Ancel Glink | Diamond Bush DiCianni & Krafthefer

Public Rights and Issues

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Legal Issues Involving Local Governments

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Presented by:
Scott A. Puma
Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C.
175 E. Hawthorn Parkway, Suite 145
Vernon Hills, Illinois 60061
847.247.7400
847.247.7405 (fax)
spuma@ancelglink.com
www.ancelglink.com

I. Right of Assembly and Protests

A. Anti-War Demonstrations

1. Bell v. Keating and City of Chicago, 697 F 3d 455 (7th Cir. 2012)

- On January 7, 2008, plaintiff participated in a protest against Operation Iraqi Freedom on the corner of Dearborn Street and Jackson Boulevard in Chicago. He held a banner with other protesters that said "End the War and Occupation TROOPS HOME NOW". At the time President Bush was at a luncheon at the nearby Union League Club.

- One protester, Andy Thayer, entered the street carrying a large banner and advanced on defendant, Keating, the Deputy Chief of Police who was in the area monitoring the situation on a Segeway. Thayer was arrested, handcuffed and placed in a squadrol. Plaintiff and two other men walked into the street several times chanting and were ordered back on the sidewalk, but they refused.

- All three were arrested for disorderly conduct.

- After plaintiff was acquitted in State Court of violating the ordinance, he sued under Section 1983 alleging that the provision in the City's Ordinance was unconstitutionally over broad and vague and violated his First, Fourth and Fourteen Amendment rights.

- The case proceeded to trial on a Fourth Amendment claim of false arrest and a malicious prosecution claim which resulted in a verdict for the defendants. The District Court denied declaratory injunctive relief relative to the over-breadth and vagueness claims because the plaintiff did not demonstrate a likelihood of future or repeat injury. The 7th Circuit reversed and remanded the case.

- Chicago Municipal Code Disorderly Conduct – 8-4-010

    1. At issue is sub-section D, which criminalizes a person's conduct when he or she "knowingly ...

> [f]ails to obey a lawful order of dispersal by a person known by him to be a peace officer under circumstances where three or more persons are committing acts of disorderly conduct in the immediate vicinity, which acts are likely to cause substantial harm or serious inconvenience, annoyance or alarm."

2. Over-breadth challenge.

- The First Amendment doctrine of over-breadth is an exception to the normal rule regarding the standards for facial challenges. Content neutral regulations – laws that restrict expressive conduct for reasons unrelated to the expression itself suffer from over-breadth and necessitate the facial invalidation if their unconstitutional applications against otherwise protected expression outnumber their legitimate ones. The question is one of magnitude.

- Where sufficient imbalance exists, a statute proves facially invalid, not because it lacks any conceivable constitutional application but because of the threat of its enforcement deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas.

- Over-broad statutes must fail because they unconstitutionally chill protected expression.

3. Vagueness.

- A vagueness claim alleges that as written the law either fails to provide definite notice to individuals regarding what behavior is criminalized or invites arbitrary and discriminatory enforcement or both. In those instances where imprecise law implicates speech and assembly rights, an injured plaintiff may also facially challenge a statute as void for vagueness.

4. First Amendment Challenge for Over-Breadth

- The Illinois Supreme Court has stated several times that disorderly conduct statutes must be narrowly drawn and construed so that the statutes do not reach protected speech.

- The police may not stop a peaceful demonstration merely because a hostile crowd does not agree with the views of the demonstrators, threatens violence and in fact the police owe a duty to protect the peaceful individual from acts of hostility. See City of Chicago v. Weiss, 51 Ill. 2d 113, 283 N.E.2d 310 (1972).

- However, courts have long held that when an immediate danger to speakers and protesters exist, speech may be curtailed to prevent a riot or serious bodily injury to those gathered. When such conditions emerge, dispersal of protesters and counter-protesters is a necessary means of avoiding danger and damage and the City may empower law enforcement to order people to disburse without unconstitutionally burdening free speech.

- Therefore, the District Court found that Sub-Section D which provides for dispersal when an assembly creates or is threatened by substantial harm that it does not improperly infringe upon protected speech. Id. at 458.

- However, "serious inconvenience, annoyance or alarm" was a problem for the Appellate Court.

- The Court found that Sub-Section D did not specify what inconveniences, if performed by 3 or more individuals, would trigger an order to disperse. This lack of specificity in tailoring led the Court to find that it did not pass constitutional muster.

- The Court declined to void the ordinance in total and found that the city may criminalize one's failure "to obey a lawful order of dispersal by a person known

by him to be a peace officer under circumstances where 3 or more persons are committing acts of disorderly conduct in the immediate vicinity, which acts are likely to cause substantial harm." Thus the Court found "or serious inconvenience, annoyance, or alarm" to be unconstitutional.

2. Thayer v. Chiczewski. 2012 WC 6621169 (7th Cir. 2012)

- This case involved anti-war protester Andy Thayer and was decided eight days after Bell v. Keating and reviewed the Opinion of Judge Darrah who was also the judge in Bell.

- The case involved the arrest of the plaintiffs at a 2005 anti-war demonstration which began at Oak Street and Michigan Avenue. The group had initially sought a permit for 2,000 to 4,000 people to gather at the southwest corner of Oak and Michigan on a Saturday at noon and then march to the Federal Plaza down Michigan Avenue, Randolph Street, State Street, and Adams Street.

- The city denied the application and offered an alternative assembly point at Washington Square Park which is three blocks west and one block south of Oak and Michigan and a parade route down Clark Street and Dearborn Street to the Federal Plaza. Thayer did not accept the alternative site and instead appealed to the Mayor's License Commission which held a 2-day hearing. The Commission found that the proposed route would unduly disrupt pedestrian and motor traffic, adversely affect businesses in the area, impede ambulance traffic and bus routes, and require an unjustifiable level of law enforcement.

- Thayer then filed a complaint in Federal Court seeking to compel the city to grant the permit and after another 2-day hearing, the District Court denied the motion on March 11, 2005. The Chicago Police Department sent Thayer a letter on March 14 stating it wished to accommodate marches by allowing it to assemble and march at the proposed alternate location and he and his group obtain a permit for a rally at the Federal Plaza.

- In the week before March 19, the city posted a notice on the CPD's website directed to the demonstration participants and informing them of the alternate assembly point. However, despite the notice, which Thayer saw, he and his group continued to publicize Oak and Michigan as the assembly point through its website and fliers. They sent fliers and e-mails declaring, "lack of permit won't stop anti-war protest" urging people to assemble at Oak and Michigan.

- Thayer's group then changed it's tact and decided it would hold a "press conference" on the sidewalk instead of an assembly and issued a press release about it.

- On the morning of March 19, Thayer was repeatedly told that if you show up at Oak and Michigan, you will be arrested. This did not deter Thayer or his group and many of them assembled despite the lack of a permit. Thayer was arrested at Oak and Michigan and then filed a false arrest and malicious prosecution lawsuit.

- In construing Thayer's First Amendment claim of retaliation for exercising his First Amendment rights, the court found that his failure to dispute that the officer had probable cause for his arrest provides strong evidence that he would have been arrested regardless of any illegal animus. Id. at *12. The court went on to find that Thayer's refusal to disperse, not his speech, was the but for cause of his arrest. The Court found that the officer was entitled to qualified immunity under the state of the law such as it was in 2005.

- In addition to the facial attack on Sub-Section D, the Court conformed its ruling to that of the Bell case.

- Solution: Constitutional Ordinances

II. Use of Public Property

A. First Vagabonds Church of God v. City of Orlando, 638 F 3d 756 (11th Cir. 2011).

- The City of Orlando passed an ordinance restricting the frequency of feeding homeless persons in any park within a 2-mile radius of the

Orlando City Hall. The city's reason for passing the ordinance was to spread the burden that feedings of large groups have on parks and their surrounding neighborhoods.

- The church is a religious organization of about 40 members, most of whom are homeless, which conducted group feedings at a park every Wednesday at 5:00 p.m. and also religious services at that time. A few years later it added a second weekly feeding at 8:00 a.m. The free feedings attracted between 50 and 120 people each time. Residents complained about the conduct of people who dispersed into the neighborhoods after the feeding events.

- The city passed an ordinance requiring sponsors of large feedings within the downtown area to obtain a permit and the ordinance limited the number of permits that a recipient could obtain for any one park to two (2) a year. The ordinance defined a "large group feeding" as "an event intended to attract, attracting, or likely to attract 25 or more people…for the delivery or service of food."

- The city's position was the ordinance was to spread the burden across a variety of parks because the park chosen by the church was not conducive to large group feedings and the city had other parks in the area which had more open space. The Court looked to the case of United States v. O'Brien, 391 US 367 (1968) regarding sleeping in parks. It applied a 4-step analysis

  1. The city has power to enact ordinances that regulate park usage.
  2. The city has a substantial interest in managing park property and spreading the burden of large group feedings through a greater area.
  3. The interest in managing parks and spreading group feedings to a large number of parks is unrelated to this suppression of speech.
  4. The incidental restriction of alleged freedoms under the First Amendment is not greater than necessary to further the interests of the city.

- In determining that the ordinance was a valid regulation of expressive conduct, the court stated that the city is in a far better position than the court was to determine how best to manage the burden that large group feedings place on neighborhoods in the city.

B. PETA v. Kansas State Fair Board, 2012 WL 3834740 (D Kansas).

- PETA applied for a booth for the 2012 Kansas State Fair and as part of its petition wanted to show a video on large video screens which was taken in food processing plants and slaughter houses which purportedly showed the inhumane treatment of chickens, cows, pigs and fish. PETA's request was approved by the Kansas State Fair Board but required that sound be kept to a reasonable volume and that video screens or pictures must be shielded so that they are not readily visible to passers by or the general public in neighboring booths.

- When the State Fair refused to yield in its position, PETA filed suit seeking an injunction that it has a First Amendment right to display the images at the State Fair.

- Governmental regulations of expressive activity are deemed content neutral if they are justified without reference to the content of regulated speech. The court stated that if it applied strict scrutiny, it would be difficult to find a constitutional basis for the regulation. However, the court found that the State Fair is a limited public forum only.

- A limited public forum arises when government opens up property limited to use by certain groups or dedicated solely to the discussion of certain subjects. A governing body may regulate speech in the limited forum that's regulations are reasonable, and its regulation is not motivated by the content of the speech. The court's finding was bolstered by a similar case involving the Minnesota State Fair.

- In finding that the restriction was reasonable, the court noted that shielding the video was not based on PETA's political views as it was not excluded from the fair but had been granted an exhibitor license with certain conditions. The court found the restriction to be minimal in nature and that it served a rational government interest.

C. Gallagher v. City of Clayton, 699 F 3d 13 (8th Cir. 1021).

- Gallagher sued the City of Clayton and several officials claiming that the city's ordinance prohibiting smoking on any property or premises owned by the city including buildings, grounds, parks and playgrounds was a violation of its constitutional rights.

- Gallagher's suit contended that he has a fundamental right which warranted strict scrutiny of the ordinance. A fundamental right is one

which is objectively deeply routed in the nation's history and tradition and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed.

- Gallagher proposed that the city declare smoking a new fundamental right because of tobacco's ancient traditions in American history or a part of an established fundamental right to bodily integrity.

- The Court found that the right to smoke in public is not so deeply routed in the nation's history and tradition and is not implicit in the concept of ordered liberty. As such it does not deserve special protection to the due process clause.

- The Court applied a rational basis test to its review of the ordinance.

D. Registered Sex Offenders in School Zones and Parks and Illinois Law

- 720 ILCS 5/11-9.3

Sec. 11-9.3. Presence within school zone by child sex offenders prohibited; approaching, contacting, residing with, or communicating with a child within certain places by child sex offenders prohibited.
(a) It is unlawful for a child sex offender to knowingly be present in any school building, on real property comprising any school, or in any conveyance owned, leased, or contracted by a school to transport students to or from school or a school related activity when persons under the age of 18 are present in the building, on the grounds or in the conveyance, unless the offender is a parent or guardian of a student attending the school and the parent or guardian is: (i) attending a conference at the school with school personnel to discuss the progress of his or her child academically or socially, (ii) participating in child review conferences in which evaluation and placement decisions may be made with respect to his or her child regarding special education services, or (iii) attending conferences to discuss other student issues concerning his or her child such as retention and promotion and notifies the principal of the school of his or her presence at the school or unless the offender has permission to be present from the superintendent or the school board or in the case of a private school from the principal. In the case of a public school, if permission is granted, the superintendent or school board president must inform the principal of the school where the sex offender will be present. Notification includes the nature of the sex offender's visit and the hours in which the sex offender will be present in the school. The sex offender is responsible for notifying the principal's office when he or

she arrives on school property and when he or she departs from school property. If the sex offender is to be present in the vicinity of children, the sex offender has the duty to remain under the direct supervision of a school official.

(a-5) It is unlawful for a child sex offender to knowingly be present within 100 feet of a site posted as a pick-up or discharge stop for a conveyance owned, leased, or contracted by a school to transport students to or from school or a school related activity when one or more persons under the age of 18 are present at the site.

(a-10) It is unlawful for a child sex offender to knowingly be present in any public park building or on real property comprising any public park when persons under the age of 18 are present in the building or on the grounds and to approach, contact, or communicate with a child under 18 years of age, unless the offender is a parent or guardian of a person under 18 years of age present in the building or on the grounds.

(b) It is unlawful for a child sex offender to knowingly loiter within 500 feet of a school building or real property comprising any school while persons under the age of 18 are present in the building or on the grounds, unless the offender is a parent or guardian of a student attending the school and the parent or guardian is: (i) attending a conference at the school with school personnel to discuss the progress of his or her child academically or socially, (ii) participating in child review conferences in which evaluation and placement decisions may be made with respect to his or her child regarding special education services, or (iii) attending conferences to discuss other student issues concerning his or her child such as retention and promotion and notifies the principal of the school of his or her presence at the school or has permission to be present from the superintendent or the school board or in the case of a private school from the principal. In the case of a public school, if permission is granted, the superintendent or school board president must inform the principal of the school where the sex offender will be present. Notification includes the nature of the sex offender's visit and the hours in which the sex offender will be present in the school. The sex offender is responsible for notifying the principal's office when he or she arrives on school property and when he or she departs from school property. If the sex offender is to be present in the vicinity of children, the sex offender has the duty to remain under the direct supervision of a school official.

(b-2) It is unlawful for a child sex offender to knowingly loiter on a public way within 500 feet of a public park building or real property comprising any public park while persons under the age of 18 are present in the building or on the grounds and to approach, contact, or communicate with a child under 18 years of age, unless the offender is a parent or guardian of a person under

18 years of age present in the building or on the grounds.
(b-5) It is unlawful for a child sex offender to knowingly reside within 500 feet of a school building or the real property comprising any school that persons under the age of 18 attend. Nothing in this subsection (b-5) prohibits a child sex offender from residing within 500 feet of a school building or the real property comprising any school that persons under 18 attend if the property is owned by the child sex offender and was purchased before the effective date of this amendatory Act of the 91st General Assembly.
(b-10) It is unlawful for a child sex offender to knowingly reside within 500 feet of a playground, child care institution, day care center, part day child care facility, day care home, group day care home, or a facility providing programs or services exclusively directed toward persons under 18 years of age. Nothing in this subsection (b-10) prohibits a child sex offender from residing within 500 feet of a playground or a facility providing programs or services exclusively directed toward persons under 18 years of age if the property is owned by the child sex offender and was purchased before July 7, 2000. Nothing in this subsection (b-10) prohibits a child sex offender from residing within 500 feet of a child care institution, day care center, or part day child care facility if the property is owned by the child sex offender and was purchased before June 26, 2006. Nothing in this subsection (b-10) prohibits a child sex offender from residing within 500 feet of a day care home or group day care home if the property is owned by the child sex offender and was purchased before August 14, 2008 (the effective date of Public Act 95-821).
(b-15) It is unlawful for a child sex offender to knowingly reside within 500 feet of the victim of the sex offense. Nothing in this subsection (b-15) prohibits a child sex offender from residing within 500 feet of the victim if the property in which the child sex offender resides is owned by the child sex offender and was purchased before August 22, 2002.
This subsection (b-15) does not apply if the victim of the sex offense is 21 years of age or older.
(b-20) It is unlawful for a child sex offender to knowingly communicate, other than for a lawful purpose under Illinois law, using the Internet or any other digital media, with a person under 18 years of age or with a person whom he or she believes to be a person under 18 years of age, unless the offender is a parent or guardian of the person under 18 years of age.
(c) It is unlawful for a child sex offender to knowingly operate, manage, be employed by, volunteer at, be associated with, or knowingly be present at any: (i) facility providing programs or services exclusively directed toward persons under the age of 18; (ii) day care center; (iii) part day child care facility; (iv) child care institution; (v) school providing before and after school programs for children under 18 years of age; (vi) day care home; or

(vii) group day care home. This does not prohibit a child sex offender from owning the real property upon which the programs or services are offered or upon which the day care center, part day child care facility, child care institution, or school providing before and after school programs for children under 18 years of age is located, provided the child sex offender refrains from being present on the premises for the hours during which: (1) the programs or services are being offered or (2) the day care center, part day child care facility, child care institution, or school providing before and after school programs for children under 18 years of age, day care home, or group day care home is operated.

(c-2) It is unlawful for a child sex offender to participate in a holiday event involving children under 18 years of age, including but not limited to distributing candy or other items to children on Halloween, wearing a Santa Claus costume on or preceding Christmas, being employed as a department store Santa Claus, or wearing an Easter Bunny costume on or preceding Easter. For the purposes of this subsection, child sex offender has the meaning as defined in this Section, but does not include as a sex offense under paragraph (2) of subsection (d) of this Section, the offense under subsection (c) of Section 11-1.50 of this Code. This subsection does not apply to a child sex offender who is a parent or guardian of children under 18 years of age that are present in the home and other non-familial minors are not present.

(c-5) It is unlawful for a child sex offender to knowingly operate, manage, be employed by, or be associated with any county fair when persons under the age of 18 are present.

(c-6) It is unlawful for a child sex offender who owns and resides at residential real estate to knowingly rent any residential unit within the same building in which he or she resides to a person who is the parent or guardian of a child or children under 18 years of age. This subsection shall apply only to leases or other rental arrangements entered into after January 1, 2009 (the effective date of Public Act 95-820).

(c-7) It is unlawful for a child sex offender to knowingly offer or provide any programs or services to persons under 18 years of age in his or her residence or the residence of another or in any facility for the purpose of offering or providing such programs or services, whether such programs or services are offered or provided by contract, agreement, arrangement, or on a volunteer basis.

(c-8) It is unlawful for a child sex offender to knowingly operate, whether authorized to do so or not, any of the following vehicles: (1) a vehicle which is specifically designed, constructed or modified and equipped to be used for the retail sale of food or beverages, including but not limited to an ice cream

truck; (2) an authorized emergency vehicle; or (3) a rescue vehicle.
(d) Definitions. In this Section:
(1) "Child sex offender" means any person who:
(i) has been charged under Illinois law, or any substantially similar federal law or law of another state, with a sex offense set forth in paragraph (2) of this subsection (d) or the attempt to commit an included sex offense, and:
(A) is convicted of such offense or an attempt to commit such offense; or
(B) is found not guilty by reason of insanity of such offense or an attempt to commit such offense; or
(C) is found not guilty by reason of insanity pursuant to subsection (c) of Section 104-25 of the Code of Criminal Procedure of 1963 of such offense or an attempt to commit such offense; or
(D) is the subject of a finding not resulting in an acquittal at a hearing conducted pursuant to subsection (a) of Section 104-25 of the Code of Criminal Procedure of 1963 for the alleged commission or attempted commission of such offense; or
(E) is found not guilty by reason of insanity following a hearing conducted pursuant to a federal law or the law of another state substantially similar to subsection (c) of Section 104-25 of the Code of Criminal Procedure of 1963 of such offense or of the attempted commission of such offense; or
(F) is the subject of a finding not resulting in an acquittal at a hearing conducted pursuant to a federal law or the law of another state substantially similar to subsection (a) of Section 104-25 of the Code of Criminal Procedure of 1963 for the alleged violation or attempted commission of such offense; or
(ii) is certified as a sexually dangerous person pursuant to the Illinois Sexually Dangerous Persons Act, or any substantially similar federal law or the law of another state, when any conduct giving rise to such certification is committed or attempted against a person less than 18 years of age; or
(iii) is subject to the provisions of Section 2 of the Interstate Agreements on Sexually Dangerous Persons Act.
Convictions that result from or are connected with the same act, or result from offenses committed at the same time, shall be counted for the purpose of this Section as one conviction. Any conviction set aside pursuant to law is not a conviction for purposes of this Section.
(2) Except as otherwise provided in paragraph (2.5), "sex offense" means:

(i) A violation of any of the following Sections of the Criminal Code of 1961: 10-7 (aiding or abetting child abduction under Section 10-5(b)(10)), 10-5(b)(10) (child luring), 11-1.40 (predatory criminal sexual assault of a child), 11-6 (indecent solicitation of a child), 11-6.5 (indecent solicitation of an adult), 11-9.1 (sexual exploitation of a child), 11-14.4 (promoting juvenile prostitution), 11-18.1 (patronizing a juvenile prostitute), 11-20.1 (child pornography), 11-20.1B (aggravated child pornography), 11-21 (harmful material), 12-33 (ritualized abuse of a child), 11-20 (obscenity) (when that offense was committed in any school, on real property comprising any school, in any conveyance owned, leased, or contracted by a school to transport students to or from school or a school related activity, or in a public park), 11-30 (public indecency) (when committed in a school, on real property comprising a school, in any conveyance owned, leased, or contracted by a school to transport students to or from school or a school related activity, or in a public park). An attempt to commit any of these offenses.

(ii) A violation of any of the following Sections of the Criminal Code of 1961, when the victim is a person under 18 years of age: 11-1.20 (criminal sexual assault), 11-1.30 (aggravated criminal sexual assault), 11-1.50 (criminal sexual abuse), 11-1.60 (aggravated criminal sexual abuse). An attempt to commit any of these offenses.

(iii) A violation of any of the following Sections of the Criminal Code of 1961, when the victim is a person under 18 years of age and the defendant is not a parent of the victim:
10-1 (kidnapping),
10-2 (aggravated kidnapping),
10-3 (unlawful restraint),
10-3.1 (aggravated unlawful restraint).
An attempt to commit any of these offenses.

(iv) A violation of any former law of this State substantially equivalent to any offense listed in clause (2)(i) of subsection (d) of this Section.

(2.5) For the purposes of subsections (b-5) and (b-10) only, a sex offense means:

(i) A violation of any of the following Sections of the Criminal Code of 1961:
10-5(b)(10) (child luring), 10-7 (aiding or abetting child abduction under Section 10-5(b)(10)), 11-1.40 (predatory criminal sexual assault of a child), 11-6 (indecent solicitation of a child), 11-6.5 (indecent solicitation of an adult), 11-14.4 (promoting juvenile prostitution), 11-18.1 (patronizing a juvenile prostitute), 11-20.1 (child

pornography), 11-20.1B (aggravated child pornography), or 12-33 (ritualized abuse of a child). An attempt to commit any of these offenses.
(ii) A violation of any of the following Sections
of the Criminal Code of 1961, when the victim is a person under 18 years of age: 11-1.20 (criminal sexual assault), 11-1.30 (aggravated criminal sexual assault), 11-1.60 (aggravated criminal sexual abuse), and subsection (a) of Section 11-1.50 (criminal sexual abuse). An attempt to commit any of these offenses.
(iii) A violation of any of the following
Sections of the Criminal Code of 1961, when the victim is a person under 18 years of age and the defendant is not a parent of the victim:
10-1 (kidnapping),
10-2 (aggravated kidnapping),
10-3 (unlawful restraint),
10-3.1 (aggravated unlawful restraint).
An attempt to commit any of these offenses.
(iv) A violation of any former law of this State
substantially equivalent to any offense listed in this paragraph (2.5) of this subsection.
(3) A conviction for an offense of federal law or the
law of another state that is substantially equivalent to any offense listed in paragraph (2) of subsection (d) of this Section shall constitute a conviction for the purpose of this Section. A finding or adjudication as a sexually dangerous person under any federal law or law of another state that is substantially equivalent to the Sexually Dangerous Persons Act shall constitute an adjudication for the purposes of this Section.
(4) "Authorized emergency vehicle", "rescue vehicle",
and "vehicle" have the meanings ascribed to them in Sections 1-105, 1-171.8 and 1-217, respectively, of the Illinois Vehicle Code.
(5) "Child care institution" has the meaning ascribed
to it in Section 2.06 of the Child Care Act of 1969.
(6) "Day care center" has the meaning ascribed to it
in Section 2.09 of the Child Care Act of 1969.
(7) "Day care home" has the meaning ascribed to it in
Section 2.18 of the Child Care Act of 1969.
(8) "Facility providing programs or services directed
towards persons under the age of 18" means any facility providing programs or services exclusively directed towards persons under the age of 18.
(9) "Group day care home" has the meaning ascribed to
it in Section 2.20 of the Child Care Act of 1969.
(10) "Internet" has the meaning set forth in Section

16J-5 of this Code.
(11) "Loiter" means:
(i) Standing, sitting idly, whether or not the person is in a vehicle, or remaining in or around school or public park property.
(ii) Standing, sitting idly, whether or not the person is in a vehicle, or remaining in or around school or public park property, for the purpose of committing or attempting to commit a sex offense.
(iii) Entering or remaining in a building in or around school property, other than the offender's residence.
(12) "Part day child care facility" has the meaning ascribed to it in Section 2.10 of the Child Care Act of 1969.
(13) "Playground" means a piece of land owned or controlled by a unit of local government that is designated by the unit of local government for use solely or primarily for children's recreation.
(14) "Public park" includes a park, forest preserve, or conservation area under the jurisdiction of the State or a unit of local government.
(15) "School" means a public or private preschool or elementary or secondary school.
(16) "School official" means the principal, a teacher, or any other certified employee of the school, the superintendent of schools or a member of the school board.
(e) For the purposes of this Section, the 500 feet distance shall be measured from: (1) the edge of the property of the school building or the real property comprising the school that is closest to the edge of the property of the child sex offender's residence or where he or she is loitering, and (2) the edge of the property comprising the public park building or the real property comprising the public park, playground, child care institution, day care center, part day child care facility, or facility providing programs or services exclusively directed toward persons under 18 years of age, or a victim of the sex offense who is under 21 years of age, to the edge of the child sex offender's place of residence or place where he or she is loitering.
(f) Sentence. A person who violates this Section is guilty of a Class 4 felony.
(Source: P.A. 96-328, eff. 8-11-09; 96-710, eff. 1-1-10; 96-1551, eff. 7-1-11; 97-699, eff. 1-1-13.)

- 720 ILCS 5/11-9.4-1

Sec. 11-9.4-1. Sexual predator and child sex offender; presence or loitering in

or near public parks prohibited.
(a) For the purposes of this Section:
"Child sex offender" has the meaning ascribed to it
in subsection (d) of Section 11-9.3 of this Code, but does not include as a sex offense under paragraph (2) of subsection (d) of Section 11-9.3, the offenses under subsections (b) and (c) of Section 11-1.50 or subsections (b) and (c) of Section 12-15 of this Code.
"Public park" includes a park, forest preserve,
bikeway, trail, or conservation area under the jurisdiction of the State or a unit of local government.
"Loiter" means:
(i) Standing, sitting idly, whether or not the
person is in a vehicle or remaining in or around public park property.
(ii) Standing, sitting idly, whether or not the
person is in a vehicle or remaining in or around public park property, for the purpose of committing or attempting to commit a sex offense.
"Sexual predator" has the meaning ascribed to it in
subsection (E) of Section 2 of the Sex Offender Registration Act.
(b) It is unlawful for a sexual predator or a child sex offender to knowingly be present in any public park building or on real property comprising any public park.
(c) It is unlawful for a sexual predator or a child sex offender to knowingly loiter on a public way within 500 feet of a public park building or real property comprising any public park. For the purposes of this subsection (c), the 500 feet distance shall be measured from the edge of the property comprising the public park building or the real property comprising the public park.
(d) Sentence. A person who violates this Section is guilty of a Class A misdemeanor, except that a second or subsequent violation is a Class 4 felony.
(Source: P.A. 96-1099, eff. 1-1-11; 97-698, eff. 1-1-13; 97-1109, eff. 1-1-13.)

- The statutes have been upheld in Illinois in several cases.

E. Doe v. City of Albuquerque, 667 F 3d 1111 (10th Cir. 2012).

- This case involved a city's prohibition of registered sex offenders in libraries. The plaintiff alleged that he had a First Amendment right to receive information at the library and the First Amendment has been extended to the receipt of such information.

- The court then looked to determine whether a library was a traditional public forum and examined the three categories of government property.

  1. Traditional public fora are streets and parks which have always been held in trust for the use of the public and have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions.
  2. Designated public fora are public property which the state has opened for use by the public as a place for expressive activity.
  3. Non-public fora are public property which are not by tradition or designation a forum for public communication.

  - The court found that a public library is open for particular forms of expressive activity, including receiving information. The court acknowledged that public libraries are not designated for certain other First Amendment activities such as speech or debate but this did not preclude them from being designated as public fora.

  - Interestingly, the city made a bad strategic decision and chose not to rebut arguments made by the plaintiff in the case in accordance with FRCP 56 in opposition to the motion for summary judgment in not including affidavits, depositions or other material to show there was a genuine issue of material fact.

  - Therefore, the 10th Circuit noted that it recognized the city had legitimate concerns but it was constrained by the record in this case. The court specifically stated that it believed the city could successfully draft a revised ordinance which would satisfy the time, place and manner test.

III. Westboro Baptist Church.

A. Snyder v. Phelps, 131 S Ct. 1207 (2011).

- This case involved a private lawsuit where a father of a deceased Marine sued the Westboro Baptist Church in tort relative to its signs and protests at his son's funeral. After a jury verdict in favor of the father, the case made its way to the Supreme Court which considered the question of whether the First Amendment shields church members for tort liability for their speech.

- The court found that Westboro conducted its picketing peacefully on matters of public concern at a public place adjacent to a public street and that this street enjoyed a special position in terms of First Amendment protection, as a traditional public forum.

- The picketing is subject to reasonable time, place and manner restrictions which are consistent with as precedence.

- The court held that the nation has chosen to protect even hurtful speech on public issues to ensure that we do not stifle public debate. It then stated that Westborough was immune from tort liability for its picketing in this case.

- Justice Alito dissented. The decedent was not a public figure and did not publicly espouse any beliefs which were being protested.

B. Illinois Statute regarding picketing at funerals.

- 720 ILCS 5/26-6.

Disorderly conduct at a funeral or memorial service.
(a) The General Assembly finds and declares that due to the unique nature of funeral and memorial services and the heightened opportunity for extreme emotional distress on such occasions, the purpose of this Section is to protect the privacy and ability to mourn of grieving families directly before, during, and after a funeral or memorial service.
(b) For purposes of this Section:
(1) "Funeral" means the ceremonies, rituals, processions, and memorial services held at a funeral site in connection with the burial, cremation, or memorial of a deceased person.
(2) "Funeral site" means a church, synagogue, mosque, funeral home, mortuary, cemetery, gravesite, mausoleum, or other place at which a funeral is conducted or is scheduled to be conducted within the next 30 minutes or has been conducted within the last 30 minutes.
(c) A person commits the offense of disorderly conduct at a funeral or memorial service when he or she:
(1) engages, with knowledge of the existence of a funeral site, in any loud singing, playing of music, chanting, whistling, yelling, or noisemaking with, or without, noise amplification including, but not limited to, bullhorns, auto horns, and microphones within 300 feet of any ingress or egress of that funeral site, where the volume of such singing,

music, chanting, whistling, yelling, or noisemaking is likely to be audible at and disturbing to the funeral site;
(2) displays, with knowledge of the existence of a funeral site and within 300 feet of any ingress or egress of that funeral site, any visual images that convey fighting words or actual or veiled threats against any other person; or
(3) with knowledge of the existence of a funeral site, knowingly obstructs, hinders, impedes, or blocks another person's entry to or exit from that funeral site or a facility containing that funeral site, except that the owner or occupant of property may take lawful actions to exclude others from that property.
(d) Disorderly conduct at a funeral or memorial service is a Class C misdemeanor. A second or subsequent violation is a Class 4 felony.
(e) If any clause, sentence, section, provision, or part of this Section or the application thereof to any person or circumstance is adjudged to be unconstitutional, the remainder of this Section or its application to persons or circumstances other than those to which it is held invalid, is not affected thereby.

IV. Open Meetings Act.

A. Public comment at meetings.

- The OMA requires that people be given the opportunity to speak at meetings, "Any person shall be permitted an opportunity to address public officials under the rules established and recorded by the public body". 5 ILCS 120/2.06(g).

- Reasonable rules.

1. Questions and answers
2. Length of time
3. Attacks on officials or staff
4. Spokesmen for groups
5. Taping of meetings (include in rules)

    - Turn off for tapes if witness objects (Sec. 2.05)

    - Location of tapers

    - Can't move around the room

B, Recent Cases and PAC Opinions

- No PAC Opinions on the Open Meetings Act in 2010 or 2011 but three in 2012.

1. Lake County Board of Review (12-020). A resident was refused the right to tape record his Board of Review hearing for his challenge to his property tax assessment.

    - The Board had established rules which required advance notice on audio video recording to the clerk of the Board. The clerk was the Chief Assessment Officer, Martin Paulson.

    - The PAC found that the rule was contrary to the express provisions of the OMA because it was not shown that it was necessary to protect the integrity of the public meeting or safety of those attending it.

2. Village of Swansea (12-011). The complainant was a reporter who alleged that two committees of the Village Board improperly discussed the Village's budget in closed session. The committees were the Finance Committee and the Personnel Committee at three separate meetings.

    - The committees relied on Section 2(c)(1) which allows the discussion of "the appointment, employment, compensation, discipline, performance, or dismissal of specific employees of the public body" in closed session.

    - Apparently the committees had entered into closed session under the good faith belief that because the budgets they were discussing could negatively impact employees, including the termination of some employees, that the entire discussion was appropriate.

    - In fact, the PAC noted that a public body may discuss the merits of individual employees as a result of its fiscal decisions in closed session under 2(c)(1). However, the underlying budgetary discussion leading to employment decisions may not be discussed in closed session.

- Such things which were not authorized were discussions centering on staffing needs, how staff reductions would affect the services provided by the village and which services were most valuable to the village residents.

- The remedy for the violation was to release a portion of the closed session minutes where improper discussions were noted in accordance with the opinion.

- This case illustrates the difficulty of discussing employees in the context of budgets and the PAC's strict view of the OMA.

3. Washington County (20-013). The Finance Committee of the Washington County Board went into closed session on June 25, 2012 pursuant to the exception for probable or imminent litigation contained at Section 2(c)(11) in response to a letter received by the County Board chair on March 28, 2012.

- First, the PAC found that a committee failed to fully comply with 2(c)(11) which provides in full as follows:

> Litigation, when an action against, affecting or on behalf of the particular public body has been filed and is pending before a court or administrative tribunal, or when the public body finds that an action is probable or imminent, in which case the basis for the finding shall be recorded and entered into the minutes of the closed meeting.

- The committee did not publicly announce on the record the finding that litigation was probable or imminent and the basis for such a finding as required by Henry v. Anderson, 356 Ill. App. 3d 952, 957 (4th Dist. 2005).

- The PAC then cited to a 1983 Attorney General's Opinion, No. 83-026, which found that the only matters which may lawfully be discussed at a closed meeting are the strategies, posture, theories and consequences of the litigation itself. Interestingly, the PAC stated, "Thus, even if there are reasonable grounds to believe that litigation is probably or imminent, it is not permissible for a public body to use the closed session to discuss taking an action or to make a

decision on the underlying issue that is likely to be the subject of a litigation."

- In this case, those things were whether to amend an ordinance to avoid the threat of litigation.

- The PAC found it significant that the minutes indicated that the Finance Committee discussed the substance of the issues related to the possible litigation rather than strategies, postures, theories and consequences of the litigation.

- In addition, representatives of the threatening plaintiff were invited to join in the discussion of the meeting. The PAC entirely missed this issue: why should an adverse party be allowed to discuss litigation with a local government to the exclusion of the residents.

- The threatening plaintiff made an offer of a new ordinance but the PAC found that the finance committee couldn't discuss the ordinance, even if that ordinance would have avoided litigation.

- The committee also decided to recommend approval of the ordinance and host agreement to the county board. The PAC then asked whether this was a final action and the state's attorney responded as follows, "

- The PAC concluded from this explanation that the finance committee agreed during the closed session either to recommend a passage of the ordinance or at least not to oppose the proposed ordinance.

- The PAC then found that when a concession is reached in closed session, even if it is reached informally, a concession constitutes a final action. Therefore, the finance committee should have discussed and voted on its recommendation in an open meeting.

- There are many layers to this opinion, some of which have been missed by the PAC but it is clear from this opinion that the PAC views closed session discussions on pending litigation to be very limited.

V. Employee Information and Public Records

A. Definitions

- 5 ILCS 140/2 (c) "Public records" means all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, electronic communications, recorded information and all other documentary materials pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body.

- 5 ILCA 140/2 (c-5) "Private information" means unique identifiers, including a person's social security number, driver's license number, employee identification number, biometric identifiers, personal financial information, passwords or other access codes, medical records, home or personal telephone numbers, and personal email addresses. Private information also includes home address and personal license plates, except as otherwise provided by law or when compiled without possibility of attribution to any person.

B. Exemptions.

- 5 ILCS 140(1)

(a) Information specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law.

- 5 ILCS 149(1)

(b) Private information, unless disclosure is required by another provision of this Act, a State or federal law or a court order.

- 5 ILCS 140/7(1)

(c) Personal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information. "Unwarranted invasion of personal privacy" means the disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to

privacy outweighs any legitimate public interest in obtaining the information. The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy.

- 5 ILCS 140/7(1)

(n) Records relating to a public body's adjudication of employee grievances or disciplinary cases; however, this exemption shall not extend to the final outcome of cases in which discipline is imposed.

- 5 ILCS 140/7.5

Statutory Exemptions. To the extent provided for by the statutes referenced below, the following shall be exempt from inspection and copying: (q) Information prohibited from being disclosed by the Personnel Records Review Act.

C. Personnel Records Review Act 820 ILCS 40/1, et seq.

- 820 ILCS 40/7

(1) An employer or former employer shall not divulge a disciplinary report, letter of reprimand, or other disciplinary action to a third party, to a party who is not a part of the employer's organization, or to a party who is not a part of a labor organization representing the employee, without written notice as provided in this Section.
(2) The written notice to the employee shall be by first-class mail to the employee's last known address and shall be mailed on or before the day the information is divulged.
(3) This Section shall not apply if:
(a) the employee has specifically waived written notice as part of a written, signed employment application with another employer;
(b) the disclosure is ordered to a party in a legal action or arbitration; or
(c) information is requested by a government agency as a result of a claim or complaint by an employee, or as a result of a criminal investigation by such agency.
(4) An employer who receives a request for records of a disciplinary report, letter of reprimand, or other disciplinary action in relation to an employee under the Freedom of Information Act may provide notification to the employee in written form as described in subsection (2) or through electronic

mail, if available.

- 820 ILS 40/8

  An employer shall review a personnel record before releasing information to a third party and, except when the release is ordered to a party in a legal action or arbitration, delete disciplinary reports, letters of reprimand, or other records of disciplinary action which are more than 4 years old.

  (820 ILCS 40/11) (from Ch. 48, par. 2011)
  Sec. 11. This Act shall not be construed to diminish a right of access to records already otherwise provided by law, provided that disclosure of performance evaluations under the Freedom of Information Act shall be prohibited.

D. Other Exemptions Relative to employees

- 65 ILCS 5/10-1-18-d(5)

  (d) Commencing on January 1, 1993, each board or other entity responsible for determining whether or not to file a charge shall, no later than December 31 of each year, publish a status report on its investigations of allegations of unreasonable force. At a minimum, the status report shall include the following information:

(5) a listing of allegations of unreasonable force
for which the board has determined not to file charges.
These status reports shall not disclose the identity of
any witness or victim, nor shall they disclose the identity of any police officer who is the subject of an allegation of unreasonable force against whom a charge has not been filed. The information underlying these status reports shall be confidential and exempt from public inspection and copying, as provided under Section 7 of the Freedom of Information Act.

- 105 ILCS 5/24A-7.1

  Teacher, principal, and superintendent performance evaluations. Except as otherwise provided under this Act, disclosure of public school teacher, principal, and superintendent performance evaluations is prohibited.