

# Local Officials and Regulating Livestock Production

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## Background

The growth of livestock production and other forms of agriculture have led to new land use challenges in rural Indiana. Agricultural producers, rural residents, and local officials increasingly recognize the need for improved planning and zoning in rural areas to address these issues effectively. During the planning process, questions often arise about the role of local officials in relation to existing state and federal regulation.

As an advisory body to state government<sup>1</sup>, the Indiana Land Resources Council developed this guidance document to clarify the extent of local authority to regulate livestock operations. The purpose of this document is to aid state and local officials in understanding the roles and responsibilities of each unit of government in the regulation of livestock agriculture. It will first look at the specific powers granted to local units of government under the state's land-use policies and then analyze the areas where state agencies have preemptive authority.

## Zoning Ordinances

Local units of government have the authority to implement zoning ordinances through the Indiana Planning and Zoning Law.<sup>2</sup> The law gives county and municipal government the ability to plan for the use of land and the location of buildings, including improvements, through planning and zoning.<sup>3</sup> However, local zoning authority is limited by other state statutes. This document summarizes the statutory limitations on local regulation of livestock production.

Local governments that enact zoning have the following responsibilities:

- Designate a plan commission
- Prepare a comprehensive plan
- Prepare a zoning ordinance and a subdivision control ordinance
- Amend, if needed, the text of the zoning ordinance or subdivision control ordinance
- Approve or deny proposals to subdivide land and development plans<sup>4</sup>

In order to write a zoning ordinance, local governments must develop a comprehensive plan that meets state requirements.<sup>5</sup> After a comprehensive plan is approved, the plan commission must consider that plan when making zoning decisions.<sup>6</sup> According to the Indiana Supreme Court, “[t]he ultimate purpose of zoning ordinances is to confine certain classes of uses and structures to designated areas.”<sup>7</sup> The Indiana Code lists the following purposes for local zoning ordinances:

<sup>1</sup> See Ind. Code § 15-7-9-6.

<sup>2</sup> Ind. Code § 36 - 7 [Planning and Development].

<sup>3</sup> Ind. Code § 36-7-2-2 (2007).

<sup>4</sup> Ind. Code § 36-7-4-405 (2007).

<sup>5</sup> Ind. Code § 36-7-4-601(a) (2007).

<sup>6</sup> Ind. Code § 36-7-4-504(a) (2007).

<sup>7</sup> *Ragucci v. Metro. Dev. Comm'n*, 702 N.E.2d 677, 679 (Ind. 1998) (citations omitted).

- Secure adequate light; air; convenience of access; and safety from fire, flood, and other danger
- Lessen or avoid congestion in public ways
- Promote public health, safety, comfort, morals, convenience, and general welfare<sup>8</sup>

In order to meet the needs of the community, a plan commission may enact the following zoning regulations:

- Establish one or more districts which may be for agricultural, commercial, industrial, or residential uses
- Develop performance standards for the emission of noises, gases, heat, vibration, or particulate matter into the air or ground or across lot lines<sup>9</sup>

Local governments are not necessarily required to establish a district for each type of land use. However, they are required to exercise zoning powers in a way that recognizes the current and future needs of agriculture.<sup>10</sup> Zoning authority provides local government with significant control over where different types of agricultural operations are permitted to locate in their community.

### Planning Law

In performing these zoning functions, the plan commission must follow the requirements of Indiana's Planning Law<sup>11</sup>. Each plan commission must also operate within limitations established by the state legislature and the state courts. Limitations on local regulation of livestock production are governed by the Home Rule statute<sup>12</sup> and the Commercial Fertilizer Law<sup>13</sup>.

### State Preemption

State laws can preempt, or overrule, local laws and ordinances. State laws preempt local laws in one of two ways: express or implied. Express preemption occurs where a state or federal law explicitly states that a county cannot regulate a particular subject matter. With implied preemption, the law does not explicitly state whether it was meant to preempt local laws; however, the regulatory system is so comprehensive that intent of the legislature is implied to preclude local regulation in that area.

The Home Rule statute states that "any doubt as to the existence of a power of a [county, municipality, or township]<sup>14</sup> shall be resolved in favor of its existence."<sup>15</sup> The policy of the

<sup>8</sup> Ind. Code § 36-7-4-601(c) (2007).

<sup>9</sup> Ind. Code § 36-7-4-601(d) (2007).

<sup>10</sup> Ind. Code § 36-7-4-201(b)(3) (2007).

<sup>11</sup> Ind. Code § 36-7-4-201(a) (2007).

<sup>12</sup> Ind. Code. § 36-1-3 (2007).

<sup>13</sup> Ind. Code § 15-3-3 (2007).

<sup>14</sup> Ind. Code § 36-1-2-23 (2007) [defines "unit"].

statute is to "grant [county, municipality, or township]<sup>16</sup> all the powers that they need for the effective operation of government as to local affairs."<sup>17</sup> However, there are seventeen exceptions in the Home Rule statute setting forth areas prohibiting local government regulation. One of these exceptions is local regulations which affect existing state regulation.

### *IC § 36-1-3-8 Powers Specifically Withheld*

*(7) The power to regulate conduct that is regulated by a state agency, except as expressly granted by statute.*

Under this provision, state regulatory authority trumps local zoning authority in Indiana. With regard to livestock production, this limitation applies to state environmental programs administered by the Indiana Department of Environmental Management (IDEM) and the Office of the Indiana State Chemist (OISC). These regulatory programs are based upon stringent environmental quality standards to protect human health.

Indiana courts have addressed county authority to implement environmental protection regulations in addition to state requirements.<sup>18</sup> In these cases, the land-siting and operation standards in the county ordinances were addressed in state regulation, but the county made the requirements more restrictive. These decisions have consistently held that, to the extent a county ordinance attempts to regulate conduct that a state agency already regulates, the ordinance is preempted and unenforceable.<sup>19</sup>

The county ordinances were found in violation of IC § 36-1-3-8(7) because they regulated "conduct regulated by a state agency" without express statutory authority for the county to do so. Courts have enforced the express authorization required to avoid preemption. They establish a precedent and reinforce the fact that a state statute is needed to save an ordinance that controls conduct regulated by a state agency.

The comprehensiveness of the state regulatory programs in these cases is similar to IDEM's confined feeding program for confined feeding operations ("CFOs") and concentrated animal feeding operations ("CAFOs"). This program includes detailed design, construction, and maintenance requirements for manure storage structures. It also sets forth operational requirements for livestock facilities through detailed nutrient management and manure application requirements.

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<sup>15</sup> Ind. Code § 36-1-3-3 (2007).

<sup>16</sup> Ind. Code § 36-1-2-23.

<sup>17</sup> Ind. Code § 36-1-3-2 (2007).

<sup>18</sup> *Triple G Landfills v. Bd. of Comm'rs of Fountain Cty*, 774 F. Supp. 528 (S.D. Ind. 1991). *Hopkins v. Tipton Cty Health Dept.*, 769 N.E.2d 604 (Ind. Ct. App. 2002). *Bd. of Comm'rs of LaPorte Cty v. Town & Country Utilities*, 791 N.E.2d 249 (Ind. Ct. App. 2003).

<sup>19</sup> *Triple G Landfills*, 774 F. Supp. at 532. *Hopkins*, 769 N.E.2d at 604. *Bd. of Comm'rs of LaPorte County*, 791 N.E.2d at 255.

Another statutory limitation on local zoning regulation is the Indiana Commercial Fertilizer Law, which expressly preempts local regulation of fertilizer.<sup>20</sup> By statute, the definition of fertilizer includes animal manure.<sup>21</sup> Based on this statute, a local unit of government must submit proposed manure application regulations to the OISC for approval.

*IC §15-3-3-12(c) Except as provided in subsection (d), a political subdivision does not have authority to regulate by ordinance the storage and utilization of fertilizer.*

*(d) A political subdivision may, by resolution, petition the state chemist for a hearing to allow a waiver to adopt an ordinance because of special circumstances relating to the storage and utilization of fertilizer. If a petition is received, the state chemist shall hold a public hearing to consider allowing the waiver requested. The public hearing must be conducted in an informal manner.*

Indiana courts have drawn a distinction between county ordinances that merely restrict the use of land versus those that attempt to regulate the conduct of an operation. Ordinances that control the specific uses of land have been found a valid exercise of local zoning authority.<sup>22</sup> However, ordinances that attempt to regulate the environmental impacts of an operation have been preempted by the limitation on Home Rule.<sup>23</sup> With regard to local regulation of livestock production, it is likely that a court would find that local government is preempted by state regulation from imposing more stringent design and operational standards for CFOs and CAFOs to protect water quality.

Generally, local government has broad authority over *where* an activity takes place but limited authority over *how* it takes place. Planning and zoning are essentially about separation of uses or where an activity takes place. Local government plays a critical role in making such decisions, which complement state regulation of how that activity takes place. Plan commissions have many responsibilities, but their most important duty is to develop and recommend a plan for the future of the community. Focusing on this fundamental planning responsibility is critical to ensure that the plan is effectively implemented.

<sup>20</sup> Ind. Code § 15-3-3 (2007).

<sup>21</sup> Ind. Code § 15-3-3-3 (1) (2007).

<sup>22</sup> *O'Banion v. Shively*, 253 N.E.2d 739, 745 (Ind. App. 1970).

<sup>23</sup> *Triple G Landfills*, 774 F. Supp. at 532. *Hopkins*, 769 N.E.2d at 608.