

**COMMITTEE MEETING OF THE HOME RULE ATTORNEYS OF
THE ILLINOIS MUNICIPAL LEAGUE
HELD FRIDAY, JANUARY 17, 2003
OAK BROOK BATH & TENNIS CLUB**

A meeting of the Illinois Municipal League Committee of Home Rule Attorneys was held on Friday, January 17, 2003 at the Oak Brook Bath & Tennis Club in Oak Brook, Illinois. The following individuals were in attendance:

Rita E. Elsner, Chair	Schaumburg	relsner@ci.shaumburg.il.us
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Roger Huebner	IML	rhuebner@iml.org

INTRODUCTION

Chairperson Rita Elsner called the meeting to order at 10:13 a.m. As the first order of business, attendees introduced themselves.

APPROVAL OF MINUTES

- The minutes of the December 13, 2002 meeting were unanimously approved upon

motion made and voice vote.

LEGISLATIVE UPDATE

Roger Huebner reported that the new General Assembly will be focusing on budgetary issues. The current debt is approximately \$1.2 billion and next year's revenues appear to be trending downward about \$3.8 billion. The major issues of the 2003 session will be revenues and the state budget. The IML will be introducing the 2003 legislative agenda shortly.

Joan Cherry reported on Attorney General Madigan's transition committee dealing with Freedom of Information and Open Meetings Act changes and/or recommendations. Roger Huebner serves on this committee also. The final report has not been distributed. The major focus is on a Public Access Counselor position in the Attorney General's office similar to Indiana's.

RECENT LITIGATION

Bernie Paul reported on City of Marengo v. Pollack, Second District Appellate Court No. 2-01-0775 (Dec. 30, 2002). The city filed a complaint alleging that the defendant, the owner of a business which restores and sells wood pallets in an industrial zoning district within the city, violated the city's 1992 ordinance limiting defendant's outdoor storage space to 1,000 square feet. The defendant's affirmative defenses alleged a legal nonconforming use that plaintiff was barred by laches from enforcing the earlier ordinance, which limited the outdoor storage area to 10% of the lot size. The trial court found that the defendant was entitled to continue using 10% of its 99,244 square foot lot for outdoor storage pursuant to the city's earlier ordinance because the defendant began business in 1986 when that ordinance was in effect. However, the trial court rejected defendant's laches claim even though the city did not attempt to enforce its ordinance until 1999. The city appealed and the defendant cross-appealed.

On appeal, the defendant claimed that it was not subject to the 10% outdoor storage limit under the earlier ordinance because it did not operate an industrial or manufacturing plant in the zoning district in which it is located. However, the appellate court determined that this argument was without merit because the defendant's use of the property fell squarely within the general definition of manufacturing or industry. The city argued that because the defendant continually exceeded the 10% storage limit from 1986 to 1992, its use of the property cannot be a legal nonconforming use. However, the appellate court determined that the defendant could not be barred from using 10% of its lot for outdoor storage space simply because he exceeded that amount during the specified time frame of the previous ordinance. Furthermore, it was reasonable for the trial court to determine that the defendant should be allowed to continue under the previous ordinance and use 10% of his property for outdoor storage since he started his business during that time. The appellate court further determined that the trial court was not unreasonable to determine that the defendant's laches claim was barred even though the city did not enforce its ordinance for almost 13 years because mere inaction and delay in enforcement did not give rise to laches. Therefore, the appellate court affirmed the decision of the trial court.

John Brechin reported on Russell v. Village of Lake Villa, Second District Appellate Court No. 2-01-1002 (Dec. 30, 2002). The plaintiff brought an action against the village after he suffered injuries on village property. The plaintiff was rushing to catch a commuter train when he slipped on a patch of ice in that portion of the train station that was owned and maintained by the village. Employees of the village had previously plowed snow in the parking lot and piled it near where the plaintiff slipped and fell. In his deposition, the plaintiff admitted that he believed that the patch of ice upon which he slipped was caused by the melting of the mound of snow during the daylight hours and the resulting freeze of that moisture during the night. The village's director of public works testified to the same in his deposition. As a result, the trial court granted the village's motion for summary judgment because the plaintiff was injured from the natural accumulation of ice. The plaintiff appealed.

On appeal, the plaintiff argued that granting the village summary judgment was immature because there were genuine issues of material fact as to whether the accumulation of ice was an unnatural condition. The appellate court noted that the village did not dispute that the ice patch was the proximate cause of the plaintiff's injuries. However, the village maintained that the plaintiff did not present a sufficient factual basis to establish a material issue of fact that would entitle the plaintiff to a judgment in his favor. The appellate court determined, however, that where the snow mound is an unnatural accumulation and the water melts from such a snow mound and freezes, the resulting ice is also an unnatural accumulation. But, it is the plaintiff's burden to present facts indicating a direct link between the snow pile and the ice. The appellate court noted that the ice surrounded the base of the snow pile and was contiguous with it, and it appeared to have come from water that melted off the snow. The plaintiff and the village's director of public works both testified that there was no new snow event, and that the snow pile created by village employees appeared to have melted and refrozen causing the ice patch. Therefore, the appellate court determined that the plaintiff presented sufficient facts to bar summary judgment for the village.

John Brechin reported on the case of Romine v. Village of Irving, Fifth District Appellate Court No. 5-01-0798 (January 15, 2003). This case involved an auto accident involving a third party's (Osborne) drinking at a tavern then going to a festival and drinking more and causing a disturbance. Irving police officers arrived and dealt with the husband and son and handcuffed the husband. The wife asked and the officer let the husband go because the son he got into the fight with told them he did not want to press charges. The officer then told them not to drive the vehicle. After walking several blocks, the wife got behind the wheel and had an accident with plaintiff Romine.

The appellate court reviewed the trial court's decision and affirmed. The appellate court said that the remote possibility of the accident did not give rise to legal duty on the part of the police officers or the municipality. The court also found that it would be an unreasonable burden on the municipality to impose a legal duty.

- Joan Cherry reported on Waicekauskas v. Burke, First District Appellate Court No. 1-01-3673 (Dec. 13, 2002). Petitioner was issued five separate tickets by the village of Midlothian police department for various violations of municipal parking and vehicle regulations. The tickets were issued under the authority of the village's vehicular standing, parking, and condition

of vehicles ordinance. The ordinance provided a schedule of fines and penalties which increased over specified periods of time and prior to a hearing. At the hearing, upon request by the petitioner, the petitioner objected to the ordinance and the hearing process as violating the due process clause of the federal and state constitutions. Specifically, the petitioner contended that the procedure for adjudicating parking violations violated due process in that the amount owed increased upon the exercise of a right to a hearing to contest the merits of the violation. Petitioner's objection was denied and a finding of liable was entered. The traffic compliance administrator upheld the finding of the hearing officer and the petitioner filed a petition for judicial review. The circuit court entered an order denying the petition and entered a judgment upholding the administrative order. The circuit court supplemented its order with specific findings that the challenged ordinance did not violate petitioner's due process and the ordinance complied with the requirements of Section 11-208.3 of the Illinois Vehicle Code. The petitioner appealed.

On appeal, the petitioner maintained that the village's procedure for adjudicating parking violations violated due process because the amount owed increased upon the exercise of a right to a hearing contesting the merits of the violation. The appellate court noted that the General Assembly authorized municipalities to decriminalize parking violations and to adopt a civil penalty system by enacting Section 11-208.3 of the Illinois Vehicle Code. Subsequently, the village enacted an ordinance for the administrative adjudication of parking violations. The appellate court further noted that the imposition of a penalty for having pursued a right to appeal is a violation of due process and this rule applies to civil cases as well. The ordinance in the present matter imposed a late fee prior to any hearing on the merits and a ticket recipient seeking a hearing was subject to a penalty which doubled the fine. This, the appellate court determined, was not authorized by Illinois Statute, and was in violation of due process. Therefore, the appellate court held that the ordinance's fine schedule was unconstitutional. The appellate court further determined that the village's ordinance was entirely invalid because the fine schedule was an essential part of the ordinance to the point that the ordinance was no longer operative without the fine schedule.

The Committee had a lengthy discussion on the impact of this case on current municipal practices with handling parking tickets and existing fine structures. All municipalities should review their current practice of hearings with regard to escalating fines during the process. Rob Bush will prepare an article for the IML Review magazine.

- Rita Elsner discussed Pierce County, Washington v. Guillen, United States Supreme Court No. 01-1229 (January 14, 2003). This United States Supreme Court case involves a federal statute (23 U.S.C. 409) which protects from disclosure materials compiled or collected in connection with certain federal highway safety programs. At issue also was a Washington state statute that allowed for such information to be discoverable.

The Supreme Court of Washington held the federal statute preempted state rules regarding discovery and admissibility and that Congress was without authority to do so.

The United States Supreme Court had jurisdiction because of the conflict between the federal statutes and Washington's public disclosure law. The Court found materials gathered by

the sheriff for law enforcement purposes and held by the county sheriff would not be protected, however, if collected pursuant to the federal statute and held by another department it would be protected.

The Court found that this was a proper exercise of Congress' authority via the Commerce Clause in improving safety in the channels of commerce.

- Rita Elsner reported on United Artists Theatre Circuit Inc. v. Township of Warrington. (3rd Circuit). The Court ruled that land developers who claim their rights were violated by municipal zoning officials must now prove that the defendants' conduct "shocks the conscience" and not merely that they acted with "improper motives". The court found that a long line of 3rd Circuit cases that discussed the improper motives test are no longer good law as a result of the U.S. Supreme Court's 1998 decision in County of Sacramento v. Lewis that called for a "shocks the conscience" test in all substantive due process cases.

- Rita Elsner reported on Nottolini v. LaSalle National Bank, Second District Appellate Court No. 2-01-1380. The question was whether a water-filled quarry was a lake and what were the property owner's rights to use of the water/lake. The defendant erected a fence to keep other people out of the water-filled quarry. Plaintiffs objected, filed suit, and won at the trial level. The appellate court reversed and found it a quarry and defendants retained complete ownership rights.

OLD BUSINESS

Dave Wiltse gave an update on the MWRD litigation which now only involves Des Plaines TIF district and MWRD fees. Dave will discuss the results of the February 11 hearing at next month's meeting.

What are cities doing after the Lake Villa case? The general consensus of the group was that municipalities are going ahead with demolitions of unsafe property.

- Rob Bush reported that he argued a catastrophic injury case in the Fifth District Appellate Court involving Shiloh.

NEW BUSINESS

Herb Hill talked about CTA wanting exemption from Evanston's utility taxes for its facilities. Several members said that they required CTA to document locations and the taxes paid. There is usually no follow-up from CTA.

A question was raised about the non-home rule authority to regulate tobacco possession for underage minors. Several members felt that the authority stems from health, safety, and welfare general provisions.

- Underage liquor violations / reporting to Secretary of State. The final form has still not been sent out from the Secretary of State's office, but will shortly.

• Topics for the IML Annual Attorney's Seminar in Bloomington are being requested. Please forward any suggestions to Roger as soon as possible. The seminar will be held on Friday, March 14 at the Radisson Conference Center in Bloomington, Illinois.

NEXT MEETING

The next meeting of the Home Rule Attorney's Committee will be held at 10:00 a.m. on Friday, February 21, 2003 at the Oak Brook Bath & Tennis Club in Oak Brook, Illinois.

MEETING SCHEDULE FOR 2003

February 21, 2003	Oak Brook Bath & Tennis Club
March 14, 2003	IML Municipal Attorneys Seminar / Radisson Conference Center, Bloomington, IL
April 11, 2003	Oak Brook Bath & Tennis Club
May 16, 2003	Suburban Location (Location TBA)
June 20, 2003	Oak Brook Bath & Tennis Club
July 18, 2003	Oak Brook Bath & Tennis Club
August 15, 2003	Oak Brook Bath & Tennis Club
September 2003	No Meeting /IML Annual Conference Sept. 18-21
October 17, 2003	Oak Brook Bath & Tennis Club
November 21, 2003	Oak Brook Bath & Tennis Club
December 2003	Downtown Chicago (Date & Location TBA)

ADJOURNMENT

There being no further business, the meeting was adjourned upon motion made and voice vote.