1 Land Use Process: Governmental Bodies and Jurisdiction

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I. [1.1] INTRODUCTION

This chapter introduces some of the land use controls and the players commonly encountered in connection with regulating land use in Illinois. Omitting matters discussed elsewhere in this handbook, it covers the following items:

a. the statutory authority for local governments to engage in planning activities and regulation of development;

b. a comparison of the powers of counties and municipalities to regulate development;

c. land use regulation powers of municipalities that have extraterritorial effect;

d. considerations for electing to develop in a municipality or in the unincorporated area of the county when a choice is available;

e. federal intervention in local land use matters;

f. the statutory and regulatory authority of state agencies affecting development;

g. laws having a basis in the following engineering or environmental concerns: (1) flood zones; (2) storm water; (3) sanitary sewerage; (4) road access and traffic control; and (5) airport height limitations; and

h. private land use controls and property owner associations.

This chapter intentionally limits discussion of public powers of eminent domain as a land use control mechanism. Also omitted or treated in a limited manner are matters covered more fully in subsequent chapters in this handbook, including the package of financing that active communities may be able to offer to developers to encourage desired development, specific zoning controls, subdivision controls, impact fees, and the constitutional limits of governmental land use authority.

II. [1.2] TRADITIONAL LAND USE CONTROLS

The statutory basis of traditional land use controls is discussed in §§1.6 – 1.19 below, and each method is discussed in detail later in this handbook. But a statement briefly describing each is appropriate at this point.

The basis of most traditional land use controls may be found in the Standard State Zoning Enabling Act prepared by the United States Department of Commerce in 1922 and the Standard City Planning Enabling Act prepared by the U.S. Department of Commerce in 1928. On these model Acts most states based statutes enabling local governments to engage in land use planning. With the authority of such statutes, cities and villages enacted ordinances to provide for zoning and subdivision controls. In addition, beginning at about the same time, local governments began adopting building codes that had the effect of regulating land use.

A. [1.3] Zoning

Other than direct acquisition of land, zoning is the most direct form of governmental land use regulation. Zoning is also the most pervasive means by which local governments control the use of land. Zoning ordinances prescribe limitations on each parcel of land in the jurisdiction with respect to activity conducted on the property, building bulk, location, height, floor area, signage, parking, outbuildings, lot size, setbacks, side yards, and similar matters.

Generally, zoning ordinances permit variances in cases in which strict adherence to the zoning regulations would cause economic hardship or prevent reasonable use of a parcel of land. Variances are generally granted through administrative proceedings. In addition, most ordinances permit nonconforming uses that existed at the time the ordinance was adopted to continue until the property is sold, the use of the property changes, improvements on the property are altered, or an amortization period has expired.

Many zoning ordinances provide for a category of "special uses" for which a permit is required. Zoning ordinances have employed more innovative concepts such as adult use zones (which is merely a new category in an old system of categorization of uses), overlay zones, holding zones, buffer zones, zoning inducements (such as permitting greater floor area if certain desirable design elements are incorporated into the building, such as porches, plazas, or arcades), and zero height or open land zoning (such as the system created by Chicago's Lakefront Protection Ordinance).

Of course, like any ordinance, the zoning ordinance is created by action of the corporate authorities of local government and may be amended by the corporate authorities. In fact, most zoning ordinances anticipate change and provide for a procedure for amendments.

B. [1.4] Subdivision Controls

Subdivision controls are usually applied before development and are enforced through an approval procedure required prior to recording a plat of subdivision. Most commonly, size and layout of streets, curbs, and sidewalks and dedication and improvement of land for other public uses are dictated. Although most subdivision ordinances provide guidelines for such matters, the developer often is in a position of negotiating with local government officials or staff with respect to the application of those guidelines.

C. [1.5] Building Codes

Building codes, although not strictly a means of land use regulation, can have a profound effect on the way in which land in a jurisdiction is used by affecting the economics of a development. It is said that Chicago's suburbs received a great impetus for growth after the Chicago fire when the city adopted laws restricting the use of wood construction in new buildings. As a result, lower-cost construction was forced outside the city limits. Today, many large municipalities have detailed building codes that precisely define the materials to be employed in construction. Although many of these are seen by some as unnecessary, political forces have been at work to protect construction techniques that require the use of skilled building trades.

Outside the large municipalities, most local governments in Illinois have adopted building codes based on one of the predominant model codes. Among these codes are the Building Officials Conference of America (BOCA) National Building Code (BOCA Code), the International Conference of Building Officials (ICBO), the Uniform Building Code, and the Suburban Building Officials Conference (SBOC) Building Code or one of the model codes developed by the International Code Council (ICC), an organization founded by BOCA, the ICBO, and the Southern Building Code Congress International, Inc. (SBCCI).

After July 1, 2011, newly built commercial buildings in all jurisdictions in Illinois will be required to comply with a building code. 20 ILCS 3105/10.09-1. The Capital Development Board Act, 20 ILCS 3105/1, *et seq.,* provides that certain specified standard building codes will apply in any jurisdiction in that state that does not otherwise have a building code. *Id.*

III. [1.6] STATUTORY FRAMEWORK

In general, local governments adopt plans, aspirational in nature, that are implemented through specific regulations, including zoning and subdivision ordinances. Sections 1.7 – 1.19 below outline the statutory authority from which local governments derive these powers.

A. [1.7] Home-Rule Powers

Article VII, §6, of the Illinois Constitution grants home-rule authority to counties having an executive form of government (currently, only Cook County), to all municipalities having a population of over 25,000, and to municipalities having a smaller population whose voters approve home-rule authority by referendum. The voters in a home-rule unit of government may also chose, by referendum, not to be a home-rule unit.

According to the Illinois Municipal League, as of December 1, 2008, there were 198 Illinois communities with home-rule authority (up from 180 on March 23, 2006). Recently, there has been a trend for more municipalities to approve home-rule authority. For many years, most efforts failed at the ballot box. Voters appeared reluctant to grant their municipal authorities additional authority that would result in higher taxes. However, recently adopted tax caps and state-imposed restrictions on non-home-rule municipalities may have resulted in more proposals being approved at referenda. Municipalities are seeking new sources of revenue, such as transfer taxes and so-called “sin” taxes, new authority to encourage and direct development, and, perhaps, exemption from some of the requirements of certain state statutes, such as the Affordable Housing Planning and Appeal Act, 310 ILCS 67/1, *et seq.*

Although local governments that have home-rule powers may create plan commissions, planning departments, and other bodies and adopt plans in the manner described in the statutes discussed in §1.9 below, they are not limited by such statutes. Such governments have the freedom to adopt any structure they desire, subject to preempting statutes. One may wish to consult the applicable enabling act to check for such preemption. In some cases, the legislature has buried preemption language in a specific statutory provision, applicable only to a portion of the section.

B. Planning Authority

1. [1.8] County and Regional Planning Powers

The regional planning enabling statutes, 55 ILCS 5/5-14001, *et seq.,* permit but do not require the county board of any county to create a regional planning commission with respect to all or any portion of such county. Section 5-14001 provides:

> **Said Commission shall be a fact finding body and shall make such investigations and gather such statistics as it shall deem necessary for the planning and development of said region, and shall make a plan of said region to include all matter which it may deem necessary for the development of the region.** 55 ILCS 5/5-14001.

The regional planning enabling statutes also permit several counties to designate one regional planning commission for a region that crosses county lines. 55 ILCS 5/5-14003. Section 5-14005 requires regional planning commissions to

> **encourage the cooperation of the political subdivisions within their respective territories in any matters whatsoever which may concern the county or regional plan or maps prepared by such commission as an aid toward coordination of municipal plans with county and regional plans.** 55 ILCS 5/5-14005.

Both counties and municipalities (*i.e.,* cities, villages, and incorporated towns) are authorized by §3B of the Local Land Resource Management Planning Act, 50 ILCS 805/1, *et seq.,* to adopt plans that

> **shall include but not be limited to sewer and water systems, energy distribution systems, recreational facilities, public safety facilities and their relationship to natural resources, air, water and land quality management or conservation programs.** 50 ILCS 805/3.B.

The Local Land Resource Management Planning Act authorizes intergovernmental agreements to develop or coordinate such plans with those plans of other local governments. 50 ILCS 805/6. This Act also permits the state's Department of Commerce and Economic Opportunity to make annual grants to counties and municipalities "to develop, update, administer and implement" such plans. 50 ILCS 805/8(a). However, to qualify for such grants, the local government must also adopt (a) implementing ordinances and zoning subdivision ordinances, (b) a three-year capital improvement and maintenance program, (c) a statement of goals, and (d) a system and timetable to review and update the plan at least every ten years. 50 ILCS 805/5.

The Southwestern Illinois Metropolitan and Regional Planning Act, 70 ILCS 1710/1, *et seq.,* creates the Southwestern Illinois Metropolitan and Regional Planning Commission to act with respect to Washington, Bond, Madison, St. Clair, Randolph, Clinton, and Monroe Counties. The Commission is charged with adopting and amending comprehensive and functional plans for the development of the area.

The Illinois legislature also created the Northeastern Illinois Planning Commission (NIPC) to act with respect to Cook, Lake, Will, DuPage, Kane, and McHenry Counties, and NIPC served as the regional planning agency in northeastern Illinois from 1957 until 2007. However, the functions and staffs of NIPC and the Chicago Area Transportation Study were integrated into the Chicago Metropolitan Agency for Planning (CMAP), pursuant to the Regional Planning Act, 70 ILCS 1707/1, *et seq.* Among other things, CMAP, the official regional planning organization for the counties of Cook, DuPage, Kane, Kendall, Lake, McHenry, and Will, is charged with developing a regional comprehensive plan that integrates land use and transportation at intervals of no less than every five years. In addition, CMAP is designated as the "metropolitan planning organization" for the purpose of federal transportation funding.

2. [1.9] Municipal Planning Powers

In addition to the authority in the Local Land Resource Management Planning Act, 50 ILCS 805/1, *et seq.,* described in §1.8 above, non-home-rule municipalities receive their authority to prepare and adopt comprehensive plans from §§11-12-4 through 11-12-13 of the Illinois Municipal Code, 65 ILCS 5/11-12-4 through 5/11-12-13. This division of the Municipal Code authorizes but does not require every municipality to "create a plan commission or a planning department or both." 65 ILCS 5/11-12-4. Such department or commission has the power "[t]o prepare and recommend to the corporate authorities a comprehensive plan" and to engage in other, related activities. 65 ILCS 5/11-12-5(1). "Such plan shall be advisory and in and of itself shall not be construed to regulate or control the use of private property in any way, except as to such part thereof as has been implemented by ordinances duly enacted by the corporate authorities." 65 ILCS 5/11-12-6.

3. [1.10] Reasons for Adopting a Plan

A local government is not required to adopt an official plan. An official plan is advisory only, and developers are not bound to follow the official plan unless it has been implemented by the adoption of other ordinances and regulations such as zoning ordinances, subdivision ordinances, or regulations dealing with access to utilities and services such as water and sewer.

In fact, once adopted, a comprehensive plan is generally advisory in nature. The advisory nature of the comprehensive plan was the basis of the Illinois Supreme Court's decision in *City of Chicago Heights v. Living Word Outreach Full Gospel Church & Ministries, Inc.,* 196 Ill.2d 1, 749 N.E.2d 916, 255 Ill.Dec. 434 (2001). The court invalidated the city's denial of a special use permit when the basis for the denial was inconsistency with the comprehensive plan. The special use provisions of the zoning ordinance did not require that the use be consistent with the comprehensive plan, and the city had not amended its zoning ordinance to incorporate the concepts within a new comprehensive plan.

However, apart from providing a map for a local government's aspirations for future land uses, there are pragmatic reasons for the local government to adopt a comprehensive plan. The local governmental body may need an official plan to obtain certain types of funding. For example, the Local Land Resource Management Planning Act, 50 ILCS 805/1, *et seq.,* requires

that a plan be in place (although not necessarily a comprehensive plan for the entire municipality). In addition, a comprehensive plan may be used to support the rationale for implementing regulations.

Conversely, if there is no plan, or if the official plan is inconsistent with local laws regulating development, such facts may be used to attack those laws. For example, *City National Bank of Kankakee v. County of Kendall,* 140 Ill.App.3d 933, 489 N.E.2d 486, 95 Ill.Dec. 265 (2d Dist. 1986), relied on the comprehensive plan of the county as support for the reasonableness, and thus validity, of an agricultural zoning category. *See also 1350 Lake Shore Associates v. Casalino,* 352 Ill.App.3d 1027, 816 N.E.2d 675, 287 Ill.Dec. 708 (1st Dist. 2004), *rev'd on other grounds sub nom. 1350 Lake Shore Associates v. Healey,* 223 Ill.2d 607 (2006). On the other hand, courts have found that a zoning classification that has no relationship to a comprehensive plan is suspect and may be invalidated as arbitrary and unreasonable without relationship to public health, safety, and welfare. *See, e.g., Family Christian Fellowship v. County of Winnebago,* 151 Ill.App.3d 616, 503 N.E.2d 367, 104 Ill.Dec. 810 (2d Dist. 1986), which found that denial of a special use permit was arbitrary and unreasonable when, among other things, the proposed use was consistent with the county's comprehensive plan.

An official comprehensive plan may also be necessary for a municipality to defend its boundaries from erosion through disconnection. Division 3 of Article 7 of the Municipal Code, 65 ILCS 5/7-3-1, *et seq.,* provides procedures by which property owners may disconnect territory from a municipality. In order to accomplish this, the petitioner must prove, among other things, that, after disconnection, "the growth prospects and plan and zoning ordinances, if any, of such municipality will not be unreasonably disrupted." 65 ILCS 5/7-3-6(4). 65 ILCS 5/7-3-6.2, dealing with split lots, includes similar language relating to the effect of disconnection on the plan.

C. [1.11] Governmental Bodies and Public Officials

The following §§1.12 – 1.18 below provide a summary of those public bodies and officials that may provide input into or review the development process and that Illinois law provides or expressly permits for local governments.

1. [1.12] Plan Commissions and Planning Developments

As noted in §§1.8 and 1.9 above, plan commissions are authorized for both counties (55 ILCS 5/5-14001, *et seq.*) and municipalities (65 ILCS 5/11-12-4 through 5/11-12-13). These commissions may prepare plans on which other bodies base regulatory decisions. In addition, a plan commission may be asked to review a proposed use to determine whether it is consistent with the comprehensive plan or to determine whether the plan should be amended to accommodate such use. Many municipalities employ a planning department that performs many of the tasks of the plan commission. Such departments are also authorized under 65 ILCS 5/11-12-4.

2. [1.13] Zoning Commissions

Zoning commissions are temporary bodies created when a local government initiates the zoning process. Section 11-13-2 of the Illinois Municipal Code requires the creation of a zoning commission if a municipality desires to adopt a zoning ordinance. 65 ILCS 5/11-13-2.

"The corporate authorities in each municipality which desires to exercise the powers conferred by this Division 13, or who have exercised such power and desire to adopt a new ordinance, shall provide for a zoning commission with the duty to recommend the boundaries of districts and appropriate regulations to be enforced therein." *Id.* The commission shall be appointed by the mayor or president, subject to confirmation by the corporate authorities. *Id.*

The zoning commission shall "cease to exist upon the adoption of a zoning ordinance for the entire municipality." *Id.*

In *Passalino v. City of Zion,* No. 107429, 2010 WL 1713997 (Ill. Dec. 17, 2009), *rehearing denied* (Apr. 22, 2010), the Illinois Supreme Court, in a split decision, held that the notice by publication prescribed by this statute was constitutionally insufficient when a zoning amendment resulted in down-zoning 85 parcels in the city. The majority held that due process requires that more should have been done by the city to notify the beneficiaries of the land trusts that owned the properties affected. The dissent expressed discomfort at the uncertainty at what notice is required when and predicted that more attacks on notice by publication will come.

A county that adopts a zoning ordinance is also required to appoint a zoning commission with similar duties. The county zoning commission also ceases to exist upon adoption of the zoning ordinance. 55 ILCS 5/5-12007.

3. [1.14] Zoning Administrator

Once adopted, the zoning ordinance is to be enforced by the officer designated in the ordinance. The officer, usually an employee whose title may vary among local governments, is often referred to as the "zoning administrator." The provision for enforcement by such officer is found in 65 ILCS 5/11-13-3(a) for municipalities ("All ordinances passed under the terms of this Division 13 shall be enforced by those officers of the municipality that are designated by ordinance.") and 55 ILCS 5/5-12008 for counties ("All ordinances or resolutions passed under the terms of this Division shall be enforced by such officer of the county as may be designated by ordinance or resolution.").

The zoning administrator is often responsible for interpreting the zoning ordinance and applying it to proposals for new construction. The Counties Code also permits the zoning administrator to grant certain limited variations to the zoning and bulk regulations without necessity for a hearing. See 55 ILCS 5/5-12009.

4. [1.15] Zoning Board of Appeals

Statutes authorizing both municipal zoning (65 ILCS 5/11-13-3) and county zoning (55 ILCS 5/5-12010) provide for the creation of a board of appeals. In each case, the board of appeals has

responsibilities with respect to granting variations and special use permits, holding hearings on proposed amendments to zoning ordinances, and hearing appeals from decisions of the zoning administrator. Even if not required, the board of appeals (or a similarly functioning position) is necessary to avoid constitutional objections to the zoning ordinance by owners of specially affected properties. The zoning board of appeals is often empowered to grant variations from strict compliance with the zoning "where there are practical difficulties or particular hardship in the way of carrying out the strict letter of any of [such] regulations." 55 ILCS 5/5-12009 (Counties Code provisions). See also 65 ILCS 5/11-13-5, 5/11-12-4 (Municipal Code provisions). Note, however, that despite the wording of these sections, if the variation decision is made by the governing authority (*e.g.*, village board), it is a legislative decision, which "will not be struck down unless it is found to be arbitrary, unreasonable, and bearing no substantial relation to public health, safety, morals, comfort, or general welfare." *Dunlap v. Village of Schaumburg,* 394 Ill.App.3d 629, 915 N.E.2d 890, 903, 333 Ill.Dec. 819 (1st Dist. 2009).

5. [1.16] Hearing Officers

Illinois law permits counties or municipalities to establish by ordinance and appoint hearing officers either in addition to or as an alternative to the zoning board of appeals discussed in §1.15 above. 55 ILCS 5/5-12015; 65 ILCS 5/11-13-14.1. The local government may delegate to a hearing officer authority (a) to conduct public hearings in connection with applications for special uses, variations, amendments, or other changes to the zoning ordinance; and (b) to hear appeals from orders and decisions of the zoning administrator. In general, the same notices and formalities that are required of the board of appeals are also required of the hearing officer.

6. [1.17] Corporate Authorities and the Executive

Of course, the applicable corporate authorities (*e.g.,* county board, city council, village board of trustees) and the executive (*e.g.,* mayor, village president) have the ultimate power over the ordinances that regulate development. The approval of the corporate authorities and the executive is often a requirement in the development process, particularly in the amendment and annexation contexts. Such authorities, as elected bodies, are also the most responsive to public desires. Therefore, a developer whose project will be popular among the electorate (perhaps due to increased tax base or provision of needed services) may seek an amendment from the corporate authorities that will permit the development. In addition, many councils and boards have specialized committees that review land use matters, and often the views of these committees are de facto determinative.

The Illinois Supreme Court held that corporate authorities, when acting in their legislative (as opposed to administrative) capacity, may change land use regulations by ordinance without following procedures adopted in prior resolutions and ordinances. *Landmarks Preservation Council of Illinois v. City of Chicago,* 125 Ill.2d 164, 531 N.E.2d 9, 125 Ill.Dec. 830 (1988). Following a decision by the Illinois Supreme Court that certain types of proceedings were quasi-judicial in nature and required due process in their conduct (*People ex rel. Klaeren v. Village of Lisle,* 202 Ill.2d 164, 781 N.E.2d 223, 269 Ill.Dec. 426 (2002)), the legislature clarified that court appeals of any zoning decision (including variations, special use applications, and rezoning) are de novo review as a legislative decision. 65 ILCS 5/11-13-25 (municipalities); 55 ILCS 5/5-12012.1 (counties).

7. [1.18] Miscellaneous Commissions

Many municipalities and some counties have other commissions with which a developer needs to be concerned. Often, they are created pursuant to home-rule powers of local government. These special commissions may include landmark (or preservation) commissions, architectural review commissions, building commissions, beautification commissions, landscape review commissions, and site plan review committees. In areas that have been fully developed, demolition of existing structures has become a hot topic. Some municipalities have created special bodies to review applications for permits to demolish existing structures.

The site plan review committee is a means by which some municipalities can channel review of major projects through various departments simultaneously. These may include building, fire, police, traffic engineering, and water and sewer departments.

D. [1.19] Constitutional Limitations

The topic of constitutional constraints and takings is dealt with in more detail in Chapters 13 and 14 of this handbook. However, it is important to note here that from a state Constitution basis, local governments have only those powers granted to them by the state, either through the state Constitution (such as Article VII, §6, which provides home-rule powers) or through statute. Thus, a regulation enacted by a unit of local government that the state has not authorized will be found to be void. *Marquette Properties, Inc. v. City of Wood Dale*, 159 Ill.App.3d 307, 512 N.E.2d 371, 111 Ill.Dec. 255 (2d Dist. 1987).

IV. [1.20] INCORPORATED VS. UNINCORPORATED

Local governments generally are in favor of development. The proper development in an appropriate location can increase the tax base that funds the local government and can increase employment while satisfying needs of the citizens and providing other benefits to the community. However, local governments often find it in their best interests to plan for development by determining the proper uses for the land within or adjacent to their jurisdictions or that may be added to their jurisdictions at a later time. Governments implement such plans through the use of controls discussed in this and subsequent chapters. The most important of the controls is zoning and subdivision regulation. The manner in which such plans are implemented and the types of regulation will impact on developers' activities.

A developer has two primary considerations regardless of the nature of the development: (a) the cost of development; and (b) the marketability (for finance, sale, or rental) of the developed real estate. The extent of the developer's success will directly depend on the ability to keep the cost at a minimum and the marketability at a maximum. An important factor affecting the goals of a developer is the regulatory body under whose jurisdiction the development will occur. The cost of the development is directly impacted by the nature and extent of the governmental body's land use regulations (*e.g.,* lot size regulations, subdivision improvement requirements, and construction standards) and the reasonableness of that body's staff. The location of the land

within the jurisdiction of a particular political subdivision and the services that political subdivision has available to serve the subject property directly and significantly influence the marketability of the completed development.

From a developer's standpoint, the ideal location for the acreage acquired for development may well be in that part of the unincorporated area of the county where the property is contiguous to one or more municipalities but not surrounded by municipalities. In this position, the developer has a choice of either allowing the land to remain in the unincorporated area of the county or annexing it to one of a number of municipalities, whichever may offer the greatest advantage. Because obtaining governmental approval of a proposed development often becomes a matter of negotiation, the developer has important leverage with which to negotiate when it can choose which governmental unit will have jurisdiction over the development.

Ironically, too, a developer will find that if the land is in the unincorporated area of the county and the proposition is to annex it to an Illinois city or village, Illinois law permits the developer and the municipality to enter into a binding agreement covering a wide variety of important subjects. 65 ILCS 5/11-15.1-1, *et seq.* Such an agreement would be prohibited if the property were already within the corporate limits of the municipality.

A. County vs. Municipal Land Use Regulatory Powers

1. [1.21] Zoning

Like Illinois municipalities, counties must be expressly granted the authority to zone. Non-home-rule counties are authorized by 55 ILCS 5/5-12007 to regulate zoning "outside the limits of cities, villages and incorporated towns which have in effect municipal zoning ordinances." If a municipality has no zoning ordinance of its own, the county zoning ordinance will apply within the limits of that municipality.

The powers of counties to zone are substantially the same as the powers of cities and villages, and the enabling legislation for the two types of governments have become more similar over the past 20 years. However, a line-by-line comparison of the zoning statutes discloses some differences in language and in the specified powers. Municipalities, for example, are empowered to classify the use of property on the basis of family relationship, while counties are not. 65 ILCS 5/11-13-1(9). However, even in the absence of such language, the courts have upheld single-family residential districts established by counties. *Kellett v. County of DuPage,* 89 Ill.App.2d 437, 231 N.E.2d 706 (2d Dist. 1967).

Counties are expressly prohibited from exercising their zoning powers to impose certain restrictions that the legislature apparently thinks are inappropriate or not necessary in rural areas. For example, county zoning regulations may not (a) impose regulations, other than requiring conformance with building or setback lines, on land, buildings, or structures used or to be used for agricultural purposes (including growing, animal and poultry husbandry, apiculture, aquaculture, dairying, floriculture, horticulture, nurseries, tree farms, sod farms, pasturage, viticulture, and wholesale greenhouses), except for parcels of land consisting of less than 5 acres in populous counties; (b) prohibit the temporary use of land by contractors in the course of

construction activities (except the county may regulate the manner of such use in some circumstances); and (c) regulate the type or location of public utility distribution and telecommunications equipment. 55 ILCS 5/5-12001. However, certain county regulation of the location of certain wireless telecommunication and AM transmitting facilities is expressly permitted under 55 ILCS 5/5-12001.1. Despite counties' exclusive jurisdiction, the Municipal Code requires that before construction of telecommunications facilities within 1.5 miles of a municipality, notice must be given to all owners of property within 250 feet of the parcel in which the telecommunications carrier has a leasehold or ownership interest. 65 ILCS 5/11-13-1.

Both counties (55 ILCS 5/5-12020) and municipalities (65 ILCS 5/11-13-26) are authorized to regulate wind farms with similar, but not identical, enabling language. Municipalities may regulate within a 1.5-mile radius of its territory. However, both types of government are restricted in the size of setback that may be imposed, and the restriction applies to both home-rule and non-home-rule governments.

Most restrictions in the county and municipal zoning statutes do not apply to home-rule units. Cook County is currently the only home-rule county in Illinois. It is generally agreed that home-rule units can establish their own zoning rules, at least within their own boundaries. Home-rule powers can be used to expand on the powers granted by the state enabling statutes.

2. Subdivision

a. [1.22] General Powers

The regulatory powers of non-home-rule counties over subdivisions outside a municipality are found in 55 ILCS 5/5-1041 and 5/5-1042. As in the case of zoning powers, the legislature empowered counties to regulate the subdivision of land in the unincorporated area in a manner substantially similar to municipalities. 65 ILCS 5/11-12-5(1), 5/11-15-1. Although there are differences in the language of the sections granting subdivision powers to counties and municipalities, such as with respect to streetscape design, as a practical matter the powers are very similar.

b. [1.23] Land Dedication

Another distinction between the county and municipal subdivision enabling statutes is found in the authority to make provisions for public grounds for schools, parks, and playgrounds. Both are authorized to make provisions for such facilities, but the county enabling statute goes no further. Section 11-12-8 of the Illinois Municipal Code empowers cities and villages to enforce their comprehensive plan designation of public grounds by prohibiting contrary use of such lands for a period of one year from the date of approval of a plat of subdivision. 65 ILCS 5/11-12-8. Within the one-year period, the school district, park board, or other authority having jurisdiction may purchase or condemn the property. If it does not act within that period, the subdivider may then use it for any proper purpose.

Counties, like municipalities, are not empowered to compel the subdivider to dedicate land or contribute money for public purposes unless the need for such public land arises out of the

subdivision of the land itself. *Pioneer Trust & Savings Bank v. Village of Mount Prospect,* 22 Ill.2d 375, 176 N.E.2d 799 (1961), followed by *Northern Illinois Home Builders Ass'n v. County of DuPage,* 165 Ill.2d 25, 649 N.E.2d 384, 208 Ill.Dec. 328 (1995). However, in *Board of Education of School District No. 68, DuPage County v. Surety Developers, Inc.,* 63 Ill.2d 193, 347 N.E.2d 149 (1975), the Illinois Supreme Court enforced a contract entered into by the developer and the county as an element of issuance of a special use permit on the basis that the evidence supported the allegation that the school needs were "uniquely attributable" to the developer's property and not the community as a whole.

c. [1.24] Plats

State law requires that subdivision plats, required under the Illinois Plat Act, 765 ILCS 205/0.01, *et seq.,* first be approved by the city council or board of trustees (for land located within a city, village, or incorporated town or within contiguous territory affected by an official plan of such municipality) or by the county board (for land in the unincorporated parts of a county and not affected by such official plan). 765 ILCS 205/2. Such approval is not to be given unless the plat satisfies the specified conditions.

Subdivisions are discussed more fully in Chapter 4 of this handbook.

3. [1.25] Building or Setback Lines

55 ILCS 5/5-13001 authorizes counties to establish building or setback lines from streets and highways outside municipal boundaries. This statute was enacted prior to the county zoning statutes, and the latter now duplicate this authorization. This provision permits counties to establish building lines without adopting a zoning ordinance. *Lake County v. Cuneo,* 333 Ill.App. 164, 76 N.E.2d 826 (2d Dist. 1947).

B. Extraterritorial Municipal Powers

1. [1.26] Zoning

Under the authority of §11-13-1 of the Illinois Municipal Code, Illinois municipalities situated in counties that have not adopted zoning ordinances affecting a parcel may exercise their municipal zoning powers on such parcel for a distance of one and one-half miles beyond their corporate boundaries, provided that no part of such extraterritorial area is within another municipality or is properly included within the comprehensive plan that a neighboring city or village has adopted pursuant to its municipal planning power. 65 ILCS 5/11-13-1, *et seq.* Should property within one and one-half miles of a municipality that exercises this extraterritorial zoning authority subsequently be annexed to another municipality, the latter's zoning jurisdiction prevails.

Similarly, if the county in which the property is located subsequently adopts a zoning ordinance, the county regulations are controlling. *City of Canton v. County of Fulton,* 11 Ill.App.3d 171, 296 N.E.2d 97 (3d Dist. 1973). Note that the nature of a home-rule unit's

extraterritorial zoning powers may be limited to the zoning powers afforded non-home-rule communities. *See City of Peoria v. Keehner,* 115 Ill.App.3d 130, 449 N.E.2d 1376, 70 Ill.Dec. 772 (3d Dist. 1983).

2. [1.27] Subdivision and Planning: Municipal-County and Inter-Municipal Conflicts

Municipalities are authorized to exercise their planning and subdivision powers for a distance of one and one-half miles beyond their corporate limits. This authority is exercisable irrespective of whether the county in which the subject site is located has adopted a zoning ordinance or subdivision regulations. 65 ILCS 5/11-12-5.

The obvious area of conflict between county and municipal planning and subdivision regulations has been resolved in favor of the cities and villages. Section 11-12-11 of the Illinois Municipal Code provides that if a municipality has adopted a comprehensive plan covering unincorporated areas, then such unincorporated areas within the one-and-one-half-mile extraterritorial sphere of influence are exempt from "the application of any less restrictive rules or regulations" by the county. 65 ILCS 5/11-12-11. Thus, the subdivider has to meet the highest (*i.e.,* most restrictive) standards and requirements of both governmental units.

Conflicts of the one-and-one-half-mile planning and subdivision jurisdiction for land within the limits of two or more neighboring municipalities are resolved by 65 ILCS 5/11-12-9. This section authorizes municipalities to agree on a jurisdictional boundary while giving consideration "to the natural flow of storm water drainage, and, when practical, shall include all of any single tract having common ownership within the jurisdiction of one corporate authority." *Id.* In the absence of such agreement, the statute provides that "the jurisdiction of any one of the authorities shall extend to a median line equidistant" between the boundaries of the municipalities. *Id.* Such a jurisdictional agreement may have a term of up to 20 years. Such a jurisdictional agreement may also restrict the ability of a municipality to annex a parcel of land within the jurisdiction of the other municipality. Section 11-12-9 provides special notice and public hearing requirements for such jurisdictional agreements. The section includes a special statute of limitations for challenges based on a failure to comply with those requirements. It also addresses the possibility of conflicting jurisdictional agreements entered into by the same municipality.

V. [1.28] ADDITIONAL LAND USE CONCERNS AND AUTHORITIES

Discussed in §§1.29 – 1.39 below are a number of other practical legal problems with which developers are frequently faced in the process of land development.

A. [1.29] Storm Water, Flood Control, and Wastewater Management

Most municipalities and many counties, as well as the Metropolitan Water Reclamation District of Greater Chicago (MWRD), have adopted ordinances requiring storm-water retention and/or detention in connection with the development of property. The MWRD traditionally asserts jurisdiction over storm water in connection with sewer permits and construction within its territory.

From a developer's standpoint, the preferred method of dealing with storm-water retention areas is to dedicate such areas to the city, village, or other appropriate governmental unit. Dedication often allows a developer to reduce its maintenance and real estate tax expenses. A municipality may be willing to accept dedication because the retention areas form a part of the storm-water sewer system, and, if they are to perform the function for which they are required, proper maintenance is necessary. In some cases involving dry retention areas, a park district may be interested in dedication of the property for recreational purposes.

The Illinois Department of Natural Resources (DNR) must approve any plat of subdivision for property adjacent to or including a waterway in which the state has a property interest (generally, navigable waterways) before such plat may be recorded. 615 ILCS 5/7; 55 ILCS 5/3-5029. Section 3-5029 of the Counties Code (relating to duties of the county recorder) also provides that no plat may be recorded for land unless the plat discloses whether the land is "within a special flood hazard area as identified by the Federal Emergency Management Agency" as part of the National Flood Insurance Program. 55 ILCS 5/3-5029. This requirement applies to all subdivisions in Illinois, regardless of location.

The existence of municipal (and/or MWRD) capacity to receive and adequately treat wastewater is one of the primary reasons for locating in a municipality. It cannot be taken for granted that such capacity will be available. Ultimately, the Illinois Environmental Protection Agency (IEPA) and the Illinois Pollution Control Board govern the operation of a community's wastewater treatment plant and the flow of waste to the plant for treatment. Although the IEPA has the authority to revoke a permit, once issued and the connection made, it would be rare for the agency to deny continued access to a private user that was itself not violating applicable regulations.

B. [1.30] Architectural Control

Often, a developer will be directed to appear before an architectural control or similar commission established by a municipality. Such commissions perform a variety of functions, and communities differ widely as to the nature and extent of authority granted to these commissions. While some such commissions may be interested merely in the exterior appearance, others attempt to participate in the planning process with the developer. In some cases, such commissions have exceeded their authority. *See, e.g., Pacesetter Homes, Inc. v. Village of Olympia Fields,* 104 Ill.App.2d 218, 244 N.E.2d 369 (1st Dist. 1968); *R.S.T. Builders, Inc. v. Village of Bolingbrook,* 141 Ill.App.3d 41, 489 N.E.2d 1151, 95 Ill.Dec. 423 (3d Dist. 1986).

Pacesetter Homes, supra, is often cited for the proposition that architectural advisory boards or commissions are, by their nature, illegal. The ordinance establishing the architectural advisory committee was declared unconstitutional as an "unlawful delegation of legislative authority to an administrative body without proper standards." 244 N.E.2d at 371. In fact, in the last paragraph of the court's opinion, the court stated that "it is unnecessary to consider the matters raised in the briefs of the parties with respect to the purpose and validity of architectural control ordinances generally." 244 N.E.2d at 373. The Third District Appellate Court in *R.S.T. Builders, supra,* held that the Bolingbrook ordinance, as in *Pacesetter Homes,* provided insufficient and vague standards for the architectural review process and, thus, was void.

However, the Illinois Supreme Court has recognized aesthetics as playing a role in local land use planning. In *LaSalle National Bank v. City of Evanston,* 57 Ill.2d 415, 312 N.E.2d 625, 634 (1974), citing *Village of Belle Terre v. Boraas,* 416 U.S. 1, 39 L.Ed.2d 797, 94 S.Ct. 1536, 1539, 1541 (1974), the court stated:

> **We are of the opinion that in the present case aesthetic qualities are a properly cognizable feature and that the evidence presented is supportive of defendant's position that the R-5A use is not arbitrary or unreasonable and is in accord with the general public welfare.**

In a 2009 appellate court decision that is likely to be discussed and revisited, a First District panel held that certain aspects of the Chicago preservation ordinance did not satisfy constitutional requirements. Among other things, the appellate court found that use of subjective judgment (rather than objective standards) in determining which structures should be designated landmarks is not permitted. *Hanna v. City of Chicago,* 388 Ill.App.3d 909, 907 N.E.2d 390, 329 Ill.Dec. 799 (1st Dist.), *appeal denied,* 232 Ill.2d 580 (2009). See §1.31 below for a more detailed discussion of this case.

C. [1.31] Historic Preservation

It will be of special interest to developers that archaeological investigations will be required for undertakings involving a state or federal permit, certificate, or license, including Department of Transportation approval of subdivision plats. 20 ILCS 3420/6.

While there is a plethora of state and federal programs involving historic preservation, mostly of an incentive nature, by far the most prevalent regulation of land use involving historic or architecturally significant properties (or "landmarks") is at the municipal level, either pursuant to home-rule authority or enabling legislation in the Municipal Code. 65 ILCS 5/11-13-1, *et seq.,* 5/11-48.2-1, *et seq.*

However, in *Hanna v. City of Chicago,* 388 Ill.App.3d 909, 907 N.E.2d 390, 329 Ill.Dec. 799 (1st Dist.), *appeal denied,* 232 Ill.2d 580 (2009), the Illinois Appellate Court First District has thrown into question, on due process grounds, the lawfulness of the City of Chicago's standards for determining landmark status without owner consent. The Illinois Supreme Court denied leave to appeal the case, which now returns to the trial court for further proceedings. By implication, the case also calls into question the vast majority of Illinois municipal landmark ordinances, which are similar, if not identical, to the Chicago ordinance.

The underlying facts of the opinion in *Hanna, supra,* are that the Chicago City Council named the East Village area as a "Landmark District," and the Commission on Chicago Landmarks (Commission) recommended the Arlington Deming neighborhood as a Landmark District. The plaintiffs owned properties in those districts and did not consent, but had objected, to the designation and the recommendation. The Commission's recommendation of the Arlington Deming neighborhood matured into an official Landmark District designation because the city council did not, within the time period established by the ordinance, act to reject the recommendation. Procedurally, the court reviewed the granting of defendant's motion to dismiss.

The Chicago ordinance required that any two of the following seven standards be satisfied for a district to qualify as landmark:

> **1. Its value as an example of the architectural, cultural, economic, historic, social, or other aspect of the heritage of the City of Chicago, State of Illinois, or the United States;**
>
> **2. Its location as a site of a significant historic event which may or may not have taken place within or involved the use of any existing improvements;**
>
> **3. Its identification with a person or persons who significantly contributed to architectural, cultural, economic, historic, social, or other aspect of the development of the City of Chicago, State of Illinois, or the United States;**
>
> **4. Its exemplification of an architectural type or style distinguished by innovation, rarity, uniqueness, or overall quality of design, detail, materials or craftsmanship;**
>
> **5. Its identification as the work of an architect, designer, engineer, or builder whose individual work is significant in the history or development of the City of Chicago, the State of Illinois, or the United States;**
>
> **6. Its representation of an architectural, cultural, economic, historic, social, or other theme expressed through distinctive areas, districts, places, buildings, structures, works of art, or other objects that may or may not be contiguous;**
>
> **7. Its unique location or distinctive physical appearance or presence representing an established and familiar visual feature of a neighborhood, community, or the City of Chicago.** Chicago Municipal Code §2-120-620.

The court held that " 'value,' 'important,' 'significant,' and 'unique' are vague, ambiguous, and overly broad" and, accordingly, violated the Illinois Constitution, but remanded the case to the trial court for its determination. 907 N.E.2d at 396. The appellate court declined to rule on the plaintiffs' due process claims until the trial court has ruled.

The appellate court also held that the process allowing a district to be designated a landmark based on Commission recommendation and city council inaction was a delegation of authority, and an unconstitutional one given that the ordinance's standards "are unconstitutionally vague and therefore do not adequately provide intelligible standards by which to guide the Commission." 907 N.E.2d at 399.

Although *Hanna* deals directly only with landmark districts and not landmark buildings, the logic of the opinion is equally applicable.

Combined with the terms the court believed to be vague, the breadth of the categories to which they apply, *e.g.*, "architectural, cultural, economic, historic, social or other" (907 N.E.2d at 396), leads to a situation in which it would seem that virtually any building or district can be found to be a landmark.

D. [1.32] Federal Land Use Controls

Various federal agencies have authority over certain types of land uses, including those discussed in §§1.33 – 1.36 below.

1. [1.33] Wetlands Regulation and Navigable Waters

The United States Army Corps of Engineers (Corps) has jurisdiction over the dredging and filling of "navigable waters," and the United States Environmental Protection Agency (USEPA) generally has the veto powers under §404 of the Clean Water Act, 33 U.S.C. §1344. These powers, and the definition of "navigable waters," have been the subject of significant litigation and regulatory change, which are discussed in Chapter 5 of this handbook.

A developer should investigate the need for a Corps permit if land is saturated with groundwater at any time during the year or if the vegetation is similar to that found in wetlands (*e.g.,* cattails) and adjacent to a waterway. It may be helpful to examine maps prepared by the U.S. Fish and Wildlife Service as part of its wetlands inventory. Data available from the USEPA's regional offices can also supply some information.

Counties may legislate differing wetlands standards than are enforced from time to time by the Corps. Notably, DuPage County has adopted broader requirements.

2. [1.34] Telecommunications Facilities

Congress has determined that that some restrictions should be placed on local authority when dealing with telecommunications facilities.

Section 704 of the Telecommunications Act of 1996 places both substantive and procedural restrictions on certain local land use regulations affecting wireless telecommunications facilities (generally, towers and related equipment). 47 U.S.C. §332. The Telecommunications Act imposes three substantive restrictions on local government:

a. Regulation cannot unreasonably discriminate among providers of functionally equivalent services.

b. Regulation cannot have the effect of prohibiting provision of wireless services to a community.

c. No regulation is permitted based on environmental effects of radio frequency emissions if they comply with the FCC regulations. 47 U.S.C. §332(c)(7)(B).

The Telecommunications Act also imposes three procedural restrictions on local government:

a. Local governments must act on land use requests within a reasonable amount of time.

b. Any decision to deny a request must be in writing.

c. Any decision to deny a request must be supported by substantial evidence contained in a written record. *Id.*

The land use provisions under the Telecommunications Act have been interpreted by a wide variety of state and local courts, including the Seventh Circuit Court of Appeals in *VoiceStream Minneapolis, Inc. v. St. Croix County,* 342 F.3d 818 (7th Cir. 2003), which upheld the county's denial of a special exception permit for a cellular tower. The denial did not have the effect of prohibiting service and was based on substantial evidence contained in a written record. In another case, the Seventh Circuit reversed denial of a permit to construct an antenna as not based on substantial evidence. *PrimeCo Personal Communications, Limited Partnership v. City of Mequon,* 352 F.3d 1147 (7th Cir. 2003). In *Helcher v. Dearborn County,* 595 F.3d 710, 719 (7th Cir. 2010), the Seventh Circuit considered an issue in which there is a split among the circuits and determined that the "in writing" requirement of the Telecommunications Act is satisfied if a "written decision contains a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons." In *Helcher,* the court concluded that the minutes of the zoning board were sufficient to satisfy the "in writing" requirement.

3. [1.35] Land Use near Airports

The Federal Aviation Administration regulates the height of buildings affecting flight patterns of the airports it oversees. 14 C.F.R. pt. 77. Some local aviation authorities may also become involved, often by acquiring easements for airplane navigation.

4. [1.36] Religious Land Use; Voting Rights Act

The Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §2000cc, *et seq.,* prohibits any government from imposing or implementing a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person unless there is a compelling governmental interest and the least restrictive means is used. The Seventh Circuit Court of Appeals in *Vision Church, United Methodist v. Village of Long Grove,* 468 F.3d 975 (7th Cir. 2006), discussed this statute along with Illinois law relating to vested rights, annexation, and special use permits.

Even the United States Attorney General must pre-clear annexations of residential property by communities identified in the Voting Rights Act of 1965, 42 U.S.C. §1973b. *See City of Pleasant Grove v. United States,* 479 U.S. 462, 93 L.Ed.2d 866, 107 S.Ct. 794 (1987).

E. [1.37] Jurisdiction of Miscellaneous Governmental Bodies

Numerous governmental districts and agencies regulate the use and development of land. The role of municipalities is extensively discussed throughout this handbook, and Chapter 5 discusses the role of the federal and state agencies dealing with environmental controls. As this is being written, it is probably true that somewhere a previously uninvolved governmental body is being given or is asserting jurisdiction over the development process.

One assertion is the Illinois Capital Development Board's promulgation and enforcement of accessibility standards pursuant to the Illinois Environmental Barriers Act, 410 ILCS 25/1, *et seq.* See 71 Ill.Admin. Code pt. 400. These standards apply to "public facilities" (defined to include many commercial, privately owned structures) and apartment and condominium buildings ("multi-story housing unit") having more than ten housing units and over four stories. 410 ILCS 25/3. Other residential uses financed by or through public programs may also be affected.

Wells and other water supply matters are regulated by the Illinois Department of Public Health through the Illinois Water Well Construction Code, 415 ILCS 30/1, *et seq.,* overlapping the jurisdiction of the state or federal EPAs and local governments and health agencies.

The Illinois Department of Mines and Minerals, through the Surface-Mined Land Conservation and Reclamation Act, 225 ILCS 715/1, *et seq.,* regulates numerous types of excavations, some of which are occasionally associated with typical real estate developments.

The Illinois Department of Transportation (IDOT) regulates access to state highways and signalization, both of which are key issues to many developments. 605 ILCS 5/8-102. Local governments, such as municipal, township, and county authorities, regulate such matters for roadways within their jurisdictions. Condemnation rights of highway authorities further exert a strong influence on the pattern of land use. Note particularly the chilling effect IDOT can have pursuant to 605 ILCS 5/4-510, which allows IDOT to record a map of planned highways without actually taking property.

Soil conservation districts exert some influence on local planning decisions. 70 ILCS 405/22.02a. Such a district must be provided a copy of any petition or proposal for a variation, amendment, or other relief from the local zoning regulations involving land located within the district. The district then has 30 days within which to issue its written opinion to the local zoning agency.

The Affordable Housing Planning and Appeal Act, 310 ILCS 67/1, *et seq.,* requires local governments to adopt affordable housing plans aimed at reaching a goal of ten percent "affordable" housing within their jurisdictions. 310 ILCS 67/25. The Affordable Housing Planning and Appeal Act establishes a State Housing Appeals Board to hear appeals by developers who are denied in their efforts to build affordable housing. 310 ILCS 67/30. As of January 1, 2009, the Board has the power to alter local government decisions, and ultimately to order a local government to permit an affordable housing development. *Id.* The Affordable Housing Planning and Appeal Act permits intergovernmental agreements relating to the subject of the Act and encourages a regional approach to affordable housing issues.

F. [1.38] Private Controls: Restrictive Covenants and Property Owner Associations

Land use controls are not only government made. A developer will often want to control the use of a development prior to leaving the project but after selling off the first parcel, unit, or building. The developers or the purchasers may also desire to have land use regulated after selling the last parcel. The Condominium Property Act, 765 ILCS 605/1, *et seq.,* extensively governs the use of condominium covenants and associations. Outside the condominium context, there is little statutory control over property owner associations and restrictive covenants. For various reasons, a municipality may require such covenants or an association and have standards to be met in connection therewith. At this writing, S.B. 1933 is pending, which, if passed into law, would create a separate statute ("Homeowners' Association Bill of Rights Act") governing non-condominium community associations. In addition, S.B. 3747, 96th Gen.Assem. (2010), which would create the Transfer Fee Covenant Act, has been introduced to prohibit covenants requiring certain transfer fees.

Common questions that arise and should be anticipated in the recorded private land use control instrument include the following:

1. What is the effect of developer (or design committee) approval of plans?

2. Can variances be granted?

3. Will purchasers want previously undeveloped land to be regulated?

4. Under what conditions can the covenants be amended?

5. What is the effect of an owner's failure to pay assessments?

6. What title issues are created by the covenants?

7. How easily can a future owner resolve title issues?

G. [1.39] Eminent Domain

Of course, one of the most direct ways government can control the use of land is to buy it. However, the ability of Illinois local government to purchase land through condemnation proceedings has recently been limited by the Illinois legislature. Like many states, Illinois has reacted to the United States Supreme Court's decision in *Kelo v. City of New London, Connecticut,* 545 U.S. 469, 162 L.Ed.2d 439, 125 S.Ct. 2655 (2005). The new Eminent Domain Act, 735 ILCS 30/1-1-1, *et seq.,* which became effective for actions begun on or after January 1, 2007, provides, among other things, that "a condemning authority may not take or damage property by the exercise of the power of eminent domain unless it is for a public use." 735 ILCS 30/5-5-5(a). In particular, the Eminent Domain Act provides hurdles that need to be overcome before a condemning authority can use its power of eminent domain to acquire property for transfer to a private developer.