Ancel Glink | Diamond Bush DiCianni & Krafthefer

In the Zone
Current Trends in Land Use Law

Fall 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.

Medical Cannabis Open For Business In Illinois

On September 8, 2014 the State of Illinois officially began accepting applications from groups interesting in operating medical cannabis dispensaries and cultivation centers. The Compassionate Use of Medical Cannabis Pilot Program Act requires all parties interested in growing or selling cannabis at retail to participate in a competitive state-run application process. What does this have to do with zoning, you may ask? The Act authorizes municipalities to adopt reasonable zoning regulations governing cannabis businesses, and the state requires applicants to disclose whether their proposed facility complies with local zoning regulations. Applicants that have already obtained local zoning approval stand a better chance of receiving a state license, although failure to obtain local approval will not prevent an applicant from submitting a state application. The applicant simply must explain the status of its request for local zoning approval in its state application. Applicants will have to hurry, though, as the September 22, 2014 deadline to submit applications is rapidly approaching. The state will subsequently review the applications and select the most qualified applicants to run cannabis farms and dispensaries. Although the state has not set a definitive timeline for license decisions, it is widely anticipated that determinations will be made late this year or in early 2015.

Stormwater Utility Fees

Across Illinois, stormwater impact fees (a.k.a. utility fees) are gaining popularity as an efficient means of funding improvements to storm sewer infrastructure. Beyond the direct financial benefits, these fees internalize costs of runoff created by a development, which encourages more sustainable design. As discussed below, the principles behind stormwater fees are well intrenched. The implementation, however, is not. Credits and other waivers are the battles of the future and municipalities should take a hard look at these issues before taking on their own fee structure.

Key Characteristics of Stormwater Utility Fees:

The general principles of a stormwater utility program are as follows:

- Fees are set to cover the cost of providing a predetermined level of service.
- Fees are determined based on amount of stormwater runoff.
- Fees are dedicated to a stormwater management program and cannot be used for unrelated purposes.
- Must have an opt-out option if stormwater runoff is reduced or eliminated

While this article primarily focuses on utility programs, municipalities have the option of assessing a more limited impact fee program. As with any impact fee, municipalities may consider a fee for the largest sources of runoff, allowing a base threshold of runoff without charge.

Tax v. Fee

Under Illinois law, municipalities are authorized to charge residents for government services, as long as the charge functions as a "fee," and not a "tax." Under Illinois law, a stormwater assessment is a "fee" if it meets three criteria: (1) the charge must serve a regulatory purpose rather than raise revenue; (2) the charge must be proportionate to the necessary cost of the service; and (3) the charge must be voluntary. *Church of Peace v. City of Rock Island,* 357 Ill. App. 3d 471, 474 (2005). A tax is "an enforced proportional contribution levied by the State," having no relation to a service rendered. *People ex rel. County of DuPage v. Smith,* 21 Ill.2d 572, 583, 173 N.E.2d 485 (1961); *See* 35 ILCS 200/1–145 (definition of property "tax"). A tax is assessed to provide general revenue rather than compensation. *Id*. A fee, on the other hand, is proportional to a benefit or service rendered. *Church of Peace*, 357 Ill. App. 3d at 475 (citing *Crocker v. Finley,* 99 Ill.2d 444 (1984)).

In *Church of Peace*, the court found that Rock Island's stormwater utility charge, similar to the ones used across Illinois (and likely used by DuPage County), was a "fee," not a tax because it: 1) funded the operation and maintenance of the storm sewer system; 2) was based on the proportion of impervious area on a property; and 3) was charged based on the owner's voluntary use of the stormwater system. *Church of Peace*, 357 Ill. App. 3d at 476. The court noted that impervious surfaces (i.e. driveways, roofs) are known to cause increased runoff of stormwater. Landowners typically use storm sewer systems to collect and convey this stormwater away from the area. The greater the impervious area, the greater the impact on the storm system.

Typical Fee Structure: The Equivalent Residential Unit

For ease of application, most municipalities set a flat rate for single family residential lots. For remaining properties, municipalities set a rate based on the area of impervious surface on a typical residential lot—known as the Equivalent Residential Unit (ERU). Stormwater engineers routinely calculate the ERU by mapping all impervious area in a municipality, and dividing by the average residential lot size. The result is the average impervious surface per area equivalent to a residential lot.

The ERU is used as the billing unit for the stormwater fee in much the same manner as kilowatt hours are the billing unit for electrical service. For non-single family residential properties (i.e.

commercial, industrial, hospitals, etc.) the actual impervious area is computed and their charges determined based on the number of ERUs on the property. For example, the sampling in Urbana, Illinois determined that 3,100 square feet of impervious area is the local ERU.

The amount charged per ERU depends on the amount needed by the municipality to implement their stormwater management plan. The cost of implementation, as estimated by the municipality, is divided by the number of ERUs to get a cost per ERU. Finally, the municipality calculates the number of ERUs on each lot, applies the rate and includes the final stormwater utility fee as a line item in the water or sewer utility bill.

When collecting the fee, the City should create an enterprise fund dedicated solely to the funding of the stormwater management program. The primary source of revenue for the stormwater enterprise fund should be a dedicated utility fee.

Section 5-1062.3 of the County Code

Recently, Illinois law has expanded express authority for stormwater utilities to certain County governments (currently, DuPage and Peoria County). Section 5-1062.3 of the County Code, 55 ILCS 5/5-1062.3, states, in part, as follows:

> For the purpose of implementing this Section and for the development, design, planning, construction, operation, and maintenance of stormwater facilities provided for in the adopted stormwater management plan, a county board . . . may adopt a schedule of fees applicable to all real property within the county which benefits from the county's stormwater management facilities and activities, and as may be necessary to mitigate the effects of increased stormwater runoff resulting from development.

55 ILCS 5/5-1062(h).

Consistent with Illinois law on impact fees, the new statutory section requires that "[t]he individual fees must be specifically and uniquely attributable to the portion of the actual cost to the county of managing the runoff from the property." 55 ILCS 5/1062(h) (as created by HB 1522). The County "shall include a procedure for a full or partial waiver for property owners who have taken actions or put in place facilities that reduce or eliminate the cost to the county of providing stormwater management services to their property**.**" *Id*. The waiver may be given for uses of property such as "green infrastructure," which allows stormwater to infiltrate on site instead of flowing into the County's storm sewer system.

"Specifically and Uniquely Attributable" Standard

In Section 5-1062.3 of the County Code, the State adopted the "specifically and uniquely attributable" standard for authorized county-wide stormwater utilities. Under this standard, the fee must be "specifically and uniquely attributable to the portion of the actual cost to the county of managing the runoff from the property." 55 ILCS 5/5-1062(h). While this statutory language is only applied to a limited set of county-wide utilities, the standard is consistent with Illinois law on impact fees. *N. Illinois Home Builders Ass'n, Inc. v. Cnty. of Du Page*, 165 Ill. 2d 25, 33 (1995); *Church of Peace*, 357 Ill.App.3d 471 (3rd Dist. 2005) (stormwater impact fees).

In the stormwater context, municipalities use impervious area to estimate impacts (or costs) that are "specifically and uniquely attributable" to an individual property. The County's overall cost of

stormwater management is broken down into cost per unit of impervious area being served by the system. Again, the greater the impervious area, the greater the runoff volume and greater impact on the stormwater management infrastructure.

However, not all "costs" are passed on to the County. As the Court recognized in *Church of Peace*, some property owners may eliminate the cost associated with their impervious area by retaining the stormwater on Site. *Church of Peace,* 357 Ill.App.3d at 476. If a property retains stormwater from other impervious areas in the area, it is further reducing the cost to the County system.

The County is only impacted by the *net* discharge of stormwater from a property. If a property offsets all of the cost of its discharge by removing an equivalent amount of stormwater before it reaches the stormwater system, there is no resulting cost "specifically and uniquely attributable" to that property. The new law recognizes this fact and requires a "full of partial waiver for property owners who have taken actions or put in place facilities that reduce or eliminate the cost to the county of providing stormwater management services to their property**.**"

Instead granting full waivers for on-site retention, however, most utilities provide a one-time reduction of up to 50% of a property's annual fee if stormwater is managed on site. Ostensibly, these municipalities do not issue a full credit because the municipality must still maintain costly stormwater infrastructure for each waiver property, in case discharge resumes. The municipalities maintain storm drains to service each property, whether or not the property uses rain gardens to recapture all runoff.

Waiver for Park Districts, Forest Preserves and Conservation Districts

Unlike a tax, stormwater utility fees apply to all land, whether or not it is tax exempt. Some tax exempt properties may contribute significant stormwater runoff to the system, such as large hospitals, universities or other government and non-profit facilities. Other tax exempt parcels, such as parks, forest preserves and conservation districts, likely contribute a net benefit to the municipal storm sewer system. As discussed above, the legal standard for calculating impact fees tends to support a full waiver for utility "customers" that reduce more stormwater across the municipality than they create.

For park districts, forest preserves and conservation districts, the municipal-wide impacts on stormwater runoff are almost certainly a net benefit. To bolster relationships with fellow local government districts, and avoid the administrative costs of calculating net benefits, municipalities should consider waivers for park districts and similar entities with large areas of open, permeable land that dramatically out-weigh the intermittent parking lots to access these open spaces

Conclusion

The costs of providing stormwater management services vary from parcel to parcel. Large parking lots create far greater impacts than large parks. Municipalities can use impact fees and utilities to tailor charges based on impacts. This approach not only frees up general funds for other uses, but provides market incentives for private landowners to reduce runoff. The result is an economically-efficient reduction in overland flooding and sewer backups.

How to Wind up a TIF District

Winding up a TIF district must be carefully planned and executed. The ambiguity of the Act and the Illinois property tax collection system create pitfalls for the unwary.

Section 3(n)(3) of the Act requires that the redevelopment plan must include the estimated date of completion of the redevelopment project and retirement of obligations issued to finance redevelopment costs,

> *which shall not be later than December 31 of the year in which payment to the municipal treasurer…is to be made with respect to ad valorem taxes levied in the twenty-third calendar year after the year in which the ordinance approving the redevelopment project is adopted…*

This clause is commonly interpreted to mean that the life of a TIF district is 23 years. (It can be extended to 35 years by an act of the General Assembly or in limited circumstances defined in §3(n).) But what happens at the end of 23 years? Does the TIF district self-destruct? No. The municipality must take certain steps, which must be coordinated with the county clerk.

Buried in Section 8 of the Act is the following paragraph:

> *Upon the payment of all redevelopment costs, the retirement of obligations, the distribution of any excess monies pursuant to this Section, and final closing of the books and records of the redevelopment project area, the municipality shall adopt an ordinance dissolving the special tax allocation fund for the redevelopment project area and terminating the designation of the redevelopment project area as a redevelopment project area….Municipalities shall notify affected taxing districts prior to November 1 if the redevelopment project area is to be terminated by December 31 of that same year.*

So closing a TIF district requires timely notice to affected taxing bodies and adoption of an ordinance. Other steps include declaration of surplus, if any, filing the termination ordinance with the county clerk, and distribution of any surplus to the affected taxing bodies.

The timing of the termination ordinance is driven by the fact that property taxes in Illinois are collected one year in arrears, e.g., taxes levied in calendar 2014 are collected and paid to the municipality in calendar 2015. The language of §3(n)(3) set forth above says that the date of completion of the TIF project and the retirement of obligations may be December 31 of the year in which taxes levied in the 23rd year of the TIF are paid to the municipality by the county. This would be the end of the 24th year after the creation of the TIF district.

Assume for purposes of illustration a TIF district for which the last day of its 23 year lifespan is August 30, 2014. Incremental TIF revenue generated in calendar 2014 will be collected by the county and paid to the municipality in 2015. If the municipality were to adopt and file an ordinance terminating the TIF district on August 30, 2014, it is likely that the county clerk would not calculate or pay TIF increment in 2015. Thus, the municipality would lose the 23rd year of its TIF revenue. The careful practitioner will consult with the county clerk to determine how that official interprets this provision of the Act.

As noted, project costs and debt obligations issued to pay project costs must be paid by December 31 of the 24th year after creation of the TIF district. The ordinance terminating the TIF district must be adopted “Upon payment of all redevelopment costs, [and] the retirement of

obligations." Upon adoption of the ordinance terminating the TIF district, property taxes are to be paid by the county to the affected taxing districts "in the manner applicable in the absence of the adoption of tax increment allocation financing."

Cases to Know

I. Schools Must Comply with Local Zoning

Gurba v. Community HS Dist. No. 115, 2014 IL App (2d) 140098

In *Gurba v. Community HS Dist. 155*, the appellate court upheld the trial court's ruling that the school district was required to obtain zoning approvals prior to installing the bleachers.

The appellate court rejected the school district's argument that the city was preempted from applying its zoning regulations on school property because the state constitution declares public education to be a matter of statewide concern. The court first noted that the city was a home-rule municipality with the power to enact and enforce zoning ordinances. While a home rule unit cannot enact ordinances that infringe upon public education, the court concluded that *land-use regulations* have no inherent impact on the substance of public education. Moreover, the court determined that the Illinois School Code expressly authorizes school districts to seek zoning relief for property it holds. That authorization would have no meaning if a school district were exempt from local zoning.

This is a good decision for municipalities that may have had to defend their local ordinances against claims by some school districts that they are exempt from zoning. This decision does not change the fact that school districts have their own building code (contained in the Illinois School Code) but should clear up any misunderstanding about application of zoning regulations to school buildings and facilities.

II. Firing Range is Permitted by Right in Business District

Platform I LLC v. Village of Lincolnwood Zoning Board of Appeals, 2014 IL App (1st) 133923

In *Platform I LLC v. Village of Lincolnwood Zoning Board of Appeals, a*n appellate court recently overturned a municipal decision to deny a permit to allow a firing range on property located in a business district. The owner of the proposed firing range applied for a building permit to construct a shooting range on the second floor of the building above an existing gun shop, relying on the "health clubs and recreation" uses that were permitted by-right in the business district. The village's zoning officer denied the application, stating that a firing range did not fall within the "recreation" use. The owner appealed to the ZBA, which agreed with the zoning officer's interpretation. The owner then appealed to the circuit court, which also upheld the zoning officer's interpretation, holding that the court was required to defer to the village's interpretation of its own ordinance.

On appeal, the appellate court reviewed the village's zoning ordinance, and specifically the use list in the business district that expressly allowed "health club or recreation facility, private" as a permitted by-right use. The court that the "plain meaning" of "recreation" includes activities for entertainment and amusement, and the zoning ordinance includes "sports" as an aspect of recreation. The court also said that "common sense dictates that target shooting is also considered a sport as it is an Olympic sporting event and a recognized sporting activity within our national college associations and 4-H clubs." As a result, the court held that the proposed shooting range was permitted in the business district and the permit should have been issued.

The village has since amended its zoning ordinance to specifically address shooting ranges, to exclude them from the definition of "recreation." However, the court did not address the subsequent amendment, instead applying the zoning ordinance as it existed on the date the owner filed its application for a permit to develop the shooting range.

III. Delay in Acting on Wind Permits Not Unconstitutional

CEnergy-Glenmore Wind Farm #1, LLC v. Town of Glenmore, 2014 WL 3867527 (7th Cir. Aug. 7, 2014)

In *CEnergy-Glenmore Wind Farm #1, LLC v. Town of Glenmore*, the 7th Circuit Court of Appeals dismissed the case which challenged a local governmental body's actions regarding an application for permits for a proposed wind farm.

The plaintiff sought building permits from the town to build seven wind turbines. The project was highly controversial, and angry citizens attend town board meetings to protest the proposed wind farm project. After months of meetings, the town board did finally approve the building permit applications at a public meeting. However, after citizens threatened the chair and board members, the board voted to rescind its approval at that same meeting. Then, a week later, the town board rescinded its decision to rescind approval. The approvals were never issued, however, because of deficiencies in the applications.

Since CEnergy failed to obtain the necessary permits by March 1st, it lost its contract rights to build the wind farm project, and it sued the town claiming that the delay in granting the permits violated its due process rights and vested rights. The district court disagreed, finding that the plaintiff failed to show that its due process rights were violated. The court also held that plaintiff should have sought state law relief to challenge the local land use decision rather than file a federal court action.

The 7th Circuit agreed with the district court, finding that the plaintiff's due process claims fail because the town board's actions were not arbitrary and because CEnergy failed to seek state law relief. The court noted that in order to be "arbitrary," a land use decision must "shock the conscience" or be "egregious official conduct." Here, the town board's decision to delay action on the building permits because of popular opposition to the project was a "rational and legitimate reason for a legislature to delay making a decision." In any event, plaintiff should have brought its land use case to state court, which offers a variety of remedies, including a writ of mandamus.

Upcoming Presentations

September 20, 2014: Illinois Municipal League's Annual Conference

Ancel Glink attorneys will be presenting

Adam Simon and Dan Bolin will be speaking on "Second Amendment & Zoning: The Other Side of Concealed Carry."

David Silverman and Julie Tappendorf will be presenting "How Much Process is Due Process?"

Finally, don't miss the annual "Council Wars" session, with Rob Bush, Stewart Diamond, Ker-Lyn Krafthefer, Steven Mahrt, Derke Price, and Julie Tappendorf!

October 3, 2014: Illinois Chapter Annual Conference: "LawLawPalooza"

David Silverman and Greg Jones will be speaking on the updates on the latest land use law issues.

October 22, 2014: APA Planning & Law Division Webinar

Greg Jones and Dan Bolin will be discussing on "Sex, Guns & Drugs: Planning for Controversial Land Uses."

November 13, 2014: North Central Illinois Council of Government's Annual Dinner

Greg Jones and Dan Bolin will be discussing medical cannabis, e-cigarettes, guns, and adult uses at the NCICG Annual Dinner.

Recent Publications

David S. Silverman, *The Temporary Use and Economic Development*, American Planning Association, Planning & Environmental Law, July 2014.

Julie A. Tappendorf, *Common Zoning Definitions Found Unconstitutional in TLC v. Elgin*, American Planning Association, Planning & Environmental Law, July 2014.

Gregory W. Jones & Robert K. Bush, *Net Gain: Pitfalls to Avoid when Bringing Paddle Tennis to a Community*, Parks & Rec. Business, Aug. 2014 at 38.

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

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