

The *Klaeren* Case: Entering a Brave New World of Illinois Zoning Law

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ABSTRACT: *The Illinois Supreme Court recently handed down its decision in People ex rel. Klaeren v. Village of Lisle, Case No. 90537 (10/18/02). The decision not only affects the way local governments conduct public hearings on zoning matters, but it also fundamentally changes the way that Illinois courts have analyzed certain local zoning decisions for more than 40 years. The significance of this decision and its impacts on both local governments and courts needs to be understood in the context of the case.*

A. Introduction

On October 18, 2002, few local government officials may have felt the tremors, but the Illinois Supreme Court's decision that day dramatically shook up the well-established procedures for granting certain site-specific zoning relief in Illinois. In *People ex rel. Klaeren v. Village of Lisle*,¹ the Supreme Court affirmed a decision of the Second District Appellate Court² holding that "interested parties [have] the right to cross-examine adverse witnesses" as part of a special use proceeding. In reaching this decision, however, the Court overturned more than 40 years of precedent by ruling that "municipal bodies act in administrative or quasi-judicial capacities when those bodies conduct zoning hearings concerning a special use petition."³

The *Klaeren* case may ultimately prove to be yet another example of bad facts making bad law. Although in some respects the Supreme Court corrected some of the troubling aspects of the Appellate Court's decision, a close review of the case, its facts, and the Supreme Court's ultimate ruling suggests that municipalities and courts have even more trouble in store as they try to respond to the decision itself and its wide-ranging implications.

B. The Dispute

In *Klaeren*, landowners living adjacent to a proposed Meijer development challenged the procedure by which the Village of Lisle approved the development. Specifically, Lisle used the uncommon procedure of a joint hearing of its zoning board of appeals, plan commission and board of trustees on the proposed development to hear evidence on the requested annexation, annexation agreement, rezoning and special use permits for a planned development and for a gas station. Over 500 people attended the public hearing. The mayor of Lisle presided at the hearing, allowing the petitioners to make a full presentation of their case but setting a two-minute time limit on all speakers from the audience – a limitation that prevented a citizen group from making a prepared presentation on behalf of 2,000 residents who had signed a petition. The mayor also barred citizens from presenting poster board exhibits as evidence. Moreover, the mayor prohibited any of the citizens from cross-examining any of the petitioner's witnesses.⁴

After the joint hearing was adjourned, the Plan Commission and Zoning Board of Appeals each considered the evidence relating to the requested planned development and gas station special use permits, and both of these bodies ultimately recommended that the special use permits should be denied.⁵ Nevertheless, the Village Board in Lisle decided not to follow the recommendations of the Plan Commission and Zoning Board of Appeals, and it approved the annexation and zoning petitions needed to permit the Meijer development to proceed.

The plaintiffs, disappointed residents of Lisle, filed their lawsuit to prevent the Meijer development

from proceeding. The trial court held a preliminary injunction hearing at which at least ten witnesses testified to matters both within and without the public hearing record. Following the hearing, the trial court granted a preliminary injunction from which the case was appealed.⁶

Significantly, in filing suit, the plaintiffs did not challenge the substance of Lisle's zoning decisions. Rather, the basis for their zoning challenge was that the public hearing process did not afford them an adequate opportunity to be heard.⁷ Although the trial court, appellate court and Supreme Court properly criticized the procedures that Lisle employed at the hearing, one must question whether the process was fundamentally defective in light of the fact that the hearing bodies considering the special use permits both recommended *denial* of the requested relief. Because the public hearing bodies produced the very result that the plaintiffs sought, whatever technical defects a court might find with the procedures could not have resulted any better for the plaintiffs. Thus, from a strictly procedural perspective, one could question whether there was a justiciable controversy for which the courts could fashion any meaningful relief.

This issue apparently never came before the trial court, and therefore was not part of the appeal. Perhaps this issue was overlooked because of a fact largely overlooked by the courts, to-wit: the Village of Lisle was only a nominal defendant in the case. Although the Village's procedures were the center of the dispute, local elections following the Village Board's approval of the Meijer development brought a change in the Village's viewpoint so that it was adverse to the development. Because of annexation agreement obligations, however, the Village could not oppose the approvals, leaving it no choice but to effectively stay on the sidelines and let Meijer defend the case. Thus, this case proceeded at the trial and appellate court levels without *any* meaningful input from the affected municipality. In the Supreme Court, several municipalities filed an *amicus curiae* brief to express municipal concerns, but the issues in the case were already framed and could only be marginally influenced.

In short, the *Klaeren* case came to the courts focusing on the excessive limitations on the opportunity for members of the public to participate in the hearing process, but overlooking the facts that the hearings yielded precisely the results that the plaintiffs sought in the case and that the affected municipality was necessarily a "no-show" in court. The seeds for a troubling decision were planted early on.

C. The Appellate Court Decision

In reviewing this case, the Appellate Court of Illinois, Second District, held that the procedures used at the public hearing in Lisle violated the public hearing rights of the adjacent landowners. In doing so, the Second District determined that *all* public hearings "in all municipalities" must allow not only the right of cross-examination, but the "full panoply of rights" to subpoena witnesses, present witnesses and request continuances for purposes of developing rebuttal evidence.⁸

The Second District's blanket ruling assumed that all public hearings are the same. The Illinois Compiled Statutes, however, include numerous types of public hearings to serve a variety of purposes. Some of these hearings are quasi-judicial or adjudicative, while others are plainly legislative. Given the various types and purposes of public hearings, applying the Appellate Court's "one size fits all" ruling would be quite impractical, if not inconsistent with existing law.

Many of the public hearings required in the Illinois Compiled Statutes are clearly legislative in nature, and their purposes vary. They are used for investigating the efficiency of government employees,⁹ for soliciting public objections and suggestions regarding public projects,¹⁰ for explaining intended governmental actions,¹¹ and for fact-finding purposes.¹² Other hearings have no express purpose, but do provide the public with an opportunity to be heard prior to consideration of important governmental decisions.¹³ Thus, the common purpose of such hearings is to foster greater democratic participation in local governance and to provide opportunities for more informed public decision-making — whether or not the opinions expressed at public hearings are based on verifiable facts.

The General Assembly has not prescribed a single set of hearing procedures for all hearings. As a

result, some hearings do not require testimony to be under oath,¹⁴ while others do.¹⁵ For some hearings, members of the public have an express right to submit written statements.¹⁶ Some hearings authorize the public to comment generally on the subject of the hearing, while other hearings prescribe the topics on which testimony may be offered.¹⁷ Because the General Assembly has chosen to establish special procedures for certain hearings, the statutes themselves should be the source for determining what procedures are required for any particular hearing.¹⁸ The courts have no need to elaborate on those procedures,¹⁹ except as necessary to afford citizens a fair opportunity to communicate their views to public officials.²⁰

Furthermore, the legislative hearing process is designed to vet an issue, but not necessarily to decide it.²¹ This has historically been the case in the land use context, where the power of the corporate authorities to amend an ordinance or grant an approval has historically not been constrained by the evidence presented at a public hearing.²² Moreover, at least prior to the Supreme Court's decision in *Klaeren*, when the corporate authorities of a municipality decided a zoning issue, the evidence presented at the public hearing would be both irrelevant and inadmissible in a subsequent court challenge.²³ Only when a local zoning board of appeals had final decision-making power would the record be appropriate for a court to consider pursuant to the Administrative Review Law.²⁴ Thus, prior to *Klaeren*, there has been no practical need for procedural perfection in the vast majority of zoning hearings.

D. The Supreme Court's Decision

In its review of the appellate court's decision in *Klaeren*, the Supreme Court expressly rejected the Second District's conclusion that *any* public hearing before *any* municipal body required the municipal body to provide the full spectrum of rights identified by the Second District. The Supreme Court held that the Second District had construed the phrase "public hearing" too broadly.²⁵ The Supreme Court properly distinguished between the process necessary at "legislative" hearings and "quasi-judicial" or adjudicative hearings, noting that quasi-judicial hearings must provide certain procedures for public participation not required for legislative hearings.²⁶

It was the next step of the Court's analysis that turned Illinois zoning law on its head. The Court overturned more than 40 years of precedent and decided that, when considering special use permits, the corporate authorities of municipalities were acting in a quasi-judicial rather than legislative capacity.²⁷ In taking this dramatic step, the Supreme Court determined that special use permits were adjudicative hearings because "the property rights of the interested parties are at issue."²⁸ Because many matters coming before municipalities directly affect the property rights of individuals (including annexation agreements), the Court's opinion does not provide a clear basis for distinguishing adjudicative and legislative hearings. Moreover, the Court offered little guidance in determining what procedural rights are extended to participants in public hearings. The upshot of the Court's decision is that municipalities face great uncertainty regarding whether a hearing is adjudicative or legislative.

Ironically, the Court's decision was largely unnecessary for several reasons. First, there is no constitutional requirement for a public hearing in the zoning or annexation context.²⁹ Thus, the only rights that the plaintiffs had were the public hearing rights provided by statute. With respect to the special use permits, the plaintiffs received exactly the outcome they sought from the hearing bodies: negative recommendations. Theoretically, a fairer hearing process could have resulted in a more persuasive recommendation that might have changed the Village Board's ultimate decision. The plaintiffs, however, did not challenge the substantive decision of the Village Board, only the procedural process. Thus, the Court could have found this to be a case of "no harm, no foul."

Second, even if the Court found that the procedures that Lisle employed were so fundamentally unfair that some redress was required, the Court could have acted without disturbing such longstanding precedent. Specifically, the Court could have issued a narrow decision that the procedures were so restrictive that they failed to satisfy the statutory requirement for a public hearing. This approach would have

addressed the perceived wrong with minimal repercussions.

Third, even if the plaintiffs had objected to the substantive grounds for issuing the special use permits to Meijer, the Court did not have to fashion a new remedy to address such objections. Illinois courts long ago established that such challenges can be brought to the circuit court for a trial *de novo* to determine whether the decision was arbitrary and unreasonable based on the so-called “*LaSalle* factors.”³⁰ This is a familiar and well-understood remedy. In contrast, the Court’s ruling that the special use permit hearings in Lisle were quasi-judicial raises unanswered questions regarding the available judicial remedy. The Illinois procedures under the Administrative Review Law are not available because the special use was not determined by a final action of the zoning board of appeals.³¹ There is also some doubt regarding the availability of a common law writ of *certiorari* because plaintiffs would seem to have the right to bring a *LaSalle* factor-based declaratory action.³² Moreover, in the *Klaeren* case, the plaintiffs did *not* seek a writ of *certiorari* and the trial court acted based on evidence outside hearing record, which is improper when proceeding under a writ of *certiorari*.³³

Despite the opportunity to decide the dispute on much narrower grounds, the Court’s decision seemed to be fueled by the perception of some commentators that a majority of other states regard hearings on special uses as quasi-judicial rather than legislative.³⁴ Although such commentaries will be discussed further in Part 2 of this article, the Court apparently accepted these commentaries without regard to the existing statutory structure in Illinois. For example, if the standard for adjudicative hearings depends on whether the hearing affects individual rights, then the zoning amendment process that the General Assembly has created is schizophrenic. Illinois courts have previously ruled that amendments to zoning regulations are generally applicable and do not affect any particular property.³⁵ On the other hand, there can be little doubt that an amendment to a zoning map with respect to a single parcel affects individual property rights. Nevertheless, the General Assembly has created a single hearing process for both of these amendments, and such process includes its own relief in the form of protests and super-majority votes.³⁶ Under the Court’s new view, a zoning amendment hearing can conceivably be legislative or quasi-judicial. This hardly seems to be the result anticipated, as the General Assembly has not subjected the amendment process (or the special use process) to the Illinois Administrative Review Law, even though it plainly has done so with other zoning processes when it deemed appropriate.³⁷

E. Potential Consequences of *Klaeren*

Although it is too early to determine all of the consequences from the Supreme Court’s decision in *Klaeren*, some initial observations are appropriate.

First, the right of cross-examination will be available in at least some zoning hearings.³⁸ Neither the Supreme Court nor the Appellate Court offered any specific guidelines for implementing these new rules. Thus, municipalities will have the task of adopting procedures “uniquely suited to local conditions.”³⁹ The Appellate Court has already identified a number of the procedural issues to be addressed, including: (i) who are the beneficiaries of such rights (*i.e.*, who has standing to cross-examine); (ii) what will be the allowable scope of cross-examination; (iii) which witnesses will have their testimony subject to cross-examination; and (iv) what factual issues are relevant for purposes of cross-examination.⁴⁰ Although these issues may be customary for courts to decide, they are not standard fare for local zoning officials, who in the vast majority are not trained as attorneys. Moreover, both the Appellate Court and Supreme Court cautioned that reasonableness of such procedures will be subject to judicial review based on the particular circumstances.⁴¹

As a result, special use and other zoning hearings will likely take on the character of “mini-trials.” This will necessarily increase the complexity of the hearing process. Moreover, because the Court has now recognized a procedural due process claim where someone is not extended adequate opportunities for cross-examination, municipalities will be faced with the Hobson’s Choice of allowing unrestrained

cross-examination for every person who requests it, or facing litigation every time that someone believes his or her cross-examination rights were improperly curtailed. The former approach presents the risk of interminable hearings (with associated administrative costs),⁴² while the latter increases the need for (and cost of) legal services. Both approaches will likely exacerbate the difficult task of recruiting qualified citizens to serve as zoning officials.

Second, municipalities can expect more zoning litigation. Prior to *Klaeren*, a municipality might encounter a challenge to the substantive correctness of granting or denying a special use permit. In light of *Klaeren*, even if a municipality makes the correct decision, it may still face litigation if it did not have a procedurally perfect hearing.

Third, far from enhancing the public process, the *Klaeren* decision may diminish it. If certain zoning hearings are now deemed quasi-judicial, a disappointed applicant may be required to sue all residents who asked questions at the hearing because they are conceivably parties in interest. Similarly, any person who testifies may suddenly become the subject of cross-examination by a petitioner or another resident. Also, as the entire process becomes increasingly legalistic, neighboring property owners may feel that their rights cannot be fully exercised without legal counsel. The cost to the ordinary citizen of communicating to local officials at public hearings may increase and become prohibitive.

Finally, the effectiveness of the process may be impaired. If the new procedures are perceived as shifting the responsibility of questioning a zoning petitioner from the designated hearing body to “interested” property owners, the hearing body may itself become more passive and assume a role of making recommendations based on information presented instead of independently investigating the facts to reach the best policy alternative. Given the experience and local knowledge that many zoning boards bring to bear on zoning issues, this could be the greatest loss of all to the public interest.

F. Conclusion to Part 1

The Supreme Court in *Klaeren* held that when a municipality holds a public hearing to consider a special use application – whether the application is being considered on its own, or in conjunction with other land use relief – the municipality must allow the cross-examination of witnesses in some form. The Supreme Court’s decision does not specifically require any other due process protections for any other kind of public hearing. However, the Supreme Court’s decision requires the Village to determine, on a case-by-case basis and with limited judicial guidance, what kind of public hearings are “quasi-judicial,” and what kind of due process protections are required at those hearings. ■

¹ Case No. 90537, 2002 Ill. LEXIS 941 (Ill. Supreme Court, 10/18/02).

² *People ex rel. Klaeren v. Village of Lisle*, 316 Ill. App. 3d 770, 737 N.E.2d 1099 (2d Dist. 2000).

³ 2002 Ill. LEXIS 941 at 27.

⁴ *Id.* at 2-7.

⁵ *Id.* at 9.

⁶ *Id.* at 7-14.

⁷ 737 N.E.2d at 1107.

⁸ *Id.* at 1110.

⁹ See 65 ILCS 5/10-4-4.

¹⁰ See, e.g., 65 ILCS 5/11-130-4 and 11-141-15.

¹¹ 35 ILCS 200/18-80 (truth-in-taxation hearings).

¹² See *Petersen v. Chicago Plan Comm’n*, 302 Ill. App. 3d 461, 466 (1st Dist. 1998) (hearings under Chicago’s Lakefront Protection Ordinance).

¹³ See, e.g., 65 ILCS 5/8-2-9 (hearings on annual appropriation ordinances); 11-15.1-3 (annexation agreements).

¹⁴ See, e.g., 65 ILCS 5/11-15.1-3 (annexation agreements).

¹⁵ See, e.g., 65 ILCS 10-4-4 (investigations of municipal ordinance enforcement); 65 ILCS 5/11-13-18 (zoning hearings).

¹⁶ 65 ILCS 5/11-12-7 (comprehensive plans).

¹⁷ Compare, e.g., 65 ILCS 5/11-130-4 (construction of waterworks facilities), with 35 ILCS 200/27-35 (special service areas).

¹⁸ See *In re Consolidated Objections to Tax Levies of School District No. 205*, 193 Ill.2d 490, 496 (2000).

¹⁹ See *People v. Pullen*, 192 Ill.2d 36, 42 (2000).

- 20 *See Petersen v. Chicago Plan Comm'n*, 302 Ill. App. 3d at 466.
- 21 Even the Second District acknowledged that while such legislative hearings are required, the legislative bodies are not required to listen. 737 N.E.2d at 1113. *See also* 65 ILCS 5/11-130-4 (“At this hearing all objections and suggestions shall be heard, and the corporate authorities shall take such action as they shall deem proper in the premises”).
- 22 *See Freesen Inc. v. County of McLean*, 258 Ill. App. 3d 377, 382-83 (4th Dist. 1994); *Anthony v. City of Kewanee*, 79 Ill. App. 2d 243, 249 (3d Dist. 1967). It is also important to note that the General Assembly has required a greater number of votes to approve special use permits and variations when the hearing body did not recommend such approval. 65 ILCS 5/11-13-1.1, 5/11-13-10. Such extraordinary voting requirement, however, does not limit the ultimate authority of the corporate authorities to disregard the public hearing results.
- 23 *See Yusef v. Village of Villa Park*, 120 Ill. App. 3d 533, 545 (2d Dist. 1983); *Thompson v. Cook County Zoning Board of Appeals*, 96 Ill. App. 3d 561, 575 (1st Dist. 1981); *Smith v. County Bd. of Madison County*, 86 Ill. App. 3d 708, 718 (5th Dist. 1980).
- 24 65 ILCS 5/11-13-13; *see also* 735 ILCS 3-101 *et seq.* (Administrative Review Law).
- 25 2002 Ill. LEXIS 941 at 24-25.
- 26 *Id.* at 25, 28-29.
- 27 *Id.* at 27-28. The Supreme Court long ago recognized that municipalities act legislatively when conducting zoning hearings. *LaSalle Nat'l Bank v. County of Cook*, 12 Ill. 2d 40 (1957). Moreover, the Supreme Court confirmed the legislative nature of special use permits in *Kotrich v. County of DuPage*, 19 Ill. 2d 181 (1960), and Illinois courts have consistently re-affirmed the legislative character of special use permits.
- 28 2002 Ill. LEXIS 941 at 28.
- 29 *See River Park, Inc. v. City of Highland Park*, 23 F. 3d 164, 166 (7th Cir. 1994), *citing City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976) (procedural due process can be satisfied for zoning decisions through the political process without any hearing); *Hunter v. City of Pittsburgh*, 207 U.S. 161 U.S. 178-79 (1907) (no process is constitutionally due in annexation decisions).
- 30 *Cf. LaSalle Nat'l Bank v. County of Cook*, 12 Ill. 2d 40, 46-48 (1957). When planned developments or other special use permits are involved, courts can evaluate whether the *LaSalle* factors have been satisfied by considering the standards for such relief as provided in the local zoning ordinance. *See LaSalle Nat'l Bank v. Village of Bloomingdale*, 154 Ill. App. 3d 918 (2nd Dist. 1987).
- 31 *See* 65 ILCS 5/11-13-13. *See also Wilkins v. State of Illinois*, 51 Ill. 2d 88, 90 (1972) (administrative review procedures are only available when expressly authorized by statute).
- 32 *See Russell v. Department of Natural Resources*, 183 Ill. 2d 434, 440-41 (1998) (*certiorari* is available when there is no other available form of review).
- 33 *See Zenith Vending Corp. v. Village of Schaumburg*, 180 Ill. App. 3d 354, 361-62 (1st Dist. 1989).
- 34 2002 Ill. LEXIS 941 at 26.
- 35 *See Bieretz v. Village of Montgomery*, 67 Ill. App. 2d 403 (2d Dist. 1966).
- 36 *See* 65 ILCS 5/11-13-14.
- 37 *See* 65 ILCS 5/11-13-13 (administrative review applies when the zoning board makes a final administrative decision).
- 38 Although final variation hearings before zoning boards of appeals have long been recognized as quasi-judicial hearings, the right of interested parties to cross-examine witnesses has not been apparent in municipalities outside Chicago. The Illinois Municipal Code provisions extending rights of cross-examination apply expressly only to municipalities over 500,000. 65 ILCS 5/11-13-7a.
- 39 737 N.E.2d at 1111.
- 40 *Id.* at 1110-12.
- 41 2002 Ill. LEXIS 941 at 33; 737 N.E.2d at 1111.
- 42 The administrative costs will be further increased because full transcripts may become necessary to preserve the record for future review of the newly ordained quasi-judicial hearings.