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In the Zone

Current Trends in Land Use Law

Fall, 2013

Welcome to **Ancel Glink's *In the Zone***. Our e-newsletter includes articles on lively land use topics designed to inform local government officials about current trends in land use law and provide useful resources to promote planning and zoning practice throughout the state.

In the Zone is a publication of Ancel Glink's Zoning and Land Use Group. For more than 80 years, Ancel Glink has counseled municipalities and private clients in zoning, land use, and other municipal matters.

The (Hidden) Heart of Illinois' New Fracking Law: How Two Important Components of Hydraulic Fracturing Regulatory Act Could Shape the Future of Fracking in Illinois

On June 17, 2013, Illinois Governor Pat Quinn signed in to law the Hydraulic Fracturing Regulatory Act (the "Act") [\[1\]](#), which allows, but heavily regulates, hydraulic fracturing operations in Illinois. Widely regarded as the strictest set of fracking regulations in the U.S., the Act may provide a consensus path forward for other states bitterly divided over the practice. But, if successful, which provisions will be the model for the future-the performance standards or administrative requirements? The answer may be surprising.

Depending on who you talk to, hydraulic fracturing, or "fracking," is the answer to our economic and energy prayers-or a national disaster waiting to happen. Fracking is a technique used to create small fractures in the rock formations in order to release petroleum, natural gas (including shale gas, tight gas, and coal seam gas) or other substances for extraction. Many view these vast, previously untapped natural gas deposits as the answer to our economic, environmental and energy concerns. The abundant presence of this cleaner, locally produced, and quick-to-market fuel source has sparked significant financial and political investment.

However, significant concerns remain about fracking and its potential impact on public health and the environment. Fracking concerns include,

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among others, (i) stress on surface water and ground watersupplies from the withdrawal of large volumes of water, (ii) contamination of underground sources of drinking water andsurface waters resulting from spills, faulty well construction, or by other means, (iii) adverse impacts from discharges intosurface waters or from disposal into underground injection wells, and (iv) air pollution resulting from the release of volatileorganic compounds, hazardous air pollutants, and greenhouse gases.[\[iii\]](#)

The solution in Illinois-the Hydraulic Fracturing Regulatory Act (the "Act")-contains plenty of restrictions designed to address these concerns. The Act includes strict "cradle to grave" performance standards for fracking operations, which target nearly every aspect of the operation, from siting to construction to disposal of all process waste. Additionally, the Act requires public disclosures of the chemicals and processes used to frack. The secrecy surrounding fracking chemicals and techniques has been a rallying point for anti-fracking critics, and a significant focus when lobbying for strict regulation. The Act's disclosure requirement removes the secrecy and creates a foundation for a more educated future discussion about when, where and how we should allow fracking in our communities. These substantive restrictions are just part of what is considered the strongest set of fracking restrictions, short of prohibition, around today.

Yet, the true power of the Act lies hidden beneath the flashy substantive restrictions. Without much fanfare, two provisions, alone- 1) local consent; and 2) citizen suit authority- give individuals and communities the power to shut down fracking in their community, impose penalties and steer development projects independent of the State or federal permitting process.

The Power of Local Consent

In Section 1-35 of the Act requires all "high volume horizontal hydraulic fracturing" operations to obtain a permit from the Illinois Department of Natural Resources (IDNR). [\[iii\]](#) To be eligible for an IDNR permit, operators must show that they received "official consent" from the municipal authorities of any "city, village or incorporated town" that has jurisdiction over the well site. The law is clear: "No permit shall be issued unless [local] consent is secured and filed with the permit application." (Section 1-35). The impact of this local approval requirement is significant. Municipal corporate authorities (i.e. Mayor/President and Council/Board Members) are given de facto veto power over future high volume horizontal fracking operations in their jurisdiction. Local control over fracking is at the heart of most states' fracking debate, and the inclusion of local approval requirements in the Act advances the concept of cooperative state-local regulatory approach. Arguably, the Illinois approach extends local authority far beyond a "cooperative" regulatory role and into a king-maker position.

Of course, the strength of the Act's local consent requirement will depend on IDNR's interpretation and application of the requirement. From the outset, one can imagine battles that may arise as a result of the Act's deference to local approval. For example, how will IDNR treat

a local rejection that lacks a rational basis-the legal standard applied to most government decisions? Without local consent, the Act requires IDNR to similarly deny a permit application based on a local government's arbitrary action. If the IDNR decision similarly lacks a rational basis, it may be vulnerable to attack in court. The local consent requirement stands to be a powerful tool for local governments, if they can keep from forcing IDNR to begin undercutting its value in final permit decisions.

Similarly, the Illinois law's local consent requirement may be tested by "conditional" local consent. If conditional consent is allowed, the details of a fraction operation may be controlled by a third party local government before IDNR is able to work with the applicant on environmental protections. IDNRs lack of flexibility may undercut its ability to manage operations and promote optimal locations and best management practices.

Citizen Suit Authority

In addition to local consent and de facto veto power, local governments-and all affected residents, for that matter-have a powerful tool to make sure all fracking operations toe the line. Following the tradition set by early environmental laws, the Act includes a "citizen suit" provision, which allows "any person having an interest that is or may be adversely affected" by a fracking operation to file suit against the operator or IDNR to enforce the Act's requirements. (Act 1-102). The citizen suit provisions in the Clean Water Act, Clean Air Act and Resource Conservation and Recovery Act have proven to be a powerful tool. If an affected person (i.e. area landowner) believes the Act, its regulations or the terms of an individual permit are being violated, the person can directly enforce the Act in court (and recover fees and costs if successful).

Beyond the clear benefits to affected individuals, the citizen suit provision strengthens the Act across the board. By empowering neighbors to act as investigators and prosecutors, the Legislature dramatically increases the likelihood that operators will comply with the Act and IDNR permit conditions. Instead of weighing the likelihood of a government inspection, operators must focus on satisfying concerned neighbors that raise concerns. This model allows IDNR to effectively control fracking operations through deterrence without necessarily adding investigators and prosecutors. Without this citizen suit provision, the Act's substantive provisions are far less powerful in action.

The authority delegated to local governments and neighbors in the Act will ensure that every controversial operation is actively monitored and vetted by those with the most to lose. As seen with other statutes, local siting control and citizen suit provisions will drive compliance and pave the path for meaningful regulation. The Act's substantive provisions are rightly gaining attention. However, if Illinois' law becomes a successful national standard, it will be in large part due to the administrative provisions that brought these standards to life.

[i] 225 ILCS 732/1-1 *et. seq.*

[ii] United States Environmental Protection Agency, "Natural Gas Extraction-Hydraulic Fracturing," <http://www2.epa.gov/hydraulicfracturing#improving> (last visited September 23, 2013).
[iii] 225 ILCS 732/1-35.

Cases to Know

I. Village Breached Infrastructure Development Agreement by Failing to Guarantee Payment to Subcontractors.

Lake County Grading v. Village of Antioch, 2013 IL App (2d) 120474

In *Lake County Grading v. Village of Antioch*, a subcontractor, Lake County Grading Company, LLC, sued the Village of Antioch alleging that the village breached an infrastructure agreement with a developer, Neumann Homes, Inc. The infrastructure agreement required Neumann to construct certain public improvements in two residential subdivisions located in the village. Upon completion, Neumann would dedicate the improvements to the village. The agreement also required Neumann to provide the village with performance bonds in an amount equaling the total cost of the improvements as a guarantee that Neumann would construct the improvements. Notably, the bonds guaranteed that Neumann would complete the work, but did not guarantee that subcontractors hired by Neumann would be paid.

Neumann hired Lake County Grading to complete earthwork, and the subcontractor completed its work in accordance with the plans. Before Lake County Grading could be paid, however, Neumann declared bankruptcy. Subsequently, Lake County Grading sued the village as a third party beneficiary of the infrastructure agreement, claiming that the village breached its duty to require that Neumann guarantee payment to Lake County Grading. The village argued that Lake County Grading's claim was barred by the Bond Act's 6 month statute of limitations. The trial court agreed with Lake County Grading and granted summary judgment in its favor on the breach on contract claim. The village appealed the court's decision.

In analyzing whether the subcontractor could sue as a third party beneficiary, the Appellate Court noted that Lake County Grading could only pursue a breach of contract claim if it showed that the infrastructure agreement was made for the direct - and not merely the incidental - benefit of Lake County Grading. Lake County Grading relied on one express provision and one implied provision of the infrastructure agreement to establish that the agreement was made for Lake County Grading's direct benefit.

First, Lake County Grading noted that the Bond Act required that the village obtain from Neumann surety (i.e., a performance bond) guaranteeing payment for all infrastructure work, including work completed by subcontractors. This provision of the Bond Act is implied in every development contract involving municipalities and contractors, regardless of whether the provision actually appears in the agreement. Second, the infrastructure agreement expressly stated that "the Village agrees that Neumann shall construct the public improvements using subcontractors and materialmen selected from time to time by Neumann

in Neumann's sole discretion."

The Appellate Court held that the Bond Act's implied provision coupled with the infrastructure agreement's express authorization for Neumann to select and utilize its own subcontractors had the effect of making Lake County Grading a direct beneficiary of the infrastructure agreement. Consequently, Lake County Grading could recover from the village for the village's breach of the infrastructure agreement.

Notably, the Appellate Court expressly disavowed an earlier Illinois Appellate Court decision, *Shaw Industries, Inc. v. Community College District No. 515*, 318 Ill. App. 3d 661 (1st Dist. 2000), which held that the Bond Act's statute of limitations applied to a third party breach of contract claim. The court stated that the Shaw court's logic was flawed because the statute of limitations only applied to claims brought under the Bond Act, and that breach of contract claims are based on contracts, not the Bond Act. In so holding, the Lake County Grading court exposed municipalities to increased third party liability when entering into development agreements.

II. Residential Signage Restrictions Found to be Content Neutral.

Brown v. Town of Cary, 706 F.3d 294 (4th Cir. 2013)

The Court of Appeals for the Fourth Circuit recently held that a municipality's sign ordinance was a content-neutral restriction and, therefore, did not violate the First Amendment. This case arose when a man painted "Screwed by the Town of Cary" on his house after it was allegedly damaged by water discharged from a municipal road-paving project. The town issued a notice of zoning violation pursuant to the ordinance governing the placement and display of residential signs. Specifically, signs were not allowed to exceed two square feet or use fluorescent colors. The man's sign was painted across a fifteen-foot space on his house with bright orange paint.

The court stated that a regulation is content neutral if it is "justified without reference to the content of regulated speech," even if it "facially differentiates between types of speech." In this case, the Town's ordinance explicitly stated that the purpose was to promote aesthetics and traffic safety. The court found that the ordinance placed reasonable restrictions on only the physical characteristics of the signs, not the content or message, and applied intermediate scrutiny. Under this level of scrutiny, the ordinance was constitutional because it "furthers a substantial government interest, it is narrowly tailored to further that interest, and it leaves open ample alternative channels of communication." The court noted that the town's stated interests in promoting aesthetics and traffic safety are substantial and that the size, color and position restriction did no more than eliminate the exact source of the evil it sought to remedy. Finally, the court explained that the ordinance does not ban signs or regulate the content rather it generally permits residential signs subject to reasonable restrictions.



Legislation to Love or Loathe

Governor's Signature Brings Medical Marijuana to Illinois

On August 1, 2013, Governor Quinn signed [Ill. H.B. 1](#) and, effective January 1, 2014, Illinois will join 18 other states and the District of Columbia in allowing for the medical use and cultivation of cannabis. This legislation will establish up to 22 cultivation centers (one for each Illinois State Police district), and up to 60 dispensaries "geographically dispersed throughout the State" The law imposes distance requirements for cultivation centers (2,500 feet) and dispensing organizations (1,000 feet) from the property line of any pre-existing public or private preschool, elementary, or secondary school, day care home or center, or part day child care facility. Cultivation centers must also be located 2,500 feet from any area zoned for residential use, and dispensaries are prohibited in houses, apartments, condominiums, or any residentially zoned area.

Some home rule and non-home rule local government regulations are preempted by this legislation, but local governments may still enact reasonable zoning ordinances regulating cultivation centers and dispensaries that do not conflict with the Act or its administrative rules. Therefore, a municipality should be able to zone cultivation centers and dispensaries, both by identifying the appropriate (or inappropriate) zoning districts for such uses, as well as determining whether these uses should be permitted by-right or require a special use permit in the defined zoning districts. A municipality should also be permitted to impose reasonable conditions on any special use permit to mitigate the impacts, just as it does for other special uses. Likewise, it would seem reasonable to prohibit dispensaries and cultivation centers in certain zoning districts.

The Act also provides that communities may not "unreasonably prohibit the cultivation, dispensing, and use of medical cannabis authorized by this Act." Therefore, an outright ban on all cultivation centers and dispensaries, would probably have to be supported by findings of fact

that there is a rational basis for banning these uses from a particular community (e.g., unique character). For example, a local zoning ordinance prohibiting cultivation centers or dispensaries simply because the use may violate federal law (e.g., the federal Controlled Substances Act) would likely be invalid under the new Illinois law. Finally, a local government will have to establish a rational basis for prohibitions on medical marijuana use in locations other than those locations prohibited by the Act. Those locations include schools, school buses, motor vehicles, private residences used to provide licensed child care, and public places. A "public place" does not include hospitals, nursing homes, hospice care centers, long-term care facilities, and most private residences.

Prohibited Areas under Illinois' Concealed Carry Law

Planners should be mindful of Illinois' new concealed carry law, its preemption of local authority, and areas where firearm possession will be prohibited. On July 9, 2013, the General Assembly enacted Public Act 98-0063, the first law authorizing the possession of concealed handguns in Illinois.

a. Preemption

The Act contains a comprehensive preemption of local regulations regarding the:

- regulation, licensing, possession, registration, and transportation of handguns and handgun ammunition by concealed carry licensees or Firearm Owners Identification ("FOID") card holders (Section 90, Firearm Concealed Carry Act; 430 ILCS 65/13.1(b));
- transportation of any firearm by the holder of a valid FOID card (430 ILCS 65/13.1(b)); and
- the possession or ownership of assault weapons (with grandfathering for certain regulations (e.g., Cook County's assault weapons ban)) (430 ILCS 65/13.1(c)).

Thus, a unit of local government cannot impose restrictions on licensees inconsistent with the Act. While municipalities have broad police powers, those powers may not be exercised in a manner inconsistent with State law on these subjects.

b. Prohibited Areas

Additionally, firearm possession by concealed carry licensees is not allowed in "prohibited areas," including government buildings, schools, parks, and other areas identified in the Act. Municipalities will be unable to prohibit handgun possession by licensees in any other locations. The Act also requires standardized 4" x 6" signs approved by the Illinois State Police to be "clearly and conspicuously posted at the entrance" of each prohibited area. The following "prohibited areas" are of interest to local governments:

- "1. Any building, real property, and parking area under the control of a public or private elementary or secondary school. . . .
- 5. Any building or portion of a building under the control of a unit of local government. . . .
- 10. Any public gathering or special event conducted on property open to the public that requires the issuance of a permit from the unit of local government, provided this prohibition shall not apply to a licensee who must walk through a public gathering in order to access his or her residence, place of business, or vehicle. . . .
- 12. Any public playground.
- 13. Any public park, athletic area, or athletic facility under the control of a municipality or park district, provided nothing in this Section shall prohibit a licensee from carrying a concealed firearm while on a trail or bikeway if only a portion of the trail or bikeway includes a public park. . . .
- 17. Any stadium, arena, or the real property or parking area under the control of a stadium, arena, or any collegiate or professional sporting event. . . .
- 23. Any area where firearms are prohibited under federal law." (Firearm Concealed Carry Act, Section 65).

Federal law prohibits firearm possession within 1,000 feet from the grounds of a public, parochial, or private school. 18 U.S.C. § 921(a)(25), 922(q).

Licensees will also be permitted to carry and store a handgun in a locked vehicle in parking lots outside most prohibited areas, and may carry concealed handguns along a public right of way that touches or crosses a prohibited area. (Firearm Concealed Carry Act, Section 65). Further guidance on required signs, and the storage of handguns in workplace parking lots, may be forthcoming in the rules to be adopted by the Illinois State Police.

Based on the Act's broad preemption, planners should discourage the use of conditions on special use permits and other approvals that will prohibit the possession of handguns by licensees in any location that is not a "prohibited area" under the Act.

TIF District Reporting Requirements

Recently adopted Ill. S.B. 2182 provides that municipalities must electronically file Tax Increment Financing Reports with the Comptroller 180 days after the municipal fiscal year ends or as soon as the audit for the redevelopment project area for that fiscal year becomes available. Also authorizes the Comptroller to grant extensions to file reports or charge delinquent municipalities a fee until the report is submitted. This legislation has passed both houses and is currently awaiting Governor Quinn's signature.

Upcoming Speeches and Events

October 2 and October 3, 2013: [ICSC Chicago Deal Making](#)

Come visit our booth at the International Council of Shopping Centers deal making event at Navy Pier in Chicago!

October 3-4, 2013: [40th Annual Taking Symposium - Touro Law Review](#)

Julie Tappendorf will be speaking at the Taking Conference At Touro College Law Center in New York about Unconstitutional Conditions

October 4, 2013: [APA-CMS Fall Conference](#)

The APA Law Explosion 2013 will feature David Silverman, Greg Jones, and Dan Bolin discussing the latest legislation and cases affecting planning and zoning officials, the use of social media to encourage and enhance public participation, land use tools to address the challenges of climate change, zoning tools to promote urban agriculture, getting the most out of your development agreement, and more.

October 17-18, 2013: [Illinois Environmental Health Association](#), "Annual Education Conference Hotstove"

David Silverman and Brent Denzin will be speaking on "What's Land Use Gotta do with Environmental Health"? This presentation will define how land use affects our environment and what we should be doing to protect it.

ABOUT ANCEL GLINK

Visit Ancel Glink's web-site at www.ancelglink.com or email us at inthezone@ancelglink.com.

For current information about new and pending legislation, recent cases, and other topics of interest to local governments, you can visit our blog [Municipal Minute](#), follow the Land Use Group on Twitter [@AncelGlinkLand](#), or like [Ancel Glink: Land Use](#) on Facebook.

Other Ancel Glink publications on land use and related issues are available on Ancel Glink's website (www.ancelglink.com) for public use and download:

[Zoning Administration Tools of the Trade](#)

[Zoning Administration Handbook](#)

[Economic Development Toolbox for Municipal Officials](#)

[Municipal Annexation Handbook](#)

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