Judicial Review

RONALD S. COPE
Ungaretti & Harris LLP
Chicago

The author gratefully acknowledges the assistance of Jamie A. Robinson and Gina C. Virgo in the preparation of this chapter.
I. [7.1] Scope of Chapter

II. Standing To Challenge or Enforce Zoning Ordinances

A. [7.2] Contract Purchaser, Property Owner, or Party in Possession Attacking Validity
B. [7.3] Neighboring Property Owner Must Show Some Unique Damage To Challenge Ordinance
C. [7.4] Neighboring Property Owner Intervening To Sustain Ordinance
D. [7.5] Standing of Municipalities
E. [7.6] Municipality Has Standing To Challenge Its Own Board of Appeals
F. [7.7] Standing of School District
G. [7.8] Standing of Objector at Administrative Hearing
H. [7.9] On Administrative Review All Persons Who Were Parties to Administrative Proceeding Must Be Named
I. [7.10] Standing of Property Owner Who Buys Property in Face of Existing Zoning
J. [7.11] Mere Economic Loss as Result of Competition Permitted by Zoning Change Is Insufficient To Confer Standing
K. [7.12] Property Owner May Enforce Ordinances

III. Exhaustion of Administrative Remedies

B. [7.14] Record Made Before Local Zoning Board on Administrative Review
C. [7.15] Board Does Not Decide Issues of Law
D. [7.16] Bright Doctrine — Exhaust Local Remedies
E. [7.17] Application for Amendment as Exhaustion of Remedies
F. [7.18] Administrative Review Does Not Apply When Corporate Authorities Make Final Decision
G. [7.19] Property Owner Need Not Apply for Relief Certain To Be Denied
H. [7.20] Independent Court Action Not Precluded by Application for Administrative Relief
   1. [7.21] Findings of Fact
   2. [7.22] Administrative Relief Envisions Fair Hearing
   3. [7.23] Administrative Agency May Have No Authority To Grant Rehearing

IV. Forms of Action

A. [7.24] Action by Municipalities To Enforce Ordinance
B. [7.25] Action by Property Owner To Enforce Ordinance
C. [7.26] Action to Review Zoning Decision by a Municipality, County, or Township
D. Petition for Order of Mandamus
   1. [7.27] In General
   2. [7.28] Change of Position in Reliance on Prior Zoning or Issuance of Permits
   3. [7.29] Mandamus Action Must Show Clear Legal Right to Relief

E. [7.30] Declaratory Judgment Action and Action To Quiet Title

   1. [7.32] Fair Housing
   3. [7.34] First Amendment — Adult Uses
   4. [7.35] Action for Inverse Condemnation
      a. [7.36] United States Supreme Court Opinions
         (1) [7.37] Keystone Bituminous Coal Ass’n v. Benedictus
         (2) [7.38] First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California
         (3) [7.39] Nollan v. California Coastal Commission
         (4) [7.40] Lucas v. South Carolina Coastal Council
         (5) [7.41] Dolan v. City of Tigard
         (6) [7.42] Lingle v. Chevron U.S.A., Inc.
      b. [7.43] Seventh Circuit and Illinois Opinions
      c. [7.44] Right to Jury Trial in an Inverse Condemnation Case
      d. [7.45] Action for Damages
   5. [7.46] Antitrust Liability

V. Klaeren and Judicial Review Under §11-13-25

A. [7.47] Is the Decision by the Village Board To Be Considered Administrative or Legislative

B. Scope and Nature of Review
   1. [7.48] Section 11-13-25 Rational-Basis Test or “Heightened Scrutiny”
   2. [7.49] Applicability of the LaSalle Standards to §11-13-25

VI. [7.50] Home-Rule Municipality Need Not Follow Its Own Ordinances

VII. [7.51] Form of the Order — Role of the Courts

VIII. Issues in Determining Validity of Classification

   A. [7.52] Reasonable Relationship to Public Health, Safety, and Welfare
   B. [7.53] Factors Determining Validity of Classification
   C. [7.54] Presumption of Validity
D. [7.55] Difference of Expert Opinion
E. [7.56] Use of Nearby Property
F. [7.57] Spot Zoning
G. [7.58] Increased Value to Property Owner

IX. Form of Complaint and Answer

A. [7.59] Answer in Administrative Review
B. Complaint
   1. [7.60] Elements in Complaint
   2. [7.61] Allegations Regarding Comprehensive Planning
   3. [7.62] Allegations Regarding Need or Demand for Requested Classification
   4. [7.63] Inclusion of Demonstrative Exhibits
   5. [7.64] How To Allege Exhaustion of Local Remedies
   6. [7.65] Laches as a Defense in a Zoning Case

X. [7.66] Discovery

A. [7.67] Discovery for Plaintiff
B. [7.68] Discovery for Defendant
C. [7.69] Discovery of Expert Opinions

XI. Trial Preparation

A. [7.70] Chronology of Events
B. [7.71] Stipulation to Existing Uses of Land and Zoning in Neighborhood
C. [7.72] Maps, Photographs, and Other Exhibits
D. [7.73] Expert Witnesses
E. [7.74] Trial Preparation Checklist

XII. Conduct of the Trial

A. [7.75] Elements of Proof
B. [7.76] Expert Testimony
C. [7.77] Municipal Officials as Witnesses
D. [7.78] Demonstrative Evidence
E. [7.79] View by the Court

XIII. [7.80] Settlements and Consent Orders
XIV. [7.81] Appendix — Sample Forms

A. [7.82] Complaint for Declaratory Judgment and Injunction
B. [7.83] Interrogatories to Defendant
C. [7.84] Interrogatories to Plaintiff
D. [7.85] Form of Order for Declaratory Judgment with Injunctive Relief
I. [7.1] SCOPE OF CHAPTER

This chapter deals with judicial review of zoning decisions. It covers standing to change or enforce zoning laws; administrative review, including exhaustion of administrative remedies; forms of action to challenge an administrative decision or the validity of an ordinance; the nature of the relief courts may grant; the issues raised in determining the validity of a zoning classification; and the basic format of the complaint and answer. Special attention is given to current caselaw, and the practitioner is duly warned that effective counsel in zoning cases requires a constant review of current opinions.

II. STANDING TO CHALLENGE OR ENFORCE ZONING ORDINANCES

A. [7.2] Contract Purchaser, Property Owner, or Party in Possession Attacking Validity

The question of when an individual has standing to challenge the validity of a zoning ordinance raises significant problems. It has been held that a plaintiff who does not have a possessory interest in the property or is not the titleholder does not have standing to test the validity of the zoning restriction. Clark Oil & Refining Corp. v. City of Evanston, 23 Ill.2d 48, 177 N.E.2d 191 (1961). In Clark Oil, the company had a contract to purchase that was contingent on the granting of a variation. The Illinois Supreme Court held that the Clark Oil Company did not have standing. It was, therefore, necessary to have the property owner join in the suit. See also Hazdra Homes, Inc. v. County of DuPage, 27 Ill.App.3d 685, 326 N.E.2d 561 (2d Dist. 1975).

However, the federal courts impose a different standard with reference to standing to challenge the constitutionality of a zoning ordinance. A contract purchaser is considered to have a sufficient interest to challenge the ordinance, either under the Fourteenth Amendment to the United States Constitution or under the Fair Housing Act, which is Title VIII of the Civil Rights Act of 1968, Pub.L. No. 90-284, 82 Stat. 81, and is codified generally at 42 U.S.C. §3601, et seq. See Metropolitan Housing Development Corp. v. Village of Arlington Heights, 517 F.2d 409 (7th Cir. 1975), rev’d, 97 S.Ct. 555 (1977). See also Metroweb Corp. v. County of Lake, 130 Ill.App.3d 934, 474 N.E.2d 900, 85 Ill.Dec. 940 (2d Dist. 1985), in which the lessee brought an action for declaratory and injunctive relief against the county, challenging the constitutional validity of a local zoning ordinance. The appellate court held that, while the form of the agreement between the lessee and the lessor appeared to convey a leasehold interest to the lessee while permitting an early termination of that interest if the lessee did not obtain the necessary zoning approval, the agreement was really no more than a lease contingent on the lessee’s obtaining a conditional-use permit, and, therefore, the lessee lacked the requisite possessory interest to have standing to maintain the action.

B. [7.3] Neighboring Property Owner Must Show Some Unique Damage To Challenge Ordinance

Neighboring property owners may question the validity of zoning ordinances with respect to certain property when they can show that they will sustain some special damage different from
that sustained by the public generally. See, e.g., Treadway v. City of Rockford, 28 Ill.2d 370, 192 N.E.2d 351 (1963). In this connection, the courts have even upheld the right of a nonresident party to challenge the validity of an ordinance upon a showing that the party “suffered a special damage by reason of the change in the use or zoning — different from that suffered by the general public.” Whittingham v. Village of Woodridge, 111 Ill.App.2d 147, 249 N.E.2d 332, 333 (2d Dist. 1969). The court reasoned that there did not appear to be any logic in using the municipality’s boundary line for prohibiting a property owner immediately abutting the subject property from bringing an action. The harm was just as great whether the owner was inside or outside the municipality.

The reader should also examine §7.12 below, discussing §11-13-15 of the Illinois Municipal Code, 65 ILCS 5/1-1-1, et seq., which provides that any owner or tenant of real property within 1,200 feet in any direction may bring an action to enforce a building or zoning ordinance. In connection with this is Palella v. Leyden Family Service & Mental Health Center, 79 Ill.2d 493, 404 N.E.2d 228, 38 Ill.Dec. 804 (1980), a case reaffirming the power of §11-13-15, in which an action was brought by the neighbors of operators of a nursing home to enjoin the operation of a nonmedical detoxification center as a violation of the local zoning ordinance. The court enjoined the operation of the detoxification center and also allowed a substantial award of attorneys’ fees.

In People ex rel. Klaeren v. Village of Lisle, 202 Ill.2d 164, 781 N.E.2d 223, 230, 269 Ill.Dec. 426 (2002), the Illinois Supreme Court stated the following in regard to the standing of a neighboring property owner:

The court in [Yusuf v. Village of Villa Park, 120 Ill.App.3d 533, 458 N.E.2d 575, 76 Ill.Dec. 175 (2d Dist. 1983)] held that a diminution in value and a loss in the quiet enjoyment of one’s property caused by additional traffic and noise created by the proposed special use was adequate to confer standing on adjoining property owners. . . . The appellate majority in this case likewise held that any increase in noise, traffic or light pollution created by the development would affect the use and enjoyment of plaintiffs’ properties in a manner distinct in both quantity and quality from any injury suffered by the public as a whole. We agree with this conclusion. [Citation omitted.]

Klaeren and its effects are discussed more fully in §§7.47 – 7.49 below.

C. [7.4] Neighboring Property Owner Intervening To Sustain Ordinance

The concept of showing that the property owner will sustain damages that are different from those sustained by the public applies when a property owner seeks to defend a zoning restriction under attack by some other property owner. East Maine Township Community Ass’n v. Pioneer Trust & Savings Bank, 15 Ill.App.2d 250, 145 N.E.2d 777 (1st Dist. 1957). Upon a showing of some special damage, the property owner may be permitted to intervene.

D. [7.5] Standing of Municipalities

The law concerning standing of municipalities has undergone a change. Early cases such as Village of Bensenville v. County of DuPage, 30 Ill.App.2d 324, 174 N.E.2d 403 (2d Dist. 1961)
(abst.), held that municipal corporations did not have standing to test the validity of zoning restrictions adopted by the county for property abutting the municipality. This rationale stemmed from a narrow interpretation of the municipal zoning enabling statute, 65 ILCS 5/11-13-1, et seq. The same rationale did not apply to home-rule municipalities, which were held to have standing since they were not restricted by the zoning provisions but rather could look outside their boundaries when it was determined that they were seeking to enforce a public policy manifested by their ordinances and that they had the same rights to seek injunctive relief as a private person or a corporation might have.

The law is best expressed by Village of Barrington Hills v. Village of Hoffman Estates, 81 Ill.2d 392, 410 N.E.2d 37, 43 Ill.Dec. 37 (1980), in which the Illinois Supreme Court held that a municipality, whether home-rule or non-home-rule, has standing to challenge the zoning decisions of other governmental units upon a clear demonstration that it would be substantially, directly, and adversely affected in its corporate capacity. In Barrington Hills, the complaint of two municipalities had been dismissed on the grounds that they lacked standing to challenge the rezoning of certain property to allow for the development of an open-air music theater. The plaintiff municipalities alleged special damages in their corporate capacities in the form of a loss of municipal revenues due to a diminution in property values, an increase in municipal expenditures for the hiring of additional police manpower and squad cars to monitor vehicular congestion, the additional expense of clearing litter and debris on their roads and highways that would result from theater crowds, the degradation of ambient air quality due to vehicular exhaust, and the increase in sound levels resulting from increased traffic flow and the electronic amplification of music.

The Illinois Supreme Court concluded that these potential results of the rezoning indicated direct, substantial, and adverse effects on the plaintiff municipalities in the performance of their corporate obligations, thus giving them a real interest in the subject matter of the controversy. 410 N.E.2d at 40.

The Barrington Hills court also cited with approval City of Hickory Hills v. Village of Bridgeview, 67 Ill.2d 399, 367 N.E.2d 1305, 1307, 10 Ill.Dec. 539 (1977), in which the Illinois Supreme Court held that the complaining municipality had standing when it was obliged under a previous court order to provide water and sewage services to the subject property, finding that the plaintiff was an “aggrieved person” with a real interest in the rezoning ordinances adopted by the adjoining municipality. The Barrington Hills court also cited with approval City of West Chicago v. County of DuPage, 67 Ill.App.3d 924, 385 N.E.2d 826, 24 Ill.Dec. 685 (2d Dist. 1979), in which the court held that a municipality’s objection to a county ordinance permitting the construction of township offices, a garage, and other facilities within one and one-half miles of its single-family residential district constituted a real interest sufficient to permit its intervention in an action challenging the ordinance.

However, for a contrasting view, see Village of Riverwoods v. Village of Buffalo Grove, 159 Ill.App.3d 208, 511 N.E.2d 184, 110 Ill.Dec. 349 (2d Dist. 1987), in which the court held that the Village of Riverwoods had failed to introduce facts during the trial sufficient to show that the rezoning taking place in Buffalo Grove would have a substantial adverse effect on the performance of its municipal corporate obligations and, therefore, Riverwoods was without
standing to contest the rezoning. The court held that any impact of the development on Riverwoods’ municipal expenditures was de minimis. Village of Riverwoods provides an interesting contrast to Barrington Hills, supra. The holding by the appellate court in Village of Riverwoods is interesting in light of the fact that Riverwoods’ comprehensive plan designated the site in question for single-family residential and the site was being developed with two twelve-story office buildings connected by a one-story concourse and two four-story parking structures. The site was within 1,600 feet of the Village of Riverwoods.

In City of Carbondale v. City of Marion, 210 Ill.App.3d 870, 569 N.E.2d 290, 155 Ill.Dec. 290 (5th Dist. 1991), the court held that the City of Carbondale lacked standing to challenge a tax increment financing plan to develop a retail shopping mall. Carbondale argued that it had set forth a distinct and palpable injury in the form of lost sales and property tax receipts since the proposed mall, to be located in Marion, would attract some businesses from Carbondale. The appellate court, in a split decision, held that the injury set forth was not enough to show standing. Applying the tests established in Greer v. Illinois Housing Development Authority, 122 Ill.2d 462, 524 N.E.2d 561, 575, 120 Ill.Dec. 531 (1988), the court in City of Carbondale stated that “the claimed injury, whether ‘actual or threatened’ . . . must be: (1) ‘distinct and palpable’ . . . (2) ‘fairly traceable’ to the defendant’s actions . . . and (3) substantially likely to be prevented or redressed by the grant of the requested relief.” [Citations omitted by City of Carbondale court.] 569 N.E.2d at 292. The court held that the alleged resulting loss in real estate tax receipts was not sufficient injury to confer standing. Freedom from competition is not a legally cognizable right.

E. [7.6] Municipality Has Standing To Challenge Its Own Board of Appeals

In Reichard v. Zoning Board of Appeals of City of Park Ridge, 8 Ill.App.3d 374, 290 N.E.2d 349 (1st Dist. 1972), the court held that a municipality had standing to challenge the validity of a determination by its own board of appeals in regard to a variation granted by the board. The Reichard court distinguished the county zoning cases by reference to the language of the statute and the rationale relied on by the courts in those cases.

F. [7.7] Standing of School District

The Illinois Municipal Code allows a school district, within which the property at issue or any part of it is located, to appear at any hearing before a zoning commission, board of appeals, or any commission or committee and to present evidence. 65 ILCS 5/11-13-20. However, §11-13-20 does not give a school district a right as a matter of law to intervene in any succeeding litigation. The general rule that has evolved is that school district interests in zoning litigation are relevant but not controlling; a school district may be permitted to intervene but is not entitled to intervene as a matter of right in the absence of some specific statutory authorization. Dato v. Village of Vernon Hills, 62 Ill.App.2d 274, 210 N.E.2d 626 (2d Dist. 1965); Duggan v. County of Cook, 17 Ill.App.3d 253, 307 N.E.2d 782 (1st Dist. 1974), aff’d in part, rev’d in part, 60 Ill.2d 107 (1975). In Morris Community High School District No. 101 v. Morris Development Co., 24 Ill.App.3d 208, 320 N.E.2d 37 (3d Dist. 1974), the court held that the school district had an enforceable interest in the school site donation statute. The local city ordinance required all developers and subdividers who built within the city to dedicate land or pay money to the school district for educational use. The court held that the school site ordinance created rights in the school district.
G. [7.8] Standing of Objector at Administrative Hearing

The right of review of a final administrative decision is limited to parties of record whose rights, privileges, or duties are affected by the decision. The person seeking review has the burden of alleging and of proving that he has the right to maintain the suit by reason of his standing as a party and because his rights were adversely affected or will be injured by the administrative body’s ruling. O’Hare International Bank v. Zoning Board of Appeals, City of Park Ridge, 8 Ill.App.3d 764, 291 N.E.2d 349 (1st Dist. 1972). However, in cities with a population of 500,000 or more, the Illinois Municipal Code allows any owner of property located within 250 feet of the property for which zoning relief is requested to enter an appearance and objections before the board of appeals. 65 ILCS 5/11-13-7. The party is entitled to judicial review provided that the owner has shown at the board level that his or her property would be substantially affected by the outcome of the decision of the board. Lincoln Central Ass’n v. Zoning Board of Appeals, 30 Ill.App.3d 258, 332 N.E.2d 510 (1st Dist. 1975).

In Winnebago County Citizens for Controlled Growth v. County of Winnebago, 383 Ill.App.3d 735, 891 N.E.2d 448, 322 Ill.Dec. 433 (2d Dist. 2008), an association of concerned citizens was held to have standing to challenge a special-use permit in a complaint brought under the Administrative Review Law, 735 ILCS 5/3-101, et seq., even when the association was not a party to the proceeding before the zoning board or the county board. According to the court, the association met the standing requirements set forth in International Union of Operating Engineers, Local 148, AFL-CIO v. Illinois Department of Employment Security, 215 Ill.2d 37, 828 N.E.2d 1104, 293 Ill.Dec. 606 (2005), even though only some of its members had standing to sue on their own. 891 N.E.2d at 461 – 462.

H. [7.9] On Administrative Review All Persons Who Were Parties to Administrative Proceeding Must Be Named

In Winston v. Zoning Board of Appeals of Peoria County, 407 Ill. 588, 95 N.E.2d 864 (1950), the Illinois Supreme Court held that the requirement of Ill.Rev.Stat. (1949), c. 110, ¶271, the predecessor to §3-107 of the Administrative Review Law, 735 ILCS 5/3-107, that the administrative agency and all persons who were parties to the proceedings be made defendants in their own right is both mandatory and jurisdictional. “The requirement that all adverse parties of record to the administrative proceeding shall be made defendants on review is mandatory and specific, and admits of no modification.” 95 N.E.2d at 869. In Winston, the plaintiffs brought an action for administrative review of the grant of a variation by the Zoning Board of Appeals of Peoria County. The plaintiffs’ complaint failed to name five persons who had appeared before the zoning board in support of the variation.

The Illinois Supreme Court again had an opportunity to interpret §3-107 in Cuny v. Annunzio, 411 Ill. 613, 104 N.E.2d 780 (1952), in which the plaintiff sought review of a determination of the Board of Review of the Department of Labor that he was responsible for unemployment compensation. The plaintiff named the director of the Department of Labor as the only defendant. The Illinois Supreme Court held the complaint to be fatally defective. Referring to the foregoing statement from the Winston court, the Cuny court stated that it “applies with equal force to the provision of [§3-107] that the administrative agency rendering the final decision sought to be reviewed shall be made a party defendant.” 104 N.E.2d at 782.
Winston and Cuny were held binding in Lewis v. Trainor, 51 Ill.App.3d 180, 366 N.E.2d 579, 9 Ill.Dec. 322 (1st Dist. 1977), in which a caseworker for the Illinois Department of Public Aid brought an administrative review action challenging the decision of the Illinois Civil Service Commission terminating his employment. The plaintiff named the directors of the Illinois and Cook County Departments of Public Aid as defendants. Although the Illinois Civil Service Commission was mentioned in the body of the complaint, the Commission was not named as a party defendant and was not served with summons. The court referred to §3-107 of the Administrative Review Law and, citing Cuny and Winston, affirmed the decision of the circuit court dismissing the plaintiff’s complaint as being fatally defective “because it did not name all parties of record as defendants. That requirement is both mandatory and jurisdictional.” 366 N.E.2d at 581. The Illinois Supreme Court decisions in Winston and Cuny have not been overruled and were applied to the zoning context in O’Hare International Bank v. Zoning Board of Appeals, City of Park Ridge, 8 Ill.App.3d 764, 291 N.E.2d 349 (1st Dist. 1972), which concerned a request by a property owner to build on substandard lots. The plaintiff’s complaint for administrative review of the decision of the zoning board was held to be fatally defective for failure to name as defendants all parties of record in the administrative proceedings. The court applied the Illinois Supreme Court’s interpretation that §3-107 of the Administrative Review Law is both mandatory and jurisdictional and found that the defect was not waived even though the defendants had failed to object in the trial court.

“Parties of record” in a review of a zoning board of appeals decision in a municipality of 500,000 or more means “only the zoning board of appeals and applicants before the zoning board of appeals.” 735 ILCS 5/3-107(b).

The Code of Civil Procedure provides the following modifications to the strict application of the rule of naming all parties to the proceedings:

1. a party not named as a defendant who was also not named by the administrative agency in its final order:

   If, during the course of a review action, the court determines that an agency or a party of record to the administrative proceedings was not made a defendant as required by the preceding paragraph, then the court shall grant the plaintiff 35 days from the date of the determination in which to name and serve the unnamed agency or party as a defendant. 735 ILCS 5/3-107(a).

2. a different rule for municipalities with a population of 500,000 or more inhabitants:

   With respect to actions to review decisions of a zoning board of appeals in a municipality with a population of 500,000 or more inhabitants under Division 13 of Article 11 of the Illinois Municipal Code, “parties of record” means only the zoning board of appeals and applicants before the zoning board of appeals. The plaintiff shall send a notice of filing of the action by certified mail to each other person who appeared before and submitted oral testimony or written statements to the zoning board of appeals with respect to the decision appealed from. The notice shall be mailed within 2 days of the filing of the action. 735 ILCS 5/3-107(b).
In *Ultsch v. Illinois Municipal Retirement Fund*, 226 Ill.2d 169, 874 N.E.2d 1, 314 Ill.Dec. 91 (2007), the Illinois Supreme Court held that the exceptions set forth in §3-107 did not apply when an employee failed to name the board of trustees and instead named the Illinois Municipal Retirement Fund in her appeal of the denial of temporary disability benefits. As a result, the plaintiff’s complaint was dismissed.

I. [7.10] Standing of Property Owner Who Buys Property in Face of Existing Zoning

The general rule is that the purchaser of property who knows about the existing zoning classification is not precluded from subsequently challenging that existing classification. However, this knowledge is one factor considered, primarily because the price that the purchaser paid was probably commensurate with the existing zoning and also because the purchaser is not in a position to argue that anything he or she did was not done in reliance on the existing classification. See *Treadway v. City of Rockford*, 28 Ill.2d 370, 192 N.E.2d 351 (1963); *LaSalle National Bank v. Village of Harwood Heights*, 2 Ill.App.3d 1040, 278 N.E.2d 114 (1st Dist. 1971); *Cohen v. City of Des Plaines*, 30 Ill.App.3d 918, 333 N.E.2d 513 (1st Dist. 1975). See also *Grobman v. City of Des Plaines*, 59 Ill.2d 588, 322 N.E.2d 443 (1975), in which it is stated that one who purchases with his eyes open is treated differently. Also, in *Malman v. Village of Lincolnwood*, 113 Ill.App.2d 350, 252 N.E.2d 86 (1st Dist. 1969), the court held that not only is such a purchaser not favored, but, to the contrary, a purchaser with knowledge is to be treated quite the opposite.

J. [7.11] Mere Economic Loss as Result of Competition Permitted by Zoning Change Is Insufficient To Confer Standing

Zoning changes, especially those that allow for business and commercial developments, will often produce possible economic detriment as a result of increased competition from the new businesses. The general rule is that this economic loss is not sufficient to confer standing on businesspersons or property owners to challenge the zoning amendment. *Swain v. County of Winnebago*, 111 Ill.App.2d 458, 250 N.E.2d 439 (2d Dist. 1969). “Neither the fact that parties may suffer reduced incomes or be put out of business by more vigorous or appealing competition, nor the fact that properties on which such businesses are operated would thus depreciate in value, give[s] rise to a standing to sue.” 250 N.E.2d at 444, citing *Cord Meyer Development Co. v. Bell Bay Drugs, Inc.*, 20 N.Y.2d 111, 229 N.E.2d 44, 282 N.Y.S.2d 259 (1967), *Whitney Theatre Co. v. Zoning Board of Appeals of Town of Hamden*, 150 Conn. 285, 189 A.2d 396 (1963), *London v. Planning & Zoning Commission of Town of Stratford*, 149 Conn. 282, 179 A.2d 614 (1962), and *Kreatchman v. Ramsburg*, 224 Md. 209, 167 A.2d 345 (1961). See also *City of Carbondale v. City of Marion*, 210 Ill.App.3d 870, 569 N.E.2d 290, 155 Ill.Dec. 290 (5th Dist. 1991), in which the court held that lost sales tax and property tax receipts resulting from the construction of a mall in a neighboring community were not sufficient to confer standing on the city to challenge the validity of a tax increment financing district being used to finance the new mall.

K. [7.12] Property Owner May Enforce Ordinances

The Illinois Municipal Code provides that for any violation of any ordinances passed pursuant to the municipal zoning enabling statute, a property owner or tenant of real property
within 1,200 feet in any direction of the subject property who shows that he or she will be “substantially affected by the alleged violation” may institute an action “(1) to prevent the unlawful construction, reconstruction, alteration, repair, conversion, maintenance, or use, (2) to prevent the occupancy of the building, structure, or land, (3) to prevent any illegal act, conduct, business, or use in or about the premises, or (4) to restrain, correct, or abate the violation.” 65 ILCS 5/11-13-15. In addition, §11-13-15 also specifically provides, “An owner or tenant need not prove any specific, special or unique damages to himself or his property or any adverse effect upon his property from the alleged violation in order to maintain a suit under the foregoing provisions.” Therefore, an owner or tenant can bring an original action to restrain a violation of a zoning ordinance.

It has been contended that even under §11-13-15, it is necessary for a property owner in the same zoning district as the alleged zoning violation to show some individual damage in order to have a right to obtain injunctive relief. In support of this contention, see 222 East Chestnut Street Corp. v. LaSalle National Bank, 15 Ill.App.2d 460, 146 N.E.2d 717 (1st Dist. 1957), which involved Ill.Rev.Stat. (1955), c. 24, ¶73-9, the predecessor to §11-13-15. However, in Bull v. American National Bank & Trust Company of Chicago, 112 Ill.App.2d 32, 250 N.E.2d 839 (1st Dist. 1969), the court dealt with this argument and seemed to imply the existence of special damage by the proximity of the plaintiff’s property to that of the defendant. See the supplemental opinion on petition for rehearing at 250 N.E.2d at 843.

III. EXHAUSTION OF ADMINISTRATIVE REMEDIES


When the final decision in regard to a zoning matter is made by the board of appeals, the decision is reviewable only pursuant to the terms of the Administrative Review Law. 65 ILCS 5/11-13-13. Appeals under the Administrative Review Law are filed in the circuit court of the county in which the administrative decision was rendered, and the review is limited to the record that was made before the administrative body. 735 ILCS 5/3-104, 5/3-110. Essentially what is to be determined before the court is whether there was adequate evidence to support the decision of the administrative agency. Vasilopoulos v. Zoning Board of Appeals, 34 Ill.App.3d 480, 340 N.E.2d 19 (1st Dist. 1975). An administrative review appeal must be commenced within 35 days after the date of the administrative decision. 735 ILCS 5/3-103.

B. [7.14] Record Made Before Local Zoning Board on Administrative Review

The record made before the zoning board of appeals must be complete. The failure by the applicant to make an adequate record will result in defeat. It is only this record that the circuit court may review, and unless the necessary facts are contained in the record to show why a decision of a zoning board is incorrect, there is no basis for overturning the zoning board. Sokolis v. Zoning Board of Appeals of City of Springfield, 21 Ill.App.2d 178, 157 N.E.2d 427 (3d Dist. 1959) (abst.).
In this regard, it has long been the rule in administrative review actions, including those involving zoning cases, that the decision of the administrative body must be shown to be contrary to the manifest weight of the evidence. *Coston Chapel A.M.E. Church v. Chaddick*, 9 Ill.App.3d 321, 292 N.E.2d 215 (1st Dist. 1972). It has also long been the rule that only those questions raised before the zoning board will be considered on administrative review. *Lion Specialty & Properties, Inc. v. City of Chicago Zoning Board of Appeals*, 107 Ill.App.2d 354, 247 N.E.2d 30, 33 (1st Dist. 1969). This, of course, relates to the issues that can properly be raised before the zoning board of appeals and is not intended to include such items as the constitutionality of the ordinance. *Howard v. Lawton*, 22 Ill.2d 331, 175 N.E.2d 556 (1961).

The requirement of presenting all relevant facts in evidence and all relevant issues before the zoning board becomes important when it is noted that the decision of the zoning board of appeals may not be made the subject of a collateral attack in another proceeding. *Bull v. American National Bank & Trust Company of Chicago*, 112 Ill.App.2d 32, 250 N.E.2d 839 (1st Dist. 1969).

C. [7.15] Board Does Not Decide Issues of Law

Local zoning boards have the power to make only administrative decisions and do not have the authority to pass on questions of law, particularly constitutional questions. These issues can, however, be raised in the complaint filed in an administrative review appeal taken pursuant to the Administrative Review Law. *Winston v. Zoning Board of Appeals of Peoria County*, 407 Ill. 588, 95 N.E.2d 864 (1950). In *Howard v. Lawton*, 22 Ill.2d 331, 175 N.E.2d 556, 557 (1961), the court considered and rejected the argument that constitutional issues could not be raised in a complaint for administrative review, stating that it “would result in piecemeal litigation by first requiring review of an administrative body’s decision and then entertaining another action to test constitutionality brought on by such decision.”

D. [7.16] *Bright Doctrine — Exhaust Local Remedies*

When a municipality has procedures that can afford relief to the property owner with reference to the particular problem arising from the contemplated use of his or her property, the property owner must apply to the municipality for local relief before the owner may commence any action in the courts. *Bright v. City of Evanston*, 10 Ill.2d 178, 139 N.E.2d 270 (1956). In *Bright*, the court stated:

A review of applicable authorities would seem to indicate that where it is claimed the effect of an ordinance as a whole is to unconstitutionally impair the value of the property and destroy its marketability, direct judicial relief may be afforded without prior resort to remedies under the ordinance. . . . Under this rule one who seeks relief from an ordinance on the ground that it is void in its entirety is not obliged to pursue the machinery of the ordinance itself for his remedy.

On the other hand, where the claim is merely that the enforcement or application of a particular classification to the plaintiff’s property is unlawful and void, and no attack is made against the ordinance as a whole, judicial relief is
appropriate only after available administrative remedies have been exhausted. . . . The reason for such a rule is found in the practical difficulty encountered by the city council in foreseeing particular instances of hardship, when general restrictions are initially established for a given area. [Citations omitted.] 139 N.E.2d at 274.


When the municipality has filed a counterclaim for injunctive relief to enforce its ordinance, the property owner who originally brought a declaratory judgment action seeking to prevent the village from enforcing its ordinance need not return to the village seeking administrative relief. The filing of the counterclaim indicates the village’s intention to enforce the ordinance as interpreted against the plaintiff’s property. Monahan v. Village of Hinsdale, 210 Ill.App.3d 985, 569 N.E.2d 1182, 155 Ill.Dec. 571 (2d Dist. 1991). This is consistent with County of Lake v. MacNeal, 24 Ill.2d 253, 181 N.E.2d 85 (1962), which held that if a government institutes an action against the owner for an ordinance violation, the owner should be entitled to defend on the ground of invalidity.

E. [7.17] Application for Amendment as Exhaustion of Remedies

One of the most important functions of a practitioner in the field of zoning is determining what administrative remedy is available to the client. Those who are uncertain as to when a variation or special use is applicable (as opposed to, for example, a zoning amendment) may find themselves in serious trouble. The requirement of exhaustion of administrative remedies also applies when a “legislative” remedy is available in the form of amendment by the corporate authorities of the municipality of the applicable zoning map or text in order to provide the relief needed. Reilly v. City of Chicago, 24 Ill.2d 348, 181 N.E.2d 175 (1962). In Reilly, the property owner was denied relief for failing to seek an amendment to the zoning ordinance.

In contrast, and highlighting the potential pitfalls, is National Boulevard Bank of Chicago v. City of Chicago, 123 Ill.App.2d 166, 259 N.E.2d 862 (1st Dist. 1970), in which the plaintiff did apply for an amendment to the zoning ordinance, but the court concluded that it had still failed to exhaust administrative remedies because it had applied for the wrong relief:

The application for amendment attached to plaintiff’s brief reveals that the present zoning of the subject property is B4-2 and that the relief requested in the application was a change to a B4-3 status, relating to the existence of rental units on the lower floors of apartment buildings. This was not an appropriate request to make of the City Council under the Ordinance.

The relief allegedly requested in the application was for a variation in the nature of a special use, which could be acted upon only by the Zoning Board of Appeals. . . .
Consequently, the use requested in the application for amendment . . . was never brought before the appropriate local body for its consideration. [Citations omitted.] 259 N.E.2d at 863 – 864.

F. [7.18] Administrative Review Does Not Apply When Corporate Authorities Make Final Decision

Administrative review is applicable when the final determination is made by the zoning board. When the zoning board merely recommends action and the final decision is made by the city council or village board, the relief to be taken is by an independent action in the circuit court because the act of a city council or village board in granting or denying relief is not considered “so administrative” that an appeal would be mandatory. Fitzpatrick v. City of Springfield, 10 Ill.App.3d 317, 293 N.E.2d 712 (4th Dist. 1973). See also Hawthorne v. Village of Olympia Fields, 204 Ill.2d 243, 790 N.E.2d 832, 274 Ill.Dec. 59 (2003) (decision by village trustees granting variance was legislative and therefore not subject to Administrative Review Law); Artz v. Commercial National Bank of Peoria, 125 Ill.App.2d 86, 259 N.E.2d 813 (3d Dist. 1970) (action under Administrative Review Law was improper because that Law was not designed to provide means of reviewing legislative act of city council).

G. [7.19] Property Owner Need Not Apply for Relief Certain To Be Denied

The property owner need not engage in futile acts. When it is clear that the local authorities have no intention of granting the relief sought, it is not necessary to apply for this relief before filing an action in the circuit court. The property owner should be extremely wary in deciding when the evidence is clear that the municipality will not grant the relief pursuant to some administrative action. The courts have held that the property owner need not also apply for a variation when the corporate authorities have declined to amend a zoning ordinance. Herman v. Village of Hillside, 15 Ill.2d 396, 155 N.E.2d 47 (1958). Contra Bank of Lyons v. County of Cook, 13 Ill.2d 493, 150 N.E.2d 97 (1958).

In addition, if the city council recently considered the particular zoning, there may not be a need for an application for an amendment. The cases should be reviewed carefully. In particular, see Westfield v. City of Chicago, 26 Ill.2d 526, 187 N.E.2d 208 (1962). In Van Laten v. City of Chicago, 28 Ill.2d 157, 190 N.E.2d 717 (1963), the court stated the general principle that, when application to the local government would have been futile, there was no need to apply for an amendment. In Van Laten, the municipality had twice amended its zoning ordinance since the suit was filed, and it twice had an opportunity to correct any inequities that it might have considered to be present:

The 1960 amendment affecting practically the identical area involved in the litigation followed the filing of the master’s report by only 12 days. Twice [the city] had an opportunity to correct inequities, if such they were. The 1960 amendment changing the classification was in the face of an adverse recommendation by the master after the evidence had been taken, and its adoption caused a rereference and further delay. If this procedure were condoned, it could go on ad infinitum, and would defeat one of the purposes of the Bright rule, namely, to prevent delay in the
administration of justice. [See Bright v. City of Evanston, 10 Ill.2d 178, 139 N.E.2d 270 (1956).] Under the circumstances presented, we are of the opinion that seeking a further amendment would have been futile and therefore the Bright rule does not apply. 190 N.E.2d at 718.

See also Fiore v. City of Highland Park, 76 Ill.App.2d 62, 221 N.E.2d 323 (2d Dist. 1966), in which the court held that when the plan commission had, after the suit was filed and long prior to the trial of the case, acted on its own in regard to the overall plan of development in a manner that denied zoning relief sought by the plaintiffs, there was no need for the plaintiffs to have sought any further relief from the local administrative agencies.

A fascinating exercise on this issue is a consideration of the appellate court and Supreme Court decisions in Northwestern University v. City of Evanston, 55 Ill.App.3d 609, 370 N.E.2d 1073, 13 Ill.Dec. 46 (1st Dist. 1977), which involved a challenge to a city zoning ordinance that prohibited the use of the university’s athletic facilities for professional athletic events. The university had filed a complaint for declaratory judgment prior to completion of the hearing before the zoning board of appeals. The Illinois appellate court held that the university, in not presenting anything more than what it termed a “statement of facts” in support of its case, had exhausted its administrative remedies even though no final administrative decision had actually been rendered:

In the instant case the University presented a detailed statement of its position to both local zoning bodies. Where an amendment proceeding and a variation proceeding are before the same body, a landowner need not pursue both remedies...

The University told both bodies that the statement of facts was specifically designed as a recitation of all the facts which the University intended to present in court in support of its claim that the ordinance was unconstitutional... We find that the University presented its position to the local zoning bodies and gave them ample opportunity to act on its request.

Where such an opportunity has been provided, a court will not scrutinize the nature of the evidence presented to the local zoning authorities. [Citations omitted.] 370 N.E.2d at 1078 – 1079.

The Illinois Supreme Court reversed the appellate court’s decision, taking a different view of the submission of a “statement of facts” and stating that the appellate court and the parties considered the dispositive issue to be what kind of evidentiary showing a party must make before local zoning authorities. Northwestern University v. City of Evanston, 74 Ill.2d 80, 383 N.E.2d 964, 23 Ill.Dec. 93 (1978). The Supreme Court stated that, while a party will not be required to “exhaust his administrative remedies when it would be patently useless to seek relief before local bodies... the facts of this case do not demonstrate that such action would be useless.” [Citations omitted.] 383 N.E.2d at 968 – 969. The court further stated:

We simply do not agree that the history of controversy between Northwestern and Evanston over the zoning ordinance is such that, in November 1975, the university’s
resort to the local authorities was patently useless and therefore unnecessary. The exhaustion requirement cannot be avoided simply because relief may be, or even probably will be, denied by the local authorities. 383 N.E.2d at 969.

The practitioner should carefully review these cases in order to appreciate the exhaustion concept fully.

H. [7.20] Independent Court Action Not Precluded by Application for Administrative Relief

When a party has applied for administrative relief, the party is not precluded from filing an original action for independent relief. In Stemwedel v. Village of Kenilworth, 14 Ill.2d 470, 153 N.E.2d 79 (1958), the court held that a property owner could bring an independent action for injunctive relief from the provisions of a municipal zoning ordinance even though the owner had applied to the municipal authorities and the board of appeals for the granting of a variation, which was denied. The fact that the owner applied for the administrative relief did not act as a bar to his bringing an independent action to declare the ordinance invalid or to the granting of injunctive relief. However, the court did note that since the relief the owner was requesting could have been obtained through administrative sources, the action was maintainable because the property owner did, in the first instance, apply for the administrative relief. In short, even though an action for independent relief may be brought when the administrative agency may grant the relief being sought, it is first necessary to apply there. What is not necessary is that there then be an administrative review. Under an administrative review, the issue is whether the board of appeals acted in error or abused its discretion. In the independent action before the courts, the issue is whether the restriction as applied to the plaintiff’s property is arbitrary, unreasonable, and without substantial relation to the public health, safety, comfort, morals, and general welfare.

In Broccolo v. Village of Skokie, 14 Ill.App.3d 27, 302 N.E.2d 74 (1st Dist. 1972), the court stated that it is necessary in a declaratory judgment action to allege facts showing why an administrative review action was not taken. Therefore, when there has been exhaustion of local remedies and an independent action is filed, it is necessary to allege why an administrative review action was not taken from the decision of the local body. See also Swim Club of Rockford, Ltd. v. City of Rockford, 130 Ill.App.3d 353, 473 N.E.2d 1375, 85 Ill.Dec. 570 (2d Dist. 1985), in which the court held that, upon denial of a special use, a property owner has a right to test the denial by traditional standards of reasonableness that govern the review of zoning ordinances. While a city in the exercise of its legislative function is not required to follow any set standards in determining whether to grant a special use, its decision is reviewable by the court; not only may the decision be reviewed with reference to whether the standards the city used were satisfied by the property owners, but, in addition, the court will determine the validity of the zoning as applied to the subject property by the use of the traditional zoning factors.

1. [7.21] Findings of Fact

In determining whether there has been proper exhaustion of administrative remedies, the courts may look to the question of whether the procedures before the administrative body have been proper. A proper administrative procedure requires that a zoning board of appeals make findings of fact in denying a special-use permit. 65 ILCS 5/11-13-11. In Melrose Park National
Bank v. Zoning Board of Appeals of City of Chicago, 79 Ill.App.3d 56, 398 N.E.2d 252, 34 Ill.Dec. 577 (1st Dist. 1979), the court held that a resolution of the acting chairman that was not adopted did not constitute findings of fact as required by the statutes and that the action of a zoning board of appeals was improper.

2. [7.22] Administrative Relief Envisions Fair Hearing

A party appearing before a plan commission or a zoning board with reference to a rezoning is entitled to a fair hearing. This includes the right to appear and give evidence, as well as the right to examine witnesses of the opposing party. In E & E Hauling Inc. v. County of DuPage, 77 Ill.App.3d 1017, 396 N.E.2d 1260, 33 Ill.Dec. 536 (2d Dist. 1979), the court also pointed out that the attorney for the opposing party did not have to be sworn as a witness in order to make statements or to cross-examine. Accord Annot., 27 A.L.R.3d 1304 (1969). E & E Hauling held for the first time in Illinois that an attorney at a hearing before a zoning board has a right to cross-examination, and the court in so holding quoted Wadell v. Board of Zoning Appeals of City of New Haven, 136 Conn. 1, 68 A.2d 152, 155 – 156 (1949):

[A zoning board] often deals with important property interests; and a denial of a right to cross-examine may easily lead to the acceptance of testimony at its face value when its lack of credibility or the necessity for accepting it only with qualifications can be shown by cross-examination. We quote from Interstate Commerce Commission v. Louisville & Nashville [R.R.], 227 U.S. 88, 93, 33 S.Ct. 185, 187, 57 L.Ed. 431 ([1913]). “The Commission is an administrative body, and, even where it acts in a quasi judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. . . . But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal.” 396 N.E.2d at 1264.

In People ex rel. Klaeren v. Village of Lisle, 202 Ill.2d 164, 781 N.E.2d 223, 269 Ill.Dec. 426 (2002), the Illinois Supreme Court reinforced the fundamental principles of due process for objectors at an administrative hearing, including the right to cross-examine witnesses due to the fact that this type of hearing is quasi-judicial in nature. The court stated that in an administrative or quasi-judicial hearing,

[the municipal body acts in a fact-finding capacity to decide disputed adjudicative facts based upon evidence adduced at the hearing and ultimately determines the relative rights of the interested parties. As a result, those parties must be afforded the due process rights normally granted to individuals whose property rights are at stake. 781 N.E.2d at 234.

It should be noted that the court ruled this to be a right supported by both the Illinois and the United States Constitutions.
3. **[7.23] Administrative Agency May Have No Authority To Grant Rehearing**

In *Reiter v. Neilis*, 125 Ill.App.3d 774, 466 N.E.2d 696, 81 Ill.Dec. 110 (3d Dist. 1984), the court considered the issue of whether the zoning board of appeals could rehear an application for a variation after it had already ruled against granting the petition. The appellate court held that the zoning board had no authority to rehear the matter:

> An agency, being a creation of statute, has only those powers specifically conferred upon it. It has no inherent power to amend or change a decision it has made. . . . If a rule of the agency permits a petition for rehearing, the decision will not be final until the rehearing is completed or the petition denied. . . . The Will County Zoning Ordinance makes no provision for rehearing nor did the procedural rules of the Zoning Board of Appeals at the time in question. In the absence of a jurisdictional challenge, such as the one raised by the plaintiffs, the only means of appealing the board’s denial of the variance was via administrative review. The board had no authority to reconsider and change its ruling. Therefore, the amended variance is void and a nullity. [Citations omitted.] 466 N.E.2d at 699.

One must apparently look to the ordinance establishing the zoning board of appeals or any other body granted authority to hear matters such as a request for a variation or a special use. Absent some authority within either the statute or the ordinances of the municipality, it would appear that any request for a rehearing is invalid. However, one must distinguish between a request for a rehearing and a new application. It certainly is possible for an applicant to refile and start the process all over again. However, the pitfall is that many municipal ordinances contain a restriction, usually of one year, before another application on the same request may be filed.

**IV. FORMS OF ACTION**

A. **[7.24] Action by Municipalities To Enforce Ordinance**

Judicial review of zoning matters may take several different forms. First, there is the action by the municipality to enforce the terms and conditions of a zoning ordinance against a property owner whose property is in violation of the ordinance. 65 ILCS 5/11-13-15. Municipalities have the power to provide in their ordinances that a violation of the zoning code can result in a fine not to exceed $750 or, in home-rule municipalities, imprisonment not to exceed six months. 65 ILCS 5/1-2-1. This rule of proceeding is a quasi-criminal prosecution. As a practical matter, if a large and substantial use is imposed on the subject property, a suit seeking a fine or even six months’ imprisonment usually does not have the necessary deterrent effect. The more effective action by the municipality in this connection is a suit to enjoin the continuation of the alleged violation. The better practice is to bring both the action to enjoin and the ordinance violation suit seeking a fine and imprisonment at the same time.

B. **[7.25] Action by Property Owner To Enforce Ordinance**

It is also possible for an owner or tenant of real property within 1,200 feet of the property on which is located the building or structure in which the alleged violation is claimed to exist to
bring an action to enforce the terms and conditions of the zoning ordinance. 65 ILCS 5/11-13-15. Section 11-13-15 vests the trial court with jurisdiction to issue an injunction to restrain the violation of the ordinance. It should also be noted that §11-13-15 also allows for the award of attorneys’ fees as well as an allowance for cost of the litigation.

C. [7.26] Action To Review Zoning Decisions by a Municipality, County, or Township

The Illinois Supreme Court in *People ex rel. Klaeren v. Village of Lisle*, 202 Ill.2d 164, 781 N.E.2d 223, 234, 269 Ill.Dec. 426 (2002), determined that hearings such as those involving a special use are administrative or quasi-judicial hearings and, as such, due process rights had to be afforded to the parties. The court concluded “that municipal bodies act in administrative or quasi-judicial capacities when those bodies conduct zoning hearings concerning a special-use petition. . . . To the extent any prior decisions of this court hold the contrary to be true, we now expressly overrule those decisions.” [Citation omitted.] 781 N.E.2d at 234.

As a result of the Illinois Supreme Court’s holding, issues arose as to the proper form of review. In response to this debate, S.B. 94 was enacted as P.A. 94-1027 and became effective July 14, 2006; the text was amended by P.A. 95-843 (eff. Jan. 1, 2009). The statute applicable to municipalities provides:

(a) Any decision by the corporate authorities of any municipality, home rule or non-home rule, in regard to any petition or application for a special use, variance, rezoning, or other amendment to a zoning ordinance shall be subject to de novo judicial review as a legislative decision, regardless of whether the process in relation thereto is considered administrative for other purposes. Any action seeking the judicial review of such a decision shall be commenced not later than 90 days after the date of the decision.

(b) The principles of substantive and procedural due process apply at all stages of the decision-making and review of all zoning decisions. 65 ILCS 5/11-13-25.

New §5-12012.1 was added to the Counties Code, 55 ILCS 5/5-12012.1, et seq., and new §110-50.1 was added to the Township Code, 60 ILCS 1/110-50.1, et seq., as well.

Under this statute, any special use, variance, rezoning, or other amendment is subject to “de novo judicial review.” The cause of action must be filed within 90 days, but the form of the cause of action is not specifically set forth. It is therefore recommended that a practitioner mention that the action is brought pursuant to the statute.

The term “de novo judicial review” has been well understood in Illinois law to mean a review of the prior proceedings. *Schmeier v. Chicago Park District*, 301 Ill.App.3d 17, 703 N.E.2d 396, 405, 234 Ill.Dec. 535 (1st Dist. 1998); *Lachenmyer v. Didrickson*, 263 Ill.App.3d 382, 636 N.E.2d 93, 97 – 98, 200 Ill.Dec. 902 (4th Dist. 1994). De novo judicial review, therefore, would appear to put the burden on the judiciary to review the record made before the local governmental body. However, §11-13-25 requires the court to review the decision of the corporate authorities as a “legislative decision,” which suggests that a reviewing court may disregard the record.
For a full discussion of the nature of proceedings before local governmental bodies, see *City of Chicago Heights v. Living Word Outreach Full Gospel Church & Ministries, Inc.*, 196 Ill.2d 1, 749 N.E.2d 916, 255 Ill.Dec. 434 (2001). In that case, the court dealt with an application for a special-use permit by a church in an area where the city’s comprehensive plan envisioned a development that generated sales tax revenues for the municipality. The city cited this aspect of the plan as a reason for denying the church’s special-use application. The court, in reversing the city’s denial, stated:

Even if one views the city council’s decision to deny Living Word’s application as a purely legislative act, that decision cannot be sustained under the justification offered by the city council. The City has emphasized that the council’s decision to deny Living Word’s application for a special use permit was based on a desire to exclude all noncommercial uses from the West Lincoln Highway corridor and not on any particular objection or ill-will directed to Living Word in particular. . . . It is clear, therefore, that to uphold the rationale offered by the council for denying Living Word’s application for a special use permit would result in the effective amendment of the City’s zoning ordinance. Adopting the council’s reasoning would completely remove churches from the list of special uses set forth in the City’s zoning ordinance. . . . A new zoning district, one exclusively commercial in character, would thus be created in the West Lincoln Highway corridor . . .

The City’s zoning ordinance requires that certain mandatory procedures regarding notice and hearing be completed before any amendment may be made to the zoning ordinance. 749 N.E.2d at 930.

Because the applicant satisfied the criteria for special use, there was no reasonable basis short of amending the zoning code to justify denying the application; the city’s denial of the special-use permit was reversed.

In light of *Klaeren* and *Living Word*, the issue for the practitioner is to determine what is reasonable if the decision of the corporate authorities is administrative but to be treated as legislative.

D. Petition for Order of Mandamus

1. [7.27] In General

A petition for an order of mandamus is brought when a zoning certificate or a building permit has been refused on the grounds that the zoning ordinance does not authorize the issuance of the permit. See, e.g., *Winston v. Zoning Board of Appeals of Peoria County*, 407 Ill. 588, 95 N.E.2d 864 (1950). In this regard, it is important that the practitioner keep in mind the problem of exhaustion of administrative remedies. Also, when there has been a refusal by the zoning administrator to issue a certificate or permit, it is first necessary that a review be taken to the zoning board of appeals when that procedure is provided for by ordinance.
2. [7.28] Change of Position in Reliance on Prior Zoning or Issuance of Permits

There is generally no vested right in the continuation of an existing zoning classification. 1350 Lake Shore Associates v. Healey, 223 Ill.2d 607, 861 N.E.2d 944, 308 Ill. Dec. 379 (2006); Ward v. Village of Elmwood Park, 8 Ill.App.2d 37, 130 N.E.2d 287 (1st Dist. 1955); Cribbin v. City of Chicago, 384 Ill.App.3d 878, 893 N.E.2d 1016, 323 Ill.Dec. 542 (1st Dist. 2008); Goldblatt v. City of Chicago, 30 Ill.App.2d 211, 174 N.E.2d 222 (1st Dist. 1961). A petition for mandamus, however, may be granted when a property owner has in good faith substantially changed his or her position or has incurred substantial expenditures in reliance on the prior zoning classification of the property. People ex rel. Skokie Town House Builders, Inc. v. Village of Morton Grove, 16 Ill.2d 183, 157 N.E.2d 33 (1959); Deer Park Civic Ass’n v. City of Chicago, 347 Ill.App. 346, 106 N.E.2d 823 (1st Dist. 1952). The right to use property as a use that has been made unlawful by a zoning change typically arises when a building permit or a zoning certificate has been issued and the owner has made a substantial change of position in reliance on the issuance of the permit. However, in Healey, supra, the Illinois Supreme Court remanded in order for the trial court to determine whether a property owner’s expenditures prior to the date a downzoning ordinance was introduced to the city council were substantial enough for the property owner to have obtained a vested interest in the prior zoning. See also Cribbin, supra (finding property owner entitled to mandamus for issuance of building permits under former zoning when property was downzoned after owner applied for building permits).

Some courts have accepted the idea that reliance on approval of a special-use permit, development plan, site plan, or other governmental assurance may confer the same rights as a building permit. See Frink v. Orleans Corp., 159 Fla. 646, 32 So.2d 425 (1947); Board of Supervisors of Fairfax County, Virginia v. Medical Structures, Inc., 213 Va. 355, 192 S.E.2d 799 (1972). See also Bear Valley Drive-In Theater Corp. v. Board of County Commissioners of County of Jefferson, 173 Colo. 57, 476 P.2d 48 (1970). However, in Foster & Kleiser v. City of Chicago, 146 Ill.App.3d 928, 497 N.E.2d 459, 100 Ill.Dec. 481 (1st Dist. 1986), the court held that even when a permit was issued, if it was issued in violation of the ordinances of the municipality, the doctrine of equitable estoppel was not applicable, and the municipality had the right to require the removal of electric advertising signs.

In Central Transport, Inc. v. Village of Hillside, 210 Ill.App.3d 499, 568 N.E.2d 1359, 154 Ill.Dec. 910 (1st Dist. 1991), the court held that the village was estopped from asserting that its own zoning ordinance granting a special use was not validly enacted. In Central Transport, the purchaser of a freight truck facility filed a complaint for mandamus to require the village to issue a building permit. The purchaser relied on a zoning ordinance that appeared to have been enacted properly ten years earlier. While a finding of estoppel against a municipality is not favored, it could be invoked under the particular circumstances of a case such as Central Transport.

3. [7.29] Mandamus Action Must Show Clear Legal Right to Relief

Mandamus is an extraordinary remedy. The petitioner must show compliance with all valid requirements of applicable ordinances and has the burden of showing a clear and undoubted right to the order. People ex rel. American National Bank & Trust Company of Chicago v. City of Park Ridge, 25 Ill.App.2d 424, 166 N.E.2d 635 (1st Dist. 1960); Solomon v. City of Evanston, 29 Ill.App.3d 782, 331 N.E.2d 380 (1st Dist. 1975).
It should be noted that an order of mandamus may be issued as relief granted in a declaratory judgment action. *Kozioł v. Village of Rosemont*, 32 Ill.App.2d 320, 177 N.E.2d 867 (1st Dist. 1961).

E. **[7.30] Declaratory Judgment Action and Action To Quiet Title**

One of the most common forms of action brought today that challenges the validity of a zoning ordinance is the declaratory judgment action brought pursuant to §2-701 of the Code of Civil Procedure, 735 ILCS 5/2-701. In municipalities of 500,000 or more population, the Illinois Municipal Code requires that “when any zoning ordinance, rule or regulation is sought to be declared invalid by means of a declaratory judgment proceeding,” notice must be given to owners of property within 250 feet of the subject property. 65 ILCS 5/11-13-8. The notice must be sent “not more than 30 days before filing suit for a declaratory judgment.” *Id.* The notice is required to contain the address of the location for which the action is brought and a statement of the nature of the relief requested and also must list the legal and beneficial owner of the subject property. 65 ILCS 5/11-13-7. This notice is to be furnished to the clerk of the court in which the declaratory judgment suit is filed, along with a list of property owners within 250 feet and a written certificate that the notice was served. 65 ILCS 5/11-13-8. A property owner entitled to notice who shows that his property will be substantially affected by the outcome of the declaratory judgment proceeding may enter his appearance and “shall have the rights of a party.” *Id.* In this regard, it is important to note that under §11-13-8, the property owner need not “prove any specific, special, or unique damages to himself or his property or any adverse effect upon his property from the declaratory judgment proceeding.” *Id.*

The fact that a declaratory judgment action may be filed does not in any way preclude the filing of a suit to remove a cloud on title. This is made clear by two Illinois Supreme Court decisions, *Kupsik v. City of Chicago*, 25 Ill.2d 595, 185 N.E.2d 858 (1962), and *Cosmopolitan National Bank of Chicago v. City of Chicago*, 27 Ill.2d 578, 190 N.E.2d 352 (1963). Indeed, when an action to quiet title is brought, it is not necessary to serve the notice called for under §11-13-8:

Having failed in that contention it now takes the tack that declaratory judgment procedure is no more than a modern counterpart of the old equity proceeding to remove a cloud on title and that, whichever remedy is employed, the notice provisions must be complied with. We do not depart, however, from our holdings in Kupsik that the two remedies are separate and independent of the other, and that the conditions laid down for the use of declaratory judgment procedure do not control or apply to the use of the equitable remedy of an action to remove a cloud upon title. Further, when we consider the fact that an action to remove a cloud on title has never been abolished as a remedy for attacking a zoning ordinance, we may not, under basic principles of statutory construction read into section 73-4 [predecessor to §11-13-8] a legislative intent that the notice provisions are to apply when such equitable remedy is pursued. *Cosmopolitan National Bank*, supra, 190 N.E.2d at 354.
It often happens that the zoning being challenged was brought about as a result of an annexation agreement and the ultimate annexation of the subject property. In Schallau v. City of Northlake, 82 Ill.App.3d 456, 403 N.E.2d 266, 38 Ill.Dec. 178 (1st Dist. 1979), the appellate court held that an action for declaratory judgment or for injunctive relief was not an appropriate remedy when challenging the validity of the annexation and that the only appropriate remedy was an action in quo warranto.


Perhaps the most significant development in zoning actions has been the spate of actions brought under the Fourteenth Amendment to the U.S. Constitution and 42 U.S.C. §1983, which was originally enacted as part of the Civil Rights Act of 1871, ch. 22, 17 Stat. 13.

1. [7.32] Fair Housing

The question of when a refusal to rezone property constitutes racial discrimination prohibited by either the Fourteenth Amendment or the Fair Housing Act, 42 U.S.C. §3601, et seq., is the subject of Edwin P. Chester, Note, Zoning — Arlington Heights v. Metropolitan Housing Development Corp.: An Implicit Endorsement of Exclusionary Zoning?, 55 N.C.L.Rev. 733 (1977). For the zoning practitioner, it is important to be conversant with Metropolitan Housing Development Corp. v. Village of Arlington Heights, 373 F.Supp. 208 (N.D.Ill. 1974), rev’d, 517 F.2d 409 (7th Cir. 1975), rev’d, 97 S.Ct. 555, on remand, 558 F.2d 1283 (7th Cir. 1977), which Chester discusses in a case note. In Metropolitan Housing, the district court found that the village’s motivation in denying an application for rezoning was based on its concern for property values and the integrity of its zoning plan and that there was no act of invidious discrimination that would require the showing of a compelling state interest. The Seventh Circuit Court of Appeals, in seeking to assess the village’s decision in light of its historical context and ultimate effect, reversed, finding that Arlington Heights had exploited a long history of segregated housing patterns in the metropolitan area by failing to integrate its community and was attempting to avoid its responsibility by rejecting “the only present hope of Arlington Heights making even a small contribution toward eliminating the pervasive problem of segregated housing.” 517 F.2d at 415. The decision of the Seventh Circuit implied that Arlington Heights had a duty to alleviate the problem of segregated housing. This theory, incidentally, is in keeping with a New Jersey Supreme Court decision that held that under the state Constitution, the village (indeed, the villages in the entire region) had an obligation to act affirmatively to alleviate segregated housing patterns and to set aside certain amounts of land for the encouragement of low- and moderate-income housing. Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975). See also Metropolitan Housing Development Corp. v. Village of Arlington Heights, 469 F.Supp. 836 (N.D.Ill. 1979).

In Mount Laurel, the New Jersey Supreme Court opened what it thought was the door to obtain low- and moderate-income housing scattered throughout suburban areas by interpreting the New Jersey Constitution’s welfare provisions as requiring this housing to be built throughout the state with each suburb taking on its “fair share.” 336 A.2d at 724. Later, in Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390, 410 (1983), the New Jersey Supreme Court looked back on what had been accomplished since its earlier decision
and reached the conclusion that there had been “widespread non-compliance with the constitutional mandate of our original opinion in this case.” In a lengthy opinion, Chief Justice Wilentz reaffirmed the court’s earlier holding and then set about to legislate judicially what that court believed to be the necessary affirmative measures to provide realistically for low-income housing. What the New Jersey Supreme Court requires is that there be federal or state housing subsidies, zoning incentives, and requirements for low-income housing in some or all new developments throughout the state. The importance of this case lies in the fact that other state courts have held that municipalities have an obligation to consider so-called “regional needs” in their zoning ordinances, and these state courts might also adopt the remedies imposed by the New Jersey Supreme Court. To implement the remedies, the New Jersey Supreme Court has established panels of trial judges who will oversee housing needs for particular municipalities as well as special masters (fact-finders to serve the court) to assist in the operation. One can only wonder as to the extent to which the New Jersey Supreme Court believes it might participate in local government as an active member of each village board.

In any event, one of the interesting anomalies is that one of the methods of providing for low-income housing is so-called “inclusionary zoning,” which requires a mandatory set-aside of certain land to be developed with low-income housing. Suppose, for example, that the municipality does rezone a developer’s land to require low-income housing and the developer then files a suit claiming that the rezoning amounts to a taking of the property, requiring just compensation. Is the municipality then required to pay for the taking? It will be interesting to see whether New Jersey’s landmark zoning decision will be followed by any other states. It will also be interesting to see whether the judicial zeal of the New Jersey Supreme Court will be translated into tangible benefits for the citizens of New Jersey. Since the Mount Laurel cases, the New Hampshire Supreme Court ruled in Britton v. Town of Chester, 134 N.H. 434, 595 A.2d 492, 495 (1991), that the state’s zoning enabling statute, which authorized cities and town to enact zoning ordinances to promote “the general welfare of the community,” obligated municipalities to consider regional needs when enacting ordinances that control growth and to provide low- and moderate-income families within the region the opportunity to obtain affordable housing.

Practitioners should note that the New Jersey legislature codified the Mount Laurel doctrine, including its available compliance measures, by enacting the Fair Housing Act, N.J.Stat.Ann. §52:27D-301, et seq. However, the Mount Laurel judicial and legislative mandates have not been as successful as hoped. According to an assembly task force created to study the impact of the Fair Housing Act, zoning has not proved to be a sufficient mechanism for a “realistic opportunity” for affordable housing, particularly due to the high cost of building affordable housing. Assemblywoman Connie Myers, Chair, Assembly Task Force to Study the Impact of the Fair Housing Act and State Planning Act, Findings and Recommendations (Nov. 29, 2001), available at www.njleg.state.nj.us/legislativepub/reports/housing.pdf.

Here in Illinois, the State Legislature has taken up the reasoning of the New Jersey Supreme Court and the views of the plaintiffs in Metropolitan Housing, supra, and has mandated municipalities to provide affordable housing under the Affordable Housing Planning and Appeal Act, 310 ILCS 67/1, et seq. This Act requires that all local government bodies having zoning authority provide that at least ten percent of their year-round housing units constitute affordable housing. If a municipality fails to meet this standard, then it must submit a plan to the Illinois Housing Department Authority showing how it will come into compliance. In addition, if a
developer of low- or moderate-income housing believes that he or she was “unfairly denied or unreasonable conditions were placed on the tentative approval of the development,” that developer may appeal the decision of the local governmental body to a newly created State Housing Appeals Board challenging the decision. 310 ILCS 67/1(b). This Board would then have the power to “affirm, reverse, or modify the conditions of, or add conditions to, a decision made by the approving authority.” 310 ILCS 67/1(f). In short, this Board would take over for local government zoning authority as it relates to low- and moderate-income housing.


In Monell v. Department of Social Services of City of New York, 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978), the United States Supreme Court held for the first time that local governmental bodies could be sued under 42 U.S.C. §1983, which, as stated in §7.31 above, was originally enacted as part of the Civil Rights Act of 1871. Prior to Monell, the law had been that a municipality was not a “person” within the language of the Civil Rights Act and therefore was not liable under the Act. Monroe v. Pape, 365 U.S. 167, 5 L.Ed.2d 492, 81 S.Ct. 473 (1961). Following Monell, the Court in Owen v. City of Independence, Missouri, 445 U.S. 622, 63 L.Ed.2d 673, 100 S.Ct. 1398, 1409 (1980), took the next step in exposing municipalities and municipal officials to civil rights liability by holding that there is no “good faith” immunity for a municipality in an action brought under §1983. This holding means that while municipal officials and employees may be immune from liability because they acted in “good faith,” the municipality they serve enjoys no such protection. A municipality is strictly liable for civil rights violations regardless of the good intentions of the municipal officials who acted if the action represents official policy and is found to be in violation of some constitutional right.

The Supreme Court has, however, held that an absolute immunity exists for members of a state-created regional land planning agency acting in their legislative capacity. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 59 L.Ed.2d 401, 99 S.Ct. 1171 (1979).

In at least one recent decision, the district court determined that village trustees could be subject to a civil rights action brought under 42 U.S.C. §1983 when they voted to deny the applicant’s request for a special-use permit. Chicago Joe’s Tea Room LLC v. Village of Broadview, No. 07 C 2680, 2009 WL 3824723 (N.D.Ill. Nov. 12, 2009). The defendant trustees argued that pursuant to 65 ILCS 5/11-13-25 they were acting in a legislative capacity and therefore were entitled to absolute legislative immunity. The court, in denying the trustees’ motion to dismiss, stated:

Despite the “legislative” standard of review, though, the legislative history of the amendment to §5/11-13-25 explicitly states that the amendment is not meant to question the Illinois Supreme Court’s conclusion that special use decisions have a quasi-judicial character. See [Millineum Maintenance Management, Inc. v. County of Lake, 384 Ill.App.3d 638, 894 N.E.2d 845, 856, 323 Ill.Dec. 819 (2d Dist. 2008)]. Indeed, the [Millineum] court found that the legislature had the legal authority (under Illinois’ separation of powers doctrine) to dictate the appropriate standard of review to the courts only because the decision to grant or deny a special use permit is an administrative — not legislative — decision. 2009 WL 3824723 at *2.
The court in *Chicago Joe’s Tea Room* further did not recognize a grant of absolute judicial immunity that is granted to public officials who act in a quasi-judicial capacity. See *Reed v. Village of Shorewood*, 704 F.2d 943, 951 (7th Cir. 1983). The court in *Chicago Joe’s Tea Room* observed that the trustees are not required to give any rationale for a particular vote. The court then stated:

**Thus the Trustees’ approval or denial of a special use permit is not reviewable in the same manner as this court’s decisions are, or even on the same basis as Illinois liquor commissioners, who must provide some reason for any adverse decision.**

2009 WL 3824723 at *3.

Citing *Reed, supra*, the court then went on to say:

*This distinction is crucial because Reed’s extension of judicial immunity to a liquor commissioner who revokes a liquor license is premised on the fact that a liquor commissioner’s mistakes — like a judge’s — are “remediable through the appellate process.” . . . The absence of a requirement that Trustees give a reason for a special-use vote, coupled with the Illinois legislature’s decision to mandate that special use decisions be reviewed by Illinois courts under the deferential standard accorded to legislative acts, renders appellate review of special use votes too insubstantial a procedural safeguard to permit the extension of judicial immunity to the trustees under Reed.* [Citation omitted.] *Id.*


Finally, a distinction is noted between suing a public official in the official’s official, as opposed to individual, capacity. When, for example, the sheriff, the superintendent of schools, or some other individual is sued because he or she holds that position, the courts generally treat it as another way of bringing an action against an entity of which this particular officer is simply an agent. In such a situation, the so-called “good-faith defense” is not applicable, but rather the official faces strict liability under the doctrine of *Owen, supra*. However, the liability to pay the damages falls on the entity on whose behalf the agent was acting in his or her official capacity. *Kincaid v. Rusk*, 670 F.2d 737 (7th Cir. 1982).

Putting all of this together and recognizing an opportunity to employ federal law to rectify perceived and actual wrongs, real estate developers have not been reluctant to file suit against municipalities and public officials in order to obtain redress for allegedly improper zoning restrictions. In the cases discussed below, there are no overtones of racial discrimination, but rather they present situations in which private developers have brought action because they perceive either the failure to zone or a rezoning to have been a denial of their constitutional rights.

In *Gorman Towers, Inc. v. Bogoslovsky*, 626 F.2d 607 (8th Cir. 1980), a developer brought an action against various public officials, landowners, and the landowners’ attorney, claiming that after the plaintiff had planned to build a high-rise apartment complex to house elderly or
physically handicapped persons, the defendants, at the urging of the others, rezoned the site from multiple-family to single-family and duplex, thereby depriving the plaintiff of equal protection under the Fourteenth Amendment and also defaming the plaintiff. The court of appeals affirmed a dismissal of the complaint but only on the basis of the particular facts of the case and not because §1983 could not be invoked in such a circumstance. See also Rogin v. Bensalem Township, 616 F.2d 680 (3d Cir. 1980).

In Westborough Mall, Inc. v. City of Cape Girardeau, Missouri, 693 F.2d 733 (8th Cir. 1982), the court of appeals considered a suit that combined an action under 42 U.S.C. §1983 with a claim brought under the Sherman Anti-Trust Act, 15 U.S.C. §1, et seq. The court held that a cause of action was stated against the city as well as its officials under the facts in the case. It was alleged that the city manager and city attorney, and the city council through its acquiescence in the actions of the city manager, permitted the city manager to issue an opinion that the zoning classification of the plaintiff’s property had reverted to a classification that no longer permitted the development of a shopping center, thereby interfering with the plaintiff’s efforts to obtain financing. The manager also instructed the building department not to issue building permits for construction of the plaintiff’s mall. These actions, it was alleged, constituted violations of the plaintiff’s property rights and deprived the plaintiff of this property without due process and equal protection and thereby constituted actions properly brought under §1983.

In Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981), the court considered an action under 42 U.S.C. §1983 in which the plaintiff was contending that the action of the municipality in failing to rezone his land had deprived him of property without due process of law and without just compensation under the Fifth and Fourteenth Amendments. The court held that the mayor of Lafayette, who vetoed an ordinance that would have rezoned the plaintiff’s property, enjoyed an absolute immunity from actions under the Civil Rights Act of 1871 since, in vetoing the ordinance, he was acting in his legislative capacity. However, the court held that the plaintiff’s allegation that the city’s R1-A zoning classification had denied the plaintiff any reasonable economically viable use of his land and thereby constituted a taking without just compensation stated a cause of action against the city.

In Shelton v. City of College Station, 780 F.2d 475 (5th Cir. 1986), the court held that zoning decisions are to be reviewed by federal courts by the same constitutional standards employed to review statutes enacted by state legislatures and that a zoning ordinance is not unconstitutional unless it is clearly arbitrary and unreasonable and there is no rational basis for the zoning decision. This opinion was rendered on a rehearing in which a panel of the Fifth Circuit Court of Appeals had earlier held that a cause of action for damages was proper upon the denial of a zoning variation under color of state law and that such an action could be brought under the Civil Rights Act of 1871 despite the argument that, as a matter of law, no recovery is allowable for denial of a variance from a zoning regulation. Shelton v. City of College Station, 754 F.2d 1251 (5th Cir. 1985).

The clear implication seems to be developing that the so-called “garden-variety” zoning case cannot and should not be dressed up “in the trappings of constitutional law” so as to bring such an action under the ubiquitous 42 U.S.C. §1983. Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 467 (7th Cir. 1988); Standard Bank & Trust Co. v. Village of Orland Hills, 891 F.Supp. 446, 450 (N.D.Ill. 1995) (quoting Coniston Corp.). The court in Coniston Corp. made clear that
such things as the approval or disapproval of a site plan are legislative rather than adjudicative decisions and that the U.S. Constitution does not require legislatures to use adjudicative-type procedures in making their decisions. Indeed, acting as a legislature permits actions that might otherwise be thought improper in judicial decision-making. The court wrestled with what is called “substantive due process” and came to the conclusion that the validity of a zoning ordinance might become a constitutional issue because of an alleged denial of substantive due process only if it can be said that the decision of the legislature is “invidious or irrational.” 844 F.2d at 468.

The foregoing discussion is intended to give a brief synopsis of the law as it is evolving in this area. One observation that cannot be overlooked is that a small municipality whose budget for an entire year may not exceed $2 million may, because of legislative action or inaction, be faced with potential liability in excess of several million dollars when a large corporate developer is seeking damages, whether under 42 U.S.C. §1983 or for inverse condemnation. Such an action could result in the financial ruin of the municipality or its officials. It is iniquitous that local government, which can least afford it, should face this type of liability for governmental action, while state and federal governments are immune from these suits.

The U.S. Supreme Court in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 143 L.Ed.2d 882, 119 S.Ct. 1624 (1999), held, in an opinion authored by Justice Kennedy, that property owners who file a civil rights suit under 42 U.S.C. §1983 seeking compensation for an alleged taking of their property have a right to jury trial under the Seventh Amendment to the U.S. Constitution in the extremely limited context of a federal claim alleging that a state had both taken property within the meaning of the Fifth Amendment and provided no procedure by which a developer could recover compensation for that taking. The Court then upheld the jury’s award on procedural grounds — the fact that the city had not objected to the jury instructions — without addressing whether the jury’s ruling on the merits was correct. The Court held that “the disputed questions were whether the government had denied a constitutional right in acting outside the bounds of its authority, and, if so, the extent of any resulting damages.” 119 S.Ct. at 1645. Justice Kennedy then added, “These were questions for the jury.” *Id.*

In *City of Monterey*, the plaintiff brought a civil rights action against the City of Monterey alleging violations of due process and equal protection as a result of the city’s taking of the plaintiff’s property. The doctrine of ripeness is generally applied to land use cases in order to avoid premature adjudication in the federal courts. These claims under 42 U.S.C. §1983 are premature if the plaintiff has not exhausted possible state remedies. If the state court provides a remedy for the taking, then federal courts will not hear the matter. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 87 L.Ed.2d 126, 105 S.Ct. 3108, 3120 – 3121 (1985); *Estate of Himelstein v. City of Fort Wayne, Indiana*, 898 F.2d 573, 577 (7th Cir. 1990).

However, in reviewing *City of Monterey*, the practitioner should note that in actions for just compensation pursuant to the takings clause of Article I, §15, of the Illinois Constitution, the Illinois courts have applied to the Illinois Constitution the U.S. Supreme Court’s determination of what constitutes a taking under the U.S. Constitution. *St. Lucas Ass’n v. City of Chicago*, 212
Ill.App.3d 817, 571 N.E.2d 865, 875 – 876, 156 Ill.Dec. 885 (1st Dist. 1991); Tim Thompson, Inc. v. Village of Hinsdale, 247 Ill.App.3d 863, 617 N.E.2d 1227, 187 Ill.Dec. 506 (2d Dist.), appeal denied, 152 Ill.2d 581 (1993). Under such a circumstance, if the U.S. Supreme Court decides that there is a right to a jury trial, then it may well be that this will be the rule applied in Illinois under the Illinois Constitution.

42 U.S.C. §1983 allows persons deprived of the rights secured by the laws of the United States to bring “an action at law, suit in equity, or other proper proceeding for redress.” The statute is silent with respect to whether plaintiffs have a right to a jury trial. The court of appeals in Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422 (9th Cir. 1996), concluded that there was a right to a jury trial, pointing out that §1983 relief mirrors the split that existed between courts of law (trial by jury) and courts of equity (bench trial). The court concluded that a plaintiff who brings an action at law under §1983 has a right to a jury trial.

There is no court of appeals decision that directly addresses the issue of whether a jury may decide the takings issue. In Illinois, these issues are tried by a judge. They are certainly not by statute deemed to be issues for a jury. The Supreme Court in City of Monterey ruled that there is a right to a jury trial only when a property owner is “denied not only its property but also just compensation or even an adequate forum for seeking it.” 119 S.Ct. at 1641. The Court’s opinion strongly suggests that there is no right to jury trial in “an ordinary inverse condemnation suit.” 119 S.Ct. at 1644.

3. [7.34] First Amendment — Adult Uses

A significant difference exists between situations in which a developer is alleging that a rezoning constitutes a taking without due process or a denial of equal protection and situations in which issues of free speech under the First Amendment are involved. When the developer is simply arguing that the downzoning was denial of equal protection, the litmus test for determining the validity of the zoning amendment is to measure whether the rezoning is “arbitrary or irrational”; i.e., if there is any reasonable basis for the passage of the legislation, then the legislation is to be upheld. Regin v. Bensalem Township, 616 F.2d 680, 689 (3d Cir. 1980). The court held that the zoning was denial of equal protection, the litmus test for determining the validity of the zoning amendment is to measure whether the rezoning is “arbitrary or irrational”; i.e., if there is any reasonable basis for the passage of the legislation, then the legislation is to be upheld. Rogin v. Bensalem Township, 616 F.2d 680, 689 (3d Cir. 1980). This rationale is consistent with Illinois law in measuring the validity of a zoning ordinance. Urran v. Village of Hinsdale, 30 Ill.2d 170, 195 N.E.2d 643 (1964).

However, there are cases that have First Amendment overtones, such as those that deal with the regulation of so-called “adult” businesses. Young v. American Mini Theatres, Inc., 427 U.S. 50, 49 L.Ed.2d 310, 96 S.Ct. 2440 (1976). In Genusa v. City of Peoria, 619 F.2d 1203 (7th Cir. 1980), the Seventh Circuit considered a comprehensive series of ordinances regulating adult bookstores. The court held that the zoning provisions of the adult use ordinance requiring that adult uses be separated from one another by a distance of at least 500 feet was constitutional. The court held unconstitutional certain other requirements, such as a police department investigation into the background of adult bookstore licensees and a requirement that employees of an adult store must obtain an employee permit. The constitutional challenge was predicated on the First Amendment, and when First Amendment rights are involved, the test is not whether there is some reasonable basis for the zoning legislation, but whether the restriction imposes an impermissible restraint on the exercise of free speech. Young, supra.
In *County of Cook v. World Wide News Agency*, 98 Ill.App.3d 1094, 424 N.E.2d 1173, 54 Ill.Dec. 270 (1st Dist. 1981), the appellate court held unconstitutional a county ordinance requiring every operator of an adult bookstore to obtain a special-use permit regardless of the store’s proximity to another regulated use. The court found that the ordinance granted the county board unbridled discretion to grant or deny special-use permits to operators of adult bookstores and movie theaters and thus served as a prior restraint on speech and was unconstitutional. The court further noted that the ordinance, which prohibited the establishment of an adult bookstore or movie theater within 1,000 feet of an area zoned for residential use absent a waiver by the residents of the area and also required adult uses to be located in certain zones, was invalid as a prior restraint of speech when all the zones but three were within 1,000 feet of residential areas and because the residents were, therefore, given the unbridled discretion under the ordinance to determine whether adult uses could exist in the area.

The United States Supreme Court, in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 L.Ed.2d 671, 101 S.Ct. 2176, 2181 (1981), held that a zoning ordinance of the municipality that excluded “live entertainment” throughout the borough was a violation of the First Amendment. The Court distinguished its opinion in *Young*, supra, by pointing out that in *Young* the restriction did not affect the number of adult movie theaters that could operate in the city and merely disbursed them. Furthermore, the Court did not imply that a municipality could ban all adult theaters, much less all live entertainment or all nude dancing, from its commercial districts as in *Schad*. It also pointed out that the evidence presented in *Young* indicated that the concentration of adult movie theaters in limited areas led to deterioration of surrounding neighborhoods. No such evidence was presented in *Schad*.

But in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 115 L.Ed.2d 504, 111 S.Ct. 2456 (1991), the Supreme Court upheld the State of Indiana public indecency law that required dancers to wear pasties and a G-string. The Court rejected the contention that symbolic speech is entitled to full First Amendment protection and held that the state law furthered a substantial governmental interest in protecting societal order and morality. “Public indecency statutes,” the Court stated, “reflect moral disapproval of people appearing in the nude among strangers in public places.” 111 S.Ct. at 2461. This particular law follows state law dating back more than 150 years banning public nudity. Dancers still have the opportunity to express an erotic message; they just have to be slightly dressed in order to do so.

In *Entertainment Concepts, Inc., III v. Maciejewski*, 631 F.2d 497 (7th Cir. 1980), the court of appeals held invalid a zoning ordinance as a prior restraint on First Amendment protected communication when the ordinance required all “adult” movie theaters to obtain a special-use permit. The court found that the zoning ordinance failed to provide an adequate definition of “adult.” 631 F.2d at 501.

However, in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 89 L.Ed.2d 29, 106 S.Ct. 925 (1986), the Supreme Court held that a zoning ordinance that prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school was a valid governmental response to the serious problems created by adult theaters and satisfied the dictates of the First Amendment. The district court had found that the Renton city council’s predominant concerns were with the secondary effects of
adult theaters on the surrounding community and not with the content of adult films themselves. The Supreme Court held that this finding was more than adequate to establish that the city’s pursuit of its zoning interests was unrelated to the suppression of free speech and thus the ordinance was a “content-neutral” speech regulation. 106 S.Ct. at 929.

Following the reasoning in City of Renton, supra, the Illinois Supreme Court in County of Cook v. Renaissance Arcade & Bookstore, 122 Ill.2d 123, 522 N.E.2d 73, 118 Ill.Dec. 618 (1988), held that the Cook County zoning ordinance that permitted the location of adult uses as of right only in industrial zones did not deny bookstore operators the reasonable opportunity to operate adult businesses and, therefore, did not violate the First Amendment. This holding was true even though the ordinance had an amortization clause that required preexisting adult uses that became nonconforming uses when the ordinance was passed to relocate within six months, with a discretionary six-month extension for those adult uses requesting it.

In Alexander v. City of Minneapolis, 928 F.2d 278 (8th Cir. 1991), the court held that an ordinance regulating the location of adults-only businesses did not violate a theater owner’s First Amendment rights even though the theater owner claimed that the ordinance would effectively put his theaters out of business because he could find no economically viable place to relocate. The ordinance in question was similar to the City of Renton ordinance, making the adult entertainment facility a nonconforming use and providing for a limited two-year amortization period for nonconforming uses. Evidence by the city showed that 6.6 percent of the total acreage committed to commercial uses in the city could accommodate adult entertainment facilities. The court felt no sympathy for the argument that the owner could not find another location for his business at a price he could afford, noting, “The inquiry for First Amendment purposes is not concerned with economic impact.” 928 F.2d at 283, quoting Young, supra, 96 S.Ct. at 2456.

The courts have upheld restrictions on such activities as massage parlors and abortion clinics against constitutional challenges under 42 U.S.C. §1983 and have found that there were no proper free speech issues as to restrictions on these uses. Wigginess, Inc. v. Fruchtman, 482 F.Supp. 681 (S.D.N.Y. 1979), aff’d, 628 F.2d 1346 (2d Cir. 1980); Bossier City Medical Suite, Inc. v. City of Bossier City, 483 F.Supp. 633 (W.D.La. 1980).

4. [7.35] Action for Inverse Condemnation

The term “inverse condemnation” refers to a claim by a landowner that arises when a public agency has adopted a zoning ordinance that substantially limits the use of the landowner’s property. The “taking,” or the “condemnation,” is in the rezoning, which restricts the use of the property from what was formerly permitted. The concept has been expressed as follows:

Not only is an actual physical appropriation, under an attempted exercise of the police power, in practical effect an exercise of the power of eminent domain, but if regulative legislation is so unreasonable or arbitrary as virtually to deprive a person of the complete use and enjoyment of his property, it comes within the purview of the law of eminent domain.
Such legislation is an invalid exercise of the police power since it is clearly unreasonable and arbitrary. It is invalid as an exercise of the power of eminent domain since no provision is made for compensation. 1 Julius L. Sackman, NICHOLS ON EMINENT DOMAIN §1.42[1], pp. 1-157 through 1-200 (4th ed. 2008).

The United States and Illinois Supreme Courts have wrestled with the concept of inverse condemnation. In particular, the issue remains of when and under what circumstances a municipality must pay damages as a result of having passed a zoning ordinance pursuant to the powers granted it under the zoning enabling statute or pursuant to police powers. This question can become quite complex as it requires resolution of some difficult issues.

When does a taking occur? Every regulation in some manner or another restricts or limits the use of property, yet not every regulation constitutes a taking.

Under what circumstances may a property owner collect damages? It is possible that the property owner will sue to have the zoning ordinance declared invalid. If the ordinance is declared invalid, whatever taking may have existed for that property, i.e., whatever restriction was placed on that property, is no longer in effect, and therefore the damage has ceased to exist.

At one point or another in the proceedings, a court might determine that there has been a taking and direct the municipality to pay damages for that taking. At that point, it would seem the municipality has the option of either rescinding the ordinance, thereby restoring to the property owner the full value of this property, or paying the damages, in which case title to the property would still remain in the property owner and the municipality would, in effect, have paid an amount sufficient to allow its ordinance to remain in effect. What if the municipality subsequently passes an ordinance rescinding the prior ordinance? Is it entitled to a refund? Or what if the municipality passes an ordinance that has the effect of increasing the value of the property? Is it entitled to some comparable compensation?

These are some of the issues with which the courts have been wrestling and for which there do not appear to be any clear-cut answers, as shown by the discussions in §§7.36 – 7.45 below.

a. [7.36] United States Supreme Court Opinions

San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 67 L.Ed.2d 551, 101 S.Ct. 1287 (1981), involved an action by a property owner who claimed the city had taken its property without just compensation in violation of federal and state Constitutions by virtue of the passage of a zoning law that rezoned parts of the property from industrial to agricultural and open space uses. Justice Blackmun, writing for a majority, held that there had been no final judgment from which a proper appeal could be taken, and, therefore, the appeal to the Supreme Court was dismissed. However, a majority of the Supreme Court in this case concurred with the rationale of the dissent insofar as the merits of the case were concerned. Justice Brennan wrote the dissenting opinion, stating that “once a court finds that a police power regulation has effected a ‘taking,’ the government entity must pay just compensation for the period commencing on the date the regulation first effected the ‘taking,’ and ending on the date the government entity chooses to rescind or otherwise amend the regulation.” 101 S.Ct. at 1307.
Ordinary principles determining the proper measure of just compensation, regularly applied in cases of permanent and temporary takings involving formal condemnation proceedings, occupations, and physical invasions, should provide guidance to the courts in the award of compensation for a regulatory taking.

Following the holding in *San Diego Gas & Electric*, the Supreme Court considered *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L.Ed.2d 868, 102 S.Ct. 3164 (1982), which involved a New York law that provides that a landlord must permit a cable television company to install its cable facilities on the landlord’s property. In *Loretto*, the cable installation occupied portions of the plaintiff’s roof and the side of her building. The New York Court of Appeals, the highest court in the State of New York, ruled that the law did not constitute a taking. However, the United States Supreme Court disagreed. Justice Marshall, writing for a majority of the court, pointed out:

As [*Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 57 L.Ed.2d 631, 98 S.Ct. 2646 (1978)] affirms, the Court has often upheld substantial regulation of an owner’s use of his own property where deemed necessary to promote the public interest. At the same time, we have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. 102 S.Ct. at 3171.

The dissent, which, interestingly enough, Justice Brennan joined, pointed out that if the Court’s decision in *Loretto* did anything, it established that there “is no set formula to determine where regulation ends and taking begins.” 102 S.Ct. at 3179, quoting *Goldblatt v. Town of Hempstead, New York*, 369 U.S. 590, 8 L.Ed.2d 130, 82 S.Ct. 987, 990 (1962). What this seems to mean is that the taking in this instance was so minimal as to be extremely difficult to measure and, therefore, would seem to be more in the nature of a valid exercise of the police powers of the state. However, a majority of the Court seemed to make a distinction between a permanent physical occupation authorized by government, which is a taking, and a temporary physical invasion, which is not a taking. This appears to demonstrate that no clear rule can be applied to determine when a regulation might become so restrictive as to constitute a taking.

This entire issue has received exhaustive treatment in six United States Supreme Court opinions: *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 94 L.Ed.2d 472, 107 S.Ct. 1232 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304, 96 L.Ed.2d 250, 107 S.Ct. 2378 (1987); *Nollan v. California Coastal Commission*, 483 U.S. 825, 97 L.Ed.2d 677, 107 S.Ct. 3141 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L.Ed.2d 798, 112 S.Ct. 2886 (1992); *Dolan v. City of Tigard*, 512 U.S. 374, 129 L.Ed.2d 304, 114 S.Ct. 2309 (1994); and *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 161 L.Ed.2d 876, 125 S.Ct. 2074 (2005). In summary, these cases hold that a landowner is entitled to recover damages in an inverse condemnation action for a temporary taking measured from the time the regulation restricting the use of the property went into effect; that the government has the legitimate police power to condition the use of land on some concession by the owner, even a concession of property rights, as long as the condition is related...
to the particular land use; and that the regulation restricting the use of property is not one requiring compensation unless it can be said that the regulation denies the owner any economically viable use of the land. It is important to note that these cases pick up on the themes already enunciated by the Court of distinguishing between a physical intrusion and a regulation, but that whether dealing with a physical intrusion or a regulation limiting the use of land, the Court still looks to the “character of the governmental action involved” to determine if it substantially advances legitimate public interests. Keystone Bituminous Coal, supra, 107 S.Ct. at 1242. See also Penn Central Transportation, supra, 98 S.Ct. at 2662 (“Court focuses . . . on the character of the action and on the nature and extent of the interference with rights in the parcel”).

(1) [7.37] Keystone Bituminous Coal Ass’n v. DeBenedictis

In Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470, 94 L.Ed.2d 472, 107 S.Ct. 1232 (1987), the Court considered a challenge by certain coal companies of the Pennsylvania Subsidence Act, which requires that 50 percent of the coal beneath certain structures be kept in place to provide surface support. The Supreme Court upheld the validity of the Act, and in so doing, the five-member majority raised and analyzed certain distinct points:

a. The Court analyzed the public purpose of the Act in order to measure the state’s interest in the regulation; i.e., how important is the limitation on the use of the land? The Court found, for example, that the purpose included the protection and safety of the public from open pit or strip mining, which would damage the surface of the land and could further pose a danger to surface water drainage and public water supplies. In making this analysis, the Court went so far as to point out that there have been regulations that almost totally limited the use to be made of property that have been held valid and did not constitute a taking. For example, in Mugler v. Kansas, 123 U.S. 623, 31 L.Ed. 205, 8 S.Ct. 273 (1887), a Kansas distiller who had built a brewery while it was legal to do so challenged a Kansas constitutional amendment that prohibited the manufacture and sale of intoxicating liquors. Although the Mugler Court recognized that the buildings and machinery constituting these breweries were of little value because of the amendment, the Court explained:

A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or appropriation of property. . . . The power which the states have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not, and, consistently with the existence and safety of organized society, cannot be, burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. 8 S.Ct. at 301.

In Keystone Bituminous Coal, the Court made clear that all property is held under the implied obligation that the owner’s use of it shall not be injurious to the community, and the Takings Clause did not transform that principle to one that requires compensation whenever the state asserts its power to enforce it. The Court, however, also made clear that it is necessary to weigh the private and public interests involved in the legislation.
b. The Court pointed out that the plaintiffs in *Keystone Bituminous Coal* had failed to show any diminution of value and investment-backed expectations significant enough to satisfy “the heavy burden placed upon one alleging a regulatory taking.” 107 S.Ct. at 1246. There was no actual proof of diminution in value presented. The Court, however, did reiterate the statement by the Court in *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 69 L.Ed.2d 1, 101 S.Ct. 2352, 2370 (1981), quoting *Agins v. City of Tiburon*, 447 U.S. 255, 65 L.Ed.2d 106, 100 S.Ct. 2138, 2141 (1980), that “[t]he test to be applied in considering this facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it ‘denies an owner economically viable use of his land.’ ” 107 S.Ct. at 1247.

Regarding the plaintiff’s burden of proof, the *Keystone Bituminous Coal* Court further added, “The hill is made especially steep because petitioners have not claimed, at this stage, that the [Pennsylvania Subsidence] Act makes it commercially impracticable for them to continue mining their bituminous coal interests in western Pennsylvania. Indeed, petitioners have not even pointed to a single mine that can no longer be mined for profit.” *Id.* Reference to the term “commercially impracticable” suggests the standard that must be met is a showing of near impossibility. Whether “economic viability” and “commercial impracticability” have the same meaning to the Court is not entirely clear.

c. One of the issues constantly before the courts in regard to regulatory taking has to do with measuring the unit of property involved whose value is diminished. For example, if a property owner must comply with a front yard setback requirement, it can be said that the front yard cannot be used for any economically viable purpose, yet the courts do not look at such a setback requirement as being a taking. *Gorieb v. Fox*, 274 U.S. 603, 71 L.Ed. 1228, 47 S.Ct. 675 (1927). In *Keystone Bituminous Coal*, the plaintiffs had argued that they were unable to mine two percent of the coal in the mines because of the restriction. The parties stipulated that application of the Pennsylvania Subsidence Act would require the plaintiffs to leave approximately 27 million tons of coal in place. The Supreme Court five-member majority held, however, that this 27 million tons of coal did not constitute a separate segment of property for purposes of takings law, reiterating that “where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking because the aggregate must be viewed in its entirety.” 107 S.Ct. at 1248, quoting *Andrus v. Allard*, 444 U.S. 51, 62 L.Ed.2d 210, 100 S.Ct. 318, 327 (1979). This view certainly raises some thorny problems, especially in relation to *Nollan v. California Coastal Commission*, 483 U.S. 825, 97 L.Ed.2d 677, 107 S.Ct. 3141 (1987), in which the issue had to do with an easement across a small portion of the plaintiff’s property. How does one correlate the inability to mine the 27 million tons of coal with the requirement that the public be granted an easement across a portion of the plaintiff’s property?

(2) [7.38] *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*

In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304, 96 L.Ed.2d 250, 107 S.Ct. 2378 (1987), the Court held that under the Just Compensation Clause of the Fifth Amendment to the United States Constitution, a property owner is entitled to monetary compensation for even a temporary taking under a regulatory
ordinance. In *First English Evangelical Lutheran Church*, the Court was referring to the time period between the enactment of the regulation and the determination by a court that the regulation does, in fact, constitute a taking. Prior California courts had held that the only remedy was nonmonetary relief, such as an injunction against the enforcement of the regulation.

In *First English Evangelical Lutheran Church*, the Court considered an ordinance of the County of Los Angeles that prohibited construction within a flood protection area. The plaintiff’s property was located in an area that had been subjected to serious flooding that destroyed all the buildings located on the property. The church had operated a campground known as “Lutherglen” and a retreat center and a recreation area for handicapped children. The County of Los Angeles determined that because of the flood hazard, the ordinance was “required for the immediate preservation of the public health and safety.” 107 S.Ct. at 2382. It is important to note that the Supreme Court did not deal with the validity of the regulation as measured against the deprivation of value as was the case in *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 94 L.Ed.2d 472, 107 S.Ct. 1232 (1987). See §7.37 above. Rather, the majority of the Court focused only on the narrow question of whether the plaintiff would be entitled to damages from the time that the ordinance was enacted until the time a court ultimately ruled on the validity of the ordinance; i.e., the Court dealt only with the “temporary taking” issue. The Court specifically stated, “We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State’s authority to enact safety regulations.” 107 S.Ct. at 2384 – 2385.

Both the majority and the dissenting opinions recognized that the Court’s holding “will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations.” 107 S.Ct. at 2389. That is, until this decision, it was certainly unclear whether a municipality would be liable for damages from the time of imposing the limitation. In California, damages would have been imposed only if the municipality continued with enforcement of the ordinance after it had been finally declared invalid by a court. See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 210 Cal.App.3d 1353, 258 Cal.Rptr. 893 (1989), in which the California appellate court, on remand from the U.S. Supreme Court, determined that the regulation did not deny the church all use of its property and did not amount to a taking.

(3) [7.39]  *Nollan v. California Coastal Commission*

In *Nollan v. California Coastal Commission*, 483 U.S. 825, 97 L.Ed.2d 677, 107 S.Ct. 3141 (1987), the Court dealt with a situation in which the California Coastal Commission would grant permission to the plaintiffs to rebuild their house only on the condition that they convey to the public an easement across a portion of their beachfront property. The majority of the Court, quoting *Loretto*, supra, stated that “where governmental action results in ‘[a] permanent physical occupation’ of the property, by the government itself or by others, see [102 S.Ct. at 3174 n.9], ‘our cases uniformly have found a taking to the extent of the occupation without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner,” [102 S.Ct. at 3175.]” 107 S.Ct. at 3146. The Court then concluded that a “permanent physical occupation” occurred for purposes of that rule when the public was given a permanent
and continuous right to pass to and fro over the plaintiff’s property. Id. The Court, however, also
made an important point in comparing this to land use regulation as opposed to an outright
physical taking of land; i.e., if the condition is related to the purpose of the building restriction,
then such a taking may be non-compensable:

Thus, if the Commission attached to the permit some condition that would have
protected the public’s ability to see the beach notwithstanding construction of the
new house — for example, a height limitation, a width restriction, or a ban on fences
— so long as the Commission could have exercised its police power (as we have
assumed it could) to forbid construction of the house altogether, imposition of the
condition would also be constitutional. 107 S.Ct. at 3148.

The Court also found that there was a “lack of nexus” between the condition, the grant of the
easement, and the building of the house. 107 S.Ct. at 3149.

(4) [7.40] Lucas v. South Carolina Coastal Council

In Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 120 L.Ed.2d 798, 112 S.Ct. 2886
(1992), the United States Supreme Court once again considered the issues discussed in Keystone
First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California,
482 U.S. 304, 96 L.Ed.2d 250, 107 S.Ct. 2378 (1987), and Nollan v. California Coastal

In Lucas, the plaintiff had purchased two beachfront lots for more than $1 million. At the time that
he purchased the lots, they were zoned for single-family residential construction, and he could,
according to the findings of the trial court, have built two single-family homes in compliance with
existing regulations. However, subsequent to the purchase, South Carolina enacted the Beachfront
Management Act, which barred construction of the houses Lucas had planned to build. In fact, the
trial court concluded that the Beachfront Management Act deprived Lucas “of any reasonable
economic use of the lots, . . . eliminated the unrestricted right of use, and render[ed] them
valueless.” 112 S.Ct. at 2890. The South Carolina Coastal Council was ordered to pay just
compensation in the amount of $1,232,387.50.

The South Carolina Supreme Court reversed this decision based on its conclusion that the
Beachfront Management Act was properly and validly designed “to preserve . . . South Carolina’s
beaches” and that new construction in the Coastal Zone, such as that intended by the plaintiff,
threatened this public resource. 112 S.Ct. at 2890, quoting Lucas v. South Carolina Coastal
determined that when a regulation respecting the use of properties is designed “to prevent serious
public harm,” no compensation is owed under the Takings Clause regardless of the regulation’s
effect on the property’s value. 404 S.E.2d at 899.

The United States Supreme Court reversed the judgment of the Supreme Court of South
Carolina, concluding that when a regulation denies all economically beneficial or productive use
of land, a taking has occurred that requires the payment of just compensation. The Court sent the
case back to the lower court for further proceedings to determine whether, in fact, a “total taking”
had occurred.
The Court, in rendering its decision in *Lucas*, advised that there are at least two categories of regulatory action that are compensable. The first occurs when the regulation compels the property owner to suffer a physical invasion of his property, as in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L.Ed.2d 868, 102 S.Ct. 3164 (1982), in which New York law required landlords to allow television cable companies to place their cable facilities in the landlords’ apartment buildings.

The second situation identified by the Court in *Lucas* is “where regulation denies all economically beneficial or productive use of land.” 112 S.Ct. at 2893. The Court explained the rationale for compensation in these situations as follows:

**On the other side of the balance, affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use — typically, as here, by requiring land to be left substantially in its natural state — carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.** 112 S.Ct. at 2894 – 2895.

The question then becomes how to determine whether there has been a “total regulatory taking” that must be compensated. The Court stated that the new test is that “[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with.” 112 S.Ct. at 2899.

The Court further explained:

**Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts — by adjacent landowners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complimentary power to abate nuisances that affect the public generally, or otherwise.** 112 S.Ct. at 2900.

In short, it is necessary to determine whether what was purchased had a limitation inherent in its title under the state’s law of property and nuisance restrictions such as the limitation imposed by the regulation in question.

The Court gave an example of a situation in which the property owner could not have used the property for the use being denied by the legislation:

**On this analysis, the owner of a lake-bed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others’ land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements**
from its land upon discovery that the plant sits astride an earthquake fault. Such regulatory action may well have the effect of eliminating the land’s only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles. The use of these properties for what are now expressly prohibited purposes was always unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit. [Emphasis in original.] 112 S.Ct. at 2900 – 2901.

Further, once the plaintiff has satisfied a prima facie case of denial of all economically viable use of property, the burden shifts to the state to go forward with proving that the legislation is consistent with the public interest and an analysis of, among other things, the degree of harm to public lands and resources or adjacent private property posed by the claimant’s proposed activities. The Court said of its new rule:

When, however, a regulation that declares “off-limits” all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.

The “total taking” inquiry we require today will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant’s proposed activities . . . the social value of the claimant’s activities and their suitability to the locality in question . . . and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike. . . .

. . . The question, however, is one of state law to be dealt with on remand. We emphasize that to win its case South Carolina must do more than proffer the legislature’s declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim. . . . Instead, as it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found. [Citations omitted.] 112 S.Ct. at 2901 – 2902.

The test imposed by the Supreme Court would involve an analysis of each state’s nuisance law and a determination of whether the proscribed activity is one that would constitute a nuisance under that law. This burden of proof appears to shift to the state once it has been determined through an analysis not clearly spelled out by the Court that there has been a deprivation of all economically viable use.

(5) [7.41] Dolan v. City of Tigard

In Dolan v. City of Tigard, 512 U.S. 374, 129 L.Ed.2d 304, 114 S.Ct. 2309 (1994), the Supreme Court concluded that the City of Tigard’s conditions that related to the prevention of
flooding and the reduction of traffic congestion in the central business district were the type of legitimate public purposes previously upheld by the Court and would satisfy the “essential nexus” criteria of \textit{Nollan v. California Coastal Commission}, 483 U.S. 825, 97 L.Ed.2d 677, 107 S.Ct. 3141 (1987). See §7.39 above. However, the Court expanded the takings concept found in \textit{Nollan} into a two-step analysis:

a. A court must determine whether an “essential nexus” exists between a legitimate local governmental interest and the condition for obtaining a permit.

b. If such an “essential nexus” does exist, then the court must determine whether the required condition imposed on the property owner and the governmental interest bear a “rough proportionality” to each other. 114 S.Ct. at 2312, 2317.

In \textit{Dolan}, the plaintiff was the owner of a plumbing and electrical supply store located on Main Street in the central business district of Tigard, Oregon, who sought to expand her store from 9,700 square feet on the eastern side of a 1.67-acre parcel to 17,600 square feet, including the paving of a 39-space parking lot. The city planning commission required that the plaintiff dedicate a portion of her property within a 100-year floodplain as improvement of a storm drainage system and that she dedicate an additional 15-foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway. The commission concluded that the floodplain dedication was reasonably related to the petitioner’s request to intensify the use of the site, given the increase in the impervious surface. The commission also found that the creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation “could offset some of the traffic demand on [nearby] streets and lessen the increase in traffic congestion.” 114 S.Ct. at 2315. These conditions were a furtherance of the city’s master drainage plan and the city’s transportation study of the central business district, both of which were adopted pursuant to the State of Oregon’s requirement that all Oregon cities adopt comprehensive land use plans consistent with statewide planning goals.

The Court, in an opinion written by Chief Justice Rehnquist, confirmed that an “essential nexus” existed between “preventing flooding along Fanno Creek and limiting development within the creek’s 100-year floodplain.” 114 S.Ct. at 2318. The Court also concluded that the city’s attempt to reduce traffic congestion by providing for alternative means of transportation through the use of a pedestrian/bicycle pathway provided a useful alternative means of transportation for workers and shoppers. However, the second part of the new standard required determining whether “the degree of the exactions demanded by the city’s permit conditions bear the required relationship to the projected impact of petitioner’s proposed development.” \textit{Id.}

The Court first had to decide what “degree” was to be required. The Court rejected generalized statements as to the necessary connection between the required dedication and the proposed development, stating that they seemed to be simply too lax. On the other hand, the Court also rejected the “specifically and uniquely attributable” test enunciated by the Illinois Supreme Court in \textit{Pioneer Trust & Savings Bank v. Village of Mount Prospect}, 22 Ill.2d 375, 176 N.E.2d 799 (1961). 114 S.Ct. at 2319. The Court also decided not to accept the “reasonable relationship” test adopted by a majority of state courts because it thought the term was “confusingly similar” to the term “rational basis,” which describes the “minimal level of scrutiny
under the Equal Protection Clause of the Fourteenth Amendment.” *Id.* The Court then freshly minted the test called “rough proportionality,” of which “[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.” 114 S.Ct. at 2319 – 2320.

Note that the burden under the Court’s “rough proportionality test” lies with the municipality to demonstrate that this test has been satisfied. The Court commented on Justice Stevens’ having taken the majority to task in his dissent for placing the burden on the city to justify the required dedication:

*He is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. . . . Here, by contrast, the city made an *adjudicative* decision to condition petitioner’s application for a building permit on an individual parcel. In this situation, the burden properly rests on the city.* [Emphasis added.] [Citations omitted.] 114 S.Ct. at 2320 n.8.

What an “adjudicative decision” is almost seems to be in the eye of the beholder. In *Dolan*, the requirements being imposed related to a particular parcel of land, as is the case in every land use application process. However, these requirements were predicated on comprehensive plans for the development of the municipality that were necessitated by the state’s requirement that the municipality adopt a comprehensive land use management program, and the master plans were most certainly legislative in nature. Simply applying the legislation to the particular parcel of land could hardly be deemed “adjudicative” in a zoning context. Otherwise, every decision related to the application of a zoning ordinance could be deemed “adjudicative” and not legislative, which is hardly the case. In other words, unless the Court was prepared to hold the comprehensive plan that mandated the dedication to be unconstitutional, the requirements imposed on the plaintiff in *Dolan* simply flowed from the prior legislative determinations.

In any event, the burden of proof shifted to the city, at which point the *Dolan* Court, in analyzing the evidence, stated, “The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control,” and “It is difficult to see why recreational visitors trampling along petitioner’s floodplain easement are sufficiently related to the city’s legitimate interest in reducing flooding problems along Fanno Creek, and the city has not attempted to make any individualized determination to support this part of its request.” 114 S.Ct. at 2320 – 2321.

In response to the dissenting opinion of Justice Peterson of the Oregon Supreme Court that “the findings of fact that the bicycle pathway system ‘*could* offset some of the traffic demand’ is a far cry from a finding that the bicycle pathway *will*, or is *likely* to, offset some of the traffic demand,’ ” Chief Justice Rehnquist stated that while no precise mathematical calculation is required, the city had to make “some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demands generated.” [Emphasis in original.] 114 S.Ct. at 2322, quoting *Dolan v. City of Tigard*, 317 Or. 110, 854 P.2d 437, 447 (1993).
In the dissent by Justice Stevens, issues that will no doubt be explored in the future were raised. He pointed out that there was nothing in the record that advised the Court as to the “dollar value of [the plaintiff’s] interest in excluding the public from the greenway adjacent to her hardware business.” 114 S.Ct. at 2322. The required dedication as a condition of the approval would “provide her with benefits that may well go beyond any advantage she gets from expanding her business.” 114 S.Ct. at 2324. It could not reasonably be presumed that the discretionary benefit that the city offered was less valuable than the property interest that the plaintiff could retain or surrender at her option.

Further, Justice Stevens raised a critical issue important to developers as well as local government. Almost all of the state court cases considered by the majority involved challenges to municipal ordinances requiring developers to dedicate either a percentage of the entire parcel (usually seven percent or ten percent of the platted subdivision) or an equivalent value in cash (usually a certain dollar amount per lot) to help finance the construction of roads, utilities, schools, parks, and playgrounds. The various state courts, including the Illinois Supreme Court, have not indicated that the transfer of an interest in realty was any more objectionable than a cash payment. Instead, “the courts uniformly examined the character of the entire economic transactions.” Id.

Justice Stevens pointed out that “takings jurisprudence ‘does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.’ ” Id., quoting Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 57 L.Ed.2d 631, 98 S.Ct. 2646, 2662 (1978). Justice Stevens, quoting John D. Johnston, Jr., Constitutionality of Subdivision Control Exactions: The Quest for a Rationale, 52 Cornell L.Q. 871, 923 (1967), further argued that by looking at only one aspect of the property owner’s “bundle of property rights” instead of the entire economic transaction, the majority had lost the proper focus in this type of case:

The subdivider is a manufacturer, processor, and marketer of a product; land is but one of his raw materials. In subdivision control disputes, the developer is not defending hearth and home against the king’s intrusion, but simply attempting to maximize his profits from the sale of a finished product. As applied to him, subdivision control exactions are actually business regulations. 114 S.Ct. at 2325.

It should be sufficient, according to the view adopted by the minority, “if the municipality can demonstrate that its assessment of financial burdens against subdividers is rational, impartial, and conducive to fulfillment of authorized planning objectives.” Id., quoting Johnston, supra, 52 Cornell L.Q. at 917.

Since the property in Dolan was a floodplain and would simply be used for detention purposes, Justice Stevens commented that “it seems likely that potential customers ‘trampling along petitioner’s floodplain’ . . . are more valuable than a useless parcel of vacant land. Moreover, the duty to pay taxes and the responsibility for potential tort liability may well make ownership of the fee interest in useless land a liability rather than an asset.” [Citation omitted.] 114 S.Ct. at 2326.
If one were to adopt the economic analysis referred to earlier in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L.Ed.2d 798, 112 S.Ct. 2886 (1992) (see §7.40 above), one could well conclude that in balancing the costs, the plaintiff in *Dolan* would be in a superior position if, in fact, she had dedicated the land as requested. Since the land had no apparent value and may well have subjected her to liability, simply analyzing the issue in terms of cost would suggest upholding the constitutionality. In other words, there is no taking because the plaintiff is better off dedicating property that is a liability to her.

While some commentators may make the comparison of the cost of the exaction with the potential gain from getting the permit, in *Dolan*, it is necessary first to consider that, given the water runoff created by the plaintiff’s expansion, she would, in fact, be causing harm to surrounding properties and would have had to make reasonable accommodation as to the drainage. Since the land in question would be used to offset the drainage problem created by the construction, yielding title would serve as a benefit to the property owner in this particular case, and the comparison between the cost of the exaction and the gains obtainable from getting a permit must first be modified by determining the cost of the exaction. In *Dolan*, it would be a negative cost.

The question of who bears the costs of public improvements has historically not been answered by saying that the government must use public funds for public improvements. Instead, those who are in fact creating or exacerbating the need for the public improvement should bear the burden. Overburdening the school systems or the road systems is in fact a harm to the public at large.

Clearly, the last has not been heard from the United States Supreme Court on the question of exactions. Given the narrow majority of this foray and given the changing economic climate within local governments, it may well be expected that there is much more to be said.


The most recent Supreme Court decision in the takings arena is the decision in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 161 L.Ed.2d 876, 125 S.Ct. 2074 (2005). In *Lingle*, Chevron challenged a Hawaii statute that limited the amount of rent oil companies could charge dealers leasing company-owned service stations. Chevron filed suit seeking a declaration that the rent cap effected an unconstitutional taking. 125 S.Ct. at 2075. The district court held and the Ninth Circuit affirmed that the legislation was an unconstitutional taking because the statute did “not substantially advance Hawaii’s asserted interest in controlling retail gas prices.” Id.

The Supreme Court reversed, holding that in a takings analysis, an inquiry into whether a government’s regulation of private property substantially advances a legitimate state interest is not an appropriate test for identifying compensable regulatory takings. 125 S.Ct. at 2078.

The Supreme Court stated that there are only three types of governmental takings that require a property owner to be justly compensated. The first taking occurs when a government requires an owner to suffer a permanent, physical invasion of his property no matter how minor, which is known as a “Loretto taking.” 125 S.Ct. at 2076, citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L.Ed.2d 868, 102 S.Ct. 3164 (1982). See §7.36 above. Another type of
taking occurs when a government regulation completely deprives an owner of all economically beneficial use of his property, which has come to be known as a “Lucas taking.” 125 S.Ct. at 2076, citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 120 L.Ed.2d 798, 112 S.Ct. 2886 (1992). See §7.40 above. The third type of taking is a partial regulatory taking, which is governed by the standards set forth in Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 57 L.Ed.2d 631, 98 S.Ct. 2646 (1978), known as a “Penn Central taking.” 125 S.Ct. at 2076.

The Court stated that the “substantially advances” theory could not be another type of taking as it

reveals nothing about the magnitude or character of the burden a particular regulation imposes upon private property rights or how any regulatory burden is distributed among property owners. Thus, this test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property; it is tethered neither to the test of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause. . . . [and] . . . would require courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for which they are not well suited. [Emphasis in original.] Id.

The Court went on to say that there was no need to disturb any of its prior holdings as none of those holding were predicated on the “substantially advances” inquiry. 125 S.Ct. at 2077.

7.43 Seventh Circuit and Illinois Opinions

In Illinois, the Supreme Court has considered whether a former state enabling statute, Ill.Rev.Stat. (1987), c. 121, ¶5-608(a) (repealed by P.A. 86-97 (eff. July 26, 1989)), and its replacement, §5-904 of the Road Improvement Impact Fee Law, 605 ILCS 5/5-904, and three DuPage County ordinances that, pursuant to these statutes, imposed transportation impact fees on new development violated the Takings Clause of Article I, §2, of the Illinois Constitution. Northern Illinois Home Builders Ass’n v. County of DuPage, 165 Ill.2d 25, 649 N.E.2d 384, 208 Ill.Dec. 328 (1995) (Northern Illinois Home Builders II), aff’d in part, rev’d in part 251 Ill.App.3d 494, 621 N.E.2d 1012, 190 Ill.Dec. 559 (2d Dist. 1993) (Northern Illinois Home Builders I). Utilizing the two-part inquiry of Dolan v. City of Tigard, 512 U.S. 374, 129 L.Ed.2d 304, 114 S.Ct. 2309 (1994) (see §7.41 above), the court in Northern Illinois Home Builders II first held that an “essential nexus” existed between the government’s legitimate need to prevent further traffic congestion and the exaction demanded to pay for road improvements to ease that congestion. 649 N.E.2d at 389. However, the court held that the earlier state enabling statute failed the second prong of the inquiry because the required degree of connection between the exaction and the projected impact of the new development was lacking. Despite Dolan’s “proportional impact” test, the Illinois Supreme Court agreed with and reiterated the statement by the appellate court in Northern Illinois Home Builders I requiring a more demanding degree of connection. 649 N.E.2d at 389. Quoting Pioneer Trust & Savings Bank v. Village of Mount Prospect, 22 Ill.2d 375, 176 N.E.2d 799, 802 (1961), the appellate court had held that for the impact fees to pass constitutional muster, “the need for road improvement impact fees must be
'specifically and uniquely attributable' to the new development paying the fee.” 621 N.E.2d at 1019. Because nothing in the earlier enabling statute restricted the expenditure of funds collected to deficiencies created by the new development providing the funds, the Supreme Court held the earlier statute, and any ordinances adopted pursuant to it, unconstitutional. 649 N.E.2d at 397.

The Seventh Circuit seems to require that the restriction be so severe as to affect either “all” uses or an “essential” use of the property. In Barbian v. Panagis, 694 F.2d 476 (7th Cir. 1982), the court considered a homeowner’s challenge of a variation granted by the City of Milwaukee from the strict requirements of a pollution control ordinance so as to permit an industrial user to drive trucks across a driveway adjacent to the plaintiff’s single-family residence. The noise level of the trucks exceeded that permitted without the variation under the pollution control ordinance. In holding that the variation did not constitute a deprivation sufficient to be a taking under the Fifth and Fourteenth Amendments to the U.S. Constitution, the Barbian court stated:

**Rather than merely prevent the most beneficial use, government action must deny an individual “all” or an “essential” use of his property before a confiscation occurs. . . . A property owner must establish that the right lost was “so essential to the use or economic value of [the] property that [a] state-authorized limitation of it amounted to a ‘taking.’”** [Citations omitted.] 694 F.2d at 484, quoting Pruneyard Shopping Center v. Robins, 447 U.S. 74, 64 L.Ed.2d 741, 100 S.Ct. 2035, 2042 (1980).

The Barbian court also analyzed Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 73 L.Ed.2d 868, 102 S.Ct. 3164 (1982), as well as certain other U.S. Supreme Court opinions and concluded that the resolution of the question of whether a particular regulation constitutes a taking depends on the following factors:

1. the economic impact of the intrusion;
2. the degree of interference with investment-backed expectations; and
3. the physical rather than purely regulatory nature of the invasion.

The court further pointed out that the Supreme Court, in considering these factors, has recognized that none is necessarily paramount and it really becomes a matter of weighing all of them in the context of the regulation and the land use.

It should also be noted that the court did point out that a civil rights action under 42 U.S.C. §1983 does not necessarily provide a property owner with a forum in which to question the merits of the municipality’s regulation but is rather limited to a determination of whether the decision or regulation was arbitrary and capricious and thereby deprived the plaintiff of property without due process of law. This can also be different from the question of whether the regulation or decision, which may not be a violation of §1983 (i.e., it may not be unreasonable, arbitrary, or capricious), still constitutes a taking of the individual’s property without just compensation in violation of the provisions of the Fifth and Fourteenth Amendments. In Loretto, for example, the regulation concerning cable television wires may have been a perfectly proper exercise of the police powers
but, at the same time, in its application, may have constituted, and indeed was adjudicated to constitute, a taking within the meaning of the Fifth and Fourteenth Amendments so as to warrant compensation for the property owner.

Significantly, the Illinois Supreme Court has touched on the issue in *Harris Trust & Savings Bank v. Duggan*, 95 Ill.2d 516, 449 N.E.2d 69, 70 Ill.Dec. 195 (1983), which involved an action brought by a property owner seeking a writ of mandamus to compel the issuance of demolition permits and a declaratory judgment that a certain zoning ordinance downzoning the subject property was unconstitutional and void and that the rezoning of the property constituted a taking for public use for which the owner was entitled to just compensation. In particular, *Harris Trust* involved the Kellogg mansion complex in the 2900 block of North Lake Shore Drive in Chicago, which the plaintiff had entered into a contract with the Kellogg Trust to purchase, subject to the purchaser’s right to develop the property in accordance with R-8 (high-rise) zoning. The permits were issued to demolish the mansions located on the subject property but were revoked the following day. In addition, the city enacted an ordinance downzoning the property from R-8 to R-5 (medium rise).

The trial court, the appellate court, and the Illinois Supreme Court all held that the zoning regulations were invalid insofar as they deprived the property owner of the highest and best use of the subject property. The interesting nuance of this case is that the trial court, as part of the judgment order, held that the property was taken without due process or just compensation. The case proceeded to trial on the theory of inverse condemnation. The trial court determined that the plaintiff had been deprived of all reasonable use of the property and held that this denial constituted a taking requiring payment of just compensation in the amount of $3.65 million. However, the court did not enter the money judgment because the city was “unwilling” to acquire the property and compensate the plaintiff. 449 N.E.2d at 71. Instead, the court entered a declaratory judgment declaring the landmark ordinance unconstitutional and void.

The Illinois Supreme Court’s opinion in *Harris Trust* makes reference to *Agins v. City of Tiburon*, 447 U.S. 255, 65 L.Ed.2d 106, 100 S.Ct. 2138 (1980), as well as the court of appeals opinion in *Amdur v. City of Chicago*, 638 F.2d 37 (7th Cir. 1980). The Illinois Supreme Court seemed to state that these cases do not negate the possibility of awarding just compensation when a property owner is not permitted to use his or her property for its highest and best use. This statement has suggested that perhaps a denial of the highest and best use by a zoning ordinance is sufficient to permit an action for taking even though the property owner has not been deprived of “all” or an “essential” use of his or her property as seems to be required by the Seventh Circuit holdings in *Barbian* and *Amdur*. It is not clear whether state standards for determining if a taking has occurred are coterminous with federal standards. *St. Lucas Ass’n v. City of Chicago*, 212 Ill.App.3d 817, 571 N.E.2d 865, 156 Ill.Dec. 885 (1st Dist. 1991). The court in *St. Lucas* made clear, however, that even though the ordinance in question was found to be unconstitutional insofar as it deprived the plaintiff of the highest and best use of the property, there was not the equivalent of a taking since the property might still have been developed for other uses under the existing zoning classification. There was no testimony to establish that all other uses that might provide some reasonable return to the property owner were not feasible under the existing zoning. Absent such a showing, there could be no taking.
c. [7.44] Right to Jury Trial in an Inverse Condemnation Case

The U.S. Supreme Court in City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 143 L.Ed.2d 882, 119 S.Ct. 1624 (1999), held, in an opinion authored by Justice Kennedy, that property owners who file a civil rights suit under 42 U.S.C. §1983 seeking compensation for an alleged taking of their property have a right to jury trial under the Seventh Amendment to the U.S. Constitution in the extremely limited context of a federal claim alleging that a state had both (1) taken property within the meaning of the Fifth Amendment, and (2) provided no procedure by which a developer could recover compensation for that taking. The Court then upheld the jury’s award on procedural grounds — the fact that the city had not objected to the jury instructions — without addressing whether the jury’s ruling on the merits was correct: “[T]he disputed questions were whether the government had denied a constitutional right outside the bounds of its authority, and, if so, the extent of any resulting damages. These were questions for the jury.” 119 S.Ct. at 1645.

d. [7.45] Action for Damages

River Park, Inc. v. City of Highland Park, 281 Ill.App.3d 154, 667 N.E.2d 499, 217 Ill.Dec. 410 (2d Dist. 1996), aff’d in part, rev’d in part, 184 Ill.2d 290 (1998), raises the issue of whether it is possible to sue a municipality for damages in a zoning case. It is important for the practitioner to read and closely examine the facts of River Park, which was decided on the pleadings. Based on these pleadings, it could well be concluded that the city had acted in a rather harsh and unjust manner toward the property owner. However, whether this rises to the level of a cause of action against a municipality or whether the municipality is protected by the Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/1-101, et seq., is still an issue to be considered. To bar the litigation in River Park, the trial court relied on 745 ILCS 10/2-104, which provides:

A local public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order or similar authorization where the entity or its employee is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked.

The plain language of the Act would seem to bar a tort action against a municipality for failure to issue a permit. However, the River Park court reasoned that Second District Appellate Court has consistently moved towards the position that the Act does not shield local public entities or their employees from liability for acts undertaken in bad faith or inspired by corrupt or malicious motives. We have stated that section 2-104 “does not immunize ... a public entity for enforcing or executing a law where the complaint alleges that the defendant acted wilfully and wantonly.” 667 N.E.2d at 504, quoting Firestone v. Fritz, 119 Ill.App.3d 685, 456 N.E.2d 904, 908, 75 Ill.Dec. 83 (2d Dist. 1983).
The Illinois Supreme Court, in *Henrich v. Libertyville High School*, 186 Ill.2d 381, 712 N.E.2d 298, 304, 238 Ill.Dec. 576 (1998), held with respect to 745 ILCS 10/3-108(a) that it was not going to read into the Act qualifying language that does not appear in the Act’s “plain language.” Whether a municipal body acted willfully or wantonly, the court concluded, was not an exception to the language of the Act.

The appellate court in *River Park, supra*, also considered the arguments of tortious interference with business expectancy and breach of implied contract. The breach of implied contract is interesting because it reads into the relationship between the city and the applicant an implied contract in law. There is no explanation as to how one finds the offer and acceptance. The court also goes on to state that “our contract implied-at-law holding is highly fact-specific and therefore of limited applicability.” 667 N.E.2d at 509.

5. **[7.46] Antitrust Liability**

In *Parker v. Brown*, 317 U.S. 341, 87 L.Ed. 315, 63 S.Ct. 307 (1943), the Supreme Court held that states were exempt from the application of the Sherman Anti-Trust Act, ch. 647, 26 Stat. 209 (1890). However, 35 years after *Parker*, the Supreme Court, in *City of Lafayette, Louisiana v. Louisiana Power & Light Co.*, 435 U.S. 389, 55 L.Ed.2d 364, 98 S.Ct. 1123, 1133 – 1134 (1978), decided that the Act was applicable to municipalities that, although instrumentalities of the states, did not enjoy their immunity unless the state specifically sanctioned their particular “anticompetitive activity.” In *Community Communications Co. v. City of Boulder, Colorado*, 455 U.S. 40, 70 L.Ed.2d 810, 102 S.Ct. 835 (1982), the Supreme Court decided that the *Parker* immunity did not extend to a home-rule municipality even though the municipality was granted extensive powers in local and municipal matters by the state constitution. There was no immunity from antitrust liability laws unless the conduct complained of constituted the action of the state itself in its sovereign capacity or the municipality acting in furtherance of a clearly articulated and affirmatively expressed state policy. Home rule was not in and of itself equated with state action immunity.

As a result of these decisions, municipalities and municipal officials were faced with defending themselves against numerous cases filed against them challenging a myriad of conduct ranging from cable television rights to waste disposal contracts to the acquisition of lands by a city for airport use. *Affiliated Capital Corp. v. City of Houston*, 700 F.2d 226 (5th Cir. 1983); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 85 L.Ed.2d 24, 105 S.Ct. 1713 (1985), aff’g 700 F.2d 376 (7th Cir. 1983); *Pueblo Aircraft Service, Inc. v. City of Pueblo, Colorado*, 679 F.2d 805 (10th Cir. 1982).

A $2.1 million damage award was entered against Mayor McConn of Houston, Texas, in *Affiliated Capital Corp., supra*, despite the mayor’s argument that the law regarding a municipal official’s liability for antitrust violations was unsettled in 1978 and he therefore could not have known what conduct was proper under the law: “It is not relevant whether the official knows he can be held liable for a particular violation of the antitrust law, only whether a clearly established violation exists.” 700 F.2d at 237.
In answer to what amounted to outrage by municipal officials around the country, Congress enacted the Local Government Antitrust Act of 1984, Pub.L. No. 98-544, 98 Stat. 2750, which amended the Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified generally at 15 U.S.C. §12, et seq., and 29 U.S.C. §§52 – 53), to provide that no damages, interest on damages, costs, or attorneys’ fees may be recovered under §4, §4A, or §4C of the Clayton Act (15 U.S.C. §§15, 15a, 15c) from any local government or its official or employee acting in an official capacity. 15 U.S.C. §35(a). This change in the law does not, however, apply retroactively unless “the defendant establishes and the court determines, in light of all the circumstances, including the stage of litigation and the availability of alternative relief under the Clayton Act, that it would be inequitable not to apply this subsection to a pending case.” 15 U.S.C. §35(b).

This legislation does not, however, prohibit an action to enjoin a municipality from conduct that violates the antitrust laws. There is a difference between obtaining an injunction and seeking money damages. Furthermore, §5 of the Local Government Antitrust Act of 1984 overturned the ban on antitrust action by the Federal Trade Commission against local governments that had been enacted into law by §510 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1985, Pub.L. No. 98-411, 98 Stat. 1545, on August 30, 1984. This means that the Federal Trade Commission may file lawsuits against municipalities.

However, Town of Hallie, supra, made it clear that a municipality may be immune from any portion of the federal antitrust laws under the state action exemption if the activities in question were authorized by the state. Town of Hallie involved a suit by unincorporated townships in Wisconsin against the City of Eau Claire, which claimed that the city had violated the Sherman Anti-Trust Act by acquiring a monopoly over the provision of sewage treatment services in the area and by tying the provision of services to the provision of sewage collection and transportation services. The city refused to supply sewage treatment services to the towns but supplied the services to individual landowners in their area if a majority of the individuals in the area voted by referendum to have their homes annexed to the city and to use its sewage collection and transportation services. The Supreme Court held that that the city was exempt from the antitrust provisions pursuant to a clearly articulated state policy found in the Wisconsin statutes that granted to the municipality the power to construct and maintain sewage systems, to describe the district to be served, and to refuse to serve unannexed areas. The Court found that the statutes were not merely neutral as to state policy but clearly contemplated that a city might engage in what would otherwise be construed as anticompetitive conduct. The Court held that the legislation in question does not have to state in so many words that it intends for the delegated action to have anticompetitive effects as long as the clear policy to be derived from the statutes is that competition might be displaced through regulation of a particular area by the municipality providing sewage services.

The Illinois legislature also acted to exempt municipalities from antitrust liability for engaging in statutorily authorized activities. P.A. 84-1050 (eff. July 1, 1986) amended the Illinois Municipal Code to provide that the state policy is “that all powers granted, either expressly or by necessary implication, by this Code, by Illinois statute, or the Illinois Constitution to municipalities may be exercised by those municipalities, and the officers, employees and agents of each notwithstanding effects on competition.” 65 ILCS 5/1-1-10. Also, with P.A. 83-929 (eff.
Nov. 3, 1983), the Illinois legislature amended the Illinois Antitrust Act, 740 ILCS 10/1, *et seq.*, to make it clear that when a village engages in conduct authorized by statute, it cannot be subjected to antitrust liability:

> When the wording of this Act is identical or similar to that of a federal antitrust law, the courts of this State shall use the construction of the federal law by the federal courts as a guide in construing this Act. However, this Act shall not be construed to restrict the exercise by units of local government or school districts of powers granted, either expressly or by necessary implication, by Illinois statute or the Illinois Constitution. 740 ILCS 10/11.

V. **KLAEREN AND JUDICIAL REVIEW UNDER §11-13-25**

A. [7.47] Is the Decision by the Village Board To Be Considered Administrative or Legislative?

The Illinois Supreme Court in *People ex rel. Klaeren v. Village of Lisle*, 202 Ill.2d 164, 781 N.E.2d 223, 269 Ill.Dec. 426 (2002), left no doubt that a hearing for a special use is to be considered for constitutional purposes as administrative. The court stated:

> The municipal body acts in a fact-finding capacity to decide disputed adjudicative facts based upon evidence adduced at the hearing and ultimately determines the relative rights of the interested parties. As a result, those parties must be afforded due process rights normally granted to individuals whose property rights are at stake. 781 N.E.2d at 234.

However, in 2006, the General Assembly passed S.B. 94 as a method of review for zoning decisions. The statute provides, in part:

> Any decision by the corporate authorities of any municipality, home rule or non-home rule, in regard to any petition or application for a special use, variance, rezoning, or other amendment to a zoning ordinance shall be subject to de novo judicial review as a legislative decision, regardless of whether the process in relation thereto is considered administrative for other purposes. 65 ILCS 5/11-13-25(a).

Therefore, the Illinois legislature has stated that the review is to be legislative regardless of the actual process followed in the municipality or county.

The legislative history of S.B. 94 demonstrates, however, that by passing the bill the legislature did “not intend[] to question the essential conclusions in Klaeren regarding the legal character of special use permit decisions or due process.” 94th Ill.Gen.Assem., House Proceedings, pp. 6 – 8 (Apr. 25, 2006) (statements of Rep. Mathias). This pronouncement by the legislature in passing the Act has caused considerable confusion for the zoning practitioner. The cases that follow the passage of this statute reflect this confusion.
As far back as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178, 2 L.Ed. 60 (1803), the Court stated, “If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.”

For a full discussion of the distinction between legislative and judicial authority, see *Millineum Maintenance Management, Inc. v. County of Lake*, 384 Ill.App.3d 638, 894 N.E.2d 845, 323 Ill.Dec. 819 (2d Dist. 2008). In *Millineum Maintenance*, the court quoted directly from the Illinois Constitution, which provides that the “legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.” ILL.CONST. art. II, §1. “It is the role of the judiciary to interpret the law and the Constitution.” 894 N.E.2d at 857.

It is clear beyond any question that the Illinois legislature has no authority to overturn a constitutional determination by the Illinois Supreme Court. To the extent that the nature of a proceeding bears on the applicability of constitutional rights of due process, it is the nature of that proceeding that must prevail and not a pronouncement by the Illinois legislature. This point was articulated in *Gallik v. County of Lake*, 335 Ill.App.3d 325, 781 N.E.2d 522, 525, 269 Ill.Dec. 725 (2d Dist. 2002), in which the court stated:

> It is the nature of the proceeding, not the identity of the body assuming to act in the matter, which should determine the necessity for standards. Otherwise basic constitutional protections can readily be circumvented by the simple expedient of placing quasi-judicial functions in a legislative body.

Despite this separation of power principle, 65 ILCS 5/11-13-25 appears to be recharacterizing what the court in *Klaeren* found to be quasi-judicial functions as legislative, at least for purposes of judicial review.

**B. Scope and Nature of Review**

1. **[7.48] Section 11-13-25 Rational-Basis Test or “Heightened Scrutiny”**

   In *Condominium Association of Commonwealth Plaza v. City of Chicago*, ____ Ill.App.3d ___, 924 N.E.2d 596, 338 Ill.Dec. 390 (1st Dist. 2009), the court considered a challenge to the validity of a zoning amendment passed by the City of Chicago changing the zoning classification of certain land to allow for the construction of a medical office building. The plaintiffs argued that the ordinance was invalid because the city had not followed its own preexisting zoning conditions and that they were denied procedural and substantive due process in connection with the plan commission hearings on the ordinance.

   The Illinois appellate court considered 625 ILCS 5/11-13-25 in the context of the standard of review. The court stated:

   > Plaintiffs argue that, by passing the [institutional planned development] ordinance in violation of other provisions of the Chicago Zoning Ordinance, the city has
denied them the due process protections guaranteed in section 11-13-25(b). Plaintiffs further imply in their brief that since zoning decisions are “subject to de novo judicial review” under section 11-13-25(a), we are to accord no deference to the decision of the Chicago city council in conducting our analysis of their claim.

However, such a view represents a misunderstanding of the scope and purpose of section 11-13-25. This section must be understood as an attempt to nullify the effect of the court’s decision in People ex rel. Klaeren v. Village of Lisle, 202 Ill.2d 164, 269 Ill.Dec. 426, 781 N.E.2d 223 (2002), which held that a municipality was acting in an administrative (otherwise known as a quasi-judicial) capacity rather than in a legislative capacity in ruling on a special use permit application. . . . The distinction is significant because the two types of decisions are subject to different standards of review: Legislative decisions are subject only to rational basis review as long as they do not implicate a fundamental constitutional right . . . while administrative decisions are subject to heightened scrutiny. . . . Specifically, when an administrative ruling on a zoning permit application is reviewed, the decision “may be reviewed to determine whether the decision was made in compliance with any criteria listed in the zoning ordinance.” . . . By contrast, since legislative decisions are reviewed for arbitrariness, such compliance is not dispositive, but merely a factor to be considered. . . .

As mentioned, the court in Klaeren ruled that a municipality granting a special use permit was taking administrative action and therefore subject to a heightened level of review. . . . The legislature expressly responded to this decision by classifying every adopted zoning amendment as a legislative act rather than an administrative one. . . . That is, the phrase “de novo” in section 11-13-25 cannot be read in isolation, but must be understood in its context — “‘de novo review as a legislative decision’” — which prescribes the standard of review as that which is applicable to legislative decisions. (Emphasis in original.) . . . Consequently, the IPD ordinance remains subject to rational basis review, despite the fact that plaintiffs have brought a claim under section 11-13-25. For the reasons discussed above, it passes muster under that standard.” [Emphasis added.] [Citations omitted.] 924 N.E.2d at 608 – 610.

2. [7.49] Applicability of the LaSalle Standards to §11-13-25

The court in Dunlap v. Village of Schaumburg, 394 Ill.App.3d 629, 915 N.E.2d 890, 333 Ill.Dec. 819 (1st Dist. 2009), advised that it is the standards in LaSalle National Bank of Chicago v. County of Cook, 12 Ill.2d 40, 145 N.E.2d 65 (1957), that are applicable in a review of a case brought pursuant to 65 ILCS 5/11-13-25. It seems clear from the Dunlap decision that additional evidence was presented on the motions for summary judgment other than simply the record that had been made before the village. Indeed, attached to the motions for summary judgment were affidavits as well as copies of depositions, including the depositions of expert witnesses. The court then determined:

We have concluded that the sole standard to be applied in determining the validity of the variance at issue is the constitutional standard articulated in LaSalle,
namely, whether the challenged variance is “arbitrary, capricious or unrelated to the public health, safety and morals” (LaSalle, 12 Ill.2d at 46-47, 145 N.E.2d at 69.) Based on the evidence presented before the trial court, the determination of this issue leaves no room for a question of material fact. 915 N.E.2d at 907.

The practitioner might note that in some instances it may be easier for an applicant to satisfy the LaSalle standards by showing that what the applicant is seeking is consistent with the surrounding neighborhood rather than by relying on the record and that it may be more difficult for a governmental body to show that the proposed use should not be permitted.

VI. [7.50] HOME-RULE MUNICIPALITY NEED NOT FOLLOW ITS OWN ORDINANCES

Dunlap v. Village of Schaumburg, 394 Ill.App.3d 629, 915 N.E.2d 890, 333 Ill.Dec. 819 (1st Dist. 2009), involved a challenge to a variation granted to a property owner to allow for the construction of a patio room in a backyard. A neighbor argued that the grant of the variation was not in accord with the standards for variations in the Village of Schaumburg Zoning Code. The village argued that the variation was passed by ordinance, that it was a home-rule municipality, and, therefore, that it was not bound by the restrictions contained in the zoning enabling statute, 65 ILCS 5/11-13-1, et seq. The court in Dunlap appeared to agree that as a home-rule municipality, the village could overturn its own ordinances or even the standards in the zoning enabling statute by passing an ordinance inconsistent with its own zoning standards. 915 N.E.2d at 903. The court in Dunlap then stated:

As discussed above, zoning variances are classified as legislative acts for purposes of judicial review under section 11-13-25(a) (65 ILCS 5/11-13-25(a) (West 2006)), which means that they will be upheld as long as they represent a rational means to accomplish a legitimate purpose . . . That is, a variance will not be struck down unless it is found to be arbitrary, unreasonable, and bearing no substantial relation to the public health, safety, morals, comfort, or general welfare. . . . Accordingly, a legislative body passing on a variance or other zoning ordinance is not strictly required to conform to its own standards as long as it meets this reasonableness test. . . . Therefore, contrary to Dunlap’s assertion, the Village’s failure to comply with its internal requirement that a variance be supported by a finding of practical difficulties or particular hardship is not, in itself, sufficient to invalidate the variance. [Citations omitted.] 915 N.E.2d at 904 – 905.

VII. [7.51] FORM OF THE ORDER — ROLE OF THE COURTS

The role the courts play in resolving zoning disputes has long been a subject of controversy. The basic dichotomy has rested on the notion that courts do not have the power to legislate and that they may do nothing more than declare a particular ordinance to be invalid as was held by cases following LaSalle National Bank v. City of Chicago, 4 Ill.2d 253, 122 N.E.2d 519 (1954). The result of such an order would be to leave the property unzoned. At the same time, other cases
had affirmed orders enjoining a municipality from interfering with any use of the property that would be permitted in the zoning classification that was sought by the plaintiff. *Tower Cabana Club, Inc. v. City of Chicago*, 5 Ill.2d 11, 123 N.E.2d 834 (1955). In *Sinclair Pipe Line Co. v. Village of Richton Park*, 19 Ill.2d 370, 167 N.E.2d 406 (1960), the court sought to resolve the conflict between these lines of authority by attempting to avoid the problem of leaving the property unzoned as a result of an order declaring a zoning ordinance void and the resultant problem that the municipality might rezone the property to another use classification but still exclude the one that the plaintiff sought, thus making further litigation necessary. The court felt that all of this might be avoided if the plaintiff could secure the entry of an order by the presentation of evidence favoring a particular proposed use so that the order could be framed in terms of holding the ordinance void insofar as it precluded the particular use:

In our opinion, it is appropriate for the court to avoid these difficulties by framing its decree with reference to the record before it, and particularly with reference to the evidence offered at the trial. In most of the cases that have come before us in recent years, a specific use was contemplated and the record was shaped in terms of that use. In such cases the relief awarded may guarantee that the owner will be allowed to proceed with that use without further litigation and that he will not proceed with a different use. 167 N.E.2d at 411.

However, the court, by its language, did not preclude the landowner from asserting “a broader challenge in terms of a class of uses,” and it specifically held that “the decree may be shaped accordingly.” *Id.* So in *Franklin v. Village of Franklin Park*, 19 Ill.2d 381, 167 N.E.2d 195 (1960), the Illinois Supreme Court was presented with just such a broader challenge as described by *Sinclair Pipe Line*, and it upheld an order that prevented the village from interfering with the use of the property for commercial and light industrial purposes. Subsequently, in *Reeve v. Village of Glenview*, 29 Ill.2d 611, 195 N.E.2d 188 (1963), the court held that when the plaintiff limits his or her proof to establishing the unreas onableness of the existing zoning classification, the order must also be limited. When there is no evidence of the proposed use to be made of the subject property or the reasonableness of the use, then the order cannot be framed so as to permit a specific use of the subject property.

Even when the courts adopt the theory that the relief is to be framed with reference to the particular use proposed, it is still possible that the court will refuse to invalidate the applicable zoning restriction on the theory that the plaintiff’s proposed use was not shown to be reasonable. *Gedmin v. City of Chicago*, 88 Ill.App.2d 294, 232 N.E.2d 573 (1st Dist. 1967); *Seith v. City of Wheaton*, 89 Ill.App.2d 446, 232 N.E.2d 173 (2d Dist. 1967).

In the midst of this confusion, the Illinois appellate court in *LaSalle National Bank v. City of Chicago*, 130 Ill.App.2d 457, 264 N.E.2d 799 (1st Dist. 1970), sought to bring some order out of chaos. The court reviewed a judgment order in which the lower court held the ordinance invalid and then proceeded to rule that the plaintiff could construct any use within an R-3 zone, a multiple residential designation. The court, in affirming the order in part and reversing it in part, stated:

The issue here is how a decree in a zoning case is to be framed. While the courts possess the authority to pass upon the validity of a zoning ordinance, this authority
does not include the power to determine the ultimate zoning classification. . . . Since the practical effect of declaring an existing zoning ordinance void in regard to a particular piece of property is to leave that piece of property in an unzoned condition, the court may frame its order in reference to a specific proposal before it and find that the contemplated use would be a reasonable one. . . . However, the court must exercise this authority with extreme care to avoid any encroachment into the legislative function of zoning. . . . The most that a court may do after declaring an existing zoning ordinance void as applied to certain property is to find from clear evidence before it that the specific use contemplated by the owner is reasonable and may be permitted. . . . Consequently, the decree of the trial court should be framed with reference to the evidence of the intended use and permit such use only, rather than being framed with reference to a multiple family zoning classification. [Citations omitted.] 264 N.E.2d at 801 – 802.

One court has held that when an order is entered for the plaintiff based on a specific proposed use, the landowner is prevented from using the land for any other purpose, including the uses permitted under the former zoning classification. Cities Service Oil Co. v. Village of Oak Brook, 84 Ill.App.3d 381, 405 N.E.2d 379, 39 Ill.Dec. 626 (2d Dist. 1980). Alternatively, the court may, when it finds both the existing zoning and the proposed use unreasonable, remand the question of the proper zoning to the corporate authorities while retaining jurisdiction to grant relief to the property owner later. First National Bank of Lake Forest v. Village of Northbrook, 2 Ill.App.3d 1082, 278 N.E.2d 533 (1st Dist. 1971).

It is the author’s belief that the weight of authority requires that the order be framed with reference to a particular use and that the party challenging the zoning classification must establish the unreasonableness of the existing zoning and the reasonableness of the proposed use. The order should be so worded as to permit the particular use. For an interesting analysis of this subject, see Norwood Builders v. City of Des Plaines, 128 Ill.App.3d 908, 471 N.E.2d 634, 84 Ill.Dec. 105 (1st Dist. 1984).

A sample form of an order is reprinted in §7.85 below.

VIII. ISSUES IN DETERMINING VALIDITY OF CLASSIFICATION

A. [7.52] Reasonable Relationship to Public Health, Safety, and Welfare

The general rule of law is that a zoning classification must have a reasonable relationship to the public health, safety, welfare, or morals, and the regulations and division into districts must be reasonable and must have a fair tendency to accomplish some legitimate legislative purpose. Frost v. Village of Glen Ellyn, 30 Ill.2d 241, 195 N.E.2d 616 (1964); Regner v. County of McHenry, 9 Ill.2d 577, 138 N.E.2d 545 (1956); City of Chicago v. Sachs, 1 Ill.2d 342, 115 N.E.2d 762 (1953); Ronda Realty Corp. v. Lawton, 414 Ill. 313, 111 N.E.2d 310 (1953).
In *Frost*, the court stated:

Zoning regulations must have a real and substantial relation to the public health, safety, welfare or morals . . . and, as was observed in *City of Richmond Heights v. Richmond Heights Memorial Post Benevolent Ass’n*, 358 Mo. 70, 213 S.W.2d 479, at 480 [(1948)]: “. . . the regulation and restriction into districts must be reasonable, uniform or universal and nondiscriminatory, the restrictions having a fair tendency to accomplish or aid in the accomplishment of some purpose for which the city may exercise its power.” In the present case we see nothing essential to the protection or preservation of the public health, safety, welfare or morals, which justifies or requires the singling out of the drive-in restaurant business and according to it a different treatment than the many other uses permitted under the B-2 classification. Stated differently, we see nothing inherently different in the character of the business plaintiffs seek to establish on their property, so far as it affects the public interests, from the many other business uses that could be put there as a matter of right under the B-2 business classification. Statutory classifications, even those affected by zoning ordinances, can be sustained only where there are real differences between the classes and where the selection of a particular class, as distinguished from others, is reasonably related to the evils to be remedied by the statute or ordinance. . . .

We fail to see how a drive-in restaurant of the nature here planned is significantly more detrimental to the public health, safety, welfare or morals than a restaurant fully enclosed within four walls, or than a bakery, a candy or ice cream store, a grocery store, a meat market, a delicatessen, or a retail liquor store and many more of the sixty-two businesses permitted in B-2 districts. [Citations omitted.] 195 N.E.2d at 618 – 619.

**B. [7.53] Factors Determining Validity of Classification**

In determining whether a particular zoning classification is valid, various factors must be taken into consideration. See Ronald S. Cope, *ZONING: Factors Determining Validity of Classification*, 51 Chi.B.Rec. 192 (1970). In *LaSalle National Bank of Chicago v. County of Cook*, 12 Ill.2d 40, 145 N.E.2d 65, 69 (1957), the Illinois Supreme Court undertook a synthesis of prior zoning tests and held that, in reaching a decision, the following circumstances should be given consideration:

1. the existing uses and zoning of nearby property;
2. the extent to which property values are diminished by the particular zoning restrictions;
3. the extent to which the diminution in value of the plaintiff’s property promotes the health, safety, or general welfare of the public;
4. the relative gain to the public as compared to the hardship imposed on the individual property owner;
5. the suitability of the subject property for the zoned purposes; and

6. the length of time the property has been vacant as zoned considered in the context of land development in the area surrounding the subject property.

In *Sinclair Pipe Line Co. v. Village of Richton Park*, 19 Ill.2d 370, 167 N.E.2d 406, 411 (1960), the court added two additional factors:

1. community need for the proposed use; and

2. the care with which the community has undertaken to plan its land use development.

Superficially, these tests pose little problem. They have a beguiling simplicity that almost begs for facts to be thrown into their hopper so that the appropriate judicial determination can be sifted out. In practice, however, the refining process is much more complex.

C. [7.54] Presumption of Validity

Every zoning case is overshadowed by the doctrine that there is a presumption of validity in favor of the ordinance. The burden is on the person attacking the ordinance to overcome this presumption by clear and convincing evidence and to show that the ordinance, as applied, is without reasonable relation to the public health, safety, and welfare. *Urann v. Village of Hinsdale*, 30 Ill.2d 170, 195 N.E.2d 643 (1964).

The burden of proof in a zoning case is twofold. The property owner must prove both that the existing zoning is unreasonable and that the proposed use is reasonable. *Schultz v. Village of Lisle*, 53 Ill.2d 39, 289 N.E.2d 614 (1972); *Glenview State Bank v. Village of Deerfield*, 213 Ill.App.3d 747, 572 N.E.2d 399, 157 Ill.Dec. 330 (2d Dist. 1991); *Northern Trust Bank/Lake Forest, N.A. v. County of Lake*, 311 Ill.App.3d 332, 723 N.E.2d 1269, 243 Ill.Dec. 668 (2d Dist. 2000). It is interesting to note that in *Glenview State Bank*, the court, in determining whether the existing zoning ordinance was valid as applied to the subject property, considered not only the permitted uses in the district but also uses that would require variations and special uses, including planned unit developments.

D. [7.55] Difference of Expert Opinion

It is clearly not enough to establish a difference of opinion as to the reasonableness of the classification. On the other hand, it is not enough for a municipality simply to introduce the testimony of its expert witness to contradict the expert witness of the plaintiff. The fact that there is a difference of opinion between the experts does not mean that it is a “reasonable” difference. Only when there is a reasonable difference of opinion does the presumption of validity in favor of the ordinance act to uphold its validity. *LaSalle National Bank v. Village of Harwood Heights*, 2 Ill.App.3d 1040, 278 N.E.2d 114 (1st Dist. 1971); *Oak Forest Mobile Home Park, Inc. v. City of Oak Forest*, 27 Ill.App.3d 303, 326 N.E.2d 473 (1st Dist. 1975); *Midwest Bank & Trust Co. v. City of Chicago*, 133 Ill.App.2d 518, 273 N.E.2d 519 (1st Dist. 1971); *Schmidt v. City of Berwyn*, 134 Ill.App.3d 36, 479 N.E.2d 1199, 89 Ill.Dec. 193 (1st Dist. 1985).
In *State Bank of Countryside v. City of Chicago*, 287 Ill.App.3d 904, 679 N.E.2d 435, 223 Ill.Dec. 250 (1st Dist. 1997), the city presented no expert witnesses but rather only an alderman who was not put on as an expert witness. In contrast, the plaintiffs introduced the evidence of a land developer and general contractor, a real estate appraiser, a registered engineer, and a registered architect and certified land planner. Despite this, the trial court ruled in favor of the city, and the appellate court, in affirming the trial court, concluded, “Plaintiffs ascribe error to the court’s finding that their experts’ testimony was unpersuasive with respect to this factor, as well as the other factors. An expert’s opinion, however, is only as valid as the bases and reasons for that opinion . . . and the record supports the court’s conclusion that plaintiffs’ experts failed to provide sufficient bases for their conclusions.” [Citation omitted.] 679 N.E.2d at 444.

E. [7.56] Use of Nearby Property


At the outset, this test poses problems. First, how far is “nearby”? Is it permissible to examine the uses a block away, two blocks away, a mile away, or just across the street? In many cases, the courts have stated the oft-repeated adage that zoning must begin and end somewhere and simply because there is an apartment building across the street from the subject property does not mean that an apartment building can be built on the subject property. A street is a valid zoning demarcation line. There is much sense to this proposition since it might otherwise be impossible to establish zoning boundaries because of their constant erosion. On the other hand, the practical result of applying this rule often is, for example, the establishment of single-family homes on one side of the street and apartment buildings on the other, with apartment buildings forever banished to their side of the road. *Liberty National Bank of Chicago v. City of Chicago*, 10 Ill.2d 137, 139 N.E.2d 235 (1956); *LaSalle National Bank v. City of Evanston*, 10 Ill.App.3d 158, 293 N.E.2d 500 (1st Dist. 1972), rev’d, 57 Ill.2d 415 (1974); *Oak Park National Bank v. City of Chicago*, 10 Ill.App.3d 258, 294 N.E.2d 42 (1st Dist. 1973); *Schmidt v. City of Berwyn*, 134 Ill.App.3d 36, 479 N.E.2d 1199, 89 Ill.Dec. 193 (1st Dist. 1985); *Suhadolnik v. City of Springfield*, 184 Ill.App.3d 155, 540 N.E.2d 895, 133 Ill.Dec. 29 (4th Dist. 1989).

In addition, the question is raised as to what kinds of uses and how many of them justify the imposition of the particular use being sought by the plaintiff in a zoning case. It is clear that the Illinois legislature, in adopting the municipal zoning enabling statute, contemplated the existence of uses in any zone that are different from the uses required by the particular classification. The practitioner must make judgments in regard to how many uses different from those allowed by the ordinance exist in the area of the subject property and the effect these uses have on the subject property.
For example, two nonconforming uses a block away from the subject property might not be enough under the circumstances in the case to hold the existing ordinance invalid insofar as it precludes a similar use. However, a use of the same type desired by the plaintiff located adjacent to the subject property might well call for holding the ordinance invalid in its application to that property. In this regard, consideration should also be given to whether the particular type of use is similar to the nonconforming use with which it is being compared. It makes little sense to allow for the establishment of an apartment building in a single-family zone because there is an illegal or nonconforming grocery store next to the subject property. Some relationship must be established between the use that is sought to be imposed and the other uses in the area.

In *Cosmopolitan National Bank of Chicago v. City of Chicago*, 22 Ill.2d 367, 176 N.E.2d 795 (1961), the Illinois Supreme Court considered an action brought to declare the R-3 general residence district classification of the City of Chicago zoning ordinance invalid insofar as it prohibited the construction on the plaintiff’s property of a multiple-family use with a greater density than that permitted under the existing classification. One of the arguments advanced by the plaintiff was that there was a garage, a nonconforming use, adjacent to the plaintiff’s property. In rejecting the argument that this use militated in favor of a multifamily structure, the court stated:

> We recognize that a location immediately adjacent to a garage is not usually considered the most desirable location for a residence, but we do not think that this fact in itself, in the absence of other evidence, can be decisive. The fact that this may not be a prime location for one or two families to live does not ipso facto compel the conclusion that it is unconstitutional not to permit at least five families to live there.
> 176 N.E.2d at 798.

In *Glenview State Bank*, supra, the court upheld the residential use classification against a challenge by a developer who wished to construct a family restaurant, a savings and loan with a drive-up facility, and an office building on property located on a major arterial road at an intersection. The court reviewed the factors presented in *LaSalle National Bank of Chicago v. County of Cook*, 12 Ill.2d 40, 145 N.E.2d 65 (1957), and the factors added by *Sinclair Pipe Line Co. v. Village of Richton Park*, 19 Ill.2d 370, 167 N.E.2d 406 (1960) (see §7.53 above) and upheld the validity of the zoning. The *Glenview State Bank* court especially noted the uniform residential development within the zoning district in which the subject property was located.

F. [7.57] Spot Zoning

When a small area is zoned differently from the surrounding area, the courts may well characterize the zoning as “spot zoning” and hold it invalid. In *Concerned Citizens for McHenry, Inc. v. City of McHenry*, 76 Ill.App.3d 798, 395 N.E.2d 944, 32 Ill.Dec. 563 (2d Dist. 1979), the Second District held that the rezoning of certain properties was invalid when a six-acre parcel was rezoned from single-family to commercial, as this rezoning constituted spot zoning. The court also pointed out that a highway serves as a proper boundary line between residential and business uses. This point has been reiterated by other courts and represents a traditional view. *Bennett v. City of Chicago*, 24 Ill.2d 270, 181 N.E.2d 96, 98 (1962). *See also Thornber v. Village of North Barrington*, 321 Ill.App.3d 318, 747 N.E.2d 513, 254 Ill.Dec. 473 (2d Dist. 2001).

G. [7.58] Increased Value to Property Owner

The argument often advanced for declaring a zoning ordinance invalid is that the property would be worth more to the property owner if the property could be developed under a different classification. The courts in Illinois have indicated that this argument in and of itself is not a basis for holding a zoning ordinance invalid. In *People ex rel. Alco Dereee Co. v. City of Chicago*, 2 Ill.2d 350, 118 N.E.2d 20, 25 (1954), the court stated:

*The fact that, as plaintiff's building consultant testified, and as defendant concedes, the property in question may be more valuable if zoned for commercial use than for apartments is not decisive. . . . This fact exists in nearly every case where the intensity with which property may be used is restrained by zoning laws. The extent to which property values are changed by a zoning ordinance is, of course, a proper consideration in determining its validity, but the profit accruing to individual property owners if zoning restrictions were removed must always be weighed against the detriment to the public welfare resulting from such action.* [Citations omitted.]

*See also LaGrange State Bank v. County of Cook*, 75 Ill.2d 301, 388 N.E.2d 388, 26 Ill.Dec. 673 (1979).

In an interesting twist, increased value to a property owner has also been raised as an argument supporting the validity of existing zoning. In *Rodriguez v. Henderson*, 217 Ill.App.3d 1024, 578 N.E.2d 57, 160 Ill.Dec. 878 (1st Dist. 1991), the rezoning of a factory property to allow “work/live” residential units was challenged by owners and tenants of neighboring properties who complained that the rezoning would drive up the values of their properties so much that they would be unable to afford the increased taxes and rents that would inevitably follow. In upholding the complaint of the neighbors, the appellate court cited studies on the impact of “gentrification” on the closing of factories and job displacement by urban redevelopment.

IX. FORM OF COMPLAINT AND ANSWER

A. [7.59] Answer in Administrative Review

It is important to note in an administrative review proceeding that, under the Administrative Review Law, the record before the administrative body is to be filed as the answer in that action. Indeed, the failure to have a complete record and an effort to complete the record by filing as part
of the answer certain additional findings of fact will result in the answer’s being stricken. The administrative body can lose its case if a proper record is not filed. *Weaver v. Zoning Board of Appeals of City of Park Ridge*, 130 Ill.App.2d 1052, 264 N.E.2d 758 (1st Dist. 1970).

**B. Complaint**

1. **[7.60] Elements in Complaint**

Typically, a zoning complaint alleges the ownership and location of the subject property by the plaintiff, the zoning classification of the tract and the nature of the restriction, the character of the neighboring area, the exhaustion of local remedies, impairment of the value of the subject property by reason of the zoning restrictions, and a concluding allegation that the plaintiff is being unconstitutionally deprived of the value of his property without due process of law in contravention of both federal and state constitutions.

A sample form of a complaint is contained in §7.82 below.

2. **[7.61] Allegations Regarding Comprehensive Planning**

The increasing emphasis on comprehensive planning as an essential underpinning of the zoning process suggests that if a municipality has not based its zoning ordinance on a comprehensive plan, the complaint should allege that fact. Although the Illinois municipal zoning enabling statute does not require, as does the enabling legislation in many states, that the zoning ordinance be in accordance with a comprehensive plan, the courts are becoming aware that, to avoid arbitrariness, zoning must be based on careful planning by the community. *Sinclair Pipe Line Co. v. Village of Richton Park*, 19 Ill.2d 370, 167 N.E.2d 406 (1960). See also *Zenith Radio Corp. v. Village of Mount Prospect*, 15 Ill.App.3d 587, 304 N.E.2d 754 (1st Dist. 1973).

In *First National Bank of Highland Park v. Village of Vernon Hills*, 55 Ill.App.3d 985, 371 N.E.2d 659, 13 Ill.Dec. 724 (2d Dist. 1977), the Illinois appellate court held that the village’s zoning ordinance was entitled to a presumption of validity despite the fact that the village had not adopted a comprehensive plan.

3. **[7.62] Allegations Regarding Need or Demand for Requested Classification**

An additional allegation that may be appropriate in some types of zoning cases is a claim that there is a need or demand in the community involved for the particular classification or use that the property owner has in mind. *See Hoffman v. City of Waukegan*, 51 Ill.App.2d 241, 201 N.E.2d 177 (3d Dist. 1964). For example, a complaint alleging the unreasonableness of a zoning ordinance that prohibited apartments on the plaintiff’s property might allege that there was a scarcity of multiple-family housing available in the community and that the zoning ordinance was unreasonable because it did not provide an appropriate amount of land that could be used for apartments.
4. **[7.63] Inclusion of Demonstrative Exhibits**

Adding demonstrative exhibits such as maps or photographs to the complaint may also be desirable. One advantage to this inclusion is that it will enable the trial judge to have some familiarity with the vicinity of the subject property before any evidence has been put in.

5. **[7.64] How To Allege Exhaustion of Local Remedies**

It is not sufficient simply to allege that the appropriate local remedies have been exhausted. The complaint should state the facts that support this conclusion, including the application for local relief, the giving of notice, the holding of a public hearing, and the action of the zoning board or corporate authorities. In the event that the municipality’s answer denies the exhaustion of administrative remedies, the plaintiff ordinarily should test this denial with a motion for summary judgment before the trial to avoid the risk that the time and effort of a trial on the merits will go for naught because the Bright rule has not been satisfied. See *Bright v. City of Evanston*, 10 Ill.2d 178, 139 N.E.2d 270 (1956). If the trial court, in advance of a trial on the merits, rules that local remedies have not been exhausted, then a request to stay the proceedings might be considered while the municipality is asked to reconsider the issue.

6. **[7.65] Laches as a Defense in a Zoning Case**

In *Blankenship v. County of Kane*, 85 Ill.App.3d 621, 407 N.E.2d 145, 40 Ill.Dec. 914 (2d Dist. 1980), a developer successfully raised the defense of laches against a claim brought by neighboring property owners challenging the validity of a ten-year-old special-use ordinance. The defendant developer had already spent $2.5 million in reliance on the ordinance. This defense is interesting and unique in a zoning case and one of which the practitioner should be made aware.

X. **[7.66] DISCOVERY**

Discovery plays an important role in zoning litigation. Ordinarily, discovery in zoning litigation is best commenced with interrogatories, followed by depositions. Not to be overlooked is the utility of notices to admit facts or the genuineness of documents under S.Ct. Rule 216 as a method of establishing threshold issues, such as title, beneficial ownership, or consent of the land trustee, that might otherwise require cumbersome or inconvenient proofs. Use of these notices is also an efficient way to avoid consuming trial time with the authentication of documents.

Except by leave of the court, no discovery can be taken from the defendant in a prosecution for violation of a zoning ordinance when the only penalty is a fine. S.Ct. Rule 201(h); *City of Danville v. Hartshorn*, 53 Ill.2d 399, 292 N.E.2d 382 (1973); *County of Peoria v. Schielein*, 87 Ill.App.3d 14, 409 N.E.2d 86, 42 Ill.Dec. 591 (3d Dist. 1980).

However, the question of a deprivation of value may be totally different in an action brought under 42 U.S.C. §1983. In *Executive 100, Inc. v. Martin County*, 922 F.2d 1536 (11th Cir. 1991), the court dealt with a §1983 suit challenging the denial by the county of a rezoning of the plaintiff’s property from agricultural to industrial. The plaintiff argued that the value of the
property had been significantly diminished by the denial of the request for rezoning. However, while one who owns agricultural land is always going to be economically benefited by having it rezoned to industrial, to argue that the value has been diminished significantly by the board’s action is to fail to note that it has really not been increased significantly by board action. The practitioner should note the difference between the argument made in *People ex rel. Alco Deree Co. v. City of Chicago*, 2 Ill.2d 350, 118 N.E.2d 20 (1954), regarding a declaratory judgment action challenging the validity of the zoning and an action such as *Executive 100* claiming that there has been a taking.

A. [7.67] Discovery for Plaintiff

The plaintiff can use interrogatories to discover when and under what circumstances amendments or variations were granted for other property in the vicinity. Copies of the minutes of the corporate authorities and of the plan commission can be secured for examination. In most municipalities that record their plan commission and village board meetings, it should be possible to secure these tape recordings for the purpose of transcribing them. The extent of the comprehensive planning undertaken by a community and any reports and documentation that the process has produced can also be secured readily through the use of interrogatories and notices to produce documents. Among the documents that the plaintiff’s attorney should be interested in examining, if they exist, are the master plan, the official map, any traffic surveys, land use plans, housing studies, and all the rest of the literary baggage that accompanies the comprehensive planning process. In addition, the names of the individuals who prepared the various plans and studies can be secured through the discovery process. Plaintiffs should also consider using interrogatories to determine the names and areas of expertise of the persons involved in the planning process; the names and addresses of any planners, planning consultants, or other experts regularly retained by the municipality; the existence of studies and reports relating to planning, land use, and zoning matters; the existence and status of nonconforming uses in the vicinity of the subject property; the existence and location of other similarly zoned undeveloped property in the municipality; the extent to which variations or rezoning similar to that requested by the plaintiff has been granted by the municipality in the past; and a list of the persons who are expected to testify as witnesses.

Sample interrogatories to the defendant are contained in §7.83 below.

Depositions may be needed in order to understand the data that underlies the comprehensive planning process and the manner in which it was collected, to distinguish, for example, between the municipal consultant who collects his own data file and the one who relies on the reports of others. Depositions of the members of the plan commission and the board or council may disclose the extent to which the members of those bodies were aware of or took into account the available studies.

B. [7.68] Discovery for Defendant

On the defendant’s side, interrogatories and depositions will disclose in advance the amount that the plaintiff paid for the property and the uses to which the plaintiff proposes to put it. Documentary discovery will give the defendant’s lawyer and witnesses an advance look at the
plaintiff’s land use map and the site plans, architectural renderings, and other graphic materials that depict the proposed use or that may be offered at trial as demonstrative evidence. All of this material should be carefully reviewed with the experts for inaccuracies or inconsistencies. It is also possible to determine the extent to which the plaintiff has made an effort to use the property as it is zoned — whether, for example, the plaintiff has had offers for the property and the amount of any offer. Many times the owner of the property will have made no previous effort to sell it and will be in the position of not having offered the property without the rezoning contingency. The defendant should also secure through interrogatories the names of prospective witnesses for the plaintiff.

Sample interrogatories to the plaintiff are contained in §7.84 below.

C. [7.69] Discovery of Expert Opinions

When reviewing the work of expert consultants in the course of the discovery process, the attorney should take care to examine not just their written reports but their work papers that support these reports, as well as the time records and the project budgets kept by the consultants. Many a persuasive and impressive final report has been shown, on closer inspection, to be backed up by very little collection and analysis of data. Note that there is a distinction between the collection and analysis of original data and the review of data collected by others. The expert who relies extensively on secondary sources has placed himself or herself in the position of basing his or her opinion on data for whose reliability the expert cannot vouch. This process becomes particularly dangerous when the expert uses secondary sources in an effort to extrapolate data that bears directly on the particular project in hand. To take a specific and simple example, it is always more useful to base a traffic analysis on actual traffic counts than on traffic volumes that are derived by making computations from generalized figures for a larger area.

S.Ct. Rule 213(f) requires a party, upon written interrogatory, to disclose any witnesses who will testify at trial. In addition, Rule 213(i) imposes a duty on the responding party to seasonably supplement a response. The trial court is required by S.Ct. Rule 218(a) to hold an initial case management conference, the goal of which is to tailor the future course of the litigation to reflect the characteristics of the case. At the conference, the court must set deadlines for the disclosure of witnesses. S.Ct. Rule 218(c). All discovery should be completed not later than 60 days before trial is anticipated to commence. Id. Upon disclosure, a controlled expert witness is subject to discovery with respect to the subject matter on which he or she is expected to testify, his or her conclusions and opinions and the bases for them, and his or her qualifications. S.Ct. Rule 213(f)(3).

XI. TRIAL PREPARATION

A. [7.70] Chronology of Events

In most zoning litigation, the early preparation of a chronology of events will be helpful. Each municipal action and each document should be listed in chronological order. Conversations and meetings of which there is no formal record should also be included in the chronology. Then
a list of subjects that are pertinent to the litigation should be prepared, and the chronology should be cross-indexed. In cases in which acts and expenditures in reliance on existing zoning restrictions are alleged, an effective detailing of the sequence of events can be extremely persuasive. See Arastra Limited Partnership v. City of Palo Alto, 401 F.Supp. 962 (1975), vacated after settlement, 417 F.Supp. 1125 (N.D.Cal. 1976).

B. [7.71] Stipulation to Existing Uses of Land and Zoning in Neighborhood

A substantial amount of time is consumed in many zoning cases on multiple recitations of the uses of land and zoning in the neighborhood. This testimony clutters the record and often bores judges. Only rarely is there any dispute over what are the existing uses and zoning of the neighborhood. One way to avoid dull recitations of the neighborhood geography is to stipulate the existing uses and zoning in the neighborhood.

As noted in §7.69 above, S.Ct. Rule 218(a) requires a trial court to hold an initial case management conference, the product of which is an order that reflects the action to be taken and controls the course of litigation unless and until modified subsequently. This order should contain an agreed description of the area involved, a statement of any factual matters on which there is agreement, a statement of contested issues of fact and law, a list of exhibits together with such stipulations as can be reached on matters of foundations and admissibility, and a list of the witnesses that each party plans to call.

C. [7.72] Maps, Photographs, and Other Exhibits

Land use litigation is highly visual litigation. The more visual the aids that are supplied in connection with the land use case, the better the presentation will be. There should be both ground-level and aerial photographs. Oblique aerials are particularly useful in giving a sense of the relationship of land uses in the area in question to each other. Land use maps, zoning maps, surveys, and topographical maps all play a part in illustrating the character of the area and in demonstrating visually what might otherwise be confusing. In addition, site plans, perspective renderings, and even architectural models help illustrate the type of use that is to be established on the property if the litigation succeeds.

D. [7.73] Expert Witnesses

Perhaps more than any other type of litigation, land use cases depend on expert testimony. Too frequently, the expert is retained too late to offer anything more than a fact opinion based on a superficial “windshield” survey of the neighborhood.

To be effective, expert testimony must be based on careful collection and analysis of facts and data. Therefore, professional consultants should be retained at the earliest stage possible. They should not be brought on board at the last minute in an effort to justify or rationalize the theories that the lawyer and client have long since developed. The case should be shaped from the outset by a team that consists of the client, the lawyer, and all the professional consultants expected to be involved in the conduct of the litigation and in providing expert testimony in the lawsuit.
The only fair way to retain expert consultants is to ask the prospective witness to make an initial survey of the property and its situation with a view to determining whether the witness believes that there is any basis on which to support the plaintiff's or defendant's case. If the answer to that question is “no,” the expert should be paid for his or her time and excused from further responsibility in the case, and a search should be commenced for a new consultant.

The following are considerations the attorney should weigh in selecting an expert witness:

1. Should a local expert who is familiar with the area be used or a national expert with impressive qualifications?

2. Do the expert’s qualifications really match the testimony the expert is being asked to give? For example, a city planner is not necessarily the best person to testify with respect to traffic matters.

3. Does the expert understand the litigation process and the role he or she will be expected to play in this process?

4. Is the expert able to communicate in a clear and understandable manner? Beware the expert who tends to speak in technical language or to offer jargon as an explanation for his or her conclusions.

5. Is the expert quick-witted? If the prospective expert takes a long time to reply to questions and then is not fully responsive, the practitioner can expect that the expert will provide the same kind of performance on cross-examination, to the detriment of the case.

6. Is the expert an individual who insists on knowing and understanding all the facts before forming an opinion or the sort of individual who forms an opinion and then goes out to look for facts to justify it? Beware the latter expert. This expert is dangerous.

7. Does the expert actually practice his or her profession, or does the expert’s practice consist largely of testifying in land use disputes? The professional witness can often be impeached with contradictory testimony that he or she has given in other cases.

In preparing the expert to testify, it is useful after the initial survey to have a session with the expert in which the lawyer explains the legal theories that he or she hopes to be able to sustain in the lawsuit. Knowing the objectives in the lawsuit and having contributed when possible to elaborating or refining of these objectives, the expert should be turned loose to collect and evaluate his or her data and prepare a preliminary report for discussion with the attorney and with the client, when appropriate. After reviewing the preliminary report and any additional data collection and analysis required, the expert should submit a final report to the attorney to serve as the basis for structuring the list of questions to be asked at trial. The expert should have an opportunity to review and respond to the questions so that counsel is fully apprised of the way in which the expert testimony will fit into the overall case. To that end, the expert should be asked each question, and the attorney should listen carefully to each answer given. In addition, the expert can be prepared adequately for trial only if the attorney endeavors to cross-examine the expert even more severely than is anticipated at trial.
E. [7.74] Trial Preparation Checklist

The following facets of the preparation and trial of a zoning case are sometimes overlooked but can frequently provide useful evidence:

1. Counsel representing the plaintiff should subscribe to the local newspaper as this is often a useful source of information. Counsel may secure very valuable leads on aspects of the case that might otherwise be overlooked. For example, proposals to widen streets or to install expressway interchanges may have a significant impact on the character of the area involved in the lawsuit. Local flooding or sanitary sewer surcharge problems may affect the use and development of the subject property or nearby property. Developments approved for other property may have an important bearing on the litigation. Careful attention to the legal notice columns in the local newspaper will alert counsel to rezoning and variations that are proposed for property that is located in the same vicinity.

2. Counsel should determine whether the community has a recently adopted comprehensive plan and, if so, what its status is. Federal assistance for comprehensive planning under the Department of Housing and Urban Development’s 701 program produced comprehensive plans in many communities some years ago, many of which have been largely ignored ever since. See §701 of the Housing Act of 1954, ch. 649, 68 Stat. 590. In any community, there is a good chance that, sometime during the previous five to ten years, a planner has been employed to prepare a comprehensive plan or elements of such a plan for the community. Counsel should find out who prepared the plan, what the plan recommended for the property involved in the case, and whether the municipality paid any attention to the planner’s recommendations. If it has not, it may be desirable to subpoena the planner and have the planner identify his or her work and state what his or her recommendations were with respect to the subject property. Even if the community appears to have followed its plan with regard to the property in question, counsel should check to see whether it has departed from the plan in other areas.

The adoption of a comprehensive plan that incorporates proper zoning goals increases the likelihood that a court will uphold the validity of the zoning of a particular parcel if the zoning is in conformity with the comprehensive plan. Wilson v. County of McHenry, 92 Ill.App.3d 997, 416 N.E.2d 426, 48 Ill.Dec. 395 (2d Dist. 1981).

3. The frequency with which a community has rezoned or granted variations for property within the area of the property involved in a lawsuit may provide useful ammunition for the plaintiff. For the attorney defending the municipality, the circumstances surrounding these variations or amendments should be explored carefully so that there are no unpleasant surprises waiting when the case is reached for trial.

If, as plaintiff, counsel can establish that the municipality has granted amendments or variations to similarly situated property in the same vicinity, it may raise a serious question as to the reasonableness of the decision that was made in the case. Annexations and rezonings in other parts of the community should also be examined to determine whether, in substantially similar circumstances, the municipality has allowed developments that are much the same as that proposed in counsel’s case.
4. Another exercise that is frequently useful for the plaintiff in preparing to try a zoning case is to determine how frequently the community with which the client is embroiled has been a defendant in zoning litigations. Prior appellate and Supreme Court zoning decisions involving the same municipality should be examined and abstracts and briefs of these cases secured. Counsel should determine whom the community has used as expert witnesses in the past and what they have said about other zoning cases in which the municipality has been involved. Counsel should also look for arguments or testimony on which the community has relied in the past that is inconsistent with the position the municipality is taking in the present case. Computerized research has simplified this task. With any computerized legal research system that searches for words and word combinations (e.g., Westlaw), the names of municipalities or witnesses and similar facts can be easily retrieved.

XII. CONDUCT OF THE TRIAL

A. [7.75] Elements of Proof

As with any other kind of litigation, the attorney should develop a very clear theory of the case. In the older zoning cases, the proofs were relatively simple. Ownership would be proved, and there would be a description of the present use of the property and of its surrounding neighborhood. Then there would be real estate valuation testimony from both sides, and the municipality would also produce some neighbors who would testify that they were worried about the impact that the proposed use would have on the value of their investments in their homes.

The elements of proof are not so simple any more. Cases such as Bauske v. City of Des Plaines, 13 Ill.2d 169, 148 N.E.2d 584 (1957), Chicago & North Western Ry. v. City of Des Plaines, 97 Ill.App.2d 201, 240 N.E.2d 280 (1st Dist. 1968), and Camboni’s, Inc. v. County of DuPage, 26 Ill.2d 427, 187 N.E.2d 212 (1962), indicate how complex the record in a zoning case may become. However, when the issue is only one of how the zoning ordinance should be interpreted, testimony with respect to the nature of the surrounding uses has been held irrelevant. Village of Maywood v. Health, Inc., 104 Ill.App.3d 948, 433 N.E.2d 951, 60 Ill.Dec. 713 (1st Dist. 1982).

The Illinois decisions stress that the paramount consideration in determining the validity of a zoning restriction is whether the property is zoned in conformity with the classification and use of surrounding property. See, e.g., River Forest State Bank & Trust Co. v. Village of Maywood, 23 Ill.2d 560, 179 N.E.2d 671 (1962). However, in some instances the trend of development may be more important than the existing use. See Chicago & North Western Ry., supra.

As noted in §7.54 above, the plaintiff’s burden of proof is a heavy one. The conventional judicial wisdom is that there must be clear and convincing proof of the unreasonable and arbitrary nature of the zoning restrictions. Jans v. City of Evanston, 52 Ill.App.2d 61, 201 N.E.2d 663 (1st Dist. 1964). The burden of proof in a zoning case is twofold. The property owner must prove both that the existing zoning is unreasonable and that the proposed use is reasonable. Mangel & Co. v. Village of Wilmette, 115 Ill.App.2d 383, 253 N.E.2d 9 (1st Dist. 1969). The Supreme Court has linked these two aspects by saying that the validity of the existing restrictions depends on the...

When there are zoning classifications that intervene between the one in which the property is classified and the one that would permit the proposed use, the plaintiff does not have to prove that all the intervening classifications would also be unreasonable. *Brunette v. County of McHenry, Illinois*, 48 Ill.App.3d 396, 363 N.E.2d 122, 6 Ill.Dec. 593 (2d Dist. 1977); *Aurora National Bank v. City of Aurora*, 41 Ill.App.3d 239, 353 N.E.2d 61 (2d Dist. 1976); *First National Bank of Skokie v. Village of Morton Grove*, 12 Ill.App.3d 589, 299 N.E.2d 570 (1st Dist. 1973); *Stalzer v. Village of Matteson*, 14 Ill.App.3d 891, 303 N.E.2d 489 (1st Dist. 1973). The earlier contrary view expressed in *First National Bank of Lake Forest v. Village of Northbrook*, 2 Ill.App.3d 1082, 278 N.E.2d 533 (1st Dist. 1971), appears to have been rejected. However, even when the court finds the existing zoning to be invalid, it may consider the defendant’s evidence of the reasonableness of an intervening classification in connection with the plaintiff’s claim that the proposed use is reasonable. *Pillman v. Village of Northbrook, Illinois*, 65 Ill.App.3d 40, 382 N.E.2d 399, 22 Ill.Dec. 79 (1st Dist. 1978).

**B. [7.76] Expert Testimony**

The importance of expert testimony in land use litigation cannot be overemphasized. In all but a few cases in which the land use restrictions are blatantly arbitrary, expert testimony is necessary for both the plaintiff’s and the defendant’s proofs.

The key witness will ordinarily be the city planner, whose role is to prepare a detailed land use inventory and analysis of the area involved. The planner should be asked to analyze the site with a view to determining how it may best be developed and what influences impinge on the site, both manmade and environmental. It is the planner’s function to explain any special circumstances about the site that influence the way in which a site plan is developed for it. The planner also evaluates the feasibility of using the site either as it is zoned or as it is proposed to be used. How the proposed use will impact the neighborhood is also the province of the planner. Frequently, the planner also provides an analysis of the respective costs and benefits of alternative development possibilities. In addition, the plaintiff’s planning consultant should always review and verify any data that has been collected by the town. It is always effective to be able to show that the municipality has relied on inadequate or incorrect data.

Appraisal testimony is essential in most land use cases. Effective appraisal testimony cannot usually be secured from a real estate broker giving an opinion as to value based on his or her many years in the real estate business in the locality. This testimony will be accepted by many courts, but it may not be persuasive. Valuation testimony is always more persuasive when given by a trained appraiser, preferably a member of the Appraisal Institute. Most land use litigation involves vacant property, and for practical purposes, the only reliable way of valuing vacant property is to form an opinion of its fair market value based on comparable sales duly adjusted for time, size, location, and other circumstances. There may be rare instances in which other methods of valuation, such as capitalization of an income stream or estimates of replacement cost new less depreciation, will be appropriate, but they are rare.
An increasing number of knowledgeable and sophisticated appraisers are beginning to insist that it is difficult, if not impossible, to form any reliable, quantified opinion with respect to the impact that a particular use of a parcel of land will have on the value, use, and enjoyment of adjacent property. Some impacts are obvious. A tannery does not make a good neighbor for residences. But the far more common problem, that of estimating the impact that multiple-family dwellings will have on the value, use, and enjoyment of single-family dwellings, presents very complex issues. Beware of the appraiser who gives pat answers to valuation problems of this type.

The land economist also deals in land values but from a somewhat different standpoint. By analyzing the market for a particular type of land use, such as retail stores, offices, or multiple-family dwellings, the land economist can make an informed estimate of the rate at which new commercial or residential structures can be absorbed by the market and assign to the particular parcel of property involved a share of this market demand. Such an absorption analysis, coupled with knowledge or evidence with respect to construction costs and carrying costs, enables the land economist, essentially working backwards, to tell the landowner how much he or she should pay for a piece of property if the owner expects to develop it in the manner proposed and make a profit. Computing value by this “land residual” method sets an upper limit on the amount of the prudent investment and, in so doing, is itself a measure of the value of the property and the feasibility of developing it as zoned.

Analysis of the traffic impacts of a proposed development has become increasingly important, particularly when the issue is residential development vs. commercial or industrial development. One should not settle for automatic traffic counters that provide no more than a measure of the volume of traffic crossing a strip of roadway, which are useful only for determining the peak traffic out on the roadway. Only a very careful manual count of traffic that measures turning movements and traffic volumes by quarter-hour periods will provide the peak hour and turning movement statistics that are meaningful in traffic analysis. Traffic generation rates for the proposed use of land can be estimated by analyzing the actual traffic generated by similar developments. Traffic engineers estimate the ability of a highway to handle particular volumes of traffic in terms of levels of service, which are really measures of how relatively free-flowing or congested the highway is. The distributional analysis made by the traffic expert can also be of critical importance. Quite frequently, traffic from a residential development will distribute itself on the road network in a fashion that is quite different from traffic from a commercial development.

The civil engineer will deal with questions of water supply, sewage treatment availability and capacity, and methods of handling storm-water runoff. In cases in which it is necessary to prove or disprove the economic feasibility of development of the property as zoned, the engineer plays a critical role. An economic feasibility study analyzes the raw land value of the tract and the cost of providing the infrastructure of public improvements to determine whether lot or dwelling unit prices that will be competitive can be attained. The engineer’s role in this analysis is to design a typical development of the property that will minimize infrastructure costs per lot or per dwelling unit and then to cost out the infrastructure and reduce it to a cost per lot or dwelling unit. This cost coupled with the raw land cost per lot or dwelling unit, together with an allowance of overhead and profit, will provide a comparative figure for the appraiser or a knowledgeable real
estate broker to compare to the average selling price of vacant lots or similar dwelling units in the area. If, for example, the analysis shows that it will cost $12,000 to $15,000 to develop and sell a single-family lot, the feasibility of developing under the existing zoning restrictions is cast into serious question if comparable lots in the area are selling for a maximum of $7,500 to $10,000.

Increasingly, land use litigation involves the specialized skills of the environmental professions. Experts on matters of air quality, water pollution, hydrology, soils, limnology, botany, zoology, archeology, or other esoteric specialties may be required occasionally. Only in more unusual circumstances will the technical skills of some of the narrower environmental specialties be required. However, the increasing focus on environmental considerations has made a role for the environmental generalist or ecologist in land use litigation. An increasing number of zoning restrictions purport to have an environmental rationale or foundation. The validity of these environmental claims for land use restrictions can be evaluated only by an individual who is thoroughly familiar with a broad range of environmental disciplines.


C. [7.77] Municipal Officials as Witnesses

Not infrequently, the plaintiff will find that municipal officials are useful witnesses, especially in instances in which there has been a favorable recommendation by the zoning board or the planning consultants of the municipality. The findings and recommendations of the plan commission or zoning board are admissible (Society of Divine Word v. County of Cook, 107 Ill.App.2d 363, 247 N.E.2d 21 (1st Dist. 1969)), but the record of the proceedings itself is not. See Smith v. County Board of Madison County, 86 Ill.App.3d 708, 408 N.E.2d 452, 42 Ill.Dec. 74 (5th Dist. 1980).

The failure of a municipality to conduct its own independent evaluation of a land use proposal can best be shown by a series of questions directed to the municipal official along the lines of “Did you consider or have available,” followed by the negative answer of the official. If there have been many zoning changes in the area, it may be possible, with carefully constructed questions, to elicit interesting testimony from the mayor or the president of the board of trustees with respect to the considerations that led to some requests for zoning relief being granted while the client’s request was turned down. Useful evidence with respect to the amount of new development in the neighborhood and its value can also be secured from the records of the building department.

When defending the municipality, public officials should be used as witnesses with great care. They should be confined to factual testimony unless they are professionals, such as
planners, traffic engineers, or civil engineers, who are in the employ of the defendant. Elected policy-making officials of the municipality should be used only rarely. There is always the danger that some chance comment from the witness stand will establish conclusively for the judge that the decision of the local authorities was, in fact, unreasonable and arbitrary. Some testimony from municipal witnesses will almost always be necessary to establish the current problems of the municipality, the municipality’s ability to provide public services, and the nature of the comprehensive planning and capital improvements program. When prior comprehensive planning efforts of the municipality are involved, they can best be detailed by municipal officials who are thoroughly familiar with these efforts.

D. [7.78] Demonstrative Evidence

Demonstrative evidence is exceedingly important in a zoning case. There should be a brightly colored land use map made of zip-a-tone or other exotic material. This map should also show the existing zoning classifications, as well as land use. Photographs, preferably color, of the subject property and of the structures and land uses in the vicinity are also necessary. One effective technique is to group the photographs around a map of the area with a key showing the location of each of the photographs. An aerial photograph, if it is available and up-to-date, can be exceptionally useful.

Counsel representing the plaintiff who seeks the right to establish a particular land use should have prepared a site plan showing the manner in which the property will be developed, including the traffic circulation pattern into and on the property, as well as architectural elevations showing how the development will appear when it is completed. Sometimes, especially in the case of residential developments, floor plans of the proposed building will be offered in evidence as well. On the other hand, municipalities may, if they wish, offer alternative site plans showing how the property might be developed in accordance with the existing zoning. American National Bank & Trust Company of Chicago v. City of Chicago, 30 Ill.2d 251, 195 N.E.2d 627 (1964).

A series of aerial photographs taken at intervals over a few years prior to the lawsuit can be an excellent way of showing how the character of the neighborhood has changed. Ordinarily, photographs in a zoning case will have different impacts depending on the season of the year in which they were taken.

E. [7.79] View by the Court

While a view of the property by the trial judge is apparently not forbidden, it is error for the judge to rely on his or her personal inspection or take it into account in reaching a judgment. Lancer Industries, Inc. v. City of Aurora, 30 Ill.App.3d 962, 333 N.E.2d 653 (2d Dist. 1975). Caution dictates that there be a view by the trial judge only if all of the parties agree to it.

XIII. [7.80] SETTLEMENTS AND CONSENT ORDERS

Municipalities have authority to settle actions brought against them provided the settlement represents a genuine compromise of matters in issue. These settlements may take the form of a

Like any other form of litigation, land use lawsuits are frequently settled. Settlement negotiations are not always productive, but when they fail, the fact that settlement offers were made and the content of the offers are no more admissible in a zoning case than they would be in any other lawsuit. Mangel & Co. v. Village of Wilmette, 115 Ill.App.2d 383, 253 N.E.2d 9 (1st Dist. 1969).

When settlement of a land use lawsuit is effected, it has been a common practice for the terms of the settlement to be embodied in a consent order. A consent order settling a land use lawsuit may be approved by a municipality or county only after all of the procedural due process requirements of notice and a public hearing as mandated by the municipal zoning enabling statute have been observed. In Martin v. City of Greenville, 54 Ill.App.3d 42, 369 N.E.2d 543, 545, 12 Ill.Dec. 46 (5th Dist. 1977), the court stated:

The settlement agreement entered into by the parties, although argued by the plaintiffs to be merely a modification of the enforcement provision of the existing Greenville Zoning Ordinance, would amend the ordinance by modifying the existing requirements of the R-1 zoning district in which the plaintiffs property is located. It is well settled that a municipality must substantially adhere to the procedural requirements mandated by its zoning ordinance for amendments thereto.

A broader result was reached in Midtown Properties, Inc. v. Township of Madison, New Jersey, 68 N.J. Super. 197, 172 A.2d 40 (Law Div. 1961), aff’d, 78 N.J. Super. 471 (App.Div. 1963), in which the municipality and a landowner entered into a contract setting out the terms under which the plaintiff could proceed with the development of its land. This agreement became the basis for a consent judgment in the trial court. Subsequently, the municipality refused to approve a plat of the subdivision implementing the agreement on the ground that the consent judgment was illegal and void. There was no public hearing on the agreement and consent judgment. The New Jersey court held:

This contract, on its face, is illegal and void. It is an attempt to do by contract what can only be done by following statutory procedure. The zoning power delegated by the Legislature to the township officials was prostituted for the special benefit of the plaintiff. Certainly, if the contract is illegal and void, having it incorporated in a consent judgment will not breathe legal life into it.

* * *

The mere fact that the contract took the changed form of a consent judgment does not make it good. [Citations omitted.] 172 A.2d at 45.

A different pitfall in the drafting of a consent order is illustrated by Andgar Associates, supra, in which a New York court held that a municipality could agree to a consent judgment that represented a legitimate compromise of conflicting claims if the landowner could show a prima facie case for relief but that the village could not use a consent order to create rights that would impair a public duty owned by it or give validity to a void claim.

XIV. [7.81] APPENDIX — SAMPLE FORMS

The following sample forms are intended to be just that, samples to stimulate the thinking of the litigator. Slavish adherence to them could, depending on the facts of a particular case, produce surprising, undesirable results. The forms are also offered with the usual disclaimer that any resemblance between the persons, business organizations, and municipalities, living or dead, is purely coincidental.

A. [7.82] Complaint for Declaratory Judgment and Injunction

FORM(S) AVAILABLE BY PURCHASING HANDBOOK OR BY SUBSCRIBING TO SMARTBOOKS® OR SMARTBOOKSPLUS.

B. [7.83] Interrogatories to Defendant

FORM(S) AVAILABLE BY PURCHASING HANDBOOK OR BY SUBSCRIBING TO SMARTBOOKS® OR SMARTBOOKSPLUS.

C. [7.84] Interrogatories to Plaintiff

FORM(S) AVAILABLE BY PURCHASING HANDBOOK OR BY SUBSCRIBING TO SMARTBOOKS® OR SMARTBOOKSPLUS.

D. [7.85] Form of Order for Declaratory Judgment with Injunctive Relief

FORM(S) AVAILABLE BY PURCHASING HANDBOOK OR BY SUBSCRIBING TO SMARTBOOKS® OR SMARTBOOKSPLUS.