

January 1984

The Uncertain State of Zoning Law in Illinois

R. Marlin Smith

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>



Part of the [Law Commons](#)

Recommended Citation

R. M. Smith, *The Uncertain State of Zoning Law in Illinois*, 60 Chi.-Kent L. Rev. 93 (1984).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol60/iss1/8>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact jwenger@kentlaw.iit.edu, ebarney@kentlaw.iit.edu.

THE UNCERTAIN STATE OF ZONING LAW IN ILLINOIS

R. MARLIN SMITH*

As the frequency of zoning cases has increased, the Supreme Court docket appears more and more like that of a state-wide zoning commission.¹

The only thing that has changed since Dick Babcock made that observation almost 25 years ago has been that it is no longer the docket of the Illinois Supreme Court that looks like that of a state-wide zoning commission. Now it is the docket of the Appellate Courts that bears that resemblance. Nor is it the docket alone. The decisions of the Appellate Court read like those of a state-wide zoning commission.

What has happened in Illinois is that the judiciary has nearly lost sight of the fact that challenges to the validity of zoning regulations, except for those rare cases in which it is alleged a municipality has exceeded its statutory authority, invariably involve constitutional adjudication. The constitutional nature of such challenges to local land use regulation is frequently overlooked or glossed over by the reviewing courts of this state. Instead the courts talk of "challenges to" or "the validity of" municipal zoning decisions without explicitly identifying the case as one that presents a constitutional question.² The casual reader of the Illinois opinions would conclude that the judiciary of this state has fashioned some kind of *sui generis* cause of action known as an action to declare a zoning ordinance invalid. The constitutional underpinnings of such challenges have long since been buried beneath a

* Partner, Ross & Hardies, Chicago, Illinois.

1. Babcock, *The Unhappy State of Zoning Administration in Illinois*, 26 U. CHI. L. REV. 509, 534 (1959). [hereinafter cited as Babcock]. The title of this article has an obvious parentage in that of the earlier Babcock article. This note is a good point to express my appreciation to my long-time partner, Dick Babcock, and my professional colleagues and good friends Daniel Mandelker and Norman Williams, Jr. for their helpful comments on an early draft of this article. I do not expect them to share in the opprobrium which may follow the publication of these views, which some will surely regard as heretical.

2. See, e.g., *Parkway Bank & Trust Co. v. Village of Norridge*, 106 Ill. App. 3d 350, 436 N.E.2d 9 (1982); *National Boulevard Bank v. Village of Schaumburg*, 83 Ill. 2d 228, 415 N.E.2d 333 (1980); *Finfrock v. City of Urbana*, 39 Ill. App. 3d 641, 349 N.E.2d 491 (1976). But not always. See *Thompson v. Cook County Zoning Board of Appeals*, 96 Ill. App. 3d 561, 575-76, 421 N.E.2d 285, 297, (1981), in which the Court said "zoning is primarily a legislative function, subject to court review only for the purpose of determining whether the power, as exercised, involves an undue invasion of private constitutional rights without a reasonable justification in relation to the public welfare." For whatever it may suggest, the Court chose (or was obliged) to cite a thirty-two year Supreme Court decision as authority for this statement, *People ex rel. Joseph Lumber Co. v. City of Chicago*, 402 Ill. 321, 83 N.E.2d 592 (1949).

prodigious pile of decisions that do not adjudicate constitutional issues at all but do no more than decide the merits of particular land use disputes. To be sure, this is not a new development. In that same 1959 article Babcock observed, with respect to zoning litigation,

The court does not construe the law; it examines the facts. It may in its decision speak of 'principles' but there is persuasive evidence that the court has convenient braces of zoning axioms, one of each pair useful when the court has concluded that the facts favor the municipality, the other handy when the court interprets the facts sympathetically to the landowner.³

In that respect all that has changed in twenty-five years is that the decisional repertoire has been materially enhanced.

The result is that in zoning litigation the courts in Illinois have cast aside the traditional judicial reluctance to hold legislative acts unconstitutional and have not hesitated to do so with a frequency that belies any deference to local legislative decisions. In fact, the Illinois courts have been deciding land use cases on the factual merits of the dispute while at the same time ostensibly adhering to the doctrine that the courts will not substitute their judgment for that of the local legislative body. The result is that the legal community, both landowner's attorneys and municipal attorneys, are not able to advise their clients with any degree of assurance as to the probable outcome of land use litigation that is commenced in this state.

Until 1980 the utter lack of predictability in Illinois zoning law was an aberration that could be viewed with a certain amount of bemused tolerance. In that year, however, the United States Supreme Court converted Illinois' quaint decisional practices in land use matters into a deadly financial peril for local government. The decision of the Supreme Court in *Owen v. City of Independence* held that municipalities could be compelled to respond in damages for regulations that transgress the limits of the Federal constitution and that strict liability was to be the rule where municipalities themselves were concerned.⁴ Municipal immunity based upon the good faith of the officials responsible for the regulation would not be a defense. After *Owen* the price of constitutionally invalid regulation could be monetary damages. In that state of the law the need for predictability became more critical, but in Illinois there was no predictability to be had.

In *Owen*, Justice Brennan said piously that a municipality does not

3. Babcock, *supra* note 10, at 533.

4. 445 U.S. 622 (1980) *reh'g denied*, 446 U.S. 993 (1980). The author has previously commented on the implications of the *Owen* decision. See Smith, R.M., *Owen v. City of Independence*, 32 LAND USE LAW & ZONING DIGEST 5 (June, 1980).

have discretion to violate the constitution.⁵ Unfortunately, Justice Brennan undoubtedly believed that, like obscenity, it is easy for anyone to recognize unconstitutional legislation when he sees it. In the federal courts, and in many state courts, that is undoubtedly true. Constitutional challenges to land use regulations on the ground that they are substantively wanting in due process or are a “taking” ordinarily are confronted with nearly insurmountable hurdles.⁶

The United States Supreme Court believes that the scope of a substantive due process inquiry is very limited. In *United States v. Carolene Products Co.*, the Court said:

. . . where the legislative judgment is drawn in question, [the inquiry] must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords any support for [the legislation].⁷

The nature of the presumption of validity, to which the Illinois courts pay formal deference in zoning litigation, was explained by Justice Stone in *Carolene Products*.

. . . the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.⁸

As the Court has recently said in *Agins v. City of Tiburon*, which involved very restrictive residential zoning regulations, the test for determining whether regulation meets substantive due process standards is: Does the regulation “substantially advance legitimate governmental goals.?”⁹ If it does, then there can be no infringement of constitution-

5. 445 U.S. at 649.

6. The difficulty that typically confronts a plaintiff in a constitutional challenge to land use regulations was described by Robert Anderson, a California lawyer who successfully defended the Petaluma (Calif.) growth management plan in *Construction Industry Association of Sonoma County v. City of Petaluma*, 375 F. Supp. 574 (N.D. Cal., 1974), *rev'd*, 522 F.2d 897 (9th Cir. 1975), cert. denied, 424 U.S. 934 (1976). With respect to the defense of land use cases, Anderson has observed:

I think that if you get away from what they tried to do in Petaluma with the right to travel [where they tried] to shift the burden of proof and get back on the traditional business of presumption of validity, I think from the city's standpoint you just sit there and you wait for them to try to establish for some reason that [the zoning] is unreasonable. . . . [T]hey have an uphill battle and it's tough in my opinion, at least in California. It's very difficult to show that what the City has done in a particular case is unreasonable and therefore invalid. So from the city's standpoint it seems to me all you have to do is just sit there, and let them go after you. Ordinarily they can't do it. Transcript of interview by the author with Robert Anderson in Santa Barbara, Calif., on August 20, 1976.

7. 304 U.S. 144, 154 (1938).

8. *Id.* at 152.

9. 447 U.S. 255, 261 (1980).

ally protected rights.

Nor does substantive due process analysis permit the courts to substitute their judgment for that of the legislative body on the question of whether the objects to be achieved by the regulation are appropriate governmental goals. Speaking for the Court in *Ferguson v. Skrupa*,¹⁰ Justice Black said:

Under the system of government created by our Constitution, it is up to the legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy.

Th[at] doctrine . . . has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.

We refuse to sit as a 'superlegislature to weigh the wisdom of legislation'. . . Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes or some other is no concern of ours.¹¹

The U.S. Supreme Court has recently reaffirmed its longstanding reluctance to interfere with local zoning decisions on constitutional grounds in *Larkin v. Grendels Den, Inc.*, saying:

The zoning function is traditionally a governmental task requiring the 'balancing [of] numerous competing considerations,' and courts should properly 'refrain from reviewing the merits of [such] decisions, absent a showing of arbitrariness or irrationality.'¹²

The tests for determining whether a "taking" has occurred are equally strict. In *Penn Central Transportation Co. v. City of New York*, the Supreme Court said that governmental regulation of the use of land would not be an appropriation of private property rights when reasonable economic uses were still available to the owner.¹³ For there to be a "taking," regulation must render property no longer "economically viable." Proof that the value of property has been diminished even when the diminution is substantial, does not establish that regulation is tanta-

10. 372 U.S. 726 (1963).

11. *Id.* at 729-30, 731-32.

12. 454 U.S. 1140 (1982). *Cf.* *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-9 (1974); and, *Hawaii Housing Authority v. Midkiff*, — U.S. —, 52 L.W. 4673 (1984), in which the Court said: When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts. 52 L.W. at 4676.

13. 438 U.S. 104 (1978).

mount to acquisition.¹⁴

In land use regulation Illinois is a chaotic exception to those well-accepted constitutional rules. Justice Brennan may believe that substantive due process is dead as a rule of constitutional law, but if he does, he is mistaken. It is alive, well, and living in the state courts. Indeed, in Illinois it is running amuck. The superficial air of certainty that the criteria listed in *La Salle National Bank v. County of Cook*¹⁵ give to Illinois zoning law have actually done nothing of the sort. In fact, *LaSalle National Bank* has given the courts a roving commission to overturn local land use decisions that they simply think are wrong. The results have not been lost on the development community. One developer, addressing a village board, expressed the perception that is common in the industry this way:

While it is true, you may elect an entire board whose policy is strictly single family, the courts will decide the highest and best use if it is brought to the courts. And even though you and everyone on the board wants it to be single family, if the courts feel that it is for multi or shopping center, they are going to grant it in the courts; and then, of course, you can appeal it to the [higher] courts, but the zoning action doesn't stop at this level.¹⁶

How did we come to reach a state of affairs in which there is a general perception that the courts are the final arbiter not of what the constitutional limits to land use regulations are but of what the zoning *ought* to be. It is in part a consequence of the fact that Illinois land use

14. *Id.* at 131, 136-38. *See, e.g.*, *William C. Haas & Co. v. City and County of San Francisco*, 605 F.2d 1117 (9th Cir. 1979) in which a restrictive rezoning was upheld despite the claim that it reduced the value of the property from \$2,000,000 to \$100,000. In *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1961), the court sustained a municipal regulation of sand and gravel mining that it conceded "completely prohibits a beneficial use to which the property has previously been devoted." *Id.* at 592.

15. 12 Ill. 2d 40, 145 N.E.2d 65 (1957). In that decision the Supreme Court said that "among the facts which *may* be taken into consideration" in zoning litigation are: (1) The existing uses and zoning of nearby property, (2) the extent to which property values are diminished by the particular zoning restrictions, (3) the extent to which the destruction of property values of plaintiff 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, and (6) the length of time the property has been vacant as zoned considered in the context of land development in the area in the vicinity of the subject property. *Id.* at 46-47, 145 N.E.2d at 69. (emphasis added).

To these considerations the Supreme Court has added an additional factor: the care with which a community has undertaken to plan for the use of land. *Sinclair Pipeline Co., v. Village of Richton Park*, 19 Ill. 2d 370, 167 N.E.2d 406 (1960). In *Forestview Homeowners Assoc. Inc. v. County of Cook*, 18 Ill. App. 3d 230, 309 N.E.2d 763, lv. to app. den., 56 Ill. 2d 582, the court held that when there is evidence that a municipality has no comprehensive plan or planning process, then the presumption of validity is "weakened." *Id.* at 242-43, 309 N.E.2d at 772-73.

16. Transcript of hearing before Northbrook Village Board in the matter of a petition for rezoning of 13.6 acres at the southwest corner of Sanders and Lake-Cook Roads, Docket No. 81-15, June 9, 1981, at p. 60.

law is a classic case of arrested development. The zoning law of this state has solidified in a stage that virtually everyone of its comparable sister states has long since left behind.

The process has not gone without notice. Professor Norman Williams, in his treatise on American planning law, discusses four stages through which the zoning law of the states has passed and reports:

Illinois zoning law is unique in the United States, since this is the only state in which the courts have remained happily stuck in the second period of American zoning, with little variation for a period of over 40 years.¹⁷

In Williams' "second period" the courts accepted the principle that the use and development of land could be controlled, but when confronted with disputes over the controls on particular tracts they tended to require municipalities to carry the burden of justifying their regulations by identifying the harm to be avoided.¹⁸

Quoting what he calls the "ritual list" of factors from *La Salle National Bank v. County of Cook*,¹⁹ Williams describes the inevitable lack of predictability that flows from the Illinois judicial attitude.

The courts clearly regard all this as well settled, and the tone of smug satisfaction is unmistakable. For example, one fairly recent case said that 'the general rules of zoning are so familiar as to be axiomatic;' another commented that this branch of law was 'pellucid.' In addition to the often repeated approved list, there are in fact several other considerations which have also been taken seriously in the Illinois case law—the trend of development, the existence of heavy traffic in the adjacent streets, whether the land has long been vacant, whether the developer purchased the land with notice of the regulation complained of, and so on. Since the list of criteria to be taken into consideration is so large, no one of these is controlling, except perhaps in the case of the homogeneous single-family neighborhood In

17. I WILLIAMS, AMERICAN LAND PLANNING LAW § 6.17, 143 (1974).

18. Williams' fuller description of the second period is as follows:

In the second period, following *Euclid* and a number of other leading cases at about the same time, two principles were clearly established: privately owned land could be made subject to broad restrictions on its use, without compensation, and the uses of land could be arranged into districts. However, during this period, when specific cases arose on the validity of zoning districts as mapped, or on the denial of variances (and occasionally of special permits), the courts tended in many or most instances to hold the restrictive regulations invalid as applied—with the single exception of cases involving homogeneous single family residential areas, where no (or very few) nonconforming uses existed. In this stage the courts suggested, somewhat hesitantly, that the power to regulate the physical environment extended beyond the power to control nuisances; and the principle was clearly established that most uses of land were not exempt from control on the ground that they were inherently 'lawful.' However, when it came to a specific case, the burden of proof was generally on the municipalities to show why a given restriction should be enforced, by a specific indication of the harm to be avoided thereby. Almost all states have gone through this stage; Illinois is still clearly (and happily) resting there.

Id. § 5.03, at 104-05.

19. 12 Ill. 2d 40, 145 N.E.2d 65.

other situations, the existence of so many criteria creates a situation analogous to a grab bag; the courts are left with broad discretion to decide each case according to their own view of the merits. Perhaps this is one purpose of having so long a list.²⁰

The decisional disarray that has resulted from leaving the courts "with broad discretion to decide each case according to their own view of the merits" has produced a body of law which is anything but "pellucid" and in which there are no reasonably certain touchstones for determining the constitutional limits on local land use regulation. A few examples from an abundance of riches will demonstrate that land use law in Illinois gives no cause for happiness.

In some decisions the courts have applied constitutional doctrine rigorously and have sustained zoning regulations even though the restrictions seem to have been seriously out of phase with the environs of the property. In *Zenith Radio Corp. v. Village of Mount Prospect*,²¹ the court sustained a single family classification when the property faced into a busy intersection and was across the street from the rear of an automobile agency and a restaurant. In *La Salle National Bank v. County of Cook*,²² the court upheld a single family zoning restriction on property that was on a heavily traveled arterial street and across the road from a regional shopping center. In *Georgen v. Village of Mount Prospect*,²³ the plaintiff wanted to use a site on a heavily traveled arterial highway for a Poppin' Fresh Pies restaurant. The court upheld the single family zoning of the subject property despite the fact that it was across the street from an automobile sales agency and that a shopping center, miniature golf course and a baseball hitting range were in the immediate area.

On the other hand, the courts have routinely invalidated zoning

20. Williams, *supra* note 17 § 6.17, at 145-46. Not all commentators are as perceptive as Williams. One author has innocently attributed the frequency with which banks appear as plaintiffs in Illinois zoning lawsuits to what he presumes to be their economic interest.

Zoning litigation there [Illinois] is shared by the developers and the banks on that side of the equation, and the involvement of the banks directly in zoning cases is somewhat unusual for the major zoning states and possibly others. I have not noticed it to anywhere near the same extent elsewhere. The banks naturally supply the money for much of the development and presumably have an interest in the particular type of cases permitted by public regulation. Some regulations provide more intensive and higher density uses. These uses, it can be fairly assumed, bring greater financial returns to investing bankers. The bank's involvement is by way of loans, usually secured by mortgages on property.

D. ALLENSWORTH, *LAND PLANNING LAW* 126 (1981). It can be "fairly assumed" that "presumably" the author was unfamiliar with the Illinois land trust. As the "The Music Man" said, "You've gotta know the territory."

21. 15 Ill. App. 3d 587, 304 N.E.2d 754 (1973).

22. 94 Ill. App. 3d 341, 418 N.E.2d 932 (1981).

23. 65 Ill. App. 3d 512, 382 N.E.2d 523 (1978).

regulations in instances in which almost any fair-minded person would say that reasonable minds might differ with respect to the reasonableness of the restriction. In *Oak Park Trust & Savings Bank v. Village of Palos Park*,²⁴ the court held single family zoning of a 19.6 acre tract of land to be invalid even though the predominant use of land in the area was for single family houses and a forest preserve and despite the court's concession that a nearby stable and restaurant were not of themselves uses which would require a zoning change. The court decided that the forest preserve would provide a buffer for the single family homes, a determination that is a planning consideration, not a rule of law.²⁵ Here the court said that the proximity of a major highway "militates against single family zoning" even as it acknowledged that residential developments adjoining heavily travelled roadways had not prevented the courts from finding single family restrictions to be valid in other instances, such as *Zenith Radio Corp. v. Mount Prospect*²⁶ which was cited by the court. In *Oak Lawn Trust and Savings Bank v. City of Palos Heights*,²⁷ the court held invalid the single family classification of property that prevented a former school building from being developed with professional offices. In that case the property contained only 1.5 acres of land, had single family residences abutting on the north and east and across the street to the west and south, and was a block away from the nearest commercial use. In *Beaver v. Village of Bolingbrook*,²⁸ the court invalidated single family zoning at an intersection and permitted commercial use of the property despite the fact that the other three corners of the intersection were also zoned for single family use, two of them were so developed, the third was a bean field, and the nearest commercial uses were one mile to the north and one mile to the south.

Not infrequently similarly situated properties get treated differently. For example, the Appellate Court reached diametrically opposite results in the case of two parcels of land both of which were located on Willow Road in unincorporated Northfield Township in Cook County and which were only one-half mile apart. Both parcels were at intersections, both were classified in the R-3 Single Family District, and both fronted on Willow Road, a major arterial with a 50 mile per hour speed limit and an average daily traffic volume of approximately

24. 106 Ill. App. 3d 394, 435 N.E.2d 1265 (1982).

25. *Id.* at 402, 435 N.E.2d at 1272.

26. 15 Ill. App. 3d 587, 304 N.E.2d 754 (1973).

27. 115 Ill. App. 3d 887, 450 N.E.2d 788 (1983).

28. 12 Ill. App. 3d 923, 298 N.E.2d 776 (1973).

24,000 cars. In both instances the trial court had held the zoning invalid as applied. In the first of the cases, *Hutson v. County of Cook*,²⁹ the landowner sought an injunction preventing interference with the use of the property for a planned development that would put a convenience shopping center at the southeast corner of Willow and Pfingsten Roads. Although the property did not abut any other commercial zoning and there were single family residences in the immediate area, the Appellate Court upheld the trial court's finding that the Cook County zoning restrictions in four multiple family and three business districts would all be unconstitutional in their application to the subject property and enjoined interference with the plaintiff's proposed planned development that was to contain a 44,000 square foot food and drug store, a three-story, 21,000 square foot office building, and a 22,000 square foot restaurant.³⁰

Four months later a different division of the same Appellate Court, in *Littlestone Co. v. County of Cook*, considered the second Willow Road case in which the claim was that the County's R-3 single family restrictions were invalid insofar as they prevented the plaintiffs from constructing a development at the northwest corner of the intersection of Landwehr and Willow Roads that would contain three five-story office buildings each with 80,000 square feet of floor area and a six story hotel.³¹ As with the property in the *Hutson* case the area around the tract that was the subject of the dispute was zoned and used for single family development. The property in the *Littlestone* case was west of the *Hutson* site and only 500 feet east of the Tri-State Tollway. The same road, the same zoning, and the same traffic produced very different judicial reactions. In *Littlestone* the court said,

Admittedly there is heavy traffic on Willow Road. This in itself does not impart a commercial character to the subject property, and although it is a factor militating against residential use, it cannot be considered conclusive.³²

However, in the *Hutson* case in support of the assertion that "the overwhelming amount of evidence offered by the plaintiff clearly demonstrates that the R-3 single family zoning of the ordinance is not the highest and best use of the subject property," the court had said,

The change of the intersection from a two-lane to a four-lane highway, with greatly increased traffic and the tollway, and surrounding commercial and residential areas, demonstrate the need for a conve-

29. 17 Ill. App. 3d 195, 308 N.E.2d 65 (1974).

30. *Id.* at 205-06, 308 N.E.2d at 72.

31. 19 Ill. App. 3d 222, 311 N.E.2d 68 (1974).

32. *Id.* at 238, 311 N.E.2d at 280.

nient shopping area to take care of the expanding population.³³ In the *Hutson* case the court relied on commercial uses a mile to the east for its characterization of nearby uses as the "surrounding commercial."³⁴ In the *Littlestone* case the court found that very similar office uses on the west side of the tollway that were considerably closer than one mile from the subject tract to be of no consequence in characterizing the property in question.

The decisions with respect to the magnitude of the burden that may be imposed upon the value of property by zoning restrictions are not amenable to any kind of rational classification. In *National Boulevard Bank of Chicago v. Village of Schaumburg*,³⁵ the court was not impressed by plaintiff's claim that the single family restrictions were unduly burdensome because the 26.5 acre tract would be worth from \$280,000 to \$570,000 more for a multiple family use than it would be for single family use. With a shrug of the judicial shoulders, the court said,

The existence of a diminution in value does not necessarily require invalidation of the zoning ordinance. The increase in density which is characteristic of multifamily developments typically increases the value of the property. This situation is common to virtually every zoning case where a more intensive use is sought.³⁶

In *Parkway Bank and Trust Company v. County of Lake*,³⁷ the valuation difference for the 149 acre tract was even more dramatic. There the plaintiffs claimed that the existing two acre and five acre single family zoning gave the land a value of only \$5,000 per acre, whereas if it could be used for the light industrial purposes sought by the plaintiff it would

33. 17 Ill. App. 3d at 205, 308 N.E.2d at 72. (emphasis supplied) Note the careful limitation of the court's characterization of the evidence as that "offered by the plaintiffs." One is led to wonder what became of the principle that appellate manifest weight of the evidence review must consider *all* of the evidence. A casual attitude toward factual accuracy is also common in Illinois zoning decisions. In the *Hutson* case there was no "surrounding commercial." Apart from a tree nursery across the street, the nearest commercial uses were a mile away at the Shermer-Willow intersection. The *Hutson* court also notes that there is a sanitary landfill on the north side of Willow that is "west of the railroad." That is literally true, but what the court does not tell the reader is that there is a second railroad line, on a raised embankment, that is west of the sanitary landfill and between it and Shermer Road to the west. The sanitary landfill was placed in that location by the earlier decision in *Society of the Divine Word v. County of Cook*, 107 Ill. App. 2d 363, 247 N.E.2d 21 (1969).

34. Six years later in *Amalgamated Trust & Savings Bank v. County of Cook*, 82 Ill. App. 3d 370, 402 N.E.2d 719 (1980), the Appellate Court sustained single family zoning on Willow Road property that was closer to the Shermer-Willow intersection than the *Hutson* property. In doing so, the Court noted that the only commercial use west of Shermer on the south side of Willow was the shopping center that had been built as a result of the decree in *Hutson*. *Id.* at 373, 402 N.E.2d at 723.

35. 76 Ill. App. 3d 388, 394 N.E.2d 1320 (1979), *aff'd*, 83 Ill. 2d 228, 415 N.E.2d 333 (1981).

36. 76 Ill. App. 3d at 398, 394 N.E.2d at 1327.

37. 71 Ill. App. 3d 421, 389 N.E.2d 882 (1979).

be worth \$12,000 per acre, making a gross valuation difference of \$1,043,000. Nevertheless, the court was not impressed.

While the plaintiffs speak of 'substantial loss in value' of the land there is not, of course, any 'loss' in the value of the land—the loss is in the hoped for profit.³⁸

Parkway Bank is not alone in recognizing that what it pleases plaintiff to characterize as an injury to the value of property is really only a restriction on "hoped for profit." In *Amalgamated Trust & Savings Bank v. County of Cook* the differential in market value was \$1.3 to \$1.8 million, but even so the Court said that plaintiff's "only hardship is that they are unable to realize as great a profit as they would like."³⁹

On other occasions the loss of "hoped for profit" becomes transmuted into grievous hardship. In *Oak Park Trust and Savings Bank v. Village of Palos Park*,⁴⁰ the dispute was over whether 19.6 acres should be developed as single family or multiple family property. According to the plaintiffs the zoning restrictions made a difference of \$215,000 in the value of the property and according to the Village it made a difference of between \$80,000 and \$160,000. The difference between the Village's estimate of single family value and the plaintiff's estimate of multiple family value was only \$115,000. The court treated what it conceded to be only a diminution of prospective profit as a hardship.

Thus, if the property were not rezoned, plaintiffs expected profit would be significantly reduced.⁴¹

The result in *Oak Lawn Trust and Savings Bank v. City of Palos Heights*,⁴² is even more difficult to reconcile. In that instance the plaintiff bought a one-story school building at public auction for \$100,000. It was zoned for single family use. Then, ostensibly to his surprise, plaintiff found he was unable to sell the school building for single family use. So he made plans to develop it as a medical and dental office building and sued the City of Palos Heights when it refused to reclassify the property in the B-1 Restricted Business zone. The casual observer might have been tempted to believe that the refusal to rezone was a not unreasonable decision because there were single family

38. *Id.* at 425, 389 N.E.2d at 885.

39. 82 Ill. App. 3d 370, 384, 402 N.E.2d 719, 730 (1980). See also *Heller v. City of Chicago*, 69 Ill. App. 3d 815, 387 N.E.2d 745 (1979), in which plaintiff's effort to double the value of his property through rezoning was rebuffed with the observation that "there has been no demonstrated hardship on the plaintiff except that he cannot realize the huge profit that might attend a rezoning, a consideration which courts almost uniformly have rejected as unimportant." *Id.* at 823, 387 N.E.2d at 749.

40. 106 Ill. App. 3d 394, 435 N.E.2d 1265 (1982).

41. *Id.* at 403, 435 N.E.2d at 1272.

42. 115 Ill. App. 3d 887, 450 N.E.2d 788 (1983).

homes on all four sides of the property. But that small fact did not trouble either the trial court or the Appellate Court. With a fine disregard for the fact that the plaintiff was the author of his own predicament, the Appellate Court found that there was a "loss in value of between \$115,000 and \$170,000" and bailed the plaintiff out of his mistaken real estate investment by holding that the single family zoning of the property was invalid. There was no talk of "hoped for profit" in the *Palos Heights* case. Instead the court found that "the value of the subject property is diminished by its present zoning."⁴³ The court in the *Palos Heights* case must have forgotten decisions like *Moeller v. City of Moline*,⁴⁴ in which the court said,

plaintiff purchased his property with full knowledge of the zoning restrictions. While we are not unmindful of the rule that this does not create any estoppel against him, we also think it is reasonably clear that the purchase was made with the very purpose in mind that he now seeks to accomplish by this suit. The claim by plaintiff that a continuation of residential classification will inflict financial hardship on plaintiff is therefore self-created and comes with bad grace.⁴⁵

So notwithstanding decisions like *Parkway Bank and Trust Company v. County of Lake*,⁴⁶ loss of "hoped for profit" may become a "taking."

There was a time when the disarray and confusion in the Illinois decisional law about what is and what is not constitutional land use regulation could be tolerated as a reasonably harmless eccentricity. But the days when the courts could afford the luxury of permitting decisions on the merits of zoning disputes to masquerade as constitutional adjudication ended with *Owen v. City of Independence*.⁴⁷ Now the price of making unconstitutional land use decisions is not just invalidation of the offending regulation but the imposition of strict liability under the federal civil rights laws for any monetary damages that may be occasioned by the constitutional transgression.⁴⁸ In case anyone had missed the point in *Owen*, or thought that perhaps *Owen* did not apply

43. *Id.* at 892, 450 N.E.2d at 793.

44. 50 Ill. App. 2d 379, 200 N.E.2d 93 (1964).

45. *Id.* at 387-88, 200 N.E.2d at 97. See also, *Urban v. Madison County Building and Zoning Department*, 8 Ill. App. 3d 775, 778, 290 N.E.2d 324, 326 (1972); *Evanston State Bank v. Village of Oak Park*, 99 Ill. App. 2d 329, 339-40, 241 N.E.2d 630, 635 (1968).

46. 71 Ill. App. 3d 421, 389 N.E.2d 882 (1979).

47. 445 U.S. 622 (1980).

48. 42 U.S.C. § 1983. Originally a part of the Civil Rights Act of 1871, the statute provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." Attorneys fees for the "prevailing party" may be awarded under 42 U.S.C. § 1988.

to land use regulations or would be limited to deprivations of procedural due process, Justice Brennan made sure that local governments understood the point by remarking in a footnote to his dissent in *San Diego Gas & Electric v. City of San Diego*,

Such liability might also encourage municipalities to err on the constitutional side of police power regulations, and to develop internal rules and operating procedures to minimize overzealous regulatory attempts . . . After all, if a policeman must know the constitution, then why not a planner?⁴⁹

Unfortunately, there is a small difficulty with Justice Brennan's policeman analogy. There is no equivalent of the "Miranda card"⁵⁰ upon which reasonably reliable guidelines for discerning unconstitutional land use regulations can be concisely inscribed to be read to city councils and village boards before they act on zoning matters.

How did the zoning law of this state become such a decisional gallimaufery? It is not altogether clear. In the early years, the law of this state was not markedly different from that of any other state. The Illinois Supreme Court upheld the constitutionality of zoning in *City of Aurora v. Burns*,⁵¹ even before the issue reached the United States Supreme Court in *Village of Euclid v. Ambler Realty Co.*⁵² The language chosen by the court to sustain the constitutionality of zoning was deferential to the exercise of local legislative discretion.

The question is not whether we approve the ordinance under review, but whether we can pronounce it an unreasonable exercise of power, having no rational relation to the public health, morals, safety or general welfare.⁵³

The language in *City of Aurora* foreshadowed that which was used a year later by the Supreme Court in the *Euclid* decision.

If [the reasons for the restrictions] do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indi-

49. 450 U.S. 621, 661 (1981) (Brennan, dissenting).

50. The "Miranda card" is just that. It is the size of a playing card and fits readily in the wallet or shirt pocket. On one side is printed the "Miranda Warning" which is:

1. You have the right to remain silent.
2. Anything you say can and will be used against you in a court of law.
3. You have a right to talk to a lawyer and have him present with you while you are being questioned.
4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish.
5. You can decide at any time to exercise these rights and not answer any questions or make any statements.

On the other side are two standardized waiver questions. (Source: Wilmette, Illinois, Police Department) See *Miranda v. Arizona*, 384 U.S. 436 (1966).

51. 319 Ill. 84, 149 N.E. 784 (1925).

52. 272 U.S. 365, (1926).

53. 319 Ill. at 98, 149 N.E. at 789.

cated as pertinent to the inquiry, at least the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.⁵⁴

Thirteen years after the *City of Aurora* decision, the Illinois Supreme Court was still according the traditional deference to local legislative discretion. In *Morgan v. City of Chicago*,⁵⁵ the court still meant what it said when it required that considerable latitude be given to the discretion of legislative bodies in zoning matters.

It is primarily the province of the municipal body to which the zoning function is committed, to draw the line of demarcation as to the use and purpose to which property shall be assigned or placed, and it is neither the province nor duty of courts to interfere with the discretion with which such bodies are vested, in the absence of a clear showing of an abuse of that discretion . . . Whether the action of the city council in passing the variation ordinance was an unreasonable, arbitrary or unequal exercise of power may be fairly debatable. Yet in such instances we have established the rule that this court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question. . .⁵⁶

In the years since *City of Aurora* and *Morgan* the Illinois Supreme Court, in deciding challenges to zoning ordinances, has said time and time again that a cardinal rule is that courts must not sit as a "super zoning commission."⁵⁷ Yet nothing could be clearer than that in fact the Illinois courts are functioning as a "super zoning commission." Examples are abundant, but two should suffice as illustrations.

In *Gust v. Village of Westchester*⁵⁸ the Village had rezoned four lots containing three single family residences that abutted an existing shopping center from a single family residential zone to a business zone. The purpose of the rezoning was to permit the expansion of a retail supermarket in the abutting shopping center, which would entail the removal of the houses. Residential neighbors across the street from the houses brought suit challenging the constitutionality of the rezoning on substantive due process grounds. Both the trial court and the

54. 272 U.S. at 395.

55. 370 Ill. 347, 18 N.E.2d 872 (1938).

56. *Id.* at 350, 18 N.E.2d at 873.

57. See *La Salle National Bank v. City of Evanston*, 57 Ill. 2d 415, 428, 312 N.E.2d 625, 632-33 (1974); *Exchange National Bank of Chicago v. County of Cook*, 25 Ill. 2d 434, 440, 185 N.E.2d 250, 253 (1962); *Bennett v. City of Chicago*, 24 Ill. 2d 270, 273-74, 181 N.E.2d 96, 98 (1962); *Atkins v. County of Cook*, 18 Ill. 2d 287, 292-93, 163 N.E.2d 826, 829-30 (1960); *La Salle National Bank v. County of Cook*, 12 Ill. 2d 40, 46, 145 N.E.2d 65, 68-69 (1957); *Jacobson v. City of Evanston*, 10 Ill. 2d 61, 69, 139 N.E.2d 205, 209 (1956).

58. 110 Ill. App. 3d 425, 442 N.E.2d 525 (1982).

Appellate Court held that the rezoning was invalid. The Appellate Court managed to do so without ever noting that the ground of the complaint rested on a charge that the rezoning invaded constitutionally protected rights of the plaintiffs. The Appellate Court decided that “[t]he homes on the subject property face the residential district and, presently act as buffers and constitute a reasonable demarcation between the residential and business areas.”⁵⁹ So initially the Appellate Court put itself in the position of deciding where the zoning boundary ought to be, an exercise in which the courts have said many times they will not indulge.⁶⁰ Then, speaking of the site plan, which showed a 25 foot driveway for trucks between the expanded building and the sidewalk to the north, the court said,

Testimony, presented by plaintiffs’ experts, however, indicates that pedestrians, cars, and semi-trailer trucks would conceivably be in a 25-foot driveway simultaneously, supporting the trial court’s conclusion that the proposed rear parking facility poses a safety hazard to the public.⁶¹

At this point both the trial court and the Appellate Court were not adjudicating constitutional issues. They were substituting their judgment with respect to what would be a safety hazard for that of the corporate authorities of the Village.

The court then proceeded to stand the Illinois balancing test on its head. It is common in Illinois zoning decisions for the court to compare the benefit to the public from the restrictions in question to the hardship that is imposed upon the property owner.⁶² So in this case, application of the balancing test should have resulted in a comparison of the burdens imposed upon the objecting neighbors by the rezoning to the public harm that could be avoided by, or the public benefit that could be expected to accrue from, the expansion of the shopping center. The Appellate Court shunned that accepted analysis and formulated its own novel rule.

. . . the relative gain to the public should be compared to the hardship imposed upon [the supermarket]. Absent the zoning change and consequent expansion, the hardship imposed upon defendants is an asserted loss of profits. In the instant case, the trial court properly found that defendants’ hardship is outweighed by the public interest

59. *Id.* at 429, 442 N.E.2d at 528.

60. *Elmhurst National Bank v. City of Chicago*, 22 Ill. 2d 396, 176 N.E.2d 771 (1961); *Bohan v. Village of North Riverside*, 9 Ill. 2d 561, 138 N.E.2d 487 (1957); *Bolger v. Village of Mount Prospect*, 10 Ill. 2d 596, 141 N.E.2d 22 (1957); *Amalgamated Trust & Savings Bank v. County of Cook*, 82 Ill. App. 3d 370, 402 N.E.2d 719 (1980).

61. 110 Ill. App. 3d 425, 430, 442 N.E.2d 525, 529.

62. *See, e.g., Weitling v. County of Du Page*, 26 Ill. 2d 196, 199, 186 N.E.2d 291, 292 (1962); *County of Lake v. MacNeal*, 24 Ill. 2d 253, 265, 181 N.E.2d 85, 90 (1962).

in safety and maintaining the integrity of the established residential neighborhood.⁶³

This passage is simply incredible. The supermarket was not the plaintiff. It was not complaining of the zoning. The neighboring property owners were. The supermarket and the village (who were both defendants) were not asserting a hardship—the neighbor plaintiffs were. The defense against the plaintiffs' complaint was that the rezoning would promote the welfare of the public. The question of whether the "defendants" had a hardship or might lose profits was totally irrelevant to the due process question which was whether the Village Board of Trustees could have reasonably believed that the rezoning would benefit the welfare of the public by preserving convenience shopping in the Village and preventing deterioration of the shopping center from adversely impacting nearby businesses *and* residences. Instead of deferring to the legislative judgment, the Appellate Court set itself up as the arbiter of the public interest by comparing the supermarket's "hardship" to the "public interest in safety and maintaining the integrity of established neighborhoods" and came down on the side of a "public interest" that presumptively the Village Board had already weighed against the benefits that would accrue from an expanded shopping center. This rationale was a direct judicial intrusion into the local legislative process. What the Appellate Court did was to decide what public objectives it believed should have been important to the Village Board and then compared its conception of what the supermarket's hardship might be to the achievement of those judicially pronounced objectives.

But the Appellate Court was not through. Before closing it noted that the "Illinois courts have adopted the modern view that aesthetic factors such as the aesthetic enjoyment of one's home, do have a significant bearing on zoning."⁶⁴ However, the decisions upon which the court relied stand for the view that local government may seek to achieve aesthetic objectives through the use of the police power.⁶⁵ But, *Gust* was not a case in which the Village had sought to achieve aesthetic objectives through the exercise of the police power. In effect the Appellate Court found that the expansion of the supermarket would be aesthetically objectionable to the neighbors and was therefore objec-

63. 110 Ill. App. 3d at 430, 442 N.E.2d at 529. *See*, *Kleidon v. City of Hickory Hills*, 120 Ill. App. 3d 1043, 458 N.E.2d 931 (1984), for a decision in which the same court applied the orthodox tests to a zoning challenge by neighboring property owners.

64. *Id.*

65. *See* *Amalgamated Trust and Savings Bank v. County of Cook*, 82 Ill. App. 3d 370, 402 N.E.2d 719 (1980); *Ward v. County of Cook*, 68 Ill. App. 3d 563, 386 N.E.2d 309 (1979).

tionable to it. So the Court substituted its aesthetic opinions for those of the Village Board. So much for the principle that in zoning cases courts do not substitute their judgment for that of the municipal authorities.

Another example of judicial second-guessing is *Haws v. Village of Hinsdale*⁶⁶ in which the Appellate Court held that the Village had unconstitutionally applied the Planned Development District provisions of its zoning ordinance to plaintiffs' property by denying their request to allow the site to be used for a fast food restaurant. The case turned on the factual question of whether the proposed use would create traffic congestion and hazards. There were conflicting traffic opinions offered by the parties and it was clear that the Village officials could have reasonably held the view that the proposed use posed traffic hazards because even the Appellate Court described the case as involving "a potentially serious traffic problem."⁶⁷ The trial court decided the traffic dispute in favor of the plaintiff. The Appellate Court let that determination stand, saying,

We recognize that a presumption of validity attaches to the zoning ordinance and that if such an ordinance is reasonably debateable it should be upheld. (citations omitted) *However, the trial court was in the best position to sift and weigh the massive amount of technical testimony, much of it contradictory, on this traffic issue in order to decide whether this presumption of validity had been overcome.*⁶⁸

The quoted passage, while avowing deference to the presumption of validity, in fact ignores it. It does, however, have the merit of candor because the Court implicitly asserts that the trial judge was in a better position than the Village to decide whether the proposed use would be a traffic hazard. The *Haws* decision illustrates the problem neatly. In losing sight of what a substantive due process challenge means, the courts are led to ask the wrong question. The question in *Haws* should not have been: Who is in the best position to judge traffic hazards? It should have been: Could the Village Board have reasonably believed the proposed use would create a traffic hazard? If the answer was yes, as it would almost have to have been on the facts in *Haws*, then substantive due process principles would require that the municipal decision be upheld.

Even when it is upholding a local zoning decision, the judiciary is capable of casually tossing off dicta that both reveal the judicial mind set in zoning matters and store up trouble for future decisions. In *Chi-*

66. 68 Ill. App. 3d 226, 386 N.E.2d 122 (1979).

67. *Id.* at 232, 386 N.E.2d at 126.

68. *Id.* at 235, 386 N.E.2d at 128 (emphasis added).

ago Title & Trust Co. v. County of Cook,⁶⁹ the Appellate Court upheld the decision of the county to rezone property for commercial use, but in doing so said,

Clearly, the property does not appear to be part of a solidly residential area. So, unless some compelling reasons of public welfare or safety exists, the imposition of a residential restriction on the subject property could be properly found to be unreasonable.⁷⁰

Compelling reasons? Since when is the language of strict scrutiny analysis appropos in an ordinary zoning case? No better demonstration could be offered for the proposition that the Illinois courts pay formal deference to the presumptive validity of zoning regulations while mentally requiring the municipal defendant to justify the reasonableness of its land use restrictions.

There does not appear to be any single reason for the decisional quagmire into which the zoning law of this state has been run. Among the likely legal explanations, three candidates stand out. They are:

1. The focus in the Illinois decisions on the "highest and best use" of land.
2. The decision of the Illinois Supreme Court in *La Salle National Bank v. County of Cook*.⁷¹
3. The characterization of discretionary local decisions with respect to how particular parcels of land shall be used and developed as legislative decisions.⁷²

The zoning law of Illinois is nearly unique in its emphasis upon highest and best use, which is an economic concept that is used by appraisers in valuing real estate. The rule in most states is very clear. Property owners are not entitled to the "highest and best use" of their land. The late Arden Rathkopf, in his authoritative text, articulated the nearly universally accepted view.

It is the generally accepted rule that a zoning ordinance is not

69. 120 Ill. App. 3d 443, 457 N.E.2d 1326.

70. 120 Ill. App. 3d at 452, 457 N.E.2d at 1332-33 (emphasis supplied). The "compelling reasons" slip of the judicial tongue is not the only gaffe in this opinion. The court, in dealing with a res judicata question, overlooked long-settled rules with respect to privity of title by suggesting that a mere change in the ownership of the subject property could defeat the identity of parties that is required for the application of res judicata. 120 Ill. App. 3d at 454, 457 N.E.2d at 1334.

71. 12 Ill. 2d 40, 145 N.E.2d 65 (1957).

72. Whether a decision is characterized as legislative or administrative depends not upon the nature of the proceeding (i.e. whether it is adversarial and fact finding as opposed to policy making) but upon the body that makes the decision. Thus if the final decision is left to the city council or village board of trustees, it is legislative irrespective of whether it involves a rezoning, a special use permit, or a variation. See *LaGrange State Bank v. County of Cook*, 53 Ill. App. 3d 79, 368 N.E.2d 601 (1977); *Meyer v. County of Madison*, 7 Ill. App. 3d 289, 287 N.E.2d 159 (1972); *Camardo v. Village of LaGrange Park*, 61 Ill. App. 2d 302, 210 N.E.2d 16 (1965); *Traders Development Corp. v. Zoning Board of Appeals*, 20 Ill. App. 2d 383, 156 N.E.2d 274 (1959); *Village of Justice v. Jamison*, Ill. App. 2d 113, 129 N.E.2d 269 (1955).

rendered confiscatory and unreasonable solely for the reason that the value of the land is greater for uses which are not permitted thereon than for those which are. There is a distinction between finding that the property which is the subject of the suit is not zoned for its "best and most profitable use" or its "highest and best use" and finding that the present zoning amounts to a deprivation of the plaintiff's right to make reasonable use of his property. Stated otherwise, the ordinance is not to be held unconstitutional as depriving its owner of property without due process merely because the property may not be put to its most profitable use.⁷³

So governmental regulation may prevent that use which, absent regulation, might be the highest and best use, but that does not make the regulation constitutionally infirm. The requirements of the constitution are satisfied if the property owner is allowed a reasonable use of his property. The emphasis in the Illinois decisions on comparative property values instead of reasonable economic use simply gives developers an incentive to attempt to maximize development so as to make the "loss in value" more dramatic and, hence, more persuasive.⁷⁴ Regrettably, the Illinois Supreme Court has recently exacerbated an already serious misconception by seeming to embrace the idea that landowners

73. 1 RATHKOPF, *THE LAW OF ZONING AND PLANNING* (4th ed.) § 6.04, 6-9 to 6-13 (1984). See, e.g., *Board of County Commissioners v. Mountain Air Ranch*, 192 Colo. 364, 563 P.2d 341 (1977) ("it is clearly not necessary that the land be available for the 'highest and best use'"); *Dauernheim v. Town Board of Town of Hempstead*, 33 N.Y.2d 468, 354 N.Y.S.2d 909 (1974); ("Plaintiff is entitled to have his property yield a reasonable return. It need not be the most profitable or greatest return."); *North Westchester Professional Park Assoc. v. Town of Bedford*, 60 N.Y.2d 492, 458 N.E.2d 809, 811, (1983) ("the issue is not whether other zoning would be appropriate or whether the property is zoned for its highest and best use but whether the existing zoning classification deprives the owner of any use to which it is reasonably adapted.") *Township of Neville v. Exxon Corp.*, 14 Pa. Comm. 225, 322 A.2d 144 (1974). The Rathkopf text, at pp. 6-10 to 6-11 and pp. 33-36 of the cumulative supplement, notes decisions from 26 states which reject the notion that the "highest and best use" or the "most profitable use" has any bearing on a zoning dispute. Curiously, the list includes four Illinois Supreme Court decisions, none of them recent or in current vogue as citations. The four are *Galt v. Cook County* 405 Ill. 396, 91 N.E.2d 395 (1950); *First Nat'l Bank of Lake Forest v. Lake Forest*, 7 Ill. 2d 213, 130 N.E.2d 267 (1955); (highest and best use and lessened value are only factors to be considered); *Bolger v. Village of Mt. Prospect*, 10 Ill. 2d 596, 141 N.E.2d 22 (1957); *LaSalle Nat'l Bank v. City of Evanston*, 24 Ill. 2d 59, 179 N.E.2d 673 (1962). Of the four decisions only *First National* speaks explicitly of highest and best use and then only to recognize it as a factor to be weighed. For a discussion of the different approaches to analyzing "taking" claims, see D. MANDELKER, *LAND USE LAW* 15-36 (1982).

74. One of the more perceptive and thoughtful Illinois trial court judges recently took note of this phenomenon. In a case in which plaintiffs were seeking to invalidate the single family zoning of their property so as to consummate a sale of the property for \$1.2 million to a developer who proposed to build a six story office building on the site, the court, commenting on evidence of a need to expend \$470,000 for water and sewer service extensions, said,

" . . . [S]uch expenditures when coupled with the purchase price encourage developers to make excessive use of the property."

(Transcript of opinion of Hofert, J., in *Parkway Bank & Trust Company v. County of Cook*, Circuit Court of Cook County Case No. 82 L 11408, January 4, 1984).

do have a constitutional right to the "best" use of their property.⁷⁵

As used by appraisal experts in zoning litigation, the term "highest and best use" is commonly defined as "the use to which the property can be put over a period of time, with the greatest amount of monetary return to the owners."⁷⁶ One highly qualified appraiser defined "highest and best use" as:

[t]he use to which a property may be put that would produce the greatest land value for the greatest return to the owner over a given period of time. When that use is dependent upon a zoning change or amendment, consideration [is given] to the need and demand for the type of use proposed; its overall compatibility with existing land use and zoning patterns in the vicinity; and, most important, its impact on value, use, and marketability of other property in the vicinity.⁷⁷

Actually, the meaning of the term is not quite so simple because highest and best use studies are not designed to provide testimonial support for zoning challenges, as the definitive text on appraisal principles and methodology of the American Institute of Appraisers makes clear. Highest and best use is defined as:

The reasonable and probable use that supports the highest present value, as defined, as of the date of the appraisal.

Alternatively, highest and best use is:

The use, from among *reasonably probable and legal alternative uses*, found to be physically possible, appropriately supported, financially feasible, and that results in the highest present land value.

The second definition applies specifically to the highest and best use of land or sites as though vacant. When a site contains improvements, the highest and best use may be determined to be different from the existing use. The existing use will continue unless and until land value in its highest and best use exceeds the sum of the value of the entire property in its existing use and the cost to remove the improvements.

Implied in these definitions is that the determination of highest and best use takes into account the contribution of a specific use to the community and community development goals as well as the

75. *Harris Trust & Savings Bank v. Duggan*, 95 Ill. 2d 516, 533, 449 N.E.2d 69, 77 (1983). There is nothing in the *Harris Trust* opinion to suggest that the Court expected anyone to be startled by its double reference to "best use," so perhaps it should not be taken as an indication that the Court intends to enshrine a guarantee of "best use" as a rule of zoning law. If it does, it is going to have to explain away some very inconvenient prior opinions such as *La Salle Nat'l Bank v. City of Evanston*, 57 Ill. 2d 415, 312 N.E.2d 625 (1974), and the Illinois decisions listed at *supra* note 60.

76. *Harris Trust & Savings Bank v. Duggan*, 95 Ill. 2d 516, 531, 449 N.E.2d 69, 76 (1983).

77. Transcript of testimony of William McCann in *Frenchman's Cove v. Village of Northbrook*, No. 81 CH 52 16, Report of Proceedings at 314-15 (Cir. Ct. of Cook County August 1, 1983).

benefits of that use to individual property owners.⁷⁸

Highest and best use analysis can take into account the possibility of securing a zoning change but only when the local government has not had the question presented to it.

In the absence of private restriction, uses allowed under zoning typically constitute the available choices in most highest and best use determinations. However, a possible change in zoning should not be precluded from the appraiser's consideration of what is legally permissible.⁷⁹

Appraisers are cautioned that in making highest and best use studies,

Risks as well as returns are appropriate considerations in the analysis of highest and best use and should be weighed quantitatively as much as possible. A prediction that depends on a specific future event, such as a favorable zoning determination, cannot be justified if the probability of that event has not been carefully considered and factored into the feasibility analysis.⁸⁰

Predictions with respect to zoning changes may be appropriate when the question is whether or not the local authorities will change the zoning on a particular piece of property. But once local government has refused to change the zoning and litigation has ensued, then consideration of the probability of rezoning requires the appraiser to assess the probability that the existing land use regulations will be adjudicated to be constitutionally invalid. Put another way, when highest and best use testimony is offered in support of a challenge to the constitutionality of local zoning regulations it becomes a self-fulfilling prophecy. So the first step toward the re-establishment of coherent constitutional principles in zoning cases should be the quiet interment of highest and best use testimony. Instead the courts should ask whether there is any reasonable economic use that can be made of the property under the existing zoning regulations. If there is, then the regulations do not impose a constitutionally impermissible burden.

The second problem is the *La Salle National Bank* decision. The standards set out in that opinion⁸¹ were intended as an aid to analysis in "taking" and substantive due process challenges. The repetitive incantation of those standards in zoning case after zoning case has effectively ossified the *La Salle Bank* factors into the touchstone of constitutionality. And in becoming etched in stone, the *La Salle Bank* standards have virtually obscured the constitutional substance of the

78. AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, *THE APPRAISAL OF REAL ESTATE* 244 (1983) (emphasis supplied). This is the standard text for appraisers.

79. *Id.* at 251.

80. *Id.* at 571.

81. See *supra* text accompanying note 15.

litigation in which they are employed. Thus we get decisions like *Gust v. Westchester* in which the Appellate Court can write an entire opinion without even once identifying the cause of action as one that is grounded in a constitutional claim and that do not use the words "constitution," "constitutionality," "due process," or "taking" anywhere in the opinion.

So one of the principal matters that is amiss in Illinois zoning law is that the *La Salle Bank* criteria have become the beginning and the end of judicial analysis in zoning cases. They are treated by the courts as a kind of independent cause of action called an "action to declare a zoning ordinance invalid." The *La Salle Bank* standards lead courts astray because they focus judicial attention upon the merits of the dispute rather than on whether a reasonably viable, economic use remains of the land or whether the facts preclude the existence of any rational basis for the local land use decision. They encourage courts to balance competing considerations—an exercise that the Supreme Court, in *Larkin v. Grendel's Den*, described as a governmental function.⁸² Asking, as the Illinois courts do, whether the gain to the public justifies the burden on the landowner inevitably entices the courts into making judgments with respect to the social value and utility of the public objectives sought to be achieved by the zoning regulations.

So, the fatal flaw in the *LaSalle Bank* standards is that they insidiously lure courts into weighing and balancing the factual and opinion evidence. But the function of a court reviewing a legislative act for constitutional validity is not to weigh the evidence in the traditional sense, but to determine from the evidence whether the legislation is without any reasonable basis.⁸³ The *LaSalle Bank* standards are no more than a characterization of the kinds of facts which can be weighed in determining whether there exists any state of facts either known, or which may reasonably be assumed, that afford support for the legislative decision. This crucial distinction is almost invariably overlooked altogether or blurred beyond recognition in Illinois zoning decisions.

The emphasis in the Illinois zoning decisions upon the use proposed to be made of property rather than on the constitutionality of the existing zoning aggravates the tendency of the *LaSalle Bank* standards

82. See *supra* text accompanying note 12.

83. See *Noranda Exploration, Inc. v. Ostrum*, 113 Wis. 2d 612, 335 N.W.2d 596, 604 (1983). (Not a land use case. The decision holds that a Wisconsin statute requiring licensed metallic mineral explorers to disclose geologic exploration data and provide core samples to the state was a "taking" of a property right which could not be sustained in the absence of compensation.)

to push the courts into weighing the merits of the land use dispute. The constitutional questions are (1) is the restriction wanting in due process, i.e., is it unreasonable because it has no relationship to the purposes for which the zoning power is granted; (2) is it confiscatory; and (3) does it deny equal protection? Illinois courts do not examine the existing zoning from this perspective. The analytical approach sanctioned by the Illinois Supreme Court encourages the courts to focus on the proposed use by making the validity of a zoning restriction depend upon the nature of the use which is prohibited by the current restrictions.⁸⁴ This focus on the reasonableness of the landowner's proposed use, when employed in the context of the *LaSalle Bank* factors, diverts the courts from constitutional analysis and leads inexorably to their sitting in judgment on the merits of the local zoning decision. Put simply, the emphasis on the proposed development quite plainly leads courts to decide zoning cases by asking themselves: How can it hurt if the plaintiff is permitted to do so as he wishes with the property? That inquiry unavoidably results in shifting the burden of justification onto the municipality and in frustrating the application of the rules of constitutional adjudication by dissipating the presumptive validity of the regulation.⁸⁵

In litigation over other police power ordinances, the Illinois courts have not lost sight of the stringent requirements of substantive due process analysis. In upholding a municipal ordinance that prohibited anyone within the municipality from owning or possessing handguns, the Appellate Court said,

We also reject plaintiffs' contention that the ordinance in question was an unreasonable exercise of the police power. A municipality has broad discretion to determine not only what the interests of the public welfare require but what measures are necessary to secure those interests. We will not disturb an exercise of police power merely because there is room for a difference of opinion as to its wisdom or necessity.⁸⁶

The courts of this state need to remind themselves that the same "broad discretion" applies to zoning decisions as much as it does to gun control. The judiciary needs to remember that the validity of a zoning

84. See *Schultz v. Village of Lisle*, 53 Ill. 2d 39, 289 N.E.2d 614 (1972).

85. Land use regulations that do not involve zoning do not suffer from such burden shifting and are usually accorded a genuinely effective presumption of validity. See, for example, *Village of Skokie v. Walton on Dempster*, 119 Ill. App. 3d 299, 456 N.E.2d 293, (1983), in which the court upheld the constitutionality of sign regulations that were prompted by considerations of community aesthetics.

86. *Kalodimos v. Village of Morton Grove*, 13 Ill. App. 3d 488, 493, 447 N.E.2d 849, 852 (1983).

ordinance, unless it is grounded on a claim that statutory authority has been exceeded, raises constitutional questions that have the potential for cutting deeply into the separation of governmental powers and that therefore require the same deference to the zoning decisions of the local legislative body as would be given as a matter of course to any other local legislative exercise of the police power. It may indeed be true that the courts know better what the public interest requires than local elected officials do, but the principles of our jurisprudence do not permit them to base their decisions on that assumption.

And that brings us to the third and final problem, which is: Are local zoning decisions with respect to particularized uses of land really legislative decisions at all? And if they are not, what implications does that have for the standard of judicial review?

In *City of Aurora v. Burns* the Illinois Supreme Court, had observed, "zoning is regulation by districts and not by individual pieces of property."⁸⁷ Over 20 years ago two members of the Illinois Supreme Court expressed grave reservations about the drift away from "regulation by districts" and the practice, which even then was burgeoning, of using zoning ordinances as a mechanism for controlling the particular, specific use to be made of individual parcels of land on the ground that such ad hoc zoning decisions were antithetical to basic zoning principles. In *Ward v. Village of Skokie*,⁸⁸ Justice Klingbiel expressed his concern over the turn that zoning had taken.

It is not a part of the legislative function to grant permits, make special exceptions, or decide particular cases. Such activities are not legislative but administrative, quasi-judicial, or judicial in character. To place them in the hands of legislative bodies, whose acts as such are not judicially reviewable, is to open the door completely to arbitrary government.⁸⁹

If the decisions of the Illinois courts in zoning cases sound like those of a "super zoning commission," it is because they do not involve, except in rare instances, broad questions of public policy with respect to land use regulations or even the facial validity of particular regulatory techniques. Instead they involve only the very narrow question of the way in which a particular parcel of land should be used and developed. The local decision-making process in such instances is almost

87. 319 Ill. 84, 98, 149 N.E. 784, 789 (1925).

88. 26 Ill. 2d 415, 186 N.E.2d 529 (1962).

89. *Id.* at 424, 186 N.E.2d at 533 (Klingbiel, J., and House, J., specially concurring). Justices Klingbiel and House were specifically concerned with the proliferation of special use permit procedures in which prior permission of the city council or village board is required before certain uses may be established.

invariably adversarial. Hearings before local authorities are often highly controversial with exhibits, expert opinion testimony, and, not infrequently, inflammatory oratory from all concerned and their attorneys. In such instances the function of the city council or the village board of trustees is essentially adjudicatory. It needs to be recognized as such. The courts must analyze the real nature of the process instead of automatically characterizing decisions as legislative just because they are made by the body that has local legislative authority. The present practice of using the locus of the final decision-making authority as the determinant exalts form over substance.⁹⁰ It also results in the courts being deprived of an opportunity to form any sure judgment as to the reliability of the local decision. The corollary is that we also need to recognize that the appropriate method of judicial review of decisions on the specific use to be made of particular parcels is not a trial *de novo* on constitutional substantive due process or taking claims, but a review of the record made before the local body to determine whether, considering the evidence that was offered to it, the decision was arbitrary and capricious. In that type of proceeding, constitutional issues would not be raised routinely. In that context the threshold question on judicial review would be simply whether there was substantial evidence to support the decision made by the local body. If traditional constitutional issues were raised on judicial review of the local decision, the courts could, with an easier conscience, apply the demanding standards of constitutional adjudication to the resolution of those issues. The need to cloak doubts about the reliability of the local decision in the incantation of constitutional formulas would no longer exist.

Justices Klingbiel and House may have been ignored in Illinois, but their observations have been accorded great deference in other states. Ten years ago the Oregon Supreme Court in *Fasano v. Board of County Commissioners of Washington County*,⁹¹ described Justice Klingbiel's concerns as a "growing judicial recognition" of the fact of life that "[l]ocal and small decision groups are simply not the equivalent in all respects of state and national legislatures."⁹² So the Oregon Supreme Court held that particularized land use decisions were quasi-judicial, and placed the burden of proof with respect to requests

90. When decisions are made finally by an administrative body such as the Board of Zoning Appeals, they are reviewable on the administrative record under the Administrative Review Act. Ill. Rev. Stat., c. 110, §§ 3-102 and 3-108.

91. 264 Ore. 574, 507 P.2d 23 (1973).

92. *Id.* at 580, 507 P.2d at 26.

for specific changes on the applicant at the local level.⁹³

One year before the *Fasano* decision the Washington Supreme Court had reached the same conclusion.

Generally, when a municipal legislative body enacts a comprehensive plan and zoning code it acts in a policy making capacity. But in amending a zoning code, or reclassifying land thereunder, the same body, in effect, makes an adjudication between the rights sought by the proponents and those claimed by the opponents of the zoning change. The parties whose interests are affected are readily identifiable. Although important questions of public policy may permeate a zoning amendment, the decision has a far greater impact on one group of citizens than on the public generally.⁹⁴

Since *Fasano*, four other states have adopted the view that particularized land use decisions are quasi-judicial. The most recent is Idaho in *Cooper v. Board of County Commissioners of Ada County*,⁹⁵ in which the Idaho Supreme Court said,

We are persuaded the cases which characterize as quasi-judicial the action of a zoning body in applying general rules or policies to specific individuals, interests, or situations represent the better rule. The shield from meaningful judicial review which the legislative label provides is inappropriate in these highly particularized land use decisions. The great deference given true legislative action stems from its high visibility and widely felt impact, on the theory that an appropriate remedy can be had at the polls . . . This rationale is inapposite when applied to a local zoning body's decision as to the fate of an individual's application for rezone. Most voters are unaware or unconcerned that fair dealing and consistent treatment may have been sacrificed in the procedural informality which accompanies action deemed legislative. Only by recognizing the adjudicative nature of these proceedings and by establishing standards for their conduct can the rights of the parties directly affected, whether proponents or opponents of the application, be given protection.⁹⁶

The *Fasano* states have recognized that the adversarial nature of land use decisions with respect to particular parcels makes substantive due process analysis singularly inappropriate because inevitably either

93. In *Fasano*, the Oregon court required proof of conformity of the change with the comprehensive plan, of a public need for a change of the kind in question, and a showing that the need would best be served by changing the classification of the particular piece of property in question as compared with other available property. *Id.* at 583-84, 507 P.2d at 28. The public need and "other available property" standards have since been abandoned by the Oregon Supreme Court on the ground that statutory mandatory planning legislation has made them unnecessary. *Neuberger v. City of Portland*, 288 Ore. 155, 603 P.2d 772, (1979); rehearing den. with supplementary opinion 288 Ore. 585, 607 P.2d 722 (1980).

94. *Fleming v. City of Tacoma*, 81 Wash. 2d 292, 502 P.2d 327.

95. 101 Idaho 407, 614 P.2d 947 (1980). The others are: Colorado: *Snyder v. City of Lakewood*, 189 Colo. 421, 542 P.2d 371 (1975); Kansas: *Golden v. Overland Park*, 224 Kan. 591, 584 P.2d 130 (1978); Montana: *Lowe v. City of Missoula*, 165 Montana 38, 525 P.2d 551 (1974).

96. 101 Idaho at 410, 614 P.2d at 950-51.

the characterization of the decision as legislative insulates it from meaningful review or, if the focus of the inquiry is on the soundness of the particular decision and the planning principles that support it, then settled principles of constitutional adjudication must be jettisoned *sub silentio*.

Nearly eighty years ago, Justice Oliver Wendell Holmes, dissenting in *Lochner v. New York*, said “[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.”⁹⁷ Neither does the Fourteenth Amendment, or the Fifth Amendment, enact the planning philosophies of Frederick Law Olmstead, Daniel Burnham, or the National Association of Homebuilders. Nevertheless, the galloping revival of the most discredited aspects of the substantive due process test continues apace in Illinois. The judicial proclivity for intervening in the merits of land use disputes may well stem more from an abiding suspicion about the reliability of the local land use decision-making process than it does from any misconception of the extent to which the Constitution restrains the use of land use controls.⁹⁸ But the kaleidoscopic pattern of land use decisions in this state that results simply encourages disappointed or disgruntled landowners or neighbors to importune the judiciary to pass judgment on the wisdom of local zoning decisions. The temptation to intervene when a judge believes that a local decision has been mistaken can be a persuasive incentive for invalidating the regulation. Indeed, in the course of oral argument in a zoning case an Appellate Court judge once asked the author, “Don’t these municipalities make a lot of mistakes?”⁹⁹ The conviction that local authorities are prone to make mistakes and that their decisions are not really as reliable as those of the state legislature leads to a pervasive skepticism about the fundamental reasonableness of the local land use decision-making process. Or, as Dick Babcock reported some years ago, “A state Supreme Court Justice told me he decided at least one well-noted case against the municipality because he simply could not accept the view that officials of a small governmental unit were capable of exercising fairness where decisions on land use matters required con-

97. 198 U.S. 45, 75 (1905).

98. When the local land use decision is “legislative” (see *supra* note 72), the Illinois courts do not examine the record made locally in support of a rezoning or other request for zoning relief because the decisional rule is that the courts are forbidden to do so. See *Forestview Homeowner’s Ass’n v. County of Cook*, (1st Dist. 1978), 18 Ill. App. 3d 230, 304 N.E.2d 763; *Siegal v. City of Chicago*, (1st Dist., 1970) 127 Ill. App. 2d 84, 261 N.E.2d 802; *Anthony v. City of Kewanee*, (3rd Dist., 1967) 79 Ill. App. 243, 223 N.E.2d 738.

99. In the interest of avoiding personalities, the name of the misguided jurist has been withheld.

siderable discretion.”¹⁰⁰ The not infrequently demonstrated municipal capacity for capriciousness surely has led many other judges to the same unstated conviction.

The only way to deal with the judiciary's obvious sense of unease about the nature of the local land use decision-making process is to lay that process before the courts and give them an opportunity to test the municipal land use decision for reasonableness or arbitrariness on the basis of the record made in support of and opposition to the proposed rezoning or special permit. The further consequence of characterizing particularized land use decisions as quasi-judicial is that the procedure by which such decisions are made must be attended by a full range of procedural due process protections.¹⁰¹ This means that all interested persons must have a full opportunity to be heard and that an opportunity for cross-examination must be accorded.¹⁰² And it means that there must be a verbatim record of proceedings and specific written findings of fact and conclusions upon which the decision is based.¹⁰³

The prescription is rather strong medicine, but judicial confidence in the reliability and integrity of the local land use decision-making process will not be restored until municipalities give up on the tattered shreds of the presumption of validity in zoning cases and welcome the review of those disputes on the basis of the record that was made before and considered by the local decision-making body. On review, then, the attention of the courts will be focused on a question with which they are more accustomed to dealing, which is: Was there substantial evidence to support the decision that the local authorities reached? Coincidentally, those twin sirens, “highest and best use” and the *LaSalle Bank* criteria, will achieve a well-deserved obsolescence. Courts will then be able to protect applicants and objectors from arbitrary decisions without debasing constitutional principles in order to reach a result that is deemed meritorious.

100. R. BABCOCK, *THE ZONING GAME* 105 (1966).

101. See *Fasano v. Washington County*, 264 Ore. 574, 507 P.2d 23 (1973); *Cooper v. Board of Commissioners of Ada County*, 101 Idaho 407, 614 P.2d 947 (1980).

102. This is not novel doctrine. It has already been accepted in Illinois by one Appellate Court. See *E & E Hauling v. County of Du Page*, 77 Ill. App. 3d 1017, 396 N.E.2d 1260 (1979).

103. *Fasano v. Washington County*, 264 Ore. 574, 507 P.2d 23 (1973); contains a useful catalogue of the procedural due process rights that must attend a quasi-judicial proceeding. Prominent among the Oregon requirements is a ban on *ex parte* communications with the decision-makers. The Washington “appearance of fairness” rule has also been applied to preclude *ex parte* communication with the local decision-making body. See *Smith v. Skagit County*, 75 Wash. 2d 715, 453 P.2d 832 (1969). In *Neuberger v. City of Portland*, 288 Ore. 585, 607 P.2d 722 (1980), the Oregon court disavowed any intention that the *ex parte* contact rule was to be applied “mechanically.”

NOTES
&
COMMENTS

