Ancel Glink | Diamond Bush DiCianni & Krafthefer

In the Zone
Current Trends in Land Use Law

Summer, 2012

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 land use law and provide useful resources to promote planning and zoning practice.

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.

In This Issue

How Far Does the Second Amendment Extend Beyond the Home?

In 2008, the U.S. Supreme Court first recognized a personal right to possess a handgun for self-defense, especially in the home. *District of Columbia v. Heller*. Since that time, lower courts and local governments have been left to grapple with the scope of this new Second Amendment right. While local regulations are certainly invalid when they restrict handgun possession in the home for self defense purposes, courts are beginning to consider whether the constitutional right applies outside the home, which could have great consequences for all forms of local gun regulation, including zoning restrictions on gun shops, firing ranges and other gun-related land uses.

Recently, two Federal District Courts considered whether the Second Amendment right applies outside the home and came down on different sides of the question. In *Woollard v. Sheridan*, a Federal District Court struck down a Maryland law requiring an applicant to demonstrate a "good and substantial reason" for a permit to carry a handgun outside the home finding that the right to bear arms is not limited to inside the home because the protected purpose of self defense must take place wherever that person happens to be. Because Maryland failed to demonstrate that the regulation was reasonably adapted to a substantial government interest, the permit requirement was found unconstitutional.

However, in *Moore v. Madigan*, a Federal District Court upheld Illinois' "Unlawful Use of Weapon" statutes, reasoning that the core Second Amendment right only exists inside the home. These statutes generally prohibit the carrying of firearms in public, with limited exceptions for unloaded and cased weapons. The Court noted that the Supreme Court

emphasizes the right to bear arms in the home and the "implicit approval" of long-recognized concealed weapons bans.

What do these apparently inconsistent rulings mean for municipalities? At the very least, communities should tread carefully in adopting or enforcing local gun laws that interfere with the core right to possess a handgun in the home for self defense. With respect to other local gun laws, local officials should establish that its local regulation reasonably furthers the community's public safety, crime abatement, or other substantial goals.

New Law Affecting Your Zoning Hearings and other Public Meetings

Before the first meeting of your Plan Commission or Zoning Board of Appeals in 2013, you should review this new law affecting meeting agendas and notices.

P.A. 97-0827 amends the Open Meetings Act to add two new requirements for agendas and notices.

1. Agendas Must Identify the General Subject Matter of Ordinances and Resolutions

Public bodies must identify the "general subject matter" of any ordinance or resolution to be voted on at a meeting on the agenda. This language is not a significant change from existing law established by the Illinois appellate court's ruling in *Rice v. Adams County* requiring agendas to provide "sufficient advance notice to the people" of the action to be taken at a meeting.

2. Agendas and Notices Must Be Continuously Available to Public 48 Hours Before Meeting

Public bodies must make notices and agendas continuously available for public review during the entire 48-hour period before a meeting. This may create problems for public bodies that post their agendas and notices inside their principal office, such as a city or village hall, if that office is not continuously open to the public for the 48-hour period prior to a meeting.

Public bodies would appear to have three options available for complying with the new 48-hour continuous posting requirement:

* Post and maintain notices and agendas inside the principal office or meeting place, provided it remains open to the public the entire 48-hour period before a meeting; or

* Post and maintain notices and agendas outside the principal office or meeting place; or

* For public bodies that maintain a website, post and maintain notices and agendas on the public body's website in order to satisfy the requirement for continuous posting.

These two new requirements become effective January 1, 2013.

CASES TO KNOW

Failure to Obtain an Adult Use License Results in Loss of Nonconforming Use

In 2006, the County brought an action against George Stamatopoulos to enjoin the operation of his adult merchandise business, Video Magic. The trial court entered an order for the County, and the Appellate Court affirmed in 2008. That same year, Plaintiffs purchased Video Magic from Stamatopoulos and filed a zoning application to operate an adult use establishment; but the County Zoning Board of Appeals (ZBA) denied the application on the basis that Video Magic did not constitute a valid nonconforming use when the Plaintiffs purchased it. On administrative review, the trial court affirmed the denial of the zoning application, and the Plaintiffs appealed in *County of Lake v. George Stamatopoulos, d/b/a Video Magic*. The Plaintiffs argued that the ZBA was bound by the injunction against Video Magic, prohibiting it from conducting business until it came into compliance with the adult licensing ordinance. However, the Appellate Court accepted the County's argument that Video Magic never operated as a legal nonconforming use because it failed to comply with the adult licensing ordinance. While not every violation of a licensing statute will discontinue a nonconforming use, where the adult licensing ordinance was clearly designed to assist in the regulation of land use, Video Magic lost its legal nonconforming use status due to its failure to obtain a license.

"Gyrocopter" Special Use Permit Doesn't Fly

The Fourth District Illinois Appellate Court recently struck down a property owner's special use permit as unconstitutional because the use almost exclusively benefited the owner. The special use permit was for a "restricted landing area" for the owner's "personal gyrocopter." A "gyrocopter" is an experimental aircraft with one or two seats, an open cockpit, and a gasoline engine that typically flies at an altitude of 600 to 1,000 feet. A "restricted landing area" is essentially a private non-commercial aircraft runway. Neighbors objected to the special use permit ordinance, and the trial court held the ordinance was unconstitutional.

On the county's appeal, the Appellate Court analyzed what are known as the *LaSalle* and *Sinclair* factors. Robrock v. County of Piatt. First, the Court noted that the use and zoning of nearby property was agricultural, scoring this important factor for the objecting neighbors. Next, the objecting neighbors established that the flight paths of the gyroplanes and gyrocopters would diminish their property values. The Court concluded that the devaluation of property values did not have a corresponding benefit to the public because the landing area would only benefit the private owner and his guests. The minimal public good did not compare to the hardship of the neighbors, who already wear ear protection to preserve their sensitive hearing. The Court also found that the owner's land was suitable for its existing agricultural zoning, and that

there was little community need for a landing area because at least two airports were within 20 miles of the owner's property. Finally, the Court looked to the county's comprehensive plan, which sought to protect the "rural countryside" and anticipated that the local airports would be adequate to handle local flight operations. Therefore, the Court concluded that the county's award of a special use permit for a restricted landing area was arbitrary and bore no real and substantial relation to the public health, safety, morals, comfort, and welfare of the public as applied to the objecting neighbors' property.

No Vested Right to Build Condo Development in PMD District

In *Morgan Place of Chicago, et al. v. City of Chicago*, an Illinois Appellate Court determined that the City was not equitably estopped from revoking a building permit for a condominium development. The court also determined that the developer did not have a vested right to the permit notwithstanding that the property was subsequently rezoned to a planned manufacturing district.

In 1993, Cedicci acquired land zoned in the M-2, light manufacturing district. Shortly after the purchase, the property was rezoned to the C-2 district, which would allow the owner to construct its proposed condominium building above a ground floor warehouse. In 1997, however, the City proposed rezoning the property to planned manufacturing district (PMD), which would allow manufacturing and commercial uses, but prohibit residential uses. Cedicci claims he was not notified of the PMD zoning change.

In 1998, Cedicci submitted a permit application to develop a mixed-use (condominium and warehouse uses) on the property. That application was approved by the zoning department, and a building permit was issued in 2000, notwithstanding that residential uses were not permitted in the PMD district.

Shortly after construction began in 2004, a City inspector issued a stop work order (SWO) on the basis that the initial building permit had been revoked for inactivity under the City's building code. Cedicci hired counsel to challenge the SWO, and the permit was eventually reinstated in 2004 upon recommendation of the City's corporation counsel, who expressed concerns about vested rights. One year later, the City revoked the building permit because the use did not comply with the City's zoning ordinance, and Cedicci filed a lawsuit claiming it had a vested right to continue with the development and the City was equitably estopped from enforcing the City's zoning ordinance. The trial court ruled in favor of the City, which was recently affirmed by the appellate court.

On the equitable estoppel claim, the Court determined that the City official who had reinstated the permit in 2004 on the recommendation of City counsel was not authorized to do so and the City could not be bound to that unauthorized act.

On the vested rights claim, the Court determined that the vested rights doctrine presupposes issuance of a *legal* building permit. In this case,

the zoning of the property prohibited residential uses; thus the building permit was never legally issued. Furthermore, the Court determined that the expenditures made by the owner prior to the zoning change were not substantial enough to satisfy a vested rights claim.

LEGISLATION TO LOVE OR LOATHE

Bills signed by the Governor

Use of Streets for Charitable Solicitations

P.A. 97-692 requires municipalities and counties to allow for charitable solicitations in roadways if the individuals engaged in the solicitation are police, firefighters, or other public-safety employees.

Bills sent to the Governor

More Detail Required on Notices of Building Code Violations

Illinois SB 3406 would require municipal officials to include on any notice of violation of a building code (1) a citation to the specific code provision alleged to be violated and (2) a description of the circumstances giving rise to the violation. This is a change to the current language that requires violation notices to indicate "the type and nature of the violation." Code officials and others who write up these violation notices should be advised that beginning January 1, 2013, they will need to provide more detail about the violation and cite the specific code section or sections being violated. The same requirement applies to notices of violations of sanitation ordinances.

Enterprise Zone Program Extended

SB 3616 extends enterprise zones by an additional 25 years, creates five additional zones, introduces competition and financial transparency, and eliminates tax incentives that are deemed unnecessary to the core mission of enterprise zones

Special Service Areas

SB 409 sets additional notice and hearing procedures for Special Service Areas. The legislation requires (i) that the notice of the SSA provide an estimated amount of the first year levy under the SSA; (ii) that there be at least 60 days between the adoption of the SSA ordinance and the public hearing; and (iii) that the public body hold an additional public hearing if the amount of the SSA levy in any year exceeds the levy of the prior year by more than 5%.

ABOUT ANCEL GLINK

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

You can also visit our blog Municipal Minute for current information about new

and pending legislation, recent cases, and other topics of interest to local governments or follow the Zoning and Land Use Group on Twitter @AncelGlinkLand.

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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