CMAP

Handbook of Planning Law Principles and Practices for Northeastern Illinois

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Foreword

Context

The Chicago Metropolitan Agency for Planning sponsored the preparation of this handbook to help local officials in the local governments served by CMAP to cope with the complexities of Illinois law as they make local land-use decisions.

Two of the major themes of GO TO 2040, the CMAP regional plan, are "Livable Communities" and "Efficient Governance." Local land-use controls are critical tools in achieving and maintaining a quality of development that results in a quality of life that makes a livable community. Efforts to achieve such results are as disjointed as the laws described in this handbook. CMAP officials hope that this handbook will help local officials to make important land-use decisions efficiently.

CMAP distributed a Request for Proposals to select a team to prepare this handbook. After reviewing multiple responses, CMAP selected a team led by Duncan Associates, a firm that is based in Chicago and Austin and that regularly consults with local governments on the implementation of plans. The team members who contributed to this project are:

Eric Damian Kelly, Ph.D., FAICP, a lawyer and planner who is a Professor of Urban Planning at Ball State University and who has worked with Duncan Associates for more than 20 years. He is a past president of the American Planning Association and a Fellow of the American Institute of Certified Planners. He is the author of multiple publications in planning and law, including the recently published second edition of *Community Planning: an Introduction to the Comprehensive Plan* (Island Press). Since 1995, he has been General Editor of the 10-volume legal treatise, *Zoning and Land Use Controls (*Matthew Bender, a Lexis-Nexis Company).

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Stuart Meck, FAICP, Associate Research Professor and Director of the Planning Practice Center at the Edward J. Bloustein School of Planning and Public Policy at Rutgers, the State University of New Jersey. Like Kelly, Meck is a past president of the American Planning Association and a Fellow of AICP. Like Morris, he is a former staff member of the APA Research Department. His primary job at APA was leading the development of the *Growing Smart Legislative Guidebook*, containing model provisions for state land-use enabling acts. He is also a much-published author in the fields of zoning and land-use controls.

Limitation on Use

This is intended as a reference work, not as specific legal advice. You should rely on legal opinions expressed in this report only on the advice of an attorney licensed to practice in Illinois.

How to Use this Handbook

This handbook consists of five chapters:

Chapter 1 provides an overview of the structure of local governments in Illinois and the local agencies that make planning decisions;

Chapter 2 provides an overview of the statutory and constitutional requirements for local land-use decision-making;

Chapter 3 provides detailed guidance for making specific types of land-use decisions: rezoning (map amendments); variations; special use permits; and subdivisions; the checklists provided in this section are available as separate documents on-line;

Chapter 4 discusses some of the most difficult legal issues that arise in land-use law: regulating religious institutions, signs and billboards, and sex businesses, uses which have constitutional protection under the First Amendment; and imposing requirements that developers deal with some of the impacts of their developments by providing land or public facilities;

Chapter 5 describes the role of planning in making all of these decisions and provides checklists for determining when it is time to update a comprehensive plan or zoning ordinance.

Chapters 1, 2, 4 and 5 provide education and background reading. Chapter 3 may be used separately in meetings as a guide for making specific decisions.

1. Introduction

Local Governments in Illinois

Overview

There are multiple forms of local government in Illinois: cities, villages, townships, counties, and a variety of special districts. The entire state of Illinois is divided into 102 counties. There were no automobiles or railroads in 1818, the year Illinois became a state. Thus, people in many parts of the state were not only many miles but many days away from the state capital of Springfield. The original role of counties was to provide a more local link between the people and the state government. County courthouses serve as the base for state courts, and state prosecutors are elected by county. Property taxes are collected at the county level, under state laws. Counties continue to provide a variety of state-related services to citizens throughout their territories.

Because the state cannot provide all governmental services that people expect, the Illinois Constitution and laws passed by the legislature authorize local governments to be formed for the purpose of providing services to residents at the local level. Villages and cities evolved to create local governments that could provide local services to residents who formed a community. They are called "municipalities" or "municipal governments." The formal process for creating a city or a village is called "incorporation." State law refers to these entities as corporations and their governing bodies as corporate authorities. Although not defined in Illinois state law, as used in this handbook the term "governing body" is a generic phrase that describes any board, commission, council, or individual that acts as the elected legislative body of local government and has the authority to adopt legislation.

Basic services of early cities and villages included fire and police protection, street maintenance, and water and wastewater services. The legislature also authorizes cities and villages to adopt local laws, called "ordinances," regulating local matters; today, such ordinances include the zoning and subdivision controls that are the principal subject of this handbook. Although at one time cities had significantly more authority than villages, today the principal differences are in the structure of local governments. Villages and cities operate under the same enabling legislation (i.e., state law) and have the same authority (but see brief discussion below of "home rule").

Townships are a local option form of government in Illinois and exist only in those counties where a county-wide referendum has created them. Townships in Illinois have zoning authority in unincorporated areas only where the county has not adopted a zoning ordinance.[1] The topic of township zoning is not discussed further in this handbook, because all of the counties with territory included in CMAP have adopted zoning ordinances.

Enabling Legislation

Local governments are created by the state and thus have the scope, attributes and powers – and only those – given them by the state. "Enabling legislation" is a type of state law that describes the powers and duties that the state has delegated to local units of government. Such state laws also describe the limits of what local governments are authorized to do or are prohibited from doing and the procedures by which they do it. This manual uses both phrases—"state law" and "enabling legislation" at various points. With respect to the planning, zoning, and subdivision responsibilities the two phrases generally mean the same thing.

As the state supreme court has held in striking down a county ordinance:

> It is clear that a county is a mere creature of the State and can exercise only the powers expressly delegated by the legislature or those that arise from necessary implication from expressly granted powers.[2]

Similarly, a state appellate court has said:

> The City…is "but a creature of the State and may exercise only those powers that the legislature [has] expressly or impliedly delegated."[3]

Although state law in Illinois grants local governments a great deal of authority to address matters of local concern, they do so under enabling legislation that typically defines the extent of the authority and the procedures for exercising it. Thus, although planning and zoning are largely local activities in Illinois and other Midwestern states, it is necessary to refer to state laws to provide a context for how those activities are carried out. As noted above, "home rule" local governments have more authority to address some issues than non-home-rule local governments.

Home Rule

Local governments have the authority granted them in specific enabling legislation – and only that authority. In Illinois and some other states, "home-rule" local governments have more authority and flexibility than others. A county which has a chief executive officer elected by the electors of the county and any municipality which has a population of more than 25,000 are home rule units (An exception is Will County which has the executive form of government but has opted not to exercise home-rule authority.[4]) Other municipalities may elect by referendum to become home rule units."[5]

In general, the distinctions are subtle and are of limited significance in dealing with most planning and zoning matters. It can make a difference in dealing with specific uses, however. One paragraph of the constitutional provision on home-rule provides:

> Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive.[6]

In an important decision regarding home rule in Illinois, a state court of appeals has held:

> It is thus apparent that the city of Champaign in the adoption of its general zoning ordinance or an amendment thereto relating to PUD [Planned Unit Development] is not limited in the exercise of its power by the then-existing enabling statutes. It has plenary power in this regard. The precise procedure for the exercise of this power and the resolution of zoning problems must be left to the local exercise of this new constitutional grant of power.[7]

Home-rule local governments have some additional flexibility in how they implement zoning and land-use controls, but, in decisions cited throughout this handbook, the state supreme court and other appellate courts have continued to look to the enabling legislation when determining the validity of a local zoning ordinance – whether the community is home-rule or not. For example, the Illinois Supreme Court has held that a non-home-rule local government could not deny a zoning variation for a day-care home for children where the state had granted a license for the home.[8] The clear implication of the decision was that the "concurrent" regulatory authority of home-rule local governments would allow them to deny zoning approval to such a facility even in a location where the state would grant a license for it. Thus, the same court has held that a home-rule local government can deny zoning approval for a billboard in a location where it would otherwise be allowed under the state's Highway Beautification Act.[9]

Another section of the Illinois constitution provides:

> If a home rule county ordinance conflicts with an ordinance of a municipality, the municipal ordinance shall prevail within its jurisdiction.[10]

An Illinois appellate court has construed that broadly, saying that the quoted language "suggests the intent of the Constitutional Convention to recognize a priority of municipalities over counties when matters of local concern are involved. "[11]

Decision-Making Bodies

Governing Body

As explained earlier, this handbook uses the generic term "governing body" to refer to the body of the local government that functions as the legislative body and that has the authority to adopt legislation.

For cities, the governing body is the city council, which consists of the mayor and aldermen.[12] The mayor presides at meetings and can vote only in the case of a tie or in other limited circumstances.[13] For villages, the governing body is the "president and trustees,"[14] who comprise the village board. State statutes sometimes refer to these bodies as the "corporate authorities."[15] These bodies have the authority to adopt ordinances (local laws) for municipalities.[16]

In counties, that body is the county board.[17] The number of members of the board can be established by county ordinance and thus varies from county to county. In some counties, the county board serves

both legislative and executive functions. Other counties have adopted a "county executive" form of government which creates a position like that of a mayor to handle executive functions for the county.[18] The county board remains the legislative body in such counties, however, and thus plays a critical role in the zoning and land-use control process. In the CMAP region, Will County and Cook County have established the county executive form of government; in DuPage, Kane, Kendall, Lake, McHenry, and Grundy Counties the county board serves as both the legislative and executive branch of the county government.

Board of Appeals

Enabling legislation for cities and counties provides for the creation of a [zoning] board of appeals.[19] By local ordinance, a municipality or county may delegate the power to grant variations to the zoning ordinance (discussed later in this handbook) to the board of appeals or may give that power to the governing body.[20] In a municipality where the governing body holds the authority to grant a variation, it may do so only after the application has had a hearing before the board of appeals. Counties may allow applicants to apply directly to an administrator, with no review by the board of appeals, in cases where "the variation sought is a variation of ten percent or less of the regulations by this Division authorized as to location of structures or as to bulk requirements under such regulations."[21] **The 10 percent rule does not apply to municipalities.** The board of appeals in both municipalities and counties also hears such appeals as are assigned to it under the zoning ordinance.[22] The most common form of such appeal is to challenge the denial or issuance of a zoning or building permit.

Board of Appeals Duties

Hear appeals from administrative zoning decisions

Hold hearings on variations
Grant dimensional variations (*if duty assigned in local ordinance*)

Grant use variations (if use variations allowed and if duty assigned in local ordinance)

Hold hearings on special use permits

Grant special use permits (*if duty assigned in local ordinance*)

Municipalities may provide for special uses in their zoning ordinances.[23] Such uses may be approved "only after a public hearing before some commission or committee designated by the corporate authorities."[24] Practice under this law varies within the region, with some municipalities referring special use applications to the planning commission and others referring those applications to the board of appeals.

Where the county board retains the authority to grant variations, it may do so against the recommendation of the board of appeals only by a 3/4-majority vote (2/3 in the case of a county with a 3-member board). Counties that provide for special use permits may delegate to the zoning board the authority to grant such permits[25] or may retain that authority for the governing body.[26] Although there is no similar provision for municipal zoning boards, municipal ordinances may impose super-majority requirements to override the recommendation of the board of appeals. A special use permit, whether granted by the governing body or the zoning board, can be granted only after a hearing before the zoning board and findings of fact and a recommendation by the

board.[27] There are more detailed requirements in the statute; those are discussed in a later section of the handbook, beginning at page 38.

Zoning Commission

Any county or municipality considering the adoption of zoning for the first time must create a zoning commission with the duty "to recommend the boundaries of districts and appropriate regulations to be enforced therein."[28] The enabling legislation for both municipalities and counties provides, "The zoning commission shall cease to exist upon the adoption of a zoning ordinance" for the county or municipality."[29]

Zoning Commission Duties

Recommend and hold hearing on initial zoning ordinance

Note that bodies that are called "planning and zoning commissions" are "planning commissions" for purpose of state law – *see next sub-section*

Planning Commission

Municipalities may have a "plan" commission[30] and/or a planning department. The powers of the commission or department include the power to recommend a comprehensive plan for the municipality.[31] A comprehensive plan is effective only when adopted by a governing body.[32] Under the relatively broad flexibility given to municipalities for the creation of advisory bodies for the zoning process, a number of Illinois municipalities have combined the functions of two commissions under a "Planning and Zoning Commission."

Counties have the authority to create a "regional planning commission" to create a plan for a region consisting of "a portion or all of said county."[33] It is good practice to forward proposed plans to the county board for formal adoption, but one portion of the statute suggests that the county board can, in establishing the regional planning commission, give the regional planning commission the power to adopt the plan, not simply to recommend it.[34]

Planning Commission (or Planning and Zoning Commission) Duties

Hold hearings on special use permits (if assigned under local ordinance)

Hold hearings on variations (if assigned under local ordinance)

Review and act on proposed subdivision plats

Review and make recommendations on all amendments to zoning ordinance or map

Propose and/or review and make recommendations on comprehensive plan or amendments to comprehensive plan

Types of Decisions

Land-use regulation involves three different types of decisions by public bodies. The differences are important, because local governments have a great deal of discretion in making certain types of decisions and much less in making others.

Legislative Decisions

Legislative decisions are ones that establish policies. They include the adoption of plans and ordinances and the approval of a budget. Legislative decisions are made by the local government's

elected body, but not every decision made by the elected body is a legislative decision. Local governments have the broadest discretion in making legislative decisions. As the Illinois Supreme Court has said:

> It is the province of the municipal body to draw the line of demarcation as to the use and purpose to which property shall be assigned or placed, and it is neither the province nor duty of courts to interfere with the discretion with which such bodies are invested, except where there is a clear showing of an abuse of that discretion, which is not the case where the question is merely debatable.
>
> The judgment of municipal authorities with reference to zoning is conclusive unless it is shown to be arbitrary, capricious and unrelated to the public morals, safety and general welfare, and, where there is room for a legitimate difference of opinion concerning the reasonableness of a particular zoning ordinance, the finding of the legislative body will not be disturbed.[35]

Administrative or Quasi-Judicial Decisions

Administrative or quasi-judicial land-use decisions are those in which a local board or commission applies an adopted policy (such as a zoning or subdivision ordinance) to a specific application. They include variations, special uses, preliminary and final subdivision plats, and site plan review. Local governments have less flexibility in making "quasi-judicial" or "administrative" decisions. On this, the Illinois Supreme Court has said:

> The reasons for classifying zoning hearings that deal with special use applications as administrative or quasi-judicial are manifest. In these hearings, the property rights of the interested parties are at issue. The municipal body acts in a fact-finding capacity to decide disputed adjudicative facts based upon evidence adduced at the hearing and ultimately determines the relative rights of the interested parties. As a result, those parties must be afforded the due process rights normally granted to individuals whose property rights are at stake.[36]

An Illinois appellate court has explained:

> Administrative decisions, which… are also referred to as quasi-judicial decisions, "'concern agency decisions that affect a small number of persons on individual grounds based on a particular set of disputed facts that were adjudicated.'" … Legislative decisions, on the other hand, "'involve general facts affecting everyone.'"[37] [internal citations omitted]

Advisory Recommendations

Local zoning ordinances typically provide for review of some applications by a zoning board, planning commission or other local body even where the final decisions are reserved to the governing body. In such cases, the recommendations of those bodies are advisory. The governing body retains the final authority on such decisions. As an appellate court has explained:

> Reports or findings of an administrative body, even when required by statute, are merely advisory and do not affect the authority of the City Council where the latter has the final decision-making authority.[38]

The governing body is not bound by the recommendation of an advisory body. Where the statutes require review by an advisory body before action by the governing body, the legislature has indicated its intent that the review by the advisory body be considered in the final decision-making. Thus, although the governing body retains the discretion to act in whatever way it determines to be best, it should consider carefully the recommendation of any advisory body which has reviewed the proposal under a statutory requirement.

Effect on Judicial Review

The type of decision makes a difference not only in how the decision is made but in how it is treated by courts in an appeal or other challenge:

> These two types of decisions are subject to different standards of review. Legislative decisions made by municipalities are subject to review only "for arbitrariness as a matter of substantive due process." That is, such decisions will be upheld if they represent a rational means to accomplish a legitimate purpose, as long as a fundamental constitutional right is not implicated…
>
> ... On the other hand, administrative or quasi-judicial decisions are subject to a heightened level of judicial scrutiny...When a municipality makes an administrative zoning decision, "'it must follow the zoning regulations, and its actions are reviewable, and subject to judicial reversal if they are without support in the record or are otherwise arbitrary or unreasonable.'" … Thus, the reviewing court not only considers whether the decision is arbitrary, but also considers whether it was made in compliance with any criteria in the zoning ordinance based upon the facts in the record.[39]

Tips: Findings of fact

- ✓ Use the checklists for decisions in this handbook as a basis for making findings of fact;
- ✓ Many findings can be adopted by reference to a good staff report;
- ✓ Where there is conflicting evidence in the record, the findings should explicitly address the conflicts and indicate at least why the board or commission reached the conclusion that it did;
- ✓ Findings drafted by staff or counsel outside the meeting room are not as persuasive on review as are findings made by motion from the floor; and
- ✓ The findings should be fully incorporated in the resolution or other action of the board and not simply kept in the minutes.

A Note on Findings of Fact for Planning Decisions

Decisions of a board of appeals on variations and special uses require findings of fact. Findings of fact are always desirable in support of administrative or quasi-judicial decisions. Findings of fact are helpful in support of advisory recommendations, because they help to inform the decision-maker why the advisory body made its recommendation. Although findings are not required in support of legislative decisions, they can be extremely useful in explaining a decision in case of a challenge.

The importance of findings of fact becomes most clear in cases that go to court. On appeal, a court will review all of the legal analysis and conclusions of the board or commission that made the final decision. If the court disagrees with that decision on legal grounds, it will typically (and should) reverse or modify the decision. In contrast, on findings of fact, the court will usually defer to the body that heard the evidence.[40] Often different witnesses offer conflicting opinions and documents may contain apparently conflicting evidence. After sitting through a hearing, the body that has heard the evidence is usually in the best position to evaluate it. Only where a court finds that there is no evidence in the record to support a finding by the decision-maker will it typically ignore or over-ride such a finding.

The Concept of the Police Power

The authority to zone and regulate land development is a part of the "police power":

> "A zoning ordinance takes from an owner the traditional right to use his property as he sees fit. Its justification is founded upon exercise of the police power to secure the common welfare. A zoning classification must therefore bear a real and substantial relation to the public health, safety, comfort, morals or welfare."[41]

The United States was founded in part to give its new citizens freedom from unreasonable government burdens and controls. In dealing with regulations, there is a basic assumption in our legal system that government can intervene in individual lives or in the use of private property only for the protection of the public health, safety, and welfare – that is the basic concept of the police power:

> While cities and villages have statutory authority for the enactment of zoning ordinances, the power so conferred to interfere by zoning regulations with the general rights of property owners is not unlimited and such an ordinance, to be valid, must have a real and substantial relation to the public health safety, morals or general welfare.[42]
>
> The privilege of a citizen to use his property according to his own will is both a liberty and a property right, subject however to the police power of the State under which new burdens may be imposed upon property and new restrictions placed upon its use when public welfare demands.[43]

Although early laws often included “morals” along with health, safety and welfare, the concept of ”morals” in this concept is somewhat vague and difficult to apply. To the extent that “moral” issues arise in dealing with establishments such as bars and liquor stores, there is also an observable effect on the general welfare of the community. Thus, modern treatments of the police power generally focus on the three criteria without specific reference to morals. When a citizen or public official questions the logic of a particular regulatory action, it is always worth posing the basic question, “How does this regulation or action protect the public health, safety or welfare.” The Illinois Supreme Court has repeatedly held:

> [I]f [zoning] restrictions imposed bear no real and substantial relation to the public health, safety, morals, comfort and general welfare, the ordinance is void.[44]

2. The Role and Value of Planning

Local Comprehensive Planning

The Concept

A plan provides an organized way to accomplish something, to reach a goal or to address the future in general. In our contemporary society, there are lots of plans. Businesses have plans. Farmers plan the rotation and harvesting of their crops. Educators plan curricula for students. Families plan vacations. Armies plan campaigns. .

Municipal and county officials regularly prepare plans and make implementation decisions that shape the future of the community, including:

- Approving the zoning for a new shopping mall or big box store;
- Extending or widening a major road;
- Extending the service area of sewer and water utilities;
- Developing a new park;
- Approving a new residential development with hundreds of new homes; or
- Closing a fire station because of budget concerns, and many others.

There are a lot of decision-makers who influence the future shape of a community, yet many – such as state agencies and even school districts – are not subject to local control or even required to follow local plans. For example, if the Department of Transportation decides to build a by-pass around a community or to make major improvements to a state highway through the community, there will be significant local land-use impacts on the community from that decision. A school board decision to replace two or three neighborhood schools with a larger school, serving a larger area but providing more amenities, will change the character of the neighborhoods.

On the other hand, many other decisions are under local control – where to build the new library, which streets to widen, whether to provide new recreation facilities in a particular park, whether an area needs a fire station. Further, state and other agencies pay attention to local plans when developing their projects. Having a local plan does not ensure a perfectly planned future, but it provides a method for coordinating decisions in a way that results in a manageable and workable future.

Regional Planning

The Concept and History

Regional planning is planning for a geographic area that transcends the boundaries of individual governmental units but that share common social, economic, political, cultural, and natural resources, and transportation characteristics. A regional planning agency prepares plans that serve as a framework or skeleton for planning by local governments and special districts. [45] Regional planning has been part of planning in the U.S. and the Chicago area since its origins in the late 19th and early 20th centuries. The

1909 *Plan of Chicago*, prepared for the Commercial Club by Daniel Burnham and Edward Bennett, was in essence a regional plan.

The Purposes

Illinois, like other Midwestern states, has a strong tradition of local planning and local control of land-use decisions. All of those local decisions, however, occur in a large and complex regional context. Regional planning provides a context in which local governments – as well as state agencies – can consider the effects of particular decisions on other communities and other parts of the region.

CMAP Responsibilities

The authorizing legislation for the Chicago Metropolitan Agency for Planning (CMAP), the Regional Planning Act, charges the agency with three major duties:

> (1) Provide a policy framework under which all regional plans are developed.
>
> (2) Coordinate regional transportation and land use planning.
>
> (3) Identify and promote regional priorities.[46]

CMAP also has the responsibility to develop and update a regional plan at least every four years (while the state legislation authorizing CMAP requires a regional plan every five years, the federal government requires one every four years).[47] The law provides:

> The Regional Comprehensive Plan shall present the goals, policies, guidelines, and recommendations to guide the physical development of the Region. It shall include, but shall not be limited to:
>
> (a) Official forecasts for overall growth and change and an evaluation of alternative scenarios for the future of the Region… ;
> (b) Policies that reflect the relationship of transportation to land use, economic development, the environment, air quality, and energy consumption…;
> (c) A 20-year plan for a coordinated and integrated multimodal network of transportation facilities and services…;
> (d) A listing of proposed public investment priorities in transportation and other public facilities and utilities of regional significance; and
> (e) Criteria and procedures proposed for evaluating and ranking projects in the Plan and for the allocation of transportation funds…[48]

The law specifies that "units of local government shall continue to maintain control over land use and zoning decisions."[49]

The GO TO 2040 comprehensive regional plan was adopted unanimously by CMAP's governing boards on October 13, 2010. There are some very practical reasons why GO TO 2040 is critical to local decisions in the Chicago metropolitan area:

- A decision about a major project by any one of the 200-plus local government units in the Chicago area can have significant impacts on other local governments. The regional plan provides a context for making such a decision.
- The regional plan provides data and analysis that are invaluable to decision-making but that would be unavailable to local governments without CMAP.
- One of the major determinants of growth in any metro area is the transportation plan. CMAP is the official planning agency for future federal and state investments in roads. Thus, those plans will largely become a reality, and those plans will help to shape land use.

Coordinating Local Planning with CMAP Plans

GO TO 2040, adopted by CMAP in October 2010, relies on local governments to ensure that their local level land-use decisions both reflect and help implement the plan.

The Livable Communities chapter of GO TO 2040 asserts that municipalities…

> "are critical to the [regional plan's] success because of their responsibility for land use decisions, which create the built environment of the region and determine the livability of its communities. The most important thing that a municipality can do to implement *GO TO 2040* is to take this responsibility very seriously."[50]

The plan urges municipalities to pursue "reinvestment within their existing developed areas" and urges communities to reevaluate their development regulations to encourage mixed-use development. Other policies relate to encouraging affordable housing, undertaking a study of future demand and supply of housing, removing regulatory barriers, supporting housing preservation, and engaging in inclusionary zoning.[51]

Given this backdrop, municipalities in the seven-county region should do the following to incorporate recommendations of GO TO 2040.

1) Adopt or update their comprehensive plan, integrating the regional principles discussed in GO TO 2040. These principles, which must be applied in locally appropriate ways , include support for transportation options, a range of housing options, environmental protection, a focus on reinvestment, denser and mixed-use development, design and aesthetics, and the context or "fit" of development with the local community.

2) Review specific implementation proposals contained in GO TO 2040 for possible inclusion in comprehensive plans.[52]

3) Ensure that local land use ordinances—zoning and subdivision--are consistent with their comprehensive plan in terms of carrying out the pattern of development contemplated in such plans.[53]

4) Coordinate with each other to ensure that the impacts of development along jurisdictional boundaries will be mitigated as a “good neighbor” policy, and coordinate with other units of government to consider the impacts of land use decisions that extend beyond municipal boundaries.

5) Ensure that elected and appointed officials with planning and land use responsibilities receive training in making land use decisions, including understanding state law and the contents of local plans and regulations.

3. The Local Decision-Making Process

Illinois law provides the authority for local governments to regulate land use and land development. It also spells out the procedures that local officials must follow in implementing such controls. This section outlines those procedures and includes practical tips on complying with them.

Due Process

Procedures for the consideration of zoning, subdivision and other applications are designed to provide applicants and other affected parties with procedural due process. The Illinois Supreme Court has recently cited the U.S. Supreme Court for this proposition:

> Procedural due process is founded upon the notion that prior to a deprivation of life, liberty or property, a party is entitled to "'notice and opportunity for [a] hearing appropriate to the nature of the case.'"[54]

Under the modern view of constitutional law, the concept of "property" includes licenses, permits, and approvals, including established zoning. Thus, any action which would change the zoning or development status of a piece of property is likely to be subject to "due process" requirements.

The right to procedural due process applies most clearly in administrative and quasi-judicial decisions such as the review of a subdivision plat or the consideration of a variation or special use permit by a board of appeals; it has not been fully applied to legislative decisions, such as rezoning property.[55] In its 2009 decision in *Passalino v. City of Zion,* the Illinois Supreme Court made it clear that due process rights apply to all types of zoning decisions, including those made by a legislative or governing body.[56] The implications of the case are discussed more fully at the end of the next section, dealing with "Notice."

A basic element of due process in an administrative or quasi-judicial review is that of fairness, which typically requires that the review body be objective and impartial. In legislative decisions, the decision itself is clearly a policy judgment, not administrative ones; thus, the legislative bodies have more flexibility in considering general policy issues (including the comprehensive plan) as well as specific evidence in making a decision.[57] A board of appeals or planning commission that provides an initial review and recommendation on such a decision, however, does not have legislative discretion; it may offer policy advice, but it should present its recommendation with specific findings of fact and explanations of any suggested policy changes. Although the governing body has flexibility, every hearing itself should be fair, offering all those with interests in the matter a reasonable opportunity to be heard and, in some cases, to present evidence and even cross-examine witnesses (see discussion of Public Hearings below).

Due Process, Section 1983 and Managing Risk

The Civil Rights Act of 1871 provides a remedy for violations of a person's federal constitutional or statutory rights if the violation occurs under color of state law[58] – that is, when an official or board is acting in an official capacity, as authorized by state law. Since the Supreme Court decided in 1972 that

"constitutional rights" include property rights,[59] the section has been applied to allow the recovery of money damages from local governments in a variety of land-use contexts. Some of those are discussed near the end of the handbook, but one is critical here – the right to "due process" is protected by the Fifth Amendment to the Constitution. The law in Illinois and in other states significantly limits the ability of citizens to sue local governments for money damages. Thus, in many decisions local officials assume that the worst-case result if someone challenges a decision might be that a court will hold that the action is unconstitutional, essentially sending it back to the local government to do it again. Under Section 1983, however, a plaintiff in federal court can recover damages from a local government for a violation of constitutional rights, including the right to due process. Although federal judges can be sympathetic with local governments and may limit damage awards in such cases, a parallel section of the law[60] provides for the recovery of attorneys' fees by a party that brings a successful claim under Section 1983. Thus, the monetary risks of violating anyone's constitutional rights are substantial. Although sometimes a local government may choose to "push the envelope" by adopting a regulation that it knows may be successfully challenged, there is absolutely no good reason for running the risk of damages by failing to provide due process.

Tips: What to do with incomplete applications

Applications for large subdivisions, planned unit developments and even some special use permits are often complex, requiring multiple maps, plats, drawings, reports and other information. It is fairly common for an applicant – or an engineering or other firm representing an applicant – to ask staff to accept a partial application with the promise that "We will get you the rest of the material before the hearing."

Local governments should have an absolute policy against processing incomplete applications. State law imposes time limits on the review of plats. Local ordinances may impose time limits on the consideration of other applications. Those time limits only work if the local government has all of the necessary information to review. Without the soils report, the drainage report or the traffic analysis, there is no reasonable way to complete the review of a project application. Even if there is no statutory or ordinance time limit for a particular application, there is always subtle or not-so-subtle pressure for local government to be efficient and to act promptly on a proposal. If an application is incomplete during staff review and some material arrives just before the public hearing, staff will have had no time to review that material. That leaves the review body with the choice of voting on a complicated proposal without staff comments on parts of the application or voting to table (which the applicant will say is "delaying") the application. For staff, accepting incomplete applications is very high risk. Some board members may blame staff for the fact that the staff analysis is incomplete, even though the problem started with staff doing a favor for the applicant – by starting the process without a complete application.

FOR OFFICE USE
Received 11/4/10
File # 91011
Fee Paid $ 50
Receipt 121314

APPLICATION FOR A VARIATION

PLEASE PRINT AND PROVIDE ALL INFORMATION AS REQUESTED.

APPLICANT & OWNER:

Name of Applicant* Joe Plumber Phone (777)-777-7777
Address/City/State/Zip 1234 W St., Chicago, IL
Applicant's interest in the property Developer
Name and Phone of Owner(s) of Record* Joe Plumber (777)-777-7777

Applicant is (check one) __ Attorney __ Agent X Owner __ Other:
Owner acquired the property on (date): 10/29/09

ADDRESS, USE & ZONING OF PROPERTY:

Address of Property (attach legal description) 5678 E St., Chicago, IL
Present Use (commercial, industrial, residential, etc.) Residential
Zoning District R-1
To your knowledge, have any previous applications for variations been filed in connection with this property? No
If YES, provide relevant information

ACTION BY APPLICANT ON PROPERTY:

Permit applied for and denied? (yes or no) Yes
An Appeal was made with respect to this property? (yes or no) No
Appeal Application File Number 91011
Appeal approved? (yes or no) N/A
Appeal Application accompanies this request for variation? (yes or no) N/A

*In the event that the applicant or owner is a trustee of a land trust or beneficiary of a land trust, a statement identifying each beneficiary by name and address of such land trust and defining his/her interest therein must be attached hereto. Such statement shall be verified by the trustee of such trust.

FOR OFFICE USE
Received
File #
Fee Paid $
Receipt

APPLICATION FOR A VARIATION

PLEASE PRINT AND PROVIDE ALL INFORMATION AS REQUESTED.

APPLICANT & OWNER:

Name of Applicant* Joe Plumber Phone (777)-777-777
Address/City/State/Zip Chicago, IL
Applicant's interest in the property Just interested
Name and Phone of Owner(s) of Record*

Applicant is (check one) __ Attorney __ Agent __ Owner __ Other:
Owner acquired the property on (date):

ADDRESS, USE & ZONING OF PROPERTY:

Address of Property (attach legal description) Chicago
Present Use (commercial, industrial, residential, etc.)
Zoning District
To your knowledge, have any previous applications for variations been filed in connection with this property?
If YES, provide relevant information

ACTION BY APPLICANT ON PROPERTY:

Permit applied for and denied? (yes or no) Yes
An Appeal was made with respect to this property? (yes or no) Yes
Appeal Application File Number
Appeal approved? (yes or no) Yes
Appeal Application accompanies this request for variation? (yes or no) Yes

*In the event that the applicant or owner is a trustee of a land trust or beneficiary of a land trust, a statement identifying each beneficiary by name and address of such land trust and defining his/her interest therein must be attached hereto. Such statement shall be verified by the trustee of such trust.

Public Hearings and Meetings

There is a difference between a "public meeting" and a "public hearing." A "public hearing" is usually a portion of a larger meeting which is devoted to hearing public testimony on a pending matter. The procedures for public hearings are discussed in this section.

Virtually EVERY meeting of an official government body in Illinois is a "public meeting." The General Assembly has declared:

> It is the public policy of this State that public bodies exist to aid in the conduct of the people's business and that the people have a right to be informed as to the conduct of their business. In order that the people shall be informed, the General Assembly finds and declares that it is the intent of this Act to ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly.[61]

In short, meetings to discuss land-use plans, zoning ordinances, subdivision regulations, and land-use matters and applications of all kinds are public meetings. The legislature has further explained the effect of this policy:

> The General Assembly further declares it to be the public policy of this State that its citizens shall be given advance notice of and the right to attend all meetings at which any business of a public body is discussed or acted upon in any way. Exceptions to the public's right to attend exist only in those limited circumstances where the General Assembly has specifically determined that the public interest would be clearly endangered or the personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion.[62]

There are 24 exceptions, but only one – situations involving actual, likely, or imminent litigation -- might even arguably apply to a public body dealing with a land-use case:

> Litigation, when an action against, affecting or on behalf of the particular public body has been filed and is pending before a court or administrative tribunal, or when the public body finds that an action is probable or imminent, in which case the basis for the finding shall be recorded and entered into the minutes of the closed meeting.[63]

Clearly a local body should go into a closed session to discuss litigation only when an attorney advising the body on the litigation is present, and that attorney can also advise the body on whether it is appropriate to go into a closed meeting.

There are other exceptions that may apply to a body that considers land-use matters when it is doing something else – for example, dealing with a personnel matter.

Quorum and Attendance

A public body can conduct business only when it has a quorum. A quorum is a majority of all members of the body (five of nine, four of seven, three of five, two of three), but local rules or ordinances may provide other requirements for a quorum. To conduct a meeting, a "quorum of members of a public body must be physically present at the location of an open meeting."[64]

If a quorum is physically present, a majority of those present may vote to allow another member to participate by audio or conference link if "the member is prevented from physically attending because of: (i) personal illness or disability; (ii) employment purposes or the business of the public body; or (iii) a family or other emergency."[65]

Notice

State law requires notice of public hearings, public meetings and of certain types of decisions. The law provides some details of what notice must be given and when it must be given. This section expands on the law by suggesting practical means to implement the law.

Providing public notice of a hearing is a matter that is handled by the applicant and staff. Although the law does not specifically require that notice be handled by staff or the applicant, elected officials and volunteer members of local boards and commissions typically do not have ready access to the forms, equipment and calendar details that are necessary to an effective system of notice.

Local ordinances should specify how many days in advance the notice must be given for each type of meeting. In some communities, the staff handles the notice process. The applicant covers the costs to local government for providing notice. Some communities – particularly those with small staffs – have local ordinances that require the applicant provide notice and bring proof of that notice to the public hearing. That is a practical approach to the issue that is consistent with – but not required by – state law.

It is important that members of review bodies be familiar with notice requirements and be prepared to make, when required, a determination of whether notice was adequate. Failure to provide required

notice deprives the hearing body of the jurisdiction or authority to hold a hearing and can result in a court finding that action of the review body is invalid. See "TIPS" at end of this section.

Notice of Public Meeting

Here are the general requirements for notice of every public meeting:

> Every public body shall give public notice of the schedule of regular meetings at the beginning of each calendar or fiscal year and shall state the regular dates, times, and places of such meetings. An agenda for each regular meeting shall be posted at the principal office of the public body and at the location where the meeting is to be held at least 48 hours in advance of the holding of the meeting. A public body that has a website that the full-time staff of the public body maintains shall also post on its website the agenda of any regular meetings of the governing body of that public body…[66]

The law further requires:

> Public notice shall be given by posting a copy of the notice at the principal office of the body holding the meeting or, if no such office exists, at the building in which the meeting is to be held. In addition, a public body that has a website that the full-time staff of the public body maintains shall post notice on its website of all meetings of the governing body of the public body. Any notice of an annual schedule of meetings shall remain on the website until a new public notice of the schedule of regular meetings is approved. Any notice of a regular meeting that is posted on a public body's website shall remain posted on the website until the regular meeting is concluded.[67]

The statute contains some exceptions for emergency meetings and additional details on what notice must be given and how it should be given.

All of these provisions are linked. If there has not been adequate notice of a meeting, there can be no public meeting. If there is no public meeting, the body cannot conduct business.

General notice of meetings should be handled by the town clerk or other staff person. Members of boards and commissions need to be aware of these requirements, however, so that they understand that, when proper notice has not been given, there is no valid basis for holding the hearing or meeting and it is necessary to take a step back in the process and have the staff or applicant give proper notice before holding another hearing. .

Constitutional Principles of Notifying the Public

Several provisions of the zoning and land-use enabling acts in Illinois require public hearings before specific actions are taken. Notice to affected parties is what gives the hearing body the jurisdiction or authority to hear a matter, just as service of a summons on an individual gives a court jurisdiction over that individual. An Illinois appellate court has said squarely:

> Notice setting forth the time and place of a hearing to zone property is mandatory and jurisdictional and any amendment passed on contravention thereof is void.[68]

Of more importance is the fact that the Fifth Amendment of the U.S. Constitution requires the "due process of law" for a person whose rights are at stake. The Fourteenth Amendment applied that principle to actions by the states and their political subdivisions. In a 2009 decision involving zoning, the Illinois Supreme Court quoted the U.S. Supreme Court for this proposition:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. ***
>
> *** [W]hen notice is a person's due, process which is a mere gesture is not due process."[69]

What the court was saying in that last sentence is that notice has a substantive purpose. Merely going through the motions without a real effort to give effective notice does not meet the constitutional requirements of due process. In that same decision, the Illinois court went on to quote the U.S. Supreme Court's decision for the following implementing principle:

> Accordingly, "[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." The lengths any party must go to achieve proper notice need not be unreasonable. Underlying any assessment of the "practicalities and peculiarities" of any case requires balancing the "interest of the State" against the "individual interest sought to be protected." [70]

The case has important implications for implementing notice for major rezoning efforts; those are discussed below.

Tips: What must be included in a public notice

Notice of a public hearing should include:

- ✓ The location of the public hearing;
- ✓ The date and time of the public hearing;
- ✓ The name of the body holding the hearing;
- ✓ The subject of the hearing:
  - If it involves a particular piece of property, it should describe the location of the property well enough that anyone familiar with the area can quickly find it on a map or on the ground. Only one Illinois statute specifically addresses this issue, and it provides:

    > the particular location of the real estate for which the variation is requested by legal description and street address, and if no street address then by locating such real estate with reference to any well-known landmark, highway, road, thoroughfare or intersection…[71]

- If it involves a proposed rezoning, then it should identify what the proposed zoning would be – not only the name of the district (such as R-3) but a brief description of what it allows ("allowing multi-family dwelling units, schools, boarding houses and similar uses");
- If it involves a special use permit or a variation, the notice should describe the general character of the application ("a variation to allow a carport to encroach 3 feet into the required side yard;" "a special use permit to allow a dog kennel for not more than 12 dogs in a residential zoning district");
- It is useful, although not required by Illinois law, to provide references to the sections of the zoning code that deal with the substantive issues to be considered (district regulations, special use standards, variation criteria and so on);
- If it involves an application for a particular piece of property, the identity of the applicant;[72]

✓ Contact information for an office or person where interested people can obtain more information.

Timing of Notice

Notice should be given far enough in advance of an event to allow people to plan to attend but not so far that they think "Oh, that's months away; I will worry about it later." It is good practice to give notice between 15 and 30 days before a public hearing. Illinois law provides specific minimum times for giving notice for certain types of applications, but a notice given more than 15 but less than 30 days before a hearing will meet any applicable statutory requirement.[73]

Notice: How and to Whom Given

The Illinois statutes consistently require publication of notice "in a newspaper of general circulation" within the affected community for a number of types of zoning and land-use notices. Some also require mailed notice to surrounding landowners;[74] those technical requirements should be handled by staff or the applicant before the hearing and are not covered here; the are set forth in full in a footnote to this paragraph, for those who want to review them.[75]

At least one statute (related to special uses in counties) requires notice of certain hearing to nearby local governments.[76] A separate section gives a school district in which any part of a development proposal lies standing to appear at zoning hearings;[77] although that section does not explicitly require notice to affected school districts, the only logical way to ensure that they have the opportunity to be heard is to provide them with notice. It is good practice to give written notice to any municipal government that has boundaries within 250 feet of any development proposal and within 1,000 to 2,000 feet of large proposed developments. A municipality, although not required by state law, should also give notice to a county regarding projects near the unincorporated area.

Notices published in the legal advertising sections of newspapers are not particularly effective; many people simply do not take time to read the multiple items that appear in small print in those locations. One advantage of such notices, however, is that the newspaper will provide a certificate or other form of proof that the ad actually ran; that evidence should b part of the record of the public hearing.

The rapid decline of newspaper circulation further reduces the likelihood that affected persons will see the notice. Thus, many local governments today use three other kinds of notice:

- Display ads in larger type, in the front parts of the newspaper;
- Notices on local government websites; and/or
- Signs posted on the site (usually with less detail than suggested above).

For a typical land-use decision, most people who will be affected by it are neighbors and thus are likely to see the sign on the site. For that reason, many local governments consistently use such signs as a form of notice. Display ads are far more effective than legal notices for reaching typical citizens. Web notices will not reach everyone, but they are effective for some groups. As noted above, notice requirements are not just a bureaucratic formality; the purpose of notice is to be sure that people who are affected by a pending decision have the opportunity to participate in the process. Thus, it is important for local governments to consider how best to reach their constituents. Because the costs of notice are either included in the application fee or passed on to the applicant directly, there is no additional cost burden to the local government to provide this type of notice. For a minor variation or a rezoning of limited impact, the requirements of state law for a mailed notice to owners of property within 250 feet of the affected parcel are adequate. For a larger project that may generate significant traffic or otherwise have impacts that extend well beyond the block on which the property sits, the mailed notice will not reach many people who may be affected; in those cases particularly, the use of display ads or signs on the site is an important supplemental form of notice.

In Practice – Inadequate Notice

Notice is legally inadequate when:

- It was published or given too late. If the statute requires 15 days' notice, a publication two weeks before the hearing is not adequate;
- It does not provide a description of the affected site that is adequate to identify it on a map or on the ground;
- Some sort of notice was given but not the type of notice required by the statute;
- The notice misled or might have misled people about what the result of the hearing might be; this issue arises most often when the notice suggests that the property may be rezoned to one type of classification and it is rezoned (or recommended for rezoning) to an entirely different one;
- The time, date, or place of the hearing was substantially incorrect in the notice.

A notice with one or more defects may still be adequate for statutory and constitutional purposes. Some examples of errors in notice that do not invalidate the notice:

- The date and place of the hearing are accurately stated in the notice, but the agenda calls for the hearing to start later in the meeting than the notice provided;

- The review board approves the application or recommends approving the application subject to conditions that were not mentioned in the notice, provided that the effect of the conditions is to limit the extent of the change or the impact of the application;

- The notice provides an accurate address or map for the affected property but also includes a legal description and there is a typographical error in the legal description (if the entire legal description is wrong, the notice is defective even if the address was correct);One or two (or even three) people who say they should have received mailed notice did not receive it, if there are other people there who clearly did receive the required notice. The law does not require perfection. Sometimes things get lost in the mail, and sometimes people do not pay attention to what they actually do get. If statutory procedures were followed and the notice was generally effective (which is indicated because there are other people there as a result of the notice), the fact that a small number of people appear to have been omitted is not a fatal defect in the notice.

Tips: How to handle questions about notice

If someone at a hearing says that he or she does not believe there was adequate notice, the hearing body should stop and address that issue directly. The two checklists above should help in resolving the issue. It is also important to consider whether the notice was effective. Ask how many people in the audience came because of the pending issue. If there are several, that is a good indication that the notice was effective, despite a minor defect. Board members should also use their common sense and ask themselves, "If I had only read this notice and not had any other information, would I have understood what the board might consider at this hearing?" If you decide that the notice was inadequate, the matter should not be heard at that meeting but should be continued to the next meeting that will occur at least 16 days later (allowing the next day to republish notice). Technically the board has no jurisdiction and can just skip that item. However, it is perfectly acceptable to adopt a motion "tabling" the matter to a future meeting, with directions to staff to give the required notice for that hearing.

If you decide that the error was minor, adopt a motion like the following:

> Having heard and considered an objection to the notice that was given for this hearing, the board has considered the objection and concluded that [there was no error in the notice] [there was an error in the notice, but it was minor and did not interfere with the purpose of the notice]. In reaching this conclusion, the board notes that there are ## people in attendance who came because they knew of this particular item. [*Consider adding another sentence to explain what the error was and why the board considers it minor.]*

Someone can still raise this issue in a court challenge to your decision, or to the decision made by the body to which you make a recommendation. It is very likely, however, that a judge hearing the case will defer to a carefully considered action of the board specifically addressing the issue.

Notice for a Continued Hearing

A hearing may be continued from one meeting to a later meeting. State law does not specifically address the notice requirements in such situations. Here are some practical tips:

- ✓ If the hearing has begun, notice was proper, the applicant and others are in attendance, and the hearing is continued to the next regular meeting of the board or commission on a known date, simply announcing the continuance at the meeting and then including the item in the agenda for the next meeting should provide adequate notice;
- ✓ If there were problems with notice or the hearing was not begun, the entire notice process should start over;
- ✓ If the hearing was not begun but notice was proper and the continuance date is to the next regular meeting of the board or commission, it is probably acceptable to make an announcement at the original meeting and then simply to republish notice, without resending mailed notice;
- ✓ If the matter is tabled or continued to an indefinite date, the entire notice process should be undertaken again for the next meeting at which the matter is to be considered.

A Note on Notice for Comprehensive Zoning Map Amendments

In *Passalino v. City of Zion*, the Illinois Supreme Court invalidated a rezoning that had occurred 12 years earlier and five years before the case was taken to court because the notice was inadequate.[78] In 1996, the city considered and adopted "a new zoning ordinance for the entire municipality."[79] Communities often update zoning ordinances without changing the related map, but the update in this case also included changes to the map. Following the statutory requirements for notice,[80] the city published notice of public hearings on the new ordinance in two newspapers.[81] The effect of the map change "downzoned" Passalino's property from an R2 zone that allowed multi-family units to an R8 zone that allowed only single-family residences.[82] The zoning map amendment apparently changed the zoning of 85 parcels in the city.[83] In holding that the property owners were entitled to develop under the zoning that was in effect before 1996, the state high court said:

> As our appellate court has stated, "notice by publication is not enough in cases where a person's legally protected interests are directly affected by the legal proceedings and the person's name and address are known or easily discerned."….
>
> Among the reasonable actions that the City could have taken was to review the records of the Lake County collector and then mail notice to the taxpayers of record of the 85 properties affected by the zoning map amendment. As defense counsel agreed at oral argument, this would have cost approximately $30. As such, in this instance it is not unreasonable to mail notice to the taxpayers of record of the affected parcels, and it would not "place impossible or impractical obstacles" on the City's zoning efforts.[84]

The court went on to explain:

> To clarify for the bench and bar, our holding does not require actual notice to these plaintiffs, as beneficiaries of an Illinois land trust, but only efforts "such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."… Here, reasonable efforts may have included sending notice to the land trustee as the taxpayer of record, who then could have forwarded the notice to the plaintiffs. Under the instant circumstances, a more extensive search to unearth the identities and addresses of the beneficiaries of the land trust so the City could directly provide them with actual notice is not constitutionally required. This court's holding also does not affect the continuing validity of the use of publication notice under section 11-13-2 of the Municipal Code (65 ILCS 5/11-13-1 through 11-13-20). Rather, we only hold that, in this zoning map amendment case, notice was insufficient such that ordinance No. 96-O-71 was invalid in its application to plaintiff's property and that the property can currently be lawfully used in accordance with the previous zoning ordinance.[85]

This area of the law will remain somewhat uncertain until the Illinois legislature decides to amend the statute and until the state supreme court construes the amendment. In the meantime, any local government making a major update to the zoning map should consult carefully with counsel on the issue of how notice should be given. There is certainly what lawyers call a "safe harbor" for any local government that decides to mail notice to every property owner whose property may be affected by the changes, but that can be a prohibitively expensive process if there are thousands of properties involved.

Public Hearings

Parties

Property Owners

Illinois law provides limited guidance about who can participate in public hearings. Several provisions of state law require mailed notice of a hearing to anyone owning property located within 250 feet of property that is subject to a zoning action.[86] The statute for counties does not use a specific distance but requires notice to "all adjoining landowners"[87] or "the owner or owners of any land adjacent to or immediately across any street, alley, or public right-of-way from the property proposed as a special use."[88]

There is a different and less objective test regarding who can take a zoning matter to court:

> The law is well settled that the right to review a final administrative decision is limited to those parties to the proceeding before the administrative agency whose rights, privileges or duties are affected by the decision. In recently applying this principle in zoning litigation… we held it is incumbent upon the party seeking review to both allege and prove that the board's decision would in fact adversely affect such party**.** This is in accord with the majority view which holds that the right to maintain a suit in such cases depends upon whether the zoning inflicts a special or peculiar injury upon the party bringing the suit.[89]

The state high court has separately defined "special injury" to be "damage which is different from that suffered by the public generally…"[90] The court has noted that the distance between the property subject to the zoning action and that owned by the person challenging it is a relevant consideration in determining whether the challenging party has suffered or will suffer "special or peculiar injury."[91]

Other Governmental Entities

By statute, at a zoning hearing, "any school district within which the property in issue, or any part thereof, is located" has the right to present evidence.[92] State law specifically gives most townships[93], and all villages and cities standing to "protest" and make recommendations for proposed zoning ordinances or amendments in counties. To exercise such rights, the township, city or village must appear at a public hearing held to consider the proposal.[94] The Illinois Supreme Court has also ruled squarely that a local government in Illinois has standing to challenge a zoning decision of another local government where the challenging local government meets the "special or peculiar injury" test described in the preceding subsection.[95]

Tips: Who should be allowed to testify?

A public hearing is a poor place to try to sort out who may or may not suffer a special injury from a zoning proposal. What the hearing body *can* do is to make sure that the relationship of the person testifying to the proposed matter is clear on the record. Does she own or lease property in the area? If so, how close is her property to the property that is the subject of the hearing? If it is another local government testifying, how do officials there believe that the local government will be affected by the proposal? Is the testimony based on a resolution or other formal action of an official body of the local government, or is it just the opinion of one public official or staff member?

If the hearing body has the answers to those questions in the record, members can decide how much weight to attach to testimony, based in part on the extent to which the zoning proposal may affect the party offering the testimony. If the proposal is a variation to allow a carport to extend an extra two feet into a side yard setback, it seems unlikely that anyone other than the next-door neighbors and people living across the street would be much affected. On the other hand, if the proposal is for a special use permit to allow establishment of a go-kart track in a residential neighborhood, people owning homes a half mile away or more might credibly express concerns about the effects of noise and dust. Weighing the value of testimony based on such factors is one of the main tasks of a fact-finding body. In general, if a decision is challenged, courts will defer to the weighting made by the body that heard the evidence first-hand. Even if a court decides to re-weigh the evidence, the worst possible result might be a reversal of the decision. On the other hand, if a board or other hearing body refuses to hear someone (or some entity) who wants to testify, it may be found to have denied that person or entity "due process" (see material beginning at page 16), thus subjecting the local government to possible liability for damages under Section 1983 of the Civil Rights Act (see material beginning at page 16).

Conducting Hearings

Overview

Local governments hold different types of zoning and land-use hearings and meetings. The type of hearing or meeting should guide the way that the meeting is conducted. The general types of hearings and meetings are:

Fact-finding: By law, a public hearing on an application for special use permit or variation is a fact-finding hearing. At such a hearing, it is the duty of the body holding the hearing to make findings of fact (see discussion beginning on page 10)), to consider those facts in the context of the local zoning or other applicable ordinance, and to make a decision or recommendation on the case. Such hearings are very different from policy hearings – the focus at these hearings should be on, as one television detective used to say, "Just the facts…" Expert witnesses may help a board to determine what the facts are, but other expressions of opinion and general polls of the popularity (or unpopularity) of a proposal or its proponent are simply not relevant.

Advisory: The adoption or amendment of a zoning ordinance, the adoption or amendment of a comprehensive plan, and some other types of policy decisions go to the governing body for a final decision but are first subject to a hearing before the board of appeals, planning and zoning commission or other body. Although state law is much less specific about the nature of such hearings, in general these should be considered fact-finding hearings, also. The city council or county board may value the recommendation of an appointed board or commission on a particular item, but it is extremely dependent on that board or commission to determine what the facts are and how they relate to the proposal.

Policy: Although it is not required under Illinois law, a city council or county board may hold its own hearing on a proposed rezoning or other matter that has already had a hearing before another board or commission. Such a hearing is a policy-making matter. If it involves zoning, state law requires that the witnesses be sworn. Other than that, the governing body can proceed as it chooses.

Action Only: Sometimes a matter comes before a body at a public meeting only for a decision. In a small number of such cases, someone may ask to be heard at the meeting. If it is a matter on which a hearing was held before another body, the decision-making body should refuse to hear from anyone; it will be relying on findings of fact from the other body, and a decision to hear from one person or one side on the spur of the moment may distort the record. If the local rules allow such a procedure, the governing body could schedule a hearing for a later date and hold such a hearing after giving proper notice. If the matter is one that does not generally require a hearing (such as an application for subdivision approval), the decision-making body has a little more discretion and might choose to hear informally from people. If hearing from people simply involves answering some questions or allaying minor fears, there is little potential problem. If it reaches the point of actually hearing testimony that could affect the outcome, the

matter should be tabled and further proceedings should take place under local rules and/or with the advice of counsel.

Sworn Testimony

At any zoning hearing, state statutes require that testimony by witnesses "shall be given under oath."[96] The chairman or acting chairman of the hearing body may administer oaths.[97] At a fact-finding hearing, this requirement provides a way to ensure that the evidence and testimony put before the hearing body is reliable. For advisory and policy hearings (see above), this requirement may seem unnecessary. It may be, but it is also Illinois law. I If a local government fails to follow this requirement of the law, a court may invalidate the resulting decision.

Cross-Examination

Applicants for zoning variations and special use permits in municipalities have the right to cross-examine witnesses.[98] There is no comparable provision for applicants in counties.

Municipal bodies that hold hearings on variations and special use permits thus must allow cross-examination. Although the statute provides the right of cross-examination only for the applicant, it would violate basic principles of due process and equal protection to allow the applicant such a privilege without allowing the same to opponents.

At other zoning and land-use hearings, each local body should have clear rules about whether it allows cross-examination or not. There are competing considerations in making that decision:

Cross-examination provides the opportunity to clarify the testimony – or bias – of a witness; but

Cross-examination at a public hearing can become contentious and even unpleasant.

Certainly any board should have some method for getting answers to legitimate questions posed by persons at the hearing. One common practice is to require that questions be directed to the person chairing the meeting, who then asks the witness to address the issue. As long as things remain friendly, it may make sense to allow a brief dialogue between the questioner and the witness, but the chair should be prepared to step in if necessary to stop an argument between the two. Such arguments are more problematic in public hearings than in court for two reasons: 1) public bodies do not have the extensive rules of procedure that courts use to control the form and scope of questions; and 2) an argument at a public hearing may quickly elicit participation from other audience members – with a large crowd and without a judge's power to threaten people with contempt, it is easy to lose control of a meeting, even if only temporarily.

Documentary Evidence

There are detailed additional rules that apply to hearings before a zoning board in a municipality. Applicants for special use permits and variations and "property owners" have the right "at any hearing before a board of appeals" to obtain materials that relate to the subject matter of the hearing (as described in the excerpt from Illinois law set out immediately below). "Property owners" in this context refers to those persons who are entitled to notice under the section. Principles of basic fairness, due

process and constitutional equal protection would suggest that anyone with a demonstrable interest in the matter should be granted the same privilege. The statute gives such property owners the right to present witnesses and to have subpoenas issued to obtain documents relevant to the hearing (the detailed statutory requirements are set forth in the endnote). [99]

Opponents of a proposal have one additional right:

> Property owners within the terms of Section 11-13-7 who object to the zoning application or special use application may, upon request, be granted one continuance for the purpose of presenting evidence to rebut testimony given by the applicant. The date of such continued hearing shall be in the discretion of the board of appeals.[100]

These rules do not apply to counties or to plan commissions, zoning commissions, other advisory boards or city councils in municipalities. This is one of several provisions in Illinois law that may not seem to make sense – but they remain the law. If your local government sends special use permits to a planning commission, zoning commission or another review body these rules do not apply – they apply only before the board of appeals. By ordinance, a local government could grant similar rights and privileges to parties in other local proceedings – but see discussion below, suggesting that some of the provisions of the statute are probably unnecessary.

Each body that holds public hearings should have an orderly system for receiving and identifying documentary evidence. The simplest way is often to use Exhibit labels available for courtroom use, but any clear method will work. If the clerk has a unique stamp, it can be used on each document received into evidence, with the clerk adding an exhibit number and initials or a date as further identification. The important thing is to enable the decision-making body to be certain – even if challenged – that a particular document is the specific one that the body received into evidence. As with witnesses, in most cases it will make sense to receive submitted documents into evidence – even if some seem only marginally relevant – and then to weigh their relative values later.

Subpoenas, authorized by the statute quoted above for municipal boards of appeals, are unusual in local government public hearings. A hearing body, however, should make reasonable efforts to ensure that it has in the record before it any evidence that is critical to helping it to make a decision. That is typically possible without a subpoena: 1) the applicant must provide complete and accurate information to the decision-makers and can be asked to supplement the application with items that may have been omitted; 2) opponents have the burden of showing how they may be adversely affected by a proposal and thus carry a related burden of producing evidence that they control; and 3) much of the evidence relevant to a zoning case will consist of public documents – reports on sewer and water systems, general soil studies, drainage reports and so on – that the decision-makers can request and receive under state law without the necessity of a subpoena.

The idea of granting a “continuance” to allow a party to gather additional evidence is another carry-over from judicial proceedings. It is, however, almost always within the authority of a local board or

commission to table an item for further consideration at a later meeting. Thus, if a board or commission believes that it can make a materially better decision upon the receipt of additional information OR that it simply cannot make a decision based on the information before it, the board can act to table the matter to give it time to obtain that information. But see note on page 17regarding the problems with processing incomplete applications.

Tips: Managing testimony

Many local hearing bodies establish time limits for participants in public hearing. Some allow a particular number of minutes per person. Others allow a specified amount of time "per side." Neither is ideal. A limit per-person can be unfair to an applicant, who essentially has the burden of proof and must present the most information. A limitation "per side," however, often eliminates testimony by people who have concerns but do not want to take a strong position against (or for) the proposal. Often those people are the ones who provide the most valuable testimony. The best way to manage and limit testimony at a public hearing is by having an effective chairperson. Here are some techniques that can help:

- Require that people who want to testify sign up in the back of the room. That eliminates from testimony anyone who suddenly thinks of some point to make and leaps up to make it. Even if the board allows people to sign up while the hearing is proceeding (which is the fairer way to proceed), asking people to walk to the back (or, in case of a disability, to have a sign-up sheet brought to her or him) gives them some time to consider whether what they want to contribute is really important. At fact-finding hearings, the chair at the beginning of the hearing should make a statement: like this:

  We are here today to make a finding of facts and then to determine how we believe the local zoning ordinance applies to those facts. We want to hear all relevant facts. We are not, however, conducting a popularity contest. Once someone has clearly put a fact before us, hearing the same thing from several people will make little or no difference. Of course that statement does not apply if a particular fact is disputed; in that case, additional testimony from people who are directly familiar with the facts may be helpful. When you testify, please identify yourself, give us the address where you live (or the address of the property in which you have an interest that is affected by this matter) and then testify to the relevant facts. If someone else has already said everything you intended to say, unless someone else contradicts it, you do not need to testify.

Creating a Record of a Meeting

Written minutes should be taken of every public meeting and should be reviewed and approved by members of the body at the next regular meeting.

Because minutes rarely incorporate every detail of a meeting, and because details can become important, every official body required to hold public hearings should have a back-up plan – usually an audio or video recording of the meeting. If the back-up is an audio recording, it should either be from a system that has separate microphones for each board member, or the chair should ensure that every

participant – including members of the board – is identified at least by name each time he or she speaks. From such a recording, it is possible, where needed, to create a transcript of a meeting or of a critical section of the meeting. As a matter of good professional practice, such electronic records should be retained for at least three years, which is the period of time during which typical legal challenges to the decision might be brought.

A local government or a party appearing before it may decide to use a court reporter at a public hearing. For any local decision-making body that keeps reasonably good, carefully reviewed and approved minutes a court reporter is not necessary. An exception would be for a hearing on a matter that has already been subject to litigation and has been sent back to the local government for further consideration. Or, if a proposed project is large or controversial and litigation seems like a real possibility, it may be wise to use a court reporter. There are two separate cost factors with using one: most charge an hourly rate or flat fee for attending and recording the hearing; there is a separate fee (often per-page) for producing a transcript.

A private citizen may also choose to make an audio or video recording of a meeting. A party to a hearing may bring her or his own court reporter to a meeting. Regardless of the means that someone uses to record a meeting, the board should: 1) let them do it – these are public meetings and it is well within their right to do it; and 2) be doubly sure that the board's own recording equipment is working. The second part of the advice is necessary because it is not unheard of for someone with a tape of a meeting to edit and release a version of the recorded proceedings that is entirely out of context. The only effective rebuttal to such a release is the board's own recording. There is less risk of manipulation with a transcript by a court reporter – who typically attests to the accuracy of his or her transcription – but the person who hired the court reporter could still release a partial transcript.

4. Making Decisions in Specific Cases

In addition to setting out the procedures that local governments must follow in implementing land-use controls, Illinois law also sets out criteria for making specific decisions. Some of the criteria are contained in the statutes. Others come from judicial interpretations of those statutes. Some of the criteria are explicit standards that must be followed; others are simply guidelines. This section discusses the criteria for various decisions, identifies the source(s) of those criteria and explains which are mandatory and which are merely guidelines.

The Role of the Plan

Illinois Law

One of the principal powers granted to municipal plan commissions in Illinois is the creation of a comprehensive plan. Specifically, "every planning commission and planning department" has the power:

> To prepare and recommend to the corporate authorities a comprehensive plan for the present and future development or redevelopment of the municipality. Such plan may be adopted in whole or in separate geographical or functional parts, each of which, when adopted, shall be the official comprehensive plan, or part thereof, of that municipality. This plan may include reasonable requirements with reference to streets, alleys, public grounds, and other improvements hereinafter specified. The plan, as recommended by the plan commission and as thereafter adopted in any municipality in this state, may be made applicable, by the terms thereof, to land situated within the corporate limits and contiguous territory not more than one and one-half miles beyond the corporate limits and not included in any municipality. Such plan may be implemented by ordinances (a) establishing reasonable standards of design for subdivisions and for resubdivisions of unimproved land and of areas subject to redevelopment in respect to public improvements as herein defined; (b) establishing reasonable requirements governing the location, width, course, and surfacing of public streets and highways, alleys, ways for public service facilities, curbs, gutters, sidewalks, street lights, parks, playgrounds, school grounds, size of lots to be used for residential purposes, storm water drainage, water supply and distribution, sanitary sewers, and sewage collection and treatment; and (c) may designate land suitable for annexation to the municipality and the recommended zoning classification for such land upon annexation.[101]

The plan is advisory, not binding. The municipal enabling legislation provides:

> An official comprehensive plan, or any amendment thereof, or addition thereto, proposed by a plan commission shall be effective in the municipality and contiguous area herein prescribed only after its formal adoption by the corporate authorities. Such plan shall be advisory and in and of itself shall not be construed to regulate or control the use of private property in any way,

> except as to such part thereof as has been implemented by ordinances duly enacted by the corporate authorities.[102]

The county enabling legislation similarly, but more briefly, provides:

> Except as hereinafter provided, all plans of the region made by such commission shall be advisory only…[103]

Although a local government in Illinois is not required to have or to follow a comprehensive plan, there are exceptions. There is a relatively recent "Local Planning Technical Assistance Act,"[104] administered by the Department of Commerce and Economic Opportunity. For any local government that receives technical assistance under that act, the law is different:

> If a municipality or county is receiving assistance to write or revise a comprehensive plan, for 5 years after the effective date of the plan, land development regulations, including amendments to a zoning map, and any land use actions should be consistent with the new or revised comprehensive plan. "Land use actions" include preliminary or final approval of a subdivision plat, approval of a planned unit development, approval of a conditional use, granting a variance, or a decision by a unit of local government to construct a capital improvement, acquire land for community facilities, or both.[105]

Further, if a municipal government wants to exercise zoning authority over an area outside the corporate limits (up to 1.5 miles), it must first adopt a comprehensive plan that includes that area.[106]

The Illinois Court of Appeals, in a much-cited and long-standing case, has held that the failure to follow a comprehensive plan weakens the presumption of validity that otherwise attaches to a zoning ordinance.[107] In striking down as arbitrary and capricious a decision by Cook County to rezone a 96-acre tract from a single-family designation to one that would allow the construction of nearly 3,000 multiple-family dwelling units, the court held in material part:

> [T]he failure of Cook County to plan comprehensively for the use and development of land in its unincorporated areas, and its failure to relate its rezoning decisions to data files and plans of other related county agencies, weaken the presumption of validity which otherwise would attach to a county zoning ordinance.[108]

Good Practices

Although Illinois law does not require that local governments adopt a comprehensive plan, and it requires that they follow only certain plans, adopting, updating and following a comprehensive plan is at the heart of good local planning practice. The planning reasons for that are addressed at the beginning of this section. The legal reasons go beyond the simple statement from the Court of Appeals, however.

Some important legal reasons to adopt and follow a plan are:

- When a court reviews a zoning decision to see if it seems "arbitrary and capricious," showing that it follows a long-range plan is the very best way to show that the decision is rational and not arbitrary;
- On decisions that require findings of fact (see material beginning on page 10) that relate the decision to an adopted plan greatly strengthen the record on appeal;
- The very process of considering whether the decision is consistent with the plan often leads to better decision-making.

Tips: Must we follow the plan?

Sometimes a community has a plan but public officials want to do something that does not follow the plan – perhaps for very good reasons. Conditions may have changed (e.g., the state widened the road through the area or the utility provider extended sewer into it) or an opportunity or challenge that no one had imagined comes along. The law in another state requires that local officials always follow the adopted plan in making decisions unless two conditions are met:

1. As part of the resolution, ordinance or other action, the decision-making body acknowledges that it is not following the plan; and
2. In that same action, it explains the reason(s) why it is not following the plan.

That is not the law in Illinois, but it is good practice. If your council, board, or commission collectively agrees that it is appropriate to make a decision that does not follow the plan, just explain the reasons why, on the record, as part of the action you take.

If you find that there are frequent instances when you want to make decisions that do not follow the plan, it is time to amend or update the plan. See checklist on page 72.

Rezoning

What is commonly called "rezoning" is actually an amendment to the zoning map, which is adopted as part of the zoning ordinance. The zoning ordinance is itself a form of local law. Thus, any change to the ordinance or the map is a legislative action (see discussion on page 7). The governing body makes such decisions and has relatively broad discretion in doing so. The Illinois Supreme Court set forth the following criteria and considerations (often referred to as the "LaSalle Bank factors" owing to the case in which the court included them in its opinion) that have guided rezoning decisions in Illinois for more than 50 years:

1. existing uses and zoning of nearby property;

2. extent to which property values are diminished by the particular zoning restrictions;

3. extent to which the destruction of property values of plaintiff promotes the health, safety, morals or general welfare of the public;

4. relative gain to the public as compared to the hardship imposed upon the individual property owner;

5. suitability of the subject property for the zoned purposes; and

6. length of time the property has been vacant as zoned considered in the context of land development in the area in the vicinity of the subject property.[109] [multiple citations omitted]

Relying on a 1960 decision of the supreme court,[110]the court of appeals has suggested that two other factors ought to be considered:

7. the community need for the proposed use; and

8. the care that the community has undertaken to plan its development.[111]

In its 1960 decision, the Illinois Supreme Court had explained that these factors were used in determining whether the ordinance had the required relationship to the public health, safety, and welfare. The importance of the planning basis for the decision is reinforced by the state supreme court's decision holding that the lack of a comprehensive plan for the area undercut the "presumption of validity" that would otherwise attach to a local zoning ordinance.

The following checklist is designed to help decision making bodies determine if a rezoning proposal should be approved. If all answers on the questionnaire are "yes," the proposal should generally be approved. If there are any "no" answers, the decision-making body should give serious consideration to whether it is appropriate to approve the proposal even though it fails to meet one of the criteria. Three or more "no" answers on this checklist would likely indicate the proposed rezoning should be denied.

Checklist for Reviewing a Rezoning Proposal		
Question	**Yes/No**	**Notes**
Is the proposed rezoning consistent with the comprehensive plan? If not, is there a good, public policy reason for diverging from the plan at this time – such as significantly changed conditions in the area? [a yes answer to either part of this question is acceptable]		
Is the proposed rezoning compatible with existing uses and zoning of nearby property?		
Does the current zoning limit the property to uses for which it is not suited because of its size, topography, location in relation to other uses or other reasons?		
If the property is currently vacant, does that fact appear to result		

from the limitations of the zoning? If yes, how long has the zoning apparently had that affect?		
Does the current zoning artificially reduce the value of the property?		
If the current zoning reduces the value of the property, does it do so for the apparent purpose of protecting one or more clear characteristics of the public health, safety and welfare?		
If the answer to the previous question is "yes," is the relative protection offered to the public great enough to justify the burden on the property?		
Is there a community need for the proposed use (in answering this question, it is important to include constitutional mandates protecting certain uses and a community's need for uses that it may consider undesirable, such as places to dispose of waste)?		

Special Use Permits

The Illinois Supreme Court has cited law professor Susan Connor of the John Marshall Law School for this description of the purpose and character of a special use permit:

> In general, a "special use" is a type of property use that is expressly permitted within a zoning district by the controlling zoning ordinance so long as the use meets certain criteria or conditions. "The purpose of special uses is to provide for those uses that are either necessary or generally appropriate for a community but may require special regulation because of unique or unusual impacts associated with them."[112]

It has further explained, the special use permit technique was developed:

> as a means of providing for infrequent types of land use which are necessary and desirable but which are potentially incompatible with uses usually allowed in residential, commercial, and industrial zones. Such uses generally occupy a rather large tract of land. They cannot be categorized in any given use zone without the danger of excluding beneficial uses or including dangerous ones.[113]

Note that special use permits can be granted either by the governing body or the zoning board, depending on what the local ordinance says. The Illinois legislature has made it clear that that such decisions, if made by the governing body, are always legislative, at least as far as the appeal process is concerned. That is not *exactly* what the law says. Thus, the following discussion sets out the law for special use permit decisions by the board of appeals. The types of criteria described here also represent "best practices" for such decisions by governing bodies, but it is not entirely clear at this writing whether the law requires that governing bodies follow these criteria. Where the board of appeals or another designated committee or commission holds a hearing and makes a recommendation to the governing

body, it should follow the guidelines suggested here, as summarized in the checklist at the end of this section.

The statute for municipalities provides the following standards for special use permits:

> A special use shall be permitted only upon evidence that such use meets standards established for such classification in the ordinances, and the granting of permission therefore may be subject to conditions reasonably necessary to meet such standards.[114]

The wording of the statute for counties is slightly different but has the same effect.[115]

Nature of the Special Use Review Process

The special use review process in Illinois may be either administrative or legislative. The Illinois enabling legislation expressly provides for cross-examination in hearings involving special use permits.[116] A mid-level court in the state seemed to extrapolate that to a requirement to allow cross examination in any zoning or other public hearing. [117] The Illinois Supreme Court limited the effect of that statement (which appeared to be dicta, or "legally irrelevant chatter") on appeal, [118] but the high court also took the opportunity to hold that all special use permit proceedings are "administrative or quasi-judicial" [119] That did not end the story of this case. The Illinois legislature did not like the supreme court's result and wound up amending state statutes twice to make it clear that special use permit decisions are legislative in nature.[120] The result has led to confusion, at least in cases that were pending as the law was amended.[121]

Special Use Standards or Conditions

Many local ordinances include specific standards for specific special uses. Here are some examples of uses designated in zoning ordinances as special uses (and the types of standards imposed) by local governments in the CMAP region:

> ***City of Aurora (drive-through bank)***
> Financial institutions with a drive-through facility, when located within 1000' of an intersection of two publicly dedicated streets and
>
> i. When said intersection is designated as non-residential on only two of the four corners of the intersection of said two publicly dedicated streets (corner) and contains one or more existing financial institutions with a drive-through facilities located within 1000' of said intersection, as measured property line to property line.
> ii. When said intersection is designated as non-residential on all four corners and contains two or more existing Financial institutions with a drive-through facilities located within 1000' of said intersection, as measured property line to property line.[122]

City of Aurora (Intertrack wagering facility)

Intertrack wagering facilities when not located within eight hundred (800) feet of a religious institution, grade school, high school, hospital, nursing home property or any single-family detached residential zoning district.[123]

Will County (bed and breakfast in specified residential/agricultural zones)

1. Length of stay for a lodger shall not exceed ten (10) consecutive days;

2. Number of guest rooms is limited to four (4) bedrooms in the dwelling unit. Maximum occupancy is limited to two (2) adults per guest room;

3. A single identification sign not to exceed two (2) square feet may be erected. Such sign shall be non-illuminated and shall be attached flat against the front wall of the building it identifies;

4. Tandem off-street parking spaces may be provided, but not more than two (2) deep. No parking spaces shall be provided in the front yard; and,

5. The dwelling in which the bed and breakfast operates shall be the principal residence of the operator/owner and the operator/owner shall live on the premises where the bed and breakfast is active.

Bolingbrook (cemetery)

1. Any new cemetery shall be located on a site containing at least 80 acres.

2. All burial buildings and lots shall be set back at least 80 feet from any street abutting the cemetery; and there shall be two side yards and a rear yard of at least 55 feet each.

3. Existing cemeteries may continue to operate in a manner consistent with the existing development in the area presently covered by a special use permit. Any expansion to land not covered by an existing special use permit must comply with the requirements of this section.

4. Adequate parking shall be provided on the site, and no cemetery parking shall be permitted on any public street.[124]

Joliet (private recreational facilities in residential district)

Private country clubs, golf courses, tennis courts and similar private recreational uses, provided that any principal building or swimming pool shall be located not less than one hundred (100) feet from any other lot located in a residential district.[125]

For common special uses, it is a good idea to have criteria like these in the ordinance. For some types of special use permits – for example, for a waste transfer station or a gravel quarry – it is very difficult to write such criteria in advance. In such cases, it may be necessary to look to the comprehensive plan and the more general criteria suggested in the checklist.

Special Use vs. Conditional Use in Illinois

Note that some communities in Northeastern Illinois use the term "conditional use" to mean the same thing as "special use" as discussed in this handbook. Although the terms are sometimes used interchangeably in other states, the Illinois enabling legislation is very specific in its repeated references to "special use permits." A community updating a zoning ordinance that refers to "conditional uses" or "conditional use permits" should replace that terminology with "special use permit" or "special use."

Overview of Questions

In principle, the LaSalle Bank factors, discussed above in the rezoning section, are relevant to any zoning decision. As a practical matter, however, the designation of a use as one that is permitted as a special use in a particular zone represents a determination by the governing body that:

- The use is consistent with the comprehensive plan;
- Subject to particular standards imposed on special uses in general or on this particular use, the use is compatible with existing uses and zoning of nearby property.

The following checklist is intended for review of special use permit applications. In contrast to a rezoning application, questions about impact of the restrictions on the property and its value are usually not relevant to a special use permit applications, because the ordinance specifically allows the use.

Checklist for Reviewing a Special Use Permit Application		
Question	**Yes/No**	**Notes**
Is the proposed use listed as an allowed "special use" in the zoning district in which it resides?		
Will the proposed use conform to all standards applicable to special uses *generally*?		
Will the use conform to any standards applicable to the *type* of special use?		
If the special use is significantly more intense than uses allowed by right in the zoning district? If so will the proposed setbacks, buffers, landscaping, fences, walls, circulation patterns, or other design features mitigate possible negative effects of the use on neighboring property?		
Based on the available information, does it appear that approval of this particular special use in this specific location will be consistent with the legislative intent in designating it a "special use"?		
Is there a community need for the proposed use (in answering this question, it is important to include constitutional mandates protecting certain uses and a community's need for uses that it may consider undesirable, such as places to dispose of waste)?		

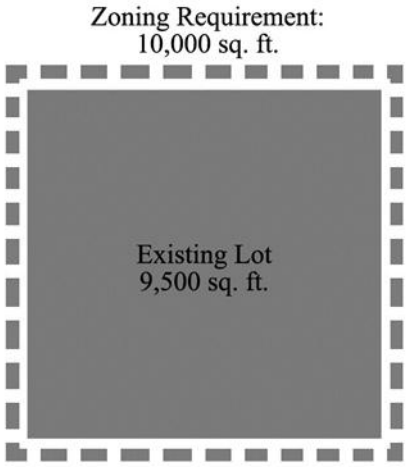
If the decision-making body answers “yes” to all questions, the proposal should generally be approved. If the answer to the first question is “no,” the application should be immediately denied; it should be more appropriately considered as an application for rezoning. If there are any other “no” answers, the decision-making body should give serious consideration to whether there are adequate mitigating actions that could help overcome the issue raised. If there are three or more “no” answers on this checklist, it would usually be a mistake to approve the proposal.

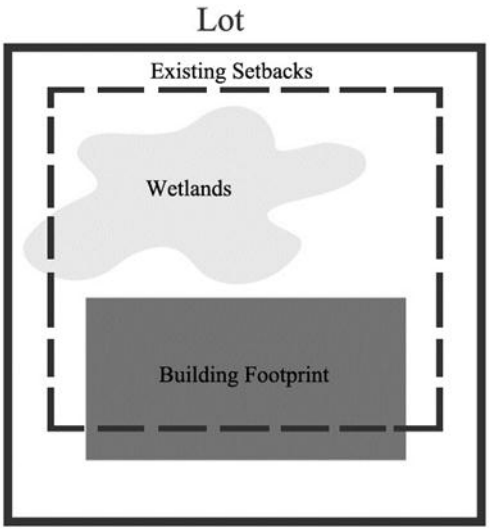
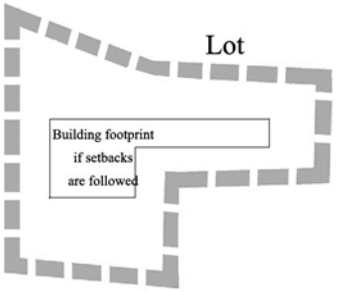
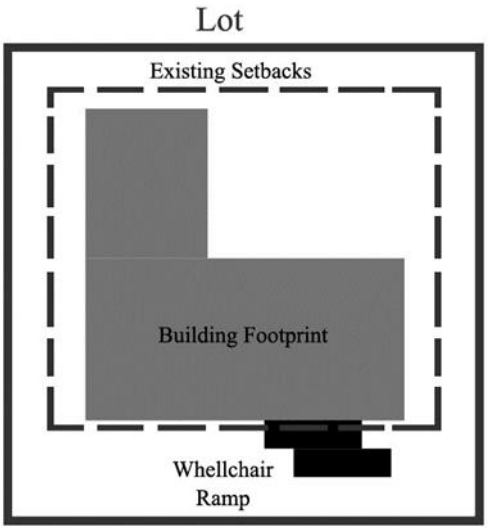
The existence of the comprehensive plan, and the council's reliance upon that plan, does not alter this conclusion. Special use criteria in a city's zoning ordinance do not include conformance with the comprehensive plan as a requirement that must be met before a special use permit may be granted.[126]

Variation

Overview

The concept of the variation (called a variance in most states) has been part of zoning law since the 1920s. The original idea was to provide a simple process to grant relief to the owner of a property that cannot or cannot without “practical difficulties” conform to the prescriptive, geometric dimensional restrictions set out in a zoning ordinance. Classic examples of situations that would easily justify the grant of a variation are:

• An existing lot that has only 9,500 square feet in a zoning district that requires a minimum lot size of 10,000 square feet.	

• An oddly shaped lot, on which it is difficult to site a rectangular building in conformance with all yard and setback requirements.	
• A lot on which natural features, such as steep slopes or wetlands, make it difficult to site a building in conformance with setbacks but on which such a building could easily be located with a variation in one or more of the setbacks.	
• The addition of a wheelchair ramp to an existing residence built up to the front setback line, where the ramp will encroach into the required front yard.	

Variations apply most clearly to modifications in dimensional standards, that is, lot size, lot width or depth, yard or setback, and, less frequently, and height.

Applicability

Illinois law allows that cities and counties "may provide" for such variations[127] but does not require them to do so. Laws for both cities and counties further specify that the local government may allow use variations and further specifies that municipalities may limit or prohibit them.[128] The use variation is an oddity in the land-use law of several states, because it allows property to be used in a way that is entirely inconsistent with the applicable zoning ordinance. The more appropriate way to address a change of use is through a rezoning (discussed above, beginning at page 35). The courts have upheld grants of use variations to allow the following uses in residential districts:

- Sewage treatment plant[129]
- Water plant[130]
- Telephone exchange[131]

As a matter of public policy, allowing utilities and similar location-critical facilities to be located in residential districts where they are needed makes perfect sense. As a matter of good zoning practice, it is typically better to provide in the zoning ordinance that "public utility facilities" are allowed by special use permit than to handle these issues by variation. The problem with providing for use variations in a local ordinance is that it opens the door to applications for extremely incompatible uses.[132]

Although the county enabling act does not specifically allow counties to limit or prohibit use variations, the fact that counties, like municipalities, are not required to provide for variations at all would suggest that counties, also, can limit the circumstances in which variation relief is available.[133]

The authors of this handbook and its sponsor suggest caution by local governments in dealing with use variations. Ideally a local zoning ordinance should simply prohibit use variations. If a local government chooses to allow them, it is important to remember that, by law, use variations are to be allowed only for **hardships** related to unique characteristics of a piece of property, while dimensional variations can be granted for **practical difficulties**. Both topics are discussed further below.

Variation Procedures – Municipal

The local ordinance can provide for variations to be granted either by the board of appeals or by the governing body.[134] If the board of appeals has the authority to grant variations, its decision is final and reviewable in court, not by the governing body.[135]

If the local ordinance provides that variations are to be granted by the governing body, then the action on the variation is by ordinance, after a hearing and recommendation by the board of appeals.[136] The board of appeals must make findings of fact in support of its recommendation.[137] The governing body may, "adopt any proposed variation or may refer it back to the board for further consideration."[138] If

the board of appeals does not recommend approval of the variation, it "shall not be passed except by the favorable vote of two-thirds of all aldermen or trustees of the municipality."[139] The language in this part of the statute must be read carefully for two considerations that are not standard in other statutory language: 1) the super-majority vote by the governing body is required not only if the board of appeals recommends rejection but if it fails to make an affirmative recommendation; 2) the super-majority is based on the total membership of the council; it is possible to have a quorum without having enough people present to make up such a super-majority.

When acting by ordinance, the governing body is not constrained by the factors that govern quasi-judicial decisions like those of the board of appeals.[140] The state law, however, limits the governing body action on variations in ways that it does not limit its action on rezonings, that is, by requiring a super-majority to approve a variation against the recommendation of the board. To the extent that it is truly legislative in nature (as the use of the ordinance process would suggest), the grant of a variation by the governing body may be considered the equivalent of a rezoning; on the other hand, the requirement for the board of appeals review suggests that the process is not one in which the governing body has complete legislative discretion. Thus, in a municipality in which the governing body makes the decisions on variations, it is appropriate to apply a combination of the variation criteria (discussed beginning on page 45) and the criteria for rezonings, beginning on page 35. For notice and hearing procedures, see material beginning at page 19 (notice) and page 26 regarding hearings.

Variation Procedures – Counties

The variation procedures for counties are different from those for municipalities. The board of appeals has a role in the variation procedure for counties, but the authority to grant most variations is reserved by state law to the county board.[141]

If an application to a county is for "a variation of ten percent or less of [the zoning ordinance or resolution] as to location of structures or as to bulk requirements under such regulations," the variation may be granted by the administrator[142] after the applicant or county provides "notice of intent to grant" the variation to "all adjoining landowners."[143] If any landowner files a written objection within 15 days of the notice, then the variation must be processed as described in the next paragraph; otherwise, after the expiration of the 15-day period, the variation can be granted.[144]

The rest of the procedure for variations granted by counties is similar to that for variations granted by governing bodies in cities – it requires a hearing before the board of appeals and a recommendation to the county board by the board of appeals.[145] The board of appeals must make findings in support of its recommendation. If the board of appeals does not recommend approval of the variation, the variation "shall not be passed except by the favorable vote of 3/4 of all the members of the county board, but in counties in which the county board consists of 3 members only a 2/3 vote is required."[146] As is the case with the statutory language governing variations by a municipality, there are two considerations that are not standard in other statutory language: 1) the super-majority vote by the governing body is required not only if the board of appeals recommends rejection but if it fails to make an affirmative

recommendation; 2) the super-majority is based on the total membership of the council; it is possible to have a quorum without having enough people present to make up such a super-majority.

The notice requirements for applications for variations in counties is similar in timing to other notice requirements (i.e., at least 15 days but not more than 30 days before the hearing), but the requirements for the content of the notice are much more detailed than for any other notices required under Illinois land-use law.[147] For hearing procedures, see material beginning at page 26 (hearings).

Criteria for Granting Variations

For municipalities, the state law provides for approval of variations by the board of appeals under the following conditions:

> Variations shall be permitted by the board of appeals only when they are in harmony with the general purpose and intent of the regulations and only in cases where there are practical difficulties or particular hardship in the way of carrying out the strict letter of any of those regulations relating to the use, construction, or alteration of buildings or structures or the use of land. In its consideration of the standards of practical difficulties or particular hardship, the board of appeals shall require evidence that (1) the property in question cannot yield a reasonable return if permitted to be used only under the conditions allowed by the regulations in that zone; and (2) the plight of the owner is due to unique circumstances; and (3) the variation, if granted, will not alter the essential character of the locality. A variation shall be permitted only if the evidence, in the judgment of the board of appeals, sustains each of the 3 conditions enumerated.[148]

The law for counties is essentially identical.

An Illinois Court of Appeals has cited with approval a provision of the Chicago Zoning Ordinance that supplemented the three basic standards in the state law with the following:

> For the purpose of implementing the above rules, the Board shall also, in making its determination whether there are particular difficulties or particular hardships, take into consideration the extent to which the following facts favorable to the applicant have been established by the evidence.
>
> (1) The particular physical surroundings, shape or topographical condition of the specific property involved would result in a particular hardship upon the owner as distinguished from a mere inconvenience, if the strict letter of the regulations were carried out;
>
> (2) The conditions upon which the petition for a variation is based would not be applicable, generally, to other property within the same zoning classification;
>
> (3) The purpose of the variation is not based exclusively upon a desire to make more money out of the property;

(4) The alleged difficulty or hardship has not been created by any person presently having an interest in the property;

(5) The granting of the variation will not be detrimental to the public welfare or injurious to other property or improvements in the neighborhood in which the property is located; and

(6) The proposed variations will not impair an adequate supply of light and air to adjacent property, or substantially increase the congestion in the public streets, or increase the danger of fire, or endanger the public safety, or substantially diminish or impair property values within the neighborhood."[149]

Four of the criteria used in the Chicago ordinance simply add detail to concepts mentioned in the state act. The third criterion limits appropriately the effect of the "cannot make a reasonable return" language in the state law. The fourth criterion addresses what is often called a "self-created hardship." In the Chicago case in which the ordinance was cited, the court upheld a denial of a variation to a property owner who began construction of an apartment building without applying for building permits, where the partially constructed building violated setback requirements of the zoning ordinance. Although the court agreed with the property owner that the lot was unusual, it agreed with the trial court that the property owner could have avoided the problem by applying for building permits and determining the possible need for a variation before beginning construction.[150] Illinois courts have held, however, that merely purchasing property with the knowledge of what zoning regulations affect it does not prevent a property owner from obtaining variation relief from parts of those regulations.[151]

Checklist for Reviewing a Variation Application		
Question	**Yes/No**	**Notes**
Has the applicant demonstrated that the property in question cannot be used for any economically viable purpose?		
Is the plight of the owner due to unique circumstances affecting that property?		
Has the applicant demonstrated that the variation, if granted, will not alter the essential character of the locality?		
Did the hardship or practical difficulty arise from circumstances beyond the control of the landowner or his or her immediate predecessors in interest?		
Did the hardship or practical difficulty arise from circumstances beyond the control of the landowner or his or her immediate predecessors in interest?		
[For a use variation if allowed under the local ordinance] Would the particular physical surroundings, shape or topographical		

condition of the specific property involved result in a **particular hardship** upon the owner as distinguished from a mere inconvenience, if the strict letter of the regulations were carried out?		
[For a dimensional variation] Would the particular physical surroundings, shape, or topographical condition of the specific property involved result in **practical difficulties** in using the property for a permitted use if all of the dimensional standards applicable to the zoning district are enforced?		
Is the plight of the applicant unusual for this zoning district (in contrast to having developmental problems that are common to a number of properties in the district)?		
Has the applicant demonstrated that there is no reasonable use for the property subject to the applicable restrictions (in contrast to a desire to adapt the property to a more profitable use)?		
Has the applicant demonstrated that the proposed variations will not impair an adequate supply of light and air to adjacent property, or substantially increase the congestion in the public streets, or increase the danger of fire, or endanger the public safety, or substantially diminish or impair property values within the neighborhood?		

If all answers on the checklist are "yes" (something that will rarely occur in a variation case), the application should almost certainly be approved. By state law, if the answer to any of the first three questions is "no," the application should be immediately denied. If there are other "no" answers, the decision-making body should weigh the related information seriously. In legal terms, the variation process is one that is equitable in nature, that is, a process intended to produce a result that is fair for the applicant and for others who may be affected. Rigid laws do not always produce equity. The real purpose of the last six questions is to help the board to determine what is fair.

Conditional Approvals

When neighbors or others protest a proposal that otherwise appears reasonable to the review body, members of that body may seek to strike a balance by imposing conditions that will address some (or all) of the concerns raised by objectors while allowing the project to go forward. The Illinois courts have upheld the imposition of reasonable conditions on project approvals. There is express language allowing the imposition of conditions on special use permits,[152] but the courts have upheld the imposition of conditions on other zoning decisions. Even where an appellate court held that the decision of a village denying a special use permit for a restaurant was inconsistent with state law, it emphasized the right of the village to impose conditions when subsequently approving the permit.[153]

An Illinois appellate court, in upholding in part conditions that were imposed on the approval of a permit for a group home and challenged by the operator, has noted that:

> Generally, courts have upheld reasonable conditions, even though they severely restrict the scope of the operation.[154]

The Illinois Supreme Court has even upheld as valid a condition imposed on a rezoning that would cause the property to revert to its prior zoning if the zoning officer ever determined that any of the conditions were violated.[155] The courts in most states would have problems with such a condition, concerned with the statutory and due process issues involved in allowing a zoning change that does not follow required procedures. The case is cited, however, to illustrate the extent to which the Illinois courts are willing to accept conditions in zoning cases.

The conditions imposed, however, must be closely related to the anticipated impact of the project; where the conditions go beyond those reasonably necessary to mitigate those impacts, the courts may find them unconstitutional.[156]

Some additional examples of zoning conditions that have been upheld in Illinois include:

- A condition requiring the demolition of an accessory building to create some additional parking, imposed as a condition of granting a variation in the number of off-street parking spaces required for the proposed re-use of two other existing buildings;[157]
- A condition that 96 of 107 acres in a project remain as common open space, as a condition of approval for a special use permit for development of 1875 residential units;[158]
- A condition that a special use permit would be valid only for a period of five years and subject to further review after that period;[159] and
- In a very odd case, a condition imposed on a rezoning to allow the construction of apartments, subject to the requirement that the developer contribute $100 per unit to a fund for a local cultural center.[160]

Tip: Using conditions

If you sit on a board that is willing to approve a project only with conditions, it is worth asking yourself, "what is the worst that can happen?' Here are several likely scenarios of a project with conditions:

1. The applicant accepts the conditions and carries out the project in a way that is consistent with those conditions. That is the best result.
2. The applicant does not like the conditions but seems to accept them and proceeds with the building or development allowed by the project approval. Later, the applicant goes to court to challenge the conditions. The applicant is very likely to fail in this lawsuit. The Illinois

courts have been entirely unsympathetic to developers who proceed with projects based on conditional approvals and then attempt to avoid the conditions.[161]

3. The applicant protests the conditions or files a lawsuit challenging them before proceeding with work. The result of local governments in such litigation has been mixed; in a number of cases involving monetary exactions, the courts have held that the conditions were unconstitutional.[162] Local governments have been much more successful in defending conditions that relate to physical improvements on the development site. If, however, an applicant files such a challenge, your board can reopen the item, modify the conditions to satisfy the developer, remove the conditions, or deny approval to the project.

Factors Not to Consider in Zoning Cases

Zoning and land-use decisions deal with land, improvements to land and activities conducted on the land or in the buildings or other improvements. Land-use decisions should focus on those issues. Below are examples of factors that should not be considered in zoning cases.

Increased Land Value or Profit

Several provisions of state law and cases citing it refer to allowing property owners a "reasonable return" on their investments. Property owners may argue that their property should be rezoned to allow the "highest and best use." That is an appraisal term, not a zoning term. If the owner can achieve a "reasonable return" on the property as zoned, the local government is not compelled to grant a zoning approval or permit just because it would increase the value of the property. As the Illinois Supreme Court has noted in a much-cited case:

> Furthermore, in probably all instances of restrictions on property, the property would be worth more if the restriction were not effective… It is not the mere loss in value that is significant. Rather, the loss in value to the plaintiff must be considered in relation to the public welfare. Only when the public welfare does not require the restriction and resulting loss does the loss in value become significant… We are satisfied that the loss in value to plaintiff as the result of the ordinance restriction is reasonably justified by the public welfare.[163]

"Reasonable return" may seem vague, and it is particularly difficult to apply rationally to property that is owner-occupied. A better test is probably that adopted by the U.S. Supreme Court in *Lucas v. South Carolina Coastal Council,*[164] where it held that a land-use control is unconstitutional where it denies an owner "all economically viable use" of property.

Ownership

Drivers' licenses, liquor licenses, medical licenses and others allow a particular person to engage in a particular activity. If that person dies or loses some of the abilities or character that supported the grant of the license, it only makes sense that the license should be revoked or not renewed.

Zoning and land development approvals, on the other hand, authorize construction or the establishment of a use or activity at a particular location. People who invest in such structures or activities typically have "vested rights" to continue them. Those vested rights do not go away simply because a person dies or moves away, because the vested rights are based on the investment in the property, not on the character of the individual owner. When a property is rezoned or a variation is granted, that decision generally runs with the land, and it is rarely appropriate to impose a condition that relates to the identity of the person or entity using the property.

An Illinois court, however, *has* held that a special use permit can be limited to a particular owner, terminating when that person no longer owns the property.[165] Regarding special use permits, the court held in part:

> Moreover, a special use permit may be issued for certain periods of time and under certain circumstances which allow the county authorities the opportunity to maintain a certain degree of control of the special use.[166]

In the discussion that followed, the court emphasized the difference between a special use permit and a zoning map amendment, apparently accepting the position stated above, that a change in the zoning map runs with the land.[167]

Subdivision Review

Local governments regulate the development of land through the subdivision review process. At this stage, local officials and professional staff review the development to see that lots within it will have access to the public street system and that there will be utilities available to serve buildings within the development.

Overview of Substantive Regulations

Local subdivision ordinances typically have separate procedures for two different types of land divisions:

> **Minor Subdivisions.** Small subdivisions – particularly those that do not involve the opening of a new street or road – are much simpler to review than larger ones and thus often go through a simplified, one-step review process.
>
> **[Major] Subdivisions (may just be called "subdivision"].** Any division of land that is not exempt from subdivision regulation or that is not a minor subdivision must go through the full subdivision review process.

Under Illinois law, subdivision plat review is required "whenever the owner of land subdivides it into 2 or more parts, any of which is less than 5 acres."[168] The Plat Act[169] applies to subdivisions in municipalities and in counties. It also contains a long list of exemptions.[170] The first exemption actually modifies the definition, providing that a division into parcels of five acres or more is exempt only if it "does not involve any new streets or easements of access."[171] Other commonly applicable exemptions include some further divisions within a recorded subdivision;[172] transfers between owners of contiguous

parcels;[173] several exemptions for transfers involving public or quasi-public agencies dealing with roads or other rights-of-way;[174] and an exemption from state platting requirements for a single split of a parcel of less than five acres from a "larger tract," with limiting language making it clear that local subdivision requirements may still apply.[175] There are separate exemptions for certain combinations of parcels in unincorporated areas.[176]

An Illinois court has said succinctly:

> The purpose of the statute on Plats is to require the submission of plats to governmental approval to insure that adequate provision has been made for streets, alleys, parks and other public facilities indispensable to the particular community affected.[177]

A century ago, it was common for developers simply to grade out streets and sell lots along them, leaving the buyers and the local government to deal with the issue of paving and other improvements at a later time. Today, requirements that developers pave streets and install utilities are almost universal.

Illinois law for counties specifies that subdivision regulations may address the following:

> [T]he location, width and course of streets and highways, and the provision of public grounds for schools, parks or playgrounds, in any map, plat or subdivision of any block, lot or sub-lot or any part thereof or any piece or parcel of land in the county, not being within any city, village or incorporated town in the county which rules and regulations may include such reasonable requirements with respect to water supply and sewage collection and treatment, and such reasonable requirements with respect to street drainage and surfacing, as may be established by the county board as minimum requirements in the interest of the health, safety and convenience of the public of the county…[178]

There is no similar language in the enabling legislation for municipalities, but the law for counties provides a comprehensive checklist of issues typically addressed in subdivision regulation.

Through the subdivision review process, local governments typically address most of the following issues. Note that many of the purposes of the livability principles in GO TO 2040 are typically implemented through subdivision regulations, where the community deals with the physical character of the built environment. Standards for some of these matters are set forth in the subdivision ordinance or regulations. Others, such as drainage design and specifications for pavement, are highly technical and are often contained in a separate "Design Manual" or similar document; such technical documents are legally binding on applicants only after they have been approved by the governing body. Such standards typically include:

- Requirements that new streets align with adopted comprehensive plan and/or with existing streets
- Required right-of-way widths

- Specifications for the width of street paving and of sidewalks
- Design of stormwater facilities (CMAP provides an on-line list of references on this subject at http://www.cmap.illinois.gov/strategy-papers/stormwater-best-management-practices/references (accessed February 2011);
- Installation of utilities
- Installation of such street accessories as street signs, and, in some communities, bus shelters and street trees
- Street layout standards that may include maximum block lengths, distance between offset intersections
- In some communities, lot design standards that supplement those in zoning ordinance – usually intended to avoid "flag" and other odd-shaped lots
- Requirements that utility easements be dedicated to the public
- Dedication requirements for park and school sites (see material beginning at page 60).

Overview of Procedures

Local subdivision review procedures typically include two or three steps:

- A preapplication review, sometimes involving the submittal of a "sketch plan" or similar general information about the proposed subdivision;
- A preliminary plan or plat; and
- A final plat.

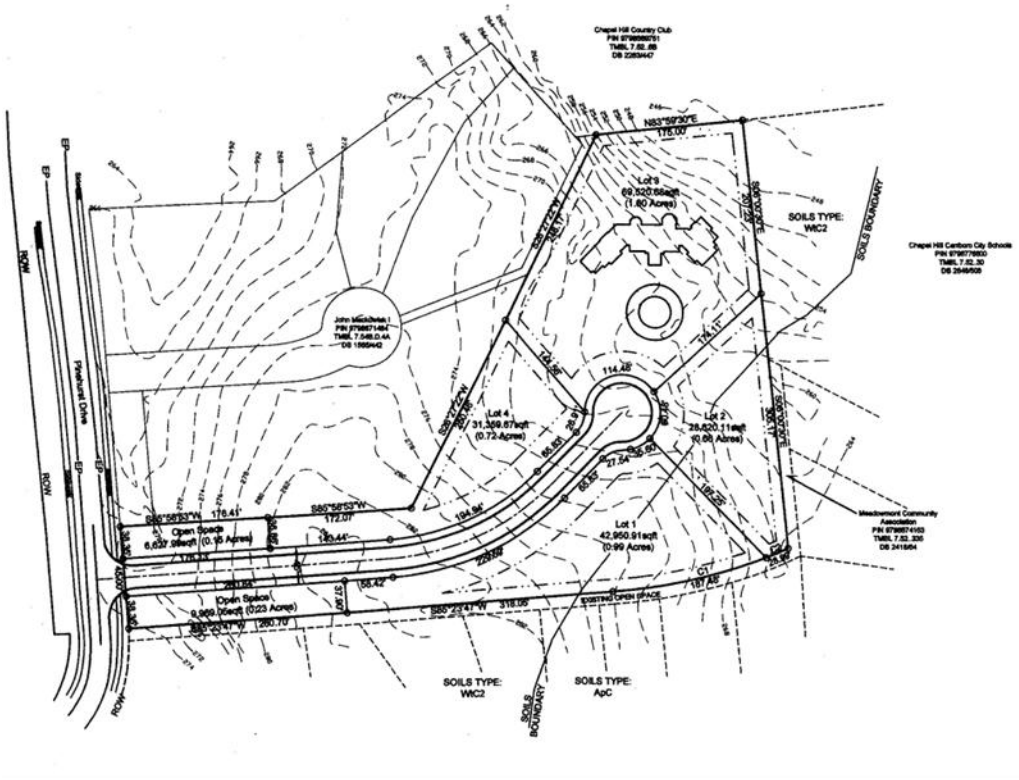


Figure 1. A preliminary plat showing street, lot layout and topography.

Figure 2. A portion of a final plat, showing engineering details.

For minor subdivisions, local ordinances typically require only one submittal. For more complex subdivisions, the multiple-step process benefits both the developer and the local government. A final plat involves a great deal of engineering detail and thus entails significant expense for the developer. Through a pre-application review (optional under many local ordinances), engineers and/or planners from the local government can provide the developer with information about major issues that may arise with a specific proposed development. In some cases, developers may decide that the issues pose obstacles that are so significant that they decide to abandon the project. In others, the preapplication review may lead to modifications in the developer's original concept to address those local issues.

The preliminary plan or preliminary plat provides the information about a subdivision that is of general interest to public officials, neighbors and other interested citizens. The preliminary plan shows the boundaries of the subdivision, its topography, proposed street layout, the locations and dimensions of all lots and blocks, plans for utility connections, areas designated for park or school sites, and general stormwater plans; for a large project, it will also show phasing plans. Illinois law for municipalities requires that the preliminary plat be submitted to the planning commission for review.[179]

After a preliminary plan or plat has been approved, the subdivider can prepare and submit a final plat. In municipalities, the subdivider must submit the final plat within one year of approval of the preliminary.[180] Supplemental documents with the final plat will contain extensive engineering details, showing the exact geometry of road curves, sizing and design of utilities, the specifications for street and sidewalk construction and the other details to be used by contractors to build the improvements and create the individual lots within the subdivision. Review of these documents requires technical expertise and is often assigned primarily or entirely to engineering staff.

Extraterritorial Control

If a municipality has adopted subdivision regulations that apply outside its borders, any subdivision of land within 1.5 miles of the municipality must conform to the municipality's subdivision requirements.[181] The Illinois Supreme Court has sustained this statutory authority, holding squarely:

> A consideration of the above statutes and their amendatory provisions reveals the clear intention of our legislature to grant to municipalities adopting an official plan exclusive control and jurisdiction over the subdivision of lands located not more than one and one-half miles beyond the corporate limits of the municipality.[182]

In some counties, property that is the subject of an annexation agreement (a topic beyond the scope of this handbook) is also subject to municipal regulatory control.[183] That section of the law does not apply to Cook County or the counties adjacent to it.[184]

Roadway Access and Septic Review

The Plat Act prohibits a local government from approving a plat unless:

> [T]he plat has been approved in writing (i) except in municipalities with a population of 1,000,000 or more, by the Illinois Department of Transportation with respect to roadway access where such access is to a state highway, (ii) by the relevant local highway authority with respect to all other roadway access, and (iii) by the local health department, if one exists, with respect to sewage disposal systems if any part of the platted land will not be served by a public sewer system.[185]

The outside review agencies have 90 days to submit their review to the local government considering the plat.[186]

Time Limits for Review

By law, municipalities must act on a proposed final plat within 60 days of submittal of a complete application.[187] If the municipal authorities fail to act within that time, the applicant, after five days' notice, can seek a court order approving the plat.[188]

The statutes do not address how this requirement relates to the requirement that certain outside agencies be given 90 days to review a proposed plat before a local government can act on it. For a two-step review process, the preliminary plat can be submitted to the outside agencies for review; because there is no time limit on review of the preliminary plat, the 90-day review period does not pose a problem. The combination of the 60-day time limit on approval and the 90-day review period for outside agencies suggests that a local government may not want to allow a streamlined, minor subdivision review for any project involving new roads or septic tanks.

There is no comparable time limit on the review of subdivisions by counties.

Nature of Subdivision Review

Many zoning decisions in Illinois are legislative in nature, providing the local government with considerable discretion in deciding whether to approve or deny a proposal. In significant contrast, subdivision review in Illinois is considered "ministerial."[189] If a subdivider meets all of the standards set forth in state law and in the local ordinance, the local government must approve the plat. As Illinois courts have said:

> The act of approving a plat by an officer designated by a county board for that purpose is ministerial when the statute and ordinances have been complied with and may be enforced by mandamus. A plat officer has no discretion in such case to refuse to execute a plat. He has only those powers given to his office by the legislative body establishing the office, the county board in this case, and may not make any determinations of what standards must be met to allow approval of a plat. The plat officer can only look to those ordinances or resolutions adopted by the county board for his authority.[190]

These principles apply equally to municipalities and to counties.

Public Hearings

Illinois law does not require public hearings of the sort described beginning on page 26 in the review of proposed subdivision plats, but at least one stage of the review must take place at a public meeting as described at page 17. Some local governments hold public hearings on proposed plats and many allow informal public comment on them. In general, public participation and public comment improve the quality of decisions made by local governments and enhance the trust that citizens place in that government. The difficulty with holding public hearings on proposed subdivision plats is that most people who testify at such hearings are really concerned with the type or intensity of development – matters that are controlled by zoning. If the zoning allows development of the type and intensity proposed by the developer, the local government cannot deny approval based on concerns about those issues. Thus, allowing public testimony in relation to the consideration of proposed subdivisions may simply lead to frustration by those who testify. There is no perfect solution; public participation may provide useful information to improve the largely technical review process for a subdivision, but it may also lead to a venting of concerns that the local government cannot address at that stage of the land-use control process.

Final Decision

Municipalities and counties in Illinois can designate in local subdivision ordinances what body has the authority to review and approve proposed subdivisions.[191] Small municipalities often assign that duty to the governing body. Larger local governments typically assign subdivision review to the planning commission, planning and zoning commission, or a special plat review committee.

Regardless of what body has the final review authority for subdivisions, there is one aspect of any subdivision that must go before the governing body – that is the dedication of land. As the Illinois Supreme Court has held:

> A municipal corporation cannot, by the mere making and recording of a plat by a property owner, be required to accept the public places dedicated to it thereby. The dedicator cannot in that way impose upon the public authorities the burden of caring for the streets and alleys included in the subdivision of a property, nor can the municipality be required to open and improve such streets or be held liable for damages occasioned by reason of their unsafe condition until it has actually accepted such streets. The public authorities have a right to determine whether or not they will accept a tract purported to be dedicated as a road for a public highway as a charge upon the municipality for the maintenance thereof, and until they have so accepted the public way the road or street does not become a public thoroughfare.[192]

Thus, at some point in the subdivision review process, any proposed plat that includes proposed dedications of streets, parks, easements or other public lands must go before the governing body for review.

Checklist for Reviewing Preliminary or Final Plats		
Question	**Yes/No**	**Notes**
Do the lots in the proposed subdivision conform to the dimensional standards for lots in the applicable zoning district(s)?		
Can each of the proposed lots be used for a use that is lawful under the applicable zoning district?		
Will each lot in the proposed subdivision have legal access to the public road system, either through frontage on a public road or over an easement or private road [if easements and private roads are allowed for access under the local ordinance]?		
Has the Illinois Department of Transportation approved any proposed access to state roads or highways from the proposed plat?		
Has the local transportation department that maintains roads to which the subdivision connect approved the proposed plat?		
Does the proposed layout of public streets conform to applicable provisions of an adopted comprehensive plan?		
Does the proposed layout of streets, lots and blocks conform to applicable provisions of the subdivision ordinance or regulation and any supporting technical manuals or standards?		
Does the proposed system of stormwater management conform to applicable provisions of the subdivision ordinance or regulation and any supporting technical manuals or standards?		
If any lots in the proposed plat will depend on septic tanks for wastewater disposal, has the county health department approved the plat?		

Does the subdivision proposal include arrangements for water supply and wastewater treatment that conform to applicable standards of local ordinances and state law?		
Does the subdivision proposal include proposed dedications of land for park and/or school purposes to the extent required by the local ordinance or regulation?		
Does the subdivision proposal include street trees, street signs and other requirements of the local ordinance or regulations not mentioned above?		
If the proposed subdivision will be built in phases, does the preliminary plat or plan include a phasing schedule?		
If the answer to the previous question is "yes," does the phasing schedule include a proportionate share of public improvements or amenities in each phase?		
If roads, stormwater control or other facilities that are important to the municipality or county will be maintained by a private entity, does the application include adequate information to assure the municipality or county that the services to be provided through such facilities are financially sustainable?		

If the answer to any one of these questions is "no," the proposed plat should either be denied or approved on the condition that the deficiency be corrected. If the answer to each of the questions is "yes," the plat must be approved.

After the preliminary plan or plat has been approved, it is both common and a good practice to delegate the review of the final plat to staff, with engineers taking the lead review responsibility. The first question on the checklist for such a staff review should be, "Is this proposed final plat consistent with a preliminary plat approved by the appropriate authority and any conditions imposed on such approval?" If the answer is "no," the final plat should be rejected with a recommendation to the applicant to seek approval of an amended preliminary plat or plan. If the answer to the question is "yes," the staff can proceed with what is for the most part a technical review.

Subdivision review involves at least one chicken-and-egg question. A developer will be reluctant to spend money installing roads, sidewalks and utilities in a project before the project has been completely approved by the local government; on the other hand, a local government will be equally reluctant to grant final approval to such a project unless it is sure that those facilities have been installed – or will be installed. Thus, at this stage, it is common for a local government and a subdivider to enter into a "subdivision improvements agreement" or comparable contract, under which the subdivider agrees to complete specific, required improvements. The subdivider's performance under such an agreement is sometimes secured by a bond or letter of credit, although the real estate recession of 2009 and 2010

made it more difficult for many developers to obtain such bonds. On the date of publication of this handbook, it is unclear to what extent the insurance companies will re-enter that part of the bond market as the economy improves; it is thus difficult to make firm recommendations about whether local governments that want to encourage responsible development should require such bonds.

5. Difficult Legal Issues

Many land-use decisions are relatively routine. Even those that are politically complex (such as neighborhood opposition to new development) are not legally complicated. Some land-use issues, however, raise complex legal issues. The purpose of this section is to identify some of those issues and to explain the legal principles that govern such decisions. The material in this section provides only an overview of these issues, but it also provides suggestions on when it may be desirable to obtain formal legal advice to deal with a particular situation.

Exactions, including Dedication Requirements and Impact Fees

Overview

The Illinois law on this subject is complex and not entirely clear. The leading decision of the Illinois Supreme Court on this issue is *Pioneer Trust Savings Bank v. Village of Mount Prospect*,[193] in which the court famously held that Mount Prospect's requirements for land dedications were unconstitutional because:

> this record does not establish that the need for recreational and educational facilities in the event that said subdivision plat is permitted to be filed, is one that is specifically and uniquely attributable to the addition of the subdivision and which should be cast upon the subdivider as his sole financial burden.[194]

A narrow reading of that language would suggest that no requirement for dedications for facilities that might benefit or be affected by multiple subdivisions would ever be constitutional in Illinois. The Illinois courts have not read it so narrowly and have in fact approved a number of such dedication requirements.

Two cases decided by the Supreme Court have addressed the constitutionality of and provided guidelines for the field of exactions law. *Nollan v. California Coastal Commission*[195] involved an application by the Nollans to tear down a beachfront bungalow and replace it with a larger single-family home. The home sat on an existing lot and the proposal conformed with local zoning. The local government was always willing to approve building on the site, but such construction also required approval from the Coastal Commission. The Commission granted a permit only on the condition that the Nollans dedicate a trail easement across the beach front, providing an important link in a larger trail system that ultimately provided access to a beachfront park. The Court found that the proposed exaction amounted to an unconstitutional taking and in the process established the requirement that there be a "rational nexus" between the impact of a proposed development and any exaction imposed upon it. In this case, it found no such nexus, because there was no evidence that the replacement of one single-family home with a larger one would increase the demand for trails in the area.

Seven years later, in *Dolan v. City of Tigard*[196], the Court expanded the rational nexus test, adding a "rough proportionality" test to determine whether a builder exaction exceeds that which is constitutionally permissible. Dolan owned a plumbing and electrical supply store, which Dolan wanted to expand. The City Planning Commission granted her application subject to the imposition of two conditions: first, that she dedicate a portion of the property for improvement of a storm drainage system and, second, that she also dedicate a strip of land for use as a pedestrian/bicycle pathway. The Oregon courts had ruled for the city, applying a "reasonable relationship" test. The United States Supreme Court reversed. The Court extended its taking analysis beyond the *Nollan* requirement that there be a rational nexus between the impacts of a proposed development and any exaction imposed on it. Here, the Court considered "the required degree of connection between the exactions and the projected impact of the proposed development"[197], a question that had not been reached in *Nollan* because the California Coastal Commission's requirement that the property owner dedicate a lateral beach easement had failed the rational nexus test.

Fourteen years later, the Illinois Supreme Court seemed to modify its position. In a relatively little-noted case, the court dealt with a large-scale development proposal.[198] The zoning board had reviewed it and commented to the county board that it was "totally out of character" with the area and that it would "place a substantial burden" on the affected school district.[199] In response, the developer agreed to provide "houses as temporary school facilities" and then to build a school to be leased to the school district for up to five years at one dollar per year, with the school district then to buy the school at 80 percent of its cost;[200] in reliance on those promises, the county approved the proposed development. The developer encountered financial problems; the county renegotiated and agreed to some up-front payments plus a fee of $200 per house to be used for school construction. The developer still failed to perform. The county sued, and the developer challenged the authority of the county to enforce the conditions. The county argued that the state high court should move away from its "specifically and uniquely attributable test" toward one involving a broader view of the impact of new development. The county won the suit, but the court rejected that argument, saying:

> We consider such reexamination unnecessary here, however, for in our opinion the conditions imposed in this case were designed to alleviate a school problem specifically and uniquely attributable to defendant's activity.[201]

After the U.S. Supreme Court decision in *Nollan* but before its decision in *Dolan,* the Illinois legislature attempted to blend the seemingly more government-friendly approach of the U.S. Supreme Court with the more narrow one of the state high court in enabling legislation for highway impact fees that specified:

> An impact fee payable by a developer shall not exceed a proportionate share of costs incurred by a unit of local government which are specifically and uniquely attributable to the new development paying the fee in providing road improvements, but may be used to cover costs associated with the surveying of the service area, with the acquisition of land and rights-of-way, with engineering and planning costs, and with all other costs which are directly related to the

improvement, expansion, enlargement or construction of roads, streets or highways within the service area or areas as designated in the comprehensive road improvement plan.[202]

Note the blending of the idea of "proportionate share" with the "specifically and uniquely attributable language from the state high court's opinion in *Pioneer Trust*. The legislature further elaborated on the concept in the definitions in the act:

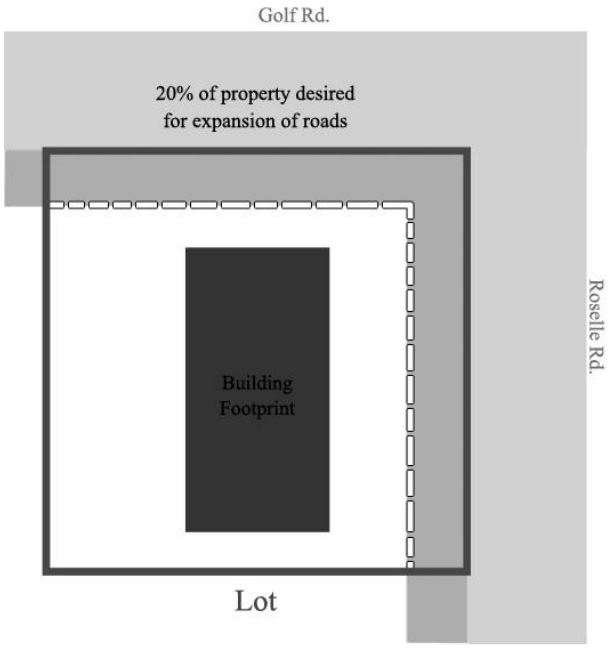
> "'Specifically and uniquely attributable' means that a new development creates the need, or an identifiable portion of the need, for additional capacity to be provided by a road improvement. Each new development paying impact fees used to fund a road improvement must receive a direct and material benefit from the road improvement constructed with the impact fees paid. The need for road improvements funded by impact fees shall be based upon generally accepted traffic engineering practices as assignable to the new development paying the fees."[203]

In a 1995 decision, the Illinois Supreme Court upheld this statutory approach as constitutional:

> We believe that this language comports with the dictates of *Pioneer Trust,* wherein this court indicated that an exaction which required a developer to provide for improvements "'which are required by [his] activity,'" would be permissible, but one which required him to provide for improvements made necessary by "'the total activity of the community,'" would be forbidden.[204]

In more recent cases, Illinois courts have:

- Struck down as unconstitutional a Long Grove ordinance that required the payment of impact fees "for the benefit of the school districts and for the acquisition, maintenance, preservation, and operation of open space in the Village" because it provided funding for operations and maintenance;[205]
- Struck down as unconstitutional a site specific dedication requirement that would have taken about 20 percent of an oil company's corner site to help the city and state widen two already-congested roads and provide additional land at the corner – the land-use proposal was to remove an existing service station and replace it with a convenience store, still selling gas (see illustration);[206]
- Struck down as unconstitutional a village ordinance that required that developers



connecting to sewer lines along specified roads had to post a deposit "to cover the cost of installing streets, curbs, gutters, sidewalks, stormwater sewers, sanitary sewers and water mains which have not been installed by the builder or developer, but are required by the Village to be installed at a future date;"[207]

- Upheld a local ordinance that had resulted in a requirement that a subdivider pay $37,630 in fees to be used for the future acquisition of a school site and to dedicate a lot in the subdivision to be used for park purposes;[208]
- Upheld an unusual, project-specific exaction in which the local government made the contribution of $100 per dwelling unit toward the cost of constructing a cultural center a condition of approving a large planned unit development project.[209]

Summary and Analysis

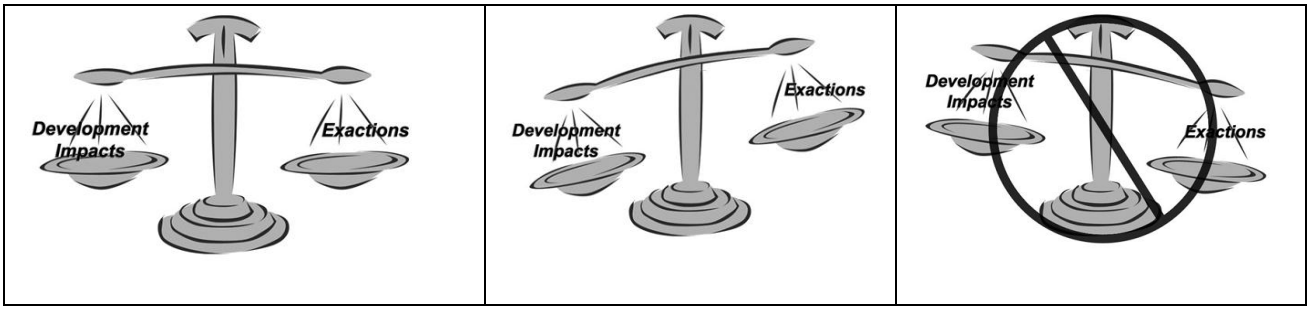
The following guidelines should help local decision-makers, although these guidelines as well as decisions in individual cases involving exactions should be carefully reviewed with counsel:

Street or road impact fees carefully modeled on the most current enabling legislation are likely to be upheld;

It appears that the Illinois courts will accept exactions for parks and schools that are "roughly proportional" to the impact of a proposed development (the *Nollan/Dolan* standard) as imposing only burdens that are "uniquely and specifically attributable to" that development (the Illinois standard from *Pioneer Trust*);

Negotiated or project-specific exactions are at greater risk of invalidation than those based on uniformly applied standards set forth in local ordinances; and

Ordinances adopting exaction requirements should, like sign ordinances and those regulating sex businesses, include a legislative predicate in the form of a report or detailed findings that explain how the fees or land will be used and how the burden imposed on each developer is "proportional" to the impacts of the proposed development and thus within the apparent current construction of the "uniquely and specifically attributable" standard.



Zoning Regulation of Religious Institutions

The free exercise of religion is guaranteed by the First Amendment to the United States Constitution. The Illinois Constitution also provides:

> The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed, and no person shall be denied any civil or political right, privilege or capacity, on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State. No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship.[210]

These provisions, together with the equal protection provisions of the United States[211] and Illinois Constitutions[212] have been construed to protect religious land uses from discriminatory treatment.[213] Congress has chosen to supplement the constitutional mandates with the "Religious Land Use and Institutionalized Persons Act,[214] adopted in 2000 and commonly referred to by its awkward acronym, "RLUIPA."

Illinois has adopted its own "Religious Freedom Restoration Act."[215] It provides a broad definition of what it protects:

> "Exercise of religion" means an act or refusal to act that is substantially motivated by religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief.[216]

It then provides this broad protection:

> Government may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that application of the burden to the person (i) is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling governmental interest.[217]

The act provides for judicial relief[218] and essentially overrides home-rule authority as it may apply to regulating religious institutions.[219] The act further provides:

> If an ordinance, standard, rule, or regulation enacted under the authority of this Section or under the authority of a unit of local government's home rule powers prohibits, restricts, narrows, or burdens a person's exercise of religion or permits the prohibition, restriction, narrowing, or burdening of a person's exercise of religion, that ordinance, standard, rule, or regulation is void and unenforceable as to that person if it (i) is not in furtherance of a compelling governmental interest and (ii) is not the least restrictive means of furthering that governmental interest.[220]

In a key test of the state act, a state appellate court was moderate in its construction of the act. A church filed an application for site plan review for a substantial expansion of its facilities. The church was allowed in the zoning district under a special use permit, but it was found by the zoning administrator to be "non-complying" because it did not meet the ordinance requirement that it front on an arterial street. The city thus determined that the church could not simply apply for a site plan approval but required that the church apply for a new special use permit. The church challenged the procedural decision but also proceeded with a special use permit application. After public hearings and extensive discussion, the planning commission recommended approval of the special use permit application; the city council, after discussion, denied the special use permit application but approved a staff recommendation that waived the city's off-street parking requirement and that responded to neighborhood concerns by eliminating a proposed parking lot and driveway from the expansion and moved a proposed covered drop-off.[221] In a legal challenge to both decisions, the Illinois court of appeals in a thoughtful opinion affirmed the decision of the trial court upholding the city's refusal to consider the church's application for site plan review.[222] It rejected the church's argument that the refusal to allow it to use the site plan review process imposed a substantial burden, finding instead that the effect of the local ordinance was simply to provide an expedited review for "complying" churches and then to treat the application from a non-complying church the same as it would treat applications from other places of public assembly. On the issue of the denial of the special use permit, the appellate court remanded the case to the trial court for further consideration, citing the procedural confusion and concerns that arose from earlier court decisions and the legislature's attempt to override them (see discussion beginning at page 38).

An important facial distinction between the state act and the federal one is that the state act includes "laws of general applicability" among those that may result in a "substantial burden," while the federal act applies the "substantial burden" test only where a religious institution is subject to a review process in which the local government can "make, individualized assessments of the proposed uses for the property involved." [223] In other words, any local process that requires a special use permit or a variation for most or all religious institutions in the community may be particularly hard to defend. In a handful of decisions applying the "substantial burden" test, courts appear not to attach much significance to the distinction. In a challenge to an Elgin ordinance that required a church to obtain a special use permit to add a homeless shelter to its facilities, a federal court rejected claims that the requirement imposed a "substantial burden" on the church under either RLUIPA or the state act, noting that the special use permit requirement was "facially neutral" and of general applicability:

> Here the harm to Family Life's religious exercise was no more than incidental to Elgin's neutral land use ordinances. Elgin legitimately seeks to control what types of operations populate its city center. No evidence exists that it seeks to exclude religious organizations (either generally or Family Life in particular) because of their nature. Instead it simply seeks oversight of the existence and operation of homeless shelters as such.[224]

Similarly, the Seventh Circuit refused to find a "substantial burden" under state or federal law where a local zoning ordinance prohibited churches in all industrial zoning districts:

> The ban on churches in the industrial zone cannot in itself constitute a substantial burden on religion, because then every zoning ordinance that didn't permit churches everywhere would be a prima facie violation of RLUIPA.[225]

This brief section does not contain a complete analysis of this complex area of the law. Without citations, here are some general guidelines to consider:

Do not:

- Ban all religious uses from the community;
- Require special use permits for all religious institutions in the community; or
- Distinguish among various places of worship, such as synagogues, churches, temples, or mosques.

You may safely enforce provisions of the zoning ordinance that:

- Ban religious institutions from some zoning districts if you allow them in others;
- Require that religious institutions conform to setback requirements, parking and landscaping standards, and other broadly applicable site development standards; or
- Limit the accessory uses at a religious institution (such as gyms, bowling alleys, homeless shelters, schools), particularly in residential zoning districts.

You should consult with counsel before:

- Denying a special use permit or other discretionary review to a religious institution; [226]
- Litigating with a religious institution over height limits as they apply to steeples and other adornments; [227]
- Allowing places of public assembly such as clubs, fraternal organizations or community centers in a residential or other zoning district that does not allow religious institutions;[228] or
- Denying a religious institution a permit to add an accessory use where the local ordinance does not clearly address the issue.[229]

Regulation of Signs and Billboards

Signs and billboards, like religious institutions, are protected by the First Amendment to the U.S. Constitution. Signs expressing opinions have always been protected, and still are entitled to the most constitutional protection.[230] Since the 1970s, the Supreme Court has recognized that commercial speech

is also protected.[231] That said, courts have long recognized that signs are a legitimate subject for local regulation. [232]

The constitutional rules affecting sign regulation are simple in concept, but many local sign ordinances violate several of them. The basic rule is this:

> Content-neutral regulations of the size, height, number, location, and lighting of signs will generally be upheld.

These types of regulation are often referred to as "time, place, and manner" standards. Where sign regulations stumble into a constitutional grey area is where it becomes necessary to read a sign to determine whether it is legal or not. The ideal sign ordinance could be enforced by an immigrant who spoke no English at all but who is adept with measuring devices.

Many local sign ordinances, however, make extensive content-based distinctions among signs. One distinction is entirely defensible, and that is the distinction between "commercial" and "non-commercial" signs.[233] Many local sign ordinances have specific rules for:

- Real estate signs;
- "Political" signs;
- Construction signs;
- "No parking" signs;
- "Business identification" signs;
- "Gas price" signs;
- Movie marquees; and
- many others.

The problem with these distinctions is that they require a person to read the sign in order to know what regulations apply to it, thus they are not content-neutral.

A majority of local sign ordinances define or describe billboards as "off-premise" signs, which is a content-based distinction. For example roadside billboards displaying beer advertisements are not associated with the location (aka "premises") on which they are situated. To date, however, the courts have recognized off-premise **commercial** signs as a legitimate regulatory distinction.[234] (A content-neutral definition of a billboard may be, for example,"very large signs for which the business purpose is renting advertising space.") The apparent corollary of that, however, is problematic – specifically allowing "on-premise" or "on-premise commercial" signs can have the effect of discriminating against non-commercial messages. such as "Give to the United Way" or "Support Honest Government." Most

other content-based distinctions are at least potentially problematic, and courts have treated these distinctions in varying and often contradictory ways

Here are some practical tips for legally sound sign regulations:

Your sign or zoning ordinance may safely:

- Regulate the height, size and number of signs;
- Regulate lighting, including limits on intensity, flashing and other effects;
- Regulate whether the message on a sign changes and, if it does, how frequently;
- Have different rules for signs in different zoning districts;
- Have different rules for signs based on the size of the lot, building or wall on which a sign is located;
- Treat commercial signs more restrictively than non-commercial ones;
- Exempt from application signs that are inside buildings and not "legible" from other property or from a public right-of-way;
- Allow small, unlighted, non-commercial signs without a permit (to provide for "no trespassing," "no parking," and similar signs);
- Limit the number or size of flags or the height of flagpoles;[235]
- Limit the total number of signs on a site, including those that are non-commercial.

Your sign ordinance may be subject to successful challenge if it:

- Requires special-use permits or another discretionary review process for signs;[236]
- Severely limits the number of non-commercial signs, particularly at a residence;[237]
- Allows for sign variations (although sign variations for height, based on topographic problems, are usually defensible);
- Treats state or federal flags more liberally than other non-commercial flags[238] (but restrictive treatment of flags with commercial messages is probably defensible);
- Requires permits for non-commercial signs[239];
- Provides special treatment for "on-premise" or "on-site" signs;[240]

- Imposes time limits "before the election" on non-commercial signs (requirements that signs be removed within a reasonable period after the occurrence of an event to which they relate are probably defensible);[241]

- Deals with non-commercial signs by calling them "political" signs or "campaign" signs (where does "I love the U.S.A." or "I hate cell phones" go?);[242]

You Should Consult with Counsel before:

- Denying a special use permit or other discretionary review for a sign; [243]

- Litigating with anyone over a sign dispute if the content of the sign is in any way relevant to the dispute;

- Adding an exemption, exception or other provision to your sign ordinance if it refers to sign content.[244]

Regulation of Sexually Oriented Businesses

Like religious institutions and signs, many forms of communication that are used in the adult industry are protected by the First Amendment. Obscene materials are not one of the protected forms. [245] Illinois has defined obscene material to be:

> Any material or performance is **obscene** if: (1) the average person, applying contemporary adult community standards, would find that, taken as a whole, it appeals to the prurient interest; and (2) the average person, applying contemporary adult community standards, would find that it depicts or describes, in a patently offensive way, ultimate sexual acts or sadomasochistic sexual acts, whether normal or perverted, actual or simulated, or masturbation, excretory functions or lewd exhibition of the genitals; and (3) taken as a whole, it lacks serious literary, artistic, political or scientific value.[246]

The language in the statute is consistent with an important decision of the U.S. Supreme Court, also defining obscenity.[247] Proving that something is obscene under this test is difficult, and obscenity convictions are not common.[248] As a result, there are a number of books, videos, films,and live performances that may offend a considerable number of people that have not been found to be obscene and that must thus be considered lawful under local zoning ordinances.

The First Amendment protects non-obscene:

> Motion pictures (a protection that appears to extend to the theater building, which is an integral part of presenting the medium);[249]
>
> Videos and DVDs;[250]
>
> Live performances.[251]

A local government cannot entirely ban such uses and activities from the community.[252] Rather court decisions have been interpreted to require that a local government's zoning scheme must leave a reasonable number of sites available for such businesses.[253] Subject to those restrictions, however, a local government may use zoning to specify in what districts such uses are allowed, and may require that they be kept a specified distance from sensitive uses such as religious residential neighborhoods, religious institutions and elementary schools.[254] Local ordinances may also use separation requirements between such businesses to limit the cumulative effects that may occur from a concentration of such businesses.[255]

Local governments can also prohibit providing adult entertainment in small closed booths,[256] which may serve as venues for sexual activity. Massage, including nude massage, is not protected by the First Amendment,[257] and communities thus are not required to provide sites for such establishments. A local government may prohibit the presentation of nude or erotic dancing in an establishment which serves alcohol.[258]

As with signs, local permitting processes that involve discretion are risky and often subject to successful constitutional challenge.[259] Local permitting processes should contain objective criteria and tight timelines during which a decision will be rendered.[260]

Local governments that do not specifically deal with adult entertainment or other sexually oriented businesses in their zoning ordinances often face crises when an adult operator applies for a permit or opens a store or cabaret. In the absence of definitions and specific provisions dealing with sexually oriented businesses, an adult bookstore is simply a "book store"[261] or "retail store" under the local ordinance, an adult movie theater is simply a movie theater, and a strip club is simply a "cabaret" or "bar."[262] Since about 2000, the adult industry has increasingly located its businesses in locations in small cities, towns, and rural counties that lack adequate regulations to control their location. Thus it is important for most local governments to update their regulations to allow but restrict these businesses.

Because it is virtually impossible to regulate sexually oriented businesses without defining them by reference to the content of media or performances, such regulations are typically not in a pure sense "content neutral." The courts, however, led by the Supreme Court, have held that where the purpose of the ordinance is to mitigate "negative secondary effects" of such businesses, the regulations will be treated as though they were content-neutral; the leading decision on that point is *Playtime Theaters, Inc., v. City of Renton.*[263] Although mere recital of apparent secondary effects was at times enough to support the adoption of zoning restrictions on sex businesses in the 1980s or even 1990s, today the

demands are more rigorous. An important plurality opinion of the Supreme Court in *City of Los Angeles v. Alameda Books* said on this issue:

> In *Renton*… we held that a municipality may rely on any evidence that is "reasonably believed to be relevant" for demonstrating a connection between speech and a substantial, independent government interest… This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in Renton. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.[264]

The Seventh Circuit, which is the federal appeals circuit that includes Illinois, has elaborated upon that point, saying:

> *Alameda Books* does not require a court to re-weigh the evidence considered by a legislative body, nor does it empower a court to substitute its judgment in regards to whether a regulation will best serve a community, so long as the regulatory body has satisfied the *Renton* requirement that it consider evidence "reasonably believed to be relevant to the problem" addressed.[265]

Note: This section of the handbook provides only a brief overview of an extremely complex area of the law. Adopting or updating a zoning ordinance to address sexually oriented businesses is a task that requires the advice of counsel and, in most cases, the assistance of experts to help study the issue.[266] The sole purpose of this section is to alert local officials to the issues that arise in addressing the issue.

6. Local Planning Checkup

A Comprehensive Plan Checkup – Is it Time to Plan Again?

Overview

A general rule is that a new comprehensive plan should be prepared about every 15 years for a community that is growing or changing slowly and every 8 to 10 years for a community that is changing or growing rapidly. Other factors are also important, however, and the checklist below provides a diagnostic tool to assess the need to update a plan in a particular community.

Every community should also engage in periodic informal reviews of an adopted comprehensive plan – every year for a community that is changing rapidly and every couple of years for a community that is changing more slowly. The review process should include elected officials and members of the planning commission, zoning board and/or other local review body meeting together in an informal setting; it will be a "public meeting" under Illinois law but should not be in the usual meeting room and should not be a public hearing. Staff or an outside facilitator should establish a process for the review.

One good technique for a review is to pick out half a dozen decisions in the previous year that have been controversial or on which the elected officials and another local review board have disagreed; the discussion at the review session should then focus not on who was "right" but on whether the plan provides adequate guidance to the community in addressing such issues. Each person participating in the work session should also come prepared with comments, questions, and concerns.

Such a work session may lead to one of four results:

- Confirmation that the plan is still a good representation of what the community as a whole wants for the future.
- Minor proposed policy or wording changes that can be agreed upon by participants in the work session informally, for formal adoption at subsequent meetings.
- Identification of a small number of substantive issues or geographic areas for which the plan should be updated and establishment of a process for doing so.
- Agreement that there are major deficiencies in the plan and that it should be subject to a major update.

Plan Checkup Questions	Score
Are copies of the plan available to decision-makers? If no, add 20 points.	
Does the plan include 1) goals and/or objectives; 2) policies or strategies for implementation; 3) specific provisions at least for a) future land-use; b) transportation systems (for all travel modes); c) housing; d) natural resources, including parks, recreation and open space; e) public facilities including utilities; f) economic development; and g) other issues of particular local importance. Add 10 points for any missing item, up to a total of 30 points.	

If the plan is for a municipality, does it include the entire geographic area now under the regulatory control of the municipality, as well as land that the municipality may consider for annexation? If the answer is no, add 10 points.	
How old is the plan? Add one point for each year of age.	
What percentage increase in population has occurred in your community since the plan was adopted? Add one point for each two percent increase.	
How many times did the plan commission refer to the plan at its last meeting? Subtract one point for each case or major issue for which the plan was discussed.	
How many current members of the plan commission and the governing body were in office when the plan was prepared and adopted? Subtract one point for each person, up to 10 points.	
Is the plan consistent with and/or coordinated with the CMAP GO TO 2040 Plan? If the answer is no, add 10 points.	
Does the plan incorporate the livability principles of the GO TO 2040 Plan? If the answer is "no," add 10 more points.	
Is the plan consistent with and/or coordinated with expansion plans of school districts serving the area? If the answer is no, add 5 points.	
If there is a "future land use map," compare it to the zoning for areas of the community that have developed since the plan was adopted. For every 20 acres where the future land-use map and the current zoning are substantially different, add one point.	
Are copies of the plan available to the public for free or at a cost of less than $5? If yes, subtract 5 points.	
Is the plan available on-line? If yes, subtract 10 points.	
How long is the plan? Add one point for every 10 pages above 50 pages, not counting technical supplements and appendices.	
Has a major industry in the community (employing 500 or more people or more than 10 percent of the local labor force) closed since the plan was adopted? If yes, add 10 points.	
Has a major industry moved to the community since the plan was adopted? If yes, add 10 points.	
If the plan is for a county, does it include specific plans for different types of agricultural and other rural land uses, or are all rural and agricultural uses simply shown in one, large, undifferentiated future land-use? If there are not specific plans for different types of rural and agricultural uses, add 15 points.	
If the plan is a regional plan that has been adopted by some municipalities, as well as the county, subtract 5 points for each local government that has adopted it.	
TOTAL	

Scoring

Total score	**Diagnosis**
Below 0	Consider nominating your community for a planning award – and keep up the good work.
0-15	Your community is in good shape. Schedule a review session within the next 12 months.
15-29	It is time for a serious review session; schedule it within the next three months.
30-39	It is time to update the plan.
40 or more	Your need for a new plan is critical.

Adapted from Eric Damian Kelly. *Sensible Tools Handbook for Indiana: A Guidance for Public Officials, Professionals and Citizens Interested in Applying Sensible Growth.* Northeast Indiana Regional Planning Commission. 2007.

Updating the Zoning Ordinance

Overview

When the first zoning ordinances were adopted in Illinois, candleworks, saddleries, cooperages and ice houses were important uses; video rental stores, internet cafes and drive-through restaurants were entirely unknown. Most zoning ordinances have been updated to address those issues, but the world – and the use of land – continues to change, and it is important to update a zoning ordinance occasionally to address those changes. Chicago completed a major update of its zoning ordinance early in the 21st century, incorporating not only new land uses but also new concepts of how to manage urban form and streetscapes.

How can public officials tell when it is time to update a zoning ordinance? The following checklist suggests some criteria to consider. Note that major updates or rewrites are necessary more frequently in rapidly growing communities than in those that remain relatively stable; communities with slow growth and limited change may be able to get by with updates and technical amendments. When reviewing and/or updating a zoning ordinance, the review should include such related ordinances as those regulating site plans, subdivisions, signs and billboards, and impact fees and other exactions.

Zoning Ordinance Checkup Questions	Score
How long has it been since the local government had a complete review of the zoning ordinance or adopted a new ordinance? Add 1 point for each year..	
Has the zoning ordinance been updated since the local government adopted a new comprehensive plan? If the answer is "no," add 10 points	
Does the community have a standard list of "conditions" that it imposes on all or most development applications? Add 1 point for each such condition, because those standard conditions should be incorporated into the ordinance?	
Does the local government frequently grant variations to allow essentially the same thing? Add 1 point for each type of such variation, because the ordinance could be modified simply to allow those.	
Have local officials approved developments that they did want to approve because staff or counsel advised them that, under the current ordinance, there was no choice but to approve them? Add 1 point for each such development approval or similar decision in the last two years.	
Does the ordinance expressly address sexually oriented businesses? If the answer is "no," add 5 points.	
Does the ordinance impose time limits on "political" signs? If the answer is "yes," add 5 points.	
Does the ordinance use the term "church" to refer to religious institutions? If the answer is "yes," add 5 points.	
Has the local government been sued over a zoning or other land-use decision in the last five years? Add 1 point for each law suit plus an additional 10 points for each suit decided adversely to the city or settled through the payment of cash or through granting a major development approval.	
Can you, as a public official, make sense of most parts of the ordinance? If the answer is "no," add 20 points.	
Do new developments in the community have the character that the community expects? If the answer is "no," add 10 points.	

Scoring

Total score	Diagnosis
Below 0	Consider nominating your community for a planning award – and keep up the good work.
0-24	Your community is in good shape. Schedule a review session within the next 12 months.
25-49	It is time for a serious review session; schedule it within the next three months; at least some technical amendments should be adopted within the next year.
50-69	It is time to update the ordinances.
40 or more	Your need for a major update of the ordinances is critical.

Some Suggestions for Ordinance Updates

Every ordinance update should begin with a thorough review of the ordinance to ensure that it is consistent with state law and with the adopted comprehensive plan and that it is internally consistent. These are supplemental suggestions:

1. Signs and billboards. See section on Regulation of Signs and Billboards and incorporate updates to address issues identified there.

2. Sexually oriented businesses. Specifically address sexually oriented businesses in the ordinance, allowing lawful ones in some locations within the community. See section on Regulation of Sexually Oriented Businesses and incorporate updates to address issues identified there.

3. Religious institutions. Replace the word "church" with "religious institution" or "house of worship." Review all zoning districts (including residential ones) to be certain that religious institutions are treated no more restrictively than other places of public assembly, such as theaters, fraternal organizations, community centers and club houses. See section on Zoning Regulation of Religious Institutions and incorporate other suggestions from that section.

4. Dedication requirements. If the zoning or subdivision ordinance includes requirements for dedications or parks or school sites or payments of fees in lieu of such dedications, see section on Exactions, including Dedication Requirements and Impact Fees and incorporate suggestions from that section; impact fee ordinances should be updated separately.

5. Variations. Review minutes from the last 12 to 24 months of decisions on variations. If there are variations that are commonly granted and that make sense, amend the ordinance to allow them – possibly subject to specific conditions.

6. Use Variations. Consider prohibiting or severely limiting the availability of use variations.

7. Conditions. Review minutes on all land-use decisions for the last 12 to 24 months. If there are conditions that are commonly imposed on such decisions, consider adding them to the "standards" provisions of ordinances.

8. Special Uses. Check the ordinance to see if it has specific standards for common special-use requests; if it does not, review cases from approving such proposals, develop standards from "conditions" imposed on such cases and add those standards to ordinance.

9. Notice. Update the notice requirements to include notice to nearby local governments (see discussion in section on [Notice] Notice: How and to Whom Given).

10. Hearings. Specify the procedures and rights of parties at all land-use hearings. Those before the board of appeals are controlled by state law, but it is important to have local ordinances (or accessible by-laws) addressing these issues for hearings before the planning commission, governing body, committee or other review body.

11. Review of GO TO 2040. Communities should review GO TO 2040 to identify additional issues that could be included within the zoning ordinance to advance the regional plan's implementation. In general, these issues should be identified and included first within the community's comprehensive plan, and then consistent treatment should be provided in the zoning ordinance.

Endnotes

[1] § 60 ILCS 1/110-5(b).

[2] *Heidenreich v. Ronske*, 26 Ill. 2d 360, 362, 187 N.E.2d 261, 262-63 (1962).

[3] *Lindahl v. Des Plaines*, 210 Ill. App. 3d 281, 296, 568 N.E.2d 1306, 1316 (Ill. App. Ct. 1st Dist. 1991), citing and quoting *Rose v. Rosewell*, 163 Ill. App. 3d 646, 651, 516 N.E.2d 885, 888 (Ill. App. Ct. 1st Dist. 1987), which dealt with a county and, in turn, cited *Heidenreich*.

[4] Ill. Const. Art. VII, Sect. 6(b) provides "A home rule unit by referendum may elect not to be a home rule unit." According to the Illinois Association of County Board Members, "Will County voters elected to go to a county executive form without home rule in 1988." http://www.ilcounty.org/news/22-2.html (accessed Sept. 2010).

[5] Ill. Const. Art. VII, Sect. 6(a).

[6] Ill. Const. Art. VII, Sect. 6(i). The most extensive discussion of this provision in a court case came in *County of Cook v. John Sexton Contractors Co.*, 75 Ill. 2d 494, 507-08, 389 N.E.2d 553, 556 (1979). In that case, the court held that home-rule local governments had "concurrent" siting authority for sanitary landfills with the state agency but that non-home-rule local governments did not. It is an odd case to cite, because the legislature took action promptly to give non-home-rule local governments similar, concurrent authority over sanitary landfills. Pub. Act 82-682, discussed in *Town & Country Utils., Inc. v. Ill. Pollution Control Bd*., 225 Ill. 2d 103, 108, 866 N.E.2d 227, 230 (2007). However, the principles discussed in the case remain relevant to issues other than landfills, and the Illinois courts continue to cite this decision for its discussion of those principles. See, for example*, Schillerstrom Homes, Inc. v. City of Naperville*, 198 Ill. 2d 281, 762 N.E.2d 494 (2001).

[7] Johnny Bruce Co. v. Champaign, 24 Ill. App. 3d 900, 904, 321 N.E.2d 469, 472 (Ill. App. Ct. 4th Dist. 1974).

[8] *Hawthorne v. Vill. of Olympia Fields*, 204 Ill. 2d 243, 790 N.E.2d 832 (2003).

[9] *Scadron v. Des Plaines*, 153 Ill. 2d 164, 606 N.E.2d 1154 (1992).

[10] Ill. Const. Art. VII, Sect. 6(c).

[11] *Forestview Homeowners Asso. v. Cook,* 18 Ill. App. 3d 230, 238, 309 N.E.2d 763, 769, n. 3 (Ill. App. Ct. 1st Dist. 1974).

[12] § 65 ILCS 5/3.1-40-5.

[13] § 65 ILCS 5/3.1-40-30.

[14] § 65 ILCS 5/3.1-45-15.

[15] See, for example, this definition from the introductory provisions for the Illinois Municipal Code:

> (2) "Corporate authorities" means (a) the mayor and aldermen or similar body when the reference is to cities, (b) the president and trustees or similar body when the reference is to villages or incorporated

> towns, and (c) the council when the reference is to municipalities under the commission form of municipal government.

§ 65 ILCS 5/1-1-2(2).

[16] § 65 ILCS 5/1-2-1.

[17] Ill. Const. Art. VII, Sect. 3.

[18] For authority for this form of government, see § 55 ILCS 5/2-5004 and related sections.

[19] § 55 ILCS 5/5-12009 (counties); § 65 ILCS 5/11-13-3 (municipalities).

[20] § 55 ILCS 5/5-12009 (counties); § 65 ILCS 5/11-13-5 (municipalities). Note that the City of Chicago must assign this duty to the board of appeals and may not retain it for the governing body. § 65 ILCS 5/11-13-4.

[21] § 55 ILCS 5/5-12009 (counties).

[22] § 55 ILCS 5/5-12011 (counties); § 65 ILCS 5/11-13-3(f) (municipalities).

[23] § 65 ILCS 5/11-13-1.1

[24] § 65 ILCS 5/11-13-1.1

[25] § 55 ILCS 5/5-12009.5(e) (counties);

[26] § 55 ILCS 5/5-12009.5(a) (counties).

[27] § 55 ILCS 5/5-12009.5(b) and (d) (counties).

[28] § 55 ILCS 5/5-12007 (counties); § 65 ILCS 5/11-13-2 (municipalities).

[29] § 55 ILCS 5/5-12007 (counties); § 65 ILCS 5/11-13-2 (municipalities).

[30] § 65 ILCS 5/11-12-4.

[31] § 65 ILCS 5/11-12-5.

[32] § 65 ILCS 5/11-12-6.

[33] § 55 ILCS 5/5-14001.

34 § 55 ILCS 5/5-14001, which enables counties to create "regional planning commissions," says in part:

> The number of members of such commission, their method of appointment, and their power and authority in the making of such plan, shall be such as the county board may deem proper and not in conflict with law.

That language would suggest that the county board can empower the commission to "adopt" the plan. The very next sentence, however, begins, "Said Commission shall be a fact finding body…" That language would suggest that

it may not be a policy-making body but simply a fact finder. In addition, a separate section, § 55 ILCS 5/5-14006 requires adoption of a plan by the county board before it is effective; although this section uses the term "comprehensive plan," it shifts to the word "official plan" focusing on "public improvements." Ideally a comprehensive plan deals with public improvements as well as with private land-use. Thus, prudent and good practice for counties would suggest that a plan proposed by a planning commission is a recommendation to the county board, and that it becomes effective upon adoption by the county board.

[35] *Wesemann v. La Grange Park*, 407 Ill. 81, 87-88, 94 N.E.2d 904, 908 (1950).

[36] *People ex rel. Klaeren v. Vill. of Lisle,* 202 Ill. 2d 164, 183, 781 N.E.2d 223 (2002). This is another case that will make some lawyers nervous, because the legislature essentially over-rode the decision in some respects. See *Condominium Ass'n of Commonwealth Plaza v. City of Chicago*, 399 Ill. App. 3d 32, 924 N.E.2d 596 (Ill. App. Ct. 1st Dist. 2010), *app. den*. 236 Ill. 2d 552 (2010), discussing the effect of §65 ILCS 5/11-13-25. The case and the statute amending it are discussed in more depth later in this handbook. Subsequent actions of the legislature appear to have changed this rule as it applies to special use permits, but it remains in effect for variations considered by the board of appeals. *Dunlap v. Village of Schaumburg*, 394 Ill. App. 3d 629, 915 N.E.2d 890 (Ill. App. Ct. 1st Dist. 2009), *app. den*. 235 Ill. 2d 587, 924 N.E.2d 455 (2010).

[37] *Dunlap v. Village of Schaumburg*, 394 Ill. App. 3d 629, 640, 915 N.E.2d 890, 899 (Ill. App. Ct. 1st Dist. 2009), *app. den*. 235 Ill. 2d 587, 924 N.E.2d 455 (2010).

[38] *Kleidon v. Hickory Hills*, 120 Ill. App. 3d 1043, 1049-50, 458 N.E.2d 931, 938 (Ill. App. Ct. 1st Dist. 1983).

[39] *Dunlap v. Village of Schaumburg,* 394 Ill. App. 3d 629, 640-41, 915 N.E.2d 890, 899-900 (Ill. App. Ct. 1st Dist. 2009), app. den. 235 Ill. 2d 587, 924 N.E.2d 455 (2010).

[40] *G.M. Enterprises v. Town of St. Joseph,* 350 F.3d 631, 639–40 (7th Cir., Wis. 2003), reh. den. 2004 U.S. App. LEXIS 2116 (7th Circ. 2004), cert. den. 543 U.S. 812, 125 S. Ct. 49, 160 L. Ed. 2d 16 (2004).

[41] *Loves Park v. Woodward Governor Co.,* 14 Ill. 2d 623, 625, 153 N.E.2d 560, 561 (1958).

[42] *First Nat'l Bank v. County of Lake,* 7 Ill. 2d 213, 225, 130 N.E.2d 267, 274 (1955).

[43] *First Nat'l Bank v. County of Lake*, 7 Ill. 2d 213, 225, 130 N.E.2d 267, 274 (1955).

[44] *La Salle Nat'l Bank v. County of Cook*, 12 Ill. 2d 40, 47, 145 N.E.2d 65, 69 (1957).

[45] S. Meck, gen. ed., *Growing Smart Legislative Guidebook: Model Statutes for Planning and the Management of Change,* 2002 Edition (Chicago: American Planning Association, 2002), 6-5. Chapter 6 of the Guidebook contains model legislation for regional planning. Available at: http://www.planning.org/growingsmart/guidebook/print/pdf/chapter6.pdf (accessed August 31, 2010).

[46] § 70 ILCS 1707/20 (b), (c) and (d).

[47] § 70 ILCS 1707/45.

[48] § 70 ILCS 1707/45.

[49] § 70 ILCS 1707/45, first paragraph.

[50] Chicago Metropolitan Association for Planning (CMAP), *GO TO 2040 Regional Comprehensive Plan* SEPTEMBER 2010 DRAFT (Chicago: CMAP, 2010), 373, *available at:* http://www.goto2040.org/plandocs/

[51] *Ibid.*, 376-377.

[52] GO TO 2040 contains a series of specific implementation measures in four categories: 1) Provide Funding and Financial Incentives; 2) Provide Technical Assistance and Build Local Capacity; 3) Support Intergovernmental Collaboration; and 4) Link Transit, Land Use, and Housing. *Ibid*., 63-67. For a discussion of a formal mechanism by which local governments agree to carry out proposals contained in regional plans, see Stuart Meck, gen. ed., *Growing Smart Legislative Guidebook: Model Statutes for Planning and the Management of Change*, 2002 edition (Chicago: American Planning Association, 2002), 6-81 to 6-84, Sec. 6-402, Regional Planning and Coordination Agreements, available at: http://www.huduser.org/portal/publications/polleg/growingsmart.html. This model legislation authorizes the regional planning agency to enter into written agreements with other governmental units as a means of implementing regional comprehensive plans and regional functional plans and monitoring the results of plans. These agreements may address the delegation of responsibility for different types of functional planning and the provision of urban services consistent with regional plans.

[53] Land use regulations, a proposed amendment to existing regulations, or a proposed land use action, such as a rezoning or subdivision, is consistent with the comprehensive plan when the regulations, amendment, or action: (a) furthers, or at least does not interfere with, the goals and policies contained in the local comprehensive plan; (b) is compatible with the proposed future land uses and densities and/or intensities contained in the local comprehensive plan; and (c) carries out, as applicable, any specific proposals for community facilities, including transportation facilities, other specific public actions, or actions proposed by nonprofit and for-profit organizations that are contained in the local comprehensive plan. Stuart Meck, The Legislative Requirement that Zoning and Land Use Controls Be Consistent with an Independently Adopted Local Comprehensive Plan: A Model Statute," 3 *Washington University Journal of Law & Policy* 295, 320-21 (2000).

[54] *Passalino v. City of Zion,* 237 Ill. 2d 118, 928 N.E.2d 814 (2009), as modified April 2010, citing and quoting Jones v. Flowers, 547 U.S. 220, 223, 164 L. Ed. 2d 415, 423, 126 S. Ct. 1708, 1712 (2006), quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 94 L. Ed. 865, 873, 70 S. Ct. 652, 656-57 (1950).

[55] See River Park v. City of Highland Park, 23 F.3d 164 (7th Cir. Ill. 1994), an Illinois case in which the federal appellate court said:

> We know from *Eastlake v. Forest City Enterprises, Inc.,* 426 U.S. 668, 49 L. Ed. 2d 132, 96 S. Ct. 2358 (1976), that the procedures "due" in zoning cases are minimal. Cities may elect to make zoning decisions through the political process--in *Eastlake,* by putting the question to a popular referendum, direct democracy with no hearings of any kind.

23 F.3d at 166-67. The case has a red "stop" sign in Shepard's Citations. That is accurate but does not relate to the point for which the case is cited here. It relates to the discussion in River Park of governmental immunity in Illinois. See *Village of Bloomingdale v. C.D.G. Enters*., 196 Ill. 2d 484, 498, 752 N.E.2d 1090, 1100-01, (2001)

[56] 237 Ill. 2d 118, 928 N.E.2d 814 (2009), as modified April 2010.

[57] See *River Park v. City of Highland Park,* 23 F.3d 164 (7th Cir. Ill. 1994), discussed immediately above.

[58] Civil Rights Act of 1871, ch. 22, 17 Stat. 13 1, was amended in 1979 by Pub. L. 96-170 §1. It is now codified at 42 U.S.C. 1983 and, as amended, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[59] *Lynch v. Household Finance Corp.,* 405 U.S. 538, 92 S. Ct. 1113, 31 L. Ed. 2d 424 (1972).

[60] 42 U.S.C. §1988.

[61] § 5 ILCS 120/1.

[62] § 5 ILCS 120/1.

[63] § 5 ILCS 120/2(11).

[64] 5 ILCS 120/2.01.

[65] 5 ILCS 120/7(a).

[66] 5 ILCS 120/2.02(a).

[67] 5 ILCS 120/2.02(b).

[68] *City of Charleston v. Witmer*, 304 Ill. App. 3d 386, 495, 709 N.E.2d 998, 1003 (Ill. App. Ct. 4th Dist. 1999); see, also *Kirk v. Village of Hillcrest*, 15 Ill. App. 3d 417, 304 N.E.2d 452 (1973), where the court applied the same principle to a legislative rezoning, saying:

> In as much as no notice of hearing was ever published appropriate to the originally requested changes in Subdivision 5, neither the zoning board of appeals nor the defendant had jurisdiction to proceed with hearings, recommendations or ordinance amendments pertinent to that Subdivision.

15 Ill. App. 3d at 417, 304 N.E.2d at 454.

[69] *Passalino v. City of Zion*, 237 Ill. 2d 118, 126, 928 N.E.2d 814, 819 (2009), as modified April 2010, citing and quoting *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 314-15, 94 L. Ed. 865, 873-74, 70 S. Ct. 652, 657 (1950).

[70] 237 Ill. 2d 118, 126, 928 N.E.2d 814, 819 (2009), as modified April 2010, citing and quoting *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 314-15, 94 L. Ed. 865, 873-74, 70 S. Ct. 652, 657 (1950). The two quoted sentences appeared in the reverse order in the US. Supreme Court's decision.

[71] § 55 ILCS 5/5-12009.

[72] Because zoning affects property and really does not relate to who owns it, this is not a particularly relevant requirement. However, the Illinois statute dealing with variations granted by counties requires very detailed information on the applicant:

> (2) whether or not the petitioner or applicant is acting for himself or in the capacity of agent, alter ego, or representative of a principal, and stating the name and address of the actual and true principal; (3) whether petitioner or applicant is a corporation, and if a corporation, the correct names and addresses of all officers and directors, and of all stockholders or shareholders owning any interest in excess of 20% of all outstanding stock of such corporation; (4) whether the petitioner or applicant, or his principal if other than applicant, is a business or entity doing business under an assumed name, and if so, the name and residence of all true and actual owners of such business or entity; (5) whether the petitioner or applicant is a partnership, joint venture, syndicate or an unincorporated voluntary association, and if so, the names and addresses of all partners, joint venturers, syndicate members or members of the unincorporated voluntary association;

§ 55 ILCS 5/5-12009. For other types of applications, it is customary to identify the applicant and, if the applicant is not the property owner, the property owner.

[73] Specific statutory requirements include:

> "not more than 30 nor less than 15 days before the hearing" for published notice of a hearing by a zoning commission on a proposed municipal zoning ordinance (§ 65 ILCS 5/11-13-2) or for a hearing by recommending commission or committee on proposed amendments (§ 65 ILCS 5/11-13-14);
>
> "not more than 30 nor less than 15 days before the hearing" for a hearing on a proposed variation in Chicago (§ 65 ILCS 5/11-13-6; the following section requires that an applicant for a variation or special use permit separately provide mailed notice to certain landowners "not less than 30 days" before filing the application. § 65 ILCS 5/11-13-7);
>
> "at least 15 days before the hearing" for published and mailed notice of a hearing on a proposed telecommunications facility under review by a county (§ 55 ILCS 5/5-12001.1);
>
> "at least 15 days in advance" of the hearing for a hearing by a zoning commission on a proposed zoning ordinance for a county (§ 55 ILCS 5/5-12007);
>
> "at least 15 days in advance" for published notice for a proposed zoning variation granted by a county (§ 55 ILCS 5/5-12009);
>
> "15 days' notice before the hearing" for a special use granted by a county (§ 55 ILCS 5/5-12009.5);
>
> "at least 15 days in advance" for a public hearing on an appeal considered by the board of appeals for a county (§ 55 ILCS 5/5-12010).

[74] § 65 ILCS 5/11-13-7 (applies to special use permit applications in municipalities with populations over 500,000; § 65 ILCS 5/11-13-6 applies to smaller municipalities and cross-references this section); § 65 ILCS 5/11-13-14 (applies to zoning text or map amendment in municipalities); § 55 ILCS 5/5-12009 (applies to variation in counties); § 55

ILCS 5/5-12009.5 (applies to special use permit applications in counties); § 55 ILCS 5/5-12014 (applies to zoning text or map amendments in counties).

[75] Other notice requirements in the statutes include these:

Regarding telecommunication facilities in municipalities:

> Notwithstanding any other provision of law to the contrary, at least 30 days prior to commencing construction of a new telecommunications facility within 1.5 miles of a municipality, the telecommunications carrier constructing the facility shall provide written notice of its intent to construct the facility. The notice shall include, but not be limited to, the following information: (i) the name, address, and telephone number of the company responsible for the construction of the facility and (ii) the address and telephone number of the governmental entity that issued the building permit for the telecommunications facility. The notice shall be provided in person, by overnight private courier, or by certified mail to all owners of property within 250 feet of the parcel in which the telecommunications carrier has a leasehold or ownership interest. For the purposes of this notice requirement, "owners" means those persons or entities identified from the authentic tax records of the county in which the telecommunications facility is to be located. If, after a bona fide effort by the telecommunications carrier to determine the owner and his or her address, the owner of the property on whom the notice must be served cannot be found at the owner's last known address, or if the mailed notice is returned because the owner cannot be found at the last known address, the notice requirement of this paragraph is deemed satisfied. For the purposes of this paragraph, "facility" means that term as it is defined in Section 5-12001.1 of the Counties Code [55 ILCS 5/5-12001.1].

§ 65 ILCS 5/11-13-1.

Regarding applications for variation or special use in municipalities with population greater than 500,000:

> In addition to the notice requirements otherwise provided for in this Division 13, in municipalities of 500,000 or more population, an applicant for variation or special use shall, not more than 30 days before filing an application for variation or special use with the board of appeals, serve written notice, either in person or by registered mail, return receipt requested, on the owners, as recorded in the office of the recorder of deeds or the registrar of titles of the county in which the property is located and as appears from the authentic tax records of such county, of all property within 250 feet in each direction of the location for which the variation or special use is requested; provided, the number of feet occupied by all public roads, streets, alleys and other public ways shall be excluded in computing the 250 feet requirement. The notice herein required shall contain the address of the location for which the variation or special use is requested, a brief statement of the nature of the requested variation or special use, the

> name and address of the legal and beneficial owner of the property for which the variation or special use is requested, a statement that the applicant intends to file an application for variation or special use and the approximate date on which the application will be filed. If, after a bona fide effort to determine such address by the applicant for variation or special use, the owner of the property on which the notice is served cannot be found at his or her last known address, or the mailed notice is returned because the owner cannot be found at the last known address, the notice requirements of this sub-section shall be deemed satisfied. In addition to serving the notice herein required, at the time of filing application for variation or special use, the applicant shall furnish to the board of appeals a complete list containing the names and last known addresses of the owners of the property required to be served, the method of service and the names and last known addresses of the owners of the service and the names and addresses of the persons so served. The applicant shall also furnish a written statement certifying that he or she has complied with the requirements of this subsection. The board of appeals shall hear no application for variation or special use unless the applicant for variation or special use furnishes the list and certificate herein required. The board of appeals shall, not more than 30 days nor less than 15 days before the hearing at which the application for variation or special use is to be considered, send written notice to the persons appearing on the list furnished by the applicant, which notice shall contain the time and place of the hearing, the address of the location for which the variation or special use is requested and the name and address of the applicant for variation or special use and a brief statement of the nature of the variation or special use requested.

§ 65 ILCS 5/11-13-7.

Regarding declaratory judgment actions in municipalities with population greater than 500,000:

> In municipalities of 500,000 or more population, when any zoning ordinance, rule or regulation is sought to be declared invalid by means of a declaratory judgment proceeding, not more than 30 days before filing suit for a declaratory judgment the person filing such suit shall serve written notice in the form and manner and to all property owners as is required of applicants for variation in Section 11-13-7 [65 ILCS 5/11-13-7], and shall furnish to the clerk of the court in which the declaratory judgment suit is filed, and at the time of filing such suit, the list of property owners, the written certificate and such other information as is required in Section 11-13-7 [65 ILCS 5/11-13-7] to be furnished to the board of appeals by an applicant for variation. A property owner entitled to notice who shows that his property will be substantially affected by the outcome of the declaratory judgment proceeding may enter his appearance in the proceeding, and if he does so he shall have the rights of a party. The property owner shall not, however, need to prove any specific, special, or unique damages to himself or his property or any adverse effect upon his property from the declaratory judgment proceeding.

§ 65 ILCS 5/11-13-8.

[76] § 55 ILCS 5/5-12009.5, relating to special uses in counties, provides in part:

> In addition to any other notice required by this Section, the board of appeals must give at least 15 days' notice before the hearing to (i) any municipality whose boundaries are within 1-1/2 miles of any part of the property proposed as a special use…

[77] § 65 ILCS 5/11-13-20 (municipalities) provides:

> In any hearing before a zoning commission, board of appeals, or commission or committee designated pursuant to Section 11-13-14 [65 ILCS 5/11-13-14], any school district within which the property in issue, or any part thereof, is located shall have the right to appear and present evidence.

With slightly different language but similar effect, a provision that applies to counties (§ 55 ILCS 5/5-12019) provides in full:

> Appearance and presentation of evidence by school district. In any hearing before a zoning commission or board of appeals, any school district within which the property in issue, or any part thereof, is located shall have the right to appear and present evidence.

[78] 237 Ill. 2d 118, 928 N.E.2d 814 (2009), as modified April 2010.

[79] 237 Ill. 2d at 121 928 N.E.2d at 816.

[80] 65 ILCS 5/11-13-2.

[81] 237 Ill. 2d at 122, 928 N.E.2d at 817.

[82] 237 Ill. 2d at 120, 928 N.E.2d at 816.

[83] Eight-five is a relatively large number for a rezoning but a small percentage of the total parcels in a community with more than 8600 households.

[84] 237 Ill. 2d at 128, 928 N.E.2d at 820, quoting and citing (in order cited) *Wells v. Village of Libertyville*, 153 Ill. App. 3d 361, 367, 505 N.E.2d 740 (1987); *American Oil Corp. v. City of Chicago*, 29 Ill. App. 3d 988, 991, 331 N.E.2d 67 (1975) (citing in turn citing *Schroeder v. City of New York*, 371 U.S. 208, 9 L. Ed. 2d 255, 83 S. Ct. 279 (1962)); and *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652 (1950).

[85] *Passalino v. City of Zion,* 237 Ill. 2d 118, 128-29, 928 N.E.2d 814, 820 (2009), as modified April 2010; internal quotation is from *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 315, 94 L. Ed. 865, 874, 70 S. Ct. 652, 657 (1950).

[86] § 65 ILCS 5/11-13-1 (telecommunications carriers proposing facility must notify property owners); § 65 ILCS 5/11-13-7 (Chicago, notice of hearing on variation or special use);

[87] § 55 ILCS 5/5-12009 (counties, notice of hearing on variation).

[88] § 55 ILCS 5/5-12009.5 (counties, notice of hearing on special use).

[89] *222 East Chestnut Street Corp. v. Board of Appeals*, 14 Ill. 2d 190, 192, 152 N.E.2d 465, 466 (1958). Internal citations omitted; they referred to, in order: *Winston v. Zoning Board of Appeals,* 407 Ill. 588, 95 N.E.2d 864 (1950); *Krachock v. Department of Revenue,* 403 Ill. 148, 85 N.E.2d 682 (1949); 222 *East Chestnut Street Corp. v. Board of Appeals,* 10 Ill. 2d 130, 139 N.E.2d 221 (1956).

[90] *Garner v. County of Du Page,* 8 Ill. 2d 155, 159, 133 N.E.2d 303, 305 (1956).

[91] "[W]e may also consider the fact that appellants' properties are so far distant from the rezoned tract as to make it doubtful that any prejudice or depreciation could result…" Garner County of Du Page, 8 Ill. 2d 155, 159, 133 N.E.2d 303, 305 (1956).

[92] § 55 ILCS 5/5-12019 (counties); § 65 ILCS 5/11-13-20 (municipalities).

[93] Except those in a county with a population of more than 1,000,000 (Cook County).

[94] See § 55 ILCS 5/5-12007. See, also, *Forestview Homeowners Asso. v. Cook,* 18 Ill. App. 3d 230, 309 N.E.2d 763 (Ill. App. Ct. 1st Dist. 1974), where the court upheld a decision by the trial court to allow the Village of Northbrook to intervene in a challenge to the county's decision to rezone a 96-acre parcel from single-family zoning to a category that would allow the construction of nearly 3,000 multi-family dwelling units.

[95] *Barrington Hills v. Hoffman Estates,* 81 Ill. 2d 392, 410 N.E.2d 37 (1980), cert. den. 449 U.S. 1126, 101 S. Ct. 943, 67 L. Ed. 2d 112 (1981).

[96] § 55 ILCS 5/5-12018 (counties); § 65 ILCS 5/11-13-18 (municipalities).

[97] §65 ILCS 5/11-13-3(e) (municipalities); § 55 ILCS 5/5-12010 (counties). These sections actually only apply to the board of appeals. The previous sentence, however, requiring that all testimony at zoning hearings be under oath, applies to all zoning hearings. Thus, it seems a fair inference from the statute that the chairperson of any commission, board or other body holding a zoning hearing may swear in witnesses.

[98] § 65 ILCS 5/11-13-7a(b).

[99] The statute provides property owners with the rights to:

> (a) have subpoenas issued for persons to appear at board of appeals' hearings and for examination of documents by the person requesting the subpoena either before or at board of appeals hearings subject to the limitations in this Section. The board of appeals shall issue subpoenas as requested by zoning variation and special use applicants and by property owners within the terms of Section 11-13-7 Subpoenas shall only be enforceable against persons or for documents which have a substantial evidentiary connection with (i) the property for which a zoning variation or special use is requested, (ii) facts which would support or negate the requisite legal standards for granting a zoning variation or special use, and (iii) facts which support or negate the conclusion that property within the 250 feet notice requirement of Section 11-13-7 will be substantially affected by the outcome of the decision of the board. All matters relating to subpoenas concerning a particular zoning variation or special use case,

including all enforcement and motions to quash, shall be heard in a single action, however, the court obtaining jurisdiction over any such matter may retain jurisdiction until the disposition of the case by the board of appeals. Service of such subpoenas shall be made in the same manner as summons in a civil action[99]

and

(b) present witnesses on their behalf.

§ 65 ILCS 5/11-13-7a(a).

[100] § 65 ILCS 5/11-13-7a, last para.

[101] § 65 ILCS 5/11-12-5(1).

[102] § 65 ILCS 5/11-12-6.

[103] § 55 ILCS 5/5-14004.

[104] § 20 ILCS 662/10 et seq.; it was adopted in 2001 and amended in 2006.

[105] § 20 ILCS 662/30(a).

[106] § 65 ILCS 5/11-13-1 (unnumbered paragraph immediately following paragraph (12)).

[107] *Forestview Homeowners Asso. v. Cook*, 18 Ill. App. 3d 230, 309 N.E.2d 763 (Ill. App. Ct. 1st Dist. 1974).

[108] 18 Ill. App. 3d at 243, 309 N.E.2d at 773, citing the leading New York case of *Udell v. Haas*, 21 N.Y.2d 463, 469, 288 N.Y.S.2d 888, 893, 235 N.E.2d 897 (1968), discussed at §37.03[5][b].

[109] *La Salle Nat'l Bank v. County of Cook*, 12 Ill. 2d 40, 145 N.E.2d 65 (1957); these rules have been followed in Illinois repeatedly and were restated in litigation involving the same bank some 17 years after the original decision. *La Salle Nat'l Bank v. Evanston*, 57 Ill. 2d 415, 428-29, 312 N.E.2d 625, 632 (1974).

[110] *Sinclair Pipe Line Co. v. Richton Park,* 19 Ill. 2d 370, 167 N.E.2d 406 (1960).

[111] *Nelson v. County of De Kalb,* 363 Ill. App. 3d 206, 840 N.E.2d 795 (Ill. App. Ct. 2d Dist. 2005), citing and quoting *Sinclair Pipe Line Co. v. Richton Park,* 19 Ill. 2d 370, 378, 167 N.E.2d 406, 411 (1960).

[112] *City of Chicago Heights v. Living Word Outreach Full Gospel Church & Ministries, Inc.,* 196 Ill. 2d 1, 16, 749 N.E.2d 916, 926 (2001), citing and quoting S. Connor, *Zoning*, in Municipal Law & Practice § 13.17 (Ill. Inst. for Cont. Legal Educ. 2000).

[113] *Lazarus v. Northbrook,* 31 Ill. 2d 146, 199 N.E.2d 797 (1964), citing and quoting *Kotrich v. County of Du Page,* 19 Ill. 2d 181, 166 N.E.2d 601 (1960)

[114] 65 ILCS 5/11-13-1.1.

[115] § 55 ILCS 5/5-12009.5 (c) provides:

> A special use may be granted only upon evidence that the special use meets the standards established for that classification in the ordinance. The special use may be subject to conditions reasonably necessary to meet those standards.

[116] § 55 ILCS 5/5-12018 (counties); § 65 ILCS 5/11-13-18 (municipalities).

[117] In *People ex rel Klaeren v. Village of Lisle*, 316 Ill. App. 3d 770, 737 N.E.2d 1099 (Ill. App. Ct. 2d Dist. 2000), the court said in part:

> "the general rule is well established that a 'public hearing' before any tribunal or body" means "the right to appear and give evidence and also the right to hear and examine the witnesses whose testimony is presented by opposing parties."

316 Ill. App. 3d at 780, 737 N.E.2d at 1109, quoting *E&E Hauling, Inc. v. County of Du Page,* 77 Ill. App. 3d 1017, 1021, 396 N.E.2d 1260 (1979), quoting in turn *Braden v. Much*, 403 Ill. 507, 513, 87 N.E.2d 620 (1949).

[118] *People ex rel. Klaeren v. Vill. of Lisle*, 202 Ill. 2d 164, 181–82, 781 N.E.2d 223, 233 (Ill. 2002); subseq. App. at 352 Ill. App. 3d 831, 288 Ill. Dec. 22, 817 N.E.2d 147, 2004 Ill. App. LEXIS 1251 (Ill. App. Ct. 2d Dist. 2004). Internal citations *to E&E Hauling, Inc. v. County of Du Page*, 77 Ill. App. 3d 1017, 1021, 396 N.E.2d 1260 (1979), quoting in turn *Braden v. Much*, 403 Ill. 507, 513, 87 N.E.2d 620 (1949), quoted by the lower court, omitted.

[119] In *People ex rel. Klaeren v. Vill. of Lisle*, 202 Ill. 2d 164, 781 N.E.2d 223 (Ill. 2002), the court said in relevant part:

> We are unwilling to adopt the appellate majority's blanket endorsement of the E&E Hauling determination that a "'public hearing' before any tribunal or body" includes the full panoply of due process rights. To construe so broadly the phrase "public hearing" may be inappropriate in some instances. Thus, the appellate majority too strictly relied on the Municipal Code for its resolution of this cause.

202 Ill. 2d 164, 183, 781 N.E.2d 223, 234.

[120] See discussion In Our *Savior Evangelical Lutheran Church v. Saville,* 397 Ill. App. 3d 1003, 922 N.E.2d 1143 (Ill. App. Ct. 2d Dist. 2009), app. den., 236 Ill. 2d 508 (2010).

[121] *Our Savior Evangelical Lutheran Church v. Saville,* 397 Ill. App. 3d 1003, 922 N.E.2d 1143 (Ill. App. Ct. 2d Dist. 2009), app. den. (Ill. 2010). In that case, the court remanded a denial of a special use permit for a trial de novo, as required by the amended legislation, but noted the difficulty of reviewing the record in a case where the record had been built on the assumption by all parties that the process was administrative.

[122] Aurora Zoning Ordinance, §4.3-3.C.

[123] Aurora Zoning Ordinance, §4.3-3.G.

[124] Bolingbrook Zoning Ordinance (Chapter 29 of Municipal Code), §8-104(B).

[125] §47-5.2(B)(11)

[126] *City of Chicago Heights v. Living Word Outreach Full Gospel Church & Ministries, Inc*., 196 Ill. 2d 1, 22, 749 N.E.2d 916, 929-30 (2001), Internal citations refer to these cases, in this order: *Grobman v. City of Des Plaines*, 59 Ill. 2d 588, 595 322 N.E.2d 443, 447 (1975); *Evanston Best & Co. v. E.M. Goodman*, 369 Ill. 207, 211 16 N.E.2d 131, 133 (1938); *La Salle National Bank v. County of Cook* (1957), 12 Ill. 2d 40, 47, 145 N.E.2d 65, 69 (1975).

[127] § 65 ILCS 5/11-13-5 (municipalities); § 55 ILCS 5/5-12009 (counties).

[128] § 65 ILCS 5/11-13-4 limits the grant of authority for variations with this language:

> subject to the power of the corporate authorities to prohibit, in whole or in part, the granting of variations in respect to the classification, regulation and restriction of the location of trades and industries and the location of buildings designed for specified industrial, business, residential and other uses.

[129] *Heft v. Zoning Board of Appeals*, 31 Ill. 2d 266, 201 N.E.2d 364 (1964). Subsequent court decisions indicate that a publicly operated sewage treatment plant can be located without regard to local zoning; see *People ex rel. Scott v. North Shore Sanitary Dist*., 132 Ill. App. 2d 854, 8537, 270 N.E.2d 133, 135 (Ill. App. Ct. 2d Dist. 1971)

[130] *Baird v. Board of Zoning Appeals,* 347 Ill. App. 158, 106 N.E.2d 343 (Ill. App. Ct. 1952).

[131] *Illinois Bell Tel. Co. v. Fox,* 402 Ill. 617, 85 N.E.2d 43 (1949).

[132]

[133] § 55 ILCS 5/5-12009. The section also indicates that variations in a county may be granted only "in accordance with general or specific rules" set out in the zoning ordinance.

[134] § 65 ILCS 5/11-13-5.

[135] § 65 ILCS 5/11-13-5.

[136] § 65 ILCS 5/11-13-5.

[137] § 65 ILCS 5/11-13-5.

[138] § 65 ILCS 5/11-13-10.

[139] § 65 ILCS 5/11-13-10.

[140] See, where the court said in part:

> In enacting the 2006 amendment to section 11-13-25(a), which Dunlap seeks to rely upon in the instant suit, the legislature expressly responded to the decision in Klaeren by passing legislation that defines every "special use, variance, rezoning, or other amendment to a zoning ordinance" (65 ILCS 5/11-13-25(a)) as a legislative act rather than as an administrative act for purposes of review. Millennium, 384 Ill. App. 3d at 647, 894 N.E.2d at 855. It thereby does away with any distinction in the standard of review between variances and other forms of zoning ordinance amendments.

Dunlap v. Village of Schaumburg, 394 Ill. App. 3d 629, 641, 915 N.E.2d 890, 900-01 (Ill. App. Ct. 1st Dist. 2009), citing *People ex rel. Klaeren v. Vill. of Lisle,* 202 Ill. 2d 164, 183, 781 N.E.2d 223 (2002) and *Millennium Maint. Mgmt. v. County of Lake*, 384 Ill. App. 3d 638, 894 N.E.2d 845 (Ill. App. Ct. 2d Dist. 2008).

[141] § 55 ILCS 5/5-12009.

[142] The specific language in the statute is "the administrative official charged with the enforcement of any ordinance or resolution adopted pursuant to this Division." § 55 ILCS 5/5-12009.

[143] § 55 ILCS 5/5-12009.

[144] § 55 ILCS 5/5-12009.

[145] § 55 ILCS 5/5-12009.

[146] § 55 ILCS 5/5-12009, para.

[147] Here are the requirements, in full:

> there shall be at least 15 days' notice of the date, time and place of such hearing published in a newspaper of general circulation published in the township or road district in which such property is located. If no newspaper is published in such township or road district, then such notice shall be published in a newspaper of general circulation published in the county and having circulation where such property is located. The notice shall contain: (1) the particular location of the real estate for which the variation is requested by legal description and street address, and if no street address then by locating such real estate with reference to any well-known landmark, highway, road, thoroughfare or intersection; (2) whether or not the petitioner or applicant is acting for himself or in the capacity of agent, alter ego, or representative of a principal, and stating the name and address of the actual and true principal; (3) whether petitioner or applicant is a corporation, and if a corporation, the correct names and addresses of all officers and directors, and of all stockholders or shareholders owning any interest in excess of 20% of all outstanding stock of such corporation; (4) whether the petitioner or applicant, or his principal if other than applicant, is a business or entity doing business under an assumed name, and if so, the name and residence of all true and actual owners of such business or entity; (5) whether the petitioner or applicant is a partnership, joint venture, syndicate or an unincorporated voluntary association, and if so, the names and addresses of all partners, joint venturers, syndicate members or members of the unincorporated voluntary association; and (6) a brief statement of what the proposed variation consists.

§ 55 ILCS 5/5-12009.

[148] § 65 ILCS 5/11-13-4; although this section on its face applies to Chicago (the only city in Illinois of "500,000 or over," the following section, § 65 ILCS 5/11-13-5, applies to other municipalities and cross-references the criteria in the section that otherwise applies to Chicago.

[149] *Kimball Dawson, LLC v. City of Chicago Dep't of Zoning,* 369 Ill. App. 3d 780, 788, 861 N.E.2d 216, 223 (Ill. App. Ct. 1st Dist. 2006), citing Chicago Municipal Code § 17-11.7-3 (1999) (subsequently revised and recodified in substantially similar form at Chicago Municipal Code § 17-13-1107-B & 17-13-1107-C (2004)).

[150] *Kimball Dawson, LLC v. City of Chicago Dep't of Zoning,* 369 Ill. App. 3d 780, 788, 861 N.E.2d 216, 223 (Ill. App. Ct. 1st Dist. 2006).

[151] *Lapp v. Vill. of Winnetka*, 359 Ill. App. 3d 152, 833 N.E.2d 983 (Ill. App. Ct. 1st Dist. 2005), app. Den. 217 Ill. 2d 566, 844 N.E.2d 39 (2005).

[152] § 65 ILCS 5/11-13-5 (municipalities); § 55 ILCS 5/5-12009 (counties).

[153] *Cosmopolitan Nat'l Bank v.* Niles, 118 Ill. App. 3d 87, 91-92 454 N.E.2d 703, 706 (Ill. App. Ct. 1st Dist. 1983).

[154] *Halfway House v. City of Waukegan*, 267 Ill. App. 3d 112, 116, 641 N.E.2d 1005, 1009 (Ill. App. Ct. 2d Dist. 1994), as modified in substituted opinion.

[155] *Goffinet v. County of Christian*, 65 Ill. 2d 40, 357 N.E.2d 442 (1976). The court, after noting that "it would have been preferable for the county board to amend the special use section of the agricultural provisions in the zoning ordinance (art. III, sec. 33 (1968)) to include the gasification facility as an allowed special use and then grant the special use permit to NapGas, rather than to conditionally rezone the tract to be used only for the purpose of constructing and operating a facility." 65 Ill.2d at 52, 357 N.E.2d at 448, immediately went on to say, "We find, however, that in this situation the conditional zoning ordinance with a reverter clause and a special use permit are indistinguishable and, assuming that the proper amendment procedures were followed, the former should not be less valid than the latter." Id.

[156] See*, Amoco Oil Co. v. Village of Schaumburg, 277* Ill. App. 3d 926, 661 N.E.2d 380 (Ill. App. Ct. 1st Dist. 1995), app. Den. 167 Ill. 2d 549, 667 N.E.2d 1055 (1996), cert. den. 519 U.S. 976, 117 S. Ct. 413, 136 L. Ed. 2d 325 (1996), where the court held that a requirement that the oil company dedicate 20 percent of its site as a condition of receiving approval of a special use permit to remodel and expand an existing service station.

[157] *Psyhogios v. Skokie,* 4 Ill. App. 3d 186, 280 N.E.2d 552 (Ill. App. Ct. 1st Dist. 1972). In this case, the owners failed to comply with the condition; for reasons that are not entirely clear, the owners sued for an injunction to prevent the village from demolishing the building; the injunction was denied and the court held the owners to the agreement.

[158] *Vo-Land, LLC v. Vill. of Bartlett,* 395 Ill. App. 3d 694, 919 N.E.2d 1 (Ill. App. Ct. 1st Dist. 2009).

[159] *Rockford Blacktop Constr. Co. v. County of Boone,* 263 Ill. App. 3d 274, 635 N.E.2d 1077 (Ill. App. Ct. 2d Dist. 1994).

[160] *Plote, Inc. v. Minnesota Alden Co.,* 96 Ill. App. 3d 1001, 422 N.E.2d 231 (Ill. App. Ct. 1st Dist. 1981).

[161] See, for example, *Zweifel Mfg. Corp. v. Peoria,* 11 Ill. 2d 489, 144 N.E.2d 593 (1957), where a car dealer challenged conditions on a variation that allowed it to build a building. The court ruled for the city:

> It is evident that plaintiffs are not in a position to complain of the conditions in question. The order of June 10, 1953, which required the front area to remain vacant, granted them the benefit of a variation from the terms of the ordinance, enabling them to construct their building in the desired manner and to utilize a portion of the area in the rear (located in a two-family residence district) for parking purposes. It is not denied that in the absence of such variation plaintiffs would have had no right to do so. Upon entry

> of the order they proceeded to construct the building in substantial conformity with the plans they had submitted to the board, and to use the property in accordance with the variation granted. By the supplemental order of August 10, 1954, the board permitted plaintiffs to erect a sign and to use the entire rear area for parking purposes. It reaffirmed the restriction against used-car sales and the requirement that the front area remain vacant, including in such requirement the area on the north left vacant when the proposed ramp was omitted.
>
> * * * * A party who has accepted and retained the advantages of an order cannot be heard to attack the validity or propriety of conditions upon which its right to such advantages was expressly predicated.

11 Ill. 2d at 493, 144 N.E.2d at 595.

And see *Psyhogios v. Skokie,* 4 Ill. App. 3d 186, 280 N.E.2d 552 (Ill. App. Ct. 1st Dist. 1972). Owners of two existing buildings applied for a variation from off-street parking requirements to allow them to convert the buildings to restaurant use. The zoning board granted the variation but imposed a condition that the owners demolish one building and use that land area for parking. In this case, the owners failed to comply with the condition; for reasons that are not entirely clear, the owners sued for an injunction to prevent the village from demolishing the building; the injunction was denied and the court held the owners to the agreement. In ruling for the city, the court held in part:

> We find ample consideration in the mutual promises of the parties each to the other which are binding upon both. (*Nathan v. Leopold*, 108 Ill.App.2d 160, 169, 247 N.E.2d 4.) We also find ample consideration in the specific recitals of the agreement to which both parties are irrevocably committed. The contract recites that there was at that time a deficiency in off-street parking spaces and that plaintiffs have attempted to rectify this by a zoning variation. The contract states the conditions upon which the variation will be granted and this was agreed to by both parties. We approve the reasoning of the trial court in this respect. Plaintiffs, having entered into a specific contract based upon these recitals, having obtained their requested zoning variation on the basis of their agreement and having accepted the benefits thereof for approximately three years, cannot now rescind or repudiate their contract and attempt to relitigate the issues upon which their agreement was originally predicated.

4 Ill. App. 3d at 191, 280 N.E.2d at 556

[162] See *Pioneer Trust and Savings Bank v. Village of Mt. Prospect*, 22 Ill. 2d 375, 176 N.E.2d 799 (1961), and other exactions cases.

[163] *La Grange State Bank v. County of Cook,* 75 Ill. 2d 301, 308-09, 388 N.E.2d 388, 391 (1979).

[164] 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).

[165] *County of Cook v. Monat*, 365 Ill. App. 3d 167, 847 N.E.2d 689 (Ill. App. Ct. 1st Dist. 2006). The case involved a special use permit issued in a residential area allowing a previous owner to keep horses on the property.

[166] 365 Ill. App. 3d at 175, 847 N.E.2d at 696.

[167] Unfortunately, the Illinois courts have not been entirely consistent on this issue. See the discussion in a note in the introductory part of the Conditional Approvals section (beginning on page 49) regarding *Goffinet v. County of*

Christian, 65 Ill. 2d 40, 357 N.E.2d 442 (1976), where the court found that a zoning map amendment subject to conditions that included a reverter clause was "interchangeable with" a special use permit.

[168] § 765 ILCS 205/1(a).

[169] § 765 ILCS 205.

[170] § 765 ILCS 205/1(b) provides these exemptions:

1. The division or subdivision of land into parcels or tracts of 5 acres or more in size which does not involve any new streets or easements of access;

2. The division of lots or blocks of less than 1 acre in any recorded subdivision which does not involve any new streets or easements of access;

3. The sale or exchange of parcels of land between owners of adjoining and contiguous land;

4. The conveyance of parcels of land or interests therein for use as a right of way for railroads or other public utility facilities and other pipe lines which does not involve any new streets or easements of access;

5. The conveyance of land owned by a railroad or other public utility which does not involve any new streets or easements of access;

6. The conveyance of land for highway or other public purposes or grants or conveyances relating to the dedication of land for public use or instruments relating to the vacation of land impressed with a public use;

7. Conveyances made to correct descriptions in prior conveyances.

8. The sale or exchange of parcels or tracts of land following the division into no more than 2 parts of a particular parcel or tract of land existing on July 17, 1959 and not involving any new streets or easements of access.

9. The sale of a single lot of less than 5 acres from a larger tract when a survey is made by an Illinois Registered Land Surveyor; provided, that this exemption shall not apply to the sale of any subsequent lots from the same larger tract of land, as determined by the dimensions and configuration of the larger tract on October 1, 1973, and provided also that this exemption does not invalidate any local requirements applicable to the subdivision of land.

10. The preparation of a plat for wind energy devices under Section 10-620 of the Property Tax Code [35 ILCS 200/10-620].

[171] § 765 ILCS 205/1(b) 1.

[172] § 765 ILCS 205/1(b) 2.

[173] § 765 ILCS 205/1(b) 3.

[174] § 765 ILCS 205/1(b) 4, 5 and 6.

[175] § 765 ILCS 205/1(b) 9.

[176] § 65 ILCS 5/11-12-12, para. 3, which in part provides for extraterritorial control of subdivisions by municipalities, includes these exemptions from the extraterritorial controls:

> The provisions of this Section do not apply to any plat for consolidation of 2 or more contiguous parcels, located within any territory that is outside of the corporate limits of a municipality but within a county that has adopted a subdivision ordinance and that has a population of more than 250,000, into a smaller number of parcels if the sole purpose of the consolidation is to bring a non-conforming parcel into conformance with local zoning requirements. The exemption created by this amendatory Act of the 92nd General Assembly [P.A. 92-361] does not apply to a plat for consolidation for an area in excess of 10 acres or to any consolidation that results in a plat of more than 10 individual lots following the consolidation. If the county receives a request to approve a plat for consolidation pursuant to this Section, the county must notify all municipalities located within 1 1/2 miles of the subject property within 10 days after receiving the request.

[177] *Gricius v. Lambert,* 7 Ill. App. 3d 716, 720 288 N.E.2d 496, 499 (Ill. App. Ct. 5th Dist. 1972), reiterated *Armour v. Mueller,* 36 Ill. App. 3d 23, 30, 343 N.E.2d 251, 257 (Ill. App. Ct. 5th Dist. 1976).

[178] § 55 ILCS 5/5-1042; the quoted language applies to counties other than Cook County. § 55 ILCS 5/5-1042 has similar language that applies to Cook County.

[179] § 65 ILCS 5/11-12-8, para. 3.

[180] § 65 ILCS 5/11-12-8, para. 4.

[181] § 65 ILCS 5/11-12-12.

[182] *Petterson v. Naperville,* 9 Ill. 2d 233, 243, 137 N.E.2d 371, 377 (1956)

[183] 65 ILCS 5/11-15.1-1; *Vill. of Chatham v. County of Sangamon,* 216 Ill. 2d 402, 837 N.E.2d 29 (2005)

[184] 65 ILCS 5/11-15.1-1(b) provides:

> This Section shall not apply in (i) a county with a population of more than 3,000,000, (ii) a county that borders a county with a population of more than 3,000,000 or (iii) a county with a population of more than 246,000 according to the 1990 federal census and bordered by the Mississippi River, unless the parties to the annexation agreement have, at the time the agreement is signed, ownership or control of all property that would make the property that is the subject of the agreement contiguous to the annexing municipality, in which case the property that is the subject of the annexation agreement is subject to the ordinances, control, and jurisdiction of the municipality in all respects the same as property owned by the municipality that lies within its corporate limits.

In the CMAP region, that means that it applies only in Kendall County and in Aux Sable Township in Grundy County.

[185] § 765 ILCS 205/2.

[186] § 765 ILCS 205/2.

[187] § 65 ILCS 5/11-12-8, para 7, provides:

> When a person submitting a plat of subdivision or resubdivision for final approval has supplied all drawings, maps and other documents required by the municipal ordinances to be furnished in support thereof, and if all such material meets all municipal requirements, the corporate authorities shall approve the proposed plat within 60 days from the date of filing the last required document or other paper or within 60 days from the date of filing application for final approval of the plat, whichever date is later. The applicant and the corporate authorities may mutually agree to extend the 60 day period.

[188] § 65 ILCS 5/11-12-8, para. 10 provides:

> If the corporate authorities fail to act upon the final plat within the time prescribed the applicant may, after giving 5 days written notice to the corporate authorities, file a complaint for summary judgment in the circuit court and upon showing that the corporate authorities have failed to act within the time prescribed the court shall enter an order authorizing the recorder to record the plat as finally submitted without the approval of the corporate authorities. A plat so recorded shall have the same force and effect as though that plat had been approved by the corporate authorities. If the corporate authorities refuse to act upon the final plat within the time prescribed and if their failure to act thereon is willful, upon such showing and upon proof of damages the municipality shall be liable therefor.

[189] *People ex rel. First Nat'l Bank & Trust Co. v. Deerfield,* 50 Ill. App. 2d 349, 353, 200 N.E.2d 120, 122 (Ill. App. Ct. 2d Dist. 1964), *Urban Inv. & Dev. Co. v. Graham,* 49 Ill. App. 3d 661,664, 364 N.E.2d 628, 630 7 (Ill. App. Ct. 2d Dist. 1977), *People ex rel. Tilden v. Massieon,* 279 Ill. 312, 116 N.E. 639 (1917).

[190] *Urban Inv. & Dev. Co. v. Graham*, 49 Ill. App. 3d 661,664, 364 N.E.2d 628, 630 7 (Ill. App. Ct. 2d Dist. 1977). [internal citations omitted] See, also, *People ex rel. First Nat'l Bank & Trust Co. v. Deerfield,* 50 Ill. App. 2d 349, 353, 200 N.E.2d 120, 122 (Ill. App. Ct. 2d Dist. 1964), where the court said:

> The act of approving a plat by Village authorities is a ministerial one where the ordinances have been complied with and may be enforced by mandamus. A review of the record before us convinces us that plaintiff's plat did comply with the necessary ordinances and that the writ of mandamus should have issued

[internal citations omitted].

Note that "mandamus" is a court order directing a public official to carry out specified duties, such as approving a permit application. Such orders are rare, so this part of the law is very significant.

[191] § 55 ILCS 5/5-1041 (counties); § 65 ILCS 5/11-15-1 (municipalities).

[192] *Clokey v. Wabash Ry.,* 353 Ill. 349, 365, 187 N.E. 475, 482 (1933) [internal citations omitted].

[193] 22 Ill. 2d 375, 176 N.E.2d 799 (1961).

[194] 22 Ill. 2d at 381, 176 N.E.2d at 802.

[195] 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987).

[196] 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

[197] 512 U.S. at 388, 114 S.Ct at 2318.

[198] Board of Education v. Surety Developers, Inc., 63 Ill. 2d 193, 347 N.E.2d 149 (1975).

[199] 63 Ill. 2d at 196, 347 N.E.2d at 150.

[200] 63 Ill. 2d at 196-97, 347 N.E.2d at 151.

[201] 63 Ill. 2d at 203, 347 N.E.2d at 154.

[202] § 605 ILCS 5/5-904.(adopted in 1989, 1989 ILL. P.A. 97).

[203] § 605 ILCS 5/5-903.

[204] Northern State Home Builders Ass'n v. County of Du Page, 165 Ill. 2d 25, 35, 649 N.E.2d 384, 390 (1995), citing and quoting Pioneer Trust, 22 Ill. 2d 375, 380, 176 N.E.2d 799, 801 (1961)., in turn quoting Rosen v. Village of Downers Grove, 19 Ill. 2d 448, 453, 167 N.E.2d 230, 234 (1960). The decision was not a complete victory for the county; the court invalidated a provision which required a forfeiture of a portion of the required fee by anyone challenging the fee imposed.

[205] Raintree Homes, Inc. v. Vill. of Long Grove, 389 Ill. App. 3d 836, 906 N.E.2d 751 (Ill. App. Ct. 2d Dist. 2009), reh. den. 2009 Ill. App. LEXIS 933; the suit challenged Long Grove Municipal Code §4--1--4(B), which is quoted in the decision 389 Ill. App. 3d at 839, 906 N.E.2d at 756.

[206] Amoco Oil Co. v. Village of Schaumburg, 277 Ill. App. 3d 926, 661 N.E.2d 380 (Ill. App. Ct. 1st Dist. 1995), app. den. 167 Ill. 2d 549, 667 N.E.2d 1055 (1996), cert. den. 519 U.S. 976, 117 S. Ct. 413, 136 L. Ed. 2d 325 (1996). In this case, the appellate court's primary reliance was on Nollan and Dolan rather than on the state court precedents dealing with exactions.

[207] La Salle Nat'l Bank v. Brookfield, 95 Ill. App. 3d 765, 767, 420 N.E.2d 819, 820 (Ill. App. Ct. 1st Dist. 1981) quoting Book of Ordinances of the Village of Brookfield, Ill., ch. 28, art. IV, § 28 -- 41 (1979).

[208] Krughoff v. Naperville, 68 Ill. 2d 352, 369 N.E.2d 892 (1977); The state home builders' association had joined the suit, and the supreme court opinion suggests that it was well and carefully litigated.

[209] Plote, Inc. v. Minnesota Alden Co., 96 Ill. App. 3d 1001, 422 N.E.2d 231 (Ill. App. Ct. 1st Dist. 1981).

[210] Ill. Const. Art. I, §3.

[211] U.S. Constitution, Art I, Sect. 1; Amendment 14 applied these provisions to the states.

[212] Ill. Const. Art. I, §2.

[213] See, for example, *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961 (N.D. Ill. 2003), where the church owned property in an office district that did not allow houses of worship but that allowed cultural institutions (including theaters) and social and fraternal organizations. For a pre-RLUIPA decision, see *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*.508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993), where the Court held that a local ordinance prohibiting animal sacrifices was unconstitutional where it appeared to have been targeted particularly at the challenging church.

[214] The portions of the federal Religious Land Use and Institutionalized Persons Act that pertain to local land-use decisions are these:

(a) Substantial Burdens.

(1) General rule. No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application. This subsection applies in any case in which—

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and Exclusion.

(1) Equal terms. No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination. No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits. No government shall impose or implement a land use regulation that:

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

Section 2 of 106 Stat. § 2689, which section is entitled "Protection of Land Use as Religious Exercise."

[215] § 775 ILCS 35/1 et seq.

[216] § 775 ILCS 35/5.

[217] § 775 ILCS 35/15.

[218] § 775 ILCS 35/20.

[219] § 775 ILCS 35/25.

[220] § 775 ILCS 35/25(d).

[221] The second motion passed only by a standard majority at the original meeting and thus did not have the super-majority votes required to approve a special use permit. At a subsequent meeting, the council suspended its rules and approved the staff proposal by the required super-majority.

[222] Our Savior Evangelical Lutheran Church v. Saville, 397 Ill. App. 3d 1003, 1019, 922 N.E.2d 1143, 1155-56 (Ill. App. Ct. 2d Dist. 2009), app. den. (Ill. 2010).

[223] Sect. 2 of 106 Stat. § 2689(a) see esp. §2689(a)(2)(C).

[224] *Family Life Church v. City of Elgin,* 561 F. Supp. 2d 978, 986-87 (N.D. Ill. 2008).

[225] *Petra Presbyterian Church v. Vill. of Northbrook,* 489 F.3d 846, 850 (7th Cir. Ill. 2007). Reh. den., cert. den. 552 U.S. 1131, 128 S. Ct. 914, 169 L. Ed. 2d 786 (2008).

[226] City *of Chicago Heights v. Living Word Outreach Full Gospel Church & Ministries, Inc.,* 196 Ill. 2d 1, 749 N.E.2d 916 (2001), reh'g denied, 2001 Ill. LEXIS 497 (Ill. June 4, 2001).

[227] In *Korean Buddhist Dae Won Sa Temple v. Sullivan,* 87 Haw. 217, 953 P.2d 1315 (1998), the local government won such a fight; the case is worth reviewing, however, to understand that the arguments that arise in such a case go beyond the normal disputes over building height.

[228] In *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch,* 510 F.3d 253 (3d Cir. N.J. 2007), the court upheld such a provision, but the city made an unusually compelling case based on a redevelopment plan for a portion of its downtown area.

[229] See, for example, *Fifth Ave. Presbyterian Church v. City of New York,* 293 F.3d 570 (2d Cir. N.Y. 2002), motion denied, 2003 U.S. Dist. LEXIS 3898 (S.D.N.Y. 2003); perm. inj'n granted, 2004 U.S. Dist. LEXIS 22185 (S.D.N.Y. Oct. 28, 2004); aff'd 2006 U.S. App. LEXIS 10731 (2d Cir. N.Y. Apr. 26, 2006) (2nd Circ. opinion not published).

[230] See *City of LaDue v. Gilleo,* 512 U.S. 43, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994), striking down a local sign ordinance that officials had interpreted to prohibit a "Peace in the Gulf" sign (non-commercial) in a residential area where "real estate signs" (commercial) were allowed.

[231] *Virginia State Bd. of Pharmacy v. Virginia Consumer Council,* 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976) (advertising of prescription drug prices); *Bates v. State Bar of Ariz.,* 433 U.S. 350, 355, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977) (lawyer advertising).

[232] See, for example, *Thomas Cusack Co. v. City of Chicago,* 242 U.S. 526, 37 S. Ct. 190, 61 L. Ed. 472 (1917); *Louis Gunning Advertisement Co. v. City of St. Louis,* 235 Mo. 99,137 S.W. 929 (1911), appeal dismissed, 231 U.S. 761, 34 S. Ct. 325, 58 L. Ed. 470 (1913).

[233] *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981).

[234] See, for example, *Naegele Outdoor Advertising, Inc. v. City of Durham,* 19 F.3d 11 (4th Cir. 1994), *affirming* 803 F. Supp. 1068 (M.D.N.C. 1992), *cert. denied* 513 U.S. 928,130 L. Ed. 2d 278, 115 S. Ct. 317 (1994); *Georgia Outdoor Advertising v. City of Waynesville,* 833 F.2d 43 (4th Cir. 1987).

[235] *American Legion Post VII v. City of Durham,* 239 F.3d. 601 (4th Circ. N.C. 2001).

[236] *City of Lakewood v. Plain Dealer Publishing Co.,* 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771(1988), involving permits for newspaper vending boxes; it was applied to a sign case in *Lawson v. City of Kankakee*, 81 F. Supp. 2d 930 (C.D. Ill. 2000). *City of Cincinnati v. Discovery Network,* 507 U.S. 410, 113 S. Ct. 1505, 123 L. Ed. 2d 99(1993), also involving restrictions on newspaper vending boxes; and FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 110 S. Ct. 596, 107 L. Ed. 2d 603(1990), involving licenses for adult businesses.

[237] See *Fehribach v. City of Troy,* 341 F. Supp. 2d 727 (E.D. Mich. 2004), where the court held that a local ordinance restricting the number of political signs per property to two was unconstitutional.

[238] *Dimmitt v. City of Clearwater,* 985 F.2d 1565, 1568 (11th Cir. 1993).

[239] *Burk v. Augusta-Richmond County,* 365 F.3d 1247 (11th Cir. Ga. 2004), reh. en banc den. 107 Fed. Appx. 895, 2004 U.S. App. LEXIS 20144 (11th Cir. Ga. 2004) (case actually dealt with permits for non-commercial demonstrations, but principles are the same).

[240] *Metromedia, Inc., v. City of San Diego,* 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981).

[241] *Whitton v. City of Gladstone,* 54 F.3d 1400 (8th Cir. 1994); *Curry v. Prince George's County,* 33 F. Supp. 2d 447 (D. Md. 1999), striking down ordinance allowing campaign signs only for 45 days before an election and 10 days after; *Dimas v. City of Warren,* 939 F. Supp. 554, 556557 (E.D. Mich. 1996), finding that ordinance permitting temporary election signs for only 45 days prior to election is not content-neutral.

[242] See, for example*, Knoeffler v. Town of Mamakating,* 87 F. Supp. 2d 322 at 324 (S.D.N.Y.2000).

[243] *Cafe Erotica of Fla., Inc. v. St. Johns County,* 360 F.3d 1274 (11th Cir. Fla. 2004). This was an interesting case that began as a battle over large billboards advertising the owner's adult businesses, but the owner turned it into a

different kind of fight when the president of the company began to post messages critical of local government on the same signs.

[244] *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250 (11th Cir. Fla. 2005).

[245] *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957).

[246] § 720 ILCS 5/11-20(b).

[247] *Miller v. California,* 413 U.S. 15, 24, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973).

[248] See, for example, *People v. Page Books, Inc.*, 235 Ill. App. 3d 765, 601 N.E.2d 273 (2 Dist. 1992), appeal dismissed, Ill. 2d , 197 Ill. Dec. 230, 631 N.E.2d 233 (1994), cert. denied, 513 U.S. 873, 115 S. Ct. 198, 130 L. Ed. 2d 129 (1994).Note, however, that child pornography is treated under separate state and federal statutes under which it is much easier and thus more common to get a conviction. See the Illinois statute on this subject at § 720 ILCS 5/11-20.1.

[249] *Young v. American Mini-Theatres, Inc.,* 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976); and *Playtime Theatres, Inc. v. City of Renton,* 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed 2d 29 (1986).

[250] *Wisconsin Vendors, Inc., v. Lake County,* 152 F. Supp. 2d 1087 (N.D. Ill. 2001).

[251] *Schad v. Borough of Mt. Ephraim,* 452 U.S. 61, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991); and *City of Erie v. PAPs A.M. tdba Kandyland,* 146 L. Ed. 2d 265, 120 S. Ct. 1382 (U.S. 2000).

[252] See *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981), involving a small community in New Jersey that attempted to ban all live entertainment to avoid perceived problems with adult-oriented live entertainment.

[253] *North Ave. Novelties, Inc. v. City of Chicago,* 88 F.3d 441, 445(7th Cir. 1996). For a good discussion of what sites may be considered "available," see Topanga Press v. City of Los Angeles, 989 F.2d 1524 (9th Cir. 1993), as amended, cert. denied 511 U.S. 1030, 114 S. Ct. 1537, 128 L. Ed. 2d 190 (1994).

[254] *Stringfellows of New York v. City of New York,* 91 N.Y.2d 382, 671 N.Y.S.2d 406, 694 N.E.2d 407 (1998), cert. denied, 119 S. Ct. 795 (1999).

[255] *Playtime Theatres, Inc. v. City of Renton,* 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986); *Young v. American Mini-Theatres, Inc.,* 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976).

[256] *Pleasureland Museum, Inc. v. Beutter,* 288 F.3d 988 (7th Cir., Ind. 2002),

[257] *Wright v. County of Du Page,* 316 Ill. App. 3d 28, 736 N.E.2d 650 (Ill. App. Ct. 2d Dist. 2000).

[258] *City of Chicago v. Pooh Bah Enters.,* 224 Ill. 2d 390, 865 N.E.2d 133 (2006), reh. den. (with dissent) 224 Ill. 2d 390, 865 N.E.2d 133 (2007), cert. den. 552 U.S. 941, 128 S. Ct. 127, 169 L. Ed. 2d 244 (2007).

[259] See *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. Fla. 1999), *cert. denied* 529 U.S. 1053, 120 S. Ct. 1554, 146 L. Ed. 2d 459 (2000), followed in the 7th Circuit in Ill. One News, Inc. v. City of Marshall, 2006 U.S. Dist. LEXIS 9570 (S.D. Ill. Feb. 22, 2006), aff'd 477 F.3d 461 (7th Circ. Ill. 2007).

[260] *FW/PBS v. City of Dallas,* 493 U.S. 215, 224, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990).

[261] See, *Piece Meal, Ltd. v. Bellwood,* 1991 U.S. Dist. LEXIS 14604 (N.D. Ill. Oct. 10, 1991), where the court rejected a municipality's motion to dismiss a claim of selective enforcement where the village attempted to halt the opening of an adult bookstore. For an illustration of the principle, see *Pensack v. Denver,* 630 F. Supp. 177 (D. Colo. 1986), where the court rejected a city's attempt to ban "Le Bakery Sensual," which apparently produced some erotically decorated cakes, as an "adult bookstore," which would not have been allowed in that zoning district. See, also, *E-Bru, Inc. v. Graves,* 566 F. Supp. 1476 (D.N.J. 1983)

[262] See, for example, the discussion in City of New York v. Show World, Inc., 178 Misc. 2d 812, 683 N.Y.S.2d 376 (Sup. Ct. 1998), affd 258 A.D.2d 284, 685 N.Y.S.2d 49 (N.Y. App. Div. 1st Dept 1999), app. den. reversed in *City of New York v. Hommes,* 94 N.Y.2d 267, 702 N.Y.S.2d 576, 724 N.E.2d 368 (1999).

[263] *Playtime Theatres, Inc. v. City of Renton,* 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed 2d 29 (1986).

[264] *City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 122 S. Ct. 1728,1736, 152 L. Ed. 2d 670, 683 (2002). 152 L. Ed. 2d at 683, 122 S.Ct. at 1736.

[265] *G.M. Enterprises v. Town of St. Joseph,* 350 F.3d 631, 639–40 (7th Cir., Wis. 2003), reh. den. 2004 U.S. App. LEXIS 2116 (7th Circ. 2004), cert. den. 543 U.S. 812, 125 S. Ct. 49, 160 L. Ed. 2d 16 (2004).

[266] See, for example, *Andy's Rest. & Lounge, Inc. v. City of Gary,* 466 F.3d 550, 2006 U.S. App. LEXIS 25352 (7th Cir. Ind. 2006), where the record included both studies and findings. And see *729, Inc. v. Kenton County Fiscal Court,* 2006 U.S. Dist. LEXIS 76145 (E.D. Ky. 2006), aff'd in part, rev'd in part, 515 F.3d 485 (6th Cir.) (6th Cir. Ky. 2008) where the judge cited a locally prepared study 14 times in his decision upholding a county licensing ordinance with significant restrictions on interactions among patrons and performers. The partial reversal in the appellate court related to the limited evidence offered to support the level of licensing fees charged and had no effect on the principal point made here.

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