

Illinois Association of County Board Members

# SOLAR ENERGY *Seminar*

## The Legal Aspects of Solar Zoning

From solar ordinances to preparing for potential litigation

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# Introductions

- Andrew Keyt
  - Andy is a partner in the firm and the chair of the firms governmental practice group and represents local governmental entities in all aspects of their legal needs, including land-use and zoning issues.
- Megan Mole
  - Megan is an associate in the Chicago office of Heyl Royster practicing in governmental, zoning, and land use law.
- We represent:
  - Zoning boards
  - County boards
  - Private solar companies

# What we will cover today:

- Long term land use plan/Comprehensive Plan
- Drafting a solar ordinance
- Zoning board of appeals process
- Process at county board level
- Preparing for and Handling Litigation

# Your Long Term Land Use Plan/Comprehensive Plan

- Everything starts with your long term plan!
- When updating your long term plan, consider and include provisions for potential solar development, if desired.
- The long term plan will assist in later developing your solar ordinance.

# Drafting your Community Solar Ordinance

- Permissive versus Restrictive?
  - Balance between encouraging development versus protecting citizens from detrimental development.
  - You must consider whether you want to have strict provisions in the Special Use Permit process, itself, versus the building code process.
    - For example, less stringent SUP requirements allow an applicant an easier time getting a permit, but they still have to meet specific building code requirements, which may be more strict.

# A Tale of Two Approaches: Permissive

- Requires Special Use in all districts (and all applicable general SUP rules)
- Special Requirements
  - Height
  - Setbacks
  - Fencing
  - Lighting
  - Noise
  - Installation and Design
  - Underground wiring
  - Outdoor Storage
  - Agricultural Impact Mitigation Agreement
  - Consult with Illinois Department of Natural Resources
  - Annual Review and Reporting on modifications, complaints, emergency service use, liability insurance
  - Safety Procedures

# Permissive Continued

- Petition must include:
  - Written summary of project and generating capacity
  - Names/Addresses of owners and operators
  - Site plan
    - Boundaries
    - Structures
    - Property lines
    - Setback lines
    - Egress/ingress

# Permissive Continued...

- Decommissioning Plan
- Reimbursement for County Expenses
- Jurisdictional Requirement if litigation ensues
- Road Agreements
- Maintenance
- Signage requirements
- Certificate of Compliance prior to building permit with additional requirements
- \*Indemnification and liability provisions
- Cessation of operations
- Penalties

# A Tale of Two Approaches: Restrictive

- Includes Community Solar Gardens and Solar Farms
  - Special Use required:
    - Setbacks of underlying zoning district
    - Visual screening from roads and homes within 1000 feet of solar development
    - Landscaped area at least 10 feet wide with 1 shrub per 5 linear feet plus at least one evergreen tree per 25 linear feet of perimeter area. Shrubs must be at least three feet in height at the time of planting. Evergreen trees must be at least 5 feet in height at the time of planting; or
    - A landscaped area at least ten feet in width with a solid wall or privacy fence with a minimum height of 8 feet. At least one evergreen tree is required per 30 linear feet of the fence or wall.
    - Every evergreen in the landscaped area described in 2(a) or 2(b) above, at the time of planting, shall be at least five feet in height. In the event that a shrub or tree dies within any such landscaped area, such shrub or tree shall be promptly replaced by the then owner of the subject property, weather permitting. No portion of the landscaped area shall be situated within any right of way.

# Restrictive Continued...

- Glare remediation
- Noise
- Soils and Ground cover
  - Top soils shall not be removed from the site during development unless the removal is expressly approved as part of the special use permit.
  - Native perennial vegetative ground cover must be established in all areas containing a solar energy system and in required setbacks to prevent erosion and manage storm water run-off. Plant material may not be treated with insecticides. The ground cover shall also incorporate native grasses, flowers, plants which will provide wildlife and pollinator habitat, soil erosion protection and/or aid in strengthening the soil structure.
  - No trees or other landscaping otherwise required by the county ordinances or attached as a condition of approval of any plan, application, or permit may be removed for the installation or operation of a Solar Development

# Restrictive Continued

- Compliance with Endangered Species laws
- Underground utilities
- Signage
- Abandonment and Decommissioning
  - Removal of every aspect of farm within 180 days
  - Decommissioning Plan
    - Anticipated means/cost, provisions for removing all structures, cost estimate, parties responsible, must be submitted by cert. mail to all property owners adjacent to solar development site prior to SUP
    - Letter of credit for any damage
- Lighting
  - A solar development may not be artificially illuminated, unless required by the FAA or other applicable government agency or authority or approved by the County as part of the special use process. If lighting is approved by the County, such lighting shall be limited to that required for safety and operational purposes and shall be reasonably shielded from abutting properties. Lighting of the solar panels shall be directed downward and shall incorporate full cut-off fixtures to reduce light pollution.

# Restrictive Continued

- Monitoring and maintenance Plan
- Financial assurance
- Height
- Acknowledgement that applicant has no right to remain free of shadows
- Avoidance and mitigation of damages to Public Infrastructure
  - Road use requirements, pre-construction road survey etc, drainage and detention systems identification and maintenance plan and submission to County

# Restrictive Continued...

- Application Process

- Project description
- Signed reimbursement agreement with initial 10k deposit and maintenance of this amount for duration of project
- Site plan- physical features, roads, setbacks, floodplain, buildings, location of panels, rights of way, ID of natural resource district, all utilities, ingress and egress, wetland boundaries, drain tile study
- Locations of abandoned wells and septic systems
- Vertical elevation drawings
- Number/location/spacing of solar panels
- Schematic drawings
- Traffic control for project
- Elevation drawings and architects renderings of entire site
- Endangered Species consultation
- Illinois Historical Preservation Act consultation
- Natural Resources Inventory report
- American Land Title Association survey
- Wetland boundary map etc.
- Storm water management report
- Easement docs
- Signed sealed and dated engineer's opinion of probably construction costs for infrastructure improvements relevant to storm water management and municipal services
- Sight distance studies for access points
- Soils reports with logs
- Phasing map or plan

# Restrictive Continued

- Building permit additional requirements
  - Interconnection service agreement
  - Operation and maintenance plan (dust control, storm water controls)
  - Names/addresses
  - Manufacturer specs and installation methods of solar panels and equipment
  - Evidence of conformity to industry standards
  - Certificate of compliance that equipment tested by Underwriter Labs
  - Project summary, electrical schematic, site plan to local fire chief
  - Hours of operation for construction and maintenance
  - Water usage study
  - Complaint resolution Process
  - Waste Disposal Plan
  - Weed/grass control plan
  - Signage plan
  - Fence plan (\* foot min)
  - Utility interconnection details
  - Fire protection plan
  - Permanent easement for County to do whatever it wants on site, in its sole discretion
  - Storm water management permit
  - Warranty deed with plats of dedication from owner to gov. units.
  - Agreement from owner re gas pipelines
  - General liability policy
  - Indemnification agreement with County
  - Structural engineering plans for foundation and design
  - Tree survey and preservation plan
  - Storm sewer calculations
  - IDOT approval
  - Approval of all mods by County

# Things to Consider While Drafting your Ordinance

- Applicant indemnifies, pays costs and attorneys' fees
- Application Fees
- Set backs
- Height restrictions
- Sightline coverage (vegetation blocks, fencing)
- Lighting
- Districts where you want to allow solar (comprehensive plan)

# Zoning Board of Appeals Process

- ZBA Process is up to the board, however, once the process is established, the ZBA must adhere to the procedure to ensure due process:
- The typical order :
  - (i) the applicant presents his or her applications in summary,
  - (ii) the board or commission asks questions of the applicant,
  - (iii) members of the public cross examine the applicant's witnesses,
  - (iv) General testimony by supporters and objectors,
  - (v) applicant can question supporters and objectors
  - (vi) the evidence is closed,
  - (vii) the board or commission discusses the application amongst themselves (in the open), and
  - (viii) the board or commission acts on the application by voting and makes findings of fact.

# Protecting the Record

- Develop defined application process
- Ensure that all necessary application forms and requirements are complete and timely received
- Suggestion: Create an application checklist
- All testimony should be under oath
- Employ a court reporter

# Protecting Due Process Rights of Applicant and Objectors

- **Public forum:** Public must be granted an opportunity to speak
- **Applicant and objectors both have a right to be heard. Whatever process you employ must be applied fairly to both sides.**
- **An initial request for continuance should be granted.** Subsequent continuances depend on the circumstances of the case but should be guided by the objective of providing a reasonable opportunity to present one's case.
- **Employing a hearing officer**
  - Helps ensure that the formal process is followed
    - Not a guarantee because Board Members may disregard the officer's advice

# Always Consider the LaSalle Factors

- Illinois Statutes do not provide specific criteria for boards to consider in approving zoning changes.
- Historically, Illinois courts have used eight factors enunciated in two court cases, **LaSalle Bank of Chicago v. Count of Cook (1957)** and **Sinclair Pipeline v. County of Richton Park (1960)**, when evaluating the validity of zoning changes. The so-called “LaSalle factors” are as follows:
  1. The compatibility with existing uses and zoning of nearby property;
  2. The extent to which property values are diminished by the existing zoning;
  3. The extent to which the proposed amendment promotes the public health, safety, and welfare of the zoning district;
  4. The relative gain to the public as compared to the hardship imposed upon the applicant;
  5. The suitability of the property for which it is presently zoned;
  6. The length of time the property has been vacant as zoned, compared to development in the vicinity of the property;
  7. The consistency of the proposed use with the comprehensive plan, as well as existing land use policies;
  8. The proposed amendment will benefit the needs of the community

# Findings of Fact

1. Must be based on evidence in record, not on speculation
2. Considerations may include noise, vibrations, odors, air quality, outdoor lighting, traffic, operating characteristics, glare, environmental impact, safety features related to dangerous weather, availability of infrastructure, affect on property values etc.
3. Application of facts to standards

Written findings of fact should be prepared addressing whether the evidence adduced at the hearing supports the applicable standards at issue. This is critical when the hearing entity renders a “final decision” as these findings of fact are accepted as correct unless against the manifest weight of the evidence. **S & F Corp. v. Bilandic, 62 Ill.App.3d 193, 378 N.E.2d 1137, 19 Ill.Dec. 262 (1st Dist. 1978)**. When the hearing entity is merely making a recommendation, and a final decision is reserved to the corporate authorities, the hearing entity should still render its recommendation in the form of proposed findings of fact.

# County Board Hearing

- No more evidence can be submitted
- County board can only review evidence previously submitted
- Can approve, or send back to zoning board for further debate
- Keep in mind: This is a public hearing, and as such, public comment must be allowed (however, can reserve time for public comment after county board vote).

# Preparing for and Handling Litigation

- Due Process violations
- Protecting yourself:
  - This starts from the beginning with the application – Ensuring that the process is closely followed to ensure due process.

# Legal Standards

- Klaeren Decision Held: Special use hearings result in administrative decisions. **People Ex Re. Klaeren v. County of Lisle, 316 Ill. App. 3d 770**
  - “The municipal body acts in a fact-finding capacity to decide disputed adjudicative facts based upon evidence adduced at the hearing and ultimately determines the relative rights of the interested parties. As a result, those parties must be afforded due process rights normally granted to individuals whose property rights are at stake.”
- Post-Klaeren: 55 ILCS 5/5-12012.1
  - Actions subject to de novo review; due process.
    - (a) Any decision by the county board of any county, home rule or non-home rule, in regard to any petition or application for a special use, variance, rezoning, or other amendment to a zoning ordinance shall be subject to de novo judicial review as a legislative decision, regardless of whether the process in relation thereto is considered administrative for other purposes. Any action seeking the judicial review of such a decision shall be commenced not later than 90 days after the date of the decision.
    - (b) The principles of substantive and procedural due process apply at all stages of the decision-making and review of all zoning decisions.

# Judicial Review Presently

## 1. De Novo “as a legislative decision” Review

- This type of review may allow for presentation of new evidence at trial, but the review is “much less searching” than conventional administrative review would entail. 894 N.E.2d at 861.

## 2. Rational Basis Test - rational relationship to a legitimate legislative purpose and is neither arbitrary nor unreasonable. (Plaintiff must prove arbitrary and capricious)

- LaSalle Factors

# Conclusion

- Courts will:
  - 1. Apply LaSalle/Sinclair factors;
  - 2. Use “de novo as a legislative decision” review;
  - 3. Using rational basis test
- Records (what might come in)
  - Zoning application criteria and all related application materials
  - Evidence submitted by parties for and against application
  - Findings of fact
- Your communications
  - Assume all communications are discoverable and may come into evidence

**Dance like no one is watching.**

**Email like it may one day  
be read aloud in a deposition.**

# Closing Remarks and Questions

- Summary
  - Account for solar in long term plan
  - Permissive versus strict ordinance drafting and SUP application
  - Determine ZBA Order and STICK TO IT for the sake of Due Process
  - Consider Employing a hearing officer to ensure compliance
  - Always consider the LaSalle Factors in decision-making
  - Draft Written findings of fact
  - County Board only reviews evidence previously submitted
  - Assume all communications are discoverable and subject to FOIA
  - Special Use Hearings are subject to “De Novo as a legislative decision”
    - LaSalle Factors and Rational Basis Test