AN ILLINOIS LAW FIRM

HEYL ROYSTER GOVERNMENTAL NEWSLETTER

July-August 2009

Dear Friends:

The Illinois Legislature recently passed sweeping changes to the Freedom of Information Act and Open Meetings Act. While the legislation has not yet been signed into law by Governor Quinn, we anticipate it will be signed in the near future. These changes will require immediate action on the part of local governmental entities.

Due to the importance of these new statutes, we hosted a Town Hall meeting on July 21, 2009, to discuss this new legislation. We were pleased that many of you were able to attend the meeting. For those who were not, we would be happy to provide summaries of our remarks. As always, we would be pleased to answer any questions which you may have concerning this newly difficult area of the law.

Please feel free to contact John, Andy or me at (309) 676-0400. We anticipate that many officials will find that applying the statutory changes in real life circumstances poses questions which could not be anticipated in an educational program.

While we are concerned about the costs and additional work this will cause for our clients, we are most concerned with the potential political and civil liabilities which the changes pose. Transparency in government is a laudable goal, but not if the end effect is to discourage well-meaning and qualified individuals from running for office. Learn about the changes and don't be afraid to ask for help.

Tim

Timothy L. Bertschy is a partner with Heyl, Royster, Voelker & Allen. He concentrates his practice in the areas of complex commercial litigation, employment, and local governmental law. He has litigated cases involving contractual breaches, business torts, partnership and corporate break-ups, stockholder disputes, ERISA, unfair competition, intellectual property, covenants not to compete, lender liability, fraud and misrepresentation, eminent domain (condemnation), computer and software problems, privacy, real estate disputes, zoning issues and business losses. Tim has represented clients in the business, banking, real estate, stock brokerage, accounting, legal, insurance, governmental, and religious fields.

UPCOMING SEMINAR

Watch for your invitation to our September Township Seminar, "Your Local Government Employees: What You Need to Know." Our September seminar will be hosted by Cruger Township from 9:00 a.m. to 11:00 a.m. on September 2, 2009. We look forward to seeing you there!

IN THIS ISSUE

AMENDMENT TO SMOKE FREE ILLINOIS ACT

By John Redlingshafer
jredlingshafer@heylroyster.com

Editor's Note: This article is to follow up our prior discussion in our February 2009 newsletter on the Smoke Free Illinois Act. Since that time, the Illinois General Assembly passed Public Act 095-1029, which amended certain portions of the Act.

Earlier this year, the Illinois General Assembly passed a bill aimed at amending the Smoke Free Illinois Act. Several technical changes were made, and the legislature also made it a point to attempt the creation of more specific enforcement guidelines. While this article does not discuss all of the changes brought about by Public Act 095-1029, it does touch on those we feel most relevant for your review:

First and foremost, General Assembly reaffirmed the responsibility of a property owner. Now, the Act requires an owner of a public place, place of employment, and/or governmental vehicle to "reasonably assure that smoking is prohibited in indoor public places and work places unless specifically exempted . . . " *See* Section 15.

However, as noted above, the most noticeable changes to the Act appear in Section 40, which addresses enforcement.

You will recall from our past article that the Illinois Department of Public Health (IDPH), local health departments, and local law enforcement agencies are to enforce this Act through the issuance of citations and by levying fines. Now, the IDPH must give the violator a chance to pay the fine without objection or to contest the citation in accordance with the Illinois Administrative Procedure Act (essentially, a hearing with the IDPH). Upon receipt of a request for hearing to contest a fine, the enforcement agency involved (if not the IDPH) must forward a copy of the citation and request to the IDPH. This hearing must be conducted as appropriate under Illinois law and pursuant to the procedures the IDPH establishes for these hearings (which will appear in the Illinois Administrative Code).

Section 45 of the Act lays out an amended fine schedule for those found to be in violation of the Act.

The IDPH must then notify the violator (in writing) of the time, place and location of the hearing, which will be conducted at the nearest regional office or in a location contracted in a county where the citation was issued. Fines can be collected by all methods available, but no attempts at collection can be done during the pendency of a hearing before the IDPH.

Under 095-1029, Section 45 of the Act lays out an amended fine schedule for those found to be in violation of the Act. A first offense requires a fine of $100.00 and $250.00 for each subsequent offense. This is a change from the "not less than $100.00" language that appeared in the prior version of the Act. In addition, a person who owns, operates or otherwise controls a public place or place of employment in violation of the Act shall now be fined $250.00 for the first violation, $500.00 for the second (if within one year after the first violation), and $2,500.00 for each additional violation within that one-year time frame.

In addition to these fines, IDPH, local health agency, and/or law enforcement agency involved can now file an action in the Circuit Court seeking injunctions against violations of this Act.

If you find yourself with issues related to enforcement whether as a property owner or enforcement agency, we strongly recommend you work with your attorney and IDPH to ensure proper procedures are in place for current and future violations.

John M. Redlingshafer is an associate with Heyl, Royster, Voelker & Allen. He concentrates his practice on governmental law, representing numerous townships, fire districts, road districts, and other governmental entities. Currently, John is Vice President of the Illinois Township Attorneys' Association, and serves as the Editor of the ITAA's newsletter, the *Talk of the Township*.

The Tort Immunity Act

By Andy Keyt
akeyt@heylroyster.com

Part 1: Property Claims

NOTE: This is the first of a two-part series on the Tort Immunity Act. Part 1 will discuss general application of the Tort Immunity Act and property-related issues. Part 2 will discuss the application of the Act to emergency services such as fire and police protection.

Introduction

Kings do not like to get sued. So, they developed a rule to keep themselves from getting sued. This doctrine is generally known as "Sovereign Immunity." It began centuries ago and eventually was adopted by the English common law system. Our system of jurisprudence was originally founded on the old English common law, and this doctrine has survived in some form or another since the beginning of our country. To save you the gruesome legal details, the United States (and Illinois) provide some form of immunity, though today it is not referred to as Sovereign Immunity. Today, the immunities are codified into various acts, such as the Federal Tort Claims Act, and the absolute immunity found in the old Sovereign Immunity doctrine has vanished. In Illinois, we have the Tort Immunity Act. The Illinois Supreme Court abolished Sovereign Immunity in 1959 with its decision in *Molitor v. Kaneland Comty. Unit Dist. No. 302,* 18 Ill. 2d 11 (1959). In response, the Illinois General Assembly enacted the Local Governmental & Governmental Employees Tort Immunity Act in 1965. *745 ILCS 10/1 et seq*. sought to strike a balance between the absolute immunity found in the Sovereign Immunity doctrine and the right of an individual to sue its government. The result was immunities for some governmental functions, but not all. This two-part article is intended as a brief guide to Illinois' Local Governmental & Governmental Employees Tort Immunity Act (TIA).

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This article is only intended to give you a broad overview of the various legal concepts of immunity for local Illinois governmental entities. We are not going to discuss non-personal injury claims (such as employee suits for harassment or discrimination). We are going to stick to property-related claims, and claims arising out of the provision of emergency services. These are two of the most popular types of claims against governmental entities.

The Practical Concept of Immunity

The concept of immunity can be broadly divided into one of three categories (1) absolute immunity (meaning no matter what you do, you cannot be liable), (2) limited immunity (immunity up to a certain level of misconduct),

Heyl Royster Attorney Speaks at Statewide Conference

On June 26, 2009, Andy Keyt of Heyl Royster, spoke at the Illinois Association of Fire Protection Districts Annual Conference in Peoria, Illinois. Andy spoke regarding the pending changes to the Freedom of Information Act ("FOIA") and the immediate attention these changes will require. The educational session, entitled "Governmental Transparency – The New Buzzword" emphasized the FOIA changes at both federal and state levels.

and (3) no immunity at all (liability for simple negligence claims). The type of applicable immunity is dependent upon the activity involved.

Discretionary Acts v. Ministerial Duties

Discretionary acts of a local government and its employees are entitled to absolute immunity. *745 ILCS 10/2-201*. Section 2-201 provides: [e]xcept as otherwise provided by statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused. *745 ILCS 10/2-20; Johnson v. Mers,* 279 Ill. App. 3d 372 (2nd Dist. 1996). Generally, discretionary acts are those acts that are unique to public office and require deliberation, decision, or judgment. *White v. Village of Homewood,* 285 Ill. App. 3d 496 (1st Dist. 1996). Ministerial acts are those acts that are generally performed in a prescribed manner under obedience to legal authority (and without reference to the official's discretion). *Snyder v. Curran Township,* 167 Ill. 2d 466 (1995), *Trtanj v. City of Granite City,* 379 Ill. App. 3d 795 (5th Dist. 2008). If your actions were discretionary in nature, you have immunity (absolute immunity).

But that is not the end of your immunities. Other portions of the Tort Immunity Act may provide immunity for specific activities, or may give limited immunity up to a certain level of malfeasance. For example, a statute may abolish simple negligence suits (failure to use reasonable care) against a governmental entity, but allow suits for willful and wanton conduct (conscious disregard or utter indifference for the safety of another).

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The liability of a local governmental entity in relation to its property is a major area of litigation for local governmental entities.

Employees

If the governmental employee is immune, so is the employer. *745 ILCS 10/2-109.* The Tort Immunity Act defines employees as any "present or former officer, member of a board, commission or committee, agent, volunteer, servant or employee," but does not include independent contractors. *745 ILCS 10/1-202.*

Governmental Property

Duty to Maintain & Notice Requirements

The liability of a local governmental entity in relation to its property is a major area of litigation for local governmental entities. As a general rule, a local public entity has a duty to maintain its property in a reasonably safe condition for the purpose intended. *745 ILCS 10/3-102*. *Bubb v. Springfield School Dist. 186,* 167 Ill. 2d 372 (1995). Liability arises when the undertaken improvement, itself, creates an unreasonably dangerous condition. *Ross v. City of Chicago,* 168 Ill. App. 3d 83, (1st Dist. 1988).

A local public entity will not be held liable under the Tort Immunity Act for an injury that occurs on its property unless the injured person can show that the public entity had actual or constructive notice (i.e. . . should have known) of a dangerous condition on its property with sufficient time to take reasonable actions to remedy the dangerous condition. *745 ILCS 10/3-102(a)*.

Actual notice involves the express notification of a dangerous condition, either orally or verbally. This represents the "*know"* factor; e.g. the public entity was "told" about the danger, therefore they *knew* it existed. Constructive notice involves a more complicated evaluation.

In determining whether a public entity had constructive notice of a defective condition, courts consider various factors, including the obvious nature of the defect, or lack thereof, and the length of time the condition existed. *Pinto v. DeMunnick,* 168 Ill. App. 3d 771, 523 N.E.2d 47, 50 (1st Dist. 1988). These factors help to determine whether the public entity *should have known* about the dangerous condition regardless of whether the public entity *actually knew* about it.

A public entity can be found to have constructive notice of a dangerous condition in a street, sidewalk, or other public property if the condition existed long enough that through the exercise of reasonable care and diligence, the governmental entity should have learned of the dangerous condition and fixed it. *Repinski v. Jubilee Oil Co.,* 85 Ill. App. 3d 15, 405 N.E.2d 1383, 1387 (1st Dist. 1980). Constructive notice is not always a black and white issue and typically the determination of notice will vary depending on each case's facts. However, expressly written into the statute is language very beneficial to a "constructive notice" inquiry. The statute states that "[a] public entity does not have constructive notice… if it establishes" that a reasonably adequate inspection system would not have discovered the condition, or the public entity maintained and operated an adequate inspection system and did not discover the condition. *745 ILCS 10/3-102.*

There is no bright line rule to determine when a defect in a public sidewalk is large enough to require repair or removal.

This implementation of a property inspection system is helpful in the defense of property-related claims and we strongly suggest implementation of such a program. Now we should discuss specific categories of property.

Sidewalks

There is no duty to install sidewalks or extend existing sidewalks. *Best v. Richert*, 72 Ill. App. 3d 371 (2d Dist. 1979). A public entity does have a duty to design and maintain the sidewalks in a reasonably safe condition (for their intended use). The sidewalks do not have to be in perfect condition at all times and slight defects, or "*de minimis*" defects, are normally allowable. *Arvidson v. City of Elmhurst,* 11 Ill. 2d 601 (1957).

There is no bright line rule to determine when a defect in a public sidewalk is large enough to require repair or removal. This issue is determined on a case by case basis. The surrounding circumstances such as location, commercial or residential neighborhood and anticipated volume of pedestrian foot traffic are considered to determine if a sidewalk defect is *de minimis* and not actionable. Courts will also consider the width and depth of the defect. *West v. City of Hoopeston,* 146 Ill. App. 3d 538 (4th Dist. 1986). In *West,* a sidewalk defect that measured two inches wide and 1/4 to 9/16 of an inch in height was enough to allow the case to proceed to a trial.

Streets

Generally when it comes to street defects, public entities are only liable for injuries to the intended users vehicle traffic except for those areas where a mixed use (pedestrians, bicyclists, etc.) are intended (such as a crosswalk or bicycle path). *Risner v. City of Chicago,* 150 Ill. App. 3d 827 (1st Dist. 1986). Examples of joint use are designated street crossings and places in the street used by public transit passengers, such as bus stops. These places require reasonably safe conditions for pedestrian travel. Also, if a street includes a bicycle path, there may be an additional duty owed to bicyclists using the path.

Traffic Signs and Signals

The Tort Immunity Act immunizes a local governmental entity's initial decision to erect a traffic control device. The Tort Immunity Act states:

> Neither a local public entity nor a public employee is liable under this Act for an injury caused by the failure to *initially* provide regulatory traffic control devices, stop signs, yield right-of-way signs, speed restriction signs, distinctive roadway markings or any other traffic regulating or warning sign, device or marking, signs, overhead lights, traffic separating or restraining devices or barriers. (Emphasis added.)

745 ILCS 10/3-104. Section 3-104 provides absolute immunity to claims of negligence and willful and wanton misconduct for the decision on whether or not to install a traffic sign or signal. However, once the decision is made to install a traffic control device, the public entity is obligated to install and maintain the device with reasonable care. *Parsons v. Carbondale Township,* 217 Ill. App. 3d 637 (5th Dist. 1991). In other words, you must install the sign/signal properly and maintain the sign in a reasonably safe condition. Of note, some courts have looked to the Uniform Manual on Traffic Control Devices as the standard to which installations of signs will be judged. *Snyder v. Curran Township,* 167 Ill. 2d 466 (1995).

Parks and Recreational Property

The Tort Immunity Act creates an immunity for public entities and their employees for injuries that occur on recreational property. Unless the plaintiff can establish willful or wanton conduct on the part of the entity or employee, the public body will be immune. *745 ILCS 10/3-106*. Exactly what is willful and wanton conduct is the subject of many court room battles between lawyers. The phrase is certainly open to interpretation. Willful and wanton conduct is more egregious than simple negligence (failure to act as a reasonably prudent person) but not necessarily an intentional act (intent to harm). The common phrases used to describe willful and wanton conduct, include utter indifference or a conscious disregard for another's safety. *745 ILCS 10/1-210.* The case law regarding recreational property injuries spans a wide range of factual scenarios and outcomes because this phrase is open to differing interpretations.

It is impossible to completely insulate yourself from liability.

Ice & Snow Removal

A public entity is not liable for natural accumulations of ice or snow. *Siegel v. Village of Wilmette,* 324 Ill. App. 3d 903 (1st Dist. 2001). However, a public entity which undertakes snow removal operations may be liable for simple negligence. For example, mounds of snow which obscure the vision of motorists at an intersection may be actionable. *Ziencina v. County of Cook,* 188 Ill. 2d.1 (1999).

Simple Advice to *Help* Combat the Property Related Personal Injury Claim

Remember, it is impossible to completely insulate yourself from liability, even if you follow all of the below tips. However, making the effort can help to avoid liability.

1. **Implement an employee-based property inspection program.** If you implement a property inspection system, you have to fix the problems you find. This includes general property, buildings, road signs/signals and the condition of any streets. Road signs/streets are probably the most difficult to monitor simply because of the sheer volume. If you do not have an inspection program, you will have to show that a reasonable inspection program would not have caught the danger.
2. **Invest in portable traffic control signs.** These are good to have for a multitude of reasons. They can be used to temporarily replace downed signs (such as stop signs) and be used to warn of dangerous conditions on the approaching roadway.

3. **Consult with a civil engineer.** Civil engineers are diverse and valuable resources. They can help you comply with the Manual on Uniform Traffic Control Devices in the placement and set up of traffic signage, plan new roads, and help in building construction planning. Compliance with federal and state standards (of which the civil engineers are quite knowledgeable) goes a long way in showing reasonable care.
4. **Educate employees.** It could be professional education or in-house training, but the attempt to educate is what is important here.

Andrew J. Keyt is an associate with Heyl, Royster, Voelker & Allen. He concentrates his practice on both governmental affairs and in the defense of asbestos and toxic tort claims arising from environmental and occupational exposures, including products and premises liability claims. Andy represents and assists in the representation of public entities as their counsel. As counsel for local public entities, Andy attends monthly meetings, board meetings and provides counsel on all legal issues.

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Heyl Royster Attorney Involved in New Publication on Special Districts

By Timothy L. Bertschy
tbertschy@heylroyster.com

The prestigious Illinois Institute for Continuing Legal Education has published its Special Districts 2009 Edition. This publication is a resource for attorneys who may need guidance in their representation of local governmental entities. John Redlingshafer and Andrew Keyt from our firm were the driving force behind the publication. John undertook the substantial task of serving as the general editor.

Special District governments (including sanitary districts, forest preserves, libraries, soil and water conservation districts, cemeteries, drainage districts and fire protection districts) each have their own unique governing laws and challenges. The attorneys who represent these special districts must fully understand the regulations and how they affect the particular district. This book provides a valuable resources for guidance in these areas of the law.

Heyl Royster believes continuing education is important for our lawyers and clients and is committed to assisting in that process. The Special Districts volume is one of the many publications, articles and seminars which our lawyers have contributed to this past year.

Timothy L. Bertschy is a partner with Heyl, Royster, Voelker & Allen. He concentrates his practice in the areas of complex commercial litigation, employment, and local governmental law. He has litigated cases involving contractual breaches, business torts, partnership and corporate break-ups, stockholder disputes, ERISA, unfair competition, intellectual property, covenants not to compete, lender liability, fraud and misrepresentation, eminent domain (condemnation), computer and software problems, privacy, real estate disputes, zoning issues and business losses. Tim has represented clients in the business, banking, real estate, stock brokerage, accounting, legal, insurance, governmental, and religious fields.

Heyl, Royster, Voelker & Allen
Suite 600, Chase Building
124 S.W. Adams Street
Peoria, IL 61602-1352

For More Information

If you have questions about this newsletter, please contact:

Timothy L. Bertschy
Heyl, Royster, Voelker & Allen
Suite 600, Chase Building
124 S.W. Adams Street
Peoria, IL 61602-1352
Phone (309) 676-0400 – Fax: (309) 676-3374
E-mail: tbertschy@heylroyster.com

Peoria, Illinois 61602-1352
Suite 600, Chase Building
124 S.W. Adams Street
Phone (309) 676-0400 – Fax (309) 676-3374

Springfield, Illinois 62705-1687
Suite 575, National City Center
1 North Old State Capitol Plaza
P.O. Box 1687
Phone (217) 522-8822 – Fax (217) 523-3902

Urbana, Illinois 61803-0129
Suite 300, 102 East Main Street
P.O. Box 129
Phone (217) 344-0060 – Fax (217) 344-9295

Rockford, Illinois 61105-1288
Second Floor, National City Bank Building
120 West State Street
P.O. Box 1288
Phone (815) 963-4454 – Fax (815) 963-0399

Edwardsville, Illinois 62025-0467
Suite 100, Mark Twain Plaza III
105 West Vandalia Street
P.O. Box 467
Phone (618) 656-4646 – Fax (618) 656-7940

www.heylroyster.com