Ancel Glink | Diamond Bush DiCianni & Krafthefer

2017 Guide for Newly-Elected Officials

The April, 2017, elections are held on the same day in municipalities, park districts, school districts, townships and in many other units of local government. This Guide is written for brave men and women who ran for office in those elections, and for those who are successful in the election process. This Guide can also be used by persons who fill vacancies in elected office and those who serve in governmental bodies where the members of the Corporate Authorities are appointed. After being sworn in, all elected officials immediately become subject to a whole series of laws which govern the performance of their duties. A failure to understand and follow these laws can, in the extreme, result in a conviction under the State's criminal laws and a removal from office. More practically, a failure to know about and understand these duties and obligations can result in suspicion and non-cooperation from incumbent officials who may question whether you are "ready for prime time." Although there are certain special rules applicable to individual governmental bodies, we will focus on those statutory requirements and practical problems which are applicable to all governments.

Newly-elected officials of all local governments are subject to many laws and procedures in common.

A review of the Articles that follow will answer many questions, including:

1. Can I set up a conference call to talk to a number of my elected colleagues about items on the next meeting agenda and are these materials subject to FOIA? (Article 1)

2. Who gets to appoint municipal committees? (Article 2)

3. Can I propose a program of helping my government cover our

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increased costs and declining revenue by investing more of our funds in the stock market? (Article 3)

4. Can I enter into a private contract in my business or occupation to provide goods or services to people who do business with my governmental body? (Article 4)

5. Can I accept a gift of a lap-top computer from a vendor of my government who wants to help me to be a more efficient public official? (Article 5)

6. Can I talk employees out of joining a union? (Article 6)

7. If a material supplier isn't paid by a general contractor on a job for a public body, can it file a mechanic's lien? (Article 7)

8. If I am sued for my actions as an elected official, will I be defended? (Article 8)

9. Are there any tort immunities available to me? (Article 9)

10. Can my government purchase goods or land for joint use with other governmental bodies? (Article 10)

11. How can technology help us to solve governmental problems without creating new legal ones? (Article 11)

12. What tools are available to aid economic development? (Article 12)

13. What are common challenges for newly-elected officials? (Article 13)

14. What are 25 challenges and opportunities for new Mayors? (Article 14)

15. How can elected officials and staff work together? (Article 15)

16. Where can I download pamphlets on local governmental law? (Article 16)

17. How do you hire a governmental attorney? (Article 17)

18. What do we do if a developer with unfinished improvements files for bankruptcy? (Article 18)

19. Land Banking and nuisance abatement strategies: municipal tools for revitalizing abandoned properties (Article 19)

The Guide begins with seven sections shown with Roman numerals that describe the various kinds of local governmental entities in Illinois. A newly-elected official should have some exposure to the other governments with which he or she will interact.

A series of Articles, designated with Arabic numbers 1 through 7, deal with the Open Meetings Act, FOIA, procedural rules, financial matters, Gift Bank Act, labor issues and construction law. Articles 8 and 9 discuss governmental litigation. The next three Articles suggest ways that governments can work together through intergovernmental cooperative projects, technology and economic development. Article 13 lists 10 of the most common challenges for newly elected officials. Article 14 contains a primer for new Mayors. Article 15 is a list of helpful hints offered by two experienced Village Managers. The Ancel Glink Library, and various publications that can be downloaded or purchased, are highlighted in Article 16. Article 17 contains advice on how to go about hiring a governmental lawyer. The final Article 19 discusses land banks to deal with abandoned or tax delinquent property. Article 18 deals with the current problems associated with the recent Great Recession.

The contents of this Guide are intended to supplement the excellent seminars for newly-elected officials sponsored by regional and statewide organizations. Newly-elected officials should consult with their experienced colleagues about seminars and publications conducted by statewide organizations, such as the Illinois Municipal League, the Illinois Association of School Boards, the Illinois Association of Park Districts, the Illinois Park and Recreation Association, the Illinois Association of Fire Protection Districts, the Northern Illinois Alliance of Fire Protection Districts, and the Township Officials of Illinois, as well as by other regional associations. Another way to learn about local governments in Illinois is through the wonderful subscription website available at info@localgovnews.org which highlights news stories each day which feature local government issues.

We also hope this Guide will serve as an introduction to ANCEL GLINK. For 85 years, we have worked with governmental bodies as their regular corporate attorneys, along with providing consultation and special project services to governments throughout Illinois.

In the next few pages, you will find a brief history of our law firm and its philosophy. Our goal is to provide high quality, independent, creative legal services at a reasonable cost. We hope that you will visit our web site at www. ancelglink.com. There you can learn more about our law firm and the attorneys who can serve you. Also at our website, you will find a feature which provides the answers to a large number of frequently asked questions and you can download many helpful pamphlets.

In addition to the authors who wrote specific articles, I wish to thank our graphic designer, Shannon Burch.

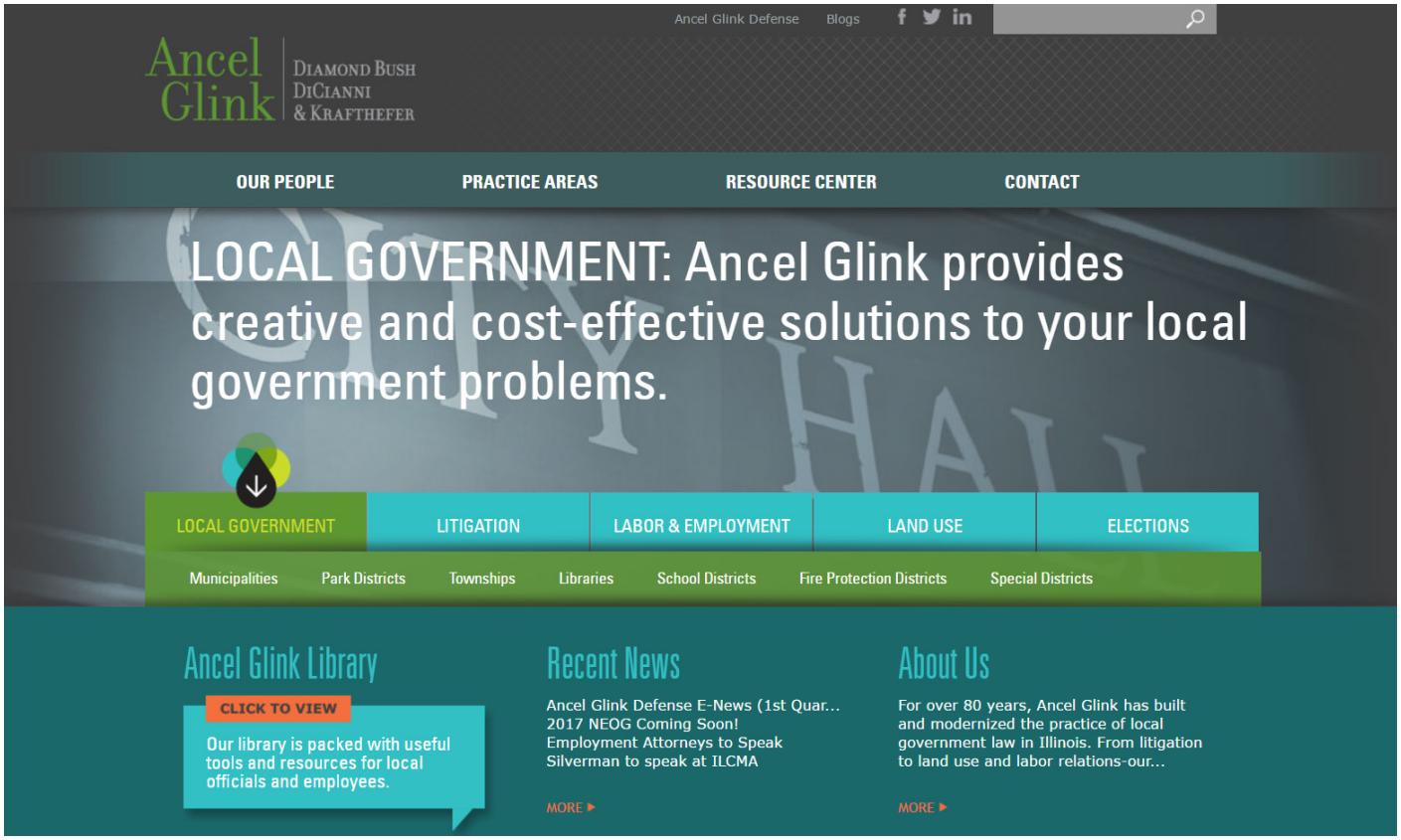
Stewart H. Diamond
General Editor
April, 2017

A Brief History of the Firm

Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C., is a law firm with almost 40 attorneys which concentrates its practice in the representation of governmental bodies. The firm was founded in 1931 by Louis Ancel, who began representing governmental bodies in Chicago's suburban ring. The firm has always served a variety of local governments throughout the State. Among our current clients are municipalities, park districts, school districts, townships, water and sewer agencies, fire protection districts, library districts and other special districts and intergovernmental agencies. We represent clients as regular and special counsel throughout the State. The lawyers at ANCEL GLINK helped to create the first governmental self-insurance pool in Illinois and currently work with many intergovernmental pools that provide coverages for property, liability, workers' compensation, civil rights and health claims.

The law firm represents governmental bodies both as regular corporate counsel and as special counsel. In many cases, we have been hired by the local government's regular attorney to provide consulting services or to handle special matters. The firm's experience with a variety of governmental bodies helps us to assist our clients in working cooperatively with other governments. Although we rarely recommend litigation as a first choice, the lawyers at ANCEL GLINK have represented governmental bodies in thousands of lawsuits. We have had excellent success in trial courts in all of the counties in the Metropolitan Chicago Area and in circuit courts throughout the state. During the history of the firm, our lawyers have argued over 300 cases before State and Federal Appellate Courts.

The philosophy of the firm is to add our legal expertise to the practical and political context provided to us by elected and appointed officials. We understand that our role is to advise and not to make policy. Because almost all of our clients are governmental bodies, our fee structure reflects the need for cost-effective representation. We provide the level of expertise associated with large firms in a small firm environment. We provide our governmental clients with a high level of expertise, energy, creativity and hands-on services. If you think that ANCEL GLINK can help your government or assist your local attorney, please call Stewart H. Diamond, Robert K. Bush, Thomas G. DiCianni, Keri-Lyn J. Krafthefer, Derke J. Price, Julie A. Tappendorf and Scott Puma. If you have any questions about a signed article in this Guide, please give the author a call at (312) 782-7606, or email us at info@ancelglink.com.



Readers are invited to visit our website, www.ancelglink.com, frequently for updates on statutory and case law developments.

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The Articles

Descriptions of Illinois Governments

This Guide has been prepared by the lawyers at ANCEL GLINK for newly-elected officials serving in a broad variety of Illinois governmental bodies. Because the 1870 Constitution limited the ability of governmental bodies to borrow funds, even with taxpayer approval, Illinois possesses a large number of governmental bodies. Whenever the voters wanted government to provide new services and the existing governments were at or near their debt limit, a new unit of government was created by referendum. For that historic reason, citizens created independent Municipalities, Park Districts, Library Districts, School Districts, Fire Protection Districts, Sanitary Districts, Townships and other governments to provide needed services. There are more than 7,000 separate governments in Illinois, a number substantially greater than in any other state.

We have prepared a series of eighteen Articles addressing statutory and court-based rules and governmental practices, which are essentially the same for all units of local government and school districts. As an introduction, we offer separate sections briefly describing the challenges that face newly-elected officials in: (I) Municipalities; (II) Park Districts; (III) School Districts; (IV) Special Districts; (V) Fire Protection Districts; (VI) Libraries; and (VII) Townships.

I. Muncipalities Many Resources, Many Challenges

By Stewart H. Diamond

Illinois municipalities come in all sizes. What has been discovered in recent years is that many of the problems which face larger municipalities can also be found in smaller communities. Perhaps that is one reason why the 1970 Illinois Constitution allowed the voters of Illinois municipalities of any size to adopt home rule. Simply stated, home rule municipalities possess all of the powers of the State, except those which have been specifically limited by the Constitution or by State legislation. Non-home rule municipalities possess only those powers which are specifically given to them by the Legislature or are necessarily implied from other legislative grants.

All but the smallest municipalities offer their citizens law enforcement services, road networks, zoning and subdivision regulation, licensing protections, and building code regulation and enforcement. As communities become larger, they typically add utility services and make efforts to encourage economic development. Elected officials begin to learn that their employees can demand collective bargaining rights and that errors in personnel management can be costly.

The Legislature has created more tools, powers, and revenue sources for municipalities than for special service governments such as park districts, townships and school districts. In addition to real estate taxes, municipalities have the ability to raise money through sales and utility taxes and to bring about needed improvements through the use of special assessments and special service districts. At the same time municipalities are given greater powers to regulate activities and to raise funds, they are governed by an extensive series of requirements which must be met before certain actions can be taken. This is especially true for a non-home rule unit's power to tax and to borrow funds. Municipalities can find themselves in serious difficulty if they try to exercise their full power to spend money without following the statutory rules necessary to raise revenue for – and to authorize – the expenditures.

A municipal government is often referred to as the most responsive form of government in Illinois because it can typically act to correct a citizen's complaint faster than can most other units of government. At the same time, when the citizens are dissatisfied with the operations of a municipality, they are swift to attend board or council meetings and to e-mail elected officials and call them on the telephone to vent their criticism and concern. In part, for that reason, it is important that elected municipal officials are aware of the importance of using the press to disseminate information about issues being considered by their communities. Although not a complete answer, it is often an important part of a justification by a government that hearings or meetings were held on controversial issues to allow the public to express their views in advance of the government's action.

Some municipalities have found that utilizing a committee system is effective, while other communities rarely meet in this format, even as a committee of the whole. Many municipalities in Illinois, especially in recent years, have found it cost effective to hire a full-time or part-time professional administrator to carry out the day-to-day operations of the municipality, subject to the policy decisions of the board. Newly-elected officials who are interested in pursuing the use of an administrator must first determine whether the mayor or village president and the members of the council and board are willing to give up some of their historic powers and prerogatives to a professional civil servant. Through the use of a referendum, voters can adopt any of several variants of governmental form, including the manager system, which gives that appointed officer important and permanent operational powers. Even if a municipality is not prepared to go that far, it can hire an administrator and give that person specific powers in an ordinance, which is subject to future change. Many administrators are also called managers although their powers are derived from an ordinance rather than statute.

Newly-elected municipal officials will quickly learn that they cannot accomplish much on their own and that building a coalition requires both patience and compromise. There is, however, no greater reward in public service than driving around your municipality and observing with pride the improvements you have helped to bring about in even one term of office. For a full discussion of municipal law, we suggest the purchase of the Illinois Municipal Handbook, currently authored by ANCEL GLINK attorneys on a volunteer basis and available through the Illinois Municipal League: (217) 525-1220.

A four-volume set of handbooks on the subject of Municipal Law and Practice in Illinois, can be purchased from the Illinois Institute for Continuing Legal Education: (800) 252-8062. ANCEL GLINK attorneys serve as the Editor and the authors of many chapters of that publication.

II. Park Districts - The Fun Governments

By Robert K. Bush

As a newly-elected Park District Commissioner, you will find that the responsibilities and the challenges, faced by a Park District are very non-traditional. In addition to serving as a trustee for public lands, your Park District may also include areas for management as varied as fitness centers and alternative kindergartens, as well as public/private partnerships with such diverse entities as beer companies and hospitals. For example, the Intergovernmental Cooperation Act and the Illinois Park District Code allow long term leases with private and public entities for recreational services and facility maintenance.

A Commissioner must understand the worlds of environmental remediation, real estate management, criminal background checks, and even child welfare laws. The days where the pressing issues centered around how often the trash was picked up in a park have given way to concerns about competition between the public and private sector for such markets as the health and fitness community. Citizens are requesting more services at reasonable prices for programs closer to their homes and work.

A Park District Board has the responsibility to set fees and fines, when appropriate, for a great variety of programs and regulations which can vary from acupuncture to archery and from Pilates to photography. Almost no other area of governmental operation can affect the lives of more citizens than the programs established by a Park District Board. An evaluation of Park District operations should be made on an annual basis to ensure that the recreation programs are in the black, as well as whether they are reaching the maximum number of citizens in the District.

Park Districts generally operate in a personnel environment with fewer union contracts, but a more diverse set of full and part-time employees than are employed by most other governments. State law has brought the collective bargaining process to more park districts since collective bargaining can now be required in governments with as few as five employees and by signed cards rather than an election held among the employees.

In a society preoccupied with litigation, Park District Commissioners, especially those that are newly-elected, need to learn how to keep themselves and their Park Districts out of needless litigation. Injuries are inevitable in a recreational setting. Lawsuits arising out of those injuries are no so inevitable when a Park District makes every reasonable effort to offer a safe environment and trained individuals for its programs.

The Illinois Park District Code gives some advice and direction, but is ill-adapted to meet some of the more creative aspects of sports and recreation problems. Many of the general Articles of this Guide, on issues such as the Open Meetings Act, employment and personnel, construction law, intergovernmental cooperation and litigation, contain rules developed through the experience of other governments which are also applicable to Park Districts. To learn about their duties, Park District Commissioners should attend Newly-Elected Commissioner Workshops and request an orientation by staff and other Board members. Copies of the Illinois Park District Handbook, coauthored by attorneys at ANCEL GLINK on a volunteer basis, and other support reference material, should also be provided to new Commissioners. The Handbook and a pamphlet on park district finances can be purchased through the Illinois Association of Park Districts: (217) 523-4554. ANCEL GLINK represents many Park Districts as regular and special counsel.

III. OK...I Just Got Elected to the School Board...Now What?

By Margaret Kostopulos

New school board members and community college trustees ("board members") face unique challenges as they formulate educational policy at the local level. As uncompensated locally elected officials, board members are among the hardest-working volunteers in their communities. Between regularly-scheduled board meetings and a full committee schedule (typical committees include finance, labor negotiations, and facilities) board members may find themselves overwhelmed by paper, e-mails, technical terms and inherited promises.

Perhaps the greatest challenge facing board members is maintaining the delicate balance between policy governance and day-to-day operations. Boards engage professional educators – superintendents and community college presidents, as well as other administrators – to guide them in day-to-day institutional decision-making. The issues that reach the board level are often stated in educational, operational or financial jargon, which may require translation. Believe it or not, the professionals you hire are capable of speaking and writing in common English, and should do so when you ask them.

Issues arising in the educational sector are often "gray" and can be emotionally charged, particularly when they concern student rights and responsibilities, as well as those of a predominantly unionized workforce. Board members will also be asked to establish budgetary priorities, and prioritize goals for buildings and grounds operations. In all of these areas, board members need to evaluate and weigh the advice they will receive from upper-level administrators, legal counsel, architects, financial consultants, and others.

Constitutional Issues

Importantly, because schools and colleges are public entities, constitutional concerns relating to freedom of speech, the Establishment Clause, and freedom from unreasonable searches and seizures often arise. Both the State and Federal Constitutions have a profound impact on educational decision making. Board members must, over time, develop a fundamental understanding of the constitutional precepts governing student rights, academic freedom, student discipline and personnel policies.

Where Legal Issues Arise

As important as constitutional questions are those relating to a board's power to make decisions. As local governmental entities, schools and community colleges are creatures of statute and, according to the long-standing "Dillon's Rule," typically only have those powers specifically provided to them by law. Both the School Code and the Public Community College Act provide road maps for the powers and duties of local boards. The respective state associations publish bound copies of the statutes containing detailed and usable indexes. Other state laws such as the Open Meetings Act and the Freedom of Information Act impacting board governance are included in the volumes.

Equally important are Federal laws relating to such issues as student records, special education and especially the No Child Left Behind Act, in addition to the more general laws such as the Americans with Disabilities Act and Title VII of the Civil Rights Act. Educational institutions receiving federal funding must also comply with Title IX of the Education Amendment's regulations concerning student gender equity and freedom from sexual harassment in athletics and other school activities. Most recently, school boards are addressing the rights of transgender and non-conforming gendered students in schools and school programs and the awareness that all students should be comfortable using school facilities.

Generally, legal and policy issues facing schools and colleges can be broken down into student rights and responsibilities; student safety and equal access, labor relations, including collective negotiation with educational unions (such as the Illinois Education Association, IEA-NEA and the Illinois Federation of Teachers, IFT-AFT); board governance (including open meeting and freedom of information requirements); and finance and operations (including bidding). The ever growing use of technology and social media in the educational setting also provides unique questions relating to copyright, computer use

School Boards, cont'd.

policies, the balance of free speech and student protection and facilities management.

Policy Governance

Board members should carefully and cautiously address their most important function – setting their community's educational policies. Board members have ample opportunity to expand their development through statewide and national annual conventions, as well as workshops on areas of specific interest. Also, both school boards and community college boards are encouraged under their respective statutes and the Open Meetings Act to engage in board self-evaluation. These are properly called Board retreats and can be an effective and legal means by which board members can spend a longer period of time reflecting on and discussing the bigger picture issues impacting their districts.

As locally-elected officials, board members should engage their state and federally elected representatives in dialogue concerning education policy. Legislators pay close attention to information they receive from school and community college board members, particularly as it relates to state and federal funding priorities. Most importantly, policy-makers at all levels are interested in how the process works for students. While many of the routine decisions board members make may sometimes seem far removed from the classroom, the fundamental role of school and community college boards is to foster a positive teaching and learning environment for the students and communities they serve. A basic understanding of the laws impacting day-to-day decisions can allow for more time to be spent on those important issues.

Protection from Lawsuits

Both the School Code and the Community College Act require boards to insure and protect individual members against legal liability. Most boards insure themselves against errors and omissions made in the course of business decision-making. Many schools are members of governmental self-insurance pools, some of which were organized and are represented by ANCEL GLINK. Schools, community colleges and their officers and employees receive some protection from lawsuits involving personal injury and property damage under the provisions of the Tort Immunity Act. Board members should familiarize themselves with the conflict of interest laws, including those related to economic interests, bidding and contracts, as violations could result in criminal penalties. As with all elected positions, school board members must avoid conflicts and even the appearance of a conflict. Prudent decisions regarding recusal from voting on sensitive matters, when there is the appearance of impropriety, is strongly recommended, but where a "true" legal conflict of interest occurs, even a recusal may not suffice.

The bottom line? Don't let the legal issues incapacitate your institution. Instead, work with the experts to make sure your policies are consistent with, and compliment, your missions and goals.

A two-volume set of handbooks on the subject of Illinois School Law can be purchased from the Illinois Institute for Continuing Legal Education: (800) 252-8062. ANCEL GLINK attorneys serve among the editors and chapter authors of that publication. The firm represents Illinois School Districts as regular and special counsel.

IV. Special Districts and Intergovernmental Agencies — Little Law, Many Challenges

By Stewart H. Diamond

Because the version of the Illinois Constitution in force from 1870 to 1970 had a rigid limitation on the amount of money which any public body could borrow, even with approval, it became necessary to create new governments as public needs increased. Due to this historical peculiarity, Illinois has over 7,000 governmental bodies – a number much greater than any other State. For that 100 year period, when a municipality reached its then constitutional maximum borrowing level of 5% of its assessed valuation, citizens' demands for parks, libraries, drainage improvements, water systems, sanitary sewers, fire protection and other services resulted in the creation of independent governments.

These new special districts could provide the needed services and borrow additional funds for capital improvements. Likewise, the need for various levels of educational institutions, including elementary, high school, community college and those to address the needs of special education students, often resulted in separate governmental bodies to provide each of these services. In many cases, the statutes relating to the operation of these special districts provided only vague outlines for how the officials were to conduct themselves.

In recent years, new governments, or their equivalent, have been created as a result of intergovernmental agreements, based on statutory authority and the direct grant of power in the Illinois Constitution. Many of these "governments," which in some instances deal with regional concerns and have budgets significantly exceeding those of cities and villages, share the same problem of minimal and vague statutory frameworks. Examples of such entities are multi-member districts which provide water and sewage treatment services, entities engaged in joint police dispatch and those which regulate cable television providers.

But for many special districts and intergovernmental agencies, it is almost as if the State Legislature knew that there was a need for these entities, but ran out of energy when it came time to establish rules of procedure and operations covering them. It becomes extremely difficult for newly-elected or appointed officials of one of these special districts or intergovernmental agencies to go to any single reference source to find the rules which govern the performance of their duties. This Guide is an effort to introduce the newly-elected officials of special districts and the new representatives to intergovernmental agencies to those general statutes which tend to govern all public agencies in Illinois, including in many cases such entities.

New officials of special districts should begin by asking their staff and consultants to provide them with an understanding of the specific statutory powers and duties relating to that type of governmental body. Since only municipalities and counties in Illinois can be home rule units, all other types of governments are subject to a concept known as "Dillon's Rule." This legal principle, enunciated in the early years of the 20th Century, provides that governments which do not have home rule powers are limited in their operations to those activities that are either specifically set forth in the State statutes or necessarily implied through the authority granted. Thus, for example, if a park district wanted to open a building to provide sports education with academic credits for kindergarten through fifth grade, it would probably not alone have the statutory power to do so. But, since the passage of the 1970 Constitution, with its Intergovernmental Cooperation Article, a park district can accomplish the desired result through an intergovernmental agreement with an appropriate educational institution. Newly-elected or appointed officials of an entity created as a result of an intergovernmental agreement should begin their quest for information by reading that agreement, and any by-laws adopted under that agreement.

Most special districts have rules applicable only to themselves regarding the expenditure of funds and the particular types of taxes, fees and charges which can be levied or imposed. Many special districts have run afoul of the law when they fail to appreciate the fact that their powers, while in some cases broad, can be severely restricted by obscure constraints. The ability of an attorney to represent such special districts is made more difficult by the fact that certain limitations on their powers are not found in the often brief, statutory regulations governing the particular district, but, rather, in "catch-all" statutes intended to govern the operations of governments not otherwise dealt with in State law.

This combination of an obligation to provide services which are essential to health and safety with vague and obscure statutory limitations makes the job of newly-elected or appointed officials in special districts and in-

Special Districts, cont'd.

tergovernmental agencies extraordinarily challenging. In addition, many such districts have a limited ability to raise funds from sources other than traditional property taxes and fees for services. To add to this mix, State law now provides that governmental bodies with at least 5 full time employees are obligated to negotiate with labor unions if a majority of their employees so requests. This rule applies to most special districts and intergovernmental agencies. See Article 16 for a downloadable pamphlet called "Labor Law for Public Employees, Large and Small."

The ability of all special districts and intergovernmental agencies to meet modern challenges requires great skill, some daring, and a willingness to work with other governmental bodies on cooperative projects. Because the status of the officials of intergovernmental agencies is still in legal flux, a good first question for new officials to ask is whether they have adequate insurance to protect them against claims or suits arising out of their actions.

V. Fire Protection Districts

By Thomas G. DiCianni

The role of a fire district trustee has changed dramatically over the last 35 years. District trustees must concern themselves with more than the purchase of hoses and equipment; they must also provide the backdrop for the management of a multi-faceted governmental organization handling not only fire fighting and rescue tasks but fire prevention, hazardous materials and EMS assignments.

Moreover, in today's complex society, trustees are faced with personnel, employment and labor law, intergovernmental agreements and mutual aid, risk management, governmental finance, and civil rights violations. A trustee must understand a fire district's rights when a neighboring municipality annexes property within its district and whether or not it is entitled to impact fees when property in the district is developed or for set offs at the creation of tax increment finance districts.

Often, modern fire districts have a diverse personnel environment with volunteer firefighters, support staff such as rehab personnel and explorer posts, full time and part time firefighters, paid on-call and paid-on-premise personnel, fire prevention staff and contract employees. Issues arise such as (1) who is considered an employee? (2) are our officers exempt from union bargaining units? (3) if we are required to negotiate, how do we do so? (4) do we need to pay unemployment benefits for paid on-call or volunteer members? (5) are our "volunteers" covered by Workers' Compensation?

In a society preoccupied with litigation, fire district boards must learn how to keep themselves and the district out of needless litigation. Given the high risk and exposure fire service operations naturally create, accidents and injuries – and the lawsuits that follow – are to some extent unavoidable. But measures can be taken to minimize those exposures. While fire protection districts, their boards, and their employees have immunity from liability provided by a number of statutes impacting fire service activities, immunities still do not cover all exposures. Understanding a district's highest risks and targeting loss control measures at those risks can go a long way towards reducing lawsuits. More and more fire districts are providing first responders to EMS incidents or are providing their own EMS service. Along with the purchase of mobile intensive care units and their related equipment, fire districts must see to it that their EMT's and paramedics are trained and understand their legal, ethical and moral obligations to their patients, the community, the district and the state.

The coordination of governmental bodies with potentially competing interests is also a problem. Questions arise such as: How can a fire protection district induce a municipality to require extensive fire walls between townhouse units or to mandate sprinkler systems in single family homes? How does a park district which is proposing to install a skateboard park arrange with the fire department to provide increased coverage for anticipated broken bones? What are the fire district's rights when a taxpayer files a tax objection? Who represents the fire district during the tax objection proceedings? How can a fire district prosecute and enforce its own ordinances?

These problems of intergovernmental coordination pale, however, when compared with infrequent but severe instances where fire protection districts are asked to function with other governments at various levels in emergency or crisis situations. Who is in charge of an accident or disaster scene? What government possesses the necessary expertise or statutory powers? What happens when state and federal military or civilian players are added to the mix? How does the Fire District's activity coordinate its activities with the Department of Homeland security?

The Fire District Code gives some advice and direction but it is very antiquated when compared to the needs of today's fire district. Many of the articles in this Guide can answer some of your general questions relating to your new rights and responsibilities. The Guide covers general issues among which are the Open Meetings Act, employment and personnel, construction law, litigation and intergovernmental cooperation. For questions specifically related to fire protection districts, this Guide can only serve as an introduction.

Fortunately, there are organizations like the Illinois Association of Fire Protection Districts, the Northern Illinois Alliance of Fire Protection Districts and the Illinois Fire Chiefs Association, which offer additional assistance. We at ANCEL GLINK provide both corporate representation and counseling to fire protection districts and fire departments in all areas relating to fire protection and defense of civil rights, employment, construction disputes and wrongful death lawsuits.

VI. Libraries

By Britt Isaly

The freedom to read is essential to our democracy...The written word is the natural medium for the new idea and the untried voice from which come the original contributions to social growth...The defense of the freedom to read requires of all publishers and librarians the utmost of their faculties, and deserves of all citizens the fullest of their support...-Excerpts from Freedom to Read Statement adopted by ALA Council, July 2000.

To most sitting library board trustees, the job duties of reviewing budgets, considering new sources of library funding, and evaluating the library director's performance may seem mundane. But at its essence, the work of a library board trustee benefits the community because it contributes to the defense of the individual's freedom to read, and it is an enlargement of the community's access to the library's collection.

The Illinois Local Library Act, (for municipal libraries)(75 ILCS 5/1 *et seq.*), and the Public Library District Act of 1991 (75 ILCS 16/.1, *et seq.*), provide guidance for creating, organizing, and financially supporting Illinois public libraries. From meeting to meeting, however, most library boards are looking for guidance in the ways that their library can best serve their communities, and the most efficient ways to attain the goals of the board.

Therefore, it is wise for library trustees always to keep in mind the parameters of the goals of the library board as they do their work. The goals of the library board are broad and of a supervisory nature over the library, the library policy, and over the library director. Control of the day-to-day operations of the library, however, is the job of the library director and the library's staff. Generally, five goals await each library board:

1. Hire and evaluate the Library Director;
2. Establish and monitor the library's budget;
3. Establish policy for the library;
4. Create and implement long-range planning for the direction of the library and its services to the public; and
5. Learn, and abide by, the library's By-Laws and the applicable state laws governing the library.

In addition to these above five general goals, occasionally, individual trustees on the library board will also be called upon as the library's ambassadors to the community, particularly when financial and other social concerns threaten the smooth operation of the library. Nonprofit groups, including "Friends of the Library" groups which are created under the Internal Revenue Code Section 501(c)(3), can provide assistance in such situations. Such Friends groups should be used by the board and cooperate with the board in getting messages out to the library's community and in publicizing fund-raising efforts in the community. The board, however, will need to regularly meet with and hear advice from its 501(c)(3) created group to confirm the long-range community planning for the library and whether any capital needs for the library need to be met within a certain time-frame.

Fund-raising is a timely topic, particularly in these recent days of budget belt-tightening, when libraries often have fewer sources of revenue than other governments. Whatever the revenue sources may be, the library will be impaired without prudent financial stewardship and long-range planning by the board.

Hot Topics for Library Boards

Newer issues face the contemporary library board. For example, periodic

review of library policies regarding a child's use of Internet-accessible, public computers must be performed by the board as the use of Internet filters are balanced against the library's concern over censorship. The State's Open Meeting Act and its application to library board meetings ensures open access of the public, but must be carefully balanced against the work periodically performed by the board in closed session meetings.

To learn more about these issues and the duties of library board trustees, trustees should attend newly-elected trustee workshops, regularly sponsored by the Illinois Library Association (ILA), as well as presentations and seminars provided by one of the State's library systems, the Chicago Public Library System, the Reaching Across Illinois System, (serving libraries north of I-80), and the Illinois Heartland Library System (serving libraries south of I-80). The articles within this Handbook principally relate to those areas of Illinois law which affect all governments. Some of the articles may involve topics faced by less specialized units of government, but, over your term or terms as a library official, you are likely to come into contact with all of them. The attorneys of ANCEL GLINK would be happy to assist you in answering questions regarding any topics covered in this article, or which are of concern to your library's board of trustees.

VII. Townships — Special Rules, Special Opportunities

By Keri-Lyn J. Krafthefer

Township government is one of the oldest forms of government in Illinois. With the clamor throughout the State for local governmental consolidation, townships are operating under a microscope. While the viability of the continued role of township government is sometimes questioned, those who work with townships and receive services from them have no doubt about their importance. Townships perform three primary functions. Briefly summarized, townships are responsible for administering a general assistance program to qualifying residents, maintaining town highways and bridges, and appraising property values in all counties other than Cook County. Townships are also given a variety of statutory responsibilities which are somewhat lesser known, but equally important. For example, they maintain cemeteries in unincorporated areas within townships, and town trustees serve as the township's official "fence viewers."

Townships have been given various powers which they may exercise depending upon the local needs of their constituencies and the activism of the township officials. Townships can establish and run local hospitals, libraries and parks, and may create special service areas for certain projects. Recently, townships have been given increased authority regarding zoning and the acquisition and maintenance of open space.

Special statutory sections govern the powers and the functions of township officers. Unlike municipalities, where municipal boards are the corporate authorities, the "corporate authorities" of a township are the electors meeting at an annual town meeting. However, each township official plays a distinct role in township government. The township supervisor serves as the chief executive officer of the township and as chair of the town board. The supervisor has certain obligations regarding township financial reporting, and serves as treasurer for purposes of certain town funds. Town supervisors also administer the general assistance programs, with authority to hire employees to assist in the provision of public aid.

Township trustees, formerly known as "auditors," oversee the township's financial expenditures by annually adopting a budget and appropriation ordinance and overseeing the expenditure of town funds throughout the year. Trustees often serve on township committees, which may include those on youth, the disabled, literacy, senior citizens and other subjects. The trustees, along with the town supervisor, comprise the town board.

The town clerk is a non-voting member of the town board who is vested with the responsibility of maintaining the township's minutes and records. The town clerk also serves as the ex officio clerk for the highway commissioner. The clerk performs many functions, and usually oversees the township's compliance with the Local Records Act and assures that regular and special meeting notices are posted

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in accordance with the Open Meetings Act. The clerk, as the local election official, also has certain duties involving township elections.

The highway commissioner, sometimes known as road district commissioner, has jurisdiction over all of the roads within the township, except those owned by incorporated municipalities or a county or the State. The highway commissioner must maintain, repair and improve town roads, and assist other public entities in the construction or improvement of such roads. The highway commissioner is not a member of the town board, and the office of highway commissioner is not subject to direction by the town board, except in a few narrow instances (e.g. the town board audits the highway commissioner's bills for payment). However, the highway commissioner must make an annual report to the town board. The highway commissioner often negotiates intergovernmental agreements with municipalities and counties for the joint maintenance of roads, and submits them to the trustees for adoption.

The township assessor appraises and values property based upon formulas set by the Illinois Department of Revenue. Those appraisals are used by county clerks in the tax process. When required, the assessor must attend meetings called by the State Revenue Department. While the assessor is not a member of the town board, the assessor does serve as a member of the township board of health. The offices of assessor and town collector are not related. The town collector has several tax reporting obligations, including the responsibility to provide monthly reports of the collection of taxes and the amounts paid under protest.

Because of its unusual exposure to direct public rule at the annual or special town meetings and its many and varied officers, the Township system is unlike other forms of government, such as municipalities. Newly-elected officials may wish to ask their attorney to conduct an introductory training session on the duties, powers and interrelationships among the various actors in the operation of the Township system. Other helpful references are the Township Officials of Illinois Laws & Duties Handbook, and a pamphlet on Township finances, which are authored by ANCEL GLINK attorneys on a volunteer basis, and may be purchased by contacting the Township Officials of Illinois at www.toi.org.

1a. The Open Meetings Act: Don't Leave Home Without It

By Keri-Lyn J. Krafthefer

Perhaps the most fundamental and germane law that governs the conduct of public officials throughout their careers is the Illinois Open Meetings Act. The Act applies to all public bodies and meetings held by those bodies. 5 ILCS 120/1. In short, the Open Meetings Act requires public bodies to conduct meetings which are open to the public, so the members of the public can know what actions the public entity is taking. For this reason, the Open Meetings Act, along with the Freedom of Information Act, are known as "sunshine laws." The first part of this section deals with OMA and the second part with FOIA.

The Open Meetings Act applies to all public bodies and meetings held by those bodies.

One significant note for newly-elected officials is that you are required to complete training on the Open Meetings Act within 30 days of being sworn into office. The training consists of an on line program administered by the Public Access Officer of the Illinois Attorney General's office. After you have completed the training, you must file your certificate of completion with your public body's clerk.

A popular misconception is that only the governing bodies, such as a village board, city council, park district board, library board, township board and fire protection district board are subject to the Act. The definition of "public body" is quite comprehensive, however, and includes not only those governing bodies but also advisory boards and commissions and subsidiary bodies appointed by them, such as committees and subcommittees. As public bodies, these entities must also comply with the provisions of the Act.

The Act requires public entities to conduct open meetings. A "meeting" is defined as "any gathering of a majority of a quorum of members of a public body held for the purpose of discussing public business." In determining whether a particular gathering constitutes a "meeting" within the scope of the Act, one must first determine what constitutes a "quorum." A "quorum" is simply a number equal to a majority of the members of the board, who are to be elected or appointed. A "meeting" will be deemed to take place when a majority of the quorum is discussing public business.

For example, if a village board consists of six trustees and the president, the total number of officials is seven; consequently, a quorum is four and a majority of the quorum is three members. Thus, if three members of the board "gather" to discuss public business, even by telephone, they are having a meeting as defined by the Act, even if they are merely chatting informally about items that come before their group, and do not believe they are having a meeting. The act also covers contemporaneous electronic communications. Where the back and forth of emails involves a majority of a quorum and morphs into an equivalent of a conference call, the Act has been violated.

A provision in the law remedies a problem formerly facing five-member groups, such as some historic preservation commissions or park district boards. For those bodies, a quorum is three and a majority of that quorum is two members. Whenever two of the members discussed matters pertaining to the commission or committee, that constituted a meeting and they could not talk to each other about public business. The law now allows two members of five-member boards to meet without falling under the obligations of the act. 5 ILCS 120/1.02. In exchange for this amendment to the law, five-member boards can now only pass a matter by an affirmative vote of three members of the board. This means, for example, that a vote of 2 – 1 on a matter would fail for a five-member board, because the matter did not receive three affirmative votes.

Public officials should become familiar with the Open Meetings Act's general rules that govern meetings of a public body. The following is a summary of those rules.

General Rules

A. All meetings required to be public must be held at specified times and places convenient to the public.

B. All public meetings must be open to the public unless the topic to be discussed is specifically permitted to be considered in a closed meeting under Section 7 of the Act. Closed sessions must be audio or video-recorded, and certain rules apply regarding the retention of closed session tapes.

C. Persons attending public meetings may record the proceedings by tape, film or other means unless a witness

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at any meeting required to be open by the Act conducted by a commission, administrative agency or other tribunal, refuses to testify on the grounds that he may not be compelled to testify if any portion of his testimony is to be broadcast to televised or if motion pictures are to be taken of him while he is testifying, but public bodies do have the ability to establish reasonable rules regarding taping so that, for example, the taping does not become disruptive of the meeting. A requirement for pre-approval of recordings has been disallowed.

D. No business can be conducted without a quorum, although less than that number can adjourn the meeting to another date or compel the attendance of absent members.

E. If a public body adopts procedures so permitting and follows certain legal requirements, a board member may participate in a meeting electronically from a different location in certain circumstances, although a quorum must still be physically present at the location of the meeting.

F. Generally, e-mail communications between public officials will not be deemed to constitute a "meeting," but contemporaneous instant message exchanges or chat room discussions participated in by a majority of a quorum may fall within the definition of a "meeting." This would constitute an improper, not publically held, meeting. The same applies to text messages. These rules apply whether the e-mails or text messages are on personal devices or devices owned by the government.

G. Governments are required to adopt rules to allow the public some opportunity to address the public officials. The Public Access Counselor's office has interpreted this requirement to mean that public bodies must give the public the opportunity to speak at all open meetings.

H. A governing body cannot take final action at a closed meeting or in closed session at an open meeting. Final action on a matter can only be taken at an open meeting, and it must be preceded by a public recital of the nature of the matter being considered and other information that will inform the public of the business being conducted.

Notice of Public Meetings

A. Public entities must give the public notice of all meetings. At the beginning of each calendar or fiscal year, a governmental body must publish notice of its regular meeting schedule for the year. Such notice should include meetings of committees and sub-committees of the body, as well as any of its independent boards and commissions.

The definition of "public body" is quite comprehensive, however, and includes not only those governing bodies but also advisory boards and commissions and subsidiary bodies appointed by them, such as committees and subcommittees.

B. A public entity must post an agenda at the principal office of the public body and at the location where the meeting will be held at least 48 hours prior to all meetings, even if those meetings were listed in the published schedule of regular meetings. The agenda must be available for viewing during all of that 48-hour period and a government which has a website, maintained by full-time staff of the government, must post the notice there also.

C. A public entity must also provide notice of meetings to any news media requesting such notice. An agenda for any special, emergency, rescheduled or reconvened meeting must also be given to the news media if they have requested such notice.

D. Notice of emergency meetings for "bona fide" emergency situations must be given as soon as practicable but, at least, prior to the meeting.

E. If a meeting is continued or is to be reconvened at another date, and the time and place of that meeting was announced at the original meeting and there is no change in the agenda, notice is not required.

Agendas and Minutes

A. A public body may consider and discuss topics not initially contained in an agenda at a regular meeting, but that body may not act upon any matter at a regular meeting that is not specifically listed in the agenda and posted 48 hours in advance both by posting for the continuous period and placing it on the governmental website. A catch-all provision in an agenda such as "new business" will not provide sufficient advance notice to the public of a matter coming before the public body for action. While it is still prudent to include a broad catch-all phrase to cover miscellaneous matters which happen to come before a public body, the body should carefully plan its agendas so that it specifically lists all matters to be

The Open Meeting Act, cont'd.

acted upon at its meetings. At a regular meeting, "new business" items can be added to the agenda and discussed. They cannot be acted upon.

If a public body is considering acting upon a matter, the agenda should specifically state that the public body will do so at the meeting. A public body always has the option of not acting on an agenda item, so the better practice is to include any possible action items on the agenda. With regard to agendas for special, rescheduled or reconvened meetings, the Act states that "the validity of any action taken by the public body which is germane to a subject on the agenda shall not be affected by other errors or omissions in the agenda." 5 ILCS 120/2-02.

B. All public bodies must take and maintain written minutes of their meetings, whether they are open or closed. The Act requires that the minutes contain a "general description of all matters proposed, discussed or decided… as well as a record of any votes taken." Such basic information as the time and place of the meeting, a list of members present or absent, and any action taken should also be included. Some public bodies record and prepare a complete transcript and use that as the record of what transpired at the meeting, a practice we do not recommend. Clerks or other minute takers should instead summarize the nature of the business discussed and the actions taken. The benefit of the latter method is that the shorter minutes provide the public and the officials with a relevant record in summary form of the evidence of the meetings which are also more likely to be read.

C. Minutes of all meetings must be available to the public no later than ten (10) days after they are approved by the public body, although we don't recommend waiting the full ten days to make the same available. The Minutes of meetings are required to be approved within thirty (30) days after the meeting or by the second meeting following the meeting to which the Minutes apply. In many governments, the Minutes are generally included on the Agenda for approval at the next regular meeting following the one to which the Minutes apply.

D. Minutes of closed sessions may be withheld from the public for as long as necessary to protect the public interest or individual privacy. The Act requires all public bodies to review minutes of closed sessions semi-annually and determine for each set of minutes whether the minutes, in whole or in part, can be made available to the public or must continue to be exempt from disclosure because of a specific need to maintain confidence.

Shorter minutes provide the public and officials with a relevant record in summary form of the evidence of the meetings, and are also more likely to be read.

E. Closed sessions must be audio or video recorded, and the tape maintained for at least 18 months. Special rules apply regarding the retention and destruction of such tapes.

Closed ("Executive") Sessions

A. Public meetings may be closed to the public by motion of the public board stating the statutorily-authorized reason for closing the meeting. The vote on the motion to go into closed session should be taken by roll call.

B. Only those topics specified in the motion to close the meeting may be discussed at the closed session.

C. Some of the more commonly-used exceptions listed in Section 2(c) of the Act which allow closure of meetings are:

(1) collective bargaining matters;

(2) deliberations concerning salary schedules for one or more classes of municipal employees;

(3) purchase or lease of real estate for use by the public body, as well as consideration as to whether a particular parcel should be acquired, or when the public body is considering the sale or lease of its property;

(4) discussions of litigation when an action "against, affecting, or on behalf of the body has been filed and is pending," or when such an action is "probable or imminent;"

(5) consideration of the appointment, employment, compensation, discipline, performance, or dismissal of specific employees or legal counsel for the public body, but not of independent contractors;

(6) consideration of the appointment of a person to fill an appointive or elective public office, or the removal of someone from office if that body has such removal power;

(7) consideration of informant sources, assignment of undercover per with criminal investigatory responsibilities; and

(8) review of closed session minutes but the vote to approve must be taken in open session.

In addition to these, the Open Meet-

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ings Act contains several other exceptions which would permit a public body to enter into closed meeting discussion under certain specified circumstances.

Enforcement of the Open Meetings Act

Enforcement of the Open Meetings Act can be undertaken by any person, including the state's attorney in the affected county, by filing a complaint with the circuit court to enforce the Act. A simpler process has been created by statute under which people can submit a request to review with the Public Access Counselor in the office of the Illinois Attorney General. Similar to any complaint that must be filed in circuit court, the request to review must be made within 60 days after the alleged violation and must be: (1) in writing; (2) signed by the requester; and (3) include a summary of the facts supporting the allegation. If the facts concerning the violation are discovered at a later date, the request for review may be made within 60 days of the discovery. The Public Access Counselor must examine the issues and the records and make findings of fact and conclusions of law and issue an opinion on same within 60 days after initiating the review or otherwise take steps to mediate the issue. The Public Access Counselor must forward a copy of the request to the governments within seven working days of its receipt. Note that as part of the review, the Public Access Counselor has the same right to examine the verbatim recording of a closed session tape as a court does in a civil action brought to enforce the Act. Although courts are rarely called upon to examine tapes, with the ease that individuals can file complaints, these tapes are more and more frequently reviewed by the Public Access Counselor. The opinion of the Public Access Counselor binds the parties, but can be appealed to the Circuit Court.

Court Remedies and Penalties

If a direct lawsuit is initiated and the court finds a violation, it may invalidate any action taken at an illegal meeting, although courts are generally unwilling to take such a step. The court can order such other relief as it believes may remedy a current or similar future problem.

A finding of guilt against a named official can result in a conviction for a Class C misdemeanor. Upon conviction, a person can be sentenced to a fine of up to $500 and imprisonment for up to 30 days. In a civil case, the court also has the discretion to award attorney's fees to a party who "substantially prevails," except that a private party is subject to such an assessment only if the court decides the complaint was frivolous or malicious. Thus, a public body or its officials could end up paying the plaintiff's attorney's fees where the court finds a violation of the Act, even if no punitive measure is taken against the public body and/or its officials.

To avoid being sued and to maintain a positive image in the community, officials should strictly observe the requirements of the Open Meetings Act. Once those rules become a habit, compliance will be viewed not as an encumbrance, but simply as a fact of life in the public domain.

Tips on Compliance

A. Make sure all of your meetings, including committee meetings, have proper notices and agendas sufficiently describing the actions to be taken.

B. Make sure you don't take action on any matter not sufficiently described on your agenda.

C. Ratify any questionable acts at a subsequent proper board or council meeting – illegal acts can't be ratified.

D. State in your motion and your minutes the authority for going into closed session and take a roll call vote.

E. Always have a tape recorder for closed sessions and have everyone present state their names and positions.

F. Don't go into closed session with your litigation opponents.

G. Do not discuss public business contemporaneously with a majority of a quorum of your board in person, by phone or electronically outside the context of a public meeting.

H. Newly-elected or appointed officials are required to pass a test available on the Attorney General's website showing adequate knowledge of the Open Meetings Act.

1b. The Freedom of Information Act: A Primary Duty of Public Bodies

By Steven D. Mahrt

As a newly-elected government official, it is essential that you be at least somewhat familiar with the basic terms of the Illinois Freedom of Information Act, (FOIA) 5 ILCS 140/1 et seq. The Act declares that providing records in compliance with the requirements of the Act is a primary duty of public bodies. Furthermore the Act states that all persons are entitled to **full and complete information** regarding the **affairs of government and the official acts and policies of those who represent them as public officials** and public employees. As a newly-elected official, this applies to YOU. Your acts as a public official may not only be subject to public scrutiny, but also subject to public access. Now, more than ever before, ignoring the Freedom of Information Act will legally imperil you and the public body which you serve. This chapter cannot possibly cover all of the requirements and nuances of this Act, but it is intended to give you an introduction to its basic concepts.

FOIA applies to "public records," and presumes that all records pertaining to the transaction of public business are open to inspection and/or copying. 5 ILCS 140/1.2. This means that if a public record is requested, it must be provided, unless your public body is able to prove, by no less than clear and convincing evidence, that all or parts of it are exempt from disclosure. The Act contains numerous exemptions; three of which are discussed herein

The first question to answer with regard to FOIA is whether or not a particular record is a public record subject to the Act. This question is becoming more and more complicated as both technology and the laws evolve. The Act defines a public record as *"all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, electronic communications, recorded information and all other documentary materials pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body."* 5 ILCS 120/2(c). **For your purposes as an elected official, and for simplicity's sake, you might think of a public record as being just about anything—as long as it pertains to public business.**

Clearly records kept by the clerk or recording secretary for your public body are public records—but what about a record which you might possess, perhaps on your smart phone, tablet, laptop or personal computer—which is in some way tied to public business? What if the public body supplies you with a personal electronic device, tablet or computer?

In City of Champaign v. Madigan 2013 Il App (4th) 120662, the Court held that text messages sent or received by individual council members during a public meeting were subject to disclosure under FOIA even though the messages were on the members' private devices. The Court said to hold otherwise would allow members of a public body, convened as a public body, to subvert the Open Meetings Act and FOIA requirements simply by communicating about city business during a city council meeting on a personal electronic device. The Court clarified that messages about public business received other times on a private device by individual public officials are not subject to FOIA unless the communication involves enough members of the public body to constitute a quorum or the message is forwarded to a quorum of the public body.

When a public body provides you a laptop, tablet, phone or other device, then messages on the devices are considered "under the control of a public body" and will be subject to FOIA regardless of when received or the number of other elected officials included in the message. An issue is one that is still being lively debated as to whether any record relating to public business on a personal device is subject to FOIA disclosure.

As a public official in possession of public records, you also need to be aware of the Illinois Local Records Act. 50 ILCS 205/1 et seq. This Act requires the preservation of all public records "coming into the custody, control or possession of any officer." Records may be destroyed, removed or otherwise disposed of "as provided by law." The Act allows the disposal of records in accordance with retention policies developed and adopted by the Secretary of State and the local records commission or officer. The definition of a public record under the Local Records Act is a bit different from the definition under FOIA. Consequently you should consult your clerk or attorney prior to deleting any records on your electronic devices to determine whether or not the record must be retained.

After determining whether or not a record is a public record subject to

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FOIA, the next step for a public body lies in determining whether all or parts of that information may be exempt from disclosure to the requesting party; in other words, **just because something is a public record, does not necessarily mean that it must be released**. In fact, the Freedom of Information Act contains in excess of sixty different exemptions, any one of which may permit a public body to withhold all or parts of a record. 5 ILCS 140/7 and 7.5. Some of the more commonly cited exemptions, which we will briefly mention include the "private information" exemption of section 7(1)(b), the "personal information" exemption of section 7(1)(c) and the "pre-decisional or deliberative process" exemption of section 7(1)(f).

"Private information" is defined as *"unique identifiers, including a person's social security number, driver's license number, employee identification number, biometric identifiers, personal financial information, passwords or other access codes, medical records, home or personal telephone numbers, and personal email addresses. Private information also includes home address and personal license plates, except as otherwise provided by law or when compiled without possibility of attribution to any person."* 5 ILCS 140/2(c-5). This section is typically used to redact such information within a larger document which is released, and though it is often cited, is not often disputed or questioned. Occasionally private information is disputed. In PAC Opinion 14-008 the Attorney General held that photographs of a former Sheriff's deputy did not meet the definition of private information. Also in PAC Opinion 12-003 the names of persons enrolled at a public university were not considered private information. These opinions illustrate the preference for disclosure of information unless specifically excluded from disclosure. Neither names, nor photographs are listed as "private information" under the statute.

The question as to whether or not information may constitute "personal information" as permitted to be withheld under section 7(1)(c) is murkier. This exemption permits the denial or redaction of *"personal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information. 'Unwarranted invasion of personal privacy' means the disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information.* **The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy."** 5 ILCS 140/7(1)(c). In other words the General Assembly requires the public body to balance the privacy right at stake and the public interest in obtaining the information. This can be a difficult and fact specific process. By way of illustration, the following types of information have been found to be exempt as "personal information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy": the names of the relatives of a deceased minor as contained in investigatory records; the names of unsuccessful job applicants; disclosure of dates of birth, particularly when coupled with other identifying information; names of suspects in police reports not arrested or charged; and the names of relatives contained in a public employee's disability application.

In contrast, the following have been held not exempt under section 7(1)(c): an incident report in which a public official was arrested but not charged; medical examiner's toxicology and autopsy reports; photographs of physical evidence at a scene of death; sales tax agreements between a city and various businesses; a police sergeant's stated basis for applying for disability benefits; the identity of an evaluator of public bids; the applications of successful candidates for public employment, and police internal investigation records (See Kalven v. City of Chicago 2014 IL App (1st) 121846). (See PAC Opinions No. 14-015, 13-011, 12-012, 12-006, 12-003 and 10-003.)

Section 7(1)(f) permits a public body to exclude *"[p]reliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated, except that a specific record or relevant portion of a record shall not be exempt when the record is publicly cited and identified by the head of the public body."* 5 ILCS 140/7(1)(f). The exception is intended to encourage frank and open discussion among public officials and employees. The following documents have been determined to be exempt from disclosure under 7(1)(f) when not publicly cited/identified by the head of the public body: surveys completed by public university police which were used to determine police assignments; a public employee opinion survey considered in the process of formulating a decision; pre-decisional email correspondence between public employees; emails from a mayor which were deemed to be deliberative in nature with opinions and recommen-

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dations about proposed projects and policies; a memorandum which was prepared to present to a committee, but never actually presented; a draft memo regarding a retirement incentive plan; and an evaluator's comments on scoring sheets made before making a final decision to award a contract. Not all information contained in a preliminary document is exempt. The Courts and the Public Access Counselor have held that factual statements contained in a pre-decisional document are subject to release under FOIA. (PAC Opinion 14-015, and State Journal-Register v. University of Illinois Springfield 2013 IL App (4th) 120881)

No education in FOIA would be complete without a general understanding of the time requirements which apply to a public body responding to a FOIA request for information. The Act provides that a public body must respond to a written request for information within 5 business days after receipt of the request. 5 ILCS 140/3. The response may come in any number of different ways, as follow: (1) grant the request, providing the records simultaneously; (2) deny the request, in whole or in part, citing a proper exemption(s) as the basis of the denial and informing the requester of his/her right to appeal; (3) indicate that an extension of time is required, providing the statutory reason(s) for the extension and the date the records will be available (not more than an additional 5 business days from the original due date); (4) assert that responding to the request within the time frames required would constitute an undue burden, and asking the requester to narrow the scope of the request; or, (5) contact the requester, explaining the difficulty and special circumstances involved, and seeking to reach an agreement for additional time to retrieve the requested records. Special rules granting longer response timelines apply to commercial requesters, "recurrent requesters," and "voluminous requests." 5 ILCS 140/2, 3.1, 3.2 and 3.6. It is important that, if necessary, you work closely with your FOIA officer, clerk, and/or attorney in determining the appropriate response to a FOIA request. Each public body must designate one or more officials or employees to act as its FOIA officer(s). 5 ILCS 140/3.5. Find out who yours is, and be kind to that person, for he or she is operating under deadline and oftentimes without clear guidance!

In addition, it is important to understand that any requester who has a complaint with the public body's response to a FOIA request may file a request for review with the Public Access Counselor established in the Illinois Attorney General's office. The PAC's office is staffed with attorneys dedicated strictly to investigating alleged violations of the Freedom of Information Act and Open Meetings Act—just another stressor for your FOIA officer! The PAC may dismiss a request for review as unfounded, or investigate further, and resolve the same by mediation, issue a binding opinion or advisory opinion, or use its discretion to otherwise resolve the same. 5 ILCS 140/9.5.

The consequences of failing to properly comply with a FOIA request may be harsh. In addition to any relief which the Public Access Counselor might impose, any person denied access to a non-exempt public record may file suit for injunctive or declaratory relief. In the event a party prevails in court, the court must award the prevailing party reasonable attorney's fees and costs. Additionally, should a court determine that a public body willfully and intentionally failed to comply with the Act, or otherwise acted in bad faith, the court must impose a civil penalty of not less than $2,500 or more than $5,000 per occurrence. 5 ILCS 140/11. There are no fines which apply to or are payable by individual employees or officers of the public body. Even if none of these remedies is applicable or available, keep in mind that suspected FOIA violations are often the type of front-page news you will wish to avoid as a public official

These are only some of the most basic aspects of the Freedom of Information Act. The Act is constantly changing as the PAC issues new opinions and the courts interpret the Act. As an elected official you are tasked with assisting your public body in meeting a "primary public duty" of providing records in compliance with the requirements of the Act. You will need to work with your FOIA officer as he or she navigates the sometimes-stormy waters of the Act. Ancel Glink has several attorneys highly-experienced in working with public bodies on numerous FOIA compliance issues. We are pleased to work with your FOIA officer(s), clerk and/or you to ensure that your interests are protected, that public interests are served, and that your journey as an elected official is not imperiled by noncompliance under the Act.

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2. The Rules Are The Game

By Stewart H. Diamond

Most governmental bodies in Illinois are given statutory authority to develop the rules of procedure under which the governing board will operate. With the exception of home rule municipalities that are given the authority to modify some rules, all other governments are required to follow statutory provisions in enacting procedural rules. For example, state statutes generally identify the governmental official or officials with the authority to call regular or special meetings. Statutes also applicable to particular governmental entities generally specify the type of vote and the vote totals that are required to pass various enactments.

In some cases, governments cannot take action without holding some form of public hearing or giving published notice of an intention to take a particular action. Court cases have expanded the right of persons attending such public hearings to fully participate and, in some cases, to question the statements of others through cross-examination. State statutes applicable to particular governmental entities also generally identify which public official is to serve as the chairperson for public meetings, who is to replace that individual when he or she is absent, and if the presiding officer is entitled to vote or exercise veto power.

One important part of governmental procedure usually not regulated by statute is the manner in which committees of the governing body are to be established and the functions which they are to perform. In limited instances, committees can be given the specific authority to act on behalf of the legislative body.

In recent years, courts have not required full compliance with those procedural rules that are not statutorily mandated. State courts will rarely overturn the actions of local governments simply because some local procedural rule was violated. Federal courts will overturn local actions based upon procedural errors only where the federal constitutional rights of citizens have been violated. In addition, except in the case of an egregious error such as when the rights of third parties are adversely affected, courts will allow governmental bodies to ratify previous actions taken in violation of a procedural rule. In one case, however, the annexation of land by a municipality was overturned because citizens attending a statutorily required public hearing were deprived of their rights to fully participate. Because court rulings switch between requiring full compliance and allowing a more leisurely approach, governments can be wrongly fooled into thinking that rules don't matter – they do.

As a newly-elected official, you should ask for a copy of the procedural rules which your government has adopted. Newly-elected officials should also not fear asking the governmental attorney, clerk or other identified expert for the specific source or for clarification of a stated procedural rule. If there are no such rules, you and your colleagues may wish to develop a simple set of procedural rules to comply with the State statutory requirements which apply to your unit of government, or you can urge the adoption of a set of procedural rules, which have been created with Illinois governments in mind. A set of Rules known as Diamond's 30 Minute—30 Rules of Order are nearing publication. Many routine procedural rules have been codified in the Open Meetings Act, which is part of the State statutes, and all governmental bodies, including municipal home rule units, are prohibited from adopting rules that are less restrictive than that Act.

Newly elected officials should also not fear asking the governmental attorney, clerk, or other identified expert for the specific source or for clarification of a stated procedural rule

In general, Illinois law allows governments substantial flexibility in the manner in which they can operate, with some care being taken to protect the rights of a legislative minority and an observing public. A legislative majority patient enough to follow the procedural rules will find that, under Illinois law, it will eventually achieve its goals.

To get you started on some issues relating to procedural rules, here are five questions which are likely to come up as you begin your new duties along

The Rules Are the Game, cont'd.

with some brief answers. For more of these questions, we invite you to visit our web site where you will find many more issues raised in a "Q" and "A" form in a pamphlet that collects hundreds of these questions and answers: www.ancelglink.com. We also post a question of the month on our website.

1. Who appoints committees of legislative body?

ANSWER: Some governmental bodies, on a regular basis, and others, as needed from time-to-time, utilize committees in an advisory capacity. For most governmental bodies, the chief executive officer has the ability, especially if no public funds are to be expended, to name individuals to serve on committees to advise him or her. Governmental bodies, like municipalities and school boards, often break up their membership into committees. Sometimes, the legislative body as a whole chooses to appoint advisory committees, which include both members of the legislative body and public members. The statutes of the State do not heavily regulate the committee process other than to provide that formally-created committees are subject to the provisions of the Open Meetings Act. In general, committees established by the executive can be appointed by the executive, and committees of the legislature, while often appointed by the executive, can be created and appointed by the legislative body itself.

2. Can a governmental body change the quorum requirement?

ANSWER: Except for home rule municipalities, which may be able to do so, all other governmental bodies in this State are governed by Dillon's Rule, which limits their authority to those powers found within the statutes or necessarily implied by the statutes. Wherever a statute establishes a particular number or the method for computing either a quorum or the votes required to pass a particular measure, no non-home rule unit of government can establish a different rule. Where, however, there is no statutory authority and a governmental body creates a new entity, such as an advisory committee, it is generally free to establish the procedural rules which will govern that entity so long as those rules do not conflict with some other statute. For example, a school district could probably establish a 20-person advisory committee on school closures with a procedural rule providing that a quorum of that committee would be 8. Since the committee was, however, a formal committee of the school board, it would be subject to the Open Meetings Act and it could not, except in the case of an emergency, call a special meeting on less than 48 hours notice even if a school board resolution purported to give it such authority.

3. Can elected officials increase their salaries during their term of office?

ANSWER: The Illinois Constitution provides that the compensation of the elected officials of any unit of local government cannot take effect during the term for which that official is elected. (Article 7, Section 9, Illinois Constitution, 1970). In addition, other statutes, applicable to the specific units of local government, provide certain time periods in which increases must be established prior to the commencement of new terms. Other public officials, like school and park board members, do not receive compensation. All officials, however, are permitted to receive advance payment or reimbursement for actual expenses incurred in the performance of their duties, but only if such payments are authorized by the governmental body. Expense reimbursement can increase with expenses actually incurred. A statute now covers this process and contains limitations. This Illinois Attorney General has given the opinion that health benefits are part of compensation and for elected officials must be provided for prior to a term of office as with other compensation.

In general, Illinois Law allows governments substantial flexibility in the manner in which they can operate, with some care being taken to protect the rights of a legislative minority and observing public.

4. Can the remarks of a public official be limited during a public meeting?

ANSWER: Illinois statutes generally do not go into great detail about the rules of procedure which govern governmental bodies. Generally, either by statute or practice, the governmental bodies are permitted to adopt their

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The Rules Are the Game, cont'd.

own procedural rules. In general, those rules cannot conflict with specific statutory requirements applicable to that governmental body. All governments are permitted to establish reasonable rules which control the time at which particular members may speak and the manner in which such statements may be restricted. All governments in Illinois are free to pass procedural rules which provide, for example, that no member would be allowed to speak a second time until all other members have been given an opportunity to speak, and reasonably limiting the period of time within which a member may address the council or board to a particular number of minutes. Courts are likely to overturn such rules if they unreasonably restricted the ability of a member of a board or council to reasonably participate in debate or if they were applied in a discriminatory manner so that the majority view could be fully expressed while the view of a minority on a particular issue was suppressed. Elected officials sometimes request the ability to extend their oral remarks in writing with the written statement being added to the official record of the meeting. In general, it is extremely unwise, both politically and legally, for a governmental faction which is clearly in the majority to be so impatient about its ability to ultimately prevail on certain matters that it would attempt to significantly suppress the public presentation of the minority views. In such a case, restraint is a valuable virtue.

5. What can be done if a member of a governmental body will not respect the secrecy of a closed meeting?

ANSWER: The Illinois Open Meetings Act allows governmental bodies to meet in closed session with regard to a variety of issues. This power exists not only for the main legislative body of a government, but also for its commissions and committees. The reasons for going into closed session must be stated publicly at an open meeting, and a vote must be taken. Once in closed session, speakers should be able to express their full views without any fear that the contents of that meeting will find its way into the public domain. Sadly, this does not always happen. In some situations, for example, the content of closed sessions called to discuss collective bargaining matters, are "leaked" by "pro-union" members of the public body. The same serious problem can occur when the discussions relate to pending litigation or the acquisition of land. In each case, the release of this information is likely to harm the governmental body financially. We do not have a perfect answer as to how to deal with such individuals. One approach, for governments that have police power, is to make such an action an ordinance violation punishable by a fine. Another approach is to seek to publicly expose and censure that individual at a regular meeting of the public body. That approach should not be taken unless there is clear evidence of a violation of the Open Meetings Act. Another approach would be to file a lawsuit against that individual seeking a court-ordered injunction against the disclosure of any other information. Finally, although there will be some reluctance to do so, the local State's Attorney can be asked to investigate the matter and to initiate a complaint against the individual ultimately culminating in a conviction for "official misconduct," this can result in a fine and removal from office. 65 ILCS 5/3.1-55-15; 720 ILCS 5/33-3.

3. Taxing and Spending

By Adam B. Simon

As a newly elected official, you will undoubtedly have questions early in your term relating to the topic of "money." For example, what are the sources of the revenue that your local governmental entity spends? What kinds of expenditures are permissible? Who has the authority to enter into contracts for supplies and services, and what process must be followed? How do you account to your constituents for the expenditures of your board or council? The following summary offers a flavor of the issues about which you should be aware. We also suggest that you approach your local governmental entity's finance director, business manager or treasurer for valuable information he or she has about the entity's fiscal operations.

The rule of law in Illinois is that only the corporate authorities may bind the governmental body unless there is some specific authority for an official to do so, or the public body has, by ordinance or other formal action, designated a specific person or persons to act on behalf of the entity.

Taxing

The primary source of revenue for local governments is the general real estate tax – the tax on all property within the municipal or district boundaries. School districts, in particular, rely principally on property tax. Cities and villages are also empowered to levy special property taxes on limited areas within their boundaries when special services are performed. In addition, municipalities can impose a variety of non-property taxes, such as sales taxes, vehicle taxes, amusement taxes, utility taxes and many others. Local governments may also impose "user fees" or "impact fees" on people who utilize government services or facilities or who apply for permits or licenses, such as admission fees for rec-reation facilities, zoning permits, and business licenses. Schools and other governmental units receive revenue from state and federal agencies. Park districts derive a fair amount of their income from user fees. Schools are also allowed to charge reasonable fees for supplementary services. Some local government units receive a portion of state income taxes.

The process of levying and collecting property tax is quite technical and complex. Because unpaid property tax can become a lien on real estate and can result in forfeiture of ownership, the law requires the government to follow the rules exactly when levying property tax. Failure to do so can result in some or all of the property tax being disallowed. Property taxes are frequently a controversial political issue.

It is difficult to explain the property tax system to the average property owner. One of the most confusing aspects is that taxes are paid in arrears. That is, the taxes collected this year were levied last year. Also, in many counties – including all the "collar counties," as well as those that have approved a "tax cap" by referenda – non-home rule governments, such as school districts, park districts, library districts and smaller municipalities, are subject to tax caps: limits imposed by the State on how much tax may be levied and by how much tax rates may be increased each year, without voter approval. Home rule municipalities and home rule counties are generally free from tax caps. Another confusing factor is that taxes are usually levied by imposing a "tax rate" on the "equalized assessed value" (EAV) of the property.

The assessor determines the assessed value, which is not the same as the fair market value. The State then multiplies the assessed value by the "equalization factor," in an attempt to cause all property in the State to be assessed at the same level. The EAV is then multiplied by the local tax rate ($0.xxx/$100 of EAV) to determine the number of dollars owed by the property owner. This process is carried out for each taxing jurisdiction in which the property is located, and may include the county, township, city or village, school districts, library district, park district, and others, all the way down to the mosquito abatement district. All these independent taxes, taken together, make up the total tax bill on

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the property.

Property tax is paid to the county collector, and then distributed to the local taxing bodies, minus a small percentage retained in case some portion of the tax is objected to and disallowed. For those taxing bodies to which the tax cap applies, the county will also refuse to collect any portion of the tax which exceeds the statutory tax cap. It is the responsibility of local elected officials to assure that proper procedures are followed in levying taxes. Any taxpayer may–and many do–pay taxes "under protest." If defects in the levy process are later proved in court, these taxpayers will have some of their taxes refunded.

Investment of Funds

Tax revenues are generally paid to local governments in large lump sums, which are then invested by the government until they are required to pay expenses. The investment of public funds is strictly regulated by various state and federal statutes. Consequences for failure to comply with these provisions can be severe, so it is important to be aware of your governmental entity's responsibilities, which range from the kinds of investments that are permitted for public funds to the purposes for which interest on investments can be used and the funds into which interest must be deposited. In addition, certain state and federal regulations apply to revenues deposited in funds and accounts established for the payment of debt service on a public entity's bond obligations. Safeguarding your investments is also important to make sure the agency's deposits are protected from loss, even when they exceed the FDIC's insurance limits.

Spending

Every taxing body must, as a condition of levying a property tax, adopt an annual appropriation, budget or similar ordinance, detailing how the money is to be spent. Although such documents can be later amended, that process requires following certain rules. Generally, the appropriation or budget ordinance doesn't authorize the actual expenditure of funds, but only the maximum amounts that can be spent in the fiscal year. Every expenditure of government funds must be provided for in the appropriation or budget ordinance and must be approved, directly or indirectly, by the local elected officials. Most governments must follow strict rules regarding timing and public notice at each step of the budget or appropriation process. The budget or appropriation ordinance becomes the basis for the tax levy, and is the government body's authority to spend money for the coming year. Remember, how-ever, that the taxes levied this year will not be collected until next year.

Failure to conform to the proverbial "letter of the law" could result in invalidation of an expenditure or the filing of an incorrect tax levy if that levy is based upon an erroneous budget or improper transfer of funds

Contracts

Most expenditures, other than those for employees' salaries and benefits, are for financial obligations which have been incurred as a result of contracts for construction of public improvements, and purchase of goods and services. Equipment, tools, professional services, office supplies, and so on, are usually purchased by entering into a contract with a supplier, vendor or professional firm. There are specific legal requirements regarding such contracts.

Because a contract is a commitment to pay money, only the corporate authorities may bind the governmental body contractually, unless there is some specific statutory authority for an official to do so, or the public body has, by ordinance or other formal action, designated a specific person or persons to act on behalf of the entity. A public official might promise a project to a particular contractor, but until the members of the governing body formally approve a contract, or otherwise ratify the understanding between the contractor and the individual official, that promise cannot bind the government. But the corporate authorities may delegate to an official the power to approve contracts for up to a maximum amount of money. Absent such authority, a single official, who thought he or she was buying something for the government, may end up paying for it if the other officials have a different view and will not ratify the unauthorized purchase.

As noted above, for most governments, expenditures require a prior appropriation, and it is not possible

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to establish appropriations beyond the current fiscal year. Sometimes it is necessary or advantageous for a government body to enter into a contract which extends beyond one fiscal year. The rules differ from government to government, but there are generally certain categories of contracts for which the law grants approval for multi-year obligations. For example, 65 ILCS 5/11-61-3, permits 10-year installment contracts for the lease or purchase of real estate, while 65 ILCS 5/11-76.1-1 enables a municipality to extend such contracts to 20 years, subject to a "back door referendum" (a referendum forced by petition of registered voters.) In addition, 65 ILCS 5/8-1-7 authorizes certain employment contracts for no longer than the term of the mayor or president as well as multiyear collective bargaining agreements and intergovernmental agreements. Other units of local government are granted similar statutory authority to execute multi-year contracts. For example, park districts may execute contracts for up to three years relating to certain kinds of professional services and to the employment of various officers. School districts may enter into multi-year contracts with administrators and employee bargaining units. In any case of a multi-year contract, an appropriation must be included in each budget year for which the contract is in effect.

Competitive Bidding

Most statutes that create municipalities and other public corporations contain procedures governing contracts for public works projects, services and supplies. For example, Section 8-9-1 of the Illinois Municipal Code requires municipalities of less than 500,000 population to solicit bids for work or other public improvements where the cost exceeds $20,000. Whether competitive bidding also applies to the purchase of supplies and materials will depend on the form of government and your locally adopted procurement regulations.

Following the advertising for bids, the municipality must let the contract to the lowest responsible bidder, although this requirement can be waived and a contract entered into without advertising if two-thirds of the aldermen or trustees approve the contract. Other units of local government can only waive competitive bidding in the event of a genuine emergency. Home rule municipalities and counties may establish their own requirements for bidding but should be aware of prevailing case law. The Code also authorizes, but does not require, municipalities to enact ordinances providing for the award of contracts for supplies. It is good practice and fosters good public relations for the municipality to seek bids which are responsive to its specifications before actually awarding a contract. This process will also generally result in a lower contract price. Provisions similar to the one described above can be found in the School and Park District Codes (105 ILCS 5/10-20.21 and 70 ILCS 1205/8-4(c)), and the statute governing Community Colleges (110 ILCS 805/3-27.1). For some of these units of government, the contracting statutes are more stringent than for municipalities. Generally, public bodies cannot change a contract in any material respect without re-advertising for bids, or change the decision after a bid has been accepted. Public officials are not prohibited from negotiating with the successful bidder for a reduced price on a contract once the selection is made, but no other terms of the contract may be changed. Also, the public body can reject all bids and start over.

In deciding whether bidders are responsible, the public entity may take into account the contractor's ability to perform the work or deliver the service in addition to its financial responsibility

The corporate authorities of government bodies are generally vested with discretion to decide who is the "lowest responsible bidder." This determination will usually be upheld by a court in the absence of an abuse of that discretion. In deciding whether bidders are responsible, the public entity may take into account the contractor's ability to perform the work or deliver the service in addition to its financial responsibility, and in that connection, may examine the bidder's performance history in its own jurisdiction or for other public bodies. Government bodies should list all of the relevant evaluation criteria for selecting the lowest responsible bidder in the bid solicitation materials. At least one Illinois court approved of a county's consideration of the service provider's social responsibility, and another court approved a city's rejection of the lowest bid due to the city council's concern about the public's

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perception of a conflict of interest. Governments receive a benefit in that a rejected bidder must act quickly if it seeks to prevent a contact being awarded to some other entity.

Certain bidding issues should always raise the red warning flag for public officials. Participating in prohibited actions could result in a charge of bid rigging or bid rotating. An official who knowingly opens a sealed bid at a time different from that advertised, or provides "inside information" to a potential bidder, or knowingly discloses information in a sealed bid to an interested party, can be convicted of a felony and punished accordingly.

For some intergovernmental agencies created pursuant to statute or by agreement, the Intergovernmental Cooperation Act and other statutes establish certain bidding requirements. Article VII, Section 10 of the 1970 Illinois Constitution permits joint purchasing activities among public entities, as does the Government Joint Purchasing Act. Under these laws, governmental bodies may join together to purchase supplies, personal property, and services more economically for all involved.

Under the Local Government Professional Services Selection Act, contracts are exempted from competitive bidding requirements if they pertain to architectural, engineering, and land surveying services, although a modified form of cost-blind proposal solicitation is required. In such a case, a selection can be made on the basis of "evaluations, discussions, and presentations." If the entity has worked with a firm previously and has a satisfactory relationship, it may be able to dispense entirely with the evaluation process.

If your government is subject to a tax cap, you will have a built-in restriction that must be honored annually.

Construction contracts are especially important because a misstep can be very costly. We have advised many local government clients on working with architects and engineers in designing construction contracts which were fair to all parties but gave the governmental body favorable and manageable terms on controversial issues. See Article 7 on construction contracts.

Grants

Some local governmental bodies receive funds from state or federal agencies for special programs or projects. There are strict regulations on the receipt and use of such funds. Misuse can result in severe penalties.

Conclusion

As is true for any business enterprise, a good way to identify the policies and practices of a unit of local government is to "Follow the Money." An understanding of government financial affairs is essential for any elected official making decisions about spending priorities. Please remember that this is a highly regulated area, in which some practices successfully used in private business are simply prohibited or will have adverse consequences. Large dollar amounts are involved in most government activities and a mistake can have unfortunate and long-lasting financial effects. Article 16 discusses a number of ANCEL GLINK pamphlets on the finances of various governmental bodies.

4. Understanding and Avoiding Conflicts of Interest

By Robert K. Bush

All newly-elected public officials should familiarize themselves with the rules governing conflicts of interest. Some of those rules may be a surprise.

Subject to certain limited exceptions, state statute generally prohibits a public official from doing business, in his or her private capacity, with the public body for which he or she serves as an officer. Any aspiring or current public official who may have a commercial connection to his or her government should thoroughly examine that connection and the applicability of Illinois' conflict of interest statutes to actions of public officials. A violation of the prohibitions against having an "interest" in contracts of the public body could result in conviction for a Class 4 felony and loss of office.

Several statutes are relevant to this issue. Article 3 of the Public Officer Prohibited Activities Act ("Act"), 50 ILCS 105/3, applies to all elected and appointed state and local government officers, and is the most restrictive of the conflict statutes. It provides that no such officer "may be in any manner financially interested, either directly or indirectly, in his own name or in the name of any other person, association, trust or corporation, in any contract or the performance of any work in the making or letting of which such officer may be called upon to act or vote." Other statutes apply to specific types of local governments. These statutes usually use language similar to that used in the Public Officer Prohibited Activities Act, although they may exempt appointed officers serving on advisory boards of governing bodies from the application of the statute. Article 3.1-55-10 of the Illinois Municipal Code, 65 ILCS 5/3.1-55-10, applies to the officers of most villages and cities in Illinois. Article 10-9 of the Illinois School Code, 105 ILCS 5/10-9, applies to school board members. Article 4-1a of the Park District Code specifically incorporates by reference the Public Officer Prohibited Activities Act into the Park District Code. Although the language used in each of these statutes varies slightly from one to the other, the general concepts employed are quite similar. In each instance where a statute is specific to a type of government, officials should compare that statute to the Act to determine which provisions may apply.

These statutes generally provide that such officers shall not be "financially interested directly or indirectly" in any contract, work, or business of the government. Exceptions exist, but they are rare. The question of what constitutes a direct or indirect financial interest in such contract, work, or business has proven to be a knotty one. It is clear that if the public official is an owner, officer, director, or employee of a company contracting with that official's government, the officer is so interested. Even if the business with which the public official is affiliated is one or more steps removed from the contract or work, the official should be careful to have such commercial activity reviewed by legal counsel.

The statutes prohibit both direct financial interests in one's own name and indirect financial interests in the name of another. If the public official, or his or her company, is to serve as a subcontractor to a business contracting with the public entity, the public official may be deemed to be interested in that contract, especially if the general contractor has chosen the subcontractor prior to the date of the award. If a public official is aware that any public money from his or her government will be flowing, directly or indirectly, to the public official or his or her company, that situation should be analyzed. It is not, however, improper for an elected official to do business with people who also do business with a government if there is no relationship between that transaction and the government. If the rule were otherwise, no local businessmen could serve in a local elected office.

A violation of these statutes does not require a showing of bad faith by the public official. Many people wrongly assume that a conflict of interest occurs only if the public official "takes advantage" of his or her position to achieve unfair or unreasonable profits. The statutes are broadly worded and are designed to prohibit any such business dealings between public officials and the governmental bodies for which they serve, as well as to eliminate any temptation and any appearance of impropriety. Thus, a public official could suffer a loss on the contract but still violate the statute. It is also important to know that

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Conflicts of Interest, cont'd.

these prohibitions generally cannot be avoided by the officer's abstention from deliberations and voting on the particular contract, business, or sale, and could require resignation from office. Moreover, a violation could also result in a voiding of the contract.

There are, however, several exceptions to the general prohibition in the relevant statutes. These exceptions apply when certain criteria are satisfied which relate to the extent of ownership by the public official in the commercial enterprise, the size of the contract involved, and the nature of the services provided. All such exceptions require that the official publicly disclose his or her interest in the contract, refrain from participating in the deliberations on the contract, and abstain from voting on the contract. The exceptions also require that the contract or other work be approved by a majority vote of the governing body.

For example, the prohibition does not apply if the mayor, president, trustee or alderman of a municipality has less than a 7½ % share in the ownership of the firm, partnership, corporation, or other business entity; if the contract is for no more than $1,500; and if the total of contracts awarded to that firm is less than or equal to $25,000 for that fiscal year. A similar exception applies, independent of the percentage of ownership by the public official, if the contract does not exceed $2,000 and if the total of contracts awarded to that firm for the fiscal year is less than or equal to $4,000. This exception applies only to small contracts based solely on the amounts involved. These same restricted exceptions are found in the Public Officer Prohibited Activities Act, but the specific rules regarding other governmental bodies may not even allow for these exceptions. The rules governing conflicts of interest are not always easily interpreted and the violations have serious consequences. Newly-elected public officials will thus be well served if they familiarize themselves as soon as possible with such rules. When in doubt, ask. When really in doubt, refrain.

Many people wrongly assume that a conflict of interest occurs only if the public official "takes advantage" of his or her position to achieve unfair or unreasonable profits

5. The Gift Ban Act and Prohibited Political Activities

By Stewart H. Diamond

Over the past several years, State government has been rocked by many charges of ethical and financial irregularities. As sometimes happens in these situations, the State Legislature decides to pass a law governing morality. The typical way in which the Legislature has gone about this process is to pass a statute which is designed to specifically relate to State elected and appointed officials and employees. Then, almost as an afterthought, the Legislature, without noticing that there has been very little corruption among local officials, decided that the law needs to be extended to units of local government and school districts. In 1999, the Legislature passed a Gift Ban Act, which seemed to favor aficionados of golf or tennis because gifts associated with those specific sports were exempt under the Act. Polo and croquette were not mentioned.

Very shortly after that act was passed, two officials filed a lawsuit seeking to declare the Act unconstitutional on a variety of grounds. The trial court judge agreed and several years of additional litigation ensued, after which the Illinois Supreme Court, in an act which will not go down in the annals of judicial courage, decided not to rule on the issue, saying that the plaintiffs had brought their case prematurely. Acting with almost reckless abandon, the Legislature passed two statutes. These laws, still in force, established new standards for the type and amount of gifts, which may be accepted by public officials. The Legislature required all governmental bodies to pass ordinances about ethics which were at least as strict as the standards contained within the State statutes. The law is found at 5 ILCS 430/1-1, et seq., which is known as the State Officials and Employees Ethics Act.

The gift ban law begins by banning the intention, solicitation or acceptance of any gift from a "prohibited source" or a gift found to be in violation of any Federal or State statute, rule or regulation. Note that the law can be violated both by the offer of the banned gift and its acceptance. The ban applies to and includes the spouse of and any immediate family member living with the public officer or employee. An officer is defined as an elected or appointed official regardless of whether the official is compensated. An employee is defined as a full-time, part-time or contractual employee. 5 ILCS 430/70-5.

The ban applies to and includes the spouse of and any immediate family member living with the public officer or employee.

Once it got started legislating gift giving or regulating righteousness the Legislature continued, by passing an ethics act which restricts the use of governmental funds and facilities for political purposes. In addition, under a series of cases over the last 20 years in Federal court, you should know that employees of your government, even without other contract or tenure rights, cannot be discharged or demoted because of their political views. There are exceptions for high-level policy-making employees. Before firing someone with whom you publicly disagree, talk to your lawyer. This presentation is in a question and answer format.

Gift Ban Act

Since this pamphlet is directed at newly-elected officials, you have just passed through a period where many of the ethics rules have not yet applied to you. Upon your taking office, the law applies to you.

What constitutes a "gift" under this law?

A gift from a prohibited source means any gratuity, discount, entertainment, hospitality, loan, forbearance, or other tangible or intangible item having monetary value including, but not limited to, cash, food and drink, and honoraria for speaking engagements related to or attributable to government employment or official position of a Board member or employee. For a list of the many exceptions to the Act definition, see below.

What is a "prohibited source"?

Under 5 ILCS 430/1-5, a "prohibited source" means any person or entity who:

1. Is seeking official action by the

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The Gift Ban Act, cont'd.

officer or, in the case of an employee, by the employee or officer or another employee directing that employee;

2. Does business or seeks to do business with the official, or, in the case of an employee, with the employee or an official or another employee directing that employee;

3. Conducts activities regulated by the official or, in the case of an employee, by the employee or by an official or another employee directing that employee; or

4. Has an interest that may be substantially affected by the performance or non-performance of the official duties of the official or employee.

5. Is required to be registered under the Lobbyist Registration Act, and

6. Is an agent or spouse of an immediate family member who is living with a prohibited source.

What does not constitute a gift under this law? (Note: Each of the following items is mutually exclusive and independent of one another.)

1. Opportunities, benefits, and services that are available on the same conditions as for the general public. So a discount offered only to public officials is banned.

2. Anything for which the officer or employee, or his or her spouse or immediate family member, pays the fair market value.

3. Any contribution that is lawfully made under the Election Code, or activities associated with a fund-raising event in support of a political organization or candidate.

4. Educational materials and missions.

5. Travel expenses for a meeting to discuss business.

6. A gift from a large number of specifically listed relatives.

7. Anything provided by an individual on the basis of a personal friendship unless the recipient has reason to believe that, under the circumstances, the gift was provided because of the official position or employment of the recipient or his or her spouse or immediate family member and not because of the personal friendship.

8. Food or refreshments not exceeding $75 per person in value on a single calendar day; provided that the food or refreshments are:

a. Consumed on the premises from which they were purchased or prepared or catered;

b. "Catered" means food or refreshments that are purchased ready to consume which are delivered by any means.

9. Food, refreshments, lodging, transportation, and other benefits resulting from outside business or employment activities (or outside activities that are not connected to the official duties of an officer or employee), if the benefits have not been offered or enhanced because of the official position or em-ployment of the officer or employee, and are customarily provided to others in similar circumstances.

10. Intra-governmental and intergovernmental gifts. "Intra-governmental gift" means any gift given to an officer or employee from another officer or employee, and "inter-governmental gift" means any gift given to an officer or employee by an officer or employee of another governmental entity.

11. Bequests, inheritances, and other transfers at death.

12. Any item or items from any one prohibited source during any calendar year having a cumulative total value of less than $100.

What can officers or employees do if they receive gifts that are prohibited under this law?

If an officer or employee receives a gift that would be prohibited under these laws, the officer or employee, his or her spouse or an immediate family member living with the officer or employee, does not violate this policy if the recipient promptly takes reasonable action to return a gift from a prohibited source to its source or gives the gift or an amount equal to its value to an appropriate charity that is exempt from income taxation under Section 501(c)(3) of the Internal Revenue Code.

Prohibited Political Activity

What is a "prohibited political activity"?

The following constitute prohibited political activities:

1. Preparing for, organizing, or participating in any political meeting, political rally, political demonstration, or other political event.

2. Soliciting contributions, including but not limited to the purchase of, selling, distributing, or receiving payment tickets for any political fundraiser, political meeting, or other political event.

3. Soliciting, planning the solicitation of, or preparing any document or report regarding anything of value intended as a campaign contribution.

4. Planning, conducting, or participating in a public opinion poll in connection with a campaign for elective office or on behalf of a political organization for political purposes or against any referendum question.

5. Surveying or gathering information from potential or actual voters in an election to determine probable vote outcome in connection with a campaign for elective office or on behalf of a political organization for political purposes or for or against any referendum question.

6. Assisting at the polls on election day on behalf of any political organiza-

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tion or candidate for elective office or for or against any referendum question.

7. Soliciting votes on behalf of a candidate for elective office or a political organization or for or against any referendum question or helping in an effort to get voters to the polls.

8. Initiating for circulation, preparing, circulating, reviewing, or filing any petition on behalf of a candidate for elective office or for or against any referendum question.

9. Making contributions on behalf of any candidate for elective office in that capacity or in connection with a campaign for elective office.

10. Preparing or reviewing the responses to candidate questionnaires.

11. Distributing, preparing for distribution, or mailing campaign literature, campaign signs, or other campaign material on behalf of any candidate for elective office or for or against any referendum question.

12. Campaigning for any elective office or for or against any referendum question.

13. Managing or working on a campaign for elective office or for or against any referendum question.

14. Serving as a delegate, alternate, or proxy to a political party convention.

5. Participating in any recount or challenge to the outcome of any election.

What does this law prohibit?

This law prohibits officers and employees of governmental entities from intentionally performing any prohibited political activity on "compensated time" and from intentionally misappropriating any governmental property or resources by engaging in any prohibited political activity for the benefit of any campaign for elective office or any political organization. The law prohibits requiring these acts or offering benefits for performing them. The law does not prohibit people from engaging in political activity voluntarily off duty, without governmental compensation.

What is "compensated time"?

The statute defines "compensated time" as any time worked by or credited to an employee that counts toward any minimum work time requirement imposed as a condition of employment, but does not include any designated holiday or any period when the employee is on a leave of absence.

Does "compensated time" include vacation, personal, or compensatory time off?

No. If an employee wants to voluntarily engage in political activities while on vacation, personal or compensatory time off, he or she may do so.

How is the ethics law to be enforced?

The State law mandates the Attorney General to prepare a sample ordinance for local governmental bodies. She has done so. That sample ordinance recommends the establishment of additional bureaucratic positions where none is required, and seems to force some governments into seeking penalties for violations of the Acts which probably exceed their powers.

One part of the ordinance suggested by the Attorney General requires each governmental body in the State to appoint an Ethics Advisor. While it is beneficial for governmental officials to understand the provisions of the Act, there are clearly better ways to accomplish it than by creating thousands of ethical "personal trainers." In addition, governments are given the right to establish Ethics Commissions, which use an administrative method of processing citizen complaints instead of the traditional method of circuit court prosecutions for ordinance violations. For some governments, the creation of an Ethics Commission and the appointment of an Ethics Advisor may be desirable.

In particular, the Ethics Commission is given the ability to evaluate citizen complaints and to make an initial determination as to whether the local Ethics Ordinance has been violated. If so, the Commission can proceed with hearings to administratively adjudicate those complaints. For some governmental bodies, where many complaints are likely to be filed, this administrative process may well protect all parties through the use of a more subtle tool than prosecution. One might argue that the Ethics Commission, which is to evaluate complaints before deciding to proceed with a hearing, is best able to turn down frivolous complaints. On the other hand, local prosecutors themselves, whose decisions are subject to public scrutiny, are not likely to bring cases which they do not think that they can win.

ANCEL GLINK recommends that, except for a small number of governmental bodies, the preferred enforcement method is to at least begin by using the old-fashioned method of

The law does not prohibit people from engaging in political activity voluntarily off duty, without governmental compensation.

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ordinance violations to deal with these problems. State law simply does not require the appointment of an Ethics Advisor, or the creation of an Ethics Commission. In most cases, we would recommend letting other governmental bodies experiment with these "courts in waiting" rather than establish them almost as a self-fulfilling prophecy to encourage complaints from disgruntled citizens.

We suspect that, for most governmental bodies, the Ethics Commission could sit around and share offices with the Maytag repairman. That is not to say that all officials of governments are entirely ethical or will follow the rules set out in the new legislation. Rather, it is to say that a well-documented violation of the law will likely be treated more fairly, more economically, and more quickly by a prosecutor than by a newly-formed, inexperienced, and perhaps not politically independent Ethics Commission.

The basic structure of both the gift ban and ethics enactments is like the Golden Rule. Governmental officers and employees should not be forced to do unwanted political work in return for his or her jobs. Public officials should not accept gifts in types and amounts which will improperly influence their decisions. Unfortunately, the Legislators have used thousands of words to implement these two concepts.

Most governmental officials have spent their full careers in complete compliance with each of these rules. For many of these officials, their adherence to the rules may have been assisted by the fact that they were never tempted. Other officials simply said "no" when efforts were made to force them to do political patronage work, or said "no" when they were offered more than the most ordinary non-corrupting gifts. It is true that for some political organizations, the rules on limiting political activities may come as something of a shock. Other officials may find their visits to fancy-named golf courses limited to the miniature kind. But from our perspective, the education of our officers and employees to these rules does not require the creation of a totally new bureaucracy. In our view, compliance can be achieved if the enforcement authority is a municipal prosecutor at the County State's Attorney's office free to take proper cases into the quasi-criminal justice system. For governments without a prosecutor, one can be appointed or the State's Attorney may be asked to prosecute. An even newer State law now limits the amounts officials can receive a reimbursement for certain legitimate expenses such as auto reimbursement and meal reimbursement which interestingly varies by location in the country.

6. You're The Boss Now! Labor and Employment Issues

By Margaret Kostopulos

In many cases, public service is likely to be a board member's first exposure to public sector employment decisions such as hiring, firing, budgeting and layoffs, creation of rules and regulations, establishment of compensation and benefits, and discipline. Even officials experienced in personnel matters in the private sector will soon realize that the landscape has changed.

Personnel decision making is an important part of a public official's duties. Many public bodies' budgets are dominated by personnel expenses. For example, school districts frequently devote more than 70% of their budgets to staff-related costs. For those who have never before held authority over subordinate workers, this new role can be stressful. Because human resources often are a local government's greatest investment, board members should have some familiarity with laws governing public employment. The following are some of the powers and constraints which newly-elected officials may have to confront during their tenure.

Constitutional Protections

Public employment is different from work in any other sector of the economy, because of the unique applications of the U.S. Constitution to governments as opposed to private corporations. For example, the First Amendment's right of free association protects all but the highest level or most confidential of public employees from discrimination based upon their political loyalties. Employment decisions such as hiring, firing and promotion generally cannot be based solely on a public employee's political activity. Also, the Fourth Amendment's prohibition against unreasonable searches and seizures has a profound effect on security issues. For instance, a local governmental entity, unlike private employers, has some restrictions on its ability to conduct employee drug/alcohol testing and locker searches.

Because human resources often are a local government's greatest investment, board members should have some familiarity with laws governing public employment.

Another area of frequent controversy is the balance of a public employee's right to free speech and a public employer's right to maintain order and efficiency in the agency's operation.

The Fifth Amendment protects a person's property interests from being taken by a government without due process. Public employees who have an employment contract or what is referred to as an "expectation of continued public employment" with a governmental entity often have such a constitutionally-protected property interest. Similarly, the teacher tenure provisions of the School Code, the Uniform Peace Officer Disciplinary Act, the Firemen's Disciplinary Act and the provisions of the Board of Fire and Police Commissioners' Act, provide employees with certain rights even absent a contract, and thus also provide a cloak of constitutional protections over their employment status. Before a public employer may deprive an employee of such an interest, certain specific procedural requirements must be met to avoid liability in federal lawsuits.

Overtime Laws

Workers of all sorts are generally aware of federal and state laws requiring that they be paid time-and-a-half "premium pay" for working in excess of 40 hours per week. In the public sector, however, employees may be paid in time off ("comp time") in lieu of payment for overtime. Also, new board members may be surprised to learn that, because of the unique "round-the-clock" nature of police and firefighter operations, there are special rules which permit employers to save great sums of money by paying overtime premium only for hours worked in excess of 171 (for police) or 212 (for firefighters) in a 28-day period. In order to create this type of compensation structure, and avoid costly litigation and possible penalties for violations of the Fair Labor Standards Act ("FLSA"), local government employers must follow very technical rules. Recent changes to the threshold criteria for common "white collar" exemptions remains in the balance.

Collective Bargaining

In the 1980s, the Illinois Legislature granted public employees the right to form unions and (except fire and police) the right to strike. The laws affecting public collective bargaining in Illinois take their roots from, and have a very similar structure to, the Federal

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labor law system under the National Labor Relations Act ("NLRA"). Generally speaking, where employees are represented by a union, a public body is required to negotiate to agreement or impasse over matters affecting wages, hours, and other terms and conditions of employment. Unions have won major legislative victories in supporting legislation which requires public sector employers with as few as 5 eligible employees to recognize union representation as opposed to the previous limit of 35. Other legislation allows unions to avoid secret ballot elections if they procure the signatures of more than 50 percent of the employees they wish to represent. More recently, the legislature granted unions representing non-police and fire personnel the right to demand interest arbitration, while not restricting the right to strike, for first time contracts of bargaining units with fewer than 35 members.

Among other things an employer cannot do in a campaign leading up to a union organizational election is Threaten, Intimidate, Promise or Surveillance–often referred to as TIPS

Very specific rules govern what a public employer can and cannot do if its workers are being asked to support or join a union. Among the things an employer cannot do in a campaign leading up to a union organizational election are the tactics of Threaten, Intimidate, Promise or Surveillance – often referred to as "TIPS". Similar technical rules govern the rights and obligations of a public employer to engage in good-faith bargaining. In either case, a misstep can be very costly, even if made with the best of intentions. For example, if the acts of the employer make a fair election or campaign impossible, the Union may achieve recognition by default and the government can be told it must begin negotiations. Many governments hire labor attorneys who are experts in this field to assist them and their regular corporate lawyer to navigate these tricky waters.

Recently the National Labor Relations Board has issued a number of decisions prohibiting adverse employment actions or policy prohibitions based on employee comments via employer email and social media. In the past few years, the NLRB has found social media statements, even when critical of the employer, to be protected as concerted activity, although statements which are defamatory or evidence a plan to harm the employer's organization are not protected. Similarly, the NLRB held recently that employees have the right in certain circumstances to use employer email to communicate with co-workers about unionization. While these protections do not automatically apply to local government employees, it is very likely that the Illinois Labor Relations Board would be greatly influenced by the NLRB decisions when presented with similar circumstances.

When the Legislature extended bargaining rights to firefighters and peace officers it did not grant the right to strike. Instead, protective service employees were given the right to have bargaining impasses resolved by a third-party "interest arbitrator." Interest arbitration is a unique remedy, and applies to protective service employees in Illinois who do not have a right to strike, and to non-protective service employees in bargaining units of fewer than 35 who are negotiating their initial agreement, as mentioned above. In interest arbitration, generally the parties present their final offer along with facts and argument in support of those offers to the arbitrator who then awards either the union's or the employer's last offer.

The next few years are likely to bring significant court rulings on issues of whether local governments can declare "right to work" zones, allowing employees to forgo fair share dues payments or whether the U.S. Supreme Court will rule on that issue on a national level. Another important topic for Illinois public employers that is currently before the courts is how an employer lawfully reach bargaining impasse, allowing the employer to implement their last offer with non-police and fire units.

Fire and Police Commissions

Newly-elected municipal officials may be surprised to learn that their police officers and firefighters usually are not hired or fired by the municipality's governing board. In many jurisdictions, Illinois law requires the governing body to appoint a fire and police commission to make hiring, discipline, promotion and termination decisions for firefighters and police officers. These commissions can be sued in their own capacity by persons challenging their decisions in administrative review

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court actions.

It is important to note that non-home rule communities cannot alter the duties and responsibilities of a Board of Fire and Police Commissioners even through the collective bargaining process, although the law provides that the method of reviewing and issuing disciplinary action is a mandatory subject of bargaining. While the law governing fire and police commissioner boards gives them the authority to suspend police officers and firefighters for more than five days, or terminate their employment, municipalities are also required to bargain with unions over possible alternative means of determining those actions.

Civil Service Commissions

Illinois statutes provide for the creation of civil service commissions in larger municipalities and park districts, or some home rule entities. These bodies are charged with administering the hiring, promotion and termination of a wide range of public employees of the local governmental entity.

Child Labor Laws

During the summer months, the rosters of park districts and municipal recreation departments grow substantially with the hiring of lifeguards, day camp counselors, park maintenance workers and other seasonal staff, many of whom are high school students on vacation. Both State and Federal laws establish a lower minimum wage requirement applicable to teenagers.

The FLSA permits employers to pay workers under 18 years of age at a rate $.50 less than the applicable minimum wage ($8.25 per hour, as of July 1, 2016), but some municipalities and counties have adopted local ordinances mandating a higher minimum wage. Illinois laws are very strict regarding the hours that can be worked by children between the ages of 14 and 16. The State also requires that younger teens must have a special employment certificate issued by their local school district, and they are prohibited from performing many types of tasks regarded as too hazardous for young people. Previously, seasonal employees were not entitled by law to earn time and one-half for hours worked over 40 in a week. Recent legislation now requires this. Strict compliance with these laws is required by the Illinois Department of Labor, and failure to comply with them can result in stiff fines of up to $5,000 per occurrence.

Prevailing Wages

In Illinois, public bodies engaged in construction projects must certify to the State that workers are paid in accordance with local "prevailing wages." Local governmental entities are required to adopt a "prevailing wage" ordinance or resolution every June to ensure their compliance. Prevailing wages are often determined by the Illinois Department of Labor, although alternative methods such as surveying area-wide standards for the type of work involved (regional union contracts, etc.) may be used. Subcontractors on projects subject to the Prevailing Wage Act must, in turn, certify to the public body that they will pay their workers in accordance with "prevailing wages."

Other Employment Laws Affecting Public Employers

Both state and federal governments continue to amend and expand laws protecting public employer. For instance, under the Illinois Human Rights Act, every party to a public contract is required to have a detailed sexual harassment policy published and available to its employees. Failure to have such a policy can constitute an independent civil rights violation.

Recent state legislation includes protections against sexual harassment for interns and pregnancy discrimination of workers, along with granting employers the ability to pay their workers with a payroll card, which is like a debit card. The Illinois Human Rights Act protects against discrimination based on gender orientation, which is defined to include gender identity.

As a new public official, you will be exposed to some or all of these various laws affecting public employment. You and your colleagues should not feel pressured to master the workings of each of these laws, but you should be prepared to recognize circumstances which may trigger the application of these laws to your public body. Once a potential issue is spotted, officials should rely on their legal counsel to analyze the law's application, options available to the board, and advantages/disadvantages flowing from each option. The new state laws, making much smaller governments susceptible to collective bargaining, are bringing about great changes. ANCEL GLINK has produced a helpful pamphlet to assist smaller governments in collective bargaining. You can download the pamphlet Labor Law for Public Employees, Large and Small from the Ancel Glink Library at our website: www.ancelglink.com. You can also stay up to date on labor and employment issues by visiting our blog, The Workplace Report with Ancel Glink, at http://workplacereport.ancelglink.com.

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7. An Outline of the Governmental Construction Process

By Derke J. Price

The public works construction project is a quest. It includes risks, tests, traps, and other obstacles to be surmounted before the journey is complete. The first step is typically the selection of a design pro-fessional: an architect or engineer (the "A/E"), whose job is to translate your collective vision into an actual, constructible plan. Statutes guide the manner of choosing the A/E and it is based on qualifications rather than fee (either due to past experience or as the result of a quality-based selection process). The A/E works with you – the "Owner," to prepare, discuss and revise plans and specifications in increasing detail until a final design product (set forth in the "contract documents") is ready for presentation to the construction market for its evaluation and bids. The most surprising news for you is that you, as Owner must make most of your decision well before the bidding ever takes place. Not only must you approve the design and select the materials to be used, but even more fundamentally you must pick the type of construction delivery system (e.g., general contractor, multi-prime contractors, construction manager) and the terms of the contracts and the processes to be followed throughout. Making these decisions requires the collaboration of the Elected Officials, Staff, the A/E and your attorney.

Once ready, and guided by statute, (and possibly local enactment of the public body), the Owner lets the project for bid and then awards the contract to the successful bidder(s) (the "Contractor"). Next, the Contractor, together with the Owner, arrange for the necessary sureties and insurance coverages required by statute, ordinance and the terms of the contract. Permits are obtained, safety precautions taken, and the Contractor, with its forces, subcontractors, and material suppliers, commences actual construction. In an ideal setting, the project proceeds to completion. But issues always develop. Questions arise as to the meaning or absence of items or errors in the contract documents; dates and milestones are missed. Specified materials may be late, not available, or more expensive than possible substitutes. The quality of work may be challenged as less than acceptable; payments get delayed, and accidents happen. Hopefully the parties are prepared for these developments and can react predictably and quickly so that the project continues to progress. Sometimes, however, litigation or arbitration is necessary to resolve the issues before the project can once again move forward.

Notably, there is no family of construction documents published by any organization representing governmental bodies. Accordingly, the standard form documents must be viewed as a starting point only and they require careful editing and revision.

Public Works construction law is largely the result of common law rules and decisions centered around the law of contracts, although statutes and ordinances play a role in defining the rights and obligations of the Owner, design professional and Contractor. In that regard, there are a number of "families" of standard-form construction contracts available to help achieve that goal. The most famous of these families is that of the American Institute of Architects ("AIA"). Notably, there is no family of construction documents published by any organization representing governmental bodies. Accordingly, the standard form documents must be viewed as a starting point only and they require careful editing and revision.

Choosing the Design Professional

The Local Government Professional Services Selection Act, 50 ILCS 510/0.01, governs the selection of the design professional (except for home rule units that may elect to follow a different procedure). The Professional Services Selection Act declares, as a matter of policy, that the design professional should be selected "on the basis of demonstrated competence and qualifications for the type of services required and at a fair and reasonable compensation." 50 ILCS 510/1. Thus, competence can take precedence over price and, therefore,

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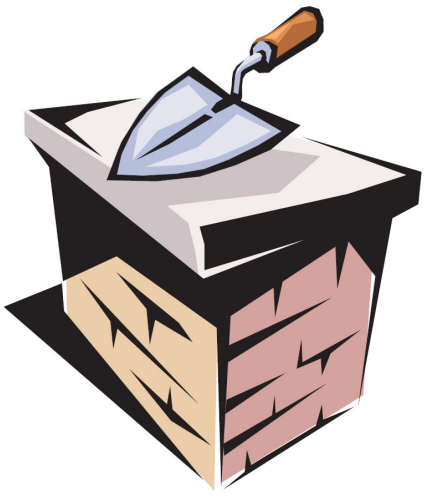
architects, engineers and land surveyor services are not to be chosen solely on the basis of competitive bids. Under the Act, the Owner must determine whether it has a "satisfactory relationship" for those services with one or more firms. (50 ILCS 510/5, 510/6). If the answer is yes, then the Owner may negotiate a contract with that firm. If the answer is no, or if an agreement cannot be negotiated with the design professional with the satisfactory relationship, then the Owner must begin the formal selection process set forth in the Act.

Increasingly popular are design/build contracts (the Owner contracts with one entity for both the design and construction of the project), and the use of construction managers. Care must be taken in entering into these contracts to assure compliance with the Act.

As indicated above, there are several standard form contracts available to serve as the basis for the agreement between the Owner and the design professional. Any standard form document is a starting point only and should be edited and revised (either through Supplementary Conditions to the contract or by direct editing of the standard form) to properly establish, protect and define the Owner's expectations, rights and obligations, including insurance provisions and a lawful indemnification provision.



Bidding the Contract

Ultimately, the design professional must produce a set of "construction documents" for submittal to the construction market for bidding. The construction documents include the bidding forms, the bidding requirements and instructions, detailed plans and specifications, the terms of the contract – including general and supplementary conditions – to which the successful bidder must agree, and any subsequent addenda modifying the original contract documents. Physically, the contract documents usually consist of the bid documents, drawings and a "project manual." Together, these materials set forth the whole of the Owner's expectations for the entire project and, equally important, the legal and other risk-management requirements that the Contractor must meet when performing public works construction (e.g., insurance and indemnification requirements and requiring compliance with the Prevailing Wage Act, the Freedom of Information Act, the Public Construction Bond Act, etc.).

The construction documents are essential to properly fulfill the competitive bidding requirements because they create a single point of reference by which to compare the competing bids. Although the A/E is contractually responsible for the preparation of the contract documents, the general and supplementary conditions for the contractors' agreements have important legal consequences. Prior to putting the materials out for bid, the Owner's attorney should review the bid documents and general and supplementary conditions to properly establish, protect and define the Owner's expectations, rights and obligations. Where there are multiple contracts, the attorney should also review for coordination between them.

Prior to putting the materials out for bid, the Owner's attorney should review the bid documents and general and supplementary conditions to properly establish, define and protect the Owner's expectations, rights and obligations.

Bonds and Surety

The Public Construction Bond Act mandates that every public body must require in the contract that the general contractor furnish, supply and deliver a surety bond to secure the performance of the contract and the payment of all subcontractors and material suppliers. 30 ILCS 550/1. The purpose of the Bond Act is to protect the expenditure of tax funds (by obtaining a guarantee of performance) and to protect those who furnish labor and material to the contractor (by guaranteeing their payment). In contrast to a private construction project where the subcontractors and material suppliers can place a lien on the property of the Owner to secure payment, subcontractors and material

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suppliers on a public works project can only lien those funds in the hands of the Owner due and owing to the contractor.

The relationship of the Owner, Con tractor and Surety is a triangle of bifurcated duties. The Owner owes the Contractor the duty to pay amounts earned, but the Owner also owes the Surety a duty to act reasonably in making those payments so as not to prejudice the Surety's ultimate right to reimbursement. The Contractor owes the Owner various duties under the Contract, but the Contractor owes the Surety a duty of good faith, cooperation and ultimately indemnification. The Surety owes a duty to the Owner to fulfill the obligations of the Contractor when it is in default but also owes a duty to the principal (Contractor) not to prejudice the principal's rights to payment or its defenses under the contract.

Award of the Contract

The authority and methodology for actually bidding and awarding a contract is a creature of statute (and possibly ordinance). Before the unit of government can enter into a binding construction contract, the public entity must have actual authority derived in accordance with the applicable statute and ordinances, including any applicable budgeting and appropriations requirements. Likewise, the duty to publicly bid a contract is a creature of statute and the statutes also set forth specific exemptions from the bidding process. These statutes are enforced according to their spirit as well as their letter. For example, both civil and criminal statutes prohibit attempts to partition or split a project into smaller projects so that each mini-project is less than the statutory trigger for competitive bidding. The guiding principle behind the bidding requirements is that the Owner—and therefore the public—is best served by obtaining as many competing bids as possible. The competitive bidding statutes are enacted to guard against favoritism, improvidence, extravagance, fraud and corruption; at the same time, they seek to invite competition so public entities can secure the best work at the lowest price. The statutes are also designed to ensure the winning bidder is responsible and qualified to do the work, not simply the lowest bidder. Each class of governmental body in Illinois (e.g., municipalities, parks districts, school districts, intergovernmental entities) is governed by different rules about when the bidding process is required and when it can be waived or avoided.

When the Owner accepts the certificate of substantial completion, the risk of loss to the project shifts to the Owner who is then liable for utilities, securities, maintenance, and insurance.

Construction

After the award and execution of the contract, the Contractor and Owner arrange for the sureties and insurance coverages, obtain the required permits, undertake the necessary safety precautions, and the Contractor, with its forces, subcontractors, and material suppliers, commences actual construction. The Owner has several responsibilities during construction, including procuring insurance coverage for various risks and not hindering or delaying the orderly performance of the contractor's duties. The Owner may incur liability for failing to properly carry out these duties. The Owner must also make timely payments under the terms of the contract and in accordance with the Illinois Prompt Payment Act, 50 ILCS 505/1 et seq.

Payment is a difficult balancing act, however. On the one hand, the Owner must be careful to obtain lien waivers from subcontractors and otherwise protect the position of the Surety with

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respect to the amounts to be paid under the contract. On the other hand, an unjustifiable failure by the Owner to pay amounts due under the contract is a material breach by the Owner and the Contractor may stop work and recover at least payment for all work performed and expenses incurred. Liens and failures to perform only complicate matters further. For example, when properly served with a notice of subcontractor's lien and in possession of amounts due the Contractor, the Owner must withhold a sufficient amount of funds due to the general contractor to pay the lien claim; but the Owner may also withhold payments for its own benefit for certain failures of performance by the Contractor.

Changes in the Work

The standard form contracts set forth a process through which the Owner may order changes in the work. The two instruments of change are called "Change Orders" and "Construction Change Directives." Typically, the Change Order is used where the parties are able to agree on the amount by which to change the Contract Sum; whereas the Construction Change Directive is used to accomplish the work while the parties resolve their differences over the pricing of the change. In those rare cases where the public construction contract does not set forth the procedure and limits of authority for changing the contract sum or time, then under the criminal code any change order (or series of change orders) that alters the Contract Sum by a total of $10,000 or more, or that changes the time for completion by more than 30 days, must be in writing. 720 ILCS 5/33E-9. Even where the contract provides for a change order process, municipalities must bid any change order work where the change order would otherwise increase the total contract price by 50% or more of the original contract price.

Substantial Performance

The law recognizes that perfect performance is not possible for the vast majority of construction projects. Accordingly, the law imposes a duty of substantial performance in a reasonably workmanlike manner and in accordance with the plans and specifications. The owner is compensated for any deficiencies or other deviations from "perfect performance" by an appropriate deduction from the contract sum. "Substantial completion" of the project is achieved when the Owner may put the project to the use for which it was intended. This is an important milestone that means the work remaining is capable of being detailed on a "punchlist" prepared by the Contractor. When the Owner accepts the certificate of substantial completion, the risk of loss to the project shifts to the Owner, who is then also liable for utilities, security, maintenance, and insurance. This acceptance does not constitute a waiver of any claims, however, for defective or incomplete work.

If the financial security process works well,it will be unobtrusive and will not require a great deal of administrative activity by the government. In those few cases where the financial security must be called upon,the ability of the government to act must be prompt, sure and effective.

Security for Performance

The Public Bond Act requires that all governmental bodies require some form of security guaranteeing both the completion of the work and the payments to subcontractors and suppliers of materials of the cost of the labor or material which they have furnished in the public works project. Courts have held that the typical completion bond also guarantees payments. Similarly, the Illinois Plat Act authorizes governmental bodies to require similar security from individuals who are constructing subdivision improvements which will eventually be given to governmental bodies. Interestingly, in Illinois, utility lines, such as sewer and water lines, which are constructed by private developers in publicly dedicated roads, do not automatically pass to the ownership of the governmental body without a bill of sale. Therefore, a supplier of sewer pipe to a real estate developer, who is not paid, may have an argument that the government cannot use any line proposed to be given to the municipality without paying him the amounts due. For that reason, it is quite important for governmental bodies to require security to guarantee both the completion of such improvements, and the payment of individuals who have performed labor or furnished goods for the construction projects. Nonetheless, governments in Illinois do not need to worry about successful claims for mechanic's liens which would apply in

Articles

Governmental Construction, cont'd.

private sector contracts. It is also important for governmental bodies to cause the completion of such utility lines, since they have issued permits for the construction of buildings which, when they are finished, will require streets, streetlights, sewer and water lines.

Developers traditionally give municipalities surety bonds issued by surety companies. Approximately 30 years ago, and continuing intermittently, it became cheaper for such developers to furnish irrevocable letters of credit from financial institutions to governmental bodies. The governments preferred irrevocable letters of credit because it was easier to draw down money to complete the job than to induce a surety company to do so. The main advantage to a surety bond, however, is that, unlike a letter of credit, which is often allowed to be drawn down as the project proceeds, a surety bond continues to provide coverage up to its full amount until the work is eventually completed and paid for. In 2000, the Illinois Legislature changed the law to give the Developer the right to choose whether to furnish either a Letter of Credit or Bond. Since the new statute only refers to the choices other than a cash bond, the contractors may not yet have removed municipal discretion.

A third category of improvements for which governmental bodies have sought security of performance are structures which, though remaining in private hands, are essential for the use and en-joyment of a development by multiple future property owners. Thus, while a municipality does not seek a security bond or other device to guarantee the installation of kitchen cabinets or an industrial assembly line, it often seeks guarantees for items of common usage, such as installation of drainage facilities, shopping center parking lots, landscaping promised in a planned unit development, and recreational facilities to be owned by a homeowners association but initially constructed by a developer. The security governmental bodies normally seek for this third kind of improvement are the same types discussed before – letters of credit and surety bonds.

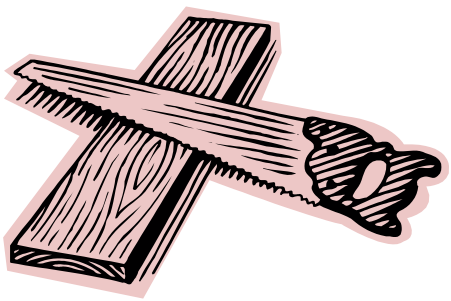
There are also a number of other minor areas in which governmental bodies seek some form of security. When governments accept subdivision improvements, they require a security to be posted to guarantee the workmanship and suitability of the construction for some period of time, usually for one year after acceptance. Typically, this is furnished through the purchase of a commercial subdivision maintenance surety bond.

Governmental bodies, by ordinance, sometimes require a commitment of long-term maintenance for a facility like a private drainage system in a residential or commercial development. There, communities are willing to generally accept the inclusion in a declaration of a property owners association of an obligation to maintain the facility. Such a covenant must contain a provision giving the municipality the right to enforce the provisions contained within the covenant if the Association fails to do so. That provision within the covenant cannot be appealed, repealed or amended without the approval of the municipality. Some governments have recently required an agreement of a developer to accept the creation of a special service district to provide a high level of maintenance if the "homeowner association" model doesn't work.

In general, the entire set of protections put in place by governmental bodies are intended to provide financial security for the installation, completion and maintenance of those elements of a development which are essential to the public health and safety. If the financial security process works well, it will be unobtrusive and will not require a great deal of administrative activity by the government. In those few cases where the financial security must be called upon, the ability of the municipality to act must be prompt, sure and effective.

Conclusion

The drafting and administration of construction contract documents for governmental bodies is an area where experience and constant efforts to improve results will pay dividends. ANCEL GLINK has helped governmental bodies, as general and special counsel, in all types of such contracts, both large and small. We can work with your engineers and architects in a professional and cooperative arrangement to provide you with contract documents that will both attract (rather than discourage) bidders and protect your interests.



8. Suing and Being Sued

By Stewart H. Diamond

There is a great tendency for some newly-elected officials to believe that litigation is the quickest way to solve problems or answer perplexing questions. After a period of time and some experience with litigation, most elected officials conclude that, while it is crucial for the government to acknowledge the existence of litigation as both an offensive and defensive weapon, it should not be the first option chosen.

Illinois governmental bodies all have the ability to access the courts. Unless specifically granted the power by statute, most "subsidiary" committees or commissions created by the government need to litigate through their parent governmental body. Nearly all units of government have the right to condemn property, in the manner established by statute, to sue to collect taxes, fees or debts, and to ask the courts to determine whether a particular governmental action is correct.

This type of lawsuit, called a declaratory judgment, can be filed either by the government or by another party seeking a court's decision as to whether the actions of the government are correct. Governments often file injunction suits to restrain people from taking improper actions or to force them to take proper actions. Private litigants file injunction suits to prevent improper governmental action. Governments are also subject to mandamus lawsuits where a person believes that the government is required by its own rules or by statute to act in a particular way, such as issuing a permit.

Governmental bodies are subject to suits of various kinds before state or federal administrative boards or agencies, and they can be sued in both state and federal courts. Because public funds are involved, a series of rules has developed to make it harder to sue public bodies and win. For example, there are certain rules which apply to the manner in which each governmental body must appropriate or budget for the expenditure of funds and the manner in which contracts are to be let. If a person or corporation enters into a contract with a governmental body which has not followed the appropriate rules, that individual may not be able to enforce the provisions of that contract. In addition, governmental bodies, unlike private parties or corporations, cannot lose ownership in property through inaction or inattention.

Governmental bodies and their officers and employees are entitled to dozens of full or partial immunities under Illinois' Local Government and Governmental Employees Tort Immunity Act and can rely on certain immunities even in Federal Court civil rights cases

The protections which governmental bodies possess in contract and property cases also extend to personal injury suits brought against governmental bodies. For cases brought under State law claims, suits for damage to property or injury to persons, called "tort cases," must be brought within one year of the date when the injury occurred (two years for federal claims).

In addition, where a governmental body or its employee or officer is only marginally negligent, and the person who brings the suit significantly contributed to the injury or damage, the government will not be required to pay, or may only need to pay a limited amount. Governmental bodies and their officers and employees are also entitled to dozens of full or partial immunities under Illinois' Local Government and Governmental Employees Tort Immunity Act and can rely on certain immunities even in Federal court claims of civil rights violations. Article 9 of this Guide discusses these immunities in detail.

Many cases filed against governmental bodies are unsuccessful even though similar cases filed against private corporations would result in significant settlements or judgments. Many Illinois governmental bodies belong to governmental self-insurance pools that support the vigorous defense of cases with varying levels of loss prevention and education for pool members. One good first task for a newly-elected official is to explore the type and amount of insurance coverage, which will protect you if you are sued. Don't be afraid to ask. The statutes relating to most governmental bodies require those governments to provide a defense for officers

Articles

Suing and Being Sued, cont'd.

Glossary

Declaratory Judgment
A judicial action that states the rights of the parties or answers a legal question without awarding any damages or generally ordering that anything be done. A person or governmental body may ask a court for declaratory judgment only if there is a real, not theoretical, problem that involves current legal consequences.

Injunction
A judge's order to a person or entity to do or to refrain from doing a particular thing. For example, a court might issue an injunction to "enjoin" a company from dumping wastes into a river. An injunction may be preliminary or temporary until the issue can be fully tried in court, or it may be permanent or final after the case has been decided.

Mandamus
Latin for "we command." A court order that tells a public official or government department to do something. It is usually directed to the executive branch.

and employees who are sued and to pay any judgment entered against that person. Some statutes, however, limit the amount of the required indemnification or impose conditions regarding notice. Some statutes require employees and officers to pay their own tort judgments and seek reimbursement from the governmental body. For that reason, it is important that newly-elected and appointed officials determine whether they have adequate protection over and above statutory minimums provided either by conventional insurance or by membership in a self-insurance pool.

Officials can lose coverage if they do not promptly report to the governmental body or the insurance company any claim or lawsuit filed against them. Elected officials seeking such coverage must also fully cooperate with their government in the defense of the case. Although it rarely happens, government officials sometimes take actions which are so far beyond their official duties that the government, or even an insuring entity, will refuse to cover them. This usually happens if the government official engages in a personal vendetta against some perceived enemy. In that case, the official might be found to have been acting "outside the scope of his or her authority," and may have to personally defend against and pay for any settlement or judgment. In most cases, public officials may have to pay out of their own assets any punitive damages awarded as a result of their actions. Thankfully, punitive damages are very rarely awarded.

In any areas involving potential litigation, the public official should be able to receive the advice of the governmental attorney, both in avoiding actions which will result in needless litigation and in shaping the issues in unavoidable litigation to the benefit of the official and the government. Sometimes, getting a second legal opinion before suing or deciding to vigorously defend a weak case may save you and your government a great deal of concern and money. ANCEL GLINK works with many self-insurance pools and insurance companies. The firm also serves as special counsel in lawsuits throughout the state and will accept assignments to offer second opinions or assist local counsel.

Although it rarely happens, governmental officials sometimes take actions which are so far beyond their official duties that the government, or even an insuring entity, will refuse to cover them.

9. How to Avoid Being Sued

By Thomas G. DiCianni

So you won the election or were recently appointed to office. Now leave it to a lawyer to throw a wet blanket on your victory party by pointing out that you could face a costly and worrisome lawsuit from almost every decision you make or vote you take in your newly-elected position. Employment matters, contract awards, public debate and comment and many other official acts all create liability potential for a public official.

The government's insurance will protect you from most liability, but "punitive damages," which are awarded for "malicious" or "willful" acts, could, unfortunately, come out of your own pocket.

The good news is that the Illinois Tort Immunity Act provides public officials with statutory immunity from liability in many of the controversial situations an elected official might face. For example, §2-201 of the Tort Immunity Act grants immunity to a public official when an injury results from his or her act deemed to be an exercise of the official's discretion, even if that discretion is abused. Skillful application of that concept by lawyers experienced in defending public officials can go a long way toward protecting an official from a wide variety of potential liability.

Even where certain acts can be seen as outside the "discretion" of the official, various immunities can still apply. If the act is seen by a court as involving the "execution or enforcement of any law," the plaintiff has to prove that the official acted with willful and wanton misconduct in order to establish liability. Where an official acts in good faith and under the apparent authority of an enactment that is unconstitutional, invalid or inapplicable, the official will be immune from liability. Officials are also immune from liability for their failure to enforce the laws.

Any decision to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization, where the decision is within the officer's powers to make, is, under Illinois State law, a protected act. Public officials have immunity from defamation liability for some, but not all, statements made about public matters. It is generally accepted that anything said by the legislators (i.e., trustees, aldermen, members of policy-making boards) during the performance of legislative functions at an official meeting of the corporate authorities of the public body is subject to immunity, and cannot cause defamation liability for those legislators. However, for comments made outside of that forum, or within the forum but where the members are not acting in a legislative capacity, it is a different matter. An executive officer such as a mayor, village, school or park board president, or head of another public body, while making a statement in that capacity enjoys executive immunity. Determining what statements could land you in trouble is complicated, but you should be aware that any critical comments made outside the context of a regular or special board meeting, such as at a press conference, are liability land mines.

Although the Tort Immunity Act will protect you from claims under Illinois law, it will not protect you from claims that you violated somebody's constitutional rights under federal law.

Although the Tort Immunity Act will protect you from claims under Illinois law, it will not protect you from claims that you violated somebody's constitutional rights under Federal law. The Federal system has its own set of rules regarding public official liability, and the immunities are much more limited. Public officials are shielded for their legislative acts – that is, those votes and other decisions made in the course of performing their functions as legislators for a local public body. That immunity does not apply, however, when the decision affects a particular individual and his or her constitutional rights,

Articles

How to Avoid Being Sued, cont'd.

rather than a broader based policy. For example, if you vote to reduce or eliminate a non-statutorily required office or part of your existing government for financial or policy reasons, you will be immune from liability for that act; but if your vote is to terminate and replace the person who holds a particular position for malicious or personal reasons, legislative immunity may not protect you from an allegation that the termination violated Federal law.

Public officials also have "qualified" immunity under Federal law. When a public official makes some decision or takes some action which has not been clearly established by prior law to be unconstitutional, the court can find the official to be immune from civil rights liability. This complex circumstance will test your attorney's knowledge of Federal civil rights law and his or her ability to creatively apply that law.

So how much exposure do you actually face as a newly-elected public official? The only advice we can give is the same advice you probably have already heard – "it depends." One thing is certain, however: you can minimize risk by having a clear understanding of those areas where your immunity protections are not absolute, and by being well prepared, both before a problem arises and after you are named in a lawsuit. The key to limiting lawsuits in the first place is for elected or appointed officials to have heightened sensibility to those areas where litigation is likely to occur. With a preconsultation with your attorney, you may be able to achieve the result you seek in a way which will not open you or the municipality's wallet to an open hunting season. If you are interested in exploring this matter further, you may wish to read the Illinois Governmental Tort Immunity Handbook, written and published by ANCEL GLINK. That handbook contains a series of suggestions on how to limit or avoid liability. You can download the pamphlet from the Ancel Glink Library at our website: www.ancelglink.com.

10. Working Together— The Intergovernmental Cooperation Act

By Robert K. Bush

Public entities in Illinois are responsible for developing, promoting, and maintaining services and benefits for residents and the general public. Some of these responsibilities do not come with any specified funding source. Illinois municipalities, and their public entities, have recognized that by banding together to supply essential governmental services they can retain a higher level of service while controlling ever escalating costs. Intergovernmental cooperation is both a constitutional and statutory grant of authority and is available to all units of local government. The 1970 Illinois Constitution Article VII, Section 10 states that:

Units of local government and school districts may contract or otherwise associate among themselves with other states in their units of local government and school districts, and with the United States to obtain or share services and to exercise, combine, or transfer any power or function in any manner not prohibited by law or by ordinance. Additionally, units of local government and school districts may contract as otherwise associated with individuals, associations and corporations in any manner not prohibited by law or by ordinance.

Consistent with this direction, the Illinois Legislature has promulgated a uniform statutory framework for intergovernmental cooperation. The Intergovernmental Cooperation Act, 5 ILCS 220/1, et seq. ("Act"), supplements the provisions of Section 10 of Article VII. For example, while the Constitution does not authorize state agencies to engage in intergovernmental activities, the Act clearly authorizes intergovernmental activity by "any agency of a state government." 5 ILCS 220/2. The Act also makes clear that it is an addition to and "is not a prohibition on the contractual and associational powers granted by Section 10 of Article VII of the Constitution." 5 ILCS 220/7.

Sections 220/3 and 220/5 of the Act allow for agreement between public agencies to perform any governmental service or activity that they are authorized to conduct. This power to enter into intergovernmental agreements endures unless it is withdrawn by statute or local ordinance. ANCEL GLINK has helped governments to create intergovernmental agencies and agreements under the authority of the Constitution and earlier statutes for more than 45 years.

ANCEL, GLINK has helped governments create intergovernmental agencies and agreements under the authority of the Constitution and earlier statutes for more than 45 years. Intergovernmental cooperation can create many forms of cooperative efforts such as sharing facilities, joint purchase of equipment, and forming self-insurance pools.

Intergovernmental cooperation takes many forms of cooperative efforts such as sharing facilities, sharing costs of equipment, and forming self-insurance pools. Such cooperation is limited only by the municipality's creativity and leadership. When used effectively, intergovernmental cooperation enables local governments to function more efficiently and economically. It is noteworthy that governmental agreements are not exclusively limited to engagements between local governmental units. Cooperative agreements can, as previously noted, be formed between a single local government and private individuals, associations, and even for-profit enities. Other examples of successful intergovernmental agreements include police and fire mutual aid agreements, agreements for the joint use of recreational areas, the serving of special populations for recreational services, street maintenance agreements, intergovernmental land use plans, solid waste disposal, and the treatment and delivery of potable water to many communities from a common source.

Governments are free to choose those entities with whom they will intergovernmentally contract. In Village of Elmwood Park v. Forest Preserve

Articles

Working Together, cont'd.

Dist. Of Cook County, 316 N.E.2d 140 (1974), the court held that the Intergovernmental Cooperation Act "was intended to encourage rather than enforce cooperation...." The court reviewed legislative history and found that while the Act allowed "intergovernmental cooperation in certain circumstances," however, it did not compel cooperation. Thus, the cooperation of governmental entities was voluntary and not obligatory.

Nature of Cooperation

Intergovernmental cooperation should begin with extensive discussions and negotiations among all participating parties. Typically, these discussions emanate from problem areas or instances in which lack of funds make an area-wide approach to a problem essential. The beginning of the process should include an identification of the problem that needs to be solved as well as a review of those governmental or non-governmental entities which can assist or share the same types of problems or issues. Before any such agreement can go into effect, it must be approved in identical form by each participating party and is usually committed to written form.

A unit of local government generally approves the agreement or contract by passing an ordinance or resolution. The ordinance or resolution should cite that it is being passed pursuant to the Constitution and statutory authority to participate in intergovernmental cooperation. Additionally, the language should note any specific source of the government's power to participate in the cooperative agreement. Where the cooperative effort is intended to be of long standing duration and governed by a separate permanent board of directors, the participating parties should strongly consider establishing permanent governing bylaws to facilitate the effective operation of the intergovernmental agency. To minimize potential liability or future litigation costs, it is also advisable for the contracting parties to consult with an attorney before entering into any formal written agreement or contract.

The beginning of the process should include an identification of the problem that needs to be solved as well as a review of those governmental and non-governmental entities which can assist your government or share the same types of problems or issues

Types of Agreements

Examples of some intergovernmental agreements are the following:

1. *Recreation*: Establishing joint recreational services for the disabled.

2. *Financing*: General obligation bonds by a home rule municipality for use by a school district to purchase an obsolete library building. The library used the money to help build a new library at another location which enhanced the village's plan for its downtown area. The remaining dollars of the bond issues were used to remodel the old library as a new headquarters for the school district. The school district entered into a long term lease under which the rent would pay all the principal and interest on the bonds. Without the help of home rule power and the Intergovernmental Cooperation Act, neither the municipality, the library district, nor the school district alone could have so easily financed these improvements.

3. *Property Purchases*: Various school districts, park districts and villages have cooperated in the purchase of derelict buildings or public buildings which are no longer of use or have asbestos or other environmental problems associated with the structures. The sharing of the purchase of the property can ensure additional open space for a community as well as cooperative and utilitarian use of parcels of property or structures for general purposes. Such agreements can also establish land banks for future economic development projects. ANCEL Glink has recently provided services to several land banks that are helping to restore to use abandoned or tax-delinquent properties.

4. *Shared Facilities*: Construc-

Working Together, cont'd.

tion of buildings for joint or shared governmental use. Intergovernmental agreements can also be used to create cooperative construction financing and long term maintenance and sharing of facilities. Shared facilities between park districts and school districts or between park districts and villages, are common.

5. *Infrastructure Need:* There are several multi-jurisdictional agreements to provide Lake Michigan water to communities to the west and north of Chicago. The Central Lake County Joint Action Water Agency, the DuPage Water Commission, and the Northwest Suburban Joint Action Water Agency are examples of these types of multi-jurisdictional cooperative agreements.

6. *Revenue Sharing*: The sharing of revenue from casino profits.

7. *Economic Development*: Joint public and private partnership in the creation of residential and commercial development in blighted areas. Many communities suffering from a lack of revenue from their downtown areas are turning to private developers to partner with their city or village and other governments such as park districts and school districts to develop an economic plan for a downtown area or blighted area. For example, a city can, by its eminent domain powers, take property, raze buildings and make condemned land available to private developers for residential and commercial use. Such a project allows a larger tax base and additional taxes over the long term for the city or village and benefits to other participating governments (Article 18 of this Guide discusses such problems).

8. *Self-insurance Pools*: Governmental bodies of all kinds throughout the state have created intergovernmental self-insurance pools using the authority of the Intergovernmental Cooperation section of the 1970 Constitution to deal with the periodic lack of available and affordable insurance. The pools provide risk management services for a variety of claims and losses such as healthcare, workers' compensation, casualty, liability and civil rights suits. In a case won by ANCEL GLINK attorneys, the Illinois Supreme Court commented on the efficiency of the use of this form of constitutionally authorized intergovernmental cooperation in the case of Antiporek v. Village of Hillside, 499 N.E.2d 1307 (1986). Intergovernmental agreements generally deal with (1) membership, (2) commencement, (3) withdrawal, (4) amendment, (5) term and (6) financial obligation. Sometimes the Legislature passes statutes which deal with intergovernmental agreements. A fairly recent statute provided that governments could withdraw from insurance pools on a time of notice established in the legislation. Very few governments have done so.

ANCEL GLINK lawyers can help your government to feel comfortable about giving up a limited amount of individual power to gain the benefits of collective problem solving.

Articles

11. Technology: What a Tangled Web-Page We Weave...

By Adam B. Simon

ThThe role of technology in public life has taken on unprecedented importance. Communities are considering whether to equip police cruisers with the ability to remotely file reports, police officers with body cameras and track student data over the internet. E-mail and web access have become integral to employment issues. Governments have joined the widespread use of social media to communicate with residents, both by reporting news and to track citizen requests. Technology has taken center stage in promoting and facilitating government transparency. The list of information the law requires governments which have full-time employees operating a website to post to that website continues to grow each year. And now, governments which post public records on its website can be excused from reproducing those documents in response to FOIA requests. Increasingly, legal questions arise from the use and regulation of technology. Newly-elected officials should be aware of the intricacies of integrating technology and the dramatic role it should play in their decisions.

Constitutional Implications

In determining the legal impact of technology, one must first look to potential constitutional implications. First Amendment issues arise when schools and colleges attempt to control the content of speech being published on student or instructor web sites. Privacy rights may be implicated by personal or business information found in community databases. Fourth Amendment limitations on unreasonable search and seizure may arise when e-mail and other communications are intercepted by webmasters. Some constitutional scholars have even suggested a new constitutional amendment dealing with the digital world. Many states, including Illinois, have enacted laws to protect the privacy of current and prospective employees' Internet alter egos. Some on-line speech is even protected by labor laws. Newly-elected officials should be sensitive to these complex issues, and know when to ask for expert advice and learn what tools can be implemented to blunt potential invasion of privacy complaints.

All public entities should carefully design their website and take into consideration those groups who will be accessing the website and for what purposes. Governmental websites can be considered the "virtual village green"--a term coined by a noted constitutional scholar. When a government establishes a website, especially a social media outlet, it may be opening up a "forum" for public participation. As a public forum, certain rules apply so that participation cannot be limited (i.e. censored) on the basis of content. Thus, policies and procedures for approving any outside entities posting, or removing, information on a government's website must be "content neutral."

Operational Issues

Technology also has tremendous impact on the nuts and bolts operations of governmental entities. Complicated contracts involving telecommunications and software should be carefully reviewed. Cost savings through e-procurement and performance contracting should be considered. Progressive and environmentally-sensitive communities are moving toward "paperless" agendas and issuing laptop or tablet computers to elected officials. Schools, colleges, libraries, and some community centers may be eligible for "e-rate" savings. Interestingly, many of the governmental bidding statutes exempt contracts relating to telecommunications and data processing equipment, which may also be permitted for a term greater than one year. Boards of all types should engage staff and consultants to assist them in creating a workable, scalable, legally sound, and affordable technology implementation plan. Often, members of the board and community can provide reliable expert advice. Most importantly, ample time should be given to debate and deliberate over these complex issues.

In determining the legal impacts of technology, one must first look to potential constitutional implications.

As the use of the Internet becomes more pervasive, laws will continue to recognize such widespread use. Each year that passes adds another report or record which must be posted on a public agency's website -in some cases regardless of whether it is managed by their own staff – instead of in a printed newspaper.

Beyond computers are the proliferation

Technology, cont'd.

of smartphones, tools by which we remain connected to our network of friends, colleagues and fellow officials. Due to the ease with which we can communicate electronically, care must be taken to remember how the application of the Local Records Act, Open Meetings Act and Freedom of Information Act affect this type of interaction. The Illinois Attorney General and Courts have interpreted these laws to ensure the public has access to any record that relates to the conduct of public business, even going so far as to require the inspection of private e-mails and text messages in some cases. At the publishing of this pamphlet, legislation was pending that would make all electronic communications on private devices related to public business subject to the Freedom of Information Act.

Copyright

Intellectual property rights also come into play, particularly in the educational sector. As instructors prepare on-line courses or use web-based materials, and as communities develop web pages, ownership issues must be considered. For instance, "safe harbors" exist for academic use of certain information, including multimedia. Fitness instructors need to be aware whether they have a license to use recorded music. Governments should be aware of the severe economic and potential criminal penalties for using materials, both printed and performed, without proper licenses. The law in this area is quite complicated and, again, experts should be consulted to implement strategies to mitigate this risk.

Proactive Approaches

Governments suffering from the proliferation of Freedom of Information requests will find economic and operational efficiencies from digitizing and posting all their public records. Governmental entities can be proactive by enacting acceptable use policies, preparing technology implementation plans, and carefully considering contracts. Public officials should consider using official e-mail accounts exclusively for public business to strengthen the separation between their public and private Internet identity. Policies governing use of government-owned computers and other equipment by officers, em-ployees, students, community residents and others should be considered. These policies can regulate issues such as web page development, public comments on social media outlets, Internet filtering, e-mail usage, and internal communication protocol. Preparation of such policies is a cross-disciplinary effort that requires the cooperation of information technology professionals, lawyers and policymakers.

Entities should also prepare technology plans emphasizing prudent roll out and replacement of hardware and software, as well as issues such as employee e-mail usage. Finally, governmental entities should not be taken in by complicated "boiler plate" in technology contracts. Often, these newly developed terms and conditions are drafted to the advantage of vendors, and as yet are not court tested. Attorneys at ANCEL GLINK have helped clients achieve contract modification or simplification even after vendors insisted that they would not deviate from their contract forms. Technology is providing new and unprecedented opportunities for local governmental entities to become more efficient, and deliver more information to their communities. Many of the legal issues involving technology integration are complex. Board members should be aware of the myriad questions that can arise when their local governmental units implement technology, such as a social media outlets, including Facebook, Pinterest, Instagram, YouTube and Twitter. Staff and consultants should be asked to explain problems and suggested solutions in simple and understandable language. Do not be embarrassed or hesitant to ask questions. In the area of technology, the old adage, "If you have the question, others do, too," often rings true.

Cable TV

Sometimes the development of a technology will get governmental bodies involved as regulators or franchisors of new technology. Because Cable TV typically uses public rights-of-ways, both State and Federal law give States, municipalities and counties the right to franchise and regulate the service providers in this industry. The local power has been severely limited by changes to State and Federal law in recent years, but there are still ways that local governments can gain revenue from this business and protect the rights of consumers. Depending on the impacts arising from "net neutrality," the growth of over-the-top video services, such as Netflix, may further encroach on municipal revenue and regulatory control. Even cable companies may adopt programming delivery models which rely more on the Internet than traditional paths of distribution.

Governments can also use cable television as a valuable communication tool to educate, inform and entertain residents. ANCEL GLINK has helped many communities to negotiate original and renewal franchise agreements. Now, more than ever, it is important to have help monitoring and explaining potential amendments which may erode local authority. More importantly, it is crucial to be able to understand and enforce the narrow rights that municipalities still have.

Website

To see the level of technology and information sharing we have achieved, you may visit our website at www.ancelglink.com. You can use the website to learn more about municipal law and send us your comments and questions.

Articles

12. Cooperating on Economic Development

By Stewart H. Diamond and David S. Silverman

The concept of planned and orderly growth is familiar not only to municipalities but also to the units of local government that provide a variety of services to their respective groups of constituents. If you are an elected official serving on the board of a taxing district, you will have a keen interest in finding ways to raise money so your governmental body can deliver necessary and promised services to the taxpayers and also in taking steps to expand the tax base in your community. Often the best way to achieve these goals is by working cooperatively with other local governmental units to attract commercial, residential and industrial development into the town and to revitalize existing amenities so that additional property taxes are available for your government.

While at first blush, it may seem as if all governments would favor economic development, this is a subject which historically has produced as much conflict as cooperation. State law gives municipalities control over the prime economic tools of annexation, subdivision, drainage, construction regulation and licensing. Other governmental bodies can advise and offer their suggestions regarding the use of the developmental tools described in this Article, but the power of these governments relate more to persuasion than prohibition.

The concern of non-municipal governments over excessive development can be quite real. School districts, park districts, library districts and fire protection districts have few defenses against a municipality which overburdens them with the responsibilities for new development while failing to assist them to provide needed services for the new residents or businesses. On the other hand, these special units of government are sometimes prone to interference with the legitimate desires of a municipal government to offer incentives to bring new commercial and industrial taxpayers to town as well as to revitalize older or deteriorating areas.

As in all other interactions between governments, the early sharing of information and the solicitation of constructive comments can make the entire process much smoother and more effective. The first step in deciding whether an economic project should be supported or opposed is to understand the nature of the mechanism. This Article identifies some of the economic development tools that can be utilized on an intergovernmental basis as a means of providing additional revenues or other benefits for your constituency. You may download the pamphlet "Economic Development Toolbox for Municipal Officials" from the Ancel Glink Library at our web site: www.ancelglink.com.

Property Tax Abatements and Intergovernmental Cooperation

Municipalities and all other taxing districts are statutorily authorized to give abatements to property owners for commercial and industrial enterprises. (See The Revenue Code, 35 ILCS 200/18-165.) You might wonder why the corporate authorities would want to offer such an outright gift to an owner, considering that the result is a loss of tax revenue to the taxing district. The simple reason is that an abatement can serve as a powerful incentive to attract a new commercial entity or to retain a business that is experiencing some economic difficulties but can, with a little financial support, continue to be an income generator for all taxing districts that rely upon property taxes as their main source of revenue and can provide jobs for local residents. This approach to development recognizes that short-term sacrifice is a long-term investment for revitalizing a community.

Property tax abatements are also a useful tool to assist a commercial development in expanding its operations. An expansion will not only keep the business in the community, but will increase the tax base and provide a benefit to the municipality, school district, park district, library district and other taxing bodies as a result of the increased assessment of the expanded business, even if those taxing bodies abate a portion of the additional taxes. When commercial enterprise opportunities are lost, the community can suffer considerably from a declining property tax base and diminishing sales taxes, which in turn can discourage new development that may be unwilling to invest in a town with a faltering business climate.

The Revenue Code allows abatements to be provided to affordable housing developments devoted to senior citizen housing, and to academic and research institutes designated as 501(c)(3) organizations by the IRS with at least 100 employees. The abatement can be as long as 15 years in the case of senior housing, and not less than 15 years for academic institutions. For senior housing the aggregate limitation is $3,000,000, while for the academic and research

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institutes, the maximum is $5,000,000. This special type of abatement can also be the subject of an intergovernmental cooperation agreement.

Government entities can associate and contract with one another by means of intergovernmental cooperation authorized under Article VII Section 10 of the Illinois Constitution and the Intergovernmental Cooperation Act (5 ILCS 220/1 et seq.), and may formalize their cooperation in an intergovernmental agreement. In an abatement sharing agreement among several taxing districts, each party to the agreement pledges a certain percentage or amount of tax abatement to the property owner. The participation of several taxing bodies in such an agreement eases the burden for each individual government entity while enabling the group to offer a greater abatement. The only limitation imposed by statute is that the total abatement period cannot exceed 10 years (20 years if the property is greater than 500 acres), and the aggregate abatement amount cannot exceed $4,000,000 or $12,000,000, if the development exceeds 500 acres. Intergovernmental agreements for tax abatements can, and often do, provide that the taxpayer benefited by the relief from property taxes must reimburse the taxing districts some or all of the amounts abated if the taxpayer leaves the area at any time during the abatement period, or within a certain reasonable period after the abatement ends. However, such reimbursement provisions can be difficult to enforce.

Sales Tax Sharing

The Illinois Municipal Code authorizes municipalities to enter into "economic incentive agreements" with businesses for the rebate of a certain portion of municipal sales tax collected by the city or village. 65 ILCS 5/8-11-20. Before a non-home rule community can proceed with such a plan, certain findings must be made by the corporate authorities with regard to the condition of the property as vacant, or if developed, then the condition of the structures on the site. These agreements can incorporate a broader incentive package for the owner or developer, and can also include reasonable obligations imposed on the beneficiary that are advantageous to the municipality. Although other types of governmental units cannot take advantage of this public financing incentive, they can benefit indirectly from the municipality agreement with a retail developer when such an agreement spurs further growth and increased property tax assessments.

Dedications, Exactions, and Impact and Recapture Fees

In accordance with State statutes (including Sections 11-12-5.1 and 11-12-8 of the Illinois Municipal Code, 65 ILCS 5/11-12-5.1, 65 ILCS 5/11-12-8) and court decisions, municipalities have authority to require developers of subdivisions to set aside land, or cash in lieu thereof ("impact fees"), for school, park, and other public purposes as a condition for plat approval. Under the Illinois Municipal Code, there must be a showing that such a dedication or "exaction" is necessary under the reasonable requirements of the municipality's subdivision control ordinance, and the courts will also apply a standard to measure whether those requirements and any other impact fees imposed by the municipality are "specifically and uniquely attributable" to the proposed development. ANCEL GLINK lawyers wrote the first successful impact fee ordinance and validated its use in an Illinois Supreme Court victory. School and park districts in particular, through their elected officials, should make their specific needs arising from new development known to the municipal officials and work with them to establish appropriate formulas for calculating the required donations and impact fees.

Developers subject to substantial land dedications and impact fees may criticize them as burdensome. If the municipality, with data from the school, park, library, and fire protection districts can demonstrate the relationship between the impact caused by the development and the fees imposed, and apply the requirements in an equal and fair manner, most developers will appreciate that these fees are simply the cost of doing business in the municipality, and they will find a way to minimize the "impact" on their own bottom line. For non-home rule communities, the statutes only mention school and park donations but developers are often willing in an annexation or development agreement to give impact fees to other governments. Because of the recent economic hard times, some governments have agreed to reduce or eliminate impact fees to jump-start residential development. The governments which are affected by such changes should be consulted. Developers will often also recognize that the provision of public amenities can facilitate project endorsement by the governing body and the adjoining neighbors and help ensure the ultimate success of the development project.

State statute also authorizes municipalities to enter into recapture agreements with subdivision developers that can be beneficial to both parties. 65 ILCS 5/9-5-1. Such agreements provide that future developments which utilize oversized roads, infrastructure facilities and other public improvements constructed and financed by the initial developer to accommodate future anticipated development must reimburse the initial developer for the cost attributed to the subsequent development. This recapture mechanism encourages municipalities to

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sensibly plan for future economic growth and obtain the utility infrastructure necessary to support such growth, while at the same time creating an opportunity for the owner of the earlier development to be reimbursed for that part of its initial cash outlay that exceeds the cost of servicing its own development. ANCEL GLINK works with many communities as a consultant on impact fee and recapture agreement issues.

Special Service Areas

Under the Special Service Area Tax Law, municipalities and counties may levy special property taxes within a specific, designated area to produce tax dollars for them but not other taxing districts for providing "special services" to that area, known as a special service area ("SSA"). 35 ILCS 200/27-5 et seq. This kind of financing allows municipalities and counties to construct projects or provide services unique to a particular area of the city, village or unincorporated territory. While SSAs are more commonly utilized to fund street replacement and improvement projects, and infrastructure projects such as storm water detention or flood basins, we have worked with clients to creatively employ this device to pay for parking garages needed to stimulate shopping in downtown business districts, deco-rative street lighting in a commercial development, utility plant expansions for new developments, and for services such as snow removal and landscaping. A number of communities have also established special service areas to generate revenues for small business loans or other means of promoting tourism through the chamber of commerce or local economic development council, or to provide long term care and maintenance of a natural resource like a lake or a wetlands area. Although an SSA project is undertaken and governed by a municipality, the services provided to the SSA through the special tax revenues can benefit other taxing districts by stimulating growth and enhancing the tax base, and helping to solve problems causing difficulty to all governments in an area such as flooding.

Tax Increment Financing Districts

One of the better known ways for a municipality with a blighted or deteriorating neighborhood to raise funds for community improvements is to establish a redevelopment project area, commonly known as a Tax Increment Financing District or TIF. 65 ILCS 5/11-74.4-1 et seq. Once a specific area in the community has been designated as a redevelopment project area, any additional property taxes generated from the tax levies of the taxing districts in the TIF as a result of the new growth (called "incremental property taxes") are deposited in a special fund. Those revenues can then be used to pay the eligible project costs associated with new developments within the TIF. There is an extensive article on TIFs, which appears as a Chapter in the four-volume IICLE publication, Municipal Law and Practice in Illinois, co-authored by an ANCEL GLINK attorney.

This method of providing public financing for public projects, and for certain allowed components of private development projects like superstores, shopping malls or industrial parks, may be controversial in some communities, partly because the incremental taxes from all the taxing districts are diverted to the municipality for the duration of the TIF, which can be as long as 23 years or 35 years in some cases. The only property taxes that the affected taxing districts continue to receive are those generated from the assessed valuation that existed and were "frozen" in the year the district was established. Many municipal officials and staff have discovered the wisdom of including taxing district representatives in the preliminary discussions regarding the proposed TIF designation. Their participation in the planning process will provide those representatives with an opportunity to have their questions answered. They can even suggest appealing ways in which a portion of the incremental revenues might be earmarked for badly needed capital projects for the other taxing districts that will enhance the quality of life and the property values in the community.

State law gives municipalities control over the prime economic tools of annexation, subdivision, drainage, construction regulation and licensing.

The State statutes require the convening of a committee of representatives of the taxing bodies in the area to review and comment on any TIF proposal before a municipality can put it in place. Some TIF projects have utilized intergovernmental agreements as a means of allocating TIF revenues for new park facilities, school equipment, library expansion, or new fire trucks and ambulances. In this way, a number of local governments can reap more immediate benefits from a successful TIF project.

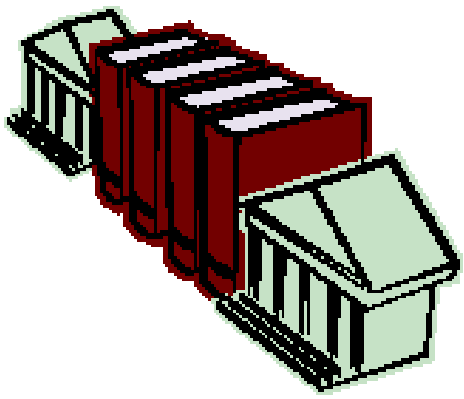
13. ANCEL GLINK'S Top Ten List

How to Deal with Ten of the Most Common Challenges for Newly-Elected Officials

By Robert K. Bush

Set out below are some of the problems or complaints that ANCEL GLINK attorneys are most often asked about at training sessions for newly-elected or appointed officials. Our web site, www.ancel-glink.com, contains a treasure trove of questions we have collected and answers we have developed over the years. We also post a "Question and Answer of the Month," which usually picks up new legal developments or changes in the law. See how many of these apply to you! You can also subscribe to the Question of the Month, the Municipal Minute and The Workplace Report and receive them via email. Just go to the Ancel Glink website: www.ancelglink.com, to discover all our email publications and get a free link or sign-up for them. If you think some other problem belongs in our "Top Ten List," please e-mail your suggestion to: rbush@ancelglink.com. We will consider adding it to the 2019 edition of this Guide, or to our web site.

1. There is no user's guide for local government. An elected official takes an oath of office which, in part, states that, "I will faithfully discharge the duties of the Office of _____ to the best of my ability." Unfortunately, for most local governmental offices, there is no easy place to find a list of one's duties. Fortunately, various handbooks do exist, such as the Illinois Municipal Handbook, the Illinois Park District Handbook, the Township Official's Handbook, the Illinois School Law Survey, etc., which offer guidance and support to newly-elected officials.



2. I don't have as much power as I thought. All new officials, including Mayors, Village Presidents, Alderpersons, Trustees, Park, Library and School Board Presidents, and their respective Commissioners and Trustees are surprised to discover that their power is limited and, in part, derived from the ability to implement common actions, including legislation. Individual officials in most governmental bodies, discover that they are only part of the legislative body and possess no power to direct employees or operations. Exceptions in municipalities are the commission form of government and certain township officers. Unless doing something legally delegated, most elected or appointed officials, while not participating in a legal board meeting, or unless having received specific individual authority by the legislative body, have no more power than any other citizen. Individual board members may have access to such public records as are necessary to carry out his/her duties, this authority is often limited by rules and regulations set out by the governmental body, and occasionally by court opinions.

3. I don't like my committee assignment. Many local governments operate through the use of legislative committees. Committees are the creation of the legislative body, through ordinance or resolution, and, therefore, committee responsibilities and assignments are subject to the dictates of the majority. Any elected official dissatisfied with his/ her committee assignment can try to modify the enabling ordinances if a majority of the board members, or a super majority if a mayoral veto is expected, can be persuaded to make those changes. An ordinance can even provide that the legislative body chooses its own committees and/or members and chair. A newly-elected official should determine whether there are any existing rules or ordinances which deal with the establishment of committees and the assignment of committee members. If there are existing rules or ordinances, the local law can be modified only by an amendment or repeal.

If you think some other problem belongs in our "Top Ten List", please email your suggestion to rbush@ancelglink.com

4. Who are all these people and why don't they like me? Illinois governmental bodies are now required to permit members of the public to speak during the open proceedings of a regular or

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special Board meeting. Even before this recent change in law, virtually every governmental body had, by ordinance, resolution, practice or tradition set aside a portion of its meeting to allow citizens to comment on matters being considered by the legislative body or to voice their interest or concern about other topics of public interest. Governmental bodies must now adopt rules about public participation, including time and topic limitations. For example, many public entities have adopted ordinances making it a violation to disrupt any lawful assemblage. (Such a prohibition would also apply to a board member.) Remember that a public meeting is still different from a public hearing, where the courts have ruled that participants can, in some cases, cross-examine witnesses. It must also be remembered that the board cannot prevent members of the public from speaking solely because the board disagrees with the content of the intended speech. Rather than engaging in a running commentary with a citizen who may be attacking one or several members of the board, it is generally preferable to sit politely during the diatribe and then merely thank the individual for his or her thoughts. If, as often happens, a number of questions are posed to the board, the response, "we will get back to you on your questions," is perfectly acceptable and is even better if a written response follows. One other note: Any person may record the proceedings of any public meeting required to be open. These recordings may be by audio/video tape, film or other means. However, the governmental body holding the meeting may prescribe reasonable rules to govern the right to make such recordings. The government cannot require prior notice of an intent to record. Any rules should be written and duly adopted by the governmental body. The right to record may be suspended at the request of a witness called before a commission, administrative agency or other tribunal.

5. I was elected by a majority of the voters, but on some issues the majority and I don't see eye to eye. Our system of representative government is an interesting mechanism. As one wise man aptly described it, (liberally paraphrased) "The American system of representative government is inefficient and cumbersome and is the best process yet developed by a civilized society." The system is designed to be a republican form of government, not a pure democracy. That means an elected official has been selected by a majority of the voters because they believe that official will, over time, do the best job in promoting the interests and concerns of all constituents. Illinois local governments are, similarly, not pure democracies. A member of a board or council, whether serving a ward or district of the governmental body or "at large," is not required to poll the constituents every time a decision must be made on a particular issue. The official is left to his or her own conscience and best judgment when participating in the decision-making process, keeping in mind what that official believes is best for the people who supported the candidacy as well as what is best for the entire community. Every term, the electorate will definitively inform the official if he or she has accurately measured the overall sentiment of the community. For appointed officials, the appointing authority will learn whether the public is happy or satisfied with the appointment.

6. Isn't there some way to get home from a meeting before 1:00 a.m.? Board and council members, both newly-elected and veterans, are used to speaking their minds on all issues facing their community. These officials were used to giving speeches when campaigning and need to give speeches to get re-elected. However, when each official needs to express an individual opinion on every separate issue, even if that opinion reflects the view asserted by the board member who just spoke, meetings of local government tend to run a bit long. Newly-elected officials shouldn't necessarily despair if they see their meetings drag on interminably. Rather, take heart and consider the following ways by which meetings can be shortened and improved:

a. Remember, there must be an agenda for all meetings and don't stray too far off that agenda;

b. Don't clutter an agenda with items not ready to be discussed;

c. Make substantial use of a consent (omnibus) agenda;

d. Consider a realistic limitation on debate and on meeting length;

e. Within legal rules, limit or control public comment (see discussion above);

f. If a time limitation is established, stick to it;

g. Utilize properly-called open pre-meeting or "workshop" sessions and committee meetings;

h. Review complete and informative agenda packets in advance of meetings;

i. Develop form ordinances so elected officials need only review the parts that are changed; and

j. Conduct training sessions for elected officials.

This is not an exhaustive list of measures which can be adopted to shorten and improve board meetings. Every governmental body which finds itself in the predicament of enduring three, four

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and five hour meetings should examine their procedures, use their imaginations and come up with methods to streamline their process into a more effective and efficient method of governing.

7. Why am I misquoted in the newspapers? Every official should remember that a newspaper reporter's goal may not be as much to get the facts straight as to write an interesting story. Even when an official spends substantial time with a member of the media trying to explain, in detail, the facts of a situation and the basis for that official's vote or view, the media personality is, at best, only looking for a good quote or two. Any article will primarily express the writer's perception of the issue and be sprinkled with catchy phrases from government officials, attorneys or residents setting out varying ideas on the subject matter.

If the reporter has taken certain literary license with your well-reasoned opinions or taken several phrases out of context, what mechanism, if any, exists to contradict the misstatement and how effective will such an effort be anyway? After all, there should be no such thing as "bad publicity."

An official must maintain a guarded acquaintance with members of the press. In order to remain in office, if that is your desire, a public official must keep his or her name before the public. However, if all the public hears or reads about that official is commentary or quotes which make the official appear negative or ignorant, no real benefit is produced from the publicity. It is probably too simplistic to advise officials never to speak to the press. Even following such a regulation will not prevent the official from being misquoted because the newspaper reporter can attend meetings and hear the discussion among board members over controversial issues. The best advice to avoid repeatedly being misquoted or misrepresented is to limit one's direct contact with the media and, whenever possible, direct all requests for comment to the chief executive officer and/or principal staff person in your government (manager, administrator, executive director, or superintendent). Otherwise, keep your comments short, smart and impersonal. When a very controversial matter occurs, one way to help to get your actual words to the public is to issue a written press release. Your words will often be accurately picked up in the story.

8. I never knew local government could get so complicated! The role of local government has become increasingly complex over recent years as the Federal and State governments funnel more issues down to the local level. Increasingly unique and unprecedented issues arise with regularity, and the task of serving as an official for an Illinois local government unit can, at times, seem overwhelming. Board meeting packets for bi-monthly or monthly meetings can resemble doctoral dissertations. These packets can be filled with reports and recommendations for architects, engineers, actuaries, attorneys, financial consultants, investment consultants, bond counsel and a host of other highly sophisticated experts dealing with issues from annexation to construction to collective bargaining to zoning. Do not despair. It is the role of these consultants to advise the officials on their relevant topic. The governmental body should not, however, abdicate the decision-making on these issues to the consultants, regardless of how complicated the issue may appear.

An elected official should insist that every expert take the time and effort to be sure every (or almost every) member of the govermental body understands what is being recommended and the ramifications of that recommendation

The government paying the bill should insist that every expert take the time and effort to be sure every (or almost every) member of the governmental body understands what is being recommended and the ramifications of that recommendation. Don't make a decision on a topic you do not understand because no one will ever accept the excuse that you voted on something without realizing what would happen as a result of your vote. Take your time - DO YOUR HOMEWORK - so that when the time comes to make a deci-

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sion, you can confidently defend that decision with facts and expert opinions.

9. If I am the one who has been elected or appointed, why won't staff follow my directions? As noted earlier, any local governmental body sits as a corporate entity and, unless that entity is participating in a legal board meet municipality, have no more power or prerogative than any other citizen with a problem. When a government has an administrative executive such as a village manager, a park district executive director, school board superintendent, township administrator, library district director or the like, with a fulltime professional staff, the day-to-day operation of government is expected to be run by that administrator. Article 15 of this Guide contains some suggestions on this issue by two generations of municipal managers.

Usually, governmental employees do not appreciate board or council members coming into their offices at all hours of the workday, trying to learn what kind of work they are doing and giving directions which may be contradictory to the instructions received from the employee's boss. Don't be one of those officials who interfere in the operation of government. Develop a smooth working relationship with the administration. Find out from your chief executive when the best time may be to seek information or give input into the business of government. Be courteous when dealing with the full-time or part-time employees of your entity. Those individuals will be much more eager to cooperate with elected or appointed board or council member officials who treat them as professionals.

10. What can we do with a council or board member who won't follow the rules? Failure to follow fundamental rules of fairness can lead to dire consequences for an official. That official may find other board or council members making derogatory comments about the "interference" or "meddling." The board or council can set rules and regulations regarding contact with staff which might be extremely inconvenient for a maverick board or council member. Such a member may find the governmental body unwilling to voluntarily give information which the official deems necessary to his or her job. In such a case, that board or council member may be forced to use Freedom of Information Act requests or, if all else fails, to seek help from a court. While in the final analysis staff serves at the pleasure of the board or council, until and unless the governmental board, council or commission is able or willing to replace members of staff, you had best learn to get along with the government's full-time administration.

Conclusion

One of the reasons democracy in Illinois requires elections every two years is to challenge the system with newly-elected officials. The lawyers and staff at ANCEL GLINK welcome you to your new challenges. Article 16 of this Guide lists a whole series of downloadable pamphlets about your duties which should allow you to spend some time with your family over the next few years. If you exercise your new power with some kindness, some patience and persistence, your efforts will be rewarded and your political supporters – and even your detractors – will be served. Good luck and good fun.

14a. 25 Challenges and Opportunities for both Experienced and New Mayors

By Stewart H. Diamond

This list is specially prepared for new Mayors or Village Presidents. In Illinois, Village Presidents may also call themselves "Mayor." Trustees and Aldermen and officials in other kinds of governments may also get an insight into the issues new Mayors face. The answer to some of these questions depends upon your community, your personality and your good or bad luck. It might be fun to write out your answers in a brief way and then return to this list of questions after a year to see if your responses are the same. We would like to hear from you if your views shift.

1. Should a Mayor do anything when the Corporate Authorities are consistently rejecting or revising recommendations from a Plan Commission or Zoning Board of Appeals?

2. Should a Mayor talk to a reporter who unfairly represents the positions of the municipality and of the Mayor in news stories? Should the Mayor try to talk to the editor or the owner?

3. How much information should a Mayor provide to Board or Council members who generally oppose the Mayor's programs?

4. In addressing meetings of the Chamber of Commerce or a homeowner's association, should the Mayor distinguish between his or her own views and those of the Council or Board?

5. What should a Mayor do when a business, with the constitutional right to do so, wishes to operate in a community where many citizens demand that the business be prohibited from operating?

6. How involved should a Mayor get in a dispute between adjacent property owners?

7. Should a Mayor be concerned about the precedent setting aspects of granting zoning variances?

8. Should a Mayor travel to another State at the expense of a potential developer to view a subdivision, industrial plant or business similar to the one that the developer wishes to bring to the community? What if the other location is in Hawaii?

9. Should a Mayor try to meet with the chief elected officials of other governmental bodies with jurisdiction within the municipality, such as school district and park districts?

10. In a municipality which has hired a Manager or an Administrator, how involved should the Mayor get in the day to day management of various departments?

11. Should the Mayor take calls from the Union President or the Union Business Agent over a dispute which has arisen between a governmental employee and his or her administrative superior?

12. Should a Mayor become involved in the elections of other officials at the local, county or State level?

13. How active should a Mayor become in Regional or Statewide organizations?

14. Can a Mayor sell products or services to companies or persons who sell to the municipality?

15. Should a Mayor always keep election promises?

16. How should a Mayor approach a complicated policy issue, such as tear downs or downtown redevelopment?

17. How involved should the Mayor be in police investigations?

18. Should the Mayor be the spokesperson for the municipality when members of the press call?

19. How frequently should the Mayor use the auditor, the consulting engineer or the municipal attorney?

20. Should a Mayor raise campaign funds all throughout a term of office?

21. Should a Mayor make an annual report on the "State of the Municipality?"

22. Should the Board or Council meetings be televised?

23. Should the "citizen's comment" section of the meeting be held at the beginning or the end of the meeting, and/or should citizens be allowed to address items on the agenda when they occur?

24. Should matters susceptible to being discussed in closed session always be discussed in that forum?

25. How does a Mayor know when and if he or she should, can or must vote?

The answer to many of these questions are contained within the Illinois Municipal Handbook, written by ANCEL GLINK attorneys, and published by the Illinois Municipal League, 217-525-1220.

Articles

14b. 10 Lessons Learned by a Former Elected Official

By Gregory S. Mathews

An experienced public official and former mayor lists 10 lessons learned

We are now pleased to present ten lessons learned from experience by former Village of Glen Ellyn Mayor Gregory S. Mathews. Greg now serves as the in-house Village Attorney for Glen Ellyn:

1. There is a big difference between public perception of a mayor's power and reality; the only real power is in the power of persuasion. The mayor's power, or rather lack of power, to implement his or her own vision of the proper course on which to steer the community generated the most discussion. Not infrequently, the new mayor will find that he or she lacks the unbending support of all board members when the mayor's first board meeting takes place. Getting elected is one thing, but accomplishing the goals that influenced a mayor to run for office requires a majority of the board to share in those goals. The ability to persuade the majority of other elected officials to join in, whether by reason, compromise, personality or sheer force of will is where the mayor will find the power and authority to move forward. A successful new mayor may persuade board members to join in his or her vision for community issues by drawing them into the process and seeking their input before making pronouncements to the press and public. Board members generally want and need to feel they make a contribution, and listening to their opinion is the best way to meet this need.

2. Reporters often do not realize you are an underpaid volunteer, not a career politician. Often, when a quote on a controversial topic appears in the paper the next day, it can seem negative and out of context. Emotions carrying over from last night's difficult decision do not help one's perception that the reporter (or headline writer, usually a different person) only writes critical stories. Just as often, reading the story a year later sheds a different, less offensive light. It is best for the mayor to be accessible to the local reporter because the tenor of a news article can be influenced by a reporter who does not hear or understand the context of a decision. This may result when most discussion takes place at an earlier workshop meeting rather than at the regular meeting. Additionally, the only other news source might be a readily available opponent on the board or in the audience. It may be helpful to ask a reporter to read back a quote and make sure it came out right. Occasionally talk to your reporter about something other than the meeting, like "Cubs or Sox?" In extraordinary circumstances, if a mayor has previously demonstrated accessibility to a newspaper's reporters, but one reporter's stories are consistently biased, it is possible to meet with the reporter and his or her editor to clear the air. A pattern of negativity can best be shown to the editor through a series of news clippings.

3. Advisory boards have feelings too. One circumstance to avoid is the advisory board which often reaches a decision based on the statement, "it does not matter what we decide because the council will decide, ultimately, regardless of our vote." This situation causes two problems. One, it tends to make petitioners feel they are being shuttled through meaningless, time consuming meetings. Two, the council or board lacks important input and is forced to recreate the wheel in its deliberations. The situation also has two causes. One, municipal board members have repeatedly demonstrated that they want to recreate the wheel whether they receive good input from the advisory board or not. Two, the advisory board members may not appreciate that their recommendation is one part of a larger process in which the municipal board must weigh opinions from a number of boards and commissions that reflect different issues. It is best for the municipal board to explain the basis for its final decisions and convey that information to the advisory boards, while at the same time offering appreciation and open discourse. A well conceived advisory board decision will relieve the municipal board of rehashing every bit of earlier discussion. I believe that these same rules apply as well to formal and informal advisory boards to other governmental bodies. Some communities have lessened this problem by choosing an elected official to be

10 Lessons Learned, cont'd.

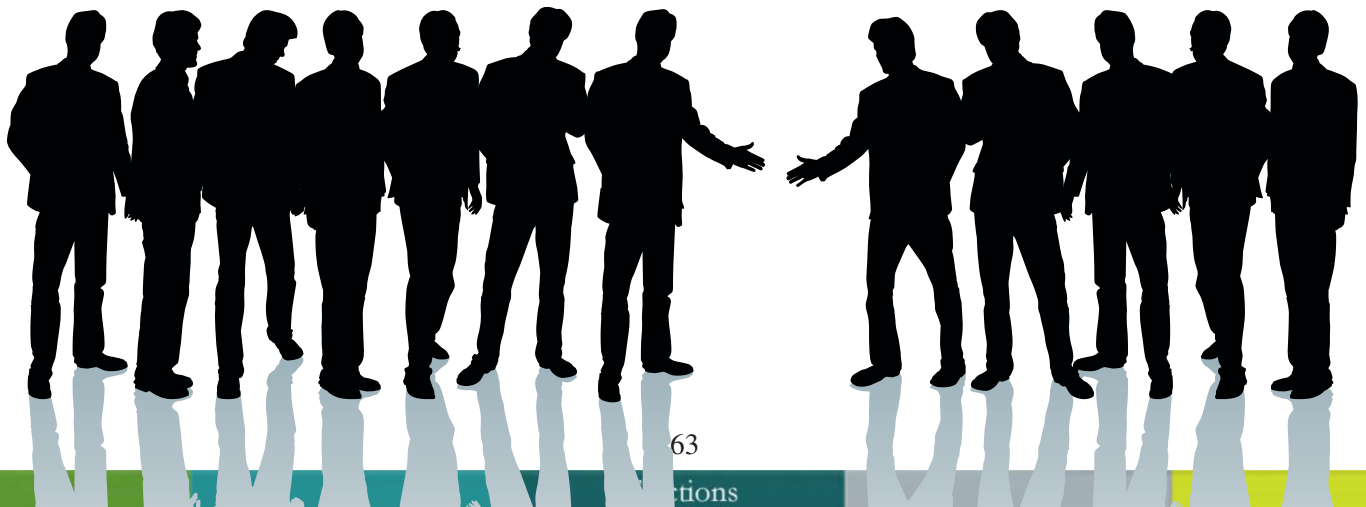
liaison to each Board or Commission and to generally attend their meetings as an observer.

4. Mediating disputes between neighbors is like being mired in quicksand: the harder you struggle to help, the deeper you sink. Newly elected officials tend to spread themselves thin acting on the belief that they can enter the fray in a dispute between neighbors and, given their position, work out an agreement that makes everyone happy. Stormwater runoff disputes, for example, where the municipality may have no legal authority or control based on existing codes, and staff has been unable to satisfy one or both parties to the dispute, can lead to endless, unsatisfying involvement that accomplishes nothing. Elected officials' involvement can also create a false impression with the residents that the town can force a resolution. Business at regular board meetings may then be interrupted or prolonged with frequent visits by disgruntled residents.

5. Intergovernmental cooperation can really work. Political speeches about the benefits of intergovernmental cooperation draw praise from all sides but accomplish little without real effort to bring government leaders together. Certainly, for a defined goal which can be accomplished between two public bodies, cooperation is a must. Regular unstructured conversations, however, over informal dinners, among political and administrative heads from local school, park, library and municipal governments, promote the exchange of ideas and perspectives on local issues. One good question, "Is anyone thinking about a referendum?" can avert two taxing bodies from heading to a controversial vote in the same election. Perhaps more mundane but nevertheless good questions are, "Can we share snow removal equipment and operations in a cost effective way?" or, "Can we share land resources for storm water control, or work together on a bond issue?" Even if no dramatic agreement comes from any single dinner meeting, simply getting to know other community leaders on a personal basis fosters the spirit and trust necessary to true intergovernmental cooperation. Developing good working relationships outside the community with mayors and managers of neighboring municipalities will also bring benefits. You will frequently see opportunities for cooperative efforts relating to development, utilities, roads and zoning matters.

6. Strong monetary reserves will prove their importance. Prior to market downturns it may seem less important to ensure that reserves to operating and capital funds always meet policies established by prior boards. When the economy is good, revenues from all sources appear adequate to fund the upcoming fiscal year without resorting to significant increases in taxes. When the economy suffers a downturn, revenues from sales taxes, interest income, motor fuel taxes, utility taxes, and state funding all drop while salary, benefits, and insurance costs generally do not. Be careful about over dependence on one revenue stream. Construction projects such as street improvements invariably turn up underlying infrastructure problems which should be repaired or replaced at the same time. Paving a street and then tearing it up shortly thereafter to make needed repairs is not cost effective and generates public dissatisfaction. The effort to establish a conservative fund reserve policy and the discipline to maintain those reserves when revenues are strong provides a welcome safety net when costs exceed revenues in any fund. In our community the most recent market decline came during a major five year road and sewer program which unearthed conditions that caused costs to exceed projections. Having strong capital reserves created over an extended time frame made possible the completion of the program, including extras, without an impact on the taxpayers.

7. Ordinary citizens have never read the Tort Immunity Act. A gap exists be-



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tween what a community's residents assume their government is doing to shelter their lives and what their government is capable of or obligated to do under the law. Many assume that no rainstorm should ever cause flooding on their property and no car should ever leave the roadway and cause injury or damage unless the town has failed to intervene, and so must be at fault. This assumption tends to foster lawsuits. The protections afforded to municipalities under the Tort Immunity Act are based in legislative acknowledgment that most municipalities lack the financial and physical ability to anticipate and remedy all ills. This is why the municipality is immune from suit for failing to enact or enforce a building code ordinance, for issuing a building or grading permit, for negligently conducting an inspection on private property or for failing to erect a new traffic sign. Unfortunately, this knowledge gap usually closes only after a judge issues a dismissal order. A mayor must learn something about these issues because otherwise he or she may falsely assure residents that all their losses will be covered.

8. The mayor need not be a vocal proponent of every decision. After an initial "breaking-in" period where every issue before the board seems to consume substantial mayoral energy, newly-elected officials may come across a subject or question that he or she finds of marginal interest. Fortunately, some board member usually will take up the slack in vocalizing a position and the mayor and other board members will serve well if they simply help bring the issue to a final conclusion as a guide rather than champion of the cause. One benefit of this approach is that the less frequently an elected official actively promotes a position, the more likely that when he or she does choose to speak out, people will sit up and pay attention.

9. Penny-wise may be consultant-foolish. Occasionally, in order to save costs, governmental staffs will take on tasks previously performed by an expert, such as an engineer or a lawyer. There is logic to the idea that staff has dealt with many of these issues in the past, has seen all the documents and notice requirements, and therefore if the paperwork from a prior agreement is simply recast to fit the current situation, more will be saved. The tempting aspect of this practice is that it may work, and the consultant fees which are avoided provide a short term, but limited, benefit. In fact, negatives to the practice may not appear during the time in which the current board or administration serves. Legal defects in improperly noticed meetings, drafted agreements, or engineering plans, however, create significant costs down the road when a fix is needed. Sometimes, the initial savings will result in litigation. Beyond legal costs, the municipality may suffer the loss of engineering and construction costs and may lose out on revenue opportunities from user fees and taxes in amounts which far outweigh the original presumed benefit of going it alone. Don't overuse your consultants, but cut their duties with care.

1*0. Time spent on an issue is often inversely proportional to its importance to the entire community.* If the impact or benefit to the entire community constitutes the measuring stick for evaluating the time devoted to the issue, one learns that many board deliberations which involve the most time actually have little or no impact on the majority of residents in town. One example I remember involved the decision whether to install sidewalks as part of major street reconstruction in an area of town with a rural feel. Engineering plans included sidewalks but residents on two blocks strenuously opposed their installation. Ninety-five percent of the town had sidewalks already. During the course of a year the board created and implemented a set of criteria to evaluate resident objections to inclusion of sidewalks in street improvement plans. Ultimately, the board decided to install the sidewalks which started the discussion because of nearby parks and a school. Some of the objectors later decided they liked the new sidewalks after all. The primary value of the time spent by the board ended up coming from the good will and credibility created by the board due to its effort to listen and respond to resident concerns seen and expressed by many residents.

15. The Magic Governmental Mix

By Robert D. Franz, Former Village Manager, Village of Deerfield and Mark Franz, Village Manager of Glen Ellyn

We thought it would be interesting to share the views of two generations of experienced professionals. In earlier versions of this material, Bob Franz, retired Village Manager, has provided insight into the issue of how elected officials and staff should try to co-exist. In this and the last edition, we have added some thoughts from a current Village Manager and Bob's son, Mark Franz, to this summary. Mark serves as the Manager of the Village of Glen Ellyn. We thank Bob and Mark for allowing us to present their excellent suggestions.

Elected officials should:

1. Be responsible not only for policy approval, but for policy leadership
2. Create realistic performance targets and goals
3. Hire good people and let them manage
4. Be a team player (Support decisions of the Village Board, even if you voted against an issue)
5. Be informed: do your homework
6. Respect staff's neutrality
7. Avoid interfering in day-to-day operations
8. Respect chain of command
9. Focus on issues and not personalities
10. Be positive
11. Make tough decisions in a timely manner
12. See the larger picture, but define your priorities
13. Understand that, generally, government works incrementally
14. Have your nose in everything, but your fingers in nothing

Staff must:

1. Respect elected officials as leaders of the community, not just messengers
2. Treat all elected officials equally
3. Recognize the need for elected officials to be responsive to citizenry
4. Be flexible and open to new ideas
5. Perform its duties as effectively and efficiently as possible
6. Avoid surprises
7. Be positive
8. Accept feedback as a positive, not an attack
9. See the larger picture
10. Be accountable
11. Treat residents similar to customers, not interruptions
12. Be true to the mission and cause, not your own ambitions
13. Stay out of politics
14. Accept board/council decisions and move on

Together, elected officials and staff need to:

Define respective roles

Set a high ethical tone

Establish goals and objectives

Deal with conflict resolution

Adapt quickly to new situations, be able to handle bad news and adversity

Create a good working environment

Avoid crisis management

Disagree and still be civil

Remember, Government has few quick fixes, it is a work in progress

Have some fun: take the job seriously, but not yourself too seriously

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16. The Ancel Glink Library

By Stewart H. Diamond

For many years, ANCEL GLINK lawyers have produced handbooks and pamphlets about many areas of local governmental law. Some of these comprehensive handbooks, such as those published by the Illinois Institute for Continuing Legal Education, the Illinois Municipal League, the Illinois Association of Park Districts, the Illinois Township Association, the Illinois Library Association and the Northern Illinois Alliance of Fire Protection Districts are available for purchase through those organizations. Ten ANCEL GLINK pamphlets are, however, offered without charge, and are available for easy downloading on our web site: www.ancelglink.com. These publications are periodically revised, and our web site contains the most recent versions available.

Ten Ancel Glink pamphlets are offered without charge, and are available for easy downloading on our web site: www.ancelglink.com.

We are very proud to offer to our clients and friends the ANCEL GLINK Library of Publications. We invite your questions and comments as well as suggestions for additional publications which could be of assistance to you. We know of no other law firm which has the staff, expertise and energy to make available such a variety of handbooks and pamphlets to assist local governmental elected and appointed officials in carrying out their interesting and challenging tasks. We invite you to review the ANCEL GLINK Library, and to decide which of these pamphlets and handbooks can help you to better carry out your elective or appointive public duties.

THE ANCEL GLINK LIBRARY OF PUBLICATIONS, AVAILABLE FOR FREE DOWNLOAD:

1. Ancel Glink's 2017 Guide for Newly-Elected Officials. This pamphlet has been written to assist newly-elected officials to understand the challenges and tasks that lie before them. The pamphlet can also provide assistance to appointed officials, current officials seeking a quick refresher course, and high-level governmental employees new to Illinois, or to their positions. This pamphlet is written for officials of all local governmental bodies and school districts. It contains a brief description of each of the local governmental bodies in Illinois, and then describes in a series of articles areas of promise and concern applicable to all governmental bodies. Among the topics discussed in the articles are: Open Meetings Act and meeting procedures, taxation and spending, ethics issues, litigation, construction contracts, personnel matters, litigation, technology and intergovernmental cooperation.

2. Municipal Questions and Answers. This pamphlet contains hundreds of frequently asked questions about local government and contains short answers in non-technical language. The pamphlet uses questions which ANCEL GLINK attorneys have been asked at the numerous conferences and speaking engagements where our lawyers address local governmental issues. These sessions normally end with a question and answer period and we have compiled some of the most interesting and timely questions from those sessions. Although principally relating to issues arising in cities and villages, many of the same questions occur in the operation of other governmental bodies as well. ANCEL GLINK attorneys also prepare a question of the week, which appears on an independently produced subscription web site Local Government News. That web site compiles newspaper articles and other publications of interest to governmental officials, including school districts throughout the State of Illinois. Further information about Local Government News can be found at its website: http://www.localgovnews.org/. If you would like a one-month free membership to evaluate that service, e-mail: info@localgovnews.org. Our own website typically contains a current Q&A feature at: www.ancelglink.com.

3. Labor Law for Public Employees, Large and Small. This pamphlet contains a discussion of the principles and laws which govern collective bargaining for units of local government and school districts in Illinois. Illinois was the last major industrial State to require its units of local government, such as municipalities, townships, park districts, library districts, fire protection

The Ancel Glink Library, cont'd.

districts and school districts, to engage in collective bargaining negotiations with public-sector labor unions. The statues which the Legislature chose in creating this right for labor unions and this obligation for governmental bodies were derived from statutes from other States and from Federal labor law concepts. Illinois governments fell under a broad and dense series of rules regarding the way in which unions achieved recognition, the process of collective bargaining and rules related to strikes. The law has been amended a number of times, including a change which allows union recognition to be achieved by petition rather than an anonymous election. The pamphlet contains many practical suggestions and warns officials, new to the process, about many of the pitfalls which, in a worst-case situation, can result in the imposition of a union and practically in the imposition of a contract. The pamphlet discusses special rules relating to public safety personnel under which strikes have been prohibited by statute, but governmental bodies have been required to participate in binding arbitration.

4. Illinois Tort Immunity Handbook. This publication is produced by ANCEL GLINK attorneys who spend the majority of their time defending governmental bodies in a great variety of tort cases. In 1979, our lawyers were asked to write the Contract and By-Laws for the first governmental self-insurance pool in Illinois, and one of the first in the United States. Since that time, ANCEL GLINK lawyers have assisted in the creation and continuing operation of a large number of governmental self-insurance pools. ANCEL GLINK lawyers also defend cases on behalf of self-insured governmental bodies and commercial insurance companies. Our lawyers successfully took to the Illinois Supreme Court a case which expanded the use of tort immunity defenses to governmental self-insurance pools, and we have tried many other cases which have used and clarified the provisions of Illinois tort immunity law. The Legislature has given governmental bodies a broad series of full and partial tort immunities which, when skillfully used in litigation, reduce the overall costs of government. The handbook describes the immunities that are available under State and Federal law, and contains a large number of practice tips, which you can use in your governmental body in an effort to reduce both the severity and frequency of personal injury lawsuits.

5. Ancel Glink's Zoning Administration. This publication describes the basic concepts involved in the process of municipal zoning. Each of the officials and public bodies in the zoning process are described and much attention is given to the creation and evaluation of good planning standards which allow governmental bodies to grant zoning categories that reflect the "highest and best use of property" which can be defended, where necessary, in zoning litigation.

6. Zoning Administration Tools of the Trade. Using the construction of a building as a motif, this pamphlet gives a practical explanation of the way in which a request for zoning moves its way through an Illinois municipality. A large section of this handbook is devoted to the general laws relating to annexation and annexation agreements. The pamphlet also features a section of practical tips for governmental officials in the dos and do-nots relating to their statutory obligations.

7. Municipal Annexation Handbook. This pamphlet brings together various articles we have written on the subject of annexation and annexation agreements. As the desires of home, business and factory owners become more sophisticated, an absence of reliable and prompt urban services such as sanitary sewer, potable water, stormwater systems, police, and social services, drive developments into the borders of municipalities. In addition, even small communities, with aging or inefficient utility systems, may overcome their concerns about municipal expansion in favor of the addition of more citizens and taxpayers to improve or replace antiquated systems. Increasingly, residential and sometimes commercial property owners, who prided themselves on their unwillingness to annex to a nearby municipality, are re-thinking those issues.

In this era of changing times and needs, governmental officials who may be thinking previously unthinkable thoughts about community expansion should have a short text that describes the annexation process and sensitizes them to some of the terms and conditions contained within the almost inevitable annexation agreement. This pamphlet is intended to supply that need. ANCEL GLINK already produces a chapter of more than 100 pages on the subject of annexation and annexation agreements, in a four-volume study of Illinois municipal law, published by the Illinois Institute for Continuing Legal Education. Those volumes are principally used by attorneys, although they are often available at County libraries and, in some cases, law libraries open to the public. Hopefully, this pamphlet will reward the reader with an introduction to annexations and annexation agreements so that it will be easier to decide whether it is worth learning

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more about the process.

8. Economic Development Toolbox for Municipal Officials. This pamphlet discusses all of the devices by which Illinois municipalities can provide economic incentives to revitalize existing commercial areas within the municipality and to encourage the creation of new areas. This pamphlet describes the creation and use of special assessments, special service areas, and tax increment financing districts.

9. Lien on Me: Municipal Debt and Expenditure Recovery Procedures. This pamphlet discusses in detail all of the statutory liens which Illinois municipalities can place on the property of individuals who owe the municipality money. State law lists a large number of instances in which a municipality, usually without the need for a court judgment, can place a lien on the property of individuals who, usually by their inaction, force municipalities to incur costs on their behalf. Such liens cover areas such as weed and rodent control, unpaid utility bills and the repair and demolition of improperly maintained property. A statutory provision also allows municipalities to convert court judgments into liens on property. Once a lien is in place, it is typically hard for the owner to sell the property without satisfying the lien. Statutes granting municipalities lien rights, however, often contain strict rules as to the manner and timeliness in which liens must be filed, and, in some cases, foreclosed. If a municipality tires of waiting for the property to be sold, it can commence a court case seeking the foreclosure of the lien and seeking the sale of the property, with the proceeds of the sale often satisfying the municipal lien rights with a first or early priority. Some liens can now be collected by the county as charges against the real estate like tax bills. It is important for all municipalities to understand the types and nature of the liens available, especially since liens are strictly statutory and cannot be self-created by a municipality, including one which is home rule. All statutory liens are described in a narrative and on a useful chart.

10. 10 Things You Need to Know About 14 Governmental Issues. There is always a great deal to cover in the speeches ANCEL GLINK attorneys are asked to give, and one of our goals has always been to highlight a few key points that we generally describe in a handout. Rarely will these presentations center on more than ten important points. While it is difficult to highlight even ten points during a 45-minute or one hour oral presentation, the handout we distribute allows audience members, at their leisure, to go into more depth about these issues of major importance. This pamphlet is the result of gathering and reworking some of those handouts.

Surely the most important ten issues to consider about a particular problem or opportunity will change from time to time, but for at least some number of years, the issues we have chosen to highlight are likely to remain those worth the attention of public officials. The articles in this pamphlet use a Top Ten format to explore a series of issues. The first twelve chapters concern topics of general interest to all governmental officials, and the last two present an introduction to intergovernmental agreements. The attorney or attorneys who principally worked on the preparation of each chapter are listed as chapter authors. In almost every case, there are a number of ANCEL GLINK attorneys who possess special knowledge or experience in these areas, but the authors of the chapters are those who have writ-ten most recently on these issues.

The length of the chapters varies significantly. In some cases, our mission is to simply acquaint the reader with some basic issues about the topics. In other cases, we are trying to tell a fuller story about certain matters of great complexity, such as a government's exposure to litigation or workers' compensation claims. In many cases, these topics are explored further in other pamphlets authored by ANCEL GLINK attorneys.

We know of no other law firm which has the staff, expertise and energy to produce a similar set of downloadable materials

HANDBOOKS AVAILABLE FOR PURCHASE FROM THE PUBLISHER:

ANCEL GLINK attorneys produce three handbooks which are used by governmental officials throughout the State, which describe in substantial detail the laws which relate to municipalities, park districts and townships. Each of these handbooks is more than 300 pages in length and provides a discussion of the most important legal issues relating to the organization and operation of each of these governmental bodies. Each handbook contains sections on: the organization of the governmental body; collective bargaining; the officers and employees; the practices and procedures that these governments are required to follow in their meetings; the Open Meetings Act; the Freedom of

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Information Act; financial issues; personnel matters; construction contracts; and with regards to municipalities, sections on licensing and home rule. Each handbook is indexed and contains extensive citations to constitutional and statutory provisions which govern their operations, along with reference to important Appellate Court decisions. The current editions of these handbooks, while copyrighted by ANCEL GLINK, have been offered for publication on a volunteer basis to the principal associations in the State that provide services to specific governmental bodies. These pamphlets can be purchased through the following organizations:

1. Illinois Municipal Handbook: Copies may be purchased from the Illinois Municipal League, 500 East Capital Avenue, Springfield, Illinois 62708; 217- 525-1220.

2. Illinois Park District Law Handbook: Copies may be purchased from the Illinois Association of Park Districts, 211 East Monroe Street, Springfield, Illinois 62701; 217-523- 4554.

3. Township Officials of Illinois Laws & Duties Handbook: Copies may be purchased from the Township Officials of Illinois, 408 South 5th Street, Springfield, Illinois 62701; 217-744-2212.

4. The Financial Handbook for Library Districts and Boards. This pamphlet describes the entire process by which library districts and library boards create and adopt budgets and tax levies. The pamphlet explains the differences between library districts, which are independent governmental bodies and library boards which, especially in their financial operations, must coordinate those processes with the municipalities with which they are associated. The pamphlet discusses this process in counties of the State which are not subject to the tax cap, along with those many counties where the tax cap has been adopted by statute or by referendum. The pamphlet discusses recent legislation which significantly changes the manner in which the levy of taxes take place, along with initiatives to increase library revenues derived from real estate taxation. The pamphlet also contains extensive sections of labor and collective bargaining, tort immunity issues and construction contracts. This pamphlet may be sold out and is in the process of being revised. For more information call the Illinois Library Association at 312-644-1896 or check the website at www. ILA.org.

5. The Financial Handbook for Fire Protection Districts. This pamphlet describes the entire process by which fire protection districts create and adopt budgets and tax levies. The pamphlet explains the differences between fire protection districts, which are independent governmental bodies and fire departments of municipalities. The pamphlet discusses this process in counties of the State which are not subject to the tax cap, along with those many counties where the tax cap has been adopted by statute or by referendum. The pamphlet discusses new legislation which significantly changes the manner in which the levy of taxes take place, along with initiatives to increase fire district revenues derived from real estate taxation. The pamphlet also contains extensive sections of labor and collective bargaining, tort immunity issues and construction contracts. For more information call 847-945-4120, or check the website at www.NIAFPD.org.

6. The Financial Handbook for Illinois Park Districts. This pamphlet describes the entire process by which park districts create and adopt budgets and tax levies. The pamphlet explains the differences between park districts, which are independent governmental bodies and park departments of municipalities. The pamphlet discusses this process in counties of the State which are not subject to the tax cap, along with those many counties where the tax cap has been adopted by statute or by referendum. The pamphlet discusses new legislation which significantly changes the manner in which the levy of taxes take place, along with initiatives to increase library revenues derived from real estate taxation. The pamphlet is available for purchase through the Illinois Association of Park Districts at 217-523-4554 or www. ilparks.org.

7. Financial Procedures for Illinois Townships. This pamphlet describes the entire process by which Townships create and adopt budgets and tax levies. The pamphlet discusses this process in counties of the State which are not subject to the tax cap, along with those many counties where the tax cap has been adopted by statute or by referendum. The pamphlet discusses new legislation which significantly changes the manner in which the levy of taxes take place, along with initiatives to increase library revenues derived from real estate taxation. This handbook is available for purchase through the Township Officials of Illinois at 217-744-2212 or www.toi.org.

ILLINOIS INSTITUTE FOR CONTINUING LEGAL EDUCATION:

The Illinois Institute for Continuing Legal Education ("IICLE") is an Illinois not-for-profit corporation, which provides handbooks and other publications to assist lawyers in particular areas of practice. For over 25 years, ANCEL GLINK attorneys have

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heavily contributed to the handbooks which contain multi-volume explanations of Illinois municipal law and Illinois school law. Although these handbooks are principally written for lawyers, many governmental officials have found that the comprehensive discussion of the law associated with these two governmental bodies serve as excellent reference tools for governmental use. Information about these handbooks can be found through the Illinois Institute for Continuing Legal Education, 2395 West Jefferson Street, Springfield, Illinois 62702; 800-252-8062; www.iicle.com. The two handbooks are briefly described, as follows:

Illinois Municipal Law Series. Stewart H. Diamond, General Editor. This four-volume handbook contains more than 30 chapters relating to all aspects of municipal government. The authors of the chapters are principally attorneys who represent local governmental bodies and the materials discuss Illinois statutory and case law, along with practical tips about making governmental practices more efficient. Among the topics discussed in the hundreds of pages in these volumes are Organization; Governmental Forms And Dissolution; Elections, Procedures And Practices; Officers And Employees; Municipal Personnel Practices; Police Department And Fire Departments; Police Power; Ordinances; Adjudication Of Ordinance Violations; Annexation And Annexation Agreements; Zoning; Subdivisions; Adult Uses; Licensing And Liquor Control; Utility Systems; Cable And Wireless Communications; Eminent Domain; Finance; Bond Issues; Home Rule; and Intergovernmental Cooperation. The handbooks can be purchased individually or in the four-volume set.

Illinois School Law Series. Stewart H. Diamond originated and Keri-Lyn Krafthefer serves as one of the continuing Editors. This series contains, in two volumes, an extensive discussion of all of the topics of legal importance to school districts. The chapter titles for the two volumes are: Creation, Dissolution and Boundary Changes; School Board Practices, Procedures and Elections; Community Colleges, School Finance; School Bonds; Warrants and Notes; Contracts; Intergovernmental Cooperation; School Property and Environmental Issues; Construction; Education Technology; Tort Liability; Employee Rights and Responsibilities; Dismissal and Suspension Procedures; Labor Relations; Employment Discrimination; Student Rights and Responsibilities; Student Discipline and Hazing; Special Education; and No Child Left Behind.

17a. How to Choose a Governmental Attorney–20 Questions

Sometimes, a governmental body may wish to consider changing attorneys. Or a government may have had the good fortune of not needing to have a regular relationship with an attorney. In either case, the question can be asked how a governmental body should go about choosing the new or substitute attorney. Set out below are our suggestions.

We believe that an educated consumer is the best customer, and that governmental bodies should not choose their attorneys lightly, but also need not agonize over the decision. Attorneys can be changed from time-to-time, and there are many competent attorneys to represent all forms of Illinois governmental bodies. With the advent of computer technology, lawyers in various part of the State are perfectly able to represent clients with whom they principally communicate at a distance. Some firms have a number of offices like ANCEL GLINK which has five offices, including a central Illinois office in Bloomington. In addition to employing an attorney or a law firm to represent you as corporate counsel, the suggestions set out below can also be used in the event that you wish to select an attorney or law firm to provide a second opinion or to choose a specific law firm to provide supplementary services.

1. On the assumption that you have used an attorney in the past, make two lists. The first list should show the tasks that you have used the attorney to perform. The candidates should be asked about their familiarity with these tasks. The second list should contain those things you liked about the attorney and those things which you would like to see improved. The candidate can be quizzed on the issues.

2. Ask your neighboring governmental bodies of similar or different types who they use as an attorney and ask your colleagues at conferences of your governmental organization for suggestions and recommendations.

3. Send a request for a proposal to a variety of law firms, unless you have fallen in love with the credentials of one firm and you have met its lawyers.

4. Interview the two or three law firms which seem to be the best candidates. You can, by law, do this in a closed session.

5. Check the web sites of the law firms that apply.

6. Make a realistic assessment of your budget for legal services. In the absence of a lawsuit which you need to file or which is filed against you or periodic collective bargaining, that budget should be relatively stable. The attorneys may tell you that you need more legal services and, believe it or not, sometimes less services. They may suggest you are legally over-medicated.

7. Decide whether you wish to employ an attorney or a law firm which can or cannot handle all matters. If you do not hire a "full service" lawyer or firm, you must be prepared to pay for consulting attorneys in special areas such as personnel, collective bargaining, acquisition of property or construction contract issues. Specialty attorneys may bill at higher hourly rates.

8. Ask for data about the history of the law firm in defending its clients in litigation matters. You don't want

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lawyers who are unfamiliar with the very occasional court battles.

9. Prepare a similar set of questions to ask during the interview. Deviate from the prepared list when an interesting question or issue emerges.

10. Find out exactly which attorney will be principally in charge of legal services for your governmental body, and who will back up those services.

11. Make certain that the law firm is technologically advanced, which may reduce the number of on-site meetings required and cut costs.

12. Explore whether the lawyer or law firm is in tune with the general philosophy of the Board and the Staff, but has a reputation of independence to uphold.

13. Ask for references and follow them up.

14. Remember that attorneys will typically work for you without a long-term contract so that they can be terminated if they do not fulfill your needs.

15. Ask to see a copy of a bill sent out by the law firm and make sure that the firm sends its bills regularly and is prepared to answer questions about billing.

16. Ask the firm to send you a copy of its malpractice insurance policy and make certain that the amount of that policy is adequate.

17. Find out what percentage of the firm's practice is devoted to the representation of governmental bodies. If the firm has a significant non-governmental practice, determine whether there would be any conflicts of interest from individuals or companies which may do business with your governmental body, or are strongly interested in issues you will need to decide.

18. Although your government may be non-partisan, determine whether the law firm's practice and its political contacts could be helpful or hurtful to you.

19. Be prepared to pay your legal fees promptly. That will keep the hourly rate in a reasonable range. Law firms with more experience may bill you at a higher hourly rate, but can frequently perform services in a shorter period of time and can make use of documents previously prepared for other clients.

20. Make certain that you clearly understand the financial arrangement under which the firm will work for you. Discuss charges, if any, made for telephone calls, clerical services, travel time and computer research time. Be prepared to pay for these services one way or another. Some governmental bodies seek to employ attorneys on a fixed retainer fee. It is often better to work with the attorney for a period of six months or a year before considering whether a retainer would be desirable for either party.

17b. Representing Smaller Governments

According to recent U.S. Census Bureau statistics, the State of Illinois ranks fifth in population among the United States, but ranks far-and-away the first in the number of established local govern-ments: 6,968. This number is composed of the following types of local governmental bodies: 102 counties, 905 independent school districts, 1,298 municipalities, 1,431 townships and 3,232 other special districts, spanning at least 25 different categories. Almost half of all Illinois municipalities have populations under 1,000; similarly, almost 47% of Illinois townships serve populations under 1,000. What this means (aside from arguments of excess and overlap) is that there exists a wide array and variety of bodies engaging in the business of the public—and among these, many, many smaller-sized public bodies. In most instances, representing a smaller governmental client does not differ significantly from representing a mid-to-large-sized governmental client; however, there are some important distinctions we at ANCEL GLINK have drawn from our experiences in local government representation which we believe are worth understanding and sharing.

Before doing so, however, it may be valuable for the reader to understand the reason(s) Illinois has so many more local public bodies than any other state (the next closest is Pennsylvania, with 2,063 fewer local governments than Illinois). The bulk of Illinois' local governments come in the form of special districts, many of which are single-purpose, and include library, park, fire protection, conservation, sanitary, sewer and mosquito abatement districts, just to name just a few. The 1870 Illinois Constitution sharply limited local government debt to 5% of the assessed valuation of each separate municipal corporation; as such, historically, if and when a municipality reached its maximum amount of debt yet still required services or capital improvements, a new unit of government was usually created for that purpose. While the 1970 Illinois Constitution removed this debt percentage limitation, the number of local governments has continued to rise from that time. It's a complicated and oftentimes confusing system subject to a tremendous amount of regulation and potential legal missteps. The following are a few factors that distinguish smaller governments from their larger counterparts, and illustrate their unique characteristics:

Representing a smaller government client does not differ significantly from representing a larger client, but there are some important distinctions

1. *Home Rule or Non-Home Rule*, In terms of municipalities, the vast majority of smaller municipalities are "non-home rule." "Home rule" municipalities possess all of the powers of the State, except those which have been specifically limited by either the State Constitution or by State statute. "Non-home rule" municipalities, on the other hand, possess only those powers which are specifically granted to them by the General Assembly. Prior to the passage of the 1970 Illinois Constitution, the concept of home rule did not exist in Illinois; in fact, in the years leading up to that, many smaller communities had been opposed to the idea of home rule, on the theory that larger communities might use it to amass an excess of power. However, as time passed, the idea grew in popularity, and the Constitution now in effect provides that any or municipality with a population in excess of 25,000 automatically becomes a home rule unit; the Constitution further states that smaller municipalities and counties other than Cook might elect to become home rule, if desired, by referendum passage.

Currently, only approximately 200 of the 1,299 Illinois municipalities are under home rule. While many smaller municipalities have passed referenda to become home rule since that became an option, the vast majority of small municipalities remain non-home rule at this time. As such, most small municipalities must continue to search for statutory authority to legislate on any particular subject. For this reason, an efficient legal representative of smaller municipalities should possess a mastery of the Municipal Code and the various powers granted there to, non-home rule municipalities.

Only one county in the State, Cook, is under home rule, and the concept of home rule is not available to other units of local government (townships,

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school districts, park districts and other special districts). As such, attorneys representing smaller governments, in general, work primarily with non-home rule public bodies, which have far less autonomy than that afforded home-rule municipalities or counties. Specific statutory authority must be available to justify any action(s). Counsel for smaller governments is tasked with finding that authority, which is oftentimes challenging, requiring creative yet practical thought.

2. *Fewer Funds, Smaller Staffs, and the Same Amount of Work?* Where populations are smaller, available revenues also tend to be smaller. Fewer dollars typically means fewer staff, and fewer staff members generally means that individual officials must take on a larger share of duties than they typically would in a more populated setting. All but the very smallest municipalities generally offer their residents roads and streets maintenance, zoning, subdivision and building code regulation and enforcement, as well, often, as basic law enforcement services. Larger communities generally provide a wider range of municipal services, but also often include separate taxing bodies which provide other special services within the larger community's jurisdiction—park districts, library districts, fire protection districts, etc.--which mean a reduced range of people in those communities interested in or available for public service. Often small-government boards may be primarily composed of retirees or those who otherwise have significant amounts of unencumbered time to dedicate to public service.

While this often works quite well, a lack of diversity may lead to a shortage of new ideas. Many small communities cannot afford to hire a professional administrator, so management duties often fall upon elected officials and, to the extent they are utilized, outside consultants. An attorney representing a small public body may be called upon to spark the ideas or initiatives which a small community may be expected to provide in the absence of a special district(s).This means that in a larger-sized government, a greater number of people generally may be responsible for overseeing a more limited range of services, in contrast to a smaller body, where one official may bear the entire responsibility for overseeing parks, another for streets, another for finance, etc., with few if any staff members backing those members up in these duties.

The smaller population, coupled with the high level of responsibility and expectations commonly placed on smaller community officials might a professional administrator might otherwise raise, and he/she should be prepared to do so when requested, while always keeping in mind that the governing body remains the policy-maker, and he or she acts only at its direction.

3. *How much is too much?* While many larger governmental bodies may have in-house counsel, this is very unusual in the small-sized governmental setting. With the exception of counties, which are represented by the county's State's Attorney, the vast majority of small-government attorneys are engaged as independent contractors. Attorneys working as such may be on a retainer, a "fee for service" arrangement, or some hybrid of both. Leaders and residents of some smaller-sized governments may operate under the theory that "because we are small, our challenges are small." While there may be some truth to this, the reality is that even smaller governments are charged with managing substantial amounts of public funds and perhaps even more in the way of public responsibilities and expectations. For this reason, it is wise for all governmental bodies, including the smaller ones, to err on the side of caution and consult with its legal counsel whenever a legal question is raised. What may appear to be a simple or routine matter may grow into a significant legal problem which might have been avoided had competent legal advice been obtained up-front. We at ANCEL GLINK oftentimes are called upon to step in to defend smaller public bodies in costly litigation. While certainly we are well-equipped to do this, we are equally as well-equipped to serve on a day-to-day advisory basis as much or as little as is needed—as it's often said, an ounce of prevention is worth a pound of cure. Regardless of its size,

The reality is that even smaller governments are charged with managing substantial amounts of public funds and perhaps even more in the way of public responsibilities and expectations.

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a governing board has a responsibility to its citizens to ensure that competent legal advice is always available to it.

Legal counsel must be able to represent the public board effectively even when board members do not agree among themselves, as is frequently the case, from the largest of cities to the tiniest of towns. Oftentimes, particularly in smaller governments, where the pool of potential attorneys may at least appear to be more limited, personal relationships enter into the choice of attorney. For example, the mayor or a dominant faction on a village board may push to employ someone with whom they may have a personal relationship but the attorney may know little about local government law. Other alternatives should at least be explored. A community can benefit from impartial and informed advice that is not unduly influenced by close relationships. A public body should review its choice of counsel on a regular basis, making adjustments when necessary to ensure that it is getting what it needs and is paying for. Governing boards should be able to rely on the attorney's judgment and ability to articulate clearly when asked unanticipated questions during public meetings or elsewhere. Don't be afraid to ask hard questions, and insist on answers.

4. *Since We're All in This Together, We Might as Well Cooperate.* Because of limited resources, particularly in smaller communities, it often advisable that local public bodies consider entering into agreements with each other, called intergovernmental agreements. The Illinois Constitution states that "units of local government and school districts may contract or otherwise associate among themselves, with the State, with other states, and their units of local government and school districts, and with the United States to obtain or share services and to exercise, combine or transfer any power or function, in any manner not prohibited by law or ordinance." The Illinois General Assembly has provided the statutory framework for intergovernmental cooperation in the Intergovernmental Cooperation Act, 5 ILCS 220/1 et seq. Every practitioner who represents smaller bodies should be very well-acquainted with this Act, and encourage its liberal use when necessary or advisable. In these times of limited resources, neighboring communities and overlapping governmental bodies should be encouraged to work together towards common goals; this is especially true for smaller public bodies, which may benefit significantly by sharing or pooling equipment and services with other small governments.

In these times of limited resources, neighboring communities and overlapping governmental bodies should be encouraged to work together towards common goals.

As an example, many smaller communities experience difficulty in code enforcement, particularly when it comes to non-criminal property compliance issues such as zoning, property maintenance and building code violations. Typically, the State's Attorney's Office will decline to prosecute such cases, as they are not criminal in nature. Prosecuting ordinance violations or filing a civil suit for injunction can be expensive and time-consuming. Many small communities simply do not enforce certain portions of their codes for this reason. Such inaction, however, may send the unwanted message to residents that "anything goes."

Administrative adjudication of code violations is a statutory tool authorizing municipalities to adjudicate and enforce a broad range of ordinance violations (excluding traffic offenses and violations that can result in incarceration) in-house, independently from the courts. The system has many benefits: 1) it is quicker and more efficient than the court system; 2) a regular adjudicator has knowledge of the municipal code, which leads to fair and consistent results; 3) municipal staff may prosecute the cases; 4) there is less formality; 5) the municipality keeps 100% of the fines ordered; 6) often, the location is more convenient to defendants and municipal staff than the county courthouse; and 7) administrative adjudication does not preclude a municipality from using the court system when needed.

A primary disadvantage of implementing an administrative adjudication system is that the municipality must provide the organizational detail that is assumed by the county for traditional prosecutions. This includes docketing, service of notice, record-keeping, and security. In order to make administrative adjudication economically viable, there must be enough volume in violations and fines to justify the administrative expenses and responsibilities involved. Larger municipalities enjoy the "economy of scale" which makes

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administrative adjudication very attractive. Smaller municipalities (on their own) would typically not have the case load to justify this type of system, and are therefore in the unfortunate position of either spending considerable costs prosecuting in court or simply letting the violation(s) go unaddressed.

As ANCEL GLINK continues to grow its practice, particularly in downstate Illinois, we have discovered that a number of our smaller municipal clients find themselves in this situation. As such, we are developing solutions which create joint and coordinated systems of administrative adjudication administered by multiple municipalities pursuant to an intergovernmental agreement. Through cost-sharing and responsibility-sharing, we believe that all participating municipalities will be able to more efficiently and decisively enforce their codes.

5. *One Size Fits All?* We recognize, of course, that smaller size and smaller revenues do not necessarily equate with smaller issues. The steady proliferation of state and federal laws has made consequential demands on smaller governments, and this is expected only to increase. In most instances, the same laws apply to small bodies as apply to larger bodies, although the impact of compliance may be felt much more strongly in a smaller community than in a larger one. For instance, section 1 of the Illinois Freedom of Information Act, 5 ILCS 140/1 et seq., states as follows: *"The General Assembly realizes that this Act imposes fiscal obligations on public bodies to provide adequate staff and equipment to comply with its requirements. The General Assembly declares that providing records in compliance with the requirements of this Act is a primary duty of public bodies to the people of this State, and this Act should be construed to this end, fiscal obligations notwithstanding."* In other words, whether or not a public body has the manpower or equipment with which to comply with a FOIA request as required by the law is immaterial; it is expected to comply, and within the time limits proscribed. This is just as true for the City of Chicago as it is for the tiniest village.

In most instances, the same laws apply to smaller bodies as apply to larger bodies, although the impact of compliance may be felt much more strongly in a smaller community.

Collective bargaining is another matter which, until 2005, smaller bodies did not frequently face. Now, however, given that collective bargaining may be required in public employers with as few as five employees (formerly 35), smaller governments are being confronted with increasing labor issues that simply did not exist for them several years ago. This is another example of the fact that just because a governmental body may be smaller does not mean that its legal issues are less complex. A practitioner must be ready to craft practical solutions to dealing with the challenges, and at a cost which the small government is able and willing to absorb.

The legal representation of local governmental bodies, whether they are large or small, always presents many challenges. However, those challenges can be minimized by experienced counsel's recognition and understanding of the unique characteristics of each, so that appropriate solutions can be crafted for the good of the public each of these bodies serve--large, small, and everything in between.

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18. Distressed Developments: Addressing the Impacts and Recognizing the Opportunities

By Stewart H. Diamond and Julie A. Tappendorf

For almost 25 years, the occasional dips in the construction of new homes or multi-family units have been little more than seasonal aberrations. The price of homes continued to rise and low-cost mortgages encouraged the "American Dream" of home ownership. Developers were entering into an-nexation agreements for 20-year terms assuming their projects would be successfully completed in 4 or 5 years at the outside. These annexation agreements required developers to pay increasing amounts of impact fees to a wide variety of governmental bodies. Even Illinois non-home rule communities began to take advantage of the fact that annexation agreements are not subject to the rather rigid provisions of state law and court interpretation that require impact fees to be "specifically and uniquely attributable" to the specific development. Some developers also agreed to construct sewer, water, drainage, and road improvements much larger than those needed by their development, relying on recapture agreements to reimburse the developer for its costs by requiring future developers to pay their proportionate share of the costs of the oversized improvements. In this scenario, everything works so long as land values continue to increase and there are new developers from which to recapture these costs. In an extended economic downturn, however, none of these old rules apply.

In the economic environment of the last ten years, we have seen developers walk away from their projects leaving half-completed homes, broken sewer systems, un-landscaped drainage basins, unfinished streets, and major intersections without traffic signals. Although the economy has improved, as a continuing problem, a municipality acquires a whole new set of potential friends and potential adversaries. Sometimes, it is hard to tell the friends from the foes. Any list of the players will likely include the following interests:

1. New voting citizens who have moved into homes on lots that have not been landscaped on streets that have not been finally paved, and who assume that their temporary certificates of occupancy issued by the municipality means that it is the community's responsibility to complete all of these improvements.

2. Banks and other financial institutions that have foreclosed on developers' loans and are unclear about how much additional money they will need to spend as the mortgagees in possession of the abandoned subdivision.

3. When a bankruptcy is involved, the trustee in bankruptcy and the bankruptcy judge, who sits above the entire process. If the bankruptcy goes far enough, a new developer, hopefully with more financial assets, may end up acquiring the land.

4. Bondholders, where a special service area was established to finance some or all of the public improvements for the development and the special service area taxes have not been paid.

5. Other governmental entities that may have had a stake in the development, either through the imposition of impact fees or property tax dollars not realized because of a failed development.

6. Finally, there is the financial institution or surety company that has issued an irrevocable letter of credit or a surety bond to guarantee the completion and payment of public, and in some cases, private improvements.

At each step of the process, the municipality needs to decide the extent to which it is obligated to place itself among this new cast of characters and whether it will function as a shallow or deep pocket or as an active or passive litigator.

Over the next few years, governmental bodies will need to deal with the affects of the Great Recession

Recognition of a Problem

The earlier the municipality can be made aware of a problem with a specific development, the better able it is to analyze its legal obligations and identify its rights and the role it wants to take in the process. One of the earliest signs of trouble is that the developer has missed deadlines for submission of required plans to the municipality or other governing bodies, or failed to revise plans in a timely fashion. This could be a sign that the developer is having financial difficulties and has either failed to pay its consultants or has not directed its consultants to do the work on the plans.

Another sign of trouble is an ex-

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tended delay in completing all of the site improvements for a development. There is no immediate monetary reward to the developer for constructing and installing site improvements. As a result, the developer may focus only on those site improvements that are absolutely necessary for the development (such as utilities and roads) and delay putting in those site improvements that the developer thinks are not necessary to the residential development (such as landscaping, signage, lighting, and park improvements) in the hopes that the municipality may issue one or more building permits to allow the construction of homes, the sale of which will bring in needed cash. If a municipality is getting pressure from a developer to issue building permits in advance of completion of all of the site improvements, this could be the first sign of a cash flow issue with the developer.

If a developer is selling off portions of a larger development to other developers, that may be a sign that the developer is in financial trouble or has lost (or failed to get) financing from its lender. A mu-nicipality should pay careful attention to a developer's requests for approval of a transfer of all or a portion of the developer's obligations to complete a development, and if a municipality does approve a transfer of a developer's obligations for part or all of a particular development, it should ensure that completion of, and security for, the site improvements, both public and private, are adequately ad-dressed in the transfer.

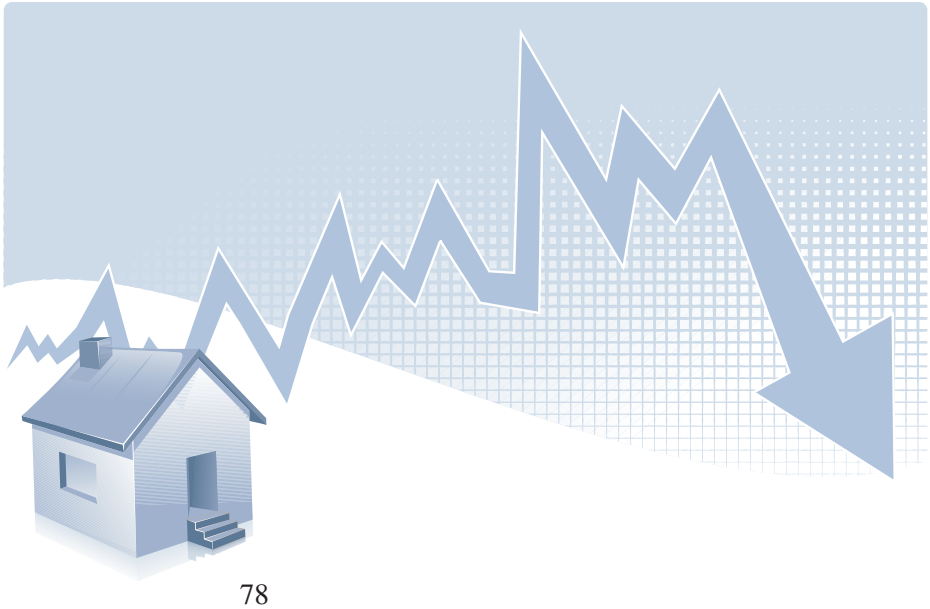
Analysis of Municipality's Legal Obligations

At the first sign of trouble in a specific development or with a particular developer, a municipality should take steps to analyze its own legal obligations, if any, with respect to the development. That should involve a careful review of all the approval documents (planned unit development or subdivision approval ordinance or annexation agreement) to determine who is responsible for completion of the on-site and off-site improvements for a particular development. In development projects that began before the Great Recession, it was almost always the developer, and not the municipality, that was obligated to construct all required improvements for a development. As a result, a well-drafted annexation agreement or planned unit development ordinance placed all the obligations to construct and complete the development, including all public and private improvements, squarely on the developer. A good agreement or approval ordinance will also include a phasing plan for completion of the development, require the developer to post adequate security with the municipality, and describe the penalties for failure to comply with the requirements of the ordinance or agreement.

If the agreement or approval ordinance is silent on some or all of these issues, the municipality's subdivision ordinance may be helpful in sorting out the issue of responsibility. A good subdivision ordinance will clearly state that it is the developer's sole financial responsibility to construct all the improvements required for the development, both on and off-site. The subdivision ordinance might also include requirements for security and penalties for non-compliance.

Identification of Municipality's Rights and Role

Even if these documents place all responsibility on the developer to construct and complete a particular development, that may provide very little comfort when the developer fails or refuses to complete required improvements, particularly those improvements that have impact outside the developer's property. A much bigger problem occurs if, for example, a developer has not completed an important part of the municipality's utility system. Other problems occur where a utility facility, like a lift station, has been constructed but the developer gave up the ghost before transferring title to the land on which the lift station to the municipality sits. The same difficulty can also occur with municipal parks, or other sites agreed, often in an annexation



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agreement, to be transferred to another governmental body. There, the bankruptcy court may order the property to be transferred. That is especially the case if the subsequent purchaser of the land understands that, in order to gain the benefits of the pro-developer parts of the annexation agreement, the parts of that document not so favorable to the developer must be adhered to as well. If the land has already been platted with the words "hereby dedicated," it should constitute an irrevocable transfer of the land to the governmental body subject only to its final acceptance. Of course, all of these standard Illinois rules may have a somewhat perilous existence when questioned in a federal bankruptcy proceeding where the judge possesses extraordinary powers.

If a municipality is inclined to do so, it can use surplus funds to bring the public improvements up to an appropriate standard and perhaps even to make grants or loans to homeowners who find themselves the victim of the developers' bankruptcy. Such a municipality might become the subject of a heroic song, but rarely will a community use its funds in this way, especially when there may be other hemorrhaging problems within the corporate boundaries. The municipality should determine what its legal obligations actually amount to and what role it will take, if any, to address these problems. A municipality that has not accepted public improvements does not own them, although a municipality should be aware that acceptance could be implied if a municipality assumes maintenance responsibilities.

If a municipality wants to maintain but not accept the improvements it needs to make its intent clear. Obviously, the municipality's first effort should be to call an irrevocable letter of credit or convince the subdivision surety company to finish the work and pay the contractor. Irrevocable letters of credit are generally secure unless the financial institution itself is experiencing difficulties. In some cases, the municipality has agreed to a prior reduction in the amount of the irrevocable letter of credit so that there may be insufficient money left to complete the work.

In the case of a surety bond, another problem may arise. For example, the surety company, (which had no difficulty in taking the premium), can often be slow in undertaking its contractual responsibility. The only way that surety companies historically stepped forward with vigor is where they believe that less money will need to be spent if the work is done quickly. Sometimes litigation may be necessary where the surety company fails or refuses to meet its obligations under the surety bond. Obviously, the first step is to read the language of the surety bond, although most standard bonds are non-reducible and continue in force until the governmental body has accepted the improvement. In that case, if the municipality wants to plow snow from the streets for safety purposes, it must make it clear that it is not accepting the improvement just by performing routine maintenance. If citizens very actively demand the public body to cause improvements to be completed, the municipality may want to consider the creation of a special service area to provide the funds necessary to complete subdivision improvements where a developer has abandoned the project. Special assessments can also be used for this purpose.

If a subdivision or an entire planned unit development has a great deal of uncompleted facilities, the municipality needs to determine whether it is wise to force the completion of all improvements even if it could do so. That is because a subsequent developer of the land may want to propose a significantly different site plan, and the flexibility of that developer will be greatly diminished if the municipality imposes its full legal authority to cause the uncompleted parts of the previously approved and undeveloped subdivision to be entirely constructed. Communities may instead opt for temporary utility improvements such as an adequate, but eventually moveable, storm water detention area. Such an area needs to be established at a level to adequately drain the portions of the development already constructed, but leaving open, perhaps for another day 3 or 5 years in the future, a different design of the final construction.

Careful pre-planning by municipality can prevent real estate developers from abandoning a project and leaving important improvements undone or as the seeming responsibility of the municipality

The municipality may need to have some role or presence in the bankruptcy court because there may be obligations of the developer in a planned unit de-

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velopment, ordinance, an annexation agreement, or in the general ordinances of the municipality that the bankruptcy court will allow collectible assets to fund. Although the municipality may be an unsecured creditor regarding certain obligations, the court may recognize the need to use some available funds to secure the higher value of the land not yet developed or to satisfy ordinance violation claims. The municipality needs to talk to all of the parties at interest before making a final decision on a specific project. The availability of assets, in particular situations, may dictate an entirely different course of action. A municipality must always remember that it was not a party to the contract between the home buyer and the developer. It did not guarantee that the kitchen cabinets would completely fit. Nor does a municipality typically agree to construct or complete the site improvements if the developer fails to do so. The problem of the municipality's intervention in these private disputes is present even in development taking place during good times. However, it is a process with much more grief during bad times.

In addition, sometimes the municipality has the undesirable task of telling homeowners who were granted temporary certificates of occupancy that it has now become their responsibility, with the developer having defaulted, to complete the improperly-pitched and poured driveway and to install parkway trees. All of these obligations were initially that of the developer/builder. Most ordinances, however, pass on the obligation for completion of final subdivision improvements to the homeowner/voter.

For those developments that envisioned placing maintenance responsibilities for the subdivision improvements in the hands of a homeowners association, the municipality may need to inform the ho-meowners association that it may have to step into the shoes of the developer earlier than expected. This assumes that the association has already been established. Unfortunately, however, that is not often the case until a substantial amount of the development is completed and a specific number of homes have been sold. Even if that threshold has not yet been reached, it may be desirable to have the association created earlier than expected, if possible, to ensure that the costs of completing the various improvements left undone by the developer are more fairly distributed throughout the development. This also has the added advantage of providing a more efficient administration of these matters and a centralized point of contact for the municipality.

The Additional Problem of Vacant Homes and Properties

As discussed above, an extended decline, or in some cases a complete halt, in the sale of houses creates massive problems for municipalities that enthusiastically approved modern planned unit developments and other residential developments. The situation is made even worse if foreclosures of houses result in abandoned or poorly-maintained private properties. There, the municipality will need to review, with great care, its property maintenance codes and the manner in which those codes can be enforced against both desperate families and absentee mortgagees. If the municipality has not enacted a property maintenance code, this may be the time to consider doing so. A municipality may also consider adopting a vacant property ordinance that requires the property interest holder to register with the municipality when a property or building becomes vacant. At the very least, registration puts the municipality on notice that a property has become vacant and provides contact information of the party responsible for maintenance of the vacant property or building. Additional tools for dealing with distressed properties, including land banks, are discussed in Article 19.

The Recovering Economy: An Opportunity?

In the last few years, many municipalities have started to see an uptick in individual building permit applications, as well as a renewed interest from developers in residential and non-residential develop-ment opportunities. Many developers are looking specifically for entitled properties (those with zoning and subdivision approvals already in place), and preferably with most if not all of the public improvements installed and constructed. Those developments that were abandoned when the recession hit are becoming attractive to developers and builders who survived the economic downturn. However, it is the rare developer or builder who is interested in building the exact subdivision or development approved pre-2008. That means that these developers and builders are likely to approach the municipality requesting amendments to the previous approvals and, in some cases, financial assistance to complete the development.

In most cases, these requested changes will require the municipality to open up the previous development approvals, including annexation or development agreements, planned unit development ordinances, and other zoning approvals. Developers may seek greater density for the development, reduced fees, and financing assistance from the municipality, such as special

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service areas, tax increment financing, and other incentives. For municipalities, it will be important to define the required legal process for these amendments and incentives, including providing the required notice and hearing opportunities, if required by statute. In addition, during the renegotiation period, a municipality will be given an opportunity to revisit provisions in an annexation agreement or zoning approval and possibly tighten up language to better protect the municipality, including provisions relating to security for public improvements and default. For developers, it will be important to demonstrate to the municipality that the development is not feasible without the requested changes and incentives. For all parties, it will be important to put aside the idea that the previously-approved development is set in stone. What may have been a perfectly appropriate and feasible development in 2007 may not be marketable in 2017 and beyond. Flexibility is a key component for all parties involved in negotiating a restructured development in a recovering economy.

Conclusion

In summary, a municipality may need to dampen the expectations of homeowners for immediate subdivision completion while making sure that the health and safety of the community is not seriously degraded. This is a time where the elected and appointed officials of municipalities and their municipal attorneys may need to dust off the ancient files of the past and combine them with the ingenuity of the present in proceeding at a pace which does not add a bankrupt municipality to the bankruptcies of the residents and developers. That is particularly key in Illinois, where state law does not allow a municipality to file for bankruptcy unless the municipality first obtains legislative approval to do so. As the economy recovers, municipalities may need to be flexible in their development vision for a particular parcel, as market-changes have affected, and will continue to affect, what will be developed in the future.

19. Land Banking and Nuisance Abatement Strategies: Municipal Tools for Revitalizing Abandoned Properties

By Brent O. Denzin

Years after its apex, the effects of the housing crisis are still being felt in municipalities throughout Illinois. Abandoned and blighted properties continue to weigh on communities, stifling growth, dissuading development, and creating spaces for illegal activity. The cycle of vacancy and blight, magnified by the Great Recession and foreclosure crisis, continues to frustrate both government and private efforts to stabilize and reinvest in hard hit communities. By the time many vacant properties can be resold, the property value no longer supports such reinvestment.

Many abandoned properties are stuck in market limbo, either from unfinished foreclosure actions or back taxes. These properties, often referred to as "zombie properties," present a particularly difficult challenge for local governments. Not only are they often abandoned, but it can be unclear who has control over – and responsibility for — the on-going maintenance of the property. Adding to the challenge, many of these properties are poor candidates for redevelopment because conditions that often accompany abandoned properties, such as delinquent taxes, make them unattractive to developers. As long as those taxes and liens outweigh the value of the property, the land will sit vacant, affecting the surrounding area.

Fortunately, thoughtful, strategic government intervention can turn around problem properties. Using many of the strategies outlined below, local governments can acquire abandoned properties, clear market barriers and find new, responsible owners.

Land Banking and Strategic Acquisition

Recently, municipalities have joined together to form intergovernmental agencies dedicated to addressing blight and abandonment. Utilizing municipal authority, these intergovernmental land banks are structured to develop and implement strategies for acquiring and repurposing abandoned properties. These land banks have focused staff and legal support, dedicated to the mission of acquiring, managing and repurposing blighted properties on behalf of, and in partnership with, the local member municipalities. Even working on their own, local governments have the authority to employ certain tactical land banking strategies that can alleviate abandonment and blight in their communities.

For properties with persistent code violations, aggressive action up front can dramatically reduce the impact these blighted properties have on neighborhoods and municipal budgets in the long run. As discussed below, many municipalities are utilizing their authority to acquire vacant properties as a blight reduction and cost-savings strategy.

Strategic intervention on distressed property typically relies on two primary tools: 1) petitions for abandonment filed by the municipality (potentially with an intergovernmental agreement to immediately transfer the properties to an intergovernmental land bank); and 2) direct action and lien enforcement under Section 11-31-1 of the Municipal Code, 65 ILCS 5/1-1 et. seq. Both

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strategies force action on properties before the municipality incurs significant costs cutting grass and seeking voluntary compliance. Moreover, the specter of early aggressive action will push responsible owners to act early, reducing the pool of problem properties.

Abandonment

For problem properties, municipalities can work to obtain title via a declaration of abandonment. See 65 ILCS 5/11-31-1(d). To qualify, properties must meet the following conditions: (i) tax delinquent for 2 or more years or have water service bills that are 2 or more years overdue; (ii) vacant (i.e. not occupied by persons legally in possession); or (iii) a structure is in a dangerous and unsafe condition. Id.

Municipalities can help use public records to identify properties that meet these criteria. Once identified, municipal staff can work with local counsel and or a regional land bank to begin taking direct action. Typically, the cost of seeking title via abandonment will be less than the cost of continuously mowing grass for the absentee owner. With title, the municipality can control the future use of the property and take actions to clear structures and resell the lot to a responsible owner. As discussed above, an intergovernmental land bank could help alleviate concerns that municipalities have about acquiring, holding and selling property directly.

Strategic Demolition Petitions

If the property is not eligible for abandonment, a municipality can seek authority from the court to complete basic rehabilitation work. This could include board-up, repairs or other work to minimize the hazard posed by the structure, up to demolition. The costs incurred to perform the board-up and maintenance work pursuant to authority in Section 11-31-1(a), including legal costs to bring the petition, can be liened against the property.

Municipalities can foreclose on the lien as part of the City's on-going building code case. 65 ILCS 5/11-31-1(a). At any time, the owner can pay the costs incurred by the municipality and release the lien. For properties with absentee owners/lienholders, however, the foreclosure will likely be uncontested and lead to a foreclosure judgment.

Local governments now can take advantage of land banking strategies to repurpose vacant buildings

With a judgment of foreclosure, the municipality can take the necessary steps to set up the property for a judicial sale, at which the municipality is credited with the amount of the lien. Given back taxes and other encumbrances, the property will not likely receive other interested bidders. If the municipality wins the bid, it can bring the Certificate of Sale back to court to get a judicial deed free and clear of all encumbrances and taxes.

If the property is vacant and in disrepair, the City can seek quick authority to board up or repair the structure. 65 ILCS 5/11-31-1(e). The expedited process applies only to buildings that are three stories or less in height (as defined by the municipality's building code), and only to those buildings that the municipality's chief code official determines to be "open and vacant and an immediate and continuing hazard to the community." *Id.* Unlike other statutory authority for board up and repair, Section 11-31-1 provides a high priority lien for all costs, including legal expense.

Instead of maintaining an absentee owner's property for months or years on end, strategic and aggressive early action can help shift the municipalities' resources into repurposing these properties in a manner that will end the perennial blight and eliminate the mounting costs. Whether as part of a fully-realized regional land bank, or utilizing land banking strategies for targeted local redevelopment, local governments now can take advantage of land banking strategies to repurpose vacant buildings. At the forefront of land banking in Illinois, Ancel Glink can help your local government use these emerging tools to tackle your most difficult redevelopment challenges. Contact us to find out how we may be able to assist you.

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