

HEYL ROYSTER

GOVERNMENTAL NEWSLETTER

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Fall 2017

Dear Friends:

As fall slowly sets in, I hope you have been enjoying this beautiful weather.

This is our hot topics newsletter, it focuses on interesting issues we have recently come across. In this newsletter, John Redlingshafer boils down what you need to know for construction season into a series of informative tweets. You do not want to miss John's hashtags. Next, Heather Mueller-Jones describes the evolving state of Illinois law on when local public entities are immune from liability for incidents on recreational trails. In the last article, Wade Blumenshine explains how land acquired by the state of Illinois (but left unused) can be re-acquired.

We hope you enjoy this newsletter. As always, please do not hesitate to contact us with any questions or to discuss interesting legal topics you have come across.

Best,




Anne Mergen
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Governmental Practice Group

USING TWITTER TO EXPLAIN YOUR NEXT CONSTRUCTION PROJECT

By: John Redlingshafer
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With fall arriving, many governments are already considering their plan for projects in 2018. Construction season can be a very exciting time, and as this newsletter and our firm seminars have conveyed over the years, it can also be a nerve-wracking experience unless you adequately prepare and understand the universe of legal issues involved in those projects.

In today's world of short sound-bytes and "tweets" as the primary sources for news (or other information), I wanted to try and capture the best of both worlds in this article. In essence, I am going to address numerous laws and legal issues that come to mind (or at least, should come to mind) as you consider and start your public construction project – but in a social media format. Specifically, each issue will be addressed in 140 characters or less, the maximum length of a "tweet" you can put out on Twitter. Do not overlook the "hashtags" I added, as those may also provide some important, related tidbits.

Obviously, the format is for entertainment purposes only. This is not an exhaustive list of laws at issue, nor is it a thorough explanation of all of the issues the laws present. However, it should get you pointed in the right direction.

Professional Services

Need a surveyor, engineer, and don't have one? Illinois law typically requires interview process.

#professionalservicesselectionact

Oversight

Do you want someone in-house to oversee project? Do you want a committee to monitor project?

#projectmanagerscanhelpstreamlineprocess

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Bids

Services, labor & materials may need a bid. Don't be cute and split up a project to avoid bid project.

#whatisyourbidthreshold

Freedom of Information

Any documents created for the project are subject to the Freedom of Information Act.

#includesbidpacket #claimoftradesecretisoverused

Prevailing Wage

Prevailing wage required for (sub)contractors on public works—anything funded in whole or part with public funds.

#nomonetarythreshold

Employees

Want to use employees on project? Do you have work comp coverage? Did you hire them just for project?

#avoidingprevailingwageisfrownedupon

Bonds

Contractors may automatically be required to get construction, performance, and other bonds.

#askforthemanyway #askforanoriginalcertifiedcopy

Insurance

Ask your contractor to provide you with proof of insurance and your government to be listed as additional insured.

#inadditiontobonds

Substance Abuse Policies

Illinois law requires contractors to share their employee substance abuse policies with you if they want to work on your project.

#anyIllinoisproject #yeseventhisproject

Change Orders

Should you only discuss and simply agree on necessary changes during project? No. Demand formal change order.

#geteverythinginwriting

Prompt Payment

If contractor fulfills obligations and you refuse to pay, you may be charged penalty.

#promptpayment #youmusttellthemifyoudontlikeit

Open Meetings

Problem with the project? Litigation “imminent”? Closed session at public meeting is possible.

#whatisyourdefinitionofimminentlitigation

Statute of Limitations

Do you know how long you have to sue on a breach of contract claim?

#typicallytenyearstosuecontractor

#contractoronlyhasoneyeartosueyou

If you have questions on anything presented here or want legal advice on your upcoming construction project, do not hesitate to contact any of us at Heyl Royster (@HeylRoyster on Twitter).



John Redlingshafer is chair of the firm's Governmental Practice. He concentrates his practice on governmental law, representing numerous townships, fire districts, road districts, and other governmental entities.

John currently serves on the Tazewell County Board and is a past President of the Illinois Township Attorneys' Association. Administrative agencies are part of the federal and state government with the power to implement legislation. Illinois administrative agencies oversee a variety of interests, including public health and assistance, transportation, education, agriculture, natural resources, law enforcement, revenue, and commerce. Well-known examples of state agencies include the Department of Agriculture, the Commerce Commission, and the Board of Education.

WHEN IS A RIDING TRAIL REALLY A RIDING TRAIL?

By: Heather Mueller-Jones

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This is a question many park districts, transit districts, and municipalities in Illinois are asking. Under the Illinois Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act), “Neither a local public entity nor a public employee is liable for an injury caused by a condition of: (a) Any road which provides access to fishing, hunting, or primitive camping, recreational, or scenic areas and which is not a (1) city, town or village street (2) county, state or federal highway (3) a township or other road district highway. (b) Any hiking, riding, fishing or hunting trail.” 745 ILCS 10/3-107.

Over the years, the move toward a more active, healthy and “green” society, along with a nationwide effort to convert abandoned railroad right-of-ways into trails, has created over 909 miles of trail in Illinois. <http://www.railstotrails.org/our-work/united-states/illinois/#state> and <https://www.dnr.illinois.gov/publications/documents/00000642.pdf> The Tort Immunity Act grants immunity to local public entities for incidents that occur as a result of a condition of their riding trails. However, questions still exist as to whether riding trails in our communities are really afforded this protection.

Envision a 15.5 mile asphalt trail that is used by bikers, skaters, walkers, and runners. The trail links with several others, affording the user access to over 100 miles of continuous trails. The 15.5 mile paved trail passes through and by old growth forests, a local park with a pond, neighborhoods, businesses, public roadways and a State Park with a lake. Is this trail a riding trail under the Tort Immunity Act?

The Current Case Law

In *Goodwin v. Carbondale Park District*, the plaintiff was injured when his bicycle collided with a tree that had fallen across a paved bike path that went through a city park. *Goodwin v. Carbondale Park District*, 268 Ill. App. 3d 489, 490 (5th Dist. 1994). The trial court dismissed his complaint, holding in part that the defendant was immune under section 3-107(b) of the Act because the path was a riding trail. *Goodwin*, 268 Ill. App. 3d at 490. However, the Fifth District of the Illinois Appellate Court reversed the dismissal, holding that “the paved bike path

located in a developed city park” was not a riding trail. *Id.* at 492. The court reasoned that section 3-107(b) was intended to apply to “unimproved property which is not maintained by the local governmental body and which is in its natural condition with obvious hazards as a result of that natural condition.” *Id.* at 493. The court concluded that, given this reasoning, the legislature did not intend section 3-107(b) to include a paved bike path within a developed city park. *Id.* at 493-94.

The First District of the Illinois Appellate Court held in *Brown v. Cook County Forest Preserve* that section 3-107(b) immunized the defendant from liability for an injury that the plaintiff suffered when he hit a bump and fell while riding on a bicycle path in the Saulk Trail Woods Forest Preserve. *Brown v. Cook County Forest Preserve*, 284 Ill. App. 3d 1098, 1099 (1st Dist. 1996). The court relied on the dictionary definition of “trail” as “a ‘marked path through a forest or mountainous region.’” *Brown*, 284 Ill. App. 3d at 1101 (quoting Webster’s Third New International Dictionary 233 [sic] (1981)). It concluded that the bike path on which the plaintiff had been riding met this definition because it was “designed to provide access for bicyclists to the natural and scenic wooded areas around Saulk Lake.” *Id.* It was not material to the court that the path was paved and the court was not persuaded to hold for the plaintiff merely because the path was adjacent to a highway. *Id.* at 1099. The court distinguished the case from *Goodwin* by explaining that the *Goodwin* court had stressed that the bicycle path in question had traversed a developed city park. *Id.* at 1101.

Likewise, in *Mull v. Kane County Forest Preserve District*, the court held that the forest preserve was immune under section 3-107(b) when the plaintiff fell while riding on a 17 mile forest-preserve bicycle path. *Mull v. Kane County Forest Pres. Dist.*, 337 Ill. App. 3d 589 (2d Dist. 2003). The fact that the bicycle path was adjacent to a road and that the entrance to a subdivision was near the path was not crucial to its decision. *Mull*, 337 Ill. App. 3d. at 592-93. What was crucial to the court was that the path was “surrounded by wooded or undeveloped land and [ran] through a forest preserve.” *Id.* at 592.

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The Second District of the Illinois Appellate Court has further departed from the *Goodwin* court's holding that a trail must be "unimproved" to qualify as a riding trail under section 3-107(b) and instead endorsed the dictionary definition of "trail" as cited in *Brown, McElroy v. Forest Pres. Dist. of Lake County*, 384 Ill. App. 3d 662, 667 (2d Dist. 2008). The court reasoned that "rarely if ever is a 'riding trail' found in nature without any improvements to make the trail accessible and safe to the public." *McElroy*, 384 Ill. App. 3d at 667.

In a recent decision, the second district held that a trail need not be unpaved to qualify as a riding trail and that the character of a path as a riding trail is not automatically defeated by the existence of any development in the surrounding area. *Corbett v. County of Lake*, 2016 IL App (2d) 160035, ¶ 28. However, the court also held that although the riding trail at issue was surrounded by narrow bands of greenway, it was also bounded by industrial development, residential neighborhoods, parking lots, railroad tracks and major vehicular thoroughfares, therefore, the trail did not qualify as a riding trail under section 3-107(b). *Corbett*, 2016 IL App (2d) 160035, ¶ 29.

Conclusion

Based on the current Appellate court rulings, an argument exists for the hypothetical 15.5 mile trail to be considered a riding trail under the Tort Immunity Act. Although paved, the trail is not in a developed city park like in *Goodwin*. The trail travels by and/or through neighborhoods, businesses and roads, but more importantly also transverses forests, parks and lakes like the trails in *Brown, Mull* and *McElroy*. Depending on what appellate district the trail is located in, it may be considered a riding trail.

We may soon know whether this immunity applies to the trails in our communities. The Illinois Supreme Court has recently allowed an appeal of the *Corbett* decision. *Corbett v. County of Lake*, No. 121536, 2017 Ill. LEXIS 105 (Jan. 25, 2017). It is anticipated that the Illinois Supreme Court will issue a ruling defining a riding trail under the Tort Immunity Act and reconciling the differing appellate court decisions. The ruling by the Illinois Supreme Court should provide a consistent basis for the determination of whether the numerous governmental owned and operated trails in Illinois are immune under the Tort Immunity Act. We will monitor this anticipated decision and keep you apprised of the outcome.



Heather Mueller-Jones concentrates her practice in civil litigation, trial as well as ADR settings, including personal injury, professional liability and product liability defense. Her focus includes representing individuals, business and governmental entities in the defense of civil litigation claims throughout Illinois and Missouri. Before joining Heyl Royster, Heather worked at a mid-sized defense firm in the St. Louis Metro East area where she represented clients, including governmental entities, in the defense of personal injury and product liability claims throughout Illinois and Missouri. Heather is an adjunct professor at Southwestern Illinois College in the Paralegal Studies Program. She also founded the Madison County Women Lawyers group.

Cold Weather Hot Legislation



Please **SAVE THE DATE**
for our annual Governmental
Holiday Seminar!

PEORIA
Wednesday, December 6th

CHAMPAIGN
Tuesday, December 12th

ROCKFORD
Thursday, December 14th

Invitations and Registration info to come!

STATE OF UNUSED LAND: AN INTRODUCTION INTO ACQUIRING OR RE-ACQUIRING ABANDONED ILLINOIS STATE LAND

By: Wade Blumenshine
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The state of Illinois routinely acquires land in order to fulfill basic responsibilities to its citizens. These responsibilities include building new roads and improving existing ones, erecting and expanding public buildings, and creating state parks. If it could not acquire private property, the state would be unable to fulfill these fundamental responsibilities. Land acquired by the state of Illinois occasionally becomes unused because the project ceases to develop further than the acquisition of the land. Regardless of the method the state used to acquire the land, if the land is deemed unused, statute 605 ILCS 5/4-508 allows the public to acquire or re-acquire those unused parcels. The process between submitting a Letter of Intent and the acquisition of the land is lengthy as the Illinois Department of Transportation must determine the complete status of the parcel of land and the legislature must approve of the transfer at the conclusion.

Methods of Acquisition

The state of Illinois acquires private property through a variety of methods, most commonly purchasing it directly from the owner or through its power of eminent domain in a court proceeding called condemnation.

If the Illinois Department of Transportation needs your property, it will first approach you with an offer to purchase it, just as a private individual would. The amount of the offer will be what the Department of Transportation believes your property would bring if it were put up for sale (called fair market value). The Department of Transportation will obtain an appraisal or waiver valuation, depending upon the complexity of the assignment, to determine the fair market value. If the Department of Transportation wishes to purchase only part of your property, the amount it offers will include compensation for any damages that is the loss in value of your remaining property that will be caused by the acquisition.

The Department of Transportation's offer will be based on the determined fair market value. State purchases of property are concluded, just as in private sales, with the property owner

giving the Department of Transportation the proper deed and other documentation to transfer good title.

The methodical process the state uses to determine fair market value and acquire property is relevant because it the same process the state uses when an individual inquires about purchasing a parcel of land back from the state. Additionally, if you fall under the criteria of 605 ILCS 5/4-508(c), the documentation executed at the time of transfer will exist in the Department system and be relied upon when re-acquiring the unused parcel of land.

Land Abandonment and § 5/4-508

The state sometimes ends up not moving forward with the construction of a highway or project that the land was initially acquired or purchased for, and the land sits vacant and unused for years or even generations. That land can be acquired or re-acquired by any private citizen by way of statute 605 ILCS 5/4-508(a), which allows Property Sales and Property Auctions to be held by the Department to dispose of excess land or improvements no longer needed for highway purposes. The wording of the Statute is contained in its entirety below:

Except as provided in paragraphs (c) and (d) of this Section, and subject to the written approval of the Governor, the Department may dispose of, by public sale, at auction or by sealed bids, any land, rights or other properties, real or personal, acquired for but no longer needed for highway purposes or remnants acquired under the provisions of Section 4-501, provided that no such sale may be made for less than the fair appraised value of such land, rights, or property.

605 ILCS 5/4-508(a).

Under section 5/4-508(c), a person from whom the subject parcel of land was acquired and who has continuously owned the land abutting the parcel of land since its acquisition by the state has the option of purchasing the parcel of land directly. This allows land owners to make their land whole once again and avoid having to compete for their former property at a

state-held land auction. The parcel of land is still subject to the lengthy investigatory process as required by the Illinois Department of Transportation to determine the status and market value of the land, but the former owner of the land has the option to purchase the land within 60 days without any competition if they so choose.

If at the time any property previously determined by the Department to be needed for highway purposes is declared no longer needed for such purposes, and the person from whom such property was acquired still owns and has continuously owned land abutting such property since the acquisition by the Department, the Department before making any disposition of that property shall first offer in writing that property to the person from whom such property was acquired at the current appraised value of the property. If the offer is accepted in writing within 60 days of the date of the written offer, the Department, subject to the written approval of the Governor, is authorized to dispose of such property to the person from whom such property was acquired upon payment of the appraised value. If the offer is not accepted in writing within 60 days of the date of the written offer, all rights under this paragraph shall terminate.

605 ILCS 5/4-508(c).

As part of section 5/4-508(d), the Department of Transportation allows special conveyance rights to any highway authority that currently has a written contract with the Department of Transportation. Prior to this statute the state only had authority to transfer highway jurisdiction, but not real estate interest. Now any real estate interest can be conveyed between the state and any highway authority if it is mutually agreeable between all parties.

If the Department enters into or currently has a written contract with another highway authority for the transfer of jurisdiction of any highway or portion thereof, the Department is authorized to convey, without compensation, any land, dedications, easements, access rights, or any interest in the real estate that it holds to that specific highway or portion thereof to the highway authority that is accepting or has accepted jurisdiction. However, no part of the

transferred property can be vacated or disposed of without the approval of the Department, which may require compensation for non-public use.

605 ILCS 5/4-508(d).

Department Procedure and Time Frame

Regardless of the size of the parcel, the process from start to finish to acquire any land is often very slow moving. Ultimately, the process begins with a Letter of Intent that includes all required documentation and ends with the Governor/legislature signing off on an order approving the transfer of land, whether directly or by auction. Before the Governor can sign off on the sale or transfer of the land, the Department of Transportation must undertake a lengthy evaluation of the land to both determine its fair market value, size, ownership history, use status, and other required data. This process can take months depending on the location of the land and the speed that the various tasks are performed by the Department of Transportation or its agents.

If the parcel of land falls under 605 ILCS 5/4-508(c), this information is easily provided as part of the Letter of Intent packet. The contract with the state in which the parcel was initially transferred from private citizen to the state will be crucial in expediting the process. If the parcel of land does not fall under or meet the requirements in section 5/4-508(c), then the Department of Transportation has to review their records and determine the acquisition history of the parcel of land as part of its initial investigation.

The Department of Transportation will then perform at least one survey of the parcel, and depending on the estimated value of the land, the Department may do multiple surveys. These surveys are the most time-consuming aspect of the process and can take many months to perform and complete the required documentation and legal descriptions.

At the end of the process, once the Department has completed its investigation of the parcel and all its internal paperwork, the land will be fully appraised and assigned a price no less than the fair market value. Upon completion of all paperwork, the Governor must sign off on an order allowing the property to be transferred or auctioned off, which could take weeks or months.

Obstacles to consider if the parcel does not fall under section 5/4-508(c) are the possibility that someone else will

purchase the land at auction, the Department does not deem the land unused, or the Department does not have the ability to transfer the property. This is, however, all determined before the property is surveyed or any of the more lengthy aspects of the investigation occur.

Conclusion

The state of Illinois acquires land through a variety of methods, but from time to time, the reasons that the land is acquired, such as the building of a highway, do not come to fruition and the land that was once acquired becomes unused. Private citizens who either sold their land to the state or were forced to sell their land to the state may find themselves wanting to purchase the land back and return their property back to its original form. Additionally, citizens who purchased property may want to purchase unused property from the state to add additional land to the property they now own. 605 ILCS 5/4-508 exists as a process that allows citizens to acquire this unused land. The process to do so is long and convoluted as the Illinois Department of Transportation undergoes its internal process to review the parcel of land, determine its status, determine its size and value, and ultimately have the legislature sign off on its transfer. If you find yourself in a situation such as this, it is important to have a strong advocate who understands the Illinois Department of Transportation's internal process and can navigate through the steps from start to finish. At Heyl Royster we have the experience and the ability to help you acquire or re-acquire unused land from the state of Illinois swiftly and efficiently.



Wade Blumenshine focuses his practice is civil litigation, with a concentration on commercial litigation and toxic tort defense. Wade earned his B.A. from the University of Illinois and his law degree from Northern Illinois University College of Law, where

he focused his studies on labor and employment, commercial litigation, and economic torts. During law school, he was a participant in the Lenny B. Mandell Moot Court Competition. Prior to law school, Wade worked at Heyl Royster as a summer associate at the firm where he gained valuable experience in a variety of matters and practice areas.



Heyl Royster serves clients in every county in Illinois. We have offices in six major population centers in Illinois - Peoria, Champaign, Chicago, Edwardsville, Rockford, and Springfield - which allows us to appear in any Illinois state or federal court quickly, effectively, and cost-efficiently for our clients. Our offices collaborate with each other and with our clients to achieve client goals. Our statewide practice has earned Heyl Royster a reputation for innovation, excellence, and professionalism and brings our clients a specialized knowledge of the courts and adversaries we face.

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The statutes and other materials presented here are in summary form. To be certain of their applicability and use for specific situations, we recommend an attorney be consulted.

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