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If It Ain't Broke, Fix It?: Assessing the Impact of *Klaeren v. Lisle* on Illinois Zoning Law

By Victor P. Filippini, Jr., Barbara A. Adams, and Elliot M. Regenstein*

When the Illinois Supreme Court agreed to review the case of *People ex rel. Klaeren v. Village of Lisle*,[1] most observers expected the Court to clarify the procedural rights associated with local public hearings in Illinois. Although the Supreme Court did address public hearing procedures, the more significant and startling aspect of its decision was the abandonment of more than 40 years of precedent through its proclamation that "municipal bodies act in administrative or quasi-judicial capacities when those bodies conduct zoning hearings concerning a special use petition."[2]

Certainly, the mere fact that a well-established precedent has been overturned is reason enough to take notice of a judicial decision. When that decision will literally affect every local government in Illinois that has zoning authority, and every property owner or developer who may seek a special use permit in connection with the use and development of a property, there is even more reason to pay attention. But when such a dramatic turnabout in the law occurs for no apparent reason, it is time to do more than read the Court's opinion; it is time to question it.

> ***...in filing suit, the plaintiffs did not challenge the substance of Lisle's zoning decisions. Rather, the basis for their zoning challenge was that the public hearing process did not afford them an adequate opportunity to be heard.***

Background: The Case and the Law

In *Klaeren*, landowners living adjacent to a proposed Meijer development challenged the procedure by which the Village of Lisle approved the development. Specifically, Lisle used the uncommon procedure of a joint hearing of its Zoning Board of Appeals, Plan Commission, and Board of Trustees on the proposed development to hear evidence on the requested annexation, annexation agreement, rezoning, and special use permits for a planned development and for a gas station. Over 500 people attended the public hearing. The mayor of Lisle presided at the hearing, allowing the petitioners to make a full presentation of their case but setting a two-minute time limit on all

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speakers from the audience – a limitation that prevented a citizen group from making a prepared presentation on behalf of 2,000 residents who had signed a petition. The mayor also barred citizens from presenting poster board exhibits as evidence. Moreover, the mayor prohibited any of the citizens from cross-examining any of the petitioner's witnesses.[3]

After the joint hearing was adjourned, the Plan Commission and Zoning Board of Appeals each considered the evidence relating to the requested planned development and gas station special use permits, and both of these bodies ultimately recommended that the special use permits should be denied.[4] Nevertheless, the Village Board in Lisle decided not to follow the recommendations of the Plan Commission and Zoning Board of Appeals, and it approved the annexation and zoning petitions needed to permit the Meijer development to proceed.

The plaintiffs, disappointed residents of Lisle, filed their lawsuit to prevent the Meijer development from proceeding. The trial court held a preliminary injunction hearing at which at least ten witnesses testified to matters both within and without the public hearing record. Following the hearing, the trial court granted a preliminary injunction from which the case was appealed.[5] Significantly, in filing suit, the plaintiffs did not challenge the substance of Lisle's zoning decisions. Rather, the basis for their zoning challenge was that the public hearing process did not afford them an adequate opportunity to be heard.[6]

In reviewing this case, the Appellate Court of Illinois, Second District, held that the procedures used at the public hearing in Lisle violated the public hearing rights of the adjacent landowners. In doing so, the Second District determined that *all* public hearings "in all municipalities" must allow not only the right of cross-examination, but the "full panoply of rights" to subpoena witnesses, present witnesses, and request continuances for purposes of developing rebuttal evidence.[7]

The Supreme Court expressly rejected the Second District's conclusion that *any* public hearing before *any* municipal body required the municipal body to provide the full spectrum of rights identified by the Second District. The Supreme Court held that the Second District had construed the phrase "public hearing" too broadly.[8] The Supreme Court properly distinguished between the process necessary at "legislative" hearings and "quasi-judicial" or adjudicative hearings, noting that quasi-judicial hearings must provide certain procedures for public participation not required for legislative hearings.[9]

It was the next step of the Court's analysis that turned Illinois zoning law on its head. The Court decided that, when considering special use permits, the corporate authorities of municipalities were acting in a quasi-judicial rather than legislative capacity.[10] This overturned the longstanding rule in Illinois that zoning decisions of a local governing board are legislative.[11] The Supreme Court supported its decision that special use permits are adjudicative hearings by noting that "the property rights of the interested parties are at issue."[12] Of course, the same could be said of nearly *every* zoning decision and many other matters coming before municipalities, including annexations (which do not ordinarily require public hearings) and annexation agreements. Thus, the Court's new litmus test for distinguishing between legislative and adjudicative decisions of a local governing body is at best unclear, and will lead to many false positives if applied as the Court directed.[13]

Ironically, the Court's decision was largely unnecessary for several reasons. First, there is no constitutional requirement for a public hearing in the zoning or annexation context.[14] Thus, the only rights that the plaintiffs had were the public hearing rights provided by statute. With respect to the special use permits, the plaintiffs received exactly the outcome they sought from the hearing bodies: negative recommendations. Moreover, the plaintiffs did not challenge the substantive decision of the Village Board, only the procedural process. Thus, the Court could

have found this to be a case of "no harm, no foul."

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

Third, even if the plaintiffs had objected to the substantive grounds for issuing the special use permits to Meijer, the Court did not have to fashion a new remedy to address such objections. Illinois courts long ago established that such challenges can be brought to the circuit court for a trial *de novo* to determine whether the decision was arbitrary and unreasonable based on the so-called "*LaSalle* factors."[15] This is a familiar and well-understood remedy. In contrast, the Court's ruling that the special use permit hearings in Lisle were quasi-judicial raises unanswered questions regarding the available judicial remedy. Illinois law provides two methods of appealing administrative decisions: the Administrative Review Law and the common law writ of *certiorari*.[16] The Illinois procedures under the Administrative Review Law are not available because the special use was not determined by a final action of the zoning board of appeals.[17] There is also some doubt regarding the availability of a common law writ of *certiorari* because plaintiffs would seem to have the right to bring a *LaSalle* factor-based declaratory action.[18] Moreover, in the *Klaeren* case, the plaintiffs did *not* seek a writ of *certiorari* and the trial court acted based on evidence outside the hearing record, which is improper when proceeding under a writ of *certiorari*.[19]

Despite the opportunity to decide the dispute on much narrower grounds, the Court's decision seemed to be fueled by the perception of some commentators that a majority of other states regard hearings on special uses as quasi-judicial rather than legislative.[20] The Court apparently accepted these commentaries without regard to the existing statutory structure in Illinois. For example, if the standard for adjudicative hearings depends on whether the hearing affects individual rights, then the zoning amendment process that the General Assembly has created is schizophrenic. Illinois courts have previously ruled that amendments to zoning regulations are generally applicable and do not affect any particular property.[21] On the other hand, there can be little doubt that an amendment to a zoning map with respect to a single parcel affects individual property rights. Nevertheless, the General Assembly has created a single hearing process for both of these amendments, and such process includes its own relief in the form of protests and super-majority votes.[22] Under the Court's new view, a zoning amendment hearing can conceivably be legislative or quasi-judicial. This hardly seems to be the result anticipated, as the General Assembly has not subjected the amendment process (or the special use process) to the Illinois Administrative Review Law, even though it plainly has done so with other zoning processes when deemed appropriate.[23]

As a result, special use and other zoning hearings will likely take on the character of "mini-trials." This will necessarily increase the complexity of the hearing process.

Potential Consequences of *Klaeren*

Although it is too early to determine all of the consequences from the Supreme Court's decision in *Klaeren*, some initial

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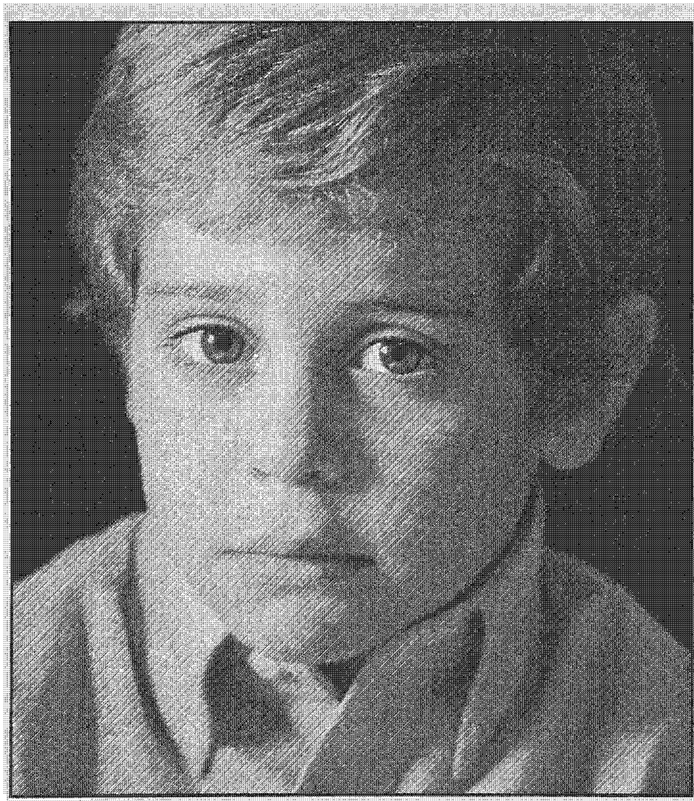
FEATURE: Child Support Reform

RECOMMENDATIONS FOR REFORM OF THE CHILD SUPPORT SYSTEM IN COOK COUNTY

By Malcolm Rich and Kristina Tunnicliff*

Statistics show that the State of Illinois has one of the worst functioning child support agencies in the country. For example, in 2000, Illinois was collecting child support in only 16 percent of all cases, including those where paternity and an order requiring payment of support have not been established. The national average is 42 percent. Also in 2000, Illinois collected only 36 percent of current child support owed. The national average is 56 percent.

But statistics tell only part of the story. Legal assistance advocates, legislators and government employees are bombarded with complaints about the child support program. Customer service remains an elusive concept and too many parents – both mothers and fathers – do not have confidence in the current system.



In October 2002, the Chicago Council of Lawyers and Chicago Appleseed Fund for Justice released a second report providing more than 80 recommendations for change. In January 2003, Illinois legislation was signed into law that would begin the process of implementing the recommendations contained in the Council/ Chicago Appleseed Fund for Justice report. During his successful 2002 gubernatorial campaign, Governor Rod Blagojevich emphasized the need for reform of the child support system.

In this article, we discuss the comprehensive research work and resulting recommendations that have helped fuel the call for reform of the child support system in Illinois.

RESEARCH INTO THE ILLINOIS CHILD SUPPORT SYSTEM

The Council and Chicago Appleseed began their work with child support in 1992 with a qualitative research study aimed at the Cook County State's Attorney's Division of Child Support Enforcement. A report detailing the results of the study and recommendations for improvement was released in May 1996.[1]

After releasing this report, we recognized that reforming one part of the child support system would not be sufficient. We found that Illinois' child support system was comprised of a collection of uncoordinated activities being conducted by at least five government bodies.

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Fixing one part of the system would not fix the rest of the process.

In June 1996, the Chicago Council of Lawyers brought together representatives from 19 government agencies, legal services providers, and community groups involved in the Cook County child support system for a series of meetings. The goal of these meetings was to devise solutions to improve Cook County's exceptionally poor record in establishing, enforcing, and collecting on child support orders. This group was called the Child Support Panel and was facilitated by former Illinois Supreme Court Justice Seymour Simon.

After a year and a half of meetings, the Child Support Panel produced a report, *Child Support in Cook County: A Model for Improved Performance,* which provides a model for how the group believes the child support system should function in Cook County.[2] All participants in the Child Support Panel agreed to support the basic structure and organizational changes set out in the model.

Subsequently, Chicago Appleseed began a research and advocacy project in September 2000. We interviewed and otherwise received input from over 100 parents, lawyers, government officials, and experts. We collected and analyzed data from the child support programs in eleven states outside of Illinois. We observed courtrooms and hearing rooms at the Cook County Circuit Court Domestic Relations Division and the Expedited Child Support Division of the Domestic Relations Division. As an innovative approach to an otherwise sociological research project, we also provided legal representation, counseling, and advice to custodial and non-custodial parents on child support matters. This allowed us to gain real world experience that helped put our research into prospective.

Overview of the IV-D Program

Title IV-D of the Social Security Act authorized the creation of state-operated child support agencies, which are commonly referred to as IV-D agencies. In Illinois, the IV-D agency is housed in the Illinois Department of Public Aid (IDPA). Any custodial parent can apply for child support services from IDPA. The services are free for welfare recipients, and cost between $0 and $25 for those not receiving welfare, depending on income level. Child support services provided by IDPA include locating missing non-resident parents, genetic testing, child support order establishment, enforcement, and modification, medical support, wage withholding, computerized accounting and billing, and interception of federal and state income tax refunds.

IDPA contracts with several organizations in Cook County in order to fulfill its IV-D responsibilities. The Cook County State's Attorney's Office acts as IDPA's legal representative in child support matters, assisting custodial parents in court with establishing parentage, and obtaining, enforcing, and modifying child support orders. The Cook County Clerk of the Circuit Court assists judges in child support courtrooms, handles customer service, helps parents resolve financial and accounting problems, maintains the docket, and processes, disburses and keeps permanent records of court ordered child support payments. Maximus, Inc. is a private, for profit company that contracts with IDPA in Cook County to conduct reviews and modifications of child support orders, follow up with income withholding notices, calculate and adjust arrears, perform customer service duties, draft petitions for enforcement, and activities related to the National Medical Support Notice (NMSN) process. Other agencies that work with IDPA so that it can carry out its IV-D responsibilities include: the Cook County Sheriff's Office, the Department of Employment Security, the Illinois State Comptroller, the Internal Revenue Service, the Department of Insurance and Professional Regulation, the Illinois Department of Public Health, the Illinois Department of Revenue, the

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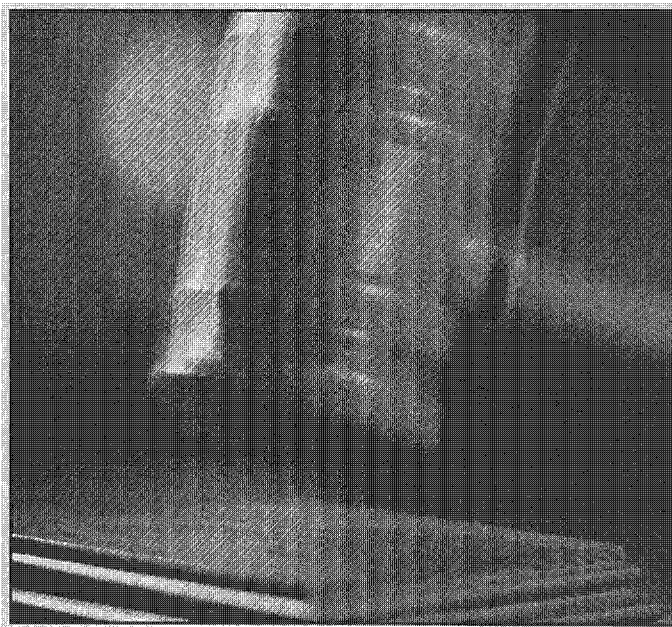
Supreme Court to Determine the Fate of Affirmative Action in Education

By Esther Choi

On December 2, 2002, the Supreme Court agreed to review the University of Michigan undergraduate and law school cases, which will decide the fate of affirmative action. The decision will either affirm or reverse the Court's decision in the landmark affirmative action case, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). The Court in *Bakke*, found that diversity is a compelling state interest. The Court also determined that as long as race is used as one of many factors, such affirmative action programs are constitutional in order to create a diverse and dynamic environment.



Hundreds of groups and individuals filed amicus curie briefs both for and against affirmative action before the February 19, 2003 deadline.

Supporters of affirmative action argue that diversity is essential to an academic environment, promoting racial awareness. Students' exposure to different cultures and races dispels prejudices and stereotypes and promotes tolerance. Diversity also broadens the learning process by providing a plethora of perspectives. Advocates also argue that it is necessary to yield leaders that reflect and fairly represent the United States population. Goodwin Liu, Affirmative Action in Higher Education: The Diversity Rationale & The Compelling Interest Test, 33 Harv. C.R.-C.L. L. Rev. 381, 410-411 (1998). Virtually all 3500 institutions of higher education agree that diversity is a compelling interest. John Friedl, Making A Compelling Case For Diversity In College Admissions, U. Pitt. L. Rev., Fall 1999, at 28 (quoting On the Importance of Diversity in Higher Education, Chron. Of Higher Educ., Feb. 13, 1998, at A48).

More than 300 organizations representing academia, major corporations, labor unions and nearly 30 of the nation's top former military and civilian defense officials filed briefs in support of affirmative action. Ethnic Majority, Groups Support University of Michigan Affirmative Action Case, at http://www.ethnicmajority.com/affirmative_action_news.htm.

Companies such as 3M, Coca-Cola, Nike, United Airlines, and General Mills filed supporting briefs as well. These companies argue that "it is necessary to ensure that members of all segments of our society receive the education and training they need to become the leaders of tomorrow." Sixty-five companies with combined annual revenues of more than $1 trillion stated the "future of American business is on the line." FindLaw, *Affirmative Action Filings Flood Court*, at http://news.findlaw.com/scripts/ scripts/printer_friendly.pl?page=/ ap_stories/a/w/1153/2-19-2003.

Many of the United States' best known retired military officers and former top Pentagon officials also filed a brief supporting affirmative

action. Joe Reeder, a former Army undersecretary, stated that diversity is "absolutely essential to our fighting force…" FindLaw, *Ex-Officers Back Michigan Affirmative Action*, http://news.findlaw.com/scripts /scripts/printer_friendly.pl?page=/ap_stories/other/1110/2-17-2003.

Professor Diane C. Geraghty, Constitutional Law Professor at Loyola University Chicago School of Law and Member of the American Civil Liberties Union's National Board of Directors commented on the importance of diversity. "Diversity is critically important, especially in an educational setting. This is particularly true for the study of law. Law does not develop in a vacuum. It is the product of history, experience, functionality and values. The ability of students to understand and critique law and policy is enriched by the opportunity to learn

The Bush Administration wants the Court to rule in favor of "race neutral factors," such as socio-economic status.

from others who bring a different set of experiences and perspectives to the issue. Equality of opportunity, of course, is important in other settings, such as employment. But in the education setting, the learning process itself depends on the creation of the fuller context that diversity allows."

There are three major arguments against affirmative action. First, critics of affirmative action argue that programs that give preference to race unconstitutionally discriminate against white applicants, creating a "reverse discrimination." Second, opponents argue that it actually hurts some minority students, specifically those that have to compete in schools they are not prepared for. Third, critics argue that it perpetuates a stereotype and suspicion that the minority students are unqualified, and are only admitted because of their race. Newsweek, *What's At Stake*, at http://stacks.msnbc.com/news/861401.asp.

President George W. Bush told reporters that he "strongly supports diversity of all kinds, including racial diversity, but the method used by the University of Michigan was… fundamentally flawed." CNN, *Bush criticizes university 'quota system,'* at http://www.cnn.com /2003/ALLPOLITICS/01/15/ bush.affirmativeaction. He stated however that, "We must be vigilant in responding to prejudice wherever we find it…As we work to address the wrongs of racial prejudice, we must not use means that create another wrong, and thus perpetuate our divisions." FindLaw, *Bush Opposes College on Race in Supreme Court Case*, at http://news.findlaw.com/scripts/ printer_friendly.pl?page=/politics/s/20030116. The Bush Administration wants the Court to rule in favor of "race neutral factors," such as socio-economic status.

The Center for Individual Rights and over 100 organizations are also opponents of affirmative action. The organization believes that "preferences are almost always unconstitutional when used to achieve an arbitrary racial diversity; they are only legal when narrowly tailored to remedy past discrimination against identifiable individuals." Center for Individual Rights, *A commitment to protecting civil rights*, at http://www.cir-usa.org/civil_rights_theme.html.

Ward Connerly, an African-American chairman of the American Civil Rights Institute, comments that "people are entitled to equal treatment under the United States Constitution, and affirmative action does not supercede that." He further stated that, "it is important for admissions officers to judge people as individuals, not by the proportion of students of a particular race at a university." The Digital Collegian, *Connerly speaks against affirmative action*, at http://www.collegian.psu.edu/archive/2003/02/02-14-03tdc/02-14-03dnews-12.asp.

On December 13, 2000, the Sixth Circuit found the University of Michigan's Undergraduate admissions affirmative action

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program constitutional. On May 14, 2002, the Sixth Circuit also found the University of Michigan Law School admissions program's use of race constitutional. Since *Bakke*, the Supreme Court has not granted petitions to review cases on affirmative action in education.

The Supreme Court cases following *Bakke*, support the principle that using racial classifications are contrary to rights protected under the Equal Protection Clause of the Fourteenth Amendment.

In May 1986, minority teachers were given preference when they were protected against layoffs because the school felt there was a compelling need to have minority role models. The Supreme Court held the school's policy of extending preferential protection based on race violated the Fourteenth Amendment. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). In 1989, the city of Richmond required prime contractors to subcontract 30 percent of their contracts to "Minority Business Enterprises," particularly to African Americans, Asian Americans and Latinos. The city felt these groups were underrepresented, and wanted the city's contracting scheme to reflect that of the minority population of Richmond. The Court found that the city failed to demonstrate a compelling governmental interest of remedying past wrongs done specifically by the city. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

More recently, in 1996, a Texas census revealed a population increase allowing three more congressional seats in the House of Representatives. Texas set up two African American districts and one Latino, so the people in these districts would elect minority representatives. The Court found the state's program that tracked race was evidence that race was the predominant factor that motivated the legislature to redistrict, and thus the redistricting program was unconstitutional. The Court found that based on race, the state denied the rights of other citizens the opportunity to participate in the political process. *Bush v. Vera*, 517 U.S. 952 (1996).

If the Supreme Court did not allow enhancing diverse representation in the state election process, it is unclear whether the Court will continue to consider diversity in an educational institution a compelling interest. The Supreme Court essentially has three options. The Court can affirm the *Bakke* decision, bar any use of race in admissions programs, or narrowly tailor their opinion to affect only the University of Michigan's admissions system. Newsweek, *What's At Stake*, at http://stacks.msnbc.com/news/861401.asp.

"If the Court's majority strikes down the Michigan affirmative action programs, it will send a terrible signal to students of color that the highest court in the land fails to recognize their historical exclusion from institutions of high education and the contributions they make to the educational process."

– Professor Diane C. Geraghty, Constitutional Law Professor, Loyola University Chicago School of Law and Member of the American Civil Liberties Union's National Board of Directors

Professor Geraghty commented on whether the Supreme Court will find affirmative action unconstitutional and the implications. "The future of affirmative action in higher education as we know it probably rests in the hands of Justice O'Connor. Although she has voted to strike down affirmative action programs in such areas

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