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Lincoln Award Winner - Zoning

Illinois Zoning Law Six Years after Klaeren

By George L. Schoenbeck

Important changes have occurred in zoning law since the Illinois Supreme Court's landmark decision in *Klaeren v Village of Lisle*. This article discusses how legislation and subsequent cases have resolved some ambiguities while giving rise to others.

In 2002, Illinois joined the majority of states in regarding special use public hearings as administrative, rather than legislative, proceedings with the supreme court's decision in *Klaeren v Village of Lisle*.[1] The decision drastically altered the formerly well-settled principle that decisions based on such hearings are legislative acts subject to de novo review, leaving many attorneys wondering how far its repercussions would spread.

Initially, attorneys and municipalities speculated that the administrative label affixed to special use decisions would extend to all zoning decisions and that zoning hearings would have to be conducted as "mini-trials" to afford interested parties due process.[2] Six years after *Klaeren*, many of those fears have been calmed as courts have limited the case's reach in several respects.

However, appellate courts remain in conflict over when denials and approvals of special use petitions should be reviewed as administrative decisions. Furthermore, recent legislation attempting to undo *Klaeren* to the extent it substituted administrative for de novo review failed due to an apparent drafting error, and an amended version of the legislation may possess a fatal constitutional defect.

This article discusses these changes and describes the uncertainties remaining in the wake of *Klaeren*.

An overview of zoning law in Illinois

The Illinois Municipal Code (the "Code") requires municipalities to conduct public hearings prior to issuing final decisions in zoning matters.[3] In most cases, it also requires municipalities to use a tiered approach in deciding zoning matters, whereby an appointed commission or board holds one or more public hearings on proposed zoning relief and then makes recommendations to the corporate authorities.[4]

Final decisions rendered by such appointed bodies have long been subject to review pursuant to the Code's explicit adoption of the Illinois Administrative Review Law.[5] The issues discussed below concern the final decisions of the corporate authorities of municipalities, rather than appointed bodies. In seeking relief from the restrictions of a zoning

ordinance, a client may pursue three options: 1) a special use permit, 2) a variance, or 3) an amendment to the zoning ordinance to rezone the property.

A *special use* is permitted to operate in a certain zoning district subject to approval by the municipality.[6] These are uses that, due to an inherent characteristic, may be incompatible or interfere with other uses in the vicinity.[7] Traditional special uses in commercial districts include "adult" facilities with drive-through windows.

A *variance* allows a petitioner already putting property to a permitted use to exceed the intensity limitations placed on that use by the zoning code.[8] Most villages will not grant a variance unless a petitioner can show that the zoning code, as applied to his or her particular property, results in an unnecessary hardship or practical difficulties.9

The variation must also be in furtherance of the general intent of the regulations causing the hardship.[10] Variances typically relate to setback, density, bulk, and height restrictions.

A *rezoning* is an amendment to a municipality's zoning code that changes the subject property's zoning district. It is appropriate when a petitioner wishes to conduct a primary use not permitted in the property's current zoning district.[11]

Zoning practice before *Klaeren*

The seminal Illinois Supreme Court case, *La Salle National Bank of Chicago v County of Cook*,[12] established municipal zoning decisions as legislative acts of

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municipalities for purposes of judicial review.[13] The *La Salle* court reasoned that counties, and by extension, municipalities, have exclusive authority to determine the uses and purposes to which their properties may be devoted and that courts should not interfere with such determinations unless they are arbitrary, capricious or unrelated to the health, morals, safety, or general welfare of the public.[14]

Legislative zoning acts not involving fundamental rights are subject to one of two distinct forms of de novo review: "as-applied" and "facial" challenges.[15] In an as-applied challenge, a reviewing court will balance the benefits accruing to the public from the challenged act against the detriments suffered by the particular plaintiff.[16] *La Salle* introduced what have come to be called the "*La Salle* Factors" for courts to use to conduct such a balancing analysis.[17]

In a facial challenge to a legislative zoning act, the plaintiff must show that the regulation at issue is either arbitrary, capricious, or bears no rational relationship to any legitimate public interest.[18]

Essentially, in an as-applied challenge, the plaintiff has to prove that the challenged regulation is unreasonable as applied to that particular plaintiff, while in a facial challenge the plaintiff has the difficult burden of proving that the regulation is not reasonable in any context.[19] In order to gain standing to challenge an ordinance on an as-applied basis, a plaintiff must have submitted a petition for specific zoning relief to the municipality and been denied by the municipality.[20]

***Klaeren:* administrative review for special use hearings**

Klaeren centered on a single public hearing for a special use petition where the Village of Lisle limited the opportunities for interested parties to cross-examine witnesses or express their opinions to two-minute time slots.[21] The village approved the petition over the objections of surrounding property owners, who subsequently appealed the municipality's

decision, claiming they were deprived of their due process rights.[22]

The court determined that special use hearings are administrative in nature because municipalities are acting in fact-finding capacities to adjudicate matters before them to determine the rights of interested parties.[23] Such "interested parties" include those affected by the proposed special use to a greater extent than members of the general public.[24]

Considering the limited impact zoning decisions have on interested parties' property rights, the court declined to extend the full range of due process rights to interested parties, but held that they should be allowed to cross-examine witnesses.[25] The extent of the right to cross examine would vary depending on the issues presented.[26]

The Administrative Review Law governs a court's review of an administrative decision.[27] No party to such a proceeding may introduce new evidence before the court, which may only consider questions of law and fact contained in the record of the administrative hearing.[28] A trial court may reverse an administrative decision when it determines that the administrative body 1) made findings of fact that were against the manifest weight of the evidence, (2) made a mistake of law (based on the court's de novo review), or (3) clearly erred in applying the facts to the law.[29]

Klaeren had a substantial impact on the way municipalities, attorneys, and property owners approached the zoning review process and left a number of open-

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ended questions, including 1) whether municipalities had to follow the rules of evidence and conduct their public hearings as mini-trials, 2) whether *Klaeren's* dictates extended to requests for variances and rezonings, and 3) whether petitioners or municipalities needed court reporters for public hearings to preserve the records for appeal.

Representing clients in municipal zoning matters became increasingly expensive after *Klaeren* and the likelihood of prevailing in an appeal diminished. Because the record in an appeal could be limited to the evidence produced at the hearing, attorneys pursuing zoning relief were forced to recommend that their clients hire expert witnesses to develop credible evidence in favor of their requests.

They also were obliged to consider whether clients should hire court reporters to preserve the record produced by such experts. Aside from the difficulties of preserving the record for an appeal, attorneys worried that they had to contend with a standard of review much more deferential to the findings of the municipality than for an as-applied challenge.[30]

Although *Klaeren* made it more difficult for municipalities to deprive interested parties of their constitutional rights, it also made the zoning review process substantially more expensive for all parties involved.

***Lapp* limits *Klaeren's* effect on public hearing procedure**

Fears that municipalities would have to transform their zoning hearings from simple public meetings to more adversarial adjudicative processes were allayed to some extent by the first district's decision in *Lapp v Village of Winnetka*.[31]

In *Lapp*, Winnetka's historical society sought a special use petition to operate a nonessential public use in an historic residence.[32] Administrative village boards held four hearings on the issue, at which protesting parties were permitted to present evidence against the requested relief and question the petitioner and its experts.[33]

The village council considered the issue over the course of several meetings, even tabling it to study the feasibility of alternative sites.[34] The protesting parties alleged that the hearing process was procedurally defective because they

could not cross examine one of the petitioner's expert witnesses, who had submitted evidence in support of the petition but did not appear at the meeting immediately afterward.[35]

The court noted that the plaintiffs had other opportunities to question the witness and found that the hearing process was fundamentally fair.[36] The decision established that due process does not require strict adherence to the rules of evidence in most zoning hearings, but merely that interested parties have the opportunities to present evidence and question adverse witnesses about their evidence and testimony.

***Hawthorne* limits *Klaeren's* impact on other forms of zoning relief**

Shortly after *Klaeren*, in *Hawthorne v Village of Olympia Fields*,[37] the supreme court limited the scope of the administrative designation to special use petitions.

In *Hawthorne*, the petitioners filed a variance petition so that they could operate a child-care facility in their residence, which was denied by the village board.[38]

The court classified the village's refusal to approve the variance as a legislative act, subject to de novo review, because the Code requires such a designation.[39]

The Code expressly authorizes the corporate authorities of municipalities with fewer than 500,000 residents to retain decision-making authority over variances.[40] It requires that a municipality that reserves its authority over variances only exercise that power through the adoption of ordinances.[41]

The *Hawthorne* court reasoned that both enacting and declining to enact ordinances are legislative acts.[42] Therefore, as a legislative act, the decision was subject to de novo review.[43] By contrast, the Code contains no similar provision governing the power to approve special uses.

In a footnote, the court distinguished its holding from its earlier decision in *Klaeren* by stating, "Illinois law makes a clear distinction between variances and special uses. Variances come into play where the desired use is forbidden under existing zoning ordinances. A special use, on the other hand, allows a property owner to use his property in a manner the zoning ordinances already address and allow."[44] The case demonstrated that Illinois courts would not extend the administrative designation beyond special uses to variances or, even further, to rezonings.

The first and second districts conflict, however, over the extent of the supreme court's holding in *Hawthorne*. The second district has used *Hawthorne* to extend the legislative designation to special use permits adopted by ordinance, while the first district has declined to do so.[45]

In *Ashley Libertyville, LLC v Village of Libertyville*,[46] the second district refused to apply the Administrative Review Law to its review of a suit filed by plaintiffs whose petition for a special use permit had been denied by the Village of Libertyville.[47] Because the village's code required all special use permits to be adopted through the passage of ordinances, the court found that the village acted in a legislative rather than an administrative capacity in refusing to enact the requested ordinance.[48]

In *Chicago Title Land Trust Co v Board of Trustees of the Village of Barrington*,[49] the first district reviewed an ordinance passed by the Village of Barrington granting a petitioner a special use permit to construct a retail shopping center.[50] The court ignored the fact that the special use was approved through an ordinance and regarded it as an administrative decision.[51]

The second district in *Ashley* thus effectively construed the supreme court's ruling in *Hawthorne* to overrule *Klaeren* when a municipality makes special use decisions by enacting ordinances rather than just voting as a corporate authority. In *Klaeren*, however, the court focused on how municipalities adjudicate the competing rights of petitioners and

interested parties in special use hearings. Moreover, *Ashley* ignores the distinction the supreme court drew between special uses and variances in its footnote in *Hawthorne*.[52]

Legislative efforts to overturn *Klaeren*

In 2006, the Governor signed into law PA 94-1027.[53] It amended the Code by adding a new section, 11-13-25, which states as follows:

> (a) Any special use, variance, re-zoning 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 a 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.[54]

The amendment was apparently designed to nullify *Klaeren* to the extent it subjected zoning decisions to administrative review. The Act also introduced identical provisions in the zoning sections of the Township and County Codes.[55]

Though the legislation is a well-intended effort to clear up some of the ambiguities surrounding judicial review of special use decisions, the drafters' use of the phrase "*adopted by* the corporate authorities of a municipality" (emphasis added). proved to be a fatal flaw. The second district examined the identical section of the Counties Code in *Millennium Maintenance Management, Inc v The County of Lake*.[56] Finding that the statute was clear on its face, the court held that it would only apply where the decision was approved, not denied, by a county.[57]

The legislature attempted to correct its drafting error with PA 95-0843, which was signed into law by the governor on August 15, 2008, with an effective date of January 1, 2009.[58] The Act amended the three components of the municipal, county, and township codes discussed above by removing the language "adopted by" and changing the sections to apply to both denials and approvals of zoning decisions.[59]

However, despite the corrective amendment, section 11-13-25 appears to be vulnerable to a constitutional attack. The *Millennium* court also considered the constitutionality of the corresponding section of the Counties Code, and those aspects of the statute remain unchanged in the Code's recently amended section 11-13-25. The court found that the section requires courts to review zoning decisions on a de novo basis, as facial challenges to the decisions in question, rather than as as-applied challenges.[60]

The Illinois Constitution grants circuit courts original jurisdiction over all justiciable matters.[61] However, it also provides that "Circuit Courts shall have such power to review administrative action as provided by law."[62] The legislature, therefore, has discretion over which administrative acts are reviewable by the courts.[63]

The court in *Millennium* reasoned that a statute offends the Illinois Constitution's separation of powers principles if it delegates too much power over administrative review to the circuit courts.[64] The legislature cannot permit the judiciary to fully reconsider an issue decided by an administrative body without any deference to that body's findings.65

In upholding the validity of section 11-13-25, the court sought to give it a meaning that would uphold its constitutionality, rather than declaring it void pursuant to the intended or more likely interpretation.[66] It found that construing the statute in conformance with its intended meaning - i.e., to permit review of zoning decisions as as-applied challenges - would violate separation of powers principles[67] by delegating too much power over the executive function to the judiciary.[68]

The court stated, "to the extent the statute here attempts to provide for an entirely new hearing in any judicial review of

the listed zoning decisions, it offends the principle of separation of powers."[69] However, the court found that the language "de novo judicial review as a legislative decision" could also mean the statute requires review pursuant to a facial challenge to a zoning decision, which would render it constitutional.[70]

In that case, a reviewing court would have to decide whether the decision had *any* rational basis, not whether it was rational as applied to the plaintiff in particular. Indeed, the *Millennium* court's interpretation of section 11-13-25 imposes a standard of review less favorable to municipalities than the administrative review standards the drafters sought to replace.

Conclusion

Much has occurred in the six years since *Klaeren*. Subsequent case law has established that variances and rezonings, as opposed to special use decisions, are still legislative acts to the extent they are decided by a municipality's corporate authorities. Moreover, public hearings do not need to be conducted with strict procedural formality to uphold the due process rights of interested parties.

Special use decisions will most likely remain administrative acts subject to administrative review in the wake of *Hawthorne*, at least outside the second district. The first district's decision to continue to treat both special use decisions by ordinance and by corporate vote as administrative acts is better reasoned than the second district's decision to exempt decisions by ordinance. Moreover, because of its constitutional infirmities, section 11-13-25 will probably subject special use decisions to de novo review on an as-applied basis.

Moving forward, attorneys must approach public hearings regarding special uses carefully. A client who is unwilling to change his or her plan to win approval from a municipality and who intends to appeal an unfavorable result must be advised to hire the appropriate experts to present evidence in favor of the plan and a court reporter to preserve the record. ■

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1. 202 Ill 2d 164, 183, 781 NE2d 223 (2002).
2. See, for example, Pat Lord and Robin Perry, *A New Era In Land Use*, Klaeren & Gallik, 39 Loc Govt L 8 (ISBA Local Government Law Section newsletter) (March 2003).
3. See 65 ILCS 5/11-13-1.1 (regarding special uses); see 65 ILCS 5/11-13-6 (regarding variances).
4. See 65 ILCS 5/11-13-1.1 (regarding special uses); See 65 ILCS 5/11-13-5 (regarding variances).
5. 65 ILCS 5/11-13-13.
6. See Robert C. Ellickson and Vicki L. Been, *Land Use Controls Cases and Materials*, 91 (Aspen 3d ed 2005).
7. Id.
8. Id.
9. Id.
10. Id.
11. Id.
12. 12 Ill 2d 40, 145 NE2d 65 (1957).
13. *Klaeren* at 182, 781 NE2d at 233.
14. *LaSalle* at 46, 145 NE2d at 68 (citing *Wechter* v *Board of Appeals,* 3 Ill 2d 13, 119 NE2d 747 (1954)).
15. *Napleton v Village of Hinsdale*, 374 Ill App 3d 1098, 1102, 872 NE2d 23 (2d D 2007).
16. Id.
17. *LaSalle* at 46-47, 145 NE2d at 69.

18. *Napleton* at 1103, 872 NE2d at 28.
19. Id at 1102, 872 NE2d at 27.
20. See *Pecora v County of Cook*, 323 Ill App 3d 917, 928, 752 NE2d 532, 540 (1st D 2001).
21. *Klaeren* at 179-180, 781 NE2d at 231.
22. Id at 170, 781 NE2d at 226
23. Id at 183, 781 NE2d at 233.
24. Id at 186 781 NE2d at 235.
25. Id at 187, 781 NE2d at 236.
26. Id.
27. See *Lapp v Village of Winnetka*, 359 Ill App 3d 152, 166, 833 NE2d 983, 995 (1st D 2005).
28. Id.
29. See *Millineum Main Mgmt, Inc v County of Lake*, 384 Ill App 3d 638, 894 NE2d 845, 851 (2d D 2008).
30. Id.
31. *Lapp* (cited in note 27).
32. Id at 156, 833 NE2d at 87.
33. Id at 157-58, 833 NE2d at 989.
34. Id at 158, 833 NE2d at 989.
35. Id at 163, 833 NE2d at 992.
36. Id at 165, 833 NE2d at 994.
37. 204 Ill 2d 243, 790 NE2d 832 (2003).
38. Id at 246-48, 790 NE2d at 835-36.
39. Id at 252-253, 790 NE2d at 839.
40. 65 ILCS 5/11-13-5.
41. Hawthorne at 252-53, 790 NE2d at 839.
42. Id at 253, 790 NE2d at 839 (citing *Kleidon v City of Hickory Hills*, 120 Ill App 3d 1043, 1046, 458 NE2d 931, 935 (1st D 1983) and *Smith v County Board*, 86 Ill App 3d 708, 714-715 (5th D 1980)).
43. Id.
44. *Hawthorne* at 253 FN2, 790 NE2d at 839 FN2.
45. Compare *Ashley Libertyville, LLC v Village of Libertyville*, 378 Ill App 3d 661, 664, 881 NE2d 962, 965 (2d D 2008), with *Chicago Title Land Trust Co v Bd of Trustees of The Village of Barrington*, 376 Ill App 3d 494, 878 NE2d 723 (1st D 2007).
46. *Ashley* (cited in note 45).
47. Id at 665, 881 NE2d at 966.
48. Id at 664, 881 NE2d at 965.
49. *Chicago Title* (cited in note 45).
50. Id at 496-97, 878 NE2d at 725.
51. Id at 499, 878 NE2d at 727.
52. *Hawthorne* (cited in note 37).
53. Effective July 14, 2006, available at http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=094-1027&GA=094.
54. 65 ILCS 5/11-13-25.
55. See 60 ILCS 1/110-50.1 (regarding township code); see 55 ILCS 5/5-5-12012.1 (regarding Counties Code).
56. 384 Ill App 3d 638, 894 NE2d 845 (2d D 2008).
57. Id, 894 NE2d at 854.
58. PA 95-0843, available at http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=094-1027&GA=094, codified at 55 ILCS 5/5-12012.1, 60 ILCS 1/110-50.1, and 65 ILCS 5/11-13-25.
59. Id.
60. *Millennium* (cited in note 56).
61. IL Const Art VI, §9.
62. Id.

63. *Millennium* (cited in note 56).
64. Id, 894 NE2d at 853-54.
65. Id, 894 NE2d at 857.
66. Id, 894 NE2d at 856-57.
67. Id, 894 NE2d at 860.
68. Id.
69. Id.
70. Id, 894 NE2d at 854.

2009 Lincoln Award Legal Writing Contest

Winner of this year's $2,000 first prize is **Kerry J. Bryson** of Ottawa, who wrote "*Crawford, Davis and Giles*: The Confrontation Clause Trifecta." Her article will not be published in the IBJ because a similar article appeared in the November issue (the contest deadline is October 1, incidentally).

Ms. Bryson is among the most successful contestants in Lincoln Award history. She has placed in the money five times, winning first place twice. Would-be competitors take heart - this was her last year of eligibility.

George L. Schoenbeck of Chicago took the $1,000 second prize. His article, "Illinois Zoning Law Six Years after *Klaeren*," appears in this issue.

Third place and $500 went to **Isaac J. Colunga** of Chicago for "Inactive Client Relationships May Still Result in *Per Se* Conflicts of Interest." He won second place last year.

The Lincoln Award Contest is open to all ISBA Young Lawyers Division members. Contest judging is blind and conducted by a different panel of lawyers and judges each year. Watch the ISBA Web site and ISBA publications beginning in May for information about the 2010 contest.

2009 ALA Writing Contest Judges

Hon. Mary K. O'Brien has served on the Illinois Appellate Court, Third District, since December 2003. Before that she was a member of the Illinois General Assembly for seven years. She serves on the Supreme Court Rules Committee and the Supreme Court Legislative Committee.

Hon. William D. Maddux is presiding judge of the law division in the Circuit Court of Cook County. In 2007 he became an adjunct professor of law at the Chicago Kent College of Law. Before he took the bench in 1991 he had a long career in private practice, starting the firm in 1975 that became Johnson and Bell.

Jill Adams is an associate professor of law at Southern Illinois University. She teaches civil procedure and employment discrimination.

David P. Leibowitz, Waukegan, concentrates his practice on consumer and business bankruptcy matters.

Gordon W. Gates is a partner at Gates, Wise & Schlosser, PC in Springfield. He concentrates his practice in real estate law, commercial transactions and litigation, and business operations.

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