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An Outsider Looks at Illinois Zoning And Planning*

Edward H. Ziegler, Jr.**

Introduction

An outsider necessarily accepts with some reluctance the invitation to address a conference devoted to the topic "What's Wrong with Illinois Land Use Law?" Others within the state and participating at the conference, no doubt, have a greater sense of familiarity with the state and with those statutes and judicial precedents that make up the state's zoning and planning law. In this situation, an outsider's presentation is perhaps best focused on general and comparative impressions derived from an examination of the law books and from an understanding, in this case derived from interviews with representatives of local communities throughout the state, of the regulatory forms and practices embodied in local planning and zoning programs. The discussion that follows, therefore, reflects the attempt to present simply one outsider's impressionistic overview of what might be wrong with Illinois land use law.

This discussion will examine three areas. Section I examines the adequacy and utilization of regulatory authority in Illinois from an outsider's perspective. Section II addresses the role of judicial review in the context of zoning classification and decisions. Last, Section III analyzes the relationship between zoning and planning in Illinois.

I. Adequacy and Utilization of Regulatory Authority

In Illinois, as in other states, enabling authority to adopt and implement local zoning programs has been in place for the better part

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1. Fifty cities in Illinois were surveyed, with emphasis on those cities with large populations, and twenty-one Illinois counties were surveyed, chosen more or less at random throughout the state.
of this century. Zoning enabling legislation and the constitutional home rule\(^2\) power granted to municipalities would appear to provide local governments within the state with ample authority to adopt and implement effective local planning and zoning programs. In fact, the "home rule" power possessed by many municipalities in Illinois is likely to be held to authorize a wide range of local land use regulatory regimes and techniques. Very few of the local officials interviewed had complaints regarding the authority to implement effective local planning and zoning programs.

Interviews with local officials disclosed that the authority to engage in local planning and zoning is probably underutilized within the state. A number of municipalities and counties surveyed had no local land use planning or zoning program of any kind.\(^3\) Also, these interviews indicated that the traditional Euclidean zoning model of rather simple self-administering legislative rules has continued, perhaps more so than in other states, as the prevalent model and form of local land use regulation within the state.\(^4\)

Across the country, modern zoning codes often have replaced, in fact if not always in form, traditional Euclidean zoning programs. The "fixed self-administering legislative rules" that characterize traditional Euclidean zoning have tended to be replaced by more flexible but intensive and site-specific development review techniques. Today, in many communities, discretionary review of individual development applications is the operative, structured form for the regulation of land use and development.\(^5\)

Interviews with local zoning officials in Illinois, however, indicate that many of the more modern regulatory forms and zoning techniques

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3. Illinois cities surveyed reporting no land use planning or zoning program of any kind included East St. Louis, Carmi, Jerseyville, Harrisburg, and Carlyle. Illinois counties surveyed reporting no land use planning or zoning program of any kind included La Salle, Schuyler, Vermillion, Edgar, and McDonough counties. Townships in counties without zoning apparently seldom exercise their statutory zoning authority. La Salle County, for example, reported that only seven of thirty-seven townships within the county had adopted a zoning code.

4. Most local zoning programs surveyed appear largely to mirror the traditional Euclidean zoning model of regulation by fixed self-administering rules with exclusive use districts. A notable exception is the Village of Hoffman Estates where discretionary site-plan review of nearly all new developments with the Village is required and planned development review is often mandated.

may well be underutilized by municipalities and counties within the state. Many local zoning programs surveyed did not reflect proliferation of zoning classifications, special zoning districts, the expanded scope of specially permitted uses or the utilization of floating zones and rezoning with site-specific conditions that so often characterize modern zoning programs elsewhere. Similarly, site plan and design review and forms of planned development and environmental impact review, all hallmarks of modern regulatory programs, appear to be significantly underutilized in Illinois. Many local zoning programs surveyed also did not include historic preservation or landmark protection or transfer development rights or incentive zoning. Moreover, many local programs did not utilize development exactions or impact fees.

Dissatisfaction with the effectiveness of Euclidean zoning by "fixed self-administering rules" and the movement toward adoption and utilization of more discretionary and flexible site-specific regulatory techniques may well be less common in Illinois than in other states. This apparent reliance on traditional Euclidean zoning and the underutilization of modern land use regulatory techniques is somewhat surprising and difficult to explain compared with trends in other states. Some local officials interviewed suggested that this situation was due both to the lack of funding for planning and zoning programs and to the absence of local political support for utilization of more intrusive and planning-intensive land use controls.

II. JUDICIAL REVIEW OF ZONING CLASSIFICATIONS AND DECISIONS

In Illinois, the judicial treatment accorded many important zoning issues, such as those involving variances, special permits, nonconforming uses and vested rights, is, in many respects, well within the


The fundamental concept of zoning is that development should be controlled through a set of detailed, self-administering rules without the exercise of any further judgment or discretion by the zoning authorities. In essence, zoning says to the local legislative body that it must sit down one fine day, think of what it wants the community to look like in the end, lay down all the rules that would permit such development to occur, and then let the development occur without any further exercise of judgment or discretion. This end-state, self-administering concept of land use control is so unrealistic that one wonders how it came to be embraced in the first place.

Id.
mainstream of the zoning law in other states. When dealing with claims involving the validity or reasonableness of zoning classifications and decisions, Illinois courts also apply the traditional doctrines of judicial deference to local zoning decisions, including the "presumption of validity" and "fairly debatable" principles of judicial review. The treatment by Illinois courts of the ultra vires or due process issue of whether a zoning classification is reasonable as applied — the heart and soul of much zoning legislation — is, however, highly unusual if not entirely unique.

The substantive criteria utilized by Illinois courts in determining the reasonableness of a zoning classification as applied and in determining the reasonableness of a specific proposed but prohibited use are comprised of a laundry list of factors derived from past Illinois judicial opinions. The most noteworthy of those decisions are *La Salle National Bank v. County of Cook* and *Sinclair Pipe Line Company v. Village of Richton Park*.

Numerous Illinois decisions have noted the following factors, which are popularly referred to as the *LaSalle* factors:

1. the existing uses and zoning of nearby property;
2. the extent to which property values are diminished by the particular zoning restriction;
3. the extent to which the destruction of property values promotes the health, safety, morals or general welfare of the public;
4. the relative gain to the public as compared to the hardship imposed upon the individual property owner;
5. the suitability of the subject property for the zoned purposes;
6. the length of time the property has been vacant as zoned;
7. the community need for the proposed use; and
8. the care with which the community has undertaken to plan its land use development.

This list of validating factors is routinely applied by Illinois courts in a variety of zoning contexts. The factors are applied in determining the reasonableness of a zoning classification as applied.

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in determining the reasonableness of a specific proposed but prohibited use, in cases involving alleged spot zoning following the grant of a rezoning, in cases involving a denial of a rezoning application, and in cases involving the grant or denial of a special permit, site-plan, or planned development application. In some cases, the factors also are applied by Illinois courts in the context of what are essentially constitutional equal protection and taking claims. While some Illinois court decisions indicate that the first of the factors listed above, "the existing uses and zoning of nearby property," is likely to be of greater significance than other listed factors, all of the above-listed factors seem to be mechanically applied by Illinois courts regardless of the specific zoning context in which the validity of a zoning classification or decision arises.

This judicial treatment by Illinois courts of the validity of zoning classifications and decisions appears to be well beyond the mainstream of the judicially-derived standards for zoning validity applied by other state courts. While many of the listed Illinois factors for zoning validity are considered by other state courts in the general context of zoning litigation, in most other states, these factors are rather selectively applied by courts depending on a particular factor's appropriateness and relevance to the legal claim asserted and in view of the particular zoning context in which the claim arises. For example, state courts often give some evidentiary value to the listed factors (1), (2), (7), and (8) above in determining the reasonableness of the grant of a rezoning request where the claim of illegal spot zoning is asserted. Similarly, other states often give some evidentiary value to the listed

factors (2), (5) and (6) above when resolving constitutional taking claims under the "denial of all reasonable use" standard generally applied for resolution of such claims.\textsuperscript{19} Most courts, federal and state, however, generally consider listed factors (3) and (4) above to be inappropriate and irrelevant to the resolution of the ultra vires or due process validity of a zoning classification or decision.\textsuperscript{20} Based on the constitutional separation-of-powers, most state courts have rejected the judicial weighing of public gain and private loss, called for by these two factors, as an improper usurpation of the legislative function.

Federal and state courts generally apply only the "minimum rationality" test or standard when judicially determining the reasonableness or due process validity of a zoning classification or decision.\textsuperscript{21} In effect, other courts apply simply a watered-down version of listed factor (3) above ("whether the zoning restriction as applied is rationally related to furthering some legitimate public purpose") when adjudicating such claims. In Illinois, however, an owner’s or developer’s lawsuit challenging the reasonableness of a zoning classification or decision may still be successful, due to application of other listed factors, despite the fact that this "rational basis" test is fully satisfied by the local zoning jurisdiction.

Considering that the ordinarily-applied rational basis test is said to present a "herculean" task for developers to overcome in other states,\textsuperscript{22} application of this laundry list of validating factors by Illinois courts would seem to clearly tip the judicial scales toward developers in Illinois, at least, when compared with the judicially-derived standards for validity facing developers in zoning cases in other states. The rather open-ended and free-wheeling judicial scrutiny of zoning classifications and decisions invited by this mish-mash of additional validating factors in Illinois would likely result in litigation outcomes more favorable to developers than would be the case in other states. While developers do not always win in Illinois, an extensive reading of the cases leaves one with the impression that local zoning jurisdictions in Illinois face a significantly more difficult task than in most other states in making their zoning decisions "stick" when challenged in court.

\textsuperscript{19} Id.
\textsuperscript{20} See E\textsc{dward H.} Ziegler, Jr., \textsc{Rathkopf’s The Law of Zoning and Planning} § 3.01(1) (1989).
\textsuperscript{21} Id.
\textsuperscript{22} See Douglas W. Kmiec, \textit{Will the Supreme Court Bring Coherence to Takings Law?}, 15 \textsc{Zoning & Plan. Rep.}, March 1992, at 17-19.
III. THE RELATIONSHIP BETWEEN PLANNING AND ZONING

Critics of local zoning have long noted the importance of effective planning as the basis for both effective and rational implementation of community goals and policies in the land use regulation process and as a means for checking the potential abuse and misuse of local zoning authority.23 A significant number of states in recent years have moved towards strengthening the relationship between planning and zoning. Some states now mandate the preparation of local land use plans.24 In some states, local planning and the adoption of a land use plan are required preconditions to enactment of zoning ordinances.25 Statutes in a number of states also specify the elements that must be addressed in local land use plans.26 In some states, zoning restrictions must be consistent with adopted land use plans.27 In addition, several states now require either the coordination of plans between municipalities or provide for some form of regional or state review of local land use plans.28

In Illinois, a great deal of planning and zoning legislation exists. There is the Illinois Municipal Code,29 The Township Zoning Act,30 the Counties Code,31 The Local Land Resource Management Planning Act,32 the Regional Enabling Planning Act,33 the Northeastern Illinois Planning Act,34 and the Southwestern Illinois Metropolitan and Regional Planning Act.35 None of these statutes, however, require that a land use plan be prepared and adopted by a single municipality, township, or county anywhere within the state. No legal nexus between

27. Id. § 3.17.
28. Id. § 3.10; see also DANIEL R. MANDELKER & ROGER A. CUNNINGHAM, PLANNING AND CONTROL OF LAND DEVELOPMENT 794-805 (3d ed. 1990).
33. ILL. REV. STAT. ch. 34, para. 5-14001-07 (1991).
planning and zoning is established anywhere in this legislation. Elements addressed in local land use plans are not specified, intergovernmental cooperation in planning and zoning is not required, and there is no required mechanism for regional review of plans. The Illinois legislature at one time anticipated state funding in support of local land use planning by establishing within the State Department of Commerce and Community Affairs a mechanism for establishment of criteria and standards of review of local plans to determine eligibility for such funding. No criteria of standards for review of local plans, however, were ever adopted by that state agency as funds for the support of local planning have never been appropriated.

Interviews with local officials within Illinois indicate that there appears to be, in fact, a very tenuous connection between planning and zoning within the state. In addition to those communities that have no planning or zoning programs of any kind, a number of Illinois communities that have adopted zoning programs have not adopted any type of local land use plan. In many communities, adopted land use plans that were prepared years ago, have not been consistently updated or revised, and are, in fact, dead plans. Only a few local officials reported the existence of adequately funded and carefully prepared local land use plans that actually provide local officials with substantial and ongoing guidance in regulating land use and development.

CONCLUSION

It may be that in Illinois the relationship between planning and zoning is not substantially worse than in other states where local land use plans are not required and where there is no mandated legal nexus between planning and zoning. The apparent tenuous connection be-

37. See supra note 3.
38. Cities that reported the adoption of a zoning code but not a land use plan included Rochelle, Greenville, Olney, Rantoul, and Rock Island. Champaign County also reported the adoption of zoning without a land use plan.
39. This appeared to be the situation in many, if not most, cities and counties that were interviewed. For example, the following cities reported that their adopted land use plans were twenty or more years old, had seldom been amended, and generally provided little if any guidance in the present zoning regulatory process: Des Plaines (plan adopted 1956); Galesburg (plan adopted 1967); Peoria (plan adopted 1966); Morris (plan adopted 1967); Metropolis (plan adopted 1964); Alton (plan adopted 1963); Pontiac (plan adopted 1967); Charleston (plan adopted 1968).
tween planning and zoning within Illinois, however, may well be related to the apparent underutilization within the state, as discussed earlier herein, of many modern regulatory devices and zoning techniques. Many modern zoning and land use regulatory techniques, such as forms of site plan, design, planned development, and environmental impact review as well as transfer development rights, incentive zoning, and exaction and impact fee programs, tend to be planning-intensive in their formulation and often require at least a modicum of continuing planning expertise.\textsuperscript{40} At the very least, the apparent underutilization of effective planning within the state is likely to further undercut the ability of local communities to have their zoning classification decisions sustained in court under the \textit{La Salle National Bank} factors for judicial review.

\textsuperscript{40} See, \textit{e.g.}, I. Michael Heyman, \textit{Innovative Land Regulation and Comprehensive Planning}, in \textit{The New Zoning} 23 (N. Marcus and M. Groves eds. 1970); see also, \textit{Model Land Dev. Code} §§ 2-201, 2-210 (1975) (recommending that planning be mandatory when sophisticated land use controls, such as planned development, are adopted).