Ancel Glink | Diamond Bush DiCianni & Krafthefer

In the Zone
Current Trends in Land Use Law

Spring, 2013

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 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.

In This Issue

See you at the American Planning Association National Conference!

Ancel Glink will be speaking on a broad range of land use topics in Chicago in the coming days. First, Paul Keller will be speaking on Subdivisions at the IICLE Land Use Law Seminar.

Friday, April 12, 2013
2:30 p.m. to 3:15 p.m.
Subdivisions
Paul Keller

"Subdivision regulation is a land use control used to carry out a community's plan. To be effective, subdivision regulations must be integrated with other local government plans, policies, and ordinances. Gain valuable information on the considerations you need to make when working with subdivisions and the most effective ways to make them."

Next, the APA National Conference will be coming to Chicago April 13-17, 2013, and Ancel Glink will be there!

Sunday, April 14, 2013
9:45 a.m. to 11:15 a.m.
It's Getting Hot in Here
David Silverman

"How are different states implementing the climate change and sustainability policies advanced by the National Environmental Policy Act (NEPA)? And how are the courts responding to these legislative initiatives? This session will use case studies and court decisions to examine those questions, with a particular focus on the regulation of

greenhouse gas impacts for individual projects."

Sunday, April 14, 2013
2:30 p.m. to 5:00 p.m.
Career Reality: Speed-dating for Planners
Julie Tappendorf, David Silverman

"This two-part session includes an opportunity for students to chat with professionals in planning's various fields. Learn about job responsibilities and required skills while making important contacts."

Monday, April 15, 2013
2:30 p.m. to 3:45 p.m.
Addressing Development Entitlements
David Silverman

"Over the course of four years, the Lincoln Institute of Land Policy and Sonoran Institute studied development entitlements in subdivisions throughout the Intermountain West region of the United States. This session culminates with the release of a final report on their work. Learn about the extent and nature of entitlement issues and what communities can-and are doing-to not only address them but also avoid them."

Tuesday, April 16, 2013
7:15 a.m. to 8:45 a.m.
Achieving Development through Community Agreement
Julie Tappendorf

"Developers, local government officials, and neighbors often seek to meet their development goals through zoning, even when development by community agreement may achieve better results. Learn how diverse stakeholders have reached agreements on affordable housing, conservation, local jobs and amenities, parks, and schools without employing traditional zoning practices. What are the legal bases for these agreements? And what, if any, pitfalls may be involved?"

You can also look for us at the Opening Reception (7 p.m.) and the Illinois After Hours Social (9:00 p.m.) on Sunday, April 14, 2013. See you at the conference!

How to Discover a Wolf in Sheep's Clothing: Encouraging Transparency in Public Hearings

Imagine that you are the manager of a community where the corporate authorities have placed a priority on economic development. Imagine still that you have finally landed a premium retailer, call it "Big Box," that could finally close some of the persistent holes in your budget that haven't been filled since 2008. The corporate authorities are excited and ready to give you a bonus for pulling the deal together.

Now imagine this: Your residents (the ones who have been clamoring for more stores), begin appearing at the plan commission to challenge the proposed development plan. Next, they hire an attorney and a public relations firm to promote a negative image campaign against Big Box,

accusing it of treating its employees poorly and having a general disregard for the environment. Then, once your Village finally approves the project after many nights of public hearings and meetings, the residents file suit for violations of due process and tie the development up in court for two more years. Finally, even though the Village and Big Box prevail in court, the market's support for the project has gone away in favor of other deals that were on a fast track. What you have left is a paper development that may never become bricks and mortar.

As your head spins looking back on the last two years, you begin to wonder how the residents became so well organized and had so much money to support their cause. Then, out of the blue, you receive an anonymous tip that the mastermind behind the opposition, and the source of all the financial support, was actually a local retailer who was fearful of how the competition would affect its profits. The owner of the local business, call it "Ma and Pa", had hired a company which specializes in organizing opposition efforts. That company engaged agents, using pseudonyms, to stir unrest, start a grassroots campaign against the development and hire the attorney responsible for the lawsuit. You finally learn that the Ma and Pa's goal the whole time was just to create delay and expense to deter the Big Box development and there was no bona fide objection to any part of the plan.

If you don't believe this could happen, you are wrong. It has happened before and it will happen again. A story, actually a nightmare, very similar to this is described in the case Rubloff Development Group, Inc. v. SuperValu, Inc.[i] In Rubloff, our fictional Big Box sued Ma and Pa and their counterparts on a variety of claims which all allege how they wrongfully interfered with the project. Surprisingly, the Court found that the actions performed by Ma and Pa were protected from liability and Big Box did not have a claim for relief.

The conspirators in Rubloff were protected by a judicial concept called the *Noerr-Pennington* doctrine, a principle which is designed to protect a party's First Amendment rights against the threat of litigation by a party opposed to the actor's speech or conduct. The *Noerr-Pennington* doctrine extends "absolute immunity" from antitrust laws to businesses and other associations when they join together to petition legislative bodies, administrative agencies or courts for action that may have anticompetitive effect. This is particularly true when part of the petitioning is a publicity campaign directed at the general public and seeks legislative or executive action. These efforts enjoy "antitrust immunity even when the campaign employs unethical and deceptive methods."[ii] In Rubloff, the doctrine was extended specifically to protect actors participating in a municipal legislative proceeding related to the grant of zoning authority.

The philosophy behind the *Noerr-Pennington* doctrine has been incorporated into State law as well. The Citizen Participation Act,[iii] enacted in 2007, implements the public policy of the State of Illinois that the constitutional rights of citizens and organizations to be involved and participate freely in the process of government must be encouraged and safeguarded with great diligence. The Act immunizes genuine First Amendment activity from litigation aimed specifically at chilling such

conduct and, more importantly, carries the risk of the award of attorneys' fees to the defendant.

So if a party seeking to oppose zoning applications related to new economic development is granted such strong protection under State and Federal law, what can a municipality do to encourage honest debate and avoid covert and misleading opposition? Principally, the corporate authorities and their subordinate administrative bodies need to adopt strong procedural rules governing the conduct of interested parties and the presentation of evidence. Cities can find authority to create and enforce strict rules in both the Open Meetings Act[iv] and the Illinois Municipal Code,[v] respectively, depending on whether the forum is a board meeting or a public hearing. Such rules should aggressively protect the integrity of the proceeding in reliance on the governing body's significant interest in effectively conducting its business. Importantly, courts have found that a municipality does not violate the First Amendment when it enforces reasonable rules on public participation that advance a legitimate public purpose.[vi] The following are a few examples of rules communities might employ to ensure fair and efficient zoning hearings:

* The rules should be tailored to the circumstances specifically before the board. The rules of procedure should be general in scope, and should allow that the rules may be temporarily waived, suspended, or adjusted to meet the particular needs of the public hearing process. Observing strict rules may be unnecessary for a simple side-yard variance, but a more formal procedure may be needed for a contested and complex planned unit development.

* Require prior registration for participants to provide comment, testimony, or questions on an application. Registration is useful not only for managing public hearings, but also as a record on who appeared and provided testimony. The registration forms can have a notes section for the Chairperson or secretary to note the testimony offered.

* Participants may be entitled to cross-examine adverse witnesses, especially if they have a property interest affected by the zoning application. However, not every participant is entitled to the full panoply of due process rights. Accordingly, the rules might limit the class of people that might exercise this right, like adjacent or nearby property owners.

* Cross-examination should be straight-forward and assist the public body in reaching its decision. A useful requirement is to require that those conducting cross-examination limit their questions to the factors required to be demonstrated to support the zoning relief. These standards are listed in the zoning code sections dealing with the zoning relief in question (e.g. special uses, variations, text and map amendments).

* The rules should distinguish between ordinary public comment, and testimony that may be the subject of cross-examination, and keep participants from blurring the lines between these categories.

* Public hearings before the board are not court proceedings and, while some formal procedures are necessary, the procedure is more flexible and informal process than a court proceeding. Participants should be reminded that rules of evidence and rules of civil procedure are only guides, and not strictly applicable to your public hearing.

* Some states allow the appointment of a hearing officer to take evidence or otherwise assist in the administration of a public hearing, which may be noted in the rules of procedure.

* Some states grant boards the power to compel the attendance of witnesses; if the governing law does not already provide the relevant guidelines, rules may be used to establish the factors to be considered and the circumstances under which the board exercises its subpoena power, if at all.

* The rules may provide that the hearing is automatically closed upon a vote of the board to make a recommendation on the relief. Alternatively, the hearing may be continued for the applicant, a member of the public, staff, or the attorney to provide new or additional information at a continued hearing date.

Ultimately, limiting misrepresentations and fraudulent misstatements through the enforcement of strong procedural rules will help avoid deceptive practices that lead to cases like Rubloff and may even save your economic development.

For more on this topic, see Adam Simon and David Silverman at the ILCMA Summer Conference at Eagle Ridge in Galena.

Friday, June 14, 2013
9:00 a.m. to 10:15 a.m.
"I was at a meeting 'til 2 a.m. last night, what did you do?"

Learn strategies to gain better control of public hearings and public meetings addressing controversial issues.

Learning objectives:

* Learn about due process requirements;
* Learn about statutory authority and requirements;
* Learn effective strategies for balancing the rights of participants against the public's interest in an orderly meeting.

---

[i] 863 F.Supp.2d 732 (N.D. Ill. 2012)
[ii] *Id.* at 741 (internal citations omitted).
[iii] 735 ILCS 110/1, et seq.
[iv] 5 ILCS 120/2.06.
[v] 65 ILCS 5/11-13-22.
[vi] *Rana Enterprises, Inc. v. City of Aurora,* 630 F.Supp. 912 (N.D. Ill. 2009).

Lack of Notice to Lienholder Did Not Require Vacating Demolition Order

In 2007, the Village of Ringwood filed a lawsuit seeking a court order to allow it to demolish a fire-damaged apartment building owned by defendant. The complaint was filed under section 11-31-1(a) of the Illinois Municipal Code (65 ILCS 5/11-31-1(a)). The trial court ruled in favor of the Village, in part based on a letter sent to the defendant over 6 months before the complaint was filed, directing defendant to "demolish the building." The trial court determined that the letter gave defendant notice and a reasonable opportunity to repair the building.

Defendant appealed the trial court's demolition order to the Illinois Appellate Court. Defendant argued that the Village failed to comply with the 15 day notice provision of section 11-31-1(a). While the Appellate Court rejected this argument as to the defendant, finding that the letter was enough to provide notice, it remanded the case for a new trial because the lienholders did not receive notice of the demolition order.

On remand, the trial court found only one lienholder, which did not attend the subsequent trial on the demolition complaint. The Village produced a waiver, signed by the lienholder, expressly waiving its right to any notice, as provided in section 11-31-1(a). The trial court ultimately entered an order directing the defendant to demolish the building within 30 days.

The defendant again appealed to the Illinois Appellate Court arguing that the Village's failure to serve the lienholder prior to the demolition suit and the lienholders absence at trial required the case to be remanded for a new trial on the complaint. The Appellate Court concluded that although the lienholder was entitled to notice of the demolition suit, it did not need to vacate the demolition order or remand for a new trial. The Appellate Court based its decision on defendant's failure to prove that the lienholders interests were not protected in the underlying proceedings. The Appellate Court reasoned that because the court vacated the demolition order, it provided the lienholder an opportunity to participate in the demolition suit, which it declined. Further, the Appellate Court reasoned that the remand was to allow the lienholder to raise objections to challenge the Village's complaint, and it was not for the defendant to present fresh evidence. Village of Ringwood v. Foster, 2013 IL App (2d) 111221 (February 11, 2013).

Legislation to Love or Loathe

Reallocation of Taxes to School District in TIF District (Ill. H.B. 197)

Provides that 3 years after a redevelopment project area is established in a TIF District, the portion of taxes levied by a school district which is attributable to annual inflationary increases (not less than zero) will be allocated to a school district though an intergovernmental agreement with the sponsoring municipality. The Illinois Municipal League and Illinois Tax Increment Association oppose this legislation, which is currently on third reading in the Illinois House.

Prohibition of Wind Energy Devices (Ill. H.B. 1201)

This legislation would allow a municipality to prohibit electric generating wind device from locating within its corporate limits, provided the prohibition is not inconsistent with another municipality's zoning regulation. This prohibition would not apply to existing electric generating wind devices, or those with a nameplate generating capacity of less than 100 kilowatts that are used primarily by an end user. H.B. 1201 passed out of the house and is presently in a Senate committee.

Treatment of Infected Trees (Ill. S.B. 1589)

This bill would allow a municipality to provide for the treatment and removal of elm trees infected with Dutch elm disease or ash trees infected with the emerald ash borer on private property if the property owners refuse, after receiving notice, to remove or treat the trees on their property. This legislation would also authorize the Illinois Finance Authority to administer a program for the treatment of standing trees and the replanting of trees on public lands that are within the emerald ash borer quarantine areas of the Department of Agriculture. S.B. 1589 passed out of the Senate and has arrived in the House for consideration.

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: Adam Simon, David Silverman, Erin Baker, Dan 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, is an officer in the Planning and Law Division and a member of the Amicus Committee of the American Planning Association, and a member of Commercial Real Estate Executive Women (CREW). She is the author and moderator of the Municipal Minute blog. jtappendorf@ancelglink.com

Adam B. Simon is a partner at Ancel Glink, concentrating in local government, land use, economic development, public finance and telecommunications law. Mr. Simon has organized or negotiated Tax Increment Financing Redevelopment Agreements and Business Redevelopment Districts and assisted with the issuance of public securities related thereto to leverage private investment. asimon@ancelglink.com

Paul Keller is an of counsel attorney at Ancel Glink, with more than 30 years experience in general municipal law. Paul concentrates on land use law, real estate development, eminent domain, zoning and planning, tax increment financing (TIF) and special services areas (SSA). pkeller@ancelglink.com

Erin Baker is an associate at Ancel Glink, and frequent contributor to Ancel Glink's local government blog, Municipal Minute. ebaker@ancelglink.com

Dan 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