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Practices, Tactics and Considerations for the Zoning Litigator

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PRACTICES, TACTICS AND CONSIDERATIONS FOR THE ZONING LITIGATOR

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The purpose of this article is to inform attorneys who try zoning cases of some of the practices, considerations and legal standards, both established and still developing, which will assist them in litigating zoning cases.

The first consideration in a zoning case, as in any other case, is to know the law and the elements of a prima facie case. The plaintiff who challenges denial of rezoning must show that the zoning ordinance is unconstitutional and, therefore, invalid. As summarized in one case:

> An ordinance will be presumed to be valid, and the one attacking the 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.[1]

The factors which the courts consider in making such a determination were enunciated in *LaSalle National Bank of Chicago v. County of Cook*.[2] These factors include: 1) the existing uses and zoning of nearby property; 2) the reduction in property value resulting from the particular zoning restriction; 3) the extent to which the destruction of property values promotes the general health, safety and welfare of the public; 4) the relative gain to the public as opposed to the hardship to the owner; 5) the suitability of the property for the zoned purpose; and 6) the length of time the property has remained vacant, as zoned. In addition to these established factors, two newer criteria have emerged. These new criteria are (a) community need for the use proposed by the property owner;[3] and (b) whether there exists a reasonable comprehensive plan encompassing the property at issue.[4] Most communities have prepared or are in the process of preparing comprehensive plans. Such plans, along with the first criterion relating to existing uses and zoning, are the most important factors.

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1. *Tomasek* v. *City of Des Plaines*, 64 Ill. 2d 172, 179-80, 354 N.E.2d 899, 903 (1976).
2. 12 Ill. 2d 40, 145 N.E.2d 65 (1957).
3. *Locker* v. *City of McHenry*, 89 Ill. App. 2d 457, 231 N.E.2d 685 (2d Dist. 1967).
4. *Wilson* v. *County of McHenry*, 92 Ill. App. 3d 997, 416 N.E.2d 426 (2d Dist. 1981).

A consideration which one should always bear in mind is that the case is likely to be appealed. Most zoning cases are appealed, and the Illinois Appellate Court does not seem to hesitate to reverse a trial judge. This is an extremely important consideration in building a record. Large exhibits should be photographed so that they can easily be reprinted in appellate briefs. Questions and the witnesses' answers must be carefully framed with an eye to further scrutiny in a sterile transcript.

Another consideration is that zoning cases are expert witness cases. Thus, the litigator must be able to use and cross-examine experts advantageously. A lawyer can run all of his or her expert's names, as well as the opposing expert's names through Lexis and/or Westlaw. By reviewing the cases where an expert's name appears, the lawyer may find that a witness advocated a position contrary to the position he is espousing in this case.

Administrative regulations and expertise must also be considered when the advocate of a zoning change confronts technical questions relating to the proposed uses of the property. There is an increasing trend on the part of courts to recognize that agencies have considerable expertise in particular areas and to defer to the agencies' findings. An attorney can use agency representatives and regulations in several ways. In direct examination, the litigator can call an agency representative as an expert or call an outside expert to testify about agency regulations. Alternatively, one can introduce the regulations into evidence to support an expert's testimony. Similarly, on cross-examination, agency personnel and/or regulations can be used to impeach an opponent's expert.

A few examples will suffice to illustrate this point. In one case, the plaintiff sued for the rezoning of his property from agricultural to multi-family.[5] The defendant's witnesses objected to the rezoning on the basis of drainage and related sewer system problems. The court found that both of these so-called problem areas would be reviewed by the sanitary district and would have to satisfy its standards before a permit could be issued. Thus, the court deferred the decision on these technical engineering details to the appropriate administrative agency and confined its inquiry to land use questions. In another case,[6] the defendant refused to rezone the plaintiff's property to permit a re-

5. *Smith* v. *County Board of Madison County*, 86 Ill. App. 3d 708, 408 N.E.2d 452 (5th Dist. 1980).

6. *Wright* v. *County of Winnebago*, 73 Ill. App. 3d 337, 391 N.E.2d 772 (2d Dist. 1979).

stricted landing area. The Illinois Division of Aeronautics had control over questions relating to the safety of such landing areas. The county had refused to permit the use of the property as a landing area, citing failure to meet administrative standards and safety problems. The court not only stated that the county had no right to substitute its judgment for the agency's determination of whether its technical standards were met, but the court further deferred to the agency's overall evaluation of safety. In yet another case,[7] the defendant partly based its case on the assertion that the plaintiff's proposed sewage disposal system was unsafe. The court did not decide the very technical questions relating to the system's operational design, but instead deferred to the Illinois Environmental Protection Agency's expertise, noting that the IEPA had given preliminary approval of the plaintiff's proposed system and would ultimately decide whether a permit would issue. Thus, the court can often avoid deciding very technical engineering or safety questions if the counsel makes proper use of agency rules and expertise.

The advocate of a zoning change must also be aware of and be prepared to deal with, a conflict in the law of zoning as it relates to comprehensive plans. One of the recently established judicial factors, as noted earlier, is the municipality's comprehensive zoning plan. However, the courts still weigh the six traditional criteria as enunciated in *LaSalle*.[8] Consideration of a comprehensive plan on the one hand and the *LaSalle* factors on the other present an inherent conflict.

Comprehensive planning entails a long-term perspective and evaluation, projecting five, ten, twenty or more years into the future. The plans, which are sometimes like wish lists, designate specific types of land uses that the city fathers hope will occur. In contrast, the *LaSalle* criteria focus on the past and present. For example, the court must consider (current) surrounding uses and zoning, the period of time a piece of property has been vacant or underutilized, and the immediate dimunition in value the property suffers from the denial of the requested zoning change.

Thus, the property owner and the municipality often approach and present their cases in conflicting directions, one focusing on the ideal future, the other on the hard present.

For the litigator, it is important to note that Illinois courts have recently given more credence to comprehensive planning. The result of

7. *Oak Park Trust & Savings Bank* v. *Village of Palos Park*, 106 Ill. App. 3d 394, 435 N.E.2d 1265 (1st Dist. 1982).

8. *See supra* note 3 and accompanying text.

this is that plaintiffs have a greater burden in proving their case. The plaintiffs are being pushed to the point of not only showing that the value of their property is diminished, but that it is almost destroyed and will not be utilized in the future if the current zoning plan remains in effect.[9] The burden on plaintiff, if the courts continue to emphasize the importance of comprehensive planning, will approach the "taking" standard which has been adopted in cases brought under 42 U.S.C. § 1983.[10]

In conclusion, the advocate must be aware of the increased number of tools at his disposal as well as the uncertainties of a changing legal standard.

9. *Parkway Bank & Trust Co.* v. *County of Lake*, 71 Ill. App. 3d 421, 389 N.E.2d 882 (2d Dist. 1979); *Wilson* v. *County of McHenry*, 92 Ill. App. 3d 997, 416 N.E.2d 426 (2d Dist. 1981).

10. *Devines* v. *Maier*, 665 F.2d 138 (7th Cir. 1981).