AN ILLINOIS LAW FIRM

HEYL ROYSTER GOVERNMENTAL NEWSLETTER

June 2011

WELCOME LETTER

Dear Friends:

I hope that by the time you read this the rain waters have subsided and we are enjoying the start of true summer.

This newsletter can be categorized as a "follow up" edition on various topics we have discussed at our past seminars as we feel there are some recent developments and further thoughts we should share with you. Andy Keyt of Peoria reviews the latest developments in cemetery law, while Keith Fruehling of Urbana provides an overview on collective bargaining. Tim Bertschy of Peoria addresses what would be sensible amendments to the Prevailing Wage Act, and I have compiled "legislative update," discussing bills on various topics involving local government which still are or already have been considered by the 97th Illinois General Assembly.

We hope you enjoy our newsletter, and please do not hesitate to contact us with any questions.

Best,
John M. Redlingshafer

ELECTRONIC NEWSLETTERS

In keeping with our firm's Green Initiative – *Practicing Green* – we are attempting to support the green effort. As a part of this endeavor, we are making our newsletter available electronically. If you would like to receive our newsletter via e-mail, please send your request to newsletters@heylroyster.com. Have a safe and enjoyable summer!

Legislative Update from Senator Darin LaHood:

CURRENT LEGAL ISSUES FOR ROAD AND STREET AUTHORITIES

Topics include:

• When to Sign off on a Plat

• Annexation Agreements & Road Jurisdiction

• What Power Do You Have Respecting Equipment and Utilities in Your Rights of Way

July 12, 2011
9:00 a.m. – 11:00 a.m.

1501 W. Garfield Ave.
Bartonville, IL 61607

IN THIS ISSUE

LEGISLATIVE UPDATE

By John M. Redlingshafer
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The Illinois General Assembly has been very active during the first part of 2011. Currently, the Illinois Senate has introduced roughly 2,500 bills, while the Illinois House is pushing 4,000 new pieces of legislation of its own. Heyl Royster has actively tracked many bills that could influence units of local government, and provides this look at what is pending. The information used in this article is available at the website of the General Assembly at www.ilga.gov, and it is important to note that since this article went to press, the status of these bills has likely changed. When a vote is listed in the "status" area for a bill, the first number represents the votes in favor, the second number is votes against, and the third is the number of abstentions.

Illinois Senate

Senate Bill 173 sponsored by Sen. Link (D – Lincolnshire) calls for the creation of the "Local Government Consolidation Commission" to recommend a list of units of local government to be abolished or consolidated no later than April 1, 2012. The General Assembly would only have the authority to approve/disapprove of the list as a whole, and could not alter specific types of units of local of government or particular named units on the list. ***Status: Senate Defeated Bill 014-030-002… BUT SEE HOUSE BILL 268.***

Senate Bill 958 sponsored by Sen. Noland (D – Elgin) calls for the elimination of all township road districts with fewer than 32 miles of road within their township. ***Status: Bill Held in Senate Local Government Committee and not scheduled for further hearing/reading at this time.***

Illinois House

House Bill 242 sponsored by Rep. Leitch (R – Peoria) and now Sen. Koehler (D – Peoria) calls for a 60 day limitation for county governments to proceed with demolition actions against the owners of dilapidated properties or otherwise allow townships to proceed under its Township Code powers.* ***Status: Passed House 113-000-000, and currently up for 2nd reading in full Senate.***

House Bill 268 sponsored by various Representatives and now various Senators calls for the creation of the "Local Government Consolidation Commission Act of 2011." This Act will establish a commission of legislative members and local government representatives appointed by the Governor to report to the Governor and General Assembly on consolidating local governments. ***Status: Passed both houses, and awaiting action from Governor Quinn.***

House Bill 1359 sponsored by various Representatives and now Sen. Althoff (R – Crystal Lake) calls for an amendment to the Fire Protection District Act authorizing the fire chief or other officer with approval from the board of trustees to prohibit open burning within the district on an emergency basis with certain limitations. ***Status: Passed House 110-000-001, and passed Senate 057-000-000, but with slight modification to original bill, requiring reconsideration by House.***

House Bill 1404 sponsored by various Representatives and now Sen. Link (D – Lincolnshire) calls for an amendment to the Public Officer Prohibited Activities Act providing no member of a county board, during the term of office for which he/she is elected, may be appointed to, accept, or hold any office unless they first resign from the county board prior to taking the oath to another office. ***Status: Passed House 104-001-000, and currently stalled in Senate committee.***

House Bill 1670 sponsored by Rep. Burke (D – Oak Lawn) and now Sens. Crotty (D – Oak Forest) and Dillard (R – Westmont) calls for Open Meetings Act training for every elected or appointed member of a public body. Status: Passed House 067-048-000, and pending review by Senate Executive Committee after several Senate amendments.

House Bill 3094 sponsored by Rep. Tryon (R – Crystal Lake) calls for amending the Prevailing Wage Act to state the Act does not apply to projects with a total cost of $20,000.00 or less. ***Status: Bill defeated in House Labor Committee 007-009-000.***

House Bill 3152 sponsored by various Representatives and now Sen. Haine (D – Alton) calls for adding language to the Township Code allowing the township board and the highway commissioner to dispose of per-

sonal property by a vote of that board or at the request of the highway commissioner at anytime during the year, without the need of a special meeting of the electors. ***Status: Passed both houses, and awaiting action from Governor Quinn.***

House Bill 3237 sponsored by various Representatives and Sens. Koehler (D – Peoria), Haine (D – Alton), and Forby (D – Benton) calls for various amendments to the Prevailing Wage Act, but most notably, violations of various provisions of the Act become a Class 4 Felony. ***Status: Passed House 067-049-000, passed Senate Labor Committee 009-000-000, and is awaiting consideration by full Senate.***

We will continue to monitor these bills and others. Please let us know if there are any others you would like us to review and monitor.

* A special "thank you" to Limestone and Medina Townships is certainly appropriate for their longstanding efforts in getting this legislation introduced to help with the growing dilapidated property situation faced by many townships.

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."

Illinois Cemetery Oversight Act

By Andrew J. Keyt
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The Illinois Cemetery Oversight Act was passed last year in the wake of shocking mismanagement (to put it mildly) at the Burr Oak Cemetery near Chicago. The legislature passed the Illinois Cemetery Oversight Act to help prevent such atrocities from occurring in the future. And now the Illinois legislature is back at work, this time to remove many of the provisions just passed in 2010. Senate Bill 1853 (SB 1853) recently passed the Illinois Senate and is currently in the House's Executive Committee, and may soon be voted on by the full Illinois House.

The key proposed changes would eliminate most cemeteries from oversight. The goal of SB 1853 appears to be to eliminate provisions on smaller cemeteries, many of which are staffed by volunteers and all of which face budgetary issues which may make it difficult to comply with all of the original provisions of the Cemetery Oversight Act. The proposal would eliminate licensing and education requirements, and eliminate the real-time database updates of burials. But the key provision of the proposed changes is the definition of who falls under the auspices of the Act. Currently, the only exempt entities are private cemeteries of less than two acres (that does not accept care funds), family burying grounds, and cemeteries that have not provided any burials within the last 10 years (that does not accept care funds). The proposed amendments will exempt any religious cemetery, private cemetery under 3 acres, fraternal cemetery, cemeteries organized under the Cemetery Association Act, and municipal cemeteries.

We will keep an eye on these pending changes, especially if municipal cemeteries will be exempted from the provisions of the Act. We believe Governor Quinn opposes the bill (at least according to various news reports) as do a number of groups that undertook the task of writing the original Cemetery Oversight Act. We suspect that the amendments will be vetoed in their current form, but that a compromise between SB 1853 and something more akin the current act will could pass.

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.

PUBLIC UNIONS AND THE COLLECTIVE BARGAINING PROCESS

By Keith E. Fruehling
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The concept of allowing public employees to join unions and bargain collectively has been around for quite some time. President Franklin D. Roosevelt reflected on the inclination of public employees to do just that to better their stations in life in an August 13, 1937 letter to Luther C. Steward, then President of the National Federation of Federal Employees:

> The desire of Government employees for fair and adequate pay, reasonable hours of work, safe and suitable working conditions, development of opportunities for advancement, facilities for fair and impartial consideration and review of grievances, and other objectives of a proper employee relations policy, is basically no different from that of employees in private industry. Organization on their part to present their views on such matters is both natural and logical, but meticulous attention should be paid to the special relationships and obligations of public servants to the public itself and to the Government.
>
> All Government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations when applied to public personnel management. The very nature and purposes of Government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with Government employee organizations. The employer is the whole people, who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employees alike are governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rules in personnel matters.
>
> Particularly, I want to emphasize my conviction that militant tactics have no place in the functions of any organization of Government employees. Upon employees in the Federal service rests the obligation to serve the whole people, whose interests and welfare require orderliness and continuity in the conduct of Government activities. This obligation is paramount. Since their own services have to do with the functioning of the Government, a strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of Government until their demands are satisfied. Such action, looking toward the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable. It is, therefore, with a feeling of gratification that I have noted in the constitution of the National Federation of Federal Employees the provision that "under no circumstances shall this Federation engage in or support strikes against the United States Government.

Notwithstanding FDR's belief system, the concept of public employees coming together to collectively bargain, and when necessary and appropriate, strike to force additional discussions is alive and well. In the State of Illinois, and many other states, it is the official policy of the state to allow such efforts by public sector labor. Specifically, it is the public policy of the State of Illinois to grant public employees full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating wages, hours and other conditions of employment or other mutual aid or protection.

In each state, the public sector collective bargaining statutes are administered by a state board or agency, which has jurisdiction over employers and employees in the public sector, including education. These laws further provide for the respective boards to create rules for establishing the authenticity of signatures on the cards and for procedures for issuing notice to affected employees.

Illinois Public Labor Relations Act governs the rights of public sector employees to associate and defines how that is to occur in Illinois. Specifically,

the Act's purpose is to guarantee public employees the right to form or join unions and negotiate collective bargaining agreements. The Act exempts certain public employees from the right to associate. The Act does not consider the following people "employees" for purposes of the benefits that the Acts establishes for all other "employees": managerial or supervisory employees, elected officials, executive heads of departments and board members, part-time and volunteer police officers, firefighters, and paramedics. The Act also does not apply to governmental units employing fewer than five employees.

The Illinois Public Labor Relations Act is administered by the Illinois Labor Relations Board. This means that the Illinois Labor Relations Board is the official governmental entity responsible for oversight of the labor activity and the application and enforcement of the terms of the Act. With respect to the right to associate, public sector employees have the right to form or join a union. Under the law, employers cannot interfere with or restrain employees from forming or joining a union.

In 2003, Illinois adopted a process that provides for a union to file a "majority interest petition," accompanied by its evidence of majority status in order to designate a "representative without an election." The showing of interest in support of a majority interest petition may consist of authorization cards, petitions, or any other evidence that demonstrates that a majority of the employees wish to be represented by the union for the purposes of collective bargaining. The employees may also pursue union representation by showing that 50% or greater of the employees have signed cards indicating a desire for the union to be their bargaining unit. It is always acceptable for the employer to elect to allow for voluntary recognition.

Once the union is recognized, it becomes the exclusive bargaining unit for the group of employees. A bargaining unit in labor relations is a group of employees with a clear and identifiable community of interests who are (under federal law) represented by a single labor union in collective bargaining and other dealings with management. It is this bargaining unit that pursues the collective bargaining process.

Collective bargaining is a process of negotiations between employers and the representatives of a unit of employees aimed at reaching agreements which regulate working conditions. Collective agreements usually set out wage scales, working hours, training, health and safety, overtime, grievance mechanisms, and rights to participate in workplace or public sector affairs.

The employer/governmental entity has very specific responsibilities when engaged in the collective bargaining process. It must meet and confer with the union representative(s) at reasonable times. It must bargain on wages, hours, and conditions. It must bargain in good faith. Finally, it must not terminate or modify the agreement without giving the other side 60 days notice and offering to meet and confer regarding a new contract.

On the other hand, the employer has areas that the union has no right to influence via the collective bargaining process. The employer has the right to define the functions of its employees, its standards of service, its overall budget, the organizational structure and selection of new employees, and the mode of direction of its employees. Employers should give consideration to the implication of multiple year collective bargaining agreements. Among other issues, budget concerns could significantly affect the employer's ability to satisfy the contractual requirements of the collective bargaining agreement (CBA).

From time to time, the collective bargaining process will break down. When the process fails in this context it is called an "impasse." A bargaining impasse occurs when the two sides negotiating an agreement are unable to reach an agreement and become deadlocked. An impasse is almost invariably mutually harmful, either

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as a result of direct action which may be taken such as a strike in employment negotiations or sanctions/military action in international relations, or simply due to the resulting delay in negotiating a mutually beneficial agreement.

If negotiations fail to lead to a completed agreement, then the parties can pursue either a non-binding (mediation) or binding arbitration process. If the parties choose the non-binding arbitration process and it fails, then the union members can strike. Only non-safety public sector employees may strike. If the employees that are capable of striking do not do so, the public entity can implement the last best offer. In certain circumstances, either the employer or union can seek a temporary restraining order if there is a specific clear and present danger if some action is allowed to go into effect.

Under law, all CBAs shall contain a formal grievance procedure. Under normal circumstances, if the employee and the employer cannot agree on a resolution, most CBAs provide for final and binding arbitration unless mutually agreed otherwise.

Historically, employers have been known to engage in behavior meant to undermine the effectiveness of the collective bargaining unit. Over time, these practices became known as "Unfair Labor Practices." There are a number of different unfair practices that can occur. Here are a few examples: refusing to put in writing or sign a collective bargaining agreement; entering into agreements with individual employees instead of with the employee union representative; threatening disciplinary action if an employee files a grievance; discriminating against union employees in favor of nonunion employees; coercing public employees participating in collective activities; attempting to cause an employer to discriminate against an employee; and/or refusing to bargain in good faith.

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The employer, union or an employee can all file an unfair labor practice charge with the Board within 6 months of the occurrence. If the Board decides that an unfair labor practice has in fact been committed, the Board will try to place the parties in the same position they were before the occurrence. Some examples of the remedies that might be imposed are as follows: reinstatement of employees with back pay; rescission of a work rule or policy; and/or posting a notice to employees that the Act was violated and the employer will cease and desist from engaging in unfair labor practice.

Collective bargaining also provides benefits for the employer. A multiyear contract allows for budget predictability and stability. It also provides labor peace and restricts the workforce from strikes and work interruptions during the term of the contract. Management can resolve issues at the lowest possible level through the grievance procedure, rather than facing a lawsuit from an issue that management might not have even known existed. Similarly, management can be more informed about employee morale and issues in the workplace with a union. This is because employees are more likely to report issues to the union than they are to the employer. Likewise, the union is more likely to inform the employer about -- and seek resolution for -- issues than employees, who could be reluctant because of concern for their careers.

In other states, the public employee union will remain a viable force for labor into the future. To the extent that it does, the collective bargaining process provides multiple opportunities for the public employer and union members to benefit. While there are potential pitfalls and the possibility of a breakdown in the negotiation process, generally speaking, the process allows for efficient issue resolution and certainty for the future of the relationship between employers and employees in the public sector.

Keith E. Fruehling is a partner in the firm's Urbana office. He served as a Senior Assistant State's Attorney with Champaign County prior to joining Heyl Royster. He concentrates his practice in civil litigation, including the defense of both product and premises liability asbestos claims, employment law, civil rights, medical malpractice and products liability litigation. He has represented universities, state and local governmental units, professional, and local businesses.

Sensible Modifications to the Prevailing Wage Act

By Timothy L. Bertschy
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Over the past few years, we have had an opportunity to give talks to many groups concerning the Prevailing Wage Act (820 ILCS 130). When they truly understand the Act, most local governmental officials are alarmed at the breadth of the Act, especially considering the civil and criminal penalties that apply.

We have often been asked how the Act might be amended to make its application more practical to small units of government.

We suggest three changes. First, small jobs should not be subject to the Prevailing Wage Act as the regulations often are more expensive than the contract involved. Moreover, the regulations discourage small companies from contracting with local governments.

Second, the Act should not apply to sole proprietorships or partnerships where wages are not paid. Rather, these are businesses where the owner(s)/worker(s) balance the books at the end of the month and hope they make money. Under the Department of Labor's interpretation of the Act, these businesses must in effect create a wage for their certified payroll, even though no wage is paid.

These first two issues could be addressed by making Section 3 of the Act into two subsections. Subsection (a) would be the existing text. We would then add a subsection (b) which would read:

> (b) This Act does not apply to contracts of less than $5,000 in the aggregate or to contracts where the laborers, workers, and mechanics are partners or part owners of the contracting party and their compensation is not wage-based.

Thus, the Act would eliminate small contracts and also eliminate sole proprietorships and partnerships.

The third change would eliminate the requirement found in Section 4(d) that governmental units advise contracting parties of changes in the prevailing wage which occur during the calendar year. There is no reason for the governmental unit to do that as the information is available equally to the contractor at the Department of Labor website.

As many of the readers of this article know, there is a proposal currently in the General Assembly to make knowing violations of the Act a felony as opposed to a misdemeanor. It goes without saying that that legislation is not in the interest of small units of government, discourages people to run for office and should be defeated.

These changes, truly not major, would bring reason and practicability into the Prevailing Wage Act.

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.

Cell phones, Facebook, and the Internet: Good for Government?

At one of our firm's most-recent seminars, we discussed the pros and cons of employees using technology. Our talk focused on internet-based media, such as Facebook and Twitter. With the explosion of these powerful tools, it is clear that local governments should consider policies that encompass not only the internet, but computers in general (think viruses and personal software use) and cell phones. We have already worked with many clients on devising a "Technology Usage and Social Media Policy" that addresses their needs, and would welcome the chance to do the same with you (or consult with you and your attorney about one). Please contact us for more details.

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