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I. INTRODUCTION

Neighborhoods change. Development resolutely pushes out beyond urbanized areas to envelop farmlands, earlier subdivisions and unused open space. New uses for land suddenly arise—the motel was once one such use. Now the fast food stand, the video arcade, the halfway house, the undesired sign, the expanding church and the adult bookstore vie for credits as undesired uses. Even the urbanized area is affected. The shopping center expands beyond the four corners. Multiple family housing replaces single family use. The gas station is turned into an all night grocery.

The system we utilize to control and plan these changes is the zoning system. The ability to use this system has rewarded some developers with profits and some communities with good planning, while in other situations landowners have been hurt by inconsistent uses and communities burdened with undesired development. From 1916, when the first zoning ordinances began to spread across the country, until today there has been remarkably little convergence that would provide definition and boundaries for exercise of the zoning power. Consequently, zoning litigation is only slightly less likely today than it was in the early days. Further, zoning decisions may be extensively litigated since the change in value to land can be significant—lawyers’ fees and court costs become affordable in even routine cases.

In addition, both potential litigants and the courts are aware of the following major criticisms often aimed at the zoning system:

— the zoning process has been called an “oriental bazaar” with uncontrolled wheeling and dealing;
— politics and pressure, more than land use planning, seem to ex-

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1. VRANICAR, STREAMLINING LAND USE REGULATION 4-7 (1980), considers the problems to be “wait and see” zoning, zoning used to discourage homebuilding, delays and complicated rules for applications, and the turning of land use into a “lawyers’ game”.

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plain many zoning decisions, and growth cannot readily be con-
trolled nor the environment protected;
—the system is called unreliable, unpredictable and an uncertain
land use protector;\(^2\)
—the system reflects a nonprofessional approach stemming from its
administration by lay boards and commissions;\(^3\)
—corruption and a perception of corruption undermines the public's
confidence in zoning;
—overly protective zoning merely tends to provide a windfall to the
clever developer; and
—illegal actions seem routinely utilized by communities.

Unfortunately, these criticisms are not unfounded. One example
of a well known ploy is for a municipality opposing a land use such as
adult entertainment to pass an unconstitutional ordinance or deny a
permit without any constitutional basis. When a court finally reverses
the municipal action another ordinance is passed—one perhaps defec-
tive for other reasons. In this way the developer is weakened economi-
cally and loses any hope of obtaining appropriate permits. Developers,
too, have their ploys. Confronting underfinanced, developing rural
communities, some developers routinely threaten litigation if they do
not get their way. All too often, these communities cave in
immediately.

As a result of these problems, those opposing zoning have received
considerable impetus to litigate because a number of state and federal
courts have recently become more skeptical of the local zoning process.
Review has become more of a "hard look" than the presumption of
validity test usually utilized. As these courts have become more critical
of overly restrictive regulation or regulation without proper procedural
or application safeguards, a whole new set of constitutional rights
seems to have emerged.

Thus, federal constitutional law has expanded the concept of "taking."
Monopolistic protection of certain land users at the expense of
competition in land use has been limited. Patterns of illegal practices
have made communities liable for damages. Neighbors and developers
have been granted new procedural rights.\(^4\) And new substantive bases
of protecting rights to free speech,\(^5\) and establishing free exercise of
religion\(^6\) and equal protection of the law\(^7\) have further limited local

2. URBAN LAND INSTITUTE, THIRTEEN PERSPECTIVES ON REGULATORY SIMPLIFICATION, I
(1979).
3. Id.
4. Such rights include notice, open hearings, right of cross examination, and disclosure of
conflicts of interest. Some jurisdictions require findings of fact.
This symposium is concerned with these new remedies and rights and how they affect the practice of land use law and the development and administration of ordinances in Illinois and nationally.

A. Symposium Summary

Professor A. Dan Tarlock of Chicago-Kent College of Law describes the "taking issue." Tarlock says that there is "no law of what constitutes a taking. The U.S. Supreme Court has been unable to... develop a set formula... for distinguishing between good and bad regulations." Tarlock describes the harm prevention/arbitration approaches, the utility test and the Illinois balancing test.

Professor Sheldon Nahmod, also of Chicago-Kent and a national expert on new rights created under 42 U.S.C. § 1983, describes the new injunctive relief, the damage liability and other remedies available when constitutional or federal law is violated by a local regulation. The absence of local government and local official immunity will cause some new caution in formerly fearless zoners, he suggests. Where land use is protected by free speech, "taking", substantive due process and other safeguards, quick response to voter anti-development moods may now be tempered by the spectre of liability.

Professor Daniel Mandelker of Washington University, prolific author and recognized land use expert, describes the complexities of the free speech protections and the intricacies of Metromedia, Inc. v. City of San Diego as the protection is applied. Adult entertainment and other action may come within this constitutional ambit. Mandelker suggests a local "free speech audit" of regulations and some change in Illinois and other state practice. According to Mandelker, local "line drawing" might have to be more cautious in the future.

Professor Stuart Deutsch of Chicago-Kent raises the spectre of treble damages when a community acts in a monopolistic manner such as zoning out a new shopping area to protect an existing one. Anti-trust law is likely to be applied seriously to local government zoning according to Deutsch and developer/owners are likely to raise the defense or offense more frequently.

8. Infra at 23.
11. Infra at 51.
12. Infra at 63.
Don Glickman, a Chicago attorney discusses the keys to presenting a case in the new environment of extended liability.\(^\text{13}\) Glickman contrasts present Illinois review criteria, heavily weighted to "diminution of value", with emerging criteria used in other courts. These new criteria are future oriented and dependent on comprehensive plans and planning.

Finally, Marlin Smith, one of the national "deans" of land use law, applies the new law to the Illinois situation.\(^\text{14}\) Examining Illinois' detailed court review of local zoning, and decisions seemingly based on federal constitutional grounds, Smith suggests that courts are opening the door to expanded "taking" claims and resulting damages as well as section 1983 damages.

B. The Problem in Illinois and States that Follow Similar Rules

Marlin Smith's article is clearly the most foreboding. It suggests the need to carefully analyze Illinois' and other states' approach to zoning review—an approach which closely analyzes local decisions and often finds them to be unconstitutional.

Not all states follow the Illinois approach. Most are somewhere on a loose continuum between full review and almost no review and consider zoning a legislative act accorded a strong presumption of validity. Local decisions to rezone, fail to rezone, or deny a special use are only overturned if clearly unconstitutional or beyond well-delineated statutory boundaries. California is one such state. New York oscillates.\(^\text{15}\) Some jurisdictions consider some zoning decisions quasi-judicial in nature and follow the Fasano\(^\text{16}\) rule, which requires strong procedural guarantees. These jurisdictions categorized land use decisions as if they were adjudicatory rather than legislative in nature.

Illinois pays homage to the legislative presumption of validity but then goes on to full judicial review. According to commentators, the court measures the "inefficient" nature of the zoning and applies a Lochner v. New York\(^\text{17}\) constitutional analysis.\(^\text{18}\) In LaSalle National Bank v. County of Cook,\(^\text{19}\) the seminal Illinois zoning case, the court points to a "constitutional question" involving construction of the con-

\(^{13}\) Infra at 89.

\(^{14}\) Infra at 93.


\(^{17}\) 198 U.S. 45 (1905).


\(^{19}\) 12 Ill. 2d 40, 145 N.E.2d 65 (1957).
stitution and a complaint that challenges the zoning on a "due process", "taking" and "equal protection" argument. The \textit{LaSalle National Bank} criteria seem to involve the application of constitutional principles to land use decisions. Whether these are federal or state constitutional rights seems never to have been determined by Illinois courts, however. Yet even then the U.S. Supreme Court may have some inclination to look at the "rational basis" of an ordinance.

This potential for federal unconstitutionality is Marlin Smith's great concern in this symposium and is the subject of this article. Considering the dearth of unique state constitutional law until recently in the land use area, the statements in \textit{LaSalle National Bank} seem to involve construction of the federal constitution.

Curing the procedural errors of local governments is easy. It requires nothing but a clear listing of those processes which an ordinance, an appeal or other interpretation and application must utilize for fair hearings, notice, bias and other standards. Meeting the \textit{Fasano} quasi-judicial standards is also relatively straightforward. But if Illinois municipalities are to clean up their zoning process by improving the substantive basis on which zoning decisions are made they will need a clear set of \textit{Miranda} guidelines to avoid the section 1983 and the taking liability discussed in this symposium. What are new problems with statutory violations and with unconstitutional activities? What is the Illinois substantive standard? What, if any, guidance do communities have in applying a substantive standard in a constitutional manner and what guidance could they be provided?

II. NEW STATUTORY AND CONSTITUTIONAL PROBLEMS THAT ZONING FACES

As Sheldon Nahmod discusses in more detail in this symposium, section 1983 liability of municipal governments and officers involves examining what practices yield liability, what persons and governments are liable, what standards are applied to the action, and what remedies are available.

To be a prohibited practice under section 1983, there must be more than an isolated instance; an official custom, policy or usage is re-


quired. Respondeat superior is not applicable. Violation of any federal law may also serve as a basis for an action except where the federal law provides its own comprehensive remedial devices. For example, zoning in violation of some federal wetlands protection policy or zoning in violation of equal housing rights could yield liability.

Further, any constitutional violation, including violation of equal protection, due process, or free speech, may provide the substantive basis for a section 1983 action and other rights. For example, improper restriction of fast food franchises but not of restaurants, or an over-ambitious diminution in property value from a restrictive ordinance, or a strict sign ordinance could result in section 1983 liability.

As to the issue of what persons and governments are liable under section 1983, the Eleventh Amendment does not provide immunity for municipalities and their officers although municipalities cannot be liable for punitive damages. While certain absolute and qualified immunities exist for actions taken by judges, legislators and local legislative bodies, the municipality is liable. However, quasi-judicial actors may be immune. This is significant in zoning actions because boards and commissions frequently have important roles and jurisdictions which apply the Fasano approach call many zoning matters judicial in nature. Still, it is unclear whether local zoning appeals boards are such quasi-judicial actors.

In 1982 the Supreme Court established an objective standard for determining what constitutes official acts. "[G]overnment officials [and necessarily the government itself] performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." But what "clearly established constitutional rights" are in a zoning situation is not at all clear. Zoning decisions which draw boundaries, examine conflicting uses, or look at hardship simply do not provide guidance and Miranda warnings cannot readily be fashioned. However, officials

23. Id. at 693-94.
27. Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980).
in non-discretionary roles, performing ministerial duties may be liable, and a standard of negligence may suffice for that liability.\(^{32}\)

Finally, both damages and injunctive remedies are available under section 1983 and administrative and judicial remedies need not be exhausted prior to bringing a section 1983 action.\(^{33}\) Also, as a prospective remedy against threatened enforcement of a municipal ordinance and used against prosecutors and judges, a section 1983 action may lie.\(^{34}\) In some situations, punitive damages may be permitted.

Constitutional partial or full taking problems are inherent in zoning. When a community regulates it generally takes some development value away from the property. When it overregulates it takes away too much development value. Case law has not yet fully recognized that a community may be forced to buy land where partial taking or over-regulation has occurred. Generally, the courts merely void the offending statute. But this remedy has not been helpful to curb unconstitutional practices. In the near future courts may change that approach and award damages.

Two cases arising in California, and resolved by the U.S. Supreme Court, come so close to awarding damages that a regulating community should fear unconstitutional taking for the damage reason alone. In one of the cases, *San Diego Gas & Electric Co. v. City of San Diego*,\(^{35}\) a divided court awarded no damages but held the state decision was not final. Four Justices (Brennan, Stewart, Marshall and Powell) found that a taking had occurred and that damages were available under the Fifth and Fourteenth Amendments. Justice Rehnquist, concurring, also found damages available but agreed with the majority that the state decision was not final.\(^{36}\)

Thus, the stage is set in the appropriate case for damages to be awarded in an unconstitutional overregulation.\(^{37}\) Such damages might equally be applied in a free speech situation, in overcontrol of a religious institution or in strict limitations on multi-family or group housing. There could be permanent damages where the government inversely condemns the property and becomes the owner. Or damages might be permanent partial, in which the difference between the before and the after value is awarded the landowner, or interim partial, where

\(^{34}\) Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980).
\(^{36}\) Id. at 633-36.
damages are awarded for the loss in value from the time the ordinance was enacted to the time the ordinance was found invalid. A government may, or ominously, may not be given the option of abandoning the regulation to mitigate damages. At present, most state courts reject interim and permanent damages and have done so unequivocally in most cases. 38

Where a local government combines with others or conspires to protect a monopoly or restrain trade, 39 recent cases have held that the government may be held liable for damages including treble damages. 40 As examples, such a situation may occur when a restaurant is protected from competition by national franchises, or when a downtown business area works with the government to restrict a new shopping center on the outskirts of town. Current decisions suggest that a municipality could impose anti-competitive zoning or other restraints on trade through land use controls and still be protected by the Eleventh Amendment when the legislature contemplated the kind of action by a subordinate government, the acts were part of a comprehensive regulatory system, the acts were clearly articulated and affirmatively expressed as state policy, and the policy was “actively supervised by the State. . . .” 41 State grants of home rule do not insulate local government. 42 Nor is a state law sufficient which “permitted” local zoning. 43

III. HOW CAN ILLINOIS AND SIMILAR STATES AVOID LIABILITY?

In this realm of new constitutional obligations and new rights to damages on the part of developer/owners it becomes important to determine if there are Illinois guidelines to assist local governments in conforming their zoning and rezoning actions to settled state law. Illinois zoning law is administered by cities and villages, townships and counties. 44 The usual panoply of variances, special uses, amendments, subdivision controls are utilized to control height, lot size, use,

41. Id. at 408-17 (opinion of Brennan, J.).
44. See R. Smith, C. Forrest & E. Freund, A Guide to Municipal Zoning Administration (1972) for a complete description of the municipal system. A similar guide has been published for County Zoning. See also —. CoPe, Zoning Handbook for Municipal Officials with Suggested Forms (1983). For Illinois zoning statutes see ILL. REV. STAT. ch. 24, §§ 11-13-4—11-13-20, (Cities and Villages); ch. 34, §§ 3151-3162 (Counties); ch. 139, §§ 301-317 (Townships) (1983).
density and other aspects of land development. A zoning administrator leads local efforts and a board of appeals, zoning amendment agency, plan commission and the local legislative body perform customary functions.

Review of zoning actions may occur at a number of points and by different parties. A developer/owner may appeal a zoning decision, a neighbor or neighborhood group may protest action, and a nearby municipality may complain in some situations. These complaints could allege that an ordinance is too strict or too lenient and should be amended, or that a special use or variation should issue or should not have been issued. Often, too, a party complains that a condition placed upon a permit is too strict or too lenient. The complaining party contests a substantive fault in the local activity asserting that the activity is not within statutory or case law guidelines, or that it is not within constitutional prerogatives. Also, a complainant may charge that activity is procedurally faulty because of improper notice hearing.

The burden of proof is always on the party attacking a zoning ordinance. Local legislative actions have a presumption of validity, but like all presumptions, this is rebuttable and can be overcome by clear and convincing evidence. The ordinance or action must be found to have "no substantial relationship to public health, safety and welfare" in order for it to be held invalid. However, a "substantial relationship" to public health, safety and welfare was required in LaGrange State Bank v. County of Cook. Generally, if the evidence is "at best, debateable" or there are "legitimate differences" of expert opinion, the action is valid.

Often the court states that the zoning must be "arbitrary and unreasonable" and more than a preponderance of evidence is required

46. "The validity of amendatory zoning ordinances is tested by the same rules applicable in ... original zoning ordinances." LaSalle National Bank v. City of Chicago, 5 Ill. 2d 344, 351, 125 N.E.2d 609, 613 (1955).
47. LaSalle National Bank v. City of Chicago, 5 Ill. 2d 344, 350, 125 N.E.2d 609, 613 (1955).
49. Forestview, supra at 242-243, 309 N.E.2d at 772-73.
51. 75 Ill. 2d 301, 310, 388 N.E.2d 388, 392 (1979).
53. Duggan v. County of Cook, 60 Ill. 2d 107, 111, 324 N.E.2d 406, 408 (1975).
for such proof.\textsuperscript{54} In \textit{Drogos v. City of Bensenville}, the court suggested that a party must prove that a proposed use is reasonable by "clear and convincing" evidence in order for the court to proceed beyond a finding of invalidity to compel a new use.\textsuperscript{55}

At various times the courts have said that invalidity occurs when there is an "invasion of private constitutional rights without reasonable justification" and a zoning ordinance cannot be amended except for the public, rather than private good.\textsuperscript{56} Review of the trial court holding is under the "manifest weight of evidence" test.\textsuperscript{57}

Remedial response to such complaints in Illinois includes injunctive relief, declaratory judgment, or substitution of a valid restriction for the invalid (judicial rezoning or definitive relief).\textsuperscript{58} Illinois courts are activists, routinely reviewing lower court and local zoning decisions.\textsuperscript{59} Generally, they conduct a cost/benefit analysis of zoning actions and invalidate those that they call inefficient.\textsuperscript{60} It is, of course, this activism, grounded as it is on constitutional and sometimes statutory objections, that presents the problem. These very objections expose municipalities to grave potential for heavy damages. Unless the courts also provide sound guidance as to what is and what is not constitutional or statutory adherence the zoning authorities and even local personnel are dangerously exposed.

The basic constitutional standards applied in Illinois revolve around the \textit{LaSalle National Bank} criteria. These criteria can be divided into the following categories:

A. The Nearby Use Test  
B. The Nearby Zoning Test  
C. Conformance with Planning Test  
D. The Suitability Test  
E. The Hardship/Public Benefit Test  
F. The Need for the Use Test  
G. The Damage to the Area Test  
H. Miscellaneous Tests—General Public Welfare, Boundary Lines and Acquisition with Knowledge.

\textsuperscript{54} \textit{Id.} at 111, 324 N.E.2d at 408.  
\textsuperscript{56} \textit{Garner v. City of Carmi}, 28 Ill. 2d 560, 564, 192 N.E.2d 816, 819 (1963).  
\textsuperscript{58} \textit{See} \textit{Drogos v. Village of Bensenville}, 100 Ill. App. 3d 48, 426 N.E.2d 1276 (1981), for a standard for definitive relief as "clear and convincing evidence that the proposed use is reasonable" even though the original zoning is found invalid. \textit{Id.} at 56, 426 N.E.2d at 1283.  
\textsuperscript{59} \textit{See} Williams, Treatise on Land Planning Law, Volume I, pp. 143-48 for a complete description of the Illinois system.  
\textsuperscript{60} R. ELICKSON & A. TARLOCK, LAND-USE CONTROLS 75 (1981).
According to the courts "no one factor is controlling"\textsuperscript{61} and the effect of each factor is considered. In some cases the standards seem to be used to directly test the validity of the ordinance. In others, the standards weaken the presumption of validity.

For each of these criterion it is important to consider the basis or rationale for the test, the cases which apply the test and whether or not the test can provide meaningful guidance to a community or developer/owner wishing to avoid constitutional issues. One commentator has said the test has a "beguiling simplicity which almost begs for facts to be thrown into the . . . hopper so that the appropriate judicial determination can be sifted out."\textsuperscript{62}

A. The Nearby Use Test

This criterion examines whether or not the uses permitted under the zoning, planned or presently in operations, are consistent with nearby uses. Obviously, in a case where the surrounding six blocks are filled with single family residences and the zoned site is not differentiated from the other areas, the nearby use test insures that zoning and rezoning is consistent, recognizes the reliance of nearby property owners and is not influenced by improper factors. However, the criterion is difficult to apply when the uses are mixed. For example, a few high rise apartment houses may be invading an urban two flat neighborhood or convenience stores may be slowly sprouting along a more or less rural or small town road. Likewise, the criterion is not well suited to situations where the character of the neighborhood is changing. Yet again, the nearby use test does not account for the natural situation where incompatible uses tend to leak over boundaries and into other areas.

While the courts have a difficult time with this test since there are no hard and fast rules for handling these three complex situations, many courts have considered nearby use as a criterion of paramount importance.\textsuperscript{63} However, recognizing the difficulties with the test in some situations, other courts have modified the test. In Parkway Bank & Trust Co. v. City of Chicago, the court noted that the test was not

\textsuperscript{61} LaSalle National Bank v. County of Cook, 12 Ill. 2d 40, 47, 145 N.E.2d 65, 69 (1957).
determinative when the area was a "patchwork" of different uses.\textsuperscript{64} Another case suggests that the combination of nearby residential uses and improvement of the subject property as a residential use is determinative.\textsuperscript{65} And \textit{Kellett v. County of DuPage}\textsuperscript{66} limits the test even more.

What can be gleaned from these cases by those concerned with the constitutional consequences of particular zoning actions? Perhaps, patchwork areas do not benefit from the test to restrict further uses. The overall character of the area may be more important than the microenvironment, the adjoining uses. Expectations of nearby property owners are important, but when conditions change and new development appears, those expectations have to change as well. The test has not been applied to suggest a \textit{status quo} and probably should not be.

\textbf{B. The Nearby Zoning Test}

Nearby zoning is a \textit{LaSalle} criterion that looks to consistency in community planning and is the obverse of spot zoning. Not only should uses be consistent but zoning itself must be consistent. To lay down an industrial special use in the midst of multi-family residences seems so inconsistent that it suggests hanky-panky at worst and ignorance at best. Nearby zoning is also a way of finding a comprehensive plan when none exists. Thus, some say the plan is in the "bosom" of the zoning ordinance found in the "planning" rather than plan.\textsuperscript{67}

Yet, there are significant problems with the nearby zoning test. The area may be riddled with nonconforming uses or structures, a zoning boundary may be nearby, or the nearby zoning may be wrong.\textsuperscript{68} Despite these problems, the court in \textit{Kellett v. County of DuPage} held that "existing uses and zoning classifications of nearby property are of paramount importance,"\textsuperscript{69} and found that even a nonconforming use of the subject property or adjoining property does not alter the residential

\begin{itemize}
  \item \textsuperscript{64} Parkway Bank v. City of Chicago, 107 Ill. App. 3d 252, 255, 437 N.E.2d 753, 756 (1982).
  \item \textsuperscript{66} Kellett v. County of DuPage, 89 Ill. App. 2d 437, 443-44, 231 N.E.2d 706, 709 (1967). There, a nearby use was a tavern and a heavily traveled thoroughfare, yet the court gave strong weight to the surrounding area being predominantly residential.
  \item \textsuperscript{67} \textit{See} Kozesnik v. Township of Montgomery, 24 N.J. 154, 131 A.2d 1 (1957).
  \item \textsuperscript{68} Uses not normally subject to zoning such as public utilities, highways and railroads may seriously affect land uses. Zoning may be imposed on a wholly undeveloped area and be unlikely to survive the first request for an amendment.
  \item \textsuperscript{69} Kellett v. County of DuPage, 89 Ill. App. 2d 437, 443, 231 N.E.2d 706, 709 (1967); Jacobson v. City of Evanston, 10 Ill. 2d 61, 70, 139 N.E.2d 205, 209 (1956).
\end{itemize}
character of the neighborhood. In Drogos v. City of Bensenville a policy of general buffer areas or main highway buffers was negated by nearby zoning different from that of the affected property. Reliance by owners on nearby zoning was considered especially important in Vedevell v. City of Northlake and Oak Park National Bank v. City of Chicago. In Bennett v. City of Chicago the integrity of the R-2 zoning and the surrounding area similarly zoned overrode any objections. The courts have described yet another factor of the test, where whether the nearby uses were "uniform and established" was important.

To those concerned with guidelines on zoning, the nearby zoning test is helpful in the simple case, where a "spot" of different zoning is set down in the midst of contradictory zoning. Also, the courts provide some guidance in dealing with buffer areas and public roads and have found that even adjacent nonconforming uses may not offset zoning in the neighborhood. No mathematical formula emerges, but the test seems as if it ought to be made more analogous to an indicia of comprehensive planning.

C. Conformance with Planning Test

A comprehensive plan is often considered the local land use constitution against which zoning validity can be tested. California and a number of other states require such a plan and some states even limit the manner and frequency in which the plan can be altered to preserve permanence and reliability. In some states it is the major document and the factual basis against which zoning is routinely tested. A plan can be a map delineating present and future preferred uses, a compendium of policies to help determine what regulations to apply or the sum total of all regulations.

Use of a comprehensive plan has a number of advantages. Citizens and developers as well as the community can rely upon them in

71. 22 Ill. 2d 611, 614, 177 N.E.2d 124, 125-26 (1961).
73. 24 Ill. 2d 270, 274, 181 N.E.2d 96, 98 (1962).
76. See, e.g., CAL. GOV'T CODE §§ 65301, 65302 (West 1983), FLA. STAT. ANN. § 163.190 (West 1980).
77. See CAL. GOV'T CODE § 65300.5 (West 1983).
making investment decisions. The community can focus its attention on major issues instead of relatively minor step-by-step changes. Comprehensive plans are the result of sound planning and generally sound studies—though there are still myriad examples of cookie cutter plans adopted under HUD 701 funding that are hardly customized to a community's needs.\textsuperscript{79}

Illinois does not require such a plan.\textsuperscript{80} But if one exists it can be utilized to support zoning action or to negate such action if there is a conflict. \textit{DeMarie v. City of Lake Forest}\textsuperscript{81} exemplifies a court's intricate analysis of a plan, an analysis not frequently done by Illinois courts. Yet, a number of Illinois cases have relied upon the comprehensive plan. In \textit{Forestview Homeowner's Assoc. v. County of Cook} the court found the plan "relevant" to determine if the zoning ordinance is in harmony with the orderly utilization of property.\textsuperscript{82} The lack of a comprehensive plan does not invalidate an ordinance but substantially weakens the well-known presumption of validity.\textsuperscript{83}

In recent years the cases have stressed the comprehensive plan more than they have in the past. The plan seems a sound basis on which to test a zoning action since it offers a more objective means to examine the consistency of a zoning action. Of course, where a plan is a mass of general goals in writing, overlay maps with little specificity, the plan is of little more help than other vague tests.

\textbf{D. The Suitability Test}

A piece of land is suitable for a zoned purpose where it can be developed for that purpose. Land which has lain idle and undeveloped may in fact illustrate improper zoning of the area. This test looks at how long the land has not been used, what efforts have been made to use the land in the zoned manner and the overall suitability of the land for the zoned purpose. \textit{LaSalle National Bank}\textsuperscript{84} suggests that this review must be made in light of the pace and tempo of land development in the immediate area. There needs to have been some development in

\begin{itemize}
\item \textsuperscript{79} Section 701 is found at 40 U.S.C. 461(c) (1982).
\item \textsuperscript{80} Plans are authorized, however. ILL. REV. STAT. ch. 34, § 3151 (1983). \textit{See also} Fifteen Fifty North State Building Corp. v. City of Chicago, 15 Ill. 2d 408, 155 N.E.2d 97 (1959).
\item \textsuperscript{81} 417 N.E.2d 641, 93 Ill. App. 3d 357 (1981).
\item \textsuperscript{82} \textit{Forestview Homeowners Ass'n v. County of Cook}, 18 Ill. App. 3d 230, 240-41, 309 N.E.2d 763, 771 (1974).
\item \textsuperscript{83} \textit{Id.} at 243, 209 N.E.2d at 773. \textit{See also} Fifteen Fifty North State Building Corp. v. City of Chicago, 15 Ill. 2d 408, 155 N.E.2d 97, 102-03 (1959).
\item \textsuperscript{84} \textit{LaSalle National Bank v. County of Cook}, 12 Ill. 2d 40, 145 N.E.2d 65, 69 (1957).
\end{itemize}
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the area and that development should have been in conformance with the zoning for that location.

In *Duggan v. County of Cook*<sup>85</sup> a one year listing without sale was enough to overrule a refusal to rezone; however, other factors such as the land being in a flood plain and the absence of sewer and water connections were important as well. Thus, factors such as how the land was marketed and listed and the asking price need to be accounted for if true market suitability is to be tested in an objective fashion. For example, in *LaGrange State Bank v. County of Cook*<sup>86</sup> and *American National Bank v. Village of Oak Lawn*<sup>87</sup> the owner did not even attempt to sell the land for the zoned purpose. And in *Kellett v. County of DuPage*<sup>88</sup> slow development was explained by lack of sewer or water.

Failure of the land to be developed can be an important constitutional marker and the cases suggest that this must be established by strong marketing, a property fully capable of development and efforts to use the land in the zoned manner. Land which is not sewered due to a municipal policy to restrict growth ought not be burdened with further bias in a rezoning case because of that policy.

### E. The Hardship/Public Benefit Test

Balancing hardship against public benefit has long been considered in the armory of tests for appropriate land use controls used on the national level.<sup>89</sup> Its reception and use in Illinois have not been that much different from that known to law students for years.

Of course, most zoning depresses market value. The question is how much is allowable and for what purposes is the value depressed. Value can be depressed up to 100 percent if the public benefit is significant.<sup>90</sup> But public benefit can be of two varieties and scholars and courts have long jostled over how much of which is acceptable. Air pollution, excessive traffic, subsidence due to mining, and dangers from an open gravel pit illustrate a public harm which can be reduced. Or, a public benefit may be enhanced as when more open space or a park are established. Generally, the alleviation of a harm (one kind of benefit)

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<sup>85. 60 Ill. 2d 107, 113, 324 N.E.2d 406, 409-10 (1975).</sup>
<sup>86. 75 Ill. 2d 301, 310, 388 N.E.2d 388, 392 (1979).</sup>
<sup>87. 81 Ill. App. 3d 952, 960, 401 N.E.2d 963, 968 (1979).</sup>
<sup>88. 89 Ill. App. 2d 437, 444-45, 231 N.E.2d 706, 710 (1967). That the county did not provide sewer and water should perhaps permit a change in use to a use which was not dependent on such services to compensate for this "growth" control.</sup>
<sup>89. Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978); Pennsylvania Coal Co. v.Mahon, 260 U.S. 393 (1922).</sup>
<sup>90. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).</sup>
has been accepted, but the provision of a benefit has been more rigorously examined.91

_LaSalle National Bank_ specifically adopts this test and suggests a balancing between relative gain to the public and the hardship to the property owner.92 In another _LaSalle National Bank_ case a 50 percent loss in value invalidated the zoning.93 _Kellett v. County of DuPage_ said that while land is substantially more valuable for the new use proposed, this is usually the case and that fact alone does not invalidate an existing zoning ordinance.94 A better view was asserted in _DeMarie v. City of Lake Forest_,” the less substantial the relationship of the zoning to the public health, safety, comfort, morals and welfare, the more likely the zoning is invalid and the more significance the diminution[sic] in value is given as one of the criteria of invalidity.”95

The hardship test is helpful and the concepts of balancing, hardship, and public benefit have been developed not only in Illinois courts but in other courts as well. Further, many law reviews have analyzed this criterion.96 As usual, however, the test is not considered determinative and Illinois has not clearly distinguished public benefit from alleviation of a hardship. Still, zoning officials can build a record to comport with Illinois holdings and with the standards that have emerged in other decisions. It is this record which will help reduce the potential for constitutional litigation.

**F. The Need Test**

The need test is of relatively minor importance.97 With this criterion, the court asks how much the community needs the proposed land use. Community need for the use was helpful in _DeMarie v. City of Lake Forest_98 and is important in the case of certain public services such as gas stations.99 However, the test has yet to be seriously consid-

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ered in zoning issues involving group housing, half-way houses, adult entertainment, arcades or fast food franchises.

G. The Damage to the Area Test

New zoning, generally to a less restrictive use, may damage the area by reducing property values because of increased noise, traffic and pollution. The damage to the area test asks whether that damage is significant enough to void the proposed zoning change. Light levels in a convenience store helped void an ordinance in Kellett v. County of DuPage. In LaSalle National Bank v. County of DuPage, LaSalle National Bank looked at the fact that value was not appreciably decreased nearby by the proposed use. In American National Bank v. Village of Oak Lawn the court noted the "prejudice" to future development of single family homes if condominiums were allowed. However, in Drogos v. Village of Bensenville the court discounted the "domino" effect of spreading damage, and the Tomasek v. City of Des Plaines ruling was heavily influenced by the fact that a proposed commercial use "would severely alter if not destroy the predominantly residential quality of the neighborhood." The impacts on community services such as schools, roads and public utilities including demands for new services that a community could not sustain have been considered as well.

Sound planning suggests that damage is an important criterion. Damage to an area can be assessed by the testimony of often competing witnesses, but there is a court ability to ferret out the realistic from the unrealistic evidence and to consider the damage that is acceptable to a neighborhood.

H. Miscellaneous Tests

1. General Public Welfare

Though not strictly a LaSalle criteria the Illinois courts often apply a general public welfare test. Thus, Tomasek v. City of Des Plaines upholds an ordinance if it has "any" substantial relationship to the public health, safety, comfort, or welfare. Forestview Homeowner's

104.  64 Ill. 2d 172, 181, 354 N.E.2d 899, 903 (1976).
106.  Tomasek v. City of Des Plaines, 64 Ill. 2d 172, 179, 354 N.E.2d 899, 903 (1976). Duggan
Assoc. v. County of Cook looks to a public benefit in a more exact sense.\textsuperscript{107} Rezoning which does not lessen or avoid congestion or reach other statutory objectives is invalid—a novel and very flexible approach. Unfortunately, the test is surely too vague for any serious application unless detailed studies show the lack of public benefit.

Very often equal protection arguments are raised here as well. In \textit{Frost v. Village of Glen Ellyn}\textsuperscript{108} the Court expanded the \textit{Bolger v. Village of Mt. Prospect}\textsuperscript{109} test to reject a distinction between drive-in and enclosed restaurants. The Court required a "real difference" between classes stating that the one form of restaurant was not significantly more detrimental to the public health, safety, welfare or morals than the other.

2. Boundary Lines

The boundary line issue is ubiquitous in zoning cases. There always are zoning boundaries and always will be because, as one court said "zoning must begin and end somewhere".\textsuperscript{110} That different zoning areas abut "does not make a more restrictive classification unreasonable".\textsuperscript{111} Boundaries need not be an important factor in review though courts could if they wished apply sound planning principles and require buffers between zones where that was possible.\textsuperscript{112}

3. Acquisition with Knowledge

Unfortunately Illinois courts have used acquisition with knowledge as a means to deny a plaintiff zoning rights, calling it a "factor to be considered . . . especially where . . . the acquisition was relatively recent to the time the zoning change was sought."\textsuperscript{113} Another court has said that, "[d]iminution of value . . . is not alone a sufficient reason to invalidate . . . . This is particularly true where plaintiffs purchased


\textsuperscript{108} 30 Ill. 2d 241, 195 N.E.2d 616 (1964).

\textsuperscript{109} 10 Ill. 2d 596, 141 N.E.2d 22 (1957).


... with full knowledge of the zoning restrictions."\textsuperscript{114} Again, the \textit{DeMarie v. City of Lake Forest} court distinguishes between purchase with the hope of "securing rezoning, then a quick profitable resale" and purchase for and development as a residence of the owner.\textsuperscript{115} \textit{DeMarie} properly distinguishes between personal use and speculative purchase. However in a broader sense, it seems clear that no landowner should be denied the right to contest an invalid zoning action merely because the landowner bought knowing about the invalidity. The land, not the owner, is the beneficiary of the zoning and in itself has rights that under sound planning doctrine should supersede any defenses against an owner.\textsuperscript{116}

\section*{IV. Conclusion}

Illinois law and the \textit{LaSalle National Bank} criteria present some guideposts that allow municipal officials to avoid liability under section 1983, "taking" and other provisions. But these criteria are generally too vague and without much case-acquired meaning to enable them to be very helpful in even routine situations. A reading of all but a few \textit{LaSalle National Bank} criteria cases will support that proposition. If all were as carefully decided as say, \textit{DeMarie}, then there might be more certainty. However, since most zoning actions involve difficult situations the guidance is limited. Landowners are uncertain of rights and local governments are overexposed and will continue to be until change occurs.

Another problem with the Illinois criteria is that the courts consider no one factor controlling.\textsuperscript{117} As a result, the observer cannot discover why a decision was made and how much of any factor is important. Only informed guesses on zoning and rezoning legality can emerge from such uncertainty. Yet with the section 1983 liability looming and the "taking" potential expanding, municipal and developers' attorneys need more.

Illinois courts will need to clearly sidestep the federal constitutional issues by building explicit state constitutional grounds or by better defining the boundaries of constitutional action. The former seems

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risky at best since the federal rights can always be superimposed on any court decision. As to defining the boundaries of constitutional action, the court should develop for each of the tests some indicia which must be proved for the zoning action to be validated or invalidated. Some of those indicia, as drawn from the cases and experience, follow.

For the nearby use test, one must define what the character of the area is. Is it a block, a street front, or fifty acres, and does it depend upon the impact of the use proposed or of other uses? How are non-conforming uses such as public utilities handled? Such uses probably should not detract from the area unless they predominate. What about changing areas, how are they handled? Some analysis of the amount of change over a few years would be helpful. And, of course, that change must impact the proposed use. Is an urban changing area different from a "wait and see" rural area where zoning is merely awaiting the proper use proposal? How are patchwork areas handled? Should the test be used at all in such areas? Perhaps expectations should not be considered at all because they merely parallel other indicia. Will opinion polls, character evidence, and expert planners assist in proving the case?

Regarding the nearby zoning test, what is meant by nearby? Could not the test be considered a consistency test to be measured by looking at zoning, changes in zoning, special use permits, variations and plans. Are boundaries to be tolerated or considered strongly? What about earlier zoning changes, special uses, variances, nonconforming uses? How is nearby improper zoning to be handled? Do the nearby uses need to be uniform?

When we turn to the conformance with planning test, we should ask what comprehensive plan is to be analyzed. Are underlying debate and studies to be considered by a court? Suppose the plan has been changed recently to adopt to the new zoning, how will those changes affect validity? Can conflict with the plan be explained by a faulty plan or changed conditions? Is absence of a plan conclusive, weighty, or of help in a decision at all? What elements are required in a plan?

The suitability test must deal with what length of time without development is requisite to show that presently zoned purpose is invalid. What activities must have been undertaken by the owner? What defenses are available to the community? How are unique, variation type lands handled?

In the hardship/public benefit test hardship to the owner can be proved by loss in property value exceeding, say, thirty per cent. But is
loss calculated from proposed use, or highest use in present zone limits? Is non-speculative investment opportunity treated similarly to speculative purchase of land based on zoning change? Public benefit can be proved by reducing public harm (ending noise, pollution, traffic) or by increasing a public benefit (opening space, parks, residences) or both. What proof of harm is acceptable? What about mitigation through performance criteria? Will the balance between harm and benefit be determined by property value, use value or by other criteria weighed mathematically against each other or weighed by other means? How is alternative regulation handled?

In the need test, is need for the use one of the tests? How is need calculated? By absence of the use, by public opinion, by travel time to nearby similar use, or by real estate experts? Are regional needs, multi-family housing, halfway houses, adult entertainment, hazardous waste storage, also needs considered in this test? Why should the demand for such a need settle on this property in this community?

And finally, the indicia for damage to the area test include what is the area? How much is mitigation by the proposed user considered? How is damage assessed? By property value change, by planner, appraiser opinion, by analysis of similar conflicting uses, or by mere opinion of neighbors? Is the damage calculated as the difference between present use (which might be no use), highest use now available, or highest use proper, and proposed use? Is that proposed use considered as mitigated and buffered? How is the "domino" effect analyzed?

Illinois courts need to fully examine the criteria by which they judge the constitutionality of zoning decisions and must revise and improve that criteria to provide more guidance. These indicia, and the courts' answers to them, should provide the appropriate guidance so that local communities can attempt to avoid section 1983 liability and the potential for an inadvertent taking.