HEYL ROYSTER GOVERNMENTAL NEWSLETTER

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June-July 2010

WELCOME LETTER

Friends:

We hope your summer is off to a good start. While we get to enjoy all of the fun activities summertime provides, we want to remind you of something of which you are undoubtedly aware: even though the seasons change, one thing always remains constant – your government-related duties. In this newsletter, you will find an array of topics for you to consider – all are based on potential pitfalls with regard to actions you decide (or do not decide) to take. First and foremost, Andy Keyt continues his series on Tort Immunity and how certain public bodies (and their officers) must be very careful in their actions, as they risk losing the shield of any available immunity, and therefore, not being able to avoid a lawsuit.

You are also well aware that your obligations are not just on a state level. Federal laws exist to protect you and the citizens in the area in which you serve. Jesse Placher, our resident authority on the Americans with Disabilities Act, will provide you with a general overview of what you need to know in this area. There is no question it applies to local governments, and you are charged with knowing how it applies to you. To make it more challenging, the Illinois General Assembly has also created state laws on how you should also interpret those requirements.

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And to all of our highway commissioners and other road officials out there, we would be remiss if we did not touch upon what summertime could specifically mean for you. As our economy rebounds, developers will be looking to you for approval of their proposed road layouts/plats. Tim Bertschy has contributed an article that will caution you to be careful in how you accept plats versus accepting roads into your jurisdiction, as there is a major difference.

As always, we are here to answer your questions and provide our services when needed. We wish you a safe and happy summer, and look forward to seeing you at our next seminar, which we have scheduled for the morning of Tuesday, July 13, 2010, at our offices in Peoria. Invitations will be sent soon.



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. John is the current President of the Illinois Township Attorneys' Association, and serves as the Editor of the ITAA's newsletter, "Talk of the Township."



In This Issue

- Recent Amendments to The Americans With Disabilities Act
- Approval of Plats v. Acceptance of Roadways
- Illinois Tort Immunity Act Part 2

RECENT AMENDMENTS TO THE AMERICANS WITH DISABILITIES ACT

By Jesse A. Placher

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Introduction

This article will be the first of several addressing issues associated with the Americans with Disabilities Act of 1990. Pub. L. 101-336, 104 Stat. 327, (hereinafter referred to as "the ADA"). As most people know, the ADA is a federal law that prohibits discrimination on the basis of a disability. The ADA covers disability issues in employment, State and local services, programs, activities and public accommodations. Significantly, the ADA imposes a number of responsibilities on State, local and municipal governments in effort to provide access to civic life by people with disabilities. To help meet this fundamental goal, the ADA requires State and local governments to make their programs and services accessible to people with disabilities. This requirement includes physical access at governmental facilities, programs and events. It also extends to policy changes that governmental entities must make to ensure that all people with disabilities can take part in, and benefit from, the programs and services of State and local governments. Furthermore, governmental entities must ensure effective communication, including the provision of necessary auxiliary aids and services, so that individuals with disabilities can participate in civic life.

Recent Changes to Illinois Law

Recently, there have been some changes to Illinois law concerning county, township and municipal governmental obligations under the ADA. The Illinois General Assembly passed Senate Bill 133, which was signed into law by Governor Quinn as Public Act 96-650. This law requires certain counties, townships and municipalities to post certain ADA information. The pertinent amendments are as follows:

- (1) the Counties Code is amended by adding Section 5-1131 (55 ILCS 5/5-1131);
- (2) the Township Code is amended by adding Section 85-60 (60 ILCS 1/85-60); and
 - (3) the Illinois Municipal Code is amended by adding

Section 1-1-11 (65 ILCS 5/1-1-11).

As a result of these amendments, certain counties, townships and municipalities must post information on their website concerning:

- (1) the name, office address, and telephone number of the ADA Coordinator, if any, employed by the municipality; and
- (2) the grievance procedures, if any, adopted by the municipality to resolve complaints alleging a violation of the ADA.

If the governmental entity does not maintain a website, then this information must be published in a local newspaper or newsletter at least once every other year.

This new law took effect January 1, 2010. The governmental entities to which it applies were to have posted on a website, or otherwise published, this information on or before March 31, 2010.

Significantly, the ADA imposes a number of responsibilities on State, local and municipal governments in effort to provide access to civic life by people with disabilities.

However, the new law does not affect every public entity. If a public entity does not have 50 or more employees, the law has no application. If a public entity has 50 or more employees, then it is required to designate at least one responsible employee to coordinate ADA compliance. The ADA Coordinator is responsible for coordinating the efforts of the governmental entity to comply with the ADA and investigating any complaints alleging that the entity has violated the ADA.

Similarly, local governments with 50 or more employees are required to adopt and publish procedures for resolving grievances arising under the ADA. Grievances procedures are to set out a system for resolving complaints of disability discrimination in a prompt and fair manner.



As a result, it important for local governments to determine which employees count toward the 50-employee requirement. The number of employees is based on a government-wide total, including employees of each department, division, or other sub-unit. Both part-time and full-time employees count including police department and fire department employees. However, contractors are not counted as employees.

As a result, it important for local governments to determine which employees count toward the 50-employee requirement.

Finally, it is important to note that the new law does not impact previously established ADA notice requirements which apply to all State and local governments, regardless of whether the governmental entity has fewer than 50 employees. For example, all governmental entities are still required to provide notice of certain information regarding the ADA, and how it applies to the programs, services and activities of the entity.

Summary

State and local governments should first determine if they have 50 or greater employees. If so, it is required to implement an ADA Coordinator and grievance procedures. Even if the governmental entity does not have 50 employees or more, it should consider implementing an ADA Coordinator and grievance procedures, if only for efficiency and consistency. There is nothing that prevents a smaller governmental entity from doing so.

In the event that the State or local government has an ADA Coordinator and/or grievance procedures, it must next determine whether it has its own website. If so, it needs to post on the website pertinent information associated with the ADA Coordinator and grievance procedures. If it does not have a website, it is still required to publish this information in a newspaper or newsletter at least once every other year.

Regardless of the size of a unit of government and whether or not it has a website, local officials should

contact an attorney to assist with necessary public notice, and the designation of an ADA Coordinator and grievance procedures, if any. We would be happy to assist with this or any other legal needs.

Jesse A. Placher is an associate in the Peoria office of Heyl Royster. He concentrates his practice in governmental law, commercial litigation, and insurance defense. Jesse represents municipalities, townships, and other governmental agencies. He focuses primarily on liquor hearings and appeals.



APPROVAL OF PLATS V. ACCEPTANCE OF ROADWAYS By Timothy L. Bertschy

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Road district commissioners are frequently faced with the question of whether they should sign off on a subdivision plat before deciding whether they want to accept the roads shown on the plat into the township road system. Does approval of the plat constitute acceptance of the roadway into the road district? The standards for each issue are different and it is important for road district commissioners to understand the distinction.

A subdivider is typically required to file a plat with the county under the Plat Act, 765 ILCS 205. Under Section 3 of the Plat Act, the county cannot approve the plat unless "...the relevant local highway authority with respect to ... roadway access" has approved the plat in writing. Further, the highway authority is to "...review the application based solely upon safety or access control standards and provide written approval or disapproval ... not later than 90 days from the date the application is received." If the approval or disapproval is not received in that time frame, the county is authorized to proceed with approval regardless of the non-action by the highway authority.

Accordingly, when reviewing a plat, the road district commissioner should consider whether the road as shown meets the safety and access control standards of the road

HEYL ROYSTER GOVERNMENTAL NEWSLETTER

district. If so, the plat can be approved. If not, the plat should be disapproved.

Case law indicates that a city's approval of a plat is not an acceptance of the roads or streets on the plat, and while there are no cases specifically involving this question for road districts, it would make sense that the same rule would apply to township road districts. Hence, so long as the plat does not contain language stating that by signing the plat

If the approval or disapproval is not received in that time frame, the county is authorized to proceed with approval regardless of the non-action by the highway authority.

the road district commissioner is accepting the roadways, the signing of a plat is not a general acceptance of the roadways on the plat. It is instead a statement that the plat meets safety or access control standards.

It appears that some county authorities do not recognize this distinction. For that reason, it is sensible to add on the plat a note (in handwriting) that the approval of a plat is not an acceptance of the roads and streets shown on the plat into the road district.

Actual acceptance of the roads and streets can occur in a variety of ways. Acceptance can be indicated informally through performing work on the roadways (although whether work on some roadways constitutes an acceptance of all roadways within a subdivision is a matter which turns upon the facts of each situation). Acceptance can occur through a formal proceeding, such as that specified at 605 ILCS 5/6-303-311.

Road district commissioners should also be alert to 605 ILCS 5/6-325. Under that provision of law, "roads or streets in platted subdivisions and dedicated to public use shall be included in and incorporated into the township.... road system without any hearing or petition...when and if such roads or streets conform to the rules, specifications, regulations regarding location, width, grades, surface and drainage structures prepared by the county superintendent of highways and adopted by the county board. The highway commissioner shall determine when such dedicated roads and streets so conform and shall thereupon make an order to incorporate them into the township...road system." Here, it is essential that the road district commissioner be familiar with the county standards adopted for roadways within platted subdivisions and that the commissioner make a determination as to those standards are satisfied. If they are satisfied, the roads should be accepted. If they are not satisfied, the roads should not be accepted. This statute also shows the necessity for township road commissioners to participate in any county determination of standard for subdivision roads. Without strong standards, road district commissioners can end up with roads which cost time and money in the future.

In sum, road district commissioners should know the different requirements of both approving plats and accepting new township roadways. Any specific questions can be referred to your township attorney.

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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.

ILLINOIS TORT IMMUNITY ACT PART 2 By Andrew J. Keyt

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This is the second of the two part series on the Illinois Tort Immunity Act. In the first part, which appeared in our July-August 2009 newsletter, we discussed the application of the Tort Immunity Act (TIA) to property-related claims. If you need a copy of that edition, please contact Sheri Kyle at skyle@heylroyster.com. This second article will deal with the application of the TIA to emergency services, such as police and fire services. This article will not deal with the application of federal law to the Illinois Tort Immunity Act.

Emergency services, more than any other function of government, enjoy broader protections from lawsuits.

Introduction

Emergency services are frequent targets of lawsuits. These lawsuits result in the dedication of financial resources, as does any suit, but they also cause stress. However, emergency services, more than any other function of government, enjoy broader protections from lawsuits. This is not to say

that police/fire/rescue services do not get sued, or even found liable, but these entities have broader protections than other forms of governmental functions.

Establishment of Police Department or Fire Department

745 ILCS 10/4-102 provides:

§ 4-102. Neither a local public entity nor a public employee is liable for failure to establish a police department or otherwise provide police protection service or, if police protection service is provided, for failure to provide adequate police protection or service, failure to prevent the commission of crimes, failure to detect or solve crimes, and failure to identify or apprehend criminals. This immunity is not waived by a contract for private security service, but cannot be transferred to any non-public entity or employee.

745 ILCS 10/5-101 provides:

§ 5-101. Neither a local public entity nor a public employee is liable for failure to establish a fire department or otherwise to provide fire protection, rescue or other emergency service.

These sections provide immunity for a large portion of what could otherwise result in a pool of potential tort claims. The purpose behind these immunity provisions is to encourage the establishment of police and fire departments without the local governmental entity fearing constant tort claims arising from the provision of those services. The main premise of these sections is that a municipality cannot be liable for not establishing a police department (under 4-102) or a fire department (under 5-101).

One of the main contentions in the interpretation of section 4-102 is what the General Assembly meant by

HEYL ROYSTER GOVERNMENTAL NEWSLETTER

"police protection." Let's take a look at an example of the application of this section.

In McLellan v. City of Chicago Heights, 61 F.3d 577 (7th Cir. 1995), the City of Chicago Heights held its annual Fourth of July celebration on the local high school field. Among those providing the seating scheme were the fire chief and a city administrator. In addition, uniformed fireman set up barricades some distance away from the fireworks. An errant firework exploded and injured several spectators who brought suit. The city moved for summary judgment based on § 4-102, and 5-102. The trial court granted summary judgment (affirmed by the appellate court) on the basis that the "police services" immunity applies to those who provide the service, so long as they are a local governmental employee, such as a fireman. Even if this section had not applied, the court found that section 5-102 (a similar provision for fire services) would have also protected the firemen. (This case was very similar to Dockery v. Village of Steeleville, 200 Ill. App. 3d 926, 558 N.E. 2d 449 (5th Dist. 1990)).

However, the provision of these immunities is not without limit. Depending on the circumstances, there may not be immunity for willful and wanton failure to provide medical care in some limited circumstances. See *Regalado v. City of Chicago*, 40 F.Supp.2d 1009 (N.D. Ill. 1999)

Detention Facilities

745 ILCS 10/4-103 provides:

§ 4-103. Neither a local public entity nor a public employee is liable for failure to provide a jail, detention or correctional facility, or if such facility is provided, for failure to provide sufficient equipment, personnel, supervision or facilities therein. Nothing in this Section requires the periodic inspection of prisoners.

As you can see, this section provides similar immunities as those provided for police services. For example, 4-103 provided protection against negligence claims against a jail

suicide case allegedly resulting from a failure to check on a prisoner on a regular basis. *Fraley v. City of Elgin*, 251 Ill. App. 3d 72, 621 N.E. 2d 276 (2d Dist. 1993).

Most claims alleging negligence in the jail environment tend to revolve around the alleged failure to provide medical treatment, or adequate medical treatment.

Most claims alleging negligence in the jail environment tend to revolve around the alleged failure to provide medical treatment, or adequate medical treatment. In this context, the immunity provided by 745 ILCS 10/4-105 provides:

§ 4-105. Neither a local public entity nor a public employee is liable for injury proximately caused by the failure of the employee to furnish or obtain medical care for a prisoner in his custody; but this Section shall not apply where the employee, acting within the scope of his employment, knows from his observation of conditions that the prisoner is in need of immediate medical care and, through willful and wanton conduct, fails to take reasonable action to summon medical care. Nothing in this Section requires the periodic inspection of prisoners.

Enforcement of the Law or Provision of Fire Services

What seems a simple statute providing immunity for governmental employees involved in the enforcement of the law, has resulted in a plethora of cases, largely because interpretations of this statute turn on factual issues. 745 ILCS 10/2-202 provides:

§ 2-202. A public employee is not liable for his act or omission in the execution or enforcement of any



law unless such act or omission constitutes willful and wanton conduct.

If a plaintiff can show that the police officer (or governmental employee engaged in the enforcement of the law) engaged in willful or wanton misconduct, there will be no immunity. Like the sections above, this section provides protection to any governmental employee who is engaged in the "execution or enforcement" of the law. *Grandalski ex rel. Grandalski v. Lyons Tp. High School Dist. 204*, 305 Ill. App. 3d 1, 711 N.E. 2d 372 (1st Dist. 1999) *appeal denied* 185 Ill. 2d 623.

Even the towing or impounding of vehicles may be sufficient "execution or enforcement" to confer immunity. *Byrne v. City of Chicago*, 215 Ill. App. 3d 698, 576 N.E. 2d 19 (1st Dist. 1991) appeal denied 142 Ill.2d 652. However, some activities may not be immune. *Aikens v. Morris*, 145 Ill. 2d 273 (1991) (transportation of an inmate did not constitute execution or enforcement of the law).

As stated above, a similar provision exists for the provision of fire services. *See* 745 ILCS 10/5-102. Unlike the correlating provision for police immunity, however, section 5-102 is a blanket immunity (the immunity is not restricted to claims of negligence and bars claims for willful and wanton misconduct).

How to *Help* Avoid Potential Emergency Services Claims:

- 1. Police officers and firefighters (and other emergency service workers) need to have proper training in writing reports that involve injuries resulting from their own activities.
- 2. Consideration should be given to installing video cameras in vehicles.
- 3. Preserve any documents or recordings that relate to an injury.

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. In this capacity, Andy attends monthly meetings and board meetings, and provides counsel on a variety of legal issues.

SAVE THE DATE! UPCOMING GOVERNMENTAL SEMINAR

Morning of Tuesday, July 13, 2010

Heyl, Royster, Voelker & Allen 124 SW Adams Street, Suite 600, Peoria, IL 61602

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