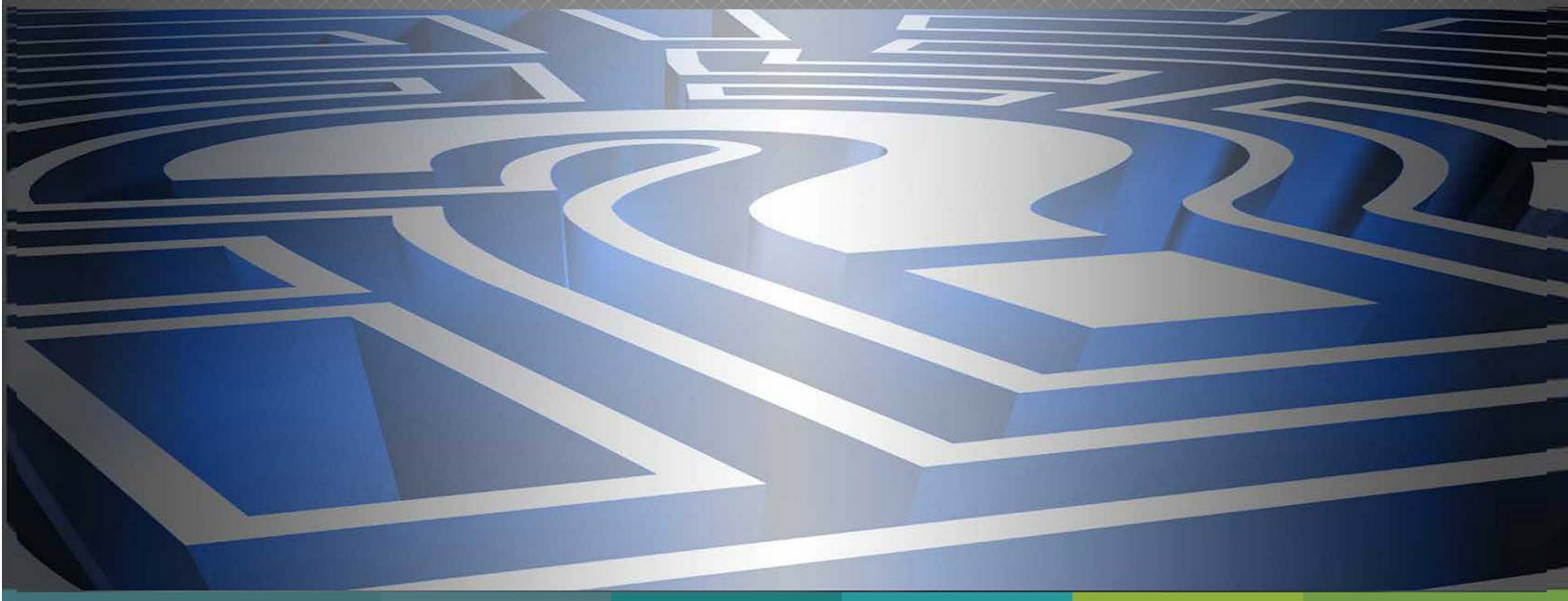
Ancel Glink

Think Ancel Glink



Municipal Questions & Answers

304 Governmental Questions That Have Actual Answers

Stewart H. Diamond
Adam B. Simon
Steven D. Mahrt

2019 Edition

ancelglink.com

Local Government

Ancel Glink

Municipal Q&A:

304 Questions That Have Actual Answers

2019 Edition

Edited by
Stewart H. Diamond, Adam B. Simon and Steve D. Mahrt

ANCEL GLINK, P.C.
140 South Dearborn, Suite 600
Chicago, Illinois 60603
(312) 782-7606
ancelglink.com

Preface to the 2019 Edition

Ancel Glink lawyers have represented governmental bodies for more than 80 years. During that time, our attorneys have been asked tens of thousands of questions and, hopefully, have generally given satisfactory answers. Because being an official of a community, or even a citizen dealing with a community, may be a new experience, it is not clear that either life's lessons or logic will produce the correct answer. A knowledge of court cases or the Municipal Code alone will not always produce usable results.

Sometimes, the Legislature in drafting statutes may have made unusual or inefficient choices and in other cases you may discover that the power you wish the government to assert is given to some other entity in the state. Even a search of the statutes may not give the appropriate answer because judicial decisions which interpret statutes may, in effect, impose additional conditions or add unexpected interpretations. Even appellate court cases sometimes reach inconsistent conclusions. Our lawyers have tried, in answering questions for clients, to combine the law with considerations of public policy, practicality and cost.

This handbook contains a list of several hundred questions and answers divided into a series of categories, followed by an index of subjects discussed. Most of these questions relate to municipalities, but many of the issues discussed apply in similar ways to other governmental bodies. Because these questions and answers were produced over a period of time, there is some overlap among questions. We have, however, edited and updated them for this edition. Unless otherwise noted we will refer to 65 Illinois Compiled Statutes, which contains the Municipal Code, as the "Act," usually followed by the appropriate section number. In this 2019 edition of the handbook, we have somewhat expanded the number of questions asked and answered. We have also added an index.

This edition contains many of the questions most frequently asked of Ancel Glink attorneys at the public meetings they attend on behalf of clients and at the many seminars and conferences at which lawyers from our law firm appear. This handbook is not intended as a comprehensive list of answers to the most important municipal law questions, but they should give readers an idea of the range of issues which public officials must deal with and the complexity of those issues. It is also important to recognize that, if one or two facts are slightly changed in any question, it is likely that the answer would be different. Unless specifically mentioned, the answer given applies to Illinois non-home rule communities. In many cases, home rule communities are able to modify their ordinances and actions in ways different from or even contrary to state law, but without a specific pre-emption of their home rule powers the changes are valid. There are limitations, however, even on things that home rule communities can do since the exercise of this broad power must always be aimed at issues within the "government and affairs" of the home rule unit, and must not have been pre-empted by the Legislature, either expressly or by implication.

A more in-depth analysis of some of these issues can be found by a visit either to our law firm's web site www.ancelglink.com or in another Ancel Glink volume, the *Illinois Municipal Handbook* published by the Illinois Municipal League. That book often contains a fuller picture of the issues which we deal with in this handbook through snapshots.

As your editors, we have drawn from questions and answers produced by Ancel Glink attorneys over the past few years. In many cases, we have quoted the question exactly as asked at a seminar or e-mailed to us to show the frustration and concern these issues often generate. Many lawyers at our firm have contributed to the answers provided. We thank them for their hard work and we take full responsibility if we have failed to update any response where new statutory or case law requires a slightly different answer. Changed answers may also be appropriate if there are statutory or case-law changes between published editions. Now-retired attorney Parker H. Johnson worked on earlier versions of this handbook, and we continue to appreciate his many years of contributions. Portions of the handbook on the Open Meetings Act and Freedom of Information Act were worked on by Steven D. Mahrt, who heads up our Bloomington Office.

Stewart H. Diamond
Adam B. Simon
Steven D. Mahrt

May, 2019

ABOUT THE FIRM

Ancel Glink, P.C., is a law firm with more than 30 attorneys that concentrates its practice in the representation of governmental bodies. The firm was founded in 1931 by Louis Ancel, who began representing governmental bodies in Chicago's suburban ring. The firm has always served a variety of local governments throughout the state. Among our current clients are municipalities, park districts, school districts, townships, water and sewer agencies, fire protection districts, library districts and other special districts and inter-governmental agencies. The lawyers at Ancel Glink helped create the first governmental self-insurance pool in Illinois and currently work with many intergovernmental pools that provide coverage for property, liability, workers' compensation, civil rights and health claims.

The law firm represents governmental bodies as regular corporate counsel, legislative counsel and as special counsel. In many cases, we have been hired by the local government's regular attorney to provide consulting services or to handle special matters. The firm's experience with a variety of governmental bodies helps us assist our clients in working cooperatively with other governments. Although we rarely recommend litigation as a first choice, the lawyers at Ancel Glink have represented governmental bodies in thousands of lawsuits. We have had excellent success in trial courts in all of the counties in the metropolitan Chicago area and in circuit courts throughout the state. During the history of the firm, our lawyers have argued over 300 cases before state and federal appellate courts. The philosophy of the firm is to add our legal expertise to the practical and political context provided to us by elected and appointed officials. We understand that our role is to advise and not to make policy. Because almost all of our clients are governmental bodies, our fee structure reflects the need for cost-effective representation. We provide the level of expertise associated with large firms in a small firm environment. We provide our governmental clients with a high level of expertise, energy, creativity and hands-on services.

Ancel Glink is committed to educating public officials throughout the State of Illinois. Our attorneys write the *Illinois Municipal Handbook*, a publication of the Illinois Municipal League, the *Laws and Duties Handbook,* a publication of the Township Officials of Illinois, as well as the *Illinois Park District Law Handbook*, a publication of the Illinois Association of Park Districts. We also produce handbooks for library and fire protection district officials. The firm places a number of publications on its website, which can be downloaded without charge. A list of those pamphlets, other than the one you are reading, are: Tort Immunity Handbook; Municipal Annexation Handbook; Lien on Me: Using Liens to Collect Municipal Debt and Expenditures; 10 Things You Need to Know About 13 Local Government Issues; Labor Law for Public Employers, Large and Small; Zoning Tools of the Trade; Zoning Administration Handbook; Handbook for Newly-Elected Officials; and Economic Development for Municipal Officials. More information about the firm can be found at: ancelglink.com.

If you think Ancel Glink can help your government or assist your local attorney, please call Stewart H. Diamond, Robert K. Bush, Thomas G. DiCianni, Keri-Lyn J. Krafthefer, Derke J. Price, Scott A. Puma, or Julie A. Tappendorf. If you have any questions about an answer in this handbook, please give one of the editors a call at (312) 782-7606, or email us at sdiamond@ancelglink.com.

ABOUT THE EDITORS

Stewart H. Diamond

Stewart H. Diamond is a senior partner with Ancel Glink, where he concentrates his practice in representation of local governmental bodies. Mr. Diamond is the originating General Editor of the IICLE handbooks on Municipal Law and Practice in Illinois and Illinois School Law and is well known throughout the state for his expertise in local governmental law. Mr. Diamond has written many articles on local governmental law and drafted one of the first contract and bylaw agreements for a comprehensive intergovernmental self-insurance pool in the State of Illinois. Mr. Diamond has taught municipal law at Northwestern University School of Law and is a past chairman of the Illinois State Bar Association Local Government Law Section Council. In over 40 years of law practice, he has represented many governmental bodies as regular or special counsel in the Chicago metropolitan area and throughout the State. He was educated at the University of Chicago, where he received both his A.B. and J.D. degrees, and at University College, Oxford, England.

Paul N. Keller

Paul N. Keller is admitted to the bars of the United States Supreme Court, Illinois Supreme Court, Michigan Supreme Court, the District of Columbia Court of Appeals, the federal courts of appeals for the Seventh Circuit and the District of Columbia Circuit, and the federal district courts for the Northern District of Illinois (Trial Bar) and the Eastern District of Wisconsin. He received his Bachelor's Degree from Albion College in 1969 and his J.D. from Wayne State University School of Law in 1972.

Mr. Keller served for twenty years as City attorney of the City of Park Ridge, Illinois. In that capacity, he was chief legal counsel to the Mayor, clerk, treasurer, City Council, Manager and all department heads. He advised all Boards and commissions, including the library Board, plan commission, license review Board, zoning Board, and civil service commission. He drafted all ordinances and other legislative documents, edited the municipal code, and drafted or reviewed all contracts. He negotiated utility, cable and telecommunication franchise agreements. He designed the City's first liquor license law and the real estate transfer tax. He supervised traffic court prosecution and personally prosecuted housing court and demolition cases. He was lead counsel for the City in litigation relating to zoning and land use, construction, annexation, eminent domain, police powers, employment, taxation and many other matters, and represented the City in the Illinois Supreme Court and the United States Supreme Court.

As a private admiralty lawyer, Mr. Keller was lead counsel in the landmark case of Zych v. The Lady Elgin, a ten-year lawsuit concerning historic preservation and title to the famous Lake Michigan shipwreck, in which the Illinois Supreme Court ruled unanimously in favor of Mr. Keller's client. He also wrote the amicus brief on the legal history of the Civil War in United States v. Steinmetz, concerning title to the bell from the wreck of the Confederate raider, C.S.S. Alabama.

Formerly a police officer, Mr. Keller served as legal advisor to the Detroit Police Department, as consultant to the Police Foundation, and as national coordinator of police legal advisor programs

at the International Association of Chiefs of Police, in Washington, D.C. He taught law and police administration at the Traffic Institute of Northwestern University and practiced labor and employment law as general counsel to regional associations of police, fire and public works employees.

Adam W. Lasker

Adam W. Lasker began his legal career as an election-law attorney helping candidates for public office with their legal needs, including nominating petitions, campaign-finance disclosures and compliance with state and federal election laws. While a student at the John Marshall Law School, he worked as a law clerk, and later as an associate attorney, with the late Michael E. Lavelle, who was the first-ever chairman of the Illinois State Board of Elections and a former director of the Chicago Board of Elections before his decades of private practice. Mr. Lasker then ran his own law office as a sole practitioner prior to teaming up with Ancel Glink, where he represents Villages, Townships and other units of local government in matters including general governance, zoning and land use, and compliance with Illinois sunshine laws.

Mr. Lasker is a monthly contributor to the Illinois State Bar Association's flagship publication, the Illinois Bar Journal. He authors the magazine's "Law Pulse" column, focusing on recent developments in Illinois legislation, appellate and Supreme Court decisions and other general trends in the law. Prior to law school, he was a staff writer for the Chicago Daily Law Bulletin, for which he currently authors a bimonthly column called "Non-Billable Hours," after having served as editor-in-chief of his college newspaper, The Daily Cardinal, at the University of Wisconsin-Madison. He has twice been named by Illinois Super Lawyers as a "Rising Star" in the field of political law.

Adam B. Simon

Adam B. Simon represents municipalities, park districts and other special districts, focusing on a variety of areas, including public finance, zoning and economic development, real estate law, and telecommunications.

Mr. Simon combines his experience in economic development and public finance to counsel municipalities on the leveraging of public debt financing and private investment to create new public improvements and enhance economic development opportunities. He has helped to organize a number of special service areas, business redevelopment districts and tax increment financing (TIF) districts. Mr. Simon also serves as issuer's counsel for the sale of general obligation, revenue and alternate revenue bonds. With respect to general public finance, Mr. Simon has presented seminars and counsels the firm's clients on the preparation and calculation of the annual tax levy, preparation of the annual budget ordinance and cooperates with independent financial advisors to create capital expenditure plans. He has also counseled a number of clients on successful referendum campaigns related to capital improvements and increases in the limiting rate and debt service extension base.

Mr. Simon also counsels the firm's clients on cellular zoning and ground leases, right-of-way management and franchising. Related to this interest, Mr. Simon has lectured or written on topics ranging from municipal broadband authority, federal preemption of local zoning authority over

satellite dishes and cellular antennas, and E-mail and Internet use policies. More recently, Mr. Simon has developed materials for our clients related to the regulation and siting of wind turbines, both for self-consumption and commercial wind farm developments.

Steven D. Mahrt

Steven D. Mahrt has represented local governmental entities for over 35 years in all aspects of municipal law, including governmental practices and procedures, zoning, labor and employment law issues, and representation of municipal boards and commissions.

For more than 30 years, he served as Corporation Counsel for the Town of Normal. In this role, he provided legal services to elected and appointed officials concerning all aspects of municipal law. Mr. Mahrt was involved in implementation of the Town of Normal Uptown Renewal project and the creation of multiple mixed use tax increment financing districts. Mr. Mahrt also provided legal support for the local bus company and the Central Illinois Regional Broadband Network.

Mr. Mahrt is active in the Illinois Municipal League's Home Rule Committee, serving as Chair of the Committee. He is on the Board of Directors of the Illinois Local Government Lawyer's Association and is currently the Vice President of the association. He is also a member of the International Municipal Lawyer's Association, the American Bar Association, the Illinois State Bar Association and the McLean County Bar Association.

Mr. Mahrt is a member of the Firm's labor and employment law committee and contributes to the AG blog Labor and Employment Update. Mr. Mahrt has presented at the Illinois Municipal League and Illinois Tax Increment Association on prevailing wages and is a regular contributor to the Illinois Local Government Lawyer's Association Journal.

Table of Contents

CHAPTER 1. MEETINGS

INTRODUCTION

Ancel Glink lawyers have fielded questions about the conduct of meetings for many years. We have attended countless meetings of virtually every type of local governmental entity. These questions arise repeatedly in these meetings. While the question of whether a quorum exists may seem simple, there are times when the correct answer is critical. Similarly, the vote necessary to pass a given ordinance, resolution, or motion must be kept in mind at all meetings. Questions are often asked about the minutes that must be kept for all governmental meetings to comply with the Open Meetings Act. Some local governments, particularly municipalities, have difficulty managing the portion of the meeting open to public comment from those who might attend. The conduct of closed sessions consistently generates questions. While an Ancel Glink lawyer at your meeting will be able to answer these kinds of questions, local officials, particularly the officer presiding at the meeting, should have a good grasp of the kinds of questions that do arise. Great constitutional issues and titanic clashes of party and personality seem to fade away over time, but procedural questions about meetings never go away.

QUORUM

1. Q: We have six voting Village Trustees that vote on issues at hand and a President that votes only in the event of a tie. One attorney has told me that a quorum is four Trustees present, while another attorney tells us that a quorum is three Trustees present. Which is correct?

A: In a commission form of government with five commissioners, three out of the five commissioners constitute a quorum. In fact, for all public bodies comprised of five members, three affirmative votes are required to take action. In all other governments like yours, however, a quorum is established under the provisions of the Act, §5/3.1-40-20. That section provides: "A ,majority of the corporate authorities shall constitute a quorum to do business. A smaller number, however, may adjourn from time-to-time and may compel the attendance of absentees under penalties including a fine for failure to attend, prescribed by the Council by ordinance." The Act, §5/1-1-2 states that the corporate authorities "means (a) the Mayor and Aldermen or similar body when the reference is to cities; (b) the President and Trustees are a similar body when the references to Villages or incorporated towns...." Thus, in a Village with six Trustees and a President, four constitutes a quorum. Those four individuals may be composed of either four Trustees or three Trustees and the President or Mayor. Perhaps the confusion between the two attorneys is that three Trustees are enough to be part of a quorum when joined with the presence of the Village President. In a City, the number is half of the Aldermen elected plus the Mayor. Vacancies in office usually don't affect the quorum. As is often the case in the law, there is one interesting exception to this rule. Act, §5/3.1-10-55 provides that: "If there is a vacancy in an elective office, and for any reason, there is not a quorum in the office of the corporate authorities, appointments to fill vacancies may be made or confirmed by a majority of the corporate authorities holding office at the time the appointment

is made or confirmed." This section, which could be called the "tornado or lottery exception," would apply when there is no quorum because of a natural disaster or because four Trustees have won the lottery and decided to leave town and travel the world.

2. Q: What do you do if a quorum shows up at a Plan Commission meeting, but some members leave before a vote is taken?

A: If a quorum is not present, no vote of the governmental body may be taken. If a quorum is lost for a brief period of time during a meeting, the meeting may still continue so long as no action is taken and no member present requests a roll call.

3. Q: In a Village with a Mayor and six Trustees, the Mayor and three Trustees attend a Board meeting. During the meeting, a Trustee storms out of the Board room and goes home to prevent a vote on a matter. Is the Trustee successful in preventing a vote on a matter at that meeting?

A: Yes. The Illinois Municipal Code provides that a quorum (a majority of the corporate authorities) is required to conduct business. A quorum of the body must be present not only to begin a meeting, but also at the time of a vote on any proposition. When less than a quorum remains at a meeting, business must be suspended. Any actions taken without a quorum are void. While this Village had a quorum when the meeting started, the Trustee's departure created a lack of a quorum, thereby preventing any further business at that meeting. Perhaps some other Trustee could be coaxed to join the meeting.

4. Q: What can a governmental body do if no quorum is present?

A: Very little. For some governmental bodies, like municipalities, the statutes provide that: "A smaller number, however, may adjourn from time to time and may compel the attendance of absentees under penalties (including a fine for failure to attend) prescribed by the Council by ordinance." Act, §5/3.1-40-20. Other governments may be able to take similar actions by including such a provision in their rules of procedure. Unfortunately, going on with a meeting with a majority of a quorum present, but no actual quorum, violates the Open Meetings Act. The Open Meetings Act applies not only to the corporate authorities of governmental bodies, but also to their committees and subsidiary bodies. Where less than a quorum is present and there are citizens who wish to address the public body, it is probably permissible–and certainly practical–to tell the members of the public that you will be happy to listen to their comments, but that you will do so as private citizens without convening the meeting and no minutes will be recorded. In order to incorporate their comments into the actual record, they would need to come to the public meeting at which their item of interest is being discussed. They may also be told when the matter will be discussed again and if they are sure of the new date, they can announce when a special meeting or an emergency meeting will be called.

5. Q: Our Village Board consists of six Trustees and the President. Is the President counted in determining a quorum? If she is, then a quorum is four. If not, then a quorum is three. But if a quorum is three, then a majority of a quorum is two, and no two Trustees can ever talk to each other about Village business without violating the Open Meetings Act.

A: While state law sometimes refers to "the Village Board" (or "City Council") and sometimes refers to "the corporate authorities" when defining how many votes are necessary to pass a measure, in our opinion the President (or Mayor) is always considered a member of the body for purposes of determining a quorum. So a quorum of the seven-member Village Board is four, and a majority of the quorum is three. Therefore, when two Trustees discuss Village business in private, they are not violating the Open Meetings Act. But if a third Trustee is present, they cannot discuss public business.

This is not a problem in your case but it has been a serious problem in governments like a commission form municipality and for the corporate authorities of other governmental types which only have five members. For example, in a Park District with five commissioners, a quorum is three and a majority of the quorum is two. Until the Open Meetings Act was amended in 2007, no two Park District commissioners could discuss district business outside of properly convened meeting. In 2007 the Act was amended to provide that, for a five-member Board, a meeting occurred when a quorum, i.e., three members, were present, not a majority of a quorum, i.e., two members. Further, all actions by five-member Boards require no less than the affirmative vote of at least three members even if a majority of those present are in agreement.

VOTE AND VETO

6. Q: What do you do if the Mayor unexpectedly vetoes an ordinance at the meeting after it was passed and there aren't enough Aldermen present to override the veto?

A: The law regarding the veto override is now a three-step process. First, the Council or Board passes the matter which the Mayor has the right to act upon by approval or veto. Not all matters are subject to the Mayor's veto. The Mayor can veto all ordinances and any resolutions or motions which create a liability against a municipality, provide for the expenditure or appropriation of its money or sell any municipal property. The second step in the process is the action of the Mayor, who must in writing veto the Council or Board action. The veto is to be returned to the Council or Board at the next regular meeting occurring not less than five days after passage of the action vetoed. Before a change in the law, it was thought that the Council or Board could act to override the Mayor or President's veto at the same meeting at which the veto message was delivered. The statute has now been clarified to provide that the response of the legislative body is to take place at the next regular meeting which follows the one at which the veto message was delivered. While somewhat delaying and extending the process, this statutory

change now prevents a situation where the Mayor can deliver a veto message unexpectedly at a meeting at which there are not sufficient members present to override the veto. (Act, §5/3.1-40-45). A Council or Board may be able to adopt a rule providing that the action to override the Mayor's veto may be tabled to a meeting at which more members are in attendance. Remember that there are a few governmental forms in which the Mayor or President does not have veto power.

7. Q: Are the votes of four Trustees, in a Village, adequate to authorize the execution of an annexation agreement?

A: No. In Illinois, a significant number of actions by municipalities require a greater than majority vote. A list of many of these items is found in the *Illinois Municipal Handbook*, authored by the attorneys of this firm, on a volunteer basis, and published by the Illinois Municipal League. If a matter requires an extraordinary vote, the Mayor or Village President, who in most communities does not ordinarily vote, is entitled to vote and his or her vote may be essential to assure passage. In the case of an agreement to authorize the execution of an annexation agreement, the vote authorizing this act must receive the vote of two-thirds of the corporate authorities. Note that the statute speaks of corporate authorities rather than Aldermen or Trustees. When that phrase is used, the group includes both the Aldermen or Trustees and the Mayor or Village President. In a Village, five affirmative votes, out of the seven members of the corporate authorities, is required to authorize the execution of an annexation agreement. Interestingly enough, the annexation of property itself would only require four votes, but most developers would not agree to annex large tracts of land to a municipality without procuring some of the benefits of an annexation agreement. Developers are interested in annexing their property to communities under the terms of an agreement that binds both parties to promises regarding the development for a period of up to 20 years.

8. Q: In a Village with a President and six Trustees, the vote to approve an ordinance authorizing the execution of an annexation agreement is 3-yes, 2-no and 1-absent. Does the President vote? Does the ordinance pass?

A: The Village President votes because half of the Board has voted in favor of a proposition, but there is no tie; however, the ordinance fails because an ordinance to approve the execution of an annexation agreement requires at least the two-thirds vote of the corporate authorities, which in this case, would require five votes. (Act, §5/11-15.1-3) It is important for elected officials to know those instances in which an extraordinary majority vote is required.

9. Q: Does a Mayor have to approve an ordinance for it to become effective?

A: No. When the municipality passes an ordinance, all Mayors who possess veto power have the choice of approving the ordinance by signing it, vetoing the ordinance, or allowing it to become effective without their signature. Mayors have until the next regular or special meeting, which occurs not less than 5 days after

the passage of the ordinance, to decide whether they wish to veto the ordinance. Vetoes must be presented in writing at or prior to the date of that subsequent meeting. The Council or Board must then wait one additional regular meeting before making an effort to achieve the vote of at least two-thirds of the Aldermen or Trustees then holding office in order to override the Mayoral veto. Mayors with veto power have the ability to reject all motions or resolutions involving the expenditure of funds and all ordinances without regard to subject.

10. Q: Can a Mayor veto part of an appropriation?

A: In Illinois, Mayors are given the ability to return items to the Council or Board with a partial veto which involves only some of the items contained within an ordinance or motion authorizing the appropriation or expenditure of sums of money. Act, §5/3.1-40-45.

11. Q: Can an Alderman who is out-of-town for the meeting where a vote is to be taken to override a Mayor's veto telephone in his or her vote?

A: Yes. State law allows this practice so long as a quorum is already present and under other Council rules. 5 ILCS 12/7. The Alderman may participate by telephone if he is prevented by illness, employment, or emergency from attending. (being on vacation does not qualify). The Council must adopt rules conforming to the statutory requirements in order to allow remote attendance. If the requisite conditions are met, the absent member can take an active part in a meeting by telephone or video connection.

12. Q: Can a governmental body reconsider actions previously taken?

A: Governmental bodies generally have the ability to reconsider actions previously taken subject to their own rules of procedure and the rights of intervening third-parties. If, for example, a governmental body has authorized the execution of a contract, and that document has been signed, it cannot destroy the rights of the other party to the contract if a majority of its members have simply had a change of mind at the next governmental meeting. The rules applicable to some governmental bodies do make the decision of a legislative body subject to the veto of an executive. In those cases, the effectuation of a governmental decision awaits the determination of the executive who has the ability to veto the legislative action, subject to having the veto overridden.

The procedures of some governmental bodies also specifically deal with efforts by the legislative branch of government to reconsider and overrule a decision made at one meeting at the next meeting of the public body. Those rules generally require that a motion to reconsider be made by an individual who was on the prevailing side of the motion and may have changed his or her mind. Such rules, however, generally cannot interfere with the rights of third parties who had acted upon the governmental action during the period of its validity. Sometimes, the rights of third parties who have acted on the basis of the prior governmental

action have a right to continue under the prior rules, such as a property owner who may be entitled to continue a "non-conforming use."

Finally, decisions made by a governmental body may be overturned by later action of the legislative body. This is especially the case if new facts have come to the attention of the government which lead a majority of its members to wish to overturn actions previously taken. Normally, however, procedural rules would allow the presiding officer of a meeting to refuse to recognize an individual on the losing side of an issue who wishes to continue to debate a matter which the governmental body has recently discussed and acted upon.

13. Q: How is a member of a Legislative body to determine whether he or she should not vote on a matter due to a conflict of interest?

A: This is one of the most difficult questions regarding the process of a legislative body. Illinois law, with some restrictions, generally forbids an elected official from entering into contracts with the governmental body on which they serve. Where there is an economic interest involved merely abstaining or not being present for the vote will not cure the conflict of interest, which constitutes an improper and generally criminal act. That economic conflict of interest exists whether the economic benefit is direct or indirect. There are certain contracts of limited amounts which members of a Board or Council can enter into. They must disclose their ownership and not vote or participate in the discussion. There is not, however, an illegal conflict of interest if the contract is with a relative or friend so long as the financial benefit does not inure to the Board or Council member. Other conflicts of interest tend to be issues of a political rather than a legal nature. Elected or appointed officials need to determine whether the citizens of the community would think it appropriate or inappropriate for them to vote on matters about which they had a special interest. For example, should a Board or Council member vote or not vote on a matter which involves a person with whom he or she has a business relationship in his or her regular employment? There is no statutory prohibition regarding this issue, except where it is known in advance that the vote would result in a business transaction with the elected officials. On the other hand, it would be illegal for a Board of Council member, who is the owner of a lumber yard, to vote in favor of the annexation of a residential development if the developer had agreed in advance to buy materials from that elected official's company. Almost all other types of "conflicts of interest" are not improper in Illinois other than raising questions about the independence of the official. Finally, there is nothing improper about an Alderman voting against a zoning change in his or her Ward if that elected official believes that the requested zoning is not appropriate. Sometimes, elected officials choose not to vote on certain issues where, because of the individuals or the issues involved, they do not feel that they can render a fair and independent judgment

14. Q: A Council of eight Aldermen and a Mayor, wishing to award a contract to the second lowest bidder, votes 4-3 (and one abstention) to reject all bids. A motion is then made to award the contract to the second lowest bidder and it receives a 5-3 vote. Is the contract valid?

A: If the City is home-rule and has its own ordinance, it may provide for the award of contracts based upon the public interest and not just to the lowest responsible bidder. Thus, the City could vote simply to award the contract to the second lowest bidder. Sometimes, however, this may discourage bidders if they think the award will be made upon some non-objective basis. If the City is not home-rule, it may find that the *lowest* bid is not responsive to other selection criteria advertised (e.g. specific experience), making them a non-responsible bidder. Because non-home rule entities must award contracts to the lowest responsible, a legislative finding that the low bidder is non-responsive will disqualify it and allow the public body to move on to the lowest *responsible* bid, which may be the second lowest bid.

Alternatively, it can reject all bids by a simple majority of the quorum vote (4-3) and then award a contract without bidding provided there is a 2/3 majority vote of Aldermen or Trustees holding office, that being six out of eight Aldermen. Once all bids are rejected, however, no prior bidders can be automatically held to a former quote unless they agree to its continuing validity. (Act, §5/8-9-1.) In this instance, the vote of 5-3 would be insufficient to approve the award of a contract to the second lowest bidder since it is not 2/3 of eight. In either case, the Council can also vote to negotiate a lesser price–but not any changed specifications–with the low bidder only. (720 ILCS 5/33E-12.)

15. Q: Does an expenditure of funds require a simple majority vote or a two-thirds vote to pass in a municipality?

A: The Act, §5/3.1-40-40 requires that all ordinances, resolutions and motions to (a) create any financial liability against the municipality, i.e., to borrow money; or (b) authorize the expenditure or appropriation of money require the concurrence of a majority of all members of the Board or Council then holding office, including the President or Mayor. Certain kinds of expenditure have different vote requirements. For example, awarding a contract in excess of $20,000 for a public improvement project, without competitive bidding, requires approval by a two-thirds vote of the Aldermen or Trustees. The Mayor or President does not vote on this issue. Some issues state that an "affirmative vote" is required. In that case, an abstention cannot be counted.

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

A: One of the things that a new Mayor needs to learn is when he or she votes. In some municipalities, like those which operate under the commission form of government, the Mayor always votes and does not have any veto power. Under

most other governmental forms, the Mayor has the right to but is not obligated to vote on three occasions. Those occasions are: (1) when the vote of the Council or Board is tied; (2) When the statutes require that a matter be approved by a greater than majority vote of the corporate authorities; and (3) When exactly half of the Council or Board has voted in favor of a matter, but there still is no tie. (Example: 3 to 2). In each of those decisions, the Mayor has the ability to vote even though sometimes that vote may actually create a tie or may not result in the approval of the motion. Once the Mayor learns when he or she gets to vote, the Mayor can turn to the other important mystery of the Mayor's power–the right to veto. That issue and many others are described in substantial detail in the *Illinois Municipal Handbook*, which attorneys at Ancel Glink write on a volunteer basis for the Illinois Municipal League.

17. Q: A Village Board (with the Mayor and six Trustees) generally uses an omnibus vote procedure. At one meeting, Trustee Ancel makes a motion to establish a consent agenda, which passes unanimously. The consent agenda consists of five ordinances. When the vote is taken on whether to approve the items on the consent agenda, three Trustees, including Trustee Ancel, vote no and the other three vote yes. The President breaks the tie and votes yes. Does the motion pass or fail?

A: The motion passes. By unanimous consent, the corporate authorities may agree to take a single vote by yeas and nays on the question of the passage of two or more designated ordinances, orders, resolutions or motions. These several items which have been placed together for voting purposes are to be entered into the minutes under the designation "omnibus vote" after which the names of the members and their vote on the total package of items is to be recorded. Although the vote to establish the omnibus vote or consent agenda must be unanimous, the single vote on the items themselves need not be unanimous. There is no requirement that the Trustee who makes the motion to establish the consent agenda support all of the substantive items on the agenda. The Trustee could be in favor of taking one vote on the items and against the actual items. We recommend you check your local rules of procedure to see whether there are restrictions which prevent a movant or seconder of a motion from voting against it."

18. Q: Following a heated debate over how it could increase tourism, a Village Board passed an ordinance declaring that the Village's motto is "The Home of the Blair Witch." At the next regular meeting, the Mayor vetoes the ordinance by signing on the ordinance the words "vetoed this silly ordinance on this 1st day of May, 2006" followed by her signature. She provides no written reasons for the veto indicating what objections she has to the ordinance. Is the veto valid? Is the ordinance valid if the Mayor refuses to sign it at all?

A: The signed veto message is sufficient to veto the ordinance. The Municipal Code specifies that, to veto an ordinance, she "shall return [it] to the City Council, with [her] written objections, at the next regular meeting of the City Council occurring

not less than 5 days after [the ordinance's] passage." Act, §5/3.1-40-45. The courts have surprisingly held that the requirement that the Mayor return "written objections" does not mean that "reasons" for the veto must be returned in writing, but only that the fact that the veto was made must be reduced to writing. If, however, the Mayor does not return a veto and merely refuses to sign the ordinance at all within the designated time, it becomes effective despite the absence of the Mayor's signature.

19. Q: Must an elected or appointed official recuse herself from voting on a matter which directly affects her family? What about when the interest is only indirect or peripheral? What should a Board do when so many of its members recuse themselves that it cannot pass a motion?

A: Section 3.1-55-10 of the Act prohibits any municipal officer, (not just elected officials), from being financially interested, directly or indirectly, in an contract with the municipality, or any sale to or work for the municipality. If the official does not receive any personal financial benefit, a contract involving members of her family would not be contrary to law. If it is not an improper vote because of a true economic interest, the elected or appointed official could choose to recuse him or herself in which case the vote would not count at all. A similar problem could arise where a member of a Board or a committee is asked to recuse himself due to alleged bias for or against one of the participants. This is commonly known as "an appearance of impropriety." There are no specific rules about such situations. When to recuse oneself due to personal bias or philosophy is usually a matter for the individual official to decide for himself or herself.

On very rare occasions, it may happen that a matter cannot be acted upon by a governmental body because there are too any recusals. In that case, if the passage of the matter will significantly benefit the governmental body, members who ordinarily would recuse themselves may choose to abstain, so long as that is a lawful option. In many instances, an abstention will count with the majority.

20. Q: Our Board has been told that if a member is absent, the absence is counted as a "no" vote on a rezoning ordinance.

A: An absent member cannot vote at all, except by phone, under procedures approved by the municipality, so it would be improper to count an absence as a vote either for or against a proposal. The person telling you that an absence is a "no" vote on zoning matters may be getting confused about "super-majority" votes. In some zoning cases (and other situations), a 2/3 or 3/4 majority vote is required to approve a proposal. If a member is absent, there may not be enough "yes" votes to approve the proposal, even if a simple majority votes in favor of it.

21. Q: Can an item be discussed and voted on if it does not appear on the agenda?

A: Any item can be DISCUSSED at a regular meeting, even if it is not on the published agenda. At a special meeting, only items on the agenda can be

discussed. However, appellate court decisions have held that it is improper to VOTE on an item which is not on the agenda. We advise our clients not to vote on matters which do not appear on the agenda. If it is absolutely necessary to act on some matter, a special meeting or even an emergency meeting can be convened, on proper notice, with the crucial item for action being shown on the agenda.

MINUTES

22. Q: What do you do if the clerk is ill and cannot take the minutes?

A: An opinion by the Illinois Attorney General makes it clear that the municipal Clerk is entitled to take minutes of the meetings of the corporate authorities. If the clerk is ill and cannot take the minutes, and there is a deputy clerk, that individual should take the minutes. If the clerk or deputy clerk is not present, then the Council or Board can and should appoint a recording secretary to take the minutes of the meeting. Clerks are also permitted to attend all meetings of the corporate authorities, both open and closed meetings. The clerk can be barred from attendance at a closed meeting only when the matter being discussed is one in which the clerk's position is adverse to that of the municipality, such as in litigation involving the clerk.

23. Q: When do minutes of open meetings have to be approved?

A: A recent amendment to the Open Meetings Act requires that minutes of open meetings must be approved within 30 days of the meeting or at the second subsequent regular meeting, whichever is later. The law also now requires that minutes must be made available to the public, and posted on the governmental website (if the body has a staff person maintaining a website), within 10 days after the minutes are approved.

24. Q: As administrative assistant, I keep all of the Board minutes, ordinances, Board packets, etc. How long do I have to maintain the signed paper copies of the minutes? Right now I have the original signed copies in ring binders and I also print out and put them in a leather-bound book (without the signatures).

A: Board minutes and ordinances with original signatures should be permanently maintained and properly indexed. You never know when it's going to be important to determine exactly what the Board did in 2013, or why, 50 years from now, someone is going to want to be able to find the minutes of last week's meeting, but it will happen. Ring binders are OK for copies of the current year's minutes, to make them easily accessible, but the originals should be stored in fireproof file cabinets. State law requires that destruction of permanent public records must be approved by the State Archivist. The State will send a representative to visit your community and will work with you to produce a schedule for the destruction of records. Many times, records can be stored

permanently on a digital medium (CD, magnetic tape) so that paper copies can be shredded and disposed, but even that requires the consent of the State Archivist.

25. Q: A member of the zoning Board consistently goes to the Board's secretary after a meeting and tells her to write the minutes according to what he thinks was "meant to be said" at the meeting rather than what the secretary actually wrote in her notes. Is this proper procedure?

A: Not at all. An individual Board member has no authority to tell the secretary what to write in the minutes. The chairperson of the Board should tell the errant member to cut it out, and should tell the secretary to write the minutes according to what actually occurred at the meeting. A tape recording of the meeting would eliminate any doubt about what was actually said. Then, at the next meeting, when the minutes are presented for approval, the member who wants them changed can move to amend the minutes as he would like them to read. The full Board then can decide whether to approve the motion.

PUBLIC COMMENT

26. Q: Do members of the audience have a legal right to speak at Board or Council meetings?

A: Yes. While most Illinois municipalities have always allowed members of the audience to speak during one or more parts of a meeting, until recently there was no specific right for the public to orally address the Board or Council. However, P.A. 96-1473, which became effective January 1, 2011, provides that "Any person shall be permitted an opportunity to address public officials at meetings subject to this [Open Meetings] Act under the rules established and recorded by the public body." 5 ILCS 120/2.06(g). All public bodies must adopt appropriate rules governing procedures for citizens to address any meeting subject to the Open Meetings Act, and that includes, besides the Board or Council, all other committees such as the plan commission that are subject to the Act. Such rules may include time limits, place on the agenda, identification of the speaker for the purpose of preparing minutes, and the like. The statute is silent on whether the rules may allow limitations on subject matter a speaker might address, such as a restriction of comments only on agenda items. It is also important to distinguish a public meeting, where citizens have a right to speak, from a public hearing where public comment may be subject to due process considerations such as a right to cross-examination or questioning. The statute also says that these rules must be "recorded." This probably means simply that the rules must be made available to the public in some form. Even though the statute is fairly vague regarding the boundaries of the rules to be adopted, one should consult with local counsel regarding the impact the First Amendment has on public comment.

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

A: Different communities handle this issue in different ways. In most municipalities, citizens are allowed to speak at the beginning of the meeting. That way, the citizen who wishes to address an item not on the agenda may leave after he or she has made a comment. If you allow citizens to speak during the meeting, or require them to hold their comments to the end, chatty citizens may well want to address many items on the agenda about which they had no opinion until they sat there and thought about the matter. Under these circumstances, meetings may go much longer than planned. If, however, the members of the Council or Board have a sadistic streak, they may wish to force citizens to wait until the end of the meeting to make their comments. That would require them to sit through the entire meeting with the possibility that they will get tired and leave before they are allowed to say anything.

Most communities allow individuals to speak to matters not on the agenda at the beginning of the meeting and will allow limited public comments on items which are on the agenda. Where there has been a prior public hearing, before the plan commission or the zoning Board of Appeals, and the individuals have expressed their views before that body, the Council or Board may suggest that they have already received those comments and they would only be interested in having those matters briefly reiterated, along with the inclusion of any matters not previously discussed. Sometimes it is beneficial to ask a group of citizens if they will choose one or two spokespersons to represent the views of the entire group and the rules adopted by the public body may create incentives to do so. A list of all of those people who take that position can be created and the attendees can be told that the minutes will reflect their attendance at the meeting and the position which they wished to take on a particular subject. The time period for particular comments or a group of comments can be limited if fairly administered.

28. Q: Can a person in attendance at a public hearing ask questions of witnesses?

A: Yes. When the law requires, or municipalities permit, a public hearing process, the public is entitled to reasonable notice and an opportunity to actively participate. That participation includes the right to make presentations, ask questions and to cross-examine witnesses. The right to cross-examine must be reasonably exercised, and the government can develop rules of procedure which persons attending the hearing must follow. Please note that in many cases some rights to participate in a public hearing (e.g. cross-examination, subpoenas) may be limited to parties with a special interest in the matter being discussed, such as those who live in close proximity to a zoning application. No special classifications should limit any person's right to present testimony.

29. Q: The Village of Diamondback has traditionally had raucous Board meetings. While the population of the community is only 5,000, at least 200-300 people generally turn out for regular Board meetings. For years, the Board meetings have been held in the school auditorium because the Village Hall meeting room is insufficient to hold all the people who regularly attend. At one Village Board meeting, during public comment, a citizen stands up and spends a substantial period of time verbally berating the performance of the Mayor and several Board members. The Mayor, finally fed up with this tirade, orders the police officers in attendance (of which there are many) to remove the individual from the chamber. While some in the crowd applaud the move, has the Mayor created an unnecessary liability for himself and/or the Village?

A: It depends. If the Board has passed specific rules for public comment and the Mayor has fairly applied those rules, it reduces the likelihood of liability. It is important to remember the Village must permit public comment, and the Village Board of Diamondback must take the good with the bad, or be accused of applying their rules discriminatorily Each member of the public has a First Amendment right to say what he or she thinks about the performance of the elected officials. Depending on the circumstances, a tirade may very well be considered protected political speech.

30. Q: Can a person speaking at an open meeting prevent his or her comments from being televised, filmed or videotaped?

A: Sometimes. The Open Meetings Act generally allows an open meeting to be broadcast, televised, filmed or videotaped, by the public body, any news organization, or any member of the public. However, Section 2.05 of the OMA also provides that a witness testifying before any commission, agency or other tribunal subject to the OMA may refuse to testify if his or her testimony is being broadcast, televised, or recorded. The witness must first demand that any cameras or audio recorders be turned off; the public body itself cannot itself ban cameras or tape recorders. But when the witness does make such a demand, the public body must require that all cameras and recorders be turned off. Most local government agencies, such as School Boards, City Councils, Village Boards or Park District Boards, are not normally operating as "tribunals" hearing testimony by "witnesses" at their regular business meetings. So the right to prohibit cameras and recorders would not apply. On the other hand, plan commission hearings, liquor commission hearings and similar hearings often do involve witnesses testifying under oath. In such cases, the witness could demand that cameras and sound recordings be prohibited.

CLOSED SESSION

31. Q: Can a public body meet only for the purpose of going into a closed session?

A: Yes. But such a meeting, limited to closed session matters, must begin with a properly announced open session. An exception allows a governmental body to schedule a number of closed sessions by an authorizing vote if the discussions relate to the same particular matters and all meetings take place within 3 months of the vote.

32. Q: Is the clerk entitled to attend closed sessions?

A: Yes. By state law, the clerk is entitled to attend all meetings of the Board or Council with the exception of meetings such as those which may specifically involve the performance of the clerk, a criminal investigation involving the clerk, or litigation when the clerk is opposing the municipality. Any effort to bar the clerk from a meeting should be discussed with the municipal attorney.

33. Q: Do minutes need to be taken in closed sessions?

A: Yes. The Open Meetings Act requires that minutes be taken of all closed sessions of all public bodies including meetings of the legislative body, its committees and other commissions, committees or agencies of the local government. The minutes need only describe who attended the meeting, and in a general way what was discussed. Any actions tentatively authorized in closed session must subsequently be approved in open session.

34. Q: How are closed session minutes taken, approved and reviewed?

A: Taking Minutes

The Open Meetings Act, 5 ILCS 120/1, requires that minutes be kept of all meetings of the principal body and its committees whether the meetings are open or permitted by statute to be closed. Section 2 of the Open Meetings Act sets out more than 20 subjects which may be discussed in closed session. These discussions could also be had in open session, but, because of their nature, such as the discipline of employees, collective bargaining, the acquisition or sale of land, and litigation, they are often best discussed in a closed session. Closed session meetings must be authorized during an open session meeting, and the vote to go into closed session must be by roll call with the citation made to the specific exception which authorizes the closing of the meeting. The minutes are required to include, but need not be limited to:

a. the date, time and place of the meetings;

b. the members of the public body recorded as either present or absent; and

c. a summary of discussion on all matters proposed or deliberated.

Some governmental bodies like to have minutes which set out much of the content of the closed or open session. Other governments choose to utilize minutes which merely summarize the matters discussed. Either variant is acceptable so long as the minimum requirements of the statute are complied with. We generally do not recommend that minutes include a verbatim transcript of the meeting, as such detail is unnecessary and the cost to produce it is expensive.

Approving Minutes

One of the many items the Open Meetings Act authorizes to be dealt with in a closed session is the "Discussion of minutes of meetings lawfully closed under this Act, whether for purpose of approval by the body of the minutes or semi-annual review of the minutes...." It makes good sense to only discuss closed session minutes in a closed session. Otherwise, any disagreement over the contents of the minutes, discussed in open session, would reveal the general contents of those minutes at a time before their final release. There is a question as to whether minutes of closed sessions must be finally approved in open session. The 21st exclusion to the Open Meetings Act states that the minutes can be discussed in closed session "for purposes of approval by the body." However, subsection (e) of this same Section 2 of the Act, states that "No final action may be taken at a closed meeting."

It is clear that a governmental body can fully discuss and come to a consensus on the content of closed session minutes in a closed session. What is not entirely clear is once the closed session minutes have been discussed in a closed session meeting, whether they can be approved at that time, or whether there must be a formal vote to approve them in an open session? We have concluded that, although a consensus regarding minutes can be reached, a motion to approve the closed session minutes needs to take place in open session. That appears to be the law even though it is hard to understand how a debate over the appropriateness of the closed session minutes can take place in open session. Perhaps the public body could limit itself to a vote in open session without a discussion over confidential information.

Releasing Minutes

Every governmental body authorized to hold closed meetings must review the minutes of those meetings periodically, but no less than semi-annually, and the review may take place in closed session to determine whether there is still a need for confidentiality as to all or part of those minutes. If there is no need for such confidentiality, then it must be reported in an open session that the minutes or portions thereof no longer require confidential treatment and are available for public inspection. This is usually done by a motion or resolution, which specifically lists the minutes that are being released. In some governments, the resolution also lists the minutes which are still being retained.

To date, we have little precedential authority as to whether governments have reasonably exercised their rights to continue to hold minutes confidential for an extended period of time. Governments must remember that the general policy stated in the first section of the Open Meetings Act is that the intention of the Act is to protect the citizens' right to know and that exceptions to the Open Meetings Act requirements are to be strictly construed against closed meetings. On the other hand, a government should be able to keep confidential the contents of closed meeting minutes which, if released, would clearly endanger the public interest, invade personal privacy, or compromise the guaranteed rights of individuals. Audio or video tapes of closed sessions must now be taken and held for eighteen (18) months. The purpose of the tapes is to provide evidence in court if an Open Meetings Act violation is charged. When the corporate authorities approve, the tapes can be erased after eighteen (18) months if no case is pending.

35. Q: What do you do with minutes and tape recordings of closed session meetings?

A: The statutes require that minutes be taken of all meetings, whether open or closed to the public. Minutes of closed meetings should be approved in closed session. Every six months, the corporate authorities are required to review the minutes of closed session meetings which have not previously been released to the public to determine whether the minutes still need to be kept in confidence or whether such minutes, or portions thereof, no longer require confidential treatment and should be available for public inspection. That determination should be formalized by resolution in open session. (5 ILCS 120/2.06(c)). Governments are also required to record closed sessions on audio or video tape. The tapes can be erased after 18 months if the written minutes of the meeting have been approved and there has been no lawsuit filed to contest the validity of the closed session.

36. Q: Can the selection of the outside auditor for the municipality take place in closed session?

A: No. Up until a few years ago, discussions regarding the employment or dismissal of officers, employees and independent contractors could all be discussed in closed session. The latest version of the Open Meetings Act specifically states that issues relating to persons or firms employed as independent contractors, like auditors, consultant engineers and others, can only be discussed in open session. The law now only allows discussions regarding attorneys, among all independent contractors, to be held in closed session.

37. Q: Can the entire Council try to reach a settlement in the presence of the suing developer in closed session?

A: No. Although the municipality is free to invite potential witnesses, attorneys, consultants and other persons into a closed session to discuss litigation, the attendance list cannot include the person suing the municipality. Closed sessions for the purpose of discussing litigation are to prevent the opponent from gaining

an improper advantage. The reason is lost if, even to avoid public embarrassment, your opponent is allowed into the closed session. The only people then being kept in the dark are the public. It is worth noting here that all settlement agreements are considered public records which are subject to copying and inspection under the Freedom of Information Act.

38. Q: **Can our Council or Board discuss in closed session laying off employees and various budget cuts?**

A: No. The Public Access Counselor recently found a violation of the Open Meetings Act where governmental body discussed personnel decisions, but also delved into budgetary effects of staffing and services. The opinion said that a discussion of "the appointment, employment compensation, discipline, performance or dismissal of specific employees" does not allow a governmental body in closed session to discuss "issues that clearly impact the public body's budget, such as whether to fill a vacant position, the number of staff needed to provide an acceptable level of service...although those issues may directly affect the employment of specific employees." Public Access Opinion 12-011. How decisions of this nature will affect specific employees can be discussed in closed session, but the general public policy questions must be discussed at an open public meeting, although a workshop or a committee meeting may be the best place to discuss these ideas.

39. Q: Should matters susceptible to being discussed in closed session always be discussed in that forum?

A: A wide variety of items which can be discussed in closed session probably should only be discussed in closed session. Among those topics are matters of litigation, the acquisition of particular parcels of property and personnel decisions. In some cases, a matter can be discussed in closed session, but might be better discussed first in open session. One example might be the creation of a special assessment district. Such a district can only be created by the filing of a lawsuit. That matter could be discussed in closed session, and where specific strategy issues need to be talked about, a closed session would be appropriate.

On the other hand, the views of the public on the proposed special assessment area probably should be actively solicited before going forward with the project. The Mayor can discuss with the municipal attorney whether particular matters can be discussed in closed session, and whether the attorney has any advice as to whether some part or all of the discussion might take place in open session. Like most other decisions relating to municipalities, the Mayor cannot make this determination on his or her own. The only way in which a closed session can begin is if there is a motion and a second to go into closed session at an open meeting with the motion containing the specific exception in the Open Meetings Act which will allow a closed session to take place. That motion must pass on a roll call vote before the closed session can begin.

In addition, it is important for the Mayor and everyone else present to make certain that what is discussed in closed session continues to be a matter pertaining to the exemption specified in the vote. State law now requires that such closed sessions be audio or video-taped and that tape made available, initially for a judge to hear, in the event that there is a lawsuit contending that a violation of the Open Meetings Act has taken place. In most municipalities, that tape will be erased after 18 months, and after the written minutes of the closed session have been approved. Some communities that believe that the words of their elected officials are entirely golden and necessary to retain for posterity may ultimately release those tapes to the public.

40. Q: The Village of Peaceful Corners has a highly politicized Board of Trustees, only three of whom are aligned with the Village President. After almost every executive session, the substance of what was discussed behind closed doors makes its way either to the newspaper or into the hands of the Mayor's political opponents. After months of trying to identify the "leak," it is admitted by one of the Trustees that she has been passing information about closed sessions on to the newspaper and her political allies because, in her opinion, all government must be open to the public. The Mayor and his loyal Trustees want to kick Trustee Loudmouth off the Board. Can they accomplish this result? If not, what options are available to them?

A: There is no mechanism in the Illinois Municipal Code for either a home-rule or non-home rule community to "impeach" an elected member of the Board. At least one case has ruled that the Open Meetings Act does not offer any remedy or even provide a cause of action against a member of a public body who discloses information discussed or revealed during a closed session, thus making punishment of such acts by the governing bodies difficult, though not impossible. An official who chooses to reveal that the public body had, in a closed meeting, agreed to pay up to a certain amount to purchase real estate or settle a lawsuit, while the body was trying to negotiate for a lesser amount can seriously damage the community.

Communities can consider an application to the State's Attorney for a malfeasance prosecution or seek a court order on its own for an injunction against the member who is leaking confidential information. The State's Attorney can bring criminal proceedings against any person who violates the provisions of the Open Meetings Act. Upon conviction, a person can be sentenced under a Class C misdemeanor, fined up to $500.00 and imprisoned for up to 30 days. The public body could also "censure" the offending member through an appropriate resolution. While the finding would have little legal effect, the political or public relations ramifications may be significant. The Act, §5/3.1-40-15 also permits a municipality to punish its members for disorderly conduct.

41. Q: I am a municipal clerk. The Village Manager, who was present at a closed session of the Village Board, has asked me to make available to him the tape and the minutes of the closed session. I have never had such a request before, what should I do?

A: In many communities, where the relationship between the municipal Manager or administrator or other staff members, and the corporate authorities is seamless, such a request might seem perfectly natural and should be honored. In the absence of that relationship, however, you, as the keeper of the municipal records, have no right or obligation to provide the requested data to the Manager. Instead, you should direct the Manager to write a letter to the President and Board of Trustees asking them for permission to review the material for a particular governmental purpose. They could direct you to either give or withhold access to this material.

42. Q: The Village President wants to make a number of appointments to various Village Boards and commissions. Some of these appointments merely reappoint the incumbent members but a number of the appointments are new members. Various Trustees object to these appointments, not so much because they oppose the individual, but more because they don't know many of the individuals being appointed and want to discuss the qualifications of the various individuals to serve in the suggested capacities. One of the Trustees asked the Village attorney whether the qualifications of these individuals is a proper subject for a closed session under the Open Meetings Act or must the discussion take place in open session?

A: One exception to the Open Meetings Act is to allow a public body to discuss "the appointment … discipline, performance or dismissal of specific employees of the public body…." A second exception includes "the selection of a person to fill a public office as defined in this Act, including a vacancy in a public office, where the public body is given power to appoint under law or ordinance…." Under either provision, therefore, it appears a discussion concerning the qualifications of such appointees can be held in closed session. Interestingly, this may not be true for purely informal advisory Boards where the members do not serve in created offices but only on an ad hoc basis.

43. Q: If a finance committee of a governmental body goes into closed session to discuss the appointment of an auditor, and the audio taping machine does not work, what should it do?

A: Stop the meeting for two reasons. Not only the corporate authorities but also the committees of local governments are subject to the provisions of the Open Meetings Act. The finance committee, therefore, is required to follow the Open Meetings Act. It violates the Open Meetings Act when it goes into closed session to discuss the employment of an independent contractor, accountant, or auditor. The appointment or employment of an independent contractor, except for an attorney, can only be discussed in open session unless perhaps it relates to some other exempt area such as litigation. In addition, the Open Meetings Act now

requires all closed sessions to be audio or video recorded. For that reason, even if the meeting had been valid, it would need to cease when the recording equipment did not work.

44. Q: Can a governmental body go into a closed meeting even if the topic of "closed meeting" does not appear on the agenda of that meeting?

A: Probably yes, assuming the subject of the closed meeting discussion is otherwise appropriate. We know of no case on the subject but we believe that governmental efficiency should allow closed session issues that come up at the last minute or during the open session. Many governmental bodies routinely show the topic of "closed meeting" as an item on the agenda of every meeting, even if no closed discussion is expected, just in case something comes up at the last minute. But even without "closed meeting" on the agenda, it is not a violation of the Open Meetings Act to have a closed-meeting discussion. Of course, no final action can be taken in any closed meeting. In addition, if the subject of the discussion is not on the agenda, it would not be proper to go back into open session and take any action. Action on the subject of the closed meeting could only be taken when that subject is on the agenda. Be sure to comply with the procedures for going into a closed meeting: motion, roll call vote, disclosure of the exception under which the meeting is closed, and tape recording the discussion.

45. Q: I want access to closed session minutes of a Board meeting that I was unable to attend. The other Board members were told not to inform me of the discussion that took place. Do I have a right to listen to the tape or look at the minutes based on the fact that I am a member of the governing body?

A: A member of a Board can be denied the right to review tapes or minutes of closed meetings if the member could have been barred from attending the meeting in the first place. For example, if the member is in litigation against the government body, or involved in some other conflict or adverse action, which is the subject of the closed meeting, the member could be barred from attending. In that case, the member could also be denied the right to review tapes or minutes. The minutes of the open portion of the meeting must state the reason for going into closed session, and it may be possible to tell from those minutes what the subject of the closed session was. Other than in these circumstances, we are not aware of any legal basis for denying a member the right to review tapes or minutes of closed meetings.

46. Q: What should we know about recording closed meetings?

The following answers are based upon the general way in which the courts have interpreted the Open Meetings Act in other cases, along with what can be expected of us where the law is still unclear. Ultimately, courts will look for the actions by governments to generally serve the goals of openness and disclose as expressed in the Act.

a. Can we have the meeting transcribed by a court reporter? The Act seems to insist on audio or video recordings, without allowing straight transcription as a method to preserve the record. Since many court reporters use a tape recording as a back-up, this new law should not affect the ability of a municipality to retain a transcribed record along with an audio tape. In some cases, closed sessions, which previously took place in a smaller conference room, may be moved to the Council chamber so that the discussion can be picked up by the audio or video equipment in place for the public sessions.

b. Who has the responsibility for taping the meeting? The statute is silent on this subject. Each municipality should appoint some person who will be in charge of operating the audio or video machine and keeping the closed session tapes until they are erased. In many municipalities, the responsibility to make the recordings will probably fall to the municipal clerk. The clerk should make it clear that he or she will only be responsible for such recordings at meetings attended. Since this rule applies to closed sessions of committees of a Council or Board, along with any of its subsidiary bodies, there probably should be a statement by the clerk, perhaps in writing, as to those meetings for which the clerk agrees to assume responsibilities. Again, nothing in this new law specifically directs that this responsibility will be that of the clerk.

c. How fancy or professional must the recording be? One of the main arguments presented by the proponents of recording was that every governmental body could fully comply with it simply by providing an inexpensive audio tape recorder to record the meetings. Unless it is very easy for a government to produce a more expensive or finished product, or move to a video taping system, we can take the legislators at their word and tape with the simplest of machines. The tapes do not need to be transcribed and, if an action is brought under the Open Meetings Act, the judge will have the tapes to listen to. The statute does not require that individuals need to identify themselves on the tape or prevent talking over one another, or to make any change in their general procedures. Nonetheless, taking a roll call at the beginning of those in attendance is recommended. A simple audio tape will satisfy the statutory requirement.

d. Who can listen to the tapes? Any member of the governing body should be permitted to listen to these tapes except when the legal interest of a member is adverse to the governing body. Once saved, it may be argued in a variety of lawsuits that they are subject to discovery in civil cases as well as being available for review in cases charging a violation of the Act. This broader discovery should be resisted, since providing law enforcement officials specific evidence of what took place during a closed session was the principal reason put forward for the new law. A federal court has held that the Open Meetings Act does not bar discovery of the tapes in federal court suits.

The Illinois Press Association, without specific examples, argued that efforts to prosecute Open Meetings Act violations were thwarted because the people present were unwilling to testify as to what took place at the meeting. Now, if there is a complaint from a citizen, or one of the Council or Board members, to a State's Attorney or a private attorney, they can bring a lawsuit under the Open Meetings Act and require that the tapes be brought into court. The judge is then to review the tapes in private. If, after the review, the judge feels that contents of the tape or tapes may reveal violations of the Open Meetings Act, he or she can order them to be delivered or copies of them sent to the plaintiff bringing this action. If they do not contain evidence of a violation, the judge is to return the tapes to the government. In some cases, the tapes may be examined and offered for evidence by the plaintiffs in the suit, but the court may ultimately reject the introduction of this evidence, since it may not be probative as to the ultimate issue before the court.

Alternatively, a private citizen who believes that a violation of the Open Meetings Act has occurred, including improper closed sessions, may file a written complaint with the Public Access Counselor in the Attorney General's office. The Public Access Counselor will investigate the alleged violation and, if a violation is found, may issue a binding opinion requiring the municipality to take whatever measures are necessary to avoid such violations.

e. What should be recorded? A recording must be made of all parts of a closed session, including any preliminary statements people may make, and any closing statements, including a motion to return to open session and the vote on the motion. Obviously, a suggestion by any of the participants that the tape recorder be turned off for a few minutes, because embarrassing information is going to be discussed, will be a violation of the Act. The Press Association believes that many closed sessions drift off the subject which brought the parties into the closed session. Under these circumstances, the entirety of the session must be recorded.

f. What is to be done if the tape recorder breaks down or runs out of batteries, or there is no additional tape available? Under a reasonable reading of the Act, the meeting must stop at this point. Governmental officials should not risk being found to be in violation of the Open Meetings Act, since both civil and criminal penalties can apply. The closed session should simply stop. If the reaching of a decision by the governmental body is a true emergency, then the meeting can be recessed until the problem is fixed, or an open session emergency meeting may be called for the next day, which will begin with a motion being made to return to closed session. It is essential that the reason for reconvening the meeting without the normal minimum 48-hours notice be a true emergency. Another possibility, in some governmental bodies, is to return the meeting to open session. It may be that the matters that need to be discussed can be talked about with only a small

number of the members of the public then in attendance at the meeting. It may also be that the remainder of the discussion can be carefully talked about in open session without revealing any secrets which would put the governmental body at a disadvantage.

g. What if the government takes a vote in the closed session? Normally, governmental bodies must return to open session to take definitive action regarding matters discussed in closed session. On the other hand, the courts have held that a government may reach a binding consensus in closed session to, for example, direct its attorney to make an offer of settlement in pending litigation or the purchase of land. That is because it would not help the municipality if the motion "Settle the Anderson case for up to $55,000.00, starting with an offer of $40,000.00" is made in an open session. In that case, Anderson, if he hears about it, will not settle for less than $55,000.00. The initial discussion and consensus, which resulted in the attorney being authorized to make the offer, can be reached in closed session, and should be recorded on the audio or video tape. The action must later be confirmed by a vote in open session.

h. What happens if a governmental body unexpectedly needs to go into closed session and there is no audio or video tape readily available? Because the sanctions for violating the Open Meetings Act are so serious, governmental officials will need to know where a usable audio or video recorder and empty tapes are available within the governmental offices. Perhaps the person who has the responsibility for taking the minutes should be given the job of always bringing such a recording device to every public meeting where minutes will be taken.

i. Should the quality of the recording be monitored? The person who has the control over the audio or video recording should, on a periodic basis, monitor the quality and completeness of the recording. This probably does not need to be done at every meeting. If such a check is undertaken, some occasional lapse in recording may be forgiven, whereas, the court and the State's Attorney will undoubtedly frown upon several months of garbled recordings.

j. What should be done with these recordings, and who should have access to them? The recordings should be kept in a safe place and typically under lock and key. Any member of the governing body who, for example, wishes to refresh his or her recollection by listening to a still non-released tape should sign a log showing what tape was checked out and how long it was kept. In most cases, the individual should not be able to remove the tape from the building where it is stored. The person in charge of securing the tapes might even make a copy of the tape for the individual who wishes to refresh his or her recollection, but even that copy should generally not leave the government's custody.

k. When can tapes be erased? Tapes of closed session minutes must be retained by the governmental body for a period of at least 18 months after the meeting is recorded. After that time, the tape may be discarded and erased if two events take place. First, the destruction of the tapes must be authorized by the entity which held the meeting. We believe that this motion or resolution must be approved in open session. Second, the written minutes of the meeting must be "approved." The approval of the minutes must be done in open session, although it can be discussed in closed session. The written minutes must be "approved," but they need not be released to the public in order for the tape to be erased if the requisite time has passed. The 18-month period of time was considered adequate for any lawsuit to be filed involving alleged violation of the Open Meetings Act. When such a lawsuit is filed, the court would likely prevent the erasure of the tape until a final resolution of the lawsuit.

It is likely that many governmental bodies, while considering the release of the minutes every six months, as required, will conclude that minutes of closed session meetings will typically not be released for a period in excess of 18 months after the meeting. So long as the written minutes of the meeting have been approved, the tapes can then be authorized to be erased and thereafter erased. We believe that the Legislature understood that audio or video tapes of these meetings would usually not become available to the general public. That is because their main audience was intended to be judges hearing those hopefully few cases alleging violations of the Open Meetings Act. The taping is really not being done for the purpose of acquainting the public with the specific words used by their officials when discussing matters of great sensitivity in closed sessions. Instead, this whole process is simply to secure evidence of any improper use of the Open Meetings Act.

Unfortunately, while not the reason for the law, these tapes can be politically potent. If, for example, a candidate for office states that he could not remember being in favor of settling a controversial zoning case, the rest of the Board or Council could order the tapes of a closed session meeting released at which that member argued that the project in question should be approved or the lawsuit settled. While historians may argue that the tapes of these meetings would provide a new source of oral history, we believe most commentators would conclude that there is more ill than good to releasing both the written minutes of a meeting and also its recorded counterpart.

l. What if tapes improperly surface? If the governmental body has an appropriate log of those individuals who listened to privately-held tapes, they may have some clue as to who might have improperly taken or re-recorded them and released them to the public. In addition to their political impact, such tapes can be hurtful to an official's personal life. If tapes have been stolen or illegally copied, a clear violation of state law would have occurred. Under those circumstances, the theft should be reported to the

police and an investigation should ensue. Unfortunately, once the tape, doctored or not, is released to the public and the newspapers, the harm may already have been done. Perhaps then the same state's attorneys and the press who sought this legislation should step up and require and pursue criminal charges against individuals who violated the Open Meetings Act by making available the non-released tapes.

m. Should elected officials be more careful about what is said in closed sessions? Certainly, officials need to be continuously observant and avoid discussing topics in closed sessions which would not qualify under the exemptions contained within the Open Meetings Act. The courts have been tolerant where evidence came forward that a conversation briefly drifted away from a central topic for which an exemption was available to a related unprotected topic. An example of this might be the exemption under the Act for the discussion of the acquisition of a particular piece of property. After going into closed session to discuss the acquisition of a particular piece of property, one member of the governmental body may begin to talk about his or her philosophical opposition to condemning property. That subject belongs to an analysis of public policy rather than to the acquisition of a particular piece of land and should not be discussed in detail in closed session. If the comment is brief and the group returns to the matter which allowed for the closed session to take place, it is not likely that a court will turn the tape over to the attorney for the plaintiff. If, on the other hand, there is a two-minute discussion about a particular piece of property, and a 20-minute discussion of whether the Village needs more parks, or the school district needs more playgrounds, the judge will probably turn the matter over for use as evidence in an Open Meetings Act prosecution or civil suit.

Elected officials also must keep in mind that any citizen can complain to the Public Access Counselor in the Attorney General's office about alleged wrongdoing in closed session. The Public Access Counselor then must investigate the matter, and the Public Access Counselor will very likely be listening to the tapes in the course of that investigation.

Members of a governmental body which goes into closed session probably have some responsibility for keeping their fellow participants on the straight and narrow. In addition, the charge could undoubtedly be brought not only against the official who violated the Open Meetings Act, but also against those other members of the body who remained silent and listened to the material which should have been discussed only in an open session. Having a knowledgeable attorney present during closed sessions should also reduce the chances of committing an Open Meetings Act violation. The lawyer should be instructed that he or she is there in part to prevent the body or any individual member from violating the Act. If your attorney frequently goes to the bathroom during your closed sessions, you might suggest either a visit to a urologist or get a lawyer willing to take a more active role in monitoring the group's discussions.

It is also possible that these tapes will have a chilling effect on free discussion. It would take a very courageous elected official, when the possible employment of a new Village Manager was being discussed, to go into specific rumors of that Manager's problems while working for other municipalities. In addition, one or two stolen and improperly-released tapes somewhere in the state may make every official leery of being completely honest in their stated evaluations of officers or employees in a closed session.

n. What is an elected official to do if he or she wants to advise fellow Board members that a new employee should not be hired because he left his last job just before being fired for charges of sexual harassment? Prior to the requirement that meetings be recorded, that information could have been shared fairly easily. We are afraid that we will have many instances in which officials will say: "This is my opinion, but I can't really tell you why." That is not very healthy or conducive to good government. The officials could also speak with other Board members individually outside of closed session.

o. Do written minutes of closed sessions need to be more inclusive to pick up all details heard on the tape? No. The recording of closed sessions should not in any way change the nature of closed session minutes. Under law, those minutes only need state the time and place of the meeting, who was present, what matters were discussed, and a summary of discussions on all matters proposed, deliberated or informally decided.

p. What should be done if an inadvertent failure to follow the law takes place? Some effort should be made to correct the failure, to publicly admit the failure, and to state how a correction has taken place. For example, if it was discovered after a closed session meeting that the tape recorder jammed in the middle of the session, or if, by mistake, a tape of one closed session, not yet released, is taped over at a later closed session, it would probably be a good idea to admit that this problem had taken place publicly, along with an attempt to see to it that this particular type of problem did not occur again.

q. What about releasing part of the minutes of a meeting? Sometimes, the corporate authorities will review the written minutes of a meeting and decide that part of the minutes of a closed session can be released, while the other part of the minutes must still be held. In that case, if the decision is made at least 18 months after the date of the meeting, and the written minutes have been approved, the entire tape can be erased if publicly authorized.

r. Must the corporate authorities listen to or watch the tapes every six months when they review the minutes of closed meetings to rule on their release? No. The corporate authorities can surely tell from the written minutes of the meeting whether holding the minutes from public view is or is not

"necessary to protect the public interest or the privacy of an individual." Making the public officials also listen to or watch the tapes every six months would probably be a form of "cruel and unusual punishment" prohibited by the United States Constitution. The statute has now been amended to make it clearer that a review of the minutes is sufficient.

s. What are the penalties for violating the Open Meetings Act? The penalties under the Open Meetings Act are potentially quite severe, although it is rare that the most draconian sanctions are applied. First, a court can order a governmental body and any of its officials to fully comply in the future with the provisions of the Open Meetings Act. The court can grant an injunction against future violations of the Act and can enforce such an injunction through contempt of court proceedings. The court can order the public body to make available to the plaintiff in the case the tapes of closed meetings after the judge has reviewed them in private. The court can declare null and void any final action taken at a closed meeting in violation of the Open Meetings Act. If, for example, in a closed session, a governmental body discusses whether or not to enter into a contract, the subject of which could not be discussed in a closed session, the court may be able to invalidate a later public action taken to authorize this contract if the public had a right to hear the pro and con arguments made by the parties in the closed session. Similarly, the Public Access Counselor, after investigating a violation, may issue a binding opinion ordering the municipality to take whatever action might be appropriate.

A violation of the Open Meetings Act can be punished by conviction of a "Class C" misdemeanor. A person convicted of a violation of a "Class C" misdemeanor is subject to a fine of up to $500.00 and imprisonment for up to 30 days. Finally, attempts to correct violations of the Open Meetings Act can be brought by the State's Attorney of the county in which the municipality is located or by any person. In the event that the lawsuit to enforce rights under the Open Meetings Act is brought by a private person who is successful in that litigation, the court may assess reasonable attorney's fees and other litigation costs against the party who substantially prevailed in the lawsuit. Therefore, a private party can recover his or her attorney's fees. A government, which battles against and prevails in a lawsuit filed by a private party may make an application to have its attorney's fees and other litigation costs paid, but the court is only likely to assess such costs where the actions of the private party were malicious or frivolous in nature.

OTHER QUESTIONS ABOUT THE CONDUCT OF MEETINGS

47. Q: What do you do if a member of the public comes to a Village Board meeting and begins setting up an elaborate light system to photograph the meeting?

A: The Open Meetings Act specifically allows members of the public to take photographs of and to record public meetings. The Council or Board, however, can establish reasonable rules and regulations, hopefully in advance of a controversial situation, which will ensure that the efforts to record the meetings will not interfere with the ability of the government to carry out its duties. (5 ILCS 120/2.05). A government cannot, however, require a prior application to record a meeting or take photographs in a manner that will not interfere with the proceedings.

48. Q: If a regularly-scheduled public meeting falls on a legal holiday, such as Labor Day, can the public body hold an official meeting on that date?

A: Yes. The Open Meetings Act, at 5 ILCS 120/2.01 provides that: "No meeting required by this Act to be public shall be held on a legal holiday unless the regular meeting date falls on that holiday." At the beginning of each calendar or fiscal year, every governmental body covered by the Open Meetings Act must prepare and make available a schedule of all of its regular meetings for such calendar or fiscal year listing the time and places of such meetings. 5 ILCS 120/2.03. If the regular meeting schedule lists a meeting as taking place on the 4th of July or Labor Day, you can go forward with that meeting. If, however, you choose to change the date of that particular meeting, after it has been listed in your notice, the governmental body must, by motion, approve an alternate meeting date. Notice of that new meeting date must be provided to any members of the media who have provided the governmental body with an annual request of notices of its meetings and given the public body an address or telephone number within the territorial jurisdiction of the public body to which the notice may be given. 5 ILCS 120/2.02. The statutes are written strictly enough so that it is doubtful that an emergency meeting could be called on a public holiday. If the government forgets to make the motion to reschedule the meeting, then the meeting can go forward on another date as a special meeting with a posted agenda of the specific matters to be undertaken.

49. Q: Can a public body, or any of its committees or commissions, hold a special meeting on election day?

A: It depends on which election day it is. The Open Meetings Act prohibits public bodies from holding special meetings on any legal holiday. (A regularly scheduled meeting is permitted on a legal holiday if the regular meeting date falls on the holiday.) However, under the Election Code, only the November general election is designated as a legal holiday. The April consolidated (municipal) election is not a legal holiday, nor are any of the primaries, so a special meeting is

allowed on that date, as long as the usual notice and agenda is posted 48 hours in advance.

50. Q: Can a special meeting be held on Thanksgiving?

A: No. Regular, but not special, meetings of governmental bodies can be held on public holidays but only if the date of that meeting happens to fall on such a holiday. That language is contained within the Open Meetings Act and applies to all governmental bodies. The definition of a "legal holiday" in Illinois is established by statute and is generally consistent with days on which the banks are closed. The members of the General Assembly probably have not thought of the question of whether an emergency meeting, which is a meeting required to be public, could be held on a legal holiday. Based on the exact words of the statute, such a meeting could not take place. One suspects that if there was a civic emergency on the 4th of July, those participating in an emergency meeting, immediately properly noticed and otherwise open to the public, would probably not face penalties.

51. Q: What do you do if you want to cancel or reschedule one Board meeting?

A: Where the corporate authorities wish to cancel or reschedule a specific Council or Board meeting, it should be done publicly at a prior meeting. That action is sufficient notice to the public, although an agenda for any rescheduled meeting must still be posted 48 hours prior to the meeting. If during the year, the municipality wishes to change the dates of all of its regularly scheduled meetings, it must publish a notice in the newspaper informing the public of this continuing change, at least ten (10) days prior to the change, or, in a community with a population of less than 500, where no newspaper is published, post a notice in three permanent places in the municipality, and also send notice to the media that have formally requested notifications pursuant to Section 2.02 of the Open Meetings Act. If a meeting is not being held because of an event such as a snow storm, the session will not be held because no quorum will appear. A notice that the meeting will not take place should be posted and sent to all participants and the press.

52. Q: Can a public body hold a meeting with less than 48 hours' notice?

A: The meetings of all governing bodies and committees of public bodies in Illinois require at least 48 hours prior notice. That notice is to be given by posting information about the meeting (e.g. agenda) at the principal office of the governmental body and furnishing the notice and agenda to news media, which have registered with the municipality in the manner provided by statute. 5 ILCS 120/2.02. The one exception to the 48-hour notice requirement is when a meeting, otherwise requiring this notice, must be called in the case of an emergency. The statute does not describe the nature of the emergency, but the courts would be expected to liberally interpret this provision so long as one might reasonably believe that a meeting of this nature would be in the public interest and that a

delay in the meeting time would be detrimental. Notice of an emergency meeting must be given as soon as practicable by posting notice and a reasonable effort must be made to contact registered news media. Like a special meeting, an emergency meeting can only be used to discuss and act upon the specific matter or matters which were mentioned in the notice of the meeting and the agenda. For a special meeting or an emergency meeting called for a specific purpose, the notice and the agenda can be quite similar.

The fact that a governmental body may meet on less than 48 hours' notice does not empower that body to take any other actions which are inconsistent with the lawful authority to act otherwise possessed by that body. The statutes relating to various governmental bodies would generally give a governmental unit, meeting under emergency conditions, the ability to take actions necessary to protect the interests of the governmental body. Sometimes, however, actions such as the ability to enter into contracts without public bidding require a greater than a majority vote. (See, for example, Act, §5/5-9-1, which allows municipal contracts to be entered into without bidding upon the vote of at least two-thirds of all the Aldermen or Trustees then holding office.)

53. Q: What do you do if all your meetings run until midnight?

A: Governmental bodies rarely do their best work late in the evening. If you find that your meetings are often running into the wee hours of the morning, it may be desirable to call additional meetings and break up the agenda. One of the best ways of shortening meetings is to make use of the consent agenda under which a single vote may be taken to pass a large number of non-controversial matters. Some communities have even adopted "curfews" which require a supermajority vote to waive.

54. Q: What do you do if you didn't pass your appropriation ordinance on time?

A: State law requires that the appropriation ordinance of a municipality must be passed before the end of the first quarter of its fiscal year. If a municipality fails to pass such an appropriation ordinance, it is barred from making expenditures and it cannot levy real estate taxes that are determined by the amounts contained within the appropriation ordinance. If a municipality misses the statutory deadline, it does have the option of passing an ordinance advancing its fiscal year by a few months so that it can then pass the appropriation ordinance within the first quarter of the new fiscal year. Great care should be taken to make sure that a municipality does in fact pass its appropriation ordinance on time.

55. Q: At a regular Village Board meeting, the Board votes to reconvene the meeting for the next afternoon. The original meeting was properly posted and noticed. While the Village Board announced at the original meeting the time and place of the reconvened meeting and planned to consider the same agenda, no notice was posted and the registered news media were not given notice. Does the meeting violate the Open Meetings Act?

A: No. No notice of a reconvened meeting need be given if the original meeting was open to the public and it is to be reconvened within 24 hours or if an announcement of the time and place of the reconvened meeting was made at the original meeting and there is no change in the agenda. However, if these conditions are not met, then notice must be posted and given to the registered news media at least 48 hours before the reconvened meeting. An agenda must accompany the notice. 5 ILCS 120/2.02.

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

A: It really is the best approach to provide full information even to Council or Board members who generally oppose your programs. You certainly can privately discuss strategy with your political supporters on the Board or Council but be sure not to violate the Open Meetings Act. This question is really directed at trying to keep important information from your opponents that they should be entitled to as elected officials. The courts are quite sympathetic to the lawsuits of elected officials who find it difficult to get material generally available to other members of the Board or Council. Providing material to opponents will prevent them from claiming that you are attempting to keep them in the dark and you can question your opponents as to whether they have actually read the material that has been submitted to them. Sometimes opponents operate purely on instinct or spite and they can sometimes be brought to momentary silence if it is clear that they have not done their homework.

57. Q: Fifty citizens show up at a plan commission meeting to object to a development. Someone notices that the published public notice about the development was invalid. Can the formal meeting continue?

A: If this was a regular meeting of the plan commission properly called as a meeting, the meeting could continue with the members of the plan commission merely hearing public comments on the proposed development in spite of the defect in the notice regarding the particular piece of property. If this was a special meeting, called for this purpose, no formal meeting could take place, but the plan commission members could probably not inconvenience the citizens by simply initiating a public forum to listen to the comments from the citizens. In either case, a new properly noticed hearing would have to be scheduled because an ordinance which requires a prior public hearing is not valid unless that hearing is held.

58. Q: Can two Aldermen or Trustees call a special meeting?

A: No. A special meeting can only be effectively called by the Village President or Mayor, or by three Trustees or Aldermen. Two is not sufficient. If less than a quorum of the full Board or Council appears at the time of the meeting, the session cannot go forward.

59. Q: Are Trustees allowed to speak as many times as they wish regarding a pending motion?

A: No. In the absence of any specifically adopted parliamentary procedure, the presiding officer determines which individuals will speak about a motion. The decision of the presiding officer can be appealed and either supported or overturned. Some municipalities adopt rules of procedure which address this issue and typically provide, at a minimum, that no member of the Board or Council shall address an issue until all other persons wishing to do so have had an opportunity to speak. Rules can be more restrictive, although care must be taken so that individuals whose views are in the minority are allowed at least "equal time."

60. Q: Our Board meetings are getting tied up in procedural issues about who can speak, who can vote, how many votes are required to approve something, motions to table, motions to reconsider, overturning vetoes and other such problems. Who decides how to run the meeting? Are there guidelines or rules for meeting procedures?

A: Yes, there are rules. Some issues, such as how many votes are required to approve certain motions, and whether the presiding officer, such as Mayor or President, gets to vote, are dictated by state law. But many procedural rules are not specified by law; the public body can set its own rules for many procedures. The most common source of procedural rules voluntarily adopted by public bodies is Robert's Rules of Order. But even Robert's Rules are not quite right for all local governmental bodies and require some interpretation. Other rules are available. Because of the overlap and gaps between state law and local procedural rules, it is usually the local government's attorney who is called on to advise on meeting processes and procedures. A knowledge of only "parliamentary procedure" will not be adequate to guide a meeting of a public body, because some common parliamentary rules are superseded by state law, and the attorney will know where state law controls and where the public body has the ability to adopt local rules.

61. Q: Can the Aldermen or Trustees create their own committee structures?

A: Yes. While in most municipalities, the Mayor, by ordinance or tradition, is given the authority to make the appointments to committees and to choose committee chairs, this function can be retained by the Council itself by the creation or amendment of an ordinance with a vote adequate to override any possible

Mayoral veto. Municipalities should carefully debate such a change before undertaking it.

62. Q: Must all meetings of a governmental body be located at the municipal building?

A: No. Governmental bodies in Illinois are given broad discretion as to the frequency, time, and place of their meetings. Meetings must be noticed in accordance with the Open Meetings Act, and they must be conducted at a time and place that is convenient for the public to attend. Occasionally, governmental bodies may wish to meet outside of the municipal boundaries to gain access to better facilities or to a larger meeting room. If properly noticed, municipalities can also hold open session retreats outside of the municipality. If, for example, a committee of a municipality is to make an off-site field trip to observe the location of a business proposed to be relocated within the community, the public should be notified of that meeting and members of the public permitted to accompany the elected officials, at their own cost, if they choose to do so. Great caution should be taken when considering a meeting outside the boundaries of the municipality, since the Public Access Counselor has opined that such a meeting may not satisfy the requirement of the Open Meetings Act that meeting be at a place convenient to the public.

63. Q: Can a governmental body hold a retreat?

A: All types of governmental bodies are permitted to hold retreats. Most retreats involve a meeting, away from the governmental body's regular meeting location, and often at a hotel or conference center where the officials can more informally discuss the goals of their government and ways to identify and correct problems. Most retreats involve meetings at which at least a majority of a quorum of the governmental body is present. For that reason, retreats are considered to be public meetings. Most retreats take place in an open meeting session, with members of the public and the press invited to attend. Often such meetings have a fixed agenda, and sometimes they utilize a consultant as a facilitator. A number of Ancel Glink attorneys have assisted communities in this capacity.

Because these sessions are public meetings, they must be held at a location and at a time when members of the public would be able to attend. There does not appear to be any legal problem in holding such meetings outside of the corporate boundaries of the governmental body so long as the distance from its jurisdiction is not so far or the time so late or so early as to make it difficult for members of the public to attend. Meetings may be held at times of the day or week different from the normal meeting time of the governmental body. Some governments hold sessions on Friday evening and all day Saturday. As long as a member of the public or the press is allowed to attend such meetings, these times should not present a legal problem.

Sometimes a governmental body may wish to discuss certain matters which are controversial, involve inter-personal relationships, and would have political overtones if discussed at a public session. One provision of the Open Meetings Act allows for an interesting exception which permits all or portions of such meetings to be held in closed sessions. That exception to the Open Meetings Act allows meetings to be closed for "self-evaluation, practices and procedures or professional ethics, when meeting with a representative of a statewide association of which the public body is a member."

Some governments have reacted to a breakdown in civility by scheduling a closed session for "self-evaluation purposes." Often, such retreats held in closed sessions have helped the governmental body to get back into a mode where officials have increased trust and confidence in each other. Even more effective is a session where the elected or appointed individuals on a governmental body use the freedoms of a closed retreat to discuss ways in which the government can work better even though they are not in a crisis situation.

64. Q: In the Village of Ancelville, one of the Trustees recently elected just doesn't seem interested in attending meetings. While the Trustee regularly speaks out in the newspaper or at public forums about the business of the Village, mostly being critical, he fails to attend most regular and special Village Board meetings. In the six months since he has been elected, he has missed eight of the 12 regular meetings and two of three special meetings. The other members of the Board are livid at this lack of attention to attending meetings. What can they do?

A: While the Village Board cannot remove the Trustee from office for non-attendance alone, the Municipal Code does give some possible sanctions. A Village Board may compel the attendance of absentees under penalties prescribed by the Board by ordinance. These penalties may include a fine for a failure to attend a regular or special meeting. See 64 ILCS 5/3.1-40-20. The Village Board may ask the state's attorney to call the official and suggest that continued absences could result in a prosecution for nonfeasance of office.

65. Q: I am a Village Trustee. At a regular Village Board meeting, another Trustee raised an issue that was not on the agenda, concerning demolition of a building being considered for historic landmark status. I objected to the discussion because the matter was not on the agenda and the public was not aware the issue would be considered. The Village attorney stated that, because no decision would be made, the discussion was proper. At the end of the discussion, the Board agreed by consensus to have the attorney prepare a resolution to approve the demolition. Wasn't it illegal to hold that discussion without notice? Wasn't the instruction to the attorney illegal action?

A: The discussion was legal and the authorization to the attorney was legal. Appellate court decisions hold that a government cannot take any final action on a matter that is not on the agenda, but it does not prohibit discussing a matter which

is not on the agenda. New discussion items can be added to the agenda at a regular meeting. At a special meeting, only items on the agenda can be discussed or acted upon. The discussion of the demolition did not violate the Act. Authorizing the attorney to prepare a resolution to approve the demolition is not "final action." In this case the final action would be the Board's vote on the resolution itself because that is the only action which has any legal effect. Before the Board may vote on the resolution, it will have to be placed on the agenda.

66. Q: Should the Board or Council meetings be televised?

A: Most Mayors and other elected officials are pleased to have their Council or Board meetings televised. After a period of time, most elected officials become used to this process and do not "play to the camera." A televised meeting is especially beneficial to a Mayor who has strong and vocal opponents either on the Council or Board or in the local press. Televising the meeting allows the public to see how an effective Mayor functions with the opposition. Even if the municipality does not video-tape and broadcast its meetings, citizens can do so, and, in some situations, they can edit the material in an unflattering way and make it available through a local cable or web cast. Under those circumstances, it may be helpful for the Mayor to know that, even if the viewership is small, citizens do have an opportunity to view the Mayor's performance in its entirety. Some Mayors benefit from watching and critiquing their performance. Angry officials do not "play well" on television. Thoughtful and patient officials generally are more appreciated by the electorate and are returned to office.

67. Q: What can a "lame duck" Council or Board do before the next group takes over?

A: Every few years, officials who will no longer be in office within several weeks begin thinking about things they would like to do before they are out of office. This phenomenon generates many calls to lawyers who represent local governments. Not surprisingly, the courts have dealt with issues similar to this over a period of many years.

In general, the members of a validly-sitting legislative body of a government can take actions up to the moment that their successors in office are sworn in. In one famous case, a governmental body passed a series of ordinances creating a Tax Increment Financing District and issuing bonds which had been planned for many years, but would likely not have been carried out by its successors in office.

The general rule is that a legislative body can take any action which is valid and procedurally in accordance with law. Examples of things which cannot validly be done are to add items to the last agenda at the meeting and act upon them, to appoint individuals to positions or enter into contracts with persons beyond the period of time authorized by law. For many governmental bodies, there are only limited powers to appoint individuals to terms beyond those of the retiring officials or to enter into multi-year contracts. Another example of an action which

could not be taken would be for a municipality to pass a zoning ordinance or enter into an annexation agreement where required public hearings had not been held.

In addition, a new Council or Board, once seated, can often undo, sometimes without any cost, actions taken by their predecessors. Where the rights of third parties have not intervened by, for example, a full execution of a contract, a new municipal Board or Council may be able to withdraw the offer without cost. In some cases, contracts previously entered into, such as construction contracts can be cancelled, but with the payment of some start-up costs. In general, the courts seem to favor the operation of government by the Board or Council then in control. They will validate acts taken by "lame duck" Boards, but they will also assist new Boards in getting out of those responsibilities where there is some room for the newly-elected or appointed officials to reflect the most recently expressed will of the people. This is an area of law where the opinions of both departing and newly-engaged attorneys should be both frank and careful.

68. Q: Can a City clerk take part in discussions during a City Council meeting or during executive session? If a question is raised during a City Council meeting or during executive session and no one knows the answer but the City clerk, can she answer the question?

A: State law provides that the corporate authorities of a municipality are composed of the Mayor or President and a Council or Board. The clerk, while having important duties in the municipality, is not a member of the City Council or the Village Board, and has no inherent right to speak at any meetings of that body, whether in closed or open sessions. The clerk, by statute, does have the right to attend all Board or Council meetings, and we have interpreted that direction to mean that the clerk cannot be barred from attending any meeting, open or closed, of the Council or Board except in a situation where that body is appropriately discussing the performance of the clerk or where the clerk is the subject of the meeting, such as litigation by or against the clerk. Having said that, in many smaller municipalities, the clerk sometimes is one of only a few full-time employees of the governmental body in the municipal building on a regular basis, and can certainly be asked or can even volunteer the answer to questions. If the question of the clerk's participation becomes an issue, the Council or Board can pass a procedural rule which indicates that, for example, the clerk may address the Board when called upon by the Mayor to do so.

69. Q: Are there rules and regulations on how an Alderman should conduct himself/herself during a City Council meeting? Can an Alderman during a City Council meeting or during executive session call other Aldermen and the Mayor names? Can he or she conduct himself or herself in such a way as to scare the public by such actions? If so, what can the Mayor do to prevent this from continuing?

A: The question of Aldermen or Trustees who are rambunctious or worse is a nightmare for every municipality. If the Alderman or Trustee violates some

specific rule of the municipality, such as calling other Aldermen and the Mayor bad names, that person can be dealt with under the Act, §5/3.1-40-15. That provision provides: "The City Council shall determine its own rules of proceedings and punish its members for disorderly conduct. With the concurrence of two-thirds of the Aldermen then holding office, it may expel an Alderman from a meeting, but not a second time for the same incident." This rule applies in Villages as well. The Council could also establish a set of rules by ordinance and prosecute an offending Alderman or Trustee, letting the circuit court decide whether a fine should be imposed. Ultimately, getting rid of a "bad Trustee or Alderman," or even a Mayor, is a job for the electorate.

70. Q: Our Village routinely has a certified court reporter record every planning commission and zoning board meeting. Do we need to have a verbatim transcript of these meetings instead of regular minutes? The court reporter is very expensive.

A: Shortly after the Illinois Supreme Court issued its decision in the "Klaeren" case, in 2002, many municipalities became very concerned about keeping a verbatim record of hearings dealing with special uses. This was because, under the Klaeren ruling, all special use cases had to be reviewed in court only on the record which was created in the municipal hearing process. Thus, it was important to have a verbatim record. But that rule only applied to special use hearings. The ruling in Klaeren has now been reversed by state legislation. Thus, it is not as important to have a verbatim transcript of what took place in the municipal hearing process. The minutes of the meeting can be prepared from the clerk's or secretary's notes, just as they are for a Board meeting. (Although zoning hearings for telecommunications antennas still require a verbatim transcript.) However, some municipalities do feel that a full transcript is helpful to the Aldermen or Trustees in reviewing the evidence presented at the hearing, and so are willing to pay for the cost of regularly using a court reporter and producing a transcript. Some municipalities only use a court reporter and have a transcript prepared in controversial or complicated cases. The production of a transcript for the use of the Board or Council as it makes its legislative decision may prevent an effort to re-hear the case at that final level.

71. Q: Does a Mayor have to relinquish the chair in order to make a comment at a Board meeting?

A: No. While it is the general rule in large deliberative assemblies (such as state legislatures or large conventions) that the presiding officer does not participate in the debate or other proceedings unless another member is called to chair, in nearly all Illinois municipalities, the Mayor may participate in discussions of matters before the Board or Council without relinquishing the chair. There is nothing improper with such a practice, unless the rules of procedure adopted by the municipal Board forbid such an active role.

72. Q: In an effort to speed up meetings, a Trustee makes a motion to "adopt ordinances nos. 1 through 6." The Board does not discuss these ordinances before approving them unanimously. Is this procedure correct?

A: No. Courts have held that the passage of ordinances is invalid where the governing body has no discussion whatsoever about the contents of the ordinance which is only referred to by a number, because the public does not have information regarding the action the body is taking. If the ordinances were available for public inspection and the titles were referred to when the motion to adopt them was made, the consolidation of the passage of ordinances 1 through 6 is valid.

73. Q: Can the Chairman of a public meeting declare it to be ended or make unappealable decisions?

A: No. A meeting of a public body is ultimately controlled by the full body itself not its Chairman or presiding officer. If the Chairman of a meeting declares it to be closed and leaves the room, the remaining members of the public body, if they constitute a quorum, can continue the business of the meeting, after choosing a temporary presiding officer. All decisions of the Chair can be appealed to the full body and overturned. A court may later decide that the actions of the presiding officer were correct, but until then, a motion to properly overrule the parliamentary decision of the Chair is in order, and if passed, should be honored by the Chair.

74. Q: At a regular meeting, can the municipal Board or Council add items to the agenda for discussion which did not previously appear upon the posted agenda and then vote on them?

A: No. At a regular meeting, the municipal Board or Council can add items to the Agenda for consideration, but they can only be discussed and not acted upon. At a special meeting, items can only be discussed or acted upon that are on the Agenda.

75. Q: A Mayor requires all motions to be placed in writing and passed to her. If she likes the motion, she will allow it to be made. If she does not like the motion, she tears up the paper and will not give the floor to the Alderman who wants to make the motion, and keeps declaring the Alderman who wants to discuss the matter to be out of order. Can the City Council do anything to override these actions?

A: Yes. While the Mayor has the right to declare motions either in or out of order, the City Council has some options. In the case of *Rudd v. Sarallo*, 111 Ill.App.2d 153 (1969), the court held that a Mayor does not have the power to refuse to let the City Council consider a motion. If the Mayor refuses to recognize an Alderman, the Council should make a motion to appeal the decision of the chair. If the motion is successful, the Council can proceed to consider the Alderman's

motion. When the Mayor fails to follow the appropriate rules of procedure, the Council has this procedural option available. The same rules apply in a Village.

CHAPTER 2. OFFICERS AND EMPLOYEES

INTRODUCTION

Elected officials of local governments come from many walks of life, with experience in business, education, sales, manufacturing, computers, and every other field. Their experience often does not prepare them for the specific issues they will confront as a Mayor, Trustee, or Council member. The powers of elected officers, qualification for office, pay, and appointment, resignation, and vacancy in public offices are all topics that one does not meet in other kinds of work. These topics are generally specified by statute, where the Illinois legislature sets limitations and requirements for elected officers. Questions about the duties and responsibilities of elected office arise very often, usually when least expected. The questions and answers listed in this section should help elected officials answer the most common questions. There are questions here also about the liability of public officials, which ought to be a topic of concern for any newly-elected Alderman or Trustee. State law provides significant protection from lawsuits for public officials, but elected officers are not completely insulated from lawsuits and the risk of liability. The section on the liability of public officials will help answer your questions about these risks. Finally, as local governments become more complex, elected officials must rely more on employees and staff members to run day-to-day local government operation. The questions regarding employees will help local governments understand the conditions for employment in the public sector, which differ significantly from those in the private sector.

POWERS OF ELECTED OFFICERS

76. Q: How frequently should the Mayor use the auditor, the consulting engineer or the municipal attorney?

A: The Mayor should feel perfectly comfortable dealing with all of the professional consultants chosen by the municipality. In many instances, including in the case of the municipal attorney, the Mayor has the power to appoint that individual or firm whether the services are provided as an officer or an independent contractor. In the case of any specific municipal office, the Mayor is the typical appointing authority, whereas, with other consultants, hired on contract, the Board or Council must concur in the choice. The courts have established special rules for the municipal attorney. In a statutory Manager form of government the Manager has the power to appoint department heads. The budget for these consultants should be adequate so that the Mayor can use them as needed. Since the charges of all of these consultants are ultimately matters of public record, the Mayor will undoubtedly, over time, develop a strategy for their use which is consistent with the budget of the community. In general, the Mayor should not accept from these individuals the answer that a particular matter is very complicated and cannot be explained to a lay person. Consultants who cannot explain even difficult concepts to elected officials should not work for municipalities.

77. Q: What is the Illinois law regarding terms of office of elected public officials?

A: An elected officer may not be sworn into office until after the appropriate election authority has completed its canvass of votes and has officially proclaimed the final results of the election. For units of local government (except Counties), which elect officials in consolidated elections in odd-numbered years, the election authority (the county clerk or a board of election commissioners) must complete its canvass of votes and proclaim the official election results within 21 days after the close of such elections. 10 ILCS 5/22-17(a) and (b). This possible delay in proclaiming election results was substantially increased in 2004, when the General Assembly abolished local canvassing boards, which had only seven days to canvass election results, and placed that authority in the hands of the county clerks and boards of election commissioners, which now have up to three weeks to certify election results.

Due to increased voting by absentee, provisional and overseas-military ballots in recent years, it sometimes takes election authorities the full 21 days to count all ballots and declare the official results, and problems could arise for any government that swears in its new officers before the election results have been duly certified. On the other hand, the increased use of electronic voting machines, and the relatively new system of early voting in Illinois, has helped speed up the process of counting votes such that it sometimes takes an election authority only a few days to perform its canvass and proclaim the official results. Even still, the final canvass cannot be declared until the expiration of the full 21 day period. This ambiguity in the timing of certified election results can make it difficult for a unit of local government to determine ahead of time the date on which it will hold its swearing-in ceremony for its newly elected and re-elected officials.

Elected officers in most units of local government are selected in consolidated elections held on the first Tuesday in April of odd-numbered years. 10 ILCS 5/2A-1.1(b). The deadline for the election authority to canvass and proclaim the election results is usually, but not always, no later than April 28. That means governmental units are usually permitted (if not required) to swear in their new officers in the first regular or special meeting of the governmental body in the month of May. However, when the date of the consolidated election conflicts with the celebration of Passover, the election is postponed until the first Tuesday after the last day of that holiday. 10 ILCS 5/2A-1.1a. (Note: there has been recent debate about the interpretation and application of the Passover rule) That means it is possible the deadline to proclaim the election results could be extended into the month of May – perhaps to a date that falls *after* the first regularly scheduled meeting in May for your governmental body.

This all requires units of local government to pay close attention to the date of the consolidated election and the corresponding deadline for the election authority to proclaim the official results in order to comply with the time-sensitive requirements related to swearing in those officials to their new terms of office. Since officials from different types of public entities have different terms of

office, please refer to the paragraph below that addresses your particular public entity for the specific rules that apply to your unit of government.

Municipalities: The Illinois Municipal Code previously required all cities, villages and incorporated towns to swear in their newly elected officers "during the month of May following the proclamation of the [election] results," unless the municipality provided by ordinance for its swearing-in ceremony to be held at a time no later than the first regular or special meeting of the corporate authorities in the month of June. 65 ILCS 5/3.1-10-15 (P.A. 93-847, eff. 7/30/04). Since the proclamation of results might not happen until sometime in the month of May, it was sometimes problematic for municipalities without a commencement-of-terms ordinance to swear in their officers after the proclamation of results, but still within the month of May. Therefore, in 2007, a few years after the General Assembly extended the deadline to proclaim election results from seven to 21 days, the legislature also fixed this timing problem by amending section 3.1-10-15 and removing the requirement that municipalities without commencement-of-terms ordinances swear in their new officers within the month of May:

> Section 3.1-10-15. Commencement of terms. The terms of elected municipal officers shall commence at the first regular or special meeting of the corporate authorities after the receipt of the official election results from the county clerk ~~during the month of May following the proclamation of the results~~ of the regular municipal election at which the officers were elected, except as otherwise provided by ordinance fixing the date for inauguration of newly elected officers of a municipality. The ordinance shall not, however, fix the time for inauguration of newly elected officers later than the first regular or special meeting of the corporate authorities in the month of June following the election. (P.A. 95-245, eff. 8/17/07.)

While the time for taking office may vary significantly by municipality depending on the amount of time it takes the county clerk to proclaim the official election results, municipalities are no longer required to inaugurate their new officers in May, unless the election results were certified in advance of that first regular or special meeting and the municipality has no local inauguration ordinance,. This also helps avoid potential Open Meetings Act notice problems if, for example, the election results are first received within 48 hours of the next regular or special meeting in May, since the municipality now has time to post the required 48-hour notice and agenda as late as its first regular or special meeting in June. If your municipality's current ordinance, if any, specifies that your new officials will be installed at the first regular meeting in May, or if your municipality has not adopted an ordinance at all and has historically installed officers at the first regular meeting in May by operation of statute, we suggest such municipalities consider amending their ordinances to specify that the installation will occur at the first regular meeting in June to avoid these potential problems. That way, the municipal board does not have to worry about being in a state of flux in the month

of May. Of course, you may also be able to inaugurate officers at the second meeting in May if your community customarily schedules one.

Another impact municipalities should consider is that the Local Government Officer Compensation Act, 50 ILCS 145/2, and Municipal Code section 3.1-50-5, provide that the compensation of elected officers must be fixed at least 180 days before the beginning of their terms of office. The date on which new terms of office will commence is basically indeterminable in advance unless a municipality has an ordinance establishing a specific date for the commencement of terms. This problem may also be remedied by adopting an ordinance fixing the time for taking office in the month of June.

Townships: The Illinois Township Code requires township supervisors, clerks and trustees to enter upon their duties of office on the third Monday in May following their election. 60 ILCS 1/50-15. Under the Illinois Highway Code, 605 ILCS 5/6-116, highway commissioners also commence their terms on the third Monday in May after the election. Since the third Monday can occur no earlier than May 15, this requirement should cause no logistical problems or Open Meetings Act violations even if the election was delayed due to Passover, or if it took the county clerk a full 21 days to canvass the votes. Assessors and collectors start their terms on January 1st of the year following their election, which clearly poses no scheduling problems. Furthermore, since the exact date on which new terms will commence is known by townships well ahead of time, there should be no problem fixing the compensation for township officials at least 180 days prior to the commencement of their terms, as required by section 65-20 of the Township Code.

Park Districts: The Illinois Park District Code specifies that commissioners serve "until their successors are elected and qualified," but does not provide any specific timeframe in which the new officers must be sworn in. 70 ILCS 1205/2-12. However, if your park district board has adopted an ordinance fixing the term of park commissioners to start on the first meeting *following the election*, it is possible the election results will not be proclaimed prior to that meeting. Accordingly, if your district has such an ordinance, it is advisable to amend the ordinance and change the terms of office so as to commence on the first meeting *following receipt of the official election results* from the county clerk, or, like with townships and municipalities, at the board's first regular meeting in June.

School Districts: The Illinois School Code requires school boards to hold their organizational meetings within 28 days of the election. 105 ILCS 5/10-16. However, because the election authority has 21 days after the election to proclaim the official results, it is possible a school district may not have sufficient time to hold an organizational meeting within seven days of the proclamation of results. To address this potential problem, and in response to the aforementioned extension of the canvassing period from seven to 21 days, a section was added to the Election Code in 2004 that provides as follows:

> Sec. 1A-19. Effect of extension of canvassing period on terms of public offices and official acts.
>
> (a) Notwithstanding any law to the contrary, if the proclamation of election results for an elected office has not been issued by the date of the commencement of the term of that elected office because of the extension of canvassing periods...then the term of the elected office shall commence on a date 14 days after the proclamation of election results is issued for that office.
>
> (b) If subsection (a) applies to the commencement date of an elected official's term, and if the elected official is authorized or required by law to perform an official act by a date occurring before the commencement of his or her term of office, including but not limited to holding an organizational meeting of the public body to which the public official is elected, then notwithstanding any law to the contrary the date by which the act shall be performed shall be a date 14 days after the date otherwise established by law.

This Election Code amendment permits school districts that have not received official vote results prior to their organizational meetings to have an additional 14 days in which to hold that meeting, but it also puts school districts in a vexing position of not being able to determine in advance what date their newly-elected officials will take office, because it hinges upon the unknown date when the school district will receive the official vote results from the county. Further, it poses problems for school districts when election results are proclaimed on the 26th, 27th or 28th day after the election, because technically the 14-day extension does not apply to them if they have received the vote results within the 28-day period and they are, therefore, still required to meet within 28 days of the election. One can resolve this issue by scheduling the organizational meeting on the 28th day and, if necessary, move to continue the meeting to a date certain which coordinates better with the election calendar.

Fire Protection Districts: The Illinois Fire Protection District Act, 70 ILCS 705/4a(2), provides that trustees enter upon their duties of office on the third Monday of the month following their election, which generally means the third Monday in May. As described above with townships, this timing should not pose any problems if the election authority fulfills its obligation to proclaim the election results within 21 days.

Library Districts: The Public Library District Act of 1991 specifies that newly-elected trustees shall take their oaths of office on the third Monday of the month following their election. 75 ILCS 16/30-10. As described above with townships and fire protection districts, this timing should not pose any problems if the election authority fulfills its obligation to proclaim the election results within 21 days.

78. Q: I am an elected official. Most of the official meetings I have to attend take place in the evening. However, I work the evening shift at my regular job. My employer is giving me a hard time about missing work, telling me I have to use vacation time. Does the law give me any protection for the time I have to take off work to attend meetings?

A: Yes. The "Time Off For Official Meetings Act," 50 ILCS 115/1, says that an employer must allow an elected official of a unit of local government or school district to take time off to attend an "official meeting" of the public body to which the employee is elected, including a reasonable amount of time to travel to and from the meeting. An "official meeting" is one at which a quorum of the members of the public body are expected to attend. The employer is not required to pay the elected official for the time off, but may not penalize him or her. The employee must inform the employer in advance of his or her intention to take time off to attend an official meeting.

79. Q: Can a Mayor sell products or services to companies or persons who sell to the municipality?

A: Mayors are allowed to sell products or services to companies or persons who sell to the municipality, but there is a reason for caution. A Mayor who is a barber can cut the hair of large numbers of citizens. A Mayor who is a lawyer can draft wills for citizens of the community. Legal problems do arise when the Mayor enters into a contract with a person or company that itself does business with the municipality. For example, a Mayor who owns a lumber yard cannot sell large amounts of lumber to a builder who has told the Mayor, in advance, that he will only buy the lumber if he receives zoning approval. In that case serious ethical concerns are raised that could rise to the level of criminal penalties.

80. Q: What do you do if, as an Alderman, you are asked to vote on an application for a special use submitted by a bitter business rival?

A: If a member of the City Council or Village Board believes that his or her own personal friendship or animosity towards an applicant would result in a lack of objectivity in his or her voting, the officer should abstain. In some cases, an abstention will count with the majority. If the official does not want the vote to count under any circumstances, the official should state that he or she is "recusing" himself or herself from the vote.

81. Q: What do you do if you are an Alderman who is chairman of the public works committee and you unexpectedly have a chance to bid on a great buy on a pick-up truck at a private auto auction which you believe is needed by the municipality?

A: Any one member of a Council or Board, including the Mayor and President, has no more power to expend public funds than that of an average citizen until he or she has been authorized to do so. Thus, the chairman of the public works

committee, who has not been authorized by the Council or Board to expend municipal funds, has no legal right to bid on a pick-up truck at an auto auction on behalf of the municipality. If that individual purchases the truck and pays for it, he or she may end up owning the truck unless the Council or Board confirms the action and reimburses the public official.

82. Q: Can an individual official on the Board or Council of a governmental body bind the government in the expenditure of funds?

A: Almost without exception, governmental officials, when acting individually and without delegated authority, do not have the power to bind their governmental bodies to expend funds. For example, the Mayor of a municipality, or the President of a School Board or Park District, while possessing some independent powers by statute, do not have the ability to spend any public funds unless that authorization is either pre-approved or confirmed by the corporate authorities of the governmental body. Public officials who make purchases, seemingly on behalf of their governmental body, may find that they are individually liable for the payment of the goods ordered. That is especially the case if they did not disclose to the vendor that they were attempting to buy the product or service for the governmental body. Under those circumstances, the individual, though wrong, may escape personal responsibility because the provider of the goods or services is assumed by the legal system to be aware of the fact that governmental bodies generally can only act to expend funds when the authorization is confirmed by the corporate authorities. In the case of an emergency, the corporate authorities can be brought together at an emergency meeting at which a particular member of the Board or Council can, indeed, be authorized to expend the necessary funds to deal with the emergency situation. If the corporate authorities of a government have been lax in allowing individuals to make purchases, then it is often the best course to pass a resolution or ordinance which makes clear to the officials and to the public that a stricter, more correct system for procurement will be used in the future. The sole exception which comes to mind regarding an official that appears to have the statutory authority to expend funds without requiring the ratification of a legislative body is the Township Road Commissioner, who is allowed to spend funds appropriated and collected for expenditures under his or her jurisdiction without requiring the approval of the Township Board.

83. Q: How involved should the Mayor be in police investigations?

A: Unless the Mayor has some background in law enforcement, police work is probably best left to the police. The Mayor needs to be informed as to how the police are approaching a particular matter and, in rare cases, the Mayor can offer suggestions and even make orders based upon what may be the Mayor's more intimate knowledge of the people or the circumstances involved. If, however, a Mayor attempts to impede an investigation, it is likely to come back and haunt him or her and could even lead to an obstruction of justice charge. On the other hand, the Mayor is the chief executive officer of the municipality and police chiefs often find themselves without jobs where they are unwilling to brief the

civilian Mayor, or follow general policy directives. A Mayor, however, cannot fire a police chief without Council or Board concurrence.

84. Q: Can a Trustee function as the building commissioner?

A: Yes, but only if there is no additional compensation for those duties, and the additional power is simply added to the function of a Trustee. In smaller municipalities, Trustees can carry out functions which, in other communities, are performed by paid employees, but these duties should not be considered those of an additional office.

85. Q: Does an elected public official have the right to see records of that governmental body, or is it necessary to file a Freedom of Information Act request?

A: This question is frequently asked by elected officials who find themselves in the political minority, or who are lone or semi-lone wolf members of Councils, Boards or Commissions. In most such cases, the records being sought are kept by the executive branch. In some cases, they are kept by an independent elected official such as a clerk or an appointed official such as a secretary. When these officials are politically aligned, access to records by other officials who are viewed as political opponents can become a political football. In the municipal context, this issue is made difficult by the fact that, by statute, it is only the Mayor or President who is given the specific statutory power to "at all times...examine and inspect the books, records and papers of any agent, employee or officer of the municipality." Act, §5/3.1-35-20. Or it could be the executive officer who wants records in the custody of an independently-elected official such as a clerk or treasurer.

The issue has been addressed by both the judicial system and the Attorney General. In the case of *Ebert v. Thompson*, 282 Ill.App.3d 385, 387-388 (1st Dist. 1996), the appellate court found that a public official is not required to file a FOIA request to obtain a record reasonably needed in the performance of his or her official duties. This case involved Township officials.

The Attorney General has concluded that "while a member of a public body is not necessarily entitled to a particular document of a public body merely because they are members of that body, a board member cannot be denied access to information relevant to the exercise of his or her duties, including information that would not generally be subject to public disclosure." Att'y.Gen.Op.32, 1996, Att'y.Gen.Op.36, 2001.

The current Attorney General, Lisa Madigan, supports these views and her office concluded that a member of a School Board was entitled to a copy of a settlement agreement entered into between the School Board and a private party. In that situation, the attorney for the school district concluded that the settlement agreement was a public record, but that the elected official was required to file an

FOIA request to obtain that information. The office of the Attorney General agreed with the elected official, that the materials should be available upon a simple request, and pointed out that the opinions of the Attorney General are to be given considerable weight as interpretations of Illinois law.

The Appellate Court case, and the Attorney General's Opinion are simply signposts in a legal trend around the country which began 10 or 15 years ago in which courts are prepared to enforce the rights of elected public officials to be able to access, because of their position, certain records which might not be available to the general public. Obviously, the courts will not support fishing expeditions by elected officials whose motivation is clearly political, but, where the action of the official or governmental body refusing access to the data seems itself to be politically motivated, the trend of the law is to require the information to be provided.

86. Q: Should a Mayor always keep election promises?

A: Certainly Mayors should try to keep election promises, but they should only make promises they honestly believe they can keep. Sometimes after being elected, a Mayor will discover that he or she did not have all of the facts when promises were initially made. In some instances, the goal to be achieved can only be reached after compromise. The Mayors will discover, upon being elected, that they cannot spend any public funds or enter into any contracts without Council or Board approval. That means that sometimes election promises cannot be fully achieved. We think that the key, however, is to explain to the electorate, perhaps in writing, in a column of the Mayor in the municipal newsletter or in a local newspaper column, how the goal originally promised will be achieved even if the process takes some time and must be modified in part.

QUALIFICATIONS FOR OFFICE

87. Q: Is it true that someone cannot run for municipal office if he or she is in arrears on the payment of a non-property tax or other indebtedness due to the municipality?

A: Yes. The Illinois Municipal Code prohibits a person from holding an elective municipal office if that person is in arrears in the payment of a tax or other indebtedness due to the municipality. 65 ILCS 3.1-10-5(b). Prior to 2008, this law was treated as an office-holding requirement, but not as a candidate-eligibility factor. However, in 2008 the Illinois Supreme Court expanded this law by ruling that a person also is not eligible to seek municipal office as a candidate if that person was in arrears on a debt to the municipality at the time he signed his statement of candidacy form. A statement of candidacy is a document mandated by the Election Code, filed with nominating petitions, in which a candidate must swear under oath that he is, at the time of signing the statement, eligible to hold the office he is seeking.

The 2008 Supreme Court case involved a candidate for office in the Village of Stickney. In previous administrative-adjudication proceedings, the candidate was found guilty of a local ordinance violation and a $100 fine was imposed. The candidate had exhausted his administrative-review remedies and had failed to pay the $100 fine prior to the due date, and prior to signing and filing of his statement of candidacy form. After an objection was filed against the candidate's nomination papers, but well in advance of the actual election, the candidate attempted to pay the fine. However, the electoral Board, appellate court and Supreme Court all agreed that paying the fine after the filing of his nomination papers was too late, because his statement of candidacy form contained a false swearing due to the fact that at the time he signed it, he was not eligible to hold the office he was seeking because of the arrearage in the $100 debt owed to the Village. *Cinkus v. Stickney Municipal Officers Electoral Bd.*, 228 Ill.2d 200 (2008).

This indebtedness issue has become a hot topic in electoral Board litigation since 2008, and the scope of enforcement of the law continues to be tested in various ways. It has become generally accepted that arrearages in common debts like past-due water bills and unpaid parking tickets will disqualify a candidate from seeking municipal office. Additionally, in 2009 the Circuit Court of Cook County upheld the disqualification of a candidate who admitted he had not paid for prior years' Village vehicle stickers as required by a self-executing local ordinance. *Moon v. Willow Springs Municipal Officers Electoral Bd.*, 2009-COEL-43 (Cook Cty. Cir. Ct., 2009). In 2011, an appellate court ruled that a Chicago Aldermanic candidate was ineligible to run for office due to unpaid parking tickets, even though the evidence showed the City had never sent notice to the candidate of the administrative hearings in which he could have contested the tickets. *Stinson v. Chicago Bd. of Election Commissioners*, 944 N.E.2d 862 (1st Dist. 2011). In 2012, the Supreme Court held that unpaid property taxes, which are assessed and collected by the county, are not valid grounds for removing a candidate from the ballot because those taxes are not a debt owed to the municipality, even though some of that revenue does trickle down to the municipality after it is collected and disbursed by the county. *Jackson v. Chicago Bd. of Election Commissioners*, 975 N.E.2d 583 (2012). In 2013, several electoral Boards heard objections against incumbent candidates seeking reelection based on allegations of arrearages in the payment of reimbursements for personal use of public municipal resources, for unpaid business licenses and building permits, and for owning dogs without having obtained pet licenses as required by local ordinance. Different circuit court judges have entered conflicting decisions in these various cases, none of which were appealed to higher-level courts. As such, there remains no binding legal precedent regarding whether unpaid reimbursements, license fees or building permits are proper candidate-eligibility factors under the statute.

88. Q: Can a public official remain in office when he or she moves out of the boundaries of the governmental body or district served?

A: If an elected official permanently moves out of the governmental body or district where residency is required to be elected or to serve, and intends to establish a new permanent residency, a vacancy in that office is created. Unfortunately, neither life nor the law regarding this subject is quite so simple. There are many instances in which individuals find themselves temporarily as non-full-time residents. One example is an elected official who retires from his or her regular employment and begins spending several months a year or more in a location with better year-long weather. Is such a "snow bird" precluded from continuing to serve in office? Under state law, an elected official who would be absent from a community as a snowbird would not be able to vote electronically during this absence but unless the person does not return when the weather warms up no vacancy is created.

The same issues arise if an elected official's house burns down or is damaged or he or she undertakes repairs or remodeling which makes the permanent residence uninhabitable for a period of some time. What if that individual should take a temporary apartment in a nearby community? The vicissitudes of marriage and personal relationships are another area where people may suddenly find themselves unexpectedly no longer living at the location which was included on their petitions to run for office. Yet another example is an elected official who is serving on active duty as a member of the National Guard or Reserves.

In each of these situations, questions can be raised, often by political opponents, as to whether the elected official has, in fact, actually resigned from the office because he or she no longer is a permanent resident within the governmental body. This is a very tricky issue, since there is no simple rule to determine if a person is a legal resident of an area who is entitled to both vote and to run for office. The general rule is that the person must have some physical presence in the community, along with an intention to return even if the person is temporarily physically out of the jurisdiction for some period of time. One need only think about members of the armed forces who may be stationed in another country for some period of time, but who retain both their United States citizenship and their ability to vote at the place that they have chosen as their permanent American residence.

There is also a difference here between legal and practical issues. Such an individual may be entitled to vote, but it is very unlikely that the public would support the candidacy of an individual who may only occasionally pass through the jurisdiction. Of course, there may be many electors in town who feel that the less involved public officials are within the community, the safer they will be. Hopefully, these individuals are in a minority.

In summary, it is generally up to the electors within a governmental body to determine whether they will support the candidacy of an individual who may

spend some time outside of the governmental body. If the candidate or incumbent actually has previously established a residence within the governmental body and legitimate circumstances result in a temporary change of abode, the court system will generally not support a finding that the individual has abandoned the office.

All of these examples, however, do not apply in a situation where a person has established a seemingly permanent residence elsewhere and simply tries to maintain a tenuous or a fraudulent home site which appears to the court to only be maintained for the purpose of running for elective office. One court found that a person who had run as a judge and who clearly lived elsewhere could not simply pick a judicial district, with favorable demographics, in which to run for election. We are also familiar with a Park Commissioner who was forced from office as a result of taking a homestead exemption on property located far from the community he represented.

89. Q: What can elected officials do if it appears that another elected official does not reside within the boundaries of the municipality or district?

A: An elected official who violates the residency requirement for his or her office can be declared to have vacated the elected position. There are two ways in which an elected official can be ousted from an office based upon a loss of the requisite residency requirement. The Attorney General, the State's Attorney or, if they both refuse, any interested citizen, can file a lawsuit known as a quo warranto, which asks a court to determine whether an elective office is vacant due to non-residency or other reason. In addition, for most governmental units, the legislative body, such as the City Council, Village Board, School Board, Park District Board and others, is given specific statutory authority to determine whether a vacancy exists in an elective office. The three most common reasons for a vacancy are death, disability and a loss of the requisite residency. In a case involving the School Code, an appellate court determined that because a School Board has the authority to fill a vacancy on the Board, it also has the ability to determine whether or not a vacancy exists. The plaintiffs in that case had argued that only the superintendent of the educational service region had such authority. Of course, in determining whether or not an incumbent is disqualified from holding office, the legislative body must protect the constitutional rights of the office holder. Supporters of the officer may also argue they will become disenfranchised if their selected representative is removed from office. Governmental bodies that wish to determine whether a vacancy exists should protect themselves against a civil rights lawsuit and do justice by engaging in an independent investigation and a formal hearing, granting the incumbent or his or her representatives full due process rights. A mere absence from the jurisdiction or temporary residence elsewhere has generally not been found to create a vacancy.

90. Q: A long-time Trustee retires from her job and proposes to spend three months of the year in Arizona. Can she continue to serve as a Trustee?

A: Probably yes. The test of residency in the municipality is physical presence at a fixed location with a permanent intention to remain in the community. A Trustee who spends three months in Arizona for extended vacation purposes can probably demonstrate a permanent intention to remain in Illinois and make Illinois her permanent residence. Ultimately, the voters will decide if a snowbird can adequately carry out his or her public duties.

91. Q: When can a political party nominate by caucus?

A: An *established* political party may nominate its candidates by caucus in most Townships (60 ILCS 1/45-5), or in a municipality with a population of fewer than 5,000 residents (10 ILCS 5/10-1). No other unit of local government may use this simplified process and an attempt to improperly do so can result in a slate of candidates being removed from the ballot. Established political parties are those that polled more than 5 % of the votes cast within the unit of local government in question in the last election. 10 ILCS 5/10-2. Municipal caucuses are to be held on the first Monday of December in even-numbered years, except when that Monday is a holiday or the eve of a holiday, the caucus shall be held on the first business day thereafter. 10 ILCS 5/10-1(a). Township caucuses are to be held on the first Tuesday in December prior to the township election. 60 ILCS 1/45-10. Multi-township caucuses are to be held on the first Wednesday in December prior to the township election to nominate candidates for township assessor. 60 ILCS 1/45-25.

Electors at an eligible established-party caucus may make one nomination for each office to be filled, and the party must then file a certificate of nomination with the municipal or Township clerk no earlier than 113 days and no later than 106 days before the election at which the nominated candidates are to be on the ballot. 10 ILCS 5/10-1(a) and 60 ILCS 1/45-20. The clerk provides notice for the time and place of the caucus. In municipalities with a population of more than 500, the notice of the caucus must be printed in a newspaper published in the municipality. If the municipality does not have a newspaper, then the notice is printed in a newspaper published in the county with general circulation in the municipality. The notice must be published or posted at least 10 days before the caucus. 10 ILCS 5/10-1(b). In municipalities with a population of 500 or fewer, the municipal clerk shall post the notice in three of the most public places in the municipality. 10 ILCS 5/10-1(b). In townships, the township board shall publish notice of the caucuses. 60 ILCS 1/45-10(b). Attendance at a caucus is limited to registered voters who reside within the municipality or township. However, no voter shall participate in the caucus of more than one political party. 10 ILCS 5/10-1(e), and any candidate who participated in a caucus and was defeated at the caucus for nomination is ineligible to be a candidate of another political party, or an independent or write-in candidate, in the upcoming consolidated election. 10 ILCS 5/7-61, 10-3, 17-16.1 and 18-9.1.

92. Q: Our Mayor is also the owner of a majority of stock of a local bank. The City has invested its money in certificates of deposit at the Mayor's bank. The Mayor has not disclosed his ownership interest in the bank. Is this a conflict of interest?

A: Yes. Section 3.2 of the Public Officer Prohibited Activities Act (50 ILCS 105/3.2) allows a public official to hold up to a 7.5% ownership interest in a local bank doing business with the official's public agency. But even in that situation, the official must disclose his or her ownership interest and may not participate in consideration or voting on any motion concerning deposit of agency funds in the bank. Ownership of a majority of the bank stock, even with disclosure and recusal, would be a violation of the Act, which is a felony and, upon conviction, causes the official to forfeit the office.

93. Q: The newly-elected Mayor is also a paid-on-call firefighter, and owns a business from which the City purchases supplies and equipment. Is this legal?

A: It's legal, up to a point. The Mayor, or other elected official, may serve as a volunteer firefighter and receive compensation for doing so, under Section 3.1-15-15 of the Illinois Municipal Code.

A business owned by a Mayor or other elected official may provide goods or services to the municipality in three situations. (1) If the official owns more than 1% but less than 7.5% interest in the company, it may contract with the municipality if the goods or services are provided on the basis of sealed bids (if the contract exceeds $1,500.00), and the aggregate of all contracts awarded to the officials is no more than $25,000.00 in any one fiscal year. (2) The official may contract with the municipality if the amount of the contract does not exceed $2,000.00 for any one contract, or $4,000.00 total in any fiscal year. (3) If the official owns less than 1% of the company, it may contract with municipality in any amount provided that the remaining rules are followed. In all three situations, the contract must be approved by a majority of the disinterested members of the Council or Board, and the involved official must abstain from voting and announce his or her interest in the contract. There are additional rules in Section 3.1-55-10 of the Act. Violation of this law is a felony.

94. Q: We have a Park District Commissioner who is employed by the Village. We have many interactions with the Village, from intergovernmental agreements to obtaining variances and permits and the like. Does this person have a conflict of interest and if so, how do we deal with it. Thanks for your help!

A: It depends on what position the person holds with the Village. There is a legal rule which prohibits a person from holding "incompatible offices." "Incompatibility" is judged on a case-by-case basis, but some situations have been litigated many

times and the courts have always ruled the same way. An elected Park District member cannot also be an elected Trustee of the Village in which the Park District is located. A conflict of interest is nearly impossible to avoid. In your case, if the park Board member is not an "officer" of the Village but is a rank and file Village employee who has no policy-making authority and does not vote on anything, then there is probably no conflict of interest. On the other hand, if the person is a Village official who would be likely to be involved in negotiating or administering intergovernmental agreements with the park Board, or enforcing the Village codes against the Park District, there may be a conflict of interest which would make the positions legally incompatible. The State's Attorney and the Attorney General have authority to take action in these cases.

95. Q: Does an arrest or conviction record bar hiring as a police officer or firefighter?

A: Sometimes, but not always. Article 10, division 2.1, of the Illinois Municipal Code provides that all applicants for positions in municipal fire and police departments are subject to reasonable eligibility limitations based upon their health, habits and moral character. 65 ILCS 5/10-2.1-6(a). Also, section 10-2.1-6(j) of the Municipal Code requires that no person be appointed to the fire or police department unless he or she is a person of good moral character and not a habitual drunkard, gambler, or a person who has been convicted of a felony or a crime involving moral turpitude. Determining the boundaries between good and bad moral character, however, can often be difficult. Complicating matters more, what constitutes a reasonable limitation is different in regards to a fire department applicant than it is for a police department applicant. In any case, local governments must be careful to always exercise their statutorily granted discretion in an objective and consistent manner.

Fire Department Applicants: Elaborating on the meaning of "habits and moral character" and the specific limitations available, the Municipal Code states that misdemeanor convictions shall not cause an applicant to be disqualified, based upon habit or moral character grounds, from taking the examination for a position in the fire department, except in the cases of certain listed criminal acts (e.g. certain sexual offenses, assault offenses, theft, weapons offenses, etc.). 65 ILCS 5/10-2.1-6(c). This section also provides that no person whose arrest does not result in conviction shall be disqualified on grounds of habit or moral character from taking the examination for the fire department. For fire department applicants, then, persons convicted of felonies and crimes of moral turpitude are prohibited from appointment. Such applicants are also subject to discretionary limitations based upon habits and moral character, with the caveat that arrests without conviction and misdemeanors not specifically listed shall not bar eligibility.

Police Department Applicants: The Municipal Code leaves the standard fairly unclear for police applicants, other than stating in very generalized language that persons convicted of felonies and crimes of moral turpitude are prohibited from

appointment, and that reasonable limitations are available based upon habits and moral character, without specifying further. However, section 10-1-7(c) of the Municipal Code explicitly allows for broader discretion in considering the habits and moral character of police department applicants than is allowed for fire department applicants:

> No person with a record of misdemeanor convictions except those under Sections 11-6 [and the rest of the sections applicable to fire department applicants] ... of the Criminal Code of 1961 or the Criminal Code of 2012 or arrested for any cause but not convicted on that cause shall be disqualified from taking the examination on grounds of habits or moral character, unless the person is attempting to qualify for a position on the police department, in which case the conviction or arrest may be considered as a factor in determining the person's habits or moral character.

Therefore, when considering applicants for police department positions, boards and commissions may consider convictions beyond those listed for fire applicants, and they may even disqualify an individual arrested for but not convicted of any misdemeanor. Caution should be taken, however, before automatically disqualifying applicants based upon arrest records, especially when the disqualifications could have a disparate impact on minority representation on the force, rendering the considerations suspect and forcing the employer to establish a business necessity for the practice. Also, it should be noted that the Illinois Human Rights Act, 775 ILCS 5/1-101 et seq., prohibits job application questions concerning arrest records (as opposed to conviction records), so whether or not an arrest without conviction may be practically used in a determination of character is debatable.

COMPENSATION

96. Q: What do you do if the Mayor asks for an increase in the salary of liquor commissioner?

A: The salary of the Mayor or Village President cannot be increased during his or her term. The salary for the liquor commissioner must be set at least 180 days before the commencement of the Mayor's term, and it cannot be newly created, increased or decreased during the term.

97. Q: Can the expense account or other fringe benefits of elected officials be increased during their term?

A: Probably yes. The Constitution provides that the salary of elected officials cannot be increased or decreased during their term. Reimbursable expenses are not considered items of salary, and can be increased to match inflation, or when the officials are asked to perform additional services for which out-of-pocket

expenditures are likely to occur. Officials should keep good records of the amount spent since, under federal law, reimbursements which are in excess of expenses are considered income. Health expenses are considered part of salary, if offered, and ordinances establishing premium payments should allow for group increases during the term.

98. Q: Can a Trustee appointed to fill the last two years of a four-year term receive a salary in the same increased amount which newly-elected Trustees will receive?

A: No. A person who chooses to accept an appointment to an elective office can only receive the same compensation which was paid to the person he or she is replacing, who did not complete the full prior-year term. Some communities have begun passing salary ordinances which include per-year pay increases.

APPOINTMENT, RESIGNATION, VACANCY

99. Q: What do you do if a majority of the Council wants to replace the police chief?

A: In no municipality can the Council or Board, on its own, remove a police chief from office. In some municipalities, the Board of fire and police commissioners chooses the police chief. In most municipalities, the Mayor appoints the chief. In municipalities with a population over 5,000, the Mayor can only remove an appointed police chief with the act being ratified by the Council or Board. In smaller communities, the Mayor can appoint a new Chief, but the new person can only serve after Board or Council approval. The Council or Board, however, exercises control over the police chief's salary through the annual appropriation process; a power which has been used to create a de facto removal.

100. Q: On April 1, a Village Trustee sends a letter of resignation to the municipal Clerk stating that the resignation is effective on April 15. How does the municipality respond to this letter?

A: The official's letter is an unconditional resignation. It cannot be withdrawn. The effective date of the resignation is April 15. The Mayor has 60 days from the effective date, in this case, April 15, to fill the vacancy. The Mayor must submit an appointment of a qualified person for the vacancy to the corporate authorities for approval. The corporate authorities must act within 30 days to approve or disapprove. If the corporate authorities do not consent to the Mayor's appointment, the Mayor must appoint and forward to the corporate authorities a second qualified person for the vacancy. The corporate authorities then have an additional 30 days to approve or reject the appointment. If the corporate authorities reject this second appointment, the Mayor may temporarily appoint one of the previously submitted appointees without the advice and consent of the corporate authorities. This temporary appointee continues to serve until the Mayor submits an appointment that receives the consent of the corporate authorities or until a person is elected to that position on the Board.

The Municipal Code section on vacancies, resignations, and appointments is found at 65 ILCS 5/3.1-10-50. You may want to check that section for specific rules relating to vacancies, resignations, and appointments.

101. Q: Does the Mayor get to choose the municipal attorney?

A: Yes, except in a Manager form of government, where the Manager is given that authority. Probably because of the significant potential liability that an ill-advised Mayor or statutory Manager can subject a municipality to, the courts have generally held that the selection of the principal attorney providing legal services to the municipality resides with the Mayor or Manager rather than with the Council or Board. This is the rule whether the person or firm providing that legal advice is functioning as an officer or as an independent contractor. Where a sufficient number of Aldermen or Trustees feel that they are not receiving complete or independent advice, they can pass, over the Mayor's veto, an ordinance establishing a separate position as legislative counsel where services of an independent lawyer or firm can be authorized and directed by them. Chapter 8 deals with the selection of an attorney in some detail.

102. Q: Is the Mayor required to appoint an officer for the full period of her term?

A: No. Except for certain offices where the term of the office is established by statute (Zoning Board of Appeals or Board of Fire and Police Commissioners or where there is no term such as a Police Chief), the Mayor may appoint an officer to serve for as long as his/her term, a fixed period of time left in that term, or for an indefinite term. In that case, the term cannot run for longer than the Mayor's term of office but the Mayor can name a new appointee during that time if he or she receives Council or Board confirmation. The Council must approve both the officer and the term except when there is a vacancy in office. In that case, the Mayor may make a temporary appointment.

103. Q: Can a Mayor remove an appointed officer in the middle of that officer's term?

A: Yes. Except where otherwise provided by statute, a Mayor may remove an appointed officer on any formal charge prior to the end of that officer's term whenever the Mayor believes the interest of the municipality demands removal. If the Mayor, after removing an officer, fails or refuses within a designated time to report to the Council of Board the reasons for the removal, or if the Council or Board disapproves of the removal by a two-thirds vote of all of its members authorized by law to be elected, then the officer is restored to the office. (Act, §5/3.1-35-10)

104. Q: The President of the Village of Discordia, with the Board's approval, has appointed a purchasing agent to fill the newly created office. After six months of excessive spending by the purchasing agent, the Board votes 4-2 to eliminate the position immediately and assign the duties of the purchasing agent to the finance director. The Board consists of six Trustees and the President. Was this action proper?

A: No. Pursuant to Section 3.1-30-5, a 2/3 vote of the corporate authorities is necessary to eliminate an office; therefore, five votes are required. If the President had voted as the statute allows, the vote might have been 5-2 and successful. Such an action would have to be by ordinance to take effect at the end of the fiscal year.

105. Q: Can an Illinois governmental body either by ordinance or referendum provide for the recall of its elected officials?

A: The State of Illinois has never been a state with broad recall power over elected officials. For many years, the commission form of government, a little used form in Illinois, contained a provision allowing for a recall of the elected commissioners. In a rather strange decision, an appellate court struck this provision saying that it was inconsistent with all of the other forms of government. In a way, that is like saying that the Manager system is inconsistent with the other forms of government because it has a Manager. Nonetheless, that appears to be the law and in a 1981 case, *Williamson v. Doyle*, 103 Ill.App. 3d 770, the appellate court held that a provision within the State Constitution, that allows both home rule and non-home rule municipalities to determine by referendum the manner of the selection of their officers, does not allow a referendum on the question of whether to establish a recall procedure. Article VII of the Illinois Constitution only allows municipalities "to provide by referendum for their officers, manner of selection and terms of office." The referendum in question was a manner of "de-selection" and did not comfortably fit into any of the categories in the constitutional section which allows referenda that relate to municipal officers. However, the *Williamson* court seemed to leave the door open to home rule communities to provide by ordinance for recall of their elected officials. Noting the broad powers of home rule units, the court commented that "Consequently, a home rule unit could enact a valid recall ordinance." Some home rule communities have enacted such ordinances and at least one person has been successfully recalled.

LIABILITY OF PUBLIC OFFICIALS

106. Q: Do all elected officials have legislative immunity against lawsuits charging libel or slander?

A: No. Mayors, Village Presidents, Aldermen and Trustees, when addressing legislative matters in the context of a Board or Council meeting, possess near absolute legislative immunity. Mayors and Village Presidents also have broad executive immunity powers when the statements they make are directly related to

their functions as the chief executive. Where legislators, however, commit libel or slander, in campaign speeches or publications, press conferences or even during certain informal parts of governmental meetings, they may lose this immunity. The municipal clerk does not possess either executive or legislative immunity. The clerk and other municipal officials are generally entitled to qualified immunity if their actions relate specifically to their duties and there is no clear law which previously established the inappropriateness of the statements made.

107. Q: An Alderman who has had a personal run-in with the police chief falsely and with malice accuses the chief of taking bribes from street gang members. The Alderman makes this statement at a Council meeting called to discuss the police chief's salary and later repeats the statement at a political rally. Can the Alderman be successfully sued for her statements?

A: The Alderman is immune from suit regarding the comments made at the City Council meeting even if the statements are false and hurtful. The statements made outside of the legislative process are likely to result in a successful lawsuit against the Alderman. An insurance company providing coverage for the community may refuse to defend or pay a judgment against the Alderman arguing that the acts were part of a personal vendetta rather than part of the elected official's duties.

108. Q: Do elected officials have any immunity as they consider decisions whether or not to issue licenses or permits?

A: Yes. Under state law, neither the municipality nor its legislators or administrators are subject to damages for either issuing or failing to issue a license or permit. In state court, the citizen who feels he or she was wronged is limited to suing in order to require the permit to be issued. In some instances, where a failure to issue a permit or a license can be shown to violate established federal law, lawsuits can be filed either in state or federal courts and, injunctive relief, damages and the payment of plaintiff's attorney fees can be awarded. In addition, especially in federal court, there is always the possibility of a punitive damage judgment against an individual public official. Such damages must generally be paid by that individual him or herself.

109. Q: Are governmental bodies obligated to purchase insurance to cover claims against their elected officials?

A: Under a provision of the statute known as the Local Governmental and Governmental Employees Tort Immunity Act, governmental bodies are permitted to purchase insurance and to provide joint self-insurance. They are not required to buy insurance and may individually self-insure. Local public entities are directed to pay any tort judgment or settlement for compensatory damages for which an employee or officer may be held liable for actions within the scope of his of her employment. They are also permitted to pay any associated attorneys' fees and costs. Certain provisions of state law limit the extent of public liability. For example, in the case of an injury to a person or property caused by a member of

the police department of a municipality with a population of less than 500,000, there is a $1,000,000 limit upon such payment. There is also an exception for instances in which the actions of the police officer "results from willful misconduct." There are similar specific provisions relating to various classes of employees within the School Code, the Park District Code and the County's Code.

It would be wise for newly-elected officials to determine whether their governmental bodies have chosen to provide a defense and indemnification through conventional insurance or membership in a governmental self-insurance pool. Over the last 35 years, many governmental bodies have joined together to create self-insurance pools. An elected official can ask to see the insurance policy which establishes the level and amounts of coverage, or the pool documents. Coverage is generally available for all types of claims, except that public funds cannot be utilized to directly pay rarely awarded punitive damage claims. For lawsuits brought under state law, public officials are entitled to the broad provisions of the Tort Immunity Act, which reduce or limit liability for a large number of occurrences, but which do not apply to breach of contract claims.

110. Q: Does the one-year tort statute of limitations always apply against governmental bodies?

A: Illinois governmental bodies are blessed with a Tort Immunity Act which contains a one-year statute of limitations for most claims. Claims which can be filed in the federal court generally are subject to a two-year statute of limitations, and minors are generally given a period of time after they reach majority age to file their claims. Another item which can toll the statute of limitations is where the claimant is in active negotiations to reach a settlement and either the governmental body or the third-party administrator somehow indicates by action or inaction that the statute will be waived.

The purpose of this answer is to add an additional example where a plaintiff may be able to pursue a tort claim against the municipality even after the one-year statute of limitations is over. The reason for bringing this to your attention is that sometimes a denial of a reasonable settlement even after the one-year period may force the plaintiff into a course of action which will be more costly to the government than if a settlement was reached. Under Illinois law, a government can be forced to defend a tort case when it is brought into the lawsuit by a third-party defendant who wishes to file a contribution action against the municipality.

In some cases, a governmental body is not the only potential defendant in a lawsuit. Let us say, for example, that a governmental body hires a contractor to trim or cut down trees. The community, either in writing or orally, directs the contractor to go to 237 Adams Street and remove the oak tree. Unfortunately, in this municipality, there is both an East and a West Adams Street. The governmental body wanted the oak tree in the parkway at East Adams to be cut down. The contractor went to West Adams and cut down an oak tree in

someone's front yard. If the owner of the property does not move quickly enough to bring a lawsuit against the governmental body, his or her opportunity to sue the government directly will be lost after a one-year period. However, the property owner has two years in which to sue the contractor who actually cut down the tree. The contractor, after being named in a lawsuit, then turns around and seeks to bring the municipality into the suit as a third-party defendant. The contractor argues that the governmental body did not give the contractor adequate direction as to what tree was to be cut down, and if the contractor is forced to pay, the municipality should be forced to pay as well. It would be left up to a jury to determine what the percentage of fault would be between the governmental body and the contractor.

The governmental body argues that it cannot be sued because the one-year statute of limitations has expired. Unfortunately, the law in Illinois permits the initial defendant in the lawsuit to bring in a governmental body as a third-party defendant so long as that action is taken within one year from the date the cause of action accrued against the initial defendant (see *Highland vs. Bracken*, 148 Ill.Dec. 104, 560 N.E.2d 406 (1990). In this example, if the governmental body, or its insurance company or pool, refused to participate in negotiations, for a settlement after the one-year statute of limitations had expired, it would be subject to an effective lawsuit where it would be brought into the case even after the expiration of the one-year period. In addition, there is a rather obscure Illinois statute, which provides that where a tree is improperly cut down, the owner may sue for three times the value of the tree (740 ILCS 185/0.01). In summary, while governmental bodies typically are able to utilize the provisions of the statute of limitations to free themselves from a number of claims, the persons working to settle claims against governmental bodies should be aware that in an appropriate case there may be a "back door way" in which the governmental body may find itself as a defendant even after the one-year period has passed.

Issues like the one discussed here become known over a period of time to attorneys who are experienced in defending governmental bodies. Attorneys from Ancel Glink have defended thousands of tort cases in the federal and state courts against governmental bodies of all kinds. The firm defends governmental bodies and public officials through assignment by self-insurance pools, insurance companies and self-funded governments. We sometimes are asked to consult with the regular attorneys for governmental bodies in the defense of tort cases. If you have any questions about governmental pools, the defense of tort cases, the Tort Immunity Act, or loss prevention methods, please call Rob Bush, Tom DiCianni or Darcy Proctor.

111. Q: Will an insurance company or a governmental self-insurance pool protect the government from all claims?

A: No. An interesting decision of the Seventh Circuit Federal Court of Appeals confirms this answer. In *St. Paul Fire and Marine Insurance Company v. Village of Franklin Park*, a lawsuit was filed against the municipality alleging that it

underfunded its firefighters' pension fund as the court wrote: "For the previous (and this is not a misprint) 30 years." At one point, the Police Pension Board asked the Village to add $4,000,000 to the fund, but the Village paid only $130,000 into the fund. After a lengthy trial, the court ultimately found that the Village had deprived the fund of only $42,000, and ordered the Village to pay into the fund and to make future payments in "a manner consistent with Illinois law." The insurance company filed a declaratory judgment action in federal court arguing that it had no obligation to defend the Village in the suit. The insurance policy was one that covered "a negligent act, error or omission." The insurance company argued that the lawsuit sought payments as a result of "intentional conduct, which was not to be defended or paid." The trial court found for the insurance company and the Seventh Circuit affirmed that decision. The appellate court found that the firefighters' lawsuit was not a claim or a suit for a "loss under the policy." The money being sought was said by the court to be money "the insured had no 'right to possess in the first place.'" The court then went on to say: "Were the rule to be otherwise, Franklin Park could avoid its pension fund obligations entirely by levying no taxes and making no contributions. It would be absurd to think that in such a situation, the effect of a court finally requiring the Village to make the contributions would be a covered 'loss' that St. Paul was required to cover." While it is possible that a more broadly written policy might have obligated as insurance company or a pool to provide some form of defense, there is no way that either entity would have ever covered the shortfall in payments. Most coverage documents also provide that no defense will be provided if there is no chance that any ultimately determined claim or loss would be recoverable under the coverage document.

APPOINTED OFFICERS AND EMPLOYEES

112. Q: What do you do if your Village administrator wants a multi-year contract?

A: Ordinarily, contracts entered into by a non-home rule municipality are limited to a one-year term because of the "prior appropriation" requirement. The Illinois Municipal Code, however, contains an exemption for contracts involving the "employment of a Manager, administrator, health officer, finance director, attorney, police chief, or other officer who requires technical training or knowledge, engineers, doctors, land planners, auditors, professional consultants and the data processing services and the provision of services which directly relate to the prevention, identification or eradication of disease." For all of these individuals and services, the municipality may enter into a multi-year contract which cannot exceed the term of the Mayor or Village President. A home rule municipality may be permitted to enter into longer and different multi-year contracts. A municipality may also execute multi-year intergovernmental agreements and collective bargaining agreements. (Act, §5/8-1-7).

113. Q: What do you do if the Mayor's son wants to be considered for building commissioner?

A: Illinois law assumes that relatives of an elected official are independent individuals whose employment by the municipality does not, per se, constitute a conflict of interest. Thus, a Mayor's spouse, child or other relative may be considered for the position of (and serve as) building commissioner or any other office or employment within the municipality. The Mayor cannot receive any direct financial payment for arranging or participating in the employment.

114. Q: Can a municipal officer, such as a building commissioner, enter into a contract with a municipality to perform work as an independent contractor?

A: No. There are only limited situations in which any officer of a municipality can enter into a contract with the community. The Mayor, Village President, members of the City Council or Village Board are the only municipal officers permitted to enter into contracts with the municipality to provide goods and services, but only up to very small dollar amounts. There is no such statutory exemption for other municipal officers, including Clerks, police officers and firefighters. That is the case even if contracting with these individuals would save the community substantial funds.

115. Q: In a municipality which has hired a Manager or an administrator, how involved should the Mayor get in the day-to-day management of various departments?

A: In a municipality which does not operate under the statutory Manager system but chooses a Manager or administrator, based upon the passage of an ordinance, the community has broad discretion over the powers to be granted to that official. It is often a difficult task for the first person to fill the Manager or administrator position to "wrest" power away from the Mayor and the Aldermen or Trustees who frequently function as committee chairmen. A community should be truly committed to allowing a professional to appropriately function when one is hired. A community can either grant very substantial powers to the Manager or administrator, subject to statutory requirements, and then take them back if the process isn't working well, or grant limited powers and expand them as that official demonstrates frugality and wisdom. Whatever the ground rules are to be, they should be established prior to and in consultation with the individual who will be brought in to carry out these tasks. Most Managers or administrators view their main job as making elected officials look good and most officials are perfectly happy to accept the ensuing compliments.

116. Q: Must you engage in collective bargaining if you employ three regular employees and two summer employees?

A: As you may have expected, the answer to this question is not a simple yes or no. Based on an Illinois appellate court decision, the answer to this question depends

on whether or not the summer employees were "assured" that they would be rehired the subsequent year.

In *City of Tuscola v. The Illinois State Labor Relations Board and The Policemen's Benevolent Labor Committee*, 732 N.E.2d 784, 247 Ill. Dec. 729 (4th Dist. 2000), the Policemen's Benevolent Labor Committee ("the Union") filed its representation and certification petition with the State Labor Relations Board ("the Board") seeking to represent all sworn police officers of the City below the rank of chief of police. The City subsequently filed a motion to dismiss the union's petition, arguing that the Board lacked jurisdiction since the City had fewer than 35 employees and, as such, at that time, did not meet the threshold jurisdictional requirement under section 20(b) of the Public Labor Act. 5 ILCS 315/20(b) (West 1998). The statutes have since been amended and now only require five employees to trigger collective bargaining rights.

The administrative law judge had to determine whether the City's 21 swimming pool employees were "short-term employees," because "short term employees" do not meet the definition of "employees" under the Act. The administrative law judge found that the swimming pool employees had a reasonable assurance of being rehired from year-to-year, and therefore, the swimming pool employees could not be considered short-term employees. The administrative law judge concluded that the Board had jurisdiction over the City because, once the swimming pool employees were included in the count (since they were not short-term employees), the City had the requisite minimum number of employees or more. The City appealed this decision.

The appellate court stated that the Act defines a short-term employee as "an employee . . . who does not have a reasonable assurance that he or she will be rehired by the same employer for the same service in a subsequent calendar year." The court held that a "reasonable assurance of rehire" requires some evidence that the employer made some type of representation that the employee could have reasonable construed as an "assurance" that he or she would be rehired at a later date. Because the City did not have a policy favoring former summer swimming pool employees over other applicants nor did any City employee ever make a statement that would provide swimming pool employees with a reasonable assurance that they would be rehired, the court found that there was no evidence that the employees had been assured rehire.

Therefore, the appellate court concluded that the swimming pool employees were short-term employees that would not be counted toward the then 35 threshold jurisdictional requirement under the Act. The court reversed the Public Labor Board's decision, holding that the Board did not have jurisdiction over the City because the City was a municipality with fewer than 35 employees. The law now requires governments with five or more employees to be subject to collective bargaining.

Governmental bodies in their contracts and personnel documents should clearly delineate that short-term employees have no assurance of being rehired.

117. Q: Can local government employees work for a candidate running in the upcoming local officer's election?

A: Employees of local governments (Cities, Villages, Townships, Park Districts, Fire Districts, Library Districts, School Districts, etc.) are permitted to work for candidates running for election to office in the governmental unit which employs them, but not while they are "on the clock," and not as an express or implied condition of employment. Local government employees may not be required to work for candidates during compensated time, and certainly not during "time off." The "State Officials and Employees Ethics Act," 5 ILCS 430-15, which local governments must make applicable to their employees, sets out "Prohibited Political Activities." Employees may not engage in these political activities during any hours for which they are receiving compensation. No employee may be rewarded for engaging in political activities for a candidate. The law does not prohibit employees from engaging in political activity voluntarily off duty, without governmental compensation.

Specific prohibitions include the following:

(a) No officer or employee shall intentionally perform any prohibited political activity during any compensated time.

(b) No officer or employee shall intentionally use any property or resource of the governmental entity in connection with any prohibited political activity.

(c) No officer or employee shall intentionally require any other officer or employee to perform any prohibited political activity (i) as part of that officer or employee's duties, (ii) as a condition of employment, or (iii) during any compensated time off (such as holidays, vacation or personal time off).

(d) No officer or employee shall be required at any time to participate in any prohibited political activity in consideration for that officer or employee being awarded additional compensation or any benefit, whether in the form of a salary adjustment, bonus, compensatory time off, continued employment or otherwise, nor shall any officer or employee be awarded additional compensation or any benefit in consideration for his or her participation in any prohibited political activity.

118. Q: Do municipal officials such as the Police Chief and public works director have to obey orders from the Mayor or Manager?

A: The answer to this question is subject to statutory differences depending on the size and form of government of the municipality. In addition, there is also the question of the appointed officer's own conscience and willingness to follow questionable orders. In municipalities which do not have a statutory Manager

form of government, the Mayor appoints almost all officers who, after being confirmed, serve for the term established. Such officers can, however, be discharged even during their term by the Mayor. If the Mayor wishes to remove an appointed officer during his or her term, the Mayor may do so by giving the reasons for the removal in writing to the corporate authorities, which are allowed to overturn the Mayoral discharge on a two-thirds vote. If so, the individual is returned to office. In most statutory Manager municipalities, the Manager appoints department heads, whose appointment need not be confirmed, and who generally serve for indefinite periods at the pleasure of the Manager.

The position of police chief is somewhat different in that in municipalities with a population of over 5,000, the Board of fire and police commissioners chooses the police chief unless the ordinance creating that body provides for a different appointing authority, which is usually the Mayor or the Manager. The Mayor cannot, however, appoint or discharge a police chief without the confirmation of both actions by the City Council or Village Board. In a Manager form of government, where the appointment of a chief is not placed in the Board of fire and police commissioners, the Manager can appoint the chief without Council or Board authority, but must receive it to discharge.

Once appointed, all such officers are to take direction from three sources. First, they are obligated to follow the directions of the municipality as they are stated in ordinances which may define their powers and duties. Second, they are normally expected to follow the directions of the officer who has the power to appoint or to make executive decisions. That individual is usually the Mayor or the Manager. Police officers, and actually all municipal officers, also have a higher obligation to not violate applicable state statutes or the state or federal constitutions. For example, if a police chief were told by his Mayor to arrest a political opponent without a valid reason, he or she may choose, at his or her peril, to exercise what is effectively prosecutorial discretion, and decide not to make what may be an unlawful arrest. An appointed officer who refuses the direction of a supervisor runs the risk that the person so rebuffed will seek his or her removal from office. Obviously, in addition to the strict legal rule involved, Mayors and Managers who try to micro-manage the activities of officers, especially without expertise in specialized areas, may well find themselves in a lawsuit either filed by the offended officer or by the person or entity which suffered the indignity or damage of some municipal action made in error or ignorance.

119. Q: I serve as an appointed clerk in a small Village. The Board of Trustees is considering changing where my position falls on the Village's organizational chart. If the Village administrator is given the authority to supervise some of my activities, can the administrator be given the power to discharge me?

A: Governmental bodies have great discretion in how to classify an appointed clerk, the duties of the clerk and who the clerk reports to. Obviously, if an appointed clerk is not happy with the "ground rules," that individual can refuse to take the job or resign. However, an appointed clerk is, nonetheless, an appointed officer of

the municipality and not an employee, and the provisions of state law which give the Mayor the power to hire or discharge appointed officers applies to a clerk as well. The Village Board, by ordinance, can change the place where the position of an appointed clerk falls on the Village's organizational chart. An appointed clerk, however, is still entitled to pursue all of the powers and duties granted to clerks under state law. That means, for example, that a clerk, whether appointed or elected, is permitted to attend all meetings, open and closed, of the Village Board, except for meetings which would directly bear on criticism of his or her performance or which involve litigation. You may be assigned duties in addition to those which the clerk is granted by statute, and the administrator may be chosen to supervise those duties.

120. Q: What must municipal officials do to comply with federal and state overtime regulations?

A: Both the federal Fair Labor Standards Act and the state Minimum Wage Law require employers, including public employers, to pay non-exempt employees overtime wages at a rate of time and one-half for all hours worked over 40 in a work week. Non-exempt employees are those who do not fall into one of the exempt categories available under the law which relieve employers from overtime obligations. Public employers most commonly have a handful of salaried employees who fall into the general exempt classifications of executive, administrative and professional (including computer professionals). Special rules also apply to police officers and firefighters. Determining whether jobs are exempt requires an analysis of jobs on an individual basis as these exemptions are duty based and is beyond the scope of this publication. Employers should consult with their labor and employment attorneys to ensure that their employers are appropriately classified.

When computing hours for overtime purposes under federal and state law, employers should count only hours actually worked, and not meal breaks where the employee is relieved of all duties or benefit time used during that week. The overtime obligation extends to all non-exempt employees, including seasonal employees and is determined on a week by week basis. Public employers may grant compensatory time in lieu of overtime pay as long as it is granted at a rate of time and one half for every hour worked over 40 in a week.

121. Q: How can you achieve flexibility in health care coverage in a collective bargaining agreement?

A: Typically, employers who enter into collective bargaining agreements with their employees seek agreements with a duration of three, four or even five years, if possible. This provides a stable work force for the employer with no threat of strike, as well as predictability of the employer's contractual obligation over that period of time. Most significantly, longer contract periods provide employers with relief in knowing that they can avoid the bargaining table for three or more years.

The greatest disadvantage to multi-year contracts is that the employer becomes obligated to certain costs without the ability to predict what the actual costs will be. This is most especially true on the issue of health care. In most bargaining situations, wages and insurance benefits are the two central financial issues negotiated. In part, this is because health care coverage can amount to anywhere from 10 to 15 percent of salary. Unions seek to guarantee the level of coverage and restrict cost increases for their members. Absent language in a collective bargaining agreement which provides an employer with flexibility to change costs or coverage should circumstances require, the employer is bound to provide union members the exact coverage that was agreed to in bargaining for the life of the contract, regardless of whether the employer can still purchase insurance to cover it.

What is the best way to plan for changes to avoid unnecessary financial risk for the employer and equitable cost sharing by the employees. These unpredictable situations generally arise in one of the following fashions:

a. Unions make unreasonable demands to control costs to its members because its members are unfamiliar with the economic reality of insurance costs today.

b. Carriers increase rates beyond those forecasted, resulting in unanticipated costs to the employer.

c. Self insurance pools limit or change plan options.

d. Governmental or legislative changes occur during the life of a contract.

e. Employees seek new types of coverage about which the employer has no history on which to determine claims or costs.

The Affordable Care Act (ACA) requires unionized employers to reassess the health benefits that they provide employees in addition to identifying which employees are eligible for benefits. The ACA creates a new bargaining landscape regarding health benefits, requiring employers to develop new strategies for negotiating these benefits, with the goal of minimizing their exposure to ACA penalties, satisfying the ACA's coverage and benefit requirements, and preserving flexibility to make changes to comply with the ACA's complex and evolving requirements.

While an employer cannot plan for all possibilities, when entering into the initial negotiation or renegotiation of a collective bargaining agreement, thought must be given to planning for unexpected changes in insurance coverage or costs. Your goal should be to develop language that can be bargained and ultimately included in contracts which provide the maximum amount of protection possible against these unpredictable situations. The contract can provide that the topic is reopened for negotiations if one of the unpredictable changes occurs. The application of the ACA may be an ideal subject for a possible reopener.

122. Q: Should the Mayor take calls from the union President or business agent over a dispute which has arisen between an employee and his or her administrative superior?

A: If the municipality has a Manager or administrator, calls from the union President or business agent should probably be addressed to that individual. In addition, most union contracts contain a methodology for formal grievances which usually begin with the head of the particular department involved and only move up after an initial process has taken place. The Mayor should understand that procedure and not cheapen it. Perhaps most important of all is the fact that many words do not have their common meanings in an environment relating to collective bargaining. For example, a Mayor may agree with the union President to only fire someone for "cause" without understanding that he or she has just effectively granted the equivalent of tenure for the second assistant mechanic. Further, while the mayor, by herself, probably cannot bind the Board to any sort of agreement with the union, even an informal commitment from the mayor gives the union a great deal of leverage in negotiations. In matters of major importance and policy decisions, the Mayor needs to be involved, but even in matters involving the same army, the sergeant normally doesn't get a direct conversation with the general.

123. Q: What can be done about IMRF overfunding?

A: The employees of many governmental bodies are entitled to benefits under the Illinois Municipal Retirement Fund. That is a fund administered by a state agency, but the actuarial base upon which contributions are developed is dependent upon the demographics of individual governmental bodies. IMRF uses an elaborate actuarial formula to inform governments of the money which must be produced each year to fund their required IMRF contribution. The contribution is a combination of money contributed from the employees and from the governmental employer. Some governments simply assume that the amounts demanded by IMRF each year are written in stone. While it is clearly the obligation of all governmental bodies to adequately fund their IMRF obligations, that state agency has often been found to have taken an excessively conservative approach in computing the amounts due from some public employers. Prior to the imposition of tax caps, governments were less concerned about the money to be paid to the IMRF since the amount of that levy was unlimited and did not diminish the amounts which could be levied under other funds. For those governmental bodies whose tax levies are subject to a tax cap, payments in excessive amounts to IMRF simply diminish the amount of money which can be used for other purposes.

Challenging the amount demanded by IMRF in its annual letter to your governmental body requires a number of steps. First, a financial advisor must be employed who can evaluate the amount which your government currently has allocated to it in the IMRF Trust Fund, along with your specific demographics. That financial consultant will check the assumptions which have been made by IMRF and may conclude that even using these assumptions, an error has been

made. More frequently, however, some of the assumptions made by IMRF are inaccurate, and the consultant can produce an actuarially-sound opinion to support the need for smaller contributions, which reduced amount may extend over several years.

At that point, your law firm, which has worked with the consultant, will attempt to convince the IMRF that fewer tax dollars are necessary for your government to meet its statutory obligation. Sometimes, governments have been successful at that stage. In other instances, it is necessary for the government to consider filing a lawsuit against the Illinois Municipal Retirement Fund seeking a declaratory judgment and a mandamus or mandatory injunction to prevent a demand for more money than is actuarially justified. Often, filing a complaint will result in a compromise being worked out, which significantly reduces the amounts of contributions necessary. In a rare case, a full trial may be necessary to determine whether the court will support reduced contributions. If a full trial is necessary, careful cost-benefit analysis must weigh the cost of litigation against the amount sought to be saved from excessive IMRF contribution requirements.

A governmental body should only undertake this kind of an effort where the amount of the reduced payments are substantial, and after its employees are made aware of the nature of its efforts. No public employer should undertake such an effort until it has explained to its employees that even payments in the reduced amount will not in any way jeopardize their right and ability to fully receive pension benefits when due. Employees must be helped to understand that there is very little benefit to them in over funding pension payments. Such over funding often prevents the community from providing other fringe benefits or improved working conditions for the employees.

124. Q: How can governments counter unionization?

A: When a governmental body becomes aware of union organizing activities involving its employees, there are actions which it can take, but these actions are highly regulated and violating the rules can have very serious consequences. The Illinois Public Labor Relations Act and the Illinois Educational Labor Relations Act contain broad protections and prohibitions about employer's actions during labor union organizational campaigns. These Acts, in general, protect an employer's right 1) to freedom of expression if such expression contains no threat of reprisal or force, or promise of benefit; 2) to spend public funds to seek or obtain advice from legal counsel and 3) to communicate internally with its employees.

When an organizational campaign is underway, employers are certainly entitled to express their view of unionization as long as that view cannot be interpreted as coercion or threats. For instance, it is completely permissible to point out to employees that if a union is elected, they will pay union dues, whether or not they choose to be a union member. Similarly, if other employees in the workplace are unionized, an employer may show a comparison of wage increases for union and

non-union employees after a deduction for union dues. The Labor Board, which enforces the Act described above, has upheld an employer's right to hold informational meetings with employees to inform them of the obligations of union membership, as long as these meetings are not at a time or place that is arguably intimidating (for instance, not one on one in the office of the department head). Management can remind employees that, with a union, contract grievances will be brought through the union instead of by an employee to his or her supervisor directly, or that a contract will probably dictate how transfers and promotions will be made. Additionally, it is permissible for an employer to ask employees to share their issues and concerns, as long as it is clear that such communication carries with it no reprisal. While an employer can most certainly provide what might be characterized as the "other side of the story" of unionization, it has to do so in a fashion that is not prohibited by law. A handy mnemonic is provided by the word "TIPS." Employers may not Threaten or Intimidate their staff, they cannot Promise a benefit in order to induce staff to forego unionization and they cannot conduct surveillance on their activities. For example, the Labor Board will find that an employer has violated the Act if it passes out "Vote No" buttons (as the employer will then be able to discern who is in favor of representation and who is not, causing the potential for intimidation). Of course, unionization can now be implemented by a signed petition rather than an election. Similarly, an attempt to question employees on their position on unionization is also impermissible, as is any attempt to identify who attends organizational meetings. Clearly, any adverse employment action, which cannot be supported by evidence of a lawful purpose unrelated to union activity, also will be held to be a violation of the Act. And, while it may seem illogical, an employer will violate the law if it grants a wage increase to staff during an organizational campaign, unless it is a raise that occurs on a regularly scheduled basis (an annual cost of living increase, for instance).

Finally, both the Public Labor Relations Act and the Educational Labor Relations Act permit an employer to expend public funds only to seek or obtain advice of counsel in organizational campaigns. Whenever a union is organizing a government workplace, legal advice is an invaluable tool in ensuring that employees receive complete information on union representation without violating the law. Conversely, the expenditure of funds on other consultants, or on materials which go beyond the communication of neutral information and are designed to influence the outcome of a campaign is strictly prohibited. Therefore, the purchase of consultant advice, videos, pamphlets, signs or the like which carry a general anti-union message and not information specific to the workplace, are a violation of the Act and could result in sanctions against the employer. This caution though does not preclude an employer's attorney from "scripting" a message to employees about their workplace. To avoid sanctions and to act within the parameters of the law, the best advice is always consult with an experienced labor attorney before waging a campaign to counter unionization.

125. Q: Can an employer prohibit union representatives from engaging in organizational activities on employer premises?

A: Many government employers attempt to counter union campaigns in the workplace by restricting the times and places that outside organizers may enter the premises to meet with employees and how they can distribute information. It is always important to remember that non-employee union organizers can be held only to the same rules that apply to other non-employee visitors or solicitors. For instance, if an employer allows insurance companies or other vendors the opportunity to meet with employees during breaks and lunch periods, then it cannot restrict the ability of union organizers to do the same. This holds true for distributing leaflets or other written material as well. Permission to enter the workplace can be a prerequisite to entering as long as it is not unreasonably withheld. Similarly, the employer can restrict meeting places to break rooms or other common areas and prohibit organizers from entering the actual work areas.

126. Q: What if I don't want our employees using our computers and e-mail to organize and support a unionization campaign?

A: If an agency's acceptable use policy allows communication of brief personal notes or jokes to co-workers then brief information regarding union representation will also be found permissible. The exception, as with all personal communication on work time, is that it will become impermissible if it causes more than a minimal disruption in the workplace.

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

CHAPTER 3. REGULATION

INTRODUCTION

All local officials want to create a better life for their residents and their communities. The most far-reaching powers given to local officials to accomplish this are zoning and land use regulation and licensing and permits. Elected officials determine where people live, where businesses can be located, what kinds of buildings may be built, what kind of streets people will drive on, and whether properties will be landscaped. When a community is just being developed or is in a growth spurt, the decisions made about zoning and land use have long-lasting and profound effects. Similarly, regulations concerning permits and licensing affect the businesses that locate in a community, and the building requirements will apply to virtually all structures in a community. Maintaining the quality of life in a community depends largely on the success with which the government administers its regulatory powers.

ZONING AND LAND USE

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

A: When dealing with a complicated policy issue, Mayors need to do their homework. They should read everything that they can about the issue. There are now many web sites which deal with most issues which are present in multiple municipalities. There are many articles in newspapers and professional journals on issues such as tear downs or downtown redevelopment. Often, the municipality chooses to employ a consultant who has dealt with the issue before, and can talk through the issue with the Mayor, the Council or Board, and with the public. Sometimes the Mayor would be well advised to appoint a citizens' committee to study and give advice on the issue. This can soften a recommendation to take a seemingly unpopular action. The best Mayors, even if they believe that they will come down on one side of the issue, are willing to listen to organizations and people who take the opposite view. At the very least, that approach will often allow the Mayor to counter his or her opponent's position in a way which will satisfy the public.

128. Q: What do you do if a lingerie shop moves next to a school and sells sexual devices, but only a few pieces of lingerie?

A: Governmental bodies are allowed to use zoning and licensing regulations to deal with "adult uses" which wish to open within the community. A series of cases have arisen that govern the way communities can limit adult uses to certain portions of the municipality and can regulate their operation. Courts have been willing to close businesses which violate carefully drafted ordinances by trying to operate adult uses under other names. Importantly, municipalities cannot regulate adult uses simply because of the conduct or message being portrayed, but because of the secondary, or indirect, impacts that such uses have been shown to have on a community. This is the "secondary effects" doctrine. These regulations must be

supported by evidence and carefully drafted to avoid regulating more strenuously than necessary. The evidence need not be based on the conditions in your community, but it must be tailored to the regulations so they are justified by the secondary effects of an adult use, rather than the principal nature of the activity.

As far as adult uses go, an ounce of prevention is worth a pound of cure. All municipalities should enact comprehensive adult use ordinances, one for licensing such businesses and another for zoning. These ordinances should apply not only to novelty shops, but also to bookstores, video stores, movie theaters, and "gentlemen's clubs." These ordinances should be reviewed regularly to be certain they meet the requirements and limitations set by the courts, which often rule on the constitutionality of such ordinances. Ancel Glink has helped many local governments prepare these ordinances.

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

A: There is generally little precedent with regard to zoning variances. The facts of each situation tend to be different, and any ordinances granting variances should point out the specific facts applicable to that particular circumstance. The precedent setting value of variances is really only important in a situation where the variance involves a situation very common within the community. In some situations, for example the ability to build a second floor on homes which are only non-conforming because of front-yard setbacks, a municipality may ultimately decide to change the zoning ordinance to allow that configuration rather than waste its time and citizen's money dealing with repeated requests for variances which are almost always granted.

130. Q: What do you do if the School District refuses to follow your drainage or building codes?

A: School buildings are not covered by municipal building codes, but, instead, by state-mandated life safety codes. School districts and other local governmental bodies are generally covered by the zoning, subdivision and drainage ordinances of the municipality. A recent cases in which a school built a stadium next to homes with no zoning approval and was held to be in violation of local zoning illustrates the validity of municipal regulations. That case is, however, being considered by the Illinois Supreme Court. Legislation is also pending which would confirm municipal zoning authority over school districts.

131. Q: Should a Mayor do anything when the corporate authorities are consistently rejecting or revising recommendations from a plan commission or zoning Board of Appeals?

A: The plan commission and zoning Board of Appeals should "run interference" for the corporate authorities and have the courage to reject questionable applications for zoning changes, special uses and variances. They should also carry out the

task of holding the often-lengthy public hearings on these subjects. They then must make fair and honest recommendations which generally follow the philosophy laid down by the Board or Council in its prior actions on granting or failing to grant property owners' requests. These are normally advisory bodies. It is also true that some few municipalities give to zoning Boards of Appeals, as is allowed by statute, the right to make final decisions regarding variances.

Where a plan commission or zoning Board of Appeals is completely out-of-step with the corporate authorities, it will become apparent fairly quickly because many of their recommendations will be overruled. Sometimes these bodies can be brought together by having a member of the Board or Council serve as liaison to these recommendatory bodies. Occasionally, joint meetings of the two bodies are helpful so that there can be an open discussion of those areas where disagreement has occurred. If the bodies are completely out-of-step, then the Mayor should fill vacancies on these bodies with individuals who, while independent, are more in tune with the general philosophy of the municipality expressed by the final decisions of the corporate authorities.

132. Q: Will insurance companies and governmental pools cover claims for "regulatory takings?"

A: The answer to this question is still very uncertain. Governmental bodies, principally municipalities and counties, frequently take regulatory actions, which can and do affect the value of property. If a municipality reduces the hours during which liquor stores, convenience stores or gasoline stations can be open, the owners or tenants can claim that part of the value of their property has been "taken" by the governmental body. Although not a physical taking, these actions can be argued to violate federal and state constitutional provisions which protect an individual's property from being taken without due process of law and without value being paid. A similar argument can be made by a home owner on a small lot who is prohibited from building a second story addition. Written on a bigger scale, the commercial owners and developers of large tracts of land can contend that a failure to grant them high density or commercial zoning categories also constitutes such a "regulatory taking."

The courts have been divided on the issue of whether governmental actions of this nature constitute a mere regulation or a "taking." Ultimately, the question comes down to whether the actions of a governmental body in restricting the use of land, are similar to other standard regulations, like front yard setbacks, for which the government does not need to pay, as opposed to rules forbidding all construction on beach front land to allow neighbors to retain a view of the ocean, for which the courts have held that governments are required to compensate the land owners. Please note that in this last example, the government would be obligated to pay damages even though it did not physically take control of the property to which the restrictions applied.

One reason why these issues are important is that the language of almost all insurance policies and the central documents of governmental self-insurance pools provide that no coverage is available when the governmental body exercises its power of eminent domain. The reason for this exception is that, absent this language, governments could simply take over lands for roadways, sewer lines or water detention ponds, without the owner's permission, and turn over any later claim to their insurance company.

After a decade or more in which the federal courts seemed to be deciding that strong regulations were really "takings," the courts have thankfully retreated. That is especially the case where the regulation was equally and fairly applied.

133. Q: Are municipalities required to have a comprehensive land use plan?

A: Municipalities are not required to adopt a comprehensive land use plan. However, if there is a comprehensive plan in effect, it can be an important factor in helping to defend a suit challenging a zoning or subdivision decision. To determine whether a municipality's decision to grant or deny zoning relief or to approve a subdivision is reasonable, a court can consider whether the municipality has carefully planned the development of the community and whether the challenged decision is consistent with the comprehensive plan. If there is a plan and if the decision was consistent with that plan, the decision is more likely to be upheld by the court. The Illinois Municipal Code gives responsibility for developing the comprehensive plan to the plan commission. Act, §5/11-12-6. There are several professional planning consultants in Illinois who have experience is assisting municipalities in creating comprehensive plans. Experienced attorneys can also help.

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

A: One of the most difficult tasks which a Mayor may face is to explain to the citizens that there is something which the municipality may not be able to do. If a developer wishes to build a project that is quite clearly within his right or someone wishes to conduct a lawful but not popular business, should the Mayor "guarantee" that he or she will "Put a stop to this nonsense" knowing full well that the effort will be unsuccessful? This is ultimately not a good approach and may result in a wasteful expense of public funds.

Ironically, in some cases, citizens have commended a Mayor who, before spending $200,000 in legal fees in an unsuccessful effort, will explain that the attorney has advised the municipality not to waste its money. Sometimes, the lawyer can be the "bad guy" who talks the unvarnished truth. This may be especially the case where a small number of homeowners demand that the municipality defend their tiny neighborhood from something they fear or wish to reject. In some cases, the statutes give neighbors the right to file lawsuits, for

example, against private property owners who are alleged to be violating the municipality's zoning ordinances.

135. Q: Are religious institutions entitled to special treatment in zoning cases?

A: Not as much as you might think. While religious institutions have been accorded different—some would say preferential—treatment under Illinois and federal law, courts have routinely upheld the application of zoning and other land use regulations to religious institutions. Federal courts have issued several decisions that will strengthen a municipality's position in a suit brought against it under the federal Religious Land Use and Institutionalized Persons Act. For example, religious institutions are subject to reasonable parking requirements in the same way as other facilities that generate traffic needs.

136. Q: Are there any federal laws or rules that apply to a special use application to construct a cellular telephone antenna, or are they treated like any other special use?

A: There are special rules for cell towers. Cellular communication is considered to be a matter of interstate commerce, subject to regulation by the Federal government. The Telecommunications Act of 1996, 47 USC 332(c)(7), establishes two basic principles: a municipality may not unreasonably discriminate among substantially similar providers (i.e., allow AT&T but not Sprint) nor effectively prohibit the provision of all cellular services. A municipality can require co-location (multiple providers on one tower, to reduce the number of towers) but not to the extent that it would result in a de facto denial of service. "Denial of service" means a gap in coverage where effectively no service is available. It does not mean that every service provider must be allowed to have "5 bar" quality of service in all parts of the community. The municipality may limit the facilities to the least intrusive installation which will provide the minimum satisfactory service. Although a matter of some controversy and nearby resident astonishment, a municipality is not allowed to consider the health consequences of radio frequency signal radiation so long as the applicant will meet FCC maximum safe transmission standards (despite what the Internet says). Neighbors who wish to raise this objection find it hard to believe that the U.S. Congress has made such concerns a non-issue. In considering a special use application for a cell tower, the plan commission should be neutral and non-discriminatory. Its decision must be in writing, be based on the evidence presented at the public hearing, and depending on the nature of the application may need to be issued within 60, 90 or 150 days. Where a carrier wants to collocate on an existing tower, or on a building where other antennas are located, the decision must be made within 60 days (provided the size of the installation is not too large). For other collocations, there is a rebuttable presumption the decision can be rendered within 90 days. Finally, new facilities are expected to be evaluated within 150 days. In each case, the timeline can be tolled if the applicant does not submit a complete application.

137. Q: Can a municipality run a sewer or water line down a road right-of-way where the property is used for public purposes only through a dedication for roadway purposes?

A: No. The dedication of public roads and other public rights-of-way in Illinois takes place in two ways. The owner of land can make a common law dedication of a roadway simply by agreeing to allow a public body to construct a road on the owner's land. The public records in many counties contain evidence, including handwritten letters by farmers allowing Townships, Counties and municipalities to "lay out a road on the north property line of my farm." Such a common law dedication is effective, into the future, but only for roadway purposes. When land is subdivided, roadways are typically shown on the plat of subdivision with the phrase "dedicated for public purposes." Such dedications can also be done by Deed or Plat of Dedication. This type of dedication is referred to as a statutory dedication and, in effect, transfers ownership interest in the land to the public body.

Under a common law dedication, the land remains owned by the dedicator, but subject to the public right-of-way easement. In that case, the owner continues to pay taxes on that land, although the amount of taxes assessed are ordinarily very small. The main reason why the distinction between these two types of dedication is important is that the courts have held that a common law dedication does not imply the right of the governmental body operating the road to construct for itself or to allow the construction by others of various utility lines on the property. A governmental body that has received a statutory dedication can, for example, permit a cable company to lay its lines in that right-of-way. The full breadth of the uses permitted in a statutorily dedicated right-of-way often can be found in the community's subdivision code, where it describes the language required to be written on a plat to dedicate the right-of-way. If the dedication of the roadway was merely done by "common law," any public or private party, which wishes to use the roadway easement for other than surface, vehicular or pedestrian traffic must receive an additional grant from the underlying property owner.

138. Q: What is a local governmental body to do when a Developer files for bankruptcy before transferring the land promised to a governmental body or paying impact fees?

A: During any period of economic downturn, many governmental bodies will find that Developers, both established and not so established, face serious economic problems, and, in some cases, have no choice but to seek bankruptcy. In many cases, the Developer has promised to donate land and may be obligated to complete improvements such as streets and to pay impact fees. These donations of land or money are contained within annexation agreements. In other cases, they are found within municipal subdivision ordinances.

To the surprise of many governmental bodies, annexation agreements, like all contracts entered into by a party filing for bankruptcy, come under the jurisdiction

of the Bankruptcy Court. In most cases, the Bankruptcy Court will order the transfer of the promised land. In other cases, lending institutions, with a priority interest in the land, or subsequent purchasers will honor the terms of the annexation agreement in order to be assured of the zoning or other needed benefits arising from the agreement. In some cases, governmental bodies will find themselves at the end of a long line of unhappy, unsecured creditors. Where the issues involve the construction of improvements to be transferred to the government such as streets and utility systems, most communities have required surety bonds or irrevocable letters of credit to be posted to guarantee the completion of these improvements.

PERMITS AND LICENSING

139. Q: What do you do if a flower shop balks at a $500 annual license fee?

A: You should listen to the complaint, since it may be valid. Municipalities must be careful that their license fees bear a reasonable relationship to the actual cost of enforcement of licensing regulations. Under the Illinois Constitution, municipalities are not permitted to use licensing as a source of revenue above the reasonable cost of providing inspectional and other services. Of course, the cost of regulation can differ from year-to-year, and the community is entitled to consider future regulatory costs. A court has held that a license fee which is four times the cost of annual regulation is valid, but another court held that a fee equal to ten times regulatory costs was invalid. Municipalities need to be careful not to make themselves victims of a class action lawsuit seeking to recover all excessive license fees for a number of past years.

140. Q: What do you do if the municipality finds that a permit has improperly been issued after construction of a building has begun?

A: If a municipality finds that a permit has been improperly issued after construction of a building has begun, it needs to review the principles stated in a series of appellate court cases, which address whether the rights of the property owner have intervened and whether the cost of following the ordinances would be unreasonable when compared to the benefit to be achieved by complying with the ordinances. In some cases, the courts have held that a municipality has waited too long to correct its mistake or that the cost of fully complying with the ordinances would be excessive. Where the mistake which the municipality made would result in a building being constructed which had serious construction flaws, the court will likely order the owner to comply with the ordinances even if the cost is substantial. Sometimes a compromise can be worked out. This is a situation where the municipality should carefully consider its options before attempting to stop construction.

141. Q: Can a municipality license doctors?

A: No. Non-home rule municipalities can only license those professions and occupations which are specifically authorized by statute. Even home rule municipalities, which have broader powers, cannot license or regulate a long list of businesses where the Legislature has pre-empted home rule powers. Even where a municipality is allowed to license a business, it can only do so for regulatory purposes, and not to gain extra revenue which bears no relationship to the potential cost of enforcement (unless there is also authority to tax that enterprise). Physicians, along with a long list of other entities, have gained pre-emption by the Legislature. A list of such "pre-empted" occupations can be found in the *Illinois Municipal Handbook* written by Ancel Glink attorneys and published by the Illinois Municipal League.

142. Q: What types of businesses can Illinois municipalities license?

A: The state statutes contain many provisions regarding municipal licensing power. Where permitted by statute, Illinois non-home rule municipalities have the power to license, regulate, tax, locate and even prohibit a great variety of listed businesses. The power to tax, locate or limit is reserved for a small list of businesses. The power to license carries with it the general power to regulate. The regulations must be reasonable and non-discriminatory.

Home rule municipalities, except to the extent that their power is pre-empted by state legislation, have the full power to license and regulate businesses. Home rule municipalities, if they wish to exercise the power, can, subject to constitutional limitations, also limit and locate businesses. The power to locate is generally exercised by establishing particular zones in which certain businesses can locate or providing that particular businesses can only be located within a certain distance from the next similar business. The Constitution does contain a prohibition against the power of a home rule community to tax occupations except as that power is granted by the General Assembly. In addition, there is a constitutional prohibition against using the power to license and regulate for the purpose of producing surplus governmental funds. All Illinois governments are limited in their power to license to fees which bear some reasonable relationship to the anticipated or actual cost of regulation.

143. Q: Can a Mayor shut down a tavern?

A: Yes. The Mayor, who is by law also the liquor commissioner, can immediately suspend a liquor license for up to 7 days if the Mayor decides that the continuing operation of the establishment would threaten public health or welfare. For example, repeated sales of alcohol to minors, or evidence of drug sales or constant fights in the tavern could constitute a threat to public safety. State law, 235 ILCS 5/7-5, says that the notice of suspension must advise the licensee that he or she has the right to a public hearing within the 7 days to contest the suspension. In non-emergency situations, the Mayor must hold the hearing first, and after a

hearing may impose a fine, suspend a license up to 30 days, or revoke a license. After a hearing, the Mayor must issue a written decision containing the reason for the fine, suspension or revocation. In every case, the licensee has a right to appeal to the State Liquor Control Commission. Once the appeal is filed, the closure order is usually stayed until the Commission is able to hear the case and issue its reviewing decision. An appeal can then be taken to the court system.

CHAPTER 4. FREEDOM OF INFORMATION ACT AND OPEN MEETINGS ACT

PUBLIC ACCESS COUNSELOR

144. Q: Who is the Public Access Counselor and why do I care?

A: The powers of the Attorney General provide the power to give "written binding and advisory public access opinions." 15 ILCS 205/4. These opinions are provided through the office of the Public Access Counselor which is housed within the Attorney General's office. Accordingly, the Public Access Counselor will have the authority to issue binding opinions on whether violations of the Open Meetings Act occurred in your community and to order the release of documents under the Freedom of Information Act otherwise believed by your community to be exempt from disclosure. The Attorney General is also given subpoena power to enforce the Public Access Counselor's powers. The Public Access Counselor is a watchdog, with teeth, ensuring that your public body is complying with all public access laws.

145. Q: Are there limitations on who can serve as the Public Access Counselor?

A: There is only one limitation, namely that the Public Access Counselor must be an attorney licensed to practice law in Illinois. 15 ILCS 205/7(b).

146. Q: What are the duties of the Public Access Counselor?

A: The Public Access Counselor is charged with many responsibilities, including: (1) establishing and administering training programs on public access laws; (2) providing educational material and programs on public access laws; (3) resolving disputes over potential violations of the public access laws, by mediating, informally resolving the dispute, or issuing a binding decision; (4) issuing advisory opinions with respect to public access laws; and (5) preparing and distributing model policies for compliance with the Freedom of Information Act. 15 ILCS 205/7(c).

FREEDOM OF INFORMATION ACT

147. Q: What is the breadth and purpose of the Freedom of Information Act?

A: The preamble to the Act provides it is a "fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible…." It also states it is not the purpose to "cause an unwarranted invasion of personal privacy, nor to allow the requests of a commercial enterprise to unduly burden public resources." See 5 ILCS 140/1. The General Assembly states that providing records to the public is a primary duty of public bodies, regardless of the impact on finances.

148. Q: If it is unclear whether a document is subject to inspection or not, should we presume it to be subject to the Act?

A: Yes. Section 1.2 establishes a presumption that "all records in the custody or possession of a public body are presumed to be open to inspection or copying." The burden is on the public body to provide "clear and convincing evidence" that it is exempt. See 5 ILCS 140/1.2.

149. Q: What does the Act apply to?

A: The Act applies to all Public Records of a public body pertaining to the transaction of public business regardless of physical form. Public body includes all subsidiary bodies, committees and subcommittees of a public body. Accordingly, if a municipality forms an ad hoc committee to investigate and make a recommendation on what color to paint the Village Hall, it is now subject to the provisions of the Act. A public record is any item of information, whether recorded in writing or electronically, which bears upon the conduct of public business. While documents in the custody of public bodies are usually considered public records, correspondence of a personal nature that does not bear upon the conduct of public business is not a public record.

150. Q: Are emails considered "public records"?

A: The PAC has issued a binding opinion (No. 11-006) stating that emails related to the transaction of public business are indeed public records subject to disclosure, regardless of whether those emails are generated on the official's private equipment or personal email accounts. In response to an appropriate request, municipalities must check not only their own public equipment but also must request officials or employees to provide private emails responsive to the request. More recently, an appellate court has narrowed the scope of e-mails subject to disclosure when they are written or received on private accounts. In Champaign v. Madigan, the appellate court said that a public official's electronic communication about public business that was sent to/from a private device or account might be subject to FOIA, but only if it met one of the following three circumstances: 1. the email/text was forwarded to or from an official government account; 2. the email/text was sent to a majority of the members of a public body; or 3. the email/text was sent during a meeting of the public body.

151. Q: Is "private information" exempt?

A: Generally yes. The Act includes "private information" as an exemption, unless the information is required to be disclosed under a different provision of the Act. Private information is defined as "unique identifiers, including a person's social security number, biometric identifiers, personal financial information, passwords or other access codes, medical records, home or personal telephone numbers, and personal email addresses." It also includes "home address and personal license

plates, except as otherwise provided by law or when compiled without possibility of attribution to any person." See 5 ILCS 140/2(c-5) and 5 ILCS 140/7(1)(b).

152. Q: What is the difference between "private information" and "personal information"?

A: While "private information" is exempted under Section 7(1)(b), Section 7(1)(c) also exempts any "personal information" contained within public records. However, for the exemption to apply, the disclosure of the "personal information" must constitute a clearly "unwarranted invasion of personal privacy." This means information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information. The subject of the information may consent in writing to the disclosure. Otherwise, the personal information should not be disclosed.

153. Q: What happens if the request is for a commercial purpose?

A: If the request is for a commercial purpose, the timeframe for responding to the request is extended to 21 days. However, within this 21 days, the public body must either: (1) provide to the requester an estimate of the time required to provide the records requested and the estimated cost for same (note that the Act does not require the material to be prepared within the 21 days); (2) deny the request pursuant to an applicable exemption; (3) notify the requester that the request is unduly burdensome and notify the requester that the request should be narrowed; or (4) provide the records. 5 ILCS 140/3.1. The Act defines "commercial purpose" as the use of "any part of a public record or records or information derived from public records, in any form for sale, resale, or solicitation or advertisement for sales or services." 5 ILCS 140/2(c-10).

154. Q: Are requests by the news media considered to be made for commercial purposes?

A: Not likely. Requests made by news media and non-profit, scientific or academic organizations are not considered to be for a commercial purpose when the purpose of the request is to: (1) access and disseminate information concerning news and current or passing events; (2) for articles of opinion or features of interest to the public; or (3) for the purpose of academic, scientific or public research or education.

155. Q: Will we be able to require a requester to state the reason for the request?

A: Sometimes. The only time the public body can require a requester to state the reason for the request is to determine whether the records are requested for a commercial purpose or whether to grant a fee waiver. Other requests can be made by anyone for whatever purpose, including political advantage, and the individual need not state the purpose for the request.

156. Q: If we receive a request from Big Map Company for a variety of data related to our Village, what should we do under the new provisions?

A: First, remember that requests for commercial purposes are treated differently under the Act. Accordingly, if the FOIA request sounds like it may be commercial in nature, you should ask the requester if the records are for a commercial purpose. Pursuant to Section 3.2(c), it is a violation of the Act for a person to knowingly obtain a public record for a commercial purpose without disclosing that it is for a commercial purpose when requested to do so by the public body. If the request is for a commercial purpose, then you have 21 days to respond.

157. Q: Does the Act outline any specific financial documents that *must* be disclosed?

A: Yes. Section 2.5 provides that all records relating to the obligation, receipt, and use of public funds of a public body are public records subject to inspection and copying. Section 2.10 also provides that certified payroll records submitted pursuant to the Prevailing Wage Act are public records. However, the contractors' employees' addresses, telephone numbers and social security numbers must be redacted prior to disclosure.

158. Q: Are arrest reports subject to disclosure under the Act?

A: Yes. Section 2.15 requires the following chronologically maintained arrest information kept by a local criminal justice agency to be furnished as soon as practical, but no later than 72 hours after the arrest: (1) information that identifies the individual, including the name, age, address, and photograph, when and if available; (2) information detailing any charges relating to the arrest; (3) the time and location of the arrest; (4) the name of the investigating or arresting law enforcement agency; (5) if the individual is incarcerated, the amount of any bail or bond; and (6) if the individual is incarcerated, the time and date that the individual was received into, discharged from or transferred from the arresting agency's custody. 5 ILCS 140/2.15(a). However, items 3 through 6 may be withheld if it is determined disclosure would (1) interfere with a pending or actual reasonably contemplated law enforcement proceeding conducted by any law enforcement agency; (2) endanger the life or physical safety of law enforcement, correctional personnel or any other person; or (3) compromise security of any correctional facility. 5 ILCS 140/2.15(c).

159. Q: Do public bodies have to disclose criminal history records?

A: Yes. Section 2.15(b) provides that the following documents maintained by a public body pertaining to criminal history record information are public records subject to inspection and copying: (1) court records that are public; (2) records that are otherwise available under state or local law; and (3) records in which the requesting party is the individual identified, except as provided under Section 7(1)(d)(vi) (Disclosure would endanger the life of any person).

160. Q: Do the disclosure requirements for arrest and criminal history information apply to juveniles?

A: No. Section 2.15(d) states the disclosure requirements do not supersede the confidentiality provisions for arrest records of the Juvenile Court Act of 1987.

161. Q: Does the Act contain an exemption for preliminary drafts in which opinions are expressed or policies or actions are formulated?

A: Yes. Section 7(f) exempts preliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated (absent the head of the public body citing the record in public). (Note: The PAC has opined that factual information contained in a preliminary draft is not exempt under this provision, but it may be exempt under another provision such as an invasion of privacy (PAC op 14-015).

162. Q: One of our Village maintenance workers accidentally cut down a 50 year-old tree belonging to Timmy Terror, a very litigious and outspoken member of our community. We ended up entering into a settlement agreement with Mr. Terror and paying him $5,000 to replace the tree. Even though the settlement agreement contains a confidentiality clause, will it be subject to disclosure under the new laws?

A: Yes. Section 2.20 provides that all settlement agreements entered into by or on behalf of a public body are public records subject to inspection and copying by the public, provided that information exempt from disclosure under Section 7 may be redacted.

163. Q: Our Village contracts with a public relations firm to promote certain programs in our community. Are the records they keep subject to disclosure under the Act?

A: Yes. Section 7(2) states that a public record that is not in the possession of a public body but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the public body, and that directly relates to the governmental function and is not otherwise exempt under this Act, shall be considered a public record of the public body, for purposes of the Act. Governments should begin putting a requirement in contracts with vendors and consultants that they will assist the government in responding to FOIA requests by promptly turning over records in their possession.

164. Q: Historically, our municipality has required individuals seeking information under FOIA to use a standard request form we created. Can we continue this process?

A: No. Although Section 3(c) requires that requests must be made in writing, it prohibits public bodies from requiring that a request be submitted on a standard form. Basically, the request can be submitted by any means available to the public

body (i.e., mail, facsimile, e-mail, etc.). If a public body desires, it can also decide to honor oral requests. If oral requests for minutes, ordinances, and other simple documents are honored, the government can save the need for documenting the requests.

165. Q: If our public body has the capability to scan and e-mail records, do we have to honor a request to provide them in that format?

A: Yes. Section 140/2(d) defines "copying" as the reproduction of any public record by means of any photographic, electronic, mechanical or other process, device or means now known or hereafter developed and available to the public body. See also Section 6(a) that addresses electronic records. Accordingly, if the public body has the technological ability to produce records via e-mail, they must be so provided.

166. Q: How long will we have to respond to FOIA requests?

A: Five days. 5 ILCS 140/3(d). This time can be extended for another five-day period from the original due date only for the seven reasons listed in Section 3(e). The public body and the requestor may also reach an agreement to extend the deadline, but any such agreement should be memorialized in writing. The Act also provides for longer response periods for commercial requests and voluminous requests.

167. Q: If we cannot provide the records even by the extension, what should we do?

A: If a public body needs additional time beyond the first five days and then the five-day extension, the Act allows the public body and the requester to set a new date for compliance if both parties can agree in writing. 5 ICLS 140/3(e). Accordingly, you should contact the requester, explain the reasons for the expected delay and try to work out an agreed upon extension date. A simple letter signed by both parties stating the new extension date should be sufficient to comply with the Act.

168. Q: What if we fail to respond within five days?

A: The first consequence is that it is treated as a denial of the request. This allows a requester to either file for injunctive or declaratory relief in Cook or Sangamon County or to get the Public Access Counselor involved. The second consequence is that the public body loses the right to claim the request is unduly burdensome. Finally, the public body also forfeits the ability to charge a fee for the costs of reproduction, if any.

169. Q: Are there requirements we must follow in denying a request?

A: Yes. The denial must be in writing and inform the requester of the denial. It must also include a "detailed factual basis for the application of any exemption claimed" and the name and title of each person responsible for the denial. The denial must provide notice of the requester's right to seek review of the denial by

the Public Access Counselor along with the Counselor's address and phone number. Each denial must also inform the requester of his or her right to judicial review under Section 11 of the Act. See 5 ILCS 140/9(a).

170. Q: Can an individual appeal the denial to the Mayor?

A: Such an appeal to the Mayor may be made, but the Act provides Direct Appeal to the Public Access Counselor. These appeals must be made within 60 days of the denial and must: (1) include a copy of the request for access to records; and (2) any responses from the public body. 5 ILCS 140/9.5(a). Any time spent pursuing an appeal to the Mayor may still count against the 60 day limitation to file a statutory appeal.

171. Q: If we are claiming an exemption under Section 7, what does the requirement to cite supporting legal authority mean?

A: Since Section 9(b) already contains a specific requirement to cite to the statutory exemption, it is unclear what other legal authority the Act refers to. It is our recommendation to simply cite to the specific provisions of the Act.

172. Q: Can a person go straight to the Circuit Court if we fail to respond timely to a request?

A: Yes. Section 9(c) provides that any person making a request for public records shall be deemed to have exhausted his or her administrative remedies with respect to that request if the public body fails to act within the statutory time periods. The requestor can decide not to take the complaint to the Public Access Counselor and can go straight to court. Accordingly, the claim would be ripe for review by the circuit court of the county where the public body is located.

173. Q: How does the Public Access Counselor handle denial reviews?

A: Upon receipt of a request for review, the Public Access Counselor must determine whether further action is warranted. The Public Access Counselor will either tell the requester the allegation is unfounded or otherwise forward a copy of the request, along with the specific documents necessary for review, to the public body within seven working days. The public body thereafter has seven working days after receipt of the Public Access Counselor's request to provide the documents for review. Within that same timeframe, the public body may also "answer the allegations" of the request for review. The "answer" is also sent to the requester who may also file a response within seven working days after receipt.

174. Q: How soon will the Attorney General issue an opinion on the FOIA dispute?

A: The Attorney General must examine the issues and the records and make findings of fact and conclusions of law and issue an opinion on the question within 60 days after initiating the review. Presumably, this means 60 days after receipt of the

initial request for review. Note that the Public Access Counselor may extend the time by no more than 30 days by sending written notice to the requester and public body that details the reasons for the extension. The Attorney General could also decide to address the matter without issuance of a binding opinion. See 5 ICLS 140/9.5

175. Q: Do we have to give all documents, even those that contain personal or private information, to the Public Access Counselor?

A: Yes. If the public body fails to provide the documents to the Public Access Counselor, the Attorney General can issue subpoenas. 5 ILCS 140/9.5(c).

176. Q: What if we disagree with the Public Access Counselor's opinion?

A: Any binding opinion of the Attorney General's office under the Act is subject to administrative review. If the public body wants to appeal a decision, it must "immediately" initiate administrative review procedures (i.e., file an appeal with the circuit court). It is also important to note that the action for administrative review can only be commenced in Cook County or Sangamon County. Advisory opinions are not subject to administrative review. 5 ILCS 140/11.5

177. Q: What if the requester seeks review from the Public Access Counselor and then disagrees with the Public Access Counselor's opinion?

A: Similar to the right of public bodies, the requester may seek administrative review of the decision under Section 11.5 of the Act. However, the action for administrative review can only be commenced in Cook County or Sangamon County.

178. Q: Can a person skip the Public Access Counselor and go directly to the Circuit Court?

A: Yes. Section 11 permits a person whose request has been denied by a public body to file suit for injunctive or declaratory relief in the Circuit Court in the county where the public body is located.

179. Q: What if we lose in court under Section 11?

A: Besides any negative political consequences, if the person seeking the request obtains a favorable judgment, the court must award the person their reasonable attorneys' fees and costs. 5 ILCS 140/11(i). Additionally, if the court finds that the public body willfully and intentionally failed to comply with the Act, or otherwise acted in bad faith, the court must impose upon the public body a civil penalty of not less than $2,500 nor more than $5,000 for each occurrence. While there are no criminal penalties, there is no discretion for the award of attorneys' fees and costs against a losing public body.

180. Q: What is the difference between appealing a denial with the Public Access Counselor and appealing a decision to the circuit court?

A: If a public body denies a request based on an exemption, the denial may be appealed to the Public Access Counselor who will review the situation and determine the validity of the exemption. The Public Access Counselor may eventually order the release of the documents in question. There is no charge for this and can easily be done by any person wishing to appeal a decision. In addition to the right to appeal a denial to the Public Access Counselor, the Act also provides that any person denied access to inspect or copy any public record of a public body may file suit for injunctive or declaratory relief in the circuit court for the county where the public body is located. Accordingly, an individual could either go straight to the Public Access Counselor (for free) or take the public body to court in an attempt to seek injunctive or declaratory relief. If a suit is filed with the court, the Attorney General's office will cease involvement in the matter. The courts also get involved if a party appeals the binding decision of the Public Access Counselor. However, in such cases, the case must be heard in the circuit court of either Cook County or Sangamon County.

181. Q: The Village Clerk usually handles our FOIA requests. Should this process continue?

A: Maybe. Section 3.5 requires each public body to designate one or more officials or employees to act as its Freedom of Information ("FOI") officer. In many communities, the Clerk can certainly be designated by the public body as the FOI officer. In some communities, where FOIA requests are not centralized, there may need to be other officers designated in, for example, the Police and Planning Departments.

182. Q: What is the role of the Freedom of Information officer?

A: The FOI officer receives requests submitted to the public body, ensures that requests are responded to in a timely fashion and issues responses under the Act. The FOI officer must also develop a list of documents or categories of records that the public body shall immediately disclose upon request. 5 ILCS 140/3.5.

183. Q: How are requests processed?

A: The FOI officer must: (1) note the date the public body receives the written request; (2) compute the day on which the period for response will expire and make a notation of that date on the written request (3) maintain an electronic or paper copy of a written request, including all documents submitted with the request until the request has been complied with or denied; and (4) create a file for the retention of the original request, a copy of the response, a record of written communications with the requester, and a copy of all other communications. 5 ILCS 140.3.5(a). Note that oral requests need not be recorded.

184. Q: Are there any training requirements for FOI officers?

A: Yes. Every FOI officer has to successfully complete an electronic training curriculum developed by the Public Access Counselor. The FOI officer must thereafter successfully complete an annual training program. If new officers are designated, they must complete the electronic training curriculum within 30 days of assuming the position. The course is available and can be taken directly online at the Attorney General's website. The course is a combination of highlights about the Act and a series of questions. There is also a training course for the Open Meetings Act.

185. Q: We maintain our own municipal website, do we have any additional posting requirements under the Act?

A: Yes. For public bodies that "maintain" a website, they must post the general information otherwise required to be on hand as provided in Section 4 of the Act.

186. Q: What happens if we get requests from the same person for the same records that are unchanged or identical to records previously provided or properly denied?

A: Section 3(g) allows such requests to be deemed "unduly burdensome" and to be denied by the public body.

187. Q: Even though our lawyer advised us that charging $1.00 a page was too high for copies, we still want to do it. Is that ok?

A: No. No fee may be charged for the first 50 pages of black and white, letter or legal sized copies requested by a requester. 5 ILCS 140/6(b). After 50 pages, the fee cannot exceed 15 cents per page. Color and oversize copies beyond legal may not be charged more than its actual cost for reproduction. The cost for certifying a document cannot exceed $1.

188. Q: Do we have to provide the record in the format specified by the requester?

A: Yes. Section 6(a) provides that when a person requests a copy of a record maintained in an electronic format, the public body shall furnish it in the electronic format specified by the requester, if feasible. If such is not feasible, then the public body must furnish it in the format in which it is maintained by the public body or in paper format, whichever the requester prefers. The actual cost of the disk, tape or other medium can be charged to the requester. However, no other search or staff time can be charged.

189. Q: What is the difference between "statutory exemptions" and the other exemptions ?

A: In the Act, exemptions are located under Section 7, and also "statutory exemptions" under Section 7.5. The Act lists a number of statutory provisions like

the Library Record and Confidentiality Act, which specifically exempts certain public records from inspection and copying. If an exemption is claimed under Section 7, any information not subject to the exemption must be made available for inspection and copying. All other "exempt" information is to be redacted. Under Section 7.5, the entire statutorily-listed record is exempt.

190. Q: Will the Public Access Counselor's binding opinions be made public?

A: Yes. The Attorney General is required to post his or her binding opinions on the official website of the Office of the Attorney General. 15 ILCS 205/7(g).

191. Q: What do you do if a citizen makes repeated requests for copies of documents?

A: If a citizen makes repeated requests for copies of documents, you should first determine whether that citizen might qualify as a "recurrent requester" under section 2(g) of the Freedom of Information Act, 5 ILCS 140/2(g). A "recurrent requester" is defined as a person who, in the 12 months immediately preceding the request, has submitted to the same public body (i) a minimum of 50 requests for records, (ii) a minimum of 15 requests for records within a 30-day period, or (iii) a minimum of 7 requests for records within a 7-day period. The statute specifically defines a "request" as "a written document (or oral request, if the public body chooses to honor oral requests) that is submitted to a public body via personal delivery, mail, telefax, electronic mail, or other means available to the public body and that identifies the particular public records the requester seeks" and provides that "[o]ne request may identify multiple records to be inspected or copied." If you intend to treat an individual as a recurrent requester, you must, within five days after receiving a FOIA request, notify the requester that you are treating the request as a recurrent request under subsection (g) of Section 2, explain why you are treating the request as a recurrent request, and advise the requester that you will send an initial response within 21 business days after receipt of the request. Then, within 21 business days after receipt of the request, you must respond to the requester by doing one of the following: (i) providing the requester an estimate of the time required to provide the records and an estimate of the fees to be charged (which may be required to be paid in full before the requested documents are copied); (ii) denying the request pursuant to one or more of the exemptions set out in the Act; (iii) notifying the requester that the request is unduly burdensome and extending an opportunity to the requester to reduce the request to manageable proportions; or (iv) providing the records requested. 5 ILCS 140/3.2

In the event the person cannot lawfully be classified as a "recurrent requester," you may choose to extend the time for response for not more than five business days from the original due date upon specified reasons set forth in section 3(e) of the Act. Alternatively, within the original five business-day timeframe, you may assert that responding to the request would constitute an undue burden and ask the requester to narrow the scope of the request. In order to deny a request as unduly

burdensome under section 3(g) of the Act, you must specify the reasons why the request is unduly burdensome and the extent to which compliance with the request will burden the operations of the public body you serve. Repeated requests from the same person for the same records that are unchanged or identical to records previously provided or properly denied under the Act "shall" be deemed unduly burdensome. Finally, under section 3(e), you could contact the requester, explain the difficulty and the special circumstance(s) involved, and seek to reach an agreement for additional time to retrieve and provide the requested records; in the event you and the requester are able to agree to extend the time period for compliance, a failure to abide by any previous deadlines will not be treated as a denial.

192. Q. What can I do if a resident submits eight requests simultaneously that require copying 1,000 pages of documents?

A: Late in 2014 the General Assembly answered the call to address abuses of the Act by permitting public agencies to designate "voluminous requests. Under the amendment, a request qualifies as voluminous if it: (i) includes more than 5 individual requests for more than 5 different categories of records or a combination of individual requests that total requests for more than 5 different categories of records in a period of 20 business days; or (ii) requires the compilation of more than 500 letter or legal-sized pages of public records unless a single requested record exceeds 500 pages. For the purpose of interpreting this section, a "single requested record" may include, but is not limited to, one report, form, e-mail, letter, memorandum, book, map, microfilm, tape, or recording.

A voluminous request does not include a request made by news media and non-profit, scientific, or academic organizations if the principal purpose of the request is: (1) to access and disseminate information concerning news and current or passing events; (2) for articles of opinion or features of interest to the public; or (3) for the purpose of academic, scientific, or public research or education.

193. Q: How must a public body respond to voluminous requests?

A: Similar to requests which are unduly burdensome, a public body must still respond to a voluminous request within 5 business days, but the response shall notify the requester: (i) that the public body is treating the request as a voluminous request; (ii) the reasons why the public body is treating the request as a voluminous request; (iii) that the requester must respond to the public body within 10 business days after the public body's response was sent and specify whether the requester would like to amend the request in such a way that the public body will no longer treat the request as a voluminous request; (iv) that if the requester does not respond within 10 business days or if the request continues to be a voluminous request following the requester's response, the public body will respond to the request and assess any fees the public body charges pursuant

to its ordinances; (v) that the public body has 5 business days after receipt of the requester's response or 5 business days from the last day for the requester to amend his or her request, whichever is sooner, to respond to the request; (vi) that the public body may request an additional 10 business days to comply with the request; (vii) of the requester's right to review of the public body's determination by the Public Access Counselor and provide the address and phone number for the Public Access Counselor; and (viii) that if the requester fails to accept or collect the responsive records, the public body may still charge the requester for its response and the requester's failure to pay will be considered a debt due and owing to the public body and may be collected in accordance with applicable law.

194. Q: Can a person who submits a voluminous request change the size and scope of the request?

A: After being notified that the public body is treating the request as voluminous, the requestor is granted a chance to reduce the request or reach an agreement with the public body.

195. Q: So how does all of this protect governments from voluminous requests?

A: If despite giving the requestor an opportunity to modify the request's size and scope, a request continues to be voluminous, the public body shall respond within the earlier of 5 business days after it receives the response from the requester or 5 business days after the final day for the requester to respond to the public body's notification under this subsection. The time for response by the public body may be extended by the public body for not more than 10 business days from the final day for the requester to respond to the public body's notification. The response shall: (i) provide an estimate of the fees to be charged, which the public body may require the person to pay in full *before* copying the requested documents; (ii) deny the request pursuant to one or more of the exemptions set out in this Act; (iii) notify the requester that the request is unduly burdensome and extend an opportunity to the requester to attempt to reduce the request to manageable proportions; or (iv) provide the records requested.

If a requester does not pay a fee charged for a voluminous request, the debt shall be considered a debt due and owing to the public body and may be collected in accordance with applicable law. This fee may be charged by the public body even if the requester fails to accept or collect records the public body has prepared in response to a voluminous request.

196. Q: What was the law prior to the original version of the Freedom of Information Act?

A: Prior to the adoption of FOIA, a governmental body had no obligation to provide any materials to the public other than in a lawsuit where discovery was allowed. Most governments provided copies of ordinances and other materials that were

contained in a meeting packet, but some governments refused to release any documents short of a lawsuit.

197. Q: What governments are covered under FOIA?

A: All Illinois local governments, including municipalities. As with the Open Meetings Act, FOIA applies not only to the corporate authorities, but to all sub-units and committees within governments.

198. Q: What records are we required to produce under FOIA?

A: Except for those records which are held to be exempt by statute, all records of every kind, written, drawn, recorded or sent electronically, are subject to FOIA. The Act, however, does have certain exemptions.

199. Q: What are the powers of a court in a FOIA case?

A: The court can enjoin the public body from withholding public records and order the production of records improperly withheld. If the applicant prevails, the court must award reasonable attorneys fees and costs. If the court finds that the public body willfully and intentionally failed to comply with the Act, the court must also impose a civil penalty of $2,500 to $5,000. Unlike the Open Meetings Act, there are no criminal sanctions.

200. Q: Can a FOIA request be served upon individual Trustees or Aldermen?

A: Yes, but FOIA requests served on individual municipal officers should generally be turned over to the person or one of the persons designated by the municipality as the FOIA Officer. But it is likely that the five working-day time limitation to produce the documents begins when the request is first received, in this case, by the Trustee or Alderman.

201. Q: Are 15 drafts of the Mayor's State of the Village speech subject to FOIA?

A: No. Only final drafts of public documents are subject to FOIA, although the computer may need to contain special software to make sure the text turned over can't be searched for coded deletions, also called metadata.

202. Q: Is it legal to release documents that are exempt under FOIA?

A: Yes. FOIA allows governments to withhold certain documents, but subject to any other rules or limitations, even exempt material can be released.

203. Q: If a FOIA request asks for a pie chart of municipal expenditures, do we have to produce one if none has ever been prepared?

A: No. FOIA requires only that you turn over those documents that you possess. You do not need to prepare any document which does not exist.

204. Q: If part of a document is exempt, can the municipality withhold the entire document?

A: No. Unless deletions cannot be made to the document which will adequately protect the integrity of the properly-deleted information, the governmental body is required to redact those parts of the document which are exempt and to turn over the rest of the document.

205. Q: Can a governmental body refuse to turn over information which, if released, is embarrassing?

A: No. Embarrassment per se, or even an effort to cover up a mistake, is not a valid reason for refusing to turn over documents.

206. Q: Can't we refuse to turn over things that embarrass employees, but that relate to the employees' public duties under the exemption for "privacy"?

A: No. Although FOIA does allow the exemption of material which would constitute a clearly unwarranted invasion of personal privacy, information bearing on the "public duties of public employees and officials is not considered an invasion of privacy." The person whose privacy is being invaded can also consent to the release of data that might otherwise be entitled to the privacy exemption.

207. Q: Does a governmental body have to turn over personnel information?

A: It depends. There is no longer an exemption for information contained in a personnel file. Private information, such as telephone numbers, social security numbers, and the like, are exempt, as is personal information the disclosure of which would amount to a clearly unwarranted invasion of personal privacy. Final disciplinary action is not exempt, but employee evaluations are exempt from disclosure under the Personnel Records Act (820 ILCS 40/11).

208. Q: Do we have to turn over information about the payment of licenses or taxes?

A: Yes. All records relating to the "obligation, receipt, and use of public funds" are public records that must be disclosed, possibly subject to redaction of private information, information invoking the personal privacy exemption or the trade secret exemption.

209. Q: Do we have to turn over police reports?

A: Yes. Unless the reports involve on-going investigations, unavoidably disclose the identity of an informant, disclose specialized investigative techniques, or invade personal privacy.

210. Q: Are the invoices submitted by consulting attorneys to governmental bodies and their record of payments subject to the Freedom of Information Act?

A: One section of the Freedom of Information Act allows a government to withhold communications with its attorney which would not be subject to discovery in litigation. Another section exempts from disclosure any information which is specifically prohibited from disclosure by federal or state law. These sections can serve as the basis for withholding legal billing information in some, but not all circumstances. We believe that legal bills are generally subject to disclosure under FOIA, unless the records contain legal advice or reveal the substance of an attorney-client confidence. The courts have held that the amount of a client's fees are usually not considered a confidential communication protected by the attorney-client privilege, since the payment of fees is merely incidental to the attorney-client business relationship. If a request is made for a final version of attorney's fees submitted, even before payment is made, it is likely that a court would order such records to be turned over, once they were within the hands of the governmental body, but only after the government had been allowed to delete portions of the invoices which otherwise fit within exemptions of the Freedom of Information Act, such as privacy, active legal advice, an attorney-client confidence or a 7(1)(f) preliminary draft claim. The dollar amounts paid by a governmental body to an attorney should always be subject to citizen inquiry. The Freedom of Information Act is not, however, designed to compel the compilation of data the governmental body does not ordinarily keep or to provide answers to questions posed by the inquirer. A copy of the invoice itself, with appropriate deletions, should satisfy the inquiry.

211. Q: Can the municipality charge a fee for the time necessary to find the records?

A: No. The FOIA limits the collectible fee to the actual costs of making copies if requested by the applicant. Some fees may be charged for commercial requests and voluminous requests.

212. Q: If you request financial information about a company to learn if it is the "lowest responsible bidder," can its competitors get that information under a FOIA request?

A: It depends. Trade secrets and commercial or financial information obtained from a person or business, where the disclosure may cause competitive harm, are exempt. However, the Act now limits this exception to information that was "furnished under a claim" that the records are proprietary, privileged or confidential, and that disclosure of these specific records would cause competitive harm. The burden falls on the person or business to assert the confidentiality of the information. The municipality does not make that decision.

213. Q: Are there situations in which a public body might reduce the charge for public records?

A: FOIA allows records to be furnished without charge or at a reduced charge if the public body determines that the person requesting the documents can convince the government that a waiver or reduction of fees is in the public interest. One test is that the information will assist the health, safety, welfare or legal rights of the general public and is not for the principal purpose of personal or commercial benefit.

214. Q: Do the Open Meetings Act and FOIA have any impact on municipal elections?

A: There is little specific mention, either in the Open Meetings Act or in the Freedom of Information Act ("FOIA"), about how the administration of these laws may be impacted during an active municipal election season. The prompt and fair application of these laws can be severely tested during a hard-fought local government election.

Non-incumbent candidates for a governmental office are not subject to either of these Acts except to the extent that they interact with persons already in office. There is a general exemption under the Open Meetings Act for gatherings of either incumbent or non-incumbent individuals who are meeting to discuss issues relating to a forthcoming election. Discussions about the raising of campaign funds, campaign appearances, or general election strategy are simply not subject to the Open Meetings Act. If, however, a majority of a quorum of already elected officials were to meet to discuss campaign strategy and how they would vote on a controversial matter, the second part of that discussion would have to take place in compliance with the Open Meetings Act.

The courts are likely to give incumbent officials some leeway in discussions of the political implications of their actions if they can somehow demonstrate that it was politics, not policy, which was the central element of their meeting. Obviously, wide-ranging meetings of this nature, when "exposed" by a political opponent or a media outlet, can be used against incumbent candidates even if the officials can justify holding non-public meetings on political grounds. While not required to do so, participants at such meetings may find it advisable to take outline minutes at such meetings to demonstrate that the vast majority of the meeting was centered on discussing the course and strategy of the campaign.

Campaign literature or preliminary policy statements not publicly cited and identified by the head of the public body, are private and political rather than public documents, and would not need to be disclosed under a Freedom of Information Act request. If, however, such documents come into the possession of the municipality in final, rather than preliminary versions, they become public records subject to the requirements of the FOIA.

Probably the most significant potential for an increase in the use of the statutory "sunshine law" processes are requests by opposition candidates and their supporters for documents under the Freedom of Information Act. Any person, whether a resident of the governmental body or not, may seek a great variety of documents under the Freedom of Information Act. The governmental body is required to search out and make these documents available without being able to charge a fee for the staff time involved in the search. The only charge which can be imposed is for the cost of mechanical reproduction if the requestor asks for actual copies of documents. Multiple requests for documents or a request for multiple documents may constitute a recurrent or voluminous request under the Act. If so, the municipality may be able to extend the time to produce documents, or charge fees for the documents. The public body should take care that requesters who ask to examine the originals of documents do not carry them away. Some security procedures should also be put in place to make certain that documents are not defaced, removed or modified.

Obviously, record requests cannot be prepared for one citizen group and ignored for another and all requests must be responded to within the short time periods set forth in the statute. Where a request is denied, the governmental body must inform the requestor of the specific basis for the denial and of the right to appeal the denial to the Public Access Counselor.

The last area where these statutory provisions tend to be tested during an election cycle is with regard to public comments during governmental meetings. The open session portion of governmental meetings is required to be open to the public, and the public is allowed to address the members of the governing Board in accordance with rules adopted by the Board. The presiding officer of the governmental body, and the majority of the corporate authorities, have the right, in accordance with rules previously adopted, to limit or stop such comments which exceed time limits or are abusive. Care should be taken, however, that it is not only the public comments of one's political opponents that are limited. This practice has resulted in successful lawsuits against governmental bodies and their elected officials.

Persons attending public meetings have an opportunity to address the corporate authorities, and they are also permitted, under the Open Meetings Act, to make audio or video tapes of the public portions of the meetings of the governmental body. The government can establish reasonable rules and procedures for the way in which such recording is accomplished to assure that the recording does not unreasonably interfere with the public meeting. Where members of the public are permitted to address the public body in a public hearing which is required either by statute or by ordinance, the courts have held that such individuals must be given a reasonable period of time to speak and, within limits, to cross-examine witnesses who have offered actual testimony at the public hearing.

Violations of the Open Meetings Act can result in a criminal penalty, fine or forfeiture of office along with the invalidation of actions taken in violation of the

Act. Violations of the Freedom of Information Act can result in a lawsuit filed by the State's Attorney to remove violators from office and a requirement that the legal fees of the citizen improperly deprived of access to the public information will be paid by the government which is at fault.

215. Q: The person requesting a tape recording under FOIA says she doesn't want a copy of it. She just wants to listen to it, but she wants to listen to the original recording. Our policy is to make a copy of the tape which the requestor must pay for. Is that okay?

A: No. In *Despain v. City of Collinsville*, 888 N.E.2d 163 (5th Dist. 2008), the court said that the public body could not require someone to purchase a copy of a tape. The public body must allow that person to listen to the "original" tape. Also, the fact that a public body lacks facilities for the public to listen to the tape is not a valid reason for denying the request. You must make the tape available for "inspection" under FOIA, which means that people must be able to listen to it. You can require that the person listen to the tape in a secure environment so that it cannot be erased or changed. You can make a copy of the tape, for yourself, as a back-up protection.

216. Q: If the requested records are available on the public body's website, must the public body still produce a copy of the requested record?

A: Maybe. A public body is not required to copy a public record that is published on the public body's website, unless the requestor states his or her inability to reasonably access the record online (5 ILCS 140/8.5).

OPEN MEETINGS ACT

217. Q: Are there training requirements for complying with the Open Meetings Act?

A: Yes. The provisions of the Open Meetings Act ("OMA") provide that every public body shall designate "employees, officers, or members to receive training on compliance with the Act." 5 ILCS 120/1.05. These individuals must complete the training program each year. The OMA also requires elected and appointed officials who take office after January 1, 2012 to complete the training within 90 days of taking office. The officials must submit a certification of completion to the public body and, once completed, these officials have no continuing training obligation. Training essentially means an electronic training curriculum, developed and administered by the Public Access Counselor. Section 1.05 of the Open Meetings Act also provides alternative training methods for certain public bodies, so please consult with your local attorney to see whether your elected officials can receive training from a relevant statewide organization.

218. Q: John Smith, a citizen that always speaks at our meetings and thinks we go into closed session just to talk about him, maintains we are constantly violating the OMA. What could he do to check his suspicions?

A: If a person believes a violation of the OMA has occurred, such individuals may file a request for review with the Public Access Counselor. This request must be made within 60 days after the alleged violation and must be: (1) in writing; (2) signed by the requester; and (3) include a summary of the facts supporting the allegation. See 5 ILCS 120/3.5. Please be aware that legislation is pending which would extend the deadline for review to 60 days from discovery if the facts describing the violation are not discovered by a person using reasonable diligence, but in no case longer than two years from the date of the violation. The Public Access Counselor will either tell the requester the allegation is unfounded or otherwise forward a copy of the request to the public body within 7 working days. The public body thereafter has 7 working days after receipt of the Public Access Counselor's request to provide the documents for review. Within that same timeframe, the public body may also "answer the allegations" of the request for review. The "answer" is also sent to the requester who may also file a response within 7 working days after receipt.

219. Q: Will the Public Access Counselor be able to listen to the tape of our closed session?

A: Yes. Section 3.5 provides that the Public Access Counselor has the same right to examine the verbatim recording as the court in a civil action brought to enforce this Act. Although courts are rarely called upon to examine tapes, with the ease that individuals can file complaints, it is likely that these tapes will be more frequently reviewed. Accordingly, public bodies will need to be reminded to stay focused and on topic while in closed session.

220. Q: How soon will the Attorney General issue an opinion on the OMA dispute?

A: The Attorney General must examine the issues and the records and make findings of fact and conclusions of law and issue an opinion on same within 60 days after initiating the review. Presumably, this means 60 days after receipt of the initial request for review. Note that the Public Access Counselor may extend the time by no more than 21 days by sending written notice to the requester and public body that details the reasons for the extension. The Attorney General could also decide to address the matter without issuance of a binding opinion. See 5 ICLS 120/3.5. Despite these timeframes, it has been very uncommon for the Public Access Counsel to provide opinions in a timely manner. Unfortunately, this may cause actions of a public body to remain in limbo for an indefinite period of time and cause third parties who rely on such actions to incur additional risk and expense.

221. Q: What happens if the Public Access Counselor determines that a violation of the OMA occurred?

A: If the Public Access Counselor finds that a public body violated the OMA and issues a binding opinion on same, Section 3.5(e) requires the public body to "take necessary action as soon as practical to comply with the directive of the opinion…" Accordingly, if the public body took action on an item at an "illegal" meeting, the opinion may require the public body to reconsider the matter at a properly-noticed meeting in the future. If the complaint involved a public body going into closed session to decide what color the Village hall should be painted, the opinion might direct that such a topic is not a proper subject of closed session, that future discussion on the topic must be in open session and direct the minutes of the closed meeting be released to the public once they are approved.

222. Q: What if the public body disagrees with the Attorney General's opinion?

A: An opinion issued by the Attorney General may be appealed pursuant to the administrative review laws. This essentially requires appealing the decision to the Circuit Court, however the appeal must be filed either in Cook County or Sangamon County. 5 ILCS 120/7.5.

223. Q: Will we be able to seek informal advice from the Attorney General's Office on OMA issues?

A: Yes. Section 3.5(h) provides the Attorney General may issue advisory opinions to public bodies regarding compliance with the Act. This requires submission of a written request either from the public body or its attorney.

224. Q: In the time period prior to a newly-elected official taking office, are that person's actions subject to the Open Meetings Act?

A: No. A person who has been newly elected to public office but has not yet formally been sworn in as a member of the public body is free to meet with other such newly-elected officials without compliance with Open Meetings Act limitations. Such persons are not considered "members" of the public body until they take the oath of office, and so are not counted in determining whether there is a majority of a quorum present. So, for example, the incumbent Mayor could meet with all of the newly-elected Aldermen together, without violating the OMA. However, a person who has been re-elected to the same office is already a member of the public body and so is subject to OMA limitations on meeting with other members of the body, prior to taking the oath of office for the new term. Also, if a majority of a quorum is present, the fact that a newly-elected non-member is present will not exempt the meeting from OMA requirements.

225. Q: Three Trustees are at their individual homes surfing the Web. They all eventually end up in a chat room connected with their Village's web site. Can they participate in a conversation in the chat room without violating the Open Meetings Act?

A: Not if the purpose of the chat is to discuss public business. The Open Meetings Act, defines a "meeting" to include simultaneous electronic communication among the members of a public body. The definition of a "meeting" is as follows:

> Any gathering, whether in person or by video or audio conference, telephone call, electronic means (such as, without limitation, electronic mail, electronic chat, and instant messaging), or other means of contemporaneous interactive communication, of a majority of a quorum of the members of a public body held for the purpose of discussing business.

If three Trustees from a seven-member Board are discussing public business by means of contemporaneous electronic communication such as a chat room, they are in violation of the Open Meetings Act. Contemporaneous communication probably includes e-mailing when all the participants are on line at the same time and read the messages at the same time as other participants. Thus, in a situation where three people constitute a majority of a quorum, if A sends an e-mail about public business to B, with a copy to C, when A, B, and C are on line at the same time and one or more responds to the others, the communication is the functional equivalent of a face-to-face meeting or telephone conference call, and violates the Open Meetings Act. This circumstance frequently occurs when a trustee will be absent from a future meeting and wishes to communicate his or her opinions on agenda items in advance. The only way to know whether the Act is being violated is to determine how many of the elected officials are on line and communicating with each other contemporaneously. This could be determined after the fact by examining the headers on the e-mail messages and analyzing the times they were sent, received and responded to. Copies of such messages might constitute public records such that they are subject to disclosure under the Freedom of Information Act, and would definitely be subject to disclosure in case of litigation charging a violation of the Open Meetings Act. On the other hand, if C is not on line at the time the message is sent by A but logs on and reads the message later, the communication is more like a telephone voice mail message or a copy of a letter sent through the postal system, does not involve a "gathering" and, in our opinion, likely does not violate the Act. One way to avoid an inadvertent illegal meeting online is simply never to click on "Reply to All." Alternatively, an elected official can send an e-mail where all of the recipients are "blind carbon copied," since this disables the "Reply to All" function.

226. Q: Can a citizen bring a video-tape recorder to Village Board meetings?

A: Section 2.05 of the Open Meetings Act addresses the question of the public's right to record the proceedings of public meetings. While citizens can use tape, film or

"other means," the public body may establish "reasonable" rules of procedure governing the use of such equipment and may also prohibit certain kinds of recordings if individuals who are testifying represent that they do not wish to be so recorded. These restrictions are reasonable since they do not interfere with a citizen's right to attend and, where allowed, participate in public meetings or to take notes of those meetings.

227. Q: Can a citizen demand the tape recording of a meeting between a developer and the Mayor?

A: The meeting between the developer and the Mayor is not governed by the Open Meetings Act. However, if minutes or any recordings of that meeting are kept and find their way into the possession of the municipality itself, they could be subject to FOIA.

228. Q: What should a public body do if it discovers that it has inadvertently violated the Open Meetings Act?

A: That depends a lot on the nature of the violation. In general, the public body should direct its executive officer or attorney to notify the State's Attorney of the circumstances of the violation, and promise not to do it again. In addition, the public body should attempt to correct its improper action. If any vote was taken which would constitute improper final action, the body might be able to reconsider the matter in a proper meeting, and re-vote on it correctly. Depending on the situation, other parties who would be affected by the vote might have to be notified that the action taken could be defective, such as a contractor whose bid was accepted, or a property owner whose zoning variance was approved.

229. Q: The Mayor has asked the Board of Fire and Police Commissioners to interview candidates for fire chief and make a recommendation. Is this process subject to the Open Meetings Act?

A: Yes. The Board of Fire and Police Commissioners is a subsidiary entity of the municipality and it is subject to the Open Meetings Act, as well as the Freedom of Information Act. Whenever a majority of a quorum of this three-person Board, i.e., two members, gets together to discuss public business, a "meeting" under the OMA takes place. By statute, the Board of Fire and Police Commissioners can be given the authority to appoint the fire and police chiefs, but, in most municipalities that authority resides in the Mayor. In your case, the Mayor has chosen to ask the Board to make a recommendation. Even though the Board is acting in an advisory role, its actions are still subject to the Open Meetings Act. In order to interview candidates, it must call a formal meeting and post an agenda. After convening in an open meeting, a motion can be made to go into closed session to discuss the "employment of officers or employees." The vote must be taken by roll call. This closed session must be audio- or video-recorded and the tape must be saved for 18 months. Minutes of the closed session meeting must be kept, but they can be very brief and simply indicate that an interview took place

with a particular individual. Of course, the interview could also be held in open session.

230. Q: Now that local governments are required to record their closed sessions, are the statements made by those present discoverable as part of a lawsuit? Is it possible that a tape-recorded statement made in executive session by an individual could be played in a courtroom proceeding as part of the defense or prosecution? I thought the written minutes were the only thing discoverable. And that the recordings were only to be used to determine if there was an Open Meetings Act violation.

A: The recording of a closed meeting is discoverable in a federal lawsuit. The Open Meetings Act creates a partial privilege for recordings of closed meetings. The recording is not discoverable in any state administrative proceeding or lawsuit except one brought to enforce the Act itself. However, the Public Access Counselor now also has the same right to obtain a recording as does the court that hears a case charging a violation of the Act. In a civil or criminal judicial proceeding to enforce the Act, the judge may conduct a closed-door review of the recording. It is also possible that in a state criminal proceeding where something said in a closed meeting could be relevant evidence of a wrongful act, the recording might be discoverable. It should not be discoverable in any state civil court proceeding unrelated to the Act.

231. Q: How does a governmental body establish its meeting schedule for a new year?

A: Under the provisions of the Open Meetings Act, which apply to all units of local government and school districts, and their subsidiary bodies, including committees thereof, a schedule of the regular meetings of each covered entity must be posted at the beginning of each calendar or fiscal year. A notice of that meeting schedule should be made available and sent to any news organization which has made a written request for such information. If a change is made in an individual meeting, such as canceling a meeting occurring on a holiday, the governmental body need only establish the new date and post a notice. If, however, the governmental body, for example, changes its regular meetings from Monday night to Wednesday night, it is required to publish a notice of that change in the newspaper. The municipality must prepare agendas of these meetings and each entity may only act on those matters which appear on the agendas, but can discuss any lawful subject during regular meetings. Special meetings can be called upon not less than 48 hours written and posted notice, along with an agenda, and emergency meetings can take place with such notice and agenda as is possible under the circumstances. For special or emergency meetings, only items expressly listed on the agenda may be discussed. If a community continues, in effect, with the schedule from a prior year, it need only post the notice and send it to those news agencies which have requested such an annual notice.

232. Q: The Mayor meets quarterly with the Presidents of the local School Boards, Park District, library district, and the Township supervisor. Is this meeting public under the Open Meetings Act?

A: No. A meeting of a public body does not occur until there is present a majority of a quorum of either the main legislative body or a committee or sub-unit of at least one governmental body. The meeting you describe is not a gathering of members of one public body. In many areas of the state, periodic meetings take place between the chief elected officials of a variety of governments, with or without the participation of administrative officials such as municipal managers or school superintendents. These meetings have proven to be an important mechanism to improve governmental efficiency and cooperation and to avoid misunderstandings. These meetings can be held entirely in private and without the need to comply with the Open Meetings Act. However, if minutes are kept at these non-public meetings, and are transmitted to any of the governmental bodies, those documents would be available to the public under the Freedom of Information Act. Among the topics often discussed at such meetings are the plans of the municipality to annex additional land and the effect of the annexation on both the revenue and responsibilities of other governmental bodies in the area. Such meetings also discuss ways in which the various governments can share their facilities and personnel to improve efficiency and save money. In some counties, the County Board Chairman will also hold meetings with the officials of local governmental bodies. Meetings can also be held between such leaders and their local legislators without impacting the Open Meetings Act.

233. Q: Are political discussions subject to the Open Meetings Act?

A: While the provisions of the Open Meetings Act are quite strict in not permitting even a majority of a quorum of the Village Board or City Council to discuss matters relating to their official business, there is an acknowledged exception for matters relating strictly to politics. The Illinois General Assembly recognized that, from time-to-time, numbers of elected officials in some communities, including the Mayor and the full Board or Council, may need to meet in private to discuss political strategy including selecting persons who would be chosen to run for public office or to be available if there are vacancies. Such meetings are not subject to the Open Meetings Act.

In 1980, the Illinois Supreme Court addressed this issue in the case of *People ex rel. Difanis vs. Barr*. There, the State's Attorney of Champaign County brought a declaratory judgment action against nine defendants who were members of the Urbana City Council. They had met and conferred shortly before a special meeting of the Urbana City Council. The meeting was called to discuss matters the City Council would consider later that evening, but principally in relationship to the political aspects of those matters, along with planning for a forthcoming election. To the extent that these officials discussed matters of public business, the Supreme Court found that the Act had been violated. The Supreme Court,

however, used this opportunity to more fully discuss the issue of meetings which could be characterized as almost entirely political. The Court wrote:

> The Act is not intended to prohibit bona fide social gatherings of public officials, or truly political meetings at which party business is discussed. Rather, the Act is designed to prohibit secret deliberation and action on business which properly should be discussed in a public forum due to its potential impact on the public.

Later in the opinion, the Court wrote:

> Certainly, a true political caucus is beyond the purview of the Act; the Act comes into play only where public business which could eventually come up for a decision before the full body is deliberated or acted upon in private. Thus the defendants' argument that they could be susceptible to prosecution simply for participating in a political caucus is erroneous.

In the context of the *People ex rel. Difanis v. Barr* case, most of the defendants were members of one of the national political parties. The theory of the case, however, applies even in a small municipality where individuals may run without party affiliation as independent candidates or on slates not associated with national parties. We believe that the same rules would apply even in a kind of government like a school district where no specific political party affiliations exist. In that setting, the members of a School Board, who constitute a majority of a quorum should be able to meet in a private setting to discuss their joint efforts at being elected and whether as a group they might choose to support one or another new candidate.

It is extremely important for all participants in such political meetings to recognize that the nature of these discussions must be limited to items that are of a true political nature. The discussions are not allowed, for example, to drift into areas relating to matters pending before the governmental body or how individuals will vote on those matters. These topics relate to public business and can only be discussed as part of a public meeting, or in that portion of a closed session of a public body, which is permitted by Illinois law.

One thing which is helpful to do, where political meetings take place in private, is to have a statement read at the beginning of that meeting which can be released later to the public, the press or a State's Attorney if questions are asked about the nature of the meeting. A suggested statement is set out below. The creation of an agenda is also helpful because it will keep the attendees on a lawful course. Occasionally at a discussion relating to political matters, someone may begin an excursion into an area which would not be permitted since it principally relates to the business of the public body rather than to strictly political items. Everyone should make an effort to move such an excursion quickly back to completely

permitted topics. There may occasionally be tricky questions where politics and public issues may have some point of overlap. Every effort should be made, however, to make certain that these discussions are almost entirely related to political considerations. Certainly, no consensus should be reached on any particular matter expected to be on a forthcoming agenda. One way of encouraging this to take place is either to tape record those meetings or at least to take notes on the political content of the discussions. Those notes or a tape could be made available to a State's Attorney or in litigation if there was any question that the officials had violated the Open Meetings Act.

PROPOSED STATEMENT TO BE READ BY THE CHAIRMAN OF A MEETING OF ELECTED OFFICIALS DIRECTED AT POLITICAL ISSUES

> This meeting is being held in private for the purpose of discussing our political views and desires. We recognize that at this or later meetings, there may be in attendance persons who, as a group, would constitute a majority of a quorum of a governmental body. For that reason, we will strongly endeavor to only discuss matters which specifically relate to our common political goals and actions with regard to the candidacy and availability for office of our group or other individuals who share our general political views. We will not discuss matters currently pending before the (name of governmental body) other than the political aspects of the composition of its governing Board or that of other governments. We will not discuss matters which are required to be heard in an open session of a public body, or those which may be discussed in a closed session of a public body, with the exception of those few matters, such as the filling of a vacancy which may be discussed in a political meeting, and then only with regard to the political aspects of those actions. While we recognize that occasionally a matter which is political in nature may involve a public policy issue, we will make every effort to keep the discussion limited to the political aspects which are not subject to the Open Meetings Act.

234. Q: The municipal Clerk tape records regular Board meetings. A citizen comes to a Board meeting with a tape recorder. The Mayor tells the citizen that she cannot tape record the meeting. The citizen files a Freedom of Information Act request for the tape that the clerk has recorded. Should the citizen have been allowed to tape the meeting?

A: The Mayor was wrong, citizens are allowed to audio or videotape open public meetings. The government can set reasonable rules so the recording doesn't interfere with the meeting. A citizen can also use the Freedom of Information Act to listen to the original or get copies of the Clerk's tape recordings of open session meetings.

235. Q: Should she be allowed to hear and copy the clerk's tape?

A: Yes to both questions. The citizen should have been permitted to tape the meeting. Under the Open Meetings Act, any person may record by tape, film or other means, meetings that are required to be open by the Act. 5 ILCS 120/2.05. However, the municipal Board may adopt an ordinance establishing reasonable rules regarding the taping of such recordings. Further, because the tape would be considered a public record, the citizen should be allowed to listen to and receive a copy of the Clerk's tape of the open session meeting.

236. Q: A municipal Board meeting runs past midnight on a Thursday. Can the Board adjourn the meeting to the following Wednesday without publishing notice?

A: Yes. If an announcement of the time and place of a reconvened meeting was made at the original meeting and there was no change in the agenda, there would be no need to publish notice. However, if both these conditions have not been met, then the notice must be posted and given to the registered news media at least 48 hours before the reconvened meeting. If the meeting was voted to be reconvened within 24 hours, no further public notice would be required. 5 ILCS 120/2.02.

237. Q: A municipal Board wishes to reschedule a meeting which would have occurred on Thanksgiving. Does it need to provide notice of the modified meeting date?

A: Yes. Public notice of a rescheduled regular meeting, along with an agenda for the meeting, must be given at least 48 hours before the meeting by posting the notice at the principal office of the municipality and by furnishing the notice and agenda to the registered news media. The news media, however, must first file annual requests for such notices giving an address or telephone number within the municipality. 5 ILCS 120/2.02.

238. Q: Can the municipal Board hold an open meeting retreat outside of the municipal hall at a local hotel?

A: Yes. Section 2.01 of the Open Meetings Act (5 ILCS 120/2.01) requires that all meetings which are required to be public must be held in "places which are convenient and open to the public." A retreat which needs to be open to the public can be held outside of the municipal hall and even outside of the municipality, but needs to be at a location "convenient" to the public. At least one PAC opinion has ruled that a retreat held more than fifty miles from the community was not sufficiently convenient to comply with the Open Meetings Act.

239. Q: What does a municipality have to do if it wants to change its regular meeting date from Monday to Tuesday?

A: It must publish notice of the change in a newspaper of general circulation within the municipality or, if none, within the area. If it established its meeting dates by ordinance, it should also pass another ordinance amending the City Code. Further, the annual resolution establishing meeting dates should be corrected in the future.

240. Q: A notice of a special municipal Board meeting mistakenly listed the meeting time as 7:00 p.m. Can the meeting begin at 8:00 p.m. without any further action or notice?

A: No. The meeting may be held as long as someone is present at 7:00 p.m. to advise those who arrive for the meeting that it will not begin until 8:00 p.m. However, it would be improper to start the meeting at 8:00 p.m. if no notice or person was at the municipal hall at 7:00 p.m. to advise the public and press that the meeting will not start until 8:00 p.m. If the meeting needs to be held at 6:00 p.m., the only way to accomplish it would be as a properly-called emergency meeting.

241. Q: Does the Clerk have the right to attend all meetings of the municipal Board, including closed sessions?

A: Yes. Section 3.1-35-90 of the municipal code 65 ILCS 5/3.1-35-90 provides that the Clerk shall attend all meetings of the corporate authorities including executive sessions and keep a full record of their proceedings in the journal, except if the Clerk is the subject matter of the meeting and his or her presence creates a conflict of interest.

242. Q: Does a Trustee violate the Open Meetings Act if he e-mails his position on an upcoming vote to the other Trustees?

A: No. The Open Meetings Act prohibits contemporaneous electronic communication. There is no violation unless a majority of a quorum is involved in a chat room or communicates by e-mail every few minutes to replicate a multi-party conversation. For this reason, the elected official who wishes to share his position on an upcoming vote should advise the other officials not to "Reply to All" so a contemporaneous discussion does not grow out of the first e-mail These e-mails may be subject to public disclosure under the Freedom of Information Act.

243. Q: Do committees of a Council or Board need to follow the Open Meetings Act?

A: Yes. The Open Meetings Act applies not only to the Village Board or City Council, but also to any formally created commission or committee either of the Council or Board or even a recommendatory group such as the Plan Commission.

244. Q: Can a Board or Council go into closed session to discuss the possible acquisition of some future site for a public works garage?

A: No. At that early stage, the issue remains one of public policy, which must be discussed in open session. It is only when the discussion has moved to the acquisition of some specific parcel or parcels of land that the matter can be discussed in closed session.

245. Q: Can a Trustee who misses an executive session ask to listen to the tape recording of the closed session minutes?

A: Yes, this would be the best practice. The normal keeper of the tapes can utilize security measures to assure that the tape will not be altered, such as having someone present while the tape is being reviewed.

246. Q: Can a Trustee who misses a meeting vote to approve the minutes for that meeting?

A: Yes. Especially where the Board or Council audio or video tapes the meetings, the official who was absent has the ability to become familiar with what transpired at the meeting. Remember, the minutes are not intended to be a verbatim transcript of the proceedings, but only need to include (1) the date, time and place of the meeting; (2) the members of the public body recorded as either present or absent and whether the members were physically present or present by means of video or audio conference; and (3) a summary of discussion on all matters proposed, deliberated, or decided, and a record of any votes taken. These are easy items on which an absent officer can come up to speed before the minutes are approved.

247. Q: What can a Council or Board do with a Trustee or Alderman who breaches the secrecy of a closed session?

A: Less than you would think. On the assumption that the "leak" can be proven, the Council could charge the offender, if they had a pre-existing ordinance making that act a violation. The individual could be censured, and the other Board or Council members could state their suspicions at a meeting. The State's Attorney might do something, and the municipality could sue the Trustee seeking an injunction. Proving the offense is hard.

248. Q: Can a Trustee or Alderman be dismissed for not attending meetings?

A: Probably not. Again, the State's Attorney might help in this situation. In an extreme example, the municipality could hold a public hearing and declare the position vacant.

249. Q: If a Mayor doesn't like the way a meeting is going, can she adjourn it and walk out?

A: The Mayor can walk out at any time, but unless the Mayor's departure causes the loss of a quorum in attendance, the meeting can go on with the remaining Aldermen or Trustees choosing a temporary chairman.

250. Q: If you think you might want to sell some land on the north side of town, can the matter be discussed in closed session?

A: No. There is no exception for discussions of the possible sale of land. The ability to go into closed session does not occur unless or until the setting of a price is being discussed.

251. Q: Can a municipality go into closed session without "closed session" being a matter on the agenda?

A: Yes. The need to go into closed session may be derived from some information learned at the meeting itself. Although not required, it is probably a good idea to add an item entitled "closed session" on every meeting agenda.

252. Q: Does the Open Meetings Act require a posting of employee compensation?

A: Yes, for employers participating in the Illinois Municipal Retirement Fund. Within 6 days of approval of a budget, an applicable employer must post the total compensation package for each employee that exceeds $75,000.00 per year. Total compensation package includes salary, health insurance, housing allowance, vehicle allowance, clothing allowance, bonuses, loans, vacation days granted, and sick days granted.

253. Q: Does the Open Meetings Act require posting of a prospective employee's total compensation package prior to hiring such employee?

A: Yes, for some employees. For employers participating in the Illinois Municipal Retirement Fund, at least 6 days before the public body approves an employee's total compensation package equal to or in excess of $150,000.00 per year the employer must post the total compensation package for that employee. The posting must be maintained on the employer's website or physically posted at the principal office of the employer.

254. Q: Does the Open Meetings Act allow participation in a meeting by telephone or other electronic communication?

A: Yes, if a quorum of the members of the public body is physically present a majority of the public body may allow a member of that body to attend the meeting by a telephonic or other electronic communication if the member is prevented from physically attending only because of (1) personal illness or disability; (2) employment purposes or the business of the public body; or (3) a

family or other emergency. Family vacations do not qualify as an eligible reason to participate remotely. If a member wishes to attend a meeting by video or audio conference, the member must notify the recording secretary or the clerk of the public body before the meeting, unless advanced notice isn't practical. In order to allow remote participation, the public body must adopt rules providing for such remote participation.

255. Q: Must we allow citizens to speak at a public meeting?

A: Yes, the Open Meetings Act provides that any person shall be permitted an opportunity to address public officials at a public meeting under the rules established and recorded by the public body.

256. Q: What type of rules may a public body adopt for public comment?

A: The Public Access Counselor has issued a number of opinions regarding the type of rules and regulations a public body may adopt under the Act. Generally, as long as the rules are reasonable, a public body may establish time limits for public comment, limit comments to topics on the agenda and establish and enforce rules of decorum. The public body may also require notice of intent to speak at a public meeting, but such notice must be reasonable and the deadline cannot be prior to the issuance of the agenda for the meeting *(See PAC Opinion 14-009 and 14-012).*

CHAPTER 5. DEVELOPMENT

INTRODUCTION

All communities are engaged in development in one way or another. A small community on the edge of a metropolitan area may be expanding with suburban residential development. An established community with most property fully developed within its boundaries, may seek to renovate and restore a downtown area or industrial district. In either case, the community will be dealing with developers, business owners, planners, and construction companies. Financing for development can become a complex field, and developers will often put pressure on a community that must be understood and addressed. The community's investment in basic utility services must also be kept in mind, and its zoning regulations will be put to the test under the impact of development. Ancel Glink produces pamphlets on the subject of zoning and economic development which may supplement the questions which we present here. Those pamphlets can be downloaded from our website: www.ancelglink.com. The following questions and answers address some of the issues that repeatedly arise when local officials deal with developers.

257. Q: What do you do if a legal description in a public notice regarding a zoning change is in error?

A: If a legal description in a public notice is in error, there is a statutory procedure for the government to correct the errors. (65 ILCS §5/1-2-4.) If, however, the error was such that it would not properly notify the public of the nature of the property for which the public hearing was held, then notice must be republished.

258. Q: What do you do if an auto dealer proposes to come to your town, but wants a sales tax and property tax rebate? Can we provide such a rebate?

A: Various statutory provisions and, if your community is home-rule, then the Illinois Constitution as well, authorize municipalities to grant certain commercial and industrial entities a property tax abatement (35 ILCS 200/18-165). Most property tax abatements are limited to commercial or industrial development, a period of ten years and a combined aggregate of $4 million from all taxing districts abating taxes for the same property, but the business must be newly locating within the state or expanding an existing facility within the community, rather than simply locating from one municipality to another. Home-rule units of government are likely not bound by these restrictions. Similar types of tax abatement are available for property located within an enterprise zone, (35 ILCS 200/18-170), but with separate limitations. Sales tax sharing or rebates are also permitted by means of "economic incentive agreements" under the Illinois Municipal Code. (Act, §5/8-11-20.) Before a non-home rule entity may approve an agreement for any sales tax rebate, certain findings must be made by the corporate authorities depending upon whether the business to be granted the incentive is being constructed on vacant property or improved property.

The statutes authorizing these economic development tools should be consulted for details, but the first task of a community, once it recognizes the advantages it

can provide to business, is to determine whether the public investment in the business will result in an adequate return to the community, e.g. it will attract new or expanded business and will in the long run also be a financial benefit and a boon to development for the municipality. An alternative to rebates is to work with the developer to lower construction costs by granting reasonable waivers and variances.

259. Q: What do you do if your town and its neighboring community keep out-doing each other in offering higher density and benefits to unincorporated territory between the two municipalities?

A: If two municipalities are involved in a costly and excessive battle over which community will annex land lying between the two municipalities, the statutes provide a device to solve this problem. The municipalities can agree to the creation of a boundary line across which neither municipality will annex territory. That boundary agreement can be for a period of up to 20 years and can designate specific zoning categories to be granted to the land to be annexed. (Act, §5/11-12-9) Sometimes these agreements contain provisions to share revenue generated by development in areas where developers have tried to create conflicts.

260. Q: What do you do if a new commercial complex wants to be served with municipal utilities, but is a half mile away from the municipality's borders?

A: A municipality has the right to extend its utility lines to a commercial complex outside of its corporate boundaries. Usually, municipalities will not agree to offer such services unless the owner of the commercial complex agrees to enter into an annexation agreement with the municipality (Act, §5/11-15.1-1). Such agreements can last for a period of up to 20 years and will require that the owner annex the land to the property if it becomes contiguous to the boundaries of the community during the term of the agreement. The annexation agreement can also require the developer to construct a building in accordance with plans submitted to the community before the annexation agreement is entered into and it can require that the construction comply not only with county standards but also with municipal standards. The agreement can also provide for financial payments to the community in lieu of sales taxes, or an agreement can be worked out with the county to share sales taxes. The county may agree to such a sharing arrangement because, without municipal utilities, the commercial complex might not be built.

In some counties of the state, land which is subject to an annexation agreement, although not yet contiguous to the municipality and annexed, is governed by the ordinances of the municipality – including the payment of sales taxes to the municipality and not to the county.

261. Q: Can a municipality refuse to annex land?

A: Yes. Under Illinois law, possibly with some extremely rare exceptions, governmental bodies have the complete ability to determine whether or not to

annex additional land to a municipality. In the absence of some obligation accepted in a financial grant, or limited circumstances involving polluted water, the municipality also has the complete freedom as to whether it will provide utility services to land outside of its municipal boundaries.

262. Q: There is a utility easement across private property connecting two parts of the municipality's water system. Can the municipality use this easement for a bike path?

A: Not without permission of the landowner. Where an easement is granted, the grantor retains the underlying title to the land. What is transferred is merely the right, sometimes for a particular period of time, and sometimes in perpetuity, for the grantee of the easement, and usually the grantee's successors, to utilize the property for a particular purpose. Almost all easements state in the paragraph making the grant the specific purpose for which the grant is being made. Among the most common purposes for an easement are roadway, sidewalk, sanitary sewer, storm sewer, water main, cable line, street lights, short-term construction use, and air rights or view. It is very important for a governmental body to get clear and, where possible, broad easements rights. In the case, *River's Edge Homeowners Assn. vs. City of Naperville*, 353 Ill.App.3d 874 (2nd Dist. 2004), the City was granted and accepted an easement for "a walkway." The City then wished to use the easement for a bicycle path. The court found that it could not do so without condemning this additional right or getting a broader grant. In your case, the utility easement allows the municipality to install and maintain their water system equipment. It does not grant any rights for a bike path.

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

A: A Mayor should not be concerned about viewing a development similar to that being proposed within the community, even if the trip involves travel to another state. If, however, there are similar facilities in North Dakota and Hawaii, a trip to North Dakota is probably better advised. The Mayor may wish to ask some trusted friends within the community whether there would be a political problem arising out of such a trip, and, if it goes forward, it should be well publicized. The Mayor should also prepare a written report so that the public gets the benefit of the Mayor's reflections. Another issue the Mayor may consider is whether the developer's gift of the trip might violate the Gift Ban Act, which generally prohibits people who are seeking to do business with or receive benefits from a local official from providing certain types of gifts. One way to avoid this issue is for the Mayor to pay for the trip at the community's expense.

264. Q: When can a municipality use a recapture agreement?

A. The Act, §5/9-5-1 is often referred to as the "recapture agreement statute." That section of the statute permits a municipality to ask a developer, as part of the subdivision process, to oversize certain water mains, sanitary storm sewers and other related facilities which will also bring a benefit to other properties not yet subdivided or served by such facilities. That statute has also been amended to permit the recapture of developer costs associated with the construction of roadways, traffic signals or other traffic-related improvements. In addition to land which is subdivided, a recapture agreement can be utilized even where a project does not require a subdivision plat if the developer requests and receives approval of a planned unit development.

The municipality and the developer may enter into a recapture agreement which provides that the municipality will not permit other owners of property that will benefit from these public improvements to connect to the sewer or water lines or to use the streets unless those other property owners or developers pay their proportional share of the installation of these oversized or expanded public facilities. The statute allows the contract to add interest costs to the original cost of the improvements. Sometimes the community adds a small administrative charge to reimburse itself for orchestrating the agreement. The community should avoid a situation in which the costs agreed to in the recapture agreement, including interest, interfere with future municipal growth and annexation because the ever-increasing recapture payments made other development too expensive.

No public notice or public hearing is required before a recapture agreement can be entered into. Some municipalities require that a notice be sent to the benefited property owners before the agreement is accepted. A recapture agreement should be filed with the Recorder of Deeds. That recording serves to notify the owners and other persons interested in the "benefited property" that there will be a charge when the property owner seeks to connect to or use the facilities constructed under the contract.

Municipalities should protect themselves in such agreements with a number of provisions. One of these is a provision which requires the original subdivider to fully defend and hold harmless the municipality and its officers and employees in the event that one of the "allegedly benefited property owners" argues that no benefits occurred or that the amount of the recapture fees are unreasonable. The original developer should be required, upon request from the municipality, to post a cash bond to pay for any of the municipality's costs of defending or implementing such an agreement. That is especially the case since it is the original developer rather than the municipality which will receive all or almost all of the recapture payments. If no bond is posted, the recapture agreement should allow the municipality to permit the facilities to be used without the required payment or under a compromise payment. Another form of security which should be added is to limit the municipality's liability to the developer to only the

recapture payments actually collected, excluding any other lawful source of money to pay the developer.

265. Q: If a municipal zoning regulation is held invalid by a court, is the landowner entitled to be paid damages for a violation of civil rights?

A: No. For the past 20 years, legal scholars have debated whether governmental bodies which overly regulate should, in addition to having the regulation overturned, be required to pay for the loss of freedom suffered by the property or business owner in the interim. Some scholars argued that, if a property owner wanted to build a 10-story building in an area with established half-acre single-family homes, the government could insist on its zoning, but it would have to pay the difference in value for the land. That is an extreme position, but one which would have governments paying property owners every time they limited their supposed constitutional right. Although there have been cases in both directions, the prevailing law is that, absent facts that would demonstrate that the zoning had no rational basis, even invalid zoning decisions will not result in the government paying damages for "taking" the plaintiffs' property.

266. Q: Can a municipality install speed bumps in a public road?

A: Yes. Municipalities have broad control over roadways under their jurisdiction. Obviously, attempts to slow the speed of traffic, such as speed bumps, may create some potential for liability if their existence is not noted and a driver loses control of his or her vehicle. The risk may be small because the driver may only be able to claim a justifiable loss of control if the vehicle was traveling at a speed illegally higher than the posted limit. While municipalities have substantial control over their roadways, in special cases the public or even another municipality arguing for the need for unobstructed traffic flow have to be able to prevent, for example, a road closure intended to keep the "wrong elements" out of a community. Courts will grant government broad discretion so long as there is any reasonable justification for action taken. Action which can be shown to harm the public, however, and appears to be without justification, or based on an improper justification, will frequently be overturned.

267. Q: May a local government require a developer to pay the cost of review of development plans?

A: Yes. In the case of *Inland Land Appreciation Fund, L.P., et al. vs. County of Kane*, 279 Ill.Dec. 649 (2003), a corporation which owned land in Kane County submitted a proposed subdivision plan to the County for review. The County retained an outside consultant to perform preliminary storm water engineering review. Kane County subdivision regulations permit the plat officer to engage professional assistance in order to provide a more timely review of the preliminary plans. The developer was notified of this provision of the County ordinance in a letter, and did not object. In fact, the letter asked for its return with

a line for acceptance executed. The developer did this. A private engineering firm did the work and charged almost $7,000.00 in fees.

The owner of the property reimbursed the County in the amount of $2,800.00, but refused to make any further payments after the development plan was rejected. The County sued and the developer filed a counterclaim seeking reimbursement for the $2,800.00 arguing duress.

The court reviewed the provisions of the County subdivision code, which authorized the employment of outside consultants subject to reimbursement. The court found that "although there is no specific authorization in the state statutes governing counties for such reimbursement agreements, they fall within the broad contractual powers conferred by Section 5-1005(3) of the County Code, which authorizes counties to 'make all contracts and do all other acts in relation to the property and concerns of the county necessary to the exercise of its corporate powers'." The court went on to describe the facts of the case under which the developer accepted the position of the County that it required outside help and paid fees until its application was rejected.

The court also found that the developer was not put in a situation of duress because it did not choose to pursue the alternative approach which might result in a longer and less professionally-reviewed opinion. The court also said that the developer probably waived any duress argument by receiving the benefits of the review during the period of eight months, but then refusing to pay when the final decision was contrary to its interests.

268. Q: Can a fire protection district require sprinkler systems to be installed in municipalities?

A: No. A number of tragic fires have brought to the fore the fact that sprinklers save lives. Two entities are the principal proponents for the installation of sprinklers. The first is the sprinkler industry, which points out that today's sprinklers are great improvements over those in use in prior years. Modern sprinklers only go off in the area where a fire is detected, while the rest of the building may be undamaged by water. The fire sprinkler industry has voluminous literature showing that a significant number of lives could be saved each year if sprinklers were widely in use.

The other great proponents of the installation of sprinkler systems are the administrators and the firefighters in fire departments and fire protection districts. Their job becomes much easier, safer, and more effective if they have operating sprinklers to assist them. This combination of the industry and people who risk their lives each day in our defense has convinced a growing number of municipalities to require sprinkler systems in a variety of building types. In fact, a number of municipalities now require sprinklers to be installed in single-family homes. Other communities require sprinklers in commercial and industrial buildings, in apartment buildings, townhouses or any building where a large

group of people can assemble. But other municipalities believe that the added cost of installing sprinklers is a deterrent to development in the community, and that the benefit is not worth the expense.

In some situations, disputes have arisen between municipalities and fire protection districts as to which government has the authority to require sprinkler systems. In some cases, the argument has been made that, even though sprinklers are not required by municipal ordinances, they can be required by an overlapping fire protection district. The law on this subject is reasonably clear. Within a municipality, the decision is one for the City Council or Village Board.

269. Q: What does a municipality need to know about extending utility lines?

A: Municipalities generally assume that, since they are given by statute the right to provide roads, sidewalks, drainage facilities, and sewer and water service to their residents, they can simply do so anywhere within the municipality. Unless the municipality has an easement or an equivalent ownership interest in land, or some permission from a private property owner, it cannot exercise any of these powers. Perhaps the most dramatic surprise to a municipality will be the fact that, especially in developing areas, principally farm land, it may not actually have an ownership interest in what it believes to be public roads. While the public record may show that in 1873 a farmer consented to a road being laid out across his property, the rights which the government acquired over 100 years ago may be limited to the narrow traffic lanes which existed first as a dirt road, then as a gravel road, and finally as a paved road for many years. The municipality may have no right whatever to install sidewalks, street lights or utility lines, including drainage swales, without getting the approval of the property owner. It may come as an enormous surprise to the municipality, but the property owner may well still own the land to the center line of the road. While the municipality has the right to maintain the existing road, it may not be able to widen or modernize it without gaining greater ownership authority. The most common way for a municipality to obtain greater authority to use a right-of-way during the course of development is through a statutory dedication that is reflected on the plat of subdivision.

In addition, a municipality might be surprised to discover that, in general, its ability to condemn property for roadway purposes outside of its boundaries is limited to land which is adjacent and contiguous to the municipality. Act, §5/11-61-1. What a municipality should learn from the answer to this question is that great care needs to be taken in making certain that a community truly possesses the adequate interest in land and in facilities such as underground pipes to fully operate and expand its transportation and utility systems.

CHAPTER 6. CONTRACTS

INTRODUCTION

Illinois law places relatively few restrictions on the ability of a local government to enter into contracts and agreements, but those restrictions are strictly enforced. On some occasions, a question arises as to whether a non-home rule municipality has the power to enter into a certain type of contract and for what term. Home rule municipalities have much more freedom to contract. However, the law sets specific limitations for public works contracts and competitive bidding that non-home rule municipalities must adhere to. Also, elected officials must recognize that their governmental entity is obligated and bound by any contract it enters into, and therefore should be particularly vigilant in this area. Poorly drafted contracts and agreements can cause a great deal of grief when a dispute arises about the work to be performed or the service to be provided under the contract. Construction contracts for municipal projects can raise especially knotty issues. The following questions and answers address some of the issues involved in contracting for a local governmental entity.

270. Q: What do you do if you want to buy a product from a single-source vendor?

A: A municipality is not obligated by state statute to purchase a product by competitive bids. The statute only requires bidding for public improvement projects. However, many municipalities have adopted ordinances requiring competitive bidding for supplies. In most cases, such local ordinances allow the municipality to waive the bidding requirement when, for example, a single source vendor is encountered. One should be familiar with whether a super majority vote is required to waive competitive bidding for the procurement of personal property.

271. Q: What do you do if a low bid on a construction contract is still more than you want to pay?

A: Consider other options after first consulting any special ordinances you may have in your own code book. For example, your Board or Council could reject all bids and rebid the project, although this choice will involve an additional expense and might still produce the same result. Secondly, the corporate authorities could accept the lowest responsible bid and authorize the staff to negotiate a reduction in the contract price with that company, except that no other changes in the contract specifications may be made. 720 ILCS 5/33E-12. Third, the corporate authorities could, outside the bid process, find a contractor willing to perform the work at the desired price, and then, by a 2/3 vote of the Aldermen or Trustees, approve a waiver of competitive bidding and an award of the contract to that person or company. Finally, the municipality, also by a 2/3 vote, could choose to construct the improvement itself by employing its own labor.

272. Q: What do you do if a Council member moves to reconsider the approval of a contract which has already been signed?

A: This action should be discouraged, as it could subject the municipality to a legal challenge from the other party that has signed the contract. In *Monge v. City of*

Pekin, 245 Ill.App.3d 622, 614 N.E.2d 482 (3rd Dist.), the appellate court found an effort to invalidate a signed contract to be void because the rights of third parties had intervened in the period between the initial approval of the transaction and the subsequent votes to reconsider and then overturn the earlier approval. That conclusion was based in part on the court's finding that the reconsideration was made by a Council without legal authority.

273. Q: What do you do if you are a Trustee and a house painter and you want to offer to paint the Village hall for half your normal price?

A: In general, all municipal officers are barred from entering into contracts to provide goods or services to the municipality. There are some statutory exceptions. In this example, the Trustee is a house painter who owns his or her business. In that case, the official may provide such services if the amount of the contract does not exceed $2,000.00 and the total amount of other such contracts during the fiscal year do not exceed $4,000.00. The member must also publicly disclose the nature and extent of an interest in the contract and must abstain from voting. Act, §3.1-55-10(b)(2). Other exceptions deal with situations where the official seeking the contract has less than a 7½% share of ownership in the company. Act, §3.1-55-10(b)(1). Unfortunately, if the contract price exceeds the minimum amount specified above, the painter cannot do the community the favor of the half-price deal.

274. Q: Can an elected official in his or her full- or part-time occupation sell a product or a service to a contractor who does business with the municipality?

A: Yes. Except for certain limited circumstances, elected municipal officers cannot do business directly with the community they serve, but they can do business with individuals and companies which do business with the community. If the person is an elected officer and feels that his or her vote would be influenced by that relationship, he or she may abstain and describe the reason for the abstention. What an officer cannot do, however, is enter into any pre-arrangement to sell a product or service to a vendor when it is known that the officer will only get to provide the product or service to the vendor if the community enters into a contract with that vendor. Such an activity would constitute an illegal and criminal conflict of interest.

275. Q: In a construction contract, can a municipality choose the contract proposal of the second lowest qualified bidder?

A: No. This may seem like a trick question, but the question presumes that the lowest bidder is also a qualified and responsible bidder. Nonetheless, if the Village's choice is truly the second lowest bidder, the municipality cannot make the award utilizing the traditional bidding process. Assuming that this is a public works project in excess of $20,000, a non-home rule municipality can only pick the lowest responsible bidder. The municipality can, however, reject all bids and, by a vote of two-thirds of its Aldermen or Trustees, enter into new negotiations with

the second lowest bidder and award the contract without bidding. In that case, the governmental body must be prepared to take the political heat for this action, and the risk that the second lowest bidder will raise the price.

276. Q: If all bids are higher than the amount which the municipality wishes to spend, can it change the specifications to make the job cheaper, and negotiate without seeking new bids with the lowest bidder?

A: No. A municipality, in a public works project, is permitted to negotiate with the lowest responsible bidder to arrive at a lower price. The rule is, however, that the specifications cannot be changed or else other bidders might claim that they could offer an even lower price.

277. Q: Can a non-home rule unit enter into a three-year contract with several other municipalities and a private company to jointly pay for plan review and building inspections?

A: Yes. Ordinarily, a non-home rule unit, without specific statutory authority, does not have the authority to enter into multi-year agreements. Where, however, more than one governmental body is involved, the provisions of the Illinois Constitution and statutes allow such intergovernmental agreements to extend to matters which are not prohibited by statute or ordinance. We believe that in such cases, multi-year contracts are valid. It might also help if the contract was signed on behalf of the group by a home-rule member. Municipalities near urban areas have made great use of intergovernmental agreements. This would be an excellent device in other areas of the state where municipalities can enter into such agreements with Townships, School Districts, Park Districts or Counties.

278. Q: When do governmental bodies need to bid contracts and how much flexibility do we have in choosing the winner?

A: Rules vary greatly among governmental bodies in Illinois as to those contracts which must be bid and those which can be awarded directly to a single person or entity or through the more informal request for proposal (RFP) process. For some governmental bodies, all but a few contacts require bidding when the expense exceeds $20,000. For other governments, like municipalities, only public works projects in an amount in excess of $20,000 are subject to mandatory bidding. Municipalities are not mandatorily required to bid service contracts or contracts for materials. They are statutorily authorized to do so, but unless there is a particular ordinance passed requiring broader mandatory bidding, the decision as to how contractual relations are to be sought is generally left up to each municipality. There are requirements relating to contracting for engineers, architects and surveyors, but otherwise a bidding process for service contracts is generally left up to each community.

If a governmental body engages in the bidding process, it is not required to award the bid to the lowest bidder, but to the lowest *responsible* bidder. The

governmental body may consider many factors in determining which entity to choose, but it should be transparent in its bid specifications what those factors will be. In addition, the documents relating to bidding may contain relevant requirements which may preclude some entities from bidding. Care must be taken in establishing such standards. For example, a governmental body cannot preclude persons from bidding whose offices are outside of the municipality or the state, but the contract can require reasonable response times regarding service calls which may favor local bidders.

Finally, persons or companies which feel that they have been improperly passed over in the bidding process must move very quickly in a lawsuit if there is a desire to invalidate the action of the governmental body. The law used to allow a disgruntled bidder to sue for damages if the contract was improperly awarded. Current law forces that person to become a litigant seeking to enjoin the performance of the contract.

279. Q: Is it important for governmental bodies to obtain completion and payment bonds for public works projects?

A: Yes it is. Unlike private construction, contractors and subcontractors who supply labor and materials for governmental construction projects are not permitted to place mechanic's liens on such projects. In the private sector, such liens can be filed, and ultimately, property can be sold to satisfy the payment of properly completed, but unpaid, construction costs. However, public real estate cannot be seized in foreclosure in most cases. Instead, all governmental bodies are required by law, in the Public Construction Bond Act, 30 ILCS 550/1, et seq., to procure performance and payment bonds for public works contracts, of any kind, costing over $50,000.00. The performance bond is to protect the public; the payment bond is to protect subcontractors and labor or material suppliers.

If a contractor undertakes to perform a public works project, it is important that the work be finished. A completion bond is a bond which allows the governmental body to call upon the issuer of the bond, generally a surety bond company, to perform the work as had been agreed to by the contractor and, indeed, to complete the work at a cost up to the full amount of the bond. Thus, if a contract is let for a million-dollar public works garage, and the contractor put in $700,000 worth of effort, but, because of mistakes or other unexpected problems, still had $700,000 of work to do, the completion bond surety would be obligated to pay up to the amount of the million dollar bond, to cause the construction to be completed. The surety company may have a lawsuit against the party for whom it wrote the bond, but it should quickly respond to a notice from the government with the uncompleted work by sending in crews to complete the job. It would pay up to the face amount of the bond.

It is true that things often do not run this smoothly since the surety bond company must be convinced that the work has not in fact been completed. In an unclear case, the surety company may side with the contractor that the work has been

done and require the bond holder to go to court to prove non-completion. In a clear case where the contractor walks away from a job, the surety company will generally employ the contractor of its choosing to complete the work.

A payment bond is not there to protect the interests of the public, but rather the interest of unpaid subcontractors or the providers of goods or services. If the general contractor in a public works project should walk away from the job or become insolvent, the legislature sought to provide a remedy to the aggrieved parties since they are not allowed to file traditional mechanics liens. Parties who have not been paid have two choices under the law: first, they can send a notice to a governmental body within 180 days after completing their work and file a complaint within six months thereafter to establish a claim to any money which the governmental body may still owe the contractor. The governmental body cannot pay out money to the contractor, after receiving such a notice, until the time period for filing a suit is over or if the suit has been filed, until a court allows it to pay out the funds. The governmental body is required to hold back from the general contractor enough money to satisfy all of the claims for which notices have been properly filed. 770 ILCS 60/23

In addition to seeking to stop the payment of money from the governmental body, the aggrieved party has the ability to directly sue the company which provided the governmental body with a payment bond. It can require the governmental body to inform it as to the identity of a company which has agreed to undertake this responsibility. What happens, however, if the government is negligent in awarding a contract without procuring such a bond? An appellate court decision tells us the answer. In *Ardon Electric Company, Inc., v. Winterset Construction, Inc.*, 354 Ill.App.3d 28, 820 N.E.2d 21 (1st Dist. 2004), the Village of Merrionette Park entered into a contract with Winterset Construction, Inc., for the construction of a new Village police station. Winterset then entered into contracts with various subcontractors to perform the work and they agreed to perform as general contractor. The plaintiff-subcontractors in the lawsuit successfully completed the work, but were not paid in full. They served notice of their claim for money due to the Village, and to Winterset, but the Village informed them that no payment bond was available. The subcontractors then sued the Village and Winterset.

The Village defended the case on the grounds that certain procedural steps had not been properly taken by those subcontractors. Those procedural steps, however, were those which would have required the Village to withhold money on hand. None of those steps, however, would have been necessary had the Village properly required a payment bond at the time that the original contract was entered into. The Village argued that it could not be held responsible if it simply chose not to require a payment bond. The Village argued that the burden was on the contractor to procure the bond.

The trial court agreed, but the appellate court reversed. This case, and earlier cases, teach us a sad lesson. If a governmental body enters into a public works contract and does not procure a payment bond, it can itself be held responsible,

almost as in a mechanics lien situation. If its general contractor takes money from it and fails to pay subcontractors or material suppliers and the government has received no payment bond it will itself become responsible for the payments to these parties. All of this pain can be done away with if governmental bodies follow the statutory provision which requires all governments, including municipalities, Park Districts, library districts, school districts and all other political subdivisions to protect both the public and subcontractors and material suppliers through the purchase of such bonds. Sometimes governmental bodies believe that they are precluding local contractors from bidding on jobs by imposing such a requirement. Except in the smallest of jobs, governmental bodies would probably be better advised in working with an insurance broker to assist local contractors in understanding the nature of this insurance and helping them to purchase it rather than simply ignoring this requirement.

There may be some defenses which a governmental body might be able to raise if it failed to procure such a payment bond. Home rule communities might argue that they are entitled to ignore this requirement. In some cases, the governmental body might be able to show that the subcontractor now suing actually issued signed lien waivers even before it had received the money from the general contractor. In this latter situation, it is probable that the governmental body should have been able to rely upon a lien waiver from a company which stated it had received funds before it actually received them. There may be other exotic arguments as well. The best practice, however, is to follow the statutes and to realize that the legislature had made a public policy decision to protect subcontractors even if it adds to the cost of construction. A recent case has held that, if a surety issues a completion bond, it is also obligated to cover non-payment to contractors. Lake County Grading Company, LLC v. Village of Antioch, Illinois Supreme Court, Docket 115805, October 17, 2014.

280. Q. Is a municipality obligated to make payments under a contract when the subject of that contract is not mentioned in the appropriation ordinance for that fiscal year?

A. No. It is rare that some of the more technical rules of Illinois law get applied, but the legal environment remains one of "Seller beware." In a federal district court case involving a Village that entered into a contract for the addition of GPS technology to its golf carts, the trial court found that the contract was void because the appropriation ordinance for that fiscal year was silent on an appropriation of that type. Even though there was an appropriation in a subsequent fiscal year, the court pointed out that 65 ILCS 5/8-1-7(a) provides that an appropriation must have been "previously made" concerning a contract or expense. The money in that case came out of the general fund of the municipality rather than any special fund which might have alleviated the need for a prior appropriation. The court also expressed the often-stated rule that a person contracting with a municipality is presumed to know whether the community has taken all necessary steps to authorize the validity of its contracts. There may have been some other technical arguments that the seller of the goods either didn't raise

or waived, but there is little doubt that this private-sector defendant walked out of the courtroom shaking his head and will be more careful in dealing with municipalities in the future. The court did refuse to automatically invalidate all other monies that the company had been paid in the past. *Village of Lakewood vs. PFG Golf*, N.D. Ill., 2006cv03508, June 28, 2006. In some cases the vendor may have other claims under which payment may be required.

281. Q: In our government, the chief executive officer keeps making change orders to construction and other contracts without anybody's approval. Is this correct?

A: No. For all governmental bodies in the state, the legislature has established specific rules dealing with change orders in public contracts. Any large change order must be in writing and is subject to specific rules. The statute applies to all change orders or a series of change orders in public contracts which authorize or necessitate an increase or decrease in either the cost of the public contract by a total of $10,000 or more, or in the time of completion by a total of 30 days or more. A person employed by and authorized by a unit of local government to approve such a change order to any public contract must first obtain from the unit of local government on whose behalf the contract was signed, or from a designee authorized by that unit of local government a determination in writing that (1) the circumstances said to necessitate the change in performance were not reasonably foreseeable at the time the contract was signed, or (2) the change is germane to the original contract assigned, or (3) the change order is in the best interest of the unit of local government. The latter is not a difficult standard, but the formalities must be followed. If these procedures are not followed, the person authorizing the change order can be charged with a Class 4 felony. The written determination and the written change order resulting from the determination must be preserved in the contract's file, which shall be open to the public for inspection. 720 ILCS 5/33E-9.

In addition, the Public Works Contract Change Order Act mandates that any change that order authorizes or necessitates any increase in the contract price that is 50% or more of the original contract price or that authorizes or necessitates any increase in the price of a subcontract under the contract that is 50% or more of the original subcontract price, then the portion of the contract that is covered by the change order must be resubmitted for bidding in the same manner for which the original contract was bid. This law also provides for the preemption of home rule authority, so it is generally applicable to all municipalities.

282. Q: Does the Illinois Prevailing Wage Act prohibit a governmental body from entering into a contract for routine tree removal services if the recipient of the contract is debarred by the Illinois Department of Labor (IDOL) for Prevailing Wage Act violations?

A: Possibly. The Illinois Prevailing Wage Act ("Act") generally applies to public projects relating to construction ("Public Works") that would only cover

landscaping if it was tied in some way to a construction project. However, it is unclear in every instance whether tree removal falls into a prevailing-wage category. The Act applies to all units of local government and School Districts and covers "all fixed works constructed by any public body." In recent years, the scope of the Act has been somewhat expanded, but it still does not cover landscaping or tree removal services unconnected with "Public Works," or the improvement of public property. This issue should be reviewed from time-to-time. The Illinois Department of Labor has for years been wrestling with the question of whether routine tree removal services are subject to the Act. Recently, the Illinois Department of Transportation and other local governments have become particularly interested in this question due to concerns caused by the emerald ash borer, an insect that infests and kills ash trees. The removal of trees to prevent the spread of the emerald ash borer is an important tree-removal project that may not be directly tied to construction projects, and if the Act applies then the need to pay a prevailing wage for those tree-removal services could be exorbitantly expensive for state and local governments. As of now, the Department of Labor has issued informal guidance that tree removal related to the eradication of nuisances does require the payment of the prevailing wage. Officials of governmental bodies who willfully fail to follow the Act can be found guilty of a Class A misdemeanor. In an unclear situation, governmental bodies can ask for formal IDOL opinions by sending copies of the contract to the Illinois Department of Labor, 1 West Allstate Capital Plaza, Room 300, Springfield, Illinois 62701. If in doubt, the municipality should give contractors notice of the requirements and put the question of its application to them, since failure to give notice of the law can make local governments susceptible to liability for underpayments and penalties.

283. Q: Another governmental body wants to give our governmental body a quit claim deed for some land that we are willing to accept. Is this adequate?

A: There is really not a great deal of mystery regarding a quit claim deed. In a quit claim deed, the grantor simply gives to the grantee all rights in the ownership which it possesses. A quit claim deed is to be distinguished from a warranty deed, where the party giving the land warrants and guarantees that it has good and complete title in the property. Anyone could give you a quit claim deed for the Brooklyn Bridge. What you would be getting is the rights of ownership, if any, of the person giving you the quit claim deed. Sometimes, a quit claim deed is utilized when there is some question about ownership in the land and the seller wants to transfer all of its interest, but with no warranty.

If this is an important piece of land, you may want to ask for a report from the title company to indicate that the person offering the transfer is really the owner of this land. In some cases, people will accept quit claim deeds, when, in addition, they get a promise from a title company, in a standard title insurance policy, that the title company, even though the deed has no warranty itself, will warrant that the owner of the property actually has the right to transfer it and has successfully done so. There is also a specific statutory provision in effect by which

governmental bodies, which have various rules regarding their ability to transfer land, are authorized by statute to transfer land to another governmental body after a rather formalistic process. This statute is the Local Government Property Transfer Act, found at: 50 ILCS 605/0.01, *et seq*.

CHAPTER 7. MISCELLANEOUS QUESTIONS AND ANSWERS

INTRODUCTION

Some questions and answers do not fit into any category. Most governmental officials can tell stories about the strange questions that their residents come up with. Because local government officials are leaders in their communities, apparently everyone else believes that they have answers to almost any question that comes to mind. Note particularly the question in the following collection about banning turkeys. These questions and answers will give you a sample of the many topics about which you are expected to have an opinion and an answer.

284. Q: Should a Mayor make an annual report on the "State of the Municipality?"

A: Many Mayors do make an annual report on the "State of the Municipality." The statutes contain a direction to the Mayor to provide such a report (65 ILCS 5/3.1-35.5). The process of compiling successes and even the failures of the past year in writing forces a Mayor to do a self-evaluation. Since Mayoral terms are usually four years in length, it may be some time before the citizens will give you a grade on your performance. An annual report can be sent to the newspapers, seen over cable TV, or printed in a municipal newsletter and allows the citizens to know how well you have done at achieving your campaign promises, dealing with new problems, and establishing a vision for the future.

285. Q: What do you do if your municipality is denied membership in a governmental police dispatching pool?

A: A municipality which is denied membership in any kind of intergovernmental entity generally has no recourse. Under the intergovernmental cooperation section of the Constitution and the state statutes, governments are allowed to choose those entities with which they desire to enter into an intergovernmental relationship. No municipality can force its way into such an intergovernmental entity. One exception might be a situation where it can be proven that a municipality is excluded on racial or other protected class grounds.

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

A: It is difficult to provide advice to a Mayor or other elected official whether to give a biased reporter repeated opportunities to hurt the official through bad news stories. One approach which may help is for the official to issue written press releases to the reporter in question. At that point, it is difficult for the reporter to misquote or distort what the elected official has said. If the Mayor knows the editor or owner of the newspaper, there is no reason whatever to hold off in expressing dissatisfaction with a reporter. In the same way, praise to a really good reporter should be passed on as well. Although elected officials do not generally own their own newspapers, the use of a widely-distributed newsletter with a

column by the Mayor will at least get your position before the citizens and voters of the community.

287. Q: Should a Mayor raise campaign funds all throughout a term of office?

A: There is no reason why a Mayor should not raise campaign funds all throughout a term of office. In some communities, the budget for a subsequent campaign may be quite small. Nonetheless, a Mayor can use campaign funds for a variety of purposes such as, if he or she chooses, paying for attendance at conferences and seminars and making political contributions to officials whose service will benefit the municipality. Campaign funds should be raised in a tasteful manner and it should be clear that business with the municipality is not dependent upon campaign donations being paid. Elected officials cannot condition public employment on the payment of political donations or the provision of campaign services during the hours of public employment. Nonetheless, campaign funds are not subject to the Gift Ban Act, and employees of the community are not prohibited from working in campaigns so long as they do so voluntarily and during non-working hours.

288. Q: May a governmental body give money to a charitable or religious organization?

A: Generally, the expenditure of public funds for a non-public or non-governmental purpose is prohibited. If grants are merely gifts, they can be recovered in a taxpayer initiated lawsuit. However, where a charitable or religious organization is performing a service the government is otherwise authorized to perform or the government has contracted with the organization to perform such a service, the payment of funds does serve a public purpose and is lawful. It is important to note that the charitable or religious organization cannot provide the public service on a discriminatory basis favoring any religion, race, or ethnicity. It is not uncommon for communities to make token donations to a charitable cause in honor or memory of a public official. Because of the small nature of the expenditure, these payments are not routinely challenged. However, making the practice a regular and substantial part of the government's budget should be discouraged.

There are a number of statutory provisions which codify these general principles in a limited number of circumstances. For example, under Division 11 of the Illinois Municipal Code a municipality is allowed to pay charitable or non-profit organizations to perform services related to the elimination of poverty, operation of youth-oriented service and counseling programs and the provision of special services for seniors. Act, §5/11-5.2-1, et seq. Although home rule municipalities do not need to find statutory authority for their actions, all governments are subject to the limitation that their expenditures and actions must be directed at some "public purpose."

There are very few judicial interpretations of the general principles, but it is clear that a governmental body may donate funds to a non-profit, charitable or religious

organization so long as the services the organization provides may otherwise be performed by the government and directly benefit the community in a non-discriminatory manner. Otherwise, the disbursement may be challenged as an illegal diversion of public funds for a private purpose.

289. Q: In addressing meetings of the Chamber of Commerce or a homeowners association, should the Mayor distinguish between his or her own views and those of the Council or Board?

A: A Mayor should not assume that he or she always speaks for all of the elected officials. If there are disputes on a variety of issues, the Mayor, when speaking to civic groups, should make it clear that some of the views expressed may not be shared by all of the elected officials. In a more positive vein, it is often the Mayor who generates the ideas that will move the community forward, and it is probably good for the public to know how important the Mayor's leadership is to progress in the community.

290. Q: What can a municipality do to control election campaign signs?

A: Public Act 96-0904, effective January 1, 2011, states that, "other than reasonable restrictions as to size, no home rule or non-home rule municipality may prohibit the display of outdoor political campaign signs on residential property during any period of time." 65 ILCS 5/11-13-1(12). Many municipalities have for years had rules in place that allowed campaign signs to appear for, say, 45 days before the election and required they be removed within 5 days after the election. Those rules and ordinances are no longer valid. Essentially, a municipality can regulate the size of election signs on residential property, but not the time they are allowed to be posted. As a general rule, a municipality cannot make special rules just for campaign signs. Signs are usually regulated by the municipal zoning or sign code. Any rules that apply only to political signs are almost certainly invalid, because they focus on the "content" of the sign, which violates the First Amendment of the United States Constitution. But a prohibition of all signs on public parkways or other public property is permitted, and can be applied to political signs. Yard signs on private property can be regulated as to size as long as the rules don't single out political signs. So if "For Sale" signs of a certain size are permitted in the front yard of a home, a "Vote For Smith" sign of the same type must be allowed. The hard part of regulating political signs is enforcement. Property owners may not cooperate with municipal code enforcement officials when told that a political sign is illegal and must come down. In an extreme case, it may be necessary for a municipality to seek a judicial restraining order to remove an illegal political sign. Section 17-29 of the Illinois Election Code also removes the power from home rule municipalities to regulate electioneering, including the placement of signs on election day on polling place property.

291. Q: Should the Mayor be the spokesperson for the municipality when the press calls?

A: In many municipalities, the Mayor is the spokesperson when the press calls. In some cases, however, the police chief, the Manager or administrator, or even the head of the Public Works Department may know more about the matter and may be better at dealing with the press. Each Mayor needs to determine how well he or she will be able to speak for the municipality. Often, the municipal attorney or the municipal prosecutor is chosen to speak for the community on the theory that they do such things for a living. Even where the Mayor is the chief spokesperson, he or she should do what many executives have learned, and, after a brief announcement, turn over the issue to the professional employed by the community to principally handle the issue. Regardless of who is chosen as the spokesperson, ignoring and frustrating the media is never a good practice.

292. Q: The circuit court Clerk is telling the Village that some of the fine revenue from traffic court violations can only be used to buy and maintain police vehicles. What authority does the court clerk have to tell the Village how to spend money?

A: The court clerk is only telling you what the state law says. Courts impose a $20 fee on anyone who is "sentenced" to court supervision. 625 ILCS 5/16-104(c). "Supervision" means that the defendant is found "not guilty" on the condition that the person commits no new violations of law for a stated period of time. At the end of the period of supervision, the case is dismissed with no conviction recorded. In order to prevent municipalities from losing revenue in such cases, the General Assembly added the $20 mandatory fee, and specified that the revenue must be used for the acquisition or maintenance of police vehicles.

293. Q: How involved should a Mayor get in a dispute between adjacent property owners?

A: Typically, adjacent property owners do have the right to sue each other if they have a dispute. Unless one property owner is entirely in the wrong, and the issue involved would be important to be resolved for the whole community, a municipality is probably best letting the parties solve the matter themselves.

294. Q: How does the bankruptcy law affect municipalities which sell utility services?

A: The federal bankruptcy laws give municipalities which collect for water and sewer service tools to protect themselves against non-payment. A municipality may refuse to provide service to a new customer, or discontinue service to an existing customer, who files for bankruptcy unless, within 30 days of the filing and the municipality's demand, the customer deposits with the municipality some form of acceptable security for future service. The security can be pre-payment, a letter of credit, a cash deposit, a surety bond, or some other form agreed to by the municipality. The municipality cannot discriminate against the bankrupt for

unpaid services rendered prior to the filing, but may protect itself against future non-payment by requiring the security deposit. Generally, the amount required for acceptable security is equal to one month's service.

295. Q: For how long must a local governmental body keep financial records and other records?

A: Forever, unless destruction is authorized in accordance with the Local Records Act, 50 ILCS 205/1. Section 10 of that Act provides that documents which fall within the definition of "public records" (which includes anything pertaining to the business of the governmental unit), may be discarded only after review and approval of the Local Records Commission, a state agency. Information about the LRC is available on the State of Illinois web site, the Illinois State Archives, in the office of the Secretary of State. To obtain approval to destroy local records, the head of the governmental unit must apply to the Commission, listing all of the documents to be discarded.

296. Q: How active should a Mayor become in regional or statewide organizations?

A: Mayors should become actively involved in regional and statewide organizations. The ability to discuss solutions to problems which have or have not worked in other parts of the state, with those who have been through the trauma, is extremely valuable. On a regional basis, Mayors can come together to work on transportation, drainage and economic development issues, where a regional approach is best. Municipalities and other governments can enter into intergovernmental agreements for joint purchase, use of personnel, police and fire dispatch and a variety of other issues to become more efficient and save money. Involvement in statewide organizations can prevent the legislature from passing bills which would be extremely hurtful for your municipality without having the opportunity to learn of the concerns of municipalities.

297. Q: Can a local government ban convicted sex offenders from use of public parks?

A: Yes. Section 5/11-9.4 of the Illinois Criminal Code prohibits anyone convicted of a sex crime or required to register as a sex offender from being present on or within 500 feet of park property or in any park facility while children under the age of 18 are present. Local governments can monitor or discover who is a registered sex offender by reviewing the Illinois State Police Sex Offender Registry which can be easily accessed via the Internet at www.isp.state.il.us. This information is public and so local governments are entirely within their authority to conduct checks of program registrants and facility pass holders against the Sex Offender Registry list.

It is our opinion that local governments, both municipalities and park districts, can lawfully ban convicted sex offenders from being present on public park property at any time based on our review of the Seventh Circuit's decision in *Doe v. City of*

Lafayette, 377 F.3d 757 (7th Cir. 2004). In *City of Lafayette*, the Seventh Circuit held that an order banning a former sex offender from public parks because the person had thought about reoffending did not violate the Constitution. In January 2000, Doe visited a City park and watched several children playing. He had a long history of sex offenses involving minors and on that evening admitted he thought about initiating a sexual encounter with the children he saw in the park. He did not act on his urges, however, and went home. He later reported the incident to his therapist and support group and began taking medication to control his urges. The Lafayette Parks and Recreation Department was tipped off about the incident and, as a result, issued an order permanently banning Doe from all park property.

In holding for the City, the Seventh Circuit focused on the fact that while Doe stopped himself before he could harm any children in the park, his fantasies certainly made it more likely that he would do so. The evidence showed that Doe, fueled by his urges, and knowing of his dangerous propensity, put himself in a position where he could have acted to satisfy his desires. Doe admitted, for example, that he would likely have acted on his sexual fantasies but for the fact that there were many children in the area and not only one or two. In light of these facts, the court found that the City had reasonable cause to exclude Doe from the parks because, given the context in which Doe's urges occurred and the action they precipitated, they were likely to incite or produce imminent lawless action.

298. Q: Does charging a fee for private use of public property destroy its tax-exempt status?

A: The Illinois Property Tax Code (the "Code"), 35 ILCS 200/15-5, et seq., provides that certain real property owned by governmental entities and charitable and civic organizations is exempt from property taxes. For municipalities, all property owned by the municipality within its corporate boundaries are exempt from real estate taxes. The land owned by other governmental bodies must often pass other tests to be declared exempt. Several sections of the Code grant tax exemption to property which is used "exclusively for public purposes." For example, §60 of the Code applies to property used for "maintenance of the poor." Section 66 applies to library property; §70 to property used for fire protection purposes; §75 applies to "public grounds." However, such property is sometimes rented or leased to a private person or entity. Does such private use of public property for a fee destroy its tax exempt status? It might, in part, but not necessarily.

While the leasehold interest may be subject to property tax, payable by the lessee (see *Korzen v. American Airlines*, 39 Ill.2d 11, 233 N.E.2d 568 (1968)), charging a fee for private use of public property does not make the municipal landlord liable for property tax, so long as the private use is "incidental" to the primary exempt purpose.

284: Q: How does one tell whether private use of exempt property is incidental?

Whether the private use is "incidental" is determined on a case-by-case basis, as illustrated in two Illinois Appellate Court decisions.

In *Franklin County Board of Review v. Department of Revenue*, 346 Ill.App.3d 833, 806 N.E.2d 256 (5th Dist. 2004), the court held that the property of the Rend Lake Conservation District (the "Conservation District") used for a hotel, condominiums, and restaurant was tax-exempt. The court reached this conclusion by first determining that the restaurant, hotel, and condominiums were used for public purposes. The statute establishing conservation districts provided that the primary purposes of a conservancy district were to provide forests, wildlife area, parks, and recreational facilities and to promote the public health, comfort, and convenience. The court stated that the lack of express public purpose was insignificant in that the reasons identified by the legislature were inherently public in nature. Next, the court examined whether the land was being used for the public purposes identified by the legislature. The court found that the land was being used for public purposes in that the restaurant, hotel, and condominiums were open and available to the public. The court stated that the "fact that Rend Lake [Conservation District] charge[d] a fee did not destroy the public purposes the facilities fulfilled." The fees were incidental to the public purpose.

In *Grundy County Agricultural District Fair, Inc. v. Department of Revenue*, 346 Ill.App.3d 1075, 806 N.E.2d 695 (3rd Dist. 2004), the Appellate Court defined the proper test to be used in determining whether the property in question was exempt. Grundy County Agricultural District Fair entered into short-term leases for use of its facilities by private, for-profit organizations, such as automobile races. The fees collected by the District from these events were used to offset the cost of hosting the county's agricultural fair; an event which the District coordinated and offered to the public free of charge. The Illinois Department of Revenue (the "DOR") ruled the property was taxable, using a one-factor test: counting the number of days the property was used for exempt purposes and the number of days it was used for non-exempt purposes. The trial court reversed the DOR's decision and held that the use of the property for agricultural events was more intensive than for other events. The Appellate Court rejected both the DOR's and the circuit court's approaches. The court stated that the following factors are to be taken into consideration when the same property has two types of uses:

a. Whether non-exempt uses directly and substantially support the exempt uses;

b. The amount of time the property is used for exempt purposes;

c. The percentage of the property used for exempt purposes; and

d. The percentage of total visitors who use the property for exempt purposes.

If the non-exempt uses directly and substantially support the exempt uses, the property is used more for the exempt purpose in regards to time and space, and a large number of people utilize the property for exempt purposes, a court will likely find that the property retains its tax-exempt status when a fee is charged.

In sum, public property may not be exempt simply because a public entity owns it. When the exemption is conditioned on use "exclusively for a public purpose," the determinative factors are twofold: whether (1) the purpose of the property is public and (2) the property is actually being used for that purpose. If the property has more than one use, the Department of Revenue and/or a court will consider additional factors.

299. Q: Can a municipality ban the raising of turkeys within its borders?

A: The answer to this question illustrates the benefit of home rule. There is no doubt that a home rule municipality can pass broad regulations regarding many health matters including the raising of animals and the use of these animals as pets. The principle provision of the statutes regarding regulation of animals is Act, §5/11-20-9. "The corporate authorities of each municipality may regulate and prohibit the running at large of horses, asses, mules, cattle, swine, sheep, goats, geese, and dogs, and may impose a tax on dogs." The legal maxim, "Inclusio unius est exclusio alterius" (inclusion of one thing is the exclusion of all others) tells us that regulatory power is limited to the specific animals listed. Therefore, as we have often pointed out, on the basis of that language, non-home-rule communities do not have specific statutory authority to regulate cats, wildebeests, or turkeys. There is however a general provision at Act, §5/11-20-5 that allows the corporate authorities to "do all acts and make all regulations which may be necessary or expedient for the promotion of health or the suppression of diseases. . . ." If the municipality can make a reasonable case that the raising of turkeys within the municipality is a health hazard (which shouldn't be difficult–the smell alone can kill you), it can pass such an ordinance. The ordinance would, however, be subject to attack for a lack of specific statutory authority. It is interesting to note that at 510 ILCS 5/24, which is the State Animal Control Act, there is language to indicate that state regulation is not intended to "limit the power of any municipality or other political subdivision to further control and regulate dogs, cats, or other animals in such municipality." A home rule community has the broad regulatory power to limit gobblers to the dinner table. A non-home-rule municipality probably has to present a stronger case with the findings being put in the preamble to the ordinance.

300. Q: Should a Mayor become involved in the elections of other officials at the local, county or state level?

A: The answer to this question depends very much on local conditions. In some parts of the state, Mayors become actively involved in all political levels. In other places, Mayors remain independent from political issues. Another approach is to only become involved when not to do so would be to the detriment of the office of

Mayor or the municipality in general. Certainly, in a situation where the county government does not properly maintain roads or is permitting environmentally-unsound industrial development to take place near the municipality, the ability of the Mayor to influence and encourage voters in the County election may result in more attention being paid to the needs of the municipality.

CHAPTER 8: FINANCE

301. Q: What steps must precede a local government spending money?

A: Subject to minor exceptions, all expenses must have a prior appropriation before a local government may approve the expenditure. For most local governments, an appropriation ordinance is approved and filed with the County Clerk during the first quarter of its fiscal year. The appropriation ordinance represents the legal authority to spend money for the purposes designated in the ordinance. Some municipalities operate under the budget system, which requires the passage of a budget ordinance prior to the beginning of the fiscal year. A budget ordinance is easier to amend than appropriation ordinance. Some communities adopt an informal operating budget in addition to an appropriation ordinance, but that should not be confused with a formal budget ordinance. Either a budget ordinance or an appropriation ordinance only authorizes the maximum amounts that the governmental body may spend on particular matters during a fiscal year. In almost all cases, specific approval for the actual amounts to be spent must come through the passage of other motions, resolutions or ordinances.

302. Q: Can I execute a five year contract with a janitorial service?

A: No. Because expenditures must have a prior appropriation, and local governments may only appropriate one year at a time, most contracts may only be for a one year term. Each type of local government is generally granted certain exceptions to this limitation for categories of contracts which are not well-suited for one year terms. Some examples include employment agreements with key personnel, energy contracts and professional service agreements.

303. Q: What is a prevailing wage?

A: Public bodies are required to cause contractors and subcontractors to pay their employees who are engaged in public works projects the prevailing wage for the nature of the labor being expended. The Illinois Department of Labor studies and publishes reports describing the "prevailing wage" for dozens of categories of laborers in each county. When a local government seeks to engage in a public works project, the request for bids must notify all potential contractors and subcontractors of the current prevailing wage, that they must keep track of adjustments to the prevailing wage and they must file a certified payroll with the government. A failure to provide this notice may result in the local government becoming liable for the lost wages and statutory penalties.

304. Q: What is a bond?

A: A bond is a promise to pay an indebtedness owed by the local government. Since most governments cannot give a mortgage, a bond is a substitute form of security given to a lender. Generally, a bond may be a promise to pay the debt from any lawfully available funds, a specific source of revenue, or a combination of both. Some bonds require referendum approval in advance, while others do not. Most

of the time a local government seeks to issue a bond and borrow money, a special "bond counsel" is hired to ensure the bonds are lawfully issued and the interest on the bonds will be tax-exempt – a major advantage for many types of investors.

CHAPTER 9. HOW TO CHOOSE A MUNICIPAL ATTORNEY

20 RECOMMENDATIONS

From time-to-time, a governmental body may wish to consider changing attorneys. In some cases, it may have had the good fortune of not needing to have a regular relationship with an attorney for some period of time. In either case, the question can be asked how a governmental body should go about choosing an attorney. Set out below are our suggestions. We believe that an educated consumer is our best customer, and that governmental bodies should not choose their attorneys lightly, but also need not agonize over the decision. Attorneys can be changed from time-to-time, and there are many competent attorneys to represent all forms of Illinois governmental bodies. With the advent of computer technology, lawyers in various parts of the state are perfectly able to represent clients with whom they principally communicate from a distance. In addition to employing an attorney or a law firm to represent you as corporate counsel, the suggestions set out below can also be used in the event that you wish to select an attorney or law firm to provide a second opinion or to choose a specific law firm to provide supplementary services.

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

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

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

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

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

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

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

8. Ask for data about the history of the law firm in defending its clients in litigation matters. You don’t want lawyers who are unfamiliar with the very occasional court battles.

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

10. Find out exactly which attorney will be servicing your governmental body and who will back up those services.

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

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

13. Ask for references and follow them up.

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

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

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

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

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

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

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

CHAPTER 10. TEST YOUR KNOWLEDGE

As an extra added bonus, we have included the following questions, where the answer is given and you are expected to formulate the question, along the lines of a famous television show. Some of the answers and questions are much more difficult than those contained in previous chapters so test your expertise and, mixing television metaphors, "Come on down and play!"

CATEGORY: NOTICES

1. A: The kind of pre-annexation notice that must go to fire protection district commissioners.

Q: What is a certified or registered notice to the Commissioner at his or her home?

2. A: Where must notices announcing forced annexation appear?

Q: What is a newspaper and a notice by certified mail to the taxpayer of record?

3. A: Number of days required for a notice of a public hearing before the Zoning Board of Appeals.

Q: What is no less than 15 nor more than 30?

4. A: The person who is designated by statute to publish most governmental notices.

Q: Who is nobody? Communities must assign this duty.

5. A: Notice required for an emergency meeting.

Q: What is, "as soon as practicable?"

6. A: What a newspaper must furnish to a public body to receive notices.

Q: What is an address or phone number located within the territorial jurisdiction of the public body? Most newspapers forget to give this notice.

CATEGORY: ZONING

7. A: Two of the three municipal codes which can be privately enforced.

Q: What is zoning, abandoned property and building code? (Act, §5/11-13-15)

8. A: The opposite of "highest and best use."

Q: What is lowest and worst use? Just kidding.

9. A: The kind of zoning Dick and Jane love.

Q: What is "Spot" zoning?

10. A: They can clearly be imposed with a special use or a variation.

Q: What are conditions?

11. A: A tract larger than this cannot be forcibly annexed.

Q: What is 60 acres?

12. A: It hears objections to building code decisions.

Q: What is the Building Board of Appeals?

13. A: Vote required by a Council or Board to override the Zoning Board of Appeals.

Q: What is a two-thirds vote of the Aldermen or Trustees? (Act, §5/11-13-11)

14. A: Greek philosopher most associated with zoning.

Q: Who was Euclid? (Euclid vs. Amber Realty Co., (1926), United States Supreme Court case upholding zoning).

CATEGORY: LICENSING AND REVENUE

15. A: Dogs can but these can't be.

Q: What are cats, which cannot be licensed in a non-home rule municipality?

16. A: Television sheriff most associated with non-home rule licensing limitations.

Q: Who was Matt Dillon? (Dillon's Rule which limits the power of non-home rule communities. See *Father Basil's Lodge, Inc. v. City of Chicago*, 393 Ill. 246, 65 N.E.2d 805 (1946).

17. A: The only thing that non-home rule hotel/motel taxes can be used for.

Q: What is tourism?

18. A: Sole authority for municipal income tax.

Q: What is the State Legislature?

19. A: Prevents beauticians from being licensed.

Q: What is legislative pre-emption?

20. A: Requires a break down by objects and purposes.

Q: What is an appropriation ordinance?

21. A: Something to wear on your head and a revenue-limiting device.

Q: What is a cap?

CATEGORY: PRACTICES AND PROCEDURES

22. A: The punishment for a violation of the Open Meetings Act.

Q: What is a Class C Misdemeanor? ($500 fine — 30 days in jail)

23. A: When the Mayor may vote.

Q: What is a tie, an extraordinary majority and an affirmative one-half Council with no tie? 65 ILCS 5/3.1-40-30.

24. A: Residency requirement for all elected officials?

Q: What is one year's residency in the municipality?

25. A: Salary the plan commission members receive.

Q: What is zero plus expenses?

26. A: Two extra position Mayors automatically fill?

Q: What is a liquor commissioner and a giver of oaths?

27. A: Another position in which clerks can serve and for which they can get paid.

Q: What is a collector?

28. A: Where deputy clerks may live.

Q: What is "anywhere?"

29. A: Term of a permitted contract with a Village attorney.

Q: What is no more than the end of the Mayor's term?

30. A: Time during which an overly burdensome FOIA request must be answered.

Q: What is "never?"

31. A: The amount that can be charged for administrative work in investigating FOIA request.

Q: What is "nothing?"

CATEGORY: POOLING

32. A: A situation comedy and first Illinois pool.

Q: What is IRMA? Contract and Bylaws written by Ancel Glink attorneys.

33. A: Source of public school common law immunity.

Q: What is "in loco parentis?"

34. A: Maximum length of the term of Illinois pools.

Q: What is 12 years? Can be renewed.

35. A: Category of "sports" that is partially immune from liability.

Q: What is hazardous recreational activity?

36. A: Statute of limitation for state lawsuit by adult plaintiff.

Q: What is one year after date of injury?

37. A: Cannot be alleged in the initial pleading.

Q: What are punitive damages?

38. A: Place where after hours injury reduces governmental risk.

Q: What is a swimming pool?

39. A: Better to not have at all than to not have it lit.

Q: What is a street light?

40. A: An injured Davy Crockett would likely be barred from suing because of this immunity.

Q: What is immunity for condition of a road to a primitive camping area?

41. A: This immunity generally protects against a state-court action in strip club cases.

Q: What is the immunity for refusing to issue a permit?

CATEGORY: PERSONNEL AND LABOR

42. A: Minimum number of employees constituting a bargaining unit.

Q: What is one?

43. A: Minimum number of employees conferring jurisdiction under the Labor Act.

Q: What is 5?

44. A: Three questions you cannot ask a prospective employee.

Q: a. What is your race?

b. What is your arrest record?

c. What is your health history?

45. A: Types of governmental employees covered by OSHA.

Q: What is none?

46. A: Types of governmental employees covered by FLSA.

Q: What is all? (with special rules for police and fire)

47. A: Likelihood of liability of governments for retaliatory demotion.

Q: What is none except for protected classes?

48. A: Way to discharge a police chief.

Q: What is only by the appointing authority with confirmation by legislative body, and in some communities, by the Board of Fire and Police Commissioners?

49. A: Permissible way to discriminate on the basis of gender.

Q: What is a BFOQ? Bona Fide Occupational Qualification.

50. A: Things that a good labor contract and a pair of pants have in common.

Q: What is a zipper? A clause which prevents reopening of the contract for new issues.

51. A: Mandated payments to a union.

Q: What is “fair share?”

52. A: The opposite of "tenured."

Q: What is a "at will?"

53. A: Rhymes with "raft smartly."

Q: What is Taft-Hartley?

CATEGORY: MISCELLANEOUS

54. A: Article VII, §6g, h, and i.

Q: What are the pre-emptive sections of the home-rule article of the Illinois Constitution?

55. A: Father and son who served as Executive Directors of the Illinois Municipal League.

Q: Who were Lon and Steve Sargent?

56. A: These two borrowings don't count against the statutory debt limit.

Q: What are installment purchase contracts and revenue bonds?

57. A: Home rule communities don't have to do this when they sell real property.

Q: What is competitive bidding?

58. A: Two kinds of bonds that are required in public works contracts.

Q: What are performance and completion bonds?

59. A: This type of lien cannot be placed against public property.

Q: What is a mechanic's lien?

60. A: Ordinances are invalid if this isn't taken.

Q: What is a roll call vote?

INDEX

Ancel Glink

ancelglink.com
312.782.7606