SUMMARY AND COMMENT ON ILLINOIS LAWS RELATING TO DRAINAGE AND FLOOD CONTROL
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L162
Summary and Comment on Illinois Laws Relating to Drainage and Flood Control

Council on Community Development

University of Illinois, Urbana, October, 1962

Revised and Edited by N. G. P. Krausz
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N. G. P. Krausz, Professor of Agricultural Law
PREFACE

The primary responsibility of a University is to contribute to the sum total of human knowledge through research and to make known its accumulated knowledge through teaching.

The University of Illinois has always stood ready to make available the results of its research and teaching programs to the citizens of Illinois. The College of Agriculture, the College of Education, the Extension Division, several Schools, Bureaus, Institutes, and individual departments have carried the University into all corners of the State. The results of this work have brought substantial benefit to all of the people of Illinois.

The Council on Community Development was created in 1957 in order to provide still another instrument of effective service to the State. The Council is composed of representatives of all of the 40 or more units of the University that conduct teaching, research, and extension activities. It has two major functions. First, the Council encourages research that meets more effectively the needs of communities in such areas as education, resource conservation, urban expansion, and social or economic adjustment. Second, it acts as a central agency to which communities can send requests for advice and can be assured that the problem will be considered by every University unit that is capable in matters pertaining to that problem.

In this way the Council assists and supports existing units in their work and gives the citizens of all the State a means of communication, which they may use if they desire, between themselves and their University.

One such matter of community importance investigated under the auspices of the Council is an explanation of Illinois laws relating to drainage and flood control.

The following report was first published in September, 1959. It appears now in revised form, taking into account the changes that have occurred in Illinois statutes during the intervening three years.
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Special acknowledgment is made to Victor A. Hyde, Professor of Community Planning, for his thorough review of Part II of the manuscript.
PART I. GOVERNMENTAL UNITS HAVING POWERS
DIRECTLY RELATING TO DRAINAGE AND FLOOD CONTROL

A - SOIL AND WATER CONSERVATION DISTRICT1/

In the Illinois act establishing soil conservation districts, it is declared to be the policy of the legislature to provide for the conservation of the soil, soil resources, water and water resources, the control and prevention of soil erosion, and the prevention of erosion, floodwater and sediment damages, in order to preserve natural resources, control floods, prevent impairment of dams and reservoirs, assist in maintaining the navigability of rivers and harbors, preserve wildlife and forests, protect the tax base, and protect and promote the health, safety, and general welfare of the people.

In order to coordinate the individual soil and water conservation districts, a State Soil and Water Conservation District Advisory Board has been established. This board is advisory to the State Department of Agriculture which is charged with the duties, among others, to assist and inform directors of the soil and water conservation districts, to coordinate the activities of the individual districts, to seek assistance and cooperation of the federal government and the other state agencies, and to disseminate information throughout the state concerning the formation of soil conservation districts.

Any 25 or more owners of land lying within the limits of the territory proposed to be organized into a district who own at least ten percent of the land, by area, within such proposed district may file a petition with the Department of Agriculture asking that a soil and water conservation district be organized in the territory described in the petition.2/

Within 30 days of filing a petition the Department of Agriculture conducts a hearing for the purpose of determining whether such a district is in the public interest, health, or welfare. If the Department concludes that a district is in the public interest, it must make a further determination whether a district is administratively practicable and feasible. The Department is assisted in making a decision by submitting the question to a referendum vote which is required by statute unless more than 55 per cent of the landowners within the proposed area have signed the petition for organization of the district.

1/ C. 5, s 106 - 130
   All references are to the Illinois Revised Statutes, 1961 edition; unless otherwise noted.
2/ C. 5, s 113.
The governing body of the district consists of five directors, who are owners or occupiers of lands within the district. The directors are empowered to conduct surveys, investigations, research, and to develop comprehensive plans for the conservation of soil and water resources and for the control and prevention of erosion and floodwater and sediment damages, to carry out preventative and control measures, to furnish aid, financial or otherwise, to any government agency or private party in carrying on erosion and flood control, to acquire and improve properties for the purposes of the district (includes power to condemn), to make available to landowners agricultural and engineering machinery to assist them in erosion and flood control, to construct, improve, and operate necessary structures, to administer any erosion project undertaken by the federal government within the district, to sue and be sued in the name of the district, and to require contributions or agreements with respect to land as a condition to the extending of any benefits to private property.

One important provision of the act deals with the promulgation of land-use regulations. The directors of a district have authority to formulate regulations governing the use of land within the district in the interest of conserving soil, soil resources, water and water resources, and preventing and controlling erosion, floodwater, and sediment damages. Any such regulation proposed by the directors may not be adopted unless three-fourths of the landowners approve. The regulations must be uniform throughout the territory within the district except for certain reasonable classifications based on such factors as soil type, degree of slope, degree of erosion and other relevant factors, but the ordinance must operate uniformly upon all land within a particular classification.

A method of supervision and enforcement of the land-use regulations is set up in the act. The directors have the authority to go upon the lands to determine whether the land-use regulations are being observed. Also, the directors may provide by ordinance that any landowner who sustains damages from the violation of the regulations by any other landowner may recover such damages. Where the directors find that a particular landowner is violating the regulations and that such violation is interfering with the prevention or control of erosion, floodwater, and sediment damages on other lands within the district, they may file a petition in the Circuit Court to compel compliance.

B - SOIL AND WATER CONSERVATION SUBDISTRICT

Subdistricts were authorized as a sponsoring agency for a new federal project, aid for watershed protection and flood prevention activities.

The most logical agency seemed to be soil conservation districts, since they were already working with soil erosion problems and had objectives similar to those of the new federal law. But soil conservation districts would not qualify because they had no taxing power.

If the project was to be adopted in the rural areas, it therefore appeared necessary either to give these districts the power to tax or to form an entirely new agency with taxing power. The apparent solution in 1955 was a subdistrict law allowing soil conservation districts to form subdistricts within watershed areas—with the power to levy a tax. The maximum tax rate in Illinois is 12½ cents per $100 valuation.

3/ C. 5, s 131b-138.1.
This money may be spent for developing and executing plans and programs relating to any phase of flood prevention, flood control or erosion control and for preventing or reducing damage from erosion, flood waters and sediment. Federal funds are available if the subdistrict contribution is large enough (over half of the costs are expected to be paid from local funds) and if certain requirements are met, such as (1) furnishing the land and (2) obtaining from landowners of half of the land an agreement to carry out a soil conservation program.

To form a subdistrict, these steps are necessary:

1. A petition must be signed by a majority of the landowners who own a majority of the land, and then filed with the district directors.
2. Within 30 days after receiving the petition, the directors hold a hearing at which land may be added or excluded.
3. The directors give notice and hold an election in the proposed subdistrict within 30 days after the hearing.
4. If approved by majority vote, the directors file a certificate of organization with the county clerk and Department of Agriculture.

The governing body of the subdistrict consists of the directors of the soil and water conservation district in which the subdistrict is formed. If the subdistrict falls within more than one district, the directors of all such districts act as a joint governing body.

C - DRAINAGE DISTRICT

"Drainage districts may be formed to construct, maintain or repair drains or levees or to engage in other drainage or levee work for agricultural, sanitary or mining purposes." The area to be included within the district does not have to conform to any pre-existing political boundaries, and may cover more than one county.

"The primary purpose of the Drainage Code is to provide landowners with a legal entity or organization (a drainage district) which can be used to force unwilling owners into the district and to secure adequate drainage or flood protection for the lands lying within such an entity."  

Drainage districts are based on a system of assessments which permit districts to include only lands benefited by the organization of a drainage district. Thus, a person's land may not be included against his will and become liable for assessments, unless it can be shown that his property will be materially benefited by the inclusion. "The mere fact that the ditches of a drainage district carry off water that originates on his land does not mean, in a legal sense, that he is benefited by the drainage district. If it appears that the water would naturally have flowed off the land, or could legally have been made to flow off it by artificial ditches, then he has adequate drainage and cannot be taxed simply because that water, after it leaves his land, finds its way to the ditches of a drainage district."

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4/ C. 42, ss 3-1 to 5-31
6/ Note 4, supra. See also Commissioners of Sangamon & Drummer Drainage Dist. v. Houston, 284 Ill. 406 (1918).
Generally speaking, the commissioners of a drainage district have broad comprehensive powers in regard to constructing and maintaining drains and levees.7/

A drainage district may be organized by filing in the county court a petition signed by a majority of the landowners who own one-third of the land within the proposed district, or by one-third of the landowners who own a majority of the land in the proposed district. A smaller number of landowners may also petition for organization. The petition must be signed by at least one-tenth of the adult owners who own at least one-fifth of the land. In the event that this alternative method of petitioning is used, a referendum must be held.8/

D - SURFACE WATER PROTECTION DISTRICT9/

These districts are established to provide protection from damage to lives and property caused by surface water, and the district has the power to pass regulatory ordinances and build structures to effectuate such purposes. These structures may include sewers, drains, ditches, levees, etc. In addition, the board of trustees of the district may enact ordinances to provide protection from surface water damage. The maximum statutory tax rate is .125 per cent. With referendum, it is .25 per cent.

Fifty or more of the legal voters living within the limits of a proposed surface water district, or a majority thereof if less than one hundred, may petition the county court of the county which contains all or the largest portion of the proposed district to cause the question to be submitted to the legal voters of such proposed district, whether such proposed territory shall be organized as a surface water protection district.

The district may not cover an area larger than two counties. It is not necessary that the boundaries of the district conform with the boundaries of any pre-existing political unit. However, if the boundaries of the district are coterminous with the boundaries of a city, village, or town, or include a city, village, or town that is authorized to provide surface water protection, such

7/ See Hannah, Illinois Farm Drainage Law, at page 20 for a detailed listing of the powers of the commissioner.

8/ For a good outline of the steps to be followed in organizing a drainage district, see Hannah, Illinois Farm Drainage Law, note 25, supra, pages 13-19.

9/ C. 42, ss 448-471.
city, etc., must stop exercising such powers as conflict with the powers to be exercised by the district in regard to surface water protection within one year after organization of the district. So, it seems that a municipality and a surface water protection district can never exercise concurrent jurisdiction in regard to surface water protection.

Any owner may petition the county court of the county in which his district was organized, to have his land disconnected or detached from the district and to relieve himself of assessment. Upon a showing that he receives no benefit from the district or that he would receive greater benefit from some other district, his petition for detachment may be granted by the court.

This statute would appear to be useful in solving the problem of flooded subdivisions.

E - RIVER CONSERVANCY DISTRICT\(^{10}\)/

Such a district may be established where the uniform control of a river system or a portion thereof is desirable. A district is granted broad comprehensive powers as to flood control, drainage, irrigation, conservation, preservation of water levels, sanitation, etc. In addition, the statutes list more specific powers, including the authority to construct dams, levees, bridges. It is the duty of the trustees of any conservancy district to prevent pollution of any stream or other body of water located in such district and cause any person or business unit responsible for pollution to refrain therefrom.

Any plans adopted by the district must be submitted for approval to the Department of Public Works and the Sanitary Water Board.

Revenue may be raised for corporate purposes by issuance of bonds, but such indebtedness may not exceed 5 per cent of the valuation of taxable property situated within the district. These bonds cannot bear an interest rate in excess of 6 per cent. In order to discharge the bonds and interest thereon a tax is authorized not to exceed .083 per cent of fair cash value of taxable property as assessed by the Department of Revenue. An additional tax of .083 per cent is authorized in districts having a population of 25,000 or more, upon approval by referendum at a duly called election for that purpose. The tax may be increased to .75 per cent of the full, fair cash value of taxable property within the corporate limits of a district with less than 25,000 population.

One percent or more of the legal voters living within the limits of the proposed river conservancy district may petition the county judge of the county which contains all or the largest portion of the proposed district to cause to be submitted to the voters of the proposed district the question whether such proposed district shall be organized as a river conservancy district. After a public hearing, the final question of whether the river conservancy district shall be formed is decided by a majority of the voters of the proposed district.

\(^{10}\)/ C. 42, ss 383-404.
1. **Sanitary district containing municipalities.** Chapter 42 contains a number of acts that provide for the establishment and administration of a sanitary district. However, all but two deal with special situations that will merely be mentioned later. The first of the two main acts concerns sanitary districts containing one or more municipalities.

The district may cover more than one county, and does not have to conform to any pre-existing political boundaries.

The board of trustees of the district has the power to provide for sewage disposal and drainage, which includes the power to construct drains, sewers, laterals, pumps, and pumping stations.

The Board may grant easements or permits for the use of any real property which in the opinion of the Board will not interfere with the use of such property by the district for its corporate purposes.

Territory not located within a sanitary district but contiguous thereto may be annexed to the sanitary district according to a procedure set forth in the act. Likewise, territory already within the boundaries of a sanitary district may petition for disconnection from such district.

A district may validly charge any new user of the system a reasonable connection charge which is commensurate with the benefits realized from such use. Such a charge is not an unconstitutional tax upon the property owners.\(^{12}\)

A district may incur an indebtedness in excess of 5 per cent of property values without referendum approval if directed to do so by a court of competent jurisdiction in order to abate or discharge inadequately treated sewage and more revenue is necessary to comply with the court order.

Any 100 voters, living within the limits of the proposed sanitary district, may petition the county judge of the county in which the proposed district, or the major portion thereof is located, to cause to be submitted to the voters of such proposed district the question whether such proposed territory shall be organized as a sanitary district. After notice and public hearing, the sanitary district will be formed if a majority of the voters approve. The maximum tax rate is .083 percent. With referendum, it is .166 percent.

2. **Sanitary district outside of municipalities.**\(^{13}\) Such district must be contained within one county and must be outside the limits of any municipality.

\(^{11}\) C. 42, ss 299-319j.

\(^{12}\) Hartman v. Aurora Sanitary District, 23 Ill. 2d 109 (1961).

\(^{13}\) C. 42, ss 412-444.
The board of trustees of the district has the power to provide for sewage disposal and drainage facilities.

In order to raise revenue, the district may levy a direct annual tax for principal and interest on bonds, a tax up to .25 per cent for general purposes (.50 per cent with referendum), and special assessments. But in no case shall any property be assessed more than it will be benefited by the improvement for which the assessment is levied. In addition, the district may collect from producers of industrial waste fair additional construction, maintenance, and operating costs over and above those covered by normal taxes.

Pursuant to approval by a majority of the voters at an election, the district may purchase, by eminent domain or otherwise, or construct a drainage or waterworks system and thereafter operate it. Necessary funds are raised from revenue bonds, payable solely from the operation of the system. A plan may be submitted to the trustees by petition of at least 10 per cent of the legal voters of the district.

Additional contiguous territory within the limits of the county and without the limits of any city, village, or incorporated town may be added to any sanitary district organized under this act in a manner prescribed by the act.

Any 20 percent of the legal voters living within the limits of the proposed sanitary district may petition the county judge to cause to be submitted to the voters of the proposed sanitary district the question whether such proposed territory shall be organized as a sanitary district. After notice and public hearing, the sanitary district will be formed if a majority of the voters approve.

3. Miscellaneous sanitary districts. The following sanitary districts are merely listed because they are not general in scope, but rather apply to special situations: (a) sanitary districts composed of contiguous territory, within the limits of two counties, having within its limits two or more incorporated cities or villages, and an aggregate population of not less than 3,500 inhabitants, that is so situated as to be subject to overflow from any river or tributary thereof;14/ (b) sanitary districts for towns receiving their water supply from Lake Michigan15/; and (c) the Chicago sanitary district.16/

G - CITIES AND VILLAGES17/

The corporate authorities of municipalities have the power, for drainage purposes, to construct and maintain drains, ditches, levees, dikes, pumping works, and machinery, and to acquire the necessary land and machinery therefore, and in this manner to provide for draining any portion of the land within their corporate

14/ ss 247-274.
15/ ss 277-296.
16/ ss 320-381.
17/ C. 24.
limits, by special assessment upon the property benefited thereby, or by general taxation, or both.\textsuperscript{18} Flood hazards may be lessened or avoided by prescribing appropriate rules and regulations for the construction and alteration of buildings and structures.\textsuperscript{19}

Municipalities subject to overflow and wholly or partially surrounded by levees may, to prevent overflow, divide the municipality into improvement districts, and may fix the grade of public grounds within the improvement districts at any height necessary to give surface drainage from each improvement district to the river which causes the overflow, and may require low lots within an improvement district to be filled in such manner as to prevent them from becoming a nuisance. This work shall be done by special assessment or special taxation of contiguous property.\textsuperscript{20}

A municipality has the power to construct or acquire a sewage system either within or without its corporate limits.\textsuperscript{21} Any watercourse that flows through its boundaries may be rechanneled.\textsuperscript{22} Also, whenever a stream of water terminates within the boundaries of a municipality or is non-navigable, or the United States has abandoned jurisdiction over it, a municipality may fill in such stream for street purposes.\textsuperscript{23} In the latter case, a riparian owner may bring an action for damages.\textsuperscript{24}

\textbf{H - STATE AGENCIES}

1. \textit{Department of Public Works and Buildings}.\textsuperscript{25} The Department has authority to make examinations, surveys and plans for the construction of works for flood control, for improvement of land drainage and for conservation of water flow, in rivers, waters and watersheds. However, before any expenditures can be made for such improvements, authorization is needed from the General Assembly.

\textsuperscript{18} s 11-110-1.
\textsuperscript{19} s 11-30-2.
\textsuperscript{20} s 11-111-1.
\textsuperscript{21} s 11-141-2.
\textsuperscript{22} s 11-87-1.
\textsuperscript{23} s 11-87-3.
\textsuperscript{24} Leitch v. Sanitary District of Chicago, 369 Ill. 469 (1938).
\textsuperscript{25} C. 127, s 49; C. 19, s 126b.
To carry out these plans, the Department may enter into cooperative agreements with the United States Government and with local governments in Illinois, and may purchase lands, easements or other property to carry out its duties.

2. Board of Economic Development

The board represents and acts for the state in matters concerning any project for the improvement of navigation, flood control or any other purpose on any of the rivers, waters or watersheds of Illinois by the United States or any agency thereof. Land use and water planning will receive considerable attention, water planning to include water development and conservation. The board has power to study and determine means of coordinating water resources for maximum beneficial use, to assist in reconciling or adjusting conflicting claims of water users, and recommend legislation on water conservation.

26/ C. 127, ss 200-1, 200-4.
Summary Table

Governmental Units Having Powers Directly Relating to Drainage and Flood Control (excluding state agencies)

<table>
<thead>
<tr>
<th>Power to</th>
<th>Soil and Water Conservation Districts</th>
<th>Drainage Districts</th>
<th>Surface Water Protection Districts</th>
<th>River Conservancy Districts</th>
<th>Sanitary Districts</th>
<th>Cities and Villages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conduct surveys, investigation, and research, and develop comprehensive plans for the purpose of carrying out the objective for which the unit was organized</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Enter into agreements with private persons or governmental agencies in carrying out the objectives of the act</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Carry out preventative and control measures in regard to flood control</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Adopt and enforce ordinances for protection from surface water damage</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Adopt and enforce land-use regulations</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Provide for sewage disposal</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Construct and repair drains and levees</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Construct bridges</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Acquire or construct structures necessary for the purposes of the act</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Alter, deepen, or change the course of any water-course</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Make available to occupier of land machinery for the prevention of floodwater damage</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Appoint a police force to prevent pollution</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Acquire property by eminent domain</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Require contributions in money, service or materials as a condition to performing services</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Levy assessments</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Levy a direct annual tax</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Issue bonds</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
</tbody>
</table>
PART II. FLOOD AND DRAINAGE CONTROL THROUGH THE USE OF PLANNING COMMISSIONS, PLAT APPROVAL AND ZONING

Since most drainage and flood problems could have been prevented had proper measures been taken initially in the development of an area, the role of PLANNING COMMISSIONS appears to be particularly important. Although these commissions have no coercive power to enforce their plans, they can greatly influence and guide the thinking of officials who do have the power to adopt plans.

When a municipality or a county decides to take preventative steps in combating drainage and flood problems, certain legal tools are available to accomplish the task. Contained herein are brief summaries of two laws, plat control and zoning, the basic means by which the aims of a municipality or county in regard to land use may be accomplished.

Of the two, PLAT CONTROL is the more direct weapon in that a person who desires to develop a subdivision is not allowed to record a plat of his land unless there has been compliance with the applicable ordinances. Although it is questionable whether plat approval can deny the use of a low area to commercial development, it can require sufficient improvements for drainage and flood waters.

ZONING plays an indirect but important role in dealing with drainage and flood control problems. Zoning can facilitate adequate water flow and drainage and secure safety from floods by (1) regulations against residential invasion below the flood line, (2) setting aside adequate areas for parks, basins and other public improvements, (3) preventing overcrowding and rapid runoffs, and (4) protecting against conflicting land uses.
<table>
<thead>
<tr>
<th>Agency</th>
<th>Municipal</th>
<th>Regional</th>
<th>Northeastern Illinois metropolitan area</th>
</tr>
</thead>
<tbody>
<tr>
<td>Geographic area</td>
<td>The comprehensive plan can be adopted for a part of a municipality or for the whole area of the municipality plus contiguous territory within 1 1/2 miles of the corporate limits that is not included in any other municipality.</td>
<td>From a portion of one county up to, theoretically, an unlimited number of counties.</td>
<td>Six neighboring counties; Lake, McHenry, Kane, DuPage, Will and Cook.</td>
</tr>
<tr>
<td>Creation</td>
<td>Created by ordinance and appointment made by mayor of a city or president of a village board.</td>
<td>The county board, by a resolution of record is empowered to define the boundaries of the region and to create the commission.</td>
<td>By statutory enactment.</td>
</tr>
<tr>
<td>Composition</td>
<td>Indeterminate number of members.</td>
<td>Indeterminate number of members. Method of appointment is determined by the county board.</td>
<td>Nineteen members, variously appointed by the counties, the Mayor of Chicago and the Governor.</td>
</tr>
<tr>
<td>Duties</td>
<td>None specifically set out by statute.</td>
<td>Encouragement of cooperation among the political subdivisions in matters concerning the regional plan. Counties in northeastern Illinois: Must submit plan to northeastern Illinois Planning Commission for approval.</td>
<td>Cooperation with other units of government. Numerous other duties are specifically imposed by the statute, but are primarily concerned with administrative functions of the commission, rather than the planning function.</td>
</tr>
<tr>
<td>Agency</td>
<td>Municipal</td>
<td>Regional</td>
<td>Northeastern Illinois metropolitan area</td>
</tr>
<tr>
<td>--------------</td>
<td>---------------------------------------------------------------------------</td>
<td>--------------------------------------------------------------------------</td>
<td>------------------------------------------</td>
</tr>
<tr>
<td>Powers</td>
<td>Broad general powers to develop and promote a comprehensive plan.</td>
<td>Broad general powers to develop a comprehensive plan.</td>
<td>Broad general powers to develop a comprehensible plan, adopt a budget, conduct research, advise other units of government, etc.</td>
</tr>
<tr>
<td>Enforcement</td>
<td>May have preliminary plat approval power—by ordinance. Final approval is vested in the corporate authorities.</td>
<td>No enforcement powers. The plan is advisory only.31/</td>
<td>No enforcement powers. The plan is advisory only.</td>
</tr>
<tr>
<td>Public Hearing</td>
<td>Required before adoption.</td>
<td>No provision as to public hearing.</td>
<td>Before adoption of a segment of, or the entire comprehensive plan, a public hearing is required.</td>
</tr>
</tbody>
</table>

27/ C. 24, ss 11-12-4, 11-12-5.

28/ C. 34, ss 3001-3007.

29/ C. 34, ss 3051-3089.

30/ C. 24, s 11-12-4.

31/ See s 414. The county board is given the power to approve plots of subdivision.
B - PLAT APPROVAL

1. Municipal

Where no Municipal Plan Commission has been set up pursuant to C.24, s 11-12-4, the statute that will be relied upon by a municipality to exercise control over the platting of land is C. 24, s 11-15-1.

Under this statute, the municipal authorities may provide by ordinance that a plat of land located within the municipal boundaries must be submitted for approval to designated municipal authorities. If such an ordinance is enacted, a plat may not be recorded until approved.

Under this statute, a city may enforce its ordinances by refusing to approve a plat of land that does not conform to them. Thus, a city may indirectly enforce its zoning ordinances relating to set-back lines, height of buildings, density of use, etc., through the medium of plat control.

Illinois case law32/ has established that the duty of the municipal authorities to approve plats is ministerial, and not discretionary. No discretion is vested in the municipal authorities to refuse approval of a plat which conforms to the municipal ordinances and C. 109 of the Illinois Revised Statutes, the Plating Act. And where the municipality has no ordinances that are relevant, the owner of the land to be platted need only comply with the requirements of the Plating Act.

Where a Municipal Plan Commission has been set up pursuant to C. 24, s 11-12-4, a municipality will have additional statutory authority with which to control the platting of land, both within and outside of municipal boundaries. Recent legislation provides that every municipality may create a planning commission or a planning department or both. General power is given to prepare and recommend comprehensive plans for present and future development or redevelopment. Plans may be adopted by the municipality in whole or in separate geographical or functional parts. The official plan may be applicable to land situated within the corporate limits and contiguous territory not more than 1 1/2 miles beyond the corporate limits and not included in any municipality. The official plan is advisory only and does not regulate or control the use of private property. Implementing ordinances are authorized to regulate the use of private property if the plan is adopted.

A planning commission is appointed by the mayor of a city or the president of a village board and confirmed by the corporate authorities. A planning department is created, organized and staffed in such manner as prescribed by ordinance. Any plan commission or department now in existence and created by ordinance may

32/ People ex rel. Thistlewood v. Village of Mounds, 122 Ill. App. 448 (1905); People ex rel. Tilden v. Massiem, 279 Ill. 312 (1917).
continue under the authority of the prior ordinance and shall have all the powers conferred by law as if it had been created by the new law. Funds may be appropriated for the operation of planning commissions or planning departments, and municipalities may accept federal, state or private funds, grants and services for general planning purposes or for specific projects.

Under s 11-12-12, a plat of land within the municipal boundaries, or within contiguous territory which is not more than one and one-half miles beyond the corporate limits of the municipality may not be recorded unless the plat provides for "streets, alleys, public ways, ways for public service facilities, storm and flood water run-off channels and basins, and public grounds, in conformity with the applicable requirements of the ordinances including the official map." An Illinois Supreme Court decision has established that it is proper for a municipality to require curbs, gutters, and storm water drainage under the above statutory language.33/

Note that under s 11-15-1, no jurisdiction over contiguous territory is granted to the municipality as is granted under s 11-12-12. The Illinois Supreme Court has said that the City Plan Commission Act (C. 24, s 11-12-12 et. seq.) together with the Plat Act (C. 109), and the Recorder's Act (C. 115) show a clear legislative intent to grant to municipalities adopting an official plan exclusive jurisdiction over the subdivision of land within territory contiguous to the municipality which is not more than one and one-half miles beyond the corporate limits of the municipality.34/ Thus, even though a county has adopted subdivision regulations, contiguous lands within one and one-half miles of a city having a Plan Commission are subject to the exclusive jurisdiction of the city, provided the exercise of such power bears a reasonable and substantial relation to the public health, safety, or general welfare.

The Supreme Court of Illinois has stated in two recent cases that an ordinance requiring the dedication of a given area of land, as a condition to approval of recordation and validity of the plat, is valid if the burden imposed upon the subdivider is specifically and uniquely attributable to the addition of the subdivision. But where the need for the land required to be dedicated is not uniquely attributable to the addition of the subdivision, such an ordinance is an unconstitutional taking behind the guise of local police power. This amounts to the exercise of eminent domain without compensation.35/

A solution to this problem appears in the new laws approved in 1961:

"Whenever the reasonable requirements provided by the ordinance including the official map shall indicate the necessity for providing for a school site, park site, or other public lands within any proposed subdivision for which approval

33/ Petterson v. The City of Naperville, 9 Ill. 2d 233 (1956).
34/ Petterson v. The City of Naperville, 9 Ill. 2d 233 (1956).
has been requested, and no such provision has been made therefor, the municipal authority may require that lands be designated for such public purpose before approving such plat. Whenever a final plat of subdivision, or part thereof, has been approved by the corporate authorities as complying with the official map and there is designated therein a school site, park site or other public land, the corporate authorities having jurisdiction of such use, be it a school board, park board or other authority, such authority shall acquire the land so designated by purchase or commence proceedings to acquire such land by condemnation within one year from the date of approval of such plat; and if it does not do so within such period of one year, the land so designated may then be used by the owners thereof in any other manner consistent with the ordinance including the official map and the zoning ordinance of the municipality.36/

2. County

By C. 34, s 414, the county board is empowered to prescribe by resolution, reasonable rules and regulations governing the "location, width, and course of streets, highways and storm or floodwater run-off channels and basins, and the provision of necessary public grounds for schools, parks, or playgrounds" in any plat of land not within the boundaries of any city, village, or town. The above rules and regulations may include requirements with respect to water supply, sewage collection and treatment, street drainage, and street surfacing. If any plat does not conform to such rules and regulations, it cannot be recorded.

C. 115, s 13 is applicable to both municipal and county plat control. It provides that a recorder who records an unapproved plat may be fined $200.00.

C - ZONING

In Illinois, the power to zone has been delegated by the General Assembly to the individual municipalities27/ and counties.38/ These are the only authorities in Illinois that possess the right to enact comprehensive zoning ordinances.

36/ C. 24, s 11-12-8.
37/ C. 24, s 11-13-1 et seq.
38/ C. 34, s 3151 et seq.
1. Municipal zoning

The Municipal Zoning Commission is specifically authorized by statute to:

a - Regulate and limit the height and bulk of buildings.

b - Establish set-back lines on or along any street, parkway or storm or flood-water run-off channel or basin.

c - Regulate the intensity of use of lot areas, and determine the area of open spaces within and surrounding such buildings.

d - Classify, regulate and restrict the location of trades and industries and the location of buildings designed for specified industrial, businesses, residential and other uses.

e - Divide the municipality into districts as may be deemed best suited to promote the public welfare.

f - Fix building standards.

g - Prohibit uses incompatible with the character of the district.

h - Prevent perpetuation of nonconforming uses.

A municipality may adopt zoning ordinances applying to land within the corporate limits or in contiguous territory not more than 1 1/2 miles beyond the corporate limits, provided land beyond the corporate limits is not already within a municipality or included in another municipality's zoning plan, or provided that the county has not adopted an act in relation to county zoning. In the Attorney General's opinion No. 207, dated January 19, 1962, C. 24, s 11-13-1 did not amend by implication section 6 of the County Zoning Act. Granting a municipality zoning authority within the 1 1/2 miles outside of the corporate limits did not limit the power of the county under C.34, s 3151. A municipality's zoning power can be exercised in contiguous area 1 1/2 miles outside corporate limits only if there is no county zoning ordinance in effect.

2. County zoning

The County Zoning Commission is specifically authorized by statute to:

a - Regulate and restrict the location and intensity of use of buildings, structures and land for trade, industry, residence and other uses.

b - Establish set-back lines on or along any street, parkway or storm or flood-water run-off channel or basin, outside of city limits.

c - Divide unincorporated areas into districts according to intensity and use.

d - Prohibit the introduction of nonconforming uses and prohibit maintenance of nonconforming uses.
The County Zoning Act does not regulate agricultural uses, the only provision applicable to farming being the set-back line provision.\(^{39}\)

Additional authority provided by the 1959 General Assembly to establish set-back lines along channels and basins should help immeasurably to control excess waters by checking construction in low areas, thereby allowing percolation in adequate open areas (such as parks and forests) rather than rapid run-off in urbanized areas, and by offering protection against conflicting uses (i.e., flood water reservoir vs. lake and recreation).

3. **Comment on the validity of zoning ordinances**

In order for a zoning ordinance to be valid, it must be a proper exercise of the police power, since it regulates the use of private property. It was decided in the landmark Illinois case of *Aurora v. Burns\(^ {40}\)*, that zoning qua zoning was such a proper exercise of the police power if the zoning ordinance was reasonable. Thus, the test of whether a zoning ordinance is valid or not, is whether it is reasonable in relation to the general public welfare.

The trend of the Illinois Supreme Court is toward greater liberality in holding zoning ordinances to be reasonable, thus validating them. In 1947 Richard F. Babcock, an author of numerous articles on zoning, reported:\(^ {41}\) "On the record the Supreme Court of Illinois has not been sympathetic to municipal zoning as it has been practiced in Illinois." By 1954, conditions had changed. "The greater proportion of zoning ordinances are now being held valid, and the tendency shown in the ... cases seem to indicate a growing friendliness of the court toward zoning."\(^ {42}\)

A zoning ordinance that may be valid in and of itself may be invalid as applied to a particular piece of property: A zoning ordinance that restricts property to a use for which it is totally unsuited and which is discordant with the use of immediately surrounding property is unreasonable as applied to the property in question.\(^ {43}\) Again, a dispute may involve the question whether a particular piece of property has been placed in the proper zone rather than whether the use classifications of the zoning ordinance are themselves valid.\(^ {44}\)

\(^{39}\) C. 34, s 3151.

\(^{40}\) 319 Ill. 84, 149 N.E. 784 (1925); Pacesetter Homes, Inc. v. Village of South Holland, 18 Ill. 2d 247 (1959).

\(^{41}\) 15 U. Chi. L. Rev. 87 (1947).

\(^{42}\) 1954 Ill. L. F. 720.

\(^{43}\) See, 2700, Irving Park Bldg. Corp. v. Chicago, 395 Ill. 138, 68 N.E. 2d 827 (1946), and cases cited therein.

\(^{44}\) See, e.g., DuPage County v. Holkier, 1 Ill. 2d 491, 115 N.E. 2d 635 (1953); Hannifin Corp. v. Berwyn, 1 Ill. 2d 28, 115 N.E. 2d 315 (1953).
A recent case pointed to two devices whereby a dissatisfied property owner may seek relief from a classification which bars a desired use of property before it is necessary to petition the courts for relief.45/ Both the amendment procedure, C. 34, s 3158, and the variation procedure, C. 34, s 3154, prescribed in the County Zoning Enabling Act are designed to provide a flexible method for relaxing the rigid requirements of the ordinance in cases of individual need.

A property owner may petition for an amendment to a zoning ordinance which prohibits his desired use. The petition for amendment must be heard by the board of appeals and may be granted by the county board provided that the desired use does not contravene the scheme and purpose of the ordinance to which the amendment is sought.

A variance is an administrative procedure by which the board of appeals may under prescribed rules vary the strict application of the ordinance to a given piece of property when the applicant can show a unique and real hardship and where the board can show the granting of such a variance is not inconsistent with the community's interest.

The act requires that this administrative route be exhausted before the validity of the ordinance can be attacked. However, where it clearly appears that the varied use is inimical to the scheme and purpose of the ordinance, the reasonableness of the ordinance may be challenged without exhausting this administrative remedy, since appeal for a variation would amount to a futile act.46/

Where the court finds that the zoning ordinance in and of itself is valid but that its application to a specific property is arbitrary and unreasonable, the precise scope of the judgment or decree presents a serious problem. If the judgment or decree is confined to a finding that the ordinance as applied to the property in question is unconstitutional, either of two equally undesirable consequences may follow. Since the finding has the effect of leaving the property unzoned, the enacting authority may reclassify it in such a way as to still prohibit the desired use and thereby create further unnecessary litigation involving the same issue, or the property owner may decide to engage in a use other than that contemplated by the earlier judgment or decree. Had this different use been in issue before the court, an opposite finding might have resulted. In an effort to avoid this dilemma the court in a series of recent cases47/ held that it was proper for the trial court to frame its decree or judgment with reference to the record to permit the property owner to proceed with the proposed use which gave rise to litigation without throwing the property open to other uses not involved in litigation.

45/ Sinclair Pipe Line v. Richton Park, 19 Ill. 2d 370 (1960).
46/ Ibid.
47/ Sinclair Pipe Line v. Richton Park, 19 Ill. 2d 370; Franklin v. Village of Franklin Park, 19 Ill. 2d 381; Illinois National Bank and Trust Co. of Rockford v. County of Winnebago, 19 Ill. 2d 487 (1960).
However, this form of decree is permissible only in the situation where a finding in favor of the property owner has the effect of leaving the property unzoned. Where the court finds the application of an ordinance to be valid in a particular case, it has no power to superimpose additional conditions or restraints not set forth in the ordinance. A court has no authority to interfere with the zoning functions of the municipal authorities unless the exercise of such zoning power is clearly arbitrary or unreasonable.48/ It is submitted that this finding reflects an increasing tendency of the judiciary to defer to the judgment of the zoning authorities and that an arbitrary exercise of police power must be clearly shown before judicial interference is justified.

Since the outcome of every zoning case invariably turns upon its own peculiar facts, it is impracticable, if not impossible, to lay down an absolute formula for predicting the results of a particular case. An analysis of developing case law suggests that a useful test in determining the validity of a zoning ordinance is whether the benefit realized by the public from the ordinance is substantial compared to the hardship imposed upon the individual property owner by the restrictions. A few of the factual circumstances relevant to this test are:

1. The value of the property when put to the desired use contrasted with its highest value for a permissible use;

2. The character of the use to which other property in the zoned and immediately surrounding area is put;

3. The trend of conditions in the neighborhood in relation to property use; and

4. Whether in light of the above enumerated factors the prohibited use would really frustrate the legitimate objectives of the restriction.

If after employing the above test a fair difference of opinion results as to the reasonableness of the restriction, the courts will defer to the judgment of the zoning authority.

4. Comments on the use of zoning

"The establishment of single-family residence districts, multiple residence districts, retail business areas, light industrial areas, and heavy manufacturing areas is almost universal in all cities which have adopted zoning ordinances. Counties add farming areas to the usual districts."49/ The number of these districts and the uses permitted in each are determined by the municipality or county establishing the zoning ordinance, subject, of course, to the requirement of reasonableness.


49/ 1954 Ill. L. F. 177.
a. Residential

There is no doubt that restriction of an area to exclusive residential use is valid. However, a problem arises as to the validity of a zoning ordinance that permits other uses in addition to residential uses in a particular area.

In a 1938 case, the court held invalid an ordinance which prohibited the establishment of an undertaking business, stating that such a classification was capricious, in view of the fact that hospitals and other forms of business were permissible. In a later case an ordinance prohibiting the establishment of an undertaking business was sustained, but this apparent reversal can be explained by the fact that hospitals were not permitted and by the additional fact that the dominant character of the neighborhood was residential.

A common zoning provision is the establishment of separate districts for single-family dwellings and multiple-family dwellings. The validity of such a provision was sustained by the Illinois Supreme Court in 1949.

b. Nonresidential

While it has long been held that a district may be zoned for exclusive residential purposes, it was not until recently that the Illinois Supreme Court passed upon the validity of an ordinance dedicating a particular district to exclusive nonresidential use; such an ordinance was sustained, thus establishing the validity of noncumulative type zoning under appropriate circumstances.

A community cannot totally exclude a particular lawful business or industry where such exclusion does not produce a corresponding benefit to that community. On the other hand, a showing that such a business or industry presents a peculiar danger to, or burden on, the community would seem sufficient to justify such an ordinance. It appears unquestioned now that total exclusion of industry is

53/ People ex rel. v. Morton Grove, 16 Ill. 2d 183 (1959).
54/ Trust Co. of Chicago v. Skokie, 408 Ill. 397, 97 N.E. 2d 310 (1951).
permissible if the circumstances justify such a classification. A New Jersey case allowed a municipality to wholly exclude industry from its boundaries, and it seems probable that the Illinois courts would so hold if industry was shown to be unsuited to the character of the zoned area.

Although there has as yet been no occasion to test the validity of such a classification, it is believed that manufacturing and industrial districts may be classified by degree of noise, dirt, smoke, and sewage pollution caused by the particular operations, instead of in terms of products.

c. Agricultural

A county may dedicate certain areas to be used exclusively for farming.

Conservation of resources

A conservative view has developed in Illinois concerning the constitutionality of land-use restrictions dealing with other than urban type problems. The cases resulting from open-cut coal mining illustrate this trend.

In 1949, Knox County adopted an ordinance which excluded strip mining from all but one use district. In Midland Electric Coal Corp. v. Knox County, the ordinance was held to be unreasonable and hence unconstitutional, despite the fact that six percent of the county's land was to be stripped.


56/ 1954 Ill. L. F. 207.


58/ 1 Ill. 2d 200, 115 N.E. 2d 275 (1953).
PART III. USE OF COVENANTS, CONDITIONS AND NUISANCE

A - COVENANTS AND CONDITIONS

The developer of property has two basic tools which he himself may employ to control the future use of the land: covenants and conditions. Of the two, covenants are the more widespread and effectively used.

Since covenants and conditions in plats and deeds may be inserted only by private parties, and since the doctrine of nuisance is a remedy which may be invoked only after damage has occurred, these devices are generally remedial on a small scale and therefore not the best solution to drainage and flood problems.

1. Conditions

Two difficulties with the use of conditions as an effective tool for land-use control are (1) the limited life of conditions and (2) the hostile attitude of the courts toward conditions.

1. In Illinois, the duration of possibilities of reverter and rights of re-entry for conditions broken are limited by statute to 40 years from the date of creation.59/ This provision was held to be constitutional notwithstanding the fact that it applies to conditions created before the enactment of the statute.60/ It may also be noted that such conditions are neither alienable nor devisable.61/

2. Since forfeitures are not favored by the courts, a condition will be construed as a fee on a condition subsequent rather than a determinable fee62/ and a restriction on the use of land will be construed as a covenant rather than a condition whenever possible.63/

59/ C. 30, s 37e.

60/ Trustees of Schools of Township No. 1 v. Botdorf, 6 Ill. 2d 486, 130 N.E. 2d Ill (1955).

61/ C. 30, s 37b.

62/ Affirmative action is required on the part of the holders of the right of re-entry for condition broken in order to terminate the grantee's interest, while no such affirmative action is required on the part of the holder of a possibility of reverter.

63/ If a restriction is interpreted as a covenant, no forfeiture will result, but rather the grantee will be liable for pecuniary damages.
2. Covenants

By means of restrictive covenants, the use of land may be controlled to an extent beyond that permitted by the zoning power. While zoning ordinances, in order to be valid, must be reasonable in relation to the public health, safety, and welfare, no such restriction is fastened to the regulation of land use by means of restrictive covenants. But although a restrictive covenant does not have to promote the public health, safety and welfare, it may not be contrary to public policy.64/

Restrictive covenants commonly enforced include covenants limiting the use of land to residential purposes65/, covenants establishing building lines66/; covenants prohibiting the erection of commercial or industrial buildings67/, covenants prohibiting subdividing68/, covenants prohibiting the erection of more than one home on each lot69/, and covenants limiting or otherwise establishing the size of buildings to be erected.70/

It would be easier, perhaps, to discuss what cannot be done with covenants, than what can. It has been stated that restrictive covenants are valid so long as they are not against public policy and do not materially impair the beneficial enjoyment of the estate.71/ It must also be added that the restrictive covenant may not violate a provision of the State or Federal Constitution. Thus, because of the Fourteenth Amendment to the Federal Constitution, so called racial covenants are unenforceable.72/

Many times a private restrictive covenant and a zoning ordinance will apply to the same piece of property. If they differ in degree, the stricter will control, because they are separate and independent of one another. If the zoning ordinance and the private restrictive covenant conflict, the covenant is extinguished to the extent to which the observance of it is rendered unlawful by the ordinance.73/

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64/ Housing Authority of Gallatin County v. Church of God, 401 Ill. 100, 81 N.E. 2d 500 (1948).
69/ Ibid.
71/ 1955 Ill. L. F. 711.
In setting up a development scheme that is to be implemented by the use of private covenants, it is wise to provide that the covenants should exist for a specified period, usually about 25 years, with a provision for automatic renewal at the expiration of the period unless a certain percentage of the property owners object. Such a provision will provide an "escape hatch" in case the covenants should outlive their usefulness, due to change in the character of the area.

B. - NUISANCE

While formerly the doctrine of nuisance was the primary means by which the use of land could be controlled, the doctrine of nuisance has been relegated to an inferior position with the advent of zoning.

There are four reasons why the doctrine of nuisance is the inferior tool for controlling the use of land. The first of these is the elusiveness and indefiniteness of the court standards applied to abate a nuisance in comparison to the studies, surveys, and expert determination of city planners which, after incorporation in an ordinance, will be uniformly applied in all cases. The second reason arises from the fact that as a general rule nuisance comes in only after the harm is done; it is not a preventive measure. An injunction on a lot in the middle of a residential section does not do either the factory owner or the residents much good. The third reason really grows out of the second. If a municipality desires to attract some industry, it must provide some assurance that its location will not be subsequently condemned as a nuisance. Finally, the concept of nuisance alone cannot fully protect residential areas; a commercial use must substantially interfere with the rights of the surrounding landowners before the question of nuisance is ever raised.
It is evident that there is no dearth of governmental agencies which may exert a direct, effective influence upon the drainage and flood control problems which are confronting Illinois property owners. Whether or not these agencies are exercising jurisdiction in regard to these problems is another matter.

One of the objectives of a committee studying water problems might be to make officials of local governmental units cognizant of the potentiality for remedying or preventing drainage and flood control problems by existing agencies or by one that might be created, such as a drainage district.

Another concern of such a committee might be to determine what new controls are needed. For example, rivers and streams cross many political boundaries but the laws in this report indicate that present possible solutions are on a local basis in most of the state. The Northeastern Illinois Metropolitan Area Planning Commission and permissible regional planning commissions are exceptions but their functions generally do not extend beyond planning and advising. Perhaps watershed authorities extending beyond boundaries of units and districts could exercise restrictive powers in land settlement.

One cannot escape the conclusion that the problem of drainage and flood control is inextricably enmeshed with the broader problem of how land should be utilized to best serve the ends of society, a problem that can only become more acute because of our increasing population and urbanization.