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Litigation of a Zoning Case

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The contributions of Patrick T Brankin, Thomas R. Burney, Bernard I. Citron, and M. Hope Whitfield to prior editions of this chapter are gratefully acknowledged.

Mr. Cope would like to thank Gina C. Virgo for her invaluable assistance in the preparation of this edition of the chapter.

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I. [8.1] SCOPE OF CHAPTER

The purpose and intent of this chapter are to create a practice guide for counseling clients and for litigating a zoning case whether representing the landowner, the government, or a third-party objector. The authors have included, where appropriate, checklists and forms to assist the practitioner. See §§8.75 – 8.80 below. It is not our intention to reiterate or rewrite subjects and materials covered by others. Therefore, where applicable, references are made to other IICLE chapters in this volume as well as to other IICLE volumes in which the subject is treated in greater detail.

II. CAUSES OF ACTION IN A ZONING CASE

A. [8.2] In General

Most causes of action in zoning cases are brought by property owners against the government (a municipality or a county) for either the denial or approval of a zoning map amendment, special use, planned unit development (PUD), variation, subdivision approval, or building permit; the issuance of a stop-work order; land use regulations that exceed constitutional and statutory authority; involuntary annexation; enforcement of intergovernmental agreements or other agreements that substantially interfere with one's property rights, such as recapture agreements; and breach of an agreement entered into with the government. These actions may be brought by the property owner whose property is the direct subject of the governmental action at issue or in some cases by neighboring property owners.

In Illinois a party bringing an action challenging a zoning decision must consider 65 ILCS 5/11-13-25 (municipalities) and 55 ILCS 5/5-12012 (counties). These statutes call for de novo judicial review as a legislative decision. Actions may be brought for declaratory judgment, injunction, mandamus, specific performance, administrative review, disconnection, and monetary damages. The choice of remedy will depend on the particular wrong charged but also will be a function of the client's budget and the exigencies of time. In these cases, time is usually on the side of the government. As a result, it is our experience that remedies that avoid motions to dismiss and other lengthy pretrial motions brought by the government or third-party objectors are the remedies most often sought by a landowner or land developer.

This chapter does not focus on the more "exotic" federal causes of action such as inverse condemnation, takings, and substantive or procedural due-process constitutional violations under the Fifth and Fourteenth Amendments pursuant to 42 U.S.C. §1983. Our premise is that the client is seeking the speediest, most direct, and most efficient result possible given the exigencies of an overloaded court system, so the focus is on the more conventional remedies brought in state court.

B. [8.3] Declaratory Judgment

The "garden-variety" zoning case, as Judge Posner refers to such causes of action (*see Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988)), is generally brought as a declaratory judgment action that asks the court to determine the constitutionality of a

government's action or inaction. It is in the context of this cause of action coupled with an injunction that the *LaSalle/Sinclair* factors are applied by a court. See *LaSalle National Bank of Chicago v. County of Cook*, 12 Ill.2d 40, 145 N.E.2d 65 (1957); *Sinclair Pipe Line Co. v. Village of Richton Park*, 19 Ill.2d 370, 167 N.E.2d 406 (1960). Declaratory judgment coupled with injunction most often is employed to attack the denial of a zoning map amendment and in connection with claims that government regulations exceed constitutional or statutory authority. In such cases, a property owner is required to plead and prove the following, commonly known as the “*LaSalle* factors”:

1. the existing uses and zoning of nearby properties;
2. the extent to which property values are diminished by the particular zoning;
3. the extent to which the destruction of property values of the plaintiff promotes the health, safety, morals, and 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 purposes for which it is now zoned;
6. the length of time the property has been vacant as zoned considering the context of land development in the vicinity of the subject property;
7. the community need for the proposed use; and
8. the care with which the community has undertaken to plan land use development.

The first six factors were judicially created by the Illinois Supreme Court in *LaSalle, supra*. The last two were added by the court in *Sinclair, supra*. Although a court will review each individual factor, the existing use and zoning of nearby properties and the diminishment of property values are of the greatest import.

Historically, challenges to determinations on applications for special uses and planned unit developments (when treated as special uses by local ordinance) were to be brought as declaratory judgment and injunction actions. In 2002, the Illinois Supreme Court reversed that practice with its decision in *People ex rel. Klaeren v. Village of Lisle*, 202 Ill.2d 164, 781 N.E.2d 223, 269 Ill.Dec. 426 (2002). *Klaeren* classified government decisions on applications for special uses and planned developments as quasi-judicial decisions and required that those challenges be brought in administrative review. However, in light of 65 ILCS 5/11-13-25, 55 ILCS 5/5-12012.1, and 60 ILCS 1/110-50.1, such challenges are once again to be brought as declaratory judgment and injunction actions or as separate actions under the new statutes. See §8.18 below.

1. [8.4] Statutory Authority/Necessary Elements

The legal basis for declaratory judgment and the necessary elements are treated in MUNICIPAL LAW SERIES VOL. IV: CONTRACTS, LITIGATION, AND HOME RULE

§§4.24 – 4.27 (IICLE, 2006, Supp. 2009); II ILLINOIS CIVIL PRACTICE: PREPARING FOR TRIAL §§5.5, 5.20 (IICLE, 2009); and §7.30, “Declaratory Judgment Action and Action To Quiet Title,” of this handbook.

2. [8.5] Forms/Checklists

See §8.75 below for an example of a declaratory judgment complaint initiated by a property owner. Practitioners in Illinois should be sure to plead specific facts in support of each of the elements listed below. Illinois is a fact-pleading state, and conclusions of law will not be sufficient to withstand a motion to dismiss. The following is a checklist of the necessary elements to include in a standard complaint:

- Identify the plaintiff and the relationship to the subject property. Document ownership interest is important; a contract purchaser plaintiff without the property owner as an additional plaintiff has been deemed insufficient to initiate an action.
- Describe the subject property’s size and its location in reference to major roads and in relation to the defendant government’s and other governments’ territorial limits.
- Describe the defendant and identify the statutory basis for the government’s exercise of power and enforcement of its zoning ordinances. For non-home-rule units, reference the appropriate applicable chapter of the ILCS, *i.e.*, 65 ILCS 5/11-13-1, *et seq.*, for municipalities and 55 ILCS 5/5-12001, *et seq.*, for counties.
- Describe the statutory basis and content of the zoning ordinance in dispute.
- Describe the guidelines and restrictions on development contained in the zoning ordinance.
- Describe the zoning designation and its restrictions impressed on the subject property.
- Describe current land uses surrounding the subject property and the zoning classifications for those properties.
- Describe why the subject property is unsuitable for development for its zoned purposes and the bases for this conclusion.
- Identify the number of years the property has been vacant under the existing zoning classification.
- Describe the proposed development of the subject property and explain why this particular land use is appropriate. Include information about planning, economics, impacts, landscaping, traffic control measures, and aesthetic considerations.

- a. Further describe the density and character of the development as demonstrated by aerial photo exhibits.
- b. If applicable, include ratios for building floor area, impervious surface, and open space.
 - Describe how the development plan is “consistent with, suitable, and has great value for the proposed use under the current zoning classifications in the surrounding area.”
 - Describe how the proposed use of the subject property is “consistent and compatible with the trend of development and the character of the area” and bolster these claims with aerial photo exhibits of the area for three to five-year increments, starting with when substantial development began in the immediate area.
- a. If applicable, assert that the proposed plan of development is consistent with the government’s comprehensive plan.
- b. If applicable, assert that the proposed development is consistent with actual development approved by the government.
 - Assert that the development of the subject property is consistent with the requirements of the applicable statute and zoning ordinance in that it “promotes the public health, safety, morals, and general welfare; enhances the value of the property; has no detrimental or adverse effect on congestion in the public streets and highways or on existing property values in the government’s territory and is not solely for the benefit of the applicant; and the proposed use will increase tax revenues to the government and produce a greater number of jobs” (assuming the facts support such claims).
 - Assert that the proposed development of the subject property is the highest and best use of the land. Include factual bases for this conclusion.
 - Describe the plaintiff’s request for reclassification and/or approval of the subject property, including proposed variances, departures from the strict letter of the ordinance, and any special uses requested.
 - Describe the administrative procedures that were undertaken, the outcome, and how the plaintiff has exhausted administrative remedies.
 - Assert that the government’s denial of the plaintiff’s request is “wholly and completely unlawful and unreasonable and deprives the plaintiff of a reasonable and economic use of the subject property.”
 - Assert that the plaintiff’s interest in realizing the maximum value of their property is destroyed by enforcing the ordinance.
 - Assert that the benefits, if any, to the public are outweighed by the loss to the property owner by denying the plaintiff’s request.

- Assert that the plaintiff has endured “underutilization of his or her property under the existing zoning classification, and full compliance with the zoning ordinance has worked and will continue to work irreversible and irreparable harm on the plaintiff without due process of law.”

- Assert that “the government has enforced, now enforces, and will continue to enforce the aforesaid zoning ordinance. Unless permanently restrained or enjoined, it will continue to apply its governmental powers to prohibit the plaintiff from utilizing the subject property for the proposed use. The government is irreparably depriving the plaintiff of his or her property without due process of law or just compensation and without substantial benefit to the public welfare wherein the plaintiff lacks an adequate remedy at law.”

- Assert that “the Fifth and Fourteenth Amendments of the Constitution of the United States of America and §§2 and 15 of Article I of the Constitution of the State of Illinois guarantee that the plaintiff shall be permitted to use the premises described herein for its highest and best use. The uses permitted under the zoning ordinance as hereinabove set forth, as applicable to the premises in question, prohibit the highest and best use of the land and in effect render the premises useless and valueless. The denial of the highest and best use bears no relationship to the public health and safety, and said plaintiff cannot dispose of the property at the full value thereof because of such restrictions.”

- Assert that the zoning ordinance is “contrary to the Constitution of the United States of America and the Constitution of the State of Illinois insofar as it purports to apply to the premises described herein and is invalid because it

- a. is arbitrary and does not bear any reasonable relation to, or tend to permit or preserve, the public health, comfort, morals, safety, or general welfare;
- b. is arbitrary, discriminatory, and unreasonable;
- c. constitutes the taking of the plaintiff’s property without just compensation or due process of law; and
- d. is confiscatory.”

- Assert that the “continued application of the zoning restrictions to the subject property is arbitrary, capricious, unreasonable, unlawful, and void in its entirety based on all of the facts, circumstances, and reasons heretofore set out.”

- Cite to 735 ILCS 5/2-701 as the statutory basis for declaratory judgments.
- Assert that there is an actual controversy.
- Assert that there is “no other full, adequate, and efficient remedy at law.”
- Ask the court in the prayers for relief

- a. to enjoin and restrain the defendant-government, its agents, and employees from enforcing the ordinance against the subject property and from interfering with the plaintiff and all persons utilizing any part or portion of premises;
- b. to order that the zoning ordinance, as applied to the subject property, is arbitrary, capricious, and unreasonable; bears no substantial relationship to the health, safety, morals, and welfare of the community; and is therefore unconstitutional and void;
- c. to order that the zoning ordinance, as applied to the subject property, destroys and irreparably damages the value of the property and constitutes a taking of the plaintiffs' property without due process of law and is therefore unconstitutional;
- d. to order that the ordinance be set aside as a cloud on title;
- e. to order that the plaintiff has a clear legal right to construct the proposed development on the subject property;
- f. to order that "should the plaintiff apply to the defendant for licenses or permits to erect, establish, and maintain such buildings and improvements on the subject property, that the defendant and all of its agents, servants, and employees shall be charged with the duty to receive such applications for permits and licenses in keeping with the spirit and intent of the order of this Court"; and
- g. to "grant such other and further legal and equitable relief in the premises as the court shall deem just and proper."

3. [8.6] Examples in Caselaw

In preparing a complaint and assembling the evidence in connection with a declaratory judgment challenging the denial of a map amendment, all practitioners should review *LaSalle National Bank v. City of Chicago*, 54 Ill.App.3d 944, 369 N.E.2d 1363, 12 Ill.Dec. 349 (1st Dist. 1977), *Northbrook Trust & Savings Bank v. County of Cook*, 47 Ill.App.3d 879, 365 N.E.2d 433, 8 Ill.Dec. 195 (1st Dist. 1977), *Thompson v. Cook County Zoning Board of Appeals*, 96 Ill.App.3d 561, 421 N.E.2d 285, 51 Ill.Dec. 777 (1st Dist. 1981), *Oak Park Trust & Savings Bank v. Village of Palos Park, Cook County*, 106 Ill.App.3d 394, 435 N.E.2d 1265, 62 Ill.Dec. 293 (1st Dist. 1982), *Oak Lawn Trust & Savings Bank v. City of Palos Heights*, 115 Ill.App.3d 887, 450 N.E.2d 788, 71 Ill.Dec. 100 (1st Dist. 1983), and *Chicago Title & Trust Co. v. County of Cook*, 120 Ill.App.3d 443, 457 N.E.2d 1326, 75 Ill.Dec. 767 (1st Dist. 1983).

It is strongly recommended that counsel review and analyze the caselaw before filing a complaint so theories can be tested and additional theories can be identified with facts to support the claims. The purpose of the inquiry is to locate cases with analogous facts on which to pattern counsel's case.

C. [8.7] Injunctions

Much of the discussion about declaratory judgment equally applies to injunctions. The injunction claim naturally follows from a court's declaration that the zoning ordinance at issue is invalid as applied to the client's property and, in connection with the court's declaration, that there is no basis in the public welfare to support the restriction prohibiting the client's proposed use. Again, a court will apply the *LaSalle/Sinclair* factors (*LaSalle National Bank of Chicago v. County of Cook*, 12 Ill.2d 40, 145 N.E.2d 65 (1957); *Sinclair Pipe Line Co. v. Village of Richton Park*, 19 Ill.2d 370, 167 N.E.2d 406 (1960)) to assess the validity of the present zoning restrictions and the reasonableness of the proposed use. In effect, the injunction is the teeth that the court puts into its declaratory judgment.

An injunction is appropriate to set aside the wrongful denial of zoning relief, the wrongful denial of a building permit, the wrongful issuance of a stop-work order, and regulations that exceed constitutional and statutory authority, including intergovernmental agreements, boundary agreements, recapture agreements, and the like.

In most zoning cases, injunctive relief will be in the form of a permanent injunction. However, depending on the type of government action being challenged, a plaintiff also may seek a preliminary injunction and possibly a temporary restraining order while the case is pending. Such a strategy must be considered carefully on the basis of the facts of each case.

1. [8.8] Statutory Authority/Necessary Elements

The legal basis for injunction and the necessary elements are treated in ILLINOIS CAUSES OF ACTION — ELEMENTS, FORMS & WINNING TIPS: TORT ACTIONS, Ch. 31 (IICLE, 2008), and CHANCERY AND SPECIAL REMEDIES, Ch. 16 (IICLE, 2009).

2. [8.9] Forms/Checklist

See §8.75 below for an example of a declaratory judgment/injunction complaint that seeks to set aside a zoning restriction that bears no substantial relationship to the public welfare and to permit a plan that satisfies the *LaSalle* factors. See *LaSalle National Bank of Chicago v. County of Cook*, 12 Ill.2d 40, 145 N.E.2d 65 (1957). See also §8.5 above, which is a checklist of the suggested elements to include in a standard complaint.

In the context of a preliminary injunction or temporary restraining order, the plaintiff should also be sure to plead the following elements:

- Assert that plaintiff has a clearly ascertainable right in need of protection and describe that right.
- Assert that the plaintiff has a likelihood of succeeding on the merits of its declaratory judgment action or other substantive cause of action and explain why.
- Assert that the plaintiff will suffer immediate and irreparable injury absent the requested injunction and describe what the harm is.

- Assert that the plaintiff has no adequate remedy at law.
- Assert that in balancing the equities and harm to the parties, the harm to the plaintiff in denying the relief far outweighs any harm to the defendant in granting the relief and explain why.
- Assert and explain that the public interest supports the issuance of the requested injunctive relief.

3. [8.10] Examples in Caselaw

The cases identified in §8.6 above are a good starting point in preparing the complaint. In addition, the following cases discuss preliminary injunctions against government bodies: *G.J.Z. Enterprises, Inc. v. City of Troy*, 208 Ill.App.3d 21, 566 N.E.2d 876, 153 Ill.Dec. 26 (5th Dist. 1991) (affirming issuance of preliminary injunction against city from enforcing its zoning ordinance and preventing development when developer relied on city's mistake in informing developer that land was zoned for multifamily dwellings); *Tierney v. Village of Schaumburg*, 182 Ill.App.3d 1055, 538 N.E.2d 904, 131 Ill.Dec. 529 (1st Dist. 1989) (reversing denial of temporary restraining order against village when planned unit development would violate village ordinance for minimum right-of-way width for collector or secondary streets).

D. [8.11] Mandamus

When counsel is presented with a set of facts supporting the belief that the client has a clear legal right to the permit or approval sought and the requested action of the government official is a ministerial function, the common-law “writ of mandamus” is the remedy. Mandamus is billed as a “speedy” remedy. The summons is returnable in 5 days, compared to the 30-day summons for declaratory judgment and injunction.

Mandamus is an appropriate remedy to compel a government body to approve a subdivision plat, to issue a building permit, and to revoke a wrongfully issued stop-work order.

1. [8.12] Statutory Authority/Necessary Elements

The legal basis and the necessary elements for mandamus are treated in I ILLINOIS CIVIL PRACTICE: OPENING THE CASE, Chs. 4, 5 (IICLE, 2009); CHANCERY AND SPECIAL REMEDIES §8.54 (IICLE, 2009); MUNICIPAL LAW SERIES VOL. IV: CONTRACTS, LITIGATION, AND HOME RULE §4.35 (IICLE, 2006, Supp. 2009); and §7.29, “Mandamus Action Must Show Clear Legal Right to Relief,” in this handbook.

2. [8.13] Forms/Checklist

See §8.76 below for an example of a mandamus complaint. A checklist of the necessary elements to include in a standard mandamus complaint follows:

- Describe the plaintiff's identity and relation to subject property.

- Describe the defendant governmental unit (*e.g.*, village, city, county, state), including whether it is a home-rule or non-home-rule government.
- Describe the administrative official defendant being sued, including his or her official capacity with the government, and provide a statement that the official is being sued, not individually, but in his or her official capacity.
- Describe and recite all ordinances relevant to the cause of action (zoning ordinance, subdivision code, and/or building code).
- Describe the development plan or development completed on the subject property.
- Describe the demands made on the administrative official(s) for the approval sought.
- Describe all instances of the defendant governmental unit's failure to proceed with required actions/approvals or why the governmental unit's actions are ultra vires.
- Describe any ancillary agreements between the plaintiff and the governmental unit and any breaches or compliance with such agreements by either party (*e.g.*, annexation agreements, development agreements).
- Attach exhibits (maps, governmental unit committee meeting minutes, documentation of all correspondences between parties, etc.) relevant to the cause of action.
- Assert that the plaintiff has completed and submitted all plans and information required by legally binding ordinances of the governmental unit, including letters of credit for security (if relevant to the cause of action).
- Assert that the governmental unit has a mandatory duty to sign the plat, issue the permit, accept the public improvements, collect and pay the recapture, or rescind the stop-work order, whichever is applicable.
- Assert that the plaintiff is entitled to the approval as a matter of right and that said approval is a ministerial act under the Illinois law for which no municipal discretion is provided.
- Assert that the plaintiff has suffered, and continues to suffer, substantial financial damage due to the governmental unit's unlawful conduct.
- Request that the court issue a mandamus ordering the governmental unit to approve the development plan for the subject property.
- Set out any costs the plaintiff has incurred because of the government delay.

3. [8.14] Examples in Caselaw

Mandamus cases running in favor of the property owner include *Pioneer Trust & Savings Bank v. County of Cook*, 71 Ill.2d 510, 377 N.E.2d 21, 17 Ill.Dec. 831 (1978), *Cribbin v. City of*

Chicago, 384 Ill.App.3d 878, 893 N.E.2d 1016, 323 Ill.Dec. 542 (1st Dist. 2008), *Heerey v. City of Des Plaines*, 225 Ill.App.3d 203, 587 N.E.2d 1119, 167 Ill.Dec. 504 (1st Dist. 1992), and *Phillips Petroleum Co. v. City of Park Ridge*, 16 Ill.App.2d 555, 149 N.E.2d 344 (1st Dist. 1958).

Often, mandamus cases devolve into claims of estoppel against the government, resulting in the attorney for the property owner either anticipating the same and including additional counts for declaratory judgment and injunction or being forced to amend the complaint to include such claims.

E. [8.15] Specific Performance

With the prevalence of annexation agreements, development agreements, subdivision agreements, recapture agreements, settlement agreements, and the like involving contracts between the government (typically, municipalities) and private landowners, specific performance is often the most appropriate remedy to enforce obligations to which a government has committed.

1. [8.16] Statutory Authority/Necessary Elements

The legal basis and the necessary elements for specific performance are treated in ILLINOIS CAUSES OF ACTION — ELEMENTS, FORMS & WINNING TIPS: ESTATE, BUSINESS & NON-PERSONAL INJURY ACTIONS, Ch. 14 (IICLE, 2008); and CHANCERY AND SPECIAL REMEDIES, Ch. 3 (IICLE, 2009).

2. [8.17] Examples in Caselaw

Typically, the law and cases on contract actions equally apply to enforcement of contracts entered into by municipalities.

The following cases discuss the enforcement of rights conferred by an annexation agreement: *Union National Bank v. Village of Glenwood*, 38 Ill.App.3d 469, 348 N.E.2d 226 (1st Dist. 1976) (parties to annexation agreement have right to enforce and compel performance of agreement within designated statutory period and successors to parties to agreement bound by covenants contained therein); *Village of Orland Park v. First Federal Savings & Loan Association of Chicago*, 135 Ill.App.3d 520, 481 N.E.2d 946, 90 Ill.Dec. 146 (1st Dist. 1985) (village's action to enforce provisions of pre-annexation agreement revealed that operative contract existed; facts indicating breach of contract, village's performance of duties under contract, and damages were sufficient to allege cause of action for breach of contract). For a more detailed discussion of annexation agreements, see MUNICIPAL LAW SERIES VOL. II: ANNEXATION AND ANNEXATION AGREEMENTS, Ch. 1 (IICLE, 2006, Supp. 2009).

F. [8.18] 65 ILCS 5/11-13-25, 55 ILCS 5/5-12012.1, and 60 ILCS 1/110-50.1

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.

In response, the General Assembly enacted 65 ILCS 5/11-13-25, 55 ILCS 5/5-12012.1, and 60 ILCS 1/110-50.1, which apply to municipalities, counties, and townships respectively. The law in its current form reads:

(a) Any decision by the [corporate authorities of any municipality, county board of any county, or township board of any township, 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; 55 ILCS 5/5-12012.1; 60 ILCS 1/110-50.1.

Because it is still unclear whether these statutes constitute a separate cause of action or whether it is only a form of review, it is recommended that an action be brought both under this statute and pursuant to the Declaratory Judgment Act within 90 days of the challenged decision. Because the standard of review pursuant to this statute is also unclear, it is recommended that the practitioner allege that the act complained of violates the *LaSalle/Sinclair* factors (*LaSalle National Bank of Chicago v. County of Cook*, 12 Ill.2d 40, 145 N.E.2d 65 (1957); *Sinclair Pipe Line Co. v. Village of Richton Park*, 19 Ill.2d 370, 167 N.E.2d 406 (1960)) and assert that the governmental decision is not supported by the evidence in the record.

Review of administrative decisions made by administrative agencies are still governed by the Administrative Review Law, 735 ILCS 5/3-101, *et seq.* When a determination is being challenged under the Administrative Review Law, the reviewing court is limited to an examination of the facts and issues contained in the record of the proceedings that took place before the administrative body. In assessing the validity of an administrative decision, the court employs a “manifest weight of the evidence” or “arbitrary and capricious” standard depending on the context. For more information about the differences between these standards of review, see *One Equal Voice v. Illinois Educational Labor Relations Board*, 333 Ill.App.3d 1036, 777 N.E.2d 648, 652, 267 Ill.Dec. 845 (1st Dist. 2002), and *Schlicher v. Board of Fire & Police Commissioners of Village of Westmont*, 363 Ill.App.3d 869, 845 N.E.2d 55, 60, 300 Ill.Dec. 634 (2d Dist. 2006).

For a more thorough discussion of the Administrative Review Law, see Chapter 7 of this handbook.

1. [8.19] Statutory Authority/Necessary Elements

The legal basis for and the necessary elements of an administrative review complaint are treated in CHANCERY AND SPECIAL REMEDIES, Ch. 11 (IICLE, 2009); ILLINOIS CIVIL APPELLATE PRACTICE: STATE AND FEDERAL, Ch. 10 (IICLE, 2008); and Chapter 7 of this handbook.

2. [8.20] Examples in Caselaw

This is an area of the law in which it is absolutely essential to keep current with the most recent pronouncements from the reviewing courts. Due to 65 ILCS 5/11-13-25, 55 ILCS 5/5-12012.1, and 60 ILCS 1/110-50.1, besides reviewing *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), and *People ex rel. Klaeren v. Village of Lisle*, 202 Ill.2d 164, 781 N.E.2d 223, 269 Ill.Dec. 426 (2002), counsel should review *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), *Dunlap v. Village of Schaumburg*, 394 Ill.App.3d 629, 915 N.E.2d 890, 333 Ill.Dec. 819 (1st Dist. 2009), *Our Savior Evangelical Lutheran Church v. Saville*, 397 Ill.App.3d 1003, 922 N.E.2d 1143, 337 Ill.Dec. 566 (2d Dist. 2009), and *Condominium Association of Commonwealth Plaza v. City of Chicago*, ___ Ill.App.3d ___, 924 N.E.2d 596, 338 Ill.Dec. 390 (1st Dist. 2010). Counsel also should review *Gallik v. County of Lake*, 335 Ill.App.3d 325, 781 N.E.2d 522, 269 Ill.Dec. 725 (2d Dist. 2002), *Oak Grove Jubilee Center, Inc. v. City of Genoa*, 347 Ill.App.3d 973, 808 N.E.2d 576, 283 Ill.Dec. 610 (2d Dist. 2004), and *Hawthorne v. Village of Olympia Fields*, 204 Ill.2d 243, 790 N.E.2d 832, 274 Ill.Dec. 59 (2003), additional cases that have struggled with the Illinois Supreme Court's significant change in the law on judicial review of special uses.

G. [8.21] Disconnection

The Illinois Municipal Code, 65 ILCS 5/1-1-1, *et seq.*, provides for two methods of disconnecting land from a municipality. Pursuant to §7-3-4, lands can be disconnected by the corporate authorities upon a written petition signed by the owners of record representing a majority of the area of land in such territory. An ordinance adopted by a majority of the members elected to the city council or board of trustees is necessary to perfect such a disconnection. The other, more usual method of disconnection is found in §7-3-6, which provides for land to be disconnected by court procedure. In such a proceeding, a municipality from which disconnection is sought is made a defendant in the action.

This is a remedy for property owners with large land holdings (a combined territory of 20 acres or more) located on the border of a municipality. This remedy is typically available only when property is located in a municipality that provides few, if any, municipal services. It permits a property owner to relieve itself of the municipality's jurisdiction over zoning matters and other police powers and to subject itself to the jurisdiction of the county and leave itself the option at some future time of annexing its property to another municipality, provided the necessary requirements for annexation are met.

1. [8.22] Statutory Authority/Necessary Elements

The legal basis and the necessary elements for disconnection are treated in MUNICIPAL LAW SERIES VOL. II: ANNEXATION AND ANNEXATION AGREEMENTS, Ch. 1 (IICLE, 2006, Supp. 2009) (especially §§1.49 – 1.55).

2. [8.23] Forms

See §8.77 below for an example of a disconnection petition.

3. [8.24] Examples in Caselaw

The leading cases on disconnection are *Gaylor v. Village of Ringwood*, 363 Ill.App.3d 543, 842 N.E.2d 1241, 299 Ill.Dec. 889 (2d Dist. 2006), *JLR Investments, Inc. v. Village of Barrington Hills*, 355 Ill.App.3d 661, 828 N.E.2d 1193, 293 Ill.Dec. 695 (2d Dist. 2005), *In re Annexation of Certain Territory to Village of Deer Park*, 358 Ill.App.3d 92, 830 N.E.2d 791, 294 Ill.Dec. 379 (1st Dist. 2005), *Harris Trust & Savings Bank v. Village of Barrington Hills*, 177 Ill.App.3d 673, 532 N.E.2d 419, 126 Ill.Dec. 734 (2d Dist. 1988), *aff'd*, 133 Ill.2d 146 (1989), *First National Bank of Mount Prospect v. Village of Mount Prospect*, 197 Ill.App.3d 855, 557 N.E.2d 1257, 146 Ill.Dec. 70 (1st Dist. 1990), and *LaSalle National Trust, N.A. v. Village of Mettawa*, 249 Ill.App.3d 550, 616 N.E.2d 1297, 186 Ill.Dec. 665 (2d Dist. 1993).

H. [8.25] Involuntary Annexation

Unlike the previous remedies in which the property owner and the government are adverse to one another, involuntary annexation either by petition or by initiation of an ordinance by the municipality involves the cooperation of the landowner and the municipality. This remedy is available to those who seek to become part of the incorporated limits of a municipality but are barred from doing so by virtue of a lack of contiguity. Section 7-1-2 of the Illinois Municipal Code, 65 ILCS 5/7-1-2, permits property owners who comprise 51 percent of the owners and 51 percent of the electors residing in the territory to petition the municipality under a court-supervised annexation. The same section of the Municipal Code permits a municipality to initiate the involuntary annexation by ordinance but requires the consent of any property owner with ten acres or more.

If the potential involuntary annexation is identified before it is complete, the challenge will occur as part of the circuit court's consideration of the sufficiency of the petition or ordinance under the statutory criteria. Otherwise, completed annexation can be challenged only by a separate quo warranto action.

1. [8.26] Statutory Authority/Necessary Elements

The legal basis and the necessary elements for involuntary annexation are treated in MUNICIPAL LAW SERIES VOL. II: ANNEXATION AND ANNEXATION AGREEMENTS, Ch. 1 (IICLE, 2006, Supp. 2009).

2. [8.27] Examples in Caselaw

The leading cases on involuntary annexation include *Green v. Lawrence*, 37 Ill.App.2d 393, 185 N.E.2d 696 (2d Dist. 1962), *West v. Kotowski*, 84 Ill.App.2d 6, 228 N.E.2d 117 (1st Dist. 1967), *In re Petition To Annex Certain Territory to Village of South Barrington*, 7 Ill.App.3d 958, 289 N.E.2d 1 (1st Dist. 1972), *In re Petition of Village of Kildeer To Annex Certain Property*, 162 Ill.App.3d 262, 514 N.E.2d 1020, 113 Ill.Dec. 108 (2d Dist. 1987), *aff'd*, 124 Ill.2d 533 (1988), and *People ex rel. Nelson v. Village of Long Grove*, 169 Ill.App.3d 866, 523 N.E.2d 656, 119 Ill.Dec 900 (2d Dist. 1988).

I. [8.28] Shifting the Risk

If the government has put the client in the position of requiring it to experience the substantial delay and expense of litigation, the practitioner should look at the possibility of shifting some of the risk to the government, *i.e.*, so a loss will threaten an interest of the government. Such possible losses include monetary damages (exclusive of the attorneys' fees that the government must spend to defend the litigation) and threats to the government's authority (a judicial finding that it does not have the authority to impose the conditions it seeks, to act in the manner in which it has acted, or to adopt and enforce the ordinances that it has sought to enforce against the client and others).

As counsel plots a strategy, he or she initially should question the authority of the government to take the actions it has taken, to enforce the conditions it has sought to enforce, or to deny the approval that the client has sought. An examination of land use cases in the last several years demonstrates that there have been a number of instances when a government has been found by a court to lack authority to act in the manner it has. Government action has been declared invalid on the basis of preemption, on the basis of no prospective application of an ordinance, on the failure to follow standards contained in the state statute, on the absence of authority found in the Illinois Municipal Code or the county enabling statute to act in the manner it has, and on the failure to satisfy the procedural safeguards afforded to property owners.

1. [8.29] Attorneys' Fees/Monetary Damages

A common question clients ask is whether they can recover their attorneys' fees and be awarded monetary damages in connection with an action. To date, in connection with declaratory judgments, injunctions, mandamus, specific performance, and administrative review, the bar has been set extremely high, and a successful property owner's collecting attorneys' fees and monetary damages is a rare occurrence indeed. A client is best served by being advised that there is little or no prospect of recovering attorneys' fees in a declaratory judgment, injunction, or administrative review action. Based on the statutory authority and the practice of the trial and reviewing courts, setting aside the government's restrictions and permitting the property owner to proceed with its development have been held to be a sufficient remedy.

Note two cases in which the property owners prevailed. In *Amoco Oil Co. v. Village of Schaumburg*, 277 Ill.App.3d 926, 661 N.E.2d 380, 214 Ill.Dec. 526 (1st Dist. 1995), the government's insistence on the dedication of land for highway expansion constituted a taking, and the repeal of the special-use permit on the basis of the landowner's refusal to grant the dedication was held not to be a reasonable exercise of the village's legislative authority; therefore, the court remanded the case back for a determination of damages. In *Village of Sleepy Hollow v. Pulte Home Corp.*, 336 Ill.App.3d 506, 783 N.E.2d 1093, 270 Ill.Dec. 793 (2d Dist. 2003), the Second District affirmed the trial court's denial of the government's motion to dismiss the property owner's petition for damages. The court held that the government was not shielded from liability under the Tort Immunity Act in the face of the property owner's claims that the government's conduct (for wrongfully obtaining a temporary restraining order and preliminary injunction preventing a property owner from annexing to a surrounding municipality) was malicious and lacked probable cause. Still, other than in settlement situations, few checks have been written by local government.

2. [8.30] Threat to a Government's Authority

People ex rel. Klaeren v. Village of Lisle, 202 Ill.2d 164, 781 N.E.2d 223, 269 Ill.Dec. 426 (2002), is an example of how the Illinois Supreme Court has gone back and examined “first principles” and determined that a municipality, when acting on a request for a special use, is acting in an administrative capacity. The decision (based on the commentary in the legal community that has followed *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), and *Klaeren, supra*) appears to have sent a shudder through the municipal law bar. The decision represents a significant diminution in government authority and, particularly, the discretion vested in government over special uses. See §8.18 above for a discussion of 65 ILCS 5/11-13-25, 55 ILCS 5/5-12012.1, and 60 ILCS 1/110-50.1 and Chapter 7 of this handbook for a more thorough discussion of the interplay between these statutes and *Klaeren*. While special uses remain quasi-judicial in nature, they now must be reviewed in accordance with a legislative standard, a standard that has not yet been addressed fully by Illinois courts.

Another example of a court finding a lack of authority on the part of a government is *Town of Serena v. Kelly*, 311 Ill.App.3d 344, 724 N.E.2d 543, 243 Ill.Dec. 944 (3d Dist. 2000), in which the township was held to have no authority to regulate a gravel mining operation. The court in *County of Knox ex rel. Masterson v. Highlands, L.L.C.*, 188 Ill.2d 546, 723 N.E.2d 256, 243 Ill.Dec. 224 (1999), held that a county lacked the authority to regulate large-scale hog confinement facilities inasmuch as the facility constituted a use of land for “agricultural purposes,” which is exempt from zoning regulations. See also *Commonwealth Edison Co. v. City of Warrenville*, 288 Ill.App.3d 373, 680 N.E.2d 465, 223 Ill.Dec. 732 (2d Dist. 1997), in which the appellate court held that the Public Utilities Act preempted the city’s zoning ordinance to the extent that it interfered with the utilities transmission line construction project for which the commission had granted a utility certificate.

3. [8.31] Invalidation of Ordinances of General Applicability

More and more often, municipalities are pushing the envelope in the exercise of their authority. This is seen in their comprehensive plans, zoning ordinances, subdivision ordinances, building codes, and boundary agreements. In reviewing the restrictions contained in these ordinances and agreements, one is reminded of the following principles enumerated in *Harris Bank of Roselle v. Village of Mettawa*, 243 Ill.App.3d 103, 611 N.E.2d 550, 558, 183 Ill.Dec. 287 (2d Dist. 1993):

“Absent an *express* grant of statutory authority, a municipality may not exercise extraterritorial governmental power.” *Village of Lisle v. Action Outdoor Advertising Co.* (1989), 188 Ill.App.3d 751, 760, 136 Ill.Dec. 150, 544 N.E.2d 836. . . .

* * *

Any municipal attempt to exercise extraterritorial power is always subject to the requirements that the ordinance (1) be passed pursuant to legislative authority, (2)

constitute a valid exercise of the police power, and (3) bear a reasonable relation to the public health, safety and welfare. . . . Further, where there is a State law relating to the subject, an exercise of police power by a municipality must be in harmony with such law. [Emphasis in original.]

This is especially important when it concerns non-home-rule municipalities; their right to regulate in certain areas is strictly limited.

4. [8.32] Civil Rights Claims Brought in the Federal Courts

Another area in which it must be acknowledged that the bar has been raised very high for a landowner to survive a motion to dismiss is in the federal courts on a cause of action brought pursuant to 42 U.S.C. §1983 alleging substantive due-process violations and procedural due-process violations. Since *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461 (7th Cir. 1988), the federal courts have looked with a jaundiced eye at such claims. In *Coniston*, the circuit court of appeals stated that “[t]he Constitution does not require legislatures to use adjudicative-type procedures, to give reasons for their enactments, or to act ‘reasonably’ in the sense in which courts are required to do.” 844 F.2d at 468. See also *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 165 (7th Cir. 1994), in which the court stated, “Federal courts are not boards of zoning appeals. This message, oft-repeated, has not penetrated the consciousness of property owners who believe that federal judges are more hospitable to their claims than are state judges.” See also *Standard Bank & Trust Co. v. Village of Orland Hills*, 891 F.Supp. 446, 450 (N.D.Ill. 1995), in which the court cited with approval the high level of deference in *Coniston*, *supra*, 844 F.2d at 467, by stating, “Much like *Coniston*, the instant case ‘presents a garden-variety zoning dispute dressed up in the trappings of constitutional law.’”

In *United Artists Theater Circuit, Inc. v. Township of Warrington*, 316 F.3d 392, 400 (3d Cir. 2003), the Third Circuit adopted the “shocks the conscience” standard and rejected the less demanding “improper motive” test when applied to land use disputes in dismissing a substantive due-process claim brought by a property owner. There, the court reasoned that the application of the “shocks the conscience” standard prevents the courts from being cast in the role of a zoning board of appeals. It held that land use decisions are matters of local concern, and such disputes should not be transformed into substantive due-process claims based only on allegations that government officials acted with “improper motives.” 316 F.3d at 400 – 402.

Based on the reasoning and analyses of these federal court decisions, the practitioner must be extremely wary and careful before initiating a substantive or procedural due-process case in federal court.

A more thorough discussion of civil rights actions brought in zoning cases is contained in Chapter 7 of this handbook.

III. INITIATING THE LITIGATION

A. [8.33] In General

Having “exhausted” the client’s remedies before the local unit of government, it is typical that the property owner’s attorney will be well versed in the facts and the procedural history of the case before coming to the point of initiating the litigation. It is also fairly typical that a property owner and the attorney have made every reasonable compromise possible to secure the relief sought from the local unit of government, including negotiating over reductions in density, agreeing to conditions on donations and dedications, and assuming the cost of public improvements that benefit the government and its citizens that are not directly attributable to the development. However, at some point, a property owner can give no more, and compromise is deemed futile. In such an instance, the landowner either must retire from the field or go to court to defend his or her rights. All who have been involved in such a process recognize petitioning the court as the forum of last resort. Because time is usually on the side of the government, if the owner of the land is not willing to stay put and honor a contract, the developer may not be given the time to bring an action.

B. [8.34] Freedom of Information Act

Prior to filing a case and in connection with the thorough investigation of the facts necessary to initiate such a lawsuit, it is strongly recommended that the Freedom of Information Act (FOIA), 5 ILCS 140/1, *et seq.*, be employed. It permits the attorney for the property owner to obtain the background information on other properties in the surrounding area and the circumstances of their development approvals by the government; to examine staff memos and communications (hard copy and electronic) between the staff, the elected official, and any objectors; to review the property file for the subject property; to obtain baseline information including aerial photographs, site plans, traffic studies, and engineering studies; and to examine information bearing on the fiscal condition of the government. Such an approach not only permits the practitioner to obtain information in a far more expedited manner (the government must respond to a FOIA request much more promptly than it must in the discovery document production process once the lawsuit is initiated) but also allows one to “lock in” the information the government has comprised to support or justify its denial. Following up with a document production request and comparing the information produced pursuant to that request with the information produced pursuant to the FOIA request may result in a cause of action against the government for violating the FOIA.

It is also recommended that careful scrutiny be made of any executive sessions that were held during the course of the consideration of the client’s request. Again, later discovery may demonstrate that those executive sessions violated the Open Meetings Act, 5 ILCS 120/1, *et seq.*

Apart from separate causes of action for violations of state statutes pertaining to freedom of information and open meetings, demonstrating a violation can go toward undermining the presumption of validity that is otherwise attached to the government’s decision.

The legal basis and a discussion of the FOIA can be found in MUNICIPAL LAW SERIES VOL. I: ORGANIZATION, OPERATION, AND GOVERNANCE §3.42 (IICLE, 2006, Supp. 2009).

C. [8.35] Choosing Experts

One advantage that the landowner has over the government is that his or her team of experts in most instances has already been assembled, and they have identified the facts supporting the reasonableness of the proposed plan of development. These witnesses also have been subjected to examination by staff, objectors, members of the advisory commissions and boards, and the elected officials, thereby giving the practitioner a leg up in the preparation of his or her case. Sometimes, for strategic purposes, a new team, in whole or in part, is assembled. The typical zoning trial will involve the testimony of the landowner, the land developer (if not the landowner), a land planner, an appraiser, a civil engineer, a traffic engineer, and a fiscal impact analyst. In more complicated cases, it is not unusual to present the testimony of an architect, a hydrological engineer, a market analyst, and an environmental engineer.

As the complaint is prepared and the facts in support of claims are marshaled, it is important to keep the line of communication open between the witnesses so that the claims remain supportable by the experts to be called on to give testimony. It bears repeating that witnesses need to speak in a commonsense fashion and tell the story of the deprivation of the client's rights in a compelling manner. It also bears repeating that witnesses chosen need to be able to testify and respond on cross-examination in a commonsense fashion and not become mired in the technical.

D. [8.36] The Complaint

One must never forget that the complaint is the first opportunity for the trier of fact to hear counsel's side of the story. The complaint is the blueprint for everything that follows. A short summary at the beginning of the complaint that identifies the injuries suffered by the client and the relief requested is recommended. The complaint is the first opportunity to influence the trier of fact. The demonstrative exhibits attached to the complaint are extremely helpful. In many complex cases, it is not unusual to present to the advisory boards and to the corporate authorities bound volumes of information. Distilling that information in a readable, concise fashion and including a colored demonstrative exhibit of the site plan, surrounding land uses and zonings, historic aerial photography, the landscape plan, and photos of the subject property and the surrounding area are strongly recommended.

Involving consultants in the process before filing the complaint is important. It is not too late (unless dealing with an administrative review) to modify the exhibits to make them more readable and understandable. This will help the trier of fact understand the story.

A checklist of the necessary elements of a complaint lying in declaratory judgment and injunction and one lying in mandamus is included in §§8.5 and 8.13 above, and sample complaints are included in §§8.75 and 8.76 below.

The complaint is the first opportunity to undermine the presumption of validity of the government's action (or inaction), demonstrate that the government lacked the authority to act in the manner that it did, prove that the government violated the Open Meetings Act or committed other due-process violations when conducting the hearing, show how the government failed to provide written findings, prove that impermissible contacts outside the hearing occurred, and demonstrate how the government failed to follow its own procedures. The complaint should always state the allegations positively with no hedging. Let the court decide.

A review of the key land use cases reveals two lines of thought. In those instances when government restrictions are set aside, the courts hold:

Every property owner has a right to use his or her property in any way, subject only to the restraint necessary to secure the public welfare. . . . Zoning laws which limit that right are enacted pursuant to the police power of the State and when that power is delegated to a city or village to permit them to interfere with property rights by means of a zoning ordinance, such ordinance to be valid must have a real and substantial relationship to the public health, safety, moral or general welfare. [Citations omitted.] *LaSalle National Bank v. City of Chicago*, 54 Ill.App.3d 944, 369 N.E.2d 1363, 1367, 12 Ill.Dec. 349 (1st Dist. 1977).

In the other line, the zoning ordinance will be upheld if it bears any substantial relationship to the public welfare, and the challenging party must establish by clear and convincing evidence that the ordinance, as applied, is arbitrary and unreasonable and bears no substantial relation to the public welfare. *Thompson v. Cook County Zoning Board of Appeals*, 96 Ill.App.3d 561, 421 N.E.2d 285, 51 Ill.Dec. 777 (1st Dist. 1981).

The complaint should be structured to depict the client in a fair light. Counsel's opponents should not be allowed to pin the tag of the evil developer on the client. In most instances, the client is providing a commodity and service that is an important benefit to society — providing housing, creating jobs, generating sales tax, providing a place for industry, etc. One needs to structure the complaint to demonstrate that the municipal regulation does not promote a substantial interest. If possible, the denial should be demonstrated as inconsistent with the government's own ordinances and comprehensive plan, with its own practices, and with the treatment the government afforded other properties similarly situated. In short, the goal is to demonstrate that the government has not acted fairly and that it has not lived up to the laws that it is called on to administer and enforce. The "smoking gun" as to why the government denied the requested relief should be sought.

E. [8.37] Exhibits

Besides the exhibits attached to the complaint to help the trier of fact understand the facts of the case, it is important to anticipate additional exhibits that will need to be prepared to explain the client's case. With the great advancements in digital technology and PowerPoint® presentations, it is recommended that counsel consider using a computer-based presentation. In most instances, hard copies of the exhibits will still be needed, but an appropriately structured PowerPoint® presentation for the trier of fact is worth considering.

Exhibits that counsel and experts may consider presenting include

- the land plan;
- the government's comprehensive land use plan and map;
- text excerpts from the comprehensive land use plan;
- excerpts from the zoning ordinance;
- that portion of the zoning map covering the subject property and the surrounding area;
- excerpts from the government's subdivision regulations;
- preliminary engineering plans demonstrating how the subject property will be served with sanitary sewer and water and how storm drainage issues will be addressed;
- architectural plans;
- landscaping plans; and
- a digital aerial photo simulation of the proposed development at full build-out, including the landscaping, to demonstrate how the property fits within its surroundings.

The traditional way of showing the subject property in a land use and zoning exhibit is in either a different color from its surroundings (red seems the color of choice) or by superimposing a site plan on an aerial photo. Such an approach may unintentionally convey the impression that the development is inconsistent with its surroundings, however. With proper control and reasonable assumptions about the build-out, the growth of vegetation, and the structures to be located on the property, it is now possible to simulate digitally, without exaggerating the impact, what the proposed development will look like at full build-out if the court were to grant the relief requested. This approach is recommended.

F. [8.38] Motion Practice

Rarely, if ever, in a reported decision has a landowner prevailed at the pretrial motion stage on a declaratory judgment and injunction action challenging the government's refusal to approve a zoning map amendment. Actions founded in mandamus and administrative review lend themselves more readily to a summary disposition of the landowner's claim at the pretrial stage.

More often, the landowner's attorney is called on to defend a 735 ILCS 5/2-615, 5/2-619, or summary judgment motion in a declaratory judgment/injunction attack when the government's authority or procedure (excluding the traditional denial of a map amendment, special use, or variance) is the subject of the attack. In such a circumstance, it is essential to include in the complaint as many relevant facts as possible to defeat these pretrial motions.

G. [8.39] Discovery

If availed of the opportunities of the Freedom of Information Act, the discovery directed to the government, especially in the area of interrogatories and document production, should be an exercise in confirming that all of the information relevant to the denial of the land use approval has been produced and is in counsel's possession by virtue of the FOIA request.

If not availed of the FOIA, then the interrogatories and document production requests need to be addressed to obtain information and facts in the government's control related to

1. the subject property;
2. surrounding development;
3. property similarly situated to the subject property;
4. the government's treatment of those properties similarly situated;
5. minutes of the advisory bodies and the corporate authorities (to identify other inconsistent action taken by the government with respect to other properties);
6. staff reports;
7. communications between the staff and the corporate authorities, between any members of the corporate authorities themselves, and between third-party objectors and the staff of the corporate authorities (including members of the advisory bodies); and
8. evidence of infrastructure, transportation, and land use planning efforts.

As in the FOIA request, maps, aerial photos, fiscal impact analyses, traffic studies, engineering studies, and other analyses conducted on behalf of the municipality related to the subject property, other similarly situated properties, or other similar development projects may be obtained to advance the case.

1. [8.40] Interrogatories/Requests for Document Production

To be meaningful, interrogatories should be structured in such a way that they cannot simply be answered by the tender of documents. In addition, proper interrogatories are key in discovery. The opponent's theory of the case, basis for the theory, identity of experts, and the subject matter of experts' testimony are all determinable through interrogatories. Requests for documents should be utilized to ensure that the most up-to-date ordinances, plans, and regulations are disclosed. Also, it is important to obtain any internal reports, memoranda, or minutes for meetings in which the client's project was discussed.

2. [8.41] Requests To Admit

Requests to admit are particularly useful to streamline trial presentation issues by obtaining admissions of uncontested facts on the accuracy and authenticity of certain exhibits and on other matters that otherwise would absorb substantial amounts of trial time. Such requests to admit can form the basis for stipulations prior to the commencement of trial.

3. [8.42] Rule 213(f) Disclosures

Given the substantial sanctions that the Supreme Court Rules permit a trial court to impose for failing to disclose expert opinions and the facts relied on to support their conclusions and, more importantly, as a vehicle for the lawyer and the expert to get completely on the same page with respect to handling of facts as applied to the applicable standards, the authors strongly advocate a Rule 213(f) disclosure that is as full and complete as possible. A full and complete disclosure of each expert witness' opinion permits the other members of counsel's expert team to be fully apprised of the opinions and bases of the opinions of the other members of the team. It serves as a final check for the practitioner to be sure all of the facts that can be mustered in support of the client have been incorporated into the bases of the experts' opinions, and it permits a big-picture check on the availability of expert testimony (based on fact) in support of each of the relevant standards in connection with the claims in the complaint.

See §8.78 below for an example of a Rule 213(f)(3) disclosure for a controlled expert witness land planner. It includes a detailed list of all the documents relied on by the expert, a short summary statement of the expert's professional opinions, a general location of the subject property, a summary statement of the physical features of the site, the current zoning, a description of the proposed development, and an analysis of the present zoning and the proposed development in the context of the *LaSalle/Sinclair* factors (*LaSalle National Bank of Chicago v. County of Cook*, 12 Ill.2d 40, 145 N.E.2d 65 (1957); *Sinclair Pipe Line Co. v. Village of Richton Park*, 19 Ill.2d 370, 167 N.E.2d 406 (1960)). It goes into as much detail as possible, identifying the facts supporting the expert's opinion on the consistency of the proposed development with the *LaSalle/Sinclair* factors and the inconsistency of the present zoning restrictions with those factors.

4. [8.43] Depositions

Every practitioner has a particular style and opinion on the use and value of depositions. Certainly, an important purpose of depositions is to lock the experts in on their opinions and the bases of those opinions, especially when there are apparent inconsistencies between the facts and the experts' opinions. A deposition is useful in bringing these inconsistencies out for later use at trial. They are also useful for obtaining admissions of a party deponent. Counsel must walk a fine line when trying to limit the testimony of an expert witness to that disclosed under S.Ct. Rule 213(f), as the Supreme Court Rules provide not only that the opinions may include the written response but also any opinion offered at the deposition. S.Ct. Rule 213(g).

One would expect to depose the government's planning director and any expert the government has hired to support its case. The opportunity to depose the economic development

director and the chief financial officer (if the government has one) should not be overlooked. A deposition is an opportunity to explore in further detail any facts disclosed in the Freedom of Information Act requests, the interrogatories, and the document production requests when it appears that other property similarly situated has been granted benefits denied to the client.

As to deposing municipal elected officials, circumstances differ. Some municipalities will fight the depositions, arguing that the basis of the action or inaction of the legislators is not relevant, especially in declaratory judgment actions challenging legislative actions.

H. [8.44] Motions in Limine

Motions in limine are helpful when the discovery demonstrates that an expert's opinions are not grounded in fact, are based on erroneous information, or are offered on matters not relevant to the standards applicable to the particular cause of action. Such a motion is useful in attempting to eliminate any exhibits on the basis of legal or factual infirmity.

I. [8.45] Meeting One's Burden

In declaratory judgment and injunction actions, the moving party has the burden of overcoming the presumption of validity of the existing zoning ordinance. To do so requires proof by clear and convincing evidence that application of the ordinance is arbitrary and unreasonable in that it has no substantial relationship to the public health, safety, and welfare. *LaSalle National Bank v. City of Chicago*, 54 Ill.App.3d 944, 369 N.E.2d 1363, 1367, 12 Ill.Dec. 349 (1st Dist. 1977). With respect to administrative review actions, an administrative agency's findings of fact are deemed prima facie true and correct, and the sole function of a reviewing court is to determine whether the administrative agency's decision is contrary to the manifest weight of the evidence. *Melrose Park National Bank v. Zoning Board of Appeals of City of Chicago*, 79 Ill.App.3d 56, 398 N.E.2d 252, 256, 34 Ill.Dec. 577 (1st Dist. 1979).

J. [8.46] Trial

In many respects, a trial before an impartial jurist with a professional opponent representing the government is far less of a "trial" than the process counsel and the client went through before the advisory bodies and the corporate authorities at the local level. Gone are the hoots and hollers, interruptions, and wild applause for some inane statement made on behalf of the public. The questions from the trier of fact will be on point, and counsel and the experts will be afforded the courtesy of completing answers. As the day of trial approaches, it is time to finalize preparations of the client and witnesses, double-check lists to be sure that all the tasks set out have been completed, and simply relax and let all preparations come to the fore.

K. [8.47] Final Judgment Order

The authors subscribe to the proposition that a successful land use litigant can obtain only a final judgment order structured to set aside the zoning ordinance insofar as it prohibits the proposed use. Within that principle, however, assuming that counsel's proof supports such findings, one can structure a final judgment order using development parameters instead of a

detailed development plan. For example, for commercial, office, and industrial development, one could submit certain minimum bulk standards or other standards (height, floor area ratio, setbacks, perimeter buffering) and a list of uses that will be permitted to be developed on the property consistent with the final judgment order. The issue of permits (when applicable) is essential. Counsel should make sure that all the relief the client needs (and requested) is contained in the order. See §8.79 below for an example of a final judgment order.

IV. DEFENDING THE LITIGATION

A. [8.48] In General

It is axiomatic that a municipal ordinance is presumed valid. The zoning ordinance will be upheld if it bears any substantial relationship to the public health, safety, comfort, or welfare. The party attacking an ordinance bears the burden of demonstrating its invalidity; the challenging party must establish by clear and convincing evidence that the ordinance, as applied, is arbitrary and unreasonable and bears no substantial relation to the public health, safety, or welfare. *Thompson v. Cook County Zoning Board of Appeals*, 96 Ill.App.3d 561, 421 N.E.2d 285, 51 Ill.Dec. 777 (1st Dist. 1981).

Certainly, at the onset of the zoning litigation, the government has a substantial advantage because not only does it enjoy the presumption of validity, but also its legal costs are being funded by the taxpayers, whose resources usually are greater than those of the private property owners. The ability to stretch out time is the greatest advantage because, while the matter is pending in trial, nothing is being built.

Despite these substantial advantages, the land use decisions handed down by the reviewing courts over the last 30 years demonstrate that the property owners are successful a significant portion of the time. For example, see the cases cited in §8.6 above.

B. [8.49] Motion Practice

Because, generally speaking, time is on the side of the government, if the landowner files “exotic claims” under 42 U.S.C. §1983 premised on substantive and procedural due process and equal protection, these claims are an invitation to engage in good-faith motion practice to seek to dismiss some or all of the complaint. On causes of action brought by landowners, outside the denial of a map amendment, special use, or variation, it is not unusual for a government to test the legal theory through a motion to dismiss or summary judgment.

C. [8.50] Choosing Experts

Because most governments are staffed by professional land planners, it is not unusual for the government’s case-in-chief to rely on its professional land planner to support its denial of the proposed use. However, such an approach is fraught with danger that the trier of fact will discount or disregard such an expert inasmuch as he or she is often defending his or her own

recommendation and suffers from being in the employ of the government. The criteria for using experts on behalf of a government are essentially the same as the criteria used by the private property owner: an expert who can testify and answer cross-examination questions concisely and who does not get mired in the technical is the best choice for an expert witness.

Depending on the nature and complexity of a case, the government may choose to retain the services of experts in the field of land planning, real estate appraisal, civil engineering, fiscal impact analysis, and, in a very complex case, a hydrologist or environmental scientist.

Aside from the insight gained from personal acquaintance, a good source for locating and determining whether to retain experts is by reviewing the caselaw in which an expert is identified as testifying in a case similar to the one that counsel is bringing. Counsel also should check the expert's opinions in other cases so as not to be surprised when contrary expert opinion is given in a similar set of circumstances.

D. [8.51] Exhibits

It is in the area of exhibits that the government often realizes economies by relying on the landowner's site plan and land use and zoning exhibit. However, care must be taken that the land use and zoning exhibits depict that the area of influence (*i.e.*, the distance around the perimeter of the subject property that influences the use and development of the subject property) is consistent with the government's view of the case. Depending on the landowner's case, he or she may seek to expand or contract the area. If there is a fundamental disagreement about this, the government should consider preparing its own exhibit.

It is not unusual for a government to prepare an exhibit demonstrating, through a site plan, that the subject property can be developed under its present zoning restrictions. It is also common to see site plans or site analyses demonstrating that an intervening zoning classification between the present zoning classification and the use proposed by the property owner is a more suitable use and development of the subject property.

With respect to a PowerPoint® presentation, distilling key concepts out of the zoning ordinance, the subdivision code, and the comprehensive plan and then presenting these in conjunction with the government's expert witness is most effective. Finally, equally effective are photographs of the surrounding area depicting the surrounding land uses to acquaint the trier of fact with the environment in which the proposed use is sought to be introduced.

E. [8.52] Discovery

By the time the matter gets to trial, because of the exhaustion requirement, the government, particularly its staff, is very familiar with the request. The property owner has identified all of the information related to ownership, has laid out its site plan, and has made compromises and concessions throughout the process — first at the staff level, then before the advisory commissions, and finally before the corporate authorities. The government's own records clearly demonstrate the surrounding land uses and zonings. No one knows better than the government its own comprehensive plan, zoning ordinance, and subdivision code. The government has had the opportunity to review the testimony and question the experts on behalf of the property owner.

Therefore, it would appear that interrogatories and document production requests are generally mere surplusage. However, specific directed interrogatories and document production requests may aid the government's attorney in preparing the defense of the case. One example is when a claim for damages has been made to establish the basis of the amount of the claim for damages. Another area of inquiry is to obtain copies of all the iterations of the site plan prepared by the land planner. The government's attorney may find a site plan included within that disclosure of a less dense development of the property that the government can use to defeat the reasonableness of the proposed use.

Depositions are useful for bringing out the vulnerabilities in the landowner's case, such as issues about the economic feasibility of the project and the ability of the infrastructure, including the sanitary sewer, public water, storm sewer, traffic network, school system, and park system, to support the proposed development. Additionally, depositions are useful for exposing expert testimony that is inconsistent with testimony in the instant case.

With respect to the S.Ct. Rule 213(f) disclosure requirements, the authors reiterate the fundamental importance of being as complete as possible. The detriments of full disclosure are clearly outweighed by the benefits described above.

F. [8.53] Amending the Challenged Ordinance

The government also has the advantage of being able to amend its ordinances after the complaint has been filed and to cure through new hearings the procedural defects pointed out by the landowner in its complaint. Such a tactic appears to be more prevalent in mandamus cases when a government amends its zoning or subdivision ordinance in such a way that the proposed use is no longer permitted as a matter of right. See *Sagittarius, Inc. v. Village of Arlington Heights*, 90 Ill.App.3d 401, 413 N.E.2d 90, 45 Ill.Dec. 757 (1st Dist. 1980). "As a general rule, a legislative body has a continuing right to amend the statute or ordinance, even while litigation is pending involving the legislation." 413 N.E.2d at 93. Nevertheless, the court must decide the case in accordance with the law in effect at the time of decision.

G. [8.54] Trial Defenses

The government attorney will defend the government on the basis of the presumption of validity; on the basis of inconsistency with the comprehensive plan; on the inconsistency of the proposed development with its surroundings, with the trend of development, and with the character of the area; on the basis of the loss of value to surrounding property owners; and on the basis of impacts to the infrastructure, including the road network, overcrowding of schools, and destruction of significant environmental resources. Clearly, the government attorney has a wide field of issues to defeat the landowner.

H. [8.55] Final Judgment Order

The level of detail the government attorney is to include in a final judgment order dismissing the property owner's complaint at the close of trial is in some respects a matter of style. Inasmuch as the trial court's decision can be defended on the basis of any matter appearing of record, some

government attorneys take the position that a simple order denying the relief sought by the property owner is sufficient. However, in other instances, there are specific findings of fact included in the order on each of the relevant standards under the *LaSalle/Sinclair* factors (*LaSalle National Bank of Chicago v. County of Cook*, 12 Ill.2d 40, 145 N.E.2d 65 (1957); *Sinclair Pipe Line Co. v. Village of Richton Park*, 19 Ill.2d 370, 167 N.E.2d 406 (1960)) supporting either or both the reasonableness of the present zoning restrictions and the unreasonableness of a proposed use. The authors recommend that detailed findings based on the trial court's decision be incorporated into the final judgment order.

V. MUNICIPAL REMEDIES/CAUSES OF ACTION AGAINST LANDOWNERS/DEVELOPERS

A. [8.56] In General

The typical government-initiated litigation is in the area of ordinance and code enforcement. When a landowner, after repeated notices, fails to comply with the duly adopted ordinances of the government, the government is left with no choice but to go to court to enforce its ordinances. The typical remedies employed by the government include declaratory judgment, injunction, and monetary fines.

Because of the numerous and varied contracts and agreements that a government enters into, such as annexation agreements, boundary agreements, redevelopment agreements, and recapture agreements, the government often will initiate a complaint grounded in specific performance for breach of contract to enforce the terms and conditions of the agreement against the landowner.

A third area of government-initiated litigation in a land use area is the drawing on subdivision improvement bonds and letters of credit when there has been a failure of a private landowner to comply with the terms and conditions of the subdivision approval.

Finally, there are a substantial number of cases involving municipalities challenging the decisions of an adjoining government on annexation, zoning, and subdivision approval. These cases found their genesis in *Forestview Homeowners Ass'n v. County of Cook*, 18 Ill.App.3d 230, 309 N.E.2d 763 (1st Dist. 1974), and received significant boosts in *Village of Barrington Hills v. Village of Hoffman Estates*, 81 Ill.2d 392, 410 N.E.2d 37, 43 Ill.Dec. 37 (1980), and *Equity Associates, Inc. v. Village of Northbrook*, 171 Ill.App.3d 115, 524 N.E.2d 1119, 121 Ill.Dec. 71 (1st Dist. 1988). In this line of cases, the courts have held that a municipality has standing to challenge the decisions of another government when the challenging government established that it "was directly, substantially and adversely affected in its corporate capacity by the zoning ordinance of a neighboring municipality where the complaining municipality alleged that it would incur decreased tax revenues, increased municipal expenditures and degradation of ambient air quality resulting from increased vehicular exhaust and sound levels." *City of Elgin v. County of Cook*, 257 Ill.App.3d 186, 629 N.E.2d 86, 91, 195 Ill.Dec. 778 (1st Dist. 1993), *aff'd in part, rev'd in part*, 169 Ill.2d 53 (1995).

However, in light of the reviewing courts' pronouncement that municipalities are not persons entitled to due process and equal protection under the state or federal constitutions (*see Village of Riverwoods v. Department of Transportation*, 77 Ill.2d 130, 395 N.E.2d 555, 32 Ill.Dec. 325 (1979); *City of Evanston v. Regional Transportation Authority*, 202 Ill.App.3d 265, 559 N.E.2d 899, 147 Ill.Dec. 559 (1st Dist. 1990); *City of Elgin, supra*), third-party government-initiated lawsuits have not been as successful of late.

Most recently, in *Village of Sleepy Hollow v. Pulte Home Corp.*, 336 Ill.App.3d 506, 783 N.E.2d 1093, 270 Ill.Dec. 793 (2d Dist. 2003), a government that successfully enjoined an annexation of property to an adjoining community was held not to be immune under the Tort Immunity Act and now faces potential damages if the trial court finds that the village's actions were malicious and lacked probable cause.

1. [8.57] Forms

See §8.80 below for an example of a complaint initiated by a municipality seeking to enforce a municipal zoning ordinance.

2. [8.58] Examples in Caselaw

A survey of the cases over the last ten years reveals a number of government-initiated cases that have been successful, especially in the area of ordinance and code enforcement. In *Allied Asphalt Paving Co. v. Village of Hillside*, 314 Ill.App.3d 138, 731 N.E.2d 425, 246 Ill.Dec. 897 (1st Dist. 2000), a village's rule to show cause against an asphalt manufacturer for violation of consent decree was upheld by the reviewing court. Additionally, in *Village of Wadsworth v. Kerton*, 311 Ill.App.3d 829, 726 N.E.2d 156, 244 Ill.Dec. 560 (2d Dist. 2000), the village's complaint seeking declaratory and injunctive relief regarding a landowner's fence, removal of vegetation, and planting of new vegetation and placing of mulch within the scenic corridor and deed-restricted open areas within his lot was sustained by the reviewing court.

In these cases, the government body may seek relief in the form of a preliminary injunction or temporary restraining order. It should be noted that a municipality or other governmental body need not show irreparable harm to obtain a temporary or preliminary injunction against the violation of its ordinances. *City of Waukegan v. Illinois Environmental Protection Agency*, 339 Ill.App.3d 963, 791 N.E.2d 635, 646, 274 Ill.Dec. 543 (2d Dist. 2003) (affirming issuance of temporary restraining order against Environmental Protection Agency (EPA) to prevent construction of biosolids refuse facility because EPA had not secured necessary zoning approvals). *See also County of DuPage v. Gavrilos*, 359 Ill.App.3d 629, 834 N.E.2d 643, 296 Ill.Dec. 86 (2d Dist. 2005) (affirming issuance of temporary restraining order against landowner for operating an adult business in violation of county zoning ordinances).

See also People of City of Charleston v. Witmer, 304 Ill.App.3d 386, 709 N.E.2d 998, 237 Ill.Dec. 529 (4th Dist. 1999); *County of Montgomery v. Deer Creek, Inc.*, 294 Ill.App.3d 851, 691 N.E.2d 185, 229 Ill.Dec. 249 (5th Dist. 1998) (county's suit against owner of campground development seeking enforcement of its subdivision control ordinance was sustained by

reviewing court). In *City of Marengo v. Pollack*, 335 Ill.App.3d 981, 782 N.E.2d 913, 270 Ill.Dec. 354 (2d Dist. 2002), a zoning enforcement action brought by the village was sustained, finding that a pallet manufacturer had exceeded the limit on outdoor storage permitted under the zoning ordinance.

B. [8.59] Additional Causes of Action

Additional causes of action available to a government include village-initiated involuntary annexations to bring within its jurisdiction property located outside its boundaries when such property is wholly or nearly surrounded or when intervening property owners are unwilling to annex it to the municipality. In addition, with the emphasis being placed on redevelopments within local governments, local governments are turning more often to condemnation to achieve their purposes.

VI. THIRD-PARTY COMPLAINTS

A. [8.60] In General

A third-party complaint, *e.g.*, neighbors or an adjoining municipality opposing a development, are the least prepared of the three possible sets of plaintiffs to initiate a land use complaint challenging the approval of the zoning and development plan by a government. This is especially true in connection with the private property owner-objectors. Rarely do they hire legal counsel or experts to testify at the public hearings before the local unit of government, they are not privy to the development plan unless they have obtained copies of all of the submittals and studied them, and they are not privy to the internal workings of the government and its deliberative process.

As discussed in §8.61 – 8.71 below, third-party complaints have not fared well in the courts for these reasons, and, when they have been successful, it is typically because they could demonstrate a procedural defect in the hearings. Unfortunately, many courts take an “easy stance” in allowing third parties to intervene. Once the third-party neighboring property owner is permitted to intervene, settlements are very difficult, especially if objecting third parties have less to lose than the government does.

B. [8.61] Remedies

The remedies available to a third-party objector include declaratory judgment, injunction, and administrative review.

1. [8.62] Actions To Enforce Ordinance — Adjacent Landowners Statute

Without question, the most powerful tool objecting property owners possess in challenging nearby land uses is the adjacent landowners statute, 65 ILCS 5/11-13-15. This section of the Municipal Code allows landowners within 1,200 feet of the property in question to file a lawsuit

to abate or enjoin zoning and building code violations. Two major advantages make this statute particularly attractive to third parties: (a) plaintiffs do not need to allege special damages because the existence of the violation itself is considered harmful; and (b) successful plaintiffs are entitled to recover their attorneys' fees.

In addition to confirming that the plaintiff's property is within 1,200 feet of the subject property, it also must be confirmed that the municipal ordinance being violated was adopted under the authority of Division 13, 31, or 31.1 of the Illinois Municipal Code. If the ordinance was adopted pursuant to a different division of the Municipal Code, no relief is available under 65 ILCS 5/11-13-15.

This point raises the issue of whether §11-13-15 may be enforced against property located in a home-rule municipality because home-rule municipalities generally do not adopt ordinances under the authority of the Municipal Code. However, in *LaSalle National Bank v. Harris Trust & Savings Bank*, 220 Ill.App.3d 926, 581 N.E.2d 363, 163 Ill.Dec. 412 (1st Dist. 1991), the First District Appellate Court held that the adjacent landowners statute may be enforced within a home-rule municipality.

A plaintiff suing under §11-13-15 also must be sure to serve a copy of the complaint on the chief executive of the municipality, as explicitly required under §11-13-15. The statute may not be used, however, to sue a municipality for failure to take action against the subject property. *Heerey v. Berke*, 179 Ill.App.3d 927, 534 N.E.2d 1277, 128 Ill.Dec. 672 (1st Dist. 1989).

2. [8.63] Summary of Cases Brought by Third-Party Challengers

An analysis of the reviewing court decisions over the last 15 years discloses that third-party objector cases have not fared well in the courts. In *LaSalle National Bank v. City Suites, Inc.*, 325 Ill.App.3d 780, 758 N.E.2d 382, 259 Ill.Dec. 259 (1st Dist. 2001), a neighboring property owner suit was dismissed for failure of the complainant to give the proper notice to neighboring property owners and on the other procedural bases. In addition, the city's interpretation of its off-street parking ordinance was deemed reasonable. In *Langendorf v. City of Urbana*, 197 Ill.2d 100, 754 N.E.2d 320, 257 Ill.Dec. 662 (2001), the third-party objector's case was dismissed on the grounds that it was not timely filed. In *Thornber v. Village of North Barrington*, 321 Ill.App.3d 318, 747 N.E.2d 513, 254 Ill.Dec. 473 (2d Dist. 2001), a third-party objector suit was dismissed at the close of the plaintiff's case on a directed verdict. The court found that the ordinance permitting construction of a telecommunications monopoly at the village hall was valid and that the village did not engage in an illegal contract zoning. In *Stroick v. Village of West Dundee*, 319 Ill.App.3d 468, 744 N.E.2d 1279, 253 Ill.Dec. 215 (2d Dist. 2001), the third-party objector claim was dismissed on several grounds, including because the claim was untimely brought and because the third-party objectors lacked standing. In *Weinstein v. Zoning Board of Appeals of City of Highland Park*, 312 Ill.App.3d 460, 727 N.E.2d 655, 245 Ill.Dec. 208 (2d Dist. 2000), the third-party objection to the grant of a variance was denied on the basis that the evidence supported the government's approval of the variation. In *Bainter v. Village of Algonquin*, 285 Ill.App.3d 745, 675 N.E.2d 120, 221 Ill.Dec. 213 (2d Dist. 1996), objecting homeowners and an adjacent village challenged the approval of a gravel pit. The court permitted the use to continue on the basis that it was allowed under the county zoning ordinance prior to annexation and was therefore a legal nonconforming use.

However, third-party objectors were extremely successful in *People ex rel. Klaeren v. Village of Lisle*, 202 Ill.2d 164, 781 N.E.2d 223, 269 Ill.Dec. 426 (2002), in which a third-party's complaint seeking a preliminary injunction was granted on the basis that the denial of the right to cross-examination to the third-party objectors violated the Municipal Code. Another third-party objector victory occurred in *North Avenue Properties, L.L.C., v. Zoning Board of Appeals of City of Chicago*, 312 Ill.App.3d 182, 726 N.E.2d 65, 244 Ill.Dec. 469 (1st Dist. 2000), in which the third party's complaint in administrative review was upheld on the basis that the evidence failed to establish that the property owner had sufficient parking.

C. [8.64] Standing and Jurisdictional Issues in Connection with Third-Party Objector Cases

Standing is always a concern that an attorney for a third-party objector must address, as discussed in §8.63 above.

In actions filed pursuant to 65 ILCS 5/11-13-15, standing is conferred on any property owner within 1,200 feet of the offending use. In other actions, there is no specific rule, except that directly adjoining landowners uniformly have been found to possess standing to file claims against neighboring property owners for zoning and building code violations. The proximity of adjoining landowners to the subject premises provides them with an interest that extends beyond the general public. *Truchon v. City of Streator*, 70 Ill.App.3d 89, 388 N.E.2d 249, 26 Ill.Dec. 625 (3d Dist. 1979).

Landowners not directly adjacent to the subject property also may have standing in land use disputes, but they must adequately plead how they will suffer a specific harm that is different from other residents in the municipality. Obviously, the greater the distance from the subject property, the more difficult it is for a landowner to assert standing.

As the discussion above indicates, compliance with the procedural requirements of notice and timeliness also must be addressed by the attorney for the third-party objector.

D. [8.65] Intervention

Frequently, adjoining landowners seek to intervene in land use litigation between a property owner or developer and the government. The principal motivations for objecting property owners' intervening are a concern that the government will not aggressively pursue or defend the litigation and that the government may seek a compromise to the detriment of the neighboring landowners.

A petition to intervene must allege specific facts demonstrating the right to intervene. *Warbucks Investments Limited Partnership v. Rosewell*, 241 Ill.App.3d 814, 609 N.E.2d 832, 182 Ill.Dec. 298 (1st Dist. 1993). Unless the petitioner is seeking to intervene based on an express statutory right, the petitioner must show that its interests will or may be represented inadequately by the existing parties and that the petitioner will be bound by an order or a judgment entered in the case. See 735 ILCS 5/2-408(a)(2).

Directly adjoining property owners generally possess the right to intervene in land use litigation. *Anundson v. City of Chicago*, 44 Ill.2d 491, 256 N.E.2d 1 (1970). As with the issue of standing, there is no precise formula under Illinois law to calculate the necessary proximity between the petitioner and the subject property in order to confer on the petitioner the right to intervene.

E. [8.66] Anti-SLAPP Lawsuits

In August 2007, Illinois enacted the Citizen Participation Act, 735 ILCS 110/1, *et seq.* The statute is more commonly known as an anti-SLAPP statute, SLAPP being an acronym for “strategy lawsuits against public participation.”

In the event that a defendant believes that an action has been brought against them in violation of this statute, it may move to dispose of the claim predicated on the statute. 735 ILCS 110/15. If a defendant moves to dispose of the claim on these grounds, a “court shall grant the motion and dismiss the judicial claim unless the court finds that the responding party has produced clear and convincing evidence that the acts of the moving party are not immunized from, or are not in furtherance of acts immunized from, liability by this Act.” 735 ILCS 110/20(c). If a defendant is successful in bringing a motion to dismiss on the Act, a “court shall award [the] moving party . . . reasonable attorney’s fees and costs.” 735 ILCS 110/25.

There are few Illinois cases addressing the Act. *Mund v. Brown*, 393 Ill.App.3d 994, 913 N.E.2d 1225, 332 Ill.Dec. 935 (5th Dist. 2009) (dismissing appeal for lack of jurisdiction of circuit court’s denial of defendant’s motion to dismiss plaintiff’s complaint pursuant to Citizen Participation Act); *Nastav v. Phoenix Life Insurance Co.*, No. 07 C 4937, 2009 WL 3065209 at *3 (N.D.Ill. Sept. 23, 2009) (holding Act inapplicable to plaintiff’s claims). However, both the Circuit Court of Cook County and the Circuit Court of Kane County have addressed the Act in written opinions. *See Scheidler v. Trombley*, No. 07 L 513 (Kane Cty.Cir. Sept. 2, 2008) (holding Act applies to tortious acts and dismissing defamation claim brought by Pro-Life Action League against Planned Parenthood); *Shoreline Towers Condominium Ass’n v. Gassman*, No. 07 CH 06273 (Cook Cty.Cir. Mar. 25, 2008), available at www.adl.org/civil_rights/ab/gassman%20decision.pdf. In *Shoreline Towers*, contrary to the holding in *Scheidler*, the court held the Act inapplicable to defamation claims and therefore denied defendant’s motion to dismiss those claims.

F. [8.67] Choosing Experts

A private party objector faces a daunting task in obtaining expert testimony to establish its claims. Budgetary constraints and reluctance on the part of professional experts to represent such plaintiffs are the two major barriers to obtaining quality experts. As a result, the majority of the private third-party objectors’ complaints are founded on objections to technical and procedural bases and not on substantive bases.

G. [8.68] The Complaint

These complaints tend to resemble guerilla warfare; rather than attacking the substantive land use decision, the attacks are on the procedures used. Attorneys for the private third-party objector

must be prepared to defend against a preliminary motion to dismiss or a summary judgment motion. To defeat a motion to dismiss, the complaint should be packed with as many facts as possible. The necessary elements in a third-party complaint include the identity of the plaintiffs; the relationship to the property that is the subject of the complaint; the injuries they have suffered; the defects in the proceedings, if any, that they are challenging; the constitutional, statutory, or local ordinance violations that occurred as a result of the approval; the damage to their property values; and the prayer for relief.

H. [8.69] Motion Practice

If there is a glaring procedural defect in the proceedings, it is recommended that the attorney representing the third-party objectors go for the jugular by filing a summary judgment motion, which, if successful, will knock the legal underpinnings out from the government's approval.

I. [8.70] Discovery

Discovery on behalf of the third-party objector needs to be significantly more detailed, especially in the area of interrogatories and document production requests, than the government or the landowner would need to conduct. The attorney for the third-party objector is attempting to obtain much of the information already in the hands of the government and the private property owner.

Other suggestions with regard to discovery in connection with representing a private property owner or a municipality apply to the representation of a third-party objector. As to the objecting private property owner, extensive (time-consuming and expensive) discovery may "dampen" the furor of a third-party objector to the litigation. See §§8.39 – 8.43, 8.52 above.

J. [8.71] Municipal/Landowner Defenses to Third-Party Lawsuits

It is inevitable that the attorneys on behalf of the landowner and the government will test the complaint in a pretrial motion. The cases discussed in §8.63 above demonstrate a high degree of success in such an approach. An example of a declaratory judgment/injunction zoning suit brought by third parties that was dismissed on a pretrial motion is *City of Elgin v. County of Cook*, 169 Ill.2d 53, 660 N.E.2d 875, 214 Ill.Dec. 168 (1995). The Illinois Supreme Court held that a third-party objecting property owner and third-party government plaintiff lacked standing to challenge a Cook County landfill approval ordinance. The court held that local ordinances approving the siting of a pollution control facility are not subject to extraterritorial challenges by other units of local government.

Because the third-party objector lawsuit acts as a cloud on title and in many instances prevents the private property owner from proceeding with development until the lawsuit is resolved, the private property owner's needs may warrant a strategy that brings the matter to issue sooner rather than later.

VII. SETTLEMENT AND COMPROMISE

A. [8.72] In General

Settlement of land use disputes is divided into two categories — those that require notice and public hearings for an enforceable settlement and those that do not. As a rule, if the settlement permits use of the property in a manner that would have required the property owners to make a filing with the government and to have a public hearing, then those procedures must be followed as part of the settlement process.

B. [8.73] Law on Settlement and Compromise

A government may not, under the guise of compromise, impair a public duty owed by it. *Martin v. City of Greenville*, 54 Ill.App.3d 42, 369 N.E.2d 543, 12 Ill.Dec. 46 (5th Dist. 1977). Corporate authorities must exercise their power under the zoning ordinance in a proper manner and comply with the statutory requirements of notice and a public hearing. *Id.*

Accordingly, a property owner required to receive notice of a particular zoning change or other action under the zoning ordinance should receive such notice even though the zoning change is part of the resolution of a lawsuit. Failure to follow this requirement renders the settlement agreement null and void ab initio. *Ad-Ex, Inc. v. City of Chicago*, 207 Ill.App.3d 163, 565 N.E.2d 669, 152 Ill.Dec. 136 (1st Dist. 1990).

Nearby property owners are therefore protected against a settlement being made between a developer and the government. However, although neighbors must be given notice pursuant to the zoning ordinance, they do not hold veto power over the settlement; instead, neighboring property owners must find new deficiencies in the settlement in order to invalidate it.

C. [8.74] Notice Requirements

Under *Martin v. City of Greenville*, 54 Ill.App.3d 42, 369 N.E.2d 543, 12 Ill.Dec. 46 (5th Dist. 1977), and *Ad-Ex, Inc. v. City of Chicago*, 207 Ill.App.3d 163, 565 N.E.2d 669, 152 Ill.Dec. 136 (1st Dist. 1990) (see §8.73 above), a settlement of a land use dispute must substantially comply with the procedures found in the zoning ordinance. For example, a real estate developer may sue a government that rejects a planned unit development application. In order to settle the lawsuit, the developer and government may agree on certain changes to the PUD that will then be approved by the government. Rather than simply execute a settlement agreement that is approved by the corporate authorities of the government, the real estate developer must substantially comply with the notice and procedural requirements obtained in the PUD ordinance.

VIII. APPENDIX — SAMPLE FORMS**A. [8.75] Complaint for Declaratory Judgment Initiated by a Property Owner**

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

B. [8.76] Verified Complaint for Mandamus

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

C. [8.77] Petition for Disconnection

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

D. [8.78] Rule 213(f)(3) Disclosure for a Controlled Expert Witness Land Planner

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

E. [8.79] Agreed Final Judgment Order

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

F. [8.80] Municipal Ordinance Enforcement Complaint

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