

**Indiana Farm Bureau**  
**Agricultural Planning & Zoning School**  
**The Agricultural Zoning Guide**  
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# Structure of Land Use Regulation in Indiana

- *Home Rule.*

- Home Rule was adopted by the Indiana General Assembly in 1980.
- Formerly, Indiana followed the “Dillon Rule”, which resolved any doubt as to the existence of a governmental power against its existence.
- Home Rule instead gives local governmental units the ability to craft their own, unique ordinances, and resolves any doubt as to the of such a power, even if the power is not granted by statute, or a statute granting a power was repealed.
- Home Rule grants local governments any powers not expressly prohibited by the Indiana Constitution or by statute, or given to another entity.

# Structure of Land Use Regulation in Indiana

- *Planning and Zoning Enabling Act.*
  - Indiana Code § 36-7-4 (the Enabling Act) provides a general framework for planning law that applies to all governmental units in Indiana, but gives local units the power to create their own ordinances that reflect local needs and interests.
  - The Enabling Act is arranged in groups of what are called “Series”. Each Series covers a particular, general topic.
    - For example, the 600 Series applies to zoning ordinances, the 700 Series applies to subdivision control, and the 900 Series applies to a board of zoning appeals.

## ○ *Types of Planning Law.*

- There are three types of planning law – Advisory, Area, and Metropolitan.
- The type of planning law is established by a legislative body’s adoption of an ordinance. Typically, this is done in a zoning ordinance.
- **Advisory planning** applies to one governmental unit, which can be a county, a city, or a town, and is the most common type of planning jurisdiction.
  - A municipality that uses Advisory planning law may exercise jurisdiction up to two miles from its municipal boundaries into unincorporated areas of a county (which often is referred to as the “fringe” area) under certain conditions, with the consent of the board of county commissioners.
  - LaPorte County and Michigan City each has its own Advisory plan commission, but they have adopted a single, joint zoning ordinance that applies to both jurisdictions.

- **Area planning** applies to a group of units that are identified in a zoning ordinance, which typically includes the unincorporated areas of a county and one or more cities or towns. An example of an Area planning jurisdiction is Vanderburgh County and the City of Evansville. An Area plan commission has jurisdiction to act for all of the designated governmental units, but each unit adopts its own zoning and subdivision control ordinances.
- **Metro** planning applies only to Marion County and Indianapolis.

- **Joint District** planning uses the Advisory planning law that applies in a Joint District.
- One or more municipalities and one or more counties may establish a single, unified planning and zoning entity.
- A joint district is created by the adoption of identical ordinances by the legislative bodies of the units, which specify the boundaries of the joint district, and the duration of the joint district commission. Once established, these may not be changed.
- A joint district council is established for the joint district, with its membership comprised of named or appointed representatives of the legislative bodies of the county and each municipality.

- A joint district council must approve any ordinance adopted by the joint district commission, after a public hearing with notice by publication.
- The joint district commission also establishes a joint district board of zoning appeals consisting of five appointed members.
- A joint district board of zoning appeals may not grant use variances.
- Bartholomew County, the City of Columbus, and the Town of Edinburgh established a Joint District, and are jointly governed by the Bartholomew County zoning and subdivision control ordinances.

# Planning Bodies and Officials

- The governmental organizations in a unit involved in planning and zoning are,
  - The legislative body,
  - The plan commission, and
  - The board of zoning appeals (the “BZA”).
  
- *Legislative Body.*
  - A legislative body is the board of commissioners in a county, the common council in a city, or the town council in a town.
  
  - A legislative body has the power to give final approval to,
    - Adoption of a comprehensive plan,
    - Initial adoption and replacement of a zoning ordinance and a subdivision control ordinance,
    - Text amendment of a zoning ordinance and a subdivision control ordinance,
    - Zone map change (or a “rezoning”), and
    - Approval of a planned unit development under the 1500 Series (unless such authority is delegated by the legislative body).



- All zoning decisions by a legislative body must be at a meeting open to the public.
- Notice by publication and under the Open Door Law must be given of meetings at which the legislative body will consider the adoption of an initial or replacement zoning ordinance, if the legislative body does not vote on the proposal at its first meeting following plan commission certification of its recommendation.
- Notice to other property owners of legislative body meetings is not required for any zoning proposal.

# Plan Commission

- The 200 Series and 300 Series govern composition, and powers and duties of a plan commission.
- A plan commission has the duty to conduct public hearings on, and make recommendations to, the legislative body for,
  - Adoption or replacement of an initial comprehensive plan and amendments to it,
  - Initial adoption of a zoning ordinance, and a subdivision control ordinance, and text amendments to them, and
  - Change of a zone map (commonly called a “rezoning”).

- **Advisory** and **Area** plan commissions may take the following types of action in zoning ordinance proceedings:
  - If the proposal is to adopt an initial or replacement zoning ordinance, the plan commission may certify the ordinance to the legislative body only if a favorable recommendation is made.
  - If the proposal is either to amend the text of a zoning ordinance, or to change a zone map (a rezoning), the plan commission may make a favorable recommendation, an unfavorable recommendation, or no recommendation, to the legislative body.

- In the **Metro** planning jurisdiction,
  - The metropolitan plan commission may certify action for adoption of an initial or replacement zoning ordinance, or to amend the text of a zoning ordinance, to a legislative body only if a favorable recommendation is made.
  - A zone map change must be certified by the metropolitan plan commission to the legislative body whether the recommendation is favorable or unfavorable, or if no recommendation is made.

- ***Plan Commission Powers.*** A plan commission has the power to conduct public hearings and give final approval for:
  - Subdivision plat and assignment of street names under the 700 Series,
  - Development plans under the 1400 Series,
  - Modification or termination of written commitments required or allowed by the plan commission in a zoning proceeding, and
  - Secondary review of planned unit developments under the 1500 Series, if such authority is delegated to the plan commission by a legislative body.

▪ ***Street Names and Numbers.***

- An executive of a governmental unit (a mayor in a municipality, the board of commissioners in a county, and the town council in a town) is required to assign names to streets, unless an ordinance is adopted by the legislative body to give the plan commission the power to name streets.
- The plan commission is required to assign street numbers to lots and structures.

▪ ***Prohibition of Rehearing Rezoning Proposals.*** A plan commission may adopt a written rule that prohibits the refiling of a zone map change proposal for a period of up to one year from the date the proposal was first denied.

# Membership of Plan Commission

- An Advisory plan commission in a municipality with a park board and city engineer has nine members, but a plan commission in a municipality without a park board and city engineer has seven members.
- A county Advisory plan commission has nine members.
- An Area plan commission consists of members from the county, each city, and each town designated in the land that comprises the Area.
- The number of Area plan commission members is determined by the population of the cities, the number of towns, the number of municipal representatives, and the total number of municipal representatives.

- **Membership of Plan Commissions** consists of a combination of:
  - Citizen members who reside in a unit appointed by the governmental bodies involved,
  - Members of the governmental bodies or agencies identified in the Enabling Act, and
  - Persons who serve by virtue of their offices (like an agricultural extension agent or a county surveyor in a county, or a city engineer in a city).



- *Procedure for Review and Notice.*
  - A plan commission must hold a public hearing with notice, based on requirements established by the plan commission in written rules it must adopt.
  - Notice of all plan commission public hearings be published in a local newspaper of general circulation at least 10 days before the hearing.
  - Notice of a public hearings also must be given to those who are designated as “interested parties” in the plan commission’s rules.

# Board of Zoning Appeals

- The 900 Series governs the procedures and requirements for action by a BZA.
- A BZA must be established by the legislative body in the zoning ordinance and may consist of one or more divisions.
- *Membership.*
  - An Advisory BZA and a Metro BZA each has five members.
  - An Area BZA has seven members.
  - Members of a BZA must be either citizens that reside in the jurisdiction, or citizens who reside in the county, but own real property in the jurisdiction.
  - Members of the BZA are appointed by the various governmental bodies designated in the Enabling Act.

# Types of BZA Review.

A BZA is a quasi-judicial body with the exclusive power to review and approve certain types of zoning proceedings.

- **Special exception or special use.**
  - A use permitted under the zoning ordinance in a specific zoning district, but only if the BZA approves it after a public hearing with notice.
  - The zoning ordinance, rather than the Enabling Act, identifies specific requirements and the standard of review for a special exception or special use.

- **Conditional Use or Contingent Use.**

- A use permitted in specified zoning districts by the zoning ordinance with the approval of the BZA, if the use satisfies conditions or contingencies stated in the zoning ordinance.
- E.g., a hospital, an airport, and a school.

## •Use Variance.

- Allows a specific use for a given area of land not permitted under the zoning ordinance in the zoning district where the land is located.
- An Area BZA is prohibited from granting use variances.

- **Use Variance Requirements.** The BZA must conduct a public hearing on a use variance and determine in writing that:
  - The approval will not be injurious to the public health, safety, morals, and community general welfare,
  - The use and value of property in the area adjacent will not be affected in a substantially adverse manner,
  - The need for the variance arises from a condition peculiar to the property,
  - The strict application of the zoning ordinance will constitute an unnecessary hardship as applied to the property, and
  - The approval will not substantially interfere with the applicable comprehensive plan.

# Development Standard Variance

- Allows a different development standard than required or allowed in a zoning ordinance.
- Examples of development standard variances are changes in building set back lines, structure height limits, parking requirements, and sign limitations.

- **Development Standard Variances Requirements.**

- To approve a development standard variance, the BZA must determine:

- The approval will not be injurious to the public health, safety, morals, and community general welfare,
- The use and value of property in the area adjacent will not be affected in a substantially adverse manner, and
- The strict application of the zoning ordinance will result in practical difficulties in using the property.



- The zoning ordinance may require a stricter standard than “practical difficulties” for approval of a development standard variance.
- If a stricter standard is adopted, typically it is the “hardship” requirement that is made to apply to a use variance.

- **Appeal from decisions** regarding an order, requirement, decision, or determination made by:
  - An administrative official, hearing officer, staff member, or zoning administrator under the zoning ordinance, or
  - An administrative board or other body (except the plan commission) relative to enforcement of a zoning ordinance, or any other ordinance requiring an improvement location permit or occupancy permit to be obtained.

## *Procedure for BZA Review.*

- To approve a variance, the BZA must hold a public hearing based on procedures and requirements established in the BZA's written rules.
- The BZA's rules should describe who are "interested parties" entitled to receive notice of public hearings, and how notice is to be given to them.
- Notice of all BZA public hearings also must be published in a local newspaper of general circulation at least 10 days before the hearing.

## Special Rules for BZAs in Certain Cities and Counties

- In cities located in counties with populations greater than 400,000 but less than 700,000, and in counties with populations greater than 250,000 but less than 270,000, a BZA must hold a public hearing with notice, but the BZA only makes a recommendation to the legislative body on petitions for a special use, a special exception, and a use variance.
- The legislative body has the power to grant final approval, based on the BZA's recommendation.
- A final decision of a legislative body under this provision may be appealed by judicial review in the same manner as a BZA decision is appealed.

- Based on current populations, Lake County is the only county with a population between 400,000 and 700,000, so all municipalities in Lake County are subject to this requirement.
- Prior to 2019, the population of St. Joseph County was between 250,000 and 270,000, so it was subject to this requirement.
- Since 2019 and 2020, legislative review of BZA decisions has not applied to St. Joseph County because its population was more than 270,000.
- This requirement does not appear to apply to any other Indiana county, based on current populations.

# Other Bodies or Officials

- *Hearing Officer.*

- An alternate procedure allows a hearing officer to either be designated in a zoning ordinance, or appointed by the plan commission, with certain powers and duties for matters that otherwise would be heard by the BZA.
- If the hearing officer alternate procedure is used, the plan commission may adopt rules of procedure that apply to the hearing process similar to that apply to the plan commission or the BZA.

■ ***Plan Commission Executive Committee.***

- A plan commission may appoint an executive committee from its membership composed of between three and nine members.
- The appointment of the executive committee and adoption of rules that govern the powers, duties, and procedures of the executive committee, requires a two-thirds vote of the entire membership of the plan commission.

■ ***Plat Committee.***

- The plan commission also may appoint a plat committee consisting of between three and five persons to hold hearings and approve plats on behalf of the plan commission.

▪ ***Zoning Administrator.***

- The zoning ordinance may create the position of Zoning Administrator, and give the person certain prescribed duties, which often include the power to enforce and interpret the zoning ordinance.
- Decisions of a zoning administrator would be appealed to the BZA in the same manner as decisions of other officials or bodies are appealed.

▪ ***Plan Director and Other Employees of Advisory Plan Commissions.***

- An Advisory plan commission appoints, prescribes duties, and fixes compensation of its employees, including a plan director or executive director.



▪ ***Executive Director of Area Plan Commission.***

- An Area plan commission must appoint an executive director with training and experience in planning and zoning.
- No consideration of political affiliation can be given in the selection process.
- An Area plan commission fixes the executive director's compensation.
- An executive director in an Area plan commission has specific statutory duties including the appointment and removal of planning department employees (subject to the approval of the plan commission), and other duties as directed by the plan commission.

# Types of Zoning Proceedings

## ○ Comprehensive Plan.

- Comprehensive plans are governed by the 500 Series.
- Before a zoning ordinance may be adopted by a jurisdiction, the legislative body must first adopt a comprehensive plan.
- The plan commission must first hold a public hearing with notice on a proposed comprehensive plan.
- In Advisory and Area planning jurisdictions, a majority of the legislative body involved must adopt a resolution to approve, reject, or amend the comprehensive plan.

- If approved by the legislative body, the comprehensive plan applies to future land use decisions in the jurisdiction.
- If the plan is rejected or amended by the legislative body, it is returned to the plan commission for further consideration. If the plan commission accepts the legislative body's action, it stands.
- If the plan commission disapproves the rejection or amendment, the original action of the legislative body stands only confirmed by another resolution.
- In the Metro planning jurisdiction, a decision of the metropolitan development commission in adopting a comprehensive plan is final, and no further approval of a legislative body is required.

- A comprehensive plan contains a statement of objectives for future development, a policy statement for land use development, and a policy statement for development of public ways, places, lands, structures, and utilities.
- A comprehensive plan also may include studies for future growth, and maps and charts showing historical population and site conditions, land use, areas needed for redevelopment and conservation, transportation or thoroughfare plans, parks, and land utilization.
- After a comprehensive plan is adopted, consideration must be given to the general policy and pattern of development stated in a comprehensive plan when future land use ordinance are adopted or amended.

- The land use maps in a comprehensive plan do not require the land shown on the map to be used or zoned only for the designated purpose.
  - For example, land designated as residential in a comprehensive plan land use map does not mean the land can only be zoned for residential and not any other purpose.
- The land use maps in a comprehensive plan are only policy statements for use, to which a plan commission and legislative body must pay “reasonable regard” when acting on a zoning matter.

# Zoning Ordinance

- The 600 Series of the Enabling Act governs adoption of an initial or replacement zoning ordinance, amendment of the text of a zoning ordinance, and a zone map change (i.e., a rezoning).
- A zoning ordinance cannot be adopted until a comprehensive plan is adopted by the legislative body.
- To adopt an initial or replacement zoning ordinance, the plan commission must initiate the proposal.

- To amend the text of a zoning ordinance, the plan commission of the jurisdiction may initiate the zoning ordinance.
- Any participating legislative body (but only in Advisory and Area planning jurisdictions) also may initiate proposals to amend the text of a zoning ordinance.
- After a zoning ordinance is adopted, in order to change a zone map applicable to a certain tract of land, the proposal can be initiated by,
  - The plan commission,
  - The owners of at least 50% of the land involved, or
  - Each participating legislative body in Advisory or Area planning jurisdictions.

- **“Reasonable regard”** must be given by a plan commission and a legislative body in proceedings under the 600 Series to:
  - The comprehensive plan;
  - Current conditions and the character of current structures and uses in each district;
  - The most desirable use for which the land in each district is adopted;
  - The conservation of property values throughout the jurisdiction; and
  - Responsible development and growth.



- **Purposes of zoning ordinance:**

- To secure adequate light, air, convenience of access, and safety from fire, flood, and other danger;
- To lessen or avoid congestion in public ways (which are public streets, roads, and alleys);
- To promote the public health safety, comfort, morals, convenience, and general welfare; and
- To otherwise accomplish the purposes of the Enabling Act.

▪ **Alternate Procedure for Action by Hearing Officer.**

- An alternate procedure is available to allow a hearing officer to review and take action on:

- A development standard variance;
- A special exception, special use, contingent use, and conditional use; and
- A use variance,
  - But only if the Area planning law does not apply, and the use variance involves an expansion of a currently existing use on the land, and is consistent with the comprehensive plan.

- A hearing officer may be appointed or removed by the plan commission.
- The hearing officer may be a member of the board, a staff member, or any other person. More than one hearing officer may be appointed.
- The plan commission may adopt rules, or recommend an ordinance, to (i) limit the type of zoning proceeding a hearing officer may consider, (ii) permit the hearing officer to transfer a petition to the BZA, (iii) require creation of minutes and records of action taken at a hearing to be public, and (iv) require the same level of conduct, including conflicts of interest that apply to a BZA.

▪ **Development Plans.**

- The 1400 Series governs development plans.
- The zoning ordinance designates zoning districts that require approval of development plans.
- The plan commission reviews and acts on development plans, unless the legislative body designates the authority to plan commission staff or a hearing examiner or committee.
- The zoning ordinance designates, (i) the development requirements, (ii) plan documentation and supporting information, (iii) development requirements that may be waived and the conditions for waiver, and (iv) procedures for submission and review.
- If authority to review and approve a development plan is delegated to another, the zoning ordinance must describe the duties of the reviewer, and the procedure for review and appeal.

- The zoning ordinance may provide a hearing procedure similar to subdivision plats under the 700 Series, including approval of a secondary development plan without a public hearing.
- Primary approval of a development plan is reviewable only by judicial review.
- The plan commission may impose conditions of approval reasonably necessary to satisfy development requirements, require a bond or other written assurance to guarantee timely completion of a public improvement, and permit or require a written commitment.
- Written findings are required for decisions on development plans by a plan commission.

# *Planned Unit Development.*

- The 1500 Series governs planned unit development, or “PUD”.
- The 1500 Series describes what a PUD District Ordinance must include and the procedural requirements for approval.
- A PUD is a special zoning district that permits certain specific uses for a specific parcel of land, which accommodates a mix of uses on a parcel without having to delineate separate zoning districts for each area of use.
- For a PUD to be used, the text of the zoning ordinance must be amended to provide for planned unit development, and to specify limitations, standards, requirements, and procedures that will govern.

- For a PUD to be created for a specific parcel of land, a planned unit development district ordinance (a “PUD District Ordinance”) must be adopted by the legislative body.
- The PUD District Ordinance is a legislative act that,
  - Designates a parcel of land as a planned unit development district,
  - Specifies the uses or range of uses permitted,
  - Specifies development requirements,
  - Specifies plan documentation and information required,
  - Specifies any applicable limitation, and
  - Meets all other requirements of the 1500 Series.

- When adopting or amending a PUD District Ordinance, the legislative body may,
  - Impose reasonable conditions,
  - Make furnishing a bond or other assurance for completion of a public improvement a condition of issuance of an improvement location permit, and
  - Allow or require a written commitment.
  
- Adoption of a PUD District Ordinance is a legislative act that must be appealed in the same manner as other decisions of a legislative body, and not by judicial review under the 1600 Series.



## ○ **Subdivision Control Ordinance.**

- The 700 Series and the provisions in I.C. §36-7-3 govern subdivision platting.
- In all planning jurisdictions the plan commission has the power to take final action to review and approve or deny a subdivision plat.
- The question of what is meant by the term “subdivision” is left to local governments to define in the subdivision control ordinance. Some jurisdictions require platting even if only a single land parcel is created from a larger parcel.
- The 700 Series describes in detail the requirements and procedures for approval of a subdivision plat.

## ○ **Unified Development Ordinance.**

- A number of jurisdictions have adopted an ordinance called a Unified Development Ordinance, or a “UDO”.
- A UDO is a single ordinance that combines the features of both a zoning ordinance and a subdivision control ordinance.

## ○ Rules.

- The Enabling Act requires the plan commission and the BZA to adopt written rules that govern the procedures for how and to whom notice of public hearings must be given, and how their hearings are to be conducted.
- The plan commission also may adopt rules that identify the types of proceedings a hearing officer can act upon, and how those hearings are to be conducted, but those matters also can be identified in a zoning ordinance.

## ○ Voting and Decisions.

- In any zoning proceeding, for a plan commission, an Advisory legislative body, an Area legislative body, or a BZA to take action on a proposal, a majority of the entire body (and not just a majority of the members in attendance at a meeting) must vote either for or against the proposal.
- For a Metro legislative body, at least three-fifths of the elected members of the body must vote.
- If there is a tie vote as the result of a member being absent or abstaining from voting, the proceeding must be continued to another time to conduct another vote.

- Each city in Advisory and Area planning jurisdictions determines by general ordinance whether the mayor has the power to veto decisions made by the city's common council on proposals to adopt or amend zoning ordinances and zone map changes.
- A mayor must exercise a veto within 10 days of the date a common council acts on the zoning proposal, or within 55 days when a proposal is returned to the plan commission for consideration.
- If a zoning proposal is not vetoed, the proposal takes effect without any further action by the mayor.
- If the proposal is vetoed by the mayor, the common council can override the veto by a two-thirds vote at its first regular or special meeting after receiving notice of the mayor's veto.
- Decisions of a plan commission and a BZA must be in writing, and findings of fact must be made to support those decisions.

## ○ Conditions of Approval.

- A BZA is authorized to impose “reasonable conditions” when approving special uses, special exceptions, contingent uses, conditional uses, use variances, and development standard variances.
- A plan commission may impose conditions in making final decisions on plats and development plans.
- A hearing officer may impose conditions in approving zoning proposals decided by the hearing officer.

## ○ Written Commitments.

- A written commitment can be required or allowed as a condition of approving a rezoning, primary approval of a subdivision plat or development plan, vacation of a plat, a special exception, a special use, a contingent use, a conditional use, or a variance.
- Written commitments are in the nature of covenants that run with the land, and must be signed by the owner of the land involved and recorded.
- Recorded written commitments bind the owner of the land involved, and others who subsequently acquire an interest in it.
- If a written commitment is unrecorded, the owner of land subject to it nevertheless is bound by it, but others who acquire an interest in the land are not bound unless they have actual knowledge of the written commitment.

- Written commitments may only be modified or terminated by a plan commission or a BZA after a public hearing with notice to all interested parties.
- A legislative body may modify or terminate a written commitment made as part of a rezoning proposal or a PUD District Ordinance, but there is no requirement for a public hearing with notice.
- A hearing officer may not modify or terminate a written commitment; but instead, if a hearing officer accepts or requires a written commitment, it may only be modified or terminated by the BZA.



- **Issues Involved in Zoning Proceedings.**

- **Preemption.**

- Under Home Rule, a governmental unit may not exercise any power it has if the power is expressly granted to another governmental entity.
- If a state regulation is not followed, the proper authority to address that issue is the state agency with direct regulatory authority—not a local governmental agency.
- The operation of a CFO or land application of manure from a CFO may not legally be regulated by local agencies if the applicable state regulations are followed.

## ○ Conflicts of Interest.

- A member of a planning body may be disqualified for having a conflict of interest and may not participate in a hearing under the following circumstances:

- *Plan Commission and BZA.*

- A member of a plan commission or a member of a BZA, and a hearing officer, can be disqualified from participating in a zoning hearing because they are (i) biased, prejudiced, or otherwise unable to be impartial, or (ii) have a direct or indirect financial interest in the outcome of a zoning decision.
- An example of a disqualifying financial interest is if a BZA member is involved as a party in a real estate transaction that can be affected by the outcome of a zoning proceeding.
- A conflict does not exist merely because the member lives or owns property in the area of the land involved.

- **Legislative Body.** A legislative body member is disqualified and may not participate as a member of a plan commission or legislative body in a hearing or recommendation if the member has a direct or indirect financial interest.
- **Representation of Another Party.** A member of a legislative body or a plan commission may not directly or personally represent an applicant in a zoning proceeding concerning a zoning decision by the commission or a legislative act (e.g., a rezoning) by a legislative body.
- **Rules.** The plan commission may adopt rules to regulate conflicts of interest of a hearing officer.

## ○ **Ex Parte Communications.**

- **BZA.** A person involved in a zoning proceeding before a BZA may not communicate with a member of the BZA before the hearing on a pending zoning case, with the intent to influence the member's action in the case.
- **Plan Commission.** There is no corresponding statute prohibiting communications with a plan commission member, but some plan commissions have adopted a rule that prohibits communications related to a pending zoning proceeding.
- **Legislative Body.** There is no bar against a person involved in a zoning proceeding from communicating with a member of a legislative body (like a county commissioner or common council member) who will make a decision in the proceeding, because such communications are considered to be legislative acts, and properly part of the political process.

## ○ Governmental Estoppel.

- When a governmental official or body makes a zoning decision, or takes action to issue a permit, and then later reverses the decision or revokes the permit, the issue of governmental equitable estoppel may arise.
- A party claiming equitable estoppel must show (i) lack of knowledge, (ii) reliance on the conduct of the party to be estopped, and (iii) action taken to change the party's position prejudicially.
- Equitable estoppel does not apply to a governmental official or body except when the party asserting estoppel has detrimentally relied on the affirmative assertion or silence when the governmental official or body has a duty to speak.

## ○ “Spot Zoning”.

- A “spot zoning” means the singling out of a property for different treatment than similar surrounding land that is indistinguishable in character, for the economic benefit of the land singled out.
- A spot zoning is not illegal *per se*.
- Zoning action is not “spot zoning” if it bears a rational relation to the public health, safety, morals, convenience or general welfare.

- **Vacations.**

- **Public Ways and Public Places.**

- A “public way” is a highway, street, avenue, boulevard, road, lane, or alley. A “public place” is a tract of land owned by a state or political subdivision, such as a county or city.
- A person who owns land adjacent to a public way or public place has the right to file a petition to vacate it with the legislative body.
- Notice of the vacation petition must be given by publication and to the owners of all land that abuts the area proposed to be vacated. A hearing on the vacation petition must be held by the legislative body within 30 days of the filing.
- The Zoning Guide explains who is an “aggrieved person” that may object to a vacation, the scope of a permitted remonstrance, the requirements for notice and hearing, and the appeal rights to contest approval or denial of a vacation.

- The legislative body must deny a vacation petition if there is a remonstrance by an aggrieved person who would be landlocked.
- A public way (e.g., a street) that has not been improved in a subdivision plat may be vacated by the recording of an instrument signed by all of the owners of land in the plat, subject to the approval of the plan commission, or if there is no plan commission, by the county commissioners if the land is in an unincorporated area of the county.
- If a vacation proceeding is terminated, a subsequent vacation proceeding applicable to the same land for the same relief may not be filed for two years.



## ○ **Platted Easements.**

- A platted easement may be vacated in the same manner that applies to public ways and public places.
- An easement in a plat may not be vacated unless the owners of all land benefited by the easement consent to the vacation, regardless whether a legislative body approves an easement vacation.
- Vacation of a public way does not deprive a utility from using or occupying a platted utility easement, unless the utility waives that right.

## ○ Plats.

- A plan commission has exclusive authority control over the vacation of subdivision plats or parts of plats.
- A public hearing must be held by the plan commission on the proposed plat vacation.
- If the plan commission approves the vacation, it may impose reasonable conditions for the vacation, and a copy of the decision must be recorded.
- A plat vacation may be approved only if the plan commission finds and determines that (i) conditions in the platted area have changed so as to defeat the original purpose of the plat, (ii) the vacation of the plat is in the public interest, and (iii) the value of the land in the plat not owned by the vacation petitioner will not be diminished by the vacation.

■ **Metro.**

- A *Metro* plat committee has exclusive control over the vacation of plat or parts of plats, public ways, easements, and public places, whether or not they are included in a plat.
- A vacation petition may be approved by the plat committee only on a finding that the vacation is in a public interest.
- A plat committee vacation may use the same procedures that apply to vacations in other jurisdictions.
- A vacation decision by a plat committee may be appealed to the plan commission, and not by judicial review.

## ○ **Plat Covenants.**

- A petition to vacate all or part of a plat may include a request to the plan commission to vacate plat covenants.
- In order to approve the vacation of plat covenants, the plan commission must find,
  - The platted area is within an area needing redevelopment, and the covenant vacation would promote a recovery of property values in the area needing redevelopment by allowing or encouraging normal development and occupancy of the platted area,
  - The vacation is needed to secure adequate light, air, convenience of access, or safety from fire, flood, or other danger, or
  - The vacation is needed to lessen or avoid congestion in the public ways.

- Covenants are a constitutionally-protected property interest that cannot be taken by government from lot owners in a plat without a proper public purpose.
- If a proper public purpose does not exist, the covenant cannot be vacated.
- Even if a proper public purpose exists and the plan commission approves vacation of covenants, the vacation may be considered to be a “taking” of the property interest, and the other owners of land in the plat who are aggrieved by the decision may file a claim against the plan commission for inverse condemnation and damages.

## ● Enforcement of Zoning Decisions.

- The plan commission, the BZA, or any enforcement official designated in the zoning ordinance may bring an action to:
  - Enforce any ordinance adopted under the Enabling Act, as well as conditions imposed by the plan commission or BZA;
  - Enforce covenants made in connection with a plat, a development plan, or a PUD District Ordinance; and
  - Request any legal, equitable, or special remedy available, costs, and fines authorized by the zoning ordinance.
- A change of venue from the county may not be granted in a zoning enforcement action.

- If an appeal of a decision of an official or another board is filed with a BZA, proceedings and work on the land involved are automatically stayed unless,
  - The official or board certifies to the BZA that a stay would cause imminent peril to life or property, or
  - If a restraining order is entered by a trial court prohibiting the stay upon a showing of due cause.
- The official or board charged with enforcement in the zoning ordinance may order the work stayed and call on the police power to make the stay effective.

- **Nonconforming Uses and Structures.**

- A nonconforming use or structure is permitted because it was legally in effect or existed either (i) under a prior zoning ordinance, or (ii) before there was a zoning ordinance in effect when the use first commenced or the structure was erected, even though a subsequently adopted zoning ordinance would make the use or structure not permitted or otherwise illegal.
- Most zoning ordinances have provisions that define what constitutes a nonconforming use or structure, and determine when a nonconforming use is abandoned or terminated because of non-use for some period of time.
- In an enforcement action brought against a landowner for violation of a zoning ordinance, the existence of a nonconforming use is an affirmative defense that must be alleged and proven by the landowner.



## ○ Agricultural Nonconforming Uses.

- In 1998, legislation was adopted that applies specifically to agricultural nonconforming uses.
  - The term “agricultural use” is defined in this statute as the use of land before the most recent comprehensive plan or zoning ordinance was adopted, for a broad range of uses, including production of livestock, poultry, and agricultural crops.
- A use considered an agricultural nonconforming use may be changed to another agricultural use without losing its status as an agricultural nonconforming use.
  - For example, land used for crop farming can also be used for production of livestock without having to comply with use provisions in the current zoning ordinance.

- For an agricultural nonconforming use to be exempt from requirements under a current zoning ordinance, the agricultural use must have existed for any three-year period during a prior five-year period.
- If the agricultural nonconforming use satisfies the three-year time period requirement, the zoning authority cannot restrict the use, or require approval of a variance, special exception, special use, or other proceeding for the use to continue.
- The zoning authority may require the agricultural use to comply with state environmental and health laws and rules, and requirements in the zoning ordinance applicable to conforming agricultural uses.
- The right to continue or change an agricultural nonconforming use does not limit a governmental unit from requiring compliance with provisions in the zoning ordinance applicable to structures and development requirements.

- **Other Statutes that Can Impact an Agricultural Zoning Case.**
  - **Nuisance.**
    - A statutory injunctive action for nuisance can be brought to abate a condition or an act that is injurious to health, indecent, offensive to the senses, or an obstruction to the free use of property.
    - A zoning ordinance also may provide that a violation of the ordinance is a common nuisance.
    - Reasonable attorney fees can be recovered if the nuisance action is successfully brought by a county, city, or town, or a person successfully defends a nuisance action brought by any person or governmental unit.
    - If a residential owner claims a livestock operation is common law nuisance because of odor, a defense called “coming to the nuisance” is available to the livestock owner if the livestock use existed before the complaining owner acquired the residential land.

## ○ **“Right to Farm Law”**

- The nuisance statute was amended in 2005 to add a provision referred to as the “Right to Farm Law”.
- The statute also applies to industrial, forestry, and public use airport operations in addition to agricultural operations.
- Under this statute, an action for public or private statutory nuisance does not exist against an agricultural operation by reason of any change in condition in the “vicinity” of the operation after it has operated for more than one year, provided,
  - There is no significant change in type of the operation, and
  - The agricultural operation would not have been a nuisance when it began at the same location.

- A “significant change” in an agricultural operation does not occur because of (i) a change to another type of agricultural operation, (ii) the ownership or size of the agricultural operation changes, (iii) the enrollment, reduction or cessation in a governmental program, or (iv) a new technology is adopted.
- An “agricultural operation” is defined as being “any facility used for the production of crops, livestock, poultry, livestock products, poultry products, or horticultural products or for growing timber.”
- An agricultural operation is considered as “interrupted” if the operation is discontinued for a period of more than one year.
- The protections of “Right to Farm Law” do not apply if the claimed nuisance results from the negligent operation of an agricultural operation.

- There are special provisions for recovery of attorney fees applicable to agricultural operations involved in a nuisance action.
  - If an action for nuisance is brought against an agricultural operation, and the court finds there was no nuisance and the action was frivolous, reasonable attorney fees can be awarded to the agricultural operator.
  - If the court finds there was a nuisance by the agricultural operation and the defense was frivolous, reasonable attorney fees can be awarded against the agricultural operator.
  - Attorney fees can be awarded for only one attorney, no matter how many attorneys were employed.
- A nuisance action is not considered frivolous merely because a party did not prevail in the action.

## ○ ***Vested Rights.***

- The Vested Rights Statute, I.C. § 36-7-4-1109, provides if a person files a “completed application” for a required governmental permit, the granting of the permit is governed by the statutes, ordinances, rules and regulations in effect when the application was filed, for a period of at least three years from the application date, regardless whether there are any subsequent changes in them.
- The Vested Rights Statute does not apply to a development that is not completed within ten years after it commenced.
- If a complete application is filed, the governmental agency involved must issue the required permit within 12 business days of the filing date.

## ○ **Open Door Law.**

- The Indiana Open Door Law applies to public meetings on zoning matters.
- The Open Door Law requires that meetings of public governing bodies must be open at all times, so the public can observe and record the meetings. Secret ballots are expressly prohibited.
- The exceptions from requirements of the Open Door Law include,
  - An “executive session”, which is a meeting authorized by federal or state statute, or a meeting discussing collective bargaining, litigation (either proposed or pending), or real property transactions by the governing body until a contract is fully executed;
  - Social or chance gatherings not intended to avoid this law;
  - Traveling to and attending meetings of organizations devoted to governmental betterment;
  - A “caucus”, which is a gathering of members of a political party to plan political strategy and to prepare members for taking official action; and
  - Orientations not resulting in official action.



- “Official action” means to receive information, deliberate, make recommendations, establish policy, make decisions, or take final action.
- The Open Door Law requires posting of an agenda for the meeting at the entrance of the meeting location, posting a copy of the notice at the governmental body’s, and delivering the notice to news media office that made a timely annual request, at least 48 hours before the meeting commences.
- If a governmental body’s meeting violates the Open Door Law, an action may be filed by any person to declare as void a decision made or final action taken at the meeting.

- If the court declares the decision or action void, the governing body also may be enjoined from acting on the same subject matter until it gives “substantial reconsideration” at a meeting that complies with the requirements of the law.
- The court also may assess a civil penalties against an individual that is an officer of a public agency or employed in a managerial position, who specifically intends to violate the law by failing to give proper notice, taking final action outside a meeting, participating in a secret ballot, discussing ineligible matters in an executive session, or failing to prepare a required meeting memorandum.

- **Federal Constitution, Statutes and Rules.**

- The provisions in the United States Constitution that may apply to land use cases, are:
  - The First Amendment free exercise of religion and free speech clauses;
  - The Fifth Amendment takings clause; and
  - The Fourteenth Amendment equal protection clause, the procedural due process clause, and the substantive due process clause.
- Agricultural landowners may use these constitutional provisions to defend against unlawful conditions or exactions imposed by a governmental body in connection with permitting or approval of an agricultural development or use, exclusionary zoning, growth controls or moratoria, regulatory takings, “spot zoning”, and violation of vested rights.
- Other federal statutes and rules , like environmental laws and regulations, apply to agricultural land use matters.

- The **Takings Clause** of the Fifth Amendment applies to the states and local governments through the Fourteenth Amendment, and provides that private property shall not be taken without “just compensation”. There are two types of takings – a *per se* taking and a regulatory taking.
  - ***Per se* Taking.**
    - If government physically acquires or appropriates private property for a public use, government must provide the owner of the property with just compensation.
    - A physical appropriation or invasion of private property that qualifies as a *per se* taking occurs whether it is permanent or temporary, even if the invasion is intermittent, rather than continuous.
    - Examples of governmental actions found courts have found to be physical takings are given in the Zoning Guide.

## ■ Regulatory Takings.

- Regulatory takings exist when government imposes a regulation that restricts an owner's ability to use the owner's property, which "goes too far".
- The courts apply a flexible test that balances the regulation's economic impact, its interference with a property owner's "investment-backed expectations", and the character of the government's actions.
- If a regulation deprives an owner of all or substantially all economic or productive use of the owner's property, it is considered a regulatory taking.
- Like *per se* takings, regulatory takings can be permanent or temporary.