Ancel Glink | Diamond Bush DiCianni & Krafthefer

10 Things You Need to Know
About 14 Local Governmental Issues

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INTRODUCTION

In 2006, our law firm, commonly referred to as "Ancel Glink," celebrated its 75th year of existence. The firm was founded by Louis Ancel in the difficult years of the Great Depression, and it has continued to serve governmental bodies through wars, economic upturns and downturns, suburban growth, educational changes, the advent of mandatory collective bargaining and liberation movements of various kinds. Ancel Glink attorneys have written handbooks for municipalities, school districts, park districts, townships, fire protection districts, library districts and entities created by intergovernmental agreements. During all of those years, Ancel Glink attorneys have appeared as speakers at conferences of regional, State and national organizations, at which we described our experiences representing governmental bodies of all types.

While there is always a great deal to cover in the speeches we are asked to give, one of our goals has always been to highlight a few key points which 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 often 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 the "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 written 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.

A unique feature of our firm is the Ancel Glink Library. Our lawyers have written many pamphlets to assist local governmental officials in their tasks. This

pamphlet and others can be downloaded without charge from our website, www.ancelglink.com, which also contains more information about the firm and local governmental issues. Other pamphlet titles include:

- Ancel Glink's 2007 Guide for Newly-Elected Officials
- Municipal Questions and Answers – 230 Q & A
- Labor Law Handbook for Small Governments
- Illinois Tort Immunity Handbook
- Zoning Administration Handbook
- Zoning Tools of the Trade
- Economic Development Toolbox for Municipal Officials
- Lien on Me: Using Liens to Collect Municipal Debt and Expenditures
- Municipal Annexation Handbook

If you have any questions about the contents of this pamphlet, or any other pamphlets, please contact me at sdiamond@ancelglink.com. I wish to thank all of the contributing authors for producing the articles contained within this pamphlet. My secretary, Dale Rollins, and paralegal, Jason Olsen, saw the creation of the Ancel Glink Library through to its triumphant conclusion. The tradition started by Louis Ancel more than 75 years ago of sharing information and ideas with governmental officials throughout Illinois continues to this day.

Stewart H. Diamond, Editor
April, 2008

Chapter 1

TEN STEPS TO HELP KEEP YOUR EMPLOYEES FROM SUING YOU (OR TO HELP DEFEND YOU IF THEY DO)

Margaret Kostopulos

If they didn't already know it before the election, newly elected officials soon realize that personnel matters can and do consume an inordinate amount of time and comprise one of, if not the biggest, allotment of a local governmental entity's budget. Employment related litigation continues to be the fastest growing type of law suit filed. While no single or collective acts can guarantee that employees will not sue, a periodic assessment of your employment practices will lessen the likelihood of employment-related litigation, or provide you with the proper defense should a suit occur. We believe that a focus on these ten steps is likely to provide protection from nasty employment lawsuits.

1. Today's Applicant may be Tomorrow's Litigant

Unsuccessful job candidates comprise a significant part of the overall claims filed with the Equal Employment Opportunity Commission and the Department of Human Rights. Make sure that your hiring practices are up to date. This starts with a review of your job application. Minimally, an employment application must contain the following:

a. An EEOC statement. The application should contain the statement at either the top or the bottom of each page stating that the employer is an equal opportunity employer and does not discriminate against applicants on the basis or race, gender, religious affiliation, disability, etc.

b. An offer to accommodate disability. Not only is it important to inform an applicant of their ability to request a reasonable accommodation to perform the position for which they apply, but it is equally important to notify applicants that they can request reasonable accommodation through the application and interview process. State this directly on the application as well as in job postings to avoid disability discrimination allegations related to the interview process.

c. No request for information on age, marital status, religious affiliation, parental status, or other issues prohibited by Title VII and other non-discrimination laws. It may seem axiomatic that it is risky to ask an applicant his or her age, but more obscure minefields still exist. For instance, while it is appropriate to request educational information, avoid asking for date of graduation. Instead, the application should request information on whether the applicant graduated and, if appropriate, what degree was earned.

Similarly, an application should not ask for information on whether the candidate is disabled, but rather it should ask whether the applicant is able to perform the essential job functions of the position with or without accommodation.

Again, once a candidate is hired, it is appropriate and necessary to request information on citizenship or the ability to work in the United States. Care should be taken on a job application to avoid asking whether a candidate is a U.S. citizen, unless citizenship is a statutory requirement for the position. Otherwise, the appropriate information to request on a job application is whether the applicant is legally allowed to work in the United States or a statement that successful candidates will be required to provide proof of their ability to work in the United States upon hire.

d. No request for information on arrests. Depending on the particular position, it may be relevant to inquire about certain criminal convictions, especially since some criminal convictions serve as a bar to certain public employment. Additionally, conviction of certain crimes may be relevant to particular positions, if a close nexus exists between the job duties and the nature of the conviction, *e.g.*, a convicted embezzler may be deemed unqualified for serving as a Chief Financial Officer or Comptroller. It is important that the application seek information on convictions only. While it may seem relevant to inquire about arrests, it is absolutely impermissible to use arrests which did not result in convictions as a basis for employment decisions. The best practice is to avoid asking for the information. If no information is sought, then it can never be alleged that it was impermissibly used as a selection criteria.

e. An employment at-will statement for all positions having that characteristic. It is never too early to remind employees and applicants that should they be the successful candidate, their employment is at-will, which means that either they or the employer can decide at any time to end the employment relationship for any reason (except an unlawful one). At every juncture of the employment relationship, it is important that employees (or candidates) are reminded that no contractual relationship exists, and so they have no special "right" to their job.

f. A statement of accuracy. Every employment application should require the applicant to execute a statement that the information provided in the application is true and accurate to the best of his or her knowledge as of the date of signing. This, in effect, commits the employee to the information and should it be determined later that any of the information was false, it creates a clear and unequivocal reason for refusal to hire or termination.

2. Interviews are Not Meant for Chit-chatting

Job interviews are designed to provide a face to face opportunity to gather additional information on applicants. Apply the same principles utilized in maintaining a defensible job application to the interview process. As much as you might want to make

the candidate feel at home, avoid asking personal questions. For instance, do not ask a young female applicant if she is married or intends to start or add to her family. The reverse of that is true as well. Do not ask more mature women if they are "empty nesters" yet. The question may be designed to determine whether the candidate is available for travel or flexible scheduling, but it may be perceived as a gender or pregnancy discrimination. The availability of the applicant to carry out particular tasks should be addressed directly: "Will you be able to work a flexible schedule?" Even when it appears that a rapport exists with the candidate, adhere closely to questions that assist in determining the abilities of candidate, not extraneous information that may come back to haunt.

3. Maintain an Up to Date Employee Manual

Employee manuals need not be exhaustive of every issue ever raised. It should, though, be a fairly comprehensive compilation of the workplace rules and policies. For instance, a manual need not contain a policy on the School Visitation Leave Act, but it most certainly should contain a reference to family medical leave (as it is much more commonly used). Among the policies a personnel manual should contain are:

- A strong and conspicuous statement that the employees remain employees at will notwithstanding the existence of the manual and that the manual does not create a contractual relationship;

- An EEO statement;

- A sexual harassment policy and procedure for making a complaint;

- An explanation of benefits, such as vacation, leave benefits, holidays, etc.;

- Pay policies, such as when employees will be paid, when overtime is earned and whether an employee can earn compensatory time in lieu of overtime pay;

- A general policy about disciplinary action, incorporating the tenets of progressive discipline (verbal warning, then written reprimand...) generally, depending on the particular circumstances;

- A complaint or grievance process that also reminds employees that any variance from the process does not invalidate the action taken.

Employee manuals should be regularly reviewed, approximately every three years. The area of employment law continues to evolve and change and it is important to review your manual to ensure that it contains the most recent material.

Finally, all employees should receive a manual upon hire and receive additions or amendments when they are adopted. Employers should retain a sign-off sheet or an executed acknowledgment form from each employee signifying receipt of the manual or

additions/changes. Explanation of the policies through staff training will help employees understand the rules, as described in section 6 below.

4. Maintain Proper Personnel Files

Some materials belong in an employee's personnel file; some do not. When an employer retains inappropriate records in a personnel file, and the employee is disciplined or discharged, they will review their personnel file (it is always the first action that plaintiff's employment attorneys take), notice that it contains documents that do no belong, and in certain instances, claim that the presence of these documents wrongly influenced the decision to discipline or discharge. Here is an example:

An employee is injured on the job. He completes the appropriate forms and files a workers compensation claim. The employer places copies of the documents in his personnel file. When he returns to work he begins to engage in misconduct: insubordination and refusal to follow directives of his supervisor. Nothing documenting these problems is placed in his personnel file because the supervisor is afraid to do so, fearing he will be accused of harassing the employee. The last straw occurs when the employee refuses to attend employee safety training and leaves work for the day without permission and without leave. At that point the employer terminates the employee and tells him, in writing, that the reason for the termination is his refusal to go to training along with other misconduct. When the employee's attorney requests to review the personnel file, she discovers that the only other record in the file is the record of a worker's compensation claim. She concludes that the supervisor impermissibly considered the employee's worker's compensation claim in deciding whether to terminate her client. While the employee might make the allegation that he was fired for retaliation for his workers compensation claim even without a record if it in his file, the fact that the record was in his file increases the perception that it was a factor in the termination decision.

Documents related to worker's compensation claims do not belong in an employee's personnel file, nor do the following:

- Investigative reports related to misconduct where the employee is a witness or a complainant;

- Investigative reports of misconduct of the employee if the suspected misconduct is not substantiated;

- Complaints or reports by other co-workers about the employee if no action is considered appropriate as a result of the complaint;

- Any documents related to any lawsuit or claim by the employee against the employer (this does not include instances where a third party seeks information on lost wages relative to a suit by the employee against that third party);

- EEO information regarding the employee;

- Any insurance or health information about the employee or dependents, including what, if any, insurance benefits the employee has selected.

Documents that should be retained in an employee's personnel file include:

- All hiring documents such as employment application, skills test results (except drug testing) and reference letters;

- All records of promotions/demotions and raises or decreases in salary;

- All performance evaluation instruments, including all documents submitted by the employee related to the same;

- All records of discipline issued, unless a policy exists which requires the employer to remove certain disciplinary records after passage of an amount of time;

- Records of leave, including military leave.

5. Review Pay Procedures

Most employers understand that "non-exempt" employees are entitled to time and one half of pay for overtime. Many are unclear as to who is non-exempt and what overtime is. While the categories of exempt employees remains executive, managerial and supervisory, in recent years, the federal regulations have changed in their definition of who meets these definitions. Although a full explanation and definition of these categories requires more detail than this space allows, it is important that your human resource managers and attorneys ensure you have correctly identified exempt status employees. The penalties for failure to pay overtime are significant, including the possibility of payment of the employee's attorney's fees.

On the other hand, the law requires employers to pay overtime to non-exempt employees after they actually work 40 hours in a work week. Although employers can be more generous in payment of overtime, by law, when counting to 40 hours of work, an employer need not count vacation, sick, or personal time as time worked. Additionally, even if the general work rules only require a 35 hour work week (five days of eight hours of work with a one hour unpaid lunch break each day) an employer is only required to pay straight time for overtime worked for hours between 35 and 40 each week.

6. Provide Regular Training to Staff

Employees are generally happier when they know and understand the workplace rules. Just as importantly, when employees know what is expected of them and when and

how rules will be applied, they are less likely to believe that actions are taken for unlawful reasons.

The same is true for distribution of the personnel or employee manual to staff. Some employers believe it is not worthwhile or cost efficient to provide each employee with a copy of the current manual. In fact, few things are more cost effective. The rules should never seem a secret. When an employer distributes and trains employees on the rules, they have a staff who has had the opportunity to know exactly what is expected of them and to understand the basis for the rules. Possessing their own copy of the employee manual provides them with the book of rules to consult whenever they have a question. While some employers believe this encourages employees to look for "violations" of the rules by the employer, in a well managed workplace, education and understanding will reduce skepticism and distrust.

7. Provide Regular Training to Supervisors

Just as important as training staff is the need to regularly train supervisors. Many supervisors are promoted from the ranks and really have practical experience in supervising staff. Worse is the common occurrence when supervisors want to also be friends with their staff and do no know how or when to draw the line. It is these instances when your "nice guy" supervisors (that many people usually love working for) foregoes issuing disciplinary action or fails to adequately address workplace problems because they either do not understand what to do or what consequences might arise if they do not.

Much like having a solid and up to date sexual harassment policy to both prevent harassment in the workplace, and to avoid liability, the same is true for supervisor training on the subject. The only way to avoid liability for sexual harassment committed by a supervisor against a subordinate is for the employer to show that it had a defensible policy in place, that its supervisors were trained on the policy and that it investigated and addressed the complaint in a timely and thorough fashion. An integral part of this defense is that supervisors must be trained to understand and know how to respond to such complaints or situations. Sexual harassment training should occur every other year and for new supervisors who are hired in between.

Moreover, supervisors who receive regular training on managing employees are better able to address low performance and misconduct problems to resolve them before they overtake the workplace and demand too much time and resources from the organization. Training ensures that supervisors understand the fair and equitable enforcement of work rules (or collective bargaining agreements) and the need to do so. A well trained supervisor who professionally supervises his or her staff will reduce instances of litigation and create employment practices that will provide an invaluable defense to claims of discrimination or unfair employment practices.

8. Conduct Regular Performance Evaluations

Regular performance evaluations are a good management practice. Much like good supervisor training, regular performance evaluations shared with the employee describe expectations in their work and provide a record of their accomplishments and shortfalls. Why is this important? The answer is again two fold. First of all, an employee with clearly defined work goals is on notice of what they need to accomplish and gives them the chance to succeed. Secondly, performance evaluations that document areas of low performance create a workplace record of notice and the opportunity to improve performance which again serves as documentation or proof if the employee later claims that their termination or demotion was based on an illegal reason, rather than a performance based reason.

9. Document All Misconduct

Often supervisors overlook minor misconduct either because they want to avoid confrontation with an employee or they do not want to appear to be nit picking. A problem arises when the employee engages in misconduct that becomes "the last straw" for the supervisor who then terminates the employee. Unfortunately, the written record may make it appear that the action is "the first straw." It may, in fact, be time to terminate the employee, but unless the recent misconduct was fairly egregious, it may look like the termination comes "out of the blue" without a record of past misconduct. In an at-will employment situation it is still lawful to terminate the employee. The problem arises, though, when employees are terminated for conduct that would not otherwise have resulted in termination, but because of prior undocumented misconduct, the employer believes that termination is warranted. To the employee it appears that the termination was out of proportion to the reason and they instantly assume that another, "real" reason exists for the termination. Naturally, they assume the "real" reason is an unlawful reason and they look to file suit.

The easy solution to this situation is to be vigilant in documenting employee misconduct and utilize progressive discipline whenever a situation of misconduct arises. The benefits are two fold. If a supervisor issues appropriate disciplinary action when an employee violates a work rule or policy it not only notifies the employee of the misconduct and allows him or her the chance to correct the behavior, but the record of these actions will ultimately support the decision to terminate when it is "the last straw." It is even better to have all of your supervisors and managers utilize the same form for disciplinary action. It diminishes the enormity of the process to the supervisor who may feel he or she has so many other things to do in a day without preparing a memo from scratch about an employee. It also assures that the necessary information is recorded in each instance of corrective action.

10. Create an Internal Complaint Process

In some instances, the law requires a formal complaint process for employees, such as in cases of alleged sexual harassment. In other instances, when an employee

knows that he or she has a process, like a grievance process, available to bring complaints, it provides a recourse for employees other than a lawsuit.

As part of a valid defense for employers in claims of sexual harassment, all employers must offer a complaint process for those complaints by employees which allows for timely investigation and resolution of those allegations. As mentioned above, the employee manual should explain this process and identify individuals responsible for its execution. Specific training of supervisors and managers is necessary to ensure that these specific complaints are addressed correctly in order to create a defense for the employer should the employee sue.

In other instances, when an employee believes that they were treated unjustly, or a misapplication of the rules or policies occurred, it is valuable to provide them with a vehicle by which to raise this complaint. It is giving them some "due process". Generally, a complaint procedure should allow the employee to bring a complaint to their supervisor and the ability to seek review with the organization's top manager, such as a Village Manager or Administrator, or an Executive Director. Elected officials should not participate in this process, as employees may believe that they can bypass the chain of command in favor of political pressure on officials. The employee should be allowed to present the complaint in writing and even in person in a meeting to discuss the issues. It is not advisable to allow hearings on these complaints where the employee brings witnesses or demands to examine individuals from the organization. Finally, it is important to clearly notify employees that the procedures will generally be followed, rather than guaranteed, to ensure that staff does not mistake this effort as a contractual right.

While nothing can make employers immune to litigation, employers can lessen the chances that their staff will make claims with proper policies and training. Equitable enforcement of policies which employees know and understand will diminish the suspicion in the workplace that decisions are sometimes unfairly based. As always, consult with attorneys who are specialists in the area of labor and employment. For more information on this subject, please consult the Ancel Gink Library. Our firm maintains a series of pamphlets which cover many issues relating to local governmental law. One of them, the Labor Law Handbook for Small Governments, discusses these and many other issues in detail. These pamphlets can be downloaded without charge at our website, www.ancelglink.com.

Chapter 2

TEN LESSONS LEARNED BY A FORMER ELECTED OFFICIAL

Gregory S. Mathews

I not only have the pleasure of being an Ancel Glink attorney, but also the former Village President of Glen Ellyn. I also served as Village Trustee before my term of Village President. Set out below are ten things I learned through my experiences as an elected official. Ah, if I only knew then what I know now. Most of these items can be used both by a Village President or Mayor, or a Trustee or Alderman. Since this pamphlet will be made available to governmental officials of all types, I believe that many of my lessons learned are usable in non-municipal contexts. As in other life experiences, it may help if you understand the goals and aspirations of other elected officials as well as your own.

1. There is a Big Difference Between the Public's Perception of the Mayor's Power and Reality. The Only Real Power is in the Power to Persuade

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 <u>want</u> 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.

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.

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. 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 between 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.

10. 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 expressed by many residents due to the board's effort to listen and respond to their concerns.

Chapter 3

TEN RULES TO LIVE BY FOR PUBLIC MANAGEMENT LABOR NEGOTIATORS

Donald W. Anderson

Listed below are ten unusual truths that I have found useful in the up-and-down process of bargaining with labor unions on behalf of public employers. These ten rules are not the only ones you will need, but I hope you will find them as helpful as I have.

1. Beware of the Flying Monkeys

In order to get to the Emerald City, Dorothy had to follow the yellow brick road. But someone else built it, or maybe it appeared by magic. If you are involved in labor negotiations on behalf of public management, however, you will not be able to rely on someone else's efforts – at least not entirely. In collective bargaining, every set of negotiations requires that you follow a new path.

As with most other endeavors in life, building a path to the Emerald City requires planning and execution. You can't be like Columbus, who supposedly didn't know where he was going before he left and didn't know where he was when he got there. You need to be able to establish reasonable goals, obtain information necessary to determine whether those goals are obtainable or whether they may have to be adjusted during the course of negotiations, and develop strategies designed to achieve those goals. In this process, keep your eye on the Emerald City in the distance, which is the ultimate destination. And beware of the Flying Monkeys: distractions that get you off track, into the realm of frolic and detour. If they knock you off the yellow brick road, falling asleep in the poppy field will be the least of the ills that befall you.

2. Remember to Say "Mother, May I?"

Some of you may not be old enough to remember the childhood game of "Mother, May I?" It was a very simple game, really. One of the players was designated as the Mother, and she (or he) would give the other players directions on how to travel a specified distance to the pre-established goal. Upon receiving a direction, such as "Susan, take one giant step forward," Susan would have to say "Mother, May I?" and get Mother's approval before taking the step. Taking the step without saying "Mother, May I?" would mean Susan was out of the game.

In public sector labor negotiations, "Mother" is the governing board or council. It is a cardinal sin to present an offer to the other side – especially one involving economics – without the prior authorization of your governing board. The consequences of doing so can range from eating crow – either at the bargaining table or before the governing board – to having to defend the public jurisdiction against an unfair labor practice charge resulting from the board's rejection of the agreement that was reached at the bargaining

table. So before you take a giant step – in fact, any step of any consequence at all – be sure to ask "Mother, May I?"

3. There Ain't No Such Thing as a Free Lunch

In the science fiction novel *The Moon Is A Harsh Mistress*, by Robert A. Heinlein, dissident colonists on the Moon who are rebelling against the oppressive authority of Earth adopt the slogan "TANSTAAFL", an acronym for "There Ain't No Such Thing As A Free Lunch." This is a principle that conforms to our everyday experiences. Thus, the "free trip" offer that you get in the mail is really just a way to entice you into giving the offering organization an opportunity to try to sell you time-shares. The fact that you don't pay money for the bumpy air ride doesn't mean it's free; you're just paying in another way.

Unions, and less frequently public employers, sometimes act as though they think collective bargaining is a free lunch. They're free, they seem to believe, to make demands and proposals without responding to the other side's proposals – or even recognizing the legitimacy of the other side making proposals at all. But the consequence of thinking that there is a free lunch is no lunch; so be sure that the other side understands that lunch costs something and must be served for two.

4. They've Got to Eat the Peas and Carrots Before You Show Them Dessert

How do you get your kids to eat their vegetables? One way is to withhold dessert until a satisfactory portion of the main meal has been consumed. Just like kids at a dinner table, the employee committee is going to want to go right to dessert, skipping the peas and carrots if it can. You cannot let that happen.

Especially in first contract negotiations, there are a number of articles and sections of the collective-bargaining-agreement-in-progress that involve standard, almost boilerplate, language. The Preamble, Recognition clause, No Discrimination provision, Savings clause, and sometimes even the Grievance Procedure are relatively standard provisions that are not difficult to negotiate or agree upon. But you really should get those provisions out of the way before you start talking economics. This serves two purposes: first, it starts the negotiations off on the right foot by showing that agreement on particular provisions is possible and maybe even easy, and second, it helps to avoid the situation in which you have reached agreement on major economic items but then realize you do not have a complete contract ready to present to your respective principals. No one likes to have to go back and eat the peas and carrots after having devoured the chocolate cake.

5. Keeping the Other Side from Scoring is Not Important

In a football game, defense is as important as offense. To win the game, you have to outscore the opposition or just score a little bit and keep the opposition from scoring at

all. But in collective bargaining, there is no score card. If there were, managements would almost always lose (see Rule No. 8). Bargaining is not like football. It does not hurt the employer if the union achieves some of its objectives, as long as that achievement does not take place at the expense of management's objectives. In fact, it can be beneficial to the relationship if the union achieves some of its objectives, because that should help the ongoing relationship of the parties.

In bargaining, the employer needs to keep its mind on the achievement of its objectives at the bargaining table. If, under the circumstances, the employer is able to achieve a reasonable number of its objectives, then management wins, irrespective of what the union achieves.

There may even be circumstances in which objectives will coincide. The employer's objective with respect to wages always is, or should be, to determine the level at which, consistent with budgetary constraints, it must pay its employees in order to attract and retrain competent personnel. Unless the employer has absolutely no other rational choice, a practice of paying below market salaries, and losing employees as a consequence, is of no long-term advantage to the employer and will only accelerate or perpetuate the employer's attraction and retention problems. So the employer and the union may share a common objective of increasing wage rates, although they still may disagree on how much or how best to do that. Ultimately, management's challenge at the bargaining table will be to convince the union that achievement of management's goal also achieves the union's goal.

6. There is Always Some Part of "NO" They Do Not Understand

Everyone has heard "no means no." That is not entirely true, at least in collective bargaining. Sometimes it means "No, never." Sometimes it means "No, not now." Sometimes it means "Maybe." And sometimes it means "We're not entirely opposed to that, but we don't have the authority to agree to it at this time."

The lot of the management negotiator is to say "no" – a lot. Rarely will a union take the first "no" as being the final answer. Most unions take rejection very well. Rather than getting upset, they will simply submit the proposal again, maybe in the same form or maybe in a different form or different context. This can be frustrating for management – until it realizes that this is just part of the game. Eventually, the union will get the message if "no" means "not ever" and will keep looking for the right time if "no" means "not now." At some point, both sides will have to decide whether the issue is important enough to take to the mat. For management, that means a decision that maintaining the "no" is important enough to risk a strike or interest arbitration (in the case of police and firefighters). For the union, it means the obverse: the gain represented by a favorable outcome on the issue is important enough to warrant at least the threat to resort to one of these two types of impasse mechanisms.

7. There are Many Licks Before the Crunch

Sometimes, collective bargaining reminds me of the Tootsie Roll Pops commercial – you know, the one in which the narrator says that no one will ever know how many licks there are in a Tootsie Roll Pop because no one can resist crunching through the candy crust to get to the Tootsie Roll center. One may not be able to say for certain how many licks there are before negotiators reach the heart of a collective bargaining confrontation, but it can be said for certain that there are quite a few. So one temptation that negotiators must resist is trying to crunch to the center before the licks have reduced the candy coating to a crunchable veneer.

Strangers to the negotiation process and inexperienced negotiators sometimes wonder why it is that the parties seem to have to play a back-and-forth game until they arrive at a negotiated solution. The reason is simple – lack of information. If management knew from the outset what the union's bottom line – or "reservation price", if you will – was as to each issue, and if management could see that the union's settlement point and management's settlement point for each issue were within a "zone of agreement", then negotiations would be less time consuming. But neither side knows what the other side will agree to with respect to each issue until each issue has been explored in negotiations; hence, the "game". In fact, it is often true that neither side knows what its own true bottom line is until time and opportunity present themselves in just the right juxtaposition.

One reason why neither side goes right to its authorized bottom line concerning economic issues, in particular, is that the other side never will believe that the articulated offer represents the offering party's true reservation price. So, if management makes an initial wage offer at the full extent of its authority, the union will believe that management has more that it can offer and will explore to see if it can get management to increase its offer. Management's subsequent refusal to increase its offer would look to the union like, at best, "holding out" and at worst, bad faith bargaining. So both sides have to play the game until it's "crunch time."

8. Never Play Strip Poker with an Eskimo

The union generally starts off with more proposals than management. In addition, with respect to economics, it always leaves itself more room to come down than management has to go up. One union bargaining strategy will be to "peel the onion", which means to start high, come down a little bit at a time, and expect the employer to match the amount of movement in its turn. There is no way, under normal circumstances, that management can play that game successfully. So never play strip poker with an Eskimo – especially if you're wearing a bikini.

At some time during the bargaining process, management has to send the message to the other side that it is not going to play a game of trying to match the magnitude of union movement. Even getting into a game of "peel the onion" can work to the detriment of management, because there will come a time when the union still has room to move

when management's range of movement has been reduced almost to nothing. If management then refuses to move, the union will take that response as meaning that management has reached its bottom line, which may or may not be true. And if management moves only a fraction, then the union may choose to take the offer as an insult.

Rather than playing a game of single issue *quid pro quo*, management is usually better off getting to aggregate "package"[1] negotiations relatively early in negotiations. That way, trade-offs can take place over the whole range of issues rather than within a single issue.

9. Try to Get the Answer Before You Ask the Question

A friend of mine proposed to his wife this way: "If I were to ask you to marry me, what would you say? Mind you, I'm not asking." The lady, fortunately, did not get offended by this roundabout way of asking and said: "I'd probably say yes." My friend then clinched the deal when, on a subsequent lunch date, the couple passed the window of a jewelry store, stopped in front of the rings display and he said: "See anything here you like?"

In negotiations terminology, this is called a "supposal": suppose I were to offer X, would you accept it? One reason to use the supposal technique goes back to Rule Number 2, above. Before you ask the governing board for authority to make an offer that you think will clinch the deal, you may need to know whether the offer that you are considering will be accepted by the union. If it won't, there's no point in making the offer.

In using the supposal technique, you have to be sure that the supposal exchange is off the record and that the union understands that you don't have the authority to make the offer; all you are doing is asking the union for information that will enable you to ask for the requisite authority. Then, Rule Number 2 comes into play. You ask "Mother, May I?", and if the governing board says yes, you go back to the union with an offer along the lines of your supposal. Presumably, that will seal the deal on that issue. And if the governing board says no, you don't make the offer and both parties go back to the drawing board.

In deciding whether to use the supposal technique, you must remember Rule Number 7. This is definitely a "crunch time" technique; if you use it before then, you will not get to the Tootsie Roll center and might just chip a tooth.

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[1] In "package" negotiations, the parties make offers covering all or a designated portion of outstanding issues, with the caveat that the offer must be accepted or rejected as a package. That is, the rejection of one part of the package constitutes a rejection of the whole package. But good negotiators build on the acceptances and counter-offers included in a package response to progress over the course of several package offers and responses in the direction of the common goal of agreement.

10. Assume is a Three-Syllable Word

A negotiator who uses the word "assume" in bargaining runs the risk of an embarrassing lesson from the (presumably more experienced) negotiator on the other side. "Don't you know," he will say, "that the word 'assume' has three syllables? The syllables are 'ass-u-me.' If you assume, then you make an ass out of you and out of me."

Two areas where assumptions are particularly deadly are in communications between the bargaining team and your jurisdiction's governing board (see Rule Number 2), and in summarizing the "deal" with the union before putting together the collective bargaining agreement. Never assume that you have authority from your governing board to do something. Here, another three-syllable word comes into play: ver-i-fy. You must verify, preferably in person, with the governing board that you have authority to make an offer, particularly one that will clinch a deal. And never assume that management and the union are in agreement with the specific wording of any collective bargaining agreement provision until the language has been presented in writing to the other side and both parties have signed off on it. Many a dispute has arisen because language that one side thought was agreed to was not, in fact, the subject of agreement. You can avoid those disputes if you do not assume anything, and verify everything.

CONCLUSION

Like all art forms, successful collective bargaining requires preparation, perspiration, and inspiration. And like all art forms, the final product depends on the skill of the artist as well as the artist's chosen medium. The ten rules listed above are no substitute for skill or experience. Indeed, they are nothing more than concepts or techniques that may help an otherwise skillful artist to achieve the kind of result that feels good today and will continue to work well, when tested, in succeeding years of the contract.

The use of an experienced professional negotiator with a proven record of success at the bargaining table should illustrate these ten rules and many more in practice. Good professional negotiators are at the table, in part, to absorb any resentment that may flare up during the negotiating process.[2] Thus, the professional negotiator's presence and the exercise of proper technique typically will reduce the animosity between union representatives and the full-time public employer representatives who must work together during the contract term. By helping the public employer to avoid the Flying Monkeys, the negotiator enables the employer to reach the Emerald City and thence, by means of the transportation provided by the ruby slippers, to Kansas. Like Glinda and the Wizard, the negotiator then retreats to a land Somewhere Over The Rainbow, there to await once again the clarion call to battle.

[2] Although the Ten Commandments of Management-Side Collective Bargaining are a subject for another piece, it may be useful to mention three of them: 1) "Thou shalt not make out the governing board to be the bad guy"; 2) "Thou shalt not blame the Administration unless it is absolutely necessary to avoid violating the First Commandment"; and 3) "Thou shalt not shirk thy duty to be the bad guy if needed to avoiding violating the First and Second Commandments."

More ideas about the negotiation process can be found in our pamphlet, Labor Law Handbook for Small Governments, available for download without charge at our website, www.ancelglink.com.

Chapter 4

MOVING TEN (GIGA-)STEPS INTO THE DIGITAL FUTURE

Adam B. Simon

1. How Does Technology Impact the Governmental Workplace?

Technology has had a tremendous effect on the workplace, and of course, there are a number of legal issues that arise in the employment context because of technology. Governmental employees utilize technology in many aspects of their jobs. Types of equipment used by employees, including personal computers, laptops, handhelds, and cell phones, are typically provided to employees by the government. Governmental officials expect employees to use the equipment for work purposes. Policies and procedures must be enacted governing how equipment is to be used and what constitutes unacceptable use. Policies and procedures should, at a minimum, include appropriate use of e-mail, the Internet and internal systems.

Courts have consistently held that employees should not have an expectation of privacy on technology provided to them by their employer. While most employers understand, and even acknowledge, that employees will on occasion use technology for personal business, if such use exceeds reasonableness the employer may subject the employee to discipline. As such, employees should not have any expectation that information they store on their work computers is private.

With regard to labor relations issues involving technology, individuals working in the technology department have been determined to be "exempt" employees for purposes of inclusion in collective bargaining units. While many of these positions are typically support staff, because the individuals have access to confidential information Illinois labor boards have held that they should not be included in collective bargaining units.

2. What are the Issues Facing Governments Regarding Websites?

Most businesses, including governments, utilize websites as a service to their patrons and vendors. 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 Laurence Tribe, a noted constitutional scholar. When a government establishes a website it is opening up a "forum" for public participation. As a public forum, certain rules apply from a constitutional perspective. For instance, once a forum is opened to the public, use of that forum cannot be limited on the basis of content. Thus, policies and procedures for approving any outside entities from posting information on a government's website must be "content neutral."

Governments must also be concerned about utilizing websites for business purposes. Security and privacy issues may arise if governments permit residents to make payments, register for services, or otherwise input personally identifiable information on websites. Governmental officials should be diligent in ensuring that adequate security, firewalls, and encryption are included in website design. The same issues hold true for governments that encourage or permit vendors to "enter" the governmental system through a website.

Websites may also be utilized as a means by which governments provide information to citizens and the outside world. It is important that information published on a governmental website is up-to-date and consistent with board policies and practice. For instance, if the government publishes its ordinances or resolutions on their website, they must have systems in place to ensure that the information is kept current. Also, governments should make sure to keep information about employees and public officials current. Former employees should be removed from websites as soon as possible, and information posted on websites about public officials should be approved by the official before it is posted. For instance, staff should confirm whether an official's personal e-mail address should be disclosed prior to posting it as the official's formal contact information.

3. How is Law Enforcement Using Technology, and What Are the Limitations to Such Use?

Increasingly, law enforcement officials are utilizing technology to make their jobs more efficient and effective. Municipalities are adopting ordinances to use video surveillance to catch individuals running red lights, although for now they are prohibited from using that technology to catch speeders. *See* 625 ILCS 5/11-208.6. At present, video surveillance used for red light violators are handled as non-moving violations and are treated like other ordinance violations. Municipalities should carefully consider the costs and benefits of these systems. Often, they are very expensive to install and maintain. A thorough review of proposals to ensure that the system will work as expected should be conducted prior to approval. Also, municipalities should update their vehicle codes to reflect the use of video surveillance.

Use of video tapes as evidence could trigger constitutional implications. Under the Fourth Amendment to the United States Constitution, individuals must be free from unreasonable searches and seizures. Municipalities should be prepared to respond to Constitutional challenges that may be raised by offenders if video evidence is to be used in prosecuting such offenders. Again, ordinances should be carefully crafted to clearly and specifically set out how video surveillance evidence will be used in prosecutions, and how that evidence will be verified.

In addition to video surveillance, law enforcement officials are using laptops and other handheld devices in their vehicles to quickly track down information about potential offenders. Access to information through systems such as LEADS (the "Law Enforcement Agency Data System") provides detailed information about individuals.

While the use of this equipment and information systems has increased law enforcement efficiency, the information on law enforcement computers must be treated delicately. As mentioned above, overzealous officers may subject themselves to potential Fourth Amendment challenges if they are unreasonable in their utilization of these information systems. Governmental officials should insist that law enforcement officers be thoroughly trained on using this equipment, and should make sure policies and procedures are in place to defend against potential challenges.

Increasingly, law enforcement and prosecutors are using information gleaned from computers and other technology as evidence of crimes. State laws concerning sex offenders, drug offenses and "white collar" crime specifically reference how and to what extent this information can be collected and for what purposes it can be used to assist in prosecutions. Law enforcement officials should be well-versed in computer-related offenses and develop specific protocols for collecting and using such information.

4. What Kinds of Issues Should Governmental Officials Consider When Purchasing Technology Hardware and Software, and How Can They Protect Themselves?

Municipalities are spending an increasing percentage of their budgets on technology purchases. Generally, the purchase of computing and communications systems is exempt from competitive bidding. However, governmental officials should usually consider developing a competitive request for proposal when purchasing technology equipment or software. Technology purchases not only include hardware and software, but also include telephone systems and other communications devices. When considering new and improved systems, make sure that the contract terms meet public official's expectations. For instance, how often will the technology need to be replaced? Is it better to lease or to purchase? How many software licenses should be purchased with the equipment? Is the vendor using your government as a "beta" test site for a yet-to-be proven technology? As the old adage goes, "If it sounds too good to be true, it probably is."

Often, technology vendors present contracts that they consider "boilerplate." Governmental officials should carefully consider all the terms and conditions of these agreements, even though some of the language may be highly technical. Governmental officials should make sure that the individuals reviewing and preparing contract documents, including counsel, are well versed in technology and know the terminology associated with hardware, software and systems.

Also, governments should be cautious when engaging technology consultants. It is critical that both parties' expectations of what services will be provided are clear up front. Again, often the "language" of technology is so specialized that public officials may not fully comprehend the extent of services to be provided. This is clearly an area where there are no "stupid questions" and governmental officials should not be shy in asking technology consultants for an explanation of the extent of and need for specialized services.

Finally, as discussed in the governmental website section, employing e-commerce solutions may create additional efficiencies, but must be thoroughly considered before implementation. Issues including security and cost should be carefully vetted prior to engaging in an expensive and complex system.

5. What Are the Open Meetings Act and Freedom of Information Act Implications with the Use of Technology?

Use of technology has definite and immediate implications in terms of the Open Meetings Act and the Freedom of Information Act. It seems that each legislative session a new law is enacted concerning the implications of technology on public governance. For instance, recent amendments to the Open Meetings Act define how technology can be used by officials to participate in meetings. With emerging technologies such as digital telephony, video conferencing and web-based meetings, what constitutes attendance at a "public meeting" will continue to evolve.

In addition, public officials who communicate using e-mail should be aware of potential Open Meetings Act implications. For instance, if a majority of a quorum is contemporaneously communicating through e-mail, instant messaging or chat rooms, it is likely that a "meeting" is occurring. On the other hand, if officials are periodically communicating, that is, they are leaving e-mail messages with each other over a period of time, an argument could be made that the officials are not engaged in a meeting. This is an area where a case-by-case analysis and the exercise of caution are surely necessary.

At the same time, those e-mails are very likely to be subject to disclosure under the Freedom of Information Act. Clearly, information kept on governmental networks including documents, contracts, and communications are subject to disclosure under FOIA. Of course, such information may be protected from disclosure under some FOIA exemptions just like other information. For instance, certain personal information, personnel information, law enforcement information, preliminary drafts, etc., are protected from disclosure whether they are maintained on a governmental network or not.

Finally, governmental officials should be cognizant of the Local Records Act in terms of when data on governmental systems can be purged. Governmental officials should consult regularly with the State's archivist in determining how long and to what extent certain records must be kept. At the same time, using governmental networks and databanks provides much easier storage and retrieval options.

6. What is a "Wi-Fi" Network and How Can a Government Use It?

Wi-Fi is short-hand for the term Wireless Fidelity, or the ability to transmit electronic data without wires. Depending on the specific technology being implemented, Wi-Fi Networks can provide for wireless communication over either short or long distances. Common uses for Wi-Fi technology that you might be familiar with are a wireless home network whereby a person can install only one internet connection which

can be shared by several remote computers within the range of the primary computer. This is an example of a very short range application for Wi-Fi technology.

Applying Wi-Fi technology to create a city-wide network can enhance many traditional governmental functions. Public safety personnel can more efficiently transmit and share important information via a secured wireless network. Building inspectors can obtain access to digitized building plans stored on the governmental server. Meter readers can more efficiently enter their data into the utility billing system. Data can be sent more easily between satellite governmental sites, such as registration information for schools or park districts. A municipality may also make public information available at more locations across the community by erecting wireless information kiosks.

Implementing a Wi-Fi network entails many details that require careful consideration. Issues which should be considered with the corporate authorities include:

- Scalability and Capacity: Can it expand with demand for additional applications and users?

- Security: Is the information transmitted over the network secure? Does it need to be?

- How will the network be funded? Initial capitalization? Maintenance and repair?

- Is the user-interface easy to understand for your employees and residents?

- How reliable is the equipment? Do you want to build a redundant network to enhance reliability?

7. What Do I Do When a Cellular Company Wants to Erect a 100 ft. Monopole on Main St.?

Most municipalities understand the need for the proliferation of cellular antennas due to the increased reliance on mobile phones by their residents. However, village boards and city councils also want to preserve the architectural and aesthetic character of historic neighborhoods or commercial shopping districts to protect their tax base and property values.

Federal law was amended in 1996 to strike a balance between the federal policy of advancing the expansion of competitive telecommunications services and respect for local zoning control. Section 332(c)(7) of the Telecommunications Act of 1996 describes the procedural and substantive requirements which zoning authorities must satisfy for a negative decision to be upheld. Most importantly, a government must apply its rules in a non-discriminatory manner. Further, a zoning law which is facially neutral may not *have the effect* of eliminating cellular service for a given geographic area. Finally, a zoning authority should treat the application and hearing like a judicial proceeding wherein a written record of the evidence is created and a written opinion is crafted supporting the

reasons for the decision based on the evidence contained in that record. While there is a common misperception that the cards are stacked in favor of a cellular company seeking to locate an antenna, the balance of the cases show that a municipality which applies its rules in a non-discriminatory manner and produces a written decision based on substantial evidence contained in a written record should prevail.

Another way for municipalities to control the location of cellular facilities is to create zoning districts which contain incentives for locating antennas. An industrial district might describe a cellular antenna as a permitted use where in comparison a residential district might require a special use and provide for extraordinary height restrictions. Generally, it is wise for village planners to take stock of the sites in the community where cellular facilities will create the least disturbance and amend the zoning code to facilitate the use of those sites. In this manner, the community can avoid an allegation that its laws have the effect of prohibiting wireless services.

8. Can my Government Profit from Allowing the Erection of Cellular Facilities?

One means by which a municipality controls the location and dimensions of cellular facilities is to create incentives for siting them on property owned by local governments. In this manner, a municipality or other local government can apply greater control over the antenna since it is operating as a commercial landlord rather than solely as a regulatory body. Likewise, a local government can generate revenue from the ground lease in the form of monthly or annual rent.

Depending on whether or not the cellular facilities are free-standing or attached to an existing building or structure (e.g. water tower, clock tower), the government should take certain precautionary steps to be sure that the underlying public property is not damaged or made unusable for a public purpose. Requiring a security deposit and/or a performance security can protect the government from extraordinary costs which arise from the lessee's maintenance of the facilities. Moreover, a cellular ground lease should require the lessee to permit the co-location of additional antennas on the same tower or pole so that there is an efficient use of property and the government can generate additional revenue.

9. Should I Sell my Cellular Leases for a Lump Sum Payment?

There has recently been a proliferation of companies seeking to purchase the future stream of lease payments under cellular ground leases in exchange for a seemingly large lump sum payment. While this may seem like a new idea, it is actually the application of an old idea to a new context. For years, companies have been paying personal injury plaintiffs lump sums in exchange for an assignment of their annuity payments.

Due to the dissimilarity between a steady stream of small payments and a large lump sum payment, it may seem like you are being asked to compare apples to oranges.

However, the proper means to evaluate this transaction is to reduce the lease payments to their net present value. This can be achieved by making certain assumptions for inflation and the rate of return the community can achieve by investing current funds. By calculating the net present value of the lease payments you can compare apples to apples and discover the real value of the lease next to the lump sum offer in order to make an informed decision.

10. Has AT&T Figured out How to Travel at the Speed of Light?

No, AT&T has not morphed into NASA. Rather, Project Lightspeed is AT&T's nickname for its latest capital improvement project whereby it is enhancing its facilities to permit the delivery of advanced services, including digital phone, high speed internet and video programming. It is the video component of the advanced services which has caught the attention of many governmental officials.

AT&T is introducing a new type of video service, called U-Verse, using internet protocol-based technology. Much like how phone calls can be digitized and transmitted over the internet, so can video images. Unlike cable, which sends all of the information down the cable at once to be filtered by the converter box, IPTV sends only the "channel" which is requested by the subscriber. By analogy, one might think of each channel representing a distinct website that your computer has requested.

Notwithstanding the technical differences between cable and IPTV, both systems essentially provide the same service: the receipt, amplification and retransmission of video programming to subscribers by way of facilities placed in the right-of-way. Due to this common thread, both cable and IPTV are subject to common regulation. Recently, Illinois adopted Public Act 95-0009 to create a system of statewide franchising for all video programming services (except direct broadcast satellite). While this Act removes some local authority, municipalities are still authorized to regulate use of the right-of-way and to enforce customer services standards. Municipalities should not lose any revenue since the new scheme replaces franchise fees with "service fees" payable at 5% of the operator's gross revenues. Finally, cities and villages will need to adopt new ordinances to exercise the authority granted under the Act and to sustain the benefits it is accustomed to receiving from the incumbent cable operator.

If your government shares some of the questions described above, please call or e-mail Adam Simon, (312-782-7606 or asimon@ancelglink.com),so that Ancel Glink can share its experience with these issues to assist you with navigating the evolving world of technology.

Chapter 5

TEN THINGS GOVERNMENTAL OFFICIALS SHOULD KNOW ABOUT THE ILLINOIS GOVERNMENTAL TORT IMMUNITY ACT

Darcy L. Proctor

Ancel Glink attorneys have defended Illinois local governments in civil lawsuits for over 75 years. The most common type of claim filed in state court against a governmental entity or its employee is known as a "tort claim" in which a person seeks recovery of money damages for injury to his or her person or property arising from the operation of government. The Local Governmental and Governmental Employees Tort Immunity Act ("Tort Immunity Act") is the single most effective tool available to governments in their defense of tort claims. This article will address frequently asked questions concerning the Act's scope and application.

1. Who is Protected Under the Tort Immunity Act?

The Act provides certain immunities to "local public entities" and "public employees" from some, but not all, liability arising from the provision of governmental services. The various immunities found in the Act provide a shield or protection from civil liability in certain cases. The Act defines "local public entity" to include, among others, counties, townships, municipalities, municipal corporations, park districts, school districts, fire protection districts, and library districts, as well as all other local governmental bodies or intergovernmental agencies, or similar entities formed pursuant to the Illinois Constitution or the Intergovernmental Cooperation Act. The State of Illinois is excluded from the Act's protections.

The Act also protects "public employees" from liability for certain acts or omissions while working at their jobs. The term "public employee" is broadly defined to include any present or former officer, member of a board, commission or committee, and agent, volunteer, servant or employee whether or not compensated. The Act does not apply to independent contractors.

The tort immunities found in the Act do not apply in federal civil rights actions or other claims based solely on federal law. There are, however, other immunities available to public entities and their employees for those types of claims.

2. What Claims are Covered Under the Tort Immunity Act?

Although the Act provides a broad grant of immunities to local public entities and their employees, it does not provide absolute protection against all claims. First, the Act only applies to tort claims which include personal injury and property claims, wrongful death claims and all other claims recognized under Illinois tort law principles. The Act does not apply to contract claims or claims brought under the Worker's Compensation

Act. It also does not protect against claims seeking equitable remedies, injunction or mandamus. In addition, the Act does not apply to federal civil rights claims or other rights granted by federal law.

3. What Governmental Services are Protected Under the Act?

Some of the governmental services and activities for which whole or partial immunities are available are:

1. Injury occurring in the use of public property;
2. Police activities;
3. Fire protection and rescue services;
4. Medical, hospital and public health activities;
5. Adoption, failure to adopt enactment or enforcement the law;
6. Issuance, denial, suspension or revocation of permit, license or certificate;
7. Provision of information; and
8. Discretionary decisions.

4. What is a Local Government's Obligation to Indemnify an Employee Sued in a Civil Action?

If a lawsuit is instituted against a public employee based on an injury to some person allegedly arising out of conduct which occurred within the scope of that person's employment, the public employer may elect to do so one or more of the following:

a. Appear and defend against the claim or action;

b. Indemnify the employee or former employee for the employee's court costs incurred in the defense of such claim or action;

c. Pay or indemnify the employee or former employee for a judgment based on such claim or action; or

d. Pay or indemnify the employee or former employee for a compromise or settlement of such claim or action.

The courts have held that the local public entity has a choice of which option to pursue. For example, a local public entity may choose to wait until a case is over and only then reimburse the public employee for the amount actually paid by the employee. Most self-insured governments, pools and insurance companies will involve themselves in the case from the beginning, provide a defense and pay a judgment or settlement on behalf of the public employee. However, where there is a question about the scope of coverage to be furnished, the public employee or the government itself will be defended under a reservation of rights. If a public employee is charged with a crime rather than

with a tort, and is convicted, the local public entity cannot pay for the employee's criminal defense.

5. What Acts Fall Within the "Scope of Employment" to Trigger a Local Government's Duty to Indemnify?

Under Illinois law, a public employer may be held liable for the negligent, willful, malicious, or even criminal acts of its employees when those acts are committed "in the course and scope of employment" and in furtherance of the employer's business. Illinois courts use an objective test in determining whether an employee's acts are within the scope of employment. The inquiry will focus not on the employee's subjective intent at the time of the act or omission at issue, but instead on the employee's conduct, objectively viewed. Acts which are closely connected with what the employee is employed to do will generally meet this requirement. For example, an employer can be found liable for the shooting of a trespasser who was leaving the employer's premises by a guard who was armed, without the knowledge or permission of the employer. However, such conduct as sexual assaults by employees fall outside the employee's scope of employment because of the nature of the conduct involved. As a result, a local government may have no obligation to defend or indemnify a judgment under those circumstances.

6. Does the Purchase of Liability Insurance Waive Immunities?

When originally enacted in 1965, the Tort Immunity Act contained a provision which waived the immunities available under the Act when a unit of local government purchased liability insurance. In 1986, the Illinois General Assembly revised the Tort Immunity Act to eliminate the waiver provision. As a result, a public entity may invoke any of the immunities available under the Tort Immunity Act regardless of whether it is self-insured or has purchased conventional insurance.

7. What is the Statute of Limitations Period for a Civil Lawsuit Against a Public Entity or Its Employee?

The general statute of limitations for tort claims is one year from the date that the injury or cause of action occurred. For claims involving minors and persons under legal disability, the one-year limitation period begins to run within one year of the minor's 18th birthday or removal of the legal disability. However, in 2003, the Illinois legislature extended the one-year limitation period for actions arising from "patient care" to no less than two years after the date on which the claimant knew, or through the use of reasonable diligence should have known of the existence of the injury or death for which damages are claimed, but no more than four years after the date on which the government's negligence occurred which caused the injury or death. Please note the statute of limitations for filing a federal civil rights lawsuit or other claim asserting a violation of a federal law is generally two years and not subject to the limitation periods found in the Act.

8. Local Governments are Immune from Civil Liability When Their Employees are Not Liable

Under the Act, if a public employee is immune from liability based on some immunity or other legal defense, the local government for which that employee works is also protected from civil liability. Because a local government can act only through its employees, its potential civil liability is coextensive with the liability of its employees. So, for example, where a police officer has immunity under the Act for any negligent enforcement of the law, the local government which employs the officer is likewise immune from suit.

9. Local Governments are Only Obligated to Pay for "Compensatory Damages"

In the event no immunity applies and civil liability is ultimately established, a tort claimant is entitled to compensatory damages to be awarded by a judge or jury. Compensatory damages are aimed at placing an injured party in the position he or she would have been in had no wrong occurred. A tort claimant is only entitled to compensatory damages for his or her proven losses after liability is proven.

In Illinois, to recover compensatory damages, the tort claimant must prove he or she suffered a compensable injury. Examples of compensatory damages in a personal injury case include past and future pain and suffering, disability and disfigurement, past and future medical expenses, and lost earnings. To recover future damages, the injured party must demonstrate that these damages are reasonably certain to occur and cannot be based on speculation.

10. Local Governments are Not Liable for Punitive Damages

Under Illinois common law, governmental bodies are not liable for punitive damages which are much different than compensatory damages discussed above. For instance, the purpose of punitive damages is to punish a defendant, to teach the defendant not to repeat any intentional, deliberate and outrageous conduct, and to deter others from similar conduct. Because the burden of punitive damages assessed against a governmental entity would be borne by its taxpayers, there is no justification for punishing taxpayers or attempting to deter them from future misconduct of public employees over whom they have no control.

The Act expressly provides that a local public entity is not liable to pay punitive or exemplary damages in any state action brought directly or indirectly against it by the injured party or a third party. As a result, a local public entity may not be held liable for punitive damages in a personal injury action. Its employees, however, can, in an appropriate case, be made to personally pay punitive damages. Although governmental bodies may not pay punitive damages, they can purchase coverage under a conventional insurance policy to offer that protection to its employees. Unfortunately, the insurance industry has not generally made such coverage available. If there is no such coverage, a

government official or employee should consider retaining their own attorney to fully protect themselves against personal exposure.

Government officials interested in learning more about the various immunities and protections found in the Tort Immunity Act may contact the author at dproctor@ancelglink.com. Ancel Glink's Illinois Governmental Tort Immunity Handbook, which goes into much more detail about these issues, can be downloaded without charge at www.ancelglink.com. We also invite you to read Chapter 6: "How Governments Can Win in Cases Before Appellate Courts."

Chapter 6

HOW GOVERNMENTS CAN WIN IN CASES BEFORE APPELLATE COURTS – 10 EXAMPLES

Ellen K. Emery

Do you think that when a local governmental body is sued, the deck is stacked against it in court? Would you expect that most judges go out of their way to rule against government officials and public employees? Think again. Illinois State and Federal Appellate courts look at the actions of governments and their employees with a fair reading of governmental tort immunity and a real understanding of the difficulties governments face in performing their duties perfectly. Thus, governmental bodies often get very favorable rulings.

In 1959, the Illinois Supreme Court abolished common law tort immunity in Illinois. After several failed attempts, the Illinois Legislature adopted the Local Governmental and Governmental Employees Tort Immunity Act. As originally written, that law only provided tort immunity to self-insured governmental bodies. In 1969, Illinois became one of the first States in which governments came together to form intergovernmental self-insurance agencies, known as "risk pools." Ancel Glink attorneys wrote the Contract and By-Laws for the first pool. We successfully argued at the Illinois Supreme Court the case which validated that new concept and gave pools the ability to argue tort immunity defenses on behalf of their members. Legislation was later changed to permit insurance companies with governmental policy holders to also utilize tort immunity defenses.

While agreeing to pay most valid claims, many self-insured governments, governmental self-insurance pools and insurance companies have chosen to use the important provisions of the Illinois Tort Immunity Act to fight against frivolous cases or those in which excessive demands have been made. As demonstrated in the description of the ten cases that follow, a decision to aggressively fight questionable cases has been rewarded in both Federal and State Courts, and by both judges and juries.

1. Village Not Liable for Injury Sustained on Its Property Despite Failure to Enforce Ordinance

On a fall day in 1996, 12 year-old Joseph Schweinberg was riding a motorized dirt bike on vacant property owned by the Village of Round Lake Beach. The property had dirt trails on it, as well as four jumps. At the same time Joseph was riding north on one of the trails, Greg Britton, an adult, was coming south on the same one. When Britton came over one of the jumps, he collided with Joseph, who suffered a brain injury. Suit was filed against Britton and the Village.

During discovery depositions for the ensuing circuit court case, it was revealed that the Village was aware of people off-road motorcycling on this property since 1975.

On several occasions in 1993 and 1994, the Village dumped dirt, gravel and asphalt on the property, and some of these piles were between 10 and 15 feet high. The mounds of dirt and debris were used as jumps by people riding motorbikes.

The site also had a history of at least three accidents by riders, all young men, including one who bled to death after the footrest of his bike punctured his leg during an accident. The Village never posted any warning signs on the property at any time prior to Joseph's accident.

In 1994, the Village enacted an ordinance, which provided in part: "It shall be unlawful for any person to operate, drive or ride on any minibike, go-cart and other similarly operated motor-driven vehicle (exclusive of motorcycles) on any public street, alley or thoroughfare, or upon the publicly owned property."[1] Although the police were aware of the ordinance, it was only selectively enforced. Officers sometimes stopped children from riding only in response to a noise complaint, or after dark. Some officers told the children it was all right to ride on the property, and even pulled over to watch the riders.

The five counts against the Village in the amended complaint included failure to warn and guard against danger, willful and wanton misconduct in permitting its property to be used for off-road motorcycling despite its knowledge of dangerous conditions, failure to maintain property in a reasonably safe condition, and breach of duty to protect children from dangerous conditions on its premises. The trial court granted summary judgment to the Village, and the plaintiff appealed.[2]

Section 3-102(a) of the Tort Immunity Act provides in part that: "… a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used, and shall not be liable for injury" unless it is proved that the entity had notice of unsafe conditions, and a reasonable amount of time to address them. 745 ILCS 10/3-102(a). The Appellate Court, in upholding summary judgment in favor of the Village, found that "Pursuant to this language, the Village has a duty of ordinary care to maintain its property only for people who are both intended and permitted users of the property. Our Supreme Court has held that, although intended users of property are permitted users by definition, permitted users are not necessarily intended users."

The distinction the court makes is between permitted users and intended users of property. The plaintiff argued that the Village's knowledge of the way the property was being used, the presence of well-worn trails, and its failure to enforce the ordinance prohibiting the activity manifested its intent that the property be used for off-road motorcycling. However, the plain language of the Village's ordinance specifically

[1] Village of Round Lake Beach Municipal Code, Sec. 5-8-1(A) [1994]
[2] First Midwest Trust Co., N.A. v. Britton, et al., 322 Ill.App.3d 922, 751 N.E.2d 187 (2nd Dist. 2001)

prohibits this conduct on its property, and it is this that has largely determined its immunity in this case.

The Appellate Court found that ordinances must be interpreted in light of what they have been enacted to protect against, and if the harm or injury suffered by a party is the same harm the ordinance was enacted to prevent, then a violation of the ordinance eradicates the municipality's liability: "Illinois courts have consistently held that when a person violates a municipal ordinance prohibiting the use of municipal property in a certain manner, that person is not an intended user of the property under section 3-102(a)" of the Tort immunity Act.

While the police did not consistently enforce the ordinance, that does not transform Joseph, or any other rider, into an intended user of the property because municipal intent cannot be determined by the decisions of its police officers in particular circumstances. Even the fact that children rode motorbikes on the property frequently does not alter the Village's express intent that the property should not be used as such. The court stated: "we are unaware of any authority holding that a municipality's failure to enforce an ordinance governing the use of public property rendered the prohibited use an intended one."

Accordingly, the Appellate Court affirmed the grant of summary judgment in favor of the Village, while remanding for further proceedings the counts against defendant Britton. When honestly interpreting the provisions of the Tort Immunity Act, courts will often find for the government even when the plaintiff has suffered a debilitating injury.

2. Firing of Teacher who Engaged in "Immoral" Conduct of Theft by Deception Upheld

On December 13, 2001, the Chicago Board of Education charged plaintiff Rita Ahmad, a tenured teacher, with numerous violations of the Board's Employee Discipline Code. The Board alleged, among other things, that Ahmad misappropriated the merchandise of a nonprofit organization for the benefit of her unauthorized secondary business by falsely representing herself as an agent of the Chicago Public Schools. The trial court reversed the hearing officer's decision to uphold the Board's charges, and ordered that it reinstate Ahmad with back pay. The Board of Education appealed.

The Appellate Court[3] looked at the amended section 34-85 of the Illinois School Code which states:

> "No written warning shall be required for conduct on the part of a teacher or principal which is cruel, immoral, negligent, or criminal or which in any way causes psychological or physical harm or injury to a student as that conduct is deemed to be irremediable" (105 ILCS 5/34-85).

[3] Ahmad v. Chicago Board of Education, 365 Ill.App.3d 155, 847 N.E.2d 810 (1st Dist. 2006)

Since the Code does not define "immoral" conduct, the Court looked to Black's Law Dictionary where immoral conduct is defined as "shameless" conduct showing "moral indifference to the opinions of the good and respectable members of the community." Applying this definition to Ms. Ahmad's behavior, the Court found that the record revealed "an abundance of evidence demonstrating plaintiff engaged in conduct one might properly characterize as immoral, perhaps even criminal, *i.e.*, theft by deception."

The Court also noted that plaintiff's later decision to donate her ill-gotten merchandise did not negate the original immoral conduct plaintiff engaged in to acquire the merchandise. The Court found it "completely unreasonable" to believe that plaintiff acquired $33,979 worth of merchandise for the purpose of donating it to the Salvation Army and other charities.

Finally, the Court stated that "where teachers indulge in conduct that is immoral at best, and criminal or quasi-criminal at worst, they demonstrate a basic character flaw which makes their future employment at the Board of Education, which is partially responsible for molding the character of our youth, untenable." The Court reversed the judgment of the trial court and reinstated the decision of the hearing officer terminating Ahmad's employment. Sometimes, cases like this need to be appealed in order for a court to fully focus on the provisions of the law. The trial judge may have felt that ending a teacher's career over an "indiscretion" was too severe. The Appellate Court focused on the bigger picture and the rather unforgiving language of the statute.

3. City And Police Officer No Liability For Excessive Force Even Though Officer Admitted To Punching The Plaintiff.

On the evening of June 23, 2001, Plaintiff flew into O'Hare Airport from Washington, D.C. Plaintiff left O'Hare Airport via the "el" train to the town of Rosemont and decided to run to his home in Mount Prospect, approximately eight miles from the Rosemont el stop. Plaintiff was dressed in business casual clothes and shoes, running (not jogging) down a major thoroughfare at 9:20 p.m. When a Des Plaines police officer spotted Plaintiff running down the side of the road, the officer stopped ahead of Plaintiff to see if he needed help and to further investigate the situation.

When Plaintiff ran near the officer's stopped squad car, the officer noticed that Plaintiff was sweating profusely and that his manner of dress was not appropriate for running. The officer asked Plaintiff if he needed help, and Plaintiff swore at the officer. The officer asked Plaintiff what he was doing, and Plaintiff told him that he was running from the Rosemont el stop to his home in Mount Prospect. The officer thought the story was preposterous, given the totality of circumstances. When he asked Plaintiff for some identification, Plaintiff again swore at the officer and began to run away. The officer reached out, grabbed Plaintiff's wrist, and pulled him back near the squad car so he could further investigate the situation, as his suspicions were high at this point. Plaintiff began to struggle, and punched the officer in the chest. The officer then tried to arrest Plaintiff for battery. Plaintiff continued to struggle and repeatedly tried to strike the officer. The officer called for backup and wrestled Plaintiff to the ground in an attempt to handcuff him.

When Plaintiff continued his attempts to strike the officer in the face, the officer punched Plaintiff in the face and head several times as hard as he could to get him to stop. The officer managed to handcuff Plaintiff, and backup officers arrived to assist placing Plaintiff in the back of the squad car for transportation to the Des Plaines Police Station. Plaintiff continued to swear at the officers, and was charged with battery and resisting arrest. He was held at the police station for about 5 ½ hours in order to verify his story about having flown in from Washington. At his request, he was transported to Holy Family Medical Center, where he refused treatment.

Plaintiff brought two claims against the Des Plaines police officer, for excessive force and unlawful arrest.[4] Neither party disputed that the officer was acting under color of state law. The only issue at trial was whether a reasonable jury could conclude from the facts surrounding Plaintiff's arrest that he suffered a deprivation of his constitutional rights, privileges, or immunities.

Excessive force claims resulting from a seizure are analyzed under the Fourth Amendment's objective reasonableness standard. Reasonableness depends on the information the officer possesses prior to and at the immediate time of the use of force; the knowledge, facts and circumstances known to the officer at the time he exercised his split-second judgment as to whether the use of force was warranted. Reasonableness is evaluated from the officer's perspective at the time, not with 20/20 hindsight. Under cases interpreting the Fourth Amendment, the right to make an arrest "necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it."

The proper application of the reasonableness standard requires consideration of a number of factors known to the officer at the time, including the nature of the underlying crime. It requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. When the Des Plaines officer attempted to talk to Plaintiff and find out what he was doing, Plaintiff responded in a highly suspicious manner by swearing at the officer and refusing to cooperate. Instead, he tried to take off running again. The totality of the circumstances surrounding the situation gave the officer reasonable suspicion to stop Plaintiff. When Plaintiff threw the first punch at the officer, the officer then had probable cause to arrest Plaintiff for battery (thus defeating Plaintiff's unlawful arrest claim).

In a situation where an offender is resisting arrest, an officer can use that amount of force necessary to overcome the offender's resistance. The amount of force that police officers may justifiedly use increases as the confrontation escalates. As Plaintiff continued to fight the officer, the officer was justified in using a reasonable amount of force to get the handcuffs on Plaintiff and get him under control.

[4] Oh v. City of Des Plaines and William Rochotte, United States District Court for the Northern District of Illinois, Eastern Division, Case No. 03 C 120.

This case was tried to a jury by Ellen Emery and Allen Duarte of Ancel Glink in 2004. The jury rejected Paul Plaintiff's request for $60,000 in damages for the officer's use of excessive force. Instead, the jury returned a verdict in favor of the officer and the City of Des Plaines, his employer, even thought the officer admitted punching Plaintiff as hard as he could. Although this case may very well have gone away for a settlement amount far less that $60,000, the City stood on its principles and refused to compensate this plaintiff. It made the right decision by having Ancel Glink attorneys try this case to victory.

4. County, City, And Police Immune from Liability For Total Failure To Respond To A Call About An Accident.

On April 5, 2002, Doris Hays was driving her vehicle in rural Rock Island County when it left the road and ran into a ditch. A passing motorist witnessed the vehicle's departure from the roadway and, not stopping to investigate, used her cell phone to report her observation to the clerk of the Village of Orion. The Orion clerk then phoned the dispatcher for Henry County. When notified of the general area of the accident, the Henry County dispatcher notified the City of Moline and the City of East Moline that she had received a report of a vehicle in the ditch on Route 150 "at the Rock Island, Henry County line." The Moline dispatcher then telephoned the Rock Island County Sheriff's Department and reported the incident to a dispatcher for Rock Island County.

Although the Rock Island County dispatcher said they would "check on it," none of the parties contacted responded to the scene on the day the calls were made. On that day, Doris Hays' family also notified Rock Island County that she was missing. Three days later, Hays' body was found lying outside her vehicle at the scene of the accident.

Doris Hays' estate filed a 24-count complaint in the circuit court of Rock Island County naming as parties defendant: Rock Island County; the Sheriff of Rock Island County; the dispatcher for Rock Island County; Henry County; the Sheriff of Henry County; the Village of Orion, the clerk of the Village of Orion; the City of Moline; the City of East Moline; the Moline-East Moline Dispatch Center; the dispatcher for the Dispatch Center; and the Police Chief of the City of Moline.

The circuit court dismissed plaintiff's complaint, ruling that section 4-102 of the Illinois Tort Immunity Act immunized all defendants. Section 4-102, by its terms, immunizes local public entities and public employees from liability for failure to (1) establish a police department *or* (2) otherwise provide police protection *or* (3) if police protection service is provided, for failure to provide *adequate* police protection service. 745 ILCS 10/4-102 (emphasis added).

Doris Hays' estate presented three issues for consideration by the Illinois Supreme Court,5 all of which concerned the applicability of section 4-102 of the Act. They were:

[5] DeSmet v. County of Rock Island, et al., 219 Ill.2d 497, 848 N.E.2d 1030 (2006).

(1) whether a municipality that sends no assistance whatsoever in response to a request for help at an accident scene can claim the immunity provided by section 4-102 of the Tort Immunity Act for failure to provide adequate police or service;

(2) whether a call placed for help at an accident scene automatically triggers a police search rather than a paramedic response, thus triggering the immunity of section 4-102 for failure to provide adequate police services, or whether such a call instead simply triggers a duty to send rescue personnel, whose misconduct is not shielded by section 4-102; and

(3) whether the recognition of a willful and wanton exception to the immunity otherwise provided by section 4-102 for injuries resulting from failure to provide adequate police service remains good law and applies in this instance.

The Court decided the three issues in defendants' favor. The Court held that section 4-102 of the Act is comprehensive in the breadth of its reach, addressing situations where no police protection is provided to the general public as well as those in which inadequate protection is provided. Moreover, as section 4-102 contains no exception for willful and wanton conduct, that section immunized defendants against both negligence and willful and wanton misconduct.

In so holding, however, the Court recognized that there may be exceptions to the application of section 4-102 where a legislative enactment identifies a specially protected class of individuals to whom statutorily mandated duties are owed, such as the statutorily mandated duties owed to the class of individuals protected by the Illinois Domestic Violence Act. But as no such scenario was encountered in the facts of Doris Hays' accident, section 4-102 immunity applied and the dismissal of plaintiff's complaint against all defendants was upheld. The Legislature, in creating tort immunities for law enforcement, paramedic and fire safety activities, acknowledged that governments can only do so much and that the public cannot afford to pay damages every time an inefficiency hurts someone. Cases like this sometimes find their way to Federal Court, where the Illinois Tort Immunity Act doesn't apply if a federally-protected right is alleged. In recent years, the Federal Courts have also been narrowing the situations in which relief will be granted where the plaintiff's lawyer is simply trying to puff up a losing State tort action into a "federal case."

5. City Did Not Violate Real Estate Developer's Equal Protection Rights

Maulding Development was a real estate development company owned and operated by David Maulding, a Caucasian male. Maulding wanted to build warehouses on the west side of Springfield, and submitted a development plan to the City to do so. Before giving final approval, the City had expressed a favorable view towards Maulding's variance requests and proposed Economic Development Agreement.

During the final planning stage, certain African-American City officials, including Alderman Kunz, asked Maulding Development to consider relocating its warehouse project to the east side of Springfield in an area with a significant African-American population. Maulding agreed, then performed the necessary legwork and submitted a plan to the City for a warehouse development project on the east side. The plan met all of the technical requirements for this type of project and no variances were necessary.

As the City was considering Maulding's new plan, a public meeting was held between David Maulding and residents from the east side of the City. Alderman Kunz and two other aldermen attended. The meeting did not go well for Mr. Maulding, as he was verbally attacked with racial slurs by the residents, and openly called a racist.

Later, the matter of Maulding's development plan came before the City Council for a vote. Some east side neighbors attended and voiced their objections, while David Maulding spoke in favor of both the east and west side projects. The City Council unanimously denied both plans, citing public safety concerns. At the time of the vote, Alderman Kunz stated that the City had never before denied approval for development plans that met all of the technical requirements.

Maulding Development then filed suit in the federal district court. The court issued a writ of mandamus ordering the City to approve both plans, as the approval of a development plan that met all technical requirements was a ministerial act, as opposed to a discretionary one. Maulding also raised a "class of one" equal protection claim, alleging the City's failure to approve the east side plan was on account of Mr. Maulding's race. On Maulding's equal protection claim, the district court granted summary judgment for the City, finding no evidence of similarly situated entities and no evidence of racial animosity on the City's part. Maulding appealed. (The City, however, did not appeal the district court's issuance of the writ of mandamus and a permit would be issued if Maulding still wished to proceed.) The case went on, however, on the issues of damages.

The Seventh Circuit Court of Appeals[6] recognized that to establish its "class of one" claim, Maulding had to show that (1) it had been intentionally treated differently from others similarly situated; and (2) there was no rational basis for the difference in treatment or the cause of the differential treatment was a "totally illegitimate animus" toward Maulding by the City.

Maulding's claim failed in the Appellate Court because of the total lack of evidence of someone who was similarly situated but intentionally treated differently than it. The only evidence Maulding had was the statement made by Alderman Kunz during the City Council meeting that "the City was doing something it had never done before," namely that it "was denying the approval of a large scale development plan that met all technical requirements." Maulding introduced no evidence regarding any of the other developers to bolster his contention that he was "similarly situated."

[6] Maulding Development, LLC, v. City of Springfield, 453 F.3d 967 (7th Cir. 2006)

Since a showing that two projects were similarly situated "required some specificity," the Court pointed out that there was no evidence whatsoever to make a comparison between development projects. It found a total lack of evidence to establish whether these other plans involved warehouses, or any type of commercial property for that matter. There was no evidence establishing whether the other plans involved commercial property that, if developed, would abut already existing residential areas such as the Maulding plan did. There was no evidence establishing whether the other plans involved the development of a new commercial area, or were simply a redevelopment of a preexisting site. Furthermore, there was no evidence regarding the timing of the alleged other plans, such as whether they were submitted to the same or different members of the City Council, or even whether they were submitted in the last five (or fifty) years. Finally, there was no evidence establishing that the other plans did not seek variances, similar to Maulding's plan.

The Court held that Maulding's sweeping argument that it was "treated differently than any other developer has ever been treated" with no evidentiary support, had no specificity sufficient to show that any two projects were similarly situated, a showing necessary to proceed under an equal protection claim. The Seventh Circuit affirmed the judgment of the district court in favor of the City of Springfield. Even though this was not a political issue and the City had improperly denied the permits, Mr. Maulding was not given the benefit of the doubt by the Federal Appeals Court. The City did not have to pay damages just because the circumstances might have looked a touch suspicious.

6. Police Shooting of a Shirtless, Unarmed Man was Reasonable

At 4:14 a.m. on a chilly date in late March, a Rockford police officer was dispatched to a domestic disturbance at the DeLuna residence where Martha DeLuna had suffered a beating at the hands of her husband. Luis DeLuna had an extensive arrest history and was known to carry weapons. As the officer got out of his car, he saw Luis DeLuna standing shirtless in the yard, despite the chilly weather. The officer had his gun drawn, and told DeLuna to raise his hands. DeLuna did not raise his hands, but began walking towards the officer with his arms extended out to his sides. The officer was not able to see if DeLuna had tucked a weapon into his back waistband. The officer began backing up to keep distance between himself and DeLuna. As he backed up, the officer stumbled, and DeLuna lunged for him. The officer shot DeLuna, fearing that DeLuna was either reaching for a weapon behind his back or attempting to reach the officer's weapon.

Martha DeLuna made Fourth Amendment and wrongful death claims arising out of her husband's death. The Fourth Amendment came into play because a police officer's use of deadly force constitutes a seizure within the meaning of the Fourth Amendment and therefore is constitutional only if it is reasonable. Reasonableness is not based on hindsight, but rather is determined considering the perspective of the officer on the scene, allowing for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation. The focus is on whether the

actions of the officer are objectively reasonable. If an officer believes that the suspect's actions place him, or others in the immediate vicinity, in imminent danger of death or serious bodily injury, deadly force can reasonably be used.

The Seventh Circuit Court of Appeals[7] held that the combination of events in this case led to an unstable situation with an uncooperative person who had a history of violence and weapons possession, establishing the real danger of imminent serious bodily injury should DeLuna have succeeded in reaching the officer. The Court stated that the officer "need not wait until there is a physical struggle for control of his weapon before a situation presents an imminent danger of serious physical injury." The officer acted reasonably in firing the fatal shot. The newspaper accounts of this shooting, the next day, probably read: "Cop Kills Unarmed Man Stripped To Waist." Skilled attorneys were able to demonstrate that the headline should have read: "Wife Beater Killed While Attacking Retreating Officer." In court, governments are better able to tell their full stories.

7. Jury Finds the Shooting of Suicidal Man was Justifiable Use of Force

Around 11:00 p.m. on May 7, 2000, Joshua Berryhill got his .32 caliber handgun from home and drove to a Thornton's gas station in Streamwood. He had been drinking heavily, and was feeling suicidal. He used the pay phone to call Elmwood Park Deputy Police Chief, whom he knew through the Deputy Chief's son. The Elmwood Park Deputy Chief and one of his Commanders drove 25 miles to the gas station to try and talk Berryhill out of killing himself. Streamwood police surrounded the gas station, out of Berryhill's view. Berryhill contended that around 1:00 a.m., he was facing away from the Elmwood Park police officer was were trying to get him to surrender the handgun, when he hit his leg with his gun and it accidentally discharged. The shot prompted a Streamwood police officer, who was armed with a patrol rifle 200 feet away, to shoot Berryhill twice.

Berryhill sustained gunshot wounds to his left arm, left flank, and left leg, with forearm tissue shot away nearly to the bone. He also had shrapnel in his abdomen with bullet entry and exit wounds, the insertion of a rod in his femur to support his leg, and extensive skin grafts. His medical bills alone were nearly $350,000.

Berryhill filed suit against the Streamwood officer,[8] contending that the officer's first shot was excessive, and the second shot was unreasonable and excessive force because Berryhill had dropped his gun after the first shot. In a situation where an offender is resisting arrest, an officer can use that amount of force necessary to overcome the offender's resistance. The amount of force that police officers may justifiably use increases as the confrontation escalates.

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[7] DeLuna, et al. v. City of Rockford, Illinois, et al., 447 F.3d 1008 (7th Cir. 2006)

[8] Joshua Berryhill v. Village of Streamwood and Daniel Spychalski, United States District Court for the Northern District of Illinois, Eastern Division, Case No. 02 C 3268

This case was tried to a jury in late 2004 by Ellen Emery, Darcy Proctor, and Lucy Bednarek of Ancel Glink. At trial, the issue to be decided by the jury was whether the officer's use of deadly force was excessive, thus depriving Berryhill of his constitutional rights under the Fourth Amendment. The defense argued that the first shot was reasonable since Berryhill had pulled the trigger in the vicinity of police officers and surrounding residences, and the second shot was reasonable to stop the threat still posed by Berryhill because he was still on his feet after the first shot. The Ancel Glink lawyers were again successful in presenting the case so that the officer's actions were found to be reasonable under the law, and the jury entered a verdict in his favor.

In this case, the last settlement demand made by Berryhill prior to the start of the trial was $1,500,000, while Streamwood, on behalf of the officer, offered $18,000. Sometimes a plaintiff's demand to settle a case is so outrageous, that the government entity is basically left with no choice but to try the case. Even if the facts of the case are such that it is likely that the government entity will lose on liability, cases are often tried when the defense attorneys have had great success at keeping the verdict substantially lower than the plaintiff's demand, often lower than the amount the defendants offered to settle the case. A good example of this is illustrated by the next case.

8. Excessive Force Trial Can Be Successful When Demand is So High and Jury Award is So Low

James Knaack was convinced the Spring Grove police were harassing his son, especially after the son received his 23rd moving violation ticket. On September 12, 2001, when a police car parked alongside a bank where Knaack's son was banking, the son called his father, who rushed to the bank to confront the police officer seated in the squad car. The officer immediately radioed his supervisor to assist at the scene as the confrontation was rapidly escalating.

The confrontation ended when Knaack was ultimately arrested for reckless driving and resisting arrest. He claimed he was beaten during the arrest. After a jury acquitted Knaack of the criminal charges, he sued Spring Grove and the two police officers for false arrest, excessive force, and malicious prosecution.[9] Knaack claimed he suffered a back injury, bruised legs and emotional distress from the arrest. The defense contended that plaintiff sped to the scene, pulled up onto the curb in front of the squad car, showered the officers with profanities and tried to drive away without his driver's license after the officers took it from him. When Knaack was arrested, he acted as if he were being beaten and complained that he was hit sharply in the back, where he had a previous work injury.

Although Spring Grove made a nuisance offer of $10,000 to settle the case, plaintiff demanded $45,000. This case was tried to a jury in July of 2006 by Tom DiCianni of Ancel Glink. At trial, the jury found Spring Grove and the two police officers not guilty of the false arrest and malicious prosecution claims. On the other

[9] James Knaack v. Officer Paul Tierney, Sgt. David Holem, and Village of Spring Grove, United States District Court for the Western District of Illinois, Case No. 03 C 50360

hand, the jury agreed with Knaack that the officers had used excessive force when arresting him. However, the jury only awarded plaintiff $1,500 for that claim. A jury trial is successful even when the jury finds against the governmental entity or its employees but the award against the government defendant is so low that money was saved by not having to pay the higher amount of money offered to settle the case than what the jury ultimately awards.

9. Police Not Liable to Pedestrian When "Pursuit" Not the Proximate Cause of Injuries

On October 4, 2000, fleeing felon Jerry Davis was driving westbound on Van Buren Street located in downtown Chicago, in a station wagon fleeing from the police. At the same time, plaintiff William Wade was walking on the sidewalk on the north side of Van Buren Street when Davis drove up onto the sidewalk and struck Wade and other pedestrians, severely injuring Wade.

Wade then filed a two-count complaint against the City, and police officer Jasinski, for negligently, willfully, and wantonly "pursuing" a vehicle. Wade alleged that the officer's "pursuit" caused the driver of the pursued vehicle to drive up onto the sidewalk and strike plaintiff, thereby causing his injuries.

At trial, Wade argued that Jasinski willfully and wantonly chased Davis through a crowded downtown street, with conscious disregard for or utter indifference to the safety of others, and that Jasinski's conduct was a proximate cause of his injuries. Plaintiff's expert witness opined that Jasinski's conduct was a "pursuit" consistent with the Chicago Police Department General Order 97-3, which defined "pursuit" as:

> "[a]n active attempt by a sworn member operating an authorized emergency vehicle to apprehend any driver or operator of a motor vehicle who, having been given a visual and audible signal by the officer directing such driver or operator to bring his vehicle to a stop, fails to or refuses to obey such direction, increases or maintains his speed, extinguishes his lights, or otherwise flees or attempts to elude the officer."

Finding that Jasinski was not willful and wanton, the jury returned a verdict for defendants, and plaintiff appealed. In upholding the jury's verdict in favor of the defendants, the Appellate Court[10] found that Wade did not prove that Jasinski's conduct was willful and wanton. Section 1-210 of the Tort Immunity Act defines willful and wanton conduct as "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property." 745 ILCS 10/1-210 (2002).

The facts brought out at trial were that during the chase, Jasinski's lights and siren were activated. When he came to a red light, he slowed down and proceeded through the

[10] Wade v. City of Chicago, 364 Ill.App.3d 773, 847 N.E.2d 631 (1st Dist. 2006)

red light at about five miles per hour with his emergency equipment still activated. Jasinski also moved into the left lane so that he would be visible to the oncoming traffic. His speed never exceeded the speed limit of 30 or 35 miles per hour. Therefore, in reviewing the evidence, the Appellate court believed that Jasinski acted with due regard for the safety of the general population.

The Court also found that there was no evidence upon which the jury could conclude that any action by Jasinski was the proximate cause of plaintiff's injuries. Although Wade argued that Jasinski proximately caused his injuries because the accident was a foreseeable and likely result of the pursuit, the Court disagreed. Its review of the evidence at trial led it to opine that Jasinski did not drive recklessly or cause Davis to drive recklessly. When Jasinski was stuck in traffic on Van Buren, his location was about 20 to 25 cars behind Davis' station wagon. The officer was keeping a safe distance at the speed limit and was driving at a constant speed, when Davis drove up onto the sidewalk and struck Wade. The Court stated that it was Davis's "own independent decision to drive onto the sidewalk without regard for the pedestrians' safety that caused plaintiff's injuries. Plaintiff's argument that Jasinski's continued pursuit of the station wagon after seeing it run a red light proximately caused his injuries is illogical and against sound public policy." Accordingly, the Court affirmed the jury verdict in favor of the City and Jasinski. This case acknowledges the public policy that sometimes innocent citizens can be injured when governments carry out their activities in a reasonable way. This risk will not be passed on to the public treasury in every case.

10. Detention by Police of Armed Plain-Clothes Officer at Home Depot was Reasonable

Clifton Thurman was shopping at Home Depot when store employees noticed that he was armed. Thurman was dressed in jeans and a sweatshirt, and his clothes did not signal that he was a police officer. In response to a call from an employee of Home Depot, officers of the Homewood Police Department responded, approached Thurman, and asked if he was armed. Thurman responded in the affirmative, and stated that he had a star around his neck and credentials in his pocket. He then showed the officers his badge, which stated Chicago Police but did not contain any identifying information such as his name or photo.

The officers requested additional identification from Thurman, and he produced his driver's license and firearm registration card. The firearm serial number on the firearm card was whited out and another number was handwritten in its place. Thurman also proffered an identification card that stated Chicago Police Department. The card contained Thurman's photo, but did not indicate that he was a police officer with the department, as opposed to an employee in another capacity. The Homewood officers then asked a series of questions designed to elicit whether Thurman was truly a Chicago Police Officer. Thurman was obviously annoyed and, while answering questions, was not helpful, and did not clear up the confusion about where he worked, which would have shortened the investigation. They were still unable to verify whether he was a police

officer or not. The officers finally asked Thurman for the phone number to the 21st District of the Chicago Police Department and Thurman provided it. Upon receiving verification that Thurman was, indeed, a Chicago Police Officer, the Homewood officers returned the weapon to Thurman and left the store.

The entire incident took approximately 20-25 minutes from the initial confrontation to the resolution by Thurman's estimate, or less than 14 minutes according to the police dispatch records from the officers' arrival at the scene to their departure.

Thurman filed suit in the federal district court against Homewood and the police officers, contending that the questioning and detention by the officers deprived him of his freedom of movement in violation of his Fourth Amendment rights and that the Village of Homewood caused the violation of his rights by failing to properly train the officers. The district court granted summary judgment in favor of the defendants.

The Seventh Circuit Court of Appeals[11] found that Thurman simply failed to produce any evidence that would demonstrate that the officers unreasonably extended the duration of the investigation in violation of his Fourth Amendment rights. All of the actions taken by the officers were designed to elicit information as to whether he was a police officer. Although Thurman believed that they should have accepted his badge and initial tender of identification, the officers were not constitutionally required to do so. The Court noted that the badge could have been stolen or fabricated, apparently not an uncommon occurrence. Moreover, the altered firearm card gave the officers more reason to be cautious in making their determination as to Thurman's status. Even absent that, however, Thurman failed to present any identification with his name, or photo, which identified him as a police officer.

The Court, in upholding summary judgment in favor of the officers, held that because all of the questioning and the actions of the officers were likely to yield the needed information regarding his status as a police officer, the investigation did not violate Thurman's Fourth Amendment rights.

Then, because Thurman could not survive summary judgment on the substantive claim against the individual officers, summary judgment was proper for the Village of Homewood on Thurman's failure to train claims as well. In order to recover damages from a municipality under either a failure to train theory or a failure to institute a municipal policy theory, the plaintiff must prove that the individual officers are liable on the underlying substantive claim. Since the claim against the officers could not survive, neither could the claim against the Village.

CONCLUSION

Governmental bodies, like any other business, profession or institution, make mistakes or take conscious actions which can injure people with whom they come into

[11] Thurman v. Village of Homewood, 446 F.3d 682 (7th Cir. 2006)

contact. Some of the contacts governments make are especially prone to such risks because they involve dangerous situations or persons with special needs or vulnerabilities. The courts, in making common law rules, and the Legislature, in granting governments and their officers and employees certain immunities recognize the existence of these risks. They have also concluded that, as a matter of public policy, the taxpayers within a governmental body cannot be the insurer or guarantor of all actions of the governments. Thus, the immunities granted are substantial, but far from total. While in some cases the temptation to dip into the seemingly deep pocket of government seems strong, both judges and juries, helped by good defense lawyers, are prepared to grant to governments the protections they need to fiscally survive. At Ancel Glink, we have decades of experience in making sure that governmental bodies receive the full and often successful defenses accorded them by law. For more information about the immunities available to Illinois governments, see Chapter 5.

Chapter 7

TEN RULES ABOUT RUNNING FOR LOCAL GOVERNMENT OFFICE

Keri-Lyn J. Krafthefer

So, you've decided to run for local office or to seek re-election? In order to run a strong campaign on the merits, you need to pay attention to the details that, if neglected, can submarine your campaign before you even get started. While we strongly encourage you to seek legal guidance throughout every step of the campaign process, the steps you take before your campaign even begins warrant particularly careful attention. These ten tips, while not a substitute for legal advice, will remind you about some of the potential land mines along the way.

1. Do Not Rely on Forms or Information Distributed by Official Agencies

Laws change frequently, and sometimes election laws have changed in the middle of the election season. While some entities, such as the Illinois State Board of Elections, do a commendable job in keeping the public informed about election-related issues, at times their staff is not adequately prepared to notify everyone who may have received one of their forms which may have changed when it was distributed. Just because a form was valid during the last election cycle does not mean it is still sufficient. The same principle applies to information that you may have received from an election official, such as the required number of signatures for ballot access. Generally, this type of information is distributed with a disclaimer warning that it may be unreliable. If you use an incorrect form or rely on incorrect information, you may be removed from the ballot, depending on the mistake. Please check with an attorney before you rely on any distributed form or information.

2. Have Your Petitions Reviewed Before You Circulate Them

Once you have prepared or procured petition forms or other materials, such as a statement of candidacy or loyalty oath, make sure you have an attorney review them BEFORE you have anybody sign the petitions. It's challenging enough to procure the number of required signatures, much less having to go to voters twice because the first form was invalid. It does not take a long time to have your petitions reviewed before they are circulated, so this is one area in which an ounce of prevention is worth a ton of cure.

3. Train Your Circulators Before They Circulate Petitions

Petitions may be circulated by any United States citizen who is at least 18 years old. However, there are many rules regarding who can actually sign a petition. Make sure your circulators know the rules regarding circulation, such as that they must actually

witness the petition signers, that the signers must be registered voters, and the dozens of other rules related to the signing process. Ancel Glink has prepared a list of instructions which can be distributed to petition circulators and used to train them. Make sure your circulators understand the rules before they circulate your petitions. A mistake by a petition signer can invalidate their signature, but a mistake make by a circulator may invalidate an entire page of signatures, or potentially ALL pages circulated by the same circulator.

4. Review Your Campaign Finance Disclosure Obligations

The rules related to campaign finance disclosure reporting can be complicated and confusing. After you have reached a certain threshold for campaign receipts or expenditures, you must form a political action committee, which is subject to numerous rules related to accounting for funds that you receive or expend. While you cannot be kicked off of the ballot for not meeting these requirements, you can be fined for not following these laws. The last thing you need to distract you during your campaign is the allegation of a campaign finance violation and a pending hearing. Know the rules and follow them.

5. Make Sure Your Statement of Economic Interests is Filed in the Same Year as Your Nominating Petitions

Candidates are required to file a statement of economic interests in relation to their candidacy. The Local Government and Local Governmental Officials Ethics Act requires candidates to file this statement with the County Clerk's office, then to file the receipt for that filing along with their nomination papers when they are filed with the local election official. Sometimes, candidates file their statement in December so that they will be ready for the January filing period. However, the appellate court has ruled that such a practice is impermissible and invalidates a candidacy. Make sure that you file your statement of economic interests in the same calendar year that you file your nomination papers.

6. Do Not Notarize Your Own Election Petitions

A candidate may sign his or her own petitions, and may even circulate them. However, under the Notary Public Act, it is a violation of that Act for any person to notarize a document in which they have an interest. Accordingly, we recommend that you do not notarize your petitions, even if the petitions were circulated by someone else.

7. Have All of Your Paperwork Reviewed by an Attorney After it is Completed and Before it is Filed

Once you have procured all of your signatures and filled out all of your paperwork, make sure you have your documents reviewed by an attorney before you file them. Once you file your nomination papers, they cannot be changed, altered, or withdrawn, so you need to make sure they are correct BEFORE they are filed.

Sometimes, a second set of specially-trained eyes can help you find an error while it still can be corrected. We recommend that our clients bring their paperwork to us a week before they plan to file it, to provide for time to go back to correct any errors that may exist. Even if you are an experienced candidate, do not neglect this important step.

8. Make Sure You Keep a Copy of All the Paperwork you File

Often, candidates are so concerned about getting their nomination papers filed, they forget to keep a copy of their own documents for themselves. In the event that a candidate's petitions are challenged, a candidate will need copies of their paperwork to defend against objections. After the papers have been filed with the election official, a candidate may be required to file a special request for copies of his or her own documentation. If you keep a copy of your nominating papers, you can avoid a potential headache later.

9. If You are Running a Full Slate, Make Sure You File a Certificate of Officers who are Authorized to Fill Vacancies

Certain political party candidates are required to run a complete slate of candidates. If you are running a full slate of candidates for a political party, there may be a problem with paperwork for one of the candidates. If such an error results in one of the candidates being removed from the ballot, the entire party can potentially be removed from the ballot unless you have filed a certificate of the party's officers who are authorized to fill any vacancy that occurs during the nomination process. If you file this form, those officers can slate a candidate to fill any vacancy in nomination that occurs and save the entire slate from being removed.

10. If Both Full-Term Offices and Vacancies are Going to be Filled at the Same Election, Make Sure Your Petitions Specify Which Term of Office You are Seeking

Sometimes, public officials resign in the middle of their terms, creating vacancies that need to be filled at an election. If you are running for an office, such as trustee, for a four-year term, and there is also a vacancy to fill an unexpired two-year term that will be filled at the same election, all of your nomination papers must specify which term you are seeking. In the absence of such a designation, your paperwork can be subject to a challenge.

We hope these tips alert you to potential problems that may arise before your campaign even gets off of the ground.

Chapter 8

TOP TEN TOOLS FOR YOUR CONSTRUCTION PROJECT

Derke J. Price

The decision by any unit of local government to undertake a construction project is, like the construction of the building itself, a journey through many stages. You face risks, tests, traps, and other obstacles to be surmounted before the golden shovel goes in the ground and then before the ribbon is cut and the doors opened. Proper preparation and good contracts can, however, significantly reduce the number of obstacles the public body will confront and can get the public body through those hazards that are inevitable. This chapter is intended to give you an overview of the top ten tools you can use to make for a better project.

Schematic of the Project

The process begins when you, the "Owner," seek to fulfill some particular goals by constructing a new public improvement. The first step is typically the selection of a design professional: an Architect or Engineer (the "A/E"), whose job is to translate your vision into an actual, constructible plan. Here, the first contractual commitments are made and the first risks taken.

Next, you let the project for bid and then awards the contract to the successful bidder(s) (the "Contractor"). More risk – risk you need to control in the contract documents that were prepared *before* the project is bid!

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, people get hurt and property gets damaged. 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.

Construction law is almost entirely the law of contracts, although statutes play a role in defining the rights and obligations of the Owner, A/E and Contractor. Thus, there is no more important advice for the Owner than that of the Construction Specifications Institute: "There is no effective substitute for clear, correct, complete, concise and carefully coordinated construction documents" (Construction Specifications Institute Manual of Practice, 1996, FF/190). In that regard, there are a number of "families" of standard-form construction contracts available to help achieve that goal. These families include the American Institute of Architects ("AIA"), the Engineers Joint Contract

Documents Committee, the American General Contractor's Association, the Design-Build Institute of America, the National Society of Professional Engineers, and the Construction Managers Association. By far, the most popular family is the AIA standard forms which have the added benefit of a substantial amount of case law interpreting their provisions.

All of the various families, as their publishers' names imply, are the product of certain industry groups and, although the drafting committees welcome comments from all sectors, the final products do tend to reflect the perspective of the group publishing the document. Notably, there is no family of construction documents published by any organization representing units of local government, or even any group generally representing "Owners" for that matter. Accordingly, as further explained below, the standard form documents require careful reworking. There are blanks to be filled in, various documents to incorporate, and others to cross-reference and coordinate. It is easy for ambiguity to creep in and that ambiguity can be expensive to resolve. Here, then, are ten tools you should use to rework these agreements:

1. Eliminate the Waiver of Subrogation

Each of the parties (the Owner, Contractor and Architect) is typically required to provide different types of insurance. The Owner, for example, typically provides property insurance in the form of "builder's risk" insurance to protect the work-in-progress until such time as the work is completed and turned over to the Owner. After completion, the new improvements are added to the Owner's standard property insurance policy. For units of local government, insurance is often provided through "pool" arrangements with other similar units of government.

When property damage or personal injuries occur during the course of construction, the Owner immediately contacts its insurer and that insurer typically steps in to help the Owner get the project back up and running. Then, through the principles of "subrogation", the insurance company can bring a claim against those responsible for causing the damages to recover what it paid. For pool participants, this recovery through subrogation helps keep down premium costs for members.

The standard contracts waive this right of subrogation. This means that if the Owner's insurance responds to a claim–even where it turns out that one of the other parties was clearly responsible for causing the damages or even where the Owner's insurance responded only because the other insurers were responding too slowly–then the Owner's insurer cannot obtain recovery from the party that was the true cause of the damages. This, for units of local government, means greater losses and higher premiums.

As a general rule, liability follows knowledge and control. Because you, the Owner, have relatively little knowledge or control over the particulars of the project, at least as compared to the Contractor or Architect, the waiver of subrogation gives you relatively less protection and more risk. Improve upon that balance of risk and reward by striking the provision.

2. Amend the Indemnification Provision

Similarly, the standard indemnification provisions in the contracts favor the Contractors and Architects and not the Owners. Although the Construction Contract Indemnification for Negligence Act, 740 ILCS 35/0.01 *et seq.*, as a matter of Illinois law, effectively rewrites these provisions to give pro-rata liability for negligence (it voids any indemnification clause in a construction contract that purports to make any party liable for the negligence of another), there is still room to write a more comprehensive indemnification provision to gain several important advantages. First, as compared to a common law claim for contribution in tort, contractual indemnity offers the ability to recover both the loss for which the indemnitor is liable *and* the attorneys' fees, costs and other expenses incurred in pursuing that recovery. Typically, such costs cannot be recovered under a claim for contribution. Second, it is a tool through which to obtain recovery for acts and losses for which there may be no insurance coverage (*e.g.*, deliberate or intentional acts). Third, the indemnification provision also presents an opportunity to avoid having to make up a shortfall in damages paid by a Contractor or subcontractor due to the limits on the amount or type of damages, compensation, or benefits recoverable under the Workers' Compensation Act, Disability Benefit Act, or Employee Benefit Act (in Illinois this is known as the waiver of *Kotecki* limits). Without the proper language, the Owner could find itself paying to make up the difference between what the injured worker received under workers' compensation and the amount of damages awarded by a jury for that injury.

3. Examine the Insurance Limits

Design professionals need to carry both errors and omission insurance ("E&O coverage") and commercial general liability ("CGL") coverage for their actions outside of using their professional judgment: when they drive their firm's truck onto your property and cause damage to a person or property, it is the CGL policy, not the E&O policy, that covers the claim. Surprisingly, many design firms do not have CGL coverage in place and therefore it is imperative that the Owner require the same. Likewise, if the design firm has to rely upon consultants, the Owner should require E&O and CGL coverages for those consultants as well.

Like the design firms, it is essential that the Contractors and subcontractors have workers compensation insurance, comprehensive automobile liability insurance, commercial general liability insurance, and valuable papers insurance. The time to review and define these requirements is when the contract is being assembled before being bid upon, thus rolling the cost of the insurance into the bidding price.

All of the contracts should provide that the policies of the design firm or the Contractors and subcontractors are primary to the Owner's insurance (as this will save the pool money) and certain terms should be specified (*e.g.*, claims-made vs. occurrence; "wasting" and "aggregate" limits, notice at the time of renewal) in order to maximize your protection.

4. Meet the Statutory Requirements

The various state codes applicable to different units of local government throughout the State of Illinois mandate that governmental entities include certain provisions in their construction contracts. A failure to properly include the required provisions in your contracts can expose you to additional costs and even penalties. Among the provisions you must include in the contract are the following: prevailing wage requirements, non-discrimination and sexual harassment policy requirements, surety bond requirements, and worker and product preference statements. Although you must include these provisions, you also need to modify them. For example, with respect to prevailing wages, you should include a term that prohibits making any claims for additional compensation beyond the bid amount due to changes in the prevailing wage schedules.

Likewise, the Public Construction Bond Act, 30 ILCS 550/1 *et seq.*, mandates that the public body require every Contractor to furnish, supply and deliver a surety bond to secure the performance of the contract and the payment of all subcontractors and material suppliers. 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 suppliers on a public works project can only lien those funds in the hands of the Owner due and owing to the Contractor (770 ILCS 60/23). The Bond Act effectively substitutes the bond in place of the land as security for payment of the subcontractors and material suppliers. Failure to demand or enforce the requirement that the Contractor supply a payment bond may make the Owner liable for the debts of the Contractor, even if the Owner has fully paid the Contractor all amounts due under the contract.

5. Review Information Requirements Imposed on Owner

The standard form contracts frequently try to provide escape clauses for the design professional or the Contractor on the basis of the information provided by the Owner. But you are busy running a unit of government and not studying every aspect of the property or project – that's the expertise of Architects and Contractors. Make the professionals working for you help you get the right information. For instance, the Owner is responsible to obtain and pay for surveys and geotechnical information so that the design firm can properly design the structure. The most common example of such a report is a "soils report." Because this information will be relied upon by the Architect to design the project, the Architect should help you define the scope of the geotechnical Engineer's work (how comprehensive) rather than avoiding any responsibility for it. Incomplete or erroneous information in the documents also exposes the Owner to claims from the Contractors, and in some instances can even stop work on the project until matters are resolved. Put them on notice that they have to help you find such errors where reasonably possible and have them waive the right to stop the work while you

work out any additional costs or compensation. In short, the risks of unforeseen conditions need to managed either by shifting some of them or spreading some of them.

6. Streamline the Relationship with the Surety

Under Illinois law, every construction project for a public body must be underwritten by a surety bond provided by the Contractor that covers performance of the contract and payment of subcontractors. The notice provisions and manner of resolving claims under these bonds can be a labyrinth that will handcuff the Owner when the time comes, resulting in increased delay and dissatisfaction. By setting forth requirements for certain terms in the surety bonds, you lock in procedures that help you get the project done and people paid instead of subjecting you to endless questions and frequent delays.

Likewise, as Owner, you will owe the Surety certain duties (notice of default, protection of the income stream). Set the ground rules for how you will meet these duties right up front.

7. Consider Liquidated Damages for Delay

Illinois law recognizes the inconvenience that occurs to the public when a Contractor does not provide the public improvements in a timely fashion. Illinois law also recognizes that it not easy to quantify, in dollars, the value of such inconvenience. Accordingly, Illinois permits Contractors and public bodies to set a liquidated amount for such delay damages. Provided they do not constitute a "penalty" and are reasonably related to the amount of delay, such clauses are enforced and can assist in managing the expectations of all of the parties and making the Owner whole for delay. The standard form contracts, perhaps not surprisingly, waive such claims on the part of the Owner.

8. Tighten the A/E's Responsibility for the Budget

There are few things as omnipresent to the unit of local government or a school district as the budget. The standard form contracts acknowledge the importance of the budget, but they then put the burden back on the Owner to clearly explain its goals in the language of construction, or the Architect is excused from having to meet that budget number when the bids come in. But isn't that why you hired the Architect – to help you build what you need and within budget? Make the Architect work for you and respect your budget by obligating them to study your programming needs, and if the lowest responsive and responsible bid is more than 10% over the budget when the bids are opened, by giving you the option to have them redesign the project, at no additional cost, so the project comes in within the budget.

9. Tighten the A/E's Responsibility for Evaluating Payment Requests

You owe a duty to the Surety and the subcontractors not to over-pay the Contractor. Accordingly, you need to set up a system of evaluating pay requests that

includes obtaining a comprehensive schedule of values from the Contractor and the review and certification of pay applications by the Architect.

10. Own the Documents

Last, you need to own the design documents and all of the notes and studies that go into that design. The standard form contracts give ownership to the design professional, but the public should own the design of their building and control the ability to start and stop the project as budgets change, and to freely add to or duplicate the building in the future if necessary – without paying again for the design you already purchased. You will need to give the design professional certain protections and guarantees, but ownership by the public entity will avoid future conflicts over who owns the solutions depicted to your programming needs and values.

Routine use of these 10 tools should help you keep all of your projects running smoothly, and help lead your project to a timely and efficient completion. The analysis suggested here should take place beginning with the first design contract with the Architect and continue up until the final payment and the release of any surety bonds. Ancel Glink attorneys can work with you without delaying the process or increasing construction costs. Signing "form" documents without review or revision forms a road to disaster. A longer discussion of these issues can be found in Article 7 of Ancel Glink's 2007 Guide for Newly-Elected Officials, available for free download at www.ancelglink.com.

Chapter 9

TEN STEPS TO CREATING A TIF DISTRICT

Paul N. Keller

Tax increment financing ("TIF") is a method of raising money to pay for a redevelopment project, by capturing the increase in property value created by that redevelopment and channeling the increased tax revenue back into the project. The tax captured is not just the municipal portion of the tax bill, but the increased revenue from taxes levied by all the taxing districts in which the project is located, including school, park and library districts. By establishing a TIF district, the municipality can divert increased tax revenue to itself which would otherwise go to the other taxing bodies. However, the theory is that without the TIF district, the increased tax revenue would not be there in the first place, so the municipality is not depriving the other taxing bodies of anything.

Under tax increment financing, the increased property taxes generated by the redevelopment project that would otherwise go the various taxing bodies go instead to the municipality. The other taxing bodies do not benefit from the increased property values until the TIF expires, or unless accumulated TIF funds are declared by the municipality to be surplus, in which case the surplus funds are returned to the other taxing bodies in proportion to their respective portion of the total tax bill.

The tax revenue generated from a TIF district goes into a special municipal fund. This revenue can be used to pay eligible costs of redevelopment and can be pledged for the repayment of revenue bonds issued by the municipality.

A municipality initiates a TIF project when it identifies a vacant or deteriorated area of the community which will, if it is redeveloped, enhance the tax base and produce new tax revenue. The benefits of the redevelopment project may extend beyond the boundaries of the TIF district itself if new businesses and other enterprises are attracted to property near the revitalized area. By definition, tax increment financing is used when the area would otherwise not be improved solely with private funds.

Creating a TIF district is a complicated process. The TIF Act (65 ILCS 5/11-74.4-1 *et seq*.) is complex, not well written, and difficult to understand. Following are ten essential steps taken in the creation of a TIF district.

1. Eligibility Analysis

The ordinances the municipality enacts to formally create a TIF district must include findings showing that tax increment financing is permissible. In order to establish a factual basis for these findings, the municipality must conduct an eligibility study, resulting in a written report documenting how the project meets the statutory tests of eligibility. It is best to have the study conducted by an independent consultant. In the

event of a legal challenge to eligibility, the consultant's report and the testimony of the expert witnesses will be critical to the success of the project. There are three separate tests of eligibility, all of which must be satisfied:

1) Project Eligibility. The law requires that to create a TIF district, the municipality must determine that redevelopment of the area would not take place without public financial assistance. This is the "but for" test: "But for" the use of incremental tax revenue the site would not be developed. The legislative body must find that the redevelopment project area as a whole has not grown and developed through private investment, and cannot be expected to grow and develop without public financial assistance.

2) Site Eligibility. The site of a TIF project must qualify as a "blighted area," a "conservation area" or "an industrial park conservation area." There are detailed criteria in the statute for defining these areas. Briefly, the factors characterizing a blighted area are buildings that are dilapidated, obsolete, deteriorated, violate building codes, have inadequate utilities, or are overcrowded; or the land is contaminated with hazardous material, is poorly planned, is in diverse ownership, is tax delinquent, has declining assessed value, contains quarries, mines, or railroad right-of-ways, is subject to chronic flooding, or is an illegal disposal site for construction, demolition or excavation material. Other criteria apply to vacant land.

   A "conservation area" is one which is not yet blighted but is likely to become so. Most of the buildings are at least thirty-five years old and the area has many of the same characteristics as a blighted area though to a lesser extent.

   An industrial park conservation area must be within a designated area of higher unemployment and is a site suitable for manufacturing, industrial research or transportation facilities as defined in the statute.

3) Cost Eligibility. Only certain categories of development costs are eligible for reimbursement from incremental taxes. These are spelled out in the statute and include, among other things:

   a. Cost of studies, plans and professional services for architectural, engineering, legal, marketing and other services;

   b. Costs of marketing sites to prospective businesses, developers and investors;

   c. Costs of land acquisitions, site preparation, rehabilitation of existing buildings, construction of public infrastructure;

   d. Costs of financing; and

e. Costs mandated to be paid to school districts for their increased costs attributable to assisted housing units within the project up to 25% of the tax increment.

Specifically excluded from eligibility are costs of constructing new privately owned buildings, except for new housing units to be occupied by low income households as defined in the Affordable Housing Act.

2. Market Analysis

Before a municipality creates a TIF district, it should have some idea of what kind of redevelopment is possible. It would not make sense, for example, to create a TIF district with the expectation that the area will be redeveloped with a "big box" retailer if market conditions will not support such an operation. Municipal officials must be realistic about how the TIF district can be redeveloped. Sometimes a developer will come to the municipality with a proposal for a redevelopment project and ask for public financial support through the creation of a TIF district. In that situation, the municipality should demand that the developer submit its own market studies, showing that the proposed project will be commercially successful. In this business, the municipality should not assume that "If you build it, they will come." The municipality may at this time begin the process of negotiating with a developer for a development contract, which will determine exactly what will be constructed once the TIF district is established, and what development costs will be reimbursed from TIF funds.

3. Housing Impact Analysis

If the redevelopment project will result in the displacement of 10 or more inhabited residential units in the TIF district, or the district contains 75 or more housing units, the municipality must create a Housing Plan to address the needs of the residents who are displaced. This may require financial assistance to the displaced residents. In order to determine whether a Housing Plan is necessary, and how much it may cost, the municipality must conduct a housing impact analysis. If there are no residences in the proposed TIF district, the housing impact report may be only one sentence, but it must be stated.

4. Define Boundaries

The TIF district must be at least 1.5 acres and must be contiguous. There must be a written legal description of the boundaries as well as a depiction on a plat. The legal description must be in a form acceptable to the county clerk, so that the clerk can identify exactly what property is within the TIF district, for tax purposes. (Municipal officials are prohibited from acquiring real estate in a proposed TIF district. If they already own property in an area being considered for inclusion in a TIF district, they must disclose that ownership and must not participate in any discussion of the matter.)

5. Develop a Plan

Every TIF district requires a redevelopment plan. This describes the comprehensive program of the municipality for development or redevelopment projects intended to reduce or eliminate the "blighting" conditions that exist in the proposed TIF district. The TIF Act states that no redevelopment plan may include the development of vacant land for a golf course, camping or hunting facilities or for nature preserves. The plan must include, among other things:

- An itemized list of estimated redevelopment project costs;
- An assessment of any financial impact of the redevelopment project on other taxing districts;
- The sources of funds to pay costs;
- The nature and term of any bonds or other debt to be issued;
- The most recent equalized assessed valuation (EAV) of the redevelopment project area; and
- An estimate of the EAV of the TIF district following completion of the redevelopment project.

6. Issue Notices of Public Hearing and Joint Review Board Meeting

When the eligibility analysis, market analysis, housing analysis, redevelopment plan and boundary description are completed, the time has come for the municipality to present the proposed TIF district to the residents of the community and other interested parties. The municipality must create and publicize the existence of an "interested parties registry" on which anyone can register to receive public information about the TIF creation process. A public hearing must be scheduled at a meeting of the corporate authorities, to allow public discussion of the TIF process. Notice must be mailed, on a precise schedule, to residents within 750 feet outside the boundary of the proposed TIF district, to property owners within the proposed TIF district, and to people who have registered to receive information. Notice of the public hearing must be published in a local newspaper. A meeting of the Joint Review Board, which consists of a representative of every affected taxing body, must be scheduled, and notice sent to those taxing bodies, as well as to the Illinois Department of Commerce and Economic Development.

7. Hold the Joint Review Board Meeting

Every taxing body that receives tax revenue from the property within the proposed TIF district is entitled to send a representative to the Joint Review Board. The

meeting of the JRB must be scheduled within a specified time after issuance of the notice of the meeting. The JRB actually consists only of those representatives who show up for the meeting. The JRB reviews the TIF plan, and makes a recommendation to the corporate authorities whether the TIF district should be created. The JRB cannot veto the plan; it only makes a recommendation. However, if the JRB disapproves the plan, approval by the corporate authorities requires a 3/5 majority vote.

8. Hold the Public Hearing

A public hearing must be held within a specified time after issuance of the notices described above, at which the redevelopment plan and TIF boundaries are described. Any member of the public may comment on the proposed TIF district. No action is required by the corporate authorities at this public hearing; it is only for the purpose of providing an opportunity for public comment.

9. Adopt the TIF Ordinances

After the public hearing and the JRB meeting, the corporate authorities must decide whether to go ahead with creation of the TIF district. The creation requires adoption of three separate ordinances:

- An ordinance approving and adopting the TIF redevelopment plan;
- An ordinance fixing the boundaries of the TIF district; and
- An ordinance adopting tax increment financing within the TIF district.

10. File with the County Clerk

The final step in creation of the TIF district is filing the TIF ordinances with the county clerk. This causes the clerk to determine the EAV in the new TIF district as of the date of creation. This EAV becomes the base property value on which all tax levies will be calculated for all taxing bodies in the TIF district for the life of the TIF (usually 23 years.)

Once the TIF district is established, the municipality will probably negotiate contracts with one or more developers for construction of the projects to be financed with TIF revenue. The municipality may issue bonds, backed by the TIF revenue (and possibly other revenues), to pay for capital improvements.

For additional information, we suggest that you download a pamphlet from the Ancel Glink Library: Economic Development Toolbox for Municipal Officials. The pamphlet can be downloaded for no charge at www.ancelglink.com.

Chapter 10

TEN THINGS GOVERNMENTAL OFFICIALS DON'T KNOW ABOUT WORKERS' COMPENSATION

Gerald A. Granada and W. Britt Isaly

1. What is Workers' Compensation?

Workers' Compensation generally describes the benefits afforded to employees who are injured while working or who suffer from a condition that arises out of and in the course of that employee's employment. These benefits are set forth in the Illinois Workers' Compensation Act ("Act"), 820 ILCS 305 *et seq*. Essentially, there are three main Workers' Compensation benefits:

1) TTD or Temporary Total Disability Benefits: If an employee is injured while on the job and there is no dispute that the injury arose out of and in the course of the job, that employee is entitled to payment of TTD while that employee is off work due to the injuries. TTD is usually 2/3 of what the employee would be earning per week. However, in some governmental bodies that have a specific policy for compensating employees on work disability or in the case of fire fighters or police officers, an injured employee who loses time from work will get his or her full pay while off work for up to a year.

2) Medical/Rehabilitation Benefits: If the injured employee incurs medical expenses related to a work injury, those expenses will be paid through workers' compensation. In some cases, an employee may need vocational rehabilitation (e.g. hiring a vocational counselor) because the worker cannot return to the original job. A vocational expert can be provided as a workers' compensation benefit in order to get the injured employee back to work, if not with the governmental entity, then with another employer that can accommodate any physical restriction the employee may have as the result of the work injury.

3) Permanent Disability Benefits: Permanent disability resulting from a work related injury, is usually discussed when the employee's condition or injury will no longer improve, and no further treatment is warranted, also known as MMI or maximum medical improvement. There are cases where Permanent Disability can be discussed although the employee will need continuing medical treatment for an indefinite period of time. Permanent Partial Disability ("PPD") is compensation for the injured employee's loss of use of a specific body part, or a percentage of disability referred to as a proportional loss of the person's ability "as a whole". Disability may also be expressed as the person's loss of future earnings due to the injury.

2. Who is Protected Through Workers' Compensation?

The Act basically provides coverage for all elected and appointed local governmental and school district officials and all their employees. It does not cover injuries to volunteers although some insurance policies and governmental pools provide such coverage.

3. Workers' Compensation is Different from a Lawsuit

As a historical note, the Act is the product of compromise between both employers and employees. The Act insulates employers from civil lawsuits where litigants can claim damages that can add up into millions of dollars. In return for this, the Act puts caps on the monetary recovery of injured workers by creating a formula for calculating damages limited by the injured employee's earnings and the statutory impairment schedule set forth in the Act. The Act also created the Illinois Workers' Compensation Commission ("IWCC"), a state administrative agency that employs arbitrators and commissioners to act as judges in adjudicating workers' compensation claims filed in the State of Illinois. Some of the most notable differences between workers' compensation claims and civil lawsuits are:

- An Application for Adjustment of Claim is filed with the IWCC as opposed to a complaint in the Circuit Court;
- There is no discovery or traditional pleadings in WC cases (trial by ambush);
- Although there is a 45 day notice requirement following the injury, an injured employee has 3 years from the date of accident or 2 years from the date of the last payment of WC benefits to file an Application;
- Litigated WC claims are tried before an Arbitrator, although the Court Rules of Evidence do apply;
- Arbitration decisions can be appealed to a panel of Commissioners, and their decision can be appealed to the Circuit Court in the county where the case is venued;
- Attorney fees for claimant attorneys are set at 20% of whatever is recovered at trial or via settlement;
- Injured employees cannot seek pain and suffering or punitive damages; and
- Some Arbitrators and Commissioners are not attorneys and have had no legal education prior to their appointment to the Commission.

4. How the Amount an Employee Gets Through Workers' Compensation is Determined

Once the injured employee has reached maximum medical improvement, meaning that he/she is released from medical treatment and the condition or injury will no longer improve, the case should be evaluated for how much permanent injury has been sustained by the employee. This is usually described as the loss of use of a particular body part, termed Permanent Partial Disability, or "PPD." Essentially, the Act ascribes weeks of disability for various parts of the body, such as a leg, arm, foot, etc. There is also a category called "man as a whole" that encompasses the back, torso and situations where a case cannot simply be limited to particular body parts (e.g. loss of earnings, traumatic head injuries, multiple body parts injured). In some circumstances, an employee who can no longer perform his/her previous job may be entitled to wage differential benefits or permanent total disability benefits for the rest of his or her life. As a basic workers' compensation principle, PPD benefits are calculated by the following formula: 60% of AWW (Average Weekly Wage) multiplied by a percentage of loss of use of a body part. Determining the percentage of loss is done either through negotiation between the parties involved or decided by an arbitrator or the Commission.

As an illustration, an employee earning $500.00 on average per week, who loses his little finger in an accident resulting in a complete amputation of that finger, may be entitled to $6,600.00 (60% of $500 x 22 weeks which represents 100% loss of use of a little finger). If for some reason, that employee has difficulty using his entire hand as a result of the injury and amputated finger, then the case would have to be evaluated as a loss of a hand. In any event, it is very important that a municipality should work closely with both the claim adjuster handling the claim and the legal counsel if there is any question regarding the calculation of what an employee should receive as a result of a work related injury.

5. Ways to Defend Against Workers' Compensation Claims

Given that an underlying principle behind workers' compensation is to liberally construe the Act to benefit workers, usually workers' compensation cases are resolved through agreements and compromises made between the injured employee and the employer through their representatives. However, there are many cases where a claim is questionable due to the facts alleged by the employee, the medical records or the circumstances surrounding the claimant's employment. In those cases, employers should be proactive in doing the following:

- Educating supervisors and employees on completing accident reports within the required 45-day time frame, and include the date the report was completed, the name of the person completing the report, and the signature of that person;

- Investigating injuries immediately by taking witness statements if possible;

- Photographing the area where a questionable accident occurred;

- Following up on information regarding outside activities that may have caused an injury to an employee;

- Providing immediate medical attention to employees hurt on the job;

- Finding new ways to accommodate injured employees with either temporary or permanent disabilities as a result of a work injury; and

- Following up regularly with an injured employee.

It is very important to work closely with both the claims adjuster and your defense counsel when considering challenging a claim to determine the specific actions to be taken, before claim spirals out of control. It is also important in dealing with governmental employees that the personnel policies of the employer are reflected in the manner in which the defense is pursued. Malingering or fraudulent employees should be caught but long term excellent governmental employees must be treated, if at all possible, with an eye to their successful return to work.

6. Police Officers and Firefighters Are Entitled to More Than Workers' Compensation For One Full Year After The Injury

Any police officer or firefighter who is injured in the line of duty causing him to be unable to perform his duty is entitled to one full year's worth of full salary under the Public Employee Disability Act ("PEDA"). *See* 5 ILCS 345/1(b). Many municipalities unnecessarily pay other employees full pay while off work, (such as Public Works employees,) when only police officers and firefighters are statutorily required to be paid full salary for one year. After one full year's worth of full salary, if the injured police officer or firefighter continues to remain disabled because of a work related injury, the compensation goes back to TTD, or two-thirds of the employee's average weekly wage computed as of the date of the accident. PEDA has also recently been interpreted by the case of Albee v. City of Bloomington as entitling police officers and firefighters to a <u>full</u> year's worth of full salary when many municipalities had previously interpreted PEDA to require only payment of one <u>calendar</u> year from the date of the injury. *See* 849 N.E.2d 1094, 302 Ill. Dec. 682 (4th Dist. June 2, 2006). It will be incumbent on payroll officers of your municipality to keep track of injuries in the line of duty that cause disability and whether the police officer or firefighter is able to return to work. The employee should always be required to show a dated and signed physician's slip to prove that the claim for PEDA benefits is still the result of the original line of duty disability. The payroll officer will also need to calculate and pay out 52 weeks of full pay, while excluding dates the employee works light or full duty.

7. Interaction of the Family Medical Leave Act and Workers' Compensation

When an employee is unable to work because of a serious health condition, the Family Medical Leave Act ("FMLA") entitles a qualified employee up to 12 weeks of unpaid leave for any 12 month period. Workers' compensation TTD benefits and FMLA leave may run concurrently. In other words, while the employee receives workers' compensation and is prescribed to be off work, the 12 weeks period of FMLA time may run concurrently with the TTD benefits. This is sometimes referred to as an "anti-stacking provision." We would strongly recommend that if the governmental entity has any written guidance to employees concerning employee benefits or leave rights, (such as an employee handbook,) that such anti-stacking provisions are provided in the handbook allowing the local government to designate a leave resulting from a work injury as FMLA-qualifying, and that it will run concurrently with the workers' compensation absence. Note also that it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying and that it is also the employer's responsibility to give notice of this designation of it being an FMLA leave to the employee.

8. No Temporary Total Disability Until The Fourth Day

If an employee suffers a work related injury and has been medically required to be off work for three days or less, the employee is not entitled to TTD benefits (two-thirds of wages). Instead, the employee may use sick time or vacation time for these three days. If, however, the period of temporary total disability is an incapacity for work lasting more than three working days, weekly compensation shall be paid beginning on the fourth day of such incapacity and continue for as long as the total temporary incapacity lasts. When the temporary total incapacity for work continues for a period of fourteen days or more from the date of the accident, compensation shall commence on the date after the accident. In other words, if the employee is off work for fourteen days or more, you have to repay the first three days in TTD benefits. If, in this situation, the employee has been paid sick or vacation time and has been off work for fourteen days or more, these first three days of sick or vacation time must be reimbursed to the employee and TTD benefits instead should be paid.

9. Evidence You May Have from Police Pension and Firefighter Disability Cases that Can Be Used in Workers' Compensation Cases

Municipalities should always be aware that evidence gathered in a workers' compensation case may be used in a pension hearing for either police officers or firefighters. There has been much litigation about whether the Workers' Compensation Commission or the Pension Board is collaterally estopped or prevented from litigating certain evidence that has already been litigated in an earlier proceeding. If you have a pension hearing approaching with a police officer or firefighter, always obtain the evidence from the workers' compensation case, if there was one, for use by your

attorney. The attorney might intervene in the Pension Board's case in order to present such evidence. It is at the discretion of the Pension Board to allow such intervention.

10. Settlement of a Case Closes All Issues

When considering whether or not to settle a case or to go to trial, always remember that by trying the case, if the claimant wins, the claimant is entitled to keep his medical rights open indefinitely into the future. Of course, the employee would still be required to prove any future medical treatment is still related to the original work accident. If, on the other hand, the case is settled, all related liabilities will likely be settled along with it, not requiring the employer to pay for any future medical treatment or increased disability once the case is settled with a settlement contract. Each case is different, and you must discuss with your attorney the reasons for trying or settling a case. However, keep in mind that liability may not always end with a trial award on the case, as the employee may apply for future medical benefits related to the work accident.

Chapter 11

TEN THINGS MUNICIPAL OFFICIALS SHOULD KNOW ABOUT LOCAL PROSECUTION AND ORDINANCE ENFORCEMENT

Scott Puma and John Christensen

Local prosecution on behalf of a unit of local government is far ranging and covers everything from the prosecution of violations under the Illinois Vehicle Code to enforcement of local ordinances. Discussed below are ten items that may be of assistance in understanding the scope of authority available to units of local government in pursuing local prosecution and ordinance enforcement.

1. Does a Municipality Have Authority to Prosecute State Traffic Violations Under the Illinois Vehicle Code?

Municipalities throughout the state are able to select attorneys to prosecute municipal ordinance violations. In some communities the police are instructed to write complaints under the state statute even when there are local ordinances covering the same offenses. Section 625 ILCS 5/16-102(c) of the Illinois Vehicle Code provides:

> "The State's Attorney of the County in which the violation occurs shall prosecute all violations except when the violation occurs within the corporate limits of a municipality; [then] the municipal attorney may prosecute if written permission to do so is obtained from the State's Attorney."

Thus, two initial criteria must be satisfied for a unit of local government to prosecute cases under the Vehicle Code. First, the violation must have occurred within the corporate limits. Second, the State's Attorney must provide the unit of local government with written permission to prosecute the offense.

There are some counties, such as Cook County, where the State's Attorney has declined to give units of local government authority to prosecute violations under the Vehicle Code. However, in a number of other Counties, the State's Attorneys have granted this authority when requested by the units of local government. This authority is usually set forth in a letter from the State's Attorney to the unit of local government granting authority pursuant to Section 16-102 of the Vehicle Code to prosecute violations occurring within the corporate limits, subject to certain statutory limitations, some of which are discussed in more detail below.

2. Can a Unit of Local Government Prosecute Traffic Violations Under its Local Ordinances Where Authority has been Denied by the State's Attorney Under Section 5/16-102?

A unit of local government may adopt by reference all or part of the Vehicle Code as a local ordinance and prosecute violations of the adopted local ordinance. This authority to prosecute does not require written permission from the State's Attorney under Section 16-102 of the Vehicle Code because the municipal prosecutor is enforcing a local ordinance, not the provisions of the Vehicle Code. In the alternative, a municipality may adopt its own ordinances prohibiting such things as disregarding traffic control devices, but it is much easier to approve an ordinance adopting the Vehicle Code in its entirety as a local ordinance. In general, this authority is limited to misdemeanor and petty traffic offenses that occur within the corporate limits.

3. Can a Unit of Local Government Prosecute a Felony DUI Under the Vehicle Code?

A unit of local government does not have the authority to prosecute a felony DUI under the Vehicle Code, and as such is limited to prosecuting misdemeanor DUIs. The question arises, however, whether the unit of local government can prosecute a DUI that has been initially charged as a misdemeanor but which is felony eligible. Under a series of laws adopted in recent legislative sessions, a unit of local government, including a home rule unit, may not enforce any ordinance that prohibits DUI if, based on the alleged facts of the case or the defendant's driving history or record, the offense charged would constitute a felony under 625 ILCS 5/11-501, unless the State's Attorney rejects or denies felony charges for the DUI.

Likewise, Sections 11-208.5 of the Vehicle Code limits the power of a local authority to enact or enforce any ordinance or rule with respect to the streets or highways under its jurisdiction relating to DUIs to the enactment or enforcement of ordinances or rules the violation of which would avoid prosecution of DUIs as felonies or misdemeanors under the Vehicle Code. In other words, a municipality may not create its own system of DUI violations by ordinance to avoid the mandatory provisions of the Illinois Vehicle Code. Section 11-208.5 also provides that a municipality may not enact or enforce any ordinance or rule which would constitute a felony under Section 11-501, and requires that a municipal attorney who is aware that, based on a driver's history, the driver is subject to prosecution for a felony under Section 11-501 must notify the State's Attorney of the driver's conduct and may not prosecute the driver on behalf of the municipality. However, under Section 11-208.5(b), the municipality may charge an offender with a municipal misdemeanor offense if the State's Attorney rejects or denies felony charges for the conduct that comprises the charge.

Under Section 16-102 of the Vehicle Code, the State's Attorney may not grant to the municipal attorney permission to prosecute if the offense charged is a felony under Section 11-501. Like Section 11-208.5(b), under Section 16-102 the municipality may,

however, charge an offender with a municipal misdemeanor offense if the State's Attorney rejects or denies felony charges.

In sum, while municipal attorneys may not prosecute felony DUI cases, they can prosecute a felony eligible DUI case as a misdemeanor violation if the State's Attorney has declined to prosecute the case as a felony.

4. Can a Municipality Prosecute its Own Ordinance Violations Outside the Court System?

Municipalities have been given the statutory authority to provide for administrative adjudication of Municipal Code violations. This authority for home rule units is set forth in 65 ILCS5/1-2.1-1 et seq., and for non home rule units, 65 ILCS 5/1-2.2-1 et seq. Both Sections exclude from administrative adjudication any offense under the Vehicle Code that is a traffic regulation governing the movement of vehicles or for any reportable offense under Section 6-204 of the Vehicle Code. Municipalities often find it is easier to obtain compliance for building code and property maintenance code violations by establishing an administrative adjudication program.

If the municipality is home rule, the ordinance establishing a system of administrative adjudication must provide for a code hearing unit within an existing agency or as a separate agency in the municipal government. 65 ILCS 5/1-2.1-4. There are similar requirements for non-home rule units. Adjudicative hearings must be presided over by hearing officers, who are hired by the municipality. The hearing officers must complete a formal training program meeting the requirements of 65 ILCS 5/1-2.1-4(c) and must be an attorney licensed to practice law in the State of Illinois for at least three (3) years. 65 ILCS 5/1-2.1-4. Certain restrictions are placed on the hearing officer's authority. In particular, the hearing officer cannot impose a penalty of incarceration, or impose a fine in excess of $50,000, or at the option of the municipality, such other amount not to exceed the maximum amount established by the Mandatory Arbitration System as prescribed by the Supreme Court from time to time for the judicial circuit in which the municipality is located. 65 ILCS 5/1-2.1-4(b)(5). The ordinance establishing a system of administrative adjudication must afford parties due process of law, including notice and an opportunity for a hearing during which they may be represented by counsel, present witnesses, and cross-examine opposing witnesses. This Act does not preempt municipalities from adopting other systems of administrative adjudication pursuant to their home rule powers. 65 ILCS 5/1-2.1-10.

While different procedures are available for the implementation of a system of administrative adjudication depending on the type of code violation or the status of the municipality as a home rule or non home rule entity, these procedures all provide a municipality with an alternative to court litigation which is often a more expeditious and cost effective way to deal with ordinance enforcement.

5. Can a Municipality Prosecute Parking Tickets Through its Own System of Administrative Adjudication?

Subject to certain procedure municipalities are given the authority to establish a system of administrative adjudication to prosecute parking tickets in Section 11-208.3 of the Vehicle Code. This Section provides that any municipality may provide by ordinance for a system of administrative adjudication of vehicular standing and parking violations and vehicle compliance violations as defined therein. The administrative adjudication system shall have as its purpose the fair and efficient enforcement of municipal regulations through the administrative adjudication of violations of municipal ordinances regulating the standing and parking of vehicles, the condition and use of vehicle equipment, and the display of municipal wheel tax licenses within the municipal borders. The authority under Section 11-208.3 is limited to the adjudication of civil offenses carrying fines not in excess of $250 that occur after the effective date of the ordinance adopting this Section.

Section 11-208.3(c) authorizes a municipality to provide by ordinance for a program of vehicle immobilization for the purpose of facilitating the enforcement of its vehicular standing, parking, and compliance regulations.

6. Does a Municipality Receive More Fine Money if it Files its Traffic Offenses (speeding, etc.) as Ordinance Violations Rather Than State Violations Under the Vehicle Code?

There are several benefits when a municipality files an ordinary traffic offense such as speeding as an ordinance violation rather than a violation under the State statutes; unfortunately fine money is not one of them. The key factor is whether the official writing the charge was a municipal official.

Procedurally, when an ordinance violation is filed with the Court Clerk's office, the clerk enters the citation into the computer and assigns that citation a file number. That file number gets its designation from the particular type of case that is filed. The statutes and case law mandate that when a person is charged with a traffic (speeding, etc.) ticket that the Illinois Secretary of State monitor all of those offenses, even those offenses that are filed as ordinance violations. As a result, it makes no difference to the clerk whether that speeding ticket was written under a local ordinance or whether it is written under the Illinois Vehicle Code. That citation will be treated as if it is written under the Vehicle Code and it will be reported to the Secretary of State. The end result, relative to the apportionment of fine money is that the same amount will go to the municipality without regard to whether the case is written as an offense under the Illinois Vehicle Code or under a local ordinance.

However, there are other benefits to filing these charges as Ordinance violations. These benefits include the inherent ability to prosecute these charges without the permission from the State's Attorney because an Ordinance violation is treated as a civil complaint by the courts, the burden of proof is lower (meaning it is easier to establish that the offender committed the violation) and the municipality may adopt mandatory minimum fines for offenses provided that its fine system does not conflict with the State Statute.

7. Is it Better to Have the State Prosecute DUIs and Misdemeanor Violation of the Vehicle Code or to Hire a Local Prosecutor?

There are some important benefits to prosecuting DUIs and misdemeanor violations of the Vehicle Code with a local prosecutor. The main benefit to prosecuting these offenses with a local prosecutor is that the prosecutor works for you. While the local prosecutor maintains his or her own integrity and prosecutorial discretion, he or she can help the municipality carry out its prosecution philosophy, such as mandatory fines or no leniency for certain offenses.

The local prosecutor can also help the police department budget by controlling the court scheduling of the police officers. Often times a local prosecutor can save a police department money in overtime pay and help maintain proper and adequate police coverage for the municipality by only calling officers to court when absolutely necessary. They can do this through negotiating with the defense attorneys to settle cases where the burden of proof would be difficult or impossible to meet. The municipality would have much less control over the decision, in the proper case, to offer incentives to the defendant to plead guilty to a lesser charge and to push for special sentences such as treatment for drug and alcohol addiction, attendance at victim impact counseling, and donations to organizations which help prevent drivers from getting behind the wheel while intoxicated.

8. This is Getting Expensive. Can We Ever Get the Other Party to Pay Out Attorneys' Fees?

Yes, effective January 1, 2008, a city or village may be able to recover its attorneys' fees and costs when someone defaults in payment of a fine or an installment of a fine. 65 ILCS 5/1-2-1. The statute authorizes the municipal attorney of the municipality in which the fine was imposed to retain attorneys and collection agents for the purpose of collecting the fines which are due. Any fees or costs incurred with respect to attorneys or private collection agents retained by the municipal attorney are to be charged to the offender.

Interestingly, this provision allows a municipal attorney to engage other attorneys or collection agents rather than giving this authority to the corporate authorities of the municipality. Presumably, the municipal attorney would only engage other attorneys and collection agents with the prior approval of the municipality.

It is most likely that this statute will be utilized to collect fines imposed under an administrative adjudication system or to collect parking ticket fines. In some cases, the statute could also be utilized to collect stale fines which are deemed uncollectible by the courts.

This statute appears to have been written by collection lawyers because it does not authorize the recovery of the regular municipal attorneys' fees incurred in collecting fines. Those municipalities which have existing agreements with attorneys or collection agents should consult with their municipal attorneys to determine whether the collection agreements should be re-executed under the authority of the municipal attorneys in order to collect attorneys' fees and costs in addition to the outstanding fines.

9. My Municipality Has Several Properties That Have Junk and Debris Scattered About Them and We Can't Get the Owners to Clean Up the Property. Can We Clean Up the Property, and Who Pays for the Clean-Up?

Yes, the Municipal Code (65 ILCS 5 et seq.) contains provisions to clean up dilapidated property in two different Sections. Section 11-20-13 of the Municipal Code provides that the corporate authorities of each municipality may provide for the removal of garbage, debris, and graffiti from private property when the owner of such property, after reasonable notice, refuses or neglects to remove such garbage, debris, and graffiti and may collect from such owner the reasonable cost thereof except in the case of graffiti. This cost is a lien upon the real estate affected, superior to all subsequent liens and encumbrances, except tax liens, if within 60 days after such cost and expense is incurred the municipality, or person performing the service by authority of the municipality, in his or its own name, files notice of lien in the office of the recorder in the county in which such real estate is located. However, the lien of the municipality is not valid as to any purchaser whose rights in and to such real estate have arisen subsequent to removal of the garbage and debris and prior to the filing of such notice, and the lien of such municipality is not valid as to any mortgagee, judgment creditor or other lien or whose rights in and to such real estate arise prior to the filing of such notice. Upon payment of the cost and expense by the owner of or persons interested in such property after notice of lien has been filed, the lien shall be released by the municipality or person in whose name the lien has been filed and the release may be filed of record as in the case of filing notice of lien. The lien may be enforced by proceedings to foreclose as in case of mortgages or mechanics' liens. An action to foreclose this type of lien is required to be commenced within 2 years after the date of filing the notice of lien.

Additionally, the Municipal Code at Section 11-60-2 provides that the Corporate Authority of each municipality may define, prevent and abate nuisances. The power granted a municipality under Section 11-60-2 is broad, although not unrestricted. Nuisances have been defined in such categories as unsafe or unfit structures and premises, nuisances dangerous to health (odors, garbage and sanitation problems), and chronic nuisances (i.e. any real property to which the police department has responded, at

least three times in any consecutive 90-day period, and on each response has found nuisance activity or multiple instances of nuisance activity). Historically, the Illinois Supreme Court has set forth three classifications in determining the power of a municipality to conclusively determine what a nuisance at common law is:

a) those that in their nature are nuisances per se or are so denounced by the common law or by statute (a municipality may conclusively denounce these as nuisances);

b) those that in their nature are not nuisances but may become so by reason of their locality, their surroundings, or the manner in which they may be conducted, managed, etc. (a municipality may declare such of them to be nuisances as are in fact so); and

c) those that in their nature may be nuisances but as to which there may be honest differences of opinion in impartial minds (a municipality may conclusively denounce these as nuisances).

The legal remedies that are available to abate nuisances are the imposition of a monetary penalty, and municipalities can also provide for their own summary abatement procedures. This abatement can also be obtained with the use of the court and an Administrative Search Warrant which would allow the municipality to enter the property to remove or abate the nuisance. The municipal prosecutor is typically best suited to bring lawsuits of this type.

10. What Are Some Other Area Where the Statute Allows Municipalities to File Suits to Enforce Their Rights or Ordinances?

Set out below are some of the common police powers granted by statute:

1. Declare curfew (Code §11-1-5);
2. Provide for emergency power of the mayor (Code §11-1-6);
3. Conduct juvenile delinquency prevention programs (Code §11-1-8);
4. Suppress bawdy and disorderly gambling houses, houses of ill fame, and obscene literature (Code §11-5-1);
5. Prevent or suppress riots, disturbances, noises, trespasses, and disorderly assemblies in public or private places (Code §11-5-2);
6. Prevent intoxication, fighting, quarreling, dog fights, cock fights, and all other disorderly conduct (Code §11-5-3);
7. Prevent vagrancy, begging, and prostitution (Code §11-5-4);
8. Prohibit parking of motor vehicles on private property without consent of the owner (Code §11-5-5);
9. Prohibit cruelty to animals (Code §11-5-6);
10. Regulate mobile homes and house trailers (Code §11-5-8);
11. Provide youth and senior funding and services (Code §§11-5.2-2 through 11-5.2-4);
12. Regulate for fire safety (Code §§11-8-1 through 11-8-6);

13. Regulate conditions causing and abate air pollution (Code §11-19.1-11);
14. Regulate and establish markets and market houses (Code §11-20-1);
15. Regulate the sale of all beverages and food for human consumption (Code §11-20-2; see also 410 ILCS 635/4, 635/19 (milk), and 225 ILCS 650/4 (meat and poultry) for state minimum standards and preemption);
16. Regulate and inspect all food for human consumption and tobacco (Code §11-20-3; see also 410 ILCS 635/4, 635/19, and 225 ILCS 650/4 for state minimum standards and preemption);
17. Provide for cleansing and purification of water and drainage of ponds and prevent or abate a nuisance by draining and filling ponds on private property (Code §11-20-4);
18. Do acts and make regulations that are necessary or expedient for promotion of health and suppression of disease (Code §11-20-5);
19. Provide for destruction of weeds on private property, lien for cost of removing same (Code §§11-20-6, 11-20-7);
20. Provide for extermination of rats, lien for costs of exterminating same (Code §11-20-8);
21. Regulate and prohibit running at large of horses, asses, mules, cattle, swine, sheep, goats, geese, and dogs (Code §11-20-9);
22. Regulate construction, repair, and use of cisterns, cesspools, pumps, culverts, and drains and sealing of wells and cisterns (Code §11-20-10);
23. Provide for removal of garbage and debris from private property, lien for costs of removing same (Code §11-20-13);
24. Regulate fences and party walls (Code §11-30-1);
25. Regulate construction of buildings in areas that flood (Code §11-30-2);
26. Regulate use and construction of rooming houses (Code §11-30-3);
27. Regulate strength and manner of construction of buildings and fire escapes (Code §11-30-4);
28. Regulate grading and draining of lots and construction of paving for driveways and parking areas, terraces, and retaining walls (Code §11-30-8);
29. Regulate private swimming pools (Code §11-30-9);

30. Demolish and repair unsafe buildings, lien for costs of same (Code § §11-31-1 through 11-31-2);
31. Provide for building code hearings and procedures (Code §§11-31.1-1 through 11-31.1-11.1);
32. Regulate installation and maintenance of heating, air-conditioning, and refrigeration and contractors for same (Code §11-32-1);
33. Provide for registration of electrical contractors (Code §11-33-1);
34. Regulate steam boilers and elevators and persons having charge of same (Code §11-34-1);
35. Regulate electrical equipment installation, use, and alteration (Code §11-37-1);
36. Regulate motor vehicles on city streets (Code §11-40-1; see 625 ILCS 5/11-207, 5/11-208, 5/11-208.1, 5/11-209, and 5/11-209.1 for preemption);
37. Declare junk cars as nuisances (Code §11-40-3);

38. Regulate certain enumerated businesses and activities (Code §§11-42-1 through 11-42-14);
39. Establish and regulate cemeteries (Code §11-49-1);
40. Regulate the weighing and measuring of certain enumerated items (Code §11-53-1);
41. Provide for inspection and sealing of weights and measurements (Code §11-53-2);
42. Regulate athletic contests (Code §11-54-1);
43. Grant permits for carnivals (Code §11-54.1-1);
44. Define, prevent, and abate nuisances (Code §11-60-2);
45. Regulate streets and public ways (Code §11-80-2; see 625 ILCS 5/11- 207, 5/11-208, 5/11-208.1, and 5/11-209 as to preemption);
46. License and regulate street advertising and adult entertainment advertising (Code §11-80-15);
47. Regulate boats and harbors (Code §§11-92-3, 11-104-1, 11-104-2, 11-104-3); and
48. Regulate conditions causing and abate water pollution (Code §§11-125-2, 11-125-3, 11-129-1).

Chapter 12

THE ZONING GAME IN TEN EASY LESSONS

David S. Silverman, AICP

Zoning is one of those legal concepts that is often studied, but least understood. This dichotomy stems from the nature of property rights in our national conscience and the high value that our economic system places on them. Therefore, it may strike some as odd that the free use of land in our nation is regulated in so many ways. Among them are federal and state environmental laws, federally and state designated open space and natural resource areas, standardized building codes, regional strategic growth strategies, subdivision requirements, and zoning.

It is zoning, above all other land use controls, that impacts our ability to utilize our land as we want, when we want. Zoning is, by and large, a locally controlled process which tells us what can and can't be done with a piece of property. This chapter will provide a plain English overview of 10 things everyone should know about zoning. Why, for example, can't one develop a 40-story office building next to a single family home? You might be able to do this in Houston, which has no zoning ordinance, but that is a different story altogether.

1. What is Zoning, Really?

Zoning is simply a land use regulation system that allows certain types of activities to occur in defined areas within a municipality or county, and in more limited instances, townships (the three units of local government that have zoning power under Illinois law.) Zoning also creates so-called "bulk standards" that are designed to create the desired aesthetic for a given area of a community, and to provide that a property is not overwhelmed with buildings, driveways, and related structures. In the process, bulk standards create distance between buildings to provide for yards and avoid overcrowding. The number and nature of zoning districts in a community is only limited by imagination and the land use policies and objectives of that community.

Illinois municipalities that choose to regulate zoning are required to maintain an up-to-date official zoning map that must be adopted no later than March 31st of each year. The official zoning map details the municipality's zoning districts which typically are shown using a standard color coding system. On the official zoning map, a property owner should be able to determine which zoning district his or her property is in and which zoning regulations apply to that property.

2. OK, So What is This Comprehensive Plan All About? Isn't it Just Another Way to Zone?

Not exactly. A comprehensive plan is related to zoning only to the extent that it establishes the land use policies, goals, and objectives of a municipality, often projecting

into the future as far as 25 years. The zoning ordinance regulations are then prepared to carry out those land use goals and objectives. The comprehensive plan, by itself, is not a regulatory document but a planning document that establishes the basis and rationale for zoning regulations.

A comprehensive plan includes a land use map that is not the same as an official zoning map even though it may look similar. Using the same color codes, the land use map is a future image of land use patterns in the municipality and, in some instances, may vary from what is shown on the municipality's official zoning map. These differences often needlessly alarm property owners. It is important to keep in mind that what is on the annually published zoning map is what is allowed today, and what is on the comprehensive plan land use map is what the zoning or allowed uses may be changed to in the future. Comprehensive plans will typically identify areas of a municipality that it would like to see redevelop in a way that may be different from how it is currently used or zoned. An example of this distinction might be a deteriorated single-family residentially-zoned area on the edge of a commercial district which a comprehensive plan may show as multi-family/commercial.

3. I'm in What District? What Do You Mean I Can't Open a Tavern in This R-1 District? You're Taking Away My Property Rights!

At many public hearings people have been heard to express disapproval of a municipality's land use decision in a particular matter because "it takes away my property rights and I should be able to do what I want with my land!" Unfortunately, for people with these views, when used properly, zoning is a legally well tested local regulatory process that was first approved by the United States Supreme Court in 1926 when it upheld the constitutionality of Euclid, Ohio's zoning ordinance.[1]

Zoning cases at both the state and federal levels have evolved since the landmark Euclid case, but it can be safely stated that unless a zoning law is functionally equivalent to an actual government appropriation of land, the zoning laws will not create a "regulatory taking", also known as inverse condemnation.2 After a false step in this direction which seemed to limit zoning powers, the courts have retreated to a more governmentally friendly stance. Also, in order to successfully claim a regulatory taking, a property owner has to show that the zoning regulation adversely affects the entire parcel of land in question and not some sub-area of the parcel.[3]

4. Well, if I Can't Do What I Want When I Want, What Advantage Do I Get From This Zoning Stuff?

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[1] Village of Euclid v. Ambler Realty, 272 U.S. 365 (1926).

[2] See Pennsylvania Coal Co. v. McMahon, 341 U.S. 393, Loretto v. Teleprompter Manhattan CATV Corp, 458 U.S. 419, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, Penn Central Transportation Co. v. New York City, 438 U.S. 104, and Lingle v. Chevron, 544 U.S. 548.

[3] This is also known as the "whole parcel" rule. See the U.S. Supreme Court's own philosophical battle over this rule in Palazzolo v. Rhode Island, 533 U.S. 606 (2001), and Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002).

Plenty. Zoning creates the aesthetic and environmental character that property owners find most appealing about their neighborhoods. If someone purchases a home in a low density neighborhood where the homes are on one-acre lots, the expectation of the property owner is that this aesthetic will be preserved. The legislative basis for zoning in the Illinois statutes says that, among other things, zoning may be used to ensure adequate light, pure air, and safety from fire and other dangers, promote the taxable value of land and buildings, limit congestion on public right-of-way, protect property from excessive storm water runoff, preserve sites of historic, aesthetic, and architectural importance, as well as generally ensuring for the public health, safety, and welfare.[4] The power to zone, as can be seen, involves many interrelated goals and is one of the most common ways in which citizens interact with their local government.

5. So, This Zoning Stuff…What…is it Divinely Given? Sure Seems All Encompassing

While not divinely given or all encompassing, zoning is an extensive grant of authority to local governments from the state. In 1921, five years before the Euclid decision, then Commerce Secretary (and future President) Herbert Hoover set out to establish a model zoning enabling act that could be used by the states to grant zoning authority to local governments. Many states had already adopted enabling statutes (so called because they enable lower levels of government to regulate in some area), but they were inconsistently drafted, raising the prospect for inconsistent legal development of zoning and property rights across the country, as well as the granting of too much or too little power to effectively facilitate the goals Hoover hoped to achieve to promote planning across the country. His interest in planning stemmed from his two-fold interest in improving the nations' housing stock and promoting commercial and industrial land development to drive economic development. The Standard State Zoning Enabling Act (SSZEA) was issued by the Department of Commerce in 1926[5] and was adopted by a majority of the states within five years.

6. Fine…So There is Plenty of Authority From on High, But What's This Business About Permitted and Specially Permitted Uses? And What About This Cumulative Zoning Stuff?

Zoning ordinances list those uses that the municipality believes should be permitted, also known as "by right", in a zoning district and those uses that should be specially permitted in a district. Take a hypothetical R-1 zoning district that in many communities is the lowest density residential district and often the most restrictive in terms of allowed uses and "bulk requirements". If you want to build a single-family house and your project meets all of the bulk requirements, then in an R-1 district you, by right, can simply apply for your building permit - which must comply with the building codes - and be on your way.[6] Taking this same hypothetical R-1 district, there are other

[4] 65 ILCS 5/11-13-1

[5] A copy of the SSZEA can be read here: http://www.planning.org/growingsmart/enablingacts.htm

[6] This of course assumes too that you don't need any subdivision relief, but that is another matter in its own right.

uses that, while not similar to the predominant permitted uses, complement them, but are of a nature that special conditions should attach to ensure that these "special uses"[7] integrate smoothly into an existing neighborhood context. A good example is a library.

Libraries are wonderful complementary uses to residential areas, and convenient access is appreciated by patrons. Still, libraries aren't exactly residential in nature, structure, or operation. In our R-1 district example, the municipality has determined that libraries should be allowed in the R-1 district, subject to certain bulk requirements, and by way of a "special use permit" that enables the library to maintain and operate its building in the R-1 district. By making libraries special uses, the municipality can place certain conditions on the site plan and operations of the library to ensure it doesn't conflict with the predominant residential uses in its vicinity.

Conditions on special uses can run the gamut, and may include landscape buffering to shield the use from other surrounding uses, or time limits on hours of operation or exterior security lighting. In addition, some special use conditions need to be reexamined after a period of time to ensure that they are operating properly to address some issue, and municipalities sometimes place a time limit on how long the special use permit will be valid. Upon expiration of the special use permit, our hypothetical library would have to reappear before the municipality to examine whether the conditions are operating as designed, or whether they need to be modified to address any problems of compatibility that are present between the library and the nearby residential uses.

Cumulative zoning is simply the concept that each successive district in a given category of zoning districts (i.e. residential, commercial, industrial, etc.) permits or specially permits the uses from the previous district. So, if the R-1 district allows single-family detached dwellings as permitted uses and libraries as specially permitted uses, as well as some other uses, those uses can also be listed, permitted or specially permitted in the R-2 district and so on. Some zoning ordinances do not use cumulative zoning, especially in commercial or industrial districts.

7. Fine, But I Think This Limited-Use Zoning District Stuff Saps Creativity…There Has To Be a Better Way, Right?

This is a common complaint of both of developers and municipal officials. However, planners created a useful way to deal with complex developments that would otherwise be prohibited under traditional zoning. The planned unit development (PUD) or planned development gives developers and municipalities a flexible way to achieve important land use policy goals and objectives while allowing a developer significant flexibility to produce an interesting development, often with different land uses, densities, and features not otherwise provided in the base zoning district. The flip side of a planned development, at least for developers, is that it is also among the most procedurally complex ways to get zoning approval. The goal for the municipality is to use a well managed process that ensures for an optimal development. Planned developments are typically special uses in most zoning districts and are granted by a special use permit and

[7] Special uses are sometimes called "conditional uses."

they often can only be applied for on larger parcels of land. Typically, the only bulk regulations that apply are the required side yards relating to compatibility with adjoining properties. That means the multiple buildings usually found within a PUD can be placed in a variety of ways subject to a test of compliance with "good planning standards." In most communities, planned development ordinances place a premium on open space and preservation of natural areas through the allowance of higher densities and creative planning.

The planned unit development is the most common flexible zoning tool available, but the planning profession continues to evolve and create new zoning methods to enhance creativity and promote good planning principles and design. Among other methods are overlay or floating zoning districts that superimpose additional requirements in specific areas of a municipality to promote specific planning and development objectives, performance zoning which establishes performance requirements for certain types of uses or districts, and form based zoning that regulate the form of development desired in a certain areas of the municipality, as opposed to the organization of land uses. Special uses, including planned developments, can only be granted after there has been a public notice published and a public hearing held.

8. I'm Looking Through This Zoning Ordinance and There are a Bunch of Words and Phrases That Make No Sense. I Mean, What is "Floor Area Ratio," Anyway?

Floor area ratio is simply the ratio established by taking the net or gross floor area of a structure and dividing that by the area of the zoning lot. Thus the FAR of a 4000 square foot home on a 40,000 square foot lot is 0.1. Make sense? Zoning, like almost any specialized area has its own language and zoning ordinances almost always have a definitions section for all technical words, terms and phrases. The definitions section is very important, because words, terms or phrases that may seem common or straight forward could be defined in a way that differs from your understanding. The definitions section should be carefully reviewed when analyzing bulk regulations to understand how the allowable dimensions regulating the bulk on a property or between properties are calculated. In addition, certain permitted or specially permitted uses are defined and it is important to understand whether a proposed use is defined in a manner consistent with what is being proposed to ensure that it is allowed in a given zoning district.

9. Fine, I Think I Understand When I am Supposed to Get a Special Use Permit, or Whatever That Thing is, but What About a Variation, Map Amendment, or Text Amendment? When do I Need One of Those?

In order for zoning ordinances to be administered in a way that promotes fairness, and provide an opportunity for property owners to maximize the value of their land in light of applicable zoning regulations, there has to be administrative relief mechanisms. Each of the words and terms used above is a form of zoning relief that enables property owners to do something with their property not otherwise allowed under a strict reading of applicable zoning regulations. The kinds of zoning relief mentioned above, like

special uses, can only be granted after a public hearing before a zoning board of appeals or a plan commission. Relief or change can only be granted after specified objective findings of fact are made by the zoning board of appeals or plan commission. Variations are exclusively heard by zoning boards of appeals and plan commissions usually conduct the public hearings for special use permits, and map and text amendments. In most municipalities, zoning relief is granted by an ordinance adopted by municipal corporate authorities. The following is a quick synopsis of these forms of zoning relief:

- Variations are an administrative way to relax applicable bulk regulations (e.g. height, set back, floor area ratio, lot coverage, etc.) Often, strict application of zoning regulations create practical difficulties and particular hardships on a property owner trying to improve their land. A variation can be granted by the municipality that relaxes one or more of the regulations, thereby allowing the property owner to do something with his land that otherwise would be prohibited. In a few municipalities the Zoning Board of Appeals is given the power to grant variances. However, in most municipalities all final zoning changes are left up to the corporate authorities. Many municipalities place limits on how much variation relief can be granted, so it is a good idea to check the requirements for variations to make sure a requested variation does not exceed allowable limits.[8]

- Map amendments are also referred to as rezoning and do exactly as the words imply: change the zoning designation of a particular parcel or parcels of land. Rezoning can result in either "down zoning" that lowers the permitted or specially permitted intensity of uses and increases the bulk regulations, or "up zoning" that increases the permitted or specially permitted intensity of uses and lowers the bulk regulations. Under Illinois law, a property owner who wants to put his land to a use not otherwise permitted or specially permitted in the district must seek a rezoning that changes the zoning of the land to a district that permits such a use. Local officials should not grant map amendments that are substantially different than surrounding zoning districts or that will disrupt or alter development patterns in a neighborhood or municipal-wide.[9] If a property is zoned in a manner significantly different from adjacent and nearby properties on a zoning map it is called "spot zoning" which is an impermissible exercise of zoning authority.[10]

- Text amendments change the text of a zoning ordinance. Usually, text amendments are initiated by the municipality, but there are instances when a property owner seeks to develop a project that is not accommodated either in the applicable zoning district or in any portion of the zoning ordinance. Text amendments can range from simple adjustments of language or wholesale revisions or additions to the text of the ordinance. Local officials will usually

[8] See 65 ILCS 5/11-13-4 and 65 ILCS 5/11-13-5. As an example, a zoning ordinance may have a provision that allows reduction of rear yard requirements, but not exceeding 10% of the required rear yard. If an applicant lives in a district that requires a 35-foot rear yard, the applicant cannot seek a variation in excess of 3.5-feet.

[9] See 65 ILCS 5/11-13-14.

[10] See Thornber v. Village of North Barrington, 321 Ill.App.3d 747 (2d Dist. 2001) for a good discussion on spot zoning.

avoid text amendments that make changes to zoning regulations that could result in significant changes to existing neighborhood or municipal-wide development patterns.

10. Geez…There Sure is a Lot to Know About Zoning. If I Am a Municipal Official, How Can I Make the Zoning Process Easier to Understand and Orderly? It Seems That Without a Lot of Guidance, the Zoning Process Can Really Breakdown.

Good point. The zoning process begins with your zoning ordinance. The best ordinances are those that are readily understandable to most people. Not only should the terms be clear, but the ordinance should be organized in a logical manner that makes sense to the average person. The best ordinances are also those properly scaled to the municipality. In other words, the best zoning ordinances will relate to the land use realities of a community and be based upon the land use goals and objectives of the municipality as established in its comprehensive plan. Too often, municipalities simply borrow regulations that "look good" from other municipalities, without considering whether those regulations have any relation to actual land use conditions in their own municipality.

A second important way that the zoning process can be easier to understand and use is through good application materials. Some of the best application materials are those that are designed for a particular form of zoning relief and include information on the steps involved in the process to get approval for that form of relief. The application forms should specify, aside from the basic information, the required submittals, numbers of copies, and standards that must be shown for granting relief. The application materials should be designed to enable easy staff administration of the application, including internal and preliminary review, distribution to zoning board or plan commission members, and preparation of staff reports for the zoning board or plan commission.

Third, municipalities should get in the habit of preparing staff reports for the benefit of the Plan Commission and Zoning Board. The reports should summarize the application and proposed development, include an analysis of surrounding land uses. The report should set forth the staff's response to the request submitted by the applicant. In addition, staff should, after the recommendation of the Plan Commission or Zoning Board, submit a report to the corporate authorities with a proposed ordinance. If the request is for a special use, plan development, or variance, the proposed ordinance can contain conditions.

At the zoning board or plan commission, the public hearings should be conducted following this general order:

- Identification of applicant and witnesses on behalf of applicant
- Submittal of proof of notice
- Report by staff, if any
- Presentation by applicant

- Zoning board or plan commission examination of applicant and applicant's witnesses
- Comments and questions by the public about applicant's presentation
- Testimony and other evidence by public
- Zoning board or plan commission examination of public
- Cross-examination of public by applicant
- Summary by applicant
- Deliberations and recommendations of zoning board or plan commission

It is useful to have staff at public hearings, including the municipal planner, the municipal engineer, the municipal attorney, and other staff as appropriate, to answer technical and possible legal questions that may arise in connection with an application. Our website, www.ancelglink.com, has a number of pamphlets which can be downloaded free of charge that deal with issues related to this Chapter. See the Introduction, p. 2, for a list of those pamphlets.

Chapter 13

TEN WAYS MUNICIPALITIES AND PARK DISTRICTS CAN INTERGOVERNMENTALLY COOPERATE

Scott A. Puma

Article VII, Section 10 of The Illinois Constitution provides 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 by ordinance." The Illinois legislature has also promulgated a uniform statutory framework for broad intergovernmental cooperation in the Intergovernmental Cooperation Act, 5 ILCS 220/1 *et seq*. The legislature has expanded upon this for certain specific functions between park districts and municipalities (in this article, "municipalities" refers to cities and villages.) Where there is no express statutory authority found either in the Illinois Municipal Code or the Illinois Park District Code, a municipality and park district obtain their authority to contract from the Illinois Constitution and the Intergovernmental Cooperation Act. While there are perhaps hundreds of ways in which municipalities and park districts can cooperate to deal with specific circumstances, the following are ten general ways which they can intergovernmentally cooperate.

1. Joint Recreation Programs and Facilities

The single most common way that municipalities and park districts cooperate is through joint recreation programs and joint facilities. In this era of the tax cap, it is often difficult for one unit of local government to fund land acquisition, construction and staffing for recreational facilities to serve a community. Thus, municipalities and park districts, sometimes with school districts or community college districts, enter into agreements to own and operate such recreational facilities. Additionally, the Park District Code specifically authorizes municipalities and park districts to cooperate relative to the ownership and use of swimming pools and ice rinks (70 ILCS 1205/9-1(d); golf courses (70 ILCS 1205/9.1-5); and tennis courts and zoos (70 ILCS 1205/9.2-5). Municipalities and park districts have entered into intergovernmental agreements for jointly developed facilities which are not specifically authorized by statute such as large scale community centers, senior centers, theaters, recreation facilities and athletic facilities. Additionally, different governmental entities often find that each other's expertise is necessary to operate these facilities. Thus, there are often intergovernmental agreements relative to staffing and life-guarding at municipal pools and beaches by park district staff, maintenance and cleaning provisions relative to such public buildings and professional management provisions for such buildings.

2. Police Power

Illinois park districts are authorized to staff and fund their own police departments (70 ILCS 1205/4-7). Although the actual number of park districts maintaining their own police departments is relatively low, park districts must find a way to enforce their regulatory ordinances. For example, most park districts have an ordinance in place setting the hours when a park is open. In order to enforce this type of regulatory ordinance, park districts often contract with municipalities for police service. The municipal police department can then enter upon park land and issue citations for violations of park district ordinances for such things as being in the parks after hours, trespassing upon park land and, often, consuming alcohol in the parks when either underage or when it is prohibited. If a park district does maintain a police force, the park district and municipality may enter into an intergovernmental agreement to provide for additional jurisdiction for the park police within the municipality (70 ILCS 1325/1). Further, municipalities may utilize park police equipment in their operations. If a park district with a lot of parks also owns all-terrain vehicles or snowmobiles to access its parks, the municipality may at some point need them or ask the park district police to assist using its specialized equipment in municipal police matters. Additionally, park police officers may be utilized to backup officers of the municipality when available. It is best to provide for these occurrences in an intergovernmental agreement.

3. Comprehensive Land Planning for the Municipality

Municipalities are authorized to approve a comprehensive land plan for the present and future development or redevelopment of the municipality. The jurisdiction of the land plan may extend for one and one half miles around the boundary of the municipality (65 ILCS 5/11-12-5). The comprehensive plan should include the locations of public lands, parks, and playground. The development of the comprehensive plan is typically undertaken by a municipality with the assistance of its planning staff, an outside land planning consultant, its plan commission and the municipal board. In order to decide how a municipality will be developed in the future, as well as how certain areas of existing municipalities will be redeveloped, the park district should be consulted as to where it sees the need for new or improved park sites. For example, if the majority of the parks and playgrounds are located in a certain portion of the municipality, and new growth is anticipated away from the existing park facilities, then the park district should be consulted as to where new facilities should be located for future residents. If wide-scale redevelopment is being undertaken by a municipality through economic incentives, tax increment financing districts or the like, the park district may have thoughts as to where new recreational facilities should be located within these areas. While this process is not usually followed pursuant to a written intergovernmental agreement, it is another example of municipal and park district cooperation.

4. Developer Donations

Practically all municipalities provide that new residential development set aside land for park purposes, or cash will be paid in lieu of a land donation to the park district

for the purposes of acquiring or improving land to provide needed park space which is specifically and uniquely attributable to the new development. The question then becomes how large or small a park the developer should donate, what condition it should be in, and what is the procedure if the park district prefers cash. Typically, municipal ordinances address this by providing that cash is to be paid when the development is too small to require a land donation of five or more acres. Additional authority for more aggressive requirements for donations can be found in annexation agreements. Most municipal ordinances provide that a land donation be paid based upon the estimated ultimate population of a subdivision. For instance, a 4-bedroom single family detached house is expected to generate 3.764 new residents to a municipality. In the planning and platting process for the new subdivisions, municipalities and park districts should cooperate and meet to discuss where new park land will be located and what facilities such as playgrounds, tennis courts, basketball courts, etc., will be placed in the new park, or if parks should be maintained as open green space. Further, the municipality and park district should agree when a developer should be required to install electric, sewer and water services for future use and if a developer should construct certain improvements such as playgrounds, shelters and washroom facilities on a park site. Also, since the cash in lieu of land formula is based upon the value of land per acre, the municipality and park district should confirm each year what the value per acre is for residential land in the municipality. Typically the park district is charged with obtaining an appraisal to substantiate the land value. However, the municipality must set the value in its ordinance as the municipality, not the park district, has the authority to assess and collect developer donations. While few municipalities and park districts enter into formal agreements relative to planning parks and collecting donations, they usually enter into indemnification agreements for the benefit of the municipality which provide that in the event a developer initiates litigation against a municipality, the park district is responsible to defend and pay back any judgment or settlement that is rendered.

5. Joint Recreation Programs for the Handicapped

Municipalities and park districts are specifically authorized to enter into intergovernmental agreements to provide for joint recreation programs for the handicapped at 65 ILCS 5/11-95-14 and 70 ILCS 1205/8-10(b), respectively. Municipalities, through their recreation departments, and park districts, which are located in the same general geographical area, often establish special recreation associations through intergovernmental agreements. When a municipality is not served by its own park district, the municipality may join with other area park districts and municipalities to better provide recreation for the physically and mentally disabled. These special recreation associations have been very successful in meeting the needs of the disabled from preschool through adult ages. The employees of the special recreation districts often have the specific training to work with the disabled that municipal recreation departments lack. Neither the Park District Code nor the Municipal Code requires the establishment of a formal special recreation association, and municipalities and park districts simply enter into intergovernmental agreements providing recreation services and facilities through either governmental entity. Typically, however, the park district would provide recreation services.

6. Exchange of Services

Municipalities and park districts can also enter into intergovernmental agreements to provide certain services to each other. For example, if a park district has a large maintenance staff that has equipment for mowing and other services, the municipality may contract with the park district to mow its property, rights-of-way and public areas in exchange for snow plowing or other services upon park property. In lieu of an exchange, a municipality may waive certain fees to the park district for permitting, building and plan reviews, sewer and water tap-in fees or the like. If the municipality and park district decide that the fee waiver is desirable, they should each make sure that they are obtaining the approximate value of the service being rendered and that a credit or amount be established for such fees to be waived by the municipality. The net result is that one taxing body will not be charging another taxing body, which will ultimately benefit the residents.

7. Jointly Owned Property for Parks and Playgrounds

Like the joint recreation programs and facilities discussed above, both the Illinois Municipal Code and Park District Code allow for jointly owned parks and playgrounds at 65 ILCS 5/11-96-1 and 70 ILCS 1205/8-1(f), respectively. As such, a municipality and park district may decide how to own and maintain property. Additionally, the parties would typically share in the construction, maintenance and liability relative to any park site. This may be a beneficial way for property to be held if the political climate in a particular area requires additional oversight over property. However, given the potential question of liability, most park land and playgrounds are only owned by one party, but the maintenance and upkeep may be the responsibility of the other party. Any such arrangement should be reduced to a written intergovernmental agreement.

8. Employment of Youth

The Illinois legislature has established the Illinois Youth Recreation Corps, 525 ILCS 50/8. The purpose of the Youth Recreation Corps is to make grants to local sponsors to provide wages to youth operating and instructing in recreational programs for the benefit of other youth during the summer. The programs are to provide recreational opportunities for local children of all ages and include coordination and teaching of physical activities, arts and handicrafts and learning activities. A municipality and park district could work together to employ youth in such endeavors. The park district and municipality would apply to the Illinois Department of Natural Resources for funding for such a program. While it is unlikely that the State has an abundance of funds available for such a program, this is another way that a municipality and park district could work together to benefit the youth of the community by employing them in the summer months.

9. Special Events

Many municipalities have community-wide festivals. Such programs can be jointly sponsored by a municipality and a park district and they foster goodwill in the community. While many communities leave some of the funding to separate not-for-profit entities which are created for the sole purpose of running such a festival, there is a lot of behind the scenes work to be done by municipalities and park districts. For instance, these festivals typically occur on public grounds, absent a generous land owner. Usually, a park district will have adequate facilities to host a large scale festival. The municipality often will provide traffic control and other police presence at the festival site. Both municipalities and park districts will often provide workers for set up and take down of the festivals. The municipalities and park district often work together to schedule entertainment acts and to provide food and fireworks at the festivals. Many times the municipality and park district contribute directly to the costs of the fireworks. The goodwill fostered by community-wide festivals often far exceeds the labor and other costs expended.

10. Tourism

Municipalities have the ability to impose a tax on all persons engaged in the municipality of renting, leasing or letting rooms in a hotel (65 ILCS 5/8-3-14). The hotel and motel tax may not exceed 5% of the gross rental receipts from the rental of such rooms. In ***non-home rule*** municipalities, the proceeds of the hotel and motel tax must be used to promote tourism and conventions within a municipality or to attract nonresident overnight visitors. A municipality and park district can agree that some part of the hotel and motel tax will be distributed to the park district, as long as the park district presents certain programs. For instance, if a park district has a large art fair or band concert or competition each year, the proceeds of the hotel and motel tax may be used to promote these events to attract people to the community. In this scenario, both the park district and municipality benefit from increased nonresident attendance at these events. While some towns choose to disburse the proceeds of the hotel and motel tax annually based upon requests, a park district and the municipality could enter into a long term intergovernmental agreement to insure that the park district receives a portion of the taxes and to set forth what the park district will use the funds for.

We have listed just ten of the ways in which municipalities and park districts can cooperate. Given the broad authority under the Intergovernmental Cooperation Act, the possibilities are endless. For more information about park districts, review the handbook on park district law prepared by Ancel Glink attorneys and published by the Illinois Association of Park Districts.

Chapter 14

TEN STEPS TO A CLOSER RELATIONSHIP BETWEEN MUNICIPALITIES AND SCHOOL DISTRICTS

Margaret Kostopulos

1. Maximize Opportunities for Collaboration and Cooperation

Increasingly, municipalities and local public school districts have occasion to cross jurisdictional boundaries. School districts are separate units of local government organized and operating under the Illinois School Code. Unlike home rule municipalities, school districts (similar to non-home rule municipalities) are subject to "Dillon's Rule," that is, they only have those powers and duties expressly authorized by statute. Under the State Constitution and the Intergovernmental Cooperation Act**,** governments that have limited powers can increase those powers through intergovernmental agreements. Those agreements do not need to be based on specific statutory authority so long as their subject and operation does not violate State laws or local ordinances.

The relationship between municipal and public school district governance is complex. School districts are governed by elected non-partisan boards of education made up of individuals from the community who serve without compensation. Schools derive most of their revenue from local property taxes. They also receive some funding from the state and federal government depending on variables such as the number of children living at or below poverty, the number of special education students, and the number of English language learners in the district.

Schools and municipalities share a common constituency: children and their parents. In addition, approximately half of a homeowner's property taxes support the school district. At the same time, property values are heavily influenced by the quality (real or perceived) of the local school district. Thus, municipal officials have a vested interest in the quality of the local schools as it relates directly to the quality of life in the overall community.

2. Cooperate to Fully Utilize Public Property

Population trends often dictate where school buildings are located and how they are occupied. On occasion, a school building may be underutilized, providing school boards an opportunity to sell or lease the facility. The School Code authorizes school districts to manage their property holdings. Through intergovernmental cooperation, municipalities may take advantage of underutilized school buildings to provide additional resources to the whole community. For instance, a municipality may contract with a school district to use all or a portion of a school building for a senior center, community center, or municipal services center.

There are several advantages to these arrangements. First, most school buildings have been updated to be in compliance with requirements of the Americans with Disabilities Act and environmental laws. As such, school buildings are often in a "ready-to-use" condition by municipalities for the types of services described above. Also, school buildings are often equipped with technology that can be used by the municipality to augment their needs.

In addition to buildings, school grounds can be used cooperatively with municipalities for services to the broader community. Fields, playing fields, and field houses are an important community asset that can be shared by schools and the municipality. This arrangement can provide municipalities with much-needed space at an affordable cost. And, of course, from the school district's perspective, a municipality is a good partner since they carry adequate insurance, pay on time, and are courteous.

3. TIF Committees

School officials play an important and significant role when municipalities create tax increment finance districts. School district finances will be impacted by the creation of a TIF district, and thus should be included as an important player when the TIF district is created. When a municipality establishes a redevelopment plan, school districts can request information about the plan, which should be readily shared with school officials. In addition, by law, school districts serve on the Joint Review Board established under the TIF law. As such, school officials may provide oral or written comment on the proposed TIF, and will participate in the public hearing to discuss the redevelopment plan.

Because the creation of a TIF district has an impact on the school district, municipal officials should communicate their intent to create a TIF with school officials as soon as is reasonably practical under the circumstances. It is beneficial to the municipality if the school district is a willing and cooperative participant in the process. If the school district is not cooperative, public sentiment over creating the TIF may backfire.

Additionally, school officials should be kept abreast of the legal documentation establishing the TIF, and the attendant tax rates. Municipal finance officials should work hand in glove with school business officials so that all parties have a comprehensive understanding of the tax implications of the TIF, both positive and negative.

4. Annexation, Detachment, and School District Consolidation

School and municipal officials are often called upon to cooperate when municipal officials are considering annexation, or where school officials are considering consolidation. When municipal officials are negotiating annexation agreements, consideration should be given to the number of projected students the school district will need to absorb. Tools such as school land/cash donations, where a developer is required to contribute land or cash for school purposes, are excellent examples of statutory

authorization encouraging school/municipal cooperation. In addition to land/cash donations, the municipality should consider how the new municipal boundaries will dovetail with school district boundaries. How many school districts serve the property in question? How many schools, if any, are located in the area? What are the conditions of those schools? These questions should be carefully considered by municipal officials and communicated with school officials.

Another issue arises when school districts consolidate. Particularly in rural areas where smaller school districts have become the cornerstone of the community, school district consolidation can become a very heated, and often controversial issue—in some cases, even leading to litigation. Municipal officials play a key role in assisting school boards to determine the efficacy of the consolidation, and to measure the impacts on the community after the consolidation. On occasion, municipal officials "compete" with other municipalities to keep the administrative center of consolidated districts in their community. Such competition, while potentially healthy, may complicate issues and have a direct impact on kids (including how far their bus trip might be). As such, school and municipal officials should work together to ensure a smooth community transition in these difficult situations.

5. Library Boards Can Cooperate with School Districts to Maximize Resources

Schools and municipal library facilities share a common asset: books. When possible, school districts and municipal library boards should cooperate to fully realize their joint resources. Books are expensive, and when libraries renew their inventory, school libraries can benefit from those resources. In addition, schools and libraries share a common need for technology integration. School districts and municipal officials should jointly review potential collaborations for establishing online services and functions.

6. Establish Youth Commissions with School Districts

Importantly, many issues addressed by municipal officials relate to children and youth. Thus, establishing cross-jurisdictional advisory youth commissions can be an effective tool to bridge the gap between children and youth and the overall community in which they live. When properly utilized, youth can provide municipal officials with a much needed perspective. Schools can assist in identifying youth leaders who can work with municipal officials on youth-related issues. Schools and municipalities can also pool their resources to provide opportunities for youth, such as the creation of youth community centers and after school programs.

Creating youth commissions provides municipal and school leaders with insights into the issues facing youth in the community. Recommendations by youth relating to law enforcement, facilities usage, and recreational opportunities, as well as youth-oriented development, can give both municipal and school officials the necessary information to make a project successful.

7. School Districts Should Cooperate with Municipal Officials on Safety and Security Issues

While school districts are not subject to local building code regulations, municipal and school district officials should cooperate when school facilities are being planned and built. School districts are subject to local codes including those relating to zoning, subdivision, parking and storm water management. School construction impacts neighborhoods, and municipal officials have an important interest in the design of the building, the layout on the building site, and traffic patterns.

School districts and municipalities should work closely on these issues, as well as the construction schedule, to ensure that residents close by are impacted to the least extent practicable. Peripheral issues including traffic controls, storm water management, and lighting can create significant public opinion. Municipal officials may bear the brunt of complaints and questions from the citizenry on these issues. As a result, municipal officials should engage in a well orchestrated working relationship with the school district during school construction projects, even though technically schools are subject to the State Life Safety Code, which functions as a Building Code.

In addition, municipal officials have an important interest in making sure school buildings are safe and secure. It will pay large dividends if a school cooperates with municipal officials about the elements of the building relating to fire detection, security and, traffic signalization. With regard to security, as our society increasingly experiences shootings and other violent acts at school, municipal and school officials must work closely and cooperatively on emergency preparedness planning and implementation.

8. Law Enforcement and Police Liaison Services

One area in which schools and municipalities increasingly cooperate is in the area of law enforcement. Schools need to respond to unlawful conduct in the school setting, and school districts have discovered that municipalities are willing and able partners in fighting school-based crime. Police officers in school settings are generally grouped into three categories:

1. those where school officials initiate a search or where police involvement is minimal;

2. those involving school police or liaison officers acting on their own authority; and

3. those where outside police officers initiate a search.

It is important that expectations of law enforcement involvement in school based activities are defined clearly and specifically up front. One legal implication relates to potential claims against both the school district and municipality for violations of the Fourth Amendment to the U.S. Constitution relating to unreasonable searches and

seizures. Where school officials initiate the search or police involvement is minimal, most courts have held that the reasonable suspicion test applies. The same is true in cases involving school police or liaison officers acting on their own authority. However, where outside police officers initiate a search, or where school officials act at the behest of law enforcement agencies, the probable cause standard has been applied.

In addition, the Illinois School Code specifically grants authority to school officials to conduct locker searches using drug sniffing dogs. Often, schools will request the local police department to assist. It is advisable that schools and municipalities enter into intergovernmental agreements when partnering in these endeavors.

9. Traffic Control and Crossing Guards in School Zones

One critical issue facing both school and municipal officials is how to get students safely to school. Municipal and school officials coordinate efforts to ensure vehicular and pedestrian safety in school zones. Municipalities often hire crossing guards to make sure children have a safe trip between home and school. Municipalities and school districts can cooperate in hiring and paying for crossing guards. Also, grants are increasingly available to provide safe routes to schools. Municipalities and school districts can jointly apply for these funds to defray costs associated with additional traffic signaling, crossing guards, and striping.

School and municipal officials should formalize their relationship in defining roles for ensuring student safety. In addition to defraying costs associated with crossing guards, schools and municipalities can share the costs of sidewalk improvements, bike paths, and traffic signalization around schools. In addition, municipalities often agree to remove snow or complete other public works projects on school property. In these cases, formal intergovernmental agreements are suggested, setting forth insurance and indemnity provisions.

10. Work Together and Confer on Policy Issues of Mutual Interest

Elected school and municipal officials should meet regularly to ensure that the residents of their communities are being served by the entities with maximum efficiency and effectiveness. Good practice dictates that communication between municipal and school officials is continuous and consistent. In addition to staff communications, board members should meet on a regular basis in a formal setting to discuss issues of mutual interest and concern. As governing becomes more complex, and issues such as emergency preparedness, disaster planning, infrastructure construction and maintenance, and safety and security continue to take center stage, municipal and school officials should develop common strategies for addressing these (and other) issues.

Also, municipal and school leaders should be wary of “handshake” deals. While formal intergovernmental agreements are not always possible, it is much more advantageous to define expectations up front, in writing, than to find out later that one party is not keeping up their end of the bargain. School and municipal officials should

regularly assess their joint needs and obligations, and determine how they can work together to benefit kids, their parents and the greater community.