AN ILLINOIS LAW FIRM

HEYL ROYSTER GOVERNMENTAL NEWSLETTER

November 2010

WELCOME LETTER

Dear Friends:

It is hard to believe that another year is almost gone. It is November, the time of year when we reflect upon the blessings we have been given in months and years past. We at Heyl Royster are particularly appreciative for the growing number of fine clients which we represent in our governmental practice.

Our firm is 100 years old this year. Our governmental practice has grown in the past 25 years and particularly in the past five years. It has been my good fortune to have been joined by a strong cast of lawyers and our paralegal, Sheri Kyle, in providing a high level of governmental services and educational programs for our clientele.

A little over two years ago, we made a commitment to provide educational seminars on a quarterly basis free of charge to our clients and other interested governmental officials. We committed to publishing a quality newsletter on governmental issues on a quarterly basis. We met those commitments. This is our 9th newsletter. We have held eleven quarterly seminars.

We are particularly pleased that our governmental practice is also growing geographically. This past year our firm's Urbana office began actively collaborating with our Peoria office on newsletters and programs. The end result was the first Urbana educational program on OMA/FOIA issues which was attended by over 30 government officials. We will continue our programs on a quarterly basis in both Peoria and Urbana.

Our next seminar, to take place at our offices in Peoria on December 7, 2010, will address a unique issue – laws that are little known but which can have big consequences. One advantage of practicing in this area for an extended length of time is finding statutes throughout the Illinois Compiled Statutes which apply to our clients but are not well known or well publicized. However, these statutes can have significant consequences – from criminal or civil penalties to bad publicity. It is important to know about these statutes. We will take a look at several of these statutes and advise attendees of what actions can be taken for their governmental unit's protection. This program will also be held in Urbana on January 2, 2011. We look forward to seeing you at one of these conferences.

We do not often get the opportunity to thank our clients for the trust they place in our firm by being our clients. This letter gives me the chance to do so. We look forward to representing your interests in the years to come.

Tim

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

IN THIS ISSUE

LOCAL GOVERNMENT PROMPT PAYMENT ACT

By John M. Redlingshafer
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As you are all well aware, you face many responsibilities as a local governmental official. This newsletter focuses on some of the lesser-known statutes, and it would not be complete without looking at the Local Government Prompt Payment Act (50 ILCS 505/*et seq.*). While we are certain many of you are aware of its requirements, it never hurts to review the necessary actions when it comes to the payment for goods and services (and the penalties associated with failing to do so in a prompt manner).

There is little doubt that if you are reading this newsletter, the Act applies to you. As stated in 50 ILCS 505/2, this Act shall apply to every county, township, municipality, municipal corporation, school district, school board, forest preserve district, park district, fire protection district, sanitary district and all other local governmental units. It shall not apply to the State or any office, officer, department, division, bureau, board, commission, university or similar agency of the State, except as provided in Section 7. Simply put, when presented with a bill after receiving goods or services, it must be approved or disapproved within 30 days after the receipt of such bill or within 30 days after the date on which the goods or services were received, whichever is later. If safety or quality testing is required of the goods before payment is to be made and that testing cannot be done within the 30 days, the bill must be approved or disapproved immediately upon completion of the testing, or within 60 days after receipt of the goods, whichever occurs first. In any event, notice is to be provided in writing and mailed to the vendor or contractor immediately if a bill is disapproved. See Section 3.

Some of you may be curious as to what may need to be "tested" before a bill is (dis)approved. In one example, a city determined that it was necessary to test the resurfacing done by a contractor for a city road before payment, and litigation started because of the time in which the contractor was notified about the city's lack of satisfaction with the project. See *Superior Structures v. City of Sesser*, 277 Ill. App. 3d 653, 660 N.e.2d 1362 (5th Dist. 1996). In that case, the city advised the contractor it was not satisfied with the road resurfacing project 29 days after the testing was completed. The Illinois Appellate Court found that this was not the "immediate notification" under the Act of its disapproval and therefore awarded fees to the contractor.

With this case in mind, the Act goes on to discuss the penalties related to a local government body that fails to provide payment as required. Under Section 4 of the Act, if a local government body approves a bill but does not make payment within the 30 day period required of Section 3, an interest penalty of 1% of any amount approved and unpaid is to be added for each month or fraction thereof after the expiration of the 30 day period. This penalty is to be added until final payment is made. Further, if a local governmental body fails to approve or disapprove a bill within the 30 day period, the penalty is computed from the date 60 days after the receipt of the bill or the date 60 days after the goods or services are received, whichever is later.

However, the General Assembly did provide for those circumstances that may be out of the control of the local body. Under Section 7 of the Act, if funds from which the local body is to make payment for the goods or services are controlled by the state of Illinois, the local official is to certify to the state treasurer, comptroller, and state agency responsible for the funds that an amount is anticipated and needed within 45 days to pay for the goods or services and that it is not currently available to the local body. The state officials are to expedite distribution of the funds to make such payment and any interest penalty incurred by the local government under Sections 3 or 4 because of the fail-

ure of the funds to be distributed shall be reimbursed by the state to the local body in addition to the funds otherwise to be distributed from the state.

If there are not state funds at issue but the local government body needs more time to pay, the body and contractor/vendor can agree to a greater time period for payment. This agreement can supersede the specified time frames in other areas of the Act.

If a major project is at issue which involves contractors, subcontractors and material suppliers, Section 9 of the Act could also come into play. That section of the Act advises a contractor on how to distribute fees and payment to subcontractors and material suppliers. If a contractor fails to make payment to subcontractors or material suppliers without reasonable cause within 15 days after receipt of payment under a public contract, the contractor faces monetary penalties. If a major project is at issue, we strongly recommend you discuss the Act with the contractor and remind them of their obligations under the Act as well as to the subcontractors and material suppliers.

We know that you all visit your outstanding debts for goods and services owed at every monthly meeting. If you are concerned that your payments may be late because of the calendar (perhaps your Board skips a monthly meeting due to lack of quorum or otherwise), it would be beneficial to hold a meeting before the Act's penalty time frames are at issue.

If you have any questions about this Act and its applicability to a particular issue, do not hesitate to contact us.

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."

Record Retention Pursuant to the Local Records Act

By Jesse A. Placher
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The Local Records Act, 50 ILCS 205 *et seq*., concerns itself with the recordkeeping activities of units of local government in Illinois. Among other things, the Act regulates the preservation and disposal of public records. In doing so, the Act serves as a mechanism for the retention of records that are necessary for the proper functioning of government, the destruction of obsolete records, and the preservation of records that have long-term value but are not necessary for day-to-day governmental operations. The Act applies to "all parts, boards, departments, bureaus and commissions of any county, municipal corporation or political subdivision." 50 ILCS 205/3.

According to the Act, a public record includes any "book, paper, map, photograph, digitized electronic material, or other official documentary material, regardless of physical form or characteristics, made, produced, executed or received by any agency or officer pursuant to law or in connection with the transaction of public business and preserved or appropriate for preservation by such agency or officer, or any successor thereof, as evidence of the organization, function, policies, decisions, procedures, or other activities thereof, or because of the informational data contained therein." 50 ILCS 205/3. Additionally, audit reports, management letters, and other documents associated with the receipt and use of public funds by local governments are considered public records. An item can be considered a "public record" regardless of the media in which the data is maintained (i.e., fax, email, hard drive, DVD or CD).

The Act requires that public records be kept at the particular agency's place of business. In doing so, units of local government may reproduce existing public

records in a digitized electronic format with the intent of disposing of the original records. This practice is only allowable if the electronic records are reproduced on a "durable medium that accurately and legibly reproduces the original record in all details," and "that does not permit additions, deletions, or changes to the original document images." 50 ILCS 205/7. Such digital records must be "retained in a trustworthy manner so that the records, and the information contained in the records, are accessible and usable for subsequent reference at all times while the information must be retained." 50 ILCS 205/7.

Although the Act does not set forth any stipulations as to how long records are to be maintained, retention periods can range from 7 days to permanent retention. Retention requirements are generally based on the fiscal, historical, administrative and legal value of each record. There are thousands of categories of records, and if a record falls into two categories, the longer retention period takes precedent. After the minimum retention period has been met, an entity has the power to decide how much longer to keep the records.

Each individual agency is responsible, with assistance from the Secretary of State's office, for preparing a records inventory and retention schedule. The agency must fill out an application for authority to dispose of local records at least sixty (60) days prior to disposal. Assuming the application is granted, the Local Records Commission will issue a disposal certificate, which allows the agency to destroy the records. Once the retention period is up, provided there is no pending litigation involving the records, the records may be destroyed.

It is noteworthy that all applications, including add-ons and amendments to same, and disposal certificates are considered permanent records. Such records cannot be destroyed.

If a public body destroys a record before the retention period is up, or otherwise fails to comply with the aforementioned record retention laws, it is considered a Class 4 felony. Consequently, we recommend that any unit of local government consult an attorney when preparing its records inventory, retention schedule, or application to dispose of local records.

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Equipment of a Public Entity or Private Company on Your Right-of-Way – Is the Road District's Prior Consent Required?

By Timothy L. Bertschy
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Can a township road district require a private company or public entity to obtain the road district's consent prior to locating or constructing equipment or appurtenances upon a public right-of-way?

This answer is found in several statutes. Most prominent is 605 ILCS 5/9-113, a portion of the Illinois Highway Code. This is a lengthy statute but it sets forth substantial powers for state, county and local (including township road district) highway authorities.

The statute recites in part that "No ditches, drains, track, rails, poles, wires, pipe line or other equipment of any public utility company, municipal corporation or other public or private corporation, association or person shall be located, placed or constructed upon, under or along any highway, or upon any township or district road, without first obtaining the written consent of the appropriate highway authority as herein after provided for in this Section." Significantly, the statute makes clear that this applies to any public or private corporation, association or person, as well as a public utility.

While the statute goes on at length about various powers of state and county authorities, certain provisions apply to township road districts. Subsection (e) states that any entity "applying for consent shall submit such information in such form and detail to the appropriate highway authority as to allow the authority to evaluate the entity's application." Subsection (h) then observes, with some exceptions for public utilities, that "consent to so use a highway may be granted subject to such terms and conditions not inconsistent with this Code as the highway authority deems for the best interest of the public." In short, the township road district can require a prior application which explains the use to be made of the highway and then limit the consent and use with reasonable terms and conditions. (The term "highway" applies not only to the hard surface of the road, but to the entire right-of-way. See 605 ILCS 5/2-202.)

The terms of the statute apply not only to construction of "ditches, drains, tracks, rails, poles, wires, pipe line, or other equipment," but also to the location and placement of such items. A reasonable interpretation of that statute would require an entity which currently maintains equipment on, under or along a right-of-way to go through a permitting process.

Can the township road district charge a fee? This question is not answered by the statute's explicit terms. Statutory language does allow a state highway authority to recoup its reasonable expenses in evaluating the entity's application. This might suggest that it is prohibited to non-state highway authorities. However, while the question remains unanswered, we believe a reasonable interpretation of the statute would allow the imposition of a reasonable fee for the road district's review procedure.

Does the statute allow regulation of wires or other equipment which is "over" the right-of-way? Note that the statute by its terms pertains explicitly to equipment "upon, under or along any highway, or upon any township or district road . . . " For two reasons, we conclude that equipment which is "over" a highway or road is also included within the statute. First, typically equipment which is above a right-of-way is connected by a pole or other fixture to the right-of-way from place to place. Second, common sense would lead one to conclude that the intent of the statute is to allow a road commissioner to protect his rights of way and thus the term "along" should be given an interpretation which includes "over" so as to meet the intent of the statute.

Another question is whether the road district can require equipment to be removed, relocated or modified by the owner at the owner's expense when necessary. Again, the statute does not explicitly answer this question. The statute does provide this authority explicitly to the state or county highway authority, but not explicitly to the township highway authority. Again, we believe a reasonable interpretation of the statute would allow the road district the power to require removal, relocation or modification because this seems implied by the terms and conditions clause of the statute. However, language to this effect should be included within the permitting form.

An interesting case which supports the foregoing interpretation is *Makanda Township Road District v. Devil's Kitchen Water District*, 379 Ill. App. 3d 1064, 885 N.E.2d 1210, 319 Ill. Dec. 530 (5th Dist. 2008). In that case, a road district sought injunctive relief, damages and fines against a water district with respect to certain water lines lying under the road district's highways. The water district had located the water lines in the right-of-way without seeking prior consent from the road district. The road district sent a letter to the water district indicating that the road was to be resurfaced and that the water lines must be relocated. The water district refused to move the water lines. In part, the question presented to the court was who had prevailing rights.

The court made the following observations:

> The underlying issue here requires a reconciliation of two competing statutory schemes. The first gives the appropriate highway authority the right to control the use of its roadway rights-of-way by water districts, sewer districts, and various utility companies to deliver services to their customers. 605 ILCS 5/1-101 *et seq*. (West 2000). The second grants water districts the right to lay pipe under and along public roads. 70 ILCS 3705/0.01 *et seq*. (West 2000). The question then becomes what happens when a water district and a road district disagree over where to locate a pipeline in order to accommodate road improvements and repairs.
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> It must first be recognized that a highway commissioner's right to regulate its roadways for the safety and well-being of the public derives from the state's police power . . . A water district's rights are, on the other hand, statutory. Accordingly, our courts have determined that no matter how legitimate a water district's right to lay pipe under or along public roadways may be, that right must remain subordinate to the state's inherent right to manage the public roads for the public good...
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> By statute, a water district has the absolute right to place water lines along township roads . . . A water district does not, however, have the power to dictate where along the road its lines will be placed. A water district possesses nothing more than a mere license, a right to use the public right-of-way for its water mains . . . Only a township is charged with the overseeing and maintaining of township roads and protecting the public's safety on these roads . . . Accordingly, a water district must first obtain permission from the appropriate authori-

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> ty and must relocate its lines at its own expense, when requested to do so by the appropriate highway authority in order to accommodate the repairs and improvements or otherwise facilitate the safe and effective operation of public roads . . . Road District had the authority to insist Water District move its lines if needed for improvement of the roadways. Road District has the power and authority to direct the relocation of water mains located within the right-of-way, and that authority is not conditioned by or subject to the authority of Water District to determine the suitability of the highway commissioner's plans. Accordingly, Road District was not required to submit engineering plans to Water District, and Water District had no authority to determine the adequacy of the plans of the highway commissioner. Again, since Water District holds only a license, it does not have a statutorily created property right allowing it to dictate the location of its water lines. Water District, therefore, should have moved its lines after its receipt of Road District's notice.
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> *Makanda Township Road District v. Devil's Kitchen Water District*, 379 Ill. App. 3d 1064, 1066-1067, 885 N.E.2d 1210, 319 Ill. Dec. 530 (5th Dist. 2008).

(The *Makanda* case also notes that it was appropriate for the court to impose fines and penalties for the water district's refusal to move its pipes.)

605 ILCS 5/9-113 does recognize that the highway authority may not own the entirety of the property interest in the highway. Accordingly, it states that the consent is effective only to the extent of the property interest owned by the highway authority and is not binding upon the owner of the fee. Thus, for a party seeking to place equipment in, on, under, or along a right-of-way not owned in fee title by the road district, permission (and likely payment to the underlying fee owner) must be obtained. Condemnation is a possibility, as well.

The foregoing discussion leads to the conclusion that it would be good practice for each road district to have ordinances relating to the construction and maintenance of "ditches, drains, . . . or other equipment" upon, under, or along township rights-of-way. We recommend that our clients have two ordinances, one relating to construction and one relating to retaining the improvement at that location thereafter. The ordinances should provide for an application process and for an actual permit to be issued. Language within these documents should also provide for the road district to require removal or relocation and further should provide indemnification rights to the road district for claims relating to the equipment.

Township road districts should be alert to protecting their rights where public or private entities want to place equipment along, on or under rights-of-way. Illinois statutory law grants township road districts the ability to obtain this protection. Adoption of ordinances under this Law is a smart practice of Illinois township law.

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