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Communities on Course

Land Use

The Law Behind Planning & Zoning in Indiana

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Introduction

Can the government restrict how you use your land? The answer, with some important qualifications, is "yes." Local governments may enact planning and zoning laws that restrict certain land uses within their jurisdictions. Planning and zoning laws are designed to promote the health, safety, and welfare of all of a locality's citizens by preventing incompatible land uses. They both restrict and protect landowners. For example, the government may enact a zoning ordinance that limits what you can build on your farmland, but it may also enact ordinances prohibiting others from constructing landfills or housing developments near your farmland.

To understand how planning and zoning may affect your land, it is important to be familiar with the legal terminology. This publication explains some of the basics of Indiana planning and zoning law, including its origins, general principles, and procedures. It also describes some limitations on the government's planning and zoning powers, and supplies a brief historical perspective.

The law regards municipalities as "creatures of the state" and dictates that municipalities must look to the state constitution, their charter, or state laws for authorization to exercise powers. Therefore, a municipality has only the zoning powers that the state gives it. Municipalities in Indiana include townships, cities, and counties.

Planning and zoning falls within the broad scope of the "police power." Even though the law accepts the general proposition that a locality possesses the power to plan and zone, the law places limits on that power.

The Police Power

Most purposes allowed to a municipality fall within the broad definition of the "police power." The term "police power" refers to the ability to legislate to protect the public health, safety, and welfare of the jurisdiction. The United States Constitution delegated this power to the states in the Tenth Amendment: "all powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Thus, a broad grant of the police power to a locality does not give a locality the power to enact a zoning ordinance. The power to zone must be specifically delegated. The states have delegated portions of this police power to local governments by state constitution, charter, or enabling statute. The state grants charters to recognize the legal existence of the municipality, grant powers to the municipality, place limits on the powers of the municipality, and set out the boundaries of the entity.

One may think of a charter as the organizing document or "birth certificate" of the entity. A municipality does not exist until a charter is issued recognizing it.

Dillon's Rule

To deal with the issue of determining what powers a particular state has allocated to municipalities, several doctrines have emerged. The United States began with the proposition that municipalities are creatures of the state and must look to the state for all power. This doctrine was later stated as Dillon's Rule. The name derives from its primary author, a judge in Iowa. The rule dates to 1865 and says the following.

> It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any reasonable doubt concerning the existence of a power is resolved by the courts against the corporation, and that power is denied.

This rule arose in response to widespread municipal corruption at the end of the 19th century. Courts felt that state control of local government power was necessary to combat crime boss rule of cities and other ills that were threatening democratic governance.

Home Rule

The home rule movement, beginning with Missouri in 1875, prompted several states to adopt state constitutional amendments expanding the scope of municipal independence. The home rule doctrine allows a municipality to exercise any function, so long as it is not prohibited by the state constitution or any state statute. Although the doctrine appears promising to those who want to expand local autonomy, one commentator characterized it as "an uncertain privilege, for it depends entirely upon the whim of the legislature and may at any time be repealed or modified." In addition, the grants of home rule authority vary widely. Some grants are very broad, while others are somewhat restricted.

By1978, 41 states had granted home rule authority to cities, while only 27 states had granted home rule jurisdiction to counties. Indiana adopted *legislative* home rule, whereby local governments may exercise all powers the state legislature is capable of delegating to them, even though the legislature has not delegated the power. The legislature may take certain powers from localities or limit local powers under legislative home rule. For example, if the Indiana legislature sets forth a certain manner in which a power may be exercised by a locality, the locality must follow the legislature's instructions.

In contrast, constitutional home rule refers to a grant of broad powers by the state constitution to local governments. The legislature cannot override such powers by statute because they are grounded in the constitution.

Home Rule in Indiana

Indiana statutes provide that "the policy of the state is to grant units all the powers they need for the effective operation of government as to local affairs." The Indiana Code explicitly rejects Dillon's Rule. A unit in Indiana may exercise any power to the extent that the power is neither expressly denied by the Indiana Constitution or Indiana statute nor expressly granted to another entity. A township may not exercise any power if a unit in which the township is located exercises that same power.

Indiana law provides that a unit must use the constitutionally or statutorily prescribed method of exercising any power, if the constitution or a statute provides a prescribed method. If no constitutionally or statutorily prescribed method exists, the unit must adopt an ordinance (county or municipality) or resolution (township) specifying the particular method of exercising the power or comply with any Indiana law permitting a specified manner for exercising the power.

A unit, through zoning, may not exercise authority more stringently in the case of a power granted to a state agency. An example is the confined feeding regulations. In fact, an Indiana law [IC 36-1-3-8 (7)] provides that a unit generally does not have power to

regulate conduct regulated by a state agency. Finally, the Indiana Code lists certain powers that units do not possess. These prohibited powers include unauthorized taxation and imposition of duties on other units.

Comprehensive Plans & Zoning

Indiana law requires that a plan commission adopt a comprehensive plan if the municipality wants to exercise zoning powers. A comprehensive plan must contain at a minimum:

1. A statement of objectives for the future development of the jurisdiction;
2. A statement of policy for the land use development of the jurisdiction; and
3. A statement of policy for the development of public ways, public places, public lands, public structures, and public utilities.

It is important to understand that comprehensive plans are not laws. Local plan commissions and legislatures must pay reasonable regard to comprehensive plans in making zoning decisions. However, courts generally do not entertain legal actions attacking comprehensive plans, unless the attack is directed at a failure to comply with the requirements set forth by the legislature. Comprehensive plans must be implemented by local ordinances. The most common implementation tool for comprehensive plans is the zoning ordinance.

Indiana law does not require localities to adopt zoning ordinances but allows the adoption at the option of the locality. If adopted, the zoning ordinance must contain the elements set out by the legislature in Indiana Code Section 36-7-4-600, et. seq.

Zoning is the division of a city or town by legislative regulation into districts and the prescription and application in each district of regulations having to do with structural and architectural designs of buildings and of regulations prescribing use to which buildings within designated districts may be put. New York City enacted the first comprehensive zoning ordinance in the United States in 1916. That ordinance classified uses and created zones for all uses. The zones were mapped. The provisions included height and area (setbacks, etc.) controls.

In 1926, the United States Supreme Court upheld the constitutionality of traditional comprehensive zoning ordinances in *Village of Euclid v. Ambler Realty Co*. [272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926)]. Land use professionals refer to "traditional" zoning as "Euclidean" zoning. Euclidean zoning encompasses division of the municipality into geometric patterns of "use districts."

In other words, Euclidean zoning divides the area into sections. The ordinance restricts use of land within each section so that each section contains a single or narrow range of uses. For example, single-family residential zones contain primarily single-family houses. Farmland should predominate in agricultural zones. Note that all land in the jurisdiction zoned, for example, single-family residential, need not be, and usually is not, contiguous.

Historically, zoning seeks to prevent one landowner from harming his or her neighbor by engaging in an incompatible use. Zoning divides a city into uses (zones) in which harmful uses are excluded. By segregating uses, zoning attempts to separate incompatible uses.

But zoning serves purposes beyond preventing harm. Modern zoning often regulates uses to achieve public benefit or to maximize property values in a locality. Unfortunately, zoning may also be used to exclude low- to moderate-income people who cannot afford the housing permitted in the locality. This exclusion results, for example, from large minimum lot sizes or large minimum square footage requirements in residential districts. These requirements drive up the cost of housing.

Zoning laws embody the assumption that wholesome housing must be protected from harmful neighbors. Thus, commerce and industry are excluded from residential zones, because they are deemed harmful to housing. Even within residential zones, there is a

hierarchy of desirable uses. The law regards the single-family home as the highest use. Creation of districts containing only single-family homes seeks to protect this highest form of housing from intrusion by apartments, commercial development, or any other potentially interfering use.

Zoning Ordinance Categories of Uses

Zoning ordinances allow some uses in each district, prohibit others, and allow some uses only by special exception. This section examines and explains the various categories of land uses under each zoning ordinance.

Permitted Uses

Land use regulations specify for each zone those activities that are permitted as a manner "of right" or "permitted uses." If listed as a permitted use, the landowner may engage in this use without question.

Prohibited Uses

Generally, any use not listed as "permitted" is prohibited. An ordinance may specifically prohibit a particular use in a district to avoid a finding that this use may be similar to a permitted use in the district. For example, if not specifically prohibited, a court could find that a mobile home is a "single-family dwelling" allowable in a single-family residential district.

A board of zoning appeals may approve or disapprove a "variance." A variance allows a use that is prohibited by the zoning ordinance. The board may impose reasonable conditions as a part of its approval. In cases where variances are available, Indiana law prohibits a board of zoning appeals from approving a variance unless the board determines in writing that all of the following are true.

1. The approval will not be injurious to the public health, safety, morals, and general welfare of the community;
2. The use and value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner;
3. The need for the variance arises from some condition peculiar to the property involved;
4. The strict application of the terms of the zoning ordinance will constitute an unnecessary hardship if applied to the property for which the variance is sought; and
5. The approval does not interfere substantially with the comprehensive plan of the locality.

Special Exceptions

To conduct certain uses, a landowner may have to apply for and receive a "special exception." A special exception is a permit that allows a particular use subject to listed conditions. (Special exceptions are also referred to as special uses, conditional uses, or contingent uses that require a permit.)

The use of the word "exception" is misleading. Special exception uses are allowed in that particular district, but not in all locations within the district and not without conditions or qualifications.

For example, if listed as a special exception in the agricultural zone, an intensive livestock operation may be appropriate in those portions of an agricultural zone that are thinly populated and contain appropriate soils, topography, and tree buffers. However, in other areas of the zone that are adjacent to dense residential settlements or where the intensive livestock operation may threaten groundwater, the operation is not appropriate.

Permitted uses in a zoning ordinance are like or can be compared to the purchase of clothing "off the rack." Perhaps the use does not precisely "fit" each area within the zone. However, the governing body feels that the fit is close enough to warrant allowing the use throughout the zone.

In contrast, special exceptions are like tailored clothing. The governing body of the jurisdiction tailors the conditions and restrictions of the special exception to fit the particular piece of property on which the use will be conducted.

Amendment of the Zoning Ordinance

Once a zoning ordinance has been adopted and land has been zoned, problems may arise with proposed amendments to change the zoning application to specific parcels or to grant relief from its requirements to certain lots. Amendments to a zoning ordinance are commonly called "rezonings." Rezonings that apply to specific parcels or certain lots should be distinguished from comprehensive rezoning. Comprehensive rezoning involves study of the entire municipality and a reworking of the entire zoning ordinance. This section details the legal issues that arise when localities rezone all or a portion of the locality.

Rezonings Generally

Like the adoption of the original zoning ordinance, the amendment of a zoning ordinance is a legislative matter and must first be considered by the plan commission. As a legislative matter, the rezoning decision is left to the discretion of the local legislative body. The courts will reverse the rezoning decision of the locality only when it is arbitrary or capricious.

Arbitrary and capricious decisions involve willful and unreasonable action without consideration and in disregard of the facts or circumstances of the case. Courts examine individual or specific rezonings more closely than comprehensive rezonings because the chance for arbitrariness is heightened when only one or a few land parcels are involved.

Courts must pay reasonable regard to the comprehensive plan. Reasonable regard must be given to current conditions, structures, and uses in the district; the most desirable use of the land in the district; conservation of property value in the jurisdiction; and responsible growth and development (IC 36-7-4-603).

Spot Zoning

"Spot zoning" is perhaps the most used and least understood term in zoning parlance. Spot zoning is defined as the singling out of one piece of property for a different treatment from that accorded to similar surrounding land, which is indistinguishable from it in character, all for the economic benefit of the owner of the lot or area so singled out. In Indiana, spot zoning is not illegal per se if the zoning action bears a rational relation to the public health, safety, morals, convenience, or general welfare. The key distinction is that spot zoning is not pursuant to the police power when it fails to further the public interest. Instead, spot zoning provides private benefit, perhaps to the detriment of the public.

Agricultural Non-Conforming Use

"Grandfathered use" is synonymous with "non-conforming use." A non-conforming use is a use of the premises that legally existed prior to the enactment of a zoning ordinance or proper amendment of the zoning ordinance and which is permitted to continue subsequent to the enactment of the ordinance despite the fact that it does not conform to the new zoning requirements. However, since non-conforming uses deviate from the desired uses under the zoning ordinance, the law frowns upon them.

Typically, a zoning ordinance will allow continuance of a non-conforming use, but will prohibit extension, expansion, or change unless to a conforming use. In addition, most ordinances provide that if a non-conforming use is abandoned for two years or more, the use may not be reinstated. Some localities "amortize" the use, which requires a property owner to discontinue the non-conforming use after a certain period of time.

Indiana law now gives added protection to "agricultural non-conforming use." This law, which has attracted much attention, is shown in Appendix A. It was passed in1998 and amended in1999. "Agricultural use" for non-conforming use purposes is broadly defined. The essence of this new law is that zoning changes or a comprehensive plan may not terminate or restrict (e.g., amortize or limit extension) an agricultural use if it was consistent with or a permitted use under the prior zoning ordinances and was in place three of the five years before a recent change in zoning.

Conclusion

Planning and zoning by local governments carry out the police power function of protecting the general health, safety, and welfare of the citizens. The planning function is reflected in the comprehensive plan, which is implemented most commonly through zoning ordinances.

Zoning ordinances mainly attempt to prevent incompatible uses from locating next to one another. This is accomplished by separating uses in different zoning districts. Zoning itself is fairly straightforward. However, the law allows variances and some uses are permitted only under certain circumstances. In addition, uses that were permissible prior to the zoning ordinance or amendment are subject to restrictions. To understand the law behind planning and zoning, one must be familiar with the legal terminology.

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Appendix A

Indiana Law on Agricultural Non-Conforming Use (IC 36-7-4-616)

(a) The definitions used in this section apply only to this section.

(b) As used in this section, "agricultural use" refers to land that is used for:

(1) the production of livestock or livestock products, commercial aquaculture, equine or equine products, land designated as a conservation reserve plan, pastureland, poultry or poultry products, horticultural or nursery stock, fruit, vegetables, forage, grains, timber, trees, bees and apiary products, tobacco, or other agricultural crops, in the case of land that was not subject to a comprehensive plan or zoning ordinance before the most recent plan or zoning ordinance, including any amendments, was adopted; or

(2) agricultural purposes as defined in or consistent with a comprehensive plan or zoning ordinance that:

(A) the land was subject to; and

(B) was repealed before the adoption of the most recent comprehensive plan or zoning ordinance, including any amendments.

(c) As used in this section, "agricultural nonconforming use" means the agricultural use of land that is not permitted under the most recent comprehensive plan or zoning ordinance, including any amendments, for the area where the land is located.

(d) An agricultural use of land that constitutes an agricultural nonconforming use may be changed to another agricultural use of land without losing agricultural nonconforming use status.

(e) A county or municipality may not, through the county or municipality's zoning authority, do any of the following:

(1) Terminate an agricultural nonconforming use if the agricultural nonconforming use has been maintained for at least any three (3) year period in a five (5) year period.

(2) Restrict an agricultural nonconforming use.

(3) Require any of the following for the agricultural nonconforming use of the land:

(A) A variance for the land.

(B) A special exception for the land.

(C) A special use for the land.

(D) A contingent use for the land.

(E) A conditional use for the land.

(f) Notwithstanding subsection (e), this section does not prohibit a county, a municipality, or the state from requiring an agricultural nonconforming use to be maintained and operated in compliance with all:

(1) state environmental and state health laws and rules; and

(2) requirements to which conforming agricultural use land is subject under the county's comprehensive plan or zoning ordinance. As added by P.L.113-1998, SEC.1. Amended by P.L.106-1999, SEC.2.

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