Ancel Glink | Diamond Bush DiCianni & Krafthefer

In the Zone
Current Trends in Land Use Law

Spring 2014

Welcome to **Ancel Glink's *In the Zone***. Our e-newsletter includes articles on lively land use topics designed to inform local government officials about current trends in Illinois land use law and provide useful resources to promote planning and zoning practice throughout the state. ***In the Zone*** is a publication of Ancel Glink's Zoning and Land Use Group. For more than 80 years, Ancel Glink has counseled municipalities and private clients in zoning, land use, and other municipal matters.

Will Koontz "Chill" Negotiations Between Governments and Developers?

Last summer, the U.S. Supreme Court ruled that the Nollan/Dolan takings requirements apply even when a government denies a land use permit, and where a government imposes monetary exactions. The Koontz v. St. Johns River Water Management District decision is an important one for planning departments and plan commissions to understand because it could impact how governments negotiate with a developer on the appropriate conditions to place on a proposed development approval.

In 1994, Koontz sought to develop land in Florida. Because most of the property was wetlands, Koontz was required to obtain a permit from the St. Johns River Water Management District. In order to mitigate the development's impact, the District proposed that Koontz reduce the scale of his development or restore and enhance off-site wetlands. Koontz was also asked to perform on-site mitigation through a conservation easement or deed restriction on the rest of his property.

Koontz rejected the District's proposals and filed suit, claiming that the District was "taking" his property without compensation. The District argued that the takings analysis of Nollan and Dolan did not apply to the denial of Koontz's permit because no dedication of land was required and no damages were incurred. The state court held that the takings test did not apply because (1) the District did not impose conditions on approval and (2) there is a distinction between a demand for real property and a demand for money.

The Supreme Court disagreed with the state court. First, the Court extended the Nollan/Dolan test beyond the traditional situation where a government approves with conditions to apply to a situation where a government denies the permit because the owner refuses to turn over property. In the Court's opinion, the owner forfeits a constitutional right whether it is coerced into accepting a condition or is denied benefits for refusing to accept that condition. Under the Court's analysis, therefore, a taking can occur even where no property of any kind was actually taken, so long as the government made a "demand" on the developer.

Second, the Court held that "in lieu" fees are the same as other types of land use exactions, and must satisfy the nexus and rough proportionality requirements of Nollan and Dolan. The Court rejected the

District's and dissent's argument that its ruling would restrict a government's ability to impose property taxes or user fees without implicating the takings clause.

In the aftermath of Koontz, local governments should be extra-cautious when negotiating with developers on land use conditions.

First, local governments should make clear that any discussions with developers are exploratory only, that no demands are being made, and that the municipal board is the only entity with authority to formally approve any conditions necessary to obtain a permit to avoid these discussions being viewed as a "demand" that might result in a Koontz-style takings claim.

Second, local governments should make greater use of annexation, subdivision, or development agreements. Though such an agreement, a local government can specify the exactions it will require from the developer, while the developer can freeze zoning laws, obtain support during the development process, and streamline the approval of permits. The use of a voluntary development agreement to set the terms and conditions of development of a particular property should reduce the likelihood of a Koontz challenge and help ensure a dialogue between a local government and a developer. However, a local government should avoid mandating the use of these agreements.

Third, a local government should make a development impact fee seem different from an individualized assessment on property. The more an impact fee is seen as directed at a specific property, the more likely a court will determine it to be a monetary exaction subject to the heightened standards of Nollan/Dolan. A more cautious approach is to apply the "takings" analysis to all new impact fees or monetary exactions prior to imposing them on a development.

Koontz raises many questions and answers few. One consequence of the decision that is clear, however, is that collaboration between local governments and developers will become more difficult.

Proposed Medical Cannabis Rules Would Limit Local Zoning Authority

Earlier this year, Illinois joined the growing ranks of states allowing the medical use and cultivation of cannabis. The "Compassionate Use of Medical Cannabis Pilot Program Act" will establish up to 22 cultivation centers (one for each Illinois State Police district), and up to 60 dispensaries "geographically dispersed throughout the State." The new law prohibits cultivation centers from locating within 2,500 feet of a pre-existing school, day care, or any residential district. The law also prohibits dispensaries from locating within 1,000 feet from schools or day cares. Dispensaries are also prohibited in residential units or within a residentially zoned area.

In a provision preempting local authority, even for home rule units, the new law specifically preserves municipal zoning authority that is not in conflict with the Act or its administrative rules.

> *"A unit of local government may enact reasonable zoning ordinances or resolutions, not in conflict with this Act or with Department of Agriculture or Department of Public Health rules, regulating registered medical cannabis cultivation center or medical cannabis dispensing organizations. No unit of local government, including a home rule unit, or school district may regulate registered medical cannabis organizations other than as provided in this Act and may not unreasonably prohibit the cultivation, dispensing, and use of medical cannabis authorized by this Act." (410 ILCS 130/140).*

This means that a municipality can enact local zoning regulations to identify the zoning district or districts in which cultivation centers and dispensaries are permitted. A municipality could also specify whether these uses are permitted by-right or require a special use permit in the allowable zoning districts. A municipality can also impose reasonable conditions on any special use permit to mitigate the impacts, just as it does for other special uses. A municipality might even prohibit dispensaries and cultivation centers in certain zoning districts, although a total ban on these uses in a municipality could be subject to challenge because the law states that municipalities cannot "unreasonably prohibit the cultivation, dispensing, and use of medical cannabis authorized by this Act." On the other hand, a short-term ban in the nature of a temporary moratorium while a municipality reviews and considers adopting regulations on these uses would be reasonable.

Since enactment of the new law, a number of state agencies have filed draft rules to provide further guidance on administration of the new law. For example, on April 18, 2014, the Illinois Department of Financial and Professional Regulation formally filed proposed administrative rules taking the position that local zoning cannot interfere with the State's goal of "geographically dispersed" medical cannabis dispensaries.

> *"No local municipality or jurisdiction shall impose zoning ordinances, special use permits, conditions or requirements that conflict with the Act or this Part, that concern or address issues or subject matters that are within the regulatory jurisdiction of the Division, or that would otherwise place unreasonable restrictions on the location of dispensaries contrary to the mandate of the Act that dispensing organizations shall be geographically dispersed throughout the State to allow all registered qualified patients reasonable proximity and access to a dispensing organization. (Section 115(a) of the Act.)"*

While the Act still leaves room for local zoning authority, if the practical effect of zoning regulations in a municipality and its neighboring communities prevents the location of "geographically dispersed" dispensaries, local zoning regulations may be the subject of a preemption challenge. However, the state may have its own challenges establishing dispersed dispensaries, where many communities are discovering that the location restrictions for dispensaries (1,000 foot setbacks from schools and daycares; no locations in residentially-zoned districts) severely limit where dispensaries might be located.

In any event, the proposed rules recognize the significance of local zoning in the processing of state-level approvals for cultivation centers and dispensaries. The proposed rules require dispensary applicants to provide the Department of Financial and Professional Regulation with a "[c]ertification issued by the local jurisdiction's zoning office authorizing the use of the proposed plot as a dispensary." Moreover, the Department of Agriculture's proposed rules will require cultivation center applications to provide documentation that the proposed location complies with local zoning requirements.

The proposed rules are currently in 45-day "First Notice" public comment period, which is followed by the "Second Notice" period, where the Joint Committee on Administrative Rules will consider adoption of the rules.

Bill Would Clarify Municipal Zoning Authority Over Schools

Municipal zoning authority over school district property has long been a source of conflict for cities and schools. As we reported in the Winter 2014 edition of our newsletter, in Gurba v. Community H.S. Dist. 155, a McHenry County Circuit court recently ruled that a Crystal Lake school district cannot ignore local zoning regulations in the construction of its expanded football stadium. In the wake of this decision, State Senator Pamela Althoff has sponsored a bill that would clarify the zoning authority municipalities have over school districts.

Ill. S.B. 2647 would amend a provision in the School Code to expressly state that school boards must comply with local zoning authority, as follows:

(105 ILCS 5/10-22.13a)

Sec. 10-22.13a. Zoning changes, variations, and special uses for school district property; zoning compliance. To seek zoning changes, variations, or special uses for property held or controlled by the school district.

A school district is subject to and its school board must comply with any valid local government zoning ordinance or resolution that applies where the pertinent part of the school district is located. The changes to this Section made by this amendatory Act of the 98th General Assembly are declarative of existing law and do not change the substantive operation of this Section.

As of this writing, the bill remains on third reading in the Illinois Senate, and still must pass both houses and receive the Governor's signature to become law.

Elected Officials Immune from Liability in Discrimination Suit Brought by the American Islamic Center

Local officials across the state breathed a collective sigh of relief earlier this month when the United States District Court for the Northern District handed down its decision in *American Islamic Center v. City of Des Plaines*, 2014 WL 1243870 (N.D. Ill. 2014). The facts of the case are familiar. A disappointed rezoning applicant determines that it was wronged by the city and its elected officials and decides to file suit. To show that the applicant means business, it sues the city and each elected official (in their individual capacity) that voted against its proposal.

These were the facts in the recent case involving the City of Des Plaines. After receiving a positive recommendation from the City's Plan Commission, the Des Plaines City Council voted 5-3 to deny the American Islamic Center's application to rezone a property from a manufacturing zoning classification to an industrial zoning designation that allowed religious assembly uses by right. The American Islamic Center sued the City and the 5 City Council members who voted against the rezoning application, claiming that the City Council members violated the American Islamic Center's constitutional rights to free exercise of religion and equal protection.

The City Council members argued that their votes to deny the rezoning proposal were legislative in nature, and therefore they were protected by absolute legislative immunity. Historically, public officials acting in a legislative capacity - including officials introducing and voting on specific pieces of legislation - have been granted broad immunity from lawsuits. The American Islamic Center argued that the City Council members were acting administratively when they cast their votes, and that legislative immunity did not apply. The American Islamic Center characterized the City Council member's actions as enforcing an existing zoning ordinance against the American Islamic Center's property, which the American Islamic Center claimed was an administrative - and not a legislative - act.

The court agreed with the City Council members, finding that they acted legislatively when they denied the American Islamic Center's rezoning application. The court highlighted the fact that the City Council members' votes impacted parties beyond the American Islamic Center, including the property owner, who was unable to sell the property to the American Islamic Center because the City denied the rezoning request. As a result, the court dismissed the individual City Council members from the lawsuit.

This case provides a solid defense for city council members that vote on rezoning requests. Rezoning proposals can be complicated and frequently court controversy, but elected officials can take solace that in many cases, their votes will not expose them to individual liability.

Full Disclosure - Ancel Glink is defending the City and City Council members in this lawsuit.

American Planning Association National Planning Conference, Atlanta, GA, April 26-30

The American Planning Association National Planning Conference will be held at the Georgia World Congress Center in Atlanta from April 26 to April 30. If you are attending, be sure to catch David Silverman's and Julie Tappendorf's presentations:

- David will be speaking at the Climate Change Planning Post-*Lucas* panel on Monday, April 28 at 2:30PM ET.
- David and Julie will both be speaking at the Planning and Law Division's Facilitated Discussion: Due Process and Zoning Hearings on Tuesday, April 29 at 10:30AM ET.

We hope to see you there!

ABOUT ANCEL GLINK

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

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

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

Zoning Administration Tools of the Trade

Zoning Administration Handbook

Economic Development Toolbox for Municipal Officials

Municipal Annexation Handbook

Editors: David S. Silverman and Julie A. Tappendorf

Contributors: David S. Silverman, Julie A. Tappendorf, Gregory W. Jones, Daniel J. Bolin

David S. Silverman is a partner at Ancel Glink, concentrating in local government, land use, economic development, and real estate law. Mr. Silverman is a member of the American Institute of Certified Planners and has written and spoken extensively on a wide variety of land use and development topics. David is also a member of the honorary land economics fraternity, Lambda Alpha International - Ely Chapter. dsilverman@ancelglink.com

Julie A. Tappendorf is a partner at Ancel Glink, concentrating in the areas of local government, economic development, land use, and litigation. Ms. Tappendorf has published on a wide-range of land use and related issues and currently serves on the faculty of ALI-ABA's Land Use Institute and is an officer in the Planning and Law Division and a member of the Amicus Committee of the American Planning Association. She is the author and moderator of the Municipal Minute blog. jtappendorf@ancelglink.com

Gregory W. Jones is an associate at Ancel Glink, counsels municipalities and officials on land use, zoning, good governance, and corporate matters. gjones@ancelglink.com

Daniel J. Bolin is an associate at Ancel Glink, representing public entities and property owners in land use, zoning litigation, real estate, property maintenance and many other local government matters. dbolin@ancelgink.com

Ancel Glink | Diamond Bush DiCianni & Krafthefer

Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C.
"Serving Illinois with offices in Chicago, Vernon Hills, Naperville, Crystal Lake and Bloomington"

140 S. Dearborn St. Suite 600, Chicago, IL 60603 | 312-782-7606 | www.ancelglink.com

Contact our Zoning and Land Use Group