

HEYL ROYSTER

GOVERNMENTAL NEWSLETTER

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February 2012

WELCOME LETTER

Dear Friends:

We want to thank everyone who attended our last seminar. It is always wonderful to see our friends, and that is especially true around the holidays. This newsletter is dedicated to revisiting some of the highlights from that seminar and provides you all with additional resources on the topics discussed that day. Stacy Crabtree provides you with even more considerations on snow removal, tort immunity, and compliance with the Americans with Disabilities Act. Meanwhile, Tim Bertschy and John Redlingshafer share more “New Laws of Note” in 2012.

For those of you who were unable to attend our last few seminars, we are very excited to announce the availability of our firm’s first “Governmental Go-To Guide and Form Book.” The idea behind the Guide is to allow public officials an opportunity to have a quick “go-to” sheet on the requirements of various laws (such as the Prevailing Wage Act, Open Meetings Act, and Freedom of Information Act). However, it also provides numerous forms for you to use. For example, the Guide contains various templates for annual posting requirements and ordinances.

If you would like more information on our Guide, please contact Sheri Kyle at skyle@heyloyroyster.com or (309) 676-0400. We are in the process of making the Guide available in both paper and electronic formats. Included in the purchase price of \$850.00 will be a one-time visit from Sheri to your office to review any questions you have about the Guide and assist you with all of the current posting requirements.



Best,
John M. Redlingshafer

SNOW REMOVAL, TORT IMMUNITY AND THE ADA

By Stacy E. Crabtree

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So far this season, Illinois’ winter has been relatively mild. But, it’s only a matter of time before the inevitable snow and ice storms begin (if they haven’t already). This article will address your liability exposure as a local public entity for injuries caused by snow and ice on public property, and your exposure under the Americans with Disabilities Act. Snow and ice removal obligations of the State and state offices are outside the scope of this article.

A local public entity’s immunity from liability today originates from the doctrine of sovereign immunity. Sovereign immunity was based the principle that “the King can do no wrong.” Consequently, public entities had absolute immunity, meaning no matter what the public entity did, it could not be held liable for it. However, in 1959, the Illinois Supreme Court abolished the doctrine of sovereign immunity as it applied to Illinois local units of government in *Molitor*

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v. Kaneland Community Unit District No. 302, 18 Ill. 2d 11 (1959). The Illinois legislature responded with the Local Governmental and Governmental Employees Tort Immunity Act (“TIA”), which was enacted in 1965 and is found at 745 ILCS 10/1-101, et seq.

The purpose of the TIA is to protect local public entities and public employees from some, but not all, liability arising from the operation of government. Specifically, the protection is from tort claims, the most common of which are negligence claims. The term “local public entities” as it is used in TIA includes, but is not limited to, counties, townships, municipalities, municipal corporations, school districts, school boards, park districts, fire protection districts, library systems, and all other local governmental bodies. The term “public employees” as it is used in TIA includes present or former officers, members of a board, commission or committee, agents, volunteers, servants or employees, but does not include independent contractors.

So how are you as a local public entity or public employee protected when it snows? Going back to 1931, Illinois common law has protected a local public entity from liability for injuries caused by natural accumulations of ice and snow on public property. *Graham v. City of Chicago*, 346 Ill. 638, 643-44 (1931). Fortunately, courts realized that it would be unreasonable to expect a public entity to expend the resources and labor necessary to keep the streets and other public ways continuously safe from ice and snow during the winter. Once enacted in 1965, TIA offered the following protection:

Neither a local public entity nor a public employee is liable for an injury caused by the effect of weather conditions as such on the use of streets, highways, alleys, sidewalks or other public ways, or places, or the ways adjoining any of the foregoing, or the signals, signs, markings, traffic or pedestrian control devices, equipment or structures on or near any of the foregoing or the ways adjoining any of the foregoing.

745 ILCS 10/3-105(a). Despite the absence of the phrase “natural accumulations,” courts have interpreted this immunity in TIA to be consistent with the immunity provided at common law, and therefore local public entities still are not liable for natural accumulations of snow and ice.

But, this immunity is not absolute. Local public entities can be held liable for injuries resulting from unnatural accumulations of ice and snow on public property. For example, in *Kittoe v. Metropolitan Sanitary District of Greater Chicago*, 70 Ill. App. 3d 197 (1979), a court held a sanitary district could be held liable for injuries suffered as a result of an auto accident where the sanitary district allowed water to flow from its property onto the street and ice formed.

Furthermore, local public entities can be held liable for injuries where the public entity undertakes snow and ice removal operations and is negligent in the removal. For example, in *Ziencina v. County of Cook*, 188 Ill. 2d 1 (1999), the court held a county could be held liable for injuries resulting from an auto accident where a mound of snow on the corner of a highway created by the county’s snow clearing obscured the view of oncoming traffic.

Keep in mind that TIA only protects you from liability. It doesn’t protect you from being sued. In other words, if an accident does happen and the injured party sues the public entity, the public entity is going to incur legal defense costs up until the time a judge decides, if at all, that the TIA protects that public entity from liability.

It is also important to know that TIA does not protect local public entities or public employees against workers’ compensation claims, breach of contract claims, or claims brought under rights granted by federal law. An important federal law to look at when discussing snow and ice removal is the Americans with Disabilities Act (“ADA”), which is found at 42 U.S.C. §12101 et seq. The purpose of the ADA is to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” 42 U.S.C. §12101(b)(1). Specifically, ADA prohibits discrimination against the disabled in such areas as employment, state and local govern-

mental services, telecommunications, transportation, and public accommodations. See generally 42 U.S.C. §12101 et seq. Title II of the ADA will be our focus in this article as Title II requires public entities to ensure their programs, services, and activities are accessible to persons with disabilities. 42 U.S.C. §12132. “Public entities” under the ADA includes towns, school districts, water districts, special purpose districts, and other small local governments and applies regardless of the size of the entity. Some of the “activities” covered under ADA are public education, recreation, health care, social services, courts, voting, and town meetings.

So what does the ADA require with regard to access to these activities or other programs and services when it snows? The ADA states that features such as sidewalks, curb ramps, and parking spaces which are required under ADA must be maintained in an operable condition; however, temporary interruptions in accessibility generally do not constitute an ADA violation. 28 C.F.R. §35.133. The key word here is *temporary*. Interruption with a disabled person’s use of a feature required under ADA due to snow and ice that persists beyond a reasonable period of time would likely be considered a violation of the ADA. Unfortunately, there is no bright line as to what is a reasonable period of time for snow and ice to block a disabled person’s access to a public entity’s program. Consequently, the ADA’s requirement with respect to snow removal creates a lot of uncertainty. Additionally, if a public entity provides snow removal services, the services must be provided in a non-discriminatory matter. So, a township cannot decide to shovel snow in the middle of a snow storm and only shovel those areas used by persons without disabilities. The township must also shovel an area creating access for those with disabilities. Keep in mind that the township can choose to not shovel at all and have a temporary obstruction to access so long as that obstruction is not beyond a reasonable period of time.

If a public entity is in violation of the ADA, then the Department of Justice can step in and attempt to resolve the problem. The Department of Justice has

reported what it calls the following successes under the ADA when it is involved:

- A town built a roof over a ramp leading to the town hall to ensure the ramp does not become blocked by snow;
- A city adopted and implemented a snow removal policy which included a process where citizens could notify the city if there is an access issue and then continuously check the status of the snow removal request; and
- A town agreed to require independent contractors who plow snow to clear accessible parking spaces.

A suit can also be filed by the Department of Justice or by the disabled individual against the public entity for the ADA violation.

Remember, TIA does not protect you from violations of rights created under any federal law, and therefore you are not immune from damages you are ordered to pay or modifications you become responsible for as a result of a violation of the ADA.

In conclusion, it is important to be proactive and take steps to reduce your liability exposure even though it is impossible to completely insulate yourself from liability. Here are some things a local public entity can do to minimize liability exposure related to snow and ice removal:

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@heyloyster.com.

1. Draft and implement a snow removal policy that includes clearing curb ramps at street crossings, handicap accessible parking spaces, parking space aisles, handicap accessible routes to accessible entrances, and the handicap accessible entrances themselves. If you already have a snow removal policy, make sure it addresses these areas.

2. Remove any accumulation of snow and ice promptly.

3. Be conscientious as to snow and ice accumulations caused by you or your independent contractor's actions.

Stacy E. Crabtree is an associate with Heyl Royster. She concentrates her practice on governmental affairs as well as tort litigation and representation of corporate and individual clients in the areas of commercial and contract law.



RECENT STATUTORY CHANGES OF NOTE

By **Timothy L. Bertschy**
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This past year, the Illinois legislature enacted certain changes in laws that have direct impact upon our township clients. Set forth below are summaries of some of the more important changes in law.

Public Act 97-337

This Public Act made fundamental changes to the statute governing the purchase and sale of township and road district property. 60 ILCS 1/30-50 states that the electors "may make" all orders for the purchase, sale, conveyance, regulation or use of the township's corporate property (including the direct sale or lease of single township road district property), including certain wireless tower leases.

For many years, it was believed that this statute required that all orders for purchase and sale of corpo-

rate property be approved by the electors. A recent trial court decision suggested, however, that the electors' power is only permissible, that is to say, the electors have the right to make all orders for purchase, sale, etc, but were not required to do so, and the Township Board could otherwise take such action.

Under this Public Act, the township or township road district may dispose of (sell or otherwise convey) personal property by a vote of the township board or a request of the township highway commissioner. Although the phrase "request of the township highway commissioner" is somewhat ambiguous, it presumably allows the township highway commissioner to act within his/her discretion in making sale decisions.

However, the statute was not modified in its requirement that the electors adopt a resolution stating the intent to lease or sell real property, implying that electors retain all leasing and sale powers. Further, the powers of the electors, township board, and road district commissioner were not clarified with respect to the purchase of real or personal property.

Public Act 97-316

This Public Act creates the Illinois Local Government Consolidation Commission. This is a commission of 17 members - three members of the Senate appointed by the President of the Senate, three members of the Senate appointed by the Senate Minority Leader, three members of the House of Representatives appointed by the Speaker of the House, three members of the House of Representatives appointed by the House Minority Leader and five to be citizens of the State appointed by the Governor. Of the five appointed by the Governor, one is to be selected from recommendations provided by an association representing counties, one from recommendations provided by an association representing municipalities, one from recommendations provided by an associations representing townships, one from recommendations provided by an association representing park districts, and one who serves as an elected officer of a local governmental entity in Illinois other than a county, municipality, township, or park district.

The “Whereas” clauses of the statute express the view that there have been rapid changes in the population in Illinois that have strained the ability of Illinois local governments to adequately furnish necessary services, that Illinois local governments were conceived to serve a rural society and in urban areas they are not sufficiently flexible to address present day needs, and that inadequacies in Illinois local governments result in the creation of numerous functional local governments all competing for financial and jurisdictional support in the same area.

The Commission is charged with surveying the entire structure of local governments and their inter-relationship to each other and with formulating specific recommendations to permit effective management of local affairs, to encourage local policy decision-making, to reduce the multiplicity of local governments, to eliminate overlapping and duplicating of unnecessary powers, to increase efficiency and economy in local governments, and to allow optional forms of local governments (emphasis added).

Perhaps not surprisingly, the Commission is already behind on this work. Its report was to be completed by December 31, 2012. It is doubtful this will date will be met.

Perhaps this exercise in law-making better demonstrates the inefficiency of state government.

Public Act 97-295

This Public Act modifies 60 ILCS 1/60-5 with respect to filling vacancies in township office. It would appear that this statute was designed to address a specific situation, but it has broader application. It identifies that a vacancy in township office occurs where an officer has been convicted in any court of the State of Illinois or of the United States for an infamous crime. It specifically clarifies that a conviction for an offense that disqualifies an officer from holding that office occurs on the date of (i) the entry of a plea of guilty in court; (ii) the return of a guilty verdict; or (iii) in the case of a trial by the court, the entry of a finding of guilt. No provision is made should the convicted party

make an appeal, nor does the statute address how the vacancy is to be handled if the appeal is successful.

Public Act 97-611

This Public Act creates the statutory authority to permit a road district to be abolished, but only in Cook County. It also addresses the situation where a township assumes the rights, powers, duties, assets, property, liabilities, obligations, and responsibilities of a road district which is so abolished. Wisely, the statute recognizes that the taxing power of the township will need to increase equivalent to the taxing rate of the road district which was abolished and avoid certain restrictions which would apply in the absence of such legislation, such as a statutory limit upon a township to tax for general purposes.

Public Act 97-146

This Public Act makes changes in a variety of statutes addressing publication requirements. Perhaps most significantly, it limits the maximum rate to be charged for public notices. It also establishes requirements for notices of property assessments and how those assessments can be appealed, in addition to making other changes in public notice requirements.

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.



FURTHER NEW LAWS OF NOTE FOR 2012

By **John M. Redlingshafer**
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For those you who were able to attend our holiday seminar on December 8,, you will recall our discussion on various new laws of interest taking effect in 2011 and in 2012. In addition to those mentioned at the seminar (and feel free to contact me if you were unable to join us and want more information), please take note of the following, which is certainly not an all-inclusive list of various new laws of interest:

Public Act 97-0016

Amends the Illinois Vehicle Code (at 625 ILCS 5/12-603.1) to require every passenger (no matter the age or position in vehicle) of a motor vehicle to wear “fastened seat safety belt” with very limited exceptions.

Public Act 97-0028

Amends the Law Enforcement Disposition of Property Act (at 765 ILCS 1030/3) to authorize the donation of property worth less than \$100.00 to a registered charitable organization upon approval of the governing body of which the law enforcement agency is a part.

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**CHECK OUT OUR “RESOURCES”
SECTION FOR PREVIOUS ISSUES.**

Public Act 97-0039

Amends the Illinois Vehicle Code (at 625 ILCS 5/12-215) to authorize the lighting of “blue oscillating, rotating or flashing lights” on vehicles “when parked or stationary at the scene of a fire, rescue call, ambulance call, or motor vehicle accident.”

Public Act 97-0109

Adds new section to the Illinois Vehicle Code (at 625 ILCS 5/11-208.7) to authorize an administrative fee and procedure for municipalities in impounding vehicles for specified violations.

Public Act 97-0115

Adds new section to the Illinois Municipal Code (at 65 ILCS 5/11-5-10) to authorize a municipality to pass an ordinance regulating sound devices.

Public Act 97-0291

Adds to the Illinois Vehicle Code (at 625 ILCS 5/11-214 and 5/11-215) to require, among other things, reporting obligations of local governments on their preferred truck routes that are not Class II or Class III truck routes and their designated truck route networks.

Public Act 97-0340

Amends the Illinois School Code (at 105 ILCS 5/10-22.6) to authorize suspensions and/or expulsions in those situations where a student has made “an explicit threat” on the internet against a school employee, student, or other school personnel.

Public Act 97-0373

Amends the Illinois Highway Code (at 605 ILCS 5/9-113.02) to authorize a unit of local government to seek recovery for damage caused to local government-owned roadway property.

Public Act 97-0417

Amends and adds to the Illinois Township Code (at 60 ILCS 1/30-117 and 60 ILCS 1/210-7) and amends the Illinois Highway Code (at 605 ILCS 5/6-201.21) to authorize a new procedure for the use of town and/or road funds for the “collection, transport, and disposal of brush and leaves within the unincorporated areas of the township without referendum approval.”

Public Act 97-0466

Amends and adds to the Illinois Vehicle Code (at 625 ILCS 5/6-106.1 and 625 ILCS 5/6-106.1c) regarding stricter testing standards and penalties for school bus drivers.

Public Act 97-0488

Amends the Illinois Fire Protection District Act (at 70 ILCS 705/8.20) by adding a new subsection (d), to authorize a fire chief or other designated officer to prohibit open burning within the district “on an emergency basis” in limited circumstances after receiving authorization from the board of trustees.

Public Act 97-0627

Amends the Illinois Vehicle Code (at 625 ILCS 5/11-208.6 and 5/11-306) to authorize motorcycles and bicycles to proceed into traffic in limited circumstances even if traffic signals remain red.

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 immediate past President of the Illinois Township Attorneys’ Association.



**Heyl Royster
Governmental Go-To Guide
Form Book**

Our Go-To Guide allows any public official to have a quick resource for important questions they may face in their day-to-day governance. For example,

- How do we go into closed session under the Open Meetings Act?
- When should I respond to a Freedom of Information Act request?
- What should a Prevailing Wage Act ordinance say?

Moreover, our Guide also provides you with templates to ensure your compliance with annual posting requirements and ordinances. Available templates include:

- Annual Freedom of Information Act postings;
- Ordinance on Adopting Rules for Public Comments and Electronic Attendance at Meetings; and
- Many, many more.

For more information contact Sheri Kyle at skyle@heyloyster.com or (309) 676-0400.

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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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