Ancel Glink | Diamond Bush DiCianni & Krafthefer

In the Zone
Current Trends in Land Use Law

Fall 2015

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.

See you at the APA-IL State Conference!

The American Planning Association (APA) Illinois State Conference is being held October 7 - 9 at the Marriott Hotel and Conference Center in Normal, Illinois. Ancel Glink attorneys David Silverman, Dan Bolin, and Greg Jones are presenting sessions discussing current legal and legislative issues impacting the planning, economic development, and real estate fields.

October 7, 2015, 2:30-3:45 p.m.
Planning Legislation and You
Jason Valerius, Chris Janson, and David Silverman, AICP

October 8, 2015, 10:15-11:45 a.m.
Law & Order: Zoning Victims Unit
David Silverman, AICP, Greg Jones, AICP, and Dan Bolin.
Law Credit.

Catch up with your Ancel Glink attorneys at one of their sessions or stop by Ancel Glink's booth in the exhibition hall to chat.

We'll see you in Normal!

Signs, Signs, Everywhere a Sign?

In a previous *In the Zone*, we briefly reported on the U.S. Supreme Court's decision striking down Gilbert, Arizona's sign ordinance.Reed v. Town of Gilbert, Arizona (USSCT, June 18, 2015). In a nutshell, the Supreme Court held that the Town's sign code was a content-based regulation that could not survive the strict scrutiny required by the First Amendment. This case is certain to have an impact on how local governments regulate signage within their community, and is likely to require most communities to review and revise their current sign regulations (and based on cases following Reed, maybe all regulations that regulate speech) to bring them into conformity with the Supreme Court's decision.

So, what does this case mean for municipalities? Many, if not most municipalities regulate categories of signs in a way that would subject them to the same content-based analysis used by the Supreme Court to strike down Gilbert's sign code. Political signs are a very good example, particularly in Illinois, where state law prohibits municipalities from restricting the number and time limits for political signs installed on residential property. Does that mean that a municipality must eliminate restrictions on time limits and number of signs for all temporary signs or risk a challenge that it is treating other temporary signs less favorably than political signs? Maybe.

There are plenty of other questions that municipalities will have to answer following this decision, which will certainly impact the way sign codes treat categories of signage with similar characteristics (like temporary signs). It is very likely that most municipalities will need to modify their codes, or risk a challenge that their own codes are unconstitutional.

It's important to know that the analysis in *Reed* hasn't been limited to just sign ordinances, however. Municipalities may also need to review and consider changes to many other regulations that implicate speech. For example, a recent case applied Reed to strike down Springfield's panhandling ordinance, as discussed below.

The City of Springfield, Illinois had an ordinance that prohibits panhandling in its downtown historic district. The ordinance defines panhandling as an oral request for an immediate donation of money. Individuals who were cited under this ordinance filed suit against the City, claiming that the ordinance violated their First Amendment rights. Last fall, the 7th Circuit ruled in favor of the City, finding the ordinance content-neutral and constitutional.Norton v. Springfield (7th Cir. Sept. 25, 2014).

The plaintiffs filed a motion for a rehearing, but the 7th Circuit deferred ruling on that motion until after the U.S. Supreme Court decided Reed v. Gilbert (the sign case). Following the Supreme Court's decision in *Reed* striking down Gilbert's sign code as content-based discrimination, the 7th Circuit granted a rehearing in the panhandling case to apply the analysis from *Reed v. Gilbert*regarding content-based discrimination. Norton v. Springfield (7th Cir. August 7, 2015).

The 7th Circuit first noted that the U.S. Supreme Court changed the way courts are to look at First Amendment discrimination when it wrote that "regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."

Because Springfield's panhandling ordinance regulates particular topics (oral requests for the donation of money), the 7th Circuit found that Springfield's panhandling ordinance is a content-based regulation under the new test adopted by the Supreme Court in *Reed*. The 7th Circuit noted that *Reed* "effectively abolishes any distinction between content regulation and subject-matter regulation, requiring the government to provide a compelling reason for why it regulates speech." Because Springfield did not provide such a justification, the panhandling ordinance is unconstitutional.

Based on the 7th Circuit's ruling in *Norton* (and probably many other cases to follow), it seems as if *Reed* will have a much broader impact on government regulation than just sign codes. As the concurring opinion notes in Norton, *Reed's* content-based analysis could apply to a variety of local government ordinances, including regulations pertaining to religion or abortion, as well as any other activity that might implicate the First Amendment (adult businesses, solicitation). As a result, local governments need to be prepared to justify any regulation that implicates speech. That may be very difficult, however, as the 7th Circuit notes that few regulations will survive the strict scrutiny now required by the Supreme Court.

What Does One Very Old Supreme Court Decision About Bakeries Mean For Local Land Use Authority Today?

Recent decisions from the U.S. Supreme Court present a direct challenge to local government authority to regulate and address the impacts of development. As noted by our colleague, Julie Tappendorf, in this issue, the most recent U.S. Supreme Court decision to place a significant obstacle in the way local government land use regulations is *Reed v. Town of Gilbert, Arizona*, (USSCT, June 18, 2015). The *Reed* decision applying a heightened constitutional review on sign regulations, regardless of the nature of content, follows the 2013 *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013) that found any condition placed on development permits must pass the higher standards of the Court's earlier *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard, Oregon*, 512 U.S. 374 (1994), decisions.

The current Court's conservative majority appears to have a skeptical view on government regulation of land use. In some ways, this skepticism appears steeped in much older Court decisions predating the New Deal that routinely found government's ability to regulate business very limited. One particular case predating the New Deal that is gaining traction with conservative judges around the country and in the federal circuits is *Lochner v. New York*, 198 U.S. 45 (1905).

Lochner is a rather famous case, because it launched an almost quarter century line of cases that severely constrained the ability of state and federal governments to regulate business. Without diving too deeply into the facts of *Lochner*, the case involved a late 19th Century New York state law that limited the working hours of bakers. The U.S. Supreme Court struck down the law under due process and equal protection grounds, finding that the "right to contract" is implied in both doctrines. In other words, government cannot use its general power to regulate business in a

way that interferes with individuals' rights to contract freely among themselves. If a baker agrees to work more hours for his or her employer the government has no constitutional basis to prevent that arrangement.

So what does a case about regulating bakers working hours have to do with development regulations? Factually, not much. However,*Lochner* is finding its way into newer decisions examining government regulations impacting private economic interests. Could *Lochner* be lurking behind decisions like *Koontz* and *Reed*? At least with these two decisions, *Lochner* had no part in the Court's opinions. Courts do not sneak in legal ideas from earlier cases, Instead, courts are transparent and note earlier legal decisions to support current decisions. *Koontz* and *Reed* were both decided using other lines of legal authority. Still, if you consider that land use regulations impact someone's economic interests, and maybe even two or more parties right to enter into a contract, then it is not hard to imagine that a court could use *Lochner* as at least one line of authority to strike down land use regulations. If that happens in a federal circuit, other than the 7th Circuit where Illinois is located, the decision may have little or no effect. However, if that case finds its way into the U.S. Supreme Court's hands, given the current mood of the majority of justices concerning government land use regulatory powers, the results could be dramatic.

One very important case stands in the way of applying *Lochner* to land use regulations. *Village of Euclid, Ohio v. Ambler Realty Co*., 272 U.S. 365 (1926), established the constitutional authority of government to regulate land use through zoning. Euclid was decided 21 years after *Lochner* and during a period when the U.S. Supreme Court was starting to move away from the *Lochner*decision and reestablishing the authority of federal, state, and local governments to regulate business, even where those regulations impact economic interests. The *Euclid* decision did not address or reference *Lochner* which is a good thing, because it doesn't open up that legal authority to apply to land use regulatory decisions. However, many years later, Justice Stevens, in his dissent in *Dolan*, raised the possibility that *Lochner's* rationale could be creeping into the Court's review of development regulation.

Legal theories and court doctrines take years to develop. Given the relatively young age of the U.S. Supreme Court's most conservative justices, including its Chief Justice, there could be plenty of time to resurrect *Lochner* as an obstacle to a wide variety of governmental regulatory authority, including land use regulations.

Cases to Know

Federal

- Weeds Not Protected by the Free Speech Clause
In *Discount Inn, Inc. v. City of Chicago* (7th Cir. September 28, 2015), the Seventh Circuit rejected a Chicago business owner's challenge to the City's weed and fence ordinances. The court held that the fines for violations of the ordinances were not unconstitutionally excessive and that maintaining or failing to maintain weeds was not expressive conduct protected by the free speech clause. While the court ultimately upheld both ordinances, it expressed concern about the difficulty in defining a weed versus a native plant in municipal ordinances.

For more information on this case click here!

- Ordinance Restricting Location of Strip Club Unconstitutional
In *Green Valley Investments, LLC v. Winnebago County* (7th Cir. July 27, 2015) the Seventh Circuit determined that the County's zoning ordinance, restricting the location of adult businesses to certain zoning districts and requiring a conditional use for their operation, violated the First Amendment as an impermissible prior restraint.

For more information on this case click here!

- Court Denies Motion to Dismiss RLUIPA and Free Exercise Claims
In *Church of Our Lord and Savior, Jesus Christ v. City of Markham, Illinois* (N.D. Ill. August 19, 2015), a Church brought suit against the City based on the City denying the Church a special use permit to operate in an area zoned residential. The church argued that the City's denial of its permit was a "substantial burden" on its religious exercise, discriminated against the church, and violated the equal terms clause of RLUIPA. The court dismissed the RLUIPA nondiscrimination claims for failure to state a claim, but allowed the church's substantial burden claim and free exercise claims to move forward.

For more information on this case click here!

State

- Municipal Power to Regulate Land Uses Applies to School Property
In *Gurba v. Community High School District*, 2015 IL 118332, the Illinois Supreme Court determined that school property is subject to municipal zoning laws. The court reasoned that, since the City has broad home rule authority to regulate land uses and there is no statutory provision restricting the authority of the City to regulate zoning on school property, the school's property is subject to the City's zoning and storm water ordinances.

For more information on this case click here!

- No Compensation for Road Relocation
In *DWG Corporation v. County of Lake*, 2015 IL App (2d) 131251, the Appellate Court concluded that the owners of a 686 acre property, who were granted PUD approval, were not due compensation from the County when the County relocated a road near the commercial area of the approved development. The court determined that since the owners still had access to the road the relocation of that road did not materially impair the owners' property and constitute an unconstitutional "taking."

For more information on this case click here!

- Court Says An Estimate is Just An Estimate
In *Devyn Corp. v. City of Bloomington*, 2015 IL App (4th) 140819, the Illinois Appellate Court determined that the City of Bloomington did not fail to comply with the provisions of the Tax Increment Allocation Redevelopment Act. The court held that the "estimated date of completion"

of a tax increment allocation redevelopment plan is merely an estimate. Therefore, the City could lawfully levy and collect incremental taxes after the estimated date of completion.

For more information on this case click here!

Legislation to Love or Loathe

Public Act 99-0123 Modifies the Counties Code and the Illinois Municipal Code and provides that notwithstanding any other provision of law a county and municipality may establish standards for wind farms and electric-generating wind devices.

Public Act 99-0158 Creates an Equal Economic Opportunity Task Force to examine problems in economic development and aid in curbing residential and economic redlining.

Public Act 99-0292 States that there is no "conflict" when a municipality enters into a jurisdictional boundary line agreement where it gives up property within its jurisdiction to another municipality. The bill also states that the boundary agreement will not impact any boundary line agreement with another party.

Public Act 99-293 Changed the enforcement of administrative adjudication judgments for non-home rule municipalities. Prior to the new law a non-home rule municipality had to file an action in circuit court to enforce an administrative adjudication judgment. However, with the adoption of the new law, non-home rule municipalities can now enforce an administrative adjudication decision in the same manner as a court order or judgment and all municipalities can recover costs associated with enforcing the judgment

Public Act 99-0452 Allows a municipality to utilize up to 1% of the revenue from a business district retailers' occupation tax and service occupation tax, and a hotel operators' occupation tax received from one business district for eligible costs in another business district so long as the two business districts are either contiguous to one another or separated only by public right of way or forest preserve property.

ABOUT ANCEL GLINK

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