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# Zoning Administration Handbook

By:  
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**ANCEL GLINK'S  
ZONING ADMINISTRATION HANDBOOK**

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## **1. INTRODUCTION**

Among the most important powers that may be exercised by municipalities, as well as counties, are zoning powers. Zoning enables municipalities to implement the philosophy desired in each municipality's growth patterns, such as locations for residential, commercial and industrial uses, as well as the day to day enforcement of regulations designed to protect the health, safety and welfare of the community. Zoning dramatically affects a municipality's fiscal structure, economic development and growth, and the character of the community. Thus, there is no one-size-fits-all model for land use regulation and control. Small towns in the rural parts of the state may want to preserve their history, while encouraging economic viability of central business districts. Suburban communities may seek to promote "smart growth" by encouraging planned development with adequate traffic, landscape and density regulations. Urban municipalities may have the need for commercial and industrial development to create much-needed property tax revenues.

But, what are the limitations to these land use controls? What powers do municipal officials have to direct a comprehensive system of land use regulation? What are the proper municipal authorities to accomplish these goals?

This Handbook is designed to assist elected and appointed planning officials and municipal corporate authorities in effectively using the powers provided to municipalities in Division 13 of the Illinois Municipal Code.<sup>1</sup> This Handbook can also be read as a companion to our "Zoning Administration Tools of the Trade" handbook that provides a broader and more general overview of the various zoning tools and techniques provided in the Illinois Municipal Code.

It is vitally important that planning and zoning officials have a thorough knowledge not only of their specific statutory functions, but also of their practical effect on the overall pattern of planning and zoning decisions, made not only by the local government, but by the property owner, developers, and dissatisfied citizen's groups. Without a full knowledge of all of the players and their powers and likely roles, municipalities often do not take full advantage of their land use regulation authority. As one expert noted,

Interviews with local officials within Illinois indicate that there appears to be, in fact, a very tenuous connection between planning and zoning within the state. In addition to those communities that have no planning or zoning programs of any kind, a number of Illinois communities that have adopted zoning programs have not adopted any type of local land use plan. In many communities, adopted land use plans that were prepared years ago, have not been consistently updated or revised, and are, in fact, dead plans. Only a few local officials reported the existence of adequately funded and carefully prepared local

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<sup>1</sup> 65 ILCS 5/11-13-1 *et seq.*

land use plans that actually provide local officials with substantial and ongoing guidance in regulating land use and development.<sup>2</sup>

Ultimately, we hope a review of the powers of municipalities and the interplay of the parties of interest contained in this Handbook will encourage communities to review and, where appropriate or desired, update their land use regulations to ensure that these regulations are being utilized to their fullest statutory extent.

More information is available on our website at [www.ancelglink.com](http://www.ancelglink.com).

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<sup>2</sup> Edward H. Ziegler, Jr., "An Outsider Looks at Illinois Zoning and Planning." Northern Illinois University Law Review, Volume 12, pg. 717 at pg. 724 (1992).

## **2. ABOUT THE FIRM**

Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C. is in its 75th year of representing governmental bodies in the State of Illinois. With offices in Chicago and several of the collar counties, the firm represents a large number of governmental bodies both as regular attorney and special counsel. The firm has helped many municipalities to develop comprehensive plans, zoning and subdivision codes, and other ordinances relating to planned growth and economic development. The firm, and its over 30 attorneys, have represented communities with very limited and conservative growth goals and others that favor rapid expansion. In each instance, the firm has helped the government body manage growth so that the developers and new residents pay for the costs of the expansion rather than existing citizens. We have helped many municipalities as special counsel in negotiating annexation agreements and zoning ordinance amendments leading to planned unit developments. When called upon to do so, we have successfully tried many cases involving zoning and planning at the trial and appellate court levels. Attorneys at the law firm have authored many articles and pamphlets on these issues and are regularly asked to speak at meeting of State and regional organizations. In addition to representing municipalities, Ancel Glink represents many Park Districts, School Districts, Fire Protection Districts and other special governmental bodies. The expertise gained in this broad representation allows us to assist our clients in negotiating intergovernmental agreements which encourage communities to cooperate rather than litigate. We have also worked with municipalities and regional municipal organizations in area-wide planning and intergovernmental boundary agreements. If you have any questions about this handbook, and the techniques described, please call one of the authors at: Stewart H. Diamond, 312.604.9109 or David S. Silverman, 312.604.9117. You may also wish to visit our web site at:

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### **3. ABOUT THE AUTHORS**

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## **4. PRELIMINARY CONSIDERATIONS**

Before we begin examining the particular zoning powers of municipalities, we must first deal with several important issues that set the stage for municipalities to exercise their zoning powers.

### **A. Presumption of Validity and the LaSalle Factors.**

Illinois courts, and for that matter, federal courts, more often than not hold that municipal regulations, including land use regulations, are valid. The burden—with rare exception—is on the person attacking the regulation to prove that it is not a valid exercise of a municipality's legislative powers. Sometimes a strong attack from a landowner or developer gets matched up with a weak defense by the community. These are generally the cases that are lost.

However, as you may know from personal experience, zoning codes are often the subject of litigation on the validity of their application to individual parcels. Illinois courts have established a set of factors to be considered when reaching zoning decisions, collectively known as the LaSalle Factors<sup>3</sup> (named after the original case where the first six factors were first enunciated). Illinois courts examine and attempt to balance these factors in order to determine whether the zoning in question is fair to the owner of the subject property, owners of surrounding properties, and the public.<sup>4</sup> However, no single factor is controlling, and each case must be decided on its own facts, although Illinois courts place substantial importance on the first factor.<sup>5</sup> The LaSalle Factors are as follows:

#### 1. The existing uses and zoning of nearby property:

In deciding this factor, courts will examine whether the subject property is zoned in conformity with surrounding existing uses and whether those uses are uniform and established.<sup>6</sup> Defining what is a “nearby” property can be result in substantially different boundaries, depending on what basis is used, such as a specified distance versus the road system demarcation. However, the mere presence of buildings or other areas being put to the same use as the person challenging the validity seeks for his property, is wholly insufficient to show that the ordinance is invalid or discriminatory.<sup>7</sup>

#### 2. The extent to which property values are diminished:

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<sup>3</sup> La Salle National Bank v. County of Cook, 12 Ill.2d 40, 145 N.E.2d 65 (1957); Sinclair Pipe Line Co. v. Village of Richton Park, 19 Ill.2d 370, 167 N.E.2d 406 (1960)

<sup>4</sup> Harvard State Bank v. County of McHenry, 251 Ill.App.3d 84, 620 N.E.2d 1360 (2d. Dist. 1993)

<sup>5</sup> La Grange State Bank v. County of Cook, 53 Ill.App.3d 79, 368 N.E.2d 601 (1<sup>st</sup> Dist. 1993)

<sup>6</sup> La Grange State Bank v. County of Cook, 53 Ill.App.3d 79, 368 N.E.2d 601 (1<sup>st</sup> Dist. 1993)

<sup>7</sup> Mid-West Emery Freight System, Inc. v. City of Chicago, 120 Ill.App.3d 425, 257 N.E.2d 127 (1<sup>st</sup> Dist. 1970), quoting Mundelein Estates v. Village of Mundelein, 409 Ill.291, 99 N.E.2d (1951)

The extent to which courts permit zoning regulations to diminish property value varies depending on the purposes served by the regulation. The loss in value to the plaintiff must be considered in relation to the public welfare.<sup>8</sup> If the gain to the public is small when compared with the hardship imposed by the restriction upon the individual property owner, then no valid basis for zoning regulation exists.<sup>9</sup> In addition, courts have stated that a property owner is not constitutionally entitled to develop property to its "highest and best use" as real estate professionals typically use that term.<sup>10</sup> Moreover, if a purchaser of property knows of the existing zoning restrictions at the time of purchase, the knowledge itself is relevant to the court's decision regarding the hardship caused by the restriction.<sup>11</sup>

3. The extent to which the destruction of property value of the plaintiff promotes the health, safety, morals or general welfare of the public.
4. The relative gain to the public as opposed to the hardship imposed upon the individual property owner.

The third and fourth factor are usually considered together.<sup>12</sup> As stated earlier, if the gain to the public welfare exceeds the hardship to the individual property owner, the zoning regulation will likely be deemed valid.<sup>13</sup>

5. The suitability of the subject property for the zoned purposes:

Alternative development plans proposed by the landowner may be a factor in determining whether the proposed use is an appropriate use of the property.<sup>14</sup> The law does not require that the subject property be totally unsuitable for use as it zoned in order for the zoning restriction to be invalid. If the property cannot be reasonably developed as zoned and if the zoning restriction is unrelated to the public welfare, the restriction is not constitutional.<sup>15</sup>

6. The length of time the property has been vacant as zoned considered in the context of land development in the area:

In deciding this factor, courts look to whether the subject property is vacant or unsaleable because of the zoning ordinance.<sup>16</sup> When, but for the zoning classification, the property probably would have developed, the reasonableness of the zoning classification is

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<sup>8</sup> La Grange State Bank v. County of Cook, 53 Ill.App.3d 79, 368 N.E.2d 601 (1<sup>st</sup> Dist. 1993)

<sup>9</sup> Pioneer Trust & Savings Bank v. McHenry County, 41 Ill.2d 77, 241 N.E.2d (1968)

<sup>10</sup> Elmhurst National Bank v. City of Chicago, 22 Ill.2d 396, 176 N.E.2d 771 (1961)

<sup>11</sup> Grobman v. City of Des Plaines, 59 Ill.2d 588, 322 N.E.2d 443 (1975)

<sup>12</sup> Zietz v. Village of Glenview, 304 Ill.App.3d 586, 710 N.E.2d 849 (1<sup>st</sup> Dist. 1999)

<sup>13</sup> La Salle National Bank v. County of Cook, 12 Ill.2d 40, 145 N.E.2d 65 (1957)

<sup>14</sup> Northern Trust Bank/Lake Forest, N.A. v. County of Lake, 311 Ill.App.3d 332, 723 N.E.2d 1269 (2<sup>nd</sup> Dist. 2000)

<sup>15</sup> Amalgamated Trust & Savings Bank v. Cook County, 82 Ill.App.3d 370, 402 N.E.2d 719 (1<sup>st</sup> Dist. 1980)

<sup>16</sup> Zietz v. Village of Glenview, 304 Ill.App.3d 586, 710 N.E.2d 849 (1<sup>st</sup> Dist. 1999)

thereby called into question.<sup>17</sup> In the Second District Appellate Court, it was held that property owners had to establish that the property was vacant or unsaleable because of the zoning restriction in order for this factor even to be considered.<sup>18</sup>

7. The care with which a community has undertaken to plan its land-use development:

In order for a zoning regulation to not be found arbitrary, it must be based on careful and thorough planning. Courts therefore look to whether there is a comprehensive zoning plan which reasonably regulates and restricts land uses for the health, safety and welfare of the public in order to determine whether a zoning change is in harmony with the orderly use of the property.<sup>19</sup> The zoning of small areas that is incompatible with a zoning pattern that is compact and uniform is consistently invalidated.<sup>20</sup>

8. Community need for the use proposed by the plaintiff:

Since this factor pertains to a use at the proposed location, courts only need consider the need for the proposed use in the individual landowner's neighborhood.<sup>21</sup> While lack of community need for the use is relevant to the relative gain to the public, this factor is not in itself a conclusive or determinative factor where (1) there is no uniformity of uses in the area and the proposed use would have no adverse effect on adjacent properties; (2) denial of the proposed use would in no way benefit the public health, safety or morals; and (3) there is substantial economic loss to the landowner resulting from such denial.<sup>22</sup> When the community need is not compelling, due to other available properties or operations, the courts will only assign minimal or no weight to this factor.<sup>23</sup>

**B. Home Rule v. Non-Home Rule Municipalities.**

"Home rule" and "non-home rule" Illinois municipalities have differing authority with regard to land use regulations - but not as much as you would think.

Generally speaking, a non-home-rule municipality has only those powers granted to it by law, as well as certain powers enumerated in Article VII, Section 7, of the Illinois Constitution. The commentary to Section 7 notes that the section maintains the concept of Dillon's Rule with respect to non-home-rule units of local government. Dillon's Rule provides that municipalities possess only those powers expressly granted, powers incident to those expressly granted, and powers indispensable to the accomplishment of the declared objects and purposes of the

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<sup>17</sup> Amalgamated Trust & Savings Bank v. Cook County, 82 Ill.App.3d 370, 402 N.E.2d 719 (1<sup>st</sup> Dist. 1980)

<sup>18</sup> Northern Trust Bank/Lake Forest N.A. v. County of Lake, 311 Ill.App.3d 332, 723 N.E. 2d 1269 (2<sup>nd</sup> Dist. 2000)

<sup>19</sup> Forestview Homeowners Association, Inc. v. County of Cook, 18 Ill.App.3d 230, 309 N.E.2d 763 (1<sup>st</sup> Dist. 1974)

<sup>20</sup> Bossman v. Village of Riverton, 291 Ill.App.3d 769, 684 N.E.2d 427 (4<sup>th</sup> Dist. 1997)

<sup>21</sup> Rodriguez v. Henderson, 217 Ill.App.3d 1024, 578 N.E.2d 57 (1<sup>st</sup> Dist. 1991)

<sup>22</sup> Pioneer Trust & Savings Bank v. McHenry County, 41 Ill.2d 77, 241 N.E.2d (1968)

<sup>23</sup> Lambrecht v. County of Will, 217 Ill.App.3d 591, 577 N.E.2d 789 (3<sup>rd</sup> Dist. 1991)

municipal corporation.<sup>24</sup> In effect, non-home rule municipalities are strictly governed by the powers provided in Division 13 of the Illinois Municipal Code, and any incidental powers necessary to effectuate these legislatively granted powers. Luckily, the power given to non-home rule municipalities to plan and to zone are broadly stated.

Home rule municipalities can exercise certain new powers in addition to those provided in Division 13 of the Illinois Municipal Code. Those additional powers must be within the "government and affairs" of the home-rule municipality. In addition, the powers sought to be used must not have been expressly limited by state statute or preempted by state statute or federal law. The added power given to home rule municipalities reflects the assumption that problems affecting home rule municipalities should be met with solutions tailored to local needs and can be crafted to solve these problems at the local legislative level. To date, most of the powers which municipalities seek to exercise in a zoning setting are within the power of both home rule and non-home rule units.

### **C. Constitutional Considerations.**

#### *1. Constitutional Takings*

Both the Illinois and federal constitutions protect private property rights from governmental "takings." A taking is exactly what the word implies: an action by the government that strips a property owner of all or a portion of his or her interest in and rights to use property. Takings come in two forms: (1) direct condemnation, where the government begins a court supervised process of condemning a private property for a public benefit; or (2) inverse condemnation, where a governmental regulation has the practical effect of taking someone's property rights.

In the land use regulations context, we are concerned with the so-called inverse condemnation situations. The familiar refrain that private property cannot be taken without "just compensation" is a treasured value in our society enshrined in the federal constitution's Fifth Amendment as applied to the states through the Fourteenth Amendment, Article I, sections 1 and 15 of the Illinois Constitution, and the constitutions of the other 49 states.

It is important to note, however, that not all forms of land regulations run afoul of constitutional takings provisions. The United States Supreme Court has recognized that a land use regulation does not effect a taking if it "substantially advances legitimate state interests' and does not deny an owner economically viable use of his land." At first blush, any restriction on the use of private land, which was not a health threat or otherwise illegal, could be considered a diminishment in the value of property for which public payment should be made. In fact, in the zoning context, reasonable land use regulations have consistently been upheld

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<sup>24</sup> 1 J. Dillon, *Municipal Corporations* sec. 237.

under constitutional analysis at the federal level since 1926 when the United States Supreme Court specifically found that zoning is an appropriate governmental regulatory function.<sup>25</sup>

## *2. Due Process*

The second constitutional principle to be aware of is the “due process” clause of the Fifth Amendment which applies to the states, again, through the Fourteenth Amendment. Due process comes in two forms: procedural and substantive. Procedural due process requires that the actual process that a zoning petitioner goes through when requesting zoning relief from a municipality (i.e., a hearing before a plan commission or zoning board of appeals) is fair and equitable and is not arbitrary and capricious. The same procedural protections must be followed if the government itself is seeking to make the zoning change. Substantive due process, on the other hand, requires that the actual laws – the legal substance – that is being applied to a zoning petitioner (i.e., a zoning ordinance or a subdivision ordinance) are fair and equitable and not arbitrary and capricious.

## *3. First Amendment*

Illinois and federal courts have held that the regulations must not run afoul of the federal constitution’s First Amendment protection of freedom of speech and expression, as well as the companion provision in Article I of the Illinois Constitution. In the land use regulatory context, freedom of expression violations are most often found in respect to signs and adult uses. The First Amendment issues surrounding land use regulations are well beyond the scope of this Handbook, but some general guidelines can be formed from the extensive case law regarding the constitutionality of land use regulations that have a direct or indirect effect of free speech and expression rights

### *a. Signage*

To some peoples surprise, in a United States Supreme Court case known as “Metromedia”, the court gave substantial powers to governmental bodies, when using carefully drafted ordinances, to limit or ban commercial speech on signs. There is far less ability to regulate non-commercial speech which is an expression of traditional rights protected by the federal Constitution. With regard to signage, courts apply one of two standards in analyzing the constitutionality of sign regulations: the first, lesser standard, is legally known as “intermediate scrutiny” and examines a challenged regulations through a two part test that asks whether the regulations (i) advance a “substantial” governmental interest and (ii) are written to address the substantial governmental interest in the narrowest terms; in other words, not written more extensively than necessary to promote the substantial governmental interest.<sup>26</sup> The second standard is legally known as “strict scrutiny” and examines a challenged regulations through a two part test that asks whether the regulations (i) advance a “compelling”

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<sup>25</sup> Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)

<sup>26</sup> Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981)

governmental interest and (ii) are written in the least restrictive terms necessary to promote that compelling governmental interest; in other words, the compelling interest to be promoted is defined with precision and the regulations are designed to specifically address that defined compelling governmental interest.<sup>27</sup> While many of the items mentioned in this handbook can be addressed by public officials with little attorney advice, the issue of sign regulation is one where general knowledge and political instinct are not enough to win or save the day.

If it appears that the courts split hairs that is understandable, but there is one overriding principle that may help understand the distinguishing aspect of each analysis. Sign regulations, and for that matter any regulations directed at speech or expression, must be “content neutral”; in other words, the regulations are not written in such a way as to regulate what the sign says, but instead are designed to regulate the so-called “time, place, and manner” of the regulated speech or expression. Obviously, in the context of zoning, place and manner are regulated, and to a lesser degree the time of the speech is regulated (e.g. limitations on operating signs that display moving animation or other active features). The test used will depend upon whether the regulations does affect the content of speech or whether the regulation does not effect the content, but only the time, place, and manner.

The most active plaintiffs in sign code litigation tend to be billboard companies. In fact, as of this writing, billboard companies are engaging in a nationwide coordinated attack against sign code regulations in an effort to break the scope of appropriate sign code regulations endorsed by the plurality in Metromedia Inc., *supra*.<sup>28</sup>

*b. Adult Uses*

First Amendment protections extend to any form of speech and expression, including land uses that are oriented to purely adult audiences and otherwise known as sexually oriented businesses. Nonetheless, courts will uphold these regulations where their aim in to address the “secondary effects” of such businesses, such as prostitution.<sup>29</sup> Several studies have been prepared that have examined these secondary effects in an efforts to quantify the scope of the problem. These studies are often cited in adult-use ordinances as empirical support for the regulations. However, courts will not uphold such ordinances where, like with sign regulations, regulate content and not the time, place, and manner. Further, ordinances that effectively prohibit such uses in any area of the community will not be upheld.

Appropriate time, place, and manner restrictions controlling adult-uses may take into account the proximity of such uses to sensitive land uses such as schools, parks, hospitals and others similar uses.

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<sup>27</sup> City of Ladue v. Gilleo, 512 U.S. 43 (1994)

<sup>28</sup> See “The Modern Tower of Babel: Defending the New Wave of First Amendment Challenges to Billboard and Sign Regulations”, by John M. Baker and Robin M. Wolpert, *Planning and Environment Law*, October 2006, Vol. 58, No. 10 pp. 3-11

<sup>29</sup> Young v. American Mini-Theaters, 427 U.S. 50 (1976); City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986)

As noted above, the scope of First Amendment considerations exceed the scope of this Handbook and communities are encouraged to have legal counsel review sign and adult-use regulations.

4. *Religious Land Uses*

a. *Illinois Law*

Illinois courts have—for a long time—approached cases involving religious institutions and adverse zoning decisions differently than those land use cases involving other property owners. In particular, Illinois courts have explained that zoning regulations that effectively limit the free exercise of religion may run afoul of federal and state constitutional principles protecting religious rights.<sup>30</sup>

The practical effect of Illinois court rulings concerning zoning and religious institutions, is that the burden of proving the validity of a zoning ordinance is effectively shifted to the municipality to prove that the adverse decision does not limit the free exercise clauses of both the federal and state constitutions—compare this to the presumption of validity otherwise accorded municipal regulations noted above.

Illinois courts' decisions concerning zoning and religious institutions were codified in the Illinois Religious Freedom Restoration Act ("***IL-RFRA***").<sup>31</sup> Section 15 of IL-RFRA is the statute's operative provision:

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.<sup>32</sup>

Section 15 of IL-RFRA places the burden to prove the validity of its zoning ordinance as applied to a religious institution on the municipality, and requires that the municipality prove that the ordinance and decision were based on more than merely promoting the public health, safety, and welfare. In legal parlance, this burden of proof in IL-RFRA, (and in the federal Religious Land Use and Institutionalized Persons Act discussed below), is known as "heightened scrutiny." This state law goes beyond zoning and applies to any exercise of municipal authority that limits

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<sup>30</sup> Columbus Park Congregation of Jehovah's Witnesses, Inc., v. Brd. Of Appeals, 25 Ill.2d 65, 182 N.E.2d 722 (1962); Our Savior's Evangelical Lutheran Church of Naperville v. City of Naperville, 186 Ill.App.3d 988, 542 N.E.2d 1158 (2d Dist. 1989)

<sup>31</sup> 775 ILCS 35/1 *et seq.*

<sup>32</sup> 775 ILCS 35/15

the rights of a religious person, group, or institution. That is the case even if the ordinance or regulation is one of general application rather than specifically applied to the religious person, group, or institution.

Two additional sections of IL-RFRA are important: Section 20 enables a party that prevails against a municipality in an IL-RFRA action to recover its attorneys fees and costs<sup>33</sup>; and Section 25 makes IL-RFRA applicable to all municipal ordinances enacted prior to or after the enactment of IL-RFRA, and also pre-empts home rule authority.<sup>34</sup> The scope of IL-RFRA is very broad, but the constitutionality of the statute has not been addressed to date by any Illinois court, although the federal Religious Freedom Restoration Act of 1993 was struck down as unconstitutional by the U.S. Supreme Court in the 1997 case City of Boerne v. Flores.<sup>35</sup>

IL-RFRA raises the burdens on municipalities substantially and could be viewed as significantly limiting municipal zoning authority, including how religious land uses are categorized. Often, municipalities classify religious land uses as special permit uses in a limited number of zoning districts—most often residential districts. As discussed in more detail below, applications for special uses place additional burdens on applicants, because they have to show that the proposed special use conforms to standards for such uses set forth in municipal zoning codes. In this regard, it would seem that requiring a religious land use to apply for and receive a special permit prior to opening its proposed facility would fail the requirements of Section 15 of IL-RFRA. However, the Illinois Supreme Court noted recently that:

A church may be an appropriate special use because, depending upon its size and location, it may create traffic or parking problems within the neighborhood in which it is located. For example, the number of parking spaces needed by a church may vary considerably depending upon the availability of parking spaces in the neighborhood at the time the church holds services. Thus, although a church might be considered a desirable and appropriate use within a zoning district, the municipality may classify it as a special use and may require, for example, that parking problems be resolved before granting a special use permit to a property owner that would allow the owner to use the property as a church.<sup>36</sup>

The Illinois Supreme Court's comments, while not providing absolute cover to municipalities, do suggest that reasonable zoning regulations that do not specifically burden religious land uses, and that are reasonably tailored to address valid concerns will be upheld, even against an IL-RFRA challenge.

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<sup>33</sup> 775 ILCS 35/20

<sup>34</sup> 775 ILCS 35/25

<sup>35</sup> City of Boerne v. Flores, 521 U.S. 507 (1997)

<sup>36</sup> City of Chicago Heights v. Living Word Outreach Full Gospel Church and Ministries, Inc., 749 N.E.2d 916 (2001)

*b. Federal Law*

It is highly unusual for the federal government to affect municipal land use authority—save federal environmental statutes. However, in the context of zoning and religious land uses, the federal government has found that municipal zoning that affects religious institutions is worthy of federal statutory protection.

The federal government is on its second attempt to elevate challenges to municipal land use decisions concerning religious institutions. The first attempt was the ill-fated Religious Freedom Restoration Act of 1993<sup>37</sup> (“*US-RFRA*”) that was successfully challenged, as noted above, by the City of Boerne, Texas. Congress responded to the United States Supreme Court’s Boerne decision by enacting the Religious Land Use and Institutionalized Persons Act (“*RLUIPA*”).<sup>38</sup> RLUIPA is specifically directed at land use regulations. Section 2(a)(1) is the operative provision of RLUIPA:

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.<sup>39</sup>

This language is similar to the language in IL-RFRA, but is specifically limited to land use regulations. Unlike IL-RFRA, the burden is not totally shifted to the municipality. Instead, RLUIPA provides in Section 4(b):

If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff’s exercise of religion.<sup>40</sup>

In other words, RLUIPA requires that a party challenging a zoning ordinance or any adverse decision from such an ordinance to prove that it “substantially burdens” their free exercise of

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<sup>37</sup> 42 U.S.C. Sec. 2000bb *et seq.*

<sup>38</sup> 42 U.S.C. Sec. 2000cc *et seq.*

<sup>39</sup> 42 U.S.C. 2000cc-2(a)(1)

<sup>40</sup> 42 U.S.C. 2000cc-4(b)

religion. What exactly constitutes a substantial burden on the free exercise of religion is not defined in the statute. However, if a party succeeds in demonstrating that the adverse zoning decision does substantially burden the free exercise of religion, Section 4(b) does shift the burden to the municipality to demonstrate that the substantial burden is (1) in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest (i.e. "heightened scrutiny")

RLUIPA has somewhat increased the legal burdens on municipalities and other units of local government with zoning powers, as well as increased the legal costs that local governments may incur when their ordinances are challenged. It might be expected, then, that RLUIPA, and IL-RFRA, have had a chilling effect on local land use regulations, but this has not been the case—so far. Several courts have considered RLUIPA and—so far—the parties that have challenged local zoning ordinances and adverse zoning decisions have only been minimally successful.

Among the recent cases, perhaps the most significant is Civil Liberties for Urban Believers ("C.L.U.B.") v. City of Chicago.<sup>41</sup> C.L.U.B. challenged Chicago's business, commercial, and manufacturing zoning classifications that require religious institutions to obtain special permits to locate and operate in such districts. The Court ruled against C.L.U.B., holding that, among other things, Chicago's requirement that religious institutions obtain special permits to locate and operate in business, commercial, and manufacturing districts did not impose a "substantial burden" on religious exercise. Perhaps, most importantly, the Court also provided a definition of what constitutes a "substantial burden" under RLUIPA:

A land use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable.

The Court also approved of Chicago's amendments to its zoning ordinance, enacted after Congress adopted RLUIPA, that placed religious institutions on "equal footing" under its zoning code with non-religious assembly land uses, thereby correcting any violation of RLUIPA's non-discrimination provisions.

C.L.U.B. is an important decision for a number of reasons. First, the decision was made by the Seventh Circuit Federal District Court of Appeal. Decisions from the Seventh Circuit are binding in Illinois. Second, the decision implicitly endorses municipal zoning regulations that require religious organizations to seek special permits to locate facilities in areas where municipalities want to maximize tax revenues and employment centers—such as commercial and manufacturing districts. Third, the decision gives a "municipal friendly" definition of what

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<sup>41</sup> Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 766 (7<sup>th</sup> Cir. 2003)

is a “substantial burden.” Operationally, under RLUIPA, it is important to know that the party challenging the zoning ordinance bears the initial burden to demonstrate that an adverse zoning decision substantially burdens his or her free exercise of religion. The Court’s decision in *C.L.U.B.* requires such a party to demonstrate with a high level of precision how his or her free exercise is so burdened.

A second important case is *Petra Presbyterian Church v. Village of Northbrook*.<sup>42</sup> Petra brought suit against Northbrook after Northbrook closed down the church’s use of an industrial building in the Sky Harbor Industrial Park. Among its claims against Northbrook, Petra challenged Northbrook’s zoning ordinance under RLUIPA and IL-RFRA, because it required a special use permit to operate in an industrial district. Petra also claimed to have established a “vested right” to operate its church. The Court disagreed and basically ruled against Petra because it did not participate in the zoning process in “good faith.” Specifically, the Court explained that:

Petra purchased the property in October of 2001, but did not attempt to conduct worship services until May of 2003, a month after the 2003 ordinance came into effect [amendments that placed religious institutions on equal footing with other non-religious assembly land uses]. Thus, not only did Petra not have a good faith belief, they did not even use the property in the manner which they now claim they had a vested right to use. Moreover, before purchasing the property, Petra applied to have the property rezoned under the 1988 ordinance. Before the Village took any formal action, however, Petra withdrew its application for rezoning.

Although the Court denied Petra’s request for an injunction to prevent the Village from enforcing its zoning code, Petra continued its suit, seeking summary judgment on its federal and state claims before the Federal Court for the Northern District of Illinois in 2006.<sup>43</sup> Again, the Court found that the Village Code did not violate the Establishment Clause and that Petra’s claims for relief under Section 1983 and 1985 were time-barred. Regarding RLUIPA, the Court rejected Petra’s arguments and held that the Village’s code did not place a substantial burden, let alone a total exclusion, on the location of churches within the Village merely because it excluded organizations from an industrial park. The Court stated, “Nothing in the RLUIPA entitles Petra to establish a church anywhere it wants.” Consequently, the Court granted the Village’s motion for summary judgment on all federal claims, although it declined to exercise supplemental jurisdiction over Petra’s state law claims.

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<sup>42</sup> *Petra Presbyterian Church v. Village of Northbrook*, 2004 WL 442630 (N.D.Ill. 2004)

<sup>43</sup> *Petra Presbyterian Church v. Village of Northbrook*, 409 F.Supp.2d 1001 (N.D.Ill. 2006)

Petra reiterates the theme that religious institutions, while enjoying some preferential treatment under state and federal law, must still avail themselves of zoning procedures to locate and operate their facilities.

***PRACTICE TIP:***

While it is not certain, challenges by religious institutions to adverse municipal zoning regulations and decisions most likely will come under RLUIPA, with damage claims under Section 1983, as opposed to IL-RFRA, and to the point that this is so, the current federal case law points to several important points for municipalities:

1. Municipalities may still regulate religious institutions under their land use ordinances, provided those regulations do not discriminate against religious institutions and place religious institutions on equal footing with non-religious institutions;
2. Religious institutions must still participate in formal zoning procedures provided by the municipality;
3. Lawsuits against municipalities under RLUIPA and RFRA are not “sure bet” winners for religious institutions, and courts—at least under a RLUIPA challenge--require parties challenging local land use regulations to provide with significant precision how adverse zoning decision substantially burden free exercise of religion.
4. Each case must be considered on its own facts and a zoning decision to bar a religious institution from one zone where no alternative locations are available will continue to be an uphill battle.

***PRACTICE TIP:***

It may be wise to establish an administrative procedure to allow an aggrieved religious group to appeal an adverse zoning decision to the Zoning Board of Appeals or to corporate authorities. Because an aggrieved party is required to exhaust all administrative remedies at the local level before it can bring a court action, an administrative appeal procedure at the local level may delay the aggrieved party's ability to bring suit.

**D. Plan Commissions, Planning Departments and Zoning Boards of Appeal.**

The Illinois Municipal Code has several provisions related to the implementation and administration of zoning and other land use ordinances. Municipalities are authorized in Division 12 of the Illinois Municipal Code<sup>44</sup> to establish plan commissions as well as planning departments. Section 11-13-3 of the Illinois Municipal Code<sup>45</sup> concerns the establishment of zoning boards of appeals. As discussed below, the plan commission, planning department, and zoning board of appeals have important functions in the municipal zoning and land use regulatory process.

*1. Plan Commissions and Planning Departments*

Plan commissions and planning department statutorily have substantially the same function, which is to create and oversee the implementation of a comprehensive plan to guide the development of land in the municipality. In practice, they occupy two separate but complementary functions.

Planning departments, unlike plan commissions, are staffed by regional and city planning professionals and take responsibility to formulate various planning and land use studies, analyses, as well as serve as a repository for data relevant to a municipalities land use objectives, including demographic data, home sale, and land price data. Perhaps most importantly, planning departments are charged with creating the municipal comprehensive plan which serves as the foundation document for a municipality's land use policies as set forth in a municipal zoning ordinance. Comprehensive plans are discussed in more detail below. Finally, planning departments are often an integral first step in the zoning petition process, where zoning applications are first submitted to and reviewed by planning department staff. Based upon its review, the planning department prepares a report on the application that includes, among other things, a general description of the proposed project and zoning relief sought, compatibility with surrounding land uses, compatibility with or proposed variations from underlying zoning district regulations, and any issues that need to be examined further.

On the other hand, a plan commission is comprised of lay municipal residents appointed by the corporate authorities, (i.e. village president and board of trustees, mayor and city council), and is composed—unlike zoning boards of appeal—by an unlimited number of members. However, in a non-home rule municipality, all members must reside within the municipality or reside within one and one-half miles of the corporate limit of the municipality in unincorporated territory. While any resident of a municipality is an appropriate person to serve on a plan commission, where possible the corporate authorities may want to consider member candidates with relevant skills to the responsibilities of the plan commission, including architects, planning professionals, landscape architects, and engineers. The plan commission

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<sup>44</sup> 65 ILCS 5/11-12-4 *et seq.*

<sup>45</sup> 65 ILCS 5/11-13-3

consists of a chairman and members serving for such terms as the corporate authorities provide by ordinance. The plan commission is most often charged with reviewing in a public forum zoning applications for special use permits, including planned unit developments, text amendments, and amendments to the comprehensive plan (these forms of zoning relief are discussed in detail below). In the course of their review, plan commission members rely on the reports prepared by planning department staff, as well as their collective understanding of the land use policies of the municipality as enunciated in the comprehensive plan and zoning ordinance.

Plan commissions are typically a recommending body to the municipal corporate authorities. The corporate authorities for a municipality rely on its plan commission's recommendations for each zoning application in making a final decision on approving or denying a zoning applicant's requested zoning relief. Therefore, it is very important that plan commission recommendations be supported with appropriate findings of fact to support the substance of the recommendation. In certain instances, and as discussed in more detail below, corporate authorities that make a final decision on a zoning application which overturns a plan commission's recommendation must do so by super majority vote specified by statute.

## *2. Zoning Boards of Appeal*

Section 11-13-3 of the Illinois Municipal Code<sup>46</sup> authorizes municipal corporate authorities to appoint a 7-member board of appeals with terms as follows: one for one year, one for two years, one for three years, one for four years, one for five years, one for six years and one for seven years, the successor to each to serve a term of five years. In addition, a chairman is named at the time of the appointments.

All meetings of a ZBA are held at the call of the chairman and at such other times as the board authorizes, and minutes must be kept showing each vote. The duties of the board of appeals include: (i) to hear and decide appeals from and review any order, requirement, decision, or determination made by an administrative official charged with the enforcement of the zoning ordinance; (ii) conduct the public hearing upon requests for a variation from the zoning ordinance; (iii) to decide whether to grant a variation from the zoning ordinance, but only if so authorized by the corporate authorities; and (iv) to hear and decide all matters referred to it or upon which it is required to pass under the zoning ordinance.

The concurring votes of four members are required to reverse any order, requirement, decision, or determination made by an administrative official charged with the enforcement of the zoning ordinance, or to decide in favor of the applicant any matter upon which it is required to pass under the zoning ordinance, or to effect any variation in the ordinance, or to recommend any variation or modification in the ordinance to the corporate authority.

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<sup>46</sup> 65 ILCS 5/11-13-3

Ordinarily, zoning boards of appeal, like plan commissions, are recommending bodies to the corporate authorities on variation applications. Where a zoning board of appeal only has recommending authority on variation applications, it must make specific findings of fact that strict application of the zoning code would result in “practical difficulties” for the applicant and result in “particular hardship” upon the applicant. The corporate authorities may accept or deny the zoning board of appeal’s recommendation, but must do so by ordinance. In the event an application for a variation has received a negative recommendation from the zoning board of appeal, the corporate authorities may only approve the variation by a two-thirds vote of all members of the board of trustees or city council.<sup>47</sup>

As noted above, zoning boards of appeal may be given by ordinance final decision authority to allow or deny applications for variations. Where a zoning board of appeal has final authority on variation applications, it must require evidence to sustain the following three conditions prior to approving a variation:

- The property in question cannot yield a reasonable return if permitted to be used only under the conditions allowed by the regulations of the underlying zoning district;
- The plight of the owner is due to unique circumstances not of his or her own making; and
- The variation, if granted, will not alter the essential character of the municipality.<sup>48</sup>

### *3. Public Hearings*

All meetings of plan commissions and zoning boards of appeals are open to the public. In addition, the most common applications that plan commissions and zoning boards of appeal have before them – requests for variations, special uses, planned developments, and map & text amendments – all require that the plan commission or zoning board of appeals hold a public hearing on the application prior to making its decision.

#### *a. Historical Note – Klaeren Hearings – No Longer the Law*

Depending on the local zoning ordinance, public hearings require notice by publication and possibly notice by mail.<sup>49</sup> The public hearing itself is a legal, fact finding proceeding. These proceedings have traditionally been held in a somewhat informal manner, subject only to requirements of Illinois statutory and case law, and ensuring appropriate process to protect the rights of zoning applicants, their supporters and opponents. However, the 2002 Illinois Supreme Court’s decision in Klaeren v. Village of Lisle instituted greater requirements for

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<sup>47</sup> 65 ILCS 5/11-13-5

<sup>48</sup> 65 ILCS 5/11-13-4

<sup>49</sup> Klaeren v. Village of Lisle, 202 Ill.2d 164, 781 N.E.2d 223 (2002)

formality related to zoning applications seeking special (or conditional) use permits and added significant procedural requirements to public hearings concerning special use permits.

Klaeren involved citizens' claims that they were treated unfairly by the Village during a public hearing at which an application for a Meijer store was approved. At the public hearing, the Mayor did not allow the citizens to cross examine witnesses who had presented testimony on behalf of Meijer. As a result, the trial court and the appellate court ruled that the public hearing was improper. However, the appellate court did acknowledge that the official presiding over the public hearing may impose reasonable rules to assure that cross examination is "appropriate and contributes to the fact finding process or, in other words, is relevant and reasonable." Some reasonable rules might be: (i) a requirement that persons intending to participate must register prior to the hearing, (ii) a requirement that participants wishing to cross examine witnesses must have a special interest beyond that of the general public, and (iii) statements of presumptions that certain classes of individuals have a right to cross examine.

The Illinois Supreme Court upheld the decision of both the trial and appellate courts, substantially elevating public hearings on special use permits from their prior status as legislative acts, (the traditional view of zoning decisions in Illinois), that are accorded a great amount of deference by courts, to "administrative" or "quasi-judicial" acts that must provide more formal procedural due process rights to parties in favor of and opposed to a special use permit application. The Illinois Supreme Court endorsed the types of rules set forth by the appellate court that may be imposed upon parties wishing to cross examine witnesses or otherwise to provide testimony at special use permit public hearings. The Illinois Supreme Court also criticized the practice of municipalities to hold joint hearings on complex annexation and zoning matters, but did not hold that such joint hearings are never appropriate. Instead, the Illinois Supreme Court explained that:

The advantages of a joint hearing...are...[e]fficiency, convenience, and cost effectiveness...We must admonish public bodies...that the disadvantages of a joint hearing are similarly apparent...the size of the public audience provided little flexibility in conducting the public hearing...the two minute time limit imposed here would have been clearly improper had the proceedings complied with the due process requisite of cross examination...allowing the chief executive officer of the village to oversee a hearing of several of its boards is of questionable propriety...these concerns should be taken into account when municipalities craft procedures for joint hearings...

Klaeren Hearings were limited to special use permit applications. As if to place an imprecise point on this, the Illinois Supreme Court in Hawthorne v. Village of Olympia Fields<sup>50</sup> explained, in the context of a variation, that when municipalities reserve the power to provide final approval of zoning variations with the corporate authorities, as opposed to a zoning board

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<sup>50</sup> Hawthorne v. Village of Olympia Fields, 204 Ill.2d 243, 790 N.E.2d 832 (2003)

of appeals, that power may only be exercised by adoption of an ordinance, and such an act is a pure legislative act, as is when a municipality decides to amend its zoning ordinance. The Illinois Supreme Court, in a rather indirect manner, then made the distinction on procedural rights between variation, zoning ordinance amendments, and special use permits by explaining, in a footnote, that Illinois law makes a clear distinction between variances and special uses since variances come into play when the desired use is forbidden under existing zoning ordinances, whereas a special use allows a property owner to use his property in a manner which the zoning ordinance already allows.

*b. Public Act 94-1027 – The Current Law*

In response to the Illinois Supreme Court's decision in Klaeren, Public Act 94-1027 was signed into law on July 14, 2006 and became effective immediately. Public Act 94-1027 created Section 11-13-25 of the Municipal Code that provides as follows:

- (a) Any special use, variance, rezoning, or other amendment to a zoning ordinance adopted by the corporate authorities of any municipality, home rule or non-home rule, shall be subject to *de novo* judicial review as a legislative decision, regardless of whether the process of its adoption is considered administrative for other purposes. Any action seeking the judicial review of such decision shall be commenced not later than 90 days after the date of the decision.
- (b) The principles of substantive and procedural due process apply at all stages of the decision-making and review of all zoning decisions.

By operation, the Public Act reestablishes the previously held rule that the forms of zoning relief listed in subparagraph (a) approved by a board of trustees are legislative acts instead of "quasi-judicial" ones, as declared in Klaeren. Procedurally, legislative acts are subject to *de novo* judicial review to determine whether there was a reasonable or unreasonable basis for the act. The court's review and ultimate decision in such an instance is based on a record established at trial and any previously created record is inapplicable to the court proceedings. In other words, a challenge to an adverse zoning decision is brought in circuit court as if there never was a public hearing. All parties in a zoning lawsuit put on their respective presentations and may include new information or evidence that was not raised at the public hearing. The circuit court then makes the ultimate decision as to whether the zoning decision was appropriately made in accordance with all of the evidence presented, the municipal zoning ordinances, and other provisions of state and, in some instances, federal law.

The Public Act goes one step further and addresses situations where procedures used for review and approval or disapproval of the listed zoning relief are or can be deemed "administrative" (another way to say "quasi-judicial") by making these instances also subject to

*de novo* judicial review. However, the final decision must be made by a board of trustees and not by a zoning board of appeals that is the only other authorized body under Division 13 of the Illinois Municipal Code that may grant final zoning relief in the form of a variation.

In addition, Public Act 94-1027 has provided for a new statute of limitations within which time an aggrieved party may bring a complaint in circuit court for zoning relief. After Klaeren, and before the Public Act was adopted, challengers to adverse special use permit decisions made by a board of trustees had 35-days under the Administrative Review Law to file a complaint with the circuit court. In effect, a special use permit decision made by a board of trustees was not technically “final” until the 36<sup>th</sup> day after the board of trustees’ decision, because an aggrieved party could challenge that decision based on the record established during the public hearing. This 35-day statute of limitation was not applicable to other forms of zoning relief approved or disapproved by a board of trustees. The Public Act creates a 90-day statute of limitation within which time an aggrieved party may bring a complaint in circuit court against the listed forms of zoning relief in subparagraph (a). This requirement is both a preservation and extension of the procedural time frame established by Klaeren to challenge zoning decisions and an expansion in the formal establishment of a statute of limitation lawsuits arising from zoning decisions made by a board of trustees. Therefore, a final zoning decision by a board of trustees is technically not “final” until the 91<sup>st</sup> day after the board of trustees’ decision and neither the municipality nor the zoning petitioner can rely on any such decision for 90-days.

The Public Act also appears to preempt home rule powers even though the preemption is not specifically stated. This preemption is unnecessary. Whether a municipality is home rule or not home rule does not change the legislative nature of zoning decisions covered by the Public Act. The zoning decisions, however characterized by the municipality, are subject to *de novo* judicial review.

Lastly, although due process language in Section (b) is vague and may therefore be subject to future judicial interpretation, it appears to act as a legislative announcement adopting the heart of the Klaeren decision, that procedural and substantive due process must be accorded to all parties to a zoning proceeding.

Due to the recent challenges and changes to zoning public hearing procedures, it is still advisable that the Chairman explain the order of events for all zoning applications. The typical order is as follows: (i) the applicant presents his or her applications, (ii) the board or commission asks questions of the applicant, (iii) members of the public who are in favor of the application address the applicant and board or commission, (iv) members of the public who are not in favor of the application address the applicant and board or commission, (v) the public hearing is closed, (vi) the board or commission discusses the application amongst themselves (in the open), and (vii) the board or commission acts on the application. Also, prior to the applicant’s presentation, the Chairman should set forth some ground rules. For example, the Chairman may state that audience members may audio tape or video tape the public hearing, that no one may interfere with the public hearing unless formally recognized by the Chairman,

that audience members should not repeat prior audience members or be overly verbose with their comments, and sometimes that audience members will get a certain amount of time to speak (e.g., a limit of three minutes).

***PRACTICE TIP:***

Although the Illinois legislature has lessened the impact of Klaeren with the enactment of Public Act 94-1027, it is still best, when a special use permit application is among several to be considered, to avoid a joint public hearing. However, if you do want to hold such a joint hearing, then ensure that procedural due process rights are preserved for all participants. It is best to consult with your municipal attorney in advance of such hearings to make sure that adequate procedures are in place. Further, it is a good idea to have published and publicly available standard rules and procedures for all special use permit public hearings that include the types of rules suggested above. Again, consult with your municipal attorney to prepare appropriate rules and procedures.

***PRACTICE TIP:***

In order to avoid any issues that may arise from the newly instituted 90-day statute of limitations on zoning relief decisions, particularly for more complex zoning relief such as a mixed-used planned unit development, it may be worthwhile to make the effective date of the ordinance granting relief 91 days after its adoption and approval. This will ensure that development cannot begin until all potential challenges have been time-barred. However, keep in mind that the developer's consent will be necessary in order to extend the effective date of the ordinance.

## **5. GENERAL PLANNING AND ZONING POWERS**

Having considered important preliminary matters, this section provides information on the comprehensive plan and explaining the various types of zoning relief used to administer a zoning ordinance. Zoning relief in Illinois falls into five familiar categories: special use permits, variations, map amendments, text amendments, and a hybrid category known as planned developments. Zoning relief, as the term implies, relieves a zoning applicant of the strict application of the zoning code to his or her property

### **A. The Comprehensive Plan – Long Range Planning.**

Section 11-12-5 of the Illinois Municipal Code<sup>51</sup> provides municipalities with the power, but not the requirement, to prepare comprehensive plans. The comprehensive plan is the foundation for a municipality's land use regulations as set forth in its zoning code. In a well-planned and well-managed community, the comprehensive plan, though advisory in nature, provides the context for most local decisions regarding the long range planning and development of the municipality. As noted, and like many states, Illinois municipalities are not mandated by state statute to prepare comprehensive plans. However, having a comprehensive plan bolsters a municipality's zoning code by articulating in broad terms the rationale for zoning regulations in particular areas of the municipality.<sup>52</sup>

At a minimum, a good comprehensive plan should address at least the following elements regarding the physical future of the community:

- future land use;
- transportation and circulation (major routes -- not every street);
- public sewer and water service;
- school sites;
- major public facilities, such as convention centers, fairgrounds, stadiums, airports and landfills; and
- expansion areas for institutions, such as universities, hospitals and community colleges.

In addition, a good comprehensive plan will provide a context in which the following other activities can take place: (i) identifying locations for new industry based on the community's economic development goals, (ii) showing likely locations for controversial facilities, such as adult uses, homeless shelters, and other social service facilities, and (iii) generally providing the physical context for meeting all of the communities future needs.

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<sup>51</sup> 65 ILCS 5/11-12-5

<sup>52</sup> A comprehensive plan also serves as the basis for a municipality's 1.5 mile extra-territorial jurisdiction concerning subdivision regulations.

As noted above, when a municipality has a comprehensive plan in place and makes a land use decision for or against any proposal based, in part, on the comprehensive plan, the justification for that decision has more weight behind it in, for example, a court contest than if no comprehensive plan existed. For example, it is much more difficult for a petitioner to claim that a land use decision denying the petitioner's rezoning was not rationally related to the welfare of the community when the comprehensive plan identifies his land as residential and the petitioner wanted a rezoning to industrial in order to build a food processing plant.

Once the municipality decides that it wants to create a comprehensive plan (either at the direction of the corporate authorities or at the suggestion of the plan commission or planning staff), the first task is informing the public through press releases, fliers, and the like of the municipality's intention to create the comprehensive plan. Next, the municipality usually sets up workshops where members of the community are invited to participate in a dialogue with planning staff and local officials on the various components to the comprehensive plan (i.e., land use, economic development, transportation, etc). Prior to these workshops, the planning staff will have gathered the necessary data on the various components of the comprehensive plan needed to make the workshops meaningful. For example, prior to the workshop on economic development, the planning staff might have compiled Illinois Department of Revenue retail sales tax figures for the prior five years, determined how many business licenses have been issued and identified major employers who have either located to or relocated from the community during that same period. In addition to the workshops, the municipality may send surveys to all businesses and households in the community asking for their views on the various components to the comprehensive plan.

After the workshops have been conducted and the surveys have been received, the next step is for the planning staff to draft the comprehensive plan. Once the comprehensive plan is written there is typically a period of public comment and review where the public may read and comment on the comprehensive plan. After the close of the public comment period, Section 11-12-7 of the Illinois Municipal Code<sup>53</sup> establishes a formal process that begins with a public hearing that must take place in front of the plan commission. After the plan commission closes the public hearing and issues its recommendations to the corporate authorities on the comprehensive plan, the comprehensive plan must next go before the corporate authorities for its approval. The corporate authorities must act on the plan commission's recommendation concerning the comprehensive plan within 90-days after the close of the plan commission public hearing. If the 90-day period expires, the public hearing process at the plan commission must be repeated. After the corporate authorities have adopted a comprehensive plan, a notice of its adoption must be filed with the county recorder of deeds. The comprehensive plan does not become effective until 10-days after the filing of the notice with the county recorder of deeds. Lastly, after a comprehensive plan has been put in effect by the corporate authorities, any subsequent amendments to it must always go before the plan commission for its recommendation.

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<sup>53</sup> 65 ILCS 5/11-12-7

A comprehensive plan should be a “living document” that is relevant to existing conditions and development trends in the municipality. Accordingly, it is worthwhile to occasionally revisit the comprehensive plan and amend it to reflect changes in the municipality since the last comprehensive plan update, or create an entirely new comprehensive plan that reflects current planning and economic development practices and addresses new or emerging real estate development trends.

***PRACTICE TIP:***

Essentially, all comprehensive plans have the following three basic elements: (i) they are comprehensive *geographically*, meaning that the physical area contemplated by the comprehensive plan is at least all the territory under the jurisdiction of the local government; (ii) they are comprehensive *substantively*, meaning that the comprehensive plan deals at least with all the physical systems involved in the future of the community; and (iii) they are comprehensive *temporally*, meaning that the reference point in the future for the comprehensive plan is not too far away (usually 20 to 25 years). Furthermore, a typical comprehensive plan will show future locations of public facilities, major circulation routes, and a variety of uses of private lands (e.g., residential, commercial, industrial, institutional, open space, etc).

**B. General Zoning Powers and Zoning Map.**<sup>54</sup>

Zoning ordinances are one method of implementing the broad policies which are set forth in the comprehensive plan. Generally, zoning ordinances organize the municipality into different zones in which particular uses and structures are permitted. Zoning ordinances consist of two distinct components – the text and the map. The text of the ordinance enumerates the various zones and describes the uses which are permitted in each zone. The map shows the location of the various zones. Although it is possible to have zoning without a comprehensive plan, it is not recommended because, as noted above, when a zoning ordinance is challenged, the courts which interpret the validity of a zoning ordinance will look to see if the municipality has a comprehensive plan and if the zoning for a particular parcel is in harmony with the comprehensive plan.

*1. General Zoning Powers*

Section 11-13-1 of the Illinois Municipal Code<sup>55</sup> sets forth The purpose for which zoning authority is granted. The authority to zone is quite broad, and includes the following purposes:

<sup>54</sup> Division 13 of the Illinois Municipal Code, 65 ILCS 5/11-13-1 *et seq.*, makes several statutory distinctions between the City of Chicago and all other Illinois municipalities. For our purposes, the text of this Handbook concerns all other municipalities but Chicago

<sup>55</sup> 65 ILCS 5/11-13-1

- adequate light, pure air, and safety from fire and other dangers may be secured;
- taxable value of land and buildings throughout the municipality may be conserved;
- congestion in the public streets may be lessened or avoided;
- hazards to persons and damage to property resulting from the accumulation or runoff of storm or flood waters may be lessened or avoided;
- that public health, safety, comfort, morals, and welfare may otherwise be promoted; and
- to insure and facilitate the preservation of sites, areas and structures of historical, architectural and aesthetic importance.

The specific zoning powers set forth in Section 11-13-1, include:

- regulate and limit the height and bulk of buildings to be erected;
- establish, regulate and limit, the building or set-back lines on or along any street, traffic-way, drive, parkway or storm or floodwater runoff channel or basin;
- regulate and limit the intensity of the use of lot areas, to regulate and determine the area of open spaces, within and surrounding such buildings;
- classify, regulate and restrict the location of trades and industries and the location of buildings designed for specified industrial, business, residential and other uses; and
- divide the entire municipality into districts of such number, shape, area, and of such different classes (according to use of land and buildings, height and bulk of buildings, intensity of the use of lot area, area of open spaces, or other classification) as may be deemed best suited to carry out the purposes of a zoning ordinance.

As explained above, different portions of the zoning ordinance are administered by different people or entities. For example, the zoning ordinance may be administered by staff (e.g., what zoning district a particular use falls into), by the plan commission (e.g., review of a special permit application), or by the zoning board of appeals (e.g., review of a variation request).

## *2. Zoning Map*

Section 11-13-19 of the Illinois Municipal Code<sup>56</sup> requires municipalities to annually publish a map showing the current zoning uses, divisions, restrictions, regulations and classifications of the municipality, provided there has been a change in the past year to any zoning uses, divisions, restrictions, regulations and classifications. The map is to be published no later than March 31<sup>st</sup> of each year. The corporate authorities may establish a fee to defray the cost of publication.

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<sup>56</sup> 65 ILCS 5/11-13-19

***PRACTICE TIP:***

The zoning map should be updated as often as necessary to reflect map amendments and other changes (such as overlay districts). The Map should be clearly readable by the public, with a corresponding legend defining colors, striping or other methods for differentiating between districts. With electronic assistance, text and map changes can be made very quickly. Some communities have moved to coordinate their zoning documents with aerial and satellite photographs and Geographic Information Systems (GIS).

3. *Zoning Relief*

a. *Special Uses and Planned Unit Developments*

Zoning ordinances generally classify the uses allowable on real property as either permitted uses or special uses. Permitted uses are uses which require no action on the part of the municipality in order for the land owner to establish the use – these permitted uses are said to be allowed “as of right.” Conversely, special uses require the landowner to petition the municipality for permission to establish the particular use. Both permitted uses and special uses are expressly enumerated in each zoning district section of the zoning ordinance. The zoning ordinance must also include the standards by which an application for a special use will be judged. If the standards are vague and permit the municipality too much discretion, the zoning ordinance may be set aside by a reviewing court, and the proposed use permitted. The corporate authorities may provide for special uses, which include but are not limited to:

- public or quasi-public uses affected with the public interest;
- uses which may have a unique, special or unusual impact upon the use or enjoyment of neighboring property; and
- planned developments.

The zoning ordinance must establish standards for when a special use will be granted, and an applicant must meet these standards. The plan commission, which generally holds the public hearing on the special uses, should make findings of fact and conclusions of law which can be adopted and expanded on by the ultimate decision maker which is always the Council or Board. The Council or Board must make findings of fact which will be attached to the ordinance approving the special use, and these often refer to any exhibits containing plans and specifications for the proposed use. The municipality may grant a special use subject to conditions which are reasonably necessary to meet the standards set forth in the ordinance.

If the plan commission does not recommend the proposed special use, it may only be approved by a majority of all aldermen, commissioners or trustees of the municipality then

holding office. However, the municipality may establish by ordinance a requirement that any proposed special use, not receiving the approval of the commission or committee which held the public hearing, requires a two-thirds majority of all aldermen, commissioners or trustees of the municipality then holding office. Under either procedure, the mayor does not vote.

***PRACTICE TIP:***

Staff and the plan commission should always ask an applicant for a special use to address the standards enumerated in the zoning ordinance pertaining to special uses. It is the burden of the applicant to prove to that body and to the legislative body that he or she should be granted the requested special use.

Planned unit developments (PUDs) are a subset of special uses. A PUD is a special use that plans to develop under the permitted or special uses allowed in the zoning district then existing for the property or a new district applied for. It is often associated with multi-use developments or development which will proceed under a particular site plan. PUDs are designed to encourage the creative development of parcels, thereby providing developers with flexibility in laying out a site plan which may vary substantially from the underlying zoning district regulations. PUDs accomplish the goal of encouraging creative development by, first and foremost, suspending underlying zoning district bulk regulations (e.g. yard setback, building heights, floor-area ratios, etc.). In order to ensure control over proposed PUD site plan designs, PUD sections of zoning ordinances ordinarily have a unique set of criteria to determine whether or not the proposed PUD should be approved. A PUD often grants what would be a large number of individual variances under the umbrella of an overall design where the variances are granted in bulk as "deviations" allowed under a unified plan of design.

PUDs are akin to mini-zoning ordinances written specifically for a particular parcel of land. If a parcel of land has a PUD on it, the zoning map will specify the PUD type, along with the underlying zoning district. Some communities treat a PUD as almost its own kind of zoning district and may simply show PUD on the zoning map. This means that the zoning rules which govern that particular parcel of land are contained and enumerated in the ordinance which approved that specific PUD. For instance, the regulations in that ordinance might provide that the PUD may have one hundred twenty five attached single family homes in order to provide open space amenities on the parcel, or perhaps encourage preservation of a natural habitat. Ordinarily, this density may not be allowed under the applicable zoning district regulations, but the desired goal of preserving open space on the parcel warrants that these density requirements be relaxed.

Local municipalities have great latitude in where and under what circumstances PUDs can be allowed. That is, the zoning ordinance may provide for PUDs only in residential districts, only in industrial districts, or they may be given a district which is restricted solely to PUDs. A PUD may provide for both residential and commercial development of the same parcel.

As with any special use, any proposed PUD which fails to receive the approval of the plan commission shall not be approved by the corporate authorities except upon a majority favorable vote of the aldermen, commissioners or trustees of the municipality then holding office. The corporate authorities may also increase this requirement by ordinance to a two-thirds vote. In either case, the mayor does not vote.

***PRACTICE TIP:***

Planned Unit Developments allowing major deviations from the underlying zoning district are often only permitted on parcels of a particular size, such as 10 or 20 acres, which can be planned to accommodate multiple uses or special buildings reflecting an overall design, such as zero lot line townhomes.

*b. Variations*

Variations provide a mechanism for developers to relax certain zoning district regulations where, if strictly applied, would, upon certain findings of fact, make the project very difficult to complete. A good example is where a developer's project generally complies with all of the zoning district's regulations, but because of a unique feature of the parcel (e.g. irregular shape or ravine), the developer cannot comply with one or more of the applicable bulk regulations. In this instance, the developer can seek relief through a variation to those bulk regulations creating the difficulties. As noted above, the factors to be considered in granting a variation are dependent upon whether the zoning board of appeals is a recommending body or is charged with final decision making authority.

As a reminder, where the zoning board of appeal is a recommending body, variations may only be granted when there are practical difficulties or particular hardships in the way of carrying out the strict letter of the zoning ordinance. Also, recall that in the event an application for a variation has received a negative recommendation from the zoning board of appeal, the corporate authorities may only approve the variation by a two-thirds vote of all members of the board of trustees or city council.

Where the zoning board of appeals has final decision making authority, it must consider evidence that supports the following findings:

- the property cannot yield a reasonable return if permitted to be used only under the conditions allowed by the regulations in that zone;
- the plight of the owner is due to unique circumstances; and
- the variation, if granted, will not alter the essential character of the locality.

***PRACTICE TIP:***

Some communities believe that findings regarding unique circumstances and reasonable return are mandatory in each case. Actually, although the community should consider such factors when pertinent, the statute only requires that the relevant factors, based upon the status of the zoning board of appeal, be shown. These additional criteria generally need not be proven where the zoning board of appeals is a recommendatory body. Some municipalities have incorporated some or all of these criteria as matters that the zoning board of appeals must consider or find. We believe that these are often excessive standards. Why must a homeowner seeking a three-foot backyard setback variance need to prove that "the property cannot yield a reasonable return" without the variance.

*c. Map and Text Amendments*

Section 11-13-14 of the Illinois Municipal Code<sup>57</sup> enables municipalities to amend the text of their zoning ordinances, or to the official zoning map from time to time by ordinance.

In the case of a map amendment, Section 11-13-14 protects immediate or adjacent property owners from rezonings that would affect the use and enjoyment of their property. These property owners may file a written protest that must be signed and acknowledged by the owners of 20% of the frontage of the area proposed to be altered, or by the owners of 20% of the frontage immediately adjoining or across an alley from the area to be altered, or by the owners of 20% of the frontage directly opposite the frontage of the area to be altered. The written protest must be filed with the municipal clerk and served by the protestors on the applicant for the proposed amendment and his attorney, by certified mail, at the addresses shown in the application. In the event that a written protest has been filed, the map amendment may not be approved with less than a favorable vote of 2/3 of the aldermen or trustees holding office.

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<sup>57</sup> 65 ILCS 5/11-13-14

***PRACTICE TIP:***

A map amendment is another way to say “rezoning.” A rezoning, of course, is changing the zoning classification on a parcel of land from one classification to another. Special uses or variances are grants of privilege beyond that generally allowed to specific parcels. A text amendment is a change in the words of a zoning ordinance which can either apply to all zoning issues or just to a part of the ordinance.

***PRACTICE TIP:***

Essentially, all comprehensive plans have the following three basic elements: (i) they are comprehensive *geographically*, meaning that the physical area contemplated by the comprehensive plan is at least all the territory under the jurisdiction of the local government; (ii) they are comprehensive *substantively*, meaning that the comprehensive plan deals at least with all the physical systems involved in the future of the community; and (iii) they are comprehensive *temporally*, meaning that the reference point in the future for the comprehensive plan is not too far away (usually 20 to 25 years). Furthermore, a typical comprehensive plan will show future locations of public facilities, major circulation routes, and a variety of uses of private lands (e.g., residential, commercial, industrial, institutional, open space, etc).

**C. Enforcement of the Zoning Ordinance**

Once the zoning ordinance is approved, it should be enforced. Section 11-13-3 of the Illinois Municipal Code<sup>58</sup> creates the mechanism and procedures for municipalities to enforce their zoning ordinances. Zoning ordinances are enforced by the officers set forth in the zoning ordinance. The person primarily entrusted with the day-to-day administration and enforcement of the zoning ordinance is the zoning administrator. A citizen may appeal the decision of the zoning administrator to the zoning board of appeal. This needs to be done before a zoning ordinance violation citation is issued. Appeals of adverse zoning decisions require the following:

*Time.* Appeals must be taken within 45 days of the action complained of.

*Method.* The appellant must file a notice of appeal with the officer from whom the appeal is taken, and with the zoning board of appeals, which states the grounds of the appeal.

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<sup>58</sup> 65 ILCS 5/11-13-3

*Officer's Duty.* The officer from whom the appeal is taken shall promptly transmit all papers constituting the record to the zoning board of appeals.

*Stay.* The appeal stops all proceedings regarding the action appealed, unless the officer certifies to the zoning board of appeals, that by reason of facts stated in the certificate, stopping such proceedings could result in imminent peril to life or property.

*Hearing.* The Board of Appeals shall fix a reasonable time for the hearing, and shall decide the appeal within a reasonable time. The board shall give due notice of the hearing to the parties.

*Decision.* In making its decision, the board has the same authority as the officer making the original decision, and so may reverse or affirm, in whole or in part.

A final decision by the Board of Appeals is reviewable in the Circuit Court under the Administrative Review Law.

Violations of a zoning ordinance are treated like any other ordinance violation. A municipality may request that the Circuit Court enter a fine or a temporary restraining order, temporary injunction, or permanent injunction, to prevent violation of the zoning ordinance. Most communities do not seek jail time for zoning violatoins. If a community seeks such a higher penalty the violation will be heard under criminal rules and the charge must be proven beyond a reasonable doubt.

***PRACTICE TIP:***

Allow time for property owner to correct the violation before initiating any legal remedy. In a situation where the violation cannot be easily corrected, such as a building encroachment, encourage the property owner to seek a variance to correct the violation.

***PRACTICE TIP:***

When enforcing a zoning violation, make sure to gather good evidence of violation, including pictures, neighbor affidavits, and other sworn statements as to the violations, to substantiate the imposition of the fine and notice.

## **6. ANNEXATIONS AND ANNEXATION AGREEMENTS**

Municipalities, under Division 1 of Article 7 of the Illinois Municipal Code<sup>59</sup>, have fairly extensive authority to annex contiguous unincorporated territory. Annexation affords a municipality the ability to control development on their fringes that would otherwise be subject to the often less detailed county zoning ordinances. Additionally, annexation enables a municipality to meet the goals and objectives of their comprehensive plans by providing additional territory to address land uses underrepresented in the municipality, but deemed desirable in the comprehensive plan.

There are a few general statutory provisions that directly concern zoning of newly annexed land, as well as the ability to negotiate the terms of annexation, including zoning, through annexation agreements.

### **A. Zoning of Annexed Land.**

Section 7-1-47 of the Illinois Municipal Code<sup>60</sup> authorizes corporate authorities to provide by ordinance that annexed territory shall automatically be classified to the highest restrictive zoning classification providing principally for residential use under the annexing municipality's zoning ordinance. In this case, "highest" means the zoning designation with the lowest zoning density. Once annexed, and after a public hearing, land which has been so "automatically annexed" can be changed to another zoning category. Recently, except for small parcels of residentially zoned land, most municipalities will not annex land without an annexation agreement to control its future development.

#### **1. Common Methods of Annexation**

Division 1 of Article 7 of the Illinois Municipal Code (65 ILCS 5/7-1-1, et seq.) provides for several means of annexing property to a municipality, including voluntary non-court controlled annexation by ordinance of territory contiguous to the municipality, annexation requiring court action, "optional" annexation, and forced annexation of surrounded or nearly surrounded territory under 60 acres.

Certain notice and other procedures required by statute are conditions to all annexations; other procedures are specific to particular methods of annexing property or to unique kinds of property being annexed. Understanding which steps to take in each instance is critical, since failure to comply with a statutory requirement could result in a legal challenge and a court decision invalidating the annexation.

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<sup>59</sup> 65 ILCS 5/7-1-1 *et seq.*

<sup>60</sup> 65 ILCS 5/7-1-47

**A. Voluntary Non-Court Controlled Annexation by Ordinance of Territory Contiguous to Municipality**

The owners of record of all land within a certain territory which is contiguous to a municipality<sup>61</sup>, but has no electors may file a written petition with the municipality requesting annexation. Following consideration of the petition, the corporate authorities then holding office may, by ordinance passed by a majority vote, annex the territory.

The owners of record of all land within a certain territory and at least 51% of electors residing therein may file a written petition with the municipal clerk requesting annexation. Following consideration of the petition, the corporate authorities then holding office may, by ordinance passed by a majority vote, annex the territory.

In each of the above annexations, the annexation process is not complete until a copy of the ordinance annexing the territory and a map of the annexed territory is recorded with the County Recorder and filed with the County Clerk following action by the municipality.

**B. Annexation Requiring Court Action**

If brought by the owners of property, annexation may be accomplished by court action when not all of the owners consent to the annexation. In such an instance, a majority of the owners of record of land in the territory and a majority of the electors, if any, residing in the territory may sign a petition and file it with the circuit court clerk of the county in which the territory is located. No petitioner may withdraw from the petition except by consent of a majority of petitioners or where the court finds the signature was obtained by fraud.

When brought by the municipality, annexation may be accomplished by an ordinance submitted to and petition filed with the circuit court clerk by the municipality. (No tract of land exceeding ten acres may be included in the ordinance process for annexing property without consent of the property owner unless the tract is subdivided into lots or blocks or is bounded on at least three sides by lands subdivided into lots or blocks.)

In order to annex land by court petition or ordinance, notice of the proposed action by annexation petition or ordinance must be published at least once in one or more newspapers published in the annexing municipality or, if there is none, in one or more newspapers with a general circulation within the annexing municipality, not more than 30 nor less than 15 days before the date fixed for the court hearing. A copy of the notice must be filed with the

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<sup>61</sup> Contiguous, according to its dictionary definition, means "to touch" or "sharing a boundary or edge." Illinois courts have interpreted the contiguity requirement, for annexation purposes, to mean that the territory must have a "substantial common boundary" or a "common border of reasonable length or width" with the annexing municipality, and thus a "reasonably substantial physical touching" rule has evolved. For single lots, the contiguous width or length of the entire lot is usually a sufficient distance. For large tracts of land, a common border of at least 300 feet has been held to be sufficient.

municipal clerk who will send by registered mail an additional copy to the highway commissioner of each road district within the territory proposed for annexation. The notice must state that a petition for annexation, or ordinance, has been filed with the court and must give the substance of the petition, including a description of the territory, the name of the annexing municipality, and the date fixed for the court hearing.

Upon the receipt by the clerk of the annexing municipality of a certified copy of the order from the court validating the petition, the corporate authorities shall consider the question of annexation. If the annexation is approved by a majority vote of the corporate authorities then holding office, and a referendum is not ordered by the corporate authorities or requested by petition, the annexation is deemed effective after the expiration of 30 days and a written notice shall be sent of such annexation by registered mail to the highway commissioner of each road district within which the annexed territory is located.

**C. "Optional" Method under Section 7-1-11**

For territory that is not less than one square mile; contains at least 500 inhabitants; is not part of a municipality; and is contiguous to a municipality having less than 100,000 inhabitants, parties affected may apply to the circuit court for an order authorizing submission of the question to the electorate. Such an application must be signed by at least 100 electors and more than 50% of the property owners. Other requirements governing this method are specified in Section 7-1-11.

**D. (Forced) Annexation of Surrounded or Nearly Surrounded Territory under 60 Acres**

Territory containing 60 acres or less may be annexed by force (i.e., without consent of property owner(s)) if it is wholly bounded by one or more municipalities; one or more municipalities and a creek in a county with a population of 400,000 or more, or one or more municipalities and a river or lake in any county; one or more municipalities and the Illinois State boundary; one or more municipalities and property owned by the State except State highway right-of-way; or several other configurations listed in Section 7-1-13.

This type of annexation may be effectuated by ordinance. Notice of the contemplated annexation must be published once in a newspaper of general circulation within the territory to be annexed not less than ten days before the annexation ordinance is passed. If the territory lies wholly or partially within a township other than the municipal township, at least ten days' prior written notice of the time and place of the passage of the ordinance must be sent to the township supervisor of the township having jurisdiction. No notice (other than by publication) to the owners of the property which is subject to forced annexation is required by statute.

**2. General Procedures Applicable to Annexations**

The entities listed below must be notified in writing, by certified or registered mail, of the proposed annexation at least ten days prior to the action taken, whether that action is by the corporate authorities or by means of a court annexation proceeding. This requirement has been interpreted by case law to mean that such notice must be mailed to the individual board members at their respective home addresses. In addition, the Illinois Supreme Court has held that the notice must state the date on which the action by the corporate authorities is contemplated.

- the Trustees of a Fire Protection District if the annexing municipality provides fire protection;
- the Trustees of a Public Library District where a municipal public library is provided;
- the Township Commissioner of Highways and the Board of Town Trustees if land to be annexed includes any highway under township jurisdiction.

Failure to provide such notice shall result in the municipality having to reimburse the township for "any loss or liability caused by the failure to give notice." An affidavit of service of notice must be completed and then filed with the court clerk if annexation proceedings are pending in court, or with the county recorder if court proceedings are not involved.

Any annexation, disconnection and annexation, or disconnection must be reported by certified or registered mail to the appropriate election authorities<sup>62</sup> and the post office branches serving the territory within 30 days of the action taken. However, failure to notify these particular authorities following the actions taken will not invalidate the annexation.

Any annexation to be accomplished by court order requires notification by the corporate authorities or petitioners to all taxpayers of property (except petitioners) within the territory. The notice shall be served by certified or registered mail at least 20 days before the court hearing or other action.

Challenges to the validity of an annexation, for whatever reason, including jurisdiction, must be made no later than one year from the date the annexation becomes final, except that the limitation does not apply to annexations of property that was not contiguous at the time of annexation and is not contiguous at the time of the court action.

## **B. Annexation Agreements.**

An annexation agreement is not a prerequisite to an annexation, but is a voluntary agreement between the municipality and the owner of the property specifying terms and conditions which both parties expect to apply to the territory and the owner (or successor) upon the annexation. Such agreements, which are governed by statute, may be executed for

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<sup>62</sup> "Election authorities" means the county clerk where the clerk acts as the clerk of elections or the clerk of the election commission having jurisdiction.

property that is not yet contiguous to the municipality but which is expected to become contiguous at some future date. These agreements are sometimes called "pre-annexation" agreements, although that term and the term "annexation agreement" are often used interchangeably.

Because of the broad language in Section 11-15.1-2, annexation agreements can include a wide range of conditions and covenants affecting either or both of the parties, including provisions governing impact and recapture fees; utilities; development; financing incentives; and the applicability of various ordinances. Under Section 11-15.1-1, the term of such agreements is limited to 20 years, except that, as may otherwise be provided in the annexation agreement, zoning established for the annexed territory shall remain in effect (unless "modified in accordance with law") and does not revert to any earlier or other zoning following the termination of the annexation agreement. An annexation agreement is executed by the mayor or president and attested by the municipal clerk but only after 2/3 of the corporate authorities have approved a resolution or ordinance directing its execution. (Section 11-15.1-3.) The mayor is allowed to vote on that resolution or ordinance.

Division 15.1 of the Illinois Municipal Code<sup>63</sup> municipalities are given wide discretion to negotiate the terms of annexation, including zoning and zoning conditions placed on the annexed territory. However, a municipality that is including zoning relief as part of an annexation must conduct all required properly-noticed public hearings on such zoning relief. Such notice shall be by newspaper publication not less than 15 nor more than 30 days prior to the scheduled hearing date. (§11-15.1-3.) If the annexation agreement contains provisions affecting the zoning of the property, then whatever public hearing before a plan commission or zoning board which is required to grant that zoning must be held after the appropriate public notice is given and before the annexation agreement can be approved by the corporate authorities.

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<sup>63</sup> 65 ILCS 5/11-15.1-1

## **7. AFFORDABLE HOUSING PLANNING AND APPEAL ACT**

Illinois recently joined several other states in making provisions for affordable housing a matter of statewide concern by passage of the Illinois Affordable Housing Planning and Appeal Act ("**AHPA**").<sup>64</sup> Section 10 of the Act sets out its purpose:

The purpose of this Act is to encourage counties and municipalities to incorporate affordable housing within their housing stock sufficient to meet the needs of their county or community. Further, affordable housing developers who believe that they have been unfairly treated due to the fact that the development contains affordable housing may seek relief from local ordinances and regulations that may inhibit the construction of affordable housing needed to serve low-income and moderate- income households in this State.<sup>65</sup>

This purpose statement serves as an introduction to the state of Illinois' more direct involvement in municipal zoning matters as they pertain to provisions of affordable housing.

### **A. Overview of AHPA.**

At the outset, AHPA provides a technical definition of what is "affordable housing." Under AHPA, "affordable housing" is that housing with a sale price or rental value that is within the means of a household that may occupy:

- (1) Moderate-income housing that is marketed for occupancy by households with gross household income that is greater than 50%, but does not exceed 80% of the area median household income; or
- (2) Low-income housing that is marketed for occupancy by households with a gross income that does not exceed 50% of the area median household income.

For "for sale" housing, affordability means that housing costs (i.e. mortgage, taxes, insurance, amortization, and homeowners association fees) do not exceed 30% of the gross annual household income for a household of the size occupying the house. For rental housing, affordability means that the rent and utilities constitute no more than 30% of the gross annual household income for a household of the size occupying the rental unit. The term "area median household income" is established throughout the state annually by the U.S. Department of Housing and Urban Development.<sup>66</sup>

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<sup>64</sup> 310 ILCS 67/1

<sup>65</sup> 310 ILCS 67/10

<sup>66</sup> 310 ILCS 67/15

In August of 2004, the Illinois Housing Development Authority ("*IHDA*") contacted all municipalities that were not-exempt from the requirements of AHPA—this was based on an analysis of certain data set forth in the AHPA. To be exempt from the provisions of AHPA, IHDA's analysis must have established that 10% or more of a county's or municipality's year-round housing stock is affordable housing, as defined in AHPA. Municipalities with population under 1,000 are automatically exempt.<sup>67</sup>

Prior to April 1, 2005, non-exempt municipalities were required to adopt Affordable Housing Plans that, which among other things:

- Provides a statement of the total number of affordable housing units that are necessary to exempt the local government from the operation of AHPA;
- Identifies lands within the municipality that are most appropriate for the construction of affordable housing and of existing structures most appropriate for conversion to, or rehabilitation for, affordable housing, including a consideration of lands and structures of developers who have expressed a commitment to provide affordable housing and lands and structures that are publicly or semi-publicly owned;
- Lists incentives that the municipality may provide for the purpose of attracting affordable housing to their jurisdiction; and
- Establishes one of the following goals:
  - (a) a minimum of 15% of all new development or redevelopment within the municipality defined as affordable housing in AHPA; or
  - (b) a minimum of a 3 percentage point increase in the overall percentage of affordable housing within the municipality as described in Section 20 of AHPA; or
  - (c) a minimum of a total of 10% affordable housing within the municipality as described in Section 20 of AHPA.

A copy of the municipality's Affordable Housing Plan must be filed with IHDA not later than 60 days after its adoption.<sup>68</sup>

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<sup>67</sup> 310 ILCS 67/20

<sup>68</sup> 310 ILCS 67/25

IHDA will issue a new list of new non-exempt municipalities based upon data from the 2010 decennial census. Municipalities that are found to be non-exempt under AHPA will have 18-months from the date of notification of their status by IHDA to approve an Affordable Housing Plan.

**B. Statutory Authority to Promote Affordable Housing.**

Several amendments were made to AHPA in 2005<sup>69</sup> that, among other things, provided a number of statutorily authorized tools to promote affordable housing. Under these amendments, a local governments may:

- Jointly or individually, create housing trust funds or otherwise provide direct financial support for the purposes of facilitating affordable housing development;
- Create community land trusts that may (1) acquire land and hold it for affordable housing development, (2) convey such land under long term land lease or by deed, and (3) may retain an option to reacquire such land to ensure its use for affordable housing;
- Use zoning powers to require the creation and preservation of affordable housing – also know as “inclusionary zoning”; and
- Require developers that do not produce affordable housing, as otherwise required under zoning or other ordinances, to donate land or make a cash contribution in lieu of providing affordable housing units.

Finally, to ensure for a regional stock of affordable housing, the amendments enable a non-exempt municipality to enter into an intergovernmental agreement with another municipality within 10-miles of its corporate boundaries to create and meet its affordable housing requirement. However, no such intergovernmental agreement can be made with a municipality that is calculated as having more than 25% of its total housing stock defined as “affordable” under AHPA. An intergovernmental agreement must provide the following:

- Basis for determining how many affordable housing units created will be credited to each municipality; and
- Specify the anticipated number of newly created affordable housing units credited to each municipality.

**C. State Housing Appeals Board.**

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<sup>69</sup> P.A. 94-303, eff. July 21, 2005

The teeth of the AHPA are provided in the establishment of a new State Housing Appeals Board ("**SHAB**") that, beginning on January 1, 2009, will begin accepting appeals from affordable housing developers who receive adverse municipal zoning decisions that affect the feasibility of or outright deny the ability to develop affordable housing projects. SHAB may then begin to render decisions that may overturn such adverse municipal or county decisions. In any proceeding before SHAB, the developer has the burden of proof. An appeal shall be dismissed by SHAB where:

- The municipality has adopted and submitted an affordable housing plan to IHDA not later than April 1, 2005;
- The municipality has implemented and met its goals established in its Affordable Housing Plan; or
- The reason for denial is based on a "non-appealable government requirement" that are all essential requirements that protect the public health and safety, including any local building, electric, fire prevention, or plumbing codes.

A developer must make his or her appeal within 45-days after the adverse decision of the municipality. SHAB must render a decision on any appeal with 120-day after the appeal was filed. The 2005 amendments removed language that made such appeals subject to a *de novo* review by SHAB; in other words, conducting a new zoning hearing to reach its decision. Instead, aggrieved developers now carry the sole burden of demonstrating that his or her project was unfairly denied or has unreasonable conditions placed upon it that make it infeasible.

The 2005 amendments provide that a municipality found to be non-exempt, after IHDA's analysis of the 2010 decennial census, shall be immune from appeals made by aggrieved affordable housing developers to SHAB for a period of 60-months after being notified of its non-exempt status by IHDA.

The Illinois Appellate Court has exclusive jurisdiction of appeals from decisions of SHAB.<sup>70</sup> Any appeal to the Appellate Court may be heard only in the Appellate Court for the district in which the local government is located.

#### **D. Zoning Implications of AHPA.**

The powers of SHAB provide a strong incentive to non-exempt municipalities to adopt their Affordable Housing Plans. A non-exempt municipality that fails to meet these statutory deadlines may very well find an appealed adverse zoning decision on an affordable housing project overturned by the state, wresting control of the development from the municipality.

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<sup>70</sup> 310 ILCS 67/30

Further, the power of SHAB creates—in effect—a state zoning agency that can overturn distinctly local zoning decisions, potentially creating a highly undesirable situation on a number of levels for municipalities and their elected leaders.

***PRACTICE TIP:***

Each municipality must determine for itself whether it will comply with or wait and see what happens with AHPA. AHPA may very well be amended, perhaps even overturned on any number of grounds. However, it is prudent for all non-exempt municipalities to submit to IHDA a Affordable Housing Plan to avoid the imposition of state authority in zoning matters pertaining to affordable housing.

Most local government attorneys and law firms, including Ancel Glink, have taken the position, based on strong legal premises, that home rule municipalities are exempt. However, it serves to note that IHDA has taken a contrary position in its AHPA Recommended Procedural Guidelines for Compliance. Specifically, IHDA states:

The bills passed by both houses of the legislature (House Bill 625 in 2003 and Senate Bill 2724 in 2004) were silent on this issue. Also, in neither case did a legislator request a Home Rule Note, a process administered by the Department of Commerce and Economic Opportunity (DCEO) upon legislative request, to make a determination of home rule applicability to that particular bill. Since the law does not specifically provide for a home rule exemption, IHDA will assume that the law does apply to home rule municipalities and counties. IHDA does not intend to request or issue a legal opinion on this matter. Municipalities or counties wanting further legal clarification should consult their own legal counsel.

Ancel Glink does not agree with the rationale offered by IHDA for AHPA's application to home rule municipalities. Illinois law is quite clear that the General Assembly must specifically preempt home rule powers in statutes it wants to have apply statewide, regardless of home rule status. However, each home rule municipality should—as IHDA suggests—consult with their attorneys on this matter.

## **8. 19 PRACTICAL TIPS ON ZONING AND PLANNING ADMINISTRATION**

1. Read the Basic State Law. Amazingly enough, almost all of the statutory provisions regarding zoning and planning are contained within a single 16-page section of the Illinois Compiled Statutes. While the language uses some technical terms and its interpretation is highly dependent upon the holdings of a series of Appellate Court cases, all officials who deal with zoning and planning in a municipality should review chapter 65, Division 12 through 15.1, of the Illinois Compiled Statutes. These divisions deal with planning, zoning, setback lines, maps and plats and annexation agreements. It would be a good idea for officials to review these provisions in an orientation session with their local governmental attorney. A review of these sections of the statutes will not only strengthen officials' knowledge of the basic provisions of Illinois zoning and planning law, but will also uncover some lesser known provisions. Examples of these provisions are:

- a. The fact that Section 11-13-5 requires that applicants for variances which are eventually granted by a legislative body need only show that there are practical difficulties or particular hardships regarding the application of the statutes.
- b. Section 11-13-15, which allows any property owner within 1,200 feet of a parcel of land to bring a lawsuit contending that the provisions of a Zoning Ordinance have been violated. This section should be cited to angry citizens groups who believe that the municipality is not properly interpreting its own zoning ordinance.
- c. Section 11-12-13 allows corporate authorities of 2 or more municipalities to establish a joint plan commission.

2. Review the Zoning Ordinance. Planning and zoning officials and their staffs should review the provisions of their ordinances at least once every two years. In spite of everyone's best efforts, language sometimes gets inserted into ordinances which is difficult to understand and costly to administer. Because it is not very difficult to amend a zoning ordinance, municipalities should not seek to defend provisions which do not work. Instead, clearer and more effective language should be developed and adopted.

3. Review Zoning Administration. Communities should also look at how provisions of the Zoning Ordinance have been interpreted. For example, if a municipality consistently approves requests for a particular type of variance, such as the construction of a second floor above the footprint of a first floor, even if there is some minor setback violation involved, the ordinance can be amended to permit such applications to be approved by Staff without the need for a variance.

4. Do Your Paperwork. Applicants who appear before you spend a great of time and sometimes a great deal of money in preparing materials for you to review. Read all of this material before a public hearing and be open to discussions with citizens who have views on these subjects. Local zoning officials are not subject to the restrictions that apply to a judge hearing a case. They are not limited to considering only those items which are presented before them at the hearing itself. Elected and appointed officials dealing with zoning issues are allowed to speak to individuals, including the applicant, to ask questions and receive comments.

5. Communicate With Other Officials. Plan commissions and zoning board of appeals are recommendatory bodies, except in the rare case where a municipality gives to the Zoning Board of Appeals the power to fully decide requests for variances. These bodies should not feel that their work has been in vain if and when the corporate authorities reverse their decisions. When reversals consistently take place, however, it may be a good idea to hold a joint meeting so that any conflicting views can be more fully discussed without considering them in the context of an individual application. Ultimately, it is the Village Board of City Council which establishes the policy of the governmental body. Members of recommendatory bodies may ultimately conclude that they need to consider matters that come before them with an awareness of these policy considerations. Plan Commissions and Zoning Board of Appeals, when they consider applications for variances and special uses must also understand that negative recommendations from these bodies require the Corporate Authorities to override those decisions by an extra majority vote.

6. Use of Staff. Do not be afraid to make prior reasonable requests from the Staff. In many governmental bodies, there are officials who are assigned to evaluate applications for zoning requests. Often, Staff will write a written recommendation. As in the case of a City Council or Village Board overriding its recommendatory body, those bodies themselves may not always agree with Staff recommendations. Where there appears to be a desire to override the recommendation of Staff, responsible officials will often discuss these matters in advance with the Staff and determine whether additional inquiries or research requests to the Staff may affect the official's initial conclusion. Do not embarrass the Staff, and avoid raising last-minute questions which cannot be answered in the time frame available. In the same way that it would be helpful for the Corporate Authorities to let recommendatory bodies know why their views are being overruled or modified, those bodies should provide the same feedback when they do not agree with Staff suggestions.

7. Technical Help. Do not be afraid to ask for technical help. Questions which come before recommendatory bodies and the Corporate Authorities are often extremely complicated. Assistance is often needed from experts on drainage, traffic, landscaping, engineering, lighting, legal and other issues. The work of these experts should be focused and limited to the issues before the body making the decision. Often, a governmental body cannot comfortably approve a project without getting third-party advice on important matters which often affect other areas of the community. In most instances, the developers are prepared to pay for the reasonable cost of the use of such experts.

8. Courtesy and Fairness. Be courteous and fair. Persons in decision making positions for governments need to always remember how important the applications they consider are to individuals and companies. On the other hand, make certain that you do not give false hopes to applicants whose requests are likely to be denied. Too often, individuals are invited to re-draw their plans, although any reasonable analysis or preliminary vote would indicate that the project as a whole will not receive adequate support. It is not only important to be courteous and fair, but also honest.

9. Who Owns the Land? Always remember that you, as an elected or appointed municipal official, do not actually own the land and that you are not an investor in the project. Although there are substantial powers which can and should be exercised by governmental bodies, the micro-managing of a project is not within the power granted by State law to officials dealing with zoning and planning matters. The owner of the property or other investors are taking the risk inherent in capitalism. Governments cannot and should not protect property owners against every mistake and there is little reason to believe that if governmental officials have the last word on projects they will always be successful.

10. Aesthetics. Understand that your authority to make decisions on aesthetic grounds are limited under Illinois law. Aesthetics can be a factor which officials can consider in determining whether to approve a project. Some regulations regarding aesthetics, such as an anti-monotony provision, which prevents all houses in a subdivision from looking alike, will be upheld by the courts. On the other hand, absent some extremely compelling reason, such as an overall and universally-imposed design criteria, as in a landmark district, efforts to dictate the exact color shading of a building are likely to be found to exceed the powers of government.

11. Annexations and Annexation Agreements. Understand your increased power in a situation where land is being annexed to the community. Under Illinois law, the Corporate Authorities of governments have the absolute power to determine whether land will or will not be annexed to the municipality. Land being annexed to the municipality is often accomplished under the provisions of an annexation agreement, which establishes the way in which the land will be developed for up to 20 years. Once provisions are included in an annexation agreement, future developers and future municipal boards are bound by those provisions unless the agreement is amended through mutual agreement and after at least one public hearing.

Remember that the provisions of an annexation agreement can last up to 20 years. In drafting annexation agreements, municipalities need to consider ways in which the plans can be modified over an extended period of time. Sometimes, annexation agreements have a provision which allows certain portions of the agreement to be amended through normal applications for changes in planned unit developments or special uses without utilizing the full process of amending the annexation agreement. In order for annexation agreements to be amended, the Corporate Authorities must hold a separate public hearing and the agreement must receive the concurrence of at least two-thirds of the Corporate Authorities including the Mayor. Simple amendments to a planned unit development may require only a public hearing

before the Plan Commission or Zoning Board of Appeals, and a simple majority vote at the level of the Corporate Authorities. The community may wish to make a distinction between those changes which require amendments to the annexation agreement and those which do not require this more substantial process.

12. Impact Fees and Over Sizing. Governmental bodies have some authority, especially in annexation agreements, to require developers to pay impact fees to lessen the impact of development on costs which would otherwise be borne by the rest of the community. In addition, communities can require developers to reasonably oversize certain facilities, such as utility lines and water detention areas which can be more inexpensively constructed by a single developer, because of economies of scale, than if incrementally added to as other development takes place. However, there are substantial limitations on the ability of a governmental body to impose what can be considered excessive impact fees or over sizing. Communities which put too much of a burden on individual developers may find themselves effectively killing the project, pushing it into economic ruin, or causing litigation. As in all negotiations, each party should understand the lawful powers and pressures which can be brought to the table. Where developers are asked to install oversized facilities, they can be offered a process involving a recapture from future developers through the provisions of 65 ILCS 5/9-5-1.

13. Traffic Considerations. In creating zoning districts and authorizing commercial, industrial or multi-family residential development, communities often fail to consider the traffic flow and parking implications. While communities may be interested in improving economic development, it is important that this goal not be achieved through causing portions of the community to become hopeless bottlenecks. The community must coordinate its efforts in this regard with the County and the State in an effort to make certain that plans are made for area-wide traffic flow long in advance of development. The art of traffic engineering has reached high levels of sophistication and communities should require developers to provide professional traffic analysis data and, in some cases, to fund second opinions procured through experts hired by the municipality.

14. Comprehensive Plans. Use your Comprehensive Plan to resist temporary shifts in market values. Developmental pressures and fads are cyclical. Sometimes, a developer or land owner will tell a community that, based upon current trends, an area shown as industrial on the comprehensive plan can only be developed with multi-family residential. If the community has designated that area as an industrial zone on its comprehensive plan, strong efforts should be made to resist the development "de jour." In many cases, the passage of a few years, and a change in the economic climate, may make the land easily and successfully developable under the current zoning shown in the Comprehensive Plan.

15. Ordinance Documentation. The developers of property often present elaborate reports and beautiful pictures to Plan Commission/Zoning Board of Appeals and to the Corporate Authorities when seeking a variance, special use or planned unit development. In many instances, the application is approved only because the community has strong reason to believe that the Developer will perform in exactly the ways shown. It is extremely important that any

ordinances granting the special permissions requested have attached to them the documents which reflect the specific promises made by the owner or developer. Luckily, Illinois law allows conditions to be imposed in ordinances granting variances and special uses, including planned unit developments. A requirement that the Developer adhere to the plans is also a provision found in almost all annexation agreements.

In every case, it must be recognized that plans submitted in advance of final engineering may need to be slightly modified and many ordinances and annexation agreements have provisions which allows staff to approve minor design changes. Nonetheless, there is nothing more embarrassing for a municipality to have approved, for example, a special use for a gasoline service station and car wash than to discover that the ordinance does not compel the owner to build substantially the attractively designed building which was presented at public hearings and public meetings.

16. Think of Litigation. As a governmental body considers a controversial application, all officials should have some sense of how their actions and remarks may affect future litigation. If, for example, the Plan Commission or the Corporate Authorities, at a public hearing, does not follow the provisions of the Open Meetings Act, the zoning which is eventually granted may be invalid or in jeopardy. Statements by officials, who have an obligation to fairly consider the facts, that "under no circumstances would I approve this project" are not likely to convince a trial court judge, who ultimately considers the matter, that the community gave the developer a fair hearing. Where litigation is truly threatened, the officials involved can discuss some of these matters with their attorney in closed session.

17. Insurance. All public officials who involve themselves in the zoning and planning process should have an understanding of how the community has provided insurance coverage to protect them against potential lawsuits. Lawsuits in matters involving zoning and planning are a serious threat and sometimes elected officials are named individually. The conventional or pool insurance coverage available in your municipality should clearly cover you under those circumstances, unless your allegedly invalid act arises purely out of a personal dispute which you may have with the developer. If you act within the scope of your appointment, the coverage provided to you by the municipality should be as broad as is possible to defend and protect you. Often, such cases are ultimately dismissed or settled and the main burden on an elected official is the payment of defense costs. These costs can be substantial and you should understand the level of coverage which has been provided for you. This risk has become especially important in recent years, after a series of cases, in which officials have been sued where the allegation is that the votes which they cast were matters purely associated with personal vindictiveness. Unfortunately, one aspect of those cases, a claim for punitive damages, in a case brought under Federal law, is likely to not be covered either by insurance or by the governmental body itself. Illinois law severely restricts the payment, from governmental funds, of such punitive damages.

18. Moving On. Officials who serve on advisory boards and commissions, such as plan commissions and zoning boards of appeals, may wish to consider this as a first step in a career

of public service. Because the issues that such officials review are often central to the future of their communities, it is with some frequency that such officials eventually run for elected office in their municipalities. This "movement up" should be encouraged. Even where officials do not wish to take on a higher office, efforts need to be made on boards and commissions for the mentoring of new members. It is also important that there be some continuity on these advisory boards and commissions.

## **9. CONCLUSIONS**

This material is not a comprehensive review of all of the land use powers which are available to municipal governments. It is only intended to familiarize the reader with some of the basic techniques provided by the legislature to regulate land use. Many communities face increased development and the demand for utility expansions. Older suburban and urban centers are considering the conversion of under-used areas and the tear down of established housing stock. Rural communities face uncontrolled growth and the loss of agricultural land. Illinois law provides the appropriate powers for each of these challenges. Your efforts, assisted by legal and planning experts, can have an important and beneficial effect on the planning and economic health and future of your community.