From Civil Rights to Bleachers: Municipal Regulation of School Districts

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There is a growing body of law concerning the regulation of public school districts by municipalities. Unfortunately, not all of it is positive, and the latest trends in particular are favoring municipalities over schools.

The basic parameters are rooted in the Constitution. School districts are bodies of limited power, and cannot act unless authorized to do so by an enabling statute. Municipalities, on the other hand, exercise different types of authority depending upon whether they are home-rule. Non-home-rule municipalities are similar to school districts, in that they exercise limited power and must rely upon statutory grants of authority. Home-rule municipalities, on the other hand, are empowered by the Constitution to "exercise any power and perform any function pertaining to [their] government and affairs," unless the General Assembly has specifically limited home-rule authority in a particular field. The interplay between school districts and municipalities thus might depend upon whether the municipality is home-rule, though there are not (yet) any published decisions in which the distinction has proven to be dispositive.

We have been litigating these issues in an attempt to answer the age-old question of whether school districts are subject to local municipal zoning. The Appellate Court (Second District) has ruled against us, but we are hoping that the Supreme Court will grant us leave to appeal.

Existing Law

The leading case analyzing the interplay between school and municipal authority is *City of Peoria*.[1] Peoria, a home-rule municipality, wanted the local school district and park district to collect its municipal restaurant tax at events where concessions were sold. The taxing ordinance required restaurants to collect the tax, keep records, and remit the tax to the City.

The Supreme Court analyzed the issues separately for the school district and park district, and reached different results. As to the school district, the Supreme Court stressed that the Constitution vests the General Assembly with "plenary power" over public education. Peoria's tax ordinance placed a "burden" upon the school district, and required the School District to perform functions (recordkeeping, primarily), that had not been authorized by the General Assembly. The Supreme Court found that this was an unconstitutional intrusion by the City upon the public education system, and that Peoria did not have authority to impose its tax ordinance upon the school district.

On the other hand, the Supreme Court found that the State does not exercise exclusive dominion over parks. In fact, municipalities are authorized to establish and maintain public parks themselves. The Court thus found that Peoria did have authority to impose its tax ordinance upon the park district.

Another decision from the Supreme Court is the leading case concerning the application of municipal zoning to other public bodies. *Wilmette Park District*[2] concerned a dispute over improvements at a park district site. The Supreme Court found that the local zoning process was the best forum within which to balance the competing interests of the village and the park district, and thus held that the park district was subject to zoning. The Court specifically pointed

[1] *Board of Education v. City of Peoria*, 76 Ill.2d 469 (1979).
[2] *Wilmette Park District v. Village of Wilmette*, 112 Ill.2d 6 (1986).

out that the park district had a right to seek judicial relief if the village's zoning restrictions were to frustrate the park district's statutory purpose.

In addition to *City of Peoria* and *Wilmette Park District*, a handful of cases from the Appellate Court have gone both ways:

- *Bremen* – School district is subject to Cook County Human Rights Ordinance.[3]
- *Lake County* – School district is not subject to county building code.[4]
- *West Chicago* – School district is not subject to local building code.[5]
- *Decatur* – School kitchen is subject to local health code.[6]
- *McHenry* - School busses required to have vehicle stickers.[7]
- *UIC* – State university not subject to municipal parking, amusement taxes.[8]

As to regulation of school buildings in particular, several statutory provisions also come into play. The Health/Life Safety Code applies to school construction, and is administered by the local Regional Superintendent. The School Code also provides a specific process for local municipalities to "register" with the Regional Superintendent, which entitles those municipalities to receive notice of upcoming school construction projects and a right to review and comment upon the plans – provided, specifically, that the municipal review is limited to compliance with the Health/Life Safety Code. *School Code*, § 3-14.20. The School Code provides a similar process for municipalities to inspect new school construction "under the jurisdiction of a regional superintendent." *School Code*, §§ 3-14.21(d), 2-3.137(b).

[3] *Bremen District 228 v. Cook County Commission on Human Rights*, 2012 IL App (1st) 112177.
[4] *County of Lake v. Lake Bluff District 65*, 325 Ill.App.3d 694 (2nd Dist. 2001).
[5] *DuPage District 33 v. City of West Chicago*, 55 Ill.App.2d (2nd Dist. 1965).
[6] *County of Macon v. Decatur District 61*, 165 Ill.App.3d 1 (4th Dist. 1987).
[7] *McHenry District 15 v. City of McHenry*, 71 Ill.App.3d 904 (2nd Dist. 1979).
[8] *City of Chicago v. Board of Trustees*, 293 Ill.App.3d 897 (1997).

The only provision in the School Code concerning zoning is Section 10-22.13a, which provides as follows:

> To seek zoning changes, variations, or special uses for property held or controlled by the school district.

This provision is characterized as a "power," not as a "duty," in Section 10-20, and it appears to have been enacted in response to a decision of the Circuit Court of Cook County[9]. A school district wanted to sell an old school building, and successfully re-zoned the property to make it more attractive on the market. Community members who opposed selling the school sued the school district, claiming that the board lacked the legal authority to seek re-zoning for the campus. The Circuit Court initially agreed, but this legislative fix quickly followed.

On the municipal side, the contours of home-rule authority have been addressed in two recent Supreme Court decisions. In *StubHub*,[10] the City of Chicago tried to impose its amusement tax upon ticket sales over the internet; the Supreme Court found that regulation of e-commerce fell outside the "government and affairs" of the City, and found the tax unconstitutional. Conversely, *Palm*[11] concerned Chicago's condominium ordinance, which entitled condominium owners to review financial records; the ordinance conflicted with a State statute on the same subject, but the Supreme Court found that regulation of local condominiums was a proper exercise of home-rule authority, and had not been specifically preempted by the General Assembly. *StubHub* and *Palm* highlight the two most important factors in analyzing home-rule: whether a particular subject matter lies within the "government and affairs" of a local municipality; and, if it does, whether the General Assembly has specifically preempted the exercise of home rule authority in that field.

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[9] *Neighborhood School Group v. River Forest*, No. 97 CH 2487 (April 18, 1997).
[10] *City of Chicago v. StubHub, Inc.*, 2011 IL 111127.
[11] *Palm v. 2800 Lake Shore Drive Condominium Association*, 2013 IL 110505.

A separate line of cases is not unique to schools but may apply to larger school districts. In *Des Plaines*,[12] the Supreme Court held that home-rule authority did not authorize the City of Des Plaines to zone out a sanitary treatment facility that was intended to serve a large, regional sanitary district. Similarly, Evanston could not zone out an RTA bus barn;[13] Joliet could not zone out a state detention facility;[14] and the Village of Swansea could not zone out a county dog pound.[15] The general rule from these cases is that a local municipality cannot zone out facilities needed by a larger, regional agency; even for a home-rule municipality, those regional concerns fall outside the "government and affairs" of the local municipality.

Finally, the Attorney General issued an opinion in 2011 at the request of the State Superintendent of Education. The Attorney General analyzed *Wilmette Park District* and the zoning provision found in Section 10-22.13a, but did not address *City of Peoria* or its constitutional implications. The Attorney General concluded that school districts are, in fact, subject to local zoning.[16]

The Crystal Lake Case

After a set of old wooden bleachers were condemned, the School District replaced them with new, larger, metal bleachers. The District also flipped the home and visitor sides of the stadium to improve fire safety, foot traffic, and general crowd control inside the stadium. As a result, the west-side bleachers – which back up against residential property – increased nearly three times in size.

[12] *Metropolitan Sanitary District of Greater Chicago v. City of Des Plaines*, 63 Ill.2d 256 (1976).
[13] *City of Evanston v. Regional Transportation Authority*, 202 Ill.App.3d 265 (1st Dist. 1990).
[14] *City of Joliet v. Snyder*, 317 Ill.App.3d 940 (3rd Dist. 2000).
[15] *Village of Swansea v. St. Clair County*, 45 Ill.App.3d 184 (5th Dist. 1977).
[16] 2011 Ill. Atty. Gen. Op. 11-005.

The neighbors noticed. They sued the school district under Section 11-13-15 of the *Municipal Code*, which creates a cause of action in favor of adjacent property owners to enforce zoning regulations against nearby offenders.

On behalf of the School District, we filed a third-party declaratory judgment action, seeking a declaration that the bleachers were not subject to local zoning, because they are used for school purposes. (The bleachers were fully permitted by the Regional Superintendent under the Health/Life Safety Code.)

Our theory followed the two lines of cases set forth above. We argued that property used for school purposes is part of the statewide educational scheme implemented by the General Assembly under Article X of the Constitution, and this is not subject to local municipal regulation under *City of Peoria*. We also argued that the School District serves a large region, including all or part of a dozen different communities, reaching even into part of Lake County. Even the particular High School here (Crystal Lake South) serves students from about seven different communities. Both theories fit well into a home-rule analysis; whether viewed from a regional or state-wide basis, we argued that the operation of public schools, and the development of property for public school purposes, is not a matter of local government and affairs.

The Circuit Court disagreed, and the Second District affirmed[17]. The rulings focus upon the nature of zoning authority in general, and simply reject our various arguments that applying zoning to public schools exceeds the scope of home-rule power and infringes upon the statewide scheme enacted by the General Assembly. There is little or no discussion in either decision about the role and authority of the Regional Superintendent.

[17] *Gurba v. Community High School Dist. No. 155*, 2014 IL App(2d) 140098.

What Now?

Both the School District and the Regional Superintendent have filed petitions for leave to appeal the decision of the Second District to the Supreme Court. Those PLA's are currently pending. The Illinois Supreme Court may grant the petition for leave to appeal and may reverse the Appellate Court. But in the meantime, school districts will need to design their construction projects to comply, if possible, with the applicable zoning ordinance. Here are some issues that are likely to arise.

A. When Does Gurba Apply?

The City of Crystal Lake is a home rule municipality. Of the approximately 1,300 municipalities in Illinois, less than 200 of them are home rule. Much of the analysis in *Gurba* is an analysis of home rule power. There is nothing in the opinion that expressly limits the holding to home rule municipalities, though, so the prudent approach is to assume that it applies in situations involving any municipality.

Municipalities exercise zoning authority within their borders and within unincorporated areas outside of their borders that are within 1 ½ miles of their borders if the county has not adopted a zoning ordinance. They do not exercise zoning authority in unincorporated areas that are more than 1 ½ miles from their borders. In those unincorporated areas where the county has a zoning ordinance, the question arises as to whether the county has authority to enforce its zoning ordinance pursuant to *Gurba*. The Appellate Court did not address this issue. Once again, the prudent approach is to assume that the county does have such authority.

B. What Does the Zoning Ordinance Require?

Most, if not all, municipalities have adopted a zoning ordinance. Although they tend to have similarities, they are each unique to that municipality. Many, but not all, municipalities allow public elementary and high schools only in residential districts. Some municipalities allow schools in commercial districts instead of, or in addition to, residential districts. Some municipalities have created a special district for "public buildings," which allows the municipality to tailor the standards to a larger building that is located on a relatively large piece of land and will be occupied by a relatively large number of people.

Some municipalities allow schools as "permitted uses" in the residential (or commercial or public building) districts, which means that if all other regulations are met (height, size, setback, etc.) the district will not need to go through any zoning hearing prior to approval of a construction project. However, many municipalities allow schools only as "special uses," which means that even if the quantitative standards are met (height, size, setback, etc.), the school district will need to apply for a "special use permit," go through a public hearing, and satisfy certain standards that have been established to decide whether a proposed special use will be allowed. *See* 65 ILCS 5/11-13-1.1. The City of Crystal Lake allows schools as a special use in residential, manufacturing, and farming districts.

The zoning standards in residential districts are often inappropriate for school facilities. That is because the standards for a residential district are designed for neighborhoods with single-family homes, and schools are, quite obviously, very different. The Crystal Lake South High School is in the R-2 Single-Family Residential District. The bleachers that were built were originally analyzed by the City as an "accessory structure." Zoning theory typically analyzes a lot as having one "principal use" and (maybe) one or more "accessory uses." This leads to

characterizing buildings and other structures as “principal structures” and “accessory structures.” The best example is a home (the principal structure) with a garage (an accessory structure). So the bleachers are “accessory” to the school building.

The maximum height for an accessory structure in the R-2 District in Crystal Lake is 15 feet. The maximum size is 600 square feet. Why? Think 2-car garage. Most bleachers for a high school football field will exceed these standards. When a proposed structure exceeds a standard in a zoning ordinance, the owner can (1) modify the project to conform to the standard or (2) apply for a “zoning variation” (also sometimes referred to as a “zoning variance”) that will allow the owner to build a structure that exceeds the standard. *See* 65 ILCS 5/11-13-4 and 11-13-5. By granting a variation, the City would be making an exception for a particular structure. To obtain such a variation, the owner would need to demonstrate that forcing the owner to adhere to the standard would result in a “practical difficulty” or “particular hardship” due to the “unique circumstances” of the property. This concept is usually employed when the lot is unusually narrow or has an unusual shape that prevents the owner from meeting the requirement that most other owners of property in that district are able to meet.

C. How Will This Affect a School District’s Timetable?

School districts will need to design future projects to comply, if possible, with zoning requirements. However, it seems reasonable to expect that a school district planning to build a new school building, or an addition to an existing building, or an athletic stadium or bleachers, will sometimes find that it needs to apply to the local municipality for some form of zoning relief. The school district might need to obtain a special use permit, or variations, or other zoning relief. Applications for zoning relief are typically referred to a zoning board of appeals,

which holds a public hearing on the application at which it hears testimony from the owner and its experts and from any neighboring property owners and other members of the community who choose to attend, evaluates whether the criteria for the relief sought has been met, and then makes a recommendation to the city council or village board. (In some municipalities, the zoning board of appeals may be given authority to make the final decision.) It usually takes at least 3 months for an owner to get a final decision on an application for special use permit or variation, and can take significantly longer if the project is complicated or controversial.

The requirement to go through the municipal zoning process is, of course, in addition to the requirement in the School Code to obtain a building permit from the Regional Superintendent of Schools. Whereas most property owners will look to the municipality for both zoning approval and a building permit, the school district will need to deal with two separate agencies. This will require coordination by the school district and may increase the lead time required for a project.

D. What Recourse Does a School District Have If It Is Unhappy With the Result?

A school board that is unhappy with a decision denying zoning relief is entitled to file a lawsuit challenging the decision. There is a well-developed body of case law dealing with zoning disputes. When discussing a municipality's enforcement of its zoning ordinance with regard to units of local government, the *Wilmette Park District* case is worthy of special note. As previously mentioned, the Illinois Supreme Court held that a municipality could enforce its zoning ordinance with regard to property owned and operated by park districts. In doing so, however, the Court explained:

> Intergovernmental cooperation is, of course, a two-way street. We are mindful that only so long as the village zoning ordinance is established and administered reasonably, and

> legal recourse is available if this is not the case, will the parties be well served by their participation in a special use hearing. Should the village administer its zoning ordinance in an unreasonable, arbitrary, or discriminatory manner in denying the park district a special use permit or otherwise abuse its zoning power to thwart or frustrate the park district's statutory duties, its actions will be subject to further judicial review.

112 Ill. 2d at 18-19. In addition to the longstanding standards of rationality and reasonableness, the Court introduced a new standard of judicial review: whether a zoning decision would "thwart or frustrate the park district's statutory duties." In *Gurba*, the Illinois Appellate Court did not cite *Wilmette Park District*. Therefore, an issue arises as to whether this standard articulated in *Wilmette Park District* applies in situations involving school districts.

A Legislative Fix?

A bill was introduced in the General Assembly this last Spring, before the Second District ruled, that would have amended Section 10-22.13a to explicitly provide that school districts must comply with local zoning. The bill was introduced by the State Senator representing Crystal Lake, and supported by the Illinois Municipal League; the School Alliance opposed the bill.

There were negotiations on a compromise bill that would have required schools to comply with only certain zoning restritions – height, size, and setback, for example. A draft amendment was circulated, but never filed, and negotiations stalled.

We have a particular concern that trying to change the result in *Gurba* legislatively could result in unintended consequences. There is not a single provision in the School Code that currently preempts home-rule authority on any matter involving public schools. Any legislative fix that preempts home-rule authority on a piecemeal basis could easily have unintended consequences for the rest of the School Code: that is, if the General Assembly were to preempt

home rule authority over school construction, what about everything else as to which home rule authority has not been preempted? Expressly preempting home rule authority over some aspects of public education would almost certainly suggest that other, non-preempted aspects were subject to local municipal control. If a legislative fix were to be an option, it would have to be handled carefully to avoid unintended consequences.

Conclusion

Unless and until there is any relief from the *Gurba* decision, schools will need to review and comply with local zoning requirements. Schools already balance financial and political considerations in making facility decisions; now those decisions will run the additional gauntlet of a zoning hearing, at which the harshest critics in the public will have an opportunity to testify, and the fate of the projects will lie with the municipality. This might go smoothly for popular projects; but anything controversial (athletic fields? outdoor lighting? bus barns? vocational centers?) will now face a new forum, with a new opportunity for opponents to mobilize and block school improvements. This could have significant impacts upon project timelines and budgets, and impact the operation of schools, the types of facilities available, and even the structure of educational programs in our schools.