

ILLINOIS MUNICIPAL LEAGUE

2011 Conference

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Hilton, Chicago

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SATURDAY, SEPTEMBER 17, 2011

9:15 A.M. TO 10:15 A.M.

BEST PRACTICES FOR ZONING

HEARINGS: 10 YEARS AFTER *KLAEREN*

PRESENTERS:

REP DARLENE SENGER (96TH DISTRICT)

DAVID SILVERMAN (ANCEL GLINK)

JULIE TAPPENDORF (ANCEL GLINK)

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The Ongoing *Klaeren* Effect:

Conduct of Zoning Public Hearings

By David S. Silverman

We are now almost 10-years removed from the zoning public hearing requirements established in the Illinois Supreme Court's *Klaeren et al. v. Village of Lisle*, 202 Ill.2d 164, 781 N.E.2d 223, 269 Ill.Dec. 426 (2002), decision. Those requirements were later preserved in a modified form when the General Assembly adopted Section 11-13-25 to Illinois' zoning statutes, 65 ILCS 5/11-13-25. As a quick refresher, Section 11-13-25 reestablished that zoning decisions are legislative in nature and are to be given a great amount of deference by reviewing courts.

Under Section 11-13-25, challenges to zoning decisions are handled by courts, in effect, as a new public hearing process that may include new evidence and the court will only overturn a local zoning decision if that decision was made in an arbitrary manner. Section 11-13-25 does several other things that affect the way challenges to zoning decisions are to be handled, but it also includes an important, broadly written requirement that the principles of substantive and procedural due process apply at all stages of the decision-making and review process for zoning decisions and this serves as our jumping off point.

The requirements that ensure for the application of both substantive and procedural due process are separated out from the rest of Section 11-13-25. Since the passage of Section 11-13-25, attorneys for both developers and government have debated what exactly is meant by this requirement.

Illinois' zoning statutes are not always easy to understand and navigate and Section 11-13-25, while clearing up some issues, also introduced a fair amount of uncertainty into what exactly must occur in a zoning public hearing. Skilled attorneys can turn what should be an otherwise straightforward public hearing process into something akin to a full blown trial, demanding significant procedural accommodations that can frustrate and confuse plan commissioners or zoning board members, elected officials, applicants, and members of the public at large.

While applicants are entitled to a full airing of a proposed project, as well as a full understanding of how a project conforms to the requirements of the community's relevant zoning regulations, the question becomes how much procedure is enough? Put another way, where does a public hearing process, typically overseen by volunteer, non-attorney, plan commissioners or zoning board members, evolve effectively into a full blown court of law proceeding?

Many communities have rules of procedure to handle zoning public hearings. Certainly, in the wake of *Klaeren*, the necessity to establish rules of procedure increased given the formality of process that *Klaeren* imposed on public hearings. Section 11-13-25, to some extent, removed the bases for the procedural formalities introduced by *Klaeren*, but communities that did adopt rules of procedure typically have kept them in force, using them to

varying degrees of effect, and often in relation to the complexities of the zoning issues being reviewed at a public hearing.

The exact authority to adopt rules of procedure for the conduct of public hearings is not specifically provided for in the state's zoning statutes, but the authority has been "necessarily implied" from the general powers to conduct such hearings in the first place. However, a precise legislative allowance is always good, as it removes any dispute on whether authority properly exists to do something, particularly in the non-home rule setting.

That legislative allowance has now been provided through HB1056. HB1056 was introduced by Representative Darlene Sanger who worked with our office and other parties to explore and draft legislative options that would specifically grant municipalities with the power to establish zoning public hearing rules of procedure. Ultimately, a proposed amendment to the zoning enabling statute was introduced in the state House on January 31, 2011 and this bill, after amendments and referrals to various committees, was adopted by the General Assembly on May 29, 2011 and is, as of this writing, awaiting the Governor's signature.

The text of the bill reads as follows:

Public hearing procedures for municipalities of less than 500,000. In a municipality of less than 500,000 inhabitants, the corporate authorities may adopt or authorize the zoning board of appeals and any other board, commission, or committee that conducts public hearings under this Division to adopt rules of procedures governing those public hearings. The rules of procedures may concern participation in public hearings and the participants' rights to cross examine witnesses and to present testimony and evidence, and any other relevant matter.

The bill will be codified as 65 ILCS 5/11-13-22.

The simplicity of the bill is deliberate, because the drafters understood that over-prescribing what rules should be would not necessarily be appropriate across the state's many and varied municipalities. While an urban community might be more comfortable with detailed rules and procedures, a more rural community may not. Also, procedures that are important in one municipal setting may not be the same in another. Therefore, the language was designed to promote flexibility and allow each municipality to determine the proper rules and procedures for its needs. In addition, there is no requirement that municipalities adopt rules of procedure and can choose to treat each public hearing on a case by case basis. However, municipalities should consider the adoption of even a basic set of rules and procedures to govern their public hearings to promote efficiency and fairness of process.

Finally, the text of the bill complements the text of 65 ILCS 5/11-13-25(b) which establishes the requirements that procedural and substantive due process be accorded public hearing participants.

**Best Practices for Zoning Hearings:
10 Years After *Klaeren***

Representative Darlene Senger (96th District)



DIAMOND BISH
DI CASSI
& KRAFTHEFER

David Silverman, Ancel Glink *et al.*
Julie Tappendorf, Ancel Glink *et al.*

Zoning Public Hearings

- ▶ There's Chicago...and everyone else
 - Special zoning rules for Chicago
 - *Klaeren* Appellate Court removed distinctions
 - *Klaeren* Supreme Court restored distinctions but upheld Appellate Court's "instructive comments" on how to manage public hearings

Zoning Public Hearings

- ▶ What's required for a public hearing (outside Chicago)?
 - Published notice (statutory)
 - Personal notice (local ordinance and *Zion* decision)
 - Due process applies to the applicant and the public
 - Opportunity to be heard (testimony and written evidence)
 - Cross-examination of witnesses
 - Might include ability to subpoena witnesses
 - Fair and impartial review based on objective factors

Zoning Public Hearings

- ▶ Authority to Adopt Rules for Public Hearings
 - Previously, authority to adopt public hearing rules was implied

Zoning Public Hearings

- ▶ Authority to Adopt Rules for Public Hearings
 - Now, express statutory authority (P.A. 97-0552 amends zoning law to add 65 ILCS 5/11-13-22)

Sec. 11-13-22. Public hearing procedures for municipalities of less than 500,000.

In a municipality of less than 500,000 inhabitants, the corporate authorities may adopt or authorize the zoning board of appeals and any other board, commission, or committee that conducts public hearings under this Division to adopt rules of procedures governing those public hearings. The rules of procedures may concern participation in public hearings and the participants' rights to cross examine witnesses and to present testimony and evidence, and any other relevant matter.

Zoning Public Hearings

- ▶ Breaking Down P.A. 97-0552
 - Applies to all municipalities except Chicago
 - Authorizes corporate authorities to adopt rules of procedure for public hearings
 - Allows corporate authorities to delegate authority to adopt rules to ZBA and PC
 - Rules can deal with any aspect of public hearing
 - No requirement to adopt rules
 - No mandate on the form of rules

Zoning Public Hearings

- ▶ Are rules appropriate for your community?
 - Yes, if any of the following are true:
 - Regular zoning public hearings
 - Experience with contentious public hearings
 - ZBA or PC that could use better structure
 - Maybe, if any of the following are true:
 - Infrequent zoning public hearings
 - Generally uncontroversial public hearings

Zoning Public Hearings

- ▶ Recommendations for Basic Zoning Public Hearing Rules
 - Use clear and comprehensive application forms
 - Require applicants to reimburse municipality for:
 - Notice
 - Staff and consultant time
 - Document negotiation and preparation
 - Copying
 - Mailing and messenger costs
 - Court reporters
 - Ownership title searches

Zoning Public Hearings

- ▶ Recommendations for Basic Zoning Public Hearing Rules, cont.
 - Prepare good staff reports or consultant reports
 - Explain zoning relief request and findings of fact
 - Provide history of property
 - Discuss how applicant has addressed staff or consultants concerns and standards
 - Use maps of property and project drawings
 - Explain any unique project elements
 - Use court reporter for complex applications
 - Consider using a hearing officer for complex zoning applications (see 65 ILCS 5/11-13-14.1)

Zoning Public Hearings

▶ Basic Structure of Hearing

- Introduction of application by chair
- Staff summary of application
- Applicant's presentation
- Public comment, testimony, general questions
- Cross examination
- Subpoena witnesses
- Objector's or others' presentation
- Applicant response and/or cross examination
- Questions by ZBA or PC
- ZBA or PC discussion and deliberation
- ZBA or PC action

Zoning Public Hearings

▶ Cross Examination

- Well established right in Illinois
- Model cross examination rules
 - Establish reasonable categories of people who have an automatic right and a qualified right ("interested parties")
 - Require pre-registration requirements for people with a qualified right
 - Establish parameters on cross examination
 - Questions should concern factual matters
 - Questions should simplify complex issues
 - Questions should relate to zoning standards reviewed by ZBA or PC
 - Chair has authority to narrow the scope of cross examination

Zoning Public Hearings

▶ Subpoena of witnesses – statute

- 65 ILCS 5/11-13-3(e) (ZBA):
 - "The chairman...**may** compel the attendance of witnesses."

Compare to

- 65 ILCS 11-13-7a (Chicago only):
 - "Zoning variation and special use applicants and property owners, as set forth in Section 11-13-7 of this Act [in municipalities of 500,000 or more population], **shall have the following rights...**to have subpoenas issued for persons to appear at board of appeals' hearings and for examination of documents"

Zoning Public Hearing

▶ Subpoena of Witnesses – model rules

- Provide no automatic right to subpoena witnesses
- Include standards for issuance of subpoenas
 - Testimony to be elicited is relevant to the standards under consideration by the ZBA or PC
 - Allegation of a special interest beyond that of general public
 - Evidence to be elicited from the witness cannot be obtained through some other document or testimony
- Place the responsibility on the requestor for delivering subpoenas and paying to bring the witness to the hearing
- Limit subpoena rights to witnesses only
- Establish that the failure of a subpoena witness to appear will not delay the hearing

Zoning Public Hearings

▶ Other Model Rules

- Establish that rules apply to all participants and their representatives
- Provide that rules may be waived, suspended, or adjusted
- Define the chair of the hearing body as the duly appointed chair, unless a hearing officer is used

Zoning Public Hearings

...Questions?

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