

## SUPREME COURT MANDATES RIGHT TO CROSS-EXAMINE WITNESSES AT SPECIAL USE HEARINGS

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The recent Illinois Supreme Court decision in *People Ex Rel Robert J. Klaeren II, et al vs. Village of Lisle et al*, 202 Ill. 2d. 164 (2002) impacts the manner in which municipalities are permitted to conduct public hearings on special use requests and holds that interested parties must be afforded the right to cross examine witnesses in a hearing before a municipal zoning board considering whether or not to recommend the granting of a special use.

A "special use" is a use that a zoning ordinance permits subject to the use meeting all standards and conditions imposed by the zoning ordinance. The purpose of the special use is to provide for those uses that are appropriate for a particular zoning district, but may require special regulations because of unusual impacts associated with such uses as shopping centers, churches, hospitals, junk yards, etc.

### CROSS-EXAMINATION OF WITNESSES

Section 11-13-1.1 of the Illinois Municipal Code provides that municipalities with populations of less than 500,000 may grant special use permits only after a public hearing, preceded by appropriate notice, held before some commissioner or committee designated by the municipality. Heretofore this has been interpreted to require only notice to interested parties and an opportunity to be heard. That is, interested parties were permitted to address the board and give testimony as to why the special use request should be granted or denied. Interested parties were not, customarily, allowed to cross examine other speakers - only the board was permitted to ask questions. In *Lisle*, the Court changed this procedure and held that persons interested in a public hearing on a special use request must be afforded due process rights normally granted to individuals whose property rights are at stake, including the right to confront and cross-examine witnesses.

The Court, apparently in recognition of the administrative burden caused by permitting cross-examination, opined that a municipality may adopt reasonable rules to ease the burden. However, such rules cannot be so restrictive as to effectively prohibit cross-examination. By way of example, the Court suggested that a municipality could (i) within reasonable limits, require those wishing to exercise the right of cross-examination to register in advance of the public hearing, or (ii) require those wishing to cross-examine to allege some special interest beyond that of the general public. To facilitate identifying those individuals with a special interest the court also suggested that the municipality could adopt a rule creating a presumption of the right to cross examination in favor of an identified class - such as all landowners within 250 feet of the property for which the special use is sought.

In light of this decision, it would be prudent for each municipality to review its zoning ordinances and establish a procedure for cross-examination of witnesses. In establishing such a procedure, the municipal authority should consider such matters as whether the rules of evidence typically used in court proceedings are to be employed and who will make determinations as to relevance of testimony or questioning, and who will rule if other objections are raised.

## ISSUES LEFT UNRESOLVED

On its face, it would appear that the only ramification of Lisle is to require cross-examination of witnesses at special use hearings. However, in reaching its decision, the Lisle court characterized special use hearings as administrative rather than legislative and the ramifications are, more far reaching. While not all of the ramifications can be identified the decision clearly impacts the manner in which the municipal authority conducts its deliberations on the special use and the standard to be utilized by a court in reviewing decisions of municipalities granting or denying special use requests.

Issues left unresolved by the Lisle court include whether it is proper, or even permitted, for interested parties to have discussions with elected officials on the subject of the special use outside of any hearing; whether the city council can or should permit further testimony at council meetings (as opposed to relying upon the record established at the zoning board); and whether the municipal authority no longer has discretion to authorize special uses and instead must now grant a special use request if the proponent satisfies all of the criteria established by the municipal zoning code.

Future litigation will address these and other issues resulting from the change in the law now that special use hearings are considered as administrative hearings. In the interim, and until resolved by the courts, the adoption of a conservative approach by municipal authorities should be considered, especially with respect to permitting discussions outside of the purview of the hearing and permitting testimony other than before the zoning board.

It is common for parties seeking a special use to lobby the elected officials in addition to meeting the technical requirements of section 11-13-1.1 of the Municipal Code by presenting its case at a public hearing before a zoning board. Such lobbying was considered appropriate since a long line of Supreme Court cases construed that the elected officials acted in a legislative capacity and, therefore, were not constrained to receiving information only at a public hearing. However, under Lisle, information presented under circumstances where there is no ability for meaningful cross-examination is prohibited. It appears that this rule would prevail regardless of whether the information was presented at a public hearing or in a private conversation with the proponent or opponent. To permit private lobbying, therefore, would preclude cross examination, and, until further guidance is provided by the courts, should be discouraged.

Additionally, it has become customary for proponents and opponents to address the City Council when it considers the recommendation of the zoning board as to whether or not to grant a special use. Unless the municipal authority is going to permit the swearing in and cross-examination of witnesses at council meetings, it would be prudent for the elected officials to rely only upon the record of the hearing before the zoning board. Under Lisle, however, to permit the introduction of new evidence before the council without the prospect of cross-examination exposes the decision to attack by the non-prevailing party. In effect, then, the council must make its decision on whether to grant or deny a special use request based solely upon the record created by the zoning board.

Lisle also brings into question whether a municipal authority has discretion in granting a special use request. Traditionally, special use permits were considered permissive: that is, if the conditions established by the zoning code were met, the council could, in the exercise of its legislative authority, grant or deny the special use request. Administrative bodies, however, are not generally afforded the same discretionary authority as legislative bodies. Traditionally, if the administrative body conducting the hearing determines that the prescribed conditions are met, the permission sought must be granted. Accordingly, and with the special use process being classified as administrative, rather than legislative, there is an unresolved issue as to whether the city council must now grant a special use if all conditions are met - regardless of the opinions of the elected officials as to appropriateness.

## LISLE CHANGED THE STANDARD OF REVIEW.

Lisle also changed the standard of review of municipal decisions granting or denying special use requests. With the process being classified as an administrative function, it is subject to a review by the court under the Administrative Review Act. Prior to Lisle a court reviewing the decision of a municipality to grant or deny a special use request conducted a trial de novo. Under the Administrative Review Act, however, no new or additional evidence in support of or in opposition to any finding, order, determination or decision of the municipality can be heard by the court. The purpose of a judicial review of an administrative decision is to determine whether the administrative body (in this case the city council) acted within the scope of its jurisdiction and, if so, to ascertain whether the administrative body's decision is supported by "the manifest weight of the evidence." For these reasons, it is critically important that a full record be made of the hearing before the zoning board, that the minutes of the city council reflect a determination based upon the record, and that both the zoning board and the council make specific findings of fact as to the conditions determined by the zoning code to be relevant in the consideration of a special use. If the council accepts the recommendation of the zoning board, then the specific findings of the zoning board can simply be adopted by the council. Since, however, an appeal is based upon a review of the record, the council should, when not accepting the recommendations of the zoning board, make specific findings of fact, as to its reasons. Otherwise, there is no record as to the specific findings upon which the request is granted or denied.

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