 363 N.E.2d 1245 (Ind. App. 1977). The defense can be waived, even unintentionally. Johnson v. Consolidated Rail Corp., 565 F. Supp. 1025 (N.D. Ind. 1983).

Once the issue of failure to comply with the notice requirements is raised, the burden is on the claimant to demonstrate compliance. See Hedges v. Rawley, 419 N.E.2d 224 (Ind. Ct. App. 1981).

Courts will not dismiss a claim for failure to comply with the notice provisions of the Act so long as there is some notice that "substantially complies" with the notice requirement. Kerr v. City of South Bend, 48 N.E.3d 348, 355 (Ind. Ct. App. 2015). Letters, emails, and other documents not meeting all of the requirements for a tort claims notice may still allow a lawsuit to proceed so

long as "'the purpose of the notice requirement is satisfied. The purposes of the notice statute include informing the officials of the political subdivision with reasonable certainty of the accident and surrounding circumstances so that the political subdivision may investigate, determine its possible liability, and prepare a defense to the claim.'" *Id*. (quoting Schoettmer v. Wright, 992 N.E.2d 702, 707 (Ind. 2013) (quotations omitted). The crucial consideration is whether the notice supplied by the claimant of his intent to take legal action contains sufficient information for the government to ascertain the full nature of the claim against it so that it can determine its liability and prepare a defense. Id. But mere actual knowledge of an occurrence, even when coupled with routine investigation, does not constitute substantial compliance. Id.

F. Approval or Denial of Claim by Governmental Entity.

The governmental entity is required to notify the claimant, in writing, of its approval or denial of the claim within 90 days of the filing of a claim. A claim is denied if the governmental entity fails to approve the claim in its entirety within 90 days, unless the parties have reached a settlement before the expiration of that period. (IC 34-13-3-11)

A person may not initiate a suit against a governmental entity unless his claim has been denied in whole or in part. (IC 34-13-3-13)

G. Administrative Claim for Inmate's Recovery of Property.

An offender must file an administrative claim with the State department of correction to recover compensation for the loss of the offender's personal property alleged to have occurred during the offender's confinement as a result of an act or omission of the department or any of its agents, former officers, employees, or contractors. A claim must be filed within 180 days after the date of the alleged loss.

The department of correction shall evaluate each claim filed and determine the amount due, if any. If the amount due is not more than $5,000, the State department of correction shall approve the claim for payment and recommend to the office of the Indiana Attorney General payment pursuant to IC 34-13-3-7(c). If the amount due exceeds $5,000, the department shall submit such claims, with any recommendation the department considers appropriate, to the office of the Indiana Attorney General. The Indiana Attorney General, in acting upon the claim, must consider recommendations of the department to determine whether to deny the claim or recommend the claim to the Governor for approval of payment.

Payment of claims under foregoing provision must be made in the same manner as payment of claims under IC 34-13-3-25.

The department of correction is required to adopt rules under IC 4-22-2 necessary to carry out these provisions. (IC 34-13-3-7)

H. Disposal of Claim.

Except as provided below, the governing body of a political subdivision may compromise, settle, or defend a claim or suit brought against the political subdivision or its employees. (IC 34-

13-3-16) Likewise, except as provided in IC 34-13-3-20, the Governor may comprise or settle a claim or suit brought against the State or its employees. (IC 34-13-3-14)

Except as provided below, the Indiana Attorney General is required to:

(1) advise the Governor concerning the desirability of compromising or settling a claim or suit brought against the State or its employees;

(2) perfect a compromise or settlement which is made by the Governor;

(3) submit to the Governor on or before January 31 of each year a report concerning the status of each claim or suit pending against the State as of January 1 of that year; and

(4) defend, as chief counsel, the State and state employees as required under IC 4-6-2. However, the Indiana Attorney General may employ other counsel to aid in defending or settling those claims or suits. (IC 34-13-3-15)

With the consent of the claimant, a political subdivision may compromise or settle a claim or suit by means of a structured settlement. This may be accomplished by:

(1) an agreement requiring periodic payments by the political subdivision over a specified number of years;

(2) the purchase of an annuity;

(3) making a qualified assignment of the liability of the political subdivision as defined by the provisions of 26 U.S.C. § 130(c);

(4) payment in a lump sum; or

(5) any combination of subdivisions (1) through (4).

The present value of a structured settlement generally may not exceed the statutory limits set forth in IC 34-13-3-4 (noted below in Section J); however, the periodic or annuity payments may exceed these statutory limits. The present value of any periodic annuity payments may be determined by discounting the periodic payments by the same percentage as that found in Moody's Corporate Bond Yield Average Monthly Average Corporates as published by Moody's Investor Services, Incorporated. (IC 34-13-3-23)

I. Liability Insurance.

A political subdivision, but not the State, may choose to purchase insurance to cover the liability of itself or its employees, including a member of a board, a committee, a commission, an authority, or another instrumentality of a political subdivision. Any liability insurance so purchased is required to be purchased by invitation to, and negotiation with, providers of insurance and may be purchased with other types of insurance. If such a policy is purchased, the terms of

the policy govern the rights and obligations of the political subdivision and the insurer with respect to the investigation, settlement, and defense of claims or suits brought against the political subdivision or its employees who are covered by the policy. However, the insurer may not enter into a settlement for an amount that exceeds the insurance coverage without the approval of the mayor, if the claim or suit is against the city, or the governing body of any other political subdivision, if the claim or suit is against such subdivision. (IC 34-13-3-20)

The State may not purchase insurance to cover the liability of the State or its employees; however, this does not prohibit (1) the requiring of contractors to carry insurance, (2) the purchase of insurance to cover losses occurring on real property owned by the public employees' retirement fund or the State teachers' retirement fund, (3) the purchase of insurance by a separate body corporate and politic to cover the liability of itself or its employees or (4) the purchase of casualty and liability insurance for foster parents (under IC 27-1-30-4) on a group basis. (IC 34-13-3-20)

J. Defense of Claim.

1. Actions Against Individual Members Not Authorized; Preclusion of Action Against Employee/Payment of Judgment Against Employee.

(a) Civil actions relating to acts taken by a board, a committee, a commission, an authority, or another instrumentality of a governmental entity may be brought only against the board, the committee, the commission, the authority, or the other instrumentality of a governmental entity. A member of a board, a committee, a commission, an authority, or another instrumentality of a governmental entity may not be named as a party in a civil suit that concerns the acts taken by a board, a committee, a commission, an authority, or another instrumentality of a governmental entity where the member was acting within the scope of the member's employment. For the purposes of this provision, a member of a board, a committee, a commission, an authority, or another instrumentality of a governmental entity is acting within the scope of the member's employment when the member acts as a member of the board, committee, commission, authority, or other instrumentality.

(b) A judgment rendered with respect to, or a settlement made by, a governmental entity bars an action by the claimant against an employee, including a member of a board, a committee, a commission, an authority, or another instrumentality of a governmental entity, whose conduct gave rise to the claim resulting in that judgment or settlement. A lawsuit alleging that an employee acted within the scope of the employee's employment bars an action by the claimant against the employee personally. However, if the governmental entity answers that the employee acted outside the scope of the employee's employment, the claimant may amend the complaint and sue the employee personally. An amendment to the complaint by the claimant under this provision must be filed not later than 180 days from the date the answer was filed and may be filed notwithstanding the fact that the statute of limitations has run.

(c) A lawsuit filed against an employee personally must allege that an act or omission of the employee that causes a loss is:

(1) criminal;

(2) clearly outside the scope of the employee's employment;

(3) malicious;

(4) willful and wanton; or

(5) calculated to benefit the employee personally.

The complaint must contain a reasonable factual basis supporting the allegations.

(d) Subject to the provisions of sections 4, 14, 15, and 16 of the Tort Claims Act, the governmental entity is required to pay any judgment of a claim or suit against an employee when the act or omission causing the loss is within the scope of the employee's employment, regardless of whether the employee can or cannot be held personally liable for the loss.

(IC 34-13-3-5)

2. Provision of Counsel.

The governmental entity is required to provide legal counsel for and pay all costs and fees incurred by or on behalf of an employee in defense of a claim or suit for a loss occurring because of acts or omissions within the scope of employment, regardless of whether the employee can or cannot be held personally liable for the loss. (IC 34-13-3-5(e)) The Indiana Supreme Court has held that the state (not counties) must provide counsel and indemnification for probation officers because they report to state officers (the trial courts) and were paid out of state funds. Lake County Board of Commissioners v. State, 181 N.E.3d 960 (Ind. 2022).

3. Recovering Attorneys' Fees.

In any action brought against a governmental entity in tort, the court may grant attorney's fees to the governmental entity prevailing as defendant if it finds that the plaintiff:

(1) brought the action on a claim that is frivolous, unreasonable, or groundless;

(2) continued to litigate the action after plaintiff's claim clearly became frivolous, unreasonable, or groundless; or

(3) litigated the action in bad faith.

The award of attorney's fees does not prevent a governmental entity from bringing an action against the plaintiff for abuse of process, but the defendant may not recover attorney's fees twice. (IC 34-13-3-21)

K. Maximum Combined Aggregate Liability.

The combined aggregate liability of all governmental entities and of all public employees, acting within the scope of their employment and not excluded from liability under Section 3 of the Tort Claims Act, may not exceed:

(1) for injury to or death of one (1) person in any one (1) occurrence:

(a) $300,000 where the cause of action accrues before January 1, 2006; or

(b) $500,000 where the cause of action accrues on or after January 1, 2006 and before January 1, 2008; or

(c) $700,000 where the cause of action accrues on or after January 1, 2008; and

(4) $5,000,000 for injury to or death of all persons in that occurrence. (IC 34-13-3-4)

Claims obtained prior to the effective date of the Tort Claims Act (IC 1971, 34-4-16.5-1 et seq.) are not limited by IC 34-13-3-1 et seq., regardless of the date on which judgment is entered. See State v. Thompson, 385 N.E.2d 198 (Ind. App. 1979) (involved claim against State, not county).

A governmental entity or an employee of a governmental entity acting within the scope of employment is not liable for punitive damages. (IC 34-13-3-4(b)); Ind. Dep't of Pub. Welfare v. Rynard, 472 N.E.2d 888 (Ind. 1985).

L. Considerations After Settlement or Judgment.

1. Payment of Judgment by Governmental Entity.

A court that has rendered a judgment against a governmental entity may order that governmental entity to:

(1) appropriate funds for the payment of the judgment if funds are available for that purpose; or

(2) levy and collect a tax to pay the judgment if there are insufficient funds available for that purpose. (IC 34-13-3-17)

In the event that there are insufficient funds available for that purpose, a county council may, in its discretion, authorize the issuance and sale of judgment funding bonds of the county for the purpose of procuring funds to pay any judgment taken against the county. Such bonds may be payable from the taxes required to be levied and collected to pay the judgment. (IC 5-1-8-1)

2. Appropriations for Payment of Claims and Expenses; Payment Procedures.

There is appropriated from the State general fund sufficient funds to:

(1) settle claims and satisfy tort judgments obtained against the State; and

(2) pay expenses authorized by this chapter, including:

(A) liability insurance premiums;

(B) interest on claims and judgments; and

(C) expenses incurred by the Indiana Attorney General in employing other counsel to aid in defending or settling claims or civil actions against the State. (IC 34-13-3-24)

The Indiana Attorney General is required to present vouchers for the items or expenses described in above to the auditor of state. The auditor shall issue warrants on the treasury for the amounts presented. (IC 34-13-3-25)

A governmental entity shall pay a settlement or judgment not later than 180 days after the date of the settlement or judgment, unless there is an appeal, in which payment is due not later than 180 days after a final decision is rendered. (IC 34-13-3-18) This does not apply if there is a structured settlement under IC 34-13-3-23.

If payment is not made within 180 days after the date of a settlement or a judgment, the governmental entity is liable for interest from the date of a settlement or a judgment at an annual rate of 6%. The governmental entity is liable for interest at that rate and from that date even if the case is appealed, provided that the original judgment is upheld. (IC 34-13-3-18) If partial payment of a judgment is made, post-judgment interest stops accruing on that portion of the judgment paid. Claudio v. School City, 448 N.E.2d 1212 (Ind. App. 1983).

M. Other Considerations.

Pursuant to IC 34-51-2-2, Indiana's Comparative Fault Act does not apply to actions brought under the Tort Claims Act. Accord Heger v. Trustees of Ind. Univ., 526 N.E.2d 1041 (Ind. Ct. App. 1988). Traditional contributory negligence and incurred risk doctrines apply instead. When those doctrines apply, even the slightest negligence by the plaintiff will completely bar the claim. St. John Town Bd. v. Lambert, 725 N.E.2d 507, 516 (Ind. Ct. App. 2000).

N. Actions Based on Federal Civil Rights Laws.

1. Introduction.

In addition to or instead of a State-law claim under Indiana's Tort Claims Act, an individual may also bring a federal claim under federal civil rights statutes. The primary statute relied upon by claimants is 42 U.S.C. § 1983. While all the various forms of Section 1983 claims take are beyond easy summary, we set out some general principles below.

2. Available Forums.

A federal civil-rights claim may be brought in either federal or State court. Moreover, in either forum, the federal and State claims may be asserted together.

3. Proper Defendant.

Section 1983 requires the plaintiff to sue the "person" responsible for depriving the plaintiff of his or her constitutional rights. Los Angeles Cnty. v. Humphries, 562 U.S. 29 (2010). There is no respondeat superior liability under Section 1983. Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 691 (1978). To sue a county or other government entity (and not a natural person), the plaintiff must allege that his or her injuries arose out of a custom, policy, or practice of the government entity. Glisson v. Indiana Dep't of Corr., 849 F.3d 372, 379 (7th Cir. 2017).

4. Key Defense.

The key defense in section 1983 actions is qualified immunity. This affirmative defense, if timely pleaded, protects the governmental employee from liability for damages if the employee's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Henderson v. DeRobertis, 940 F.2d 1055, 1059 (7th Cir. 1991). The defense only applies to individual defendants, not government bodies. Hernandez v. Sheahan, 455 F.3d 772, 776 (7th Cir. 2006) Its purpose is to shield individual government employees and officers who must make decisions without clear guidance as to the constitutionality of those actions. Id. It protects these individuals from claims that could leave them destitute and prevents them from second-guessing their actions in carrying out their government functions. Capra v. Cook Cnty., Bd. of Review, 733 F.3d 705, 711 (7th Cir. 2013).

Federal law also provides an absolute immunity for certain local government functions. This absolute immunity applies to chiefly to prosecutorial and judicial functions. Auriemma v. Montgomery, 860 F.2d 273, 275 (7th Cir. 1988). The judicial immunity extends beyond officials with the title of "prosecutor" or "judge" and will shield local administrative agencies when they act in a "quasi-judicial" or "quasi-prosecutorial" capacity. Wilson v. Kelkhoff, 86 F.3d 1438, 1443 (7th Cir. 1996) ("Absolute immunity is not limited to government officials with the title of prosecutor or judge; officials performing 'functionally comparable' acts in other contexts, such as administrative agencies, are also accorded absolute immunity.").

5. Attorneys' Fees.

The major advantage of the federal civil rights statutes to claimants is the availability of attorneys' fees to a "prevailing" plaintiff under 42 U.S.C. § 1988. These fees can be substantial, and often greatly exceed the amount of recovery obtained by a claimant.

The Supreme Court has held that a plaintiff is generally not a prevailing party if the case is settled through a private settlement. Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 603 (2001). Consent decrees, agreed judgments, or any other type of settlement that has "judicial imprimatur" will generally make the plaintiff a "prevailing party" entitled to a fee award. Id.

6. Damages

Damages under Section 1983 apply common law tort principles. Carey v. Piphus, 435 U.S. 247, 250 (1978). That includes all damages proximately caused by a constitutional violation. Humphrey v. City of Anderson, 2020 WL 3060363, at *7 (S.D. Ind. June 8, 2020). This includes compensatory damages and damages for physical injuries, pain and suffering, and lost wages. Perry v. Larson, 794 F.2d 279, 285 (7th Cir. 1986). Plaintiffs may also seek punitive damages. Stanley v. Irsa, No. 2:08-CV-195, 2011 WL 1526937, at *1 (N.D. Ind. Apr. 15, 2011)

7. Indemnification

State statute requires any government entity to provide indemnification for its employees, officers, commissioners, or committee members if they are sued for a federal civil rights violation. (IC 34-13-4-1) This statute abrogates a prior version that required government entities to provide indemnification only when they chose to do so. The current statute requires indemnification as to any liability other than punitive damages, which may be indemnified only if the entity choses to do so. Id. See also Austin v. Niblick, 626 Fed. Appx. 167 (7th Cir. 2015).

X. ETHICAL CONSIDERATIONS FOR COMMISSIONERS

A. Constitutional Provisions

1. Two Lucrative Offices

a. **Article 2 Section 9 of the Indiana Constitution**

No person holding a lucrative office or appointment under the United States or under this State is eligible to a seat in the General Assembly; and no person may hold more than one lucrative office at the same time, except as expressly permitted in this Constitution. Offices in the militia to which there is attached no salary shall not be deemed lucrative.

b. **Effect of the Two Lucrative Offices Provision**

A person holding a lucrative office or appointment under the United States or under the State of Indiana who comes to hold a second lucrative office or appointment forfeits the first office that such a person held upon acceptance of the second lucrative office or appointment.

(i) **Office**: Employment on behalf of a governmental entity is characterized as an office for these purposes when the duties of the employment require the exercise of the sovereign power of government for the public benefit. These duties are created by statute and the powers to fulfill the duties of an office arise from law.

(ii) **Lucrative**: An office is lucrative if the compensation is attached to the performance of the duties of the office, regardless of the value of the compensation, and regardless of whether the office holder at issue accepts any compensation for their particular services.

a. Pure reimbursement for expenses incurred fulfilling duties of an office are the only kind of value received that are not compensation for purposes of identifying a lucrative office. Ind. Att'y. Gen. Op. No. 45 (1960).

b. An office is lucrative if the holder is entitled to compensation, even if receipt of the compensation is declined by the holder. See Dailey v. State, 8 Blackf. 329, 330 (Ind. 1846).

The office of County Commissioner is a lucrative office for purposes of the Indiana Constitution as it is both paid and requires the exercise of sovereign powers for the public benefit. However, holding a position in a second governmental unit as a required incident of a lucrative office already held is not a disqualifying second lucrative office. See State ex rel. Bateman v. Hart 181 Ind. 592, 596 (Ind. 1914).

If a County Commissioner is offered or plans to seek another office under the United States or the State of Indiana or any of its subdivisions the Commissioner should seek the advice of legal counsel before accepting or pursuing the office in question to ensure there will be no violation of the Two Lucrative Offices provision.

Additional information about Lucrative Offices under the Indiana Constitution, including opinions on specific positions, can be found in the Dual Officeholder Guide published by the Indiana Attorney General's Office on its Advisory & Opinions Webpage which can be found here: https://www.in.gov/attorneygeneral/about-the-office/advisory/.

B. Criminal Statutes

1. Introduction

a. Criminal Statute Basics

The Indiana Code contains multiple criminal statutes governing the conduct of public officials in their duties as administrators of public business. Criminal statutes generally have an action requirement and a mental state requirement. In this chapter the action elements of acts incurring criminal liability will be discussed, these acts must be done voluntarily (or constitute an omission to perform a legal duty) and be done in the appropriate mental state described in the relevant criminal statute, or criminal liability will not adhere to the acts. The mental states used in the Indiana Code include;

(i). **"Intentionally":** It is a person's conscious objective to engage in the conduct at issue. (IC 35-41-2-2(a)).

(ii). **"Knowingly":** A person is aware of a high probability that the person is engaged in the conduct at issue. (IC 35-41-2-2(b)).

(iii). **"Recklessly":** A person engages in the conduct at issue in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct. (IC 35-41-2-2(c)).

b. Definitions

(i). **"Public Servant":** A person who is;

(a) authorized to perform an official function on behalf of, and is paid by, a governmental entity,

(b) elected or appointed to office to discharge a public duty for a governmental entity, or

(c) with or without compensation, is appointed in writing by a public official to act in an advisory capacity to a

governmental entity concerning a contract or purchase made by the entity. (IC 35-31.5-2-261).

A County Commissioner is a Public Servant under this definition. The employees of the Board of Commissioners are also Public Servants.

(ii). **"Dependent":** A person who;
- (a) is the spouse of a Public Servant,
- (b) is a child, step-child, or adoptee of a Public Servant who is un-emancipated or less than eighteen (18) years of age, or
- (c) receives more than one-half (1/2) of their support during a year from the Public Servant. (IC 35-44.1-1-4).

(iii). **"Pecuniary Interest":** An interest in a contract or purchase if the contract or purchase will result or is intended to result in an ascertainable increase in the income or net worth of;
- (a) The Public Servant
- (b) A Dependent of the Public Servant who is under the direct or indirect administrative control of the Public Servant or who receives a contract or purchase order that is reviewed, approved, or directly or indirectly administered by the Public Servant. (IC 35-44.1-1-4).

2. Official Misconduct. IC 35-44.1-1-1

a. **Acts of Official Misconduct**

A public servant who knowingly or intentionally does any of the following commits Official Misconduct;

(i). Commits an offense in the performance of the public servant's official duties

(ii). solicits, accepts, or agrees to accept from an appointee or employee any property other than what the public servant is authorized by law to accept as a condition of continued employment

(iii). acquires or divests himself or herself of a pecuniary interest in any property, transaction, or enterprise or aids another person to do so based on information obtained by virtue of the public servant's office that official action that has not been made public is contemplated; or

(iv). fails to deliver public records and property in the public servant's custody to the public servant's successor in office when that successor qualifies. (IC 34-44.1-1-1).

b. **Penalty for Official Misconduct**

Official Misconduct is a Level 6 felony, meaning that it carries penalties of imprisonment for between six (6) months and two and one-half (2 1/2) years as well as the potential for a fine up to ten thousand dollars ($10,000). (IC 35-50-2-7(b)).

3. Bribery. IC 35-44.1-1-2

a. **Acts of Bribery**

Specifically in their role as a Public Servant, a County Commissioner may have committed the act of Bribery if they solicit, accept, or agree to accept, either before or after the person becomes appointed, elected, or qualified, any property, except property the person is authorized by law to accept, with intent to control the performance of an act related to the person's employment or function as a Public Servant. (IC 35-44.1-1-2).

Regarding the commission of the act of Bribery, it is irrelevant whether the money or thing of value is paid to a Public Servant before or after the official act(s) sought has occurred. As long as there was an arrangement to make the Public Servant act, then that is sufficient. See United States v. Forszt, 655 F.2d 101 (7th Cir. 1981).

Further, the Indiana Attorney General has issued an opinion advising municipal officers and employees that the acceptance of benefits from a private source to induce the performance of a preexisting public duty could be basis for a charge of Bribery. 43 Ind. Att'y. Gen. Op. No. 17 (1970).

b. **Penalty for Bribery**

Bribery is a Level 5 felony, meaning that it carries penalties of imprisonment for between one (1) and six (6) years as well as the potential for a fine of up to ten thousand dollars ($10,000). (IC 35-50-2-6).

4. Ghost Employment. IC 35-44.1-1-3

a. **Acts of Ghost Employment**

A Public Servant who knowingly or intentionally does the following commits Ghost Employment:

(i). Hires an employee for the government entity that the Public Servant serves and fails to assign to the employee any duties, or assigns the employee any duties not related to the operation of the governmental entity

(ii). Assigns an employee under the Public Servant's supervision any duties not related to the operation of the governmental entity that the Public Servant serves.

A person employed by a government entity who accepts property from the government entity commits Ghost Employment if:

(iii). The person knows that they have not been assigned any duties to perform for the entity

(iv). The person knowingly or intentionally accepts the property for performance of duties not related to the operation of the governmental entity. (IC 35-44.1-1-3).

b. **Acts that are not Ghost Employment**

A Person employed by a governmental entity is considered to be performing duties related to the operation of the governmental entity if they are a person who;

(i). with the approval of their supervisor;

(ii). in compliance with a written policy or regulation issued by the executive officer of the governmental entity which contains a limitation on the total time during a calendar year that the employee may spend performing services during normal hours of employment;

(iii). performs services on a voluntary basis for the benefit of another governmental entity or a 501(c)(3) non-profit organization that do not;

(a) Promote religion

(b) Attempt to influence legislation or governmental policy

(c) Attempt to influence elections to public office (IC 35-44.1-1-3)

c. **Penalties for Ghost Employment**

Ghost Employment is a Level 6 felony, meaning that it carries penalties of imprisonment for between six (6) months and two and one-half (2 1/2) years as well as the potential for a fine up to ten thousand dollars ($10,000). (IC 35-50-2-7(b)). A conviction for Ghost Employment may be reduced to a Class A misdemeanor upon a petition to the sentencing court if certain conditions are met. (IC 35-50-2-7(d)). A Class A misdemeanor carries penalties of not more than one (1) year of imprisonment and a fine of up to five thousand dollars ($5,000). (IC 35-50-3-2).

Ghost Employment also exposes a Public Servant and the relevant person employed by the government entity to joint and several civil liability to the governmental entity in the amount of any property received by the person employed by the governmental entity as a result of Ghost Employment. (IC 35-44.1-1-3).

5. Conflicts of Interest. IC 35-44.1-1-4

a. **Acts Constituting a Conflict of Interest**

A Public Servant who knowingly or intentionally has a pecuniary interest in or derives profit from a contract or purchase connected with an action by the governmental entity served by the Public Servant commits Conflict of Interest. (IC 35-44.1-1-4).

b. **Acts not Constituting a Conflict of Interest**

The following would not amount to a Conflict of Interest;

(i). When a Public Servant or their Dependent receives compensation through salary or an employment contract for services provided as a Public Servant or for expenses incurred by the Public Servant as provided by law.

(ii). When a Public Servant's interest in the contract or purchase and all other contracts and purchases made by the governmental entity during the twelve (12) months before the date of the contract or purchase was two hundred fifty dollars ($250) or less.

(iii). When the contract or purchase at issue involves utility services from a utility whose rate structure is regulated by the state or federal government.

(iv). When a Public Servant acts only in an advisory capacity for a state supported college or university and does not have authority to act on behalf of the college or university in a matter involving the contract or purchase. (IC 35-44.1-1-4).

When a Public Servant who is elected, <u>including County Commissioners</u>, makes a disclosure that complies with the following requirements the Public Servant has not committed a Conflict of Interest. The disclosure must;

(v). Be in writing and affirmed under penalty of perjury

(vi). contain a description of the contract or purchase to be made by the governmental entity and the pecuniary interest that the Public Servant has in that contract or purchase

(vii). be submitted to the governmental entity and accepted by it in a public meeting before final action on the contract or purchase

(viii). be filed within fifteen (15) days after final action on the contract or purchase with

(a) the state board of accounts and

(b) the clerk of the circuit court in the county where the governmental entity takes final action on the contract or purchase. (IC 35-44.1-1-4).

Indiana State Form 54266 is a Uniform Conflict of Interest Disclosure Statement that can be used by a County Commissioner for the purpose of making the above described disclosure. The form can be found here: Form 54266

c. **Penalties for Conflict of Interest**

Conflict of Interest is a Level 6 felony, meaning that it carries penalties of imprisonment for between six (6) months and two and one-half (2 1/2) years as well as the potential for a fine up to ten thousand dollars ($10,000). (IC 35-50-2-7(b)). A conviction for Conflict of Interest may be reduced to a Class A misdemeanor upon a petition to the sentencing court if certain conditions are met. (IC 35-50-2-7(d)). A Class A misdemeanor carries penalties of not more than one (1) year of imprisonment and a fine of up to five thousand dollars ($5,000). (IC 35-50-3-2).

6. Profiteering from Public Service. IC 35-44.1-1-5

a. **Acts of Profiteering**

A person commits Profiteering from Public Service who knowingly or intentionally obtains a pecuniary interest in a contract or purchase with a governmental entity within one year of separation from employment or service with the governmental entity and who is not a Public Servant for the governmental entity but who as a Public Servant approved, negotiated, or prepared on behalf of the governmental agency the terms or specifications of the contract or purchase. (IC 35-44.1-1-5).

b. **Acts not amounting to Profiteering from Public Service**

If the following is true of the matter which has led to a charge of Profiteering from Public Service the person has not committed Profiteering from Public Service;

(i). The matter is negotiations or other activities related to an economic development grant, loan, or loan guarantee.

(ii). The total amount of benefit to the person was less than two hundred fifty dollars ($250) of profit from the contract or purchase. (IC 35-44.1-1-5).

It is a defense to a charge of Profiteering from Public Service if;

(iii). the person was screened from participating in the contract or purchase,
(iv). the person has not received a part of the profits of the contract or purchase, and
(v). notice was promptly given to the governmental entity of the person's interest in the contract or purchase. (IC 35-44.1-1-5).

c. **Penalties for Profiteering from Public Service**

Profiteering from Public Service is a Level 6 felony, meaning that it carries penalties of imprisonment for between six (6) months and two and one-half (2.5) years as well as the potential for a fine up to ten thousand dollars ($10,000). (IC 35-50-2-7(b)). A conviction for Profiteering from Public Service may be reduced to a Class A misdemeanor upon a petition to the sentencing court if certain conditions are met. (IC 35-50-2-7(d)). A Class A misdemeanor carries penalties of one (1) year of imprisonment and a fine of up to five thousand dollars ($5,000). (IC 35-50-3-2).

C. Nepotism and Contracts with the County

1. Nepotism. IC 36-1-20.2

a. **Definitions**

(i). **"Direct line of supervision":** A person is in the direct line of supervision of an elected officer or employee if the elected officer or employee is in a position to affect the terms and conditions of the individuals employment, including;
  (a) making decisions about work assignments, compensation, grievances, advancement, or performance evaluation
  (b) but <u>not</u> including; the responsibility of the executive, legislative, or fiscal body of a municipal unit as provided by law to make decisions regarding salary ordinances, budges, or personnel policies of the unit. (IC 36-1-20.2-4).

(ii). **"Employed":** An individual who is employed by a unit on a full-time, part-time, temporary, intermittent, or hourly basis. The term does not include an individual who holds only an elected office. The term includes an individual who is a party to an employment contract with the unit. (IC 36-1-20.2-5).

(iii). **"Relative":** Any of;
  (a) Spouse
  (b) Parent or step-parent
  (c) Child or step-child (including adopted children)
  (d) Brother or sister (including step-siblings and siblings by the half-blood)

(e) Niece or nephew
(f) Aunt or uncle
(g) Daughter-in-law or son-in-law. (IC 36-1-20.2-8).

b. **Requirements and Limitations on Nepotism**

(i). The Board of County Commissioners must adopt a policy on Nepotism that at a minimum incorporates the standards of IC 36-1-20.2 but the Board is also permitted to adopt more stringent standards in excess of the statutory minimum. (IC 36-1-20.2-9).
  (a) If the state board of accounts finds that a unit has not implemented a policy under this chapter, the state board of accounts shall forward the information to the department of local government finance. (36-1-20.2-17).
  (b) If a unit has not implemented a policy under this chapter, the department of local government finance may not approve: (i) the unit's budget or (ii) any additional appropriations for the unit for the ensuing calendar year until the state board of accounts certifies to the department of local government finance that the unit is in compliance with the requirements of IC 36-1-20.2. (36-1-20.2-18).

(ii). Individuals who are Relatives may not be employed by a unit in a position that results in one (1) Relative being in the direct line of supervision of the other relative. (IC 36-1-20.2-10).

(iii). Each elected officer of the unit shall annually certify in writing, subject to the penalties for perjury, that the officer has not violated this chapter. An officer shall submit the certification to the executive of the unit not later than December 31 of each year. (IC 36-1-20.2-16)

c. **Exceptions**

(i). A person employed by a governmental unit on the date when that person's Relative beings serving a term in an elected office of the unit may remain employed by the unit unless the unit's policy states otherwise but may not be promoted to a position unless the unit's policy states otherwise. (IC 36-1-20.2-11).
  (a) This does not apply to merit promotions in a merit police or fire department but does apply to outside-the-merit-ranks promotions that would lead to a Relative being in direct supervision of the person at issue. (IC 36-1-20.2-11(c)(2)).

(ii). When a person's Relative begins a term in an elected office of a governmental unit, a person employed pursuant to an employment contract with the unit will not be subject to abrogation of their employment contract that was in effect on the date that person's

relative begins serving a term of an elected office of the unit. (IC 36-1-20.2-12).

2. Contracts with the County. IC 36-1-21

a. **Definitions**

(i). **"Elected Official":** Any of,
- (a) The executive or member of the executive body of a unit
- (b) A member of the legislative body of the unit
- (c) A member of the fiscal body of the unit. (IC 36-1-21-2).

(ii). **"Relative":** Any of;
- (a) Spouse
- (b) Parent or step-parent
- (c) Child or step-child (including adopted children)
- (d) Brother or sister (including step-siblings and siblings by the half-blood)
- (e) Niece or nephew
- (f) Aunt or uncle
- (g) Daughter-in-law or son-in-law. (IC 36-1-21-3).

b. **Requirements and Limitations on Contracting**

(i). The Board of County Commissioners must adopt a policy on Contracting that at a minimum incorporates the standards of IC 36-1-21 but the Board is also permitted to adopt more stringent standards in excess of the statutory minimum. (IC 36-1-21-4).

(ii). The county cannot enter into a contract or renew a contract for the procurement of goods and/or services with an individual who is a Relative of an Elected Official or a business entity that is wholly or partially owned by a Relative of an Elected Official <u>unless the following criteria are met:</u>
- (a) The Elected Official is not committing a Conflict of Interest (described above) and the Elected Official has complied with the disclosure provisions of IC 35-44.1-1-4.
- (b) The Elected Official files with a the unit a full disclosure that is in writing and affirmed under penalty of perjury and:
  - i. describes the contract or purchase to be made,
  - ii. describes the relationship between the Elected Official and the individual or business entity with whom the unit is contracting.
- (c) The legislative body of the unit accepts the full disclosure at a public meeting of the unit prior to final action on the contract or purchase
- (d) The full disclosure is filed no later than fifteen (15) days after final action on the contract or purchase with

i. The state board of accounts
ii. The clerk of the circuit court in the county where the unit takes final action on the contract or purchase

(e) The appropriate agency of the unit makes a certified statement that the contract amount or purchase price was the lowest amount or bid price or offer or makes a certified statement of the reasons why the vendor or contractor was selected.

(f) The county satisfies any relevant requirements of IC 5-22 which governs public purchasing (see Chapter 4 of this Handbook) and IC 36-1-12 which governs public construction (See Chapter 5 of this Handbook). (IC 36-1-21-5).

(iii). Each elected officer of the unit shall annually certify in writing, subject to the penalties for perjury, that the officer is in compliance with this chapter. An officer shall submit the certification to the executive of the unit not later than December 31 of each year. (IC 36-1-21-6).

(a) If the state board of accounts finds that a unit has not implemented a policy under this chapter, the state board of accounts shall forward the information to the department of local government finance. (IC 36-21-1-7).

(b) If a unit has not implemented a policy under this chapter, the department of local government finance may not approve: (i) the unit's budget or (ii) any additional appropriations for the unit for the ensuing calendar year until the state board of accounts certifies to the department of local government finance that the unit has adopted a policy under this chapter. (IC 36-1-21-8).

c. **Exceptions**

(i). The initial term of a contract, which would implicate IC 36-1-21, in existence at the time the term of office of an Elected Official of the unit begins is not subject to the requirements of IC 36-1-21-5. (IC 36-1-21-5).

XI. LABOR

A. The Constitutional Right to Due Process.

1. Introduction.

Public employees may have constitutional rights in connection with their employment. The due process clause of the constitution applies if the employee has a property interest or a liberty interest in the job. Due process considerations may require that the employee be given advance notice of disciplinary charges and the right to a hearing before a decision is made to terminate the employment relationship.

2. Property Interests.

In Roth v. Board of Regents, 408 U.S. 564 (1972), the Supreme Court held that a public employee may have a "reasonable expectation of entitlement" in his position, which the Court identified as a "property interest." A property interest may arise from a statute, ordinance or contract. Some common sources include merit statutes and employment contracts.

a. Statements by Superiors.

A property interest can also be found where an employee relies on a promise from a superior concerning continued employment:

> A property interest can arise through legitimate and reasonable reliance on a promise from the government. . . . [C]ourts (have) found a fired government employee to have a property interest through informal assurances despite statutes, regulations, or operating procedures that ostensibly voided such a property interest. Hannon v. Turnage, 892 F.2d 653, 658 (7th Cir. 1990).

b. Employee's Expectations Must Be Reasonable.

A protected property interest in a benefit such as government employment "is 'more than an abstract need or desire' for the benefit; a person 'must ... have a legitimate claim of entitlement to it.'" Kiddy-Brown v. Blagojevich, 408 F.3d 346 (7th Cir. 2005) (quoting Roth, 408 U.S. at 577). Moreover, the employee's expectations must not be unreasonable. In Colburn v. Trustees of Indiana University, 739 F.Supp. 1268 (S.D. Ind. 1990), former university professors sued Indiana University, claiming that non-renewal of their contracts, denial of promotion, and denial of tenure violated their property interests. The professors claimed that faculty handbooks contained policies governing reappointment and non-reappointment. However, the court held that these policies merely spelled out certain procedural requirements and gave no guarantee of a property right.

3. Liberty Interests.

A public employee's dismissal involves a liberty interest where: (1) the individual's good name, reputation, honor or integrity are placed at risk by such charges as immorality, dishonesty, alcoholism, disloyalty, communism, or subversive acts; or (2) the state imposes a stigma or other disability on the individual which forecloses other employment opportunities. Hannon v. Turnage, 892 F.2d 653 (7th Cir. 1990). See also Perez v. U.S., 850 F.Supp. 1354, 1362-63 (N.D. Ill. 1994); Conwell v. Beatty, 667 N.E.2d 768, 777 (Ind. Ct. App. 1996). In Larry v. Lawler, 605 F.2d 954 (7th Cir. 1978), a Civil Service Commission background investigation revealed that Larry, a job applicant, had a poor employment record, an arrest record and was a heavy drinker. Therefore, under an applicable federal statute, Larry was totally barred from all federal employment for up to three (3) years. The Seventh Circuit found a liberty interest because Larry had been stigmatized throughout the entire federal government and deprived of job opportunities in any branch of government for a substantial period of time.

Compare Lawler with Hedrich v. Board of Regents of University of Wisconsin, 274 F.3d 1174, 1184 (7th Cir. 2001). In Hedrich, a former professor at a state university brought suit against the university and its officials asserting that the denial of her tenure application violated her rights under the due process clause. Hedrich argued she was stigmatized by statements that she did not meet the university's standards of scholarship and by the university's claims that she did not submit relevant documentation for consideration by the faculty. This, she argued, portrayed her to be a "dolt." According to the court, Hedrich was required to identify stigmatizing statements that were made public making it virtually impossible for her to find employment in her chosen field. However, the only evidence she identified was that she had applied for seven academic jobs over a three year period and was not hired. According to the court, there was no question that once an individual is denied tenure, finding another academic position is considerably more difficult. Nonetheless, "Hedrich's evidence could not be construed by a trier of fact to show that the consequences of her tenure denial have been any more severe than any other professional's failure to receive a desired promotion." Therefore, Hedrich's liberty interest claim was properly denied.

4. Suspensions and Demotions.

a. Suspension Without Pay Pending Hearing.

An employee may be suspended without pay pending a hearing where an independent third-party has determined that there is probable cause to believe that the employee has committed a crime. Gilbert v. Homar, 520 U.S. 924 (1997). The court noted that since the purpose of a pre-termination hearing is to determine "whether there are reasonable grounds to believe the charges against the employee are true and support the proposed action," such a hearing is unnecessary where a grand jury has indicted an employee or a prosecutor has filed formal charges. The pre-termination hearing is unnecessary because "an independent third party has determined that there is probable cause to believe the employee committed a serious crime." Following Gilbert, the Seventh Circuit in Ibarra v. Martin, 143 F.3d 286 (7th Cir. 1998) upheld a suspension without pay pending a hearing for a probation officer who was charged with a misdemeanor.

Even though an employer may suspend an employee without pay when he or she is charged with a crime, it is imperative to conduct a prompt, post-suspension hearing to insure that "the lost income is relatively insubstantial." Further, a quick hearing will guard against the potential accumulation of significant back pay liability.

If the employee is a member of a police or fire department and is subject to criminal charges, the employee may be placed on administrative leave, with or without pay, until the disposition of the criminal charges in the trial court. All other action against the employee is stayed until the disposition of the criminal charges in the trial court. (IC 36-8-3-4(n)).

b. Demotion.

In Lawson v. Sheriff of Tippecanoe County, 725 F.2d 1136 (1984), the court held that demotions can implicate liberty interests, saying demoting an employee "from a responsible and well-paid job to a menial and low-paying one is to be as effectively excluded from one's trade or calling as by being thrown out on the street." However, the demotion must result in an individual being placed in a position "far beneath" the one he or she originally had. Thus, for example, in Gustafson v. Jones, 117 F.3d 1015, 1020 (7th Cir. 1997), the court found that police officers' transfers from the prestigious Tactical Enforcement Unit to mere "street" assignments did not constitute a transfer to a capacity "far beneath" the officers' original positions.

5. Notice and Hearing Requirements.

Once it is determined that an employee has a property or liberty interest in employment, then due process requires that if the employee faces discipline or termination of employment, the employee must receive advance notice of the charges or allegations against him, and a meaningful opportunity to respond. "The essential requirements of due process … are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why a proposed action should not be taken is a fundamental due process requirement." Bankhead v. Walker, 846 N.E.2d 1048, 1053-54 (Ind. Ct. App. 2006) (quoting Aguilera v. City of East Chicago Fire Civil Service Com'n., 768 N.E.2d 978, 987 (Ind. Ct. App. 2002)).

Where a strong property interest exists, such as a tenured job, a position protected by a merit statute, or a contractual employment relationship which may only be terminated "for cause," the employee is entitled to notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story in a hearing which occurs before the actual termination decision is made. See Bankhead, 846 N.E.2d at 1053-54 (quoting Aguilera, 768 N.E.2d at 987). The Supreme Court has held in such cases that a post-termination hearing does not satisfy due process requirements. Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).

6. Sufficiency of the Notice.

In Panozzo v. Rhoads, 905 F.2d 135 (7th Cir. 1990), the Seventh Circuit held that giving an employee notice of charges and notice of a hearing one day in advance was sufficient to satisfy

due process requirements. The Seventh Circuit noted case law from other circuits holding that oral notice given while a hearing is in progress may be sufficient to satisfy due process.

The Seventh Circuit in Staples v. City of Milwaukee, 142 F.3d 383 (7th Cir. 1998) further clarified the notice requirement. While declining to say that contemporaneous notice at a hearing could never satisfy due process, the court held that it was inadequate notice in this case because Staples was told the hearing was for an entirely different purpose.

7. Conducting the Hearing.

a. No Right to Representation by Counsel.

An employee has no constitutional right to counsel at a pre-termination hearing. Panozzo v. Rhoads, 905 F.2d 135 (7th Cir. 1990).

b. Conflict of Interest.

In Panozzo, the court also analyzed whether a denial of due process occurred because the same person who brought the charges presided at the hearing. The court held that it was up to the plaintiff-employee to overcome the presumption that the decision-maker was capable of fairly judging a controversy. See also Hunt v. Fairman, 1996 WL 41271, *3 (N.D. Ill. 1996) ("The court may not automatically presume that a public official involved in both the investigation and adjudication of a dispute is unconstitutionally biased.").

Notwithstanding the Seventh Circuit's ruling on this last issue, it is always a good idea to have different individuals serving in the prosecutorial and judicial roles in a disciplinary hearing to avoid allegations of bias or conflict of interest. After all, the charged employee can still make out a due process violation if he or she can overcome the presumption that the official is a "[person] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." Panozzo, 905 F.2d at 140.

8. Star Chamber Proceedings.

The final decision in a discipline or discharge case must be made upon evidence presented during the hearing. "Administrative adjudications may not be made upon evidence secretly obtained by an administrative agency at a time and place other than that appointed for a hearing." Neal v. Pike Township, 530 N.E.2d 103, 105 (2d Dist. Ind. 1988). There, Neal had been suspended without pay from a fire department following a hearing. Later, a township trustee presented evidence to the fire department merit commission concerning Neal which had not been disclosed during the hearing. Neither Neal nor his counsel was present at this second meeting. Because Neal had a right to hear and/or see the evidence and to rebut it, the Court found Neal's due process rights had been violated.

B. First Amendment Implications of Public Employment.

1. Free Speech.

Public employees have a constitutional right to free speech. The key issue is whether the state, through its statutes or action under color of law, suppresses "the rights of public employees to participate in public affairs." Connick v. Myers, 461 U.S. 138,144-145 (1983).

a. Matters of Public Concern.

In Connick, the Supreme Court set forth a two-tiered analysis to determine whether a public employee's right to free speech has been infringed. First, the court inquires whether the employee's speech addresses a "matter of public concern," which is determined by examining "the content, form and context of a given statement." Connick, 461 U.S. at 145, 146, 147-148; Rankin v. McPherson, 483 U.S. 378, 384-85 (1987). If the employee's speech does not address a matter of public concern, the analysis ends and the public employer's reasons for taking an adverse employment action is subjected to little, if any, scrutiny. Connick, 461 U.S. at 146.

If, by contrast, the employee's speech does address a matter of public concern, the possibility of a First Amendment claim arises. Here, the court will evaluate the employer's reasons for justifying the adverse employment action, and will apply a balancing test. The balancing test attempts to accommodate the dual role of the public employer: the state or its political subdivision as an employer which needs an efficient and disciplined workforce to provide public services weighed against the state or political subdivision as a government entity which operates under First Amendment constraints. Rankin, 483 U.S. at 384. There is, however, one significant limitation on a public employee's expression under the First Amendment's freedom of speech guarantee: In Garcetti v. Ceballos, 547 U.S. 410, 421 (2006), the United States Supreme Court explicitly held that "when public employees [make] statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."

b. Comments to News Media by Employees.

In City of Kokomo v. Kern, 852 N.E.2d 623 (Ind. Ct. App. 2006), Scott Kern was a captain in the Kokomo Fire Department. In June of 2004, Kokomo Fire Chief David Duncan received an anonymous complaint that local residents had set up donation boxes to obtain contributions for a July 2004 fireworks display. Duncan contacted Kern and informed him that a fireworks permit would be necessary to go forward. Kern responded that he would contact the community members involved. Several days later, Duncan received a letter soliciting donations for the fireworks display. Kern was listed as one of the contact persons. Thereafter, Duncan mailed certified letters to each of the named individuals, including Kern, advising them that conducting a fireworks display without a permit would be a violation of law. Id. at 625-26.

Kern subsequently obtained an application for a fireworks permit from the State Fire Marshal's office and brought the partially completed application to a June 30, 2004 meeting with Duncan. Among other things, the application did not list the name of the fireworks shooter, nor did it include a listing of fireworks sizes and types or a Certificate of Insurance. Duncan advised Kern that he would not approve an incomplete permit application. Id. at 626.

The planned fireworks display was subsequently cancelled. In an article published by the Kokomo Tribune, Kern was quoted as saying, "I don't mind if someone has a personal vendetta against me. I don't mind confrontation. But I do mind when it hurts the people of the neighborhood. I think the city is abusing its power." Id.

Additionally, in an article published by the Kokomo Perspective, Kern admitted, "We never got licensed." The Perspective further quoted Kern as saying, "We completed the rest of the process, and the state fire marshal told us there was no reason why our permit couldn't be signed. But the Chief dragged his feet." Moreover, the Kokomo Tribune published a letter signed by Kern and two other members of the "Fireworks Committee." Among other things, the letter noted that "it would be nice if they took as much interest in getting their equipment in better working order instead of wasting taxpayer dollars and spending so much time trying to shut down our fireworks show." Id.

As a result of Kern's public comments, Duncan filed a professional standards complaint alleging violations of the Fire Department Rules and Regulations. After a number of hearings, the Kokomo Fire Department Board of Chiefs found that "Captain Kern brought the Department into disrepute, misled the public and residents of his neighborhood as to the reasons for the denial of the permit application, and undermined the public's confidence in the Department." Id. at 627. Kern subsequently sought judicial review in the Howard Circuit Court. The trial court reversed the Board and ordered Kern's reinstatement as a Captain. The City of Kokomo appealed.

The Court of Appeals reversed, first noting that Kern was not making statements pursuant to his official duties as a member of the Fire Department; thus, the rule laid down in Garcetti did not come into play. Id. at 629. However, the court found that Kern's dissemination of untruthful statements having the potential to affect the efficient and effective operation of the Fire Department justified his discipline and the First Amendment provided no protection under such circumstances.

Additionally, in Biggs v. Village of Dupo, 892 F.2d 1298 (7th Cir. 1990), officer Biggs served for fourteen (14) years a part-time police officer for the Village. A reporter for a local weekly newspaper, wishing to run a series called "Meet Your Police," interviewed the Village's police with the approval of the police chief. Biggs' comments, quoted accurately by the reporter, included: "In the years that I've been here, it's been hard to distinguish the politicians from the criminals." Id. at 1300. He also opined that the force was inadequately funded, staffed, and provisioned and that the politicians interfered too much in police affairs. The Mayor recommended that the Village Board dismiss Biggs. Biggs sued. No one disputed that the reason for Biggs' discharge was solely his comments in the article.

The Seventh Circuit, applying the Connick analysis, determined that "it is plain that the interview Mr. Biggs gave concerned issues of interest to the public." Id. at 1301. Biggs had criticized what he perceived to be inadequacies in the police department: inadequate funding, lack of equipment, low pay, high turnover rate, and the indifference of the Village's politicians. Even his comment that it was hard to tell the difference between the criminals and the politicians was protected, in that Biggs did not accuse the politicians of committing criminal acts, but merely implied that, by failing to help the police apprehend criminals, the politicians should be made to share the responsibility for damage to the community caused by crime. The court found that the State's interests were insufficient to outweigh Biggs' right to free speech.

2. Free Association.

a. Political Affiliation.

Public employees also have a constitutional right to freedom of association. In Elrod v. Burns, 427 U.S. 347 (1976), the Supreme Court decided that public employees discharged solely because of their political affiliation or non-affiliation state a cause of action under the First Amendment; specifically, freedom of association rights. In Rutan v. Republican Party of Illinois, 497 U.S. 62 , 69 (1990), the Supreme Court held that freedom of association rights extend to cases involving promotion, transfer, recall, and hiring decisions as well as discharges.

The only situation in which a public employer may lawfully consider political affiliation is in employing a policy-making or confidential employee. In Pieczynski v. Duffy, 875 F.2d 1331, 1333 (7th Cir. 1989), the Seventh Circuit succinctly summarized the law on this subject:

> (i) The discharge of a public employee because of his political beliefs violates the First Amendment, unless the employee's job is a policy-making position or a position of confidence, such that his employer should have a free hand in deciding whether to retain him.
>
> (ii) A discharge is not because of the employee's political beliefs if the employee would have been discharged regardless of those beliefs, even if the reason he would have been discharged anyway, while nonpolitical, is thoroughly disreputable, such as nepotism.
>
> (iii) But the mere fact that valid grounds exist for discharging the worker will not excuse the employer if, had it not been for the worker's political beliefs, he would not have been discharged.
>
> (iv) Harassment of a public employee for his political beliefs violates the First Amendment unless the harassment is so trivial that a person of ordinary firmness would not be deterred from holding or expressing those beliefs. The harassment need not be so severe to amount to constructive discharge -- that is, it need not force the employee to quit, by making work unbearable for him.

b. Candidacy for Political Office.

Public employees are limited in their ability to run for public office. (5 U.S.C.S. § 1502, IC 4-15-2.2-45). If the principal employment is in connection with an activity financed in whole or in part by loans or grants made by the United States or a federal agency, then they are covered by the Hatch Act and cannot be a candidate for elected office. (5 U.S.C.S. § 1502(a)(3)). If the employee is instead covered by the State Civil Service System and is elected to a federal or state public office, he or she is considered to have resigned from state service on the date the person takes office. (IC 4-15-2.2-45).

C. Fourth Amendment Implications of Public Employment.

1. Drug Testing.

Drug testing of public employees without probable cause, a warrant or individualized suspicion of wrongdoing is a search within the meaning of the Fourth Amendment and is generally unconstitutional. To be constitutional, the practice must be "reasonable" when balancing the employee's privacy expectations against the government's interest in the drug testing program. Where privacy interests are minimal and the governmental interests are substantial, the individualized suspicion requirement may be unnecessary.

For example, the U.S. Supreme Court upheld drug testing of U.S. Customs' employees without an individualized suspicion of wrongdoing because their positions directly involved drug interdiction and carrying firearms. National Treasury Employees' Union v. Von Raab, 489 U.S. 656 (1989). The U.S. Supreme Court also upheld drug testing of train operators following an accident because there was evidence of drug and alcohol abuse by railroad employees. Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989). In these cases, the court found that the state's special needs in safety sufficiently compelling to warrant the intrusion. Moreover, in Oman v. State, 737 N.E.2d 1131 (Ind. 2000), a firefighter was charged with operating a vehicle with controlled substances in his blood based on results of a compulsory drug test pursuant to a city policy. The firefighter moved to suppress the test results. The Indiana Supreme Court held that the city ordinance, requiring toxicological testing of city employees under certain circumstances, was valid under the "special needs" exception to warrant and probable cause requirements of the Fourth Amendment.

However, the U.S. Supreme Court in Chandler v. Miller, 520 U.S. 305 (1997) found Georgia's requirement of mandatory drug testing for candidates for state office was unconstitutional. The Court found that Georgia failed to show a sufficient special need to override the individual's privacy interests. The Court elaborated that a demonstrated problem of drug abuse among candidates for office would have shored up an assertion of special need.

2. Workplace Searches.

In O'Connor v. Ortega, 480 U.S. 709 (1987), the Supreme Court held that the Fourth Amendment applies to workplace searches. The Court defined the "workplace" as "those areas and items that are related to work and are generally within the employer's control." Id. at 715. These include the hallways, cafeteria, offices, desks, and file cabinets, among others, even if the employee has placed personal items in the desk and/or filing cabinets.

The court then held that although public employees have a reasonable expectation of privacy, "[t]he operational realities of the workplace . . . may make some employees' expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official." The Court then determined that an employer has no need of a warrant or probable cause if (a) the search is a non-investigatory work-related intrusion (e.g., employer needs document from employee's file and employee is not present); or (b) the search is an investigatory search for evidence of suspected work-related misfeasance.

D. Issues Relating to Residency Requirements for Public Employees.

1. General.

The Indiana Constitution, and several state statutes, contain residency requirements for both elected officials and public employees. In most cases, the requirements are that the person reside in the city or county where they work during their employment or term of office. Some counties have ordinances or personnel policies that contain similar requirements.

2. Legality.

Residency requirements, such as those mandated by the Indiana statute, are constitutional. McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645 (1976). These requirements have withstood Due Process and Equal Protection challenges. Detroit Police Officers Assn. v. City of Detroit, 405 U.S. 950 (1972). In McCarthy, the Court rejected a challenge to the requirements on the basis that they interfered with the employee's right to travel interstate. 424 U.S. at 646. Residency requirements have been held to be rationally related to legitimate government purposes. Andre v. Board of Trustees of Village of Maywood, 561 F.2d 48, 50 (7th Cir. 1977) cert. denied 434 U.S. 1013 (1978) (and cases cited therein). According to the Supreme Court, its opinions have not challenged "the validity of appropriately defined and uniformly applied bona fide residence requirements." McCarthy, 424 U.S. at 647.

However, the Supreme Court has distinguished between requirements of continuing residency (those that apply prospectively) and a requirement of prior residency of a given duration (those that apply retroactively). See McCarthy, 424 U.S. at 647. The continuing residency requirements have generally been upheld for public employees and officials. Prior residency requirements (i.e. must be a resident of the government unit two years as a condition of the job) have generally been struck down.

E. Immunity of Public Employees and Entities From Suit.

Qualified immunity shields a public officer from activities within the scope of his office where he does not violate clearly established rights of which he should have been aware. Qualified immunity is available only to the acting official and not to the entity he represents.

The U.S. Supreme Court enunciated the modern standard to be applied in qualified immunity cases in Harlow v. Fitzgerald, 457 U.S. 800 (1982). The court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

Procedurally, the qualified immunity analysis has undergone some refinement in recent years. In 2001, the Supreme Court in Saucier v. Katz, 533 U.S. 194 (2001), established a two-step test to determine whether qualified immunity was warranted. Under the Saucier analysis, a court must determine whether: 1) the facts demonstrated a violation of a constitutional right; and 2) whether that constitutional right was "clearly established" at the time of the public official's conduct. In Pearson v. Callahan, 555 U.S. 223, 236(2009), the Supreme Court modified the test is Saucier, holding that courts need not first determine whether the facts alleged or shown by plaintiff make out a violation of a constitutional right. The Court in Pearson held that while the Saucier protocol is often beneficial, the sequence set forth will no longer be mandated. Instead, judges may exercise their "sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances of the particular case at hand."

For a right to be "clearly established," it must be sufficiently clear so that the officials could not have reasonably believed that their actions were lawful. Anderson v. Creighton, 483 U.S. 635 (1987). "Clearly established means that in light of pre-existing law the unlawfulness must be apparent." Therefore, when no binding precedent exists, the courts look to all relevant case law to determine whether a right has been clearly established. Doe v. Bobbit, 881 F.2d 510, 511 (7th Cir. 1989). The key is to identify "a substantial consensus of opinion that a course of conduct infringed on a right protected by the constitution."

Public officials are not charged with predicting the future course of constitutional law, but they are expected to know the extent of clearly established constitutional rights. Courts are more willing to grant immunity where a public official relies upon the advice of his attorney in deciding what action to take. See Pate v. Village of Hampshire, 2007 WL 3223360, *14 (N.D. Ill 2007) ("If an immunity defense fails because the law was clearly established and a reasonably competent public official should have known the law governing the conduct, the public official may still be immune from suit if extraordinary circumstances exist, such as relying on the advice of counsel in making the disputed decision.") (citing Davis v. Zirkelback, 149 F.3d 614, 620 (7th Cir. 2007)). See also Wells v. Dallas Independent School District, 576 F.Supp. 497 (N.D. Tex. 1983); Patterson v. Ramsey, 413 F.Supp. 523 (D.C. Md. 1976).

F. Polygraph Testing of Public Sector Employees.

1. General.

The Employee Polygraph Protection Act, 29 U.S.C. §§ 2001, et seq., was passed by Congress in 1988. It broadly prohibits the use of polygraphs in private employment, but specifically exempts "any state or local government, or any political subdivision of a state or local government." Accordingly, there is currently no federal limitation on a public employer's ability to use polygraph tests in employment; Indiana also has no statute which would prohibit use by a public employer. Most reported cases indicate that a public officer or employee can be discharged or suspended for refusing to take or failing a polygraph examination if certain principles are satisfied. There are no Indiana District Court or Seventh Circuit Court of Appeals cases on point. Given the rapidly changing legal landscape, caution is advised.

2. Fifth Amendment Concerns.

Requiring public employees to submit to polygraph examinations brings into play the Fifth Amendment prohibition against self-incrimination. Certain Supreme Court decisions provide guidance on how a public employer's right to require polygraph tests relates to Fifth Amendment concerns.

a. Statements From Employee Not Admissible in Criminal Prosecution.

Any statement obtained from a public employee under the threat of discharge or other adverse employment may not be used against him/her in a subsequent prosecution. Garrity v. New Jersey, 385 U.S. 493 (1967).

b. Discharge For Refusal to Answer Questions.

Public employees may constitutionally be discharged for refusing to answer potentially incriminating questions concerning their official duties if they have not been required to waive their constitutional immunity. Lefkowitz v. Cunningham, 431 U.S. 801 (1977).

3. Limitation on Permissible Questions.

There are limitations on the questions a public employer can ask. All questions must relate specifically and narrowly to performance of job duties.

In Talent v. Havolene, 508 S.W.2d 592 (Tex. 1974), a fireman was discharged after refusing to take a polygraph test concerning a charge against him for receiving and concealing a stolen pickup truck. The fireman argued that the fire chief had no legal authority to order a lie detector test concerning the fireman's criminal activity when the charged crime did not relate to the fireman's official duties or to his accounting for his public trust. The court agreed and held that the fire chief had no authority to order a polygraph test involving non-employment-related subjects.

The employee's position may affect the type of questions asked. In Fireman's and Policeman's Civil Service Commission v. Burnham, 715 S.W.2d 809 (Tex. App. 1986), cert. denied 102 L. Ed. 2d 86 (1988), the court held that a police department could dismiss a policeman for refusing to submit to a polygraph exam concerning a rape. The court noted that the police officer had an obligation to prevent crime even when off duty and, therefore, the exam related to the officer's official duties.

4. Applicant Testing.

There is less constitutional concern when applicants are required to pass polygraph exams before being hired. There are very few cases addressing this issue, but those reported are favorable to public employers.

In Anderson v. Philadelphia, 845 F.2d 1216 (3rd Cir. 1988), for example, the City of Philadelphia used pre-employment polygraphs to screen applicants for police and correctional positions. Several applicants who were denied positions after failing the tests claimed the tests were unconstitutional because they deprived applicants of property or liberty interests as well as equal protection and substantive due process rights. The court noted that the plaintiffs were merely applicants for employment which gave them no legitimate entitlement to the positions.

The plaintiffs also made an equal protection argument, challenging a Pennsylvania statute that allowed police and prison departments to make polygraph testing an element of their hiring procedures. The statute was upheld because there was no showing that any superior alternative was available to exclude drug-using applicants from police and correction officer positions.

G. Offering Compensatory Time in Lieu of Overtime.

1. General.

The Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201, et seq., regulates how, and whether, state, and local governments may offer employees compensatory time off in lieu of monetary overtime payments. Compensatory time received by employees must be at the rate of not less than one and one-half (1½) hours of compensatory time for each hour of overtime work, and there are limitations on the amount of compensatory time certain employees can accrue before they must be paid monetary overtime compensation.

2. Agreement Required.

Compensatory time in lieu of cash overtime payments may not be offered unless an agreement or understanding is reached between the employer and the employee, or the employee's representative, prior to the performance of the overtime work.

a. Collective Bargaining Agreement.

The agreement between the parties can be accomplished pursuant to a collective bargaining agreement or a memorandum of understanding between the public employer and the employee representative. The employee representative does not have to be a formal or recognized bargaining agent. Any individual or group designated by the employees is sufficient. However, if the employees have a recognized representative, the agreement must be between the representative and the public agency.

b. Oral Agreement.

The agreement does not need to be included in a collective bargaining agreement. Any oral or written agreement between the parties will suffice. The agreement does not need to be in writing, but a record of its existence must be kept. The requirement that an agreement be reached does not apply to employees who were hired prior to April 15, 1986, if the employer already had a regular practice of granting compensatory time off in lieu of cash payments.

c. Treating Some Employees Differently.

The public agency does not have to reach the same agreement with all of its employees, and can even offer compensatory time to some employees, but not all of them. However, the public agency cannot offer compensatory time in a manner that discriminates against any employee on the basis of sex, race, color, national origin, religion, sexual orientation, citizenship, pregnancy, gender identity, age, disability, genetic information, military status, or any other protected characteristic as protected by law.

d. Terms of Agreement.

The employee must be informed that the compensatory time may be used, preserved or cashed out according to the provisions of the Act. The employee also must knowingly and voluntarily agree to it as a condition of employment. Employees may not be coerced into accepting compensatory time. But if a public agency notifies an employee that compensatory time will be provided in lieu of overtime, and the employee fails to object, it is presumed that an agreement or understanding exists between the parties. Agreements may also provide for a combination of compensatory time off and overtime payments so long as the premium pay principle of at least time and one half is maintained.

3. Limitations on Accumulation of Compensatory Time.

There are limitations upon the number of hours certain employees can accumulate in compensatory time before they must be compensated for their additional overtime hours in cash payments.

a. Public Safety Employees/Seasonal Employees.

Employees who are engaged in "public safety," "emergency response," or "seasonal activities," may accrue up to 480 hours of compensatory time. After that, they must receive their overtime payments in cash. The category "seasonal activity" can be difficult to define. It includes work that significantly increases in demand on a regular and recurring basis. Two considerations apply: (1) whether the work is a regular and recurring aspect of the employee's job; and (2) whether it is reasonable to expect that the increased demand will result in the employee accumulating more than 240 hours of compensatory time during the peak demand periods. The word "seasonal" does not only refer to weather-related occupations. Processing tax returns is an example of a seasonal job not tied to fluctuations in the weather.

b. Other Employees.

Other employees may only accrue 240 hours before they must begin receiving monetary compensation.

4. Employee Use of Compensatory Time and Cash in Lieu of Time Off.

An employee who has accrued and requested the use of compensatory time must be permitted to use the time within a "reasonable period" after making the request, as long as the time off does not "unduly disrupt" the operations of the agency. A reasonable period of time is determined by the customs and practices within the agency. To determine what is reasonable, the normal work schedule, anticipated peak demands, emergency requirements for staff services and the availability of qualified substitute staff should be taken into account. If an agency turns down an employee's request for compensatory time off, it must be based on the fact that time off would impose an unreasonable burden on the agency's ability to function without the employee. Mere inconvenience to the employer is insufficient.

If the public employer desires, overtime compensation may be provided in cash instead of time off. The Act does not prohibit employers from substituting cash payments at any time, without jeopardizing its right to grant compensatory time off in the future. The cash overtime amount due must be paid at a rate not less than one and one-half (1½) times the employees' regular rate. However, in a work period when an employee earns cash overtime payments, and also has compensatory time off, the payment for the compensatory time off may be excluded from the employee's regular rate of pay.

5. Record Keeping Requirements.

There are certain record keeping requirements. For each covered employee, the public agency must maintain and preserve records that contain the number of compensatory time hours earned and the number of compensatory hours used during the applicable work period. A record must be kept of the number of compensatory hours compensated in cash, the total amount paid, and the date of the payment. Records of the agreements and understandings between the employees and the agency must also be maintained pursuant to the Act. In addition, separate records must be maintained for employees subject to the partial overtime exemption in § 207(k) of the Act, such as fire protection or law enforcement employees.

H. Federal Regulation of Employment.

There are several federal statutes which prohibit discrimination by public and private employers. These statutory prohibitions are in addition to the numerous constitutional limitations placed on city, county, and state conduct.

1. Title VII.

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000, et seq., prohibits discrimination on the basis of race, color, religion, sex (or pregnancy), or national origin.

The Equal Employment Opportunity Act of 1972 extended the coverage of the Civil Rights Act of 1964 to state and local governments, governmental agencies and political subdivisions (EEOC Act of 1972, § 2, ¶ (1)). When Congress extended Title VII to state and local governments in 1972, it exempted from the statute's protections any elected state officials, as well as "any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office." 42 U.S.C. § 2000e(f). Section 321 of the Civil Rights Act of 1991 does away with this exemption and individuals hired or appointed by an elected state official may now file a charge with the EEOC and, if successful, may obtain backpay and compensatory damages. Punitive damages, however, are not permitted.

a. Disparate Treatment.

The most common theory of employment discrimination is "disparate treatment." Under this theory, an employer impermissibly differentiates among employees or applicants based on their race, color, religion, sex, or national origin. International Bhd. of Teamsters v. United States, 431 U.S. 324, n. 15 (1977). Simply put, the employer intentionally treats some people less favorably than others because they are members of a protected group. The Supreme Court has recognized that this was the most obvious evil that Congress had in mind when it enacted Title VII. Id. Disparate treatment cases usually arise in the context of individual claims of discrimination. However, the theory can and has been used to prove unlawful discrimination in class actions and government pattern or practice cases.

b. Disparate Impact.

This theory applies to situations where a specific, facially neutral employment practice is challenged as having disproportionate impact on members of a protected group and that impact cannot be justified by a legitimate business concern. See, EEOC v. Steamship Clerks Union, 48 F. 3d 594, 601 (1st Cir. 1995) (union requirement that all new members be sponsored by existing member had unlawful disparate impact where all new members were white).

The Supreme Court has held that disparate impact analysis applies not only to objective criteria -- such as scored tests -- but also to subjective decision making in such matters as hiring and promotion. Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 991 (1988).

c. Retaliation.

Title VII also provides protection to employees or applicants against retaliation by an employer because they have invoked a protected right.

Specifically, Section 704(a) provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceedings, or hearing under this title.

d. Sexual Harassment.

The prohibition against sex discrimination includes claims for sexual harassment. Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. There are two types of sexual harassment:

(1) Quid Pro Quo harassment -- where submission to or rejection of the advances, requests or conduct is used as a basis for employment decisions affecting the individual.

(2) Hostile Environment harassment -- where the conduct has the purpose or effect of unreasonably interfering with an individual's job performance by creating an intimidating, hostile, humiliating or offensive work environment.

The U.S. Supreme Court clarified vicarious liability for supervisor sexual harassment in Faragher v. City of Boca Raton, 524 U.S. 775 (1998) and Ellerth v. Burlington Industries, Inc., 524 U.S. 951 (1998). An employer is vicariously liable to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. If the supervisor's harassment results in a tangible employment action, such as discharge, demotion or undesirable reassignment, the employer is vicariously liable and the employer may not assert an affirmative defense. If there is no tangible employment action taken, the defending employer may raise an affirmative defense. The defense comprises two necessary elements:

> (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

Faragher, 524 U.S. at 778.

With these decisions, the U.S. Supreme Court sternly reminded employers that it is their responsibility to eliminate such behavior by supervisors in the workplace. For this reason, employers should adopt a policy prohibiting such harassment, ensure employees are trained on the policy, institute measures for employees to report incidents, implement protocols to investigate complaints, and take prompt effective action to remedy any confirmed harassment. Adopting such measures would help an employer establish that it acted reasonably under the law, while a complainant's failure to take advantage of such reporting procedures would show that she or he acted unreasonably.

e. Harassment Based On Other Protected Categories.

Sexual harassment is not the only form of unlawful harassment prohibited by Title VII. The law recognizes that harassment based on any protected category is a form of employment discrimination. Harassment in violation of Title VII is unwelcome conduct based on race, color, religion, sex (including pregnancy), or national origin. Harassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive. Offensive conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance.

f. Religious Discrimination.

Section 701(j) of Title VII requires that an employer reasonably accommodate the religious beliefs and practices of its employees or prospective employees except to the extent that the employer can demonstrate that such accommodation will impose undue hardship on the conduct of its business. 42 U.S.C.A. § 2000e(j). An individual alleging a violation under this provision

must prove that he/she has a bona fide religious observance in conflict with some facet of his/her employment, that he/she informed his/her employer of that observance, and that the employer subsequently disciplined him/her or denied him/her a position for failing to comply with the conflicting employment requirement. Wilson v. U.S. West Communications, 58 F.3d 1337, 1340 (8th Cir. 1995); Bhatia v. Chevron U.S.A., Inc., 734 F.2d 1382, 1383 (9th Cir. 1984). The burden then shifts to the employer to demonstrate that it made a good faith effort to accommodate the religious practice but was unable to do so to the satisfaction of the employee without incurring undue hardship to the conduct of its business. Id.

Under the definition established by the U.S. Supreme Court in TWA, Inc. v. Hardison, "undue hardship" on the conduct of an employer's business will occur whenever a proposed accommodation imposes a burden on other employees, forces the abandonment of a seniority system, or forces the employer to bear more than a de minimis cost, the amount of which will be determined by the EEOC or court on a case-by-case basis. TWA, Inc. v. Hardison, 432 U.S. 63, 84 (1977). Safety considerations also may be relevant in determining whether a proposed accommodation would produce an undue hardship on the employer's business. Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 521 (6th Cir. 1976).

Most often, cases involving violations of the duty to accommodate have arisen in the context of employees whose religious observances conflict with their work schedules. There are, however, other religious practices which are entitled to accommodation under Title VII, including those related to dress and personal grooming. Decision 81-20, 27 Fair Empl. Prac. Cas. (BNA) 1809 (Apr. 8, 1981). However, the courts will balance safety considerations against dress and personal grooming practices to determine whether the employer has offered a reasonable accommodation. Decision 82-1, 28 Fair Empl. Prac. Cas. (BNA) 1840 (Jan. 18, 1982); and Bhatia v. Chevron U.S.A., Inc., 734 F.2d 1382 (9th Cir. 1984) (where company offered Sikh employee four other positions that did not require him to be clean shaven to wear a respirator mask for protection from toxic fumes, it did not violate Title VII).

Once an employer makes an offer of reasonable accommodation, it will have generally met its burden under § 701(j) of Title VII. An employer is not required to show that an employee's alternative accommodation would result in undue hardship. Board of Education v. Philbrook, 479 U.S. 60, 68 (1986).While the effort to reach accommodation must, of course, be undertaken in good faith, it is not necessary that the employee accept an offer to demonstrate that the employer has not discriminated on the basis of religion. Id.

2. Age Discrimination.

The Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621, et seq., prohibits discrimination based on age against any employee or applicant if he/she is 40 or over. The age 70 cap has been eliminated. A person may work as long as he/she is mentally and physically able.

However, some employees, most notably, state or local public safety employees, such as firefighters and law enforcement officers, may be forced to retire at a certain age. Further, an employer, employment agency, or labor organization may "observe the terms of a bona fide

seniority system or any bona fide employee benefit plan." For example, an employer may maintain a retirement plan which sets benefit levels based upon the age of the participant, but an employer may not force someone to quit work just because he/she has reached "retirement age."

The ADEA also recognizes that certain positions have "bona fide occupational qualification[s]" (BFOQ). To establish the BFOQ defense, the employer must show that:

(i) the employer reasonably believes that all people over a certain age are unable to perform a job-related task safely; and

(ii) it is impossible to test individual employees over that age to determine who can perform the job-related task safely.

However, courts have held that the BFOQ defense is to be interpreted narrowly and the burden is on the employer to show its applicability. Orzel v. City of Wauwatosa Fire Dep't, 697 F.2d 743, 748 (7th Cir. 1983).

3. Americans with Disabilities Act.

The Americans with Disabilities Act of 1990 prohibits discrimination against qualified individuals with a disability. It requires employers to make reasonable accommodations if this will permit an otherwise qualified individual to perform the essential job functions. Reasonable accommodations could include the procurement of special devices, the modification of work areas, the modification of work schedules, and the modification of job assignments. Once an employee makes an accommodation request, the employer must engage in the interactive process to determine whether a reasonable accommodation exists that will allow the employee to perform his or her essential job functions without posing an undue burden on the employer.

The ADA was amended in 2008 and significantly expends the definition of disability. For example, an impairment that is episodic or in remission still qualifies as a disability if it would constitute a disability when flaring up.

In terms of hiring, it is important to note that prior to making an offer of employment to a job applicant, it is generally unlawful to ask questions about disabilities or medical history; however, the employer may describe the job duties and ask whether there are any reasons why the applicant cannot or will not be able to perform those duties.

4. The Lilly Ledbetter Fair Pay Act of 2009.

On January 29, 2009, President Obama signed the Lilly Ledbetter Fair Pay Act which adopted the "Pay-Check Accrual" rule. The law makes the statute of limitations for claims of compensation discrimination run anew each time wages or benefits are paid under a discriminatory compensation scheme.

5. Uniform Services Employment and Reemployment Rights Act (USERRA).

USERRA protects members of the armed services, including reservists and members of the national guard, from discrimination based on their status in the uniformed services and provides for prompt reemployment of members of the armed services following their return to civilian society. 38 U.S.C. §§ 4301(a)(2) and (3). Further, like Title VII, USERRA prohibits retaliation against a person who has asserted rights under USERRA or participated in an investigation. 38 U.S.C. § 4311(b).

USERRA requires that an employer deem any employee called to active duty for training or otherwise to be on a leave of absence. 38 U.S.C. § 4316(b). The employee is entitled to the rights and benefits of his or her prior position, including rights pursuant to a pension plan, health plan, employee stock ownership plan, insurance coverage, bonuses, severance pay, supplemental unemployment benefits, vacations and the opportunity to select work hours or location of employment. 38 U.S.C. § 4303(2). The employee is also entitled to the seniority that he or she had on the date of the commencement of service plus any additional seniority or rights that accrued during the employee's military service. 38 U.S.C. § 4316(a). However, the employer is not required to pay an employee for the time he or she is absent for military duty nor is the employer required to make up the difference between the military salary and the private salary. Perz v. City of Hammond, 24 F.3d 899 (7th Cir. 1994).

USERRA also requires that an employee be reemployed to his or her former position, unless the employer can establish that the reemployment would cause an undue burden. 38 U.S.C. § 4312(d)(1). Specifically, the employer must show that the employer's circumstances have so changed as to make the employment impossible or unreasonable or that the employment would impose an undue hardship on the employer or that the employment from which the employee departed was temporary in nature. 38 U.S.C. § 4312(d)(1).

USERRA imposes an obligation upon the employee to report back to the prior position within a certain time frame. If the employee's leave was for a physical examination or for less than 31 days, the employee is required to report to work on the next scheduled workday following his travel home and an eight-hour rest period. If the employee's military service was for more than 30 days but for less than 181 days, the employee must request reemployment within 14 days; if the employee's military service was for more than 180 days, the employee must request reemployment within 90 days. 38 U.S.C. § 4312.

Once an employee is reemployed pursuant to USERRA, the employee may not be terminated, except for just cause, for one year after the date of such reemployment where the person had been employed for more than 180 days prior to his departure and for 180 days where the person had been employed for 30 to 180 days prior to his departure. 38 U.S.C. § 4316(c).

6. Family and Medical Leave Act (FMLA).

The Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601, et seq., provides for twelve (12) weeks unpaid leave per year for covered employers who have eligible employees for the birth of a child, for the placement of a child by adoption or foster care, to care for a family member with a serious health condition, a covered service member or because the employee's own serious health condition makes the employee unable to perform the functions of his/her job.

Generally, FMLA is unpaid leave; however, either the employee or the employer may elect to substitute the employee's accrued paid leave for FMLA leave time under certain circumstances. 29 U.S.C. § 2612 (d)(2)

The FMLA applies to the State and its political subdivisions. Public agencies are covered by the FMLA regardless of the number of employees. However, employees must meet all eligibility requirements, including the below requirements that the employer employ 50 employees at the worksite or within 75 miles.

To be an eligible employee under the Act, the employee must meet the following criteria:

(1) The employee must actually have worked 1,250 hours during the preceding twelve months. The 1,250 hours must be hours actually worked and would therefore exclude vacation time, sick leave, worker's compensation leave, etc. The determination for this requirement is measured as of the date the leave is to commence.

(2) The employee must have been employed for at least twelve (12) months by the Company. The twelve (12) months need not be consecutive. The "payroll method" of calculating the employee's length of employment is used. Therefore, any week in which the employee is carried on the Company's payroll will be considered a week worked. The twelve (12) month requirement is measured as of the date the leave is to commence.

(3) The employee must work at a site where fifty (50) or more employees are employed by the employer within a seventy-five (75) mile radius. Unlike the 1,250 or 12-month requirement, the "50 employee" test is measured at the time the leave is requested, not the time it is to commence.

29 C.F.R. § 825.110.

The FMLA provides for leave in a number of situations:

(1) *New Child Care*. Employers must grant leave to an eligible employee to care for a child that is born, adopted or placed in foster care within the preceding twelve (12) months. 29 C.F.R. § 825.120. The leave must be concluded within the first twelve (12) months following the birth or

placement. Thirty (30) days notice is usually required unless unforeseen. If the spouse is also employed, the total leave time for both parents is twelve (12) weeks. 29 C.F.R. § 825.120. Significantly, the Department of Labor ("DOL") recently expanded the definition of "son or daughter" under the FMLA. The expanded definition ensures that an employee who assumes the role of caring for a child receives parental rights to family leave regardless of the legal or biological relationship.

(2) *Family Leave.* An eligible employee must also be granted leave to care for a qualified family member with a serious health condition. Qualifying family members include spouses, sons, daughters, or parents of the employee. 29 U.S.C. § 2612 (1)(C). Significantly, the Department's expanded definition of "son or daughter" applies in this context as well. The family member must have a "serious health condition" as defined by 29 C.F.R. § 825.113. Additionally, the family member must be receiving treatment from "a health care provider" as defined by 29 C.F.R. § 825.125. The leave must be necessary "to care for a family member," which encompasses both physical and psychological care for the family member as well as filling in for others who are caring for the family member. The employee may take intermittent or reduced leave for this purpose.

(3) *Medical Leave for a Serious Health Condition.* An employee is entitled to twelve (12) weeks leave per year if he or she has a serious health condition. A "serious health condition" is defined as an illness, injury, impairment or physical or mental condition that involves:

- ☐ In-patient care (i.e., an overnight stay), including any subsequent period of incapacity or treatment related to the same condition; or

- ☐ Continuing treatment by a health care provider. Continuing treatment includes:

    (1) Incapacity for more than three (3) consecutive calendar days ***plus*** one of the following:

        (a) treatment two (2) or more times by a health care provider or agent within 30 days of the first day of incapacity; or

        (b) treatment on one occasion ***plus*** a regimen of continued treatment under the health care provider's supervision.

    (2) Incapacity for pregnancy or for prenatal care.

(3) Long-term or permanent incapacity due to an incurable condition ***plus*** continuing supervision of a health care provider.

(4) Incapacity due to a chronic serious health condition. Such a condition requires:

(a) periodic visits for treatment by a health care provider or agent;

(b) continuation over a long period of time; ***and***

(c) may cause episodic rather than continuing period of incapacity (e.g., asthma, diabetes, epilepsy).

(5) Any period of incapacity to receive multiple treatments for:

(a) restorative surgery after an accident or other injury; or

(b) a condition that would result in more than three (3) days of incapacity without the treatment (e.g., dialysis for renal disease, chemotherapy for cancer, physical therapy for severe arthritis).

(6) Examinations to determine whether a serious health condition exists.

29 C.F.R. § 825.114; 29 C.F.R. § 825.115

On October 28, 2009, President Obama signed into law the National Defense Authorization Act of 2010, amending the FMLA to provide the following:

- ☐ Exigency leave rights are now available to family members of active duty service members in the Armed Forces deployed to a foreign country. Qualifying exigencies include: (1) short-notice deployment (i.e. seven or less days of notice); (2) military events and related activities (i.e. official program and events sponsored by the military); (3) child care and related activities (i.e. arranging for alternative childcare); (4) financial and legal arrangements; (5) counseling; (6) rest and recuperation; (7) post-deployment activities (i.e. attending arrival ceremonies); and (8) any other event that the employee and employer agree is a qualifying exigency. 29 C.F.R. § 825.126

- ☐ Caregiver leave rights have been expanded to include 26 weeks of leave to take care of a child, spouse, parent or next of kin who is a veteran, is undergoing medical treatment, recuperation or therapy for a serious injury or illness, and who was a member of the Armed Forces (including the National Guard or the Reserves) at any time during the period of five years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy.
    - The 12 month period begins on the first day of leave, regardless of the employer's method of calculation, and ends 12 months after that date. If not taken during this 26 week period, the balance is forfeited.
    - Care of the covered service member uses a rolling forward calculation based on the first date leave is used for this purpose.

29 C.F.R. § 825.127

Every covered employer must post a notice explaining the FMLA's provisions. 29 C.F.R. § 825.300. If the employer has a handbook, the employer's FMLA policy must be included in the handbook; however, if the employer does not have a handbook, the employer must provide written information to an employee concerning his/her rights and obligations under the FMLA. 29 C.F.R. § 825.301. The FMLA also requires the employer to maintain all records and documents relating to FMLA leave, including medical certifications, recertifications, or medical histories; these medical documents must be maintained in separate files and treated as confidential.

An employer is entitled to notice of FMLA leave. An employee must give the employer thirty (30) days' notice if the leave is foreseeable. If the leave is not foreseeable, the employee must notify the employer as soon as is practicable. 29 C.F.R. §§ 825.302-303.

An employer may require medical certification for leave based on an employee's own serious health condition that makes the employee unable to perform one or more essential functions of the job or based on leave to care for a family member with a serious health condition. 29 C.F.R. § 825.305. However, the employer may not request additional information from a health care provider who has provided a certification. 29 C.F.R. § 825.307. If the employer doubts the adequacy of the certification, the employer's own health care provider, human resource professional, leave administrator, or management official may contact the certifying provider to clarify information only or the employer may require a second opinion at its expense. In no circumstances should the employee's direct supervisor contact the employee's health care provider.

An employer may generally request recertification no more frequently than every thirty (30) days for either pregnancy, or chronic or permanent long-term conditions. 29 C.F.R. § 825.308. The employer may require an employee on FMLA leave to report periodically on his/her status and intent to return to work. 29 C.F.R. §§ 825.311. The employer may also require

a return to work certification of all employees if the leave was for their own serious health condition.

During FMLA leave, the employer must maintain the employee's group health care coverage to the extent that the employee would be covered absent the leave. 29 C.F.R. §§ 825.209-211. Therefore, if the employee is required to pay a co-pay for medical benefits, the employee must continue to make his/her co-payment.

Where an employee needs a reduced leave schedule, the employer may require him or her to temporarily transfer to an available alternative position for which the employee is qualified and which can better accommodate the employee's work schedule. 29 C.F.R. § 825.204. The alternative position must have equivalent pay and benefits.

An employee is entitled to be returned to the same or equivalent position upon return from FMLA leave. An equivalent position is one that is virtually identical to the former position in terms of pay, benefits and working conditions, including privileges, pre-requisites and status. An employee is not entitled to accrue additional benefits or seniority during unpaid FMLA leave, such as paid vacation, sick time or personal leave. However, the employee is entitled to any unconditional pay increases which occur while on leave, such as cost of living increases, and the FMLA time may not be used as a break in service for purposes of pension or retirement plan vesting. 29 C.F.R. §§ 825.214, 825.216.

I. State Regulation of Employment.

Indiana has been, and remains, an employment-at-will state. This means that an employee without a written contract of employment for a fixed term may be terminated at any time by the employer with or without cause. In recent years, however, exceptions to the employment-at-will doctrine have been created by the courts and through enactment of state statutes which limit an employer's discretion.

1. Exceptions to Employment-At-Will.

Exceptions to the employment-at-will doctrine have been narrowly drawn. Baker v. Tremco, Inc., 917 N.E.2d 650, 655 (Ind. 2009).

a. Statutory Right/Statutory Duty.

An employee may not be discharged solely for exercising a statutorily confirmed right or exercising a statutory duty. An employee may not be terminated for filing a worker's compensation claim. Frampton v. Central Indiana Co., 297 N.E.2d 425 (Ind. 1973) ("Retaliatory discharge for filing a workmen's compensation claim is a wrongful, unconscionable act and should be actionable in a court of law"). Further, an employee may not be terminated for refusing to commit an illegal act for which he would be personally liable. McClanahan v. Remington Freight Lines, Inc., 517 N.E.2d 390 (Ind. 1988). Also, an employee may not be terminated for responding to a summons for jury duty. Call v. Brass, 553 N.E.2d 1225 (Ind. Ct. App. 1990); IC 34-4-29-1

(statutory provision making it illegal to fire an employee for responding to jury duty). Moreover, the Indiana Supreme Court has recognized that a constructive retaliatory discharge may in some instances fall within the narrowly drawn public policy exception to the employment-at-will doctrine. Tremco, 917. N.E.2d at 655 ("Depending on the facts, [a constructive retaliatory discharge] is merely retaliatory discharge in reverse. The constructive discharge doctrine acknowledges the fact that some employee resignations are involuntary and further prevents employers who wrongfully force an employee to resign to escape any sort of liability for their actions.").

However, the courts are very reluctant to create exceptions to the employment-at-will doctrine and have rarely found any new statutory rights/statutory duties in the cases since McClanahan. For example, in Wior v. Anchor Industries, Inc., 669 N.E.2d 172 (Ind. 1996), the Indiana Supreme Court found that an employee who was terminated for refusing to discharge an employee who had filed a worker's compensation claim did not have a claim for his own wrongful termination. The Court reasoned that the statutory right to file a worker's compensation claim flowed only to the employee who filed the claim and did not provide any employment protection to the employee's supervisor who was ordered to terminate him.

b. Adequate Independent Consideration.

An employee may not be terminated at will if he or she provides adequate independent consideration for the employment that results in a detriment to the employee or a benefit to the employer. An employer cannot arbitrarily terminate an employee when "(1) the employer knows the employee had a former job with assured permanency . . . and (2) was only accepting the new job upon receiving assurances the new employer could guarantee similar permanency." Romack v. Public Service Company of Indiana, 511 N.E.2d 1024 (Ind. 1987). Relinquishing permanent employment with the Indiana State Police is adequate independent consideration, Romack, 511 N.E.2d at 1024; however, relocating or moving does not provide sufficient independent consideration to require just cause for termination. Ohio Table Pad. Co. of Indiana, Inc. v. Hogan, 424 N.E.2d 144 (Ind. App. 1981).

2. Political Subdivision Employees.

Employees of Indiana cities and towns enjoy special protections under Indiana labor law. An employee of a political subdivision may report in writing the existence of:

(1) A violation of a federal law or regulation;
(2) A violation of a state law or rule;
(3) A violation of an ordinance of a political subdivision; or
(4) The misuse of public resources.

For having made a report, an employee may not:

(1) Be terminated;
(2) Have salary increases or employment-related benefits withheld;

(3) Be transferred or reassigned;
(4) Be denied a promotion that the employee otherwise would have received; or
(5) Be demoted.

An employer who violates this provision commits a Class A misdemeanor.

When making a report of a violation, the employee has the obligation to make a reasonable attempt to ascertain the correctness of any information. The employee may be subject to disciplinary action, including suspension or dismissal, for knowingly furnishing false information.

(IC 36-1-8-8).

3. State Employees' Bill of Rights.

In addition to those protections enjoyed by employees of political subdivisions, employees of the State of Indiana, including state administration, agency, authority, board, bureau, commission, committee, council, department, division, institution, office, service or other similar body of state government, enjoy special protections under Indiana labor law. The above protections set forth in Section 2, Political Subdivision Employees, apply to employees of state agencies. (IC 4-15-10-4). Employees of state colleges and universities and elected officials are excluded from these protections.

A State employee may not be prohibited from engaging in political activity, except while on duty. A State employee may not be denied the right to be a member of an organization of employees. A State employee may not be retaliated against or threatened to suffer retaliation because he/she exercised his/her rights under the State Employees' Bill of Rights. Further, a State employee who is a volunteer firefighter may not be disciplined for an absence from work relating to his/her firefighting duties.

4. Indiana Civil Rights Act.

Indiana has a state statute similar to Title VII known as the Indiana Civil Rights Act. This statute establishes a non-discrimination policy for the state, and prohibits discrimination based on race, religion, color, sex, disability, national origin, ancestry, or status as a veteran. (IC 22-9-1-l, et seq.). Courts generally analyze claims brought under the Indiana Civil Rights Acts the same as claims brought under Title VII.

5. Indiana Age Discrimination Act.

Indiana also has a statute which prohibits discrimination against people between the ages of forty (40) and seventy-five (75) years. (IC 22-9-2-2). Allegations of age discrimination are investigated by the Commissioner of Labor, not the Indiana Civil Rights Commission.

6. Indiana Military Code.

Any employer who refuses to permit a member of the Indiana National Guard to attend any assembly which the member has a duty to perform under the Indiana Military Code commits a Class B misdemeanor. (IC 10-16-7-4).

A public employee who is a member of the Indiana National Guard or a reserve component and is called to training for up to 15 consecutive or nonconsecutive days per calendar year is entitled to a leave of absence, in addition to any regular vacation, without loss of time or pay. (IC 10-16-7-5). During this 15-day period, public employees are entitled to both civilian and military pay. Downing v. City of Columbus, 505 N.E.2d 841, 844 (Ind. App. 1987).

Where a public employee is called to active duty because of war or national disaster, he or she is entitled to the paid 15-day leave of absence and an additional leave of absence for an unlimited period of time. (IC 10-16-7-5). The additional leave of absence may be with or without loss of time or pay at the discretion of the member's employer. (IC 10-16-7-5).

7. Service Letter.

Whenever an employee quits or is terminated, he or she is entitled to request a written letter documenting whether the employee quit or was involuntarily discharged. (IC 22-6-3-1).

8. Tobacco Use.

This provision protects the rights of employees to use tobacco outside the workplace. An employer may not require, as a condition of employment, an employee or applicant to refrain from using tobacco outside the course of his/her employment. Further, an employer may not discriminate against an employee with respect to the employee's compensation, benefits or terms and conditions of employment based on the employee's use of tobacco outside the workplace. (IC 22-5-4-1). However, an employer may implement financial incentives intended to reduce tobacco use. Churches, schools, businesses and organizations affiliated with religious organizations are exempt from this provision. (IC 22-5-4-4).

9. Black-listing.

This Indiana law prohibits an employer from preventing a former employee from obtaining another position and prohibits the disclosure of false information about an employee or former employee. If an employer violates this provision, he or she commits a Class C Infraction. (IC 22-5-3-1).

However, this does not prohibit an employer from providing a prospective employer a written statement regarding the truthful reasons for termination, even if such reasons would impede an employee's job search. An employer that discloses information about a current or former employee is immune from civil liability for the disclosure and the consequences proximately caused by the disclosure, unless it is proven by a preponderance of the evidence that the

information disclosed was known to be false at the time the disclosure was made. In 1997, pursuant to this provision, an employer was found immune from suit for disclosing to a prospective employer that its former employee was a felon. Although the employer was found not liable, it still had to defend the lawsuit. Steele v. McDonald's Corp., 686 N.E.2d 137 (Ind. Ct. App. 1997). Disclosing sensitive information is never a good practice.

A prospective employee has a right to receive copies of written documents from former or current employers which might affect the applicant's prospects of obtaining a job. The employee must request the documents from the prospective employer in writing within thirty (30) days of applying for the position.

10. Convictions.

An employer may cancel the employment contract of any person who works with children and is convicted of:

- Rape, if the victim is less than 18 years of age;
- Criminal deviate conduct, if the victim is less than 18 years of age;
- Child molesting;
- Child exploitation;
- Vicarious sexual gratification;
- Child solicitation;
- Child seduction; or
- Incest, if the victim is less than 18 years of age.

(IC 22-5-5-1).

Further, the prosecuting attorney has an obligation to inform the employer of a person charged with committing one of the above acts, unless the prosecutor determines that the person does not work with children.

11. Court Attendance.

An employer may not discriminate against nor threaten to discriminate against an employee for responding to a summons, serving as a juror or attending court for prospective jury service. This includes terminating an employee, depriving an employee of benefits or threatening termination or deprivation of a benefit. An employer who violates this provision commits a Class B Misdemeanor. (IC 35-44.1-2-11). In addition, an employee who is dismissed may bring a civil action within ninety (90) days of the dismissal to recover lost wages, reinstatement and attorney fees. (IC 34-28-4-1). An employer cannot require an employee to use annual leave, vacation leave, or sick leave for time spent responding to a summons for jury service, participating in the jury selection process, or serving on a jury. IC 33-28-5-24.3.

12. Criminal History.

a. General Requirements.

A prospective employer has the right to obtain the limited criminal history of a prospective employee. A limited criminal history includes information concerning any arrest, indictment, information or other formal criminal charge for a reportable offense. Reportable offenses include all felonies and designated Class A Misdemeanors. If the arrest or criminal charge is more than one year old, the limited criminal history must include the disposition of the charge; however, if the charge is less than one year old, the limited criminal history may not include the disposition.

To request a limited criminal history, an employer must include information to reasonably ensure the identification of the subject of the inquiry and a statement of the purpose for which the information is requested. The fee associated with obtaining a limited criminal history is currently $15.00. (IC 10-13-3-28).

An employer who uses the information contained in the limited criminal history for any purposes other than those to screen job applicants commits a Class A Misdemeanor. (IC 10-13-3-27).

b. School Corporations.

Indiana law requires that school corporations obtain the limited criminal history information of persons who apply for non-certified employment or who apply for employment with an entity with which the school corporation contracts if the individuals are likely to have direct, ongoing contact with children.

A school corporation may use information contained in a limited criminal history as grounds to refuse to hire or contract with an individual who has been convicted of any one of the following offenses:

- Murder;
- Causing suicide;
- Assisting suicide;
- Voluntary manslaughter;
- Reckless homicide;
- Aggravated battery;
- Kidnapping;
- Criminal confinement;
- A sex offense;
- Carjacking;
- Incest; or
- Child selling.

A school corporation may use information contained in a limited criminal history as grounds to refuse to hire or contract with an individual who has been convicted of any one of the following offenses, unless ten (10) years have elapsed from the date the individual was discharged from probation, imprisonment, or parole, whichever is later:

- Arson;
- Battery;
- Neglect of a dependent;
- Contributing to the delinquency of a minor;
- A weapons offense;
- A controlled substance offense; and
- An offense relating to material or a performance that is harmful to minors or obscene.

A school corporation may use information contained in a limited criminal history as grounds to refuse to hire or contract with an individual who has been convicted of operating a motor vehicle while intoxicated, unless five (5) years have elapsed from the date the individual was discharged from probation, imprisonment, or parole, whichever is later.

An employee of a school corporation or an entity which contracts with a school corporation who is convicted of any of the above offenses during the course of the individual's employment has an obligation to notify the school corporation. (IC 20-26-5-11).