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AVOIDABLE DUE PROCESS CONFUSION:
SPECIAL USE HEARINGS IN ILLINOIS
AFTER KLAEREN

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I. INTRODUCTION

Since its publication on October 18, 2002, the Illinois Supreme Court’s decision in People ex rel. Klaeren v. Village of Lisle has been misread by nearly every court to consider it and, as a result, unnecessarily has placed in doubt the due process rights that Illinois municipalities must guarantee their citizens. Klaeren addressed a gap in the Illinois Municipal Code that provides for cross-examination at public hearings on special use permits conducted by subordinate zoning bodies of large, but not small, municipalities. Closing this statutory gap, the Illinois Supreme Court ruled that, as a matter of procedural due process, all municipalities are required to provide cross-examination opportunities at such hearings. Although the issue in the case was limited to the procedural due process required at special use public hearings conducted by subordinate zoning bodies, the court discussed in dicta the substantive due process standard of review applicable to final decisions made by municipal legislative bodies. In so doing, the court planted the seeds of confusion that now threaten to eclipse the decisional rule of Klaeren.

Part II of this Article describes the statutory requirements applicable to special use hearing conducted by municipal subordinate zoning bodies that were at the heart of Klaeren. The Municipal Code, by its terms, guarantees the right to cross-examination at subordinate body special use public hearings conducted only by municipalities with populations of 500,000 or more, but not by smaller municipalities.

Part III explains that this procedural statutory gap was the sole issue considered and decided by the Klaeren trial court,

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1. 781 N.E.2d 223 (Ill. 2002) [hereinafter Klaeren III].
appellate court, and, finally, the Illinois Supreme Court. Klaeren concerned a public hearing conducted on a special use application to develop property in the Village of Lisle, a municipality having a population less than 500,000. The hearing was conducted jointly by the village's legislative body and its two subordinate zoning bodies, and the governing procedures did not permit the cross-examination of witnesses. Hearing participants subsequently brought suit against the Village of Lisle on grounds that the denial of cross-examination at the hearing violated their procedural due process rights.

The trial court, appellate court, and the Illinois Supreme Court each held that it was error for the municipality to prohibit cross-examination at the joint public hearing as a matter of procedural due process. Part III also explains that the Illinois Supreme Court also went on to confuse this procedural due process issue with the altogether different issue of the substantive due process standard of review applicable to final special use decisions made by municipal legislative bodies. Because no question of substantive due process was raised in Klaeren, however, the opinion's misguided discussion of substantive due process is not authoritative precedent.

Nevertheless, as described in Parts IV and V, almost every Illinois court to consider Klaeren wrongly has cited Klaeren's dicta discussion of substantive due process for the proposition that final decisions made by municipal legislative bodies are subject to an administrative standard of substantive review. Part VI explains that this widespread misreading of Klaeren has troubling consequences for Illinois municipalities and their citizens. First, the confusion of distinct due process doctrines violates basic principles of stare decisis and, consequently, undermines the integrity and reliability of the judicial system. Second, the misidentification of the applicable standard of substantive review compels municipalities to make extensive, expensive, yet unnecessary changes to basic zoning procedures. It is therefore important to clarify the decisional rule of Klaeren that, as a matter of procedural due process, all subordinate body special use hearings must include some opportunity for cross-examination, and nothing more.

II. SUBORDINATE BODY SPECIAL USE HEARINGS REQUIRED BY THE ILLINOIS MUNICIPAL CODE

The Illinois Municipal Code defines "special uses" of property

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Special Use Hearings in Illinois After Klaeren

as "public and quasi-public uses affected with the public interest, uses which may have a unique, special or unusual impact upon the use or enjoyment of neighboring property, and planned developments." The special use of property is distinguished from those uses that are permitted by the local zoning ordinance governing the property. If a proposed use is not permitted by the governing ordinance, the property owner may seek an exemption from the strict application of the ordinance in the form of a special use permit.

Division 13 of the Municipal Code authorizes the legislative body, or "corporate authority," of each Illinois municipality to "provide for the classification of special uses." The corporate authority may retain for itself the authority to make the final decision on a special use application or it may delegate that authority to the municipality's subordinate zoning body, the "zoning board of appeals." Whether made by the corporate authority or the subordinate zoning board of appeals, every final decision on a special use application must be preceded by "a public hearing before some commission or committee designated by the corporate authorities"—the Zoning Board of Appeals.

The statutory requirements that govern the subordinate body special use public hearing depend on whether the subject property is located in a "large" municipality having a population of 500,000 or more or in a "small" municipality having a population less than 500,000. At hearings conducted by large municipalities, the Municipal Code guarantees participants four rights, including the right to "cross examine all witnesses testifying" at such hearings.

4. Id.
5. See id. (stating procedures applicable to the situation wherein the corporate authority reserves for itself the authority to make the final decision); id. 5/11-13-7 (setting forth the standard of review applicable to the situation wherein the Zoning Board of Appeals is authorized to make the final decision); id. 5/11-13-11 (referring to "[e]very . . . special use, whether made by the board of appeals directly, or by an ordinance after a hearing before the board of appeals"); id. 5/11-13-13 (stating the standard of review applicable to "final administrative decisions" made by zoning boards of appeals pursuant to division 13 of the Municipal Code). The Municipal Code establishes requirements specific to zoning boards of appeals, including procedures regarding selecting and compensating members, filling vacancies, determining quorums, keeping records of proceedings, and voting. Id. 5/11-13-3.
6. Id. 5/11-13-1.1. The Municipal Code elsewhere refers to the municipal body designated to conduct the section 11-13-1.1 public hearing as a zoning board of appeals. See id. 5/11-13-7 (referring to the "hearing at which the application for . . . special use is to be considered" that is conducted by the "board of appeals").
7. Id. 5/11-13-7a(b). The Municipal Code also provides for the right to have subpoenas issued compelling the appearance of persons at the public hearing and/or compelling the examination of documents either before or at the hearing, the right to present witnesses, and, for objectors, the right to one
The Municipal Code does not specifically guarantee participants any right at hearings conducted by small municipalities.  

On October 18, 2002, the Illinois Supreme Court closed the procedural gap in the Municipal Code that provides for cross-examination at public hearings on special use permits conducted by subordinate zoning bodies of large, but not small, municipalities. Specifically, in *Klaeren*, the court held that procedural due process guarantees the right to cross-examine witnesses at all subordinate body special use public hearings, regardless of the size of the municipality conducting them.

III. THE KLAEREN OPINIONS

A. The Trial Court Opinion

At issue in *Klaeren* was 60.5 acres of land owned by Saint Procopious Abbey (the “Abbey Parcel”). Meijer, Inc., a retailer with stores across the Midwest, contracted to purchase the Abbey Parcel. Meijer subsequently filed with the Village of Lisle a petition to annex the Abbey Parcel to the village and a special use, planned unit development and rezoning application to allow Meijer to develop the property for commercial use.
On July 9, 1998, the village conducted a public hearing on Meijer's petition and application. Initially, each of the village's three municipal zoning bodies—the Board of Trustees, the Zoning Board of Appeals, and the Plan Commission—convened separate hearings at Village Hall. Because the village expected a large crowd, however, each body independently moved to recess its hearing and to reconvene in a joint hearing at a local junior high school auditorium. The 500-seat auditorium was filled beyond capacity.

At the outset of the joint public hearing, the village mayor, who presided over the hearing, announced the governing procedures:

This is a public hearing. It is not a debate. There will be no attempt at tonight's hearing to answer any question raised by the audience.

To the extent possible the speaker will address questions and concerned [sic] raised by the combined boards this evening.

The petitioner will be first subject to any questions by the assembled boards. We will attempt to deal with each individual aspect of the presentation as it's made. People in the audience speaking in favor of the proposal will then be heard. People in the audience speaking in opposition of the proposal will then be heard. The petitioner will then be allowed to make closing comments. After closing comments by the petitioner, the public hearing will be adjourned.

To be fair to everyone in the audience, I ask that you limit your comments to two minutes each. I will be the time keeper and will let you know when 15 seconds remain.

No one will be allowed to speak a second time until everyone has an opportunity to speak once. That requirement will also be applicable to members of the assembled boards.

After the mayor laid down these ground rules, representatives of Meijer gave a presentation in support of Meijer's application that lasted two hours and twenty minutes. No limits were placed on the length of the presentation or on the number of questions that members of the presiding bodies were allowed to ask the Meijer representatives.

Afterwards, those in attendance were allowed to comment.
Forty-seven persons spoke during this session, which lasted approximately seventy minutes. Eight speakers were warned when their two minutes were almost up, and five speakers were cut off when they exceeded the time limit. When one speaker representing a group that had collected over 2,000 signatures on a petition opposing the development requested permission for nine representatives to make brief presentations on behalf of the group, the mayor responded that only one person would be allowed to speak on behalf of the organization and that the two-minute time limit would be enforced. The mayor explained:

Rather than try and debate with you the procedure we are going to try and follow, I tried to explain at the beginning of the meeting. My instructions would give everyone who wants to speak or had a written comment an opportunity to be heard. I think that is fair.

No matter what we do it is going to be characterized as being unfair. That being the case, we are going to proceed with the suggestion I made.

Finally, those in the audience were not allowed to question the persons who spoke on behalf of Meijer. As the mayor himself later acknowledged, “cross-examination as we would know it in this room was not part of the process.”

Following the joint public hearing, the Zoning Board of Appeals and Plan Commission each considered the evidence presented at the hearing and recommended to the Board of Trustees that it deny Meijer’s zoning requests. On February 11, 1999, property owners residing within 250 feet of the parcel at issue filed a complaint against the Village of Lisle, seeking, inter alia, an injunction to prevent the Board of Trustees from approving Meijer’s applications. The trial court held that plaintiffs failed to name a necessary party and denied the injunction. On February 15, 1999, the Board of Trustees adopted ordinances and approved resolutions annexing, rezoning, and granting a special use permit for the Abbey Parcel. The plaintiffs then amended their complaint to add Meijer and the Saint Procopious Abbey as defendants and, on September 14, 1999, the trial court entered a temporary restraining order.

19. See Klaeren I, No. 99 CH 179, slip op. at 2.
21. See Klaeren II, 737 N.E.2d at 1105.
22. Klaeren III, 781 N.E.2d at 226
23. See id.
24. Id. at 229.
25. Id.
26. Id. at 226-27.
27. Id. at 227.
28. Id.
prohibiting Meijer from proceeding with site preparation.\textsuperscript{29} Judge Bonnie Wheaton of the Circuit Court in Wheaton, DuPage County held a six-day hearing on the plaintiffs' request for a preliminary injunction and, on October 18, 1999, issued a twelve-page memorandum opinion and order enjoining Meijer from developing the Abbey Parcel.\textsuperscript{30} Defining the "primary issue" as "the adequacy of the public hearing,"\textsuperscript{31} the court held that the village could not "totally deny" the plaintiffs "the right to question witnesses for the petitioners" at the joint public hearing.\textsuperscript{32} As authority for its decision, the court cited both the constitutional right to procedural due process and the statutory requirement for a "public hearing," which necessarily means "the right to... examine the witnesses whose testimony is presented by opposing parties."\textsuperscript{33} Because the plaintiffs were likely to succeed on the merits of their claim that they were improperly denied cross-examination opportunities at the joint public hearing, the court voided the ordinances at issue and ordered that no further action be taken on the Abbey Parcel "until further order of Court or until a proper public hearing is held pursuant to the statutes of the State of Illinois and its own ordinances."\textsuperscript{34}

\textbf{B. The Appellate Court Opinion}

The defendants subsequently brought an interlocutory appeal of the trial court's preliminary injunction order, and, on October 13, 2000, a divided panel of the Illinois Appellate Court, Second District, affirmed.\textsuperscript{35} Writing for a two-person majority, Justice Hutchinson limited the opinion to two issues raised by the defendants: (1) whether "plaintiffs are unlikely to succeed on the merits of their claim because due process does not require cross-examination in a zoning hearing"; and (2) whether "plaintiffs are unlikely to succeed on the merits of their claim because Illinois statutory law does not create a right to cross-examination."\textsuperscript{36} The court ultimately ruled that it was unnecessary to resolve the first question because, in answer to the second question, the right to cross-examination is guaranteed by the Municipal Code. The court first observed that the Municipal Code requires every municipality to conduct a "public hearing" before making a final decision on a special use application. Citing \textit{E&E Hauling, Inc. v.}
County of DuPage, the court then held that the term "public hearing" as it is used in the Municipal Code is, by definition, a hearing involving cross-examination: "The word 'hearing' in the zoning provisions of the Municipal Code has the meaning adopted by this court in E&E Hauling and includes the right of cross-examination." Accordingly, every subordinate body special use "public hearing" required by section 11-13-1.1 must provide some opportunity for cross-examination, regardless of the size of the municipality conducting that hearing. Because the joint zoning hearing on the special use application in Klaeren was a section 11-13-1.1 "public hearing," the village's complete denial of cross-examination opportunities at that hearing violated the plaintiffs' statutory rights.

In so doing, the court rejected as "absurd" the defendants' argument that, by explicitly recognizing the right to cross-examination at special use public hearings conducted by large municipalities, section 11-13-7a excluded the right to cross-examination at special use public hearings conducted by small municipalities. The court explained that the Municipal Code does not intend to provide fewer procedural safeguards to small municipalities than to large municipalities. Rather, the statutory distinction in procedures is intended only to give smaller municipalities greater flexibility in fashioning procedural rules: "[T]he list of rights granted adjoining owners in larger municipalities demonstrates legislative recognition of the full panoply of rights envisioned in a public hearing in all municipalities."

Although the court affirmed the trial court's decision on statutory grounds, it did not ignore the procedural due process issues raised by the plaintiffs. Indeed, the court devoted several pages to the constitutional principles that govern the right to cross-examine witnesses at public hearings.

38. Klaeren II, 737 N.E.2d at 1110.
39. Id. at 1108-10.
40. Id. at 1112.
41. Id. at 1109-10.
42. Id. at 1110.
43. Id.
44. Id.
45. See id. at 1106-08.
First, the court distinguished the doctrine of substantive due process from the doctrine of procedural due process. The court explained: "While procedural due process governs the methods by which the state may deprive an individual of a protected interest, substantive due process imposes absolute limits on the state's ability to act without regard to any of the procedural protections provided." The court then noted that plaintiffs did not challenge "the wisdom of the Village's action," but rather only challenged "the procedure used by the Village board when it approved the development." Thus, the court's opinion necessarily was "addressed solely to the process by which the board reached its decision, not the decision itself."

Turning to the procedural due process issues presented in Klaeren, the court considered the defendants' argument that there is no procedural due process right to cross-examination at a zoning hearing. Noting the parties' detailed analyses of conflicting case law in foreign jurisdictions, the court observed that "this is an area of the law around which no clear consensus has developed" and so declined to consider the issue further.

Next, the court considered the defendants' contention that no procedural protections were required because the Board of Trustees had acted in a legislative capacity for substantive due process purposes. The court promptly dismissed this argument on grounds that "simply classifying a process as legislative" for substantive due process purposes "does not insulate the underlying procedures from review." Rather, the established body of law holds that greater procedural protections may be required when legislative action affects a small class of persons. In such circumstances, additional procedural protections may be necessary to deter "the extension of special privileges to those well-connected politically." Because such additional protections were provided by the Municipal Code, however, the court found it unnecessary to continue with its constitutional analysis.

C. The Illinois Supreme Court Opinion

On October 18, 2002, the Illinois Supreme Court affirmed the
The court determined that a right to cross-examination exists at subordinate body special use public hearings in small municipalities because it is required by procedural due process, not because it is guaranteed by the Municipal Code. Although based on constitutional principles rather than statutory interpretation, the Illinois Supreme Court’s opinion had the same effect of closing the statutory gap created by section 11-13-7a and requiring opportunities for cross-examination at subordinate body special use public hearings conducted by all municipalities, regardless of size.

Like the lower courts that considered the case, the Illinois Supreme Court expressly limited the issue to whether the plaintiffs were entitled to cross-examine witnesses at the July 1998 special use joint public hearing. Thus, the court identified the “primary issue presented by this appeal [to be] whether a landowner whose property abuts a parcel subject to a proposed annexation, special use and rezoning petition can be wholly denied the right to cross-examine witnesses at a public hearing regarding the petition.” Later, the court emphasized the limited scope of its review: “On appeal, we examine only whether the party seeking the injunction has demonstrated a prima facie case that there is a fair question concerning the existence of the claimed rights.”

Explaining that the fourth element of the prima facie case—whether the plaintiffs were likely to succeed on the merits—was the “thrust” of the parties’ arguments, the court defined success on the merits in terms of the right to cross-examination:

Success on the merits in this case would be a declaration of the trial court that any of the village ordinances annexing, rezoning, and granting a special use for the subject parcel are void due to the alleged procedural flaws of the joint public hearing. Defendants maintain that there is no likelihood of success on the merits because no right to cross-examination exists; plaintiffs and the court below disagreed.

“Having distilled the arguments to focus on this particular issue” of whether the plaintiffs were entitled to cross-examine witnesses at the public hearing conducted by the village, the court assured that it would “similarly tailor [its] discussion” to that issue.

The Illinois Supreme Court opened its discussion by rejecting the statutory construction argument that was the basis of the

58. See id. at 231-35.
59. Id. at 224-25.
60. Id. at 230.
61. Id. at 231.
62. Id.
Second District's opinion. The court held that the Municipal Code does not implicitly guarantee the "full panoply of due process rights" at every public hearing conducted by a municipality because providing the "full panoply of due process rights" is not always appropriate. Rather, a reviewing court's determination of the procedural protections required at a public hearing must be guided by the purpose of the hearing. Citing U.S. Supreme Court precedent, the court observed that the purpose of a public hearing can be described as falling somewhere along a legislative-administrative spectrum. At one end of the spectrum are "legislative" hearings that are directed at and result in the formulation of general rules. At the other end of the spectrum are "administrative" or "quasi-judicial" hearings that determine the rights of one or only a few individuals. The Illinois Supreme Court observed that, in general, the closer a public hearing is to the legislative end of the spectrum, the fewer procedural protections are required:

[W]hen governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with different types of proceedings. Whether the Constitution requires that a particular right obtain in specific proceedings depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.

63. Id. at 232-33.
64. See id. at 234-35.
65. See id. (citing Hannah v. Larche, 336 U.S. 420, 442 (1960)).
66. Id. See also Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) (ruling that a county regulation increasing the valuation of all taxable property by forty percent was "legislative" in that it affected all county residents without exception).
67. See Klaeren III, 781 N.E.2d at 234. See also Londoner v. Denver, 210 U.S. 373, 385 (1908) (holding that an ordinance identifying the amount of a tax and the persons required to pay it was "administrative" because a relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds).
68. Klaeren III, 781 N.E.2d at 234 (quoting Hannah, 336 U.S. at 442). Although labeling municipal conduct as legislative or administrative can be helpful in determining the requisite procedural safeguards, courts repeatedly remind us that it is "the character of the action, rather than its label," that
Guided by these principles, the Klaeren court examined the purpose of subordinate body special use public hearings: "In these hearings, the property rights of the interested parties are at issue. 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."\(^6\) Because subordinate body special use public hearings typically resolve the rights of only a few individuals, the court reasoned, they are closer to the "administrative" end of the legislative-administrative spectrum. Accordingly, participants at subordinate body special use public hearings "must be afforded the due process rights normally granted to individuals whose property rights are at stake."\(^7\) Such rights at least include the right to cross-examine witnesses:

A landowner whose parcel adjoins a tract of land subject to a special use application cannot be entirely denied the right to cross-examine adverse witnesses at a public hearing regarding the special use application. The complete denial of such a right to interested landowners runs afoul of due process.\(^7\)

The court concluded that, by "entirely den[y]ing the right to cross-examine adverse witnesses" at the July 1998 joint public hearing, the Village of Lisle violated the plaintiffs' procedural due process rights.\(^7\)

Notwithstanding the court's limitation of the issue to be decided as one of procedural due process and the court's complete resolution of that issue, the Klaeren court proceeded to discuss City of Chicago Heights v. Living Word Outreach Full Gospel Church & Ministries, Inc.,\(^7\) which concerned the substantive due process standard of review to apply to a corporate authority's final decision on a special use application.\(^7\)

determines issues of procedural due process. See Harris v. County of Riverside, 904 F.2d 497, 501-02 (9th Cir. 1990). For example, in Harris, the Ninth Circuit determined that a county authority's general amendment to the local zoning plan affecting 600,000 acres of property was subject to procedural due process protections irrespective of the general application of the amendment. 904 F.2d at 499, 501-02. The court recognized that "[t]he County's consideration of the vast area contemplated by the General Plan Amendment certainly affected a large number of people and would not ordinarily give rise to constitutional procedural due process requirements." Id. at 502. However, because the county "specifically targeted [one individual's] property for a zoning change after notice had been published for the General Plan Amendment," the court concluded that the individual was entitled to notice of the change as a matter of procedural due process. Id.

70. Id.
71. Id. at 237.
72. Id.
73. 749 N.E.2d 916 (Ill. 2001).
74. See id. at 924-32.
According to over forty years of Illinois precedent, the substantive due process standard of review applicable to a final decision on a special use application depends on whether the decision was made by the municipality's legislative body or the subordinate zoning board of appeals. If the corporate authority reserves for itself the authority to make the final decision, the decision must be made by ordinance,\textsuperscript{75} which is subject to a legislative standard of substantive review.\textsuperscript{76} If, on the other hand, the corporate authority reserves for the subordinate zoning board of appeals the authority to make the final decision, the decision is subject to an administrative standard of substantive review pursuant to the Administrative Review Law.\textsuperscript{77}

The \textit{Living Word} court observed that this substantive due process framework applicable to special use decisions is inconsistent with the "clear weight of authority" in the United States that all final special use decisions are subject to an administrative standard of substantive review.\textsuperscript{78} Thus, the court questioned the continued validity of Illinois' substantive due process framework.\textsuperscript{79} Because the issue was not briefed or argued by the parties, however, the \textit{Living Word} court declined to resolve it.\textsuperscript{80}

In \textit{Klaeren}, the Illinois Supreme Court confused the substantive due process question in \textit{Living Word} with the procedural due process question before it.\textsuperscript{81} Specifically, the \textit{Klaeren} court stated that the substantive due process question left open in \textit{Living Word} was "freshly and squarely" presented by \textit{Klaeren}, and the court purported to answer that question as follows:

\textsuperscript{75} See 65 ILL. COMP. STAT. 5/11-13-11 (distinguishing a special use decision made "by the board of appeals directly, from a decision made by an ordinance after a hearing before the board of appeals").

\textsuperscript{76} See La Grange State Bank v. County of Cook, 388 N.E.2d 388, 391 (Ill. 1979); La Salle Nat'l Bank of Chi. v. County of Cook, 145 N.E.2d 65, 68 (Ill. 1957); York v. Vill. of Wilmette, 498 N.E.2d 712, 715 (Ill. App. Ct. 1986). Indeed, the enactment of a zoning ordinance is fundamentally a legislative act. See Anthony v. City of Kewanee, 223 N.E.2d 738, 740 (Ill. App. Ct. 1967) ("Zoning ordinances are enacted under legislative authority to provide for the public health, safety and welfare.").

\textsuperscript{77} See also Hawthorne v. Vill. of Olympia Fields, 790 N.E.2d 832, 839 (Ill. 2003) ("Administrative review is applicable only where the legislative body transfers to some administrative agency the authority to administer the ordinance."). The Administrative Review Law provides a comprehensive framework for judicial review of "final administrative decisions" in Illinois. See 735 ILL. COMP. STAT. 5/3-110. The common law counterpart to the Administrative Review Law is the writ of certiorari. See Dubin v. Pers. Bd. of Chi., 539 N.E.2d 1243, 1246 (Ill. 1989).

\textsuperscript{78} See \textit{Living Word}, 749 N.E.2d at 925.

\textsuperscript{79} See id. at 924-26.

\textsuperscript{80} See id. at 926.

\textsuperscript{81} See Klaeren III, 781 N.E.2d at 233-34.
Municipal bodies act in administrative or quasi-judicial capacities when those bodies conduct zoning hearings concerning a special use petition. As we stated in Living Word, the "clear weight of authority" so holds. To the extent any prior decisions of this court hold the contrary to be true, we now expressly overrule those decisions.82

D. The Decisional Rule of Klaeren

The precedential authority of Klaeren is defined by established principles of stare decisis.83 According to that doctrine, the binding precedent of a case does not embrace the full written opinion in which the determination appears.84 "Rather, the authoritative precedent established by a judicial decision must be extracted from the text of the opinion (or opinions) accompanying and justifying that decision."85 The authoritative precedent established by a judicial decision is binding.86 Everything else in the opinion is dicta and is not binding.87

The process of extracting the authoritative precedent of a case from the full written opinion is guided by two key principles. First, a dispositional rule is limited to the facts on which it is based.88 Second, a judicial opinion is authority only for the issues actually raised by the parties, required for decision, and resolved by the court.89 "[N]othing can be stare decisis which was not in

82. Id. at 234 (citation omitted).
83. See Roscoe Pound, What of Stare Decisis?, 10 FORDHAM L. REV. 1, 5 (1941) ("Rightly understood, stare decisis is a feature of the common law technique of decision. . . . The common law technique is based on a conception of law as experience developed by reason and reason tested and developed by experience. It is a technique of finding the grounds of decision in recorded judicial experience, making for stability by requiring adherence to decisions of the same question in the past, allowing growth and change by the freedom of choice.").
85. Id. at 13.
86. Id. at 14.
87. See id. at 15 ("Thus, all articulations contained in a single-judge opinion can be classified as either dispositional rules, which enjoy precedential status, or dicta, which do not."). See also United States v. Crawley, 837 F.2d 291, 292 (7th Cir. 1988) ("What is at stake in distinguishing holding from dictum is that a dictum is not authoritative. It is the part of an opinion that a later court, even if it is an inferior court, is free to reject.").
88. See, e.g., Armour & Co. v. Wantock, 323 U.S. 126, 132-33 (1944) ("Remind[ing] counsel that words of our opinions are to be read in the light of the facts of the case under discussion."); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399 (1821) (noting that "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. . . . If they go beyond the case, they may be respected but ought not to control the judgment in a subsequent suit").
89. See Webster v. Fall, 266 U.S. 507, 511 (1925) ("Questions which merely
fact considered and determined.”

Applying these principles to *Klaeren*, the precise dispositional rule of *Klaeren* is that some opportunity for cross-examination is required at subordinate body special use public hearings conducted by small municipalities as a matter of procedural due process. All three courts to rule on that case identified the key fact as the lack of cross-examination opportunities provided at the joint public hearing conducted on Meijer’s special use application by the Village of Lisle, a small municipality. Further, all three *Klaeren* courts identified the issue raised by the parties and necessary for decision to be the propriety of the village’s complete denial of cross-examination at that hearing. Finally, all three courts actually resolved this issue of whether the Village of Lisle should have provided cross-examination opportunities at the joint public hearing despite the fact that the Municipal Code does not guarantee the right to cross-examination at subordinate body special use public hearings conducted by small municipalities.

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lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.”); Edlin v. Firemen’s Ins. Co., 225 F.2d 80, 82 (7th Cir. 1955) (“A judicial opinion must be read as applicable only to the facts involved and is authority for what is actually decided in the case.”). A corollary of this principle is that general expressions may not be used to decide questions not essential to the determination of the issues before the court. “That maxim [of stare decisis] contemplates “[n]ot whatever a court may happen to say, in a perhaps discursive argument of a cause, or even several causes, but has regard only to points and adjudications actually involved, as essential elements, in the questions in actual controversy.” Ingham v. Harper & Son, 128 P. 675, 676 (Wash. 1912) (citation omitted).


91. *Klaeren I*, No. 99 CH 179, slip op. at 1-4; *Klaeren II*, 737 N.E.2d at 1104; *Klaeren III*, 781 N.E.2d at 225-30.

92. *Klaeren I*, No. 99 CH 179, slip op. at 8 (defining the “primary issue” as “the adequacy of the public hearing” conducted by the Village of Lisle in light of the fact that it did not allow participants to cross-examine witnesses); *Klaeren II*, 737 N.E.2d at 1104 (addressing only the issue of whether plaintiffs were unlikely to succeed on the merits of their claim because there exists a statutory and/or constitutional right to cross-examine witnesses at a special use public hearing); *Klaeren III*, 781 N.E.2d at 224-25 (confirming that the issue on appeal was limited to “whether a landowner whose property abuts a parcel subject to a proposed annexation, special use, and rezoning petition can be wholly denied the right to cross-examine witnesses at a public hearing regarding the petition”).

93. *Klaeren I*, No. 99 CH 179, slip op. at 8 (ruling that the Village of Lisle could not totally deny plaintiffs the right to cross-examine witnesses at the special use public hearing because a “public hearing,” by definition, means the right to cross-examine witnesses); *Klaeren II*, 737 N.E.2d at 1106-10 (holding that the right to cross-examination at a special use public hearing is guaranteed by the Municipal Code); *Klaeren III*, 781 N.E.2d at 230-34 (following U.S. Supreme Court precedent and concluding that because special use public hearings are more akin to administrative, fact-specific hearings than legislative, rule-making hearings, participants must be afforded the right
Accordingly, *Klaeren* is binding precedent only for the procedural due process requirement of cross-examination at subordinate body special use public hearings conducted by all municipalities, regardless of size.

*Klaeren* is not authority for the substantive due process standard to apply to final special use decisions. None of the *Klaeren* opinions identified an issue raised by the parties and necessary for decision to be the validity of the final decision of the Village of Lisle approving Meijer’s special use application, and none of the *Klaeren* courts attempted to address that issue. Thus, to the extent that the Illinois Supreme Court touched upon the substantive due process question left open by *Living Word*, that discussion is dicta and is not binding.

*Klaeren*’s substantive due process discussion is not authoritative for the additional reason that it is based on a fundamental misapprehension of due process law. As recognized by the Second District, procedural due process and substantive due process are distinct concepts that protect different interests and are subject to different analytical frameworks. Procedural due process limits the methods by which a municipality may deprive interested persons of a protected interest. Substantive due process, on the other hand, guards against arbitrary decisions made by a municipality without regard to the procedural protections provided. Because the two due process doctrines are distinct and are not interchangeable, it was unnecessary and improper for the *Klaeren* court to consider—even in dicta—a question of substantive due process when only a question of procedural due process was at issue.

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94. See, e.g., 16B AM. JUR. 2D Constitutional Law § 901 (2003) ("The Due Process Clause of the Fourteenth Amendment provides distinct guarantees of substantive due process and procedural due process... [T]he categories of substance and procedure are distinct."). Thus, courts analyze issues of substantive due process separate and apart from issues of procedural due process. See *Reno v. Flores*, 507 U.S. 292, 301-09 (1993).


97. See, e.g., *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1, 2, 7-8 (2003); *Lewis*, 523 U.S. at 840 n.4 (expressing no opinion on substantive due process issue not properly before the Court where the complaint alleged only a violation of procedural due process); *Edwards v. Balisok*, 520 U.S. 641, 645 (1997) (distinguishing case law concerning a question of substantive due process when the case presented only a question of procedural due process). *Cf. Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (declining to consider issue of procedural due process when only issue of substantive due process was raised).
IV. THE MISREADING OF KLAEREN AS A SUBSTANTIVE DUE PROCESS DECISION

By requiring cross-examination at subordinate body special use public hearings in small municipalities, Klaeren worked a substantial change in the law of special use permits. Until Klaeren, the Illinois Supreme Court had not recognized the constitutional right to procedural protections at special use public hearings conducted by subordinate zoning bodies without authority to make final decisions. Rather, the controlling case law at the time held that procedural protections at such zoning hearings are not required as a matter of procedural due process.98 Not surprisingly, Klaeren quickly got the attention of local governments and the legal community.99

What has been surprising—indeed, alarming—is that almost every court subsequently to consider the opinion wrongly has attributed to it a rule of law that was not at issue in Klaeren. Although Klaeren was limited to the procedural due process right to cross-examination at subordinate body special use public hearings in small municipalities, Klaeren repeatedly has been cited for changing the substantive due process standard of review applicable to final special use decisions.

V. THE CONFUSION OF THE POST-KLAEREN COURTS

To date, four published opinions wrongly have cited Klaeren's dicta discussion of Living Word for the proposition that final decisions made by municipal legislative bodies are subject to a legislative standard of review for substantive due process purposes. First, Gallik v. County of Lake100 considered the certified question whether a county board's denial of a conditional use application was subject to a legislative or an administrative standard of substantive review.101 Although the question was answered by a specific provision of the Counties Code (for which there is no Municipal Code counterpart) providing that a county

98. See River Park, Inc. v. City of Highland Park, 23 F.3d 164, 166-67 (7th Cir. 1994) (“[T]he procedures ‘due’ in zoning cases are minimal.... [T]he idea in zoning cases is that the due process clause permits municipalities to use political methods to decide, so that the only procedural rules are those local law provides.”).
101. See id. at 523.
board's final decision is reviewable under the Administrative Review Law, the Illinois Court of Appeals, Second District, proceeded to consider the non-binding dicta of Klaeren. The Gallik court opined that, in Klaeren, the Illinois Supreme Court "resolved the issue it had left open in Living Word" and held that a legislative body acts administratively when it grants or denies a special use application. Therefore, the court concluded, Klaeren "would appear to have answered the certified question" in Gallik.

The Second District again improperly relied on Klaeren's substantive due process dicta in Oak Grove Jubilee Center, Inc. v. City of Genoa. There, the court considered whether a challenge to the denial of a special use permit was subject to a legislative or an administrative standard of substantive review. The court observed that, in Klaeren, the Illinois Supreme Court "abandoned the traditional rule" that a legislative body acts legislatively when it makes a final special use decision. The court thus concluded that, if it applied Klaeren to the present case, it "would be compelled to hold that defendant [municipality] acted in an administrative capacity in passing on plaintiff's application for a special use permit." The court declined to give retroactive application to its misreading of Klaeren, however, on grounds that, inter alia, municipalities could not have anticipated that the Illinois judiciary would overturn the decades-old legislative standard of substantive review.

Third, in PACE v. Regional Transportation Authority, the Second District considered a challenge by PACE, a public transportation entity, to a final budgetary decision by the Regional Transportation Authority ("RTA"). Although the court held that PACE did not have standing to bring a substantive due process challenge, it still addressed the argument that the RTA's action was subject to an administrative standard of substantive

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102. See id. at 526 (citing 55 ILL. COMP. STAT. 5/1-6007).
103. See id. at 524.
104. Id.
105. Id.
107. See id. at 841.
108. Id.
109. Id.
110. See id. The Illinois Supreme Court subsequently issued a supervisory order vacating the Second District's opinion and directing the court, inter alia, to permit the parties to supplement their briefs to address the issue of Klaeren's retroactive application. Oak Grove Jubilee Ctr., Inc. v. City of Genoa, 796 N.E.2d 1059 (Ill. 2003). Thereafter, the Second District affirmed its decision limiting Klaeren to prospective application. Oak Grove Jubilee Ctr., Inc. v. City of Genoa, 808 N.E.2d 576, 580 (Ill. App. Ct. 2004).
The court stated that the "standard of review dichotomy" for reviewing a municipality's "ruling" on a special use permit was addressed by *Klaeren*.

Quoting *Living Word*, the court described the post-*Klaeren* standard as follows: "When a legislative body acts administratively," as it does when it makes a final special use decision, that decision "is subject to general principles of administrative review."

Finally, in *Shipp v. County of Kankakee*, another Counties Code case, the Illinois Appellate Court for the Third District considered a declaratory judgment challenge to a county legislative body's denial of a special use permit application. The court conceded that the "standard of review of the board's denial of the permit [was] not relevant" to its holding and reversed the decision of the trial court on grounds that the application was incomplete. Nevertheless, the court addressed the county's argument that the legislative body's action was subject to a legislative standard of substantive review. The court rejected that argument on grounds that, "in *Klaeren*, our supreme court held that 'a legislative body acts administratively when it rules on applications for special use permits.'"

Although none of these cases actually incorporate *Klaeren*'s misguided dicta in a decisional rule, these cases are nonetheless troubling because they erroneously cite that dicta as *Klaeren*'s holding. The sole issue identified and decided by each of the three *Klaeren* courts is whether, as a matter of procedural due process, the plaintiffs were entitled to cross-examine witnesses at a special use public hearing conducted by a municipality having a population less than 500,000. Applying basic principles of stare decisis, *Klaeren* is authority only for the procedural due process requirement of cross-examination at subordinate body special use public hearings conducted by small municipalities. *Klaeren* is not authority for the substantive due process standard to apply to a final special use decision. Indeed, the Illinois Supreme Court itself made this clear in the post-*Klaeren* decision, *Hawthorne v. Village of Olympia Fields*, which expressly affirmed the established rule in Illinois that a corporate authority's enactment of an ordinance is a legislative act subject to a legislative standard of substantive
VI. THE CONSEQUENCES OF MISINTERPRETING KLAEREN

Citing Klaeren for a proposition that it does not and cannot support violates basic principles of stare decisis. Stare decisis limits the precedential scope of a judicial opinion and, in so doing, realizes several important goals, including protecting reliance interests, reducing the costs of the judicial system, and ensuring equal treatment under the law. Stare decisis also limits the ability of courts to make and apply law carelessly and arbitrarily, which in turn promotes the judiciary's perceived legitimacy: "Precedent provides a source external to the judges' individual opinions that legitimizes their reasoning, supplying ready evidence that judicial decisions are based on more than individual whim." Finally, the doctrine helps government order its business and thereby minimizes the costs of compliance. If the judiciary does not consistently interpret laws, government has a difficult time identifying its enforcement obligations and determining its options for compliance.

The repeated misreading of Klaeren undermines all of these important objectives. Citing Klaeren as authority for resolution of an issue that the facts of the case did not present and that the Klaeren court did not decide is precisely the sort of arbitrary and careless decision-making that stare decisis is intended to prevent. The development and application of case law based on a fundamental misreading of Klaeren serves only to weaken public confidence in the legal system.

Further, by perpetuating the notion that Klaeren changed the basic standard of review applicable to a local legislature's decision to grant or deny a special use permit, the misreading of Klaeren imposes unjustified burdens on municipalities. It is one thing to say that a public hearing is more akin to an administrative hearing and thus requires some opportunity for cross-examination as a matter of procedural due

120. Admittedly, Hawthorne's suggestion in a footnote that Hawthorne is limited to variation decisions made by ordinance and does not apply to special use permit decisions made by ordinance is puzzling. See id. at 832, 839 n.2. However, Hawthorne did not present or resolve any issue regarding special use permits and so the footnote commentary should not be considered authoritative precedent. See supra notes 88-90 and accompanying text.


122. Pintip Hompluem Dunn, How Judges Overrule: Speech Act Theory and the Doctrine of Stare Decisis, 113 YALE L.J. 493, 493 (2003). See also Caminker, supra note 121, at 853 (noting that if "the judiciary is perceived to labor to ground its decisions on legal principles and not politics, its legitimacy will endure").

123. See Caminker, supra note 121, at 852.
process. It is quite another thing to say that the final decision of the municipality's legislative body is subject to an administrative standard of review instead of a legislative standard of review as a matter of substantive due process.

Under a legislative standard of substantive review, a final special use decision is presumed valid and the party attacking it bears the burden of showing by clear and convincing evidence that it is arbitrary, unreasonable, and without substantial relation to the public health, safety, morals, comfort, or general welfare. In the seminal cases of *La Salle National Bank of Chicago v. County of Cook* and *Sinclair Pipe Line Co. v. Village of Richton Park*, the Illinois Supreme Court identified eight factors that a reviewing court must consider when determining if a party challenging legislative action has met its burden. These factors generally relate to the existing uses and zoning of neighboring properties and the affect of the proposed use on the community's health, safety, and welfare. Review of a legislative decision is de novo, meaning that the reviewing court cannot consider the record of the zoning proceedings at issue. As a practical matter, then, the issue under a legislative standard of substantive review is not whether sufficient evidence was presented at the zoning proceedings, but whether sufficient evidence exists anywhere to support the legislative body's final decision.

The validity of a final special use decision is given less deference under an administrative standard of substantive review.

125. Id.
127. See id. at 411; *La Salle Nat'l Bank*, 145 N.E.2d at 69.
128. The eight *LaSalle-Sinclair Pipe* factors are: (1) the existing uses and zoning of nearby property; (2) the extent to which property values are diminished by the particular zoning restrictions; (3) the extent to which the destruction of property values of plaintiff promotes the health, safety, morals, or general welfare of the public; (4) the relative gain to the public as compared to the hardship imposed upon the individual property owner; (5) the suitability of the subject property for the zoned purposes; (6) the length of time the property has been vacant as zoned considered in the context of land development in the vicinity of the subject property; (7) the community's need for the proposed use of the property; and (8) the care with which the community has undertaken to plan its land use development. *Sinclair Pipe*, 167 N.E.2d at 411; *La Salle Nat'l Bank*, 45 N.E.2d at 69.
129. See Yusuf v. Vill. of Villa Park, 458 N.E.2d 575, 583 (Ill. App. Ct. 1983) (finding error in the court's consideration of the transcripts of the zoning proceedings that resulted in the challenged ordinance because the function of a trial court in such circumstances is to consider "independent evidence as the parties seek to introduce," not to rule on the adequacy or sufficiency of the evidence that was presented in the underlying zoning proceedings); *Anthony*, 223 N.E.2d at 741 (ruling that the validity of a legislative body's decision to approve or deny a special use application does not depend on the evidence presented at the underlying zoning hearings).
Under this standard, the final decision is invalid if it is "against the manifest weight of the evidence."\textsuperscript{130} In determining whether a final administrative decision is against the manifest weight of the evidence, the decision is evaluated in light of specific standards codified in the governing local zoning ordinance.\textsuperscript{131} Moreover, the court's substantive review of a final administrative decision is limited to the record of the proceedings conducted by the municipality.\textsuperscript{132}

These differences demonstrate that much more is required of a municipality when a final decision on a special use permit is subject to an administrative, as opposed to a legislative, standard of substantive review. Whereas the hearing record is inadmissible in a substantive due process review of a legislative decision, the record is the exclusive basis for review of an administrative decision. Thus, when a municipality's final decision is subject to an administrative standard of substantive review, the municipality must be careful to preserve the record. This requires it to create and store transcripts of proceedings, which can be time-consuming and expensive. Moreover, because the validity of an administrative decision is determined based exclusively on the evidence in the record, the proceedings often become lengthy and complex as participants seek to put in the record more and better evidence than their opponents. In the end, the administrative proceeding can consume a significant amount of public resources at the expense of other issues equally deserving of the municipality's attention.

The post-Klaeren courts' erroneous pronouncement that a final decision on a special use permit is subject to an administrative standard of substantive review also has important negative implications for basic review and appeals procedures implemented by municipalities. First, an administrative standard of substantive review encourages municipalities to remove legislatures from the special use process altogether. If a local legislative body's decision is not presumed valid, as it is under a legislative standard of substantive review, but instead is afforded only the level of deference that a final decision by a subordinate zoning board of appeals is afforded, there is no advantage in involving the legislative body in the decision. Rather, it makes

\textsuperscript{132} See N. Ave. Props., 726 N.E.2d at 68 (noting that, under an administrative standard of substantive review, the reviewing court is "limited to reviewing the record which was before the agency and may not consider 'new or additional evidence in support of or in opposition to any finding, order, determination, or decision of the administrative agency'").
more economic and administrative sense to authorize the subordinate zoning board of appeals that is required to conduct the precedent public hearing on a special use application to complete the review process and to make the final decision on that application.

Second, an administrative standard of review requires municipalities to adopt and implement new appeals procedures. Under a legislative standard of substantive review, an aggrieved party may seek judicial review of a final decision immediately after the decision is made without any further action by the municipality. By contrast, under an administrative standard of substantive review, the aggrieved party is required to exhaust all administrative remedies before he may file a lawsuit challenging the decision. Such administrative remedies must be provided by the municipality and typically entail comprehensive review by various government officials.

The administrative standard of substantive review requires a far different process than a legislative standard of substantive review. Thus, it is of critical importance that those circumstances be properly and clearly defined when final decisions are subject to an administrative standard of substantive review. The post-Klaeren cases are cause for concern for these very reasons. By mistakenly citing Klaeren for the proposition that a local legislative body’s decision on a special use permit is no longer subject to a legislative standard of substantive review, the post-Klaeren cases breed widespread confusion about the substantive due process standard of review applicable to final special use decisions. And by wrongly declaring that such decisions are now subject to an administrative standard of substantive review, the post-Klaeren cases encourage municipalities and citizens to change their ordinary conduct with respect to special use applications and unnecessarily to expend time and resources in an attempt to satisfy a standard that does not apply.

VII. CONCLUSION

Adherence to basic principles of stare decisis is a prerequisite to reliable judicial decision-making and the efficient operation of government. By repeatedly misreading Klaeren as a substantive due process decision, post-Klaeren courts have confused the fundamental due process rights that Illinois municipalities must guarantee their citizens. Further, by misstating the applicable standard of substantive review, post-Klaeren courts have frustrated the ability of Illinois municipalities to structure their zoning processes and for citizens to plan their affairs. It is therefore imperative that the procedural due process ruling of Klaeren be recognized as the only authoritative precedent of that case.