DuPage Water Commission

600 E. Butterfield Road, Elmhurst, IL 60126-4642
(630)834-0100 Fax: (630)834-0120

NOTICE IS HEREBY GIVEN THAT THE RESCHEDULED MARCH 2004 ADMINISTRATION COMMITTEE MEETING OF THE DU PAGE WATER COMMISSION WILL BE HELD AT 6:00 P.M. ON THURSDAY, MARCH 11, 2004, AT ITS OFFICES LISTED BELOW. THE AGENDA FOR THE RESCHEDULED MARCH 2004 REGULAR COMMITTEE MEETING IS AS FOLLOWS:

AGENDA
ADMINISTRATION COMMITTEE
THURSDAY, MARCH 11, 2004
6:00 P.M.

600 EAST BUTTERFIELD ROAD
ELMHURST, IL 60126

COMMITTEE MEMBERS

R. Benson
L. Hartwig
D. Zeilenga

I. Roll Call

II. Approval of Minutes of December 11, 2003

III. Release of Committee Executive Session Minutes

a. July 17, 2003

b. August 14, 2003

c. September 11, 2003

d. October 8, 2003

IV. Discussions Concerning Telephonic Meeting Participation

V. Legal Services Proposals

VI. Executive Search

VII. Other

Board/Agendas/Administration/ADM0403.DOC

All visitors must present a valid drivers license or other government-issued photo identification, sign in at the reception area and wear a visitor badge while at the DuPage Pumping Station.

DRAFT

MINUTES OF A MEETING OF THE ADMINISTRATION COMMITTEE OF THE DU PAGE WATER COMMISSION HELD ON DECEMBER 11, 2003

The meeting was called to order at 11:00 A.M. at the Commission's office located at 600 East Butterfield Road, Elmhurst, Illinois.

Committee members in attendance: L. Hartwig, R. Thorn, D. Zeilenga and M. Vondra *(ex officio)*

Also in attendance: J. Holzwart, M. Crowley (H&K)

Commissioner Hartwig moved to approve the Minutes of the November 13, 2003 Administration Committee. Seconded by Commissioner Zeilenga and unanimously approved by a Voice Vote.

All voted aye. Motion carried.

The Administration Committee reviewed the draft Request for Proposals for Legal Counsel and the list of law firms that the General Manager recommended receive copies of the RFP by mail. The General Manager also advised that notice of the RFP would be published in appropriate periodicals.

Commissioner Hartwig moved to recommend approval of the form of Request for Proposals transmitted by the General Manager in a memorandum dated December 5, 2003 and direct staff to advertise in the appropriate periodicals. Seconded by Commissioner Zeilenga and unanimously approved by a Voice Vote.

All voted aye. Motion carried.

The Administration Committee reviewed the Executive Search proposals received. Commissioner Zeilenga moved to recommend that the proposal of The Par Group – Paul A. Reaume, Ltd. be accepted. Seconded by Commissioner Hartwig and unanimously approved by a Voice Vote.

All voted aye. Motion carried.

The Committee also discussed the selection process and will recommend to the Commission that The Par Group – Paul A. Reaume, Ltd. be directed to (a) prepare a short list of no more than six candidates to be interviewed by the Board of Commissioners, (b) prepare the evaluation forms to be used by the Commissioners during the interviews, (c) provide the Board with written summaries of the completed evaluation forms, and (d) report back to the Commission the results of the evaluations.

The Administration Commission discussed policy considerations related to telephonic meeting participation, the appointment of a new Ethics Officer (in lieu of the General Manager as currently appointed), and the new ethics legislation, HB3412 and SB0702, the discussion of which will be continued in following meetings.

Commissioner Hartwig moved to adjourn the meeting at 11:55 A.M. Seconded by Commissioner Zeilenga and unanimously approved by a Voice Vote.

All voted aye. Motion carried.

Board/Minutes/Adm0312.doc

DuPage Water Commission
MEMORANDUM

TO: Robert L. Martin
Acting General Manager

FROM: Maureen A. Crowley
Staff Attorney

DATE: March 5, 2004

SUBJECT: Telephonic Meeting Participation

The Administration Committee has been considering whether the Commission should adopt a policy prohibiting, or setting limitations on, telephonic participation in Commission meetings. *See attached memorandum dated December 5, 2003.* In connection with that discussion, it is important to note that two bills were introduced in the current legislative session that, if passed, would restrict such participation and limit the Commission's flexibility in adopting its own regulations.

If enacted,[1] House Bill 4589 and Senate Bill 3106 would require:

- A majority of a quorum to be physically present
- Members to be physically present in order to be considered for purposes of determining a quorum and voting in connection with bond issuances
- Members to be physically present unless absent due to personal illness or disability; personal employment purposes; official business; and/or family or other emergencies
- Members intending to participate telephonically to provide 48 hours notice unless impracticable
- A physician's certification if members participate telephonically in more than 50% of the annual meetings
- Roll call votes to be taken whenever a member participates by telephone
- All members participating telephonically to state their name every time they speak

[1] The bills are inactive, having failed to pass out of a substantive committee by the applicable deadline.

DuPage Water Commission

MEMORANDUM

TO: Chairman & Commissioners

FROM: General Manager

DATE: December 5, 2003

SUBJECT: Telephonic Meeting Participation

I. Telephonic Participation in Public Meetings.

According to the Commission's legal counsel, Commissioners may participate in Commission meetings by telephone conference under the Open Meetings Act so long as the call is conducted in a manner that complies with the Act's other requirements:

> There is nothing within the Open Meetings Act which specifically prohibits conducting a meeting by telephone conference or requires members of a public body to be in each other's physical presence to establish a quorum. *People ex rel. Graf v. Village of Lake Bluff*, 321 Ill. App. 3d 897, 909 (2d Dist. 2001), *citing* F*reedom Oil Co. v. Illinois Pollution Control Bd.*, 275 Ill. App. 3d 508, 515 (4th Dist. 1995).

Moreover, the "absence of a rule [allowing telephonic participation] does not render [a public body's] authority to conduct meetings by telephone conference invalid." F*reedom Oil Co. v. Illinois Pollution Control Bd.*, 275 Ill. App. 3d at 517. However, the *Freedom Oil* court suggested that if a public body intends to regularly conduct meetings by telephonic conference, the "better practice would dictate it should have rules in place for the procedures to be followed." F*reedom Oil Co. v. Illinois Pollution Control Bd.*, 275 Ill. App. 3d at 518.

In keeping with the "better practice" suggestion of the *Freedom Oil* court, the Commission should consider adopting a policy regulating telephonic participation in its public meetings. If the Commission decides to adopt a policy allowing telephonic participation, it is essential that the Commissioner participating telephonically be able to hear the substance of the meeting, and that those in attendance at the meeting be able to hear the telephonically participating Commissioner. Other than that, the Commission is free to determine its own rules concerning telephonic participation.

Thus, in consultation with legal counsel, we have prepared a "decision tree" isolating the decisions the Commission will need to make in considering whether to adopt a policy prohibiting, or setting limitations on, telephonic participation in Commission meetings.

II. Considerations for the Commission in Formulating a Telephonic Meeting Participation Policy.

1. Should telephonic participation in meetings be allowed? The Commission may allow or prohibit telephonic participation. Senate Bill 699, if the Governor's amendatory veto had been overridden, would have required public bodies to allow telephonic participation in meetings. If the Governor's amendatory veto had been accepted by the General Assembly, the determination of whether to allow telephonic participation in meetings would have been left to the discretion of the public body.

2. *If telephonic participation is allowed, should Commissioners participating by telephone be counted in determining whether a quorum is present at the meeting?* The state agencies that have allowed telephonic participation by rule count telephonic participators in their meeting quorum. In contrast, several municipalities have adopted regulations providing that telephonic participators are not counted toward a quorum and Senate Bill 699, if adopted, would not have counted members participating by telephone for quorum purposes in connection with bond issuances or public hearings.

3. *If telephonic participation is allowed, should the allowance exclude certain types of meetings or should Commissioners participating by telephone have limited voting rights?* If Senate Bill 699 had been enacted, members of public bodies participating in a meeting by telephonic means would not be considered for purposes of determining a quorum or voting in connection with public hearings and bond issuances. In addition, if the Governor's amendatory veto to Senate Bill 699 had been accepted by the General Assembly, telephonic participation at all special and emergency meetings would have been prohibited.

4. *If telephonic participation is allowed, should Commissioners be allowed to participate telephonically whenever they want?* The Illinois agencies that allow telephonic participation do not place conditions on when board members may participate by telephone. However, several municipalities do place restrictions on participation: Beyond the official's control; personal illness or disability; personal employment purposes; official business; and/or family or other emergencies. In addition, distance restrictions have been imposed, such as 150 miles from the meeting place or, under SB if it had been adopted, absence from the territorial limits of the public body).

5. *If telephonic participation is allowed, should the Commission require advance notice of telephonic participation?* Several municipalities require, and Senate Bill 699 would have required, telephonic participants to provide 48 hours notice.

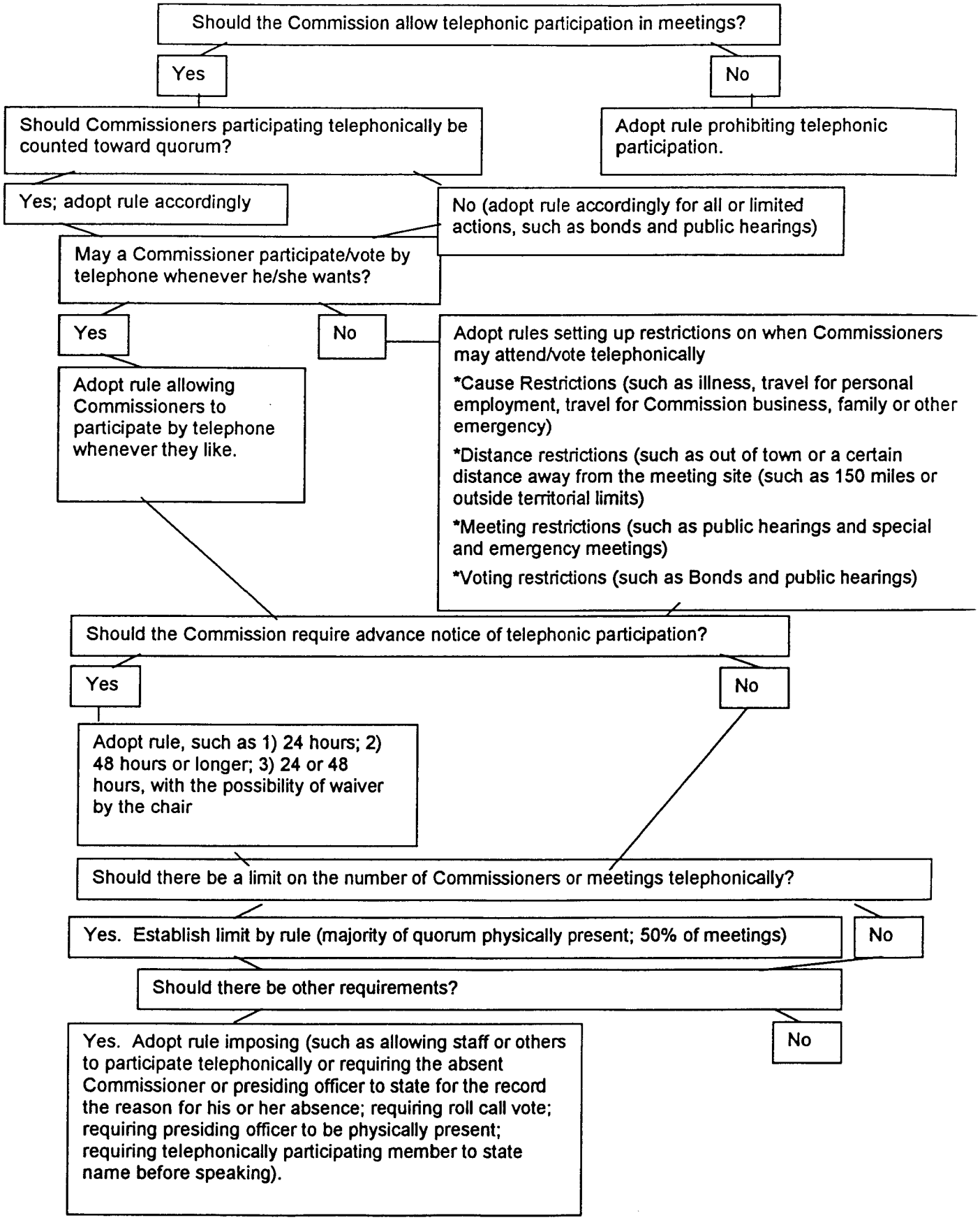
6. *If telephonic participation is allowed, should there be a limit on the number of Commissioners allowed to participate telephonically?* Clarendon Hills allows no more than two Commissioners to participate telephonically in any meeting. Senate Bill 699, if

adopted, would have required that a *majority of a quorum* be physically present at the meeting.

7. *If telephonic participation is allowed, should there be a limit on the number of meetings a Commissioner is allowed to participate in telephonically?* Senate Bill 699 would have limited Commissioners to participating in meetings telephonically in no more than 50% of the annual meetings of the Commission unless a physician's certification was provided.

8. *If telephonic participation is allowed, should miscellaneous restrictions be imposed.* Several municipalities require that if any person is participating telephonically in a public meeting, the record must reflect the reason he was unable to attend in person. Other miscellaneous restrictions include: Requiring all votes be taken by roll call when any board member participates telephonically; requiring that another presiding officer (Chair) be designated whenever the officer who would normally preside over a meeting will be participating telephonically; requiring all members participating telephonically to state their name every time they speak; and allowing the corporate authorities to establish rules allowing telephonic or electronic participation by village staff or other individuals. Similarly, Senate Bill 699, if adopted, would have required roll call votes whenever a member was participating by telephone and required all members participating telephonically to state their name every time they speak.

Telephonic Participation in Commission Meetings



DuPage Water Commission
MEMORANDUM

TO: Administration Committee

FROM: Robert L. Martin, P.E.
Acting General Manager

DATE: February 5, 2004

SUBJECT: Request for Proposals
Legal Firms

The Commission forwarded copies of its Request for Proposals for Legal Services to 21 law firms specializing in local government law, posted an announcement on the Illinois Municipal League Web Site (www.IML.org), and published an announcement in the Thursday, January 8, 2004 edition of the Chicago Daily Law Bulletin. Attached for your review and consideration are the three proposals received in response to the Commission's request.

HOLLAND & KNIGHT LLP

Legal Services Proposal to:

DuPage Water Commission

February 3, 2004

Holland & Knight LLP
131 South Dearborn Street, 30th Floor
Chicago, IL 60603
312-263-3600

One Mid America Plaza, Suite 1000
Oakbrook Terrace, IL 60181
630-954-2100

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Holland & Knight Overview

Holland & Knight LLP is a full service, national law firm with expertise in all areas of law. In our Chicago and Oakbrook Terrace offices (you may remember us as Burke, Weaver & Prell and McBride, Baker & Coles), we have special expertise and experience in state and local government law, construction law, environmental law, real estate, public finance, labor and employment, intellectual property, corporate law, and litigation. We represent governments, in all matters, at every level. In addition, we regularly represent many large corporations in their dealings with government, in complex real estate transactions, and in general litigation. More than 20 of our lawyers devote all or a substantial portion of their time to Illinois state and local government matters. We also have a team of lawyers with extensive familiarity with Capitol Hill and federal government matters. Our firm's Internet site, located at www.hklaw.com, contains substantial additional information about our firm, and we encourage you to visit it.

Qualifications and Experience

1. Construction Law

Holland & Knight's Construction Law Team is one of the largest in the United States. Our team of 100 professionals practices in all aspects of construction law, including:

- contract preparation, negotiation, and administration
- public contracts and bidding
- prosecuting and defending against construction claims
- construction counseling and claims avoidance
- construction insurance and surety bonds
- indoor air quality
- project finance
- labor and employment
- collections

This unique combination of experience is not common to law firms, and Holland & Knight's blend of both public and private sector expertise allows us to offer the most effective and efficient representation to the Commission.

Contract Preparation, Negotiation and Administration

We prepare and negotiate complex design and construction agreements, including "fast-track," fixed price, cost plus, design-build, build-to-suit and public and private venture contracts. We assist in establishing clients' administration procedures and help to educate clients' employees on documentation during the design and construction process. We also assist in creating and maintaining corporations, joint ventures and limited liability companies for construction projects.

Public Contracts and Bidding

Our representation of state and local governments has regularly required us to draft, negotiate and litigate all types of contracts. We are regularly called upon by our municipal clients to draft and

negotiate contracts for almost every conceivable purpose, including multimillion dollar public works projects; architectural, engineering, testing and inspection services; insurance and claims services and coverages; cellular and wireless tower and antenna leases; finance and investment services; easements and licenses; land acquisitions and disposals; garbage collection; concessionaire services; cable television franchises; computer hardware and software purchase, development and maintenance; surety takeovers; website development, maintenance and licensing; and federal and state grant assistance.

We have also developed model construction contract documents for all of our local government clients, including long form contracts for substantial public works projects and shorter forms for mid-size and smaller projects. We have also prepared a long and short model contract for retaining design professionals and other consultants. These documents have become easy to use, economical, "fill in the blank" forms, so our clients are not required to "reinvent the wheel" each time they enter into a contract. They also are specifically designed to protect the local government's interests, thus making them more effective than most industry models.

Construction Claims

We have extensive experience in preparing, analyzing, defending and prosecuting virtually all types of construction claims, including differing site conditions, acceleration, changes, defective plans and specifications, delay, disruption, labor inefficiency, suspension and termination. We frequently represent owners, both public and private sector, and general contractors with regard to construction claims. Having both owners and contractors as clients helps us more fully understand the perspective of both parties and, thus, to represent each more effectively and efficiently. We have been retained by and have worked with specialized domestic and international technical consultants in architecture, project scheduling, project financing, engineering and other disciplines. We also have significant experience on a wide array of technical issues, including significant tunneling, sub-surface, and underwater construction.

Construction Counseling and Claims Avoidance

We assist clients in avoiding disputes and litigation through risk shifting, efficient claim analysis and creative dispute resolution techniques. We are routinely involved in project administration, contract interpretation, project scheduling, minority and women's business enterprise issues, obtaining necessary certifications, claims analysis and preparation, false claims and fraud issues, suspension and debarment issues, contract termination, mechanic's liens, insurance issues and surety bond issues.

Construction Insurance and Surety Bonds

We assist clients in developing the insurance requirements in their contracts with public and private sector owners, general contractors, construction managers, and design professionals. We counsel clients about insurance coverage for projects, including use of Owner-Controlled Insurance Programs (OCIP), and assist them in making claims on insurance policies. We also counsel clients on bid bond and payment and performance surety bond issues, such as the types of bonds to request, or to require under applicable law, the wording of the bonds and use of project bonding programs or alternatives such as contractor default insurance or letters of credit. We assist clients in making bond or default insurance claims when needed.

Project Finance

Our team is experienced with the public sector bond market, capital markets, commercial banks, export credit agencies, and multilateral development bank facilities. We have extensive finance experience related to power plant, transportation, telecommunications, and infrastructure projects including ports and airports, waste disposal, and water related projects. Our team serves the infrastructure and project finance markets in the United States and internationally, particularly in Latin American transactions. We have handled all aspects of project finance, privatization, and joint venture creation, including due diligence, regulatory, corporate, and securities issues. See Section 5 below for further information.

Labor and Employment & Employee Safety

We negotiate and interpret collective bargaining agreements to ensure the continuity of projects in the face of labor disputes, and assist clients in complying with wage, hour and employment laws including age, race, disability and gender employment discrimination, and equal employment opportunity issues. We assist clients in complying with the applicable Occupational Safety or Mine Safety and Health Act (OSHA) Regulations. Our team represents those clients in dealing with worksite inspections and investigations, contesting citations issued by the regulatory agencies and in defending citation-enforcement litigation. See Section 7 below for further information.

Representative Engagements

Below is a sample of relevant construction matters handled by members of our team:

- Represented the DuPage Water Commission in all aspects of the design and construction of the initial water transmission and distribution system from the City of Chicago pumping station to and throughout DuPage County, and all expansions and upgrades to that system, including financing, acquisition of all rights in land by negotiation and eminent domain, permitting, bidding and contracting issues, bid disputes, contract administration, bond claims, and litigation regarding the system.
- Represented the Northwest Water Commission in all aspects of the design and construction of its water transmission system from the Evanston water treatment plant to its Morton Grove booster pumping station to its Des Plaines reservoir and to the member communities, including all upgrades to that system, including financing, acquisition of all rights in land, permitting, bidding and contracting issues, bid disputes, contract administration, and litigation involving the system (including reservoir failure during late stages of construction).
- Represented the Village of Northbrook in all matters relating to its water system expansion including a new intake in Lake Michigan, expansion of the lakefront pumping station, crossings of two golf courses and a botanic garden, and doubling the capacity of its water treatment plant, including land acquisition, permitting, bidding and contracting issues, bid disputes, contract administration, and litigation regarding the expansion.
- Represented Southern California tunneling contractor regarding numerous claims on a variety of projects let by several California agencies, including the California Department of Water Resources, San Diego County Water Authority and the Alameda Corridor. Representative claims included differing site conditions, excessive water and defects in the design of the projects.

- Represented underground contractor on linear project for Massachusetts Water Resources Authority through sensitive wetlands area, including defense of multiple subcontractor claims. Represented same contractor on linear and sewer replacement project for the Town of Bellingham, Massachusetts.
- Represented Owner (Amtrak) in defense of over 200 contractor claims, including the contractor's allegation that it encountered unanticipated subsurface conditions and unsuitable soil in over 1,000 excavation areas.
- Represented contractors on projects at the Blue Plains Waste Water Treatment Plant, the largest plant of its kind in the world. One of the Blue Plains projects was designed for an 84-foot large diameter tunnel to hold several large diameter pipes. Massive dewatering issues arose requiring redesign and delay and resulting in a 72 day trial and an award of $38 Million on behalf of our client.
- Represent a large international infrastructure contractor on a major water treatment project requiring the construction of a tunnel in excess of 500 feet in length. Due to a differing site condition, parties are currently analyzing a change in methodology from a TBM to a larger TBM or implementation of a drill-and-shoot technique.
- Represented general contractor prosecuting claims related to the construction of a power plant in California, which included the construction of a large (12 foot) diameter penstock pipe system. Claim culminated in a seven month trial before the California Office of Administrative Hearings. A separate case was filed against the testing laboratory of the penstock pipe manufacturer over the shop welding of the pipe spools and the inspection of the welds by the testing laboratory.
- Represented general contractor in pursuing numerous subsurface condition claims associated with the construction of a hydroelectric plant in Alleghany, Pennsylvania.
- Represent a public owner in connection with leaks experienced in a large college building in New York City that we alleged to have occurred due to the failure of the design to account for hydrostatic pressure and the foundation contractor's failure to proper install waterproofing material.

2. State and Local Government (Municipal) Law

Few firms have a state and local government practice comparable to that of the Chicago and Oakbrook Terrace offices of Holland & Knight. We are general and special counsel to more than 40 governmental bodies in Illinois. We represent, as general counsel, the Cities of Evanston, Highland Park and Lake Forest, the Villages of Arlington Heights, Bannockburn, Glencoe, Grayslake, Hinsdale, Kenilworth, LaGrange, Lake Bluff, Lake Zurich, Long Grove, Northbrook, Riverwoods, and Schaumburg. We also serve as general counsel for the Kenilworth Park District, Lake County Forest Preserve District, the Northwest Water Commission, the River Forest Park District, the Park District of Oak Park, and the Earl Township Public Library (a complete list is below).

In addition, team members have represented local governments throughout Illinois in connection with various special assignments. Recently, we have acted as special counsel for the Cities of Crystal Lake, Galesburg and Chillicothe and the Villages of Huntley, Niles, Roscoe, Skokie, Wilmette,

Winnetka, and Mapleton. We also act as special counsel to the County of Lake, Pace (the Suburban Bus Division of the RTA), and the State of Illinois.

Holland & Knight has also represented local governments throughout the nation in connection with various special assignments. For example, we represented Atlantic City, New Jersey, the Captiva Island Erosion Prevention District, City of Baltimore, Maryland, Glynn County, Georgia, and the City of Phoenix, Arizona, in matters ranging from the regulation of casino gambling and its related impacts, to the establishment of development controls to protect highly sensitive natural environments, to the renewal of a cable television franchise, to the development of major infrastructure financing programs.

We regularly advise not only the elected officials and staffs of our municipal clients, but also all of their subsidiary municipal bodies as well. These include committees and subcommittees of the governing boards, *ad hoc* task forces and subcommittees, plan commissions, zoning boards of appeals, civil service commissions, fire and police commissions, library boards, design review commissions, and historic preservation commissions, among many others.

The clients listed below include all of our Illinois general counsel government clients, as well as governments for which we have done projects as special counsel in recent years:

- Village of Arlington Heights
- Village of Bannockburn
- Brown County, Wisconsin
- Village of Buffalo Grove
- City of Chillicothe
- City of Crystal Lake
- Village of Downers Grove
- County of DuPage
- DuPage Water Commission
- Earl Township Library District
- City of Evanston
- City of Galesburg
- Genesee County, Michigan
- Village of Glencoe
- Village of Grayslake
- City of Highland Park
- Village of Hinsdale
- Village of Huntley
- Illinois Department of Nuclear Safety
- Lake County Forest Preserve District
- City of Lake Forest
- Village of Lake in the Hills
- Village of Lake Zurich
- Village of Libertyville
- Village of Mapleton
- Village of Mt. Prospect
- Village of Niles
- Village of Northbrook
- Northwest Water Commission
- Pace-Suburban Bus Division of RTA
- Park District of Oak Park
- City of Park Ridge
- Regional Transportation Authority
- River Forest Park District
- Village of Riverwoods
- Village of Roscoe
- Village of Schaumburg
- Village of Skokie

➢ Village of Kenilworth	➢ City of Springfield
➢ Kenilworth Park District	➢ Village of Wilmette
➢ Village of La Grange	➢ Village of Willow Springs
➢ Village of Lake Bluff	➢ Village of Winnetka
➢ Lake County	

Through our experience in representing so many local governments, we have developed not only the substantive expertise required to represent the Commission, but also a clear understanding of the special needs for efficiency and economy in the provision of legal services to public agencies. We are completely familiar with all aspects of local government law. We also recognize the level of service requirements demanded by municipal clients and we have provided such service to our clients with the knowledge and creativity that have become the hallmark of our practice. If selected to serve as legal counsel to the Commission, we will assist the Commission's staff in achieving policy objectives in a creative and effective manner with professional, practical, and efficient counsel.

We work regularly, and are familiar, with the many laws affecting the Commission's structure and operations, including the Water Commission Act of 1985 (and its latest amendments) (70 ILCS 3720); the Local Government Prompt Payment Act (50 ILCS 505); the Illinois Municipal Code (65 ILCS 5/112-135-1 *et seq.*); the Open Meetings Act (5 ILCS 120); the Freedom of Information Act (5 ILCS 140); to name just a few.

As General Counsel since the inception of both the DuPage and Northwest Water Commissions, we are intimately familiar with the issues pertaining to the legal structure, operations, administration and effectiveness of Illinois water commissions, including their controlling laws and agreements, financing methods, operations issues, and other matters.

We have been involved in Lake Michigan water allocations matters for many years, since prior to the construction of the Northwest Water Commission's system in the early 1980s, through creation of the DuPage Water Commission, and on behalf of our municipal clients who provide and/or use Lake Michigan water, including the City of Lake Forest and Highland Park, and the Villages of Glencoe, Kenilworth and Northbrook.

3. Utility and Water Law

Holland & Knight's Water Law Team is compromised of an experienced team of professionals from around the country, including former regional water management district officials, former state legislators who dealt with water issues, and attorneys from a variety of legal disciplines who have focused their practice in the area of water law.

In Illinois, the firm (as Holland & Knight and its predecessor firms) has a long and successful track record in water law representing both the oldest and the largest water commissions in the state: Northwest Water Commissions (serving the Villages of Arlington Heights, Buffalo Grove, Palatine, and Wheeling with Lake Michigan water purchased from the City of Evanston) and the DuPage

Water Commission (serving municipalities in DuPage County and others with Lake Michigan water purchased from the City of Chicago), respectively.

As noted above in Section 2, in addition to representation of these two pre-eminent water commissions, our Illinois offices have worked with many municipalities that treat, pump, distribute and sell potable water to their residents and businesses.

The team includes practitioners with experience handling water use planning and development; permitting and rulemaking; enforcement; litigation (including rule challenges, permit challenges and toxic tort cases) and legislation; acquisitions and contract drafting/negotiation; finance; privatization; ratemaking; regulatory; water system development and operations; and stormwater management.

We are regularly involved in the day to day legal issues that arise from the development and operation of water supply systems, including developing and modifying state legislation pursuant to which water agencies can organize and successfully finance and construct water supply systems, obtaining water rights, drafting, and assisting in the administration of, construction contracts pursuant to which water system facilities are constructed and installed and negotiating water purchase and sale agreements. Our lawyers continually work with water system clients as they face growth and change in their service areas.

We have considerable experience in acquiring necessary interests in land and permits and other approvals for the construction of water system infrastructure from pumping stations to reservoirs and stand pipes to water mains, metering stations and pressure adjusting stations. This experience ranges from simple easement acquisitions to multiple party real estate transactions to acquire appropriate sites, to obtaining consent to locate facilities in remote areas.

Relying on our extensive experience in public bidding and public works construction law, we provide legal advice on every aspect of construction and expansion of water systems. Our work includes development of model bidding and contract forms, resolution of bidding disputes, contract administration and bond and insurance issues.

Recent examples of our experience in the area of development and operations include:

- Representation of both the oldest and the largest intergovernmental water commissions in the State of Illinois from initial formation, financing and construction through day to day operations.
- Acting as Special Assistant State's Attorney for all matters relating to an Illinois County's water (and sewer) system.
- Representation of many different Illinois municipalities in obtaining permission to use Lake Michigan water, in addressing agreements and issues involving the intergovernmental production, sale and purchase of water, and in a wide range of litigation relating to water (and sewer) systems, service and rates.
- Representation of a planning consortium of public agencies and tribes in the State of Wisconsin relating to the creation of a formal agency to plan, finance, construct and operate a new Lake Michigan water system serving 11 communities, special districts and Indian tribes.

- Representation of a major City/County planning consortium in the State of Michigan relating to the creation of a formal agency to plan, finance, construct and operate a new Lake Huron water system.

The firm's water practice involves representation in connection with the sale of water and wastewater utility facilities. Our Team has prepared and negotiated purchase and sale agreements, indemnification agreements, consent decrees and orders, franchise agreements between water/wastewater utilities and local governments, service agreements and other contracts necessary for a successful water/wastewater utility operation, and other forms of transactional documentation. We have also negotiated of environmental insurance policies and addressed insurance coverage packages for system operations.

Our Water Team has experience representing water and wastewater clients in enforcement actions brought by state and federal regulatory authorities as well as challenges by public interest groups who may oppose a permit application or an operational technique. Should litigation arise, our Water Team works with clients to develop litigation strategies and to evaluate potential settlement opportunities. Our Water Team has successfully defended clients in enforcement actions taken by federal and state environmental regulatory agencies and the Department of Justice.

The Water Team possesses substantial experience in all types of debt and equity transactions, including tax-exempt bonds, sale-leasebacks, synthetic leases, like-kind exchanges, tax credits, tax-increment financing, general leases and participating mortgages. Our team works with lawyers from the firm's corporate and tax practice areas to insure that the transaction structure that is ultimately utilized best meets our client's financial and operational goals. The Water Team has been involved in numerous financings of various water or wastewater facilities or their delivery systems, including representation of the DuPage Water Commission (the largest intergovernmental water agency in the State of Illinois) in financing its $350 million water transmission and distribution system.

Holland & Knight's Water Team is trained in ratemaking and utility accounting principles. The firm has experience in rate cases before several regulatory commissions, including our recent representation of a water utility in obtaining a significant rate increase through proposed agency action procedures. In addition to regulatory ratemaking, our lawyers have experience in rate disputes governed by common law ratemaking principles, where the water provider is not subject to utility commission jurisdiction. For example, in Illinois, we represented the Northwest Water Commission in an intricate ratemaking arbitration against the wholesale supplier, resulting in a long-term contract for water supply at one of the lowest rates in the Chicago Metropolitan Area.

Our Water Team has extensive experience working with environmental regulatory agencies at all levels. This experience includes legal challenges, permit applications and permit renewals. We are also involved in legislative and rulemaking matters at the state and federal levels on behalf of numerous clients around the country.

The Water Team's representation of clients in rule development proceedings includes participating in agency staff workshops, preparing comments on proposed rules, presenting the client's position to regulators at hearings and, if necessary, requesting a formal hearing on proposed rules. We also represent clients in formal, trial-type rule challenges before administrative law judges. Our lawyers are experienced in presenting legal and policy arguments to public service commissions through written comments, testimony and legal briefs.

Recent examples of our experience in the area of regulatory, rulemaking and legislation include:

- Drafting of legislation and amendments to enable Illinois units of government to enter into intergovernmental agreements for the creation and operation of an entity to provide a joint potable water supply.
- Participation in several years of administrative hearings leading to a ruling that the members of an Illinois intergovernmental water commission had the right to use Lake Michigan water, and successfully defending that ruling all the way to the Illinois Supreme Court.
- Representation of mining interests in development of water use restriction, conservation, alternative supply and reallocation criteria in the Southern Water Use Caution Area of Southwest Florida.

The firm also regularly holds a national seminar on water law issues, which has focused on worldwide and nationwide water resource issues, as well as regional issues and solutions to allow our clients from around the country to be well-informed on the latest in water resource management.

4. Intergovernmental Agencies

Holland & Knight has long been a leader in representing regional intergovernmental agencies: as noted above, we have represented the oldest and largest water commissions in Illinois since prior to their commencement of operations. We have long represented entities involved in local and regional intergovernmental entities acting through the powers of intergovernmental cooperation included in the Illinois Constitution of 1970 and the Illinois Intergovernmental Cooperation Act.

In addition to the two Illinois commissions, we have represented regional water agencies all around the United States including the South Florida Water Management District and the Atlanta-Fulton County Water Resource Commission in Georgia.

In the water law area and others as well, we have drafted many intergovernmental agreements that allow our clients to cooperate with other units of state and local government. These agreements include emergency water interconnections, sharing of police, fire and other services; joint purchasing and bidding; joint land planning; the establishment of agreed government boundary lines; sharing and allocation of tax revenue; sharing of public facilities; transfers of road jurisdiction; and the mutual exchange of easements or other property rights. These cooperation agreements allow our clients to save money by sharing their costs with other governments.

5. Public Finance Law

Holland & Knight has participated in governmental debt issues since the 1960s and has served as bond counsel, co-bond counsel, disclosure counsel, underwriter's counsel, trustee counsel, issuer's counsel or in other capacities for more than $15.26 billion in principal amount of debt over the last five years, including more than $6 billion as bond counsel or co-bond counsel. In recent years, Holland & Knight has consistently ranked among the top bond and disclosure/underwriter's counsel firms in the country based on principal amount of bonds issued, according to statistics

compiled by Thomson Financial Securities Data. We understand the many possible uses for various financing tools, and we have assisted our clients in using them as part of their fiscal planning, as well as for project management and economic development.

Holland & Knight has been ranked in the top 10 underwriter's counsel firms in the United States, serving as underwriter's counsel for more than $3.35 billion of bonds issued. The firm has been listed in The Bond Buyer's Municipal Marketplace (the "Red Book") since 1975. Holland & Knight's Public Finance Team is staffed with more than 25 lawyers who devote all or a substantial portion of their practice to bond-related matters.

The firm has served as bond/disclosure counsel to state, county and local bond issuers in connection with virtually every type of governmental issue, including:

- general obligation
- lease revenue (both bonds and certificates of participation)
- excise tax revenue and enterprise fund
- water and sewer revenue
- special assessment
- special and excise tax
- tax increment
- tax anticipation
- revenue anticipation financings

The firm has served as bond counsel or underwriter's counsel for issues by such special purpose governmental entities as:

- educational facilities authorities
- industrial development authorities
- housing finance authorities
- redevelopment agencies
- correctional institution authorities
- aviation and port authorities
- special taxing districts

Holland & Knight also has participated in numerous solid waste disposal, manufacturing facility financings, single family and multi-family housing, university, airport, sports facility, and health care facility financings in a variety of roles. We have been a leader in many innovative and creative financings and have significant experience in all areas of public finance and municipal securities, including:

- variable rate bonds
- commercial paper
- puts and calls
- liquidity and credit-enhanced financings
- zero coupon bonds
- stepped coupon bonds
- original issue discount bonds
- sale/leaseback transactions
- swaps
- other derivative financial products and a variety of other financing techniques

Throughout our experience in the public finance practice, we have developed a reputation for reliability and dependability in meeting short deadlines and providing innovative, effective and high-quality services on a timely basis. Because of the size, capacity and geographic locations of the

members of our Public Finance Team, we are able to expedite transactions and respond promptly on short notice.

Below is a sample of recent public finance projects in Illinois handled by members of our team.

- Issuer's counsel for the $135,995,000 DuPage Water Commission (DuPage, Cook and Will Counties, Illinois) Water Revenue Refunding Bonds, Series 2003.
- Issuer's counsel for the $20,970,000 Northwest Water Commission Cook and Lake Counties, Illinois Water Revenue Refunding Bonds, Series 2003.
- Issuer's counsel for the $1,050,000 City of Lake Forest, Illinois Special Service Area No. 25 (Knollwood Sewer Extension) Special Tax Bonds, Series 2003.
- Issuer's counsel for the $940,000 Village of Bannockburn, Illinois Special Service Area Number 15 Special Tax Bonds, Series 2003 (Thornapple/Hilltop Sewer Project).
- Issuer's counsel for the $93,970,000 DuPage Water Commission General Obligation Water Refunding Bonds, Series 2001.
- Issuer's counsel for the $29,490,000 DuPage Water Commission General Obligation Refunding Bonds, Series 2001.
- Bond counsel to the Chicago Park District involving a $65,000,000 million refinancing.
- Issuer's counsel for the $85,000,000 Lake County Forest Preserve District General Obligation Land Acquisition and Development Bonds, Series 2000 and refunding in 2003.

6. Legislative Activities

Holland & Knight maintains a large, active, federal and state government affairs practice. We offer clients national service on critical political and public policy issues. Members of the firm's Washington-based Federal Legislative Team have developed strong professional relationships on a bipartisan basis in Congress, the Executive Offices of the White House and key executive agencies. Our lawyers and lobbyists offer clients their comprehensive understanding of the federal policy and regulatory process. Our federal legislative group generally takes the lead on public advocacy projects on behalf of our clients, but we also fully utilize all resources within Holland & Knight to ensure seasoned, creative and timely service to our public law clients. This interdisciplinary approach provides our clients with a full analysis of the legal, political, regulatory, business, international and media components that surround the public and private issues of importance to them.

Our national network of experienced strategists and advocates focuses on clients' specific federal, state and local government strategy needs. Governments – local, state and federal – serve as regulator, customer, competitor, advocate and adversary. Holland & Knight strategists and advocates understand these multifaceted government roles and work with clients to create innovative programs. We use our presence on Capitol Hill to serve as a forceful advocate for our clients before Congress. When necessary, we prepare our clients to testify before Congress, brief Members of Congress on key matters affecting our clients and their constituents, provide industry leaders and client representatives the opportunity to meet face to face with key congressional leaders and delegations, and serve as a resource for senior staff professionals handling complex issues. All

of these activities keep our clients' voice on critical legislative issues, front and center, before federal policymakers.

With regard to obtaining federal funding, the Federal Budget and Appropriations Team focuses on serving the legal and legislative needs of local, state and tribal governments, corporations, and non-profit entities before Congress and Executive Branch agencies. Our team provides the ability to interact with senior officials in a variety of federal agencies, key decision-makers in the Bush Administration, and leaders on both sides of the aisle in the House and Senate.

We provide a bipartisan approach with lawyers, nonlawyer professionals, and public relations experts in Washington who have extensive public service as elected officials and senior agency staff in the executive branch and as senior personal and professional congressional staff. Since our team members have been a part of the public policy process for so long, we know when a public law decision will be made, who will make it, and how it can be shaped efficiently and effectively. We also have close, immediate and strong relationships with members of both parties' congressional leadership and the Bush Administration.

Holland & Knight recognizes that obtaining earmarked funding for projects is more challenging in the current federal budget environment than in previous years. However, the Federal Budget and Appropriations Team has worked closely with many corporations and governments over the past several years to obtain earmarked grant funding in each of the 13 annual federal appropriations bills for initiatives such as water infrastructure projects, health care facility upgrades, educational programs, vaccine/health care programs and transportation projects. We have worked on wastewater and drinking water projects funded through the U.S. Environmental Protection Agency's budget, highway and mass transit projects funded through the Department of Transportation's budget, housing and economic development projects funded through the Department of Housing and Urban Development's budget, and flood control and dredging projects funded through the Army Corps of Engineers' budget.

7. Employment and Labor

We regularly advise our clients on employment-related matters, including hiring, discipline and dismissal issues; public pension issues, including the Illinois Municipal Retirement Fund (IMRF); medical, dental, life and other forms of insurance often provided as benefits to public employees, including social security and Medicare where applicable; employee contract matters; and police, fire and civil service commission matters. We have written entire personnel policy manuals and ADA compliance manuals and forms, drug policies, sexual harassment policies, fire, police and other civil service-style commission regulations and various employment guides. We consult with our clients daily regarding personnel and discipline issues of every type. We have, when necessary, successfully prosecuted dismissal proceedings and defended against claims of improper practices.

We have also negotiated collective bargaining agreements for public sector clients throughout the State of Illinois. For example, we have negotiated either police and/or fire contracts in the following communities: Village of Maywood, Village of Downers Grove, Provisio Township School District #214, Village of Bloomingdale, City of Naperville, Village of Bridgeview, Village of Lincolnwood, Village of Lincolnshire, City of West Chicago, Village of Glen Ellyn, Village of

Northbrook, Village of Forest Park, Village of Carol Stream, Northbrook Park District, Village of Libertyville, Norwood Park Fire Protection District, and City of Danville.

8. Additional Services Available to the Commission

Commitment to Continuing Education

The firm's lawyers regularly lecture at seminars and workshops throughout Illinois and around the country, including Illinois Institute for Continuing Legal Education (IICLE) and bar association seminars as well as sessions at the Illinois Municipal League, the International Municipal Lawyers' Association (IMLA), the Illinois Government Finance Officers' Association, the Illinois Association of Public Procurement Officials, the Illinois Association of Municipal Management Assistants, the American Planning Association, the National College of District Attorneys, the American Society of Civil Engineers, the National Business Institute, Lorman Education Services, and Illinois NATOA.

In addition, our lawyers regularly contribute papers on current local government legal issues to publications and entities in the field, including the *Urban Lawyer, Municipal Lawyer,* and the *Illinois Municipal Review*, as well as law journals such as Loyola's *Public Interest Law Reporter*.

Our attorneys have written or edited several books on local government law and practice. For example, several members of our firm wrote substantial portions of *Illinois Jurisprudence: Municipal Law*, which includes discussion of numerous issues critical to municipalities on a daily basis. We lecture on a variety of local government topics, and our attorneys regularly write and speak on issues that the Commission deals with every day.

Access to a Wealth of Shared Knowledge

As part of our effort to bring to bear all of our collective talents and many years of experience for the benefit of our clients, both our local government practice group and our National Water Law Team conduct internal meetings each month during which we share information on new legislation, case law, issues, and projects affecting the firm's government and water clients. None of the time spent in these meetings—which often result in significant advances to the interests of our clients—is ever charged to clients.

From time to time, we conduct free workshops and seminars for our government clients, including such things as governing board workshops, Plan Commission and Zoning Board training sessions, and other board and committee advisory sessions on new matters of widespread concern. Our clients also frequently ask us to update them on pending legislative and policy initiatives that may affect them. When new state or federal legislation is passed, our clients are fully briefed on the impact, as well as creative approaches for compliance.

Perhaps the most well known and highly anticipated of our Illinois seminars is the *Holland & Knight Biennial Local Government Law Seminar*. Presented to elected officials and key administrative staff every two years after the municipal elections, this seminar includes presentations on numerous vital topics as well as spirited discussion and debate among the participants. Preparation for and presentation of this seminar requires the firm's lawyers to be up to date on the laws and issues facing

its clients. In addition, as noted in Section 4 above, the firm presents its own National Water Law Conference. Officials and staff of the Commission are welcome to attend these free seminars.

Strategic Communications

Holland & Knight's Strategic Communications Group offers clients public affairs tools and strategies specifically designed to meet their needs. Our public affairs professionals provide strategic planning, policy advocacy and public relations services for corporations, communities, associations, nonprofit organizations and their leadership. Our team is comprised of political and communications professionals with a wide range of public affairs experience including former press secretaries, former principals of national PR firms and former governmental officials, all of whom possess years of experience communicating with the Congress, state legislatures, corporate shareholders, communities and the media.

In the area of media relations, we work with clients to design a message that will resonate with their target audience. We identify the appropriate media outlets and pursue a plan to secure press attention to help further their efforts. Our team has contacts with newspaper and television media, trade press and weekly publication reporters across the country. We prepare press releases, draft opinion editorials, identify issue experts and place paid media.

Our crisis management team helps companies plan for and manage their complex and critical situations. We work proactively with our clients to identify their potential vulnerabilities and to develop strategies to effectively respond to events before they become crises. We work collaboratively with our clients to address crisis situations, from litigation communication to press conferences to congressional testimony. Crisis-related services include providing spokespeople, risk assessments, simulation exercises, media monitoring, media training, on-going counseling and crisis response web sites to better prepare companies in the event of crisis.

An effective strategic communications strategy often includes getting the people "in the know" in front of the people who make the decisions. However, allowing professionals to take a public position can be a double-edged sword. We know how to keep your professionals on-message. We provide a wide variety of public affairs-related training services, ranging from preparing individuals to face the press to developing public testimony and providing delivery training.

Investigative Services

Holland & Knight clients also enjoy the services of a full-time investigative group, Corporate Integrity Services LLC. Corporate Integrity Services provides a broad range of integrated investigative, corporate compliance, business due diligence, and security services, including:

- corporate internal fraud investigations
- business due diligence inquiries
- corporate compliance program reviews
- employee background investigations
- security advisory services

The professionals in this group bring sophisticated and diverse skills to problem solving in both domestic and international arenas that have been gained from experience in senior positions with a wide variety of law enforcement and investigative agencies, including the Federal Bureau of Investigation, the United States Secret Service, and the U. S. General Accounting Office.

Staffing Plan

1. Our Attorneys

We have developed staffing procedures that are particularly well-suited to the demands of our local government clients. Our entire practice is structured to provide timely and effective response to our government clients. We understand, and cater to, government's need for quick response across a broad range of substantive areas at a responsible cost. Consistent with the Commission's goals, we believe it is best for clients to establish one or two attorneys as the principal focus for the representation of each local government, and then also to involve as many other members of the firm as may be necessary or appropriate to bring our best expertise to bear on every problem at the lowest possible per hour cost for such service. For the DuPage Water Commission engagement, **Barbara A. Adams** and **Gregory R. Meeder** will serve as principal counsel. Barb would serve as primary counsel for transactional matters, while Greg will be primary counsel for litigation matters. As necessary to meet the Commission's needs on specific topics, they will involve others in the firm.

Barbara A. Adams—Principal Counsel

Barbara A. Adams represents local governments and governmental agencies and has counseled these entities in a broad range of substantive areas, including water law, construction law, contracts, personnel and employment, telecommunications, cable television, environmental law, public finance and bonds, public property, real estate acquisition and taxation, and code and ordinance interpretation. She has litigated in state and federal courts and appeared before a variety of administrative tribunals.

Ms. Adams was recently selected as a *Leading Illinois Attorney* in Governmental Law by the Network of Leading American Attorneys. She is a frequent author and lecturer on a variety of matters affecting local government law, including water law, telecommunications law, zoning of and leasing for wireless facilities, contracting and finance. She serves as General Counsel to the Northwest Water Commission, the Village of Kenilworth and the Kenilworth Park District, and has served as Village Attorney for Hinsdale. She was extensively involved in the real estate acquisition necessary for the construction of the DuPage Water Commission system in the last 1980s and early 1990s. Ms. Adams also serves a variety of the firm's clients, including Northbrook, Highland Park, Lake Bluff, Lake Forest and Glencoe. She also serves as special counsel to various municipalities on cable television, telecommunications, pension boards, boards of fire and police commissioners, personnel and other legal issues.

Ms. Adams serves as Chair of the Health and Environment Section of the International Municipal Lawyers' Association (IMLA), having recently completed a term as Chair of that group's Contracts, Franchises and Technology Section. She has served as Chair of the Home Rule Attorneys Committee of the Illinois Municipal League. For the past six years, she has chaired a League subcommittee on the telecommunications infrastructure maintenance fee law (now the simplified telecommunications tax), including the development of model telecommunications and right-of-way construction ordinances under that law, which are now in use statewide. In addition, she serves as chair of the Northwest Municipal Conference Attorneys' Committee. Ms. Adams is also a member of the American Bar Association and the Chicago Bar Association, where she has served as Chair of the Local Government Committee and on the Legislative Executive Committee.

Ms. Adams has authored a number of articles for publication, including recent articles on the decisions in *People ex rel. Klaeren v. Village of Lisle* in Loyola Law School *Public Interest Law Reporter* and the *Illinois Municipal Review* magazine. She is the co-author of a chapter entitled "Creation or Incorporation; Dissolution" in the Municipal Law Volume of *Illinois Jurisprudence.* She also prepared a model purchase service agreement and an accompanying article for the Transportation Research Board that was nationally published and circulated to public transit agencies. Ms. Adams frequently lectures on legal issues at various programs and events, including those of the International Municipal Lawyers' Association, the Illinois Municipal League, the Illinois Government Finance Officers' Association, the Illinois Public Procurement Officials, the Illinois Association of Municipal Management Assistants, Lorman Education Services, and the West Central Municipal Conference. She has recently lectured on public bidding and contracting; the law of easements; the evolving law of electronic records, communications and contracts; the newly adopted Simplified Telecommunications Tax Act; cable TV matters; and the Open Meetings Act.

Ms. Adams is a member of the Knox College Board of Trustees and was recently elected Secretary to the Board. She has served as Chair of the College's Annual Fund Steering Committee. After the Fall 2002 elections, she served on the Higher Education Transition Task Force of Governor Rod Blagojevich. She is also a member of the Park Ridge Community Church.

Ms. Adams received her B.A. *cum laude* in 1980 from Knox College, where she was Phi Beta Kappa. She earned her J.D. in 1983 from Northwestern University School of Law where she was the Executive Editor of the Northwestern Journal of International Law and Business.

Gregory R. Meeder—Principal Counsel

Gregory R. Meeder handles civil trial matters in state and federal trial courts on a local and national basis, proceedings before governmental and administrative agencies and arbitration proceedings. His legal career has focused on complex construction litigation and the representation of public owners, property developers, underground contractors, construction companies, commercial banks, corporations, partnerships, and individuals with regard to multi-million dollar litigation matters.

Mr. Meeder has authored legislation on behalf of the Underground Contractors Association and the Illinois Construction Industry Committee requiring differing site condition clauses in public construction contracts in excess of $75,000. See 30 ILCS 557/1 *et seq.* An article on the new legislation entitled "Differing Site Condition Clauses and How They Save the Taxpayer Money" may be found in the April 1999 issue of the Illinois Municipal Review Magazine. Mr. Meeder recently authored the first ever Strategic Partnership Agreement between OSHA and the Underground Contractors Association which employs a third party administrator to significantly reduce exposure of underground contractors to safety risks associated with underground construction and tunneling in Illinois.

Mr. Meeder also currently serves as lead counsel for Fermilab in Batavia, Illinois regarding the defense of a major underground construction claim brought by a tunneling contractor regarding the construction of neutrino tunnels at Fermilab. Unique affirmative owner damage claims, differing site conditions claims, claims regarding the lost use of the experiment (delay damages), productivity

claims, and accelerated work claims are involved in this $40 million underground construction dispute.

Representative projects include waste water treatment plants, airports, tollway systems, underground utility, cable, electric, gas, fiber optic, telephone, water, stormwater, and sewer projects, including tunneling, horizontal boring, directional drilling, and other specialty work related to underground infrastructure projects.

Mr. Meeder served on the Municipal Board of the Village of Palos Park from 1995 to 2003 as the elected Public Works Commissioner. As Commissioner, Mr. Meeder was directly responsible for all executive, legislative, and departmental policy relating specifically to utilities, cable, fiber optic, water, stormwater, sewer, and the supervision of public construction contracts (multi-million dollar underground construction projects were in design or under construction during his eight-year term). Mr. Meeder has also served on the Board of Directors of the 192-member Underground Contractors Association (1996-2000), and is Counsel to the Association. Mr. Meeder has also been appointed as a Special Assistant Attorney General for representation of the Illinois State Toll Highway Authority with regard to the installation of fiber optic lines along the right-of-ways adjacent to the Illinois Tollway system.

Mr. Meeder is admitted to practice in the State of Illinois and the United States District Court, Northern District of Illinois. Mr. Meeder holds a Bachelor of Arts Degree in English from the University of Illinois/Urbana, and he completed his foundation work at the University of Southern California and the University of California at Los Angeles. Mr. Meeder's juris doctorate degree was awarded in 1983 from IIT/ Chicago-Kent College of Law. Mr. Meeder is also a member of the Chicago Bar Association, DuPage County Bar Association, and Illinois State Bar Association.

2. Depth of Experience

Additional Holland & Knight Support

In addition to the extensive depth and breadth of Barb and Greg in their respective areas of practice, they will be supported by a variety of attorneys in our Illinois State and Local Government Practice Team, Federal Legislative Team and Construction Team. With more than 1,200 attorneys in the firm, we will be able to call on the full extent of this experience when needed by the Commission.

ILLINOIS STATE AND LOCAL GOVERNMENT PRACTICE

Darrow A. Abrahams represents municipalities, governmental agencies and construction contractors on a wide range of litigation matters. Prior to joining the firm, Mr. Abrahams worked for the Honorable David G. Bernthal, Magistrate, U.S. District Court for the Central District of Illinois.

Matthew C. Alshouse's legal experience includes land use and zoning matters as well as the representation of purchasers, sellers, developers, and lenders in acquisitions, dispositions, and loan and lease transactions involving residential and commercial real estate facilities.

Mark E. Burkland represents local governments and private sector on issues of zoning, development, personnel, contracts, environmental, and general corporate counseling. He serves as Village Attorney for the Villages of Lake Zurich and Hinsdale, as General Counsel to the River Forest Park District, and as special counsel to the Village of La Grange and other firm clients.

James R. Carr practices in the areas of growth management and land use, Illinois state and local government law, and construction law. Mr. Carr's growth management and land use practice involves the representation of both public and private entities in many aspects of the real estate development process, including permitting and entitlements, land use planning and zoning, annexations and development agreements, and eminent domain law.

Kathleen T. Cunningham practices in the firm's Illinois state and local government group, representing a variety of public and private sector clients on a variety of issues, including zoning and land use, finance, and government procedures. She also works in the areas of real estate development and litigation.

Steven M. Elrod's practice is devoted to the representation of private and public sector clients on a broad range of real estate development, zoning, and land use matters. Mr. Elrod is actively involved in the general representation of the firm's Chicago-area municipal clients, including Highland Park, Lake Bluff, and Northbrook, and has provided special counsel representation to local governments throughout the country. He also represents property owners, tenants, and developers in a variety of real estate and transactional projects.

Nina J. Fain counsels, negotiates and documents client positions in connection with retail, commercial and residential real estate developments, real estate asset management programs, zoning and permitting, eminent domain, land assemblage and construction and other transactions related to governmental entities. Ms. Fain is a member of the National Association of Bond Lawyers and is listed in the Red Book as qualified underwriter counsel.

Peter M. Friedman represents private sector and public sector clients, including numerous government agencies, municipalities, counties, forest preserve districts, and water commissions, on a wide variety of government law related matters. His Chicago-area government representation includes the County of Lake as well as the Cities of Highland Park and Lake Forest and the Villages of Lake Bluff, Northbrook, Glencoe, Lake Zurich, Hinsdale, and Bannockburn. Prior to joining the firm, he served on the staff and as Legislative Director for Congressman John Porter (IL-10) in Washington, D.C.

Matthew D. Heinke concentrates his practice in the areas of real estate, environmental and land use law, representing primarily municipalities. He also has experience in eminent domain and condemnation litigation.

Iain Johnston primarily represents municipalities and State of Illinois agencies in litigation matters involving revenue, employment, civil rights and land use. He also litigates complex commercial litigation matters. Before entering private practice, he served as Assistant Attorney General and Unit Supervisor for the General Law Bureau of the Office of the Attorney General of Illinois. Mr. Johnston successfully represented the Illinois State Police, its director and officers in Chavez v. Illinois State Police, a case alleging racial profiling. Mr. Johnston, an accomplished writer and speaker, co-authored two chapters in Illinois Criminal Procedure, 3rd ed. 1999 & Annual Supplement and has authored or co-authored numerous articles in law journals, newsletters and newspapers.

Michele L. Krause has a broad range of experience in all areas of real estate law, including the acquisition, disposition, and leasing of commercial, office, residential, and industrial real estate. Ms. Krause has also represented landowners, purchasers, and tenants of environmentally contaminated real estate, and is actively engaged in retail and shopping center leasing. She is also involved in the representation of local governments, developers, and property owners in matters ranging from annexation and subdivision agreements to zoning matters.

Mercedes A. Laing is a partner in the corporate diversity counseling, government relations, and litigation practice groups. Ms. Laing assesses clients' legal exposure, develops and implements strategies regarding crisis avoidance and management, conducts diversity compliance reviews, and develops diversity action plans. She also works with clients to develop and implement government relations strategies at the local, state and federal levels. Ms. Laing has close to 20 years' experience in government relations, litigation, community affairs and strategic philanthropy, gained through her work in the private, public and non-profit sectors.

Steve Lawrence has served as bond counsel, underwriters' counsel and issuers' counsel in a range of tax-exempt finance matters including industrial revenue bonds, single-family housing bonds for the State of Illinois and multi-family housing bonds, hospital financing and general obligation bonds. In addition, Mr. Lawrence has represented the municipalities in numerous financing, park district and school bond matters as well as water and sewer financing. He also serves private sector clients in real estate and contract matters.

David M. Lefkow concentrates his practice on management-side labor and employment law. During his more than 20 years as an employment lawyer, his practice has focused on three areas: human resources support services, collective bargaining/contract administration, and litigation. Mr. Lefkow serves many of the firm's governmental clients.

Amy E. McShane practices in local government and real estate matters, including the acquisition, disposition and leasing of commercial real estate. Ms. McShane has represented purchasers and tenants of telecommunications towers and tower sites, and is actively involved in commercial leasing. She also has experience in labor and employment cases and in commercial litigation.

James T. Mueller is a trial attorney whose practice focuses on the handling of construction, commercial, products liability, eminent domain, and employer related litigation. Mr. Mueller's litigation practice includes the representation of governmental agencies involving contract disputes, civil rights, condemnation, and professional negligence. Mr. Mueller's practice also includes representing and consulting with a broad range of clients, from Fortune 500 companies to family-owned businesses. Mr. Mueller's experience includes both trial and appellate level litigation work.

Matthew E. Norton practices in the areas of real estate development, local government, zoning, and land use law and litigation. His practice includes the representation of the firm's corporate and governmental clients in matters such as property development, annexation and disconnection, zoning, constitutional rights, breach of contract, and eminent domain. He regularly drafts codes and ordinances, attends hearings and meetings, and counsels clients on all matters of general administration.

Richard A. Redmond's practice involves eminent domain, land use, regulatory takings, environmental and other real estate related litigation. In addition to representing private property owners, he also serves as a Special Assistant to the Illinois Attorney General and, in that capacity, represents the Illinois Department of Transportation, the Illinois State Toll Highway Authority, the Illinois Department of Natural Resources, the Illinois Historic Preservation Agency, and various local governmental bodies.

Elliot M. Regenstein devotes his practice to local government and land use matters. He has experience in a wide variety of matters, including planning and zoning approvals, land use litigation, municipal code revisions and environmental issues. Prior to entering law school, Mr. Regenstein worked for two years at the New York City Department of Parks & Recreation.

Jack M. Siegel has practiced in the area of municipal law for more than 50 years with heavy concentration in zoning, annexation, civil rights and other aspects of urban and government law. He has tried more than 300 cases to verdict, including the landmark zoning case of *MHDC v. Arlington Heights* in the United States Supreme Court.

Mark A. Stang is a member of the litigation group. On behalf of the firm's governmental clients, he has defended zoning cases, prosecuted eminent domain, building, zoning, and life safety code enforcement actions, litigated public works construction contracts and bonds, and defended class actions and challenges to municipal ordinances, intergovernmental agreements and a Liquor Control Act referendum. He has tried several injunction cases that required greatly expedited discovery and sharply focused trial preparation. He has tried cases in state and federal courts and before state administrative agencies and has argued several appeals.

Maureen C. Strauts has experience in land use law and zoning issues. She has negotiated and drafted annexation agreements, easement agreements, and recapture agreements. She has appeared before zoning boards and committees in DuPage and Cook Counties. She has represented clients on issues related to annexation, special uses, and amendments in the zoning law. She has served as Alderman in the City of Park Ridge.

Julie A. Tappendorf focuses her practice primarily on local government, land use and real estate development matters. She has been involved in a number of diverse projects, including annexation, zoning, real estate transactions and special service area bond transactions. Ms. Tappendorf advises the firm's local government clients on various ethical, state regulatory and employed-related issues, including conflicts of interest in government employment, gift ban laws, compliance with the state's sunshine laws, and disability, leave, and pension policies.

FEDERAL LEGISLATIVE AND APPROPRIATIONS PRACTICE

Richard M. Gold is the Leader of the firm's federal practice group in Washington, D.C. Since joining Holland & Knight after eight years of government service, culminating in stints with U.S. Senator Lloyd Bentsen and EPA Administrator Carol Browner, Mr. Gold has focused on federal budget and appropriations and environmental legislative and regulatory matters. On the appropriations front, Mr. Gold leads Holland & Knight's Federal appropriations team which has been successful in achieving federal funding in excess of $750 million for Holland & Knight clients over the last several years.

Gerry Sikorski has served as the chairman of the Holland & Knight Board of Directors and the firm's Public Law Department. As a former Congressman, Mr. Sikorski brings with him a wealth of government experience. He represented Minnesota in the U.S. House of Representatives for ten years. During this time he served on the powerful Energy and Commerce Committee, with jurisdiction over telecommunications, finance, trade, consumer protection, health, environment, insurance, nuclear power, securities, utilities and energy laws.

Janet R. Studley is the chair of the public law department and focuses her practice on providing legal advice and public policy counsel to the firm's clients, particularly with respect to federal legislation. This representation has included health care, environmental law, international telecommunications, trade, federal taxation, and appropriations. Formerly, Ms. Studley served as Chief Counsel to the Subcommittee on Federal Spending Practices and Open Government of the Senate Governmental Affairs Committee.

Robert H. Bradner is a partner in the Washington, D.C. office. Prior to joining the firm, Mr. Bradner spent 13 years in government service, including seven as Chief of Staff and Counsel to Congressman John Edward Porter of Illinois, Chairman of the House Appropriations Subcommittee on Labor, Health and Human Services, Education and related agencies. Mr. Bradner is experienced on the federal budget and appropriations process and he has broad experience in the legislative and regulatory arena.

CONSTRUCTION PRACTICE

Robert J. Asti practices in the area of litigation. Mr. Asti is experienced in construction and construction engineering, insurance coverage, personal injury, commercial litigation and product liability. Mr. Asti is a member of the Tort and Insurance Practice Section of the American Bar Association and a member of the Construction Industry Forum as well as the Insurance Coverage Litigation subcommittee. Mr. Asti received his bachelor's degree cum laude in history from John B. Stetson University and earned his law degree from Cumberland Law School.

William F. DeYoung is a trial attorney whose construction litigation experience includes the representation of general contractors, mechanical systems subcontractors, demolition contractors, and owners in a large variety of private and public project settings. Mr. DeYoung is the firm's lead counsel for its participation in a claim management program for self-insured construction entities who must utilize commercial risk managers. Mr. DeYoung received his B.S. from Northwestern University and earned his J.D. magna cum laude from the University of Illinois College of Law.

Barbara A. Gimbel handles civil litigation matters in state and federal trial and appellate courts on a local and national basis. She focuses on complex litigation and the representation of construction companies, commercial banks, corporations, title insurance companies, partnerships and individuals in such matters. Ms. Gimbel's practice includes construction defect and delay cases, mechanic's lien issues, mortgage subrogation and priority disputes, fraud, forgery, general real estate matters and the defense of claims under the Underground Utility Facilities Damage Prevention Act. Ms. Gimbel received her B.A. from the University of Illinois and her J.D. from DePaul University College of Law.

Michael J. Kanute's practice includes both general and commercial litigation, including construction litigation. He has experience in handling various types of construction matters, including the defense of personal injury actions involving construction sites, contract suits, various statutory actions, indemnification issues and zoning disputes. Mr. Kanute earned his B.A. from the University of Notre Dame and his J.D. cum laude from Loyola University of Chicago.

Loretto M. Kennedy is a trial attorney whose experience includes representation of general contractors, owners, architects, engineers and local public entities on a wide variety of matters involving construction, personal injury and contract-related claims. Ms. Kennedy also has significant involvement in the firm's representation of various risk pools and self-insured clients who utilize commercial risk managers and third-party administrators. Ms. Kennedy received her B.S. from Loyola University and her J.D. from the University of Illinois.

Edward F. Ryan practices in the area of complex commercial litigation, including a variety of construction cases representing owners, general contractors, subcontractors, and architects in matters related to contract disputes, construction defects, delay and disruption claims, lien foreclosures and design defects. He is a member of the Illinois and Florida bars and earned his J.D. at Georgetown University.

3. Familiarity with Commission

Having served as General Counsel to the Commission since prior to commencement of water operations, we do not expect to require any time to become acquainted with the Commission.

Fees

Holland & Knight is committed to providing pricing arrangements that serve the interests of our clients. To that end, at the inception of every new relationship or project, we are willing to propose alternative fee arrangements that fit the circumstances, nature, and subject matter of that project. Then we present the option that, in our view, best serves the establishment of a mutually acceptable relationship. At that point, we work with the client to analyze potential alternative billing arrangements and negotiate acceptable terms.

Historically, we have found that, in most circumstances, an hourly rate arrangement is an effective way to meet our local governmental clients' needs most efficiently and with flexibility. In fact, for our general counsel clients, average hourly rates for our firm's services are ordinarily between $180 and $230 (excluding litigation). Depending on the billing arrangement we establish, we will provide DuPage, on a monthly basis, with a complete statement detailing the precise services provided during the preceding month. Our statements show what specific tasks were performed, which attorney or paralegal performed each task, and the exact amount of time (in 1/10th hour intervals) devoted to each task by each attorney or paralegal.

As our relationships with clients develop, we have revisited fee arrangements, and we have worked with our governmental clients to create billing structures–including blended hourly rates and discounts from standard rates–to address their needs. Upon a better understanding of the level of services required by the Commission, we would be happy to discuss further alternative fee arrangements. However, in the interim, set forth below are the proposed hourly rates for the principal members of our team for DuPage.

Team Member	Standard Rates	DWC Rate
Barbara A. Adams	$240-365	$240
Gregory R. Meeder	$255-330	$255
Partners - State and Local Government and Construction Practice	$200 - $275	$200 - $275
Associates - State and Local Government and Construction Practice	$150 - $215	$150 - $215
Paralegals - State and Local Government and Construction Practice	$115 - $175	$115 - $150

In addition to our hourly fees, we bill clients, without mark-up, for customary disbursements made on their behalf, and charge for copying, computer research costs, and other administrative services at standard rates based on our cost. We do not bill for clerical services other than significant clerical overtime required because of client needs as opposed to firm convenience.

We understand that you are adjusting to your new in-house counsel arrangement and the extent of outside counsel you will require. We are willing to discuss retainer options for billing of attendance at meetings and other routine work if you believe it may be appropriate. We estimate that an appropriate monthly retainer on the terms generally outlined in the Request for Proposals would be in the range of $3,000 to $3,200 per month. We would like to discuss the content of the retainer with you in more detail.

Malpractice Insurance

Holland & Knight LLP maintains professional liability insurance in excess of $10 million in limits per claim. A statement of certification is enclosed as Attachment B. If you have questions or require further information, please let us know.

Conflicts of Interest

We are not aware of any substantial conflict of interest that would prevent our thorough and zealous representation of the Commission. However, with a law firm of the size of Holland & Knight, occasional conflicts of interest do arise. We find that by engaging in early discussion of possible conflicts with both clients, they are largely resolvable.

As you know, we have concurrently served as General Counsel to the Commission and as Village Attorney to the Village of Hinsdale, a Commission member, for many years. The fact of these representations has been fully known and disclosed to both clients since the inception of these relationships with no conflicts or problems arising involving Holland & Knight.

Attachment A
Representative Illinois Public Sector Projects and Client References

Representative Illinois Public Sector Projects

Water Purchase and Sale Agreements

Clients: Northbrook, IL and DuPage Water Commission

Prepare and negotiate agreements on behalf of our water supplier clients for comprehensive arrangements for potable water supply.

Northeast Lake Facilities Planning Area Sewerage System

Client: Lake County, IL

Multiple intergovernmental agreements with the Villages of Antioch, Old Mill Creek and Lindenhurst regarding the provision of sanitary sewer services to, and regulation of the development densities on, approximately 40,000 acres of land in northeast Lake County.

Pump Station Improvements

Client: Northwest Water Commission

Bidding and contract documents, bidding issues and settlement agreement due to contractor's failure to perform on a $4million water pumping station upgrade.

Shermer Place Development

Client: Northbrook, IL

Amendments to comprehensive plan and zoning code, and development agreement and related approvals, to create a new planning area and zoning district for the mixed use redevelopment of a contaminated industrial site near Village's downtown area. Project included financial/office and residential (condominium and town homes) uses.

21st Century Cable TV Franchise Agreement

Client: Northbrook, IL

Negotiation and drafting of a cable television franchise to allow for an alternative cable service provider for the Village.

Highland Park Land Conservation Project

Client: Highland Park, IL

Intergovernmental Agreement between the City of Highland Park, the Park District of Highland Park, and the Lake County Forest Preserve District involving the acquisition of land owned by private parties and the Illinois Department of Transportation, and the assembly of several hundred acres of golf course land, to allow for the creation of one of the largest land conservation areas along Chicago's suburban North Shore.

Northbrook Pointe Development

Client: Northbrook, IL

Annexation agreement related to approvals for mixed use restaurant, hotel and condominium development adjacent to Tri-State Tollway. Creation of new mixed use zoning district.

Lake-Cook Road Corridor Agreement

Client: Northbrook, IL

Boundary and land use management agreement between our client and the Village of Deerfield to control and manage future annexation and development or redevelopment of all of the unincorporated territory located between the borders of the two Villages.

Churchill Property

Client: Lake Zurich, IL

Complex intergovernmental agreement with the Village of Kildeer resolving a dispute concerning the annexation of a large commercial tract. The agreement allows for annexation of the tract to Kildeer, but grants Lake Zurich direct regulatory authority as well as the ability to share in the revenues generated from the development.

West Chicago Surety Agreements

Client: Illinois Department of Nuclear Safety

Complex agreements involving a structured arrangement of surety bonds, corporate guaranties, federal guaranties and related financial assurances to assure performance of over $150 million in work required by the Kerr-McGee corporation to clean up radioactive contamination in West Chicago, Illinois. Believed to be the largest transaction of its kind.

Purchase of Service Agreements

Client: Pace

Prepare and negotiate agreements to purchase public bus transportation services from municipalities providing such services in their areas.

Lindenhurst Water/Sewer Agreement

Clients: Lake County, IL & Lake County Forest Preserve District

Intergovernmental agreement with the Village of Lindenhurst, Lindenhurst Sanitary District and private parties that allowed for the construction of water and sewer mains for new construction in return for substantial land donations, including a portion of a Centennial Farm to the Forest Preserve District.

Elmhurst Quarry

Client: DuPage County, IL

Multimillion-dollar acquisition of an approximately 80-acre stone quarry and underground mine for stormwater management and flood control purposes.

Grand-Hunt Agreement

Client: Lake County, IL

Settlement agreement and land resource management plan to allow controlled development of, and sanitary sewer for, approximately 2,120 acres of land in the Village of Gurnee. In return, the County secured substantial public land and open space for a school site, two golf courses and a park.

LLRW Martinsville Facility Agreement

Client: Illinois Department of Nuclear Safety

Established public/private partnership for the siting, development, financing and operation of a highly controversial low-level radioactive waste (LLRW) disposal facility to serve the

needs of Illinois and Kentucky. Negotiated intergovernmental agreement between our client and the proposed "host community" for the facility providing for local environmental and safety protections as well as a package of economic incentive programs intended to aid the local economy.

Grainger Property - LML and Settlement Agreements

Client: Lake County, IL

Proposed intergovernmental agreement among Lake Forest, Mettawa and Lincolnshire concerning the development of the Grainger property upon disconnection from Mettawa as well as the development of surrounding property, followed by alternative settlement of ensuing litigation that allowed development, protected adjacent communities and resulted in largest land donation in Lake County history.

Immanuel Church Preservation

Client: Hinsdale, IL

Negotiation of purchase and sale agreements with owner of 100-year old landmark church and with not-for-profit historical society to save from demolition and own, preserve and operate valuable community historic resource.

Crate & Barrel Tax Rebate Agreement

Client: Northbrook, IL

Agreement by and between several local governments and taxing districts to provide for a multi-government real estate tax rebate to enable the construction of the world headquarters for a long standing corporate resident of the village.

Client References

We encourage you to contact the client representatives listed below. We think you will be very satisfied with their responses to your questions about our services. If you require additional references, please feel free to contact us and we will be glad to provide it.

Client	Primary Contacts		Description of Services	Years of Service
Village of Glencoe	Anthony Ruzicka Village President 847-835-4114	Paul Harlow Village Manager 847-835-4114	General Counsel	23
City of Highland Park	David M. Limardi City Manager 847-926-1000	Patrick Brennan Assistant City Manager 847-926-1003	Corporation Counsel	3
Village of Hinsdale	William E. Whitney Past Village Pres. 630-920-0698	Bohdan J. Proczko Village Manager 630-789-7000	General Counsel	14
Village of Lake Bluff	Tom Skinner Village President 847-234-0774	Kent Street Village Administrator 847-234-0774	General Counsel	10
County of Lake	Martin A. Galantha Superintendent, Public Works Dept. 847-680-1600	Barry Burton County Administrator 847-377-2228	Special Counsel, sewer, water, and transportation, planning, development, zoning, litigation	22
City of Lake Forest	John E. Preschlack Mayor 847-234-2600	Robert R. Kiely City Manager 847-615-4271	General Counsel	3
Village of Northbrook	James M. Reynolds Director of Public Works 847-272-4711	John M. Novinson Village Manager 847-272-5050	General Counsel	30
Northwest Water Commission	John J. DuRocher Executive Director 847-635-0777	William R. Balling Chairman 847-459-2517	General Counsel	30

Client	Primary Contacts	Description of Services	Years of Service
Village of Skokie	J. Patrick Hanley Corporation Counsel 847-933-8270	Special Counsel, water rate dispute, fire pension fund, zoning	n/a
Village of Wilmette	Timothy J. Frenzer Corporation Counsel 847-853-7504	Special Counsel, employment	n/a

Attachment B
Confirmation of Insurance

Attachment C
Additional Construction Law and Public Utility Experience

Construction Law and Public Utility Litigation

Below is a sample of additional relevant **construction** projects handled by members of our team:

- Represented a joint venture comprised of major tunneling contractors related to the South Boston Interchange component of the "Big Dig" Project. The claim presented a tremendous scheduling challenge in that virtually all of the Project's two dozen separate milestones called for liquidated damages due to late completion. As such, separate delay analyses were required for each milestone, yet the overall project required an integrated analysis. The Project also required the construction of a subway station for a separate agency.
- Represented international joint venture tunneling contractor in the preparation of a claim on a major tunnel project in New Zealand. Claim centered on productivity of tunnel boring machine in the face of a differing site condition. The DSC claim itself was somewhat unusual in that the type of rock encountered was not necessarily materially different than advertised, but rather that its behavioral characteristics when bored differed materially from what should have been reasonably expected.
- Represented multiple prime contractors on a variety of underground contracts related to the construction of the Washington, D.C. subway system ("Metro").
- Represented general contractor in prosecuting claims associated with the construction of a rail tunnel in Buffalo, New York.
- Represented general contractor related to performance of the Waste Isolation Pilot Project in Texas.
- Represented general contractor pursuing claim for unsuitable soil conditions associated with a water treatment plant excavation.
- Represented utility contractor in connection with various claims associated with the installation of underground sewer pipes and water services.
- Represented utility contractor in connection with various disputes in excavating and installing pipe in a tunnel at a major U.S. military installation.
- Represented the City of Atlanta in the defense of $12 million in claims (differing conditions, delay changes) involving a general contractor and its subcontractors arising from the Clear Creek Tunnel (hardrock) Project in Atlanta, Georgia.
- Represented a tunneling contractor with regard to leaks resulting from design and construction sequencing issues on the construction of numerous tunnels below a large convention center.

Below is a sample of relevant **public utility** projects handled by members of our team:

- Assisted in the initial analysis of claims from the prime and subcontractors and provided counsel during the negotiation and mediation of claims on behalf of the New York Power Authority regarding the construction of seven power plants.
- Represented Distrigas of Massachusetts LLC/Tractebel LNG North America in a $130 million LNG modemization project in the Boston area being constructed, in part, to provide a sole source supply to a nearby, newly constructed Sithe power plant.

- Handled a $170 million litigation dispute on behalf of international engineering and construction firm, Foster-Wheeler, involving the design, manufacture and construction of the boiler island for the largest circulating, fluidized bed power generation facility in the world.
- Litigated a breach of contract claim against a supplier of a fluoride wastewater treatment system with complex damage issues.
- Represented a joint venture engineer-procure-construct (EPC) contractor (including Parsons Power and Engineering Corp., Enron Engineering & Construction Company and Gemma Power Systems, LLC) in a case concerning a combined-cycle power plant. The suit included timeliness of performance, suitability of the turbine, and other design and construction-related issues. The litigation effort included developing a case strategy to factor in the multiple contractual relationships among the parties, developing a document control process, and overseeing the document discovery and analysis.
- Counseled PG&E National Energy Group regarding eight nominal 1,100-megawatt gas-fired, combined cycle power plants.
- Prosecuted a construction claim for Patterson Pump Company's Goldendale Energy Facility, a subcontractor that provided pumps and related equipment to a general contractor who went out of business. Over 60 liens were filed against this project, totaling over $3,000,000.
- Negotiated an EPC-style Alliance Agreement for design, procure and construction at a coal-fired power plant on behalf of general contractor and U.S. subsidiary of Flue Gas Desulfurization (FGD), a Danish company. The case, valued at over $20 million, involved the termination of the client contractor by the owner for alleged excessive cost overruns.
- Defended claims for a first-tier subcontractor brought by a third-tier subcontractor and prosecuted cross-claims against an intermediate second-tier subcontractor. The plaintiff asserted claims for copyright infringement due to the retention and continued use of allegedly copyrighted design drawings.
- Represented a surety with more than 250 bonds it wrote for a Chapter 11 contractor. The case, involving over $20 million, involved the successful reorganization of a large, international construction firm with projects all over the world, including power plants, transportation and military projects.
- Defended a payment bond claim arising out of the construction of the wastewater treatment portion of an electric generating plant.
- Defended multiple lien and lien bond claims as well as assisted in the arbitration of eight-figure claims between a general contractor and a subcontractor of a power generating plant project.
- Represented an EPC contractor against a vendor/manufacturer for money withheld due to late delivery, improper design and manufacture of combined cycle turbine generator.
- Defended and prosecuted a claim on behalf of a public owner who engaged the designer/builder for a pollution control system upgrade that failed to perform as specified.
- Defended a design/builder after a public authority withheld payment, arguing that the air pollution control system for waste-to-energy plant was not properly functioning. The design/builder argued that the schematic design was fundamentally flawed and the existing facility could not support the system under the parameters laid out in the schematic design.

- Handled various aspects of a case involving products of cool combustion being used as structural fill in Virginia power plants. The suit arose when the fly ash expanded, requiring severe remediation techniques. Little was known about the expansive characteristics of the material at the time.
- Handled court and appeal proceedings up to the Florida Supreme Court for an owner seeking to recover damages for the under sizing and defective engineering of a water treatment facility. The defective engineering required the owner to pay $1.6 million in delay damages to a third contractor on a multi-prime job.
- Defended a personal injury and property damage claim with over 700 plaintiffs for the alleged contamination of drinking water and air at an oil refinery.

PROPOSAL FOR THE PROVISION OF LEGAL SERVICES

FOR THE

DU PAGE WATER COMMISSION

Prepared by

MOSS AND BLOOMBERG, LTD.

January 30, 2004

MOSS AND BLOOMBERG, LTD.
Attorneys and Counselors at Law

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January 30, 2004

DuPage Water Commission
600 East Butterfield Road
Elmhurst, Illinois 60126

Attention: Robert L. Martin
Acting General Manager

Gentlemen/Mesdames:

It gives us great pleasure to respond to the DuPage Water Commission's request for a proposal for legal services. We believe that the unique strengths of our firm dovetail with the legal needs of the Commission and are hopeful that, after having reviewed the enclosed materials, you will understand our philosophy of representing governmental clients and appreciate the background, experience and credentials that would enable us to capably represent the Commission.

For your reference we have organized below our response to your request as follows:

Section A - QUALIFICATIONS/EXPERIENCE

Section B - STAFFING

Section C - GOVERNMENTAL CLIENTS

Section D - FEE PROPOSAL

Section E - MALPRACTICE INSURANCE

Section F - CONFLICTS

APPENDICES

Citizens Utilities Company - Village of Bolingbrook Asset Purchase and Exchange Agreement Closing Checklist

Partial List of Closing Documentation Involved in Citizens Utilities Company - Village of Bolingbrook Asset Purchase and Exchange Transaction

"Municipal Litigation," Chapter 20, *Municipal Law and Practice of Illinois,* IICLE (2000)

"Municipal Litigation," Chapter 20S, *Municipal Law and Practice of Illinois,* IICLE (2003 Supplement)

It is our sincere desire to serve the Commission in an official capacity. To do so would be a privilege and an honor. We truly appreciate the thoughtfulness the Commission has devoted to this matter, and we welcome the opportunity to interview with the Commission and answer any questions that you may have.

Sincerely yours,

MOSS AND BLOOMBERG, LTD.

Barry L. Moss

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A. QUALIFICATIONS/EXPERIENCE

Over the past thirty-five years, Moss and Bloomberg, Ltd. has specialized in the representation of local governmental entities throughout the Chicago metropolitan area. We provide our governmental clients with advice, representation and litigation services in the areas of large construction projects (including underground construction); insurance; acquisition of real estate and rights-of-way; enforcement of payment and performance bonds; utilities, including water and sewerage utilities; public finance, including debt issuance; employment practices; labor relations and personnel related questions; and a variety of additional governmental practice areas. We truly value the relationships we enjoy with our governmental clients and strive to provide effective legal representation. In this regard, we bring a high degree of competence and commitment toward guiding our governmental clients to their goals. If we are privileged to serve as the Commission's attorney, we will work closely with the Commission and staff toward achieving the Commission's policy objectives and goals. We believe that we will bring a level of professionalism, responsiveness and conscientiousness that is unequaled.

Moss and Bloomberg employs five attorneys, four paralegals, and eight support staff. We have consciously decided to maintain our size so we can provide meaningful representation to our clients.

A list of the governmental entities for which we currently provide day-to-day legal advice is included. Our firm is also retained by many other governmental entities throughout the Chicagoland region as special counsel and has acted as defense counsel to governmental entities who participate in either risk management pools or self-insurance programs.

Following is a brief description of the qualifications and experience of the firm in certain specified areas of the law. We are proud of the results we have been able to obtain.

Construction Projects; Acquisition of Real Estate and Rights-of-Way

For more than three decades, Moss and Bloomberg has been involved, continually and in depth, with large construction projects and the concomitant acquisition of real estate and rights-of-way. At the present time, for example, we represent Valley View Community School District No. 365U in a $190 million project involving acquisition of real estate, easements and construction services (including construction management agreements) re construction of a new high school, middle school and elementary school, conversion of a high school to a middle school, conversion of a middle school to an elementary school, major renovations to a high school and renovations to many other schools.

Moss and Bloomberg also represents a number of municipalities, park districts and additional governmental bodies that have been extremely active in large construction projects involving land and right-of-way acquisition. These projects include construction of municipal buildings, new village halls, sewerage and water facilities, a golf course with a 76,000 square foot clubhouse, park buildings and facilities, school buildings and the like that individually constitute extremely large projects and that cumulatively involve hundreds of millions of dollars. Moss and Bloomberg is extensively involved in utility work and securing land, easements and rights-of-way for expansion (*see* Utilities, *infra.*).

Familiarity with DuPage Water Commission

Moss and Bloomberg, Ltd. is, of course, very familiar with the DuPage Water Commission, the statutes under which it operates, and the regulatory environment in the State of Illinois. We have almost thirty years' experience with hearings before the Illinois Commerce Commission and any and all other matters involving municipally owned water systems and public water systems (tariffed by the ICC), particularly through our involvement over the years with the Village of Bolingbrook and Citizens Utilities Company (purchased by Illinois-American Water Company and subsequently purchased by Thames Water), which owned both water and sewerage utilities in the Village of Bolingbrook as well as with other governmental clients. Further, the villages of Addison, Villa Park and Winfield are members of the DuPage Water Commission. Consequently, over the years our firm has gained intimate knowledge of the Commission and its workings.

Utilities

Our firm has had extensive experience with utilities (including water and sewerage utilities). In addition to our involvement with the DuPage Water Commission and our municipal clients, we have engaged in numerous utility related projects over the past thirty years. These projects include the purchase by the Village of Bolingbrook of a water utility company and the exchange of assets with Citizens Utilities Company wherein, after Citizens constructed a pipeline from Chicago to bring lake water to Will County, the Village exchanged its water utility facilities for Citizens' sewerage facilities. The Village and Citizens each served approximately one half the Village. This was an extremely challenging transaction that most certainly encompassed all of the complex elements of legal work the Commission wrestles with on an ongoing basis, including those articulated in the Commission's Request for Proposal. A copy of the closing checklist and abbreviated list of closing documents are attached. Further, Moss and Bloomberg has participated in Illinois Commerce Commission hearings involving Citizens Utilities for almost thirty years, which participation made necessary a thorough knowledge of pricing and rate structure theories and water contracts of all kinds. In fact, because of its expertise gained in jousting with Citizens over many years, Moss and Bloomberg has been consulted by many additional municipalities who have challenged Citizens and other public utilities tariffed by the ICC.

Finance and Taxation

Moss and Bloomberg is regularly involved with public financial transactions for our governmental clients, literally hundreds and hundreds of public finance projects, many of which have included debt financing between $20 and $150 million. We have worked with practically every conceivable debt instrument that can be conjured up in cooperation with innovative investment bankers, including revenue bonds, health facility bonds, TIF bonds, special service area bonds, golf course bonds, airport bonds, general obligation bonds and variations and permutations of the foregoing. We have been Issuer's counsel in a vast majority of these transactions. We are familiar with a broad range of needs encompassing bond financing. Our clients often seek our advice on methodologies in relation to debt financing, refinancing and future project needs. We work closely with our governmental clients to provide creative financial solutions.

Legislative Process

We are completely familiar with the legislative process and with many legislators. We have been around long enough to have worked with many and varied groups, including the Illinois Municipal League, over an extended period of time and also to have worked with and established relationships with many legislators and other public officials.

Regulatory, Administrative Law and Contracts:

We regularly draft and negotiate a variety of contracts including employment, construction, professional service and utility contracts. When necessary, we are ably skilled to litigate same. Moss and Bloomberg, Ltd. has expertise in the field of regulatory and administrative law at the federal, state and local levels. We have appeared on behalf of our municipal clients before the Illinois Commerce Commission, Illinois Department of Transportation, Environmental Protection Agency, the Pollution Control Board and other administrative bodies. We speak frequently for the Illinois Municipal League and other agencies on various topics pertaining to governmental law, including the Open Meetings Act and the Freedom of Information Act.

Labor and Employment

Moss and Bloomberg, Ltd. has extensive experience in employment related issues. For example, we represent governmental clients in collective bargaining negotiations, grievance arbitrations, mediation and unfair labor practice matters before various forums, including the Illinois Labor Relations Board. We counsel our clients regularly on employment practices and personnel related insurance matters in addition to giving continuing education seminars on those topics and many other subjects related to our representation of our governmental clients. We counsel our clients on ancillary maters such as media relations and investigations. When necessary, we diligently defend our clients against actions in state and federal court.

Insurance Law, Torts, Litigation

Moss and Bloomberg, Ltd. has wide and diversified experience in dealing with questions pertaining to insurance, including, but not limited to, insurance defense, insurance coverage, tort law, and court decisions underpinning the entire range of questions which arise when properly advising, adjudicating for and defending governmental bodies. In this regard, we have defended our clients in a wide range of cases, including class action lawsuits, wrongful death claims, excessive force and personal injury cases, zoning matters, condemnation proceedings, employment matters, contract issues, construction matters and the like.

Our attorneys are familiar with state and federal courts in Illinois and have successfully defended many cases on behalf of our governmental clients. Whether the cases are small or large, we believe they are all equally important. Perhaps most important is our counsel and advice which we give to our clients so they can avoid litigation and reduce the exposure to damages, fees and unnecessary expenses. We first strive to represent our governmental clients in a most professional manner. While we try to avoid unnecessary work or expense, we nonetheless always aggressively advance our clients' interests.

Moss and Bloomberg is proud to have authored and updated over the course of many years, the Chapter on "Municipal Litigation" (attached) for IICLE's *Municipal Law and Practice in Illinois*.

Zoning, Land Use and Annexations

We have a great depth of experience in this area. Many of our clients are rapidly changing or seeking to preserve their environment, thus requiring us to provide them with land use guidance and legal advice. In this regard, we have been greatly involved in preparing development and annexation agreements, recapture agreements, and agreements necessary for a variety of developments. We have worked diligently in this area, not only with regard to counseling, but also in the area of litigation, when necessary. We have been involved in major redevelopment projects. For instance, we have worked closely with the Village of Bolingbrook, Village of Addison, Village of Villa Park, Village of Winfield, City of Warrenville and others in addressing and achieving their redevelopment goals and their desire to maintain their unique character. We believe that our counsel and legal advice for these representative communities has allowed them to grow and strengthen.

B. STAFFING

Principal Contacts

The principal persons who will act as counsel on behalf of the DuPage Water Commission are Barry L. Moss and George A. Marchetti.

Barry L. Moss, 260 East Chestnut, Apt. 3902, Chicago, Illinois 60601, Partner, a 1967 graduate of Northwestern University Law School, is recognized as an expert in the field of government law. He is a past chair and long-standing member of the Attorney's Committee of the Illinois Municipal League. He has conducted numerous seminars for the Illinois Municipal League, the Illinois Association of School Boards and the Illinois Association of Park Districts, and coauthored the section on "Municipal Litigation" for *Illinois Municipal Law*, published by the Illinois Institute for Continuing Legal Education. He is well versed in all aspects of governmental law and litigation, including utility law, and has over thirty years' experience in the areas specified in the Commission's request for proposal.

George A. Marchetti, 5726 South Grand, Western Springs, Illinois 60558, Partner, was a Legal Writing instructor and on the Law Review ("EPA v. Adamo Wrecking Co.") at Chicago-Kent College of Law, from which he earned his law degree in 1978. In addition, he holds an M.A. from the University of Chicago (1972) and a B.A. from Notre Dame University (1970). Mr. Marchetti joined Moss and Bloomberg, Ltd. in 1978. A principal of the firm specializing in the area of governmental law, he was the coauthor, with Barry L. Moss, of "Municipal Litigation," *Illinois Municipal Law*, Illinois Institute for Continuing Legal Education, and has authored numerous articles pertaining to the field of governmental law. He is well versed in all aspects of governmental law and litigation, including utility law, and has over twenty-five years experience in the areas specified in the Commission's request for proposal.

Additional attorneys in the firm are as follows:

Steven P. Bloomberg, 351 Seven Pines Circle, Highland Park, Illinois 60035, Partner, is a 1968 graduate of DePaul University College of Law and received his B.S. degree in 1965 from the University of Wisconsin. From 1971 through 1973, he served as an Assistant Attorney General in charge of litigation at the Consumer Fraud Division and as a Special Assistant Attorney General from 1973 until through 1975. From 1973 until the present, he has been engaged in the practice of law as a principal in the firm of Moss and Bloomberg, Ltd. specializing in governmental and condominium law. He has written articles and lectured in the areas of governmental and condominium law before professional groups and is admitted to practice before the Illinois and federal courts, including the Seventh Circuit Court of Appeals. He is well versed in all aspects of governmental law and litigation, including utility law, and has over thirty years experience in the areas specified in the Commission's request for proposal.

David J. Freeman, 1103 East Forest Avenue, Wheaton, Illinois 60187, Partner, received his law degree from Delaware Law School in 1983 and an A.B. from Georgetown University in 1979. He served as a judicial clerk for the Superior Court of New Jersey until 1984, when he became an Assistant Prosecutor for Mercer County, Trenton, New Jersey. Since entering private practice and joining Moss and Bloomberg in 1987, he has had extensive experience in governmental, condominium and corporate litigation. He is admitted to practice in New Jersey, Pennsylvania and Illinois and is a member of the trial bar for the United States District Court for the Northern District of Illinois. Mr. Freeman is a frequent lecturer and expert in governmental law and is well versed in all aspects of governmental law and litigation, including utility law, and has over fifteen years experience in the areas specified in the Commission's request for proposal.

James S. Boan, 463 Delaware Circle, Bolingbrook, Illinois 60440, is a 1983 graduate of Northern Illinois University, College of Law. He received his B.S. from the University of Illinois (1973) and his M.S. from George Williams College (1978). From 1984 to 1997 he was a partner in the law firm of Kusta and Boan, P.C., where he concentrated in real estate matters including governmental, zoning, and land use law. He has worked extensively in the public sector and served as the Chairman of the Kendall County Board from 1990-1995. He is admitted to practice in Illinois and the U.S. District Court of the Northern District. He served as Village Administrator for the Village of Bolingbrook from September 1, 1997 through December 31, 2001 and joined Moss and Bloomberg, Ltd. in January 2002. He is well versed in all aspects of governmental law and litigation, including utility law, and has over nineteen years experience in the areas specified in the Commission's request for proposal.

C. GOVERNMENTAL CLIENTS
(CURRENT REPRESENTATIVE LIST)

Because of our extensive experience as general counsel to many local governmental entities, we have developed an expertise in the day-to-day aspects of local government law. We regularly advise the following and additional clients on matters such as utilities, construction projects, land acquisition, public finance, employment practices, legislation, policies and procedures, appropriations, use of public property, land management and acquisition, and annexation. We welcome you to contact any one of our clients as we are confident that they will be able to share with you the beneficial role that our office has served. We are readily accessible and will be at the Commission's offices whenever the need arises. We pride ourselves on our responsiveness.

Cities and Villages:

- **Village of Bolingbrook**, Village Attorney (28 years)
  375 West Briarcliff Road
  Bolingbrook, Illinois 60440
  Roger C. Claar, Mayor (630) 226-8400

- **Village of Addison,** Village Attorney, (17 years)
  One Friendship Place
  Addison, Illinois 60101
  Joseph Block, Village Manager (630) 543-4100
  Lorenz Hartwig, Mayor

- **Village of Winfield**, Village Attorney (10 years)
  27 W 465 Jewell Road
  Winfield, Illinois 60190
  John Kirschbaum, Village President (630) 933-7100

- **Village of Villa Park**, Village Attorney (8 years)
  20 South Ardmore Avenue
  Villa Park, Illinois 60181-2696
  Rae Rupp Srch, Village President (630) 834-8500

- **City of Warrenville**, City Attorney (21 years)
  28 W 701 Stafford Place
  Warrenville, IL 60555
  John Coakley, City Manager (630) 393-9427
  Vivian Lund, Mayor

Park Districts/Recreation Associations:

- **Oakbrook Terrace Community Park District** (29 years)
  1 S 325 Ardmore Avenue
  Villa Park, Illinois 60181
  Mario Parente, Director (630) 627-6100

- **River Trails Park District** (21 years)
  401 East Camp McDonald Road
  Prospect Heights, Illinois 60070-2508
  Deborah Carlson, Director (847) 298-4445

- **Bolingbrook Park District** (33 years)
  201 Recreation Drive
  Bolingbrook, Illinois 60440
  Raymond Ochromowicz, Director (630) 739-0272

- **Salt Creek Rural Park District** (18 years)
  530 South. Williams Street
  Palatine, Illinois 60067
  Greg Kuhs, Director (847) 259-6890

- **Buffalo Grove Park District** (2 years)
  530 Bernard Drive
  Buffalo Grove, IL 60089-3351
  Michael Rylko, Director (847) 850-2100

- **NEDSRA (Northeast DuPage Special Recreation Association)**
  1770 West Centennial Place
  Addison, Illinois 60101
  Association of 13 park districts and village recreation departments in DuPage County (24 years)
  Larry Reiner, Director (630) 620-7477

- **SWSRA (Southwest Special Recreation Association)**
  12521 South Kostner Avenue
  Alsip, Illinois 60803
  Association of districts in Southern Cook County (17 years) (708) 389-9423

School Districts:

- **Itasca School District No. 10** (16 years)
  200 North Maple Street
  Itasca, Illinois 60143
  Kenneth L. Cull, E.D., Superintendent

- **Valley View Community Unit School District No. 365U** (30 years)
  755 Luther Drive
  Romeoville, Illinois 60446
  Phillip W. Schoffstall, E.D., Superintendent (815) 886-2700

Tax Consortiums:

- **Itasca Tax Consortium (3 taxing bodies)**
  200 North Maple Street
  Itasca, Illinois 60143
  Administrative District - Itasca School District 10
  Dr. Kenneth L. Cull, Superintendent

- **Addison Tax Consortium (6 taxing bodies)**
  One Friendship Place
  Addison, Illinois 60101
  Administrative District - Village of Addison
  Joseph Block, Village Administrator (630) 543-4100

- **Lombard Tax Consortium (5 taxing bodies)**
  150 West Madison
  Lombard, Illinois 60148
  Administrative District - Lombard Elementary District 44
  Dr. Gary Smit, Superintendent (630) 620-3700

- **Lake Park Tax Consortium (12 taxing bodies)**
  700 East Granville Avenue
  Roselle, Illinois 60172-1978
  Administrative District - Medinah Elementary School District 11
  Dr. L. Mitchell Bers, Superintendent (630) 529-2091

- **Wood Dale Tax Consortium (6 taxing bodies)**
  543 North Wood Dale Road
  Wood Dale, Illinois 60191-1587
  Administrative District - Wood Dale School District No. 7
  Michael Smoot, Superintendent (630) 595-9510

Miscellaneous:

- **Fountaindale Public Library District** (6 months)
  300 West Briarcliff Road
  Bolingbrook, Illinois 60440-2102
  Karen Anderson, Director (630) 759-2102

D. FEE PROPOSAL

It has been our experience that retainer fees are often dependent upon client needs and objectives. Our local governmental clients often structure retainer fee agreements differently. In this light, we are certainly flexible and willing to discuss the parameters of the retainer fee agreement, the amount of such agreement, and its application. We are sure that we can provide excellent services, utilizing our experienced attorneys and paralegals, and manage projects while interfacing with the Commission and staff in an efficient and cost-effective manner. In this context, we believe it is advisable to explore a retainer fee that covers almost all the work associated with the Commission except for complex transactions, extensive litigation or debt financing. For work other than that covered under our retainer, we bill at a rate of $165.00 per hour, per attorney. As you will note from this proposal, all the attorneys in our firm are partners and have extensive experience. We believe that this rate is fair and competitive. For paralegal services, we bill at $85.00 an hour and, where appropriate, we try to utilize our paralegals to conserve fees. We are certainly familiar with the Commission and would not charge a fee for any necessary review and assimilation of background information.

E. MALPRACTICE INSURANCE

The declaration page from our malpractice insurance policy with the Illinois State Bar Association is appended.

F. CONFLICTS

The villages of Addison, Villa Park and Winfield, which Moss and Bloomberg, Ltd. represents, are members of the Commission. Due to said representation, Moss and Bloomberg has gained intimate knowledge of the Commission and its workings.

APPENDICES

Citizens Utilities Company - Village of Bolingbrook Asset Purchase and Exchange Agreement Closing Checklist

Partial List of Closing Documentation Involved in Citizens Utilities Company - Village of Bolingbrook Asset Purchase and Exchange Transaction

"Municipal Litigation," Chapter 20, *Municipal Law and Practice of Illinois*, IICLE (2000)

"Municipal Litigation," Chapter 20S, *Municipal Law and Practice of Illinois*, IICLE (2003 Supplement)

DECLARATIONS

ILLINOIS STATE BAR ASSOCIATION MUTUAL INSURANCE COMPANYL
LAWYER'S PROFESSIONAL POLICY DECLARATIONS

1. Policy Number **IL 101486 15**

2. Named Insured and Principal Address [C O P Y]

Moss and Bloomberg, Ltd.
305 West Briarcliff Road
P. O. Box 1158
Bolingbrook, IL. 60440-0858

3. Prior Acts Limitation (Retroactive Date) **FULL PRIOR ACTS**

4. Policy Term **From June 1, 2003 to June 1, 2004**
at 12:01AM CST at address of Insured named in Item 2

5. Annual Premium **$22,212.00**

6. Limits of Liability: Per Claim **$5,000,000.00** Aggregate: **$5,000,000.00**

7. Deductible: Each claim **$5,000.00**
(Inclusive of costs, charges and expenses)

8. Date of Application **April 11, 2003**

Attached Forms and Endorsements

Policy IL 2/2002
IL 101 01/98 (06/01/2003) IL 102 01/98 (06/01/2003) IL 409 (2/03) (06/01/2003)

This schedule including all endorsements listed herein, is incorporated in and made part of hte policy to which it applies The policy to which these declarations apply is a "claims-made-and-reported" policy which is applicable to claims first made against the insured during the policy term and reported to the Illinois State Bar Association Mutual Insurance Company within sixty (60) days after the expiration of the policy. This policy contains provisions which reduce the per claim ad aggregate sum insured by the costs of legal defense.

Illinois State Bar Association
Mutual Insurance Company

By: //signature//

Its Authorized Representative

All Claims to be reported to:

ISBA Mutual, Claims Manager
223 West Ohio St.
Chicago, IL. 60610-4445
(312) 379-2000 (800) 473-4722
FAX (312) 379-2003

IL 3 DEC 01/98 epg 05/16/2003

117777

CITIZENS UTILITIES COMPANY - VILLAGE OF BOLINGBROOK
ASSET PURCHASE AND EXCHANGE AGREEMENT
CLOSING CHECKLIST

ITEM NO.	AGREEMENT SECTION NO.	DOCUMENT MATTER	DUE DATE
I.	**Pre-closing Matters**		
	A.	**Joint Responsibilities**	
1.	3.6(a)	Each party shall cause a Phase I environmental study to be performed for each parcel to be transferred & provide a copy to the other party	1/1/01
2.	3.6(a)	If the Phase I report (per Item 1 above) discloses Hazardous Materials which are not in compliance with applicable Laws, the transferee party may request the transferor party to perform a Phase II environmental study. Such request must be made within 30 days after the due date in Item I above	Within 30 days after the due date in Item 1 above
3.	3.6(b)	If a Phase II study is requested (per Item 2 above), such study shall be completed with a report of same delivered to the transferee party within 60 days of the date of the request by the transferee party	Within 60 days after the due date above
4.	3.6(b)	If a Phase II report (per Item 3 above) discloses Hazardous Materials which are not in compliance with applicable laws, the transferor party shall (unless waived by transferee party) complete the remediation of such matters prior to Closing	PTC
5.	3.7(a)	Each party shall cause an updated Phase I study to be performed (not more than 6 months prior to the Closing) for all real estate to be transferred and shall provide a copy of such report to the transferee party not less than 4 months prior to the Closing.	Not less than 4 months prior to Closing
6.	3.7(a)	If the updated Phase I report (per Item 5 above) discloses Hazardous Materials which are not in compliance with applicable laws and were not disclosed in the prior Phase I or Phase II reports, the transferee party may, within 30 days of the receipt of such Phase I report, request the transferor party to perform a Phase II study.	Within 30 days of receipt of the updated Phase I report
7.	3.7(b)	If a Phase II study is requested (per Item 6 above), such study shall be complete with a report of same delivered to the transferee party within 60 days of the date of the request by the transferee party.	Within 60 days of the date of the request for Phase II study
8.	3.7(b)	If a Phase II report (per Item 7 above)discloses Hazardous Materials which are not in compliance with applicable laws and were not disclosed in the prior Phase I or Phase II reports, the transferor party shall (unless waived by transferee party) complete the remediation of such matters prior to Closing.	PTC
9.	7.7	Read all applicable meters.	PTC

ITEM NO.	AGREEMENT SECTION NO.	DOCUMENT MATTER	DUE DATE
10.	10.1; 11.1	Preserve/operate assets (to be transferred) in ordinary course of business. Confer regularly with other party on operational matters and promptly notify the other party of material changes. to each other's operations/assets which are to be transferred.	PTC
B.	**Responsibilities of Citizens**		
11.	4.1	Remove all liens (if any) on Sewage Treatment Assets.	
12.	4.1	Review all Citizens, Contracts and other relevant documents (other than Permits)for required third party consents/approvals. Obtain such consents/approvals and provide evidence of same to Bolingbrook.	PTC
13.	6.1(c)	Complete work on STP #1 per STP #I Agreement.	PTC
14.	6.1(d)	Complete refurbishing and upgrading of STP #2.	PTC
15.	7.6	Review all Citizens Permits for transferability. Submit applications for approvals of any transfer or issuance or reissuance of Permits by January 1, 2001. Cooperate with Bolingbrook on effectuating the transfer of Permits.	PTC
16.	10.2	Give reasonable access to Bolingbrook of Citizens' properties and books and records (with respect to Sewage Treatment Assets).	PTC
17.	11.2	Citizens may review Bolingbrook Contracts, Bolingbrook Permits and other relevant documents of Bolingbrook regarding required consents and approvals and other transferability issues	PTC
18.	11.2	Citizens may inspect assets being transferred by Bolingbrook, as well as all relevant documents and records related to such assets.	PTC
19.	12.1	Promptly apply for (and diligently pursue) any certifications required from the Illinois Commerce Commission to provide Lake Michigan water to proposed service area..	PTC
C.	**Responsibilities Of Bolingbrook**		
20.	3.2	Remove all liens (if any) on Water System Assets	PTC
21.	4.1	Review all Bolingbrook Contracts and other relevant documents (other than Permits).for required third party consents/approvals. Obtain such consents/approvals and provide evidence of same to Citizens.	PTC
22.	7.6	Review all Bolingbrook Permits for transferability. Submit applications for approvals of any transfer or issuance or reissuance of Permits by January 1, 2001. Cooperate with Citizens on effectuating the. transfer of Permits.	

ITEM NO.	AGREEMENT SECTION NO.	DOCUMENT MATTER	DUE DATE
23.	10.2	Bolingbrook may review Citizens' Contracts, Citizens' Permits and other relevant documents of Citizens regarding required consents and approvals and other transferability issues.	PTC
24.	10.2	Bolingbrook may inspect all assets being transferred by Citizens as well as all documents and records related to such assets.	PTC
25	11.2	Give Citizens reasonable access to Bolingbrook's properties and books and records (with respect to Water System Assets).	PTC
26.	13.5	Conform water rate to match structure of Citizens' water rate.	PTC
II.	**JOINT CLOSING DELIVERIES**		
27.	7.5(a)	Termination Agreement for Franchise Agreement, dated 09/08/71	AC
28.	7.5(b)	New Franchise Agreement (which shall address the water tower issue)	AC
29.	7.5©)	Termination Agreement for STP #1 Agreement, dated 10/17/95	AC
30.	7.5(d)	Termination Agreement for Wheeling Citizens Contract, dated 04/15/96	AC
31.	4.1; 7.2(a)	Bill of Sale (sale of Citizens' assets)	AC
32.	4.1©); 7.2(a)	Real Property Warranty Deeds	AC
33.	4.1©); 7.2(a)	Assignment/Assumption of Easement Rights	AC
34.	4.1(e); 7.2(a)	Assignment/Assumption of Bonds	AC
35.	4.1(f)	Customer files; Customer and Supplier Lists	AC
36.	4.1(g), (k); 7.2(a)	Assignment and Assumption Agreement (Assumed Sewage Treatment Liabilities, Permits, etc.)	AC
37.	4.1(h)	Documents and records relating to STP#1 and STP#2	AC
38.	4.1(i)	Accounting records for transactions related to the Sewage Treatment Assets from 10/01/96 through the Closing Date	AC
39.	5.4	Reimbursement of Bolingbrook for Bolingbrook's Lake Water Expenditures (preapproved by Citizens) from the date of execution of the Agreement until the Closing.Date	AC
40	6.1(b);7.2(a)	Real estate contracts for transfer of real estate	AC
41	6.1(b)(1); 7.2(b)	Title insurance policies (real estate)	AC

ITEM NO.	AGREEMENT SECTION NO.	DOCUMENT MATTER	DUE DATE
42.	6.1(b)(1); 7.2(b)	Affidavit of title (real estate)	AC
43.	6.1(b)(2); 7.2(b)	Surveys (real estate)	AC
44.	6.1(b)(4)	Environmental disclosure document for real estate transfer (in compliance with the Responsible Property Transfer Act)	AC
45.	7.2©)	Resolutions of Board of Directors of Citizens regarding authorization of the execution. and performance of the Agreement, together with Secretary's certificate certifying same	AC
46.	7.2(d)	Assignment/Assumption of leasehold interests (for leased real and personal property being transferred)	AC
47.	7.2(e)	Tax Proration Agreement	AC
48.		Representations, Warranties and Covenants Bring Down Certificate	AC
49.		Vehicle title certificates to transferred vehicles	AC
50.		Confirmation of lien releases	AC
51.		Certified Charter and Bylaws (or applicable documents)	AC
52.		FIRPTA Certificate	AC
IV.	**CLOSING DELIVERIES OF BOLINGBROOK**		
53.	3.2; 7.3 (a)	Bill of Sale (sale of Bolingbrook assets)	AC
54.	3.2©); 7.3 (a)	Real Property Warranty Deeds	AC
55.	3.2©); 7.3(a)	Assignment/Assumption of Easement Rights	AC
56.	3.2(e); 7.3(a)	Assignment/Assumption of Bonds	AC
57.	3.2(f)	Customer files; customer and supplier lists	AC
58.	3.1(g), (k); 7.3(a)	Assignment and Assumption Agreement (Assumed Water System Liabilities, Permits, etc.)	AC
59.	3.2(h)	Documents and records related to water system assets being transferred	AC
60.	3.2(o)	Accounting records for transactions related to the Water System Assets from 10/1/96 through the Closing Date	AC
61.	3.2(l)	Assignment of Bolingbrook Water allocation from Ill. Dept. of Natural Resources	AC
62.	6.1(b)	Real estate contract for transfer of real estate	AC

ITEM NO.	AGREEMENT SECTION NO.	DOCUMENT MATTER	DUE DATE
63.	6.l(b)(1); 7.3(b)	Title insurance policies (real estate)	AC
64.	6.1(b)(2)	Affidavit of title (real estate)	AC
65.	6.1(b)(3); 7.3 (b)	Surveys (real estate)	AC
66.	6.1(b)(4)	Environmental disclosure document for real estate transfer (in compliance with the Responsible Property Transfer Act)	AC
67.	7.3©)	Resolutions of Board of Trustees of Bolingbrook authorizing the execution and performance of the Agreement, together with Village Clerk certificate certifying same	AC
68.	7.3(d)	Assignment/Assumption of leasehold interests	AC
69.	7.3(e)	Tax Proration Agreement	AC
70.	7.5(e)	Assignment and Assumption Agreement for assignment by Bolingbrook to Citizens of Bolingbrook's rights and obligations under the Lake Michigan Water Contract	AC
71.		Representations, Warranties and Covenants Bring Down Certificate	AC
72.		Vehicle title certificates to transferred vehicles.	AC
73.		Confirmation of lien releases	AC
74.		Certified Charter and Bylaws (or applicable documents)	AC
75.		FIRPTA Certificate	AC
V.	**CLOSING MATTERS**		
76.	5.5	Establish White Knight Fund at local bank (restricted interest-bearing account). Deposit at Closing $3.00 for each Citizens water customer connection in Bolingbrook.	AC
77.	7.8	Apportionment of current operating expenses	AC
VI.	**POST-CLOSING MATERS**		
	A.	**Joint Responsibilities**	
78	7.6	To the extent either party has not obtained all permits, licenses and approvals prior to Closing, it shall operate the transferred assets for and on behalf of the transferee party until such permits, licenses or approvals, etc. are obtained	Ongoing
79	7.7	Determine final amount of accounts receivable and unbilled charges attributable to each party's conveyed assets; cooperate with other party in its collection of such accounts and charges.	Within 60 days following the Closing

80.	7.8	Apportionment of current operating expenses not apportioned at Closing	Within 60 days following the Closing
81.	13.1	Engage in open discussions with respect to utility services	Ongoing
82.		[Allocation of purchase price for tax purposes; Form 8594 filing]	By filing due date
B.	**Responsibilities Of Citizens**		
83.	5.1	Citizens to make payments to Bolingbrook as set forth on Exhibit C to Agreement (total of $9,075,260)	Variable, per Section 5.1 of Agreement
84.	5.2	Citizens to pay New Customer Connection Payments ($550 per new customer) to Bolingbrook.	Until 2037
85.	5.3	Citizens to petition the Illinois Commerce Commission to include the former Bolingbrook water supply system in its rate base for ratemaking purposes.	Silent
86.	5.5	Deposit into White Knight Fund $3.00 for each Citizens water customer connection.	Each anniversary of Closing
87.	12.1	Until Citizens obtains the certification set forth. in Item 19, continue to supply water and maintain utility systems on a contractual basis for non-certified areas.	Open
88.	13.2	Maintain standby wells.	Ongoing
89.	13.3	Supply Bolingbrook with an updated list of names and addresses of all Citizens customers in Village of Bolingbrook.	Ongoing
90.	l3.3	Provide Bolingbrook with monthly water usage information of each of Citizens' customers residing in Bolingbrook.	Monthly
C.	**Responsibilities of Bolingbrook**		
91.	5.5	Direct the use of the White Knight Funds.	Ongoing
92.	13.7	Provide adequate sewage treatment serv ices to all of Citizens' sewage collection customers; construct additional facilities if needed to provide such required service.	Ongoing
93	14.7	Bolingbrook shall process liquid sewage sludge delivered by Citizens (subject to the limitations and costs set forth in Sec. 14.7 of Agreement)	Ongoing

Key

AC	At Closing
Agreement	Asset Purchase and Exchange Agreement between Citizens and Bolingbrook, dated February 27,1997, as amended
Bolingbrook	Village of Bolingbrook, Illinois
Citizens	Citizens Utilities Company of Illinois
PTC	Prior to Closing

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PARTIAL LIST OF CLOSING DOCUMENTATION INVOLVED IN CITIZENS UTILITIES COMPANY - VILLAGE OF BOLINGBROOK ASSET PURCHASE AND EXCHANGE TRANSACTION

ASSIGNMENT AND ASSUMPTION AGREEMENTS
(Assumption by Illinois-American Water Company of Bolingbrook contracts and easements)

1. Assignment by Bolingbrook and Assumption by Illinois-American Water Company of Bolingbrook Contracts:

   Annual Service Agreement between Bolingbrook and Corrpro Companies, Inc., dated December 12, 2000

   Intergovernmental Agreement among the Village of Bolingbrook, the Village of Woodridge, Surety Enterprises and Twin Creek Associates, dated February 25, 1988,

   Intergovernmental Agreement, between the Village of Bolingbrook and the City of Naperville, dated July 14, 1992

   Lake Michigan Water Contract between the Village of Bolingbrook and Citizens Water Resources, dated April 5, 1996

2. Assignment by Bolingbrook and Assumption by Illinois-American Water Company of:

   Easements for water line and sanitary sewer line (The Landings/Meijer, Inc.), dated September 8, 1998

   Plat of Easement, from Excel Properties, approved October 12, 1999

   Plats of Easement for northwest corner and southeast corner of Route 53 and Boughton Road in connection with intersection improvements, from Amoco Oil Company, approved April 10, 2001

   Permanent Easement Agreement between the Village of Bolingbrook and Valley View Community Unit School District No. 365U for well site and access thereto and amendment, dated July 13, 1976, amended July 8, 2002

ASSIGNMENT AND ASSUMPTION AGREEMENTS
(Assumption by Village of Bolingbrook of Illinois-American Water Company contracts and easements)

1. Assignment by Illinois-American Water Company and Assumption by Bolingbrook of Easement from Commonwealth Edison Company dated November 3, 1989

2. Assignment by Illinois-American Water Company and Assumption by Bolingbrook of Licenses to Bolingbrook Park District dated June 21, 1984 and April 16, 1998

TERMINATION AGREEMENTS

1. Termination Agreement re Water Storage and Transportation Agreement (the Wheeling Agreement), dated as of April 15, 1996

2. Termination Agreement re Wastewater Treatment and Sewer Service (STP #1 Agreement), dated as of October 17, 1995

AGREEMENTS RE TELECOMMUNICATIONS AGREEMENTS

1. Assistance and Rent Transfer Agreement between the Village of Bolingbrook and Illinois-American Water Company, dated July 25, 2001, re lease agreements between Bolingbrook and AT&T Wireless PCS, Inc., Paging Network of Illinois, Inc., PCS PrimeCo, L.P., Chicago SMSA Limited Partnership, SprintCom, Inc. And Cook Inlet/VoiceStream PCS.

2. Assignment and Assumption Agreement between the Village of Bolingbrook and Illinois-American Water Company, dated July 25, 2001, re lease agreements between Bolingbrook and AT&T Wireless PCS, Inc.–two sites (dated August 12 and August 13, 1996), Paging Network of Illinois, Inc. (dated July 12, 1996), PCS PrimeCo, L.P.–two sites (dated March 28, 1996 and November 15, 1995), Chicago SMSA Limited Partnership (dated November 14, 1989), SprintCom, Inc.(dated February 25, 1998), and Cook Inlet/VoiceStream PCS (dated March 14, 2000).

BILLS OF SALE

1. Bill of Sale (IAWC Transfer) conveying Sewage Treatment Assets to Village of Bolingbrook.

2. Bill of Sale (Bolingbrook Transfer) conveying Water System Assets to Illinois-American Water Company.

FRANCHISE

1. Termination of Existing Franchise Agreement and Adoption of New Franchise Agreement (Illinois-American Water Company)

2. Ordinance Authorizing Illinois-American Water Company to Use the Public Ways and Other Property in Conjunction with its Construction Operation and Maintenance of Water and Sanitary Sewage Collection Systems in and through the Village.

BILLING AGREEMENTS

1. Continuation Agreement memorializing Illinois-American Water Company's and Village of Bolingbrook's continuing obligations under the Exchange Agreement.

2. Sewer Billing Agreement setting forth the terms under which Illinois-American Water Company will bill customers for sewerage services performed by the Village of Bolingbrook.

3. Billing and Collection Agreement re various billing and collection services in relation to wastewater treatment service or water service.

MISCELLANEOUS

1. Certificate of the Mayor of the Village of Bolingbrook re provisions of Asset Purchase and Exchange Agreement.

2. Certificate of the Village Clerk of the Village of Bolingbrook re approval of Asset Purchase and Exchange Agreement.

3. Officer's Certificate of President of Illinois American Water Company re provisions of Asset Purchase and Exchange Agreement.

4. Indemnification and Hold Harmless Agreement (Water Storage Reservoir)

5. Certificate of the Secretary of Illinois American Water Company re approval of Asset Purchase and Exchange Agreement.

6. FIRPTA Affidavits of Bolingbrook and Illinois-American Water Company.

7. Tax Proration Agreement

8. Affidavit Relating to Property Access

9. Personal Undertaking (GAP)

DEEDS
(Illinois-American Water Company as Grantor to Grantee Village of Bolingbrook)

1. 221 West Briarcliff Road

2. 1000 West Boughton Road

(Village of Bolingbrook as Grantor to Grantee Illinois-American Water Company)

1. 601 Rockhurst Road

2. 283 Janes Avenue

3. 1451 West Boughton Road

4. Lot 2, Weber Road Well Subdivision (Release)

5. 555 South Weber Road

6. 348 Janes Avenue

7. 1380 West Boughton Road

8. 1000 Janes Avenue

EASEMENTS

(Village of Bolingbrook as Grantor to Grantee Illinois-American Water Company)

Water tower easement and water tower access easement–382 Boughton Road

(Illinois-American Water Company as Grantor to Grantee Village of Bolingbrook)

Pedestrian walkway–601 Rockhurst Road

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Municipal Litigation

BARRY L. MOSS
GEORGE A. MARCHETTI
Moss and Bloomberg, Ltd.
Bolingbrook

I. Challenges to Municipal Legislation

A. [20.1] Litigation and Non-home Rule Municipalities
   1. [20.2] General and Specific Statutes
   2. [20.3] Several Statutes Construed in Pari Materia
   3. [20.4] Preemption

B. [20.5] Home Rule Units
   1. [20.6] Home Rule Legislative Authority
   2. [20.7] Relation to Local Affairs
   3. [20.8] Extraterritorial Effect
   4. [20.9] Interference with Coequal Branches of Government
   5. [20.10] Existence of State Statutory Program and Preemption

C. Reasonableness of Ordinance
   1. [20.11] Presumption of Validity
   2. [20.12] Burden of Proof
   3. [20.13] Test of Reasonableness
      a. [20.14] Protection of Public Welfare
      b. [20.15] Accomplishment of Objective
      c. [20.16] Delegation of Authority to Administrative Personnel
      d. [20.17] Amending Ordinances During Course of Litigation
      e. [20.18] Partial Invalidity
      f. [20.19] Laches, Estoppel, and Statutes of Limitation
      g. [20.20] Contracts Implied at Law

II. Forms of Judicial Relief in Municipal Litigation

A. [20.21] Declaratory Judgments

IV. [20.73] Intergovernmental Litigation

A. [20.74] Municipalities and State Agencies
   1. [20.75] Due Process Clause
   2. [20.76] Equal Protection
   3. [20.77] Other Constitutional Provisions
   4. [20.78] Suits Against State Agencies
   5. [20.79] Suits Against State for Damages

B. [20.80] Tax Collection and Distribution Cases

   1. [20.81] Principal Amount of Collected Taxes
   2. [20.82] Interest Earned on Collected Taxes

V. [20.85] Federal Litigation

A. Rights, Privileges, and Immunities Protected by §1983
   1. [20.86] Application of Federal Constitution Through §1983
   2. [20.87] Property Interests under Due Process Clause
   3. [20.88] Liberty Interests under Due Process Clause
   4. [20.89] Other Constitutional Provisions
   5. [20.90] Equal Protection Clause
   6. [20.91] Substantive Due Process
   7. [20.92] Summary of Rights, Privileges, and Immunities

B. [20.93] State Action Requirement and Constitutional Deprivation
   1. [20.94] Color of Law
   2. [20.95] Constitutional Deprivation
      a. [20.96] Violations of State Law

I. CHALLENGES TO MUNICIPAL LEGISLATION

A. [20.1] Litigation and Non-Home Rule Municipalities

With the advent of the 1970 Illinois Constitution, there are now two broad classes into which municipalities may be divided: home rule units and non-home rule units. This distinction is a crucial one to keep in mind with respect to any analysis of trends in municipal litigation. The legislative activities of the governing boards of non-home rule units are significantly more restricted than those of home rule units. Non-home rule units are subject to the limitations placed on the scope of their authority by "Dillon's Rule." *East Lake Fork Special Drainage District v. Village of Ivesdale,* 137 Ill.App.3d 473, 484 N.E.2d 507, 91 Ill.Dec. 948 (4th Dist. 1985); *Village of Wauconda v. Hutton,* 291 Ill.App.3d 1058, 684 N.E.2d 1364, 226 Ill.Dec. 161 (2d Dist 1997). Dillon's Rule provides:

> [A] *municipal corporation possesses and can exercise the following powers, and no others:* **First, those granted** [in legislative delegation] **in** *express words;* **second, those** *necessarily or fairly implied* in or *incident* **to the powers expressly granted; third, those** *essential* **to the accomplishment of the declared objects and purposes of the corporation.** [Emphasis in original.] I Dillon, LAW OF MUNICIPAL CORPORATIONS §237 (5th ed. 1911).

See Hunt v. City of Peoria, 30 Ill.2d 230,195 N.E.2d 719 (1964); *La Salle National Bank v. Village of Brookfield,* 95 Ill.App.3d 765, 420 N.E.2d 819, 51 Ill.Dec. 405 (1st Dist. 1981); *Paterson v. City of Granite City,* 78 Ill.App.3d 821, 397 N.E.2d 237, 33 Ill.Dec. 904 (5th Dist. 1979); *Grassini v. DuPage Township,* 279 Ill.App.3d 614, 665 N.E.2d 860, 216 Ill.Dec. 602 (3d Dist. 1996) (employment contract for a term in excess of township's authority was *ultra vires* and void).

As a consequence of this rule, a non-home rule unit has no inherent powers. Rather, it derives its authority to act solely from statutes that delegate legislative authority to the municipality. *Village of Palatine v. Regard,* 136 Ill.2d 503, 557 N.E.2d 898, 145 Ill.Dec. 919 (1990) (ordinance incorporating summary license suspension procedures is authorized by Motor Vehicle Code); *City of Rockford v. Watson,* 108 Ill.App.2d 146, 246 N.E.2d 458 (2d Dist. 1969). Legal challenges to municipal legislation often begin with the premise, whether articulated or not, that the corporate authorities have acted beyond the scope of their statutory powers.

A corollary to Dillon's Rule is that when a statute does grant certain powers to a municipality, the statute is to be strictly construed. Any fair or reasonable doubt with respect to the existence of a claimed power is to be construed against the municipality. *Father Basil's Lodge, Inc. v. City of Chicago,* 393 Ill. 246, 65 N.E.2d 805 (1946). The interpretation of an ordinance is a question of law,

to which the fundamental rules of statutory construction apply. *Hilligoss v. Illini Cablevision of Illinois,* 294 Ill.App.2d 282, 689 N.E.2d 650, 228 Ill.Dec. 591 (4th Dist. 1998).

1. [20.2] General and Specific Statutes

The Illinois Municipal Code, 65 ILCS 5/1-1-1, *et seq.*, sets forth both specific and general powers that may be exercised by municipalities. A specific grant of authority may limit, or eliminate entirely, the corporate authorities' regulatory discretion. For example, in *City of Kewanee v. Riverside Industrial Materials Co.,* 21 Ill.App.2d 416, 158 N.E.2d 86 (2d Dist. 1959), the statute in issue authorized the City to license second-hand goods and junk dealers. The City sought to impose a licensing requirement on a company that operated an industrial scrap yard. The court held that since this particular type of business was not specified in the statute, the City could not license and regulate this business. *See also Billik v. Village of Brookfield, 80* Ill.App.3d 907, 400 N.E.2d 702, 36 Ill.Dec. 282 (1st Dist. 1980) (municipality could not adopt ordinance to supplement or change conditions of participation under Illinois Municipal Retirement Fund).

When a general grant of authority has been given, a municipality has far greater flexibility in tailoring its policies and procedures to meet its particular circumstances. In *Redemske v. Village of Romeoville,* 85 Ill.App.3d286,406N.E.2d662,40Ill.Dec. 596 (3d Dist. 1980), the Village enacted an ordinance designed to regulate the partisan political activities of its employees. Interpreting Illinois Municipal Code §10-4-1, the court held that the Village had been given broad authority to set working hours, pay schedules, working conditions, and other conditions and restrictions of employment even though none of these various matters were specifically mentioned in the statute. The court further held that regulation of partisan political activities also was implicit in the statute. Thus, when general powers have been conferred, courts are more likely to find that the enabling ordinance is within the scope of a municipality's "implied powers." *See also Village of Spring Grove v. Doss,* 202 Ill.App.3d 858, 563 N.E.2d 793, 150 Ill.Dec. 666 (2d Dist. 1990) (overweight truck regulation and fines).

2. [20.3] Several Statutes Construed in Pari Materia

In addition to a particular statute, municipal authority may arise from a combination of several statutes considered in pari materia. In *City of Nokomis v. Sullivan,* 14 Ill.2d 417,153 N.E.2d 48 (1958), the City passed an ordinance that required that all buildings that were adjacent to the municipal sewerage system be hooked into the system. Although no specific statute allowed the City to enact this ordinance, the court found that there was a general power implicitly arising from several statutes construed in pari materia. *See also Village of Deerfield v. Rapka,* 54 Ill.2d 217, 296 N.E.2d 336 (1973) (court interpreted several different statutory provisions to allow Village to condemn property outside its boundaries for recreation center); *Mister Softee of Illinois, Inc. v. City of Chicago,* 42 Ill.App.2d 414, 192 N.E.2d 424 (1st Dist. 1963) (noise ordinance); *Village of Spring*

Grove v. Doss, 202 Ill.App.3d 858, 563 N.E.2d 793, 150 Ill.Dec. 666 (2d Dist. 1990) (overweight truck regulation and fines).

The rules that govern the construction and interpretation of statutes are used in construing municipal ordinances. *Id.* Ordinances are normally interpreted to be prospective in nature. *City of Peoria v. Heim*, 229 Ill.App.3d 1016, 594 N.E.2d 778, 171 Ill.Dec. 634 (2d Dist. 1992).

A reviewing court will defer to an administrative agency's construction of an ordinance unless that construction is clearly erroneous, arbitrary, or unreasonable. *Monahan v. Village of Hinsdale*, 210 Ill.App.3d 985, 569 N.E.2d 1182, 155 Ill.Dec. 571 (2d Dist. 1991).

3. [20.4] Preemption

The doctrine of preemption is applied where enactments of two unequal legislative bodies, e.g., the General Assembly and a municipal governing body, are inconsistent. When a local law is preempted, the subordinate legislative body's enactment is suspended and rendered unenforceable by the existence of the superior body's enactment. *Lily Lake Road Defenders v. McHenry County*, 156 Ill.2d 1, 619 N.E.2d 137, 188 Ill.Dec. 773 (Ill. 1993).

A grant of power to a non-home rule unit may be implicitly preempted by a comprehensive statewide program. *Carlson v. Village of Worth*, 25 Ill.App.3d 315, 322 N.E.2d 852 (1st Dist. 1974) (City's statutory authority to regulate solid waste disposal preempted by the comprehensive state regulation of the subject matter under the Environmental Protection Act, 415 ILCS 5/1, *et seq.*). *Mc Claughry v. Village of Antioch*, 296 Ill.App.3d 636, 695 N.E.2d 492, 230 Ill.Dec. 1002 (2nd Dist. 1998) (Commerce Commission's exclusive jurisdiction over railroad safety preempts village's nuisance ordinance); *Commonwealth Edison Company v. City of Warrenville*, 288 Ill.App.3d 373, 680 N.E.2d 465, 223 Ill.Dec. 732 (2d Dist 1997) (Public Utilities Act preempted city's zoning ordinance to the extent that it interfered with utility's transmission line construction project for which the Illinois Commerce Commission had granted a utility certificate). However, when the statute in issue specifically authorizes municipalities to regulate the subject matter in a manner not in conflict with state law, the municipality may pass ordinances that are *more* restrictive than the state law. *Village of Deerfield v. Greenberg*, 193 Ill.App.3d 215,550 N.E.2d 12,140 Ill.Dec. 530 (2d Dist. 1990) (curfew ordinance). The same rules that govern preemption of a home rule unit's authority are also applicable to non-home rule municipalities. See §§ 20.7 - 20.9. *See also National Advertising Co. v. Downers Grove*, 166 Ill.App.3d 58, 519 N.E.2d 502, 116 Ill.Dec. 610 (2nd Dist. 1988) (local sign ordinance not preempted by Highway Advertising Control Act); *Village of Carpentersville v. Pollution Control Board*, 135 Ill.2d 463,553 N.E.2d 362,142 Ill.Dec. 848 (1990) (local zoning ordinance not preempted by provisions of Illinois Environmental Protection Act); *American Telephone and Telegraph Co. v. Village of Arlington Heights*, 156 Ill.2d 399, 620 N.E.2d

1040, 189 Ill.Dec. 723 (1993) (holding that municipalities lacked the power to require the payment of a franchise fee as a precondition to allowing the installation of cable under the public streets).

In summary, the initial inquiry in any type of litigation involving a non-home rule unit is whether the general assembly has delegated either specific or general authority for the municipality to legislate in that area. Non-home rule units' legislative prerogatives are limited by the principles derived from Dillon's Rule. Identifying the statute or combination of statutes that expressly or implicitly confers legislative power on the municipality is often the key to a successful defense of a non-home rule unit's ordinances.

B. [20.5] Home Rule Units

Home rule units in Illinois are not subject to the strictures inherent in Dillon's Rule. Indeed, the drafters of Article VII, §6, of the Illinois Constitution clearly expressed their intent to reverse the traditional application of Dillon's Rule. During the course of the 1970 constitutional convention, John Parkhurst, one of the drafters, stated, "So we did come to grips with Dillon's Rule and we did try to turn it around 180 degrees [with respect to home rule units.]" See 4 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, p. 3024 (1972). Home rule legislative powers are derived directly from the Illinois Constitution rather than by delegation from the General Assembly. ILL.CONST. art. VII, §6(a), provides:

> **Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt.**

The powers of home rule units are to be liberally construed. ILL.CONST. art. VII, §6(m). In general, the courts have adhered to the principle that home rule legislative power is to be interpreted expansively. *See City of Evanston v. Create, Inc.,* 85 Ill.2d 101, 421 N.E.2d 196, 51 Ill.Dec. 688 (1981). The reversal of Dillon's Rule, as applied to home rule units, has been substantiated by a significant body of case law. Id.; *Webster v. City of Chicago,* 132 Ill.App.3d 666, 478 N.E.2d 446, 88 Ill.Dec. 131 (1 st Dist. 1985). *See also People ex rel. Bernardi v. City of Highland Park,* 121 I11.2d 1, 520 N.E.2d 316, 117 Ill.Dec. 155 (1988), which reaffirmed the abrogation of Dillon's Rule with respect to home rule units.

1. [20.6] Home Rule Legislative Authority

With the advent of home rule, the legal analysis regarding the breadth of corporate authorities' legislative authority must be revised completely. The appropriate inquiry with respect to home rule legislation is (a) whether the ordinance relates to the municipality's local government

and affairs and (b) whether the exercise of home rule powers has been superseded by other constitutional provisions or by appropriate action of the General Assembly. Unless some type of positive prohibition exists, the corporate authorities of a home rule unit have broad, discretionary powers to enact legislation. Home rule units have all the powers of a sovereign, limited only by the Constitution or by the General Assembly in the manner provided by the Constitution. Courts can invalidate home rule legislation only on the grounds that the enactment violates the Federal or State Constitution or violates a mandate imposed by state or federal statute. *City of Elgin v. County of Cook*, 169 Ill.2d 53, 660 N.E.2d 875, 214 Ill.Dec. 168 (1995); *Stahl V. Village of Hoffman Estates*, 296 Ill.App.3d 550, 694 N.E.2d 1102, 230 Ill.Dec. 824 (1st Dist 1998). From a litigator's standpoint, therefore, the various limitations that have been placed on home rule authority must be examined closely since, in the absence of one of the foregoing exceptions, a home rule ordinance is presumed valid. It should be noted, however, that the acquisition of home rule authority does not automatically validate preexisting ordinances. If an ordinance was enacted before the acquisition of home rule powers, the ordinance's validity is tested under the municipality's prior, non-home rule status. *Bank of Elk Grove v. City of Joliet*, 171 Ill.App.3d 321, 525 N.E.2d 569, 121 Ill.Dec. 511 (3d Dist. 1988); *Application of County Collector of Kane County*, 132 Ill.2d 64, 547 N.E.2d 107, 138 Ill.Dec. 138 (1989) (pre-home rule ordinance regarding ordinance publication requirement was binding). A municipality need not enact an ordinance to execute its home rule powers. *Beneficial Development Corp. v. City of Highland Park*, 161 Ill.2d 321, 641 N.E.2d 435 , 204 Ill.Dec. 211 (1994).

The ability of home rule units to indemnify public officials in private litigation is limited to actions based on acts which occur within the scope of the public official's duties. *City of Elmhurst ex rel. Mastrino v. City of Elmhurst*, 272 Ill.App.3d 168, 649 N.E.2d 1334, 208 Ill.Dec. 673 (2 Dist. 1994). Where the public official is accused of criminal wrongdoing, a home rule unit cannot indemnify the official unless he or she is found not guilty in the criminal proceeding. *Wright v. City of Danville*, 174 Ill.2d 391, 675 N.E.2d 110, 221 Ill.Dec. 203 (1996).

2. [20.7] Relation to Local Affairs

A home rule unit's legislation must relate to its local affairs or government. A home rule unit's legislation can relate only to its own legitimate concerns, not those of the state or nation. *City of Des Plaines v. Chicago & North Western Ry.*, 65 Ill.2d 1, 357 N.E.2d 433, 2 Ill.Dec. 266 (1976). *See also Oak Park Trust & Savings Bank v. Village of Mt. Prospect*, 181 Ill.App.3d 10, 536 N.E.2d 763, 129 Ill.Dec. 713 (1st Dist. 1989) (licensing of multifamily dwelling units is local concern); *Crain Enterprises, Inc. v. Mound City*, 189 Ill.App.3d 130, 544 N.E.2d 1329, 136 Ill.Dec. 554 (5th Dist. 1989) (vacation of streets and alleys is matter of local concern); *Kadzielawski v. Board of Fire & Police Commissioners*, 194 Ill.App.3d 676, 551 N.E.2d 331, 141 Ill.Dec. 338 (1st Dist. 1990) (ordinance creating imposition of fines to discipline police and fire employees); *Trettenero v. Civil Service Commission of City of Aurora*, 221 Ill.App.3d 326, 581 N.E.2d 857, 163 Ill.Dec. 703 (2nd Dist. 1991) (ordinance determines when hearing before civil service commission is warranted); *Page*

v. City of Chicago, 29 Ill.App.3d 450, 701 N.E.2d 218, 233 Ill.Dec. 575 (1998) (city's human rights ordinance).

In *Kalodimos v. Village of Morton Grove*, 103 Ill.2d 483, 470 N.E.2d 266, 83 Ill.Dec. 308 (1984), the Supreme Court addressed the issue of whether a home rule unit had the power to bar the possession of handguns. The court's analysis of the issue began with a discussion of whether the ban related to the village's local problems. The court framed the applicable legal test as follows:

> **Whether a particular problem is of statewide rather than local dimension must be decided not on the basis of a specific formula or listing set forth in the Constitution but with regard for the nature and extent of the prob4em, the units of government which have the most vital interest in its solution, and the role traditionally played by local and statewide authorities in dealing with it.** 470 N.E.2d at 274.

While recognizing that weapons control and crime prevention were to some extent matters of statewide concern, the court found that the village had its own obvious interest in reducing the possibility of violent crime and domestic violence. Having determined that the village had legislated within an area of local concern, the court held that the ordinance was within the scope of its home rule powers. *Accord, City of Chicago v. Roman*, 184 Ill.2d 504, 705 N.E.2d 81, 235 Ill.Dec. 468 (1998) (home rule ordinance mandating a minimum sentence of 90 days' imprisonment was valid).

The courts have held that home rule units may enact eminent domain ordinances to eradicate blight and to stimulate economic development in business districts. *City of Wheaton v. Sandberg*, 215 Ill.App.3d 220, 574 N.E.2d. 697, 158 Ill.Dec. 584 (2d Dist 1991); *City of Carbondale v. Yehling*, 96 Ill.2d 495, 451 N.E.2d 837, 71 Ill.Dec. 683 (1983).

Disconnection of territory from a municipality is primarily a matter of statewide concern and therefore not within the scope of home rule powers as a matter pertaining to "local government and affairs." *LaSalle National Trust, N.A. v. Village of Mettawa*, 249 Ill.App.3d 550, 616 N.E.2d 1297, 186 Ill.Dec. 665 (2d Dist 1993).

3. [20.8] Extraterritorial Effect

An offshoot of this analysis involves the issue of whether a home rule unit may enact legislation with an extraterritorial effect. Obviously, if a state statute authorizes extraterritorial legislation, a home rule unit can use that statutory grant of power. *City of Carbondale v. Van Natta*, 61 Ill.2d 483, 338 N.E.2d. 19 (1975) (extraterritorial zoning authority). In addition, a home rule unit can perform extraterritorial acts that are proprietary, as distinguished from governmental, in character. *People ex rel. City of Salem v. McMackin*, 53 Ill.2d 347, 291 N.E.2d 807 (1972); *Marshall*

Field & Co. v. Village of South Barrington, 92 Ill.App.3d 360, 415 N.E.2d 1277, 47 Ill.Dec. 964 (1st Dist. 1981) (issuance of industrial revenue bonds to finance development outside municipal boundaries).

When a home rule unit has attempted to exercise its sovereignty in a manner that has a clear extraterritorial impact, the action usually has been struck down by the courts. *City of Des Plaines v. Chicago & North Western Ry.*, 65 Ill.2d 1, 357 N.E.2d 433, 2 Ill.Dec. 266 (1976) (city's noise abatement ordinance had extraterritorial effect); *Commercial National Bank v. City of Chicago*, 89 Ill.2d 45, 432 N.E.2d 227, 59 Ill.Dec. 643 (1982) (City of Chicago's service tax ordinance held to be incompatible with territorial limitations placed on home rule units).

4. [20.9] Interference with Coequal Branches of Government

A home rule unit may not enact legislation that would frustrate or inhibit the exercise of authority by other coequal branches of government within the municipal boundaries. This limitation is another variation of the "local government and affairs" constitutional restriction. One of the first cases to deal with this issue was *Ampersand, Inc. v. Finley*, 61 Ill.2d 537, 338 N.E.2d 15 (1975). Although the case involved an ordinance of a home rule county, its teachings are equally applicable to home rule municipalities. The county had passed an ordinance that imposed a filing fee on both plaintiffs and defendants in all civil cases. The fee was to be contributed to the law library fund. The court struck down the ordinance, finding that it interfered with traditional access of litigants to the state's courts and was therefore beyond the powers of a home rule unit.

With respect to matters of judicial review and procedure, home rule units have no authority to regulate or control these essential court processes. *See Paper Supply Co. v. City* of *Chicago*, 57 Ill.2d 553, 317 N.E.2d 3 (1974) (City had no authority to require that review of municipal administrative decisions be made under Administrative Review Act); City of *Carbondale v. Yehling*, 96 Ill.2d 495, 451 N.E.2d 837, 71 Ill.Dec. 683 (1983) (ordinance attempting to regulate eminent domain procedure).

In *People ex rel. Bernardi v. City of Highland Park*, 121Ill.2d 1, 520 N.E.2d 316,117 Ill.Dec. 155 (1988), the Supreme Court held that prevailing wages for municipal construction projects were a matter of statewide concern subject to regulation by the Department of Labor, and the municipality's actions were beyond its home rule authority. *See also Kirwin v. Peoples Gas Light & Coke Co.*, 173 Ill.App.3d 699, 528 N.E.2d 201, 123 Ill.Dec. 656 (1st Dist. 1988) (home rule municipalities lack authority to regulate public utilities that are under jurisdiction of Illinois Commerce Commission).

If regulatory authority has been given to another branch of the state or federal government, it is more likely that the regulated activity will be found to be non-local in character. *People ex rel.*

Lignoul v. City of Chicago, 67 Ill.2d 480, 368 N.E.2d 100, 10 Ill.Dec. 614 (1977) (City's ordinance that effectively allowed branch banking within City's boundaries held invalid); *Metropolitan Sanitary District v. City of Des Plaines,* 63 Ill.2d 256, 347 N.E.2d 716 (1976) (ordinance that attempted to regulate construction of wastewater treatment plant located in city held invalid); *Bridgman v. Korzen,* 54 Ill.2d 74, 295 N.E.2d 9 (1972) (tax collection ordinance held invalid). *City of Chicago v. Board of Trustees of the University of Illinois,* 293 Ill.App.3d 897, 689 N.E.2d 125, 228 Ill.Dec. 253 (1st Dist. 1997) (university could not be required to collect and remit parking and amusement taxes to city under home rule ordinance).

In *Hutchcraft Van Service, Inc. v. Urbana Human Relations Commission,* 104 Ill.App.3d 817, 433 N.E.2d 329, 60 Ill.Dec. 532 (4th Dist. 1982), the City enacted an ordinance prohibiting discrimination against persons for a broad variety of reasons. The ordinance was challenged as being beyond the scope of the City's home rule powers. In particular, the plaintiff pointed to the extensive body of state and federal law prohibiting discrimination and the powers of regulatory agencies to enforce those laws. The existence of an independent state agency to enforce the laws regarding discrimination was found to be very persuasive by the court. 433 N.E.2d at 333 - 334. The court therefore held that the City's ordinance was "preempted" by state law. *See also Village of Dolton ex rel. Winter v. CFX Transportation, Inc.,* 196 Ill.App.3d 564, 554 N.E.2d 440, 143 Ill.Dec. 505 (1st Dist. 1990); *compare Village of Bolingbrook v. Citizens Utilities Company of Illinois,* 158 Ill.2d 133, 632 N.E.2d 1000, 198 Ill.Dec. 389 (1994) (home rule unit's antipollution ordinances were enforceable against utility regulated by Illinois Commerce Commission).

These cases are examples of the test, as articulated by the Supreme Court in *Kalodimos v. Village of Morton Grove,* 103 Ill.2d 483, 470 N.E.2d 266, 83 Ill.Dec. 308 (1984), that required the court to determine if a home rule ordinance has ventured too far into areas traditionally reserved to other units of local, state, or federal government. In short, it appears from a review of current precedent that a home rule unit's legislative authority may be curtailed when it interferes with essential functions or duties that have been delegated to other governmental bodies.

Of course, there are also instances in which a municipality's ordinances may have some effect on the operations of other governmental units but still have a valid, traditional municipal function. See §20.83.

5. [20.10] Existence of State Statutory Program and Preemption

The mere existence of a state statutory scheme does not restrict a home rule unit's authority to adopt ordinances that concurrently regulate or even conflict with the state program. In *City of Evanston v. Create, Inc.,* 85 Ill.2d 101, 421 N.E.2d 196, 51 Ill..Dec. 688 (1981), the Supreme Court thoroughly examined a home rule unit's authority to regulate landlord-tenant relations in light of the preexisting state statute that also dealt with this area (see 765 ILCS 730/0.01, *et seq.,* and 735 ILCS

5/9-101, *et seq.).* The court's analysis in *Create, Inc.* is highly significant because it sets forth in a clear and concise manner the circumstances under which preemption will occur.

There are two prongs of the constitutional preemption doctrine. *Create, Inc., supra,* 421 N.E.2d at 199. First, under §6(g) of Article VII of the Illinois Constitution, the General Assembly, by a three-fifths majority vote, may deny or limit home rule powers. Second, under §6(h) of Article VII, the General Assembly may specifically provide for the exclusive exercise by the state of any power or function of a home rule unit.

With respect to statutes enacted after the effective date of the 1970 Constitution, there must be an *express* statement that the General Assembly intends to divest home rule units of their powers in a specified area. *Create, Inc., supra,* 421 N.E.2d at 199; *Lech v. Michaelson,* 129 Ill.App.3d 593, 472 N.E.2d 1166, 84 Ill.Dec. 770 (1st Dist. 1984), *aff'd in part, rev'd in part on other grounds,* 111 Ill.2d 523 (1986); *Stryker v. Village of Oak Park,* 62 I11.2d 523, 343 N.E.2d 919 (1976); *City of Chicago v. Haworth,* 303 Ill.App.3d 451, 708 N.E.2d 425, 236 Ill.Dec. 839 (1st Dist. 1999) (City's regulation of private detectives had been preempted). With respect to statutes that were in existence before the effective date of the Constitution, an ordinance of a home rule unit supersedes any such conflicting state statute. *Create, Inc., supra,* 421 N.E.2d at 199. *See also County of Cook v. John Sexton Contractors Co.,* 75 Ill.2d 494, 389 N.E.2d 553, 559, 27 Ill.Dec. 489 (1979); *Town of Cicero v. Fox Valley Trotting Club, Inc.,* 65 Ill.2d 10, 357 N.E.2d 1118, 1121, 2 Ill.Dec. 675 (1976); *Stryker v. Village of Oak Park, supra,* 343 N.E.2d at 922; *Paglini v. Police Board of Chicago,* 61 Ill.2d 233, 335 N.E.2d 480, 482 (1975); *Mulligan v. Dunne, 61* I11.2d 544, 338 N.E.2d 6, 10 - 11 (1975); *Peters v. City of Springfield,* 57 Ill.2d 142, 311 N.E.2d 107, 109 (1974); *Clarke v. Village of Arlington Heights,* 57 Ill.2d 50, 309 N.E.2d 576, 579 (1974); *People ex rel. Hanrahan v. Beck,* 54 Ill.2d 561, 301 N.E.2d 281, 283 (1973); *Kanellos v. County of Cook,* 53 Ill.2d 161, 290 N.E.2d 240, 243 - 244 (1972); *Kotte v. Normal Board of Fire and Police,* 269 Ill.App.3d 517, 646 N.E.2d 292, 206 Ill.Dec. 925 (4th Dist. 1995).

The General Assembly has the authority to preempt home rule authority of certain home rule municipalities based on population. *Village of Schaumburg v. Doyle,* 277 Ill.App.3d 832, 661 N.E.2d 496, 214 Ill.Dec. 642 (1st Dist. 1996); *Des Plaines Firemen's Association v. City of Des Plaines,* 267 Ill.App.3d 920, 642 N.E.2d 732, 204 Ill.Dec. 831 (1st Dist. 1994).

Finally, *Create, Inc. is* significant because the City's ordinance created certain legal remedies (especially for the tenant) that did not exist under state law. 421 N.E.2d at 198. The court held that the creation of new legal remedies by home rule ordinance did not interfere with the state judiciary system or the administration of justice by the courts. *See also City of Springfield v. Ushman,* 71 Ill.App.3d 112, 388 N.E.2d 1357, 27 Ill.Dec. 308 (4th Dist. 1979) (home rule ordinance providing for fines up to $1000). This ruling represents an important exception to the general rule that a home rule unit may not dictate judicial processes. See §20.9.

The Public Utilities Act does not impliedly preempt a home rule municipality's ordinances which authorize a fine for the unlawful discharge of waste. *Village of Bolingbrook v. Citizens Utilities Company of Illinois,* 158 Ill.2d 133, 632 N.E.2D 1000, 198 Ill.Dec. 389 (1994). In *Congress Care Center Associates v. Chicago Department of Health,* 260 Ill.App.3d 586, 632 N.E.2d 266, 198 Ill.Dec. 107 (1st Dist. 1994), the court held that the City's home rule authority was not preempted by the Nursing Home Care Act. *See also City of Chicago v. Krisjon Construction Co.,* 246 Ill.App.3d 950, 617 N.E.2d 21, 186 Ill.Dec. 782 (1st Dist. 1993) (open dumping of waste).

Thus, the preemption doctrine is extremely limited in its scope and effect. The mere existence of a state statutory program dealing with a particular issue does not work a per se preemption of home rule powers. *Village of Bolingbrook v. Citizens Utilities Co.,* 158 Ill.2d 133, 632 N.E.2d 1000, 198 Ill.Dec. 389 (1994); *City of Chicago v. Roman,* 292 Ill.App.3d 546, 685 N.E.2d 967, 226 Ill.Dec. 512 (1st Dist. 1997). This rule was applied by the Supreme Court in *Scadron v. City of Des, Plaines,* 153 Ill.2d 164, 606 N.E.2d 1154, 180 Ill.Dec. 77 (1992), in which the court held that a home rule ordinance that totally banned outdoor advertising signs viewable from limited access highways was not preempted by the Illinois Highway Advertising Control Act. See also §20.4.

A home rule preemption provision, applicable only to the Illinois Municipal Code, does not apply to a home rule unit that does not use that particular Code provision. For example, Chicago has adopted its own personnel ordinance and no longer operates under Article 10 of the Municipal Code with respect to personnel matters. Preemption of home rule authority under Article 10, therefore, does not apply to Chicago. *Dineen v. City of Chicago,* 125 I11.2d 248, 531 N.E.2d 347, 126 Ill.Dec. 52 (1988).

In any litigation involving a home rule unit, the litigator must be aware that the legal analysis is entirely opposite that of the traditional municipal case. Instead of looking for a statute that has delegated legislative authority to a municipality, the key inquiry is whether there is any positive prohibition against the home rule ordinance.

Based on established precedent, it is clear that the exercise of legislative authority by a home rule unit is presumptively valid unless the state has expressly preempted the field. The mere existence of a concurrent state statutory scheme is not sufficient in and of itself to overcome that presumption. A listing of selected statutes that contain express preemptive language is found in Chapter 9.

C. Reasonableness of Ordinance

1. [20.11] Presumption of Validity

Once it has been established that the municipality, whether a home rule or non-home rule unit, had the requisite authority to enact the ordinance in issue, the ordinance is entitled to a presumption of validity in any subsequent court proceedings. *Village of Niles v. City of Chicago, 201* Ill.App.3d 651, 558 N.E.2d 1324,146 Ill.Dec. 990 (1st Dist. 1990); *National Pride of Chicago, Inc. v. City of Chicago,* 206 Ill.App.3d 1090, 562 N.E.2d. 563, 150 Ill.Dec. 33 (1st Dist. 1990); *Jacobsen v. Illinois Liquor Control Commission,* 97 Ill.App.3d 700, 423 N.E.2d 531, 53 Ill.Dec. 147 (2d Dist. 1981); *Coryn v. City of Moline,* 71 Ill.2d 194,374.N.E.2d 211,15 Ill.Dec. 776 (1978); *City of Benton v. Odom,* 123 Ill.App.3d 991, 463 N.E.2d 785, 79 Ill.Dec. 231 (5th Dist. 1984). *Accord, Illinois Wine & Spirits v. County of Cook,* 191 Ill.App.3d 924, 548 N.E.2d 416, 139 Ill.Dec. 31 (1st Dist. 1989). If there is authority to prohibit certain conduct, that conduct also can be regulated. *Phillips v. Graham,* 86 Ill.2d 274, 427 N.E.2d 500, 56 Ill.Dec. 355 (1981). The ordinance may proceed step-by-step to ameliorate the problem and need not address all possible issues at once. *Sklar v. Byrne,* 727 F.2d 633 (7th Cir. 1984).

Ordinances are interpreted by means of the same standards of judicial construction as are used for interpreting statutes. *American National Bank v. Powell,* 293 Ill.App.3d 1033, 691 N.E.2d 1162, 229 Ill.Dec. 439 (1st Dist. 1998); *In re Application of County Collector,*132 Ill.2d 64, 547 N.E.2d 107, 138 Ill.Dec. 138 (1989).

In order to challenge the validity of an ordinance properly, a complaint must allege that the ordinance is arbitrary, capricious, and unreasonable; bears no substantial relationship to public health, safety, or welfare; or violates the plaintiff's constitutional rights. *Young v. City of Belleville,* 115 Ill.App.3d 960, 451 N.E.2d 913, 71 Ill.Dec. 759 (5th Dist. 1983). A complaint that fails to make these threshold allegations is patently insufficient and is subject to a timely filed motion to dismiss. 451 N.E.2d at 915; *Bauscher v. City of Freeport,* 103 Ill.App.2d 372, 243 N.E.2d 650 (2d Dist. 1968).

2. [20.12] Burden of Proof

If the complaint contains the necessary affirmative allegations, the burden of proof still rests with the plaintiff to prove by "clear and convincing" evidence that the ordinance is palpably unreasonable. *Gibson v. Village of Wilmette,* 97 Ill.App.3d 1033, 425 N.E.2d 434, 54 Ill.Dec. 569 (1st Dist. 1981); *City of Chillicothe v. Stoecker,* 58 Ill.App.3d 303, 374 N.E.2d 259, 15 Ill.Dec. 824 (3d Dist. 1978). Absent evidence that the ordinance is manifestly unreasonable, a court will not interfere with the legislative discretion of the corporate authorities. *Roth v. Daley,* 119 Ill.App.2d 462, 256 N.E.2d 166 (1st Dist. 1970). The same test of reasonableness that is applied to statutes enacted by the General Assembly is applicable to municipal ordinances. *Chicago National League Ball Club, Inc. v. Thompson,* 108 Ill.2d 357, 483 N.E.2d 1245, 91 Ill.Dec. 610 (1985). Thus, the plaintiff's burden of proof is higher than the usual "preponderance of the evidence" standard. "Clear and convincing" evidence is required. *Village of Algonquin v. Village of Barrington,* 254 Ill.App.3d

324, 626 N.E.2d 329, 193 Ill.Dec. 296 (2d Dist. 1993). Based on this legal standard, if there is room for a legitimate difference of opinion as to reasonableness in light of the evidence presented, the legislative judgment of the corporate authorities will prevail. *City of Carbondale v. Brewster,* 78 Ill.2d 111, 398 N.E.2d 829, 34 Ill.Dec. 838 (1979); *City of Des Plaines v. Gacs,* 65 Ill.App.3d 44, 382 N.E.2d 402, 22 Ill.Dec. 82 (1st Dist. 1978); *City of Chillicothe v. Stoecker, supra.* The deference to the legislative judgment of the corporate authorities will be especially strong if matters of public health and safety are implicated. *City of Des Plaines v. Gacs, supra* (prohibiting keeping fowl that could transmit disease); *Schuringa v. City of Chicago,* 30 Ill.2d 504,198 N.E.2d 326 (1964) (artificial fluoridation of water supply). When an ordinance promotes the public health or welfare, it should be liberally construed. *Houpt v. County of Stephenson,* 63 Ill.App.3d 792, 380 N.E.2d 1060, 20 Ill.Dec. 851 (2d Dist. 1978).

3. [20.13] Test of Reasonableness

Although the reasonableness of any ordinance can be determined only in light of all the facts and circumstances surrounding it, the courts have articulated certain general principles that will be of significance in the legal analysis. To constitute a legitimate exercise of legislative authority, an ordinance must (a) bear a reasonable relationship to the public interest intended to be protected and (b) be a reasonable method of accomplishing the desired objective. *Village of Caseyville v. Cunningham,* 137 Ill.App.3d 186, 484 N.E.2d 499, 91 Ill.Dec. 940 (5th Dist. 1985); *Finish Line Express, Inc. v. City of Chicago,* 72 Ill.2d 131, 379 N.E.2d 290, 19 Ill.Dec. 626 (1978); *City of Carbondale v. Brewster,* 78 Ill.2d 111, 398 N.E.2d 829, 34 Ill.Dec. 838 (1979); *Opyt's Amoco, Inc. v. Village of South Holland,* 149 Ill.2d 265, 595 N.E.2d 1060, 172 Ill.Dec. 390 (1992) (upholding Village's Sunday closing law against equal protection, First Amendment vagueness, and arbitrariness challenges). The reasonableness requirement also applies to ordinances that are enacted pursuant to statutory authority. *Petterson v. City of Naperville,* 9 Ill.2d 233, 137 N.E.2d 371 (1956); *City of Carbondale, supra.* Any exemptions from the ordinance must also meet the test of reasonableness. *Dewoskin v. Loew's Chicago Cinema, Inc.,* 306 Ill.App.3d 504, 714 N.E.2d 1047, 239 Ill.Dec. 750 (1st Dist. 1999).

a. [20.14] Protection of Public Welfare

A municipality has broad discretion to determine what the interests of the public health, safety, and welfare require. *Kalodimos v. Village of Morton Grove,* 113 Ill.App.3d 488,447 N.E.2d 849, 69 Ill.Dec. 414 (1st Dist. 1984); *Cheetah Enterprises, Inc., v. County of Lake,* 22 Ill.App.3d 306, 317 N.E.2d 129 (2d Dist. 1974); *Greyhound Lines, Inc. v. City of Chicago,* 24 Ill.App.3d 718, 321 N.E.2d 293 (1st Dist. 1974). It has been recognized that the permissible scope of municipal regulation has expanded considerably over the years. *See City of Carbondale v. Brewster,* 78 Ill.2d 111, 398 N.E.2d 829, 832, 34 Ill.Dec. 838 (1979).

If an ordinance is reasonably related to the public welfare, the courts will not substitute their judgment regarding the wisdom, necessity, or desirability of the legislation. *Hunt v. City of Peoria,* 30 Ill.2d 230, 195 N.E.2d 719 (1964); *Schuringa v. City of Chicago,* 30 Ill.2d 504, 198 N.E.2d 326 (1964). *But see Lou Owen Inc. v. Village of Schaumburg,* 279 Ill.App.3d 976, 665 N.E.2d 456, 216 Ill.Dec. 396 (1st Dist. 1996) (ordinance banning all commercial teen dances except those held in hotels was arbitrary and lacked legitimate governmental interest). Nor will the courts inquire into the motivation of the corporate authorities in enacting the ordinance. *Chicago National League Ball Club, Inc. v. Thompson,* 108 Ill.2d 357, 483 N.E.2d 1245, 91 Ill.Dec. 610 (1985); *Pence v. Village of Rantoul,* 12 Ill.App.3d 446, 298 N.E.2d 775 (4th Dist.1973). The motivation of individual legislators is irrelevant to the legal analysis of reasonableness (however, motivation and intent may be highly relevant in certain types of civil rights actions). See §§ 20.94 - 20.97. As long as the ordinance addresses matters generally affecting the public welfare, the first part of the reasonableness test is met.

Often, the plaintiff may contend that the ordinance is unreasonable because it deprives him of the use or enjoyment of property without due process of law. *Chicago National League Ball Club v. Thompson, supra.* The fact that municipal legislation has an impact on individual property rights or on the use and enjoyment of property does not negate the reasonableness of the ordinance. To the contrary, it is well recognized that the individual's privilege to use property is always subject to the legitimate restraints that may be imposed by the municipality in order to protect the public welfare. *City of Carbondale, supra; Village of Carpentersville v. Fiala,* 98 Ill.App.3d 1005, 425 N.E.2d 33, 54 Ill.Dec. 521 (2d Dist. 1981); *Petterson v. City of Naperville,* 9 Ill.2d 233, 137 N.E.2d 371 (1956).

A municipality's regulatory powers extend not only to things that have already become a hazard to the public welfare, but also to things that may become a hazard. A municipality therefore may reasonably act to *prevent* a potential problem from occurring. *Village of Carpentersville v. Fiala, supra* (limitation on number of dogs per dwelling unit); *Houpt v. County of Stephenson,* 63 Ill.App.3d 792, 380 N.E.2d 1060, 20 Ill.Dec. 851 (2d Dist. 1978) (disconnection of private septic systems that were in working order); *State Street Properties, Inc. v. Zoning Board of Appeals,* 12 Ill.App.3d 98, 298 N.E.2d 239 (1st Dist. 1973) (potential hazard from suspension of advertising sign above public way). *See also Dube v. City of Chicago,* 7 Ill.2d 313, 131 N.E.2d 9 (1955) (noise prevention); *Village of Glenview v. Velasquez, 123* Ill.App.3d 806, 463 N.E.2d 873, 79 Ill.Dec. 319 (1st Dist. 1984) (barbed wire as potential hazard).

In some instances, the determination of reasonableness may be related to the cost of compliance. Ordinances may impose a direct or indirect cost on certain activities. In *Krughoff v. City of Naperville,* 68 Ill.2d 352, 369 N.E.2d 892, 12 Ill.Dec. 185 (1977), the City enacted an ordinance that required developers to make contributions of land, or money in lieu of land, to be used for school and park sites. Prior payment of the contributions was a condition of approval of the plat of subdivision. The court found that the cost to the developer was reasonable. In reaching this

conclusion, the court held that since the costs under the ordinance were proportioned to the needs "specifically and uniquely attributable" to the developer's activities, it was a reasonable exercise of municipal regulatory powers. *Accord, Board of Education v. Surety Developers, Inc.*, 63 Ill.2d 193, 347 N.E.2d 149 (1975).

A municipality also may reasonably apply ordinances adopted under its police powers to antecedent conditions. Again, the balancing of the cost of compliance against the harm to be prevented may be a significant part of the analysis. In *Kaukas v. City of Chicago,* 27 Ill.2d 197,188 N.E.2d 700 (1963), the City passed an ordinance that prohibited the use of glass panel doors as a secondary means of exit for fire prevention purposes. The effect of the ordinance was to require all existing buildings to conform to the new ordinance even though they were originally built in conformity with the previous ordinances of the city. The court determined that the appropriate test, given these preexisting conditions, was a balancing test. On one side was the interest of the public in fire safety and on the other was the cost of compliance to the owner. The court struck the balance in favor of the City, stating:

> **When this cost [of the fire doors] is measured against the total cost of the building and considered in connection with the fact that the installation of direct means of exit would render the building more safe and would protect the tenants from the danger of fire, we think it is clear that the ordinance is not unreasonable as applied to existing buildings and does not deprive the owners of their property without due process of law.** 188 N.E.2d at 702 - 703.

Accord, Rothner v. City of Chicago, 66 Ill.App.3d 428, 383 N.E.2d 1218, 23 Ill.Dec. 191 (1st Dist. 1978); *City of Chicago v. Kutil,* 43 Ill.App.3d 826,357 N.E.2d 200,2 Ill.Dec. 223 (1st Dist. 1976). *See also City of Nokomis v. Sullivan,* 14 Ill.2d 417, 153 N.E.2d 48 (1958). However, the continued validity of this line of case law is now somewhat in doubt in light of the United States Supreme Court's expansion of a legislative "taking." *Lucas v. South Carolina Coastal Council,* _____ *U.S.* _____, 120 L.Ed.2d 798, 112 S.Ct. 2886 (1992). See §20.135.

b. [20.15] Accomplishment of Objective

The second part of the "reasonableness" test is the one that is most frequently at the heart of litigation challenging municipal ordinances. The issue under this portion of the test is whether the measures adopted by the municipality are reasonably tailored to address the problem. Again, with respect to this element, there is a presumption that the measures adopted are appropriate. *City of Carbondale v. Brewster,* 78 Ill.2d 111, 398 N.E.2d 829, 34 Ill.Dec. 838 (1979); *Memorial Gardens Association, Inc. v. Smith,* 16 I11.2d 116, 156 N.E.2d 587 (1959).

The municipality's ordinance need not gamble with the public's health, safety, and welfare. It may take the most conservative course available even though that course is also the most restrictive. *City of Nokomis v. Sullivan,* 14 Ill.2d 417, 153 N.E.2d 48 (1958); *Kaukas v. City of Chicago,* 27 Ill.2d 197, 188 N.E.2d 700 (1963). Because of the standard of judicial deference to legislative acts, the courts will not consider whether the measures adopted in the ordinance are the best, wisest, or most appropriate means to accomplish the end sought. *Schuringa v. City of Chicago,* 30 Ill.2d 504,198 N.E.2d 326 (1964); *People v. Smith,* 124 Ill.App.3d 805,465 N.E.2d 101, 80 Ill.Dec. 310 (1st Dist. 1984). Rather, the appropriate test is whether the means chosen by the legislative body are reasonably calculated to accomplish the objective. *Finish Line Express, Inc. v. City of Chicago,* 72 Ill.2d 131, 379 N.E.2d 290,19 Ill.Dec. 626 (1978); *Sherman-Reynolds, Inc. v. Mahin,* 47 Ill.2d 323, 265 N.E.2d 640 (1970). If there is a reasonable relationship between the means chosen and the legislative purpose, the ordinance is valid.

Moreover, it is not a valid objection to an ordinance that it addresses only part of the problem. The corporate authorities need not choose between legislating against all evils of the same kind or not legislating at all. They may choose to address what they perceive to be the most acute need. The entire remedial scheme is not rendered invalidated simply because it failed, through inadvertence or otherwise, to cover every evil that conceivably might have been attacked. *Chicago National League Ball Club, Inc. v. Thompson,* 108 Ill.2d 357, 438 N.E.2d 1245, 91 Ill.Dec. 610 (1985); *Friedman & Rochester, Ltd. v. Walsh,* 67 Ill.2d 413, 367 N.E.2d 1325, 10 Ill.Dec. 559 (1977).

The judicial test of reasonableness is applicable to a wide variety of cases brought to challenge municipal legislation. The allegations that trigger this type of review are that the municipality has enacted legislation that either (1) bears no reasonable relationship to the public health, safety, welfare, and convenience or (2) is arbitrary, capricious, or unreasonable in the means chosen to effect the public purpose. These types of allegations often are combined with claims under the state and federal due process clause and equal protection clause. While the legal tests applied to alleged violation of the due process or equal protection clause closely parallel the "reasonableness" test there are differences. These are discussed in more detail at §§20.105 - 20.108.

c. [20.16] Delegation of Authority to Administrative Personnel

An ordinance often delegates enforcement powers to the municipality's personnel. The personnel involved may be a board or commission, such as the plan commission or zoning board of appeals, or they may be department heads within the staff of the municipality. From a practical standpoint, it is obviously essential that the corporate authorities be able to delegate day-to-day administrative duties. Otherwise, government would cease to function. *Mister Softee of Illinois, Inc. v. City of Chicago,* 42 Ill.App.2d 414, 192 N.E.2d 424 (1st Dist. 1963). There are limitations, however, on the nature and scope of duties that can be delegated to administrative personnel.

The key element in gauging the propriety of a delegated responsibility is whether there are sufficient criteria and standards to guide the administrative decision. In making this analysis, a distinction must be drawn between a true delegation of legislative power and the delegation to a subordinate of the authority to execute the law. *Hill v. Relyea,* 34 Ill.2d 552, 216 N.E.2d 795 (1966); *City of Chicago v. State & Municipal Teamsters,* 127 Ill.App.3d 328,468 N.E.2d 1268, 82 Ill.Dec. 488 (1st Dist. 1984). If broad rule-making power is granted to administrative personnel without standards to guide their decision, an unconstitutional delegation of legislative authority has occurred. *Pacesetter Homes, Inc. v. Village of Olympia Fields,* 104 Ill.App.2d 218, 244 N.E.2d 369 (1st Dist. 1968) (architectural advisory committee).

In *Stofer v. Motor Vehicle Casualty Co.,* 68 I11.2d 361, 369 N.E.2d 875,12 Ill.Dec. 168 (1977), the Supreme Court fashioned a three-part test to determine whether too much discretionary authority had been vested in the state director of insurance. This test is equally applicable to municipal ordinances. *Fagiano v. Police Board of City of Chicago,* 98 Ill.2d 277, 456 N.E.2d 27, 74 Ill.Dec. 525 (1983). Under the *Stofer* test, the legislation delegating authority must sufficiently identify (1) the persons and activities potentially subject to regulation; (2) the harm sought to be prevented; and (3) the general means intended to be available to the administrator to prevent the identified harm.

The *Stofer* test is quite general, as it must be given the broad range of statutes and ordinances affected by the rule. However, it does identify the relevant factors with which the litigator will be confronted in any court proceeding.

Finally, it should be noted that ordinances often grant powers to administrative bodies to recommend certain types of action with the ultimate decision-making responsibility reserved for the corporate authorities. *City of Chicago v. State & Municipal Teamsters, supra.* No delegation occurs in these instances, and ordinances of this type are not subject to the impermissible delegation argument. If, however, the recommendation is enforceable unless some further action is taken by the corporate authorities, a delegation of legislative power will have occurred. *Waterfront Estates Development v. Palos Hills,* 232 Ill.App.3d 367, 597 N.E.2d 641, 173 Ill.Dec. 667 (1st Dist. 1992) (appearance review commission); *Pacesetter Homes, supra; R.S.T. Builders, Inc. v. Village of Bolingbrook,* 141 Ill.App.3d 41, 489 N.E.2d 1151, 95 Ill.Dec. 423 (3d Dist. 1986).

d. [20.17] Amending Ordinances During Course of Litigation

As a general rule, a municipality has continuing authority to amend or repeal any of its ordinances even while litigation is pending concerning the validity of the ordinance. *National Advertising Co. v. Village of Downers Grove,* 204 Ill.App.3d 499, 561 N.E.2d 1300, 149 Ill.Dec. 604 (2d Dist. 1990); *Sagittarius, Inc. v. Village of Arlington Heights,* 90 Ill.App.3d 401,413 N.E.2d 90,45 Ill.Dec. 757 (1st Dist. 1980); *Bohan v. Village of Riverside,* 9 Ill.2d 561, 138 N.E.2d 487 (1956). The

court then must decide the case in accordance with the law in effect at the time of rendering its decision. *Sagittarius, supra; Gust v. Village of Skokie,* 125 Ill.App.3d 102, 465 N.E.2d 696, 80 Ill.Dec. 584 (1st Dist. 1984). If an ordinance is repealed, all pending proceedings are suspended. *County of Du Page v. Molitor,* 26 l1l.App.2d 232, 167 N.E.2d 592 (2d Dist. 1960). The principal exception to this general rule is if the plaintiff has substantially changed her position in reliance on the prior ordinance and has thereby acquired "vested rights." *Constantine v. Village of Glen Ellyn,* 217 Ill.App.3d 4,575 N.E.2d 1363,159 Ill.Dec. 303 (2d Dist. 1991) (vested right in lot, which Village had determined buildable, after owner made substantial expenditures); *County of Kendall v. Aurora National Bank Trust No. 1107,* 219 Ill.App.3d 841, 579 N.E.2d 1283, 162 Ill.Dec. 469 (2d Dist. 1991) (explaining vested rights test). While there is generally no vested right in a public law, rights that arise under a statute vest when they are decreed by a court of competent jurisdiction. *Commonwealth Edison Co. v. Will County Collector,* 305 Ill.App.3d 819, 713 N.E.2d 572, 239 Ill.Dec. 41 (3d Dist. 1999). See §§ 20.26 - 20.29 for a further discussion of this concept.

Thus, if the complaint does identify an obvious flaw in an ordinance, the municipal litigator may consider recommending to her client that the ordinance be amended to cure the defect and thereby place the case in a more defensible posture.

Even if a municipality loses a case, it is not necessarily prohibited from subsequently enacting ordinances affecting the subject matter of the litigation as long as the ordinance does not have the effect of thwarting the final judgment. *Lake Forest Chateau, Inc. v. Lake Forest,* 133 Ill.2d 129, 549 N.E.2d 336, 139 Ill.Dec. 824 (1989) (subsequent increase in building fees held applicable to development that had been allowed by final judgment order).

e. [20.18] Partial Invalidity

When a court undertakes the review of an ordinance, it may uphold the ordinance in its entirety, strike certain portions of the ordinance, or invalidate the entire ordinance. Whether an ordinance will be partially or totally invalidated is subject to a number of considerations.

The courts will examine the ordinance to determine whether there is a severability clause. If there is a severability clause, it is more likely that only the offending portion of the ordinance will be held invalid. *Oak Forest Mobile Home Park, Inc. v. City of Oak Forest,* 27 Ill.App.3d 303, 326 N.E.2d 473 (1st Dist. 1975). *See City of Springfield v. Hall,* 93 Ill.App.3d 860, 417 N.E.2d 1059, 49 Ill.Dec. 232 (4th Dist. 1981).

The mere existence of a severability clause does not guarantee that the remainder of the ordinance will be held valid, however. *Leck v. Michaelson,* 129 Ill.App.3d 593, 472 N.E.2d 1166, 84 Ill.Dec. 770 (1st Dist. 1984), *aff'd in pertinent part,* 111 I11.2d 523 (1986). The key inquiry is whether, after severing the illegal provisions, the remainder of the ordinance is complete in itself and

susceptible to independent enforcement. *See County of Cook v. Renaissance Arcade & Bookstore*, 122 I11.2d 123,522 N.E.2d73,118 Ill.Dec. 618 (1988) (holding invalid portion of county's adult-use zoning ordinances to be severable from balance of ordinance); *Village of Oak Lawn v. Marcowitz,* 86 Ill.2d 406, 427 N.E.2d 36, 55 Ill.Dec. 916 (1981); *Brown v. City of Chicago,* 42 I11.2d 501, 250 N.E.2d 129 (1969). If the ordinance would be rendered a substantially different law than enacted by the corporate authorities and one that they did not intend to enact, then the entire act will be invalidated by the court regardless of the existence of the severability clause. *Commercial National Bank of Chicago v. City of Chicago,* 89 Ill.2d 45, 432 N.E.2d 227, 59 Ill.Dec. 643 (1982).

f. [20.19] Laches, Estoppel, and Statutes of Limitation

Even if a municipal ordinance has been determined to be a reasonable and valid exercise of municipal powers, it may be claimed that it is inequitable to apply the ordinance to the case at bar. These claims generally are set forth in terms of estoppel, laches, or statutes of limitation. Application of any of these limitation doctrines to municipalities is not favored by the law. *Carey v. City of Rockford,* 134 Ill.App.3d 217, 480 N.E.2d 164, 89 Ill.Dec. 278 (2d Dist. 1985). However, under appropriate circumstances, one or more of the limitation doctrines may be used to negate a municipal ordinance's applicability to the case at bar.

The doctrine of equitable estoppel may be used when the enforcement of an ordinance would be unjust or inequitable given the actions of the municipality. *County of DuPage v. K-Five Construction Corp.,* 267 Ill.App.3d 266, 642 N.E.2d 164, 204 Ill.Dec. 702 (2d Dist. 1994); *Estate of Besinger v. Village of Carpentersville,* 258 Ill.App.3d 218, 630 N.E.2d 178, 196 Ill.Dec. 481 (2d Dist. 1994). It is an exception to the general rule that a municipality cannot be estopped by actions of its officers that are in excess of their authority. *Village of Lisle v. Village of Woodridge,* 192 Ill.App.3d 568, 548 N.E.2d 1337, 139 Ill.Dec. 623 (2d Dist. 1989); *Rose v. Rosewell,* 163 Ill.App.3d 646, 516 N.E.2d 885, 114 Ill.Dec. 730 (1st Dist. 1987); *Chicago Food Management, Inc. v. City of Chicago,* 163 Ill.App.3d 638, 516 N.E.2d 880,114 Ill.Dec. 725 (1st Dist. 1987) (citing general rule that municipality cannot be estopped by ultra vires acts of its officers); *Lindahl v. City of Des Plaines,* 210 Ill.App.3d 281, 568 N.E.2d 1306,154 Ill.Dec. 857 (1st Dist. 1991) (agreement by supervisor to compensate salaried employee was null and void); *Elk Grove Township Rural Fire Protection District v. Village of Mt. Prospect,* 228 Ill.App.3d 228, 592 N.E.2d 549, 170 Ill.Dec. 113 (1st Dist. 1992) (citing general rule); *Ad-Ex, Inc. v. City of Chicago,* 207 Ill.App.3d 163, 565 N.E.2d 669, 152 Ill.Dec. 136 (1st Dist. 1990) (settlement of sign company's suit against City regarding zoning setback was void and could not be ratified by City's subsequent conduct). *LaSalle National Trust, N.A. v. Village of Westmont,* 264 Ill.App.3d 43, 636 N.E.2d 1157, 201 Ill.Dec. 725 (2d Dist. 1994). Estoppel generally will not lie against a municipality to perform a contractual obligation in the absence of a prior appropriation. *Lindahl v. City of DesPlaines,* 210 Ill.App.3d 281, 568 N.E.2d 1306, 154 Ill.Dec. 857 (1st Dist. 1991); *Metropolitan Water Reclamation District v. Civil Service Board,* 291 Ill.App.3d 488, 684 N.E.2d 786, 225 Ill.Dec. 795 (1997).

For equitable estoppel to lie, a four-part test must be met: (1) there must be an affirmative act by the municipality; (2) that affirmative act must include the action about which the plaintiff has complained; (3) the plaintiff must have changed his position substantially in reliance on the act; and (4) the affirmative act that induced the plaintiff's reliance must be an act of the municipality itself. *Carey v. City of Rockford, supra; Haeflinger v. City of Wood Dale,* 129 Ill.App.3d 674, 472 N.E.2d 1228, 84 Ill.Dec. 832 (2d Dist. 1984); *Village of Wadsworth v. Kerton,* 311 Ill.App.3d 829, 726 N.E.2d 156, 244 Ill.Dec. 560 (2d Dist. 2000). A municipality cannot be estopped based solely on its failure to act. *Katz v. City of Chicago,* 177 Ill.App.3d 305, 532 N.E.2d 322, 126 Ill.Dec. 637 (1st Dist. 1988). A positive act of approval is required. *Nielsen-Massey Vanillas, Inc. v. City of Waukegan,* 276 Ill.App.3d 146, 657 N.E.2d 1201, 212 Ill.Dec. 856 (2d Dist. 1995); *Beverly Bank v. County of Cook,* 157 Ill.App.3d 601, 510 N.E.2d 941, 109 Ill.Dec. 873 (1st Dist. 1987). Public policy concerns also may bar an estoppel claim. *Harris v. Johnson,* 218 Ill.App.3d 588, 578 N.E.2d 1326, 161 Ill.Dec. 680 (2d Dist. 1991) (mayor's oral promise to reappoint police chief was unenforceable for public policy reasons).

"Substantial reliance" usually involves the expenditures of substantial sums of money in reliance on representations by a municipality. *Cities Service Oil Co. v. City of Des Plaines,* 21 Ill.2d 157, 171 N.E.2d 605 (1961) (City estopped by virtue of issuance of building permit and expenditure of funds); *Cos Corp. v. City of Evanston,* 27 Ill.2d 670, 190 N.E.2d 364 (1963) (City estopped based on assurances that permit would be issued and substantial expenditures made); *Leisuretime Recreation VI, Inc. v. Byrne,* 93 Ill.App.3d 489, 417 N.E.2d 658, 48 Ill.Dec. 926 (1st Dist. 1981) (issuance of liquor license and substantial expenditures made).

The plaintiff also must have relied on the representations of the municipality to his detriment. If the plaintiff's acts were not induced by representations of the municipality, estoppel is not applicable. *See City of Des Plaines v. Gacs,* 65 Ill.App.3d 44,382 N.E.2d 402,22 Ill.Dec. 82 (1st Dist. 1978). In *Carey v. City of Rockford, supra,* the court held that the city was not estopped from denying health insurance coverage for an employee's vasectomy reversal operation by virtue of its mistaken, one-time payment of another's vasectomy reversal since neither the city nor the agency that administered its health policy had misrepresented to the employee that vasectomy reversal was covered and the employee had a convenient means of accurately ascertaining the true scope of coverage. But in *Dell v. City of Streator,* 193 Ill.App.3d 810, 550 N.E.2d 252, 140 Ill.Dec. 616 (3d Dist. 1990), the court held that the City was estopped from denying lifetime medical and life insurance benefits to retired employees since the City had already received the benefit of the employee's services. The contract was held not to be an ultra vires act.

Finally, the act that induces the plaintiff's reliance must be an act of the municipality itself, such as legislation by the city council. *American National Bank & Trust Co. v. Village of Arlington Heights,* 115 Ill.App.3d 342, 450 N.E.2d 898, 71 Ill.Dec. 210 (1st Dist. 1983); *Haeflinger v. City of Wood Dale, supra, Lake Shore Riding Academy, Inc. v. Daley,* 38 Ill.App.3d 1000, 350 N.E.2d 17

(1st Dist. 1976); *Dell v. City of Streator, supra.* A ministerial misinterpretation or a mere unauthorized act of a ministerial officer is insufficient to meet the test for estoppel. *Haeflinger v. City of Wood Dale, supra; Diakonian Society v. City of Chicago Zoning Board of Appeals,* 63 Ill.App.3d 823, 380 N.E.2d 843, 20 Ill.Dec. 634 (1st Dist. 1978). Compare, however, certain types of civil rights actions. See §§20.109 - 20.114; *Trochelman v. Village of Maywood,* 259 Ill.App.3d 1, 631 N.E.2d 334, 197 Ill.Dec. 331 (1st Dist. 1994); *Jordan v. Civil Service Commission,* 246 Ill.App.3d 1047, 617 N.E.2d 142, 186 Ill.Dec. 903 (1st Dist. 1993).

Laches is the neglect or omission on the part of the complainant to assert a right in a timely manner. If the lapse of time and other circumstances have resulted in prejudice to the adverse party, laches will operate to bar the claim. *Lincoln-Way Community High School District v. Village of Frankfort,* 51 Ill.App.3d 602, 367 N.E.2d 318, 9 Ill.Dec. 884 (3d Dist. 1977).

Several courts have held that the doctrine of laches is inapplicable to municipal ordinance enforcement and the exercise of governmental powers. *City of Des Plaines v. Gacs, supra; Campbell v. Village of Oquawka, 28* Ill.App.3d 1038, 328 N.E.2d 903, 907 (3d Dist. 1975); *Shoreline Builders Co. v. City of Park Ridge,* 60 Ill.App.2d 282, 209 N.E.2d 878, 884 - 885 (1st Dist. 1965). Based on the Supreme Court's holding in *City of Shelbyville v. Shelbyville Restorium, Inc.*, 96 Ill.2d 457, 451 N.E.2d 874, 71 Ill.Dec. 720 (1983), it would appear that this is the correct and better-reasoned view. However, other cases have found the doctrine of laches to be applicable to municipalities. *County of DuPage v. K-Five Construction Corp.*, 267 Ill.App.3d 266, 642 N.E.2d 164, 204 Ill.Dec. 702 (2d Dist. 1994); *Midland Enterprises, Inc. v. City of Elmhurst,* 226 Ill.App.3d 494, 589 N.E.2d 1019,168 Ill.Dec. 619 (2d Dist. 1993); *Haeflinger v. City of Wood Dale, supra; Village of Northbrook v. County of Cook,* 126 Ill.App.3d 145, 466 N.E.2d 1215, 81 Ill.Dec. 413 (1st Dist. 1984). If laches is to be applied to municipal action, the same type of extraordinary circumstances required for equitable estoppel must be established. Haeflinger, 472 N.E.2d at 1232.

A statute of limitations generally is inapplicable to a municipality that is acting in its governmental capacity unless the statute is made applicable by express language therein. *Clare v. Bell,* 378 Ill. 128, 37 N.E.2d 812 (1941); *People ex rel. City of Chicago v. Commercial Union Fire Insurance Co.*, 322 Ill. 326, 153 N.E. 488 (1926). This principle has been affirmed by the Supreme Court in *City of Shelbyville v. Shelbyville Restorium, Inc., supra* (developer's failure to complete street construction). The rationale behind this per se rule is that the public should not suffer because of the failure of public officers to assert a cause of action promptly. 451 N.E.2d at 876 - 877. Obviously, this same reasoning is equally valid in terms of a laches defense and should be applied in future cases. Conversely, the general five-year statute of limitations has been applied to private causes of action challenging a municipal ordinance. *Raintree Homes, Inc. v. Village of Kildeer,* 302 Ill.App.3d 304, 705 N.E.2d 953, 235 Ill.Dec. 770 (2d Dist. 1999).

g. [20.20] Contracts Implied at Law

The essence of a cause of action for a contract implied at law is the defendant's failure to make an equitable payment for a benefit it voluntarily accepted. This doctrine can be applied to a municipality if an ordinance is passed that would benefit an individual (such as a water or sewer .recapture ordinance) but the municipality fails to perform its responsibilities under the ordinance. *Woodfield Lanes, Inc. v. Village of Schaumburg,* 168 Ill.App.3d 763, 523 N.E.2d 36, 119 Ill.Dec. 568 (1st Dist. 1988). The appropriate statute of limitations for claims of breach of an implied contract or for abuse of governmental power is five years (735 ILCS 5/13-205). *River Park, Inc. v. City of Highland Park,* 295 Ill.App.3d 90, 692 N.E.2d 369, 229 Ill.Dec. 596 (2d Dist. 1998).

II. FORMS OF JUDICIAL RELIEF IN MUNICIPAL LITIGATION

A. [20.21] Declaratory Judgments

Under 735 ILCS 5/2-701, a litigant may seek to have the validity of an ordinance reviewed by the courts through a declaratory judgment action. The purpose of a declaratory judgment action is to settle and fix rights before there has been an irrevocable change of position. *City of Chicago v. Department of Human Rights,* 141 Ill.App.3d 165, 490 N.E.2d 53, 95 Ill.Dec. 580 (1st Dist. 1986). The request for a declaratory judgment may be, and very often is, joined with a prayer for additional relief, such as an injunction. 735 ILCS 5/2-701(b). The action for declaratory judgment is not precluded even though other equally effective remedies may exist. *Kupsik v. City of Chicago,* 25 Ill.2d 595, 185 N.E.2d 858 (1962); *Gagne v. Village of La Grange,* 36 Ill.App.3d 864, 345 N.E.2d 108 (1st Dist. 1976). However, the court does have the discretion to dismiss the declaratory judgment action if, in its opinion, other remedies should be used. *Id.* A declaratory judgment action may not be available with respect to conduct that has already occurred. *Howlett v. Scott,* 69 I11.2d 135, 370 N.E.2d 1036, 13 Ill.Dec. 9 (1977); *Gagne, supra.*

1. [20.22] Test for Declaratory Judgment

The two prerequisites for declaratory judgment action are (a) the existence of an actual controversy and (b) a party who has an interest in the controversy. *Underground Contractors Association v. City of Chicago,* 66 Ill.2d 371, 362 N.E.2d 298, 5 Ill.Dec. 827 (1977); *Young v. Mory,* 294 Ill.App.3d 839, 690 N.E.2d 1040, 228 Ill.Dec. 965 (5th Dist. 1998). An "actual controversy" means that the case presents a concrete dispute admitting of an immediate and definitive determination of the parties' rights, the resolution of which will aid in the determination of the controversy or a part thereof. *Kaske v. City of Rockford,* 96 Ill.2d 298, 450 N.E.2d 314, 70 Ill.Dec. 841 (1983); *Underground Contractors Association, supra.* The purpose of this requirement is to distinguish properly justiciable issues from purely hypothetical disputes. *Kaske, supra.* The court

may not render an advisory opinion with regard to a speculative state of facts that has not yet arisen or that may never arise. *Greene v. Village of Reynolds,* 36 Ill.App.3d 998, 342 N.E.2d 834 (3d Dist. 1976); *Berg v. City of Chicago,* 97 Ill.App.2d 410, 240 N.E.2d 344 (1st Dist. 1968).

For an "actual controversy" to arise, a party need not have been wronged or suffered an injury. The test for an actual controversy is met as long as the underlying facts and issues are neither premature nor moot. *Stone v. Omnicom Cable Television, Inc.*, 131 Ill.App.3d 210, 475 N.E.2d 223, 86 Ill.Dec. 226 (2d Dist. 1985). Until an ordinance is passed, neither injunctive nor declaratory relief is appropriate since there is no controversy that is ripe. *Slack v. City of Salem,* 31 Ill.2d 174, 201 N.E.2d 119 (1964).

Nor is a stated intention or threat of prosecution necessary to meet the actual controversy requirement. *City of Chicago v. Department of Human Rights,* 141 Ill.App.3d 165,490 N.E.2d 53,95 Ill.Dec. 580 (1st Dist. 1986). *But see Wills v. O'Grady,* 86 Ill.App.3d 775, 409 N.E.2d 17, 42 Ill.Dec. 522 (1st Dist. 1980) (threat of prosecution or arrest is relevant). As long as the plaintiff pleads the existence of a claim, assertion, or challenge to matters affecting the plaintiff's legal interests, an actual controversy is present. *Stone, supra; City of Chicago v. Department of Human Rights, supra.* Indeed, it has been held that the mere refusal of an agency to issue an opinion regarding the lawfulness of a certain action is sufficient to create an actual controversy. *Pioneer Processing, Inc. v. Environmental Protection Agency,* 111 Ill.App.3d 414,444 N.E.2d 211, 67 Ill.Dec. 172 (4th Dist. 1982), *vacated on other grounds,* 102 I11.2d 119 (1984) (agency would not render opinion regarding whether Environmental Protection Act prohibited development of hazardous waste disposal site for which permit had been issued).

The second part of the declaratory judgment test is whether the plaintiff has a legal interest in the controversy. To meet this portion of the test, the plaintiff must plead facts that show a protectible interest *clearly* falling within the operative language of the ordinance and that she will be adversely affected by its enforcement. *Clevenger v. City of East Moline,* 44 Ill.App.3d 168, 357 N.E.2d 719, 2 Ill.Dec. 552 (3d Dist. 1976). The plaintiff must, therefore, have a personal claim, status, or right that is capable of being affected by the ordinance. *Underground Contractors Association v. City of Chicago, supra.* This is essentially a traditional standing requirement. *See Kluk v. Lang,* 125 Ill.2d 306, 531 N.E.2d 790, 126 Ill.Dec. 163 (1988) (voters had standing to seek declaratory judgment with respect to central committee's authority to fill vacancy in General Assembly). *Compare Township High School v. Northfield,* 184 Ill.App.3d 367,540 N.E.2d 365,132 Ill.Dec. 625 (1st Dist. 1989) (school that wished to sell property to college lacked standing to challenge provision of zoning ordinance requiring college to pay fees when no purchase contract existed between school and college).

The current Illinois rule is that an association lacks standing to seek a declaratory judgment in its representational capacity alone unless it has a recognizable interest in the dispute, peculiar to

itself and capable of being affected. *Underground Contractors Association, supra; Retail Liquor Dealers Protective Association v. Fleck,* 341 11I.App. 283, 93 N.E.2d 443 (1st Dist. 1950), *modified,* 408 Ill. 219 (195 1). Whether Illinois courts will apply the less restrictive federal rule that allows an association standing to assert the rights of its members that have been affected is an open question. *See Illinois Municipal League v. Illinois State Labor Relations Board,* 140 Ill.App.3d 592, 488 N.E.2d 1040, 94 Ill.Dec. 793 (4th Dist. 1986).

Obviously, a plaintiff who is not affected by a particular ordinance lacks the requisite standing to pursue a declaratory judgment action. *Stone, supra* (nonresident could not challenge county cable television ordinance); *Metroweb Corp. v. County of Lake*, 130 Ill.App.3d 934,474 N.E.2d 900, 85 Ill.Dec. 940 (2d Dist. 1985) (lease contingent on rezoning insufficient to create interest to challenge validity of zoning ordinance). *But see Dolson Outdoor Advertising Co. v. City of Macomb,* 46 Ill.App.3d 116, 360 N.E.2d 805, 4 Ill.Dec. 692 (3d Dist. 1977) (lease of space for advertising sign contingent on permit issuance is sufficient to confer standing).

A member of a board or commission lacks standing to challenge the board's decisions. *Greer v. Illinois Liquor Control Commission,* 185 Ill.App.3d 219, 541 N.E.2d 216, 133 Ill.Dec. 379 (2d Dist. 1989); *Hume v. Town of Blackberry,* 131 Ill.App.3d 32, 475 N.E.2d 220, 86 Ill.Dec. 223 (2d Dist. 1985).

From a pleading standpoint, the complaint for a declaratory judgment must contain sufficient, well-pleaded allegations to meet the aforesaid judicial test. The plaintiff must specify all facts necessary to justify the relief sought, and the facts must be alleged with certainty and precision. Mere conclusions regarding alleged harm are inadequate. *Illinois Municipal League, supra.*

2. [20.23] Exhaustion of Administrative Remedies

The plaintiff's failure to exhaust administrative remedies may be a defense to a declaratory judgment action in certain cases. *Hitt v. Ryan,* 307 Ill.App.3d 344, 718 N.E.2d 695, 241 Ill.Dec. 124 (4th Dist. 1999). There appear to be general principles that will be applied to make this determination.

First, if jurisdiction already has attached to the administrative agency through the filing of charges or a complaint, a subsequent action for declaratory judgment will not lie. *Cushing v. Pitman*, 56 Ill.App.3d 930, 372 N.E.2d 714,14 Ill.Dec. 518 (4th Dist. 1978); *Ellison v. Kane County Sheriff's Office Merit Commission,* 108 Ill.App.3d 1065, 440 N.E.2d 331, 64 Ill.Dec. 779 (2d Dist. 1982).

Second, when there has been threat of enforcement of an ordinance or regulation but jurisdiction has not yet attached, a declaratory judgment proceeding may be proper. *Kaske v. City of Rockford,* 96 Ill.2d 298, 450 N.E.2d 314, 70 Ill.Dec. 841 (1983); *Buege v. Lee,* 56 Ill.App.3d 793,

372 N.E.2d 427, 14 Ill.Dec. 416 (2d Dist. 1978). *Contra, Dock Club, Inc. v. Illinois Liquor Control Commission,* 83 Ill.App.3d 1034, 404 N.E.2d 1050, 39 Ill.Dec. 459 (4th Dist. 1980).

Third, declaratory judgment proceedings generally will not lie when taxing statutes are in issue because an adequate remedy at law exists. *Ives v. Town of Limestone,* 62 Ill.App.3d 771, 379 N.E. 394, 19 Ill.Dec. 730 (3d Dist. 1978); *Bowman v. County of Lake,* 29 I11.2d 268, 193 N.E.2d 833 (1963).

Fourth, a declaratory judgment may be sought before the exhaustion of administrative remedies if the authority or jurisdiction of the administrative agency is challenged. *Jones v. Board of Fire & Police Commissioners,* 127 Ill.App.3d 793,469 N.E.2d 393,82 Ill.Dec. 859 (2d Dist. 1984); *Horan v. Foley,* 39 Ill.App.2d 458, 188 N.E.2d 877 (1st Dist. 1963). A declaratory judgment action, however, cannot be used as a mechanism to circumvent the Administrative Review Law's jurisdictional provisions. *Marozas v. Board of Fire & Police Commissioners,* 222 Ill.App.3d 781, 584 N.E.2d 402, 165 Ill.Dec. 223 (1st Dist. 1991).

In addition to the general principles that apply to declaratory judgment proceedings, there are other specific exemptions from the exhaustion doctrine. These exemptions are discussed in further detail in §§20.63 - 20.70.

3. [20.24] Other Defenses

In defense to a declaratory judgment action, the municipality may assert the same traditional defenses that are available for other suits brought in law or equity. Statutes of limitation apply. *Boytor v. City of Aurora,* 70 Ill.App.3d 303, 388 N.E.2d 449, 26 Ill.Dec. 734 (2d Dist. 1979), *affd,* 81 Ill.2d 308 (1980). Laches also is available as a defense. *Villiger v. City of Henry,* 47 Ill.App.3d 565, 362 N.E.2d 120,5 Ill.Dec. 807 (3d Dist. 1977); *Cangelosi v. Board of Fire & Police Commissioners,* 12 Ill.App.3d 799, 299 N.E.2d 151 (1st Dist. 1973). In short, the defenses that can be raised in a declaratory judgment proceeding appear to be coextensive with those that are available in law or equity.

B. [20.25] Injunctions

Perhaps the most common remedy sought against municipal ordinances and regulations is injunctive relief. To a large extent, the injunctive action has supplanted mandamus as the plaintiff's remedy of choice. The primary reason for this shift appears to be that the legal requirements that must be met in a mandamus action are somewhat stricter than those in an injunction action. See §§20.32 - 20.39, discussing mandamus proceedings.

Injunctive relief will not be granted against a public officer with respect to official acts unless it is shown that such acts either are outside the scope of his authority or are unlawful. *Lindsey v. Board of Education of City of Chicago,* 127 Ill.App.3d 413,468 N.E.2d 1019,82 Ill.Dec. 365 (1st Dist. 1984); *Sherman v. Board of Fire & Police Commissioners of City of Highland,* 111 Ill.App.3d 1001, 445 N.E.2d 1, 67 Ill.Dec. 709 (5th Dist. 1982). Discretionary acts of public officials are not a proper subject matter for injunctive relief. *Rocke v. County of Cook,* 60 Ill.App.3d 874, 377 N.E.2d 287, 18 Ill.Dec. 134 (1st Dist. 1977). An exception may arise, however, if there is a showing that an official has acted arbitrarily or capriciously and thereby abused his discretion. *See Id.; Phillips v. Hall,* 113 Ill.App.3d 409, 447 N.E.2d 418, 69 Ill.Dec. 210 (2d Dist. 1983) (abuse of discretion not shown).

A mandatory injunction is an extraordinary remedy and will be granted only in cases of great necessity. *Cook County Police Association v. City of Harvey,* 8 Ill.App.3d 147, 289 N.E.2d 226 (1st Dist. 1972); *First National Bank of Lake Forest v. Village of Northbrook,* 2 Ill.App.3d 1082, 278 N.E.2d 533 (1st Dist. 1971). A mandatory injunction cannot be granted to correct past wrongs, nor can it be issued to correct future wrongs absent specific allegations that such wrongs will be committed in the future. *People ex rel. Hamer v. Jones,* 39 I11.2d 360, 235 N.E.2d 589 (1968); *Board of Education of Community Unit SchoolDist. 201-U v. Pomeroy,* 47 Ill.App.3d 468, 362 N.E.2d 55,5 Ill.Dec. 742 (3d Dist. 1977).

Any action for an injunction against a municipality or its officers should conform with these governing principles. In addition, the traditional requirements for injunctive relief also must be met.

1. [20.26] Test for Permanent Injunctive Relief

The requirements that must be met for the issuance of permanent injunctive relief are clearly established. The plaintiff must demonstrate (a) that she has a clear legal right that needs protection; (b) that she will suffer irreparable harm; and (c) that she does not have an adequate remedy at law. See generally 735 ILCS 5/11-101, *et seq.; Walgreen Co. v. Illinois Liquor Control Commission,* 101 Ill.App.3d 216,427 N.E.2d 1307,56 Ill.Dec. 761 (3d Dist. 1981); *City of Chicago v. Stern,* 96 Ill.App.3d 264, 421 N.E.2d 260, 51 Ill.Dec. 752 (1st Dist. 1981). In addition, when the rights of the public are in issue, the court must balance the inconvenience to be suffered by the public against the benefits to the plaintiff. *Biggs v. Health & Hospitals Governing Commission,* 55 Ill.App.3d 501, 370 N.E.2d 1150, 13 Ill.Dec. 123 (1st Dist. 1977). If any of the conditions is not met, injunctive relief may be denied.

Normally, discretionary acts of a public official in exercising her duties are not subject to review by the judiciary in an injunction action. An exception to this rule arises when the public official's acts are arbitrary and capricious and she thus abuses her discretion. *Arnold v. Engelbrecht,*

164 Ill.App.3d 704, 518 N.E.2d 237,115 Ill.Dec. 712 (1st Dist. 1987); *Rocke v. County of Cook,* 60 Ill.App.3d 874, 377 N.E.2d 287, 18 Ill.Dec. 134 (1st Dist. 1978). Additionally, injunctive relief will lie to control discretionary actions of public officials if fraud, corruption, or gross injustice is shown. *Houseknecht v. Zagel,* 112 Ill.App.3d 284, 445 N.E.2d 402, 67 Ill.Dec. 922 (1st Dist. 1983).

a. [20.27] Existence of Legal Right

An injunction is a proper remedy to challenge the validity of a rule, regulation, or ordinance when the petitioner's property interest is involved. *Boyd v. Board of Trustees,* 15 Ill.App.3d 152, 303 N.E.2d 444 (5th Dist. 1973).

Virtually any property right or legal right created by statute, ordinance, or the Constitution can form the basis for a right that allegedly needs protection. For example, ownership of property is a tangible, legal right that is sufficient to form a basis for injunctive relief against a zoning ordinance. *Northern Trust Co. v. City of Chicago,* 4 Ill.2d 432, 123 N.E.2d 330 (1955). A lesser interest in real property may be insufficient, however. See § 20.22. Compare also certain civil rights actions. See §§20.85 - 20.91.

Civil service laws and ordinances do not create "vested" property rights. *Grobsmith v. Kempiners,* 881 Ill.2d 399, 430 N.E.2d 973, 58 Ill.Dec.722 (1981) (removal of "for cause" requirement in order to be dismissed); *Phillips v. Hall,* 113 Ill.App.3d 409, 447 N.E.2d 418, 69 Ill.Dec. 201 (2d Dist. 1983) (secondary employment). The mere allegation that a civil service test was improperly administered is insufficient to enjoin promotions from the list. *Lenert v. Wilson,* 56 Ill.App.2d 325, 206 N.E.2d 294 (1st Dist. 1965). A probationary officer has no vested right in a particular type of examination. *Sullivan v. Board of Fire & Police Commissioners,* 103 Ill.App.3d 167, 430 N.E.2d 636, 58 Ill.Dec. 604 (2d Dist. 1981).

The issuance of a license may create a legal interest sufficient to support a complaint for injunction. *Aliperto v. Department of Registration & Education,* 90 Ill.App.3d 985, 414 N.E.2d 117, 46 Ill.Dec. 395 (1st Dist. 1980).

It is obviously difficult to generalize with respect to the type of legal interests that can be protected through injunctive relief. Although there are some limitations, the scope of interests is generally as broad as equity may require.

b. [20.28] Irreparable Harm

If a legal interest is found to exist and if the municipal ordinance, rule, or regulation interferes with that interest, it is very likely that the court will find irreparable harm to exist. An alleged injury is defined as "irreparable harm" "when it is of such a nature that the injured party cannot be

adequately compensated therefor in damages, or when the damages which result therefrom cannot be measured by any certain pecuniary standard." *Simpkins v. Maras,* 17 Ill.App.2d 238,149 N.E.2d 430, 434 (3d Dist. 1958), *quoting Washingtonian Home of Chicago v. City of Chicago,* 281 Ill. 110, 117 N.E. 737, 741 (1917). Alternately, the term has been defined to encompass such injury as is not beyond the possibility of repair or beyond the possibility of compensation in damages, but that ought not be submitted to on the one hand or inflicted on the other. *Cross Word Products Inc. v. Sutter,* 97 Ill.App.3d 282, 422 N.E.2d 953, 52 Ill.Dec. 744 (1st Dist. 1981). It is not necessary that the harm be great. *Mutual of Omaha Life Insurance Co. v. Executive Plaza, Inc.,* 99 Ill.App.3d 190, 425 N.E.2d 503, 54 Ill.Dec. 638 (2d Dist. 1981); *Fischer v. Brombolich,* 207 Ill.App.3d 1053, 566 N.E.2d 785, 152 Ill.Dec. 908 (5th Dist. 1991) (city commissioner's loss of authority by virtue of city ordinance constituted irreparable harm).

However, it is equally clear that the alleged injury must be actual and substantial rather than one that is technical, inconsequential, or speculative. *Lynch v, Devine,* 45 Ill.App.3d 743, 359 N.E.2d 1137, 4 Ill.Dec. 185 (3d Dist. 1977); *Nichols v. City of Rock Island,* 3 Ill.2d 531, 121 N.E.2d 799 (1954). The petitioner has the burden of demonstrating the existence of such substantial harm or injury. *City of Chicago v. Commonwealth Edison Co.,* 24 Ill.App.3d 624,321 N.E.2d 412 (1st Dist. 1974). Mere conclusions or allegations based on information and belief will not support an injunction. *City of Chicago v. Geraci,* 30 Ill.App.3d. 699, 332 N.E.2d 487 (1st Dist. 1975); *Illinois Municipal League v. Illinois State Labor Relations Board,* 140 Ill.App.3d 592, 488 N.E.2d 1040, 94 Ill.Dec. 793 (4th Dist. 1986). The complaint must set forth factual allegations in a certain and precise manner. *Sadat v. American Motors Corp.,* 104 Ill.2d 105, 470 N.E.2d 997, 83 Ill.Dec. 577 (1984); *McGinty v. Skoog Construction Co.,* 52 Ill.App.2d 456, 202 N.E.2d 112 (4th Dist. 1964) (abst.).

In short, irreparable harm is also a fluid concept, depending more on the particular facts in issue than any precise rule of law. The petitioner clearly does have the burden, however, of demonstrating the existence of a specific and concrete injury.

c. [20.29] Inadequate Remedy at Law

If the petitioner can be compensated for any injury suffered by a damages remedy, he has an adequate remedy at law, and injunctive relief should be denied. *Tamalunis v. City of Georgetown,* 185 Ill.App.3d 173, 542 N.E.2d 402, 134 Ill.Dec. 223 (4th Dist. 1989) (compensatory damages for municipality's discharge of untreated sewage was adequate remedy); *Pullem v. Evanston Young Men's Christian Association,* 124 Ill.App.3d 264,464 N.E.2d 785, 79 Ill.Dec. 881 (1st Dist. 1984). In addition to the traditional damages remedy, an adequate legal remedy may exist under other circumstances. Although there are exceptions, the existence of an administrative remedy generally will preclude injunctive relief. *Aliperto v. Department of Registration & Education,* 90 Ill.App.3d 985, 414 N.E.2d 117, 46 Ill.Dec. 395 (1st Dist. 1980); *Illinois Bell Telephone Co. v. Allphin,* 60 Ill.2d 350, 326 N.E.2d 737 (1975). For an administrative remedy to foreclose injunctive relief, it

must be “clear, complete, and as practical and efficient to the ends of justice and its prompt administration as the equitable remedy." *Bio-Medical Laboratories, Inc. v. Trainor,* 68 Ill.2d 540, 370 N.E.2d 223, 227,12 Ill.Dec. 600 (1977), *quotingK.F.K. Corp. v. American* Continental Homes, *Inc.,* 31 Ill.App.3d 1017, 335 N.E.2d 156, 159 (2d Dist. 1975). *See also People ex rel. Fahner v. American Telephone & Telegraph Co.,* 86 Ill.2d 479, 427 N.E.2d 1226, 56 Ill.Dec. 680 (1981).

When there is an available quo warranto action, an injunctive or declaratory judgment remedy will not lie. *Schallau v. City of Northlake,* 82 Ill.App.3d 456, 403 N.E.2d 266, 38 Ill.Dec. 178 (1st Dist. 1980).

When municipal ordinance violations are pending, a court of equity should not interfere with ordinance enforcement since an adequate remedy at law is available. *Mister Softee of Illinois, Inc. v. City of Chicago,* 42 Ill.App.2d 414,192 N.E.2d 424 (1st Dist. 1963); *G & S Mortgage & Investment Corp. v. City of Evanston,* 130 Ill.App.2d 370, 264 N.E.2d 740 (1st Dist. 1970).

The existence of possible alternate legal remedies must be considered in any defense of an action for injunctive relief brought against a municipality.

If an injunction has been entered against a municipality, the municipality subsequently may seek modification of the scope of the order based on changed circumstances. *Bank of Wheaton v. Village* of *Itasca,* 178 Ill.App.3d 626, 533 N.E.2d 553, 127 Ill.Dec. 681 (2d Dist. 1989).

2. [20.30] Preliminary Injunctive Relief

The purpose of preliminary injunctive relief is to maintain the status quo pending judicial resolution of the controversy. *G.J.Z. Enterprises, Inc. v. City of Troy,* 208 Ill.App.3d 21, 566 N.E.2d 876,153 Ill.Dec. 26 (5th Dist. 1991); *Lindsey v. Board of Education of City of Chicago,* 127 Ill.App.3d 413, 468 N.E.2d 1019, 82 Ill.Dec. 365 (1st Dist. 1984); *Peoples Gas Light & Coke Co. v. City of Chicago,* 117 Ill.App.3d 353, 453 N.E.2d 740, 72 Ill.Dec. 865 (1st Dist. 1983), *appeal after remand,* 125 Ill.App.3d 95 (1st Dist. 1984). The "status quo" is the last actual, peaceable, uncontested status that preceded the pending controversy. *Lindsey v. Board of Education of City of Chicago, supra. A* preliminary injunction should not be issued when it tends to change the status quo rather than preserve it. *See In re Marriage of Schwartz,* 131 Ill.App.3d 351, 475 N.E.2d 1077, 86 Ill.Dec. 698 (1st Dist. 1985); *Bryant v. Village of Sherman,* 204 Ill.App.3d 583, 561 N.E.2d 1320,149 Ill.Dec. 624 (4th Dist. 1990). A preliminary injunction is an extraordinary remedy that should be granted only with utmost care. A preliminary injunction will not be reversed unless it constitutes an abuse of discretion or is overbroad. *Hopf v. Topcorp, Inc.,* 170 Ill.App.3d 85, 527 N.E.2d 1, 122 Ill.Dec. 629 (1st Dist. 1988); *American Telephone & Telegraph Co. v. Village of Arlington Heights,* 174 Ill.App.3d 381, 528 N.E.2d 1000, 124 Ill.Dec. 109 (1st Dist. 1988) (preliminary injunction was overbroad in ordering municipality to submit to arbitration; overbroad

provision stricken). A temporary restraining order or preliminary injunctive relief may be appropriate if a municipality's proposed construction project violates its own ordinances. *Tierney v. Village of Schaumburg,* 182 Ill.App.3d 1055, 538 N.E.2d 904, 131 Ill.Dec. 529 (1st Dist. 1989); *North Pole Corporation v. Village of East Dundee,* 263 Ill.App.3d 327, 635 N.E.2d 1060, 200 Ill.Dec. 721 (2d Dist. 1994).

In addition to the basic requirements for injunctive relief, a petitioner seeking a preliminary injunction also must demonstrate the likelihood of success on the merits of the suit. *Lindsey v. Board of Education of City of Chicago, supra. Compare Citizens Utilities Co. v. O'Connor,* 121 Ill.App.3d 533, 459 N.E.2d 682, 76 Ill.Dec. 767 (2d Dist. 1984) (probability of success must be shown to change status quo). The petitioner need not make out a case that would, in all events, warrant relief at a final hearing. *Lindsey, supra; Armstrong v. Crystal Lake Park District,* 139 Ill.App.3d 991, 487 N.E.2d 648,93 Ill.Dec. 823 (2d Dist. 1985). *Village of Westmont v. Lenihan,* 301 Ill.App.3d 1050, 704 N.E.2d 891, 235 Ill.Dec. 318 (2d Dist. 1998). However, the petitioner must at least raise a fair question regarding the existence of the right claimed. If the petitioner has failed to state a cause of action or there is no reasonable likelihood of success on the merits, preliminary injunctive relief must be denied. *Rocke v. County of Cook,* 60 Ill.App.3d 874,377 N.E.2d 287,18 Ill.Dec. 134 (1st Dist. 1978); *S & F Corp. v. American Express Co.,* 60 Ill.App.3d 824, 377 N.E.2d 73, 17 Ill.Dec. 883 (1st Dist. 1978); *Earthline Corp. v. Mauzy,* 68 Ill.App.3d 304, 385 N.E.2d 928, 24 Ill.Dec. 787 (4th Dist. 1979).

There is a further exception to the "likelihood of success" requirement. As the court stated in *Blue Cross Association v. 666 North Lake Shore Drive Associates,* 100 Ill.App.3d 647, 427 N.E.2d 270, 272, 56 Ill.Dec. 190 (1st Dist. 1981):

> **If the subject of the injunction is property which may be destroyed, or if, as here, the plaintiff seeks only to maintain the status quo until the ultimate issue is decided, the injunction is properly allowed or maintained even where there may be serious doubt as to the ultimate success of the complaint....**
>
> **We have held that it is not the purpose of a preliminary injunction to determine controverted rights or to decide the merits of a case.**

Accord, Rhoads v. Village of Bolingbrook, 130 Ill.App.3d 981, 475 N.E.2d 14,86 Ill.Dec. 208 (3d Dist. 1985). The balancing of harms may also be a significant factor in the determination. *MacDonald v. Chicago Park District,* 132 F.3d 355 (7th Cir. 1997) (park permit).

Thus, the key inquiries that are unique to preliminary injunctions are "preservation of the status quo" and "likelihood of success on the merits." These two factors must be examined closely by the litigator when analyzing the petitioner's complaint.

In addition, the litigator must consider whether the filing of a verified answer is advisable. If a verified answer is filed denying the material allegations of the complaint, an evidentiary hearing, not just oral argument, normally is required. *Peoples Gas Light& Coke v. City of Chicago, supra.* On the other hand, if the defendant has not filed an answer, it is error to hold an evidentiary hearing. *People ex rel. Edgar v. Miller,* 110 Ill.App.3d 264, 441 N.E.2d 1328,65 Ill.Dec. 814 (4th Dist. 1982). If the defendant files a motion for summary judgment as its response, which admits that no genuine issues of material fact exist, then a full evidentiary hearing is not required. *Lindsey, supra.* Whether an evidentiary hearing is appropriate will dictate the litigator's strategy, *i.e.,* a motion attacking the sufficiency of the complaint or a verified answer.

3. [20.31] Municipal Use of Injunctions

Municipalities sometimes may find it necessary or advantageous to seek an order enjoining a party from continuing a course of conduct that violates municipal ordinances.

There are statutes that allow a municipality to obtain injunctive relief for violation of municipal zoning and building codes. 65 ILCS 5/11-13-15 provides, in pertinent part:

> **In case any building or structure, including fixtures, is constructed, reconstructed, altered, repaired, converted, or maintained, or any building or structure, including fixtures, or land, is used in violation of an ordinance or ordinances adopted under Division 13, 31 or 31.1 of the Illinois Municipal Code, or of any ordinance or other regulation made under the authority conferred thereby, the proper local authorities of the municipality ... may institute any appropriate action or proceeding (1) to prevent the unlawful construction, reconstruction, alteration, repair, conversion, maintenance, or use, (2) to prevent the occupancy of the building, structure, or land, (3) to prevent any illegal act, conduct, business, or use in or about the premises, or (4) to restrain, correct, or abate the violation.**

Use of this remedy always should be considered when there are zoning ordinance violations or extensive building code violations. *See Village of Tinley Park v. Ray,* 299 Ill.App.3d 177, 700 N.E.2d 705, 233 Ill.Dec. 177 (1st Dist. 1998) (billboard); *County of Kankakee v. Anthony,* 304 Ill.App.3d 1040, 710 N.E.2d 1242, 238 Ill.Dec. 140 (3d Dist. 1999); *City of Champaign v. Kroger Co.,* 88 Ill.App.3d 498, 410 Ill.Dec. 661, 43 Ill.Dec. 661 (4th Dist. 1980) (sign ordinance); *County of DuPage v. Harris,* 89 Ill.App.2d 101, 231 N.E.2d 195 (2d Dist. 1967) (expansion of nonconforming use); *Village of Lake Bluff v. Horne,* 24 Ill.App.2d 343, 164 N.E.2d 217 (2d Dist. 1960) (projection of building into side yard setback). It is also a valuable tool when continued occupancy is a threat to the safety of tenants. *Lanski v. American National Bank & Trust Co.,* 122 Ill.App.3d 729, 462 N.E.2d 607, 78 Ill.Dec. 488 (1st Dist. 1984). In the case of buildings that are

unsafe and that have been foreclosed on, the statutory injunction may be a viable remedy against the bank or financial institution that has taken ownership of the property.

When a statutory injunction is sought, the traditional tests for injunctive relief are inapplicable to the municipality. For example, the municipality need not demonstrate that it would suffer irreparable harm. *Village of Lake Bluff v. Jacobson,* 118 Ill.App.3d 102, 454 N.E.2d 734, 73 Ill.Dec. 637 (2d Dist. 1983) (subdivision control ordinance); *City of Highland Park v. County of Cook,* 37 Ill.App.3d 15, 344 N.E.2d 665 (2d Dist. 1975) (expansion of country road). Harm is presumed from the existence of the violation. Nor is the existence of an adequate remedy at law *(e.g.,* an ordinance violation complaint seeking a fine) a defense to a statutory injunction proceeding. *People v. Fiorini,* 143 Ill.2d 318,574 N.E.2d 612,158 Ill.Dec. 499 (1991); *City of Chicago v. Piotrowski,* 215 Ill.App.3d 829, 576 N.E.2d 64,159 Ill.Dec. 395 (1st Dist. 1991). *See People ex rel. Edgar v. Miller,* 110 Ill.App.3d 264, 441 N.E.2d 1328, 65 Ill.Dec. 814 (4th Dist. 1982); *People ex rel. Carpentier v. Goers,* 20 Ill.2d 272, 170 N.E.2d 159 (1960). The municipality need meet only the statutory prerequisites to maintain this type of injunction action. Once the violation is established, the burden of proof shifts to the property owner to establish that the ordinance is unrelated to the public health, safety, and welfare or otherwise invalid. *City of Chicago v. Steiger,* 8 Ill.App.3d 424, 291 N.E.2d 57 (1st Dist. 1972) (abst.); *City of Chicago v. First National Bank of Skokie,* 8 Ill.App.3d 423, 290 N.E.2d 682 (1st Dist. 1972) (abst.).

Preannexation agreements are also specifically enforceable irrespective of the existence of a damages remedy. *Village of Orland Park v. First Federal Savings & Loan Association,* 135 Ill.App.3d 520, 481 N.E.2d 946, 90 Ill.Dec. 146 (1st Dist. 1985).

In the absence of a statutory injunction, a municipality will be hard pressed to obtain an injunction against illegal activities. The basis for the courts' reluctance to enjoin ordinance violations is that criminal or quasi-criminal prosecution is generally considered an adequate remedy at law. *City of Chicago v. Festival Theatre Corp.,* 91 Ill.2d 295, 438 N.E.2d 159, 63 Ill.Dec. 421 (1982). However, if criminal prosecution is shown by the municipality to be inadequate or ineffective to prevent the continuation of a nuisance, injunctive relief may be appropriate. *Id.; City of Chicago v. Cecola,* 75 Ill.2d 423, 389 N.E.2d 526, 27 Ill.Dec. 462 (1979). A further exception is when there is a dangerous probability of threatened injury to the community's health and safety. *Compare Village of Wilsonville v. SCA Services, Inc.,* 86 Ill.2d 1, 426 N.E.2d 824, 55 Ill.Dec. 499 (1981) (injunction granted against operation of chemical waste disposal site) *with Village of Schaumburg v. Kingsport Village, Inc.,* 122 Ill.App.3d 85, 460 N.E.2d 800, 77 Ill.Dec. 496 (1st Dist. 1984) (injunctive relief denied to correct cracked driveways) and *Village of Worth v. Watson,* 233 Ill.App.3d 974, 599 N.E.2d 967, 174 Ill.Dec. 883 (1st Dist. 1992) (preliminary injunctive relief denied absent "emergency").

Municipalities owning property in a subdivision that is subject to restrictive covenants may bring actions for injunctive relief to enforce those covenants in their capacity as landowner beneficiaries. *Rolling Meadows v. National Advertising Co.,* 228 Ill.App.3d 737, 593 N.E.2d 551, 170 Ill.Dec. 662 (1st Dist. 1992) (enforcement of covenant restricting off-premises advertising); *Kuney v. Zoning Board of Appeals of DeKalb,* 162 Ill.App.3d 854, 516 N.E.2d 850, 114 Ill.Dec. 695 (2d Dist. 1987); *Village of Wadsworth v. Kerton,* 311 Ill.App.3d 829, 726 N.E.2d 156, 244 Ill.Dec. 560 (2d Dist. 2000) (protected open space areas).

The availability of injunctive relief, as a complement to traditional methods of ordinance enforcement, is an important tool for the municipal litigator. Use of a statutory or common law nuisance injunction action may succeed in preventing ordinance violations when ordinary enforcement procedures have failed or met with only limited success.

C. [20.32] Mandamus

Mandamus is a traditional legal remedy that may be used to command a municipal officer to perform some specific duty that the petitioner is entitled as of right to have performed. 735 ILCS 5/14-101, *et seq.; Noyola v. Board of Education of City of Chicago,* 179 Ill.2d 121, 688 N.E.2d 81, 227 Ill.Dec. 744 (1997); *Donnelly v. McHenry County Sheriff's Department Merit Commission,* 83 Ill.App.3d 957, 404 N.E.2d 1033, 39 Ill.Dec. 442 (2d Dist. 1980); *Long v. Elk Grove Village,* 64 Ill.App.3d 1006, 382 N.E.2d 79, 21 Ill.Dec. 785 (1st Dist. 1978). Mandamus is considered an extraordinary remedy and is not a matter of right. As such, it will be awarded only within the sound discretion of the court. *Leisuretime Recreation Center VI, Inc. v. Byrne,* 93 Ill.App.3d 489, 417 N.E.2d 658, 48 Ill.Dec. 926 (1st Dist. 1981). The test for mandamus requires the petitioner to meet several strict requirements. The burden is placed on the petitioner to establish every material fact necessary to entitle her to relief. *Long v. Elk Grove Village, supra.*

1. [20.33] Clear Legal Right

The petitioner must have a clear legal right to the relief. *Lewis E. v. Spagnolo,* 186 Ill.2d 198, 710 N.E.2d 798, 238 Ill.Dec. 1 (1999); *Fischer v. Brombolich,* 207 Ill.App.3d 1053, 566 N.E.2d 785, 152 Ill.Dec. 908 (5th Dist. 1991); *Weisberg v. Byrne,* 92 Ill.App.3d 780, 416 N.E.2d 298,48 Ill.Dec. 267 (1st Dist. 1981). Mandamus is not a proper remedy when the right of the petitioner must be established or the duty of the officer sought to be coerced must first be determined. *Beer Barn, Inc. v. Dillard,* 227 Ill.App.3d 68, 590 N.E.2d 1042, 169 Ill.Dec. 123 (5th Dist. 1992) (mandamus could not be issued when underlying action was on appeal); *People v. Lang,* 62 Ill.App.3d 688, 378 N.E.2d 1106, 19 Ill.Dec. 231 (1st Dist. 1978), *aff'd in part, rev'd in part on other grounds,* 76 Ill.2d 311 (1978); *Aiken v. Will County,* 321 Ill.App. 171, 52 N.E.2d 607 (2d Dist. 1944). *See also Machinis v. Board of Election Commissioners,* 164 Ill.App.3d 763, 518 N.E.2d 270, 115 Ill.Dec. 745 (1st Dist. 1987) (employee failed to establish clear right to receive paid leave).

However, a mere dispute regarding the meaning of the law does not justify the denial of mandamus when otherwise proper. It is the court's duty to resolve any doubt on the issue. *People ex rel. Mathes v. Foster,* 40 Ill.App.3d 1053, 353 N.E.2d 366 (4th Dist. 1976), *aff 'd,* 67 Ill.2d 496 (1977). When the petitioner has demonstrated on the facts in evidence that he has a clear and unequivocal right to have the duty performed by the officer, the order will issue regardless of any conflict in testimony as long as the necessary facts have been established. *People ex rel. Carson v. Mateyka,* 57 Ill.App.3d 991, 373 N.E.2d 471, 15 Ill.Dec. 125 (5th Dist. 1978); *Taylor v. Wentz,* 15 I11.2d 83, 153 N.E.2d 812 (1958).

2. [20.34] Specific Legal Duty

An order of mandamus cannot create duties or confer new power on a person or public body. Mandamus is issued appropriately only when the authority to act exists independently of the order itself. *People v. Lang,* 62 Ill.App.3d 688, 378 N.E.2d 1106, 19 Ill.Dec. 231 (1st Dist. 1978), *aff'd in part, rev'd in part on other grounds,* 76 Ill.2d 311 (1979). Performance of statutory or constitutional duties by public officials is properly the subject matter for the order. *Overend v. Guard,* 98 Ill.App.3d 441, 424 N.E.2d 731, 53 Ill.Dec. 940 (4th Dist. 1981). *See also Hoffman v. Board of Fire & Police Commissioners,* 175 Ill.App.3d 219, 529 N.E.2d 790, 124 Ill.Dec. 809 (2d Dist. 1988), holding that mandamus would lie to require the promotion of an eligible police officer when there was no discretion left in the promotion process.

Mandamus is appropriate only to require an official to perform a specified ministerial act. *Holland v. Quinn,* 67 Ill.App.3d 571, 385 N.E.2d 92, 24 Ill.Dec. 325 (1st Dist. 1978); *People ex rel. Metropolitan Chicago Nursing Home Association v. Walker,* 31 Ill.App.3d 38, 332 N.E.2d 750 (1st Dist. 1975). Mandamus is not available to prescribe a general course of conduct for municipal officials or to regulate official duties generally. *People ex rel. Hopf v. Barger,* 30 Ill.App.3d 525, 332 N.E.2d 649 (2d Dist. 1975); *People ex rel. Irish v. Board of Education,* 6 Ill.App.2d 402,128 N.E.2d 348 (3d Dist. 1955). Nor is it available to prohibit action by an official. *People ex rel. Scott v. Kerner,* 32 Ill.2d 539, 208 N.E.2d 561 (1965). Thus, the scope of mandamus, even if granted, is limited to the performance of affirmative acts by the official specified in the order. Regulation or prohibition of action is properly the subject matter of injunctive relief. *People v. Schyve,* 112 Ill.App.3d 777, 445 N.E.2d 1260, 68 Ill.Dec. 407 (1st Dist. 1983), *affd,* 101 Ill.2d 355 (1984).

3. [20.35] Duty Presently Owed

The duty that is sought to be performed pursuant to the order actually must be due at the time the petition is filed. Mandamus may not be used in anticipation of an alleged omission of duty. *People ex rel. Williams v. Lower,* 168 Ill.App. 32 (1st Dist. 1912). Nor is mandamus proper if it would compel an officer to violate her duties and responsibilities or to perform an illegal act. *Hill v. Butler,* 107 Ill.App.3d 721, 437 N.E.2d 1307, 63 Ill.Dec. 385 (4th Dist. 1982).

4. [20.36] Discretionary Acts

In assessing the petition for an order of mandamus, it must be determined whether the act sought to be compelled is ministerial or discretionary. If a ministerial act is in issue, mandamus is considered a proper remedy. *People ex rel. Ryan v. Retirement Board of Firemen's Annuity & Benefit Fund of Chicago,* 136 Ill.App.3d 818, 483 N.E.2d 1037, 91 Ill.Dec. 551 (1st Dist. 1985); *Freeman v. Lane,* 129 Ill.App.3d 1061, 473 N.E.2d 584, 85 Ill.Dec. 216 (3d Dist. 1985).

Discretionary acts also may be proper subjects for mandamus under certain circumstances. Mandamus will not lie to require the performance of a purely discretionary act, *i.e.*, when the official has the discretion to decide whether to act at all. *Piller v. Village of Beecher,* 64 Ill.App.3d 887, 381 N.E.2d 1209, 21 Ill.Dec. 665 (3d Dist. 1978); *Stafford v. Bowling,* 85 Ill.App.3d 978, 407 N.E.2d 771, 41 Ill.Dec. 273 (1st Dist. 1980). If the officer has a duty to act and has arbitrarily failed to act, mandamus can compel that the act be performed. *Etten v. Lane,* 138 Ill.App.3d 439, 485 N.E.2d 1177, 92 Ill.Dec. 934 (5th Dist. 1985); *Walter v. Board of Education,* 93 Ill.2d 101, 442 N.E.2d 870, 66 Ill.Dec. 309 (1982). And the court may compel the official to act and thereby exercise the discretion vested in her, even though it cannot control the exact manner of its exercise. *Holland v. Quinn,* 67 Ill.App.3d 571, 385 N.E.2d 92, 24 Ill.Dec. 325 (1st Dist. 1978); *Freeman v. Lane, supra.* In short, mandamus does not issue to compel action in matters about which the officer has discretion regarding whether she will act, but it may issue for the purpose of compelling action in a matter in which the officer has discretion only regarding the *way* in which she will act. *McClaughry v. Village of Anioch,* 296 Ill.App.3d 630, 695 N.E.2d 492, 230 Ill.Dec. 1002 (2d Dist. 1998) (enforcement of municipal ordinances is discretionary); *Neidhardt v. City of Wood River,* 329 Ill.App. 485, 69 N.E.2d 345 (4th Dist. 1946).

Discretionary authority may be limited if a board or public agency has adopted rules or regulations. It is then bound to adhere to its adopted rules. *Holland v. Quinn, supra.* It also may be bound by prior custom and practice in the interpretation of its rules. *Id.* Thus, there may be limitations on discretion that are imposed not by the court, but by the agency itself.

The final judicial inquiry with respect to discretionary acts of public officials is whether the officials' discretion has been manifestly abused. *First National Bank of Joliet v. County of Grundy,* 197 Ill.App.3d 660, 554 N.E.2d 1089, 144 Ill.Dec. 50 (3d Dist. 1990); *Kermeen v. City of Peoria,* 65 Ill.App.3d 969, 382 N.E.2d 1374, 22 Ill.Dec. 619 (3d Dist. 1978); *Aurora National Bank v. Simpson,* 118 Ill.App.3d 392, 454 N.E.2d 1132, 73 Ill.Dec. 883 (2d Dist. 1983). Mandamus will lie if a palpable abuse of an official's discretion is shown. *Kermeen, supra.* However, it also has been said with equal certainty that discretionary action is not subject to review or control by mandamus. *Kramer v. City of Chicago,* 58 Ill.App.3d 592, 374 N.E.2d 932, 16 Ill.Dec. 157 (1st Dist. 1978). *Accord, Chicago Association of Commerce & Industry v. Regional Transportation Authority,* 86 Ill.2d 179, 427 N.E.2d 153, 56 Ill.Dec. 73 (1981). The latter rule appears to be the correct one since

it is not the function of mandamus to allow the judiciary to interfere with an official's discretionary acts. Mandamus will apply in a public contract case if the plaintiff proves fraud, lack of authority, unfair dealing, favoritism or similar arbitrary conduct by a public body in awarding a contract. *Court Street Steak House v. County of Tazewell*, 163 Ill.2d 159, 643 N.E.2d 781, 205 Ill.Dec. 490 (1994).

5. [20.37] Compliance with Ordinances

A petitioner who seeks issuance of an order of mandamus must demonstrate that he has complied fully with the requirements of the pertinent ordinances. *Kurr v. Town of Cicero*, 235 Ill.App.3d 528, 601 N.E.2d 1233, 176 Ill.Dec. 535 (1st Dist. 1992). All conditions precedent to the ordinance must be met. *Solomon v. City of Evanston*, 29 Ill.App.3d 782, 331 N.E.2d 380 (1st Dist. 1975). The petition must be denied if the petitioner has failed to comply completely and strictly with applicable ordinance provisions. *Long v. Elk Grove Village*, 64 Ill.App.3d 1006,382 N.E.2d 79, 21 Ill.Dec. 785 (1st Dist. 1978) (mandamus denied for issuance of building permit when conditions not met); *People ex rel. Citizens Bank & Trust Co. v. Ward*, 39 Ill.App.2d 20, 187 N.E.2d 533 (2d Dist. 1963) (abst.) (Village plan commission under no duty to review subdivision plan not in compliance with ordinance); *Scanlon v. Faitz*, 75 Ill.2d 472, 389 N.E.2d 571, 27 Ill.Dec. 507 (1979) (hearings not held for variations).

6. [20.38] Demand and Refusal

A distinction is drawn between mandamus actions that seek to enforce a "private" as opposed to a "public" right. When a private right is in issue, the petitioner must demand formally that the municipal official perform the duty as a condition precedent to a mandamus action. *O'Connell Home Builders, Inc. v. City of Chicago*, 99 Ill.App.3d 1054,425 N.E.2d 1339,55 Ill.Dec. 166 (1st Dist. 1981); *Eley v. Cahill*, 126 Ill.App.2d 272, 261 N.E.2d 819 (1st Dist. 1970) (police department employee classifications); *People ex rel. Edelman v. Hunter*, 350 Ill.App. 75, 111 N.E.2d 906 (1st Dist. 1953) (attorney's request to be reinstated to prior civil service classification). The demand need not be made if the petitioner can demonstrate that it would be a futile act. *See Eley v. Cahill, supra.* A petition that fails to set forth allegations of demand by the petitioner and refusal to act by the municipal authorities is fatally defective and must be dismissed. *Moffitt v. City of Rock Island*, 77 Ill.App.3d 850, 397 N.E.2d 457, 34 Ill.Dec. 1 (3d Dist. 1979); *Eley v. Cahill, supra; People ex rel. Edelman v. Hunter, supra.*

Allegations of demand and refusal are not necessary when a public right is in issue. *Weisberg v. Byrne*, 92 Ill.App.3d 780, 416 N.E.2d 298, 48 Ill.Dec. 267 (1st Dist. 1981) (petition to hold election for vacant aldermanic position).

7. [20.39] Defenses

If the petition for mandamus satisfies the pleading requirements for this type of action, the municipality must consider the affirmative defenses that may be available.

Mandamus will not issue when it would create public confusion or disorder. In *People ex rel. Hamer v. Jones,* 39 Ill.2d 360, 235 N.E.2d 589 (1968), the Supreme Court denied a petition for mandamus for revision of tax assessments in Lake County, finding that the resulting confusion in the tax collection process militated against issuance of the order. If serious, unfavorable consequences may result, the court may refuse to issue the order even though the other criteria may be met. *Thomas v. Village of Westchester,* 132 Ill.App.3d 190, 477 N.E.2d 49, 87 Ill.Dec. 448 (1st Dist. 1985).

Mandamus will not issue if the controversy has become moot or it would prove to be unavailing, fruitless, or nugatory. *Lenit v. Powers,* 120 Ill.App.2d 411, 257 N.E.2d 142 (1st Dist. 1969); *People ex rel. Hart v. City of Chicago,* 331 Ill.App. 177, 72 N.E.2d 648 (1st Dist. 1947) (abst.).

Failure to exhaust administrative remedies is also a basis for denial of a mandamus petition. *Foster v. Allphin,* 42 Ill.App.3d 871, 356 N.E.2d 963, 1 Ill.Dec. 681 (1st Dist. 1976); *Stevens v. County of Lake,* 24 Ill.App.3d 51,320 N.E.2d 263 (2d Dist. 1974). The courts are not in agreement as to whether failure to exhaust administrative remedies is an absolute bar. *Compare Foster v. Allphin, supra, with People ex rel. Shell Oil Co. v. City of Chicago,* 9 Ill.App.3d 242, 292 N.E.2d 84 (1st Dist. 1972) *and First National Bank of Chicago Heights v. City of Chicago Heights,* 63 Ill.App.3d 963, 381 N.E.2d 446, 21 Ill.Dec. 337 (1st Dist. 1978). Exhaustion of administrative remedies before filing a mandamus action is not required if it would be a futile exercise. *Heerey v. City of Des Plaines,* 225 Ill.App.3d 203,587 N.E.2d 1119,167 Ill.Dec. 504 (1st Dist. 1992). It is clear, however, that the mere existence of other judicial remedies does not necessarily bar a mandamus action. 735 ILCS 5/14-108, 5/14-109.

The equitable doctrine of laches is applicable to mandamus proceedings, even though mandamus is classified as an action at law. *Lee v. City of Decatur,* 256 Ill.App.3d 192, 627 N.E.2d 1256, 194 Ill.Dec. 614 (4th Dist. 1994); *O'Connell Home Builders, Inc. v. City of Chicago,* 99 Ill.App.3d 1054,425 N.E.2d 1339,55 Ill.Dec. 166 (1st Dist. 1981); *Di Santo v. City of Warrenville,* 59 Ill.App.3d 931, 376 N.E.2d 288, 17 Ill.Dec. 289 (2d Dist. 1978). Unless there is a reasonable explanation for further delay, a petition for mandamus should be filed within six months of the date that the cause of action occurred. *Richter v. Collinsville Township,* 97 Ill.App.3d 801, 423 N.E.2d 549, 53 Ill.Dec. 165 (5th Dist. 1981); *Murphy v. Rochford,* 55 Ill.App.3d 695, 371 N.E.2d 260, 13 Ill.Dec. 543 (1st Dist. 1977). *But see James v. Board of Education of School District No. 189,* 193

Ill.App.3d 406, 549 N.E.2d 1001, 140 Ill.Dec. 350 (5th Dist. 1990), which places the burden on the unit of government to prove that it has been prejudiced by the delay.

D. [20.40] Quo Warranto

Like mandamus, quo warranto is a highly prerogative order and will be issued only in the court's sound discretion. 735 ILCS 5/18-101, *et seq.; People ex rel. Adamowski v. Wilson,* 20 Ill.2d 568, 170 N.E.2d 605 (1960); *People ex rel. Knaus v. Village of Hinsdale,* 111 Ill.App.2d 368, 250 N.E.2d 309 (2d Dist. 1969).

The statute sets forth six specific grounds for use of quo warranto. Two particular uses are of importance in municipal practice. First, a quo warranto action may be brought to challenge annexations. Second, it may be used to challenge the legality of a person holding or executing the duties of an office. Each of these types of action is discussed below.

1. [20.41] Annexation

Quo warranto is the exclusive remedy for questioning the validity of an annexation after it has been accomplished. *Schallau v. City of Northlake,* 82 Ill.App.3d 456, 403 N.E.2d 266, 38 Ill.Dec. 178 (1st Dist. 1980); *People ex rel. Northbrook v. City of Highland Park,* 35 Ill.App.3d 435, 342 N.E.2d 196 (1st Dist. 1976); *People ex rel. McCarthy v. Firek,* 5 Ill.2d 317,125 N.E.2d 637 (1955). Neither a declaratory judgment action nor an action for injunctive relief can be used in place of the quo warranto action. *Schallau, supra.* If the form of the petitioner's cause of action is other than as quo warranto, it must be dismissed. *See Village of Bridgeview v. City of Hickory Hills,* 1 Ill.App.3d 931, 274 N.E.2d 925 (1st Dist. 1971).

The burden of proof in a quo warranto action challenging an annexation is placed on the defendant municipality. *People ex rel. Knaus v. Village of Hinsdale,* 111 Ill.App.2d 368,250 N.E.2d 309 (2d Dist. 1969); *People ex rel. Village of Forest View v. Village of Lyons,* 218 Ill.App.3d 159, 578 N.E.2d 177, 161 Ill.Dec. 50 (1st Dist. 1991). When an annexation is alleged to have exceeded a party's statutory authority, it maybe challenged in quo warranto. *People ex rel. Ryan v. City of West Chicago,* 216 Ill.App.3d 683, 575 N.E.2d 1321, 159 Ill.Dec. 261 (2d Dist. 1991), is a very unusual case because the power of an airport authority to annex was challenged, not the power of the annexing municipality. If the statutory conditional requirements for annexation are met, the exercise by the corporate authorities of their discretion to annex is not subject to challenge. *People ex rel. Citizens for a Better Bloomingdale v. Village of Bloomingdale,* 37 Ill.App.3d 583, 346 N.E.2d 5 (2d Dist. 1976).

2. [20.42] Authority To Act

The second principal use of quo warranto is to challenge the legality and authority of corporate officers to act. *People ex rel. Chillicothe Township v. Board of Review of Peoria County,* 19 Ill.2d 424, 167 N.E.2d 553 (1960); *People ex rel. Daley v. Datacom Systems Corp.,* 146 Ill.2d 1, 585 N.E.2d 51, 165 Ill.Dec. 655 (1991). Quo warranto is a proper proceeding to test the right of corporate authorities who are charged with unlawfully holding or executing an office. Qualifications and eligibility to hold a particular office may be reviewed by quo warranto. *People v. Claar,* 293 Ill.App.3d 211, 687 N.E.2d 557, 227 Ill.Dec. 307 (3d Dist. 1997); *People ex rel. Reed v. Thomas,* 43 Ill.App.3d 372, 356 N.E.2d 13 72, 2 Ill.Dec. 85 (5th Dist. 1976); *People ex rel. Romano v. Krantz,* 13 I11.2d 363, 150 N.E.2d 627 (1958). The order also may be employed to try the validity of the organization of a public body, thereby placing all corporate offices in issue. *People ex rel. Chillicothe Township, supra.* Again, the burden of proof is placed on the defendant corporate officers. *People ex rel. Henderson v. Redfern,* 48 Ill.App.2d 100, 197 N.E.2d 841 (4th Dist. 1964).

Quo warranto is not a proper proceeding to test the legality of acts of public officers. *People ex rel. Chillicothe Township, supra; People ex rel. Citizens for a Better Bloomingdale v. Village of Bloomingdale,* 37 Ill.App.3d 583, 346 N.E.2d 5 (2d Dist. 1976). The only proper scope of a quo warranto action is to challenge the authority to act, as distinguished from the manner of exercising authority. *People ex rel. Hettleman v. Board of County Commissioners of Cook County, 102* Ill.App.2d 310, 243 N.E.2d 531 (1st Dist. 1968). When certain board members seek to bring an action challenging the board president's authority to act, the dispute is considered a political or legislative controversy and is not subject to judicial interference in a quo warranto action. *People ex rel. Hansen v. Phelan,* 158 Ill.2d 445, 634 N.E.2d 739, 199 Ill.Dec. 686 (1994).

3. [20.43] Demand

It is required under 735 ILCS 5/18-102 that a quo warranto action be brought by the attorney general or state's attorney of the proper county. It also may be brought by a private party after demand on the attorney general and state's attorney and their refusals to prosecute the action. *People ex rel. Brooks v. Village of Lisle,* 24 Ill.App.3d 432, 321 N.E.2d 65 (2d Dist. 1974). Failure to notify the attorney general and state's attorney is fatal to the suit. *See People v. Thompson,* 101 Ill.App.2d 104,242 N.E.2d 104,242 N.E.2d 49 (4th Dist. 1968). Even if demand is made and refused, the court still has discretion to decide whether to entertain the action. *Schallau v. City of Northlake,* 82 Ill.App.3d 456, 403 N.E.2d 266, 38 Ill.Dec. 178 (1st Dist. 1979).

4. [20.44] Public and Private Rights

For an individual to bring a quo warranto action, she must have a sufficient interest in the proceeding. 735 ILCS 5/18-102. If the interest is merely one in common with the public generally,

an individual may not pursue the quo warranto remedy. *Rowan v. City of Shawneetown,* 378 Ill. 289, 38 N.E.2d 2 (1941); *People v. Kidd,* 398 Ill. 405, 75 N.E.2d 851 (1947). The private interest allegedly invaded must be directly, substantially, and adversely affected by the action sought to be challenged in the quo warranto proceedings, and the damage to that private interest must be then occurring or certain to occur; the petitioner cannot rely on an expected damage to her private interests. *Allen v. Love,* 112 Ill.App.3d 338, 445 N.E.2d 514, 68 Ill.Dec. 66 (1st Dist. 1983); *People ex rel. Turner v. Lewis,* 104 Ill.App.3d 75, 432 N.E.2d 665, 59 Ill.Dec. 879 (4th Dist. 1982). The private interests involved must be pleaded with specificity, and conclusionary pleading is clearly insufficient. *People ex rel. Durst v. Village of Germantown Hills,* 51 Ill.App.3d 969, 367 N.E.2d 426, 10 Ill.Dec. 38 (4th Dist. 1977). Status as a taxpayer and nearby resident is insufficient to confer standing in a quo warranto action to challenge an annexation. *People ex rel. Van Cleave v. Village of Seneca,* 165 Ill.App.3d 410, 519 N.E.2d 63, 116 Ill.Dec. 473 (3d Dist. 1988).

A municipality has a sufficient interest to bring a quo warranto action challenging the annexation of its territory by an adjoining municipality. *People ex rel. North Chicago v. City of Waukegan,* 116 Ill.App.3d 88, 451 N.E.2d 293, 71 Ill.Dec. 578 (2d Dist. 1983). However, a municipality lacks standing if the annexation is only of property within its planning and zoning area but outside its corporate limits. *People ex rel. Brooks v. Village of Lisle,* 24 Ill.App.3d 432, 321 N.E.2d 65 (2d Dist. 1974). If only public functions are performed by an affected unit of local government, that unit lacks standing to bring a quo warranto action. *Van Cleave, supra; People ex rel. Freeport Fire Protection District v. City of Freeport,* 90 Ill.App.3d 112, 412 N.E.2d 718, 45 Ill.Dec. 367 (2d Dist. 1980).

Because of the exacting limitations placed on private interests in quo warranto litigation, a municipal litigator should strongly consider the availability of these various defenses if a quo warranto action is brought.

5. [20.45] Other Defenses

Both statutes of limitation and laches may be defenses in the proper case. *People ex rel. Village of Hazel Crest v. Village of Homewood,* 132 Ill.App.3d 632,478 N.E.2d 426,88 Ill.Dec.111 (1st Dist. 1985); *People ex rel. Northfield Park District v. Glenview Park District,* 222 Ill.App.3d 35, 582 N.E.2d 1272, 164 Ill.Dec. 328 (1st Dist. 1991). If the action is brought within the one-year statute of limitations period, the defendant municipality must affirmatively demonstrate that it took the necessary steps to annex. *People ex rel. City of Des Plaines v. Village of Mt. Prospect,* 29 Ill.App.3d 807, 331 N.E.2d 373 (1st Dist. 1975). After the one-year period, the only matter that can be raised is that the ordinance was void ab initio for lack of subject matter jurisdiction. *Id.; People ex rel. Northbrook v. City of Highland Park,* 35 Ill.App.3d 435, 342 N.E.2d 196 (1st Dist. 1976). *See also People ex rel. La Salle National Bank v. Hoffman Estates Park District,* 134 Ill.App.3d 571, 481 N.E.2d 12, 89 Ill.Dec. 660 (1st Dist. 1985).

Generally, defenses of laches and estoppel are not available, especially when a public right is in issue. *People ex rel. Phelps v. Kerstein,* 413 Ill. 333, 108 N.E.2d 915 (1952). Since quo warranto is a highly prerogative order, however, an exception may be made if, as a result of inexcusable delay and public acquiescence, issuance of the order would result in great public inconvenience and detriment. *People ex rel. Northfield Park District, supra; People ex rel. Hanrahan v. Village of Wheeling,* 42 Ill.App.3d 825, 356 N.E.2d 806, 1 Ill.Dec. 524 (1st Dist. 1976).

E. [20.46] Suing Correct Municipal Entity

In some instances, the plaintiff's suit may name entities that are not capable of being sued, *e.g.,* the municipal police department or planning department. Whether the action is brought under state or federal law, these non-suable entities should be dismissed on motion. *Wozniak v. County of Du Page,* 569 F.Supp. 813 (N.D.I11. 1983); *Bowers v. Du Page County Regional Board of School Trustees,* 183 Ill.App.3d 367, 539 N.E.2d 246, 131 Ill.Dec. 893 (2d Dist. 1989). Failure to sue the proper legal entity within the statute of limitations will result in dismissal of the suit. *Jackson v. Village of Rosemont,* 180 Ill.App.3d 932, 536 N.E.2d 720, 129 Ill.Dec. 670 (1st Dist. 1988).

F. [20.47] Taxpayer Suits

Broadly speaking, there are two categories of taxpayer suits involving municipalities. First, a taxpayer may bring suit against the municipality alleging that the municipality has taken an illegal action that adversely affects his rights as a taxpayer. Second, a taxpayer may bring a derivative action on behalf of the municipality seeking to recoup funds for the municipality. Depending on the nature of the suit, there are different procedures that must be followed by the taxpayer.

1. [20.48] Tax Objection Proceedings

The typical taxpayer suit is one challenging the extension of real estate taxes against her property. The assessed value of the property and/or the tax rate extended by the municipality may be challenged by the taxpayer. This subject is covered extensively in REAL ESTATE TAXATION (Ill. Inst. for CLE, 1991, Supp. 1993).

2. [20.49] Other Tax Proceedings

Municipalities levy many different kinds of taxes in addition to real property taxes, e.g., sales tax, amusement tax, hotel tax, utility tax, etc. Whether the municipality has either the statutory or home rule authority to levy these various taxes is frequently the subject matter of litigation.

In *Ross v. City of Geneva,* 71 Ill.2d 27, 373 N.E.2d 1342, 15 Ill.Dec. 658 (1978), the Supreme Court struck down a surcharge imposed on electricity customers by the city. The purpose of the

surcharge was to fund the City's parking facilities. The court held that the City lacked the requisite authority to levy the tax.

Similarly, in *Getto v. City of Chicago,* 86 Ill.2d 39, 426 N.E.2d 844, 55 Ill.Dec. 519 (1981), the taxpayer challenged the City's method of calculation of the municipal message tax. The Supreme Court held that the method of calculation was improper and ordered a refund for 13 years of improperly collected taxes.

In *Commercial National Bank v. City of Chicago,* 89 Ill.2d 45, 432 N.E.2d 227, 59 Ill.Dec. 643 (1982), the Supreme Court held the City's imposition of a service tax to be an unconstitutional extension of its taxing powers. On the other hand, in *Illinois Gasoline Dealers Association v. City of Chicago,* 119 Ill.2d 391, 519 N.E.2d 447, 116 Ill.Dec. 555 (1988), the court upheld the City's motor vehicle fuel tax, which was challenged as a nonuniform tax, an illegal occupation tax, and double taxation.

In *Satellink of Chicago, Inc. v. City of Chicago,* 168 Ill.App.3d 689, 523 N.E.2d 13, 119 Ill.Dec 545 (1st Dist. 1988), the court found that the City's amusement tax violated equal protection because the tax was imposed on satellite television services but not on franchise cable television services. Since the tax on television services implicated First Amendment rights, a strict-scrutiny test was applied by the court.

In *Chicago Health Clubs, Inc. v. Picur,* 124 Ill.2d 1, 528 N.E.2d 978, 124 Ill.Dec. 87 (1988), the court held Chicago's tax on health club membership fees was an unconstitutional occupation tax.

Tax protest cases of this variety can wreak havoc with municipal finances because liability may extend over several past years. In both *Getto* and *Ross,* the municipalities were required to refund collected taxes for a prior 13-year period. There are two defenses that may be available in tax litigation to limit the amount of retrospective damages in the event that a municipality's taxing ordinance is found to be invalid.

First, the municipality may assert the "voluntary payment" doctrine. This doctrine was defined in *Illinois Glass Co. v. Chicago Telephone Co.,* 234 Ill. 535, 85 N.E. 200, 201 (1908), as follows:

> **It has been a universally recognized rule that money voluntarily paid under a claim of right to the payment and with knowledge of the facts by the person making the payment cannot be recovered back on the ground that the claim was illegal. It has been deemed necessary not only to show that the claim asserted was unlawful, but also that the payment was not voluntary, that there**

was some necessity which amounted to compulsion, and payment was made under the influence of such compulsion.

See also Getto v. City of Chicago, supra, 426 N.E.2d at 853 (Underwood J., dissenting); *Ross v. City of Geneva, supra; Adams v. Jewel Cos,,* 63 I11.2d 336, 348 N.E.2d 161 (1976); *Hagerty v. General Motors Corp.,* 59 Ill.2d 52, 319 N.E.2d 5 (1974).

There are significant limitations to this defense. Payment of the tax is under duress and, therefore, not "voluntary" if the taxpayer faces the choice of either paying the tax or losing an essential service. *Getto, supra (loss* of telephone service); *Ross, supra (loss* of electricity service). *Compare Isberian v. Village of Gurnee,* 116 Ill.App.3d 146, 452 N.E.2d 10, 72 Ill.Dec. 78 (1st Dist. 1983) (duress not shown). In addition, the municipality must show that the plaintiff knew or should have known of the nature and method of computation of the tax. *Getto, supra; Ross, supra.* If the taxpayer had sufficient information concerning the tax on which he *could* have based a claim of illegality, then the doctrine is applicable. *Isberian v. Village of Gurnee, supra; Lusinski v. Dominick's Finer Foods,* 136 Ill.App.3d 640, 483 N.E.2d 587, 91 Ill.Dec. 241 (1st Dist. 1985). *See also Illinois Institute of Technology v. Rosewell,* 137 Ill.App.3d 222, 484 N.E.2d 837, 93 Ill.Dec. 106 (1st Dist. 1985).

A second and closely related defense is that of laches. Laches will be a successful defense to the taxpayer action only if sufficient knowledge of the nature of the tax is imputed to the taxpayer. *See, e.g., Ross, supra.*

Finally, it should be noted that if there is an administrative mechanism to protest the tax and the taxpayer has not pursued that remedy, it is more likely that "voluntary payment" will be found. *Ross, supra. But see Illinois Institute of Technology, supra.* Of course, when real property taxes are involved, the taxpayer must exhaust his administrative remedies as well. *People ex rel. Korzen v. Fulton Market Cold Storage Co.,* 62 Ill.2d 443, 343 N.E.2d 450 (1976).

3. [20.50] Taxpayer Suit To Enjoin Expenditures

The taxpayer may sue the municipality not only to recover taxes that have been paid, but also to enjoin expenditures. The legal theory behind this type of taxpayer suit is that to the extent that municipal funds are illegally appropriated and expended, it is a misuse of taxpayer funds in which all taxpayers have an equitable ownership interest. *Barco Manufacturing Co. v. Wright, 10* I11.2d 157, 139 N.E.2d 227 (1956). *Martini v. Netsch,* 272 Ill.App.3d 693, 650 N.E.2d 668, 208 Ill.Dec. 974 (1st Dist. 1995); *Espinosa v. Board of Trustees of Community College District No. 508,* 265 Ill.App.3d 504, 632 N.E.2d 279, 198 Ill.Dec. 220 (1st Dist.1994); *Crawford v. City of Chicago,* 304 Ill.App.3d 818, 710 N.E.2d 91, 237 Ill.Dec. 668 (1st Dist. 1999) (taxpayer challenge to extending employee benefits to same sex partners of city employees).

The remedy for taxpayers seeking to enjoin the disbursement of public money is contained in 735 ILCS 5/11-301, *et seq.* The statute requires the taxpayer to submit a petition for leave to file her complaint with the court. Notice also must be provided to the attorney general.

The purpose of this statute is to provide a check on the indiscriminate filing of taxpayer suits. *People ex rel. White v. Busenhart,* 29 Ill.2d 156,193 N.E.2d 850 (1963); *Daly v. Madison County,* 378 Ill. 357, 38 N.E.2d 160 (1941). It is applicable to municipal as well as state expenditures. *Hallstrom v. City of Rockford,* 16 Ill.2d 297, 157 N.E.2d 23 (1959).

For the taxpayer to maintain the suit, the taxpayer's interest need not be substantial. *Snow v. Dixon,* 66 Ill.2d 443, 362 N.E.2d 1052, 6 Ill.Dec. 230 (1977). *See also Paepcke v. Public Building Commission,* 46 Ill.2d330, 263 N.E.2d 11 (1970). At the very least, however, the taxpayer must show a concrete injury in fact, either occurring or imminent, as a precondition to maintaining suit. *Tarhowski v. Scott,* 79 Ill.App.3d 787, 398 N.E.2d 891, 34 Ill.Dec. 900 (1st Dist. 1979). *See also Western Lion, Ltd. v. City of Mattoon,* 123 Ill.App.3d 381,462 N.E.2d 891,78 Ill.Dec. 772 (4th Dist. 1984). The use of the statutory injunction action is not limited to appropriation ordinances. Even a non-appropriation ordinance may be enjoined if it involves the expenditure of public funds. *Quinn v. Donnewald,* 107 Ill.2d 179, 483 N.E.2d 216, 90 Ill.Dec. 898 (1985); *Krebs v. Thompson,* 387 Ill. 471, 56 N.E.2d 761 (1944).

Failure of the taxpayer to comply with the provisions of the Act divests the court of jurisdiction over the complaint. *Cummings v. Ragen,* 47 Ill.App.2d 27, 197 N.E.2d 469 (4th Dist. 1964) (abst.).

4. [20.51] Taxpayer Derivative Action

A taxpayer may file suit on behalf of the municipality seeking to recover funds for the corporate treasury. In a taxpayer derivative action, the cause of action is that of the public body although it is asserted by a taxpayer. *Feen v. Ray,* 109 Ill.2d 339, 487 N.E.2d 619, 93 Ill.Dec. 794 (1985); *People v. Holton,* 287 Ill. 225,122 N.E. 540 (1919). It is a requirement of taxpayer derivative actions that prior demand be made on the public body to enforce its cause of action. *City of Chicago ex rel. Konstantelos v. Duncan Traffic Equipment, Co.,* 95 Ill.2d 344,447 N.E.2d 789,69 Ill.Dec. 354 (1983). Demand and refusal is not necessary if the taxpayer can demonstrate that demand would be a futile act. If the taxpayer's complaint fails to allege these necessary elements, it is subject to a motion to dismiss. *Weitzman v. Cook County,* 133 Ill.App.3d 10 13, 479 N.E.2d 957, 88 Ill.Dec. 937 (1st Dist. 1985). Taxpayers have standing to enjoin the sale of land dedicated to public use. *In re Petition of Village of Mt. Prospect,* 167 Ill.App.3d 1031, 522 N.E.2d 122, 118 Ill.Dec. 667 (1st Dist. 1988).

Even when the taxpayer's demand has been refused by the public body, the municipality is a necessary party and must be joined in the litigation. Dismissal of the municipality from the suit defeats the taxpayer's action. *Feen v. Ray, supra.*

III. [20.52] ADMINISTRATIVE DECISION-MAKING AND JUDICIAL REVIEW

Municipal governments affect the rights and activities of their residents through administrative decision-making as well as legislation enacted by the governing body. Usually, administrative bodies, created by statute or ordinance, decide individual cases arising with respect to the application of local ordinances to particular actions. In this sense, they act in a quasi-judicial manner. Although there are exceptions, when an administrative procedure is established by statute or ordinance, the plaintiff generally must exhaust that remedy before seeking judicial relief.

Once an administrative decision is rendered, there are two possible avenues of judicial review: (a) the Administrative Review Law of the Code of Civil Procedure 735 ILCS 5/3-101, *et seq.,* or (b) certiorari. The rules applicable to the administrative process and judicial review of administrative decisions are discussed below.

A. [20.53] Quasi-Judicial Function of Administrative Agencies

Administrative bodies at the municipal level are created by either statute or ordinance. Because they are creatures of statute, their powers are closely circumscribed to those specifically delegated or necessarily implied. *Maun v. Department of Professional Regulation,* 299 Ill.App.3d 388, 701 N.E.2d 791, 233 Ill.Dec. 726 (1998); *Schalz v. McHenry County Sheriff's Department Merit Commission,* 135 Ill.App.3d 657, 482 N.E.2d 127, 90 Ill.Dec. 420 (2d Dist. 1985). Administrative agencies lack the authority to invalidate a statute on constitutional grounds. *Metropolitan Alliance of Police v. Illinois State Labor Relations Board,* 299 Ill.App.3d 377, 701 N.E.2d 825, 233 Ill.Dec. 726 (1998). Because administrative bodies are charged with administering the law, they may be required to hold hearings in the performance of their duties. *See Bath, Inc. v. Pollution Control Board,* 10 Ill.App.3d 507, 294 N.E.2d 778 (4th Dist. 1973). These hearings are considered quasi-judicial in character. Administrative proceedings must comport with principles of fundamental fairness. *Waupoose v. Kusper,* 8 Ill.App.3d 668,2 90 N.E.2d 903 (1st Dist. 1972). At a minimum, adequate notice and a full and impartial hearing must be granted the complainant. *Mahonie v. Edgar,* 131 Ill.App.3d 175, 476 N.E.2d 474, 87 Ill.Dec. 13 (1st Dist. 1985); *Jones v. Board of Fire & Police Commissioners,* 127 Ill.App.3d 793, 469 N.E.2d 393, 82 Ill.Dec. 859 (2d Dist. 1984). The parties also must be given the opportunity to cross-examine witnesses. *Mahonie, supra; Morelli v. Board of Education of Pekin Community School District,* 42 Ill.App.3d 722, 356 N.E.2d 438, 1 Ill.Dec. 312 (3d Dist. 1976); *Daly v. Pollution Control Board,* 264 Ill.App.3d 968, 637 N.E.2d 1153, 202 Ill.Dec. 417 (1st Dist. 1994) (fair opportunity before administrative agency must include opportunity to be

heard, right to cross-examine, and impartial rulings on the evidence). Due process further requires that the administrative decision maker have no personal interest, pecuniary bias, or other interest that would affect the impartiality of the decision maker. *Huff v. Rock Island County Sheriff's Merit Commission,* 294 Ill.App.3d 477, 689 N.E.2d 1159, 228 Ill.Dec. 738 (3rd Dist. 1998). Home rule units can agree, through collective bargaining agreements with their employees, to arbitrate personnel issues that would normally be heard by appointed boards, such as the board of fire and police commissioners. *City of Decatur v. American Federation of State, County & Municipal Employees, Local 268,* 122 Ill.2d 353, 522 N.E.2d 1219, 119 Ill.Dec. 360 (1988); *Illinois Fraternal Order of Police Labor Council v. Town of Cicero,* 301 Ill.App.3d 323, 703 N.E.2d 559, 234 Ill.Dec. 698 (1st Dist. 1998).

Certain statutes contain mandatory time limits in which a hearing must be commenced. *Kvidera v. Board of Fire & Police Commissioners of Village of Schiller Park,* 192 Ill.App.3d 950, 549 N.E.2d 747, 140 Ill.Dec. 96 (1st Dist. 1989).

In other respects, however, administrative proceedings may be more flexible. It is not necessary that a full panoply of judicial procedures be used. *Board of Education of Hawthorne School District No. 17 v. Eckmann,* 103 Ill.App.3d 1127, 432 N.E.2d 298, 59 Ill.Dec. 714 (2d Dist. 1982). The Code of Civil Procedure, 735 ILCS 5/1-101, *et seq.,* does not apply to administrative proceedings. *Desai v. Metropolitan Sanitary District of Greater Chicago,* 125 Ill.App.3d 1031, 466 N.E.2d 1045, 81 Ill.Dec. 243 (1st Dist. 1984); *Village of South Elgin v. Waste Management of Illinois, Inc.,* 64 Ill.App.3d 565, 381 N.E.2d 778, 21 Ill.Dec. 451 (2d Dist. 1978). The charges filed with the administrative body need not be drawn with the same precision as judicial pleadings; however, they must be sufficiently specific to advise the defendant of the nature of the case and enable him to prepare a defense. *Batley v. Kendall County Sheriff's Department Merit Commission,* 99 Ill.App.3d 622,425 N.E.2d 1201,55 Ill.Dec. 28 (2d Dist. 1981); *Wierenga v. Board of Fire & Police Commissioners of Town of Cicero,* 40 Ill.App.3d 270, 352 N.E.2d 322 (1st Dist. 1976). Administrative agencies are vested with broad discretion to grant or deny continuances of hearings involving employees. *Swanson v. Board of Police Commissioners,* 197 Ill.App.3d 592, 555 N.E.2d 35, 144 Ill.Dec. 138 (2d Dist. 1990).

When an administrative agency makes a rule to govern its proceedings, it is then bound by that rule. *Schinkel v. Board of Fire and Police Commission,* 262 Ill.App.3d 310, 634 N.E.2d 1212, 199 Ill.Dec.858 (2d Dist. 1994). However, the agency's violation of a rule is reversible error only if the negatively affected party shows that it was prejudiced thereby. *Id.; McCleary v. Board of Fire and Police Commission,* 251 Ill.App.3d 988, 622 N.E.2d 1257, 190 Ill.Dec. 940 (2d Dist. 1993). If members of the decision-making body conduct their own investigation outside of the scope of the hearing, the fairness of the proceeding may be compromised and due process violated. *Polk v. Board of Trustees of Police Pension Fund,* 253 Ill.App.3d 525, 624 N.E.2d 1366, 192 Ill.Dec. 14 (1st Dist. 1993).

The same standards that govern the interpretation of statutes are applied to the construction of an administrative rule or regulation. *People v. Selby,* 298 Ill.App.3d 605, 698 N.E.2d 1102, 232 Ill.Dec. 672 (4th Dist. 1998).

1. [20.54] Admissibility of Evidence

With respect to the admissibility of evidence, the strict rules that govern judicial proceedings do not necessarily apply in administrative actions. *Mitchell v. Sackett,* 27 Ill.App.2d 335, 169 N.E.2d 833 (1st Dist. 1960). Unless failure to observe the technical rules of evidence materially affects the rights of a party and results in substantial injustice to her, such failure is not sufficient reason to set aside an agency's decision. *Giampa v. Illinois Civil Service Commission,* 89 Ill.App.3d 606, 411 N.E.2d 1110, 44 Ill.Dec. 744 (1st Dist. 1980).

Hearsay is generally inadmissible unless it satisfies one of the exceptions to the hearsay rule. *Cochrane's of Champaign, Inc. v. State of Illinois Liquor Control Commission,* 285 Ill.App.3d 28, 673 N.E.2d 1176, 220 Ill.Dec. 755 (4th Dist. 1996); *Daniels v. Retirement Board of Policeman's Annuity & Benefit Fund,* 106 Ill.App.3d 412, 435 N.E.2d 1276, 62 Ill.Dec. 304 (1st Dist. 1982); *Fagiano v. Police Board of City of Chicago,* 123 Ill.App.3d 963, 463 N.E.2d 845, 79 Ill.Dec. 291 (1st Dist. 1984). However, hearsay may be sufficient to support a finding of an administrative agency if more reliable evidence is not available and if the finding is supported by evidence on which responsible persons are accustomed to rely in serious affairs. *Flex v. Illinois Department of Labor Board of Review,* 125 Ill.App.3d 1021, 466 N.E.2d 1050, 81 Ill.Dec. 248 (1st Dist. 1984). *Contra, Shapiro v. Regional Board of School Trustees of Cook County,* 116 Ill.App.3d 397, 451 N.E.2d 1282, 71 Ill.Dec. 915 (1st Dist. 1983) (determination based on hearsay must be reversed).

Because of their inherent unreliability, polygraph results are inadmissible in administrative proceedings. *Diamond v. Board of Fire & Police Commissioners of Elk Grove Village, 115* Ill.App.3d 437, 450 N.E.2d 879, 71 Ill.Dec. 191 (1st Dist. 1983); *Collura v. Board of Police Commissioners of Village of Itasca,* 135 Ill.App.3d 827, 482 N.E.2d 143, 90 Ill.Dec. 436 (2d Dist. 1985).

While there is flexibility with respect to the admission of evidence in administrative proceedings, it is equally clear that the decision must be based on material and competent evidence appearing on the record.

2. [20.55] Decision Based on Evidence

The administrative body must render its decision based on the evidence in the record. It may not consider matters outside the record even though it has knowledge of such additional facts. *Rigney v. Edgar,* 135 Ill.App.3d 893, 482 N.E.2d 367, 90 Ill.Dec. 548 (1st Dist. 1985); *Stevenson v. County*

Officers Electoral Board, 58 Ill.App.3d 24, 373 N.E.2d 1043, 15 Ill.Dec. 571 (3d Dist. 1978); *Polk v. Board of Trustees of Police Pension Fund*, 253 Ill.App.3d 525, 624 N.E.2d 1366, 192 Ill.Dec. 14 (1st Dist. 1993). Depending on the nature of the case, a verbatim transcript of the proceeding by a court reporter may not be required. *Colquitt v. Rich Township High School District No. 227*, 298 Ill.App.3d 856, 699 N.E.2d 1109m 232 Ill.Dec. 924 (1st Dist. 1998).

It is the province of the administrative agency to determine the credibility of witnesses when there is conflicting testimony and evidence. *Albert v. Board of Fire & Police Commissioners*, 99 Ill.App.3d 688,425 N.E.2d 1158,54 Ill.Dec. 941 (1st Dist. 1981); *Kozsdiy v. O'Fallon Board of Fire & Police Commissioners*, 31 Ill.App.3d 173, 334 N.E.2d 325 (5th Dist. 1975); *Ross v. Civil Service Commission*, 250 Ill.App.3d 597, 612 N.E.2d 159, 190 Ill.Dec. 290 (1st Dist. 1993); *Trayling v. Board of Fire and Police Commissioners*, 273 Ill.App.3d 1, 652 N.E.2d 386, 209 Ill.Dec. 846 (2d Dist. 1995).

An administrative decision maker is not disqualified simply because he may have taken a position on a policy issue related to the dispute. Rather, it must be shown that the decision maker is not capable of judging the controversy solely on the basis of its own circumstances. *Klomann v. Illinois Municipal Retirement Fund*, 284 Ill.App.3d 224, 674 N.E.2d 38, 220 Ill.Dec. 767 (1st Dist. 1996); *Batka v. Board of Trustees*, 186 Ill.App.3d 715, 542 N.E.2d 835, 134 Ill.Dec. 489 (1st Dist. 1989); *Citizens for a Better Environment v. Illinois Pollution Control Board*, 153 Ill.App.3d 105, 504 N.E.2d 166, 105 Ill.Dec. 297 (1st Dist. 1987).

3. [20.56] Role of Municipal Attorney

When the municipal attorney is notified of a contested administrative proceeding, she should decide whether she will act as the prosecutor of the case or as the attorney for the administrative body. This is a highly recommended practice in order to avoid any appearance of impropriety or bias that might taint the proceedings. *Gigger v. Board of Fire & Police Commissioners of East St.* Louis, 23 Ill.App.2d 433, 163 N.E.2d 541 (4th Dist. 1959).

Usually, the municipal attorney will choose to represent the administrative body since its decision will be the subject matter of subsequent judicial review. The attorney representing the agency should not participate in its final decision. *Fender v. School District No. 25, Arlington Heights*, 37 Ill.App.3d 736, 347 N.E.2d 270 (1st Dist. 1976). The attorney may, however, draft the decision, incorporating the agency's findings of fact and conclusions of law, and submit it to the agency for its approval.

4. [20.57] Agency Decision

The administrative agency's decision must contain findings of fact that are sufficient to allow judicial review of the decision. *Reinhardt v. Board of Education of Alton Community Unit School District No. 11,* 61 Ill.2d 101, 329 N.E.2d 218 (1975); *Melrose Park National Bank v. Zoning Board of Appeals* of *City of Chicago,* 79 Ill.App.3d 56, 398 N.E.2d 252, 34 Ill.Dec. 577 (1st Dist. 1979). If sufficient findings of fact are lacking, the proceeding must be remanded to the agency to make the requisite findings. *Reinhardt, supra.*

Requirements for administrative findings are more exacting than those relating to findings of trial courts. *Reich v. Board* of *Fire & Police Commissioners,* 13 Ill.App.3d 1031, 301 N.E.2d 501 (2d Dist. 1973). Findings of fact should be as specific as possible and based on matters identified in the record. The findings of fact are extremely important in any subsequent judicial review. The reviewing court will not substitute its judgment for that of the agency with respect to findings of fact unless they are contrary to the manifest weight of the evidence. *Albert v. Board of Fire & Police Commission of Schiller Park,* 99 Ill.App.3d 688, 425 N.E.2d 1158, 54 Ill.Dec. 941 (1st Dist. 1981); *Ryan v. Verbic,* 97 Ill.App.3d 739,413 N.E.2d 534,53 Ill.Dec. 150 (2d Dist. 1981). See also discussion at §20.62.

Given this standard of judicial review, it is critical that findings of fact be drawn with care and precision.

5. [20.58] Precedential Effects of Agency Decisions

There is no legal principle of stare decisis applicable to decisions of administrative agencies. An administrative agency has the power to deal freely with each situation that comes before it regardless of how it may have dealt with a similar or even the same situation before. *Hazelton v. Zoning Board of Appeals,* 48 Ill.App.3d 348, 363 N.E.2d 44, 6 Ill.Dec. 515 (1st Dist. 1977); *Daley v. License Appeal Commission,* 55 Ill.App.2d 474, 205 N.E.2d 269 (1st Dist. 1965). Of course, an agency also has the discretion to follow past precedent in a particular case if a closely related set of facts is involved. *See City of Monmouth v. Pollution Control Board,* 57 Ill.2d 482, 313 N.E.2d 161 (1974).

6. [20.59] Rehearings

Unless specifically empowered by statute or ordinance, an administrative body cannot grant a rehearing. *Reiter v. Neilis,* 125 Ill.App.3d 774, 466 N.E.2d 696, 81 Ill.Dec. 110 (3d Dist. 1984); *People ex rel. Olin Corp. v. Department of Labor,* 95 Ill.App.3d 1108, 420 N.E.2d 1043, 51 Ill.Dec. 485 (5th Dist. 1981). *Accord, Caldwell v. Nolan,* 167 Ill.App.3d 1057, 522 N.E.2d 175, 118 Ill.Dec. 720 (1st Dist. 1988).

B. [20.60] Administrative Review Law

Once the administrative agency has rendered its findings of fact and conclusions of law, the decision is subject to judicial review. The vast majority of municipal administrative decisions are reviewable under the Administrative Review Law of the Code of Civil Procedure, 735 ILCS 5/3-101, *et seq. See, e.g., Schickendanz v. City of O'Fallon,* 248 Ill.App.3d 746, 618 N.E.2d 1289, 188 Ill.Dec. 719 (5th Dist. 1993) (mandamus action dismissed because final administrative decision was reviewable only under the Administrative Review Law). Since the Law sets forth both jurisdictional prerequisites and standards that govern the scope of judicial review, the litigator must have a working familiarity with the Law. An unappealed administrative decision is conclusive and has res judicata effect. *Riverdale Industries Inc. v. Malloy,* 307 Ill.App.3d 183, 717 N.E.2d 846, 240 Ill.Dec. 497 (1st Dist. 1999).

1. [20.61] Commencement of Administrative Review Action

An administrative review action is commenced by the filing of a complaint within 35 days from the date that the copy of the decision was served on the party. 735 ILCS 5/3-103. Service is deemed to have been effected on the date of personal service (if any) or on the date that the decision is mailed. *Thompson v. Civil Service Commission,* 63 Ill.App.3d 153, 379 N.E.2d 655, 19 Ill.Dec. 783 (1st Dist. 1978). Failure to file a complaint within the prescribed time is a jurisdictional defect, which requires dismissal of the suit. *Gualano v. City of Des Plaines,* 139 Ill.App.3d 456, 487 N.E.2d 1050, 94 Ill.Dec. 173 (1st Dist. 1985); *Kenney Country Lounge & Café v. Illinois Liquor Control Com'n,* 253 Ill.App.3d 1013, 625 N.E.2d 880, 192 Ill.Dec. 725 (4th Dist. 1993). Although the statute also states that summons is to be issued within 35 days, that requirement has been held to be mandatory but not jurisdictional. *Cox v. Board of Fire & Police Commissioners of City of Danville,* 96 Ill.2d 399, 451 N.E.2d 842, 72 Ill.Dec. 688 (1983). It is also mandatory that all parties before the administrative tribunal be made parties defendant in the administrative review proceedings. *Norris v. City of Aurora,* 64 Ill.App.3d 748,381 N.E.2d 996,21 Ill.Dec. 549 (2d Dist. 1978), *appeal after remand,* 105 Ill.App.3d 1051 (2d Dist. 1981); *Davis v. Chicago Police Board,* 268 Ill.App.3d 851, 645 N.E.2d 274, 206 Ill.Dec. 269 (1st Dist. 1995); *Orlowski v. Village of Villa Park Bd of Fire and Police Commissioners,* 273 Ill.App.3d 42, 652 N.E.2d 366, 209 Ill.Dec. 826 (2d Dist. 1995). However, members of the administrative hearing board need not be named individually as parties. *Hilliard v. Bagnola,* 297 Ill.App.3d 906, 698 N.E.2d 170, 232 Ill.Dec. 332 (1st Dist. 1998). In *Lockett v. Chicago Police Board,* 133 Ill.2d 349, 549 N.E.2d 1266, 140 Ill.Dec. 394 (1990), the Supreme Court held that all necessary party defendants must be named in the complaint within the 35-day time period. Failure to serve summons on all necessary party defendants will result in dismissal of a complaint unless a good-faith attempt to obtain service within 35 days is shown.

In answer to a complaint for administrative review, the agency need only file its appearance and the record of proceedings. 735 ILCS 5/3-106, 5/3-108. A formal answer may not be filed unless required by the court. *Biscan v. Village of Melrose Park Board of Fire and Police Commissioners,* 277 Ill.App.3d 844, 661 N.E.2d 424, 214 Ill.Dec. 570 (1st Dist. 1996).

2. [20.62] Scope of Judicial Review

It is well established that the scope of judicial review under the Administrative Review Law is limited. The findings of fact of the administrative agency are deemed to be prima facie true and correct. 735 ILCS 5/3-110; *Nelson v. Board of Trustees of Police Pension Fund,* 141 Ill.App.3d 411, 490 N.E.2d 216, 95 Ill.Dec. 743 (4th Dist. 1986); *Freestyle v. Board of Education of Medinah Elementary School,* 79 Ill.App.3d 460, 398 N.E.2d 637, 34 Ill.Dec. 814 (2d Dist. 1979). For the reviewing court to overturn the agency's findings, the findings must be contrary to the manifest weight of the evidence. *McGowen v. City of Bloomington,* 99 Ill.App.3d 986, 426 N.E.2d 328, 55 Ill.Dec. 353 (4th Dist. 1981); *Department of Mental Health & Developmental Disabilities v. Civil Service Commission,* 85 Ill.2d 547, 426 N.E.2d 885, 55 Ill.Dec. 560 (1981). A decision is contrary to the manifest weight of the evidence if conclusions opposite to those reached by the agency are clearly evident from the record. *City of Belvidere v. Illinois State Labor Relations Board,* 181 Ill.2d 191, 692 N.E.2d 295, 229 Ill.Dec. 522 (1998); *Pryka v. Board of Fire & Police Commissioners of Village* of *Schaumburg,* 67 I11.App.3d 210, 384 N.E.2d 784, 23 Ill.Dec. 877 (1st Dist. 1978). *Accord, Blunier v. Board of Fire & Police Commissioners,* 190 Ill.App.3d 92,545 N.E.2d 1363,137 Ill.Dec. 348 (3d Dist. 1989). The mere fact that an opposite conclusion might be reasonable is an insufficient basis for reversal of the agency findings. *Keen v. Police Board of City of Chicago,* 73 Ill.App.3d 65, 391 N.E.2d 190, 29 Ill.Dec. 31 (1st Dist. 1979). All reasonable inferences in support of the finding must be drawn in favor of the administrative agency's decision, including the credibility of conflicting evidence. *Schoenbeck v. Board of Fire & Police Commissioners of Village of River Forest,* 69 Ill.App.3d 366, 387 N.E.2d 738, 25 Ill.Dec. 862 (1st Dist. 1978); *King v. City of Chicago,* 60 Ill.App-3d 504, 377 N.E.2d 102, 17 Ill.Dec. 912 (1 st Dist. 1978); *Klee v. Board of Fire & Police Commissioners,* 214 Ill.App.3d 1099, 574 N.E.2d 241, 158 Ill.Dec. 447 (5th Dist. 1991). The court cannot reweigh the evidence on the determination of witness credibility, which is to be made by the agency. *Haynes v. Police Board of Chicago,* 293 Ill.App.3d 508, 688 N.E.2d 794, 228 Ill.Dec. 96 (1st Dist. 1997).

In short, the reviewing court must accord substantial deference to the agency's findings of fact. The court cannot overturn those findings unless they are contrary to the manifest weight of the evidence as contained in the record. The court may not entertain new evidence or conduct a hearing de novo. *Burke v. Board of Review,* 132 Ill.App.3d 1094, 477 N.E.2d 1351, 87 Ill.Dec. 823 (2d Dist. 1985).

While judicial deference is accorded to an administrative agency's findings of fact, similar deference is not accorded an agency's decision on questions of law. The reviewing court is free to assess conclusions of law as well as the legal effect of the findings of fact. *City of Belvidere v. Illinois State Labor Relations Board,* 181 Ill.2d 191, 692 N.E.2d 295, 229 Ill.Dec. 522 (1998); *Stec v. Oak Park Police Pension Board,* 204 Ill.App.3d 556, 561 N.E.2d 1234, 149 Ill.Dec. 538 (1st Dist. 1990); *Gee v. Board of Review of Department of Labor,* 136 Ill.App.3d 889, 483 N.E.2d 1025, 91 Ill.Dec. 539 (1st Dist. 1985); *Flex v. Illinois Department of Labor Board of Review,* 125 Ill.App.3d 1021, 466 N.E.2d 1050, 81 Ill.Dec. 248 (1st Dist. 1984); *Trayling v. Board of Fire and Police Commissioners*, 273 Ill.App.3d 1, 652 N.E.2d 386, 209 Ill.Dec. 846 (2d Dist. 1995); *Obasi v. Department of Professional Regulation*, 266 Ill.App.3d 693, 639 N.E.2d 1318, 203 Ill.Dec. 499, (1st Dist. 1994). An administrative agency's interpretation of its own rules is entitled to deference, but the courts are not bound by that interpretation. *Brown v. Chicago Park District,* 296 Ill.App.3d 867, 695 N.E.2d 1315, 231 Ill.Dec. 196 (1st Dist. 1998); *McTigue v. Personnel Board of City of Chicago,* 299 Ill.App.3d 579, 701 N.E.2d 135, 233 Ill.Dec. 492 (1998).

All legal arguments, defenses, and objections must be raised before the administrative agency in order to be preserved for subsequent judicial review. *Battle v. Illinois Civil Service Commission,* 78 Ill.App.3d 828, 396 N.E.2d 1321, 33 Ill.Dec. 597 (1st Dist. 1979); *Commonwealth Edison Co. v. Department of Local Government Affairs,* 126 Ill.App.3d 277, 466 N.E.2d 1351, 81 Ill.Dec. 549 (2d Dist. 1984); *Burgess v. Board of Fire & Police Commissioners,* 209 Ill.App.3d 821, 568 N.E.2d 430, 154 Ill.Dec. 430 (4th Dist. 1991) (affidavit of attorney filed after conclusion of administrative hearing could not be considered on review).

Administrative review precludes any other methods of judicial review of the proceedings. *Kren v. Civil Service Commission,* 215 Ill.App.3d 642, 574 N.E.2d 1289, 158 Ill.Dec. 896 (4th Dist. 1991) (mandamus precluded as remedy); *Blagoue v. Edgar,* 196 Ill.App.3d 92, 553 N.E.2d 90, 142 Ill.Dec. 740 (4th Dist. 1990).

3. [20.63] Scope of Judicial Remedies

Under 735 ILCS 5/3-111, the courts have extensive powers to fashion appropriate remedies in administrative review cases. The court may stay the effect of the administrative decision pending final disposition of the case. 735 ILCS 5/3-111(a)(1). The stay may be issued without bond for "good cause." *Moore v. Mankowitz,* 127 Ill.App.3d 1050, 469 N.E.2d 1133, 83 Ill.Dec. 199 (4th Dist. 1984). The traditional tests for injunctive relief are inapplicable to the issuance of a stay. *Gorr v. Board of Fire & Police Commissioners,* 129 Ill.App.3d 327, 472 N.E.2d 587, 84 Ill.Dec. 627 (2d Dist. 1984). The stay is a nonappealable, interlocutory order. *Id.*

Upon review of the merits of the case, the court may affirm or reverse the decision in whole or in part. 735 ILCS 5/3-111(a)(5). It may also reverse and remand the case to the agency for further

proceedings. 735 ILCS 5/3-111(a)(6). A circuit court order remanding the case to the agency for further proceedings is not a final order. The circuit court retains jurisdiction of the case, and the plaintiff is not required to file a new complaint after the agency's decision on remand in order to revest the court with jurisdiction. *Grames v. Illinois State Police*, 254 Ill.App.3d 191, 625 N.E.2d 945, 192 Ill.Dec. 790 (4th Dist. 1993). In rendering its judgment, the court must examine two broad aspects of the administrative decision: first, whether the agency's decision was correct with respect to the merits of the charges or complaint before it; and second, whether the remedy decided on by the agency was appropriate. *Department of Mental Health & Developmental Disabilities v. Civil Service Commission,* 85 Ill.2d 547, 426 N.E.2d 885, 55 Ill.Dec. 560 (1981). The court may affirm the decision of the agency on the merits by reverse and remand with respect to any penalty imposed. *Walsh v. Board of Fire & Police Commissioners,* 103 Ill.App.3d 635, 431 N.E.2d 1099,59 Ill.Dec. 342 (1st Dist. 1981), *vacated on other grounds,* 96 Ill.2d 101 (1983); *Moss v. Board of Fire & Police Commissioners,* 108 Ill.App.3d 8, 438 N.E.2d 685, 63 Ill.Dec. 754 (2d Dist. 1982), *rev'd on other grounds,* 96 Ill.2d 252 (1983); *O'Malley v. Board of Fire & Police Commissioners,* 182 Ill.App.3d 1019,538 N.E.2d 888,131 Ill.Dec. 513 (1st Dist. 1989). A penalty may be reversed by the courts only on a finding that it is arbitrary, capricious, or unrelated to the needs of the municipality. *Valio v. Board of Fire and Police Commissioners,* ___ Ill.App.3d ___, 724 N.E.2d 1024, 244 Ill.Dec. 136 (2nd Dist. 2000); *Sutton v. Civil Service Commission,* 91 Ill.2d 404, 438 N.E.2d 147, 63 Ill.Dec. 409 (1982). If the court reverses the penalty aspect of the administrative decision, it should remand the case to the agency for further proceedings. *Moss, supra; Obasi v. Department of Professional Regulation,* 266 Ill.App.3d 693, 639 N.E.2d 1318, 203 Ill.Dec. 499 (1st Dist. 1994); *Jacquelyn's Lounge v. License Appeal Commission of Chicago,* 277 Ill.App.3d 957, 661 N.E.2d 419, 214 Ill.Dec. 565 (1st Dist. 1996); *Roach Enterprises, Inc. v. License Appeal Commission,* 277 Ill.App.3d 523, 660 N.E.2d 276, 214 Ill.Dec. 85 (1st Dist. 1996).

The general rule is that when an administrative decision is reversed, vacated, or remanded, the case stands as if no decision had ever been made. *Creamer v. Police Pension Fund Board of Mt. Prospect,* 69 Ill.App.3d 792, 387 N.E.2d 711, 25 Ill.Dec. 835 (1st Dist. 1978); *Jones v. Board of Fire & Police Commissioners,* 127 Ill.App.3d 793, 469 N.E.2d 393, 82 Ill.Dec. 859 (2d Dist. 1984). When a case has been remanded for further proceedings by the court, the order is interlocutory in nature and therefore not appealable. *Mitrenga v. Martin,* 110 Ill.App.3d 1006, 443 N.E.2d 268, 66 Ill.Dec. 585 (1st Dist. 1982).

An administrative board and its individual members lack standing to appeal a circuit court's reversal of the administrative decision. *Wallman v. Zoning Board of Appeals,* 181 Ill.App.3d 680, 537 N.E.2d 422, 130 Ill.Dec. 355 (5th Dist. 1989); *Greer v. Illinois Liquor Control Commission,* 185 Ill.App.3d 219, 541 N.E.2d 216, 133 Ill.Dec. 379 (2d Dist. 1989).

C. [20.64] Exhaustion of Administrative Remedies

As a general rule, if there are administrative remedies available to a litigant, he must exhaust those procedures before seeking relief from the courts. This legal principle is referred to as the "exhaustion of administrative remedies" doctrine or the "primary jurisdiction" doctrine. The purposes of the exhaustion doctrine are to allow the agency to develop a factual record, to apply its own expertise to the problem, to correct its own errors, and to reconcile conflicts before resorting to judicial relief. *Steward v. Allstate Insurance Co.,* 92 Ill.App.3d 637,415 N.E.2d 1206,47 Ill.Dec. 893 (1st Dist. 1980); *Calhoun v. Illinois State Board of Education,* 550 F.Supp. 796 (N.D.Ill. 1982). Failure to exhaust administrative remedies, including statutory certiorari, ordinarily will be a basis for denial of judicial review. *Wagner v. Kramer,* 125 Ill.App.3d 12, 465 N.E.2d 547, 80 Ill.Dec. 435 (2d Dist. 1984), *aff'd, remanded,* 108 Ill.2d 413 (1985); *Illinois Bell Telephone Co. v. Allphin,* 60 Ill.2d 350, 326 N.E.2d 737 (1975); *Weissinger v. Edgar,* 180 Ill.App.3d 806, 536 N.E.2d 237, 129 Ill.Dec. 553 (2d Dist. 1989); *Hitt v. Ryan,* 307 Ill.App.3d 344, 718 N.E.2d 695, 241 Ill.Dec. 124 (4th Dist. 1999). There are numerous exceptions to this general rule, however, which are discussed below.

1. [20.65] Constitutionality of Statute or Ordinance

A litigant need not exhaust administrative remedies if she challenges a statute, ordinance, or administrative regulation as being unconstitutional on its face. *Phillips v. Graham,* 86 Ill.2d 274, 427 N.E.2d 550,56 Ill.Dec. 355 (1981); *Bio-Medical Laboratories, Inc. v. Trainor,* 68 Ill.2d 540,370 N.E.2d 223, 12 Ill.Dec. 600 (1977). The constitutional challenge must be based on the terms of the statute or ordinance itself. If a litigant merely contends that one provision of the statute is unconstitutional as applied to her particular case, prior exhaustion of administrative remedies is required. *Bright v. City of Evanston,* 10 Ill.2d 178, 139 N.E.2d 270 (1956); *Village of South Elgin v. Waste Management of Illinois, Inc.,* 62 Ill.App.3d 815, 379 N.E.2d 349, 19 Ill.Dec. 685 (2d Dist. 1978); *Flynn v. Hillard,* 303 Ill.App.3d 119, 707 N.E.2d 716, 236 Ill.Dec. 589 (1st Dist. 1999). Similarly, allegations of arbitrary or discriminatory application of ordinances first must be pursued before the administrative agency. *Oak Park Trust & Savings Bank v. Village of Palos Park,* 106 Ill.App.3d 394, 435 N.E.2d 1265, 62 Ill.Dec. 293 (1st Dist. 1982). While an administrative agency, by its very nature, is a combination of judicial and legislative power, this overlap does not violate the separation of powers doctrine of the Illinois constitution as long as the administrative actions are subject to judicial review. *VanHarken v. City of Chicago,* 305 Ill.App.3d 972, 713 N.E.2d 754, 239 Ill.Dec. 223 (1st Dist. 1999) (upholding the city's administrative adjudication system for parking violations).

2. [20.66] Agency's Lack of Authority

Administrative remedies need not be exhausted if the power of the administrative agency to act in a particular case is challenged as unauthorized. *Landfill, Inc. v. Pollution Control Board,* 74 Ill.2d 541, 387 N.E.2d 258, 25 Ill.Dec. 602 (1978). This type of challenge is usually grounded on a

claim that the enabling legislation has not empowered the agency to act in a particular area. *County of Knox v. The Highlands, L.L.C.,* 302 Ill.App.3d 342, 705 N.E.2d 128, 235 Ill.Dec. 515 (3rd Dist. 1999); *County of Kane v. Carlson,* 140 Ill.App.3d 814, 489 N.E.2d 467, 95 Ill.Dec. 246 (2d Dist. 1986) (authority of State Labor Relations Board); *City of Chicago v. Illinois Commerce Commission,* 79 Ill.2d 213, 402 N.E.2d 595, 37 Ill.Dec. 593 (1980) (rule requiring City to maintain clearance signs at railroad overpasses). Since the authority of the agency to act is itself in issue, prior exhaustion of administrative remedies is unnecessary.

3. [20.67] Agency's Lack of Jurisdiction

Although the term "jurisdiction" is not strictly applicable to an administrative body, it is used to designate the authority of the administrative body to act. In that context, administrative "jurisdiction" has three aspects: (1) "personal jurisdiction," i.e., the agency's authority over parties and intervenors to the proceeding; (2) "subject matter jurisdiction," i.e., the agency's power over the general class of cases to which a particular case belongs; and (3) the agency's scope of authority under its statute, which may properly be considered the source of the power of the agency to enter the particular order involved. *Armstead v. Sheahan,* 298 Ill.App.3d 892, 700 N.E.2d 149, 233 Ill.Dec. 48 (1st Dist. 1998); *Ogle County Board v. Pollution Control Board,* 272 Ill.App.3d 184, 649 N.E.2d 545, 208 Ill.Dec. 489, 649 N.E.2d 545 (2d Dist. 1995); *Davis v. Chicago Police Board,* 268 Ill.App.3d 851, 645 N.E.2d 274, 206 Ill.Dec. 269 (1st Dist. 1994).

A closely related exception is that exhaustion is unnecessary when the agency is alleged to have no jurisdiction over the subject matter. Under this exception, it is often claimed that the agency's jurisdiction is limited by statute or ordinance and that the agency has attempted to exceed those jurisdictional limitations. *Sherman v. Board of Fire & Police Commissioners,* 111 Ill.App.3d 1001, 445 N.E.2d 1, 67 Ill.Dec. 709 (5th Dist. 1982) (scheduling of hearing within 30 days); *Reiter v. Neilis,* 125 Ill.App.3d 774, 466 N.E.2d 696, 81 Ill.Dec. 110 (3d Dist. 1984) (no jurisdiction to hold rehearing that was not authorized by statute); *Horan v. Foley,* 39 Ill.App.2d 458, 188 N.E.2d 877 (1st Dist. 1963) (scheduling of hearing). The key distinction between this exception and the "lack of authority" exception is that here the authority to consider the case does exist by virtue of statute or ordinance but subsequently has been lost by the agency.

In rare cases, separate administrative agencies may each have subject matter jurisdiction with respect to separate aspects of the lawsuit. *Village of Maywood Board of Fire and Police Commissioners v. Department of Human Rights,* 296 Ill.App.3d 570, 695 N.E.2d 873, 231 Ill.Dec. 100 (1st Dist 1998) (Department had jurisdiction over civil rights complaint challenging the Board's alleged racially based hiring decisions); *see also City of Rock Island v. Human Rights Commission,* 297 Ill.App.3d 766, 697 N.E.2d 1207, 232 Ill.Dec. 277 (3rd Dist. 1998) (jurisdiction of Human Rights Commission not preempted by collective bargaining agreement's arbitration provision or by the Public Labor Relations Act).

4. [20.68] Futility

Another exception to the exhaustion doctrine is that a litigant may bypass administrative procedures if pursuing them would be a futile act. It must be demonstrated that the pursuit of the administrative remedies would be patently useless in order to trigger this exception. *Northwestern University v. City of Evanston,* 74 Ill.2d 80,383 N.E.2d 964,23 Ill.Dec. 93 (1978); *Van Laten v. City of Chicago,* 28 Ill.2d 157, 190 N.E.2d 717 (1963). The exhaustion requirement cannot be avoided, however, simply because relief may be, or even probably will be, denied by the administrative agency. *Northwestern University, supra; Bank of Lyons v. County of Cook,* 13 Ill.2d 493,150 N.E.2d 97 (1958). If the agency has no discretion in the matter but must deny the relief sought, it would appear that the "futility" exception is met. For example, in *Sanders v. City of Springfield,* 130 Ill.App.3d 490, 474 N.E.2d 438, 85 Ill.Dec. 710 (4th Dist. 1985), the City's home rule ordinance required termination of police officers who were not members of the Police Pension Fund. Since the board of trustees of the fund could not overturn this ordinance, any resort to administrative procedures would have been a futile act.

5. [20.69] Irreparable Harm

Irreparable harm is an additional recognized exception. If pursuit of administrative remedies would cause the plaintiff to suffer irreparable harm, prior exhaustion is not required. *See, e.g., Village of Cary v. Pollution Control Board,* 82 Ill.App.3d 793, 403 N.E.2d 83,38 Ill.Dec. 68 (2d Dist. 1980); *Illinois Bell Telephone Co. v. Allphin,* 60 Ill.2d 350,326 N.E.2d 737 (1975). In *Buege v. Lee,* 56 Ill.App.3d 793, 372 N.E.2d 427, 14 Ill.Dec. 416 (2d Dist. 1978), the court applied a similar rule and allowed a police officer to challenge his superior's order to take a polygraph examination. Because the police officer could face dismissal for disobedience of this order, the court held the order to be judicially reviewable without prior exhaustion of the administrative process. *Accord, Kaske v. City of Rockford,* 96 Ill.2d 298, 450 N.E.2d 314, 70 Ill.Dec. 841 (1983).

6. [20.70] Multiplicity of Remedies

The final exception to the exhaustion doctrine occurs when there are a multiplicity of available administrative remedies and at least one has been exhausted by the litigant. *Herman v. Village* of *Hillside,* 15 Ill.2d 396, 155 N.E.2d 47 (1958) (zoning text amendment).

7. [20.71] Pending Administrative Proceedings

Despite the numerous exceptions to the exhaustion doctrine, it has been recognized that none of the exceptions will be applied to pending administrative proceedings. Once proceedings have been initiated by appropriate action, the courts will not interfere with the case. *Eckells v. City Council of*

East St. Louis, 23 Ill.App.2d 360, 163 N.E.2d 107 (4th Dist. 1959); *Buege v. Lee,* 56 Ill.App.3d 793, 372 N.E.2d 427, 14 Ill.Dec. 416 (2d Dist. 1978).

D. [20.72] Certiorari

Although the Administrative Review Law of the Code of Civil Procedure covers the vast majority of administrative review cases, the common law order of certiorari is available if there are no other methods of judicial review. *Hartley v. Will County Board of Review,* 106 Ill.App.3d 950,436 N.E.2d 1073, 62 Ill.Dec. 771 (3d Dist. 1982); *Rochon v. Rodriguez,* 293 Ill.App.3d 952, 89 N.E.2d 288, 228 Ill.Dec. 416 (1st Dist. 1997). The absence of other adequate remedies is a precondition for the order. *Id.*

As traditionally employed by the courts, certiorari was limited in its application. Certiorari was used when it was alleged that the administrative agency had exceeded its jurisdiction, that the agency had not followed essential procedural requirements, or that the record was devoid of any evidence to support the decision. *See Id.*

Recent cases have held that there is no viable difference between the scope of statutory administrative review and common law certiorari. *Jones v. Lazerson,* 203 Ill.App.3d 829, 561 N.E.2d 151, 148 Ill.Dec. 845 (5th Dist. 1990); *Dubin v. Personnel Board of Chicago,* 128 I11.2d 490, 539 N.E.2d 1243, 132 Ill.Dec. 437 (1989); *Odell v. Village of Hoffman Estates,* 110 Ill.App.3d 974, 443 N.E.2d 247,66 Ill.Dec. 564 (1st Dist. 1982); *Penrod v. Department of Corrections,* 72 Ill.App.3d 649, 391 N.E.2d 59,28 Ill.Dec. 860 (1st Dist. 1979). The standard of review under an order of certiorari is that the court will not substitute its judgment for that of the administrative agency unless the agency's decision is arbitrary or unsupported by the evidence. *Odell, supra; Quinlan & Tyson, Inc. v. City of Evanston,* 25 Ill.App.3d 879, 324 N.E.2d 65 (1st Dist. 1975); *S & F Corp. v. Bilandic,* 62 Ill.App.3d 193,378 N.E.2d 1137,19 Ill.Dec. 262 (1st Dist. 1978); *Zenith Vending Corp. v. Village* of *Schaumburg,* 180 Ill.App.3d 354, 535 N.E.2d 1033, 129 Ill.Dec. 268 (1st Dist. 1989). However, the Third District Appellate Court continues to apply the *Hartley* test to certiorari proceedings. *National Marine, Inc. v. Illinois E.P.A.,* 2320 Ill.App.3d 847, 597 N.E.2d 911, 173 Ill.Dec. 937 (3d Dist. 1992).

A limitations period of six months generally has been applied to certiorari actions unless a reasonable excuse is shown for the delay. *Koch v. Board of Trustees of University of Illinois,* 39 Ill.App.2d 51,187 N.E.2d 340 (1st Dist. 1963); *Yeksigian v. City of Chicago,* 231 Ill.App.3d 307,596 N.E.2d 10, 172 Ill.Dec. 731 (1st Dist. 1992); *Coleman v. O'Grady,* 207 Ill.App.3d 43,565 N.E.2d 253, 152 Ill.Dec. 11 (1st Dist. 1990); *Long v. Tazewell/Pekin Consolidated Communications Center,* 236 Ill.App.3d 967, 602 N.E.2d 856, 176 Ill.Dec. 910 (3d Dist. 1992) (reasonable excuse shown).

When review of an agency's decision is available through the common law order of certiorari, no other legal remedy may be pursued. *Dubin v. Personnel Board of Chicago,* 128 Ill.2d 490, 539 N.E.2d 1243, 132 Ill.Dec. 437 (1989).

IV. [20.73] INTERGOVERNMENTAL LITIGATION

Although the bulk of municipal litigation involves controversies between the municipality and private entities, occasions do arise when municipalities engage in litigation with other governmental bodies. Intergovernmental litigation may involve disputes over a wide range of jurisdictional, regulatory, and tax matters. The purpose of the following sections is to highlight some of the general principles that regulate intergovernmental litigation and to identify the trends of recent judicial decisions in this area.

A. [20.74] Municipalities and State Agencies

Municipal challenges to the authority of state regulatory agencies may be based on claims that the state agencies have exceeded their statutory authority. Municipalities have also argued that certain actions of the state, through its agencies or by way of statute, violate constitutional protections, such as the due process and equal protection clauses. The constitutional claims of municipalities have met with mixed results, as discussed below.

1. [20.75] Due Process Clause

Municipalities generally been held not to be "persons" entitled to the protections of the due process clause of the federal Constitution. *Williams v. Baltimore,* 289 U.S. 36, 77 L.Ed. 1015, 53S.Ct. 431 (1933); *Trenton v. New Jersey,* 262 U.S. 182,67 L.Ed. 937,43 S.Ct. 534 (1923); *Newark v. New Jersey,* 262 U.S. 192, 67 L.Ed. 943, 43 S-Ct. 539 (1923). Recent case law appears to affirm the principle that municipalities are not "persons" for the purpose of due process protections. *Village of Schaumburg v. Doyle,* 277 Ill.App.3d 832, 661 N.E.2d 496, 214 Ill.Dec. 642 (1st Dist. 1996); *City of Elgin v. County of Cook,* 257 Ill.App.3d 186, 629 N.E.2d 86, 195 Ill.Dec. 778 (1st Dist. 1993); *aff'd in part, rev'd in part,* 169 Ill.2d 53 (1996).

Based on this general principle, it has been held further that municipalities may not assert certain constitutional claims or defenses against state action. As summarized by the court in *People v. Valentine,* 50 Ill.App.3d 447, 365 N.E.2d 1082, 1086, 8 Ill.Dec. 696 (5th Dist. 1977), quoting *Shelby v. City of Pensacola,* 112 Fla. 584, 151 So. 53, 55 (1933):

> **Municipal governmental entities have never been held to be "persons" within the meaning of the** [Fourteenth] **amendment, which was intended to guard the liberty and property of natural persons and corporations.**

> **In the performance of governmental functions, the State has the power to control units of local government through legislation without regard to considerations of due process or equal protection of the laws both as to substance and procedure, and it may require a city to perform acts through its officers and employees against its corporate will.** [Citations omitted.]
>
> > **'It is an established principle of constitutional law that these constitutional restraints imposed by the Federal Constitution against State action do not apply against the State in favor of its own municipality, insofar as equal protection of the laws and due process of the law under the Fourteenth Amendment are concerned."** [Citations omitted.]

Accord, Franciscan Hospital v. Town of Canoe Creek, 79 Ill.App.3d 490, 398 N.E.2d 413, 34 Ill.Dec. 738 (3d Dist. 1979); *Village of Riverwoods v. Department of Transportation,* 77 Ill.2d 130, 395 N.E.2d 555, 32 Ill.Dec. 325 (1979). A municipality may not assert due process rights under the federal Constitution whether it is challenging a state statute directly or the actions of a state agency acting pursuant to its statutory authority. *Franciscan Hospital, supra; City of Evanston v. Regional Transportation Authority*, 202 Ill.App.3d 265, 559 N.E.2d 899, 147 Ill.Dec. 559 (1st Dist. 1990).

Whether municipalities are afforded due process protections under the state Constitution is unclear. In *Meador v. City of Salem,* 51 Ill.2d 572, 284 N.E.2d 266 (1972), the Supreme Court held that a municipality did not possess due process rights under the state Constitution. However, in *Hayen v. County of Ogle,* 101 Ill.2d 413, 463 N.E.2d 124, 78 Ill.Dec. 946 (1984), the Supreme Court indicated that the issue has not been finally resolved. The court stated that it considered the question of municipal due process rights "an important issue of constitutional law." 463 N.E.2d at 127. With the advent of home rule under the 1970 Illinois Constitution, there is reason to doubt that the *Valentine* analysis is still correct, at least as applied to those units of local government that are not created by the legislature but by the Constitution itself.

2. [20.76] Equal Protection

To the extent that *People v. Valentine,* 50 Ill.App.3d 447, 365 N.E.2d 1082, 8 Ill.Dec. 696 (5th Dist. 1977), indicates that municipalities do not have rights of equal protection, it appears to be an incorrect statement of the law. In *Cronin v. Lindberg,* 66 Ill.2d 47, 360 N.E.2d 360, 4 Ill.Dec. 424 (1976), the Supreme Court reviewed the scope of due process and equal protection rights as applied to governmental bodies. While the court concluded that due process guarantees, in the ordinary sense, do not extend to local governmental bodies, equal protection claims may be asserted if the public body is a member of the class being discriminated against. *Accord, City of Carbondale v. Van*

Natta, 61 Ill.2d 483, 338 N.E.2d 19 (1975). Thus, equal protection guarantees apparently include local governmental bodies and may be asserted in challenges to state statutes or the acts of state agencies.

The issue of whether municipalities may assert equal protection claims remains undecided. *Compare Jahn v. Troy Fire Protection District*, 255 Ill.App.3d 933, 627 N.E.2d 1216, 194 Ill.Dec. 574 (3d Dist.), *aff'd on other grounds*, 163 Ill.2d 275, 644 N.E.2d 1159, 206 Ill.Dec. 106 (1994), with *Village of Schaumburg v. Doyle*, 277 Ill.App.3d 832, 661 N.E.2d 496, 214 Ill.Dec. 642 (1st Dist. 1996). However, there is no impediment to a municipality's claim that a statute violates the special or local law provision of Article 4, §13 of the Illinois Constitution. *Id.*

3. [20.77] Other Constitutional Provisions

Municipalities and other units of local government may assert the protection of other constitutional provisions in addition to equal protection guarantees. In *County of Cook v. Ogilvie*, 50 Ill.2d 379, 280 N.E.2d 224 (1972), the County challenged a statute that allowed the Illinois Department of Public Aid to reapportion welfare appropriations. The County successfully asserted that the statute was unconstitutional as a violation of the separation of powers doctrine.

Sovereign immunity does not apply to a constitutional challenge directed against the power of a state agency to act. An action that contests the validity of the conduct of state officials in the enforcement of an allegedly unconstitutional law is not considered a suit against the state. Id.; *Moline Tool Co. v. Department of Revenue*, 410 Ill. 35, 101 N.E.2d 71 (1951).

4. [20.78] Suits Against State Agencies

A municipality or other governmental body may bring suit against a state agency for acting in excess of its statutory authority. *See, e.g., Village of Lombard v. Pollution Control Board*, 66 Ill.2d 503, 363 N.E.2d 814, 6 Ill.Dec. 867 (1977) (Board lacked authority to require regional wastewater treatment); *Aurora East Public School District v. Cronin*, 92 Ill.2d 313, 442 N.E.2d 511, 66 Ill.Dec. 85 (1982) (promulgation of desegregation rules by state Board of Education invalid). The claim also may be premised on a violation of state law. *City of Springfield v. Allphin*, 74 Ill.2d 117, 384 N.E.2d 310, 23 Ill.Dec. 516 (1978) (Department of Revenue's service charge for collection of municipal retailer's occupation tax); *Village of Pawnee v. Johnson*, 103 Ill.2d 411, 469 N.E.2d 1365, 83 Ill.Dec. 219 (1984) (interest earnings on collected municipal retailer's occupation tax receipt); *Valley View Community Unit School District No. 365-U v. Cronin*, 65 Ill.App.3d 870, 382 N.E.2d 1298, 22 Ill.Dec. 600 (3d Dist. 1978) (unlawful withholding of state aid).

As in the case of constitutional challenges, sovereign immunity does not apply to these types of suits because it is necessarily alleged that the state official has acted in violation of the law. *See County of Cook v. Ogilvie,* 50 Ill.2d 379, 280 N.E.2d 224 (1972).

5. [20.79] Suits Against State for Damages

The doctrine of sovereign immunity is applicable when monetary damages are sought from the state. Under 745 ILCS 5/1, suits against the state seeking a money judgment must be brought in the Court of Claims. Whether a money judgment against the state is in issue requires a careful examination of the source of the funds sought. *City of Springfield v. Allphin,* 74 Ill.2d 117, 384 N.E.2d 310,23 Ill.Dec. 516 (1978); *Shell Oil Co. v. Department of Revenue,* 95 I11.2d 541,449 N.E.2d 65, 70 Ill.Dec. 191 (1983). A money judgment against the state is not involved when the legislature previously has appropriated funds and the municipality seeks distribution of those funds. *County of Cook v. Ogilvie,* 50 Ill.2d 379, 280 N.E.2d 224 (1972). *Compare Campbell v. Department of Public Aid,* 61 Ill.2d 1, 329 N.E.2d 225 (1975) (appropriation lapsed). However, if payment of the claim would come from the state's general revenue fund, it would constitute a money judgment against the state and would have to be brought in the Court of Claims. *Village of Pawnee v. Johnson,* 103 Ill.2d 411, 469 N.E.2d 1365, 83 Ill.Dec. 219 (1984); *Hudgens v. Dean,* 75 Ill.2d 353, 388 N.E.2d 1242, 27 Ill.Dec. 13 (1979). Thus, the key inquiry in this type of action is identification of the source of state funds available to satisfy any monetary judgment.

B. [20.80] Tax Collection and Distribution Cases

Municipalities and other units of local government have brought a number of lawsuits against state, county, and township tax collection agencies in recent years challenging the right of these agencies to withhold principal and/or interest on collected tax money. To a large extent, these lawsuits have been successful and have resulted in a substantial increase in tax dollars reaching local units of government.

1. [20.81] Principal Amount of Collected Taxes

Article 7, §9 (a) of the Illinois Constitution prohibits the receipt of fees by local tax collection authorities for their services. Based on this broad proscription, a number of statutes have been struck down that had provided for the reimbursement of local tax collection authorities from taxes collected on behalf of units of local government. *City of Joliet v. Bosworth,* 64 Ill.2d 516, 356 N.E.2d 543, 1 Ill.Dec. 355 (1976); *Century Community Unit School Dist. No. 100 v. McClellan,* 27 Ill.App.3d 255, 327 N.E.2d 32 (5th Dist. 1975). The only tax collection authority that may receive a fee from the principal amount of collected taxes is the state itself. *Village of Oak Lawn v. Zagel,* 96 Ill.App.3d 254, 421 N.E.2d 251, 51 Ill.Dec. 743 (1st Dist. 1981) (fee for collection of municipal retailer's occupation tax).

2. [20.82] Interest Earned on Collected Taxes

As a result of several cases, it has been held that interest earnings on collected tax money belong to the individual taxing bodies on whose behalf the taxes have been collected and may not be retained by the tax collecting agencies.

In *City of Peoria v. O'Connor,* 85 Ill.2d 195, 421 N.E.2d 912, 52 Ill.Dec. 49 (1981), the Supreme Court held that the Public Funds Investment Act, 30 ILCS 235/0.01, *et seq.*, required township tax collection authorities to turn over interest earned on collected tax money to the affected taxing bodies. The same reasoning was applied with respect to interest earnings on municipal retailers' occupation tax receipts collected by the state in *Village of Pawnee v. Johnson*, 103 Ill.2d 411, 469 N.E.2d 1365, 83 Ill.Dec. 219 (1984).

In *Board of Commissioners of Wood Dale v. County of Du Page*, 103 Ill.2d 422,469 N.E.2d 1370, 83 Ill.Dec. 224 (1984), the Supreme Court held that Article 7, §9(a) of the Illinois Constitution prohibited the retention of any interest earned on collected tax money by county tax collection authorities.

C. [20.83] Municipal Taxes Affecting Other Units of Government

Municipal taxes, being broad in scope, may affect other units of local government located within the municipality's boundaries. The general rule is that all property, including the property of units of local government, is subject to taxation unless specifically exempted. *People v. Deep Rock Oil Corp.*, 343 Ill. 388,175 N.E. 572 (1931). In *Board of Education v. City of McHenry,* 71 Ill.App.3d 904, 390 N.E.2d 551, 28 Ill.Dec. 384 (2d Dist. 1979), the court applied this rule in holding that a municipal vehicle license fee could be imposed on the buses of a local school district. Thus, a direct tax that affects other units of government may be levied if there is an appropriate statutory basis and no express exemption.

Direct municipal taxation of other units of local government is a rare case. Far more common are cases in which municipal taxes indirectly affect other public bodies. In *Waukegan Community Unit School District v. City of Waukegan*, 95 Ill.2d 244, 447 N.E.2d 345, 69 Ill.Dec. 128 (1983), a school district challenged the municipal utility tax, claiming that it constituted an indirect tax against the district. The Supreme Court held that since the legal incidence of the tax was actually on the utilities, not the school district itself, the tax was valid. *See also Commonwealth Edison Co. v. Community Unit School District No. 200,* 44 Ill.App.3d 665, 358 N.E.2d 688, 3 Ill.Dec. 290 (2d Dist. 1976). The legal incidence of the tax is not always conclusive. In *Board of Education v. City of Peoria*, 76 Ill.2d 469, 394 N.E.2d 399, 31 Ill.Dec. 197 (1979), the City had enacted a home rule ordinance levying a two-percent tax on food and alcohol served at restaurants or taverns. The legal incidence of the tax was on the consumer, but the operator of the facility was required to collect the

tax. The Supreme Court held that while the tax was valid as to park districts, it imposed an unconstitutional burden of collection of the tax on the state's school system. *See also Chicago Park District v. City of Chicago,* 111 Ill.2d 7, 488 N.E.2d 968,94 Ill.Dec. 721 (1986) (home rule tax on boat moorings upheld). The litigator's analysis of these types of issues must focus on three critical elements: (1) the legal incidence of the tax; (2) incidental burdens, if any, on the other public bodies; and (3) express exemptions provided by law.

Municipal property is exempt not only from real property taxes but also from sale to recoup back taxes owed. *In re Application of County Collector,* 79 Ill.App.3d 151, 398 N.E.2d 392, 34 Ill.Dec. 717 (1st Dist. 1979).

A home rule county may apply its amusement tax to all amusement facilities in a municipality, including municipally owned facilities. *County of Cook v. Village of Rosemont,* 303 Ill.App.3d 403, 708 N.E.2d 501, 236 Ill.Dec. 915 (1st Dist. 1999).

D. [20.84] Municipal Regulation Affecting Other Public Bodies

Municipal regulatory ordinances may have an impact on property owned by other units of local government. These types of ordinances primarily relate to the health, safety, and welfare of the municipality's residents, such as zoning ordinances and building codes. Whether these ordinances can be applied to other public bodies requires an analysis of the type of regulation in issue and the effect of the regulation on the operations of the other unit of local government. It is clear that a municipal ordinance cannot be used to frustrate or contravene the statutory authority granted to another unit of local government. *Clement v. O'Malley,* 95 Ill.App.3d 824, 420 N.E.2d 533, 51 Ill.Dec. 119 (1st Dist. 1981), *affd sub nom. Clement v. Chicago Park District,* 96 Ill.2d 26 (1983). When municipalities have attempted to prohibit other units of local government from performing their statutory duties by means of zoning ordinances, such ordinances have been held invalid. *City of Des Plaines v. Metropolitan Sanitary District,* 48 Ill.2d 11, 268 N.E.2d 428 (1971); *Village of Swansea v. County of St. Clair,* 45 Ill.App.3d 184, 359 N.E.2d 866, 4 Ill.Dec. 33 (5th Dist. 1977). School districts, which are subject to the state life and safety codes, generally are not bound by local building codes. *Board of Education v. City of West Chicago,* 55 Ill.App.2d 401, 205 N.E.2d 63 (2d Dist. 1965); *Board of Education v. Carter,* 119 Ill.App.3d 857, 458 N.E.2d 50, 75 Ill.Dec. 882 (3d Dist. 1983). Public health regulations and inspections may be enforceable, however. *County of Macon v. Board of Education,* 165 Ill.App.3d 1, 518 N.E.2d 653, 116 Ill.Dec. 31 (4th Dist. 1987). Site development permits also may be required in order to construct township roads. *County of Lake v. Semmerling,* 195 Ill.App.3d 93, 551 N.E.2d 1110, 141 Ill.Dec. 767 (2d Dist. 1990). *But see Village of Oak Brook v. County of Du Page,* 173 Ill.App.3d 490, 527 N.E.2d 1066, 123 Ill.Dec. 428 (2d Dist. 1988) (no such requirement for county roads).

Other public bodies are not entitled to blanket immunity from local zoning ordinances, however. When the municipality is merely attempting to regulate a use under its police powers rather than prohibiting it in an arbitrary fashion, the municipality's regulatory powers will be sustained.

In *Wilmette Park District v. Village of Wilmette,* 112 Ill.2d 6, 490 N.E.2d 1282, 96 Ill.Dec. 77 (1986), the Supreme Court held that a park district was required to submit to a special-use proceeding for zoning. Based on the reasoning in *Wilmette Park District,* it would appear that municipal building codes also would be applicable to other units of local government if they have not adopted their own code. *See Village of Swansea v. County of St. Clair, supra.*

In the case of public agencies whose facilities are located within the boundaries of a home rule municipality, the building code and related regulations of the host municipality apply, in the absence of evidence of intent on the part of the legislature to exempt the public agency's facilities. *Lake County Public Building Commission v. City of Waukegan*, 273 Ill.App.3d 15, 652 N.E.2d 370, 209 Ill.Dec. 830 (2d Dist. 1995); *see also Boll v. Chicago Park District*, 249 Ill.App.3d 952, 620 N.E.2d 1082, 180 Ill.Dec. 765 (1st Dist. 1991).

The zoning of property that is adjacent to a municipality also may give rise to intergovernmental litigation. For a municipality to challenge zoning of adjacent territory by another city, the municipality must allege that it has suffered, or will suffer, some concrete and substantial injury in its corporate capacity. *Village of Barrington Hills v. Village of Hoffman Estates*, 81 I11.2d 392,410 N.E.2d 37,43 Ill.Dec. 37 (1980); *Village of Northbrook v. County of Cook,* 126 Ill.App.3d 145, 466 N.E.2d 1215, 81 Ill.Dec. 413 (1st Dist. 1984). Examples of concrete injury would be increased expenditure of municipal revenues, increased burden on local water supplies, and increased traffic congestion. In addition, the unreasonable prevention of the free flow of traffic between two municipalities is considered a concrete injury sufficient to form the basis of injunctive relief. *City of Evanston v. City of Chicago*, 279 Ill.App.3d 255, 664 N.E.2d 291, 215 Ill.Dec. 894 (Ill.App. 1 Dist. 1996). However, the potential loss of sales and property-tax revenues by one municipality because a second municipality has established a tax increment financing district for a new shopping mall is not a "distinct and palpable injury" and does not confer standing. *City of Carbondale v. City of Marion*, 210 Ill.App.3d 870, 569 N.E.2d 290, 155 Ill.Dec. 290 (5th Dist. 1991). In addition, the unreasonable prevention of the free flow of traffic between two municipalities is considered a concrete injury sufficient to form the basis of injunctive relief. *City of Evanston v. City of Chicago*, 279 Ill.App.3d 255, 664 N.E.2d 291, 215 Ill.Dec. 894 (1st Dist. 1996). In addition, local zoning ordinances approving the siting of a pollution control facility under the Environmental Protection Act (415 ILCS 5/39) are not subject to challenge by adjacent municipalities due to the statewide nature of the Act. *City of Elgin v. County of Cook*, 169 Ill.2d 53, 660 N.E.2d 875, 214 Ill.Dec. 168 (1996).

The key factors in analyzing any intergovernmental disputes concerning regulatory ordinances are (1) whether the subject matter is one that traditionally has been regulated by municipalities and (2) whether the regulation adversely affects the performance of the governmental duties of the other public body. Both factors must be considered by the litigator in formulating his strategy.

V. [20.85] FEDERAL LITIGATION

The municipal litigator's practice was altered permanently and dramatically in 1978 by the United States Supreme Court decision in *Monell v. Department of Social Services of City of New York,* 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978). *Monell* overruled one hundred years of precedent and found that units of local government were "persons" for the purposes of 42 U.S.C. §1983. Since public bodies were "persons," they were no longer immune from liability under §1983. Units of local government thus became exposed for the first time to lawsuits based on alleged federal civil rights violations, which carried with them the potential of both damages and attorneys' fees being assessed against the public body.

It is not an exaggeration to say that, in theory, §1983 could be used by the imaginative plaintiff's attorney to contest virtually any legislative or administrative decision of a municipality. The obvious advantage to the plaintiff in pursuing a federal cause of action is that, unlike state law, §1983 is not susceptible to various immunity defenses and, further, the successful plaintiff is allowed her attorneys' fees under 42 U.S.C. §1988. Indeed, it is a commonplace occurrence for a §1983 count to be added to complaints challenging municipal actions brought in the state court. Because state courts are courts of general jurisdiction, a §1983 action may be joined with other counts based purely on state law. *See, e.g., Beverly Bank v. Board of Review of Will County,* 117 Ill.App.3d 656, 453 N.E.2d 96, 72 Ill.Dec. 791 (3d Dist. 1983); *Bohacs v. Reid,* 63 Ill.App.3d 477, 379 N.E.2d 1372, 20 Ill.Dec. 304 (2d Dist. 1978). State courts are not necessarily bound to follow the law of their federal circuit. *See United States ex rel. Lawrence v. Woods,* 432 F.2d 1072 (7th Cir. 1970). *See also District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 75 L.Ed.2d 206, 103 S.Ct. 1303 (1983). The addition of a §1983 count to a complaint filed in state court is usually appropriate because of the breadth of §1983's reach. It authorizes a cause of action for damages for any deprivation of rights, privileges, or immunities secured by the Constitution and laws.

Conversely, with the 1990 adoption of 28 U.S.C. §1367(a), a §1983 claim may be joined with related state law claims, including claims that involve the joinder or intervention of additional parties.

The purpose of the following sections is not to serve as an exhaustive treatise on §1983 litigation. Rather, their scope is limited to a discussion of general principles and current trends.

A. Rights, Privileges, and Immunities Protected by §1983

1. [20.86] Application of Federal Constitution Through §1983

Section 1983 provides as follows:

> **Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.**

Congressional authority to regulate state action arises primarily from the Fourteenth Amendment to the federal Constitution, and §1983 has been enacted pursuant to that power. In effect, §1983 has become the principal enforcement mechanism for the Fourteenth Amendment itself. *See Mitchum v. Foster,* 407 U.S. 225, 32 L.Ed.2d 705, 92 S.Ct. 2151 (1972). The Fourteenth Amendment specifically includes due process and equal protection guarantees. In addition, by virtue of the "incorporation" doctrine, as fashioned by the United States Supreme Court, most of the first eight amendments of the federal Constitution also apply to the states by virtue of the Fourteenth Amendment. *See O'Hare Truck Service, Inc. v. City of Northlake,* 518 U.S. 712, 135 L.Ed.2d 874, 116 S.Ct. 2353 (1996); *Malloy v. Hogan,* 378 U.S. 1, 12 L.Ed.2d 653, 84 S.Ct. 1489 (1964); *Duncan v. Louisiana,* 391 U.S. 145, 20 L.Ed.2d 491,88 S.Ct. 1444 (1968). Any municipal action that illegally interferes with constitutionally protected rights potentially may give rise to a § 1983 action.

Several constitutional provisions are of particular importance in this context. The Fourteenth Amendment itself is of crucial importance since it prohibits the state from (a) depriving any person of "life, liberty, or property, without due process of law" (due process clause) or (b) denying any person equal protection of the laws (equal protection clause). These two clauses are the source of the vast majority of §1983 litigation directed against municipalities. In addition, the First Amendment (freedom of speech), the Fourth Amendment (freedom from unreasonable search and seizure), the Fifth Amendment (takings clause), and the Eighth Amendment (cruel and unusual punishment) are frequently involved.

In addition to the Constitution, federal laws are also implicated by the language of §1983. *Maine v. Thiboutot,* 448 U.S. 1, 65 L.Ed.2d 555, 100 S.Ct. 2502 (1980). However, to the extent that federal laws provide their own comprehensive enforcement mechanism, either implicitly or

explicitly, for violations, that remedy is exclusive. Section 1983 remedies are therefore inapplicable. *See, e.g., Middlesex County Sewerage Authority v. National Sea Clammers Association,* 453 U.S. 1, 69 L.Ed.2d 435, 101 S.Ct. 2615 (1981); *Suter v. Artist M.,* 503 U.S. 347, 118 L.Ed.2d 1, 112 S.Ct. 1360 (1992). *Compare Golden State Transit Corp. v. City of Los Angeles,* 493 U.S. 103,107 L.Ed.2d 420, 110 S.Ct. 444 (1989) (§1983 action could be maintained against City when City conditioned approval of cab licenses based on outcome of labor dispute). *Livadas v. Aubry,* 511 U.S. 1028, 128 L.Ed.2d 188, 114 S.Ct. 1535 (1994) (Labor Management Relations Act).

2. [20.87] Property Interests Under Due Process Clause

The Fourteenth Amendment and §1983 prohibit the deprivation of life, liberty, or property without due process of law by the state. Deprivation of life, liberty, or property that is accompanied by due process is not actionable. *Parrett v. City of Connersville,* 737 F.2d 690 (7th Cir. 1984); *Berman v. Parker,* 348 U.S. 26, 99 L.Ed. 27, 75 S.Ct. 98 (1954). Therefore, the first step in the analysis of a due process claim is a determination of the existence of a property or liberty interest sufficient to maintain the action.

In *Board of Regents v, Roth,* 408 U.S. 564, 33 L.Ed.2d 548, 561, 92 S.Ct. 2701 (1972), the Supreme Court described a "property" interest as follows:

> **To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it....**
>
> **Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.**

Real and personal property obviously are included within the scope of this definition. Other types of property interests may be created by statute, ordinance, or other governmental rules, regulations, or practices. *See, e.g., Goldberg v. Kelly,* 397 U.S. 254, 25 L.Ed.2d 287, 90 S.Ct. 1011 (1970) (welfare benefits); *Perry v. Sindermann,* 408 U.S. 593, 33 L.Ed.2d 570, 92 S.Ct. 2694 (1972) (de facto tenure program); *Vinyard v. King,* 728 F.2d 428 (10th Cir. 1984) (employee handbook with "for cause" requirement for dismissal creates property interest); *Reed v. Village of Shorewood,* 704 F.2d 943 (7th Cir. 1983) (liquor license). *Contra, Ole, Ole, Inc. v. Kozubowski,* 187 Ill.App.3d 277, 543 N.E.2d 178, 134 Ill.Dec. 895 (1st Dist. 1989), holding that a liquor license is not a property right and is not subject to due process protections; *see also Lawshe v. Simpson,* 16 F.3d 1475 (7th Cir. 1994), *Fitchsur v. City of Menominee Falls,* 31 F.3d 1401 (7th Cir. 1994). In addition, a

municipality may, by ordinance, create greater procedural protections for a probationary officer than may otherwise be required by state law. *Lewis v. Hayes,* 152 Ill.App.3d 1020, 505 N.E.2d 408,106 Ill.Dec. 102 (3d Dist. 1987); *McGraw v. City of Huntington Beach,* 882 F.2d 384 (9th Cir. 1989); *Samuel v. Holmes,* 138 F.3d 173 (5th Cir. 1998).

A statute, ordinance, or other regulation that confers certain benefits may be amended or repealed. A statute or ordinance creates a "mere expectation" of its continuation in force, not a "vested right"in its continuation. *Grobsmith v. Kempiners,* 88 Ill.2d 399,430 N.E.2d 973,58 Ill.Dec. 722 (1981); *Andre v. Board of Trustees,* 561 F.2d 48 (7th Cir. 1977) (residency requirement). The classic example of a nonproperty interest is public employment that is terminable at will. *Board of Regents v. Roth, supra; but see Ertl v. City of DeKalb,* 303 Ill.App.3d 524, 708 N.E.2d 574, 236 Ill.Dec. 988 (2d Dist. 1999) (collective bargaining agreement gave probationary officer a property interest).

A mere breach of contract by a decree of local government may not rise to a level of a deprivation of property in a constitutional sense. *Vaughn v. King,* 167 F.3d 347 (7th Cir. 1999) (state court remedies for breach of contract provide all the process that is due); *Mid-American Waste systems, Inc. v. City of Gary,* 48 F.3d 286 (7th Cir. 1995); *Lillehaug v. City of Sioux Falls,* 788 F.2d 1349 (8th Cir. 1986); *Brown v. Brienen,* 722 F.2d 360 (7th Cir. 1983); *Sudeikis v. Chicago Transit Authority,* 774 F.2d 766 (7th Cir. 1985). *See also Bishop v. Wood,* 426 U.S. 341, 48 L.Ed.2d 684, 96 S.Ct. 2074 (1976) ("permanent" employee not guaranteed continued employment under state law). The hallmark of property is an individual entitlement that cannot be removed except "for cause." *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 71 L.Ed.2d 265, 102 S.Ct. 1148 (1982). *Accord, Warzon v. Drew,* 60 F.3d 1234 (7th Cir. 1995).

3. [20.88] Liberty Interests Under Due Process Clause

In *Washington v. Glucksberg,* 521 U.S. 702, 137 L.Ed.2d 772, 117 S.Ct. 2258 (1997), the Supreme Court determined that, in addition to the specific freedoms protected by the Bill of Rights, fundamental "liberty" interests protected by the Due Process Clause include the right to marry; to have children; to direct a child's education; to marital privacy; to use contraception; and to have an abortion. Liberty interests are, therefore, historically recognized, fundamental rights. There is the liberty interest in one's physical integrity. *Ingraham v. Wright,* 430 U.S. 651, 51 L.Ed.2d 711, 97 S.Ct. 1401 (1977) (corporal punishment of school children); *Thibodeaux v. Bordelon,* 740 F.2d 329 (5th Cir. 1984) (prisoner injured by fire). Also, a liberty interest exists in one's reputation if that interest is coupled with deprivation of another significant interest. This is the so-called "stigma plus" test. In other words, if a person is allegedly defamed by a governmental official, that defamation, in and of itself, does not violate a protected liberty interest. *Paul v. Davis,* 424 U.S. 693, 47 L.Ed.2d 405, 96 S.Ct. 1155 (1976); *Bone v. City of Lafayette,* 763 F.2d 295 (7th Cir. 1985). However, when the defamation is accompanied by loss of some other liberty or property interest, such as

employment, the "stigma plus" test is met, and a cause of action is stated. *Owen v. City of Independence,* 445 U.S. 622, 63 L.Ed.2d 673, 100 S.Ct. 1398 (1980). *See Marrero v. City of Hialeah,* 625 F.2d 499 (5th Cir. 1980) (damage to reputation coupled with Fourth Amendment violations). A liberty interest is not implicated merely by reduction in an individual's attractiveness to potential employers. *Perry v. F.B.I.,* 781 F.2d 1294 (7th Cir. 1986). *See Simpkins v. Sandwich Community Hospital,* 854 F.2d 215 (7th Cir. 1988), and *Hannon v. Turnage,* 892 F.2d 653 (7th Cir. 1990), applying the stigma plus test to employees' dismissal claims.

4. [20.89] Other Constitutional Provisions

By virtue of the incorporation doctrine, virtually all the provisions of the first eight amendments to the federal Constitution have been made applicable to the states through the Fourteenth Amendment. The guarantees afforded by these amendments are therefore protectible interests under §1983. *Washington v. Glucksberg, supra; Augustine v. Doe,* 740 F.2d 322 (5th Cir. 1984); *Mann v. City of Tucson, Department of Police,* 782 F.2d 790 (9th Cir. 1986).

5. [20.90] Equal Protection Clause

All persons are entitled to equal protection under the laws under the Fourteenth Amendment. Historically, the Supreme Court had interpreted the equal protection clause as protecting individuals from purposeful or invidious class-based discrimination, and the plaintiff was therefore required to demonstrate that the governmental officials had the requisite intent to discriminate purposefully against a particular, identifiable class of persons. *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252,50 L.Ed.2d 450,97 S.Ct. 555 (1977); *Personnel Administrator of Massachusetts v. Feeney,* 442 U.S. 256,60 L.Ed.2d 870,99 S.Ct. 2282 (1979); *Shango v. Jurich,* 681 F.2d 1091 (7th Cir. 1982). However, the limitation of equal protection claims to a particular, identifiable class is no longer valid. In *Village of Willowbrook v. Olech,* ___ U.S. ___, 145 L.Ed.2d 1060, ___ S.Ct. ___ (2000), the Supreme Court held that the Equal Protection Clause gives rise to a cause of action on behalf of a "class of one." *See also Esmail v. Macrane,* 53 F.3d 176 (7th Cir. 1995). Even if purposeful discrimination is shown, the plaintiff still must demonstrate that the governmental regulation is without rational basis, illegally impinges on a fundamental right, or otherwise violates constitutional principles. *Saenz v. Roe,* 526 U.S. 489, 143 L.Ed.2d 689, 119 S.Ct. 1518 (1999) (California's limitation on welfare benefits for certain residents violates the right to travel and equal protection. See also discussion at §§20.106 - 20.109.

The mere failure of a municipality to enforce the laws with "Prussian thoroughness" is not an equal protection violation. *Hameetman v. City of Chicago,* 776 F.2d 636 (7th Cir. 1985). However, when the plaintiff can show that there is a policy or custom of providing less police protection to women based on their gender, an equal protection claim will lie. *Hynson v. City of*

Chester, Legal Department, 864 F.2d 1026 (3d Cir. 1988); *Watson v. Kansas City, Kansas*, 857 F.2d 690 (10th Cir. 1988) (domestic violence cases).

Analytically, the courts have begun to draw a distinction between legislative and administrative acts for purposes of the equal protection analysis. Where generally applicable legislation is enacted, even if prompted by a danger posed by only one particular actor, the legal test is whether the legislation is rationally related to a legitimate public purpose. *Pro-Eco, Inc. v. Board of Commissioners of Jay County, Indiana*, 57 F.3d 505 (7th Cir. 1995); *Hager v. City of West Peoria*, 84 F.3d 865 (7th Cir. 1996). The motivations of the legislators in enacting legislation may be irrelevant where the legislation is challenged on its face. *City of Erie v. Pap's A.M.*, 2000 WL 323 381 (S.Ct. 2000) (the "Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive"); *Pro-Eco, supra; see also Bogan v. Scott-Harris*, 523 U.S. 44,140 L.Ed.2d 79, 118 S.Ct. 966 (1998). However, the legal analysis is different in cases where the enforcement of legislative acts is placed in issue. In such cases, the legislation is not attacked on its face, but as applied. Consequently, the motivation of the enforcing official becomes a relevant factor. *Village of Willowbrook, supra; Esmail, supra.*

6. [20.91] Substantive Due Process

The Supreme Court has shed a great deal of light on the contours of the right to "substantive due process" in a series of recent opinions. Only laws that affect "fundamental rights" come within the purview of this doctrine. *Reno v. Flores*, 507 U.S. 292, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993); *Washington v. Glucksberg*, 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). Substantive due process is derived from the many constitutional rules that protect personal liberty from unjustified governmental intrusions. *McKenzie v. City of Chicago*, 118 F.3d 552 (7th Cir. 1997). The substantive right must be a fundamental right, and the national's legal traditions must recognize a specific limitation on governmental action with respect to that right. *Washington, supra; Mays v. City of East St. Louis, Ill.*, 123 F.3d 999 (7th Cir. 1997). The fundamental rights and liberty interests implicated by the doctrine include things like the right to marry, to have children, to direct the education and upbringing of one's children, marital privacy, the use of contraception, bodily integrity, and the right to choose an abortion. *Washington, supra; Dunn v. Fairfield Community High School District No. 225*, 158 F.3d 962 (7th Cir. 1998).

Only conduct which "shocks the conscience" is considered to violate substantive due process. *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998); *Dunn, supra; see Rochin v California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952). Negligent conduct can virtually never meet this constitutional threshold. Rather, the test requires an abuse of governmental power "intended to injure in some way unjustifiable to any governmental interest." *Lewis, supra*, 118 S.Ct. at 1718; *Dunn, supra; McKenzie, supra* (economic regulation is governed by the rational basis test, not substantive due process); *National Paint and Coatings Ass'n v. City*

of Chicago, 45 F.3d 1124 (7th Cir. 1995) (economic regulation is governed by the rational basis test, not substantive due process).

Substantive due process claims have also appeared frequently in the course of land use litigation in which it is alleged that the denial of a rezoning or variation request has violated the plaintiff's property rights. Even before *Washington* and *Lewis*, the Seventh Circuit had established a high threshold that is necessary for the plaintiff to meet in order to state a substantive due process claim. The municipal decision must be "invidious and irrational." *Harding v. County of Door,* 870 F.2d 430 (7th Cir. 1989); *Coniston Corp. v. Village of Hoffman Estates,* 844 F.2d 461 (7th Cir. 1988); *Long Grove Country Club Estates, Inc. v. Village of Long Grove,* 693 F.Supp. 640 (N.D. Ill. 1988). A decision that is merely erroneous is not a sufficient basis for a substantive due process claim. *See also Schroeder v. City of Chicago,* 715 F.Supp. 222 (N.D. Ill. 1989), applying the "invidious or irrational" standard to a pension claim.

In the context of municipal employment cases, the Seventh Circuit has required the plaintiff in a substantive due process case to show (1) an irrational decision and (2) either some other constitutional violation or the inadequacy of state remedies. *Strasburger v. Board of Education,* 143 F.3d 351 (7th Cir. 1998); *Wudtke v. Davel,* 128 F.3d 1057 (7th Cir. 1997).

7. [20.92] Summary of Rights, Privileges, and Immunities

As can be seen, the scope of constitutional protections afforded by the Fourteenth Amendment is indeed extensive. An alleged violation of any of these constitutional guarantees is sufficient to form the basis for a §1983 action. Virtually any municipal action, whether legislative or administrative, will, to some degree, impact on one or more of the rights, privileges, and immunities that have been identified by the courts in the context of Fourteenth Amendment guarantees. The very potential of §1983 to become a vehicle that could transform federal courts into "superlegislatures" has resulted in significant checks being placed on the use of this sweeping judicial power. Adherence to the fundamental notion of federalism has mandated that a balance be struck between the rights of local government to legislate and regulate, on the one hand, and the constitutional guarantees protected under §1983 on the other. The evolution of these checks is discussed in the following sections.

B. [20.93] State Action Requirement and Constitutional Deprivation

Section 1983 is limited to actions of the states or their political subdivisions (state action) and has no application to actions of private individuals. In addition, the official who has performed the act that the plaintiff has alleged to be a constitutional deprivation must be acting under "color of law."

1. [20.94] Color of Law

A governmental official automatically is considered to have acted under "color of law" if his actions are fairly attributable to his official capacity. *See Monroe v. Pape,* 365 U.S. 167, 5 L.Ed.2d 492,81 S.Ct. 473 (1961); *Lugar v. Edmondson* Oil Co., 457 U.S. 922,73 L.Ed.2d 482,102 S.Ct. 2744 (1982). The fact that the official has exceeded his authority, or has even acted in violation of state law, is irrelevant under this analysis. *United States v.* Classic, 313 U.S. 299, 85 L.Ed. 1368, 61 S.Ct. 1031 (1941). *See also Rogers v. City of Little Rock, Ark.,* 152 F.3d 790 (8th Cir. 1998); and *Tavarez v. O'Malley,* 826 F.2d 671 (7th Cir. 1987), holding that ultra vires conduct may be the basis for a § 1983 action. A private not-for-profit corporation that organizes an annual festival, even though it receives a municipal permit to use public property, is not a state actor. *UAW Local 5285 v. Gaston Festivals,* 43 F.3d 902 (4th Cir. 1994). For the attorney representing a municipality or other unit of local government, the requirements of state action and acting under "color of law" usually are not in issue since it is the act of an official that is itself the subject matter of the complaint. The state action requirement usually becomes a contested issue only when a private party defendant is sought to be joined. *See, e.g., Burton v. Wilmington Parking Authority,* 365 U.S. 715,6 L.Ed.2d 45, 81 S.Ct. 856 (1961); *Blum v. Yaretsky,* 457 U.S. 991, 73 L.Ed.2d 534,102 S.Ct. 2777 (1982); *Tulsa Professional Collection Services, Inc. v. Pope,* 485 U.S. 478, 99 L.Ed.2d 565, 108 S.Ct. 1340 (1988). A private apartment complex that bars certain individuals from entering on the premises is not a state actor, even if police serve the barring notice. *Williams v. Nagel,* 162 Ill.2d 542, 643 N.E.2d 816, 205 Ill.Dec. 525 (1994). In *People v. DiGuida,* 152 Ill.2d 104, 604 N.E.2d 336, 178 Ill.Dec. 80 (1992), the Illinois Supreme Court was asked whether the free speech provision of the Illinois Constitution extended the concept of "state action" to a grocery store's private property. The Court held that the Illinois provision, like the First Amendment, applied only to governmental action. Moreover, the state prosecution of criminal trespass laws did not constitute "State action."

Another exception to this general rule involves purely private conduct of officials. An off-duty policeman's conduct may not be state action if the act complained of arises from purely personal motives unrelated to his duties. *Bonsignore v. City of New York,* 683 F.2d 635 (2d Cir. 1982). The same rule may even apply to on-duty officers under appropriate circumstances. *Woodward v. City of Worland,* 977 F.2d 1392 (10th Cir. 1992) (sexual harassment); *Rogers v. Fuller,* 410 F.Supp. 187 (N.D. Ill. 1976) (police officer stealing while in uniform). Whether the policeman is off duty is not dispositive of the state action issue. All the circumstances must be considered in order to determine if state action is present. *Zambrana-Marrero v. Suarez-Cruz,* 172 F.3d 122 (1st Cir. 1999); *see Layne v. Sampley,* 627 F.2d 12 (6th Cir. 1980) (state action found); *Traver v. Meshriy,* 627 F.2d 934 (9th Cir. 1980) (police officer engaged in approved secondary employment as security guard; state action found). *See also Gibson v. City of Chicago,* 701 F.Supp. 666 (N.D. Ill. 1988) (police officer placed on medical leave due to mental unfitness and stripped of all authority; state action not found).

2. [20.95] Constitutional Deprivation

Not all deprivations of property or liberty rise to the level of constitutional deprivations. In *Daniels v. Williams,* 474 U.S. 327, 88 L.Ed.2d 662,106 S.Ct. 662 (1986), the §1983 action was based on the negligence of prison guards in leaving a pillow on the stairs, which resulted in the plaintiff's injury. The Court held that mere negligence was insufficient to constitute a due process deprivation. *Accord, Bryan County v. Brown,* ___ U.S. ___, 117 S.Ct. 1382 (1997) (no cause of action for negligent hiring of a police officer. The Court did not articulate what tort-type standard should be applied in future cases, however. The Court did state that a "lack of due care" was not equivalent to the abuse of governmental power. Protection against abuse of power is quintessentially the guarantee of the due process clause. Thus, no constitutional deprivation of either property or liberty occurred in *Daniels.*

The Supreme Court further noted that its decision was not intended to foreclose the possibility that other constitutional rights might be deprived by mere negligence. This remains an open question. However, the lower federal courts generally have applied the heightened standard of "deliberate indifference" or "reckless indifference" to the plaintiff's constitutional rights as the minimum necessary to establish the existence of constitutional deprivation. *See, e.g., Hammond v. County of Madera,* 859 F.2d 797 (9th,Cir. 1988); *Barnier v. Szentmiklos,* 810 F.2d 594 (6th Cir. 1987); *Germany v. Vance,* 868 F.2d 9 (1st Cir. 1989). Since all acts and omissions, even negligent ones, are "intentional" on the part of the actor, one must look to the foreseeable consequences of the act to gauge whether "deliberate indifference" exists. *Germany v. Vance,* 868 F.2d at 18 n. 11, citing Justice Blackmun's dissent in *Davidson v. Cannon,* 474 U.S. 344, 88 L.Ed.2d 677, 686 n.2, 106 S.Ct-668(1986).

a. [20.96] Violations of State Law

A mere violation of state law does not effect a constitutional deprivation that would give rise to a § 1983 cause of action. *Spell v. McDaniel,* 591 F.Supp. 1090 (E.D. N.C. 1984); *Crocker v. Hakes,* 616 F.2d 237 (5th Cir. 1980); *Muckway v. Craft,* 789 F.2d 517 (7th Cir. 1986). It also has been held that procedural protections embodied in state law do not rise to the status of constitutionally protected property interests. *Doe v. Milwaukee County,* 903 F.2d 499 (7th Cir. 1990); *Villanova v. Abrams,* 972 F.2d 792 (7th Cir. 1992). *Accord, Miller v. Crystal Lake Park District,* 47 F.3d 865 (7th Cir. 1995).

b. [20.97] Duty To Provide Public Services

In a similar vein, it generally is recognized that the failure to provide a particular level of public service or to prevent harm to the public generally does not constitute a constitutional deprivation. *Jackson v. City of Joliet,* 715 F.2d 1200 (7th Cir. 1983) (no constitutional violation when state officers are grossly negligent in failing to extricate or otherwise aid accident victim);

Jackson v. Byrne, 738 F.2d 1443 (7th Cir. 1984) (holding no constitutional duty to provide fire protection services; hence, no § 1983 claim may be brought by individuals injured from fire during Chicago firefighters' strike); *Bradburry v. Pinella County,* 789 F.2d 1513 (1 1th Cir. 1986) (gross negligence by lifeguard causing drowning; insufficient to state due process claim); *Love v. King,* 784 F.2d 708 (5th Cir. 1986) (no due process claim against police chief for failure to stop domestic shooting). *But see Calloway v Kinkelaar,* 168 Ill.2d 312, 659 N.E.2d 1322, 213 Ill.Dec. 675 (1995), where the Court held that the Domestic Violence Act allowed an action for damages against police officers and municipalities if there was wilful and wanton misconduct, and *Shipp v. McMahon,* ___ F.3d ___ (2000) (failure to respond to victim complaints supported claim of discriminatory motive for equal protection purposes).

Substantive due process claims have been rejected in cases in which the state is alleged to have an affirmative duty to prevent harm from private third parties. *DeShaney v. Winnebago County .Department of Social Services,* 489 U.S. 189, 103 L.Ed.2d 249, 109 S.Ct. 998 (1989); *Salazar v. City of Chicago,* 940 F.2d 233 (7th Cir. 1991); *J. 0. v. Alton Community Unit School District 11,* 909 F.2d 267 (7th Cir. 1990). There is an exception, however, to the extent that the state has functional custody of the individual or places the individual in danger through an affirmative act. *Bowers v. De Vito,* 686 F.2d 616 (7th Cir. 1982); *K.H. ex rel. Murphy v. Morgan,* 914 F.2d 846 (7th Cir. 1990); *Yvonne L. v. New Mexico Department of Human Services,* 959 F.2d 883 (10th Cir. 1992); *Ross v. United States,* 910 F.2d 1422 (7th Cir. 1990). There is no duty to guarantee safety or security in a municipal workplace. *Collins v. City of Harker Heights, Texas,* 503 U.S. 115, 117 L.Ed.2d 261, 112 S.Ct. 1061 (1992). *See also DeShaney v. Winnebago County, supra* (no duty to provide protective services for child placed with parents who later abuse child; no constitutional deprivation occurs since due process clause does not require state to provide protective services), and *Kitzman-Kelley v. Warner,* 203 F.3d 454 (7th Cir. 2000). There may be no special duty to protect students. In *v. Alexander,* 44 F.3d 1297 (5th Cir. 1995), an en banc panel held that voluntary enrollment in school precluded the finding of a special relationship.

3. [20.98] State of Mind Requirements

Section 1983 is purely a remedial statute and, in and of itself, creates no substantive rights. The substantive rights are created through federal laws and the Constitution, as interpreted by the Supreme Court. Thus, depending on the type of substantive claim asserted, there may be independent legal tests that must be met in order to establish a constitutional violation. For example, to state an equal protection claim under the Fourteenth Amendment, the plaintiff must demonstrate the existence of "purposeful discriminatory intent." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252,50 L.Ed.2d 450,97 S.Ct. 555 (1977). A difficult issue of determining intent can arise when a governing board or council is involved. In some cases, it has been held that, if the board is charged in a §1983 lawsuit with effecting the discriminatory animus of its constituents, a sufficient showing of unlawful intent may be made by establishing (a) that the

decision-making body acted for the sole purpose of effecting the desires of the private citizens, (b) that racial considerations were a motivating factor behind those desires, and (c) that members of the decision-making body were aware of the motivations of the private citizens. *United States v. City of Birmingham,* 538 F.Supp. 819, 828 (E.D. Mich. 1982), *aff'd as modified,* 727 F.2d 560 (6th Cir.), *cert. denied,* 469 U.S. 821 (1984) *See also Contreras v. City of Chicago,* 920 F.Supp. 1370, 1399 n. 19 (N.D. Ill.1996); *Scott-Harris v. City of Fall River,* 134 F.3d 427 (1st Cir. 1997), *aff'd on other grounds, sub nom. Bogan v. Scott-Harris,* 523 U.S. 44, 118 S.Ct. 966, 140 L.Ed.2d 79 (1998), discussing whether unconstitutional animus on the part of a majority of the board is required. However, in the recent case of *City of Erie v. Pap's A.M.,* 2000 WL 313381 (S.Ct. 2000), the Court rejected the argument that an alleged illicit legislative motive was sufficient to strike down an otherwise valid ordinance or statute. While the *City of Erie* case arose in the context of a First Amendment challenge, its reasoning would seem to apply with equal force to claims of discriminatory animus under the equal protection clause. In the equal protection context, the Seventh Circuit has drawn a well-reasoned distinction between legislation and the enforcement of legislation. *Grossbaum v. Indianapolis-Marion County Bldg. Authority,* 100 F.3d 1287 (7th Cir. 1996). Except in a few limited circumstances, the motives of legislators in enacting legislation are irrelevant to the equal. protection analysis. *Id.* at 1292-95. However, where laws are unequally applied, the plaintiff may state a claim for retaliation against the unit of government. *Id.* at 1295. Under the Eighth Amendment, a showing of "deliberate indifference" is required for prisoner medical claims. *Estelle v. Gamble,* 429 U.S. 97, 50 L.Ed.2d 251, 97 S.Ct. 285 (1976). But the state of mind requirement for Eighth Amendment claims arising from prison security situations appears to hinge on whether the force used was accompanied by malice or applied sadistically to cause harm. *Hudson v. McMillan,* 503 U.S. 1, 117 L.Ed.2d 156, 112 S.Ct. 995 (1992).

Thus, whether there actually has been a constitutional violation is an important inquiry that the litigator should address whenever drafting or reviewing a §1983 complaint. Assuming a constitutional violation is alleged, the next inquiry is whether the plaintiff was denied due process of law.

C. [20.99] Procedural Due Process

To state a claim for procedural due process, the plaintiff must establish the existence of a liberty or property interest (§§20.86 - 20.92) that has been infringed on by state action (§§ 20.93 - 20.98). If these threshold criteria are satisfied, the next inquiry is what sort of procedures are necessary to meet procedural due process safeguards. In this context, two issues must be addressed: (1) the form of the due process hearing and (2) the time at which the due process hearing must be given. Again, it must be emphasized that under current law procedural due process concerns are relevant only when there has been an alleged deprivation of a liberty or property interest. Of course, when the challenged action is a legislative act affecting the interests of persons generally, as opposed to an adjudicative-type decision, the due process clause does not require individualized hearings.

Dawson v. Milwaukee Housing Authority, 930 F.2d 1283 (7th Cir. 1991); *Pro-Eco, Inc. v. Board of Commissioners of Jay County, Indiana,* 57 F.3d 505 (7th Cir. 1995).

Procedural due process may be irrelevant when other constitutional rights (for example, free speech rights under the First Amendment) are allegedly violated. See discussion at §§20.103 - 20.105.

1. [20.100] Due Process Hearings

The form of a due process hearing depends to a large extent on the nature of the property or liberty interests that are involved. In the leading case of *Goldberg v. Kelly,* 397 U.S. 254,25 L.Ed.2d 287, 90 S.Ct. 1011 (1970), the Court held that an evidentiary hearing was required before termination of welfare benefits. It was held that, at a bare minimum, the recipient was entitled to adequate notice, an opportunity to present evidence, the right to cross-examine adverse witnesses, and the right to retain counsel. In *Arnett v. Kennedy,* 416 U.S. 134, 40 L.Ed.2d 15, 94 S.Ct. 1633 (1974), however, the Court found that a full, pretermination, adversarial proceeding was not necessary in the context of dismissal of a federal employee. Since there was a right to an evidentiary hearing on appeal, the Court found the procedures adequate. In *Goss v. Lopez,* 419 U.S. 565, 42 L.Ed.2d 725, 95 S.Ct. 729 (1975), the Court held that school children who are suspended from school for ten days or less must, at a minimum, be advised of the charges against them and be afforded the right to present their side of the story to the authorities before the suspension. The right to proceed to arbitration under a collective bargaining agreement may, under certain circumstances, also satisfy procedural due process concerns. *Jackson v. Temple University of Commonwealth System of Higher Education,* 721 F.2d 931 (3d Cir. 1983); *Parrett v. City of Connersville,* 737 F.2d 690 (7th Cir. 1984); *Chaney v. Suburban Bus Division,* 52 F.3d 623 (7th Cir. 1995).

As can be seen from these cases, there is a wide spectrum of acceptable due process procedures. The key element is whether the procedures are tailored to give sufficient protection to the particular right that is being affected.

2. [20.101] Pre-Deprivation Procedural Due Process

The timing of a due process hearing may be of critical importance in a §1983 action. Under certain circumstances, the right to a pre-deprivation due process hearing may exist. The test for this element of due process was set forth by the Supreme Court in *Mathews v. Eldridge,* 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976). To determine whether a pre-deprivation hearing is required, a cost-benefit analysis is used. This test analyzes three criteria: (a) the nature of the interest that will be affected by the official action; (b) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;

and (c) the government's interest in the activity involved and the fiscal and administrative burden that the additional or substitute procedural requirement would entail.

If a pre-deprivation hearing is impracticable under the *Mathews* test, it need not be afforded to the plaintiff. *Ingraham v. Wright,* 430 U.S. 651, 51 L.Ed.2d 711, 97 S-Ct. 1401 (1977) (pre-deprivation hearing relative to corporal punishment not required; disruptive in school setting). However, failure to provide a pre-deprivation hearing, if practicable, can itself become a cause of action enforceable under § 1983. *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 84 L.Ed.2d 494,105 S.Ct. 1487 (1985); *Westborough Mall, Inc. v. City of Cape Girardeau,* 794 F.2d 330 (8th Cir. 1986). Depending on the circumstances, this type of violation may result only in an assessment of nominal damages. *See, e.g., Carey v. Piphus,* 435 U.S. 247, 55 L.Ed.2d 252, 98 S.Ct. 1042 (1978). A pre-suspension hearing may not be required to suspend a public employee for a short period of time based on serious charges of misconduct. *Gilbert v. Homar,* 520 U.S. 924, 138 L.Ed.2d 120, 117 S.Ct. 1807 (1997); *Ibarra v. Martin,* 143 F.3d 286 (7th Cir. 1998).

It should be noted that the existence of adequate post-deprivation due process is irrelevant under this analysis if pre-deprivation due process is practicable. *Compare Westborough Mall Inc., supra* (pre-deprivation hearing practicable) *with Brown v. Brienen,* 722 F.2d 360 (7th Cir. 1983) (pre-deprivation hearing would serve no practical purpose in alleged breach of contract case).

3. [20.102] Post-Deprivation Procedural Due Process

The most significant recent case regarding post-deprivation procedural due process is *Parratt v. Taylor,* 451 U.S. 527,68 L.Ed.2d 420, 101 S.Ct. 1908 (1981). In *Parratt,* a prisoner's hobby kit was lost by prison officials when established procedures for handling mail were not followed. The prisoner sued under § 1983, alleging a negligent deprivation of his property without due process of law.

The Supreme Court initially held that there had been a deprivation of property in a constitutional sense *(but see Daniels v. Williams,* 474 U.S. 327, 88 L.Ed.2d 662, 106 S.Ct. 662 (1986), in which this particular holding was overruled). The Court further held that the deprivation was *not* without due process of law because the state provided an adequate post-deprivation tort law remedy. The Court's reasoning was that it was not feasible to provide a pre-deprivation hearing for a single "random and unauthorized" act that resulted in a property deprivation.

In *Hudson v. Palmer,* 468 U.S. 517, 82 L.Ed.2d 393, 104 S.Ct. 3194 (1984), the Court extended the *Parratt* rule to include intentional deprivations of property.

The *Parratt* rule is also applicable to alleged deprivations of liberty interests. *Ingraham v. Wright,* 430 U.S. 651, 51 L.Ed.2d 711, 97 S.Ct. 1401 (1977); Ellis *v. Hamilton,* 669 F.2d 510 (7th

Cir. 1982); *Thibodeaux v. Bordelon,* 740 F.2d 329 (5th Cir. 1984). The *Parratt* rule is of great practical significance to the litigator. By focusing on the availability of state post-deprivation remedies, *Parratt* can be used to eliminate a great number of potential § 1983 claims and have state remedies applied.

An important element of the *Parratt* rule is that the state post-deprivation remedies must be adequate. If by virtue of established state procedure the plaintiff's property or liberty interests are destroyed, then the *Parratt* rule is inapplicable. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 71 L.Ed.2d 265, 102 S.Ct. 1148 (1982) (plaintiff lost post-deprivation remedy by virtue of state law because of failure of Fair Employment Practices Commission to convene); *Holman v. Hilton,* 712 F.2d 854 (3d Cir. 1983) (denial of normally available post-deprivation remedies). Thus, when established state procedure has effectively denied a post-deprivation remedy, the *Parratt* rule cannot be applied. The state post-deprivation remedy is not rendered inadequate simply because it does not afford the same type of relief as could be had under §1983. Parratt, supra.

The *Logan v. Zimmerman Brush Co.* exception does not arise if the established state procedure itself is adequate. The mere unauthorized failure of the state's agents to follow established procedure or their erroneous determinations made even after following those procedures does not give rise to a § 1983 claim. *Cohen v. City of Philadelphia,* 736 F.2d 81 (3d Cir. 1984); *Albery v. Reddig,* 718 F.2d 245 (7th Cir. 1983); *Creative Environments, Inc. v. Estabrook,* 680 F.2d 822 (1st Cir. 1982). Even when errors are extreme, the *Parratt* rule is applicable. *Roy v. City of Augusta,* 712 F.2d 1517 (lot Cir. 1983). Nor is a state remedy rendered inadequate because of the existence of state immunities. *Id. See Daniels v. Williams, supra.*

Based on *Parratt, Hudson,* and *Daniels,* it appears that garden-variety tort cases involving municipalities should no longer be cognizable under §1983. For example, if a municipal officer is involved in a traffic accident in which negligence is alleged, §1983 does not apply. Cannon v. *Taylor,* 782 F.2d 947 (11th Cir. 1986). A constitutional deprivation of property or liberty has not occurred since mere negligence is involved *(Daniels),* and the plaintiff has adequate state tort law remedies *(Parratt).* Equally significant, these types of cases do not involve the type of abuse of governmental power that is the reason for the existence of §1983. *Daniels, supra. See also Davidson v. Cannon,* 474 U.S. 344, 88 L.Ed.2d 677, 106 S.Ct. 668 (1986).

When "random or unauthorized" acts are not the cause of the constitutional deprivation, however, the *Parratt* rule with respect to procedural due process is inapplicable, even when adequate state remedies are available. *Zinermon v. Burch,* 494 U.S. 113,108 L.Ed.2d 100, 110 S.Ct. 975 (1990); *Matthiessen v. Board of Education,* 857 F.2d 404 (7th Cir. 1988). In *Wilson v. Civil Town of Clayton,* 839 F.2d 375 (7th Cir. 1988), the Seventh Circuit set forth the general rule that if the complaint pleads sufficient facts to meet the test enunciated in *Monell v. Department of Social Services of City of New York,* 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978), then the

constitutional deprivation is neither "random nor unauthorized" but rather is the consequence of official policy or custom. *Parratt* does not apply in these circumstances.

4. [20.103] Procedural Due Process and Other Constitutional Rights

As noted in § 20.102, the procedural due process analysis is relevant to alleged constitutional deprivations of liberty and property. The question therefore arises whether the same analysis is relevant to alleged violations of (a) other constitutional provisions that have been incorporated into the Fourteenth Amendment; (b) the rights secured through substantive due process; and (c) equal protection of the laws.

At the present, there is no definitive answer to this inquiry. The following discussion must therefore be viewed in light of the unsettled nature of the law.

a. [20.104] Pre-Deprivation Procedural Due Process

Although a rare case, it would appear that pre-deprivation due process would be considered an adequate state law remedy to protect alleged violations of incorporated constitutional guarantees and substantive due process rights. For example, in the First Amendment context, the Supreme Court tacitly upheld this approach in *Board of Regents v. Roth,* 408 U.S. 564, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972), and *Perry v. Sindermann,* 408 U.S. 593, 33 L.Ed.2d 570, 92 S.Ct. 2694 (1972). While both cases focused primarily on the concept of property rights, the plaintiffs had alleged termination of their employment because of the exercise of their First Amendment rights. The appropriate remedy, as determined by *Perry v. Sindermann,* was to remand the case for a hearing with the necessary procedural due process safeguards.

By contrast, in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274,50 L.Ed.2d 471, 97 S.Ct. 568 (1976), the employee, a non-tenured teacher, patently had no property rights in his position and, therefore, no enforceable procedural due process rights. In fact, a pre-termination hearing had not been provided. The teacher alleged that he had been terminated for the exercise of his First Amendment rights. The Court held that the teacher could not be discharged for a constitutionally impermissible reason, irrespective of the existence of any property right in his position. *Mt. Healthy* did not reach the difficult question of whether a pre-deprivation hearing is sufficient to protect First Amendment rights.

If a pre-deprivation hearing is afforded, it would appear sufficient to protect the plaintiff's constitutional rights and substantive due process rights. *Lee v. City of Peoria,* 685 F.2d 196 (7th Cir. 1982) (discrimination claims not raised in state discharge proceeding cannot be asserted in § 1983 action on basis of res judicata). *But see McDonald v. City of West Branch,* 466 U.S. 284,80 L.Ed.2d

302, 104 S.Ct. 1799 (1984); *Parrett v. City of Connersville, Inc.*, 737 F.2d 690 (7th Cir. 1984) (First Amendment claim not barred by prior arbitration award).

b. [20.105] Post-Deprivation Procedural Due Process

In general, post-deprivation procedural due process is insufficient to protect substantive due process rights, constitutional rights, or equal protection guarantees. *See Beckwith v. City of Daytona Beach Shores,* 58 F.3d 1554 (11th Cir. 1995); *Augustine v. Doe,* 740 F.2d 322 (5th Cir. 1984); *Mann v. City of Tucson, Department of Police,* 782 F.2d 790 (9th Cir. 1986). Strictly construed, *Parratt v. Taylor,* 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct. 1908 (1981), applies only to liberty and property interests under the due process clause and not to substantive constitutional proscriptions. *See Shelton v. City of College Station,* 754 F.2d 1251 (5th Cir.), *rehg granted, en banc,* 765 F.2d 456 (5th Cir. 1985), *different results reached on rehg, en banc,* 780 F.2d 475 (5th Cir. 1986); *Sinaloa Lake Owners Association v. City of Simi Valley,* 864 F.2d 1475 (9th Cir. 1989). However, there appear to be exceptions developing to this general rule. The exceptions seem to be based on a functional analysis of the right in issue. In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 U.S. 172, 87 L.Ed.2d 126,105 S.Ct. 3108 (1985), the Supreme Court applied *Parratt* by analogy to a Fifth Amendment "taking" claim that arose in the context of land use regulation. (See also a discussion of *Williamson County* at § 20.135.) A claim for deprivation of property without due process of law under the Fourteenth Amendment was also in issue. Under the general rule, the post-deprivation due process analysis should be inapplicable since a Fifth Amendment claim is in issue. However, the Supreme Court held that the plaintiff had to pursue the state remedy of inverse condemnation before filing a §1983 action, reasoning that the state action had not become final until just compensation was denied. In this sense, *Williamson County* could be viewed as a pre-deprivation case. See discussion at §20.104. From a functional analysis, however, the deprivation of a property right was the matter in issue. Since the alleged deprivation of a property right was enforceable under the due process clause itself, one could argue that the Fifth Amendment claim should not be used to resurrect a §1983 action that would be foreclosed by *Parratt.*

This type of functional analysis has been used by Justice Posner of the Seventh Circuit Court of Appeals in *Brown v. Brienen,* 722 F.2d 360 (7th Cir. 1983). In *Brown,* the controversy centered on the refusal of the county sheriff to allow his employees to use accrued compensatory time off. The court found that since the alleged deprivation of a property interest was in issue, the *Parratt* rule was applicable. Of greater significance, however, the court further rejected the plaintiff's substantive due process claim. The substantive due process claim apparently was based on the theory that the sheriff's actions were arbitrary and capricious. The court found that the substantive due process claim was subsumed by the *Parratt* rule. *See also Greco v. Guss,* 775 F.2d 161 (7th Cir. 1985) (adequate post-deprivation state remedies for revocation of liquor license); *Muckway v. Craft,* 789 F.2d 517 (7th Cir. 1986) (equal protection claim rejected in context of zoning administration case; adequate post-deprivation state remedies). Post-termination arbitration and judicial relief are considered

adequate state law remedies in municipal employment cases. *Vaughn v. King,* 167 F.3d 347 (7th Cir. 1999) (state court remedies for breach of contract provide all the process that is due); *Mid-America Waste Systems, Inc. v. City of Gary,* 48 F.3d 286 (7th Cir.1995); *see also* discussion of limitations on substantive due process claims in Section 20.91.

The Fifth Circuit, in *Schaper v. Huntsville,* 813 F.2d 709 (5th Cir. 1987), has drawn a principled and well-reasoned distinction between (1) property right claims and (2) Bill of Rights claims in the substantive due process context. Since property rights claims *(e.g.,* the right to continued governmental employment or to a certain type of zoning) arise primarily from state law, the existence of adequate state post-deprivation remedies is sufficient to protect the plaintiff's property interest from "arbitrary or capricious" governmental action. As the court recognized, the adoption of any other rule would effectively render *Parratt* and *Hudson v. Palmer,* 468 U.S. 517, 82 L.Ed.2d 393,104 S.Ct. 3194 (1984), a dead letter. However, when a Bill of Rights action is involved *(e.g.,* a Fourth Amendment substantive due process claim), the Fifth Circuit reiterated that post-deprivation state remedies are not adequate to vindicate the substantive due process right.

In *Polenz v. Parrott,* 883 F.2d 551 (7th Cir. 1989), the Seventh Circuit used a very similar analysis. When a substantive due process claim is based on a state-created property interest, the substantive due process claim is allowable only if (1) it is combined with an alleged violation of some other substantive constitutional right or (2) state law remedies are inadequate. In *PMB Stone, Inc. v. Palzer,* 251 Ill.App.3d 390, 622 N.E.2d 71, 190 Ill.Dec. 661 (1993), the court held that, to state a valid substantive due process claim under §1983 arising from denial of zoning permit, plaintiff must allege that the decision was arbitrary and irrational *and* must show either separate constitutional violation or inadequate state remedies. The court held that mandamus was an adequate state remedy. Thus, the Seventh and Fifth Circuits have adopted a "property right plus" test for substantive due process violations. Under these tests, even if a municipal action is "arbitrary and capricious," it is not automatically transformed into a property or liberty interest under the due process clause. *Polenz,* 883 F.2d at 656; *accord, Doherty v. City of Chicago,* 75 F.3d 318 (7th Cir. 1996). *See also Myers v. Scott County,* 868 F.2d 1017 (8th Cir. 1989) (theory of substantive due process reserved for truly egregious cases, and violations of state law, in and of themselves, are not actionable under § 1983); *Queene Anne Courts v. City of Lakeville,* 726 F.Supp. 733 (D. Minn. 1989). For further discussion of this issue, see Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment,* 86 Colum.L.Rev. 979, 994 (1986).

On the other hand, it is apparent that when a pure Bill of Rights action is involved, such as a First or Fourth Amendment claim having no relationship to property or liberty interests per se, then procedural due process concerns should be totally irrelevant to the analysis. *See McCrimmon v. Kane County,* 606 F.Supp. 216 (N.D. Ill. 1985) (adequacy of state tort law remedy irrelevant when items not listed in search warrant seized or destroyed). Any post-deprivation state due process could not

vindicate these constitutional rights, and §1983 provides the appropriate remedy. *See, e.g., Guenther v. Holmgreen,* 738 F.2d 879 (7th Cir. 1984) (substantive Fourth Amendment protections).

D. [20.106] Judicial Standards for Review of Municipal Ordinances

Assuming that a §1983 claim has been stated, the standard of judicial review that will be applied to determine the validity of the challenged municipal ordinance or regulation becomes critical. There are essentially three distinct levels of review that will be applied to municipal ordinances that affect constitutionally protected rights: the rational basis test, the strict scrutiny test, and the intermediate scrutiny test. These standards of review are applicable whether the challenge to the governmental regulation is based on equal protection grounds or due process allegations of arbitrary or capricious action.

1. [20.107] Rational Basis Test

The rational basis test incorporates traditional judicial deference for judgment of the legislature in enacting law. For legislation to be upheld as constitutional, it simply must bear a rational relationship to a legitimate governmental interest unless it disadvantages a suspect classification or impinges on a fundamental right. *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 36 L.E.2d 16, 93 S.Ct. 1278 (1973); *Dandridge v. Williams,* 397 U.S. 471, 25 L.Ed.2d 491, 90 S.Ct. 1153 (1970); *Hager v. City of West Peoria,* 84 F.3d 865 (7th Cir. 1996); *Chicago National League Ball Club, Inc. v. Thompson,* 108 Ill.2d 357, 483 N.E.2d 1245, 91 Ill.Dec. 610 (1985). This test is applicable in most economic and social legislation. *See Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 99 L.Ed. 563, 75 S.Ct. 461 (1955). The rational basis test is applicable to equal protection claims and some types of substantive due process claims *(i.e.,* claims that legislation is arbitrary, capricious, or unrelated to the public welfare). *Id. See also Morey v. Doud,* 354 U.S. 457, 1 L.Ed.2d 1485, 77 S.Ct. 1344 (1957); *McKenzie v. City of Chicago,* 118 F.3d 552 (7th Cir. 1997). In assessing whether legislation is rationally based, the court is not limited to the purposes expressly set forth in the legislation but may consider other factors that could have influenced the legislative judgment. *See Williamson, supra; Chicago National League Ball Club, Inc., supra; Sklar v. Byrne,* 727 F.2d 633 (7th Cir. 1984). The same test is applicable to municipal ordinances. *Chicago National League Ball Club, Inc., supra; Albery v. Reddig,* 718 F.2d 245 (7th Cir. 1983). The burden of proof rests on the plaintiff to demonstrate that the legislation is devoid of any rational basis. *Hager, supra; Opyt's Amoco, Inc. v. Village of South Holland,* 149 Ill.2d 265, 595 N.E.2d 1060, 172 Ill.Dec. 390 (1992) (upholding Village's Sunday closing law against equal protection, First Amendment vagueness, and arbitrariness challenges). *See also Burrell v. City of Kankakee,* 815 F.2d 1127 (7th Cir. 1987); *Magnuson v. City of Hickory Hills,* 730 F.Supp. 1439 (N.D. Ill. 1990) (ordinance must be arbitrary and unreasonable and have no substantial relationship to public health, safety, or welfare).

2. [20.108] Strict Scrutiny Test

A strict scrutiny test is to be applied as the standard of judicial review under two circumstances. First, strict scrutiny is used if a "fundamental right" is impacted by the statute, ordinance, or regulatory rule. Fundamental rights include but are not limited to (1) freedom of speech, association, and religion *(see, e.g., International Society for Krishna Consciousness, Inc. v. Rochford,* 585 F.2d 263 (7th Cir. 1978)); (2) abortion rights (*Roe v. Wade,* 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 705 (1973); (3) the right to vote *(Kramer v. Union Free School District,* 395 U.S. 621, 23 L.Ed.2d 583, 89 S.Ct. 1886 (1969)); and (4) the right to travel (*Saenz v. Roe,* 526 U.S. 489, 143 L.Ed.2d 689, 119 S.Ct. 1518 (1999); *Shapiro v. Thompson,* 394 U.S. 618, 22 L.Ed.2d 600, 89 S.Ct. 1322 (1969)). The municipality has the burden of justifying any restrictions on fundamental rights within the test of the ordinance itself and, in certain cases, with additional outside studies. *See DiMa v. Town of Hallie,* 185 F.3d 823 (7th Cir. 1999).

Fundamental rights are essentially those rights that "lie at the heart of the relationship between the individual and a republican form of nationally integrated government." *Kalodimos v. Village of Morton Grove,* 103 Ill.2d 483, 470 N.E.2d 266, 277, 83 Ill.Dec. 308 (1984), *quoting People ex rel. Tucker v. Kotsos,* 68 Ill.2d 88, 368 N.E.2d 903, 907, 11 Ill.Dec. 295 (1977). Second, a strict scrutiny test will be applied if the legislation discriminates on the basis of a "suspect category." Suspect categories typically are based on consideration of race, religion, or national origin. *Ashcraft v. Board of Education of Danville,* 83 Ill.App.3d 938, 404 N.E.2d 983, 39 Ill.Dec. 392 (4th Dist. 1980). Under the strict scrutiny test, legislation that affects a fundamental right or impacts on a suspect category will be sustained only if it is narrowly tailored to serve legitimate objectives and if it is in furtherance of a compelling governmental interest. *Saenz, supra; San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 36 L.Ed.2d 16, 33, 93 S.Ct. 1278 (1973); *Carey v. Population Services International,* 431 U.S. 678, 52 L.Ed.2d 675, 686, 97 S.Ct. 2010 (1977); *Shapiro v. Thompson,* 394 U.S. 618, 22 L.Ed.2d 600, 615, 89 S.Ct. 1322 (1969).

Because under this test legislation must be narrowly tailored to serve the governmental interest, vagueness and overbreadth challenges may arise in this context. Typically, vagueness and overbreadth challenges are associated with challenges to legislation that regulates the right of free speech or association. *City of Chicago v. Morales,* 527 U.S. 41, 144 L.Ed.2d 67, 119 S.Ct. 1849 (1999). *See e.g., Broadrick v. Oklahoma,* 413 U.S. 601, 37 L.Ed.2d 830, 93 S.Ct. 2908 (1973); *Arnett v. Kennedy,* 416 U.S. 134, 40 L.Ed.2d 15, 94 S.Ct. 1633 (1974). In *City of Harvard v. Gant,* 277 Ill.App.3d 1, 660 N.E.2d 259, 214 Ill.Dec. 68 (1996), the court held that an ordinance banning the display of gang insignia was an unconstitutionally overbroad restriction on "symbolic" speech. In *City of Chicago v. Morales,supra,* the city's gang loitering ordinance was held unconstitutional on vagueness grounds.

Overbreadth challenges are based on a claim that the ordinance sweeps too broadly and thereby includes both protected and non-protected conduct within its scope. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 71 L.Ed.2d 362, 102 S.Ct. 1186 (1982) (overbreadth challenge to Village drug paraphernalia licensing ordinance rejected). A facial challenge to legislation must establish that no set of circumstances exists under which the law would be valid. *Freed v. Ryan,* 301 Ill.App.3d 952, 704 N.E.2d 746, 235 Ill.Dec. 173 (1st Dist. 1998). In such cases, the overbreadth doctrine is not recognized outside the limited context of the First Amendment. *Id.* A vagueness challenge is predicated on the allegation that the ordinance either does not provide fair notice to a person of ordinary intelligence that the contemplated conduct is prohibited *(Papachristou v. Jacksonville,* 405 U.S. 156, 31 L.Ed.2d 110, 92 S.Ct. 839 (1972)) or allows for arbitrary enforcement *(Grayned v. City of Rockford,* 408 U.S. 104, 33 L.Ed.2d 222, 92 S.Ct. 2294 (1972)). *See also City of Aurora v. Navar,* 210 Ill.App.3d 126, 568 N.E.2d 978, 154 Ill.Dec. 757 (2d Dist. 1991) (noise ordinance held void for vagueness). A "scienter" requirement may mitigate a law's textual vagueness, and examples contained in the law may mitigate the risk of arbitrary enforcement. *Nova Records, Inc. v. Sendak,* 706 F.2d 782 (7th Cir. 1983) (drug paraphernalia statute).

3. [20.109] Intermediate Levels of Scrutiny

Under certain circumstances, the courts will apply an intermediate level of scrutiny when important individual rights are implicated, although they may not rise to a level of constitutionally protected fundamental rights. As the name of the test suggests, its parameters are somewhat stricter than a rational basis test but somewhat less than strict scrutiny. Under the intermediate scrutiny test, the governmental body has the burden of establishing that the regulation in issue advances a legitimate governmental interest and is substantially justifiable in its methods. Intermediate scrutiny is most notably applied to sex-discrimination actions. *Mary Beth G. v. City of Chicago,* 723 F.2d 1263 (7th Cir. 1983); *Madyun v. Franzen,* 704 F.2d 954 (7th Cir. 1983). An intermediate level of scrutiny is also applicable to commercial speech cases, in which the level of scrutiny is somewhat less than for pure speech cases. *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 77 L.Ed.2d 469, 103 S.Ct. 2875 (1983); *Metromedia, Inc. v. San Diego,* 453 U.S. 490, 69 L.Ed.2d 800, 101 S.Ct. 2882 (1981).

E. [20.110] Liability of Municipalities for Acts of Officers and Employees

In 1978, the United States Supreme Court decided the case of *Monell v. Department of Social Services of City of New York,* 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978). *Monell* is a landmark case because it held that units of local government were suable "persons" for the purposes of § 1983. Since municipalities and other units of local government can act only through the agency of their officers and employees, the question immediately arose whether the municipality should be held vicariously liable under § 1983 for the wrongful acts of its agents. In Monell, the Supreme Court

rejected the vicarious liability or "respondeat superior" approach to §1983 liability. Municipalities therefore are not automatically liable for the illegal acts of their officers and employees. Since vicarious liability has been rejected, the focus of the post-Monell cases has been on articulating a standard under which acts of officers and employees are fairly attributable to the municipality itself.

1. [20. 111] Acts of Municipal Governing Body

The formal acts of the municipality's governing body are clearly attributable to the municipality itself. As stated in *Monell v. Department of Social Services of City of New York,* 436 U.S. 658, 56 L.Ed.2d 611, 635, 98 S.Ct. 2018 (1978):

> **Local governing bodies, therefore, can be sued directly ... where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.**

Municipal liability under § 1983 also lies for informal acts of the municipal governing body that rise to the level of a "custom." *Monell* characterizes a "custom" as follows:

> **Moreover ... local governments, like every other §1983 "person," by the terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels.** 56 L.Ed.2d at 635.

Thus, a governmental policy or custom, whether formally or informally approved by a municipality's governing body, is clearly sufficient under *Monell* to establish a basis for §1983 liability with respect to the municipality itself. Even a single action by the governing board may be sufficient to establish a custom or policy. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 89 L.Ed.2d 452, 106 S.Ct. 1292 (1986), discussed in §20.112.

A municipal official's mere enforcement of state law is insufficient to create Monell liability against the municipality. *Surplus Store & Exchange, Inc. v. City of Delphi,* 928 F.2d 788 (7th Cir. 1991); *Scott v. O'Grady*, 760 F.Supp. 1288 (N.D. Ill. 1991).

2. [20.112] Policy-Making Employees and Municipal Liability

Policy or custom also may be established by individuals who are delegated policy-making power by the governing body. Again, as stated in *Monell v. Department of Social Services of City of New York,* 436 U.S. 658, 56 L.Ed.2d 611, 638, 98 S.Ct. 2018 (1978):

> [I]t **is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983.**

The inherent ambiguity of this test has resulted in considerable post-Monell litigation centering on the question of who may be characterized as a policy-maker under the particular facts in the case. The clear trend of current case law is that official titles, while relevant, are not dispositive of the issue. *See Easter House v. Felder,* 910 F.2d 1387 (7th Cir. 1990); *Rookard v.* Health & Hospitals Corp., 710 F.2d 41 (2d Cir. 1983). Rather, the trend is to use a functional approach to identify whether an official may be considered a policy-maker with reference to the particular decision in issue.

In *Pembaur v. City of Cincinnati*, 475 U.S. 469, 89 L.Ed.2d 452, 106 S.Ct. 1292 (1986), the Supreme Court revisited this issue for the first time since Monell. The *Pembaur* rule, as articulated by Justice Brennan, is as follows:

> **We hold that municipal liability under §1983 attaches where and only where a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.** 89 L.Ed.2d at 465.

In addition to this substantive holding, the Court's opinion sets forth several other guiding principles.

First, a single act by a policy-maker is sufficient to establish a policy for which the municipality is liable. Accord, Walker v. City of Chicago, 645 F.Supp. 269 (N.D. Ill. 1986) (alleged discharge in violation of First Amendment rights).

Second, the parameter of the official's authority must be determined by reference to state law.

Third, a plurality of the Court held the principal indicia of municipal policy-making is whether the official possesses. final authority to establish municipal policy with respect to that particular activity. If the official merely has discretionary authority (as opposed to final authority), that factor alone would be insufficient to attribute the official's act to the municipality. As Justice Brennan explained this concept:

> **Thus, for example, the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decisions**

> **respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff is the official policymaker** would **give rise to municipal liability.** 89 L.Ed.2d at 465, n.12.

Fourth, Justices White and O'Connor, in a concurring opinion, believed that conduct of a municipal official that clearly violated existing federal or state law could not be attributed to the municipality. It is conceivable that the other three dissenting justices in *Pembaur* would adopt this view in future cases, and thus this view represents an important caveat with respect to the *Pembaur* holding.

In *City of St. Louis v. Praprotnik,* 485 U.S. 112,99 L.Ed.2d 107,108 S.Ct. 915 (1988), a divided Supreme Court attempted to flesh out the parameters of what would constitute a municipal "policy-maker." The plurality indicated that if a municipal official's discretionary decision is subject to review by higher authorities, the official is not a policy-maker for Monell purposes. *See also Worsham v. City of Pasadena,* 881 F.2d 1336 (5th Cir. 1989). The concurring opinion of Justice Brennan disagreed with this broad rule, arguing that the existence of policy-making authority is a fact-specific inquiry in each case. Both the plurality and the concurring justices, however, agreed that policy-making authority was a question of state law and that authority could be delegated -implicitly or explicitly - to lower-ranking officials. *Praprotnik,* 99 L.Ed.2d at 122.

In *Jett v. Dallas Independent School District,* 491 U.S. 701, 105 L.Ed.2d 598, 109 S.Ct. 2702 (1989), the Court affirmed the view that policy-making authority is determined by reference to state law. However, "state law" is broadly construed. It means not only state and local laws but also custom or usage" having the force of law. Nonetheless, the key inquiry remains whether the official had final policy-making (as opposed to decision-making authority).

The failure to adopt a policy may, in itself, subject the municipality to liability if the fact finder concludes that the policy maker's failure to establish a policy was deliberately indifferent. *See, e.g., Richardson v. County of Cook,* 250 Ill.App.3d 544, 621 N.E.2d 114, 190 Ill.Dec. 245 (1993); *Reynolds v. Borough of Avalon,* 799 F.Supp. 442 (D. N.J. 1992); *Timberlake v. Benton,* 786 F.Supp. 676 (M.D. Tenn. 1992). If a supervisor, motivated by an unconstitutional animus, recommends an adverse employment action against another employee to the policy maker for approval, the municipality may be liable if the policy maker is deliberately indifferent to the supervisor's animus. *Willis v. Marion County Auditor's Office,* 118 F.3d 542 (7th Cir. 1997); *San Filippo v. Bongiovanni,* 30 F.3d 424 (3d Cir. 1994); *Groman v. Township of Manaplan,* 47 F.3d 628 (3rd Cir. 1995). However, the policy maker must have reason to suspect that the animus was a substantial motivating factor in the supervisor's recommendation. Mere failure to investigate is insufficient.

3. [20.113] Policy-Making Employees and Acts of Subordinates

Policy-making employees, under some circumstances, can be personally liable for the acts of their subordinates. If the plaintiff can demonstrate the actual involvement of the superior in the illegal conduct, the superior may be liable. *Oklahoma City v. Tuttle,* 471 U.S. 808, 85 L.Ed.2d 791, 105 S.Ct. 2427 (1985); *Nesmith v. Alford,* 318 F.2d 110 (5th Cir. 1963). Knowledge of unlawful acts and acquiescence in them also may be sufficient for attributed liability. *Byrd v. Brishke,* 466 F.2d 6 (7th Cir. 1972); *West v. Rowe,* 448 F.Supp. 58 (N.D. Ill. 1978). The mere failure of supervisors who lack direct knowledge to act is not a basis for §1983 liability. *Rizzo v. Goode,* 423 U.S. 362, 46 L.Ed.2d 561, 96 S.Ct. 598 (1976); *Alencastro v. Sullivan,* 297 Ill.App.3d 478, 698 N.E.2d 1095, 232 Ill.Dec. 665 (1st Dist. 1998). *See City of St. Louis v. Praprotnik,* 485 U.S. 112, 99 L.Ed.2d 107, 122, 108 S.Ct. 915 (1988). A single instance or a series of isolated incidents is usually insufficient to establish supervisory liability. *Howard v. Adkison,* 887 F.2d 134 (8th Cir. 1989); *Williams v. Garrett,* 722 F.Supp. 254 (W.D. Va. 1989).

If a policy-making supervisor is liable for the acts of her subordinates, under the test enunciated in *Pembaur v. City of Cincinnati,* 475 U.S. 469, 89 L.Ed.2d 452, 106 S.Ct. 1292 (1986), the distinct possibility exists that the liability will be attributed to the municipality as a custom or policy.

4. [20.114] Non-Policy-Making Employees and Municipal Liability

A single isolated act of misconduct by a non-policy-making employee does not give rise to municipal liability under § 1983. *Oklahoma City v. Tuttle,* 471 U.S. 808, 85 L.Ed.2d 791, 105 S.Ct. 2427 (1985). Evidence of a single instance of misconduct by a lower-level employee (such as a police patrolman) is insufficient to support the existence of a municipal policy or custom. Id. Obviously, this example is at the far end of the spectrum of supervisor-employee interaction.

A harder case is presented when it is alleged that a policy-maker knew of or was consciously indifferent to his subordinate's unconstitutional behavior. *Grandstaff v. City of Borger,* 767 F.2d 161 (5th Cir. 1985). Since the supervisor is generally a policy-maker in the context of departmental matters, his knowledge of and acquiescence in the illegal conduct could result in liability for the municipality. *Villante v. Department of Corrections,* 786 F.2d 516 (2d Cir. 1986); *Depew v. City of St. Marys,* 787 F.2d 1496 (11th Cir. 1986); *Jones v. City of Chicago,* 787 F.2d 200 (7th Cir. 1986) (supervisors had no knowledge); *Cannon v. Taylor,* 782 F.2d 947 (11th Cir. 1986) (no showing of supervisory direction of tacit authorization). A three-part test has been adopted by some courts in determining a supervisor's liability: (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to citizens; (2) that the supervisor's response to that knowledge was so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive

practices, and (3) that there was an affirmative causal link between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff. *Shaw v. Stroud*, 13 F.3d 791 (4th Cir. 1994). If a subordinate officer is entitled to qualified immunity, then the plaintiff bears a heavier burden to show a causal link between the alleged deficiency in supervision and the unconstitutional deprivation. *Hegarty v. Somerset County,* 53 F.3d 1367 (1st Cir. 1995).

If there is a well-settled departmental practice or custom, even though not formally approved, the illegal acts of a subordinate who is following that custom are attributable to the municipality. *McNabola v. Chicago Transit Authority*, 10 F.3d 501 (7th Cir. 1993); *Cornfield by Lewis v. Consolidated High School District No. 230*, 991 F.2d 1316 (7th Cir. 1993); *Partridge v. Two Unknown Police Officers,* 791 F.2d 1182 (5th Cir. 1986); *Bennett v. City of Slidell,*735 F.2d 861 (5th Cir. 1984). Where the particular conduct falls on the supervisor-subordinate spectrum ultimately will determine whether the conduct is attributable to the municipality. *See City of St. Louis v. Praprotnik,* 485 U.S. 112,99 L.Ed.2d 107,122,108 S.Ct. 915 (1988). *Compare Williams v. Butler,* 863 F.2d 1398 (8th Cir. 1988) with *Wulf v. City of Wichita,* 883 F.2d 842 (10th Cir. 1989).

When a supervisor's alleged conduct is contrary to express municipal policy, then the municipality generally is not liable. Under *Monell v. Department of Social Services of City of New York,* 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978), the municipal official's conduct must "implement rather than frustrate the government's policy." *Auriemma v. Rice,* 957 F.2d 397, 400 (7th Cir. 1992); *Easter House v. Felder,* 910 F.2d 1387 (7th Cir. 1990). Of course, a widespread practice that is inconsistent with express municipal policy may itself possibly supplant that policy. *Auriemma, supra; Wetzel v. Hoffman,* 928 F.2d 376 (11th Cir. 1991).

5. [20.115] Failure To Train Employees

A closely related theory of attributing employee conduct to the municipality involves claims that the municipality failed to train or supervise its employees properly. The conceptual basis of this theory in *Monell v. Department of Social Services of City of New York,* 436 U.S. 658,56 L.Ed.2d 611, 98 S.Ct. 2018 (1978), terms is that the failure to train or supervise adequately constitutes a "custom or policy" of the municipality. If that failure caused injury to the plaintiff, the municipality is liable because of its "custom or policy." In *City of Canton v. Harris,* 489 U.S. 378, 103 L.Ed.2d 412, 109 S.Ct. 1197 (1989), the Supreme Court established the liability standard when it was alleged that the government's failure to train its employees resulted in a constitutional deprivation. The Court held that inadequacy of training may serve as the basis for § 1983 liability only if the failure to train in a relevant respect amounts to deliberate indifference to the constitutional rights of persons with whom the police come into contact. Only if a failure to train reflects a "deliberate" or "conscious" choice by the municipality can the failure properly be thought of as an actionable "policy."Monell is not satisfied by a mere allegation that a training program represent's a policy for which the city is responsible. Rather, the focus must be on whether the program is adequate to the tasks the particular

employees must perform and, if it is not, on whether the inadequate training can justifiably be said to represent "city policy." Moreover, the identified deficiency in the training program must be related closely to the ultimate injury. *See, e.g., Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992); *Doe v. Calumet City*, 754 F.Supp. 1211 (N.D. Ill. 1990); *East v. City of Chicago*, 719 F.Supp. 683 (N.D. Ill. 1989).

The courts have held that recklessness or gross negligence amounting to conscious indifference in training or supervision may be sufficient to attribute the conduct to the municipality. *Wierstak v. Heffernan*, 789 F.2d 968 (1st Cir. 1986); *McKenna v. City of Memphis*, 785 F.2d 560 (6th Cir. 1986). Even under this test, however, there must be a showing of a causal connection between the misconduct complained of by the plaintiff and specific training inadequacies. *Vippolis v. Village of Haverstraw*, 768 F.2d 40 (2d Cir. 1985). *See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 85 L.Ed.2d 791, 105 S.Ct. 2427 (1985) (plurality opinion).

A municipality cannot be implicated in a Monell cause of action without a finding of individual wrongdoing by its officers since Monell-type liability is derivative only. *City of Los Angeles v. Heller*, 475 U.S. 796, 89 L.Ed.2d 806, 106 S.Ct. 1571 (1986).

F. [20.116] Immunities

Section 1983 claims are subject to the defense that the officials who have been sued are entitled to absolute or qualified immunity from damages. Several important caveats should be noted, however. The principles of immunity do not extend to actions brought under §1983 for declaratory or injunctive relief. *Pulliam v. Allen*, 466 U.S. 522, 80 L.Ed.2d 565, 104 S.Ct. 1970 (1984). Immunities are limited to damages claims only.

The municipality itself is not entitled to assert any immunity defenses. *Owen v. City of Independence*, 445 U.S. 622, 63 L.Ed.2d 673, 100 S.Ct. 1398 (1980). If the illegal actions of its officers or employees are attributable to the municipality under a (*Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978) (see § § 20.110 -20.115)), then the municipality is liable under § 1983 irrespective of the personal immunity afforded its officials. These rules are consistent with the purpose of the §1983 immunities generally, viz., to shield public officials from "personal" liability for their official acts. *Brandon v. Holt*, 469 U.S. 464, 83 L.Ed.2d 878, 105 S.Ct. 873 (1985). When a public official is sued in her "official" capacity only *(i.e.*, damages will be assessed against the municipality, not the official personally), immunity defenses are not available. *Owens v. City of Independence, supra.*

There are two varieties of official immunity recognized under § 1983: absolute immunity and qualified immunity. Both types of immunities are affirmative defenses and must be pleaded as such. *Gomez v. City of Toledo*, 446 U.S. 635,64 L.Ed.2d 752, 100 S.Ct. 1920 (1980). Since immunity is

a question of federal law, the states have no power to immunize their officials from §1983 liability. *Martinez v. California,* 444 U.S. 277, 62 L.Ed.2d 481, 100 S.Ct. 553 (1980).

1. [20.117] Absolute Immunity

Generally, absolute immunity covers acts that are judicial or legislative in character. While these categories, in most instances, will cover the activities of judicial and legislative officers, it is important to note that, at times, their acts may be more in the nature of executive or administrative functions, to which absolute immunity does not apply. Thus, the issue of the type of immunity available must be decided by means of a functional analysis that focuses on the nature of activity in issue.

Absolute immunity extends to judicial and prosecutorial actions. *Stump v. Sparkman,* 435 U.S. 349, 55 L.Ed.2d 331, 98 S.Ct. 1099 (1978) (judicial immunity); *Imbler v. Pachtman,* 424 U.S. 409, 47 L.Ed.2d 128, 96 S.Ct. 984 (1976). Persons acting pursuant to judicial orders have absolute immunity. *Henry v. Farmer City State Bank,* 808 F.2d 1228 (7th Cir. 1986). Governmental witnesses are absolutely immune from damages liability based on their testimony. *Briscoe v. LaHue,* 460 U.S. 325, 75 L.Ed.2d 96, 103 S.Ct. 1108 (1983). Judicial immunity also may extend to hearing examiners performing a quasi-judicial function. *Butz v. Economou,* 438 U.S. 478, 57 L.Ed.2d 895, 98 S.Ct. 2894 (1978) (federal hearing officer and officials who initiate and present evidence in administrative hearings); *Reed v. Village of Shorewood,* 704 F.2d 943 (7th Cir. 1983) (mayor acting as liquor control commissioner). *See also Shoultes v. Laidlaw,* 886 F.2d 114 (6th Cir. 1989). It seems members of local zoning boards of appeal and plan commissioners also are entitled to absolute immunity when they perform quasi-judicial functions in land planning decisions. *Bass v. Attardi,* 868 F.2d 45 (3d Cir. 1989); *Speck v. Zoning Board of Appeals,* 89 Ill.2d 482, 433 N.E.2d 685, 60 Ill.Dec. 643 (1982); *Greer v. Illinois Liquor Control Commission,* 185 Ill.App.3d 219, 541 N.E.2d 216, 133 Ill.Dec. 379 (2d Dist. 1989). *See also Culebras Enterprises Corp. v. Rios,* 813 F.2d 506 (1st Cir. 1987); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391, 59 L.Ed.2d 401, 99 S.Ct. 1171 (1979).

Absolute legislative immunity had its genesis in *Tenney v. Brandhove,* 341 U.S. 367,95 L.Ed. 1019, 71 S.Ct. 783 (1951). In that case, the Supreme Court recognized that important public policy considerations were served by deterring lawsuits against legislatures. In *Bogan v. Scott-Harris,*523 U.S. 44, 140 L.Ed.2d 79, 118 S.Ct. 966 (1998), the Supreme Court held that absolute legislative immunity extends to local county and municipal legislators acting in a legislative capacity. *Accord, Reed v. Village of Shorewood, supra; La Salle National Bank v. County of Lake,* 579 F.Supp. 8 (N.D. Ill. 1984); *Macuba v. Deboer,* 1999 WL 982404 (11th Cir. 1999).

When legislators are engaged in essentially administrative activities unrelated to the legislative process, however, only qualified immunity is applicable. *Coffey v. Quinn,* 578 F.Supp.

1464 (N.D. Ill. 1983); *Hudson v. Burke*, 617 F.Supp. 1501 (N.D. Ill. 1985) (personnel decisions). *Compare Rateree v. Rocket*, 852 F.2d 946 (7th Cir. 1988) (legislator immune for budget decision resulting in elimination of certain jobs).

2. [20.118] Qualified Immunity

Executive acts of governmental officers are entitled to only qualified immunity. In the leading case of *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982), the Supreme Court set forth the standards applicable to the qualified immunity defense. Governmental officials performing discretionary functions are immune from civil rights liability for actions that do not violate clearly established law that a reasonable person would have known. *Hunter v. Bryant*, ___U.S. ___, 116 L.Ed.2d 589, 112 S.Ct. 534 (1991). This is an objective test, which is keyed to clearly established federal statutory or constitutional rights. Qualified immunity may be asserted even if the official's conduct violated state law. *Davis v. Scherer*, 468 U.S. 183, 82 L.Ed.2d 139, 104 S.Ct. 3012 (1984).

As commentators have noted, *Harlow* results in a three-part test with respect to an asserted qualified immunity defense:

> **Was there a settled constitutional rule at the time of the challenged conduct? If so, should defendants have known of this rule? Finally, if they should have known of the rule, should they have known that their conduct violated this rule?** Nahmod, *Constitutional Wrongs Without Remedies: Executive Official Immunity*, 62 Wash.U.L.Q. 221, 251 (1984).

Each of the objective components of this test has been the source of extensive litigation.

First, the existence of a "clearly established" principle of constitutional law generally appears to require a Supreme Court decision on point or a circuit court of appeals trend. *See Coleman v. Frantz*, 754 F.2d 719 (7th Cir. 1985); *Johnson v. Bre1je*, 701 F.2d 1201 (7th Cir. 1983); *Mitchell v. Forsyth*, 472 U.S. 511, 86 L.Ed.2d 411, 105 S.Ct. 2806 (1985).

Second, the official generally is held to have knowledge of constitutional principles of which a reasonably diligent official would be aware unless there are extraordinary circumstances that would justify ignorance of the law. *See Harlow, supra; Arebaugh v. Dolton*, 730 F.2d 970 (4th Cir. 1984) (decisions on complex legal issues).

Third, there must be a degree of factual correspondence between the established precedent and the conduct in issue. How much of a factual congruence must exist to meet the third part of the

Harlow test is not open to precise formulation. As stated by the Seventh Circuit in *Lojuk v. Johnson*, 770 F.2d 619 (7th Cir. 1985):

> **While cases involving the exact fact pattern at bar are unnecessary** [to demonstrate a clearly-established right], **case law in a closely analogous area is crucial to permit us to conclude that reasonably diligent government officials would have known of the case law, related it to the situation at hand, and molded their conduct accordingly.** 770 F.2d at 628.

The question of qualified immunity is an issue of law to be decided by the court. *Rakovich v. Wade*, 850 F.2d 1180 (7th Cir. 1988); *Llaguna v. Mingey*, 763 F.2d 1560 (7th Cir. 1985). Since objective standards of law are involved, the intent of the official is irrelevant to the test for qualified immunity. *Sound Aircraft Services, Inc. v. Town of East Hampton*, 192 F.3d 329 (2d Cir. 1999). The denial of a qualified immunity defense by the trial court is subject to an immediate interlocutory appeal and review by the circuit court of appeals. *Mitchell v. Forsyth, supra.*

The first issue that the court should address when examining a qualified immunity defense is whether the plaintiff has stated a claim. *Siegert v. Gilley*, 500 U.S.226, 114 L.Ed.2d 277, 111 S.Ct. 1789 (1991). If the district court finds that a genuine issue of fact is presented that would affect the qualified immunity defense, then summary judgment is inappropriate. *Johnson v. Jones*, 515 U.S. 304, 132 L.Ed.2d 238, 115 S.Ct. 2151 (1995). Special verdicts under Federal Rule of Civil Procedure 49(a) can be used to enable the jury to resolve the factual dispute, thereby enabling the district court to resolve the legal issue of qualified immunity. *Mahoney v. Kesery,* 976 F.2d 1054 (7th Cir. 1992). The jury's resolution of the factual issues may, in certain cases, also determine the validity of the qualified immunity defense. *Frazell v. Flanigan*, 102 F.3d 877 (7th Cir. 1996) (excessive force claim).

The objective test of *Harlow is* not capable of per se application. Questions of what constitutes "clearly established" constitutional law and whether the facts are sufficiently congruent with precedent will continue to make the qualified immunity defense a matter of case-by-case application. In the absence of Supreme Court or in-circuit precedent, the court will look elsewhere for a "clear trend."

In *Anderson v. Creighton*, 483 U.S. 635, 97 L.Ed.2d 523, 107 S.Ct. 3034 (1987), the Supreme Court further clarified the principles underlying the qualified immunity defense. *Anderson* requires the district court to conduct a fact-specific inquiry into the information possessed by the official at the time of the alleged constitutional deprivation. The inquiry then becomes whether a reasonable official, based on the information known to her at the time, would have known that the conduct would violate clearly established law. *Humphrey v. Staszak,* 148 F.3d 719 (7th Cir. 1998); *Auriemma v. Rice,* 910 F.2d 1449 (7th Cir. 1990) ("reasonable police chief"); *Abel v. Miller,* 824

F.2d 1522 (7th Cir. 1987) ("reasonable prison official"). The unlawfulness must be "apparent" in light of preexisting law. *See also Green v. Carlson,* 826 F.2d 647 (7th Cir. 1987); *Hannon v. Turnage,* 892 F.2d 653 (7th Cir. 1990). In the Seventh Circuit, the plaintiff has the burden of demonstrating that the constitutional right was "clearly established." *Id.; Klein v. Ryan,* 847 F.2d 368 (7th Cir. 1988). When precedent has used a balancing test, the courts tend to find that the precedential value is severely limited since the result turns on the facts of each case. *Rakovich v. Wade, supra; Benson v. Allphin,* 786 F.2d 268 (7th Cir. 1986).

Once a qualified immunity defense is raised by the defendant, the plaintiff must produce specific, nonconclusory factual allegations that would tend to defeat the defense. *Elliot v. Thomas,* 937 F.2d 338 (7th Cir. 1991). The plaintiff may use direct or circumstantial evidence to counter the defense. *Id.; Branch v. Tunnell,* 937 F.2d 1382 (9th Cir. 1991).

G. [20.119] Other Defenses

In addition to consideration of immunity, numerous other affirmative defenses may be available to preclude a §1983 claim. A sampling of the typical defenses is discussed below. This list is intended to be representative rather than exhaustive.

1. [20.120] Statute of Limitations

In *Wilson v. Garcia,* 471 U.S. 261, 85 L.Ed.2d 254,105 S.Ct. 1938 (1985), the Supreme Court held that §1983 claims are most akin to personal injury actions. In the interest of uniformity and certainty with respect to the limitations period for §1983 claims, the Court, in *Wilson,* held that the appropriate limitations period would be that for personal injury actions in the forum state. The Illinois two-year personal injury statute of limitations is applicable to §1983 claims. *Kalimara v. Illinois Department of Corrections,* 879 F.2d 276 (7th Cir. 1989); *Farrell v. McDonough,* 966 F.2d 279 (7th Cir. 1992).

2. [20.121] The *Mt. Healthy* Defense

In *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274,50 L.Ed.2d471, 97 S.Ct. 568 (1976), a non-tenured teacher claimed that he had been terminated as a result of the exercise of his First Amendment rights. The Supreme Court held that the fact that constitutionally protected conduct played a part in the decision not to rehire the teacher did not necessarily result in a constitutional violation. The defendant school board had the right to present an affirmative defense to the plaintiff's prima facie case. If the defendant could demonstrate by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct, no constitutional deprivation would have occurred. This is a rule of causation that focuses on the question of whether there was adequate, independent jurisdiction for the decision.

See also Price Waterhouse v. Hopkins, 490 U.S. 228, 104 L.Ed.2d 268, 109 S.Ct. 1775 (1989), and *Akrabawi v. Carnes Co.*, 152 F.3d 688 (7th Cir. 1998), applying the *Mt. Healthy* test in a Title VII context.

3. [20.122] Prior Exhaustion of Administrative Remedies

Prior exhaustion of administrative remedies is not a defense to a § 1983 action. *Patsy v. Board of Regents,* 457 U.S. 496, 73 L.Ed.2d 172, 102 S.Ct. 2557 (1982); *Butcher v. City of McAlester,* 956 F.2d 973 (10th Cir. 1992) (exhaustion of grievance and arbitration procedure not required). The *Patsy* rule, however, should not be confused with adequacy of post-deprivation state remedies under *Parratt v. Taylor,* 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct. 1908 (1981), or the ripeness of a constitutional claim because of existing state remedies under *Williamson County Regional* Planning Commission *v. Hamilton Bank of Johnson City,* 473 U.S. 172,87 L.Ed.2d 126,105 S.Ct. 3108 (1985). The existence of state remedies always must be considered as a potential defense. *See Greco v. Guss,* 775 F.2d 161 (7th Cir. 1985) (no due process violation when revocation of liquor license could have been appealed to state liquor control commission and state courts).

4. [20.123] Preclusive Effect of Prior State Court Decisions

Principles of res judicata and collateral estoppel apply to §1983 actions. *Allen v. McCurry,* 449 U.S. 90,66 L.Ed.2d 308, 101 S.Ct. 411 (1980). Prior state court proceedings are encompassed by this rule. Id. In addition, state administrative proceedings also may have preclusive effects. *Astoria Federal Savings & Loan Association v. Solimino,* ____ U.S. ____, 115 L.Ed.2d 96, 111 S.Ct. 2166 (1991); *Lee v. City of Peoria,* 685 F.2d 196 (7th Cir. 1982). As the Supreme Court held in *University of Tennessee v. Elliott,* 478 U.S. 788, 92 L.Ed.2d 635, 106 S.Ct. 3220 (1986):

> **[W]e hold that when a state agency "acting in a judicial capacity ... resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate,"** [citations omitted] **federal courts must give the agency's fact finding the same preclusive effect to which it would be entitled in the State's courts.** 92 L.Ed.2d at 646 - 647.

See also Haring v. Prosise, 462 U.S. 306, 76 L.Ed.2d 59,5, 103 S.Ct. 2368 (1983) (prior guilty plea); *Migra v. Warren City School District Board of Education,* 465 U.S. 75,79 L.Ed.2d 56,104 S.Ct. 892 (1985) (prior civil proceeding).

In general, the doctrines of issue and claim preclusion require the existence of (a) a final judgment on the merits in an earlier action; (b) an identity of parties or their privies in the two suits; and (c) an identity of the cause of action in both the earlier and the later suit. *Lee v. City of Peoria,* 685 F.2d at 199; *Pirela v. Village of North Aurora,* 935 F.2d 909 (7th Cir. 1991).

H. [20.124] Judicial Remedies and Attorneys' Fees in Civil Rights Actions Under §1983

The language of §1983 does not limit the range of judicial remedies that can be used by the courts to vindicate constitutional and federal rights. Thus, a full panoply of legal and equitable remedies is available in appropriate cases. In addition, 42 U.S.C. §1988 provides for the payment of attorneys' fees to the prevailing plaintiff (and under certain circumstances to the prevailing defendant).

1. [20.125] Equitable Relief

In general, deprivations of civil rights may be remedied through injunctive or other types of equitable relief. *Mitchum v. Foster,* 407 U.S. 225, 32 L.Ed.2d 705, 92 S.Ct. 2151 (1972). Equitable relief under § 1983 is governed by the traditional judicial standards that are used to determine if this type of relief is appropriate. *See Martinez v. Winner*, 771 F.2d 424 (10th Cir.) (permanent injunction), *modified in part, rehg denied in part,* 778 F.2d 553 (10th Cir. 1985); *Taylor v. City of Knoxville,* 566 F.Supp. 925 (E.D. Tenn. 1982) (preliminary injunction).

When state proceedings have commenced, principles of federalism and comity may prevent the issuance of injunctive relief by the federal courts. *Rizzo v. Goode,* 423 U.S. 362, 46 L.Ed.2d 561, 96 S.Ct. 598 (1976); *W.C.M. Window Co. v. Bernardi*, 730 F.2d 486 (7th Cir. 1984).

For injunctive relief to issue, the plaintiff must allege or demonstrate that the challenged conduct is likely to recur with respect to the plaintiff himself. In *City of Los Angeles v. Lyons,* 461 U.S. 95, 75 L.Ed.2d 675, 103 S.Ct. 1660 (1983), the Supreme Court held that injunctive relief could not be granted to restrain the city's police officers from subjecting to strangleholds motorists who were stopped for minor traffic violations. The court ruled that the plaintiff had failed to show a present case or controversy justifying the relief sought.

Thus, while the federal courts' power to award equitable relief is broad, there are significant checks placed on the exercise of that power.

2. [20.126] Compensatory Damages

Section 1983 clearly allows the plaintiff a damages award that will compensate her for injuries caused by the deprivation of constitutional rights. *Carey v. Piphus,* 435 U.S. 247, 55 L.Ed.2d 252,98 S.Ct. 1042 (1978). Compensatory damages may be awarded for procedural due process violations and for the deprivation of other constitutional rights. The common law of torts is the appropriate starting point for assessing a damages claim under §1983. *Id.* Special damages consisting of lost income, medical expenses, etc., are recoverable. General damages such as pain, suffering, and mental and emotional distress are also recoverable. *Baskin v. Parker,* 602 F.2d 1205 (5th Cir. 1979).

But see Keyes v. Lauga, 635 F.2d 330 (5th Cir. 1981) (pain and suffering speculative); *Nekolny v. Painter,* 653 F.2d 1164 (7th Cir. 1981) (insufficient evidence of emotional and mental distress). The Seventh Circuit has recognized the "value of life," or hedonic damages, as a proper component of compensatory damage. *Bell v. City of Milwaukee,* 746 F.2d 1205 (7th Cir. 1984).

There is no presumption of compensable damages under §1983 even though a constitutional deprivation has been proved by the plaintiff. *Carey, supra* (nominal damages of one dollar for procedural due process violation); *Memphis Community School District v. Stachura,* 477 U.S. 299, 91 L.Ed.2d 249, 106 S.Ct. 2537 (1986) (damages cannot be awarded solely because deprivation of First Amendment right has occurred; actual injury or loss also must be proven). Thus, the plaintiff has the burden of pleading and proving any claim to compensatory damages.

3. [20.127] Punitive Damages

Punitive damages may be awarded against individual defendants in their personal capacity. *Smith v. Wade,* 461 U.S. 30, 75 L.Ed.2d 632, 103 S.Ct. 1625 (1983). Units of local government are immune from punitive damage awards under § 1983. City of *Newport v. Fact Concerts Inc.,* 453 U.S. 247, 69 L.Ed.2d 616, 101 S.Ct. 2748 (1981). The *City of Newport* rule also applies to suits brought against local governmental officials in their official capacity. *Holly v.* City *of Naperville,* 571 F.Supp. 668 (N.D. Ill. 1983), *summary judgment granted in part,* 603 F.Supp. 220 (N.D. Ill. 1985); *Zewde v. Elgin Community College,* 601 F.Supp. 1237 (N.D. Ill. 1984).

To be awarded punitive damages, the plaintiff need not prove that the official acted with actual malicious intent. *Smith v. Wade, supra.* Reckless or callous indifference to a plaintiff's federally protected rights is sufficient. Id.; *Illinois Municipal League Risk Management Association v. Seibert,* 223 Ill.App.3d 864, 585 N.E.2d 1130, 166 Ill.Dec. 108 (4th Dist. 1992). Since the primary purpose of punitive damages is to deter future illegal conduct, the Seventh Circuit has held that the defendant must know that the conduct that resulted in the injury was wrongful under either state or federal law. *Soderbeck v. Burnett County,* 752 F.2d 285 (7th Cir. 1985). Because the deterrent purpose is a primary consideration, an award of compensatory damages is not a necessary predicate to the award of punitive damages. *Endicott v. Huddleston,* 644 F.2d 1208 (7th Cir. 1980); *Farrar v. Cain,* 756 F.2d 1148 (5th Cir. 1985). As a matter of federal law, punitive damages may be awarded without compensatory damages, even if such an award would be contrary to state law. *Erwin v. County of Manitowoc,* 872 F.2d 1292 (7th Cir. 1989); *Bell v. City of Milwaukee,* 746 F.2d 1205 (7th Cir. 1984).

4. [20.128] Attorneys' Fees

With respect to the award of attorneys' fees for civil rights violations, 42 U.S.C. §1988 provides, in pertinent part:

> **In any action or proceedings to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.**

The principal Supreme Court case addressing the computation of attorneys' fees under § 1983 is *Hensley v. Eckerhart,* 461 U.S. 424, 76 L.Ed.2d 40, 103 S.Ct. 1933 (1983). In *Hensley,* the Court approved the use of the "lodestar" methodology. Under the methodology, the lodestar factor is the product of (a) the number of hours reasonably expended on the litigation multiplied by (b) a reasonable hourly rate. *Accord, Blum v. Stenson,* 465 U.S. 886, 79 L.Ed.2d 891, 104 S.Ct. 1541 (1984). Once the lodestar figure is determined, it may be adjusted upward or downward in light of other factors, such as the results obtained in the litigation.

However, this basic formula has been subject to many refinements over the years. The Supreme Court has held that upward adjustments in the lodestar will be appropriate only in rare cases. *See, e.g., Id.*; Pennsylvania v. *Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 92 L.Ed.2d 439, 106 S.Ct. 3088 (1986). A contingency fee contract between the plaintiff and his attorney is not relevant to the issue of the amount of reasonable attorneys' fees to be paid by the defendant under §1988. *Blanchard v. Bergeron,* 489 U.S. 87, 103 L.Ed.2d 67, 109 S.Ct. 939 (1989). *See also City of Burlington v. Dague,* 505 U.S. 557, 120 L.Ed.2d 449,112 S.Ct. 2638 (1992) (no lodestar enhancement because of contingency fee contract). As between the plaintiff and his attorney, however, a contingency fee contract is controlling even if the amount payable exceeds the "reasonable" fees as determined by the court under §1988. *Venegas v. Mitchell,* 495 U.S. 82, 109 L.Ed.2d 74, 110 S.Ct. 1679 (1990).

In *Hewitt v. Helms,* 482 U.S. 755, 96 L.Ed.2d 654, 107 S.Ct. 2672 (1987), the Supreme Court held that no attorneys' fees would be awarded to the plaintiff even though there was a finding that certain prison policies were unconstitutional. The plaintiff obtained no equitable relief for himself because he was discharged before the change in prison procedures. No damages were awarded because the governmental officials were protected by qualified immunity. Since the plaintiff had failed to secure any judicial relief for himself, the Court held he was not a prevailing party under §1988. *See also Rhodes v. Stewart,* 488 U.S. 1, 102 L.Ed.2d 1, 109 S.Ct. 202 (1988), and *Palmer v. City of Chicago,* 806 F.2d 1316 (7th Cir. 1986), for a similar analysis. Further, if a plaintiff merely obtains a temporary restraining order or preliminary injunction but does not succeed in getting permanent relief, he is not a prevailing party. *Ekanem v. Health & Hospital Corp.,* 778 F.2d 1254 (7th Cir. 1985). A plaintiff who recovers only nominal damages ordinarily will not be entitled to attorneys' fees if a claim of substantial damages is the genesis of the lawsuit. *Farrar v. Hobby,* 506 U.S. 103, 121 L.Ed.2d 494, 113 S.Ct. 566 (1992). Post-*Farrar* decisions in the Seventh Circuit have set forth a three-factor test in order to determine whether a plaintiff is a "prevailing party" eligible

for fees under §1988 in nominal damage cases. *Cartwright v. Stamper,* 7 F.3d 106 (7th Cir. 1993); *Maul v. Constan,* 23 F.3d 143 (7th Cir. 1994); *Briggs v. Marshall,* 93 F.3d 355 (7th Cir. 1996); *see also Morales v. City of San Rafael,* 96 F.3d 359 (9th Cir. 1996). The three factors which must be taken into account in determining when fees should be awarded in such cases are (a) the difference between the judgment recovered and the relief sought; (b) the significance of the legal issue on which the plaintiff prevailed; and (c) the public purpose of the litigation. The Seventh Circuit has held that the most significant factor is the difference between the judgment recovered and the recovery sought. *Briggs, supra,* 93 F.2d at 361; *Akrabawi v. Carnes Co.,* 152 F.3d 688 (7th Cir. 1998); *Cole v. Wodziak,* 169 F.3d 486 (7th Cir. 1999). Even though the suit may have become moot, a plaintiff who is awarded injunctive relief is entitled to attorney's fees. *Young v. City of Chicago,* 202 F.3d 1000 (7th Cir. 2000).

The following factors normally are not to be considered with respect to a lodestar adjustment under § 1988: (a) the novelty and complexity of the issues; (b) the quality of representation; and (c) the benefit to the class. Although there may be exceptions, these factors generally will be subsumed within the hourly rate and expended hours criteria. *Blum v. Stenson, supra.* In *Tampam, Inc. v. Property Tax Appeal Board,* 208 Ill.App.3d 127, 566 N.E.2d 905,153 Ill.Dec. 55 (2d Dist. 1991), the plaintiff was a prevailing party under § 1983 by means of a settlement with the defendant. The court adopted a 12-factor test to determine the appropriate amount of attorneys' fees. It further stated that the prevailing hourly rate of local attorneys should be applied.

In *City of Riverside v. Rivera,* 477 U.S. 561, 91 L.Ed.2d 466,106 S.Ct. 2686 (1986), the Supreme Court rejected the argument that the award of attorneys' fees should be "proportional" to the recovery achieved on behalf of the client. While the result obtained on behalf of the client is one factor in the determination of an appropriate fee award, the decision in *City of Riverside* makes it clear that it is not always a controlling factor.

The current trend is to require that contemporaneous time records be kept as a prerequisite to the recovery of any fees. *See Ramos v. Lamm,* 713 F.2d 546 (10th Cir. 1983); *McCann v. Coughlin,* 698 F.2d 112 (2d Cir. 1983).

The award of attorneys' fees may be affected by an offer of judgment made pursuant to Rule 68 of the Federal Rules of Civil Procedure. In *Marek v. Chesny,* 473 U.S. 1, 87 L.Ed.2d 1, 105 S.Ct. 3012 (1985), the plaintiff rejected a lump-sum offer of judgment for damages, costs, and fees incurred to date. The plaintiff ultimately won less than the offer. The Supreme Court held that under Fed.R.Civ.P. 68 it was proper to deny attorneys' fees that had accrued after the offer of judgment was rejected.

An attorney may be bound by an agreement to waive fees in exchange for a favorable settlement. The attorney is bound to pursue his client's best interests rather than his own. *Evans v. Jeff D.*, 475 U.S. 717, 89 L.Ed.2d 747, 106 S.Ct. 1531 (1986).

Although a rare case, attorneys' fees may be awarded to a prevailing defendant if it can be demonstrated that the plaintiff's complaint was patently frivolous or vexatious. *Hensley, supra.*

I. [20.129] Typical Municipal Functions Impacted by §1983 Litigation

As is readily observable from the foregoing sections of this chapter, a §1983 claim may be appended to virtually any claim that challenges the actions of a municipality, its officers, or its employees. The precise parameters of § 1983 and the type of limitations that will be placed on its use are still a matter of the continuously evolving precedent in the federal judicial system.

The following sections focus on several typical municipal regulatory functions with a view toward a concrete application of the principles previously discussed.

1. [20.130] Personnel Matters

Municipal employees in Illinois generally are considered to be "at will" employees and have no property rights in their positions. *Levin v. Civil Service Commission of Cook County*, 52 Ill.2d 516, 288 N.E.2d 97 (1972); Foy v. *City of Chicago,* 194 Ill.App.3d 611, 551 N.E.2d 310,141 Ill.Dec. 317 (1st Dist. 1990) (probationary employees are at will); *Willecke v. Bingham,* 278 Ill.App.3d 4, 662 N.E.2d 122, 214 Ill.Dec. 768 (1996). An important qualification to this general rule is that a property right in public employment is created by a "for cause" standard of dismissal. *Compare Villegas v. Board of Fire and Police Commissioners of Village of Downers Grove,* 266 Ill.App.3d 202, 639 N.E.2d 966, 203 Ill.Dec. 407 (1994) (when municipal code provided that employees could only be disciplined for just cause, employees had a property right which could not be taken away without procedural due process) with *DePluzer v. Village of Winnetka,* 265 Ill.App.3d 1061, 638 N.E.2d 1157, 203 Ill.Dec. 31 (1994) (village's employee handbook did not create employment contract for permanent employment so as to prevent employee from being at-will employee who could be terminated without any cause or reason; employee did not show handbook set forth any specific disciplinary procedures that the village was required to follow before dismissal); *see also Lashbrook v. Oekfitz,* 65 F.3d 1339 (7th Cir. 1995); *Warzon v. Drew,* 60 F.3d 1234 (7th Cir. 1995). By virtue of a property right in public employment, an employee may not be terminated without a due process hearing. *Board of Regents v. Roth,* 408 U.S. 564, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972); *Perry v. Sindermann,* 408 U.S. 593,33 L.Ed.2d 570,92 S.Ct. 2694 (1972). A municipality's establishment of disciplinary guidelines for its employees and failure to follow those guidelines may constitute a denial of procedural due process. *McElroy v. Cook County,* 281 Ill.App.3d 1038, 667 N.E.2d 633, 217 Ill.Dec. 544 (1996). A property right in employment can be created by statute,

ordinance, rules, regulations, or practices. *See generally Vail v. Board of Education,* 706 F.2d 1435 (7th Cir. 1983). *See also Duldalao v. St. Mary of Nazareth Hospital Center,* 115 I11.2d 482, 505 N.E.2d 314, 106 Ill.Dec. 8 (1987) (personnel policy manual may create property right). Good-faith reductions in the municipality's police or fire department force are not considered "for cause" discharges and therefore are not subject to statutory discharge procedures. *Hahn v. City of Harvard,* 239 Ill.App.3d 819, 605 N.E.2d 95, 178 Ill.Dec. 656 (2d Dist. 1992). Discretionary employee benefits are not "property rights." *Gaiser v. Village of Skokie,* 271 Ill.App.3d 85, 648 N.E.2d 205, 207 Ill.Dec. 794 (1995) (emergency leave benefits); *Dworak v. Village of Wilmette,* 249 Ill.App.3d 275, 618 N.E.2d 974, 188 Ill.Dec. 404 (1993) (advanced training). However, the denial of certain employee benefits such as a promotion or a particular job assignment may trigger due process protection if more than a mere expectation interest is involved. *Cushing v. City of Chicago,* 3 F.3d 1156 (7th Cir. 1993); *Levenstein v. Salafsky,* 164 F.3d 345 (7th Cir. 1998).

In general, "at will" employees may be discharged for any or no reason by the employing municipality. However, the municipality may not discharge even an "at will" employee for an unconstitutional reason, such as the exercise of her First Amendment rights. *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 50 L.Ed.2d 471, 97 S.Ct. 568 (1977) (discussed at § 20.121); *McKinley v. City of Eloy,* 705 F.2d 1110 (9th Cir. 1983). This does not mean that the municipality may not regulate its employees' exercise of political rights to some extent. *Broadrick v. Oklahoma,* 413 U.S. 601, 37 L.Ed.2d 830, 93 S.Ct. 2908 (1973); *Redemshe v. Village of Romeoville,* 85 Ill.App.3d 286, 406 N.E.2d 602, 40 Ill.Dec. 596 (3d Dist. 1980). However, an adverse action may not be taken against an employee for an exercise of First Amendment rights on matters of legitimate public concern. *Rutan v. Republican Party of Illinois,* 497 U.S. 62 (1990); *Pickering v. Board of Education,* 391 U.S. 563, 20 L.Ed.2d 811,88 S.Ct. 1731 (1968). The *Pickering* test is a balancing test which weighs the First Amendment right in issue against the governmental interest involved. *Bonds v. Milwaukee County,* 2000 WL 311 163 (7th Cir. 2000). This test has been applied to claims of improper transfers *(Hughes v. Whitmer,* 714 F.2d 1407 (8th Cir. 1983)), denials of promotion *(Brooks v. Ashtabula County Welfare Department,* 717 F.2d 263 (6th Cir. 1983); *Lewis v. University of Pittsburgh,* 725 F.2d 910 (3d Cir. 1983)), and demotions *(Boussom v. City,* 567 F.Supp. 1382 (N.D. Ind. 1983); *Biddle v. City of Ft. Wayne,* 591 F.Supp. 72 (N.D. Ind. 1984)); *Bonds v. Milwaukee County,*2000 WL 311 163 (7th Cir. 2000). However, where a general ban on speech is involved, rather than an isolated response to speech which has already occurred, the *National Treasury Employees Union* test is applied. *Milwaukee Police Ass'n v. Jones,* 192 F.3d 853 (7th Cir. 1999). Discretionary employee benefits are not "property rights." *Gaiser v. Village of Skokie,* 271 Ill.App.3d 85, 648 N.E.2d 205, 207 Ill.Dec. 794 (1995) (emergency leave benefits); *Dworak v. Village of Wilmette,* 249 Ill.App.3d 275, 618 N.E.2d 974, 188 Ill.Dec. 404 (1993) (advanced training).

A significant distinction exists between speech involving matters of legitimate public concern and speech involving internal affairs. *Coady v. Steil,* 187 F.3d 727 (7th Cir. 1999); *North v. DeWitt*

County Sheriff's Department Merit Commission, 204 Ill.App.3d 881, 562 N.E.2d 365, 149 Ill.Dec. 901 (4th Dist. 1990). If matters of internal affairs are involved, the municipality may be more restrictive. *Jones v. Georgia,* 725 F.2d 622 (11th Cir. 1984); *Griggs v. North Maine Fire Protection Board of Fire Commissioners,* 216 Ill.App.3d 380, 576 N.E.2d 1082,160 Ill.Dec. 128 (1st Dist. 1991). The test is essentially a balancing between the interests of the employee and those of the public body in the efficiency of the public service. *Pickering, supra.* Whether the speech involves matters of public concern or internal affairs is a question of law, not fact. *Connich v. Myers,* 461 U.S. 138,75 L.Ed.2d 708,103 S.Ct. 1684 (1983); *Kadzielawski v. Board of Fire & Police Commissioners,* 194 Ill.App.3d 676, 551 N.E.2d 331, 141 Ill.Dec. 338 (1st Dist. 1990) (reluctance to take paramedic training involved personal reasons, not public concern). *See also Rankin v. McPherson,* 483 U.S. 378,97 L.Ed.2d 315,107 S.Ct. 2891 (1987); *Gray v. Lacke,* 885 F.2d 399 (7th Cir. 1989); *Biggs v. Village of Dupo,* 892 F.2d 1298 (7th Cir. 1990).

The primary exception to the rule protecting comment on matters of public concern is with respect to "policy-making" employees. Policy-making employees may be discharged for their political affiliation. *Elrod v. Burns,* 427 U.S. 347, 49 L.Ed.2d 547, 96 S.Ct. 2673 (1976); *Branti v. Finkel,* 445 U.S. 507, 63 L.Ed.2d 574, 100 S.Ct. 1287 (1980); *Livas v. Petka,* 711 F.2d 798 (7th Cir. 1983); *Warzon v. Drew,* 60 F.3d 1234 (7th Cir. 1995); *Pleva v. Norquist,* 195 F.3d 905 (7th Cir. 1999); *Vaughn v. King,* 167 F.3d 347 (7th Cir. 1999); *Fellhauer v. City of Geneva,* 142 Ill.2d495,568N.E.2d 870,154 Ill.Dec. 649 (1991) (director of city electrical department was "policy-maker"). A distinction is drawn between "policy-making" employees and "confidential" employees. *Soderbeck v. Burnett County,* 752 F.2d 285 (7th Cir. 1985). With respect to hiring, however, political "recommendations" may still be made. *Tarpley v. Keistler,* 188 F.3d 788 (7th Cir. 1999).

Municipal anti-nepotism policies had been open to question in light of *River Bend Community Unit School District No. 2 v. Illinois Human Rights Commission,* 232 Ill.App.3d 838, 597 N.E.2d 842, 173 Ill.Dec. 868 (3d Dist. 1992), in which the court struck down the district's rule prohibiting one spouse's supervision of the other. Most questions regarding anti-nepotism policies have been laid to rest with the Illinois Supreme Court's decision in *Boaden v. Department of Law Enforcement,* 171 Ill.2d 230, 664 N.E.2d 61, 215 Ill.Dec. 664 (1996). The Court held that the prohibition against marital discrimination under the Illinois Human Rights Act (775 ILCS 5/1-101 *et seq.*) does not encompass no-spouse policies in the workplace.

An employee may be required to yield certain privacy rights when there is reasonable cause to believe that the employee has violated departmental rules. *Kinter v. Board of Fire & Police Commissioners,* 194 Ill.App.3d 126, 550 N.E.2d 1126, 141 Ill.Dec. 80 (1st Dist. 1990) (urinalysis sample reasonably required when controlled substances found in employee's locker).

In addition, public employers also must be cognizant of constitutional claims relative to employment arising from allegations of discrimination on the basis of age (29 U.S.C. §621, *et seq.),*

race, religion, or sex (42 U.S.C. §2000e). *See, e.g., Bryant v. City of Chicago,* 200 F.3d 1092 (7th Cir. 2000) (race-based challenge to police promotion testing procedure); *Smith v. Sheahan,* 189 F.3d 529 (7th Cir. 1999) (workplace sexual harassment). But, in *Kimel v. Florida Board of Regents,* ___ U.S. ___, 145 L.Ed.2d 522, 120 S.Ct. 631 (2000), the Supreme Court held that the Age Discrimination in Employment Act was not applicable to the states by virtue of sovereign immunity.

Either the statutory remedy, a § 1983 claim, or both may be pursued by the employee. *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454,44 L.Ed.2d 295, 95 S.Ct. 1716 (1975). In *Dudycz v. City of Chicago,* 206 Ill.App.3d 128, 563 N.E.2d 1122, 151 Ill.Dec. 16 (1st Dist. 1990), the plaintiff police officer was elected to the Illinois Senate and was required by departmental policy to take a leave of absence. The plaintiff subsequently resigned and then sued the city, alleging retaliatory discharge, equal protection violations, and due process violations. The court upheld the policy and dismissed the complaint. In *Estate of Strocchia v. City of Chicago,* 284 Ill.App.3d 891, 672 N.E.2d 919, 220 Ill.Dec. 102 (1st Dist. 1996), a former employee who had been denied reinstatement sued under §1983 and for alleged retaliatory discharge. The Court held that the employee failed to present evidence of a custom, practice or policy that led to the deprivation. At most, negligent supervision, which is nonactionable, was shown. A disabled employee or applicant may also bring suit against the municipality under the Americans with Disabilities Act (41 U.S.C. §12101 *et seq.*). *See, e.g., Dauen v. Board of Fire and Police Commissioners,* 275 Ill.App.3d 487, 656 N.E.2d 427, 212 Ill.Dec. 104 (3d Dist. 1995); *Wright v. Illinois Department of Corrections,* 2000 WL 210195 (7th Cir. 2000); *Krocka v. City of Chicago,* 203 F.3d 507 (7th Cir. 2000).

In challenging an adverse personnel decision on administrative review or by certiorari in the state courts, a plaintiff could append a second count alleging a violation of procedural due process rights. *See Stratton v. Wenona Community Unit District No. 1,* 133 Ill.2d 413, 551 N.E.2d 640, 141 Ill.Dec. 453 (1990), for an example of this technique involving an appended procedural due process claim.

Municipal employment decisions are also subject to the antidiscrimination provisions of the Illinois Human Rights Act, 775 ILCS 5/1-101, *et seq.* In *City of Belleville, Board of Police & Fire Commissioners v. Human Rights Commission,* 167 Ill.App.3d 834, 522 N.E.2d 268,118 Ill.Dec. 813 (5th Dist. 1988), the court held that a municipality's refusal to hire an applicant with a visual impairment as a police officer violated both the Act and public policy. *See also Village of Maywood Board of Fire and Police Commissioners v. Department of Human Rights,* 296 Ill.App.3d 570, 695 N.E.2d 873, 231 Ill.Dec. 100 (1st Dist. 1998); *City of Rock Island v. Human Rights Commission,* 297 Ill.App.3d 766, 697 N.E.2d 1207, 232 Ill.Dec. 277 (3rd Dist. 1998). In *Illinois Department of Corrections v. Illinois Human Rights Commission,* 298 Ill.App.3d 536, 699 N.E.2d 143, 232 Ill.Dec. 696 (3d Dist 1998), the Court held that the Department had violated the Act by failing to reasonably accommodate an injured employee. *See also Harton v. City of Chicago Department of Public*

Works, 301 Ill.App.3d 378, 703 N.E.2d 493, 234 Ill.Dec. 632 (1st Dist. 1998) (no combination of reasonable accommodations was possible).

Municipalities also must be cognizant of potential employee claims of retaliatory discharge or dismissals not made in good faith. *See, e.g., Di Falco v. Board of Trustees of Firemen's Pension Fund,* 122 Ill.2d 22, 521 N.E.2d 923, 118 Ill.Dec. 446 (1988); *Harrison v, Sears, Roebuck & Co.,* 189 Ill.App.3d 980, 546 N.E.2d 248, 137 Ill.Dec. 494 (4th Dist. 1989); *Foy v. City of Chicago,* 194 Ill.App.3d 611, 551 N.E.2d 310,141 Ill.Dec. 317 (1st Dist. 1990) (no implied covenant of fair dealing when employee is hired at will). In *Lambert v. City of Lake Forest,* 186 Ill.App.3d 937, 542 N.E.2d 1216, 134 Ill.Dec. 709 (2d Dist), *appeal granted,* 128 Ill.2d 664 (1989), the court summarizes many of the cases dealing with retaliatory discharge. The tort of retaliatory discharge has two elements: (a) that the employee was discharged in retaliation for her activities and (b) that the discharge is in contravention of clearly mandated public policy. *See also Daniel v. Village of Hoffman Estates,* 165 Ill.App.3d 772, 520 N.E.2d 754, 117 Ill.Dec. 403 (1st Dist. 1987); *Fellhauer v. City of Geneva,* 142 Ill.2d 495, 568 N.E.2d 870,154 Ill.Dec. 649 (1991); *Robbins v. City of Madison,* 193 Ill.App.3d 379, 549 N.E.2d 947,140 Ill.Dec. 296 (5th Dist. 1990); *Palmateer v. International Harvester Co.,* 85 Ill.2d 124, 421 N.E.2d 876, 52 Ill.Dec. 13 (1981). An employee may be dismissed, however, for excessive absenteeism without leave even if a workers' compensation case is pending. *Finnerty v. Personnel Board of City of Chicago,* 303 Ill.App.3d 1, 707 N.E.2d 600, 236 Ill.Dec. 473 (1st Dist. 1999).

Employees also may be discharged for disruptive speech arising from personal employment disputes with the municipality. *Connich v. Myers,* 461 U.S. 138, 75 L.Ed.2d 708, 103 S.Ct. 1684 (1983); *Arnett v. Kennedy,* 416 U.S. 134, 40 L.Ed.2d 15, 94 S.Ct. 1633 (1974). First Amendment protections do not extend to employee speech under such circumstances. *Norton v. Nicholson,* 187 Ill.App.3d 1046, 543 N.E.2d 1053, 135 Ill.Dec. 485 (1st Dist. 1989). *But see Fellhauer v. City of Geneva, supra.* Finally, it should be noted that in *National Treasury Employees Union v. Von Raab,* 489 U.S. 656, 103 L.Ed.2d 685, 109 S.Ct. 1384 (1989), the Supreme Court upheld random drug testing of governmental employees who are involved in drug interdiction or who carry firearms.

Generally, a cause of action for negligent hiring will not be available because hiring is a discretionary act of the municipality. *Johnson v. Mers,* 279 Ill.App.3d 372, 664 N.E.2d 668, 216 Ill.Dec. 31 (3d Dist. 1996). *Accord, Bryan County v. Brown,* 520 U.S. 397, 137 L.Ed.2d 626, 117 S.Ct. 1382 (1997). The Supreme Court has further extended First Amendment protections to municipal contractors. *Board of County Commissioners v. Umbehr,* 518 U.S. 668, 135 L.Ed.2d 843, 116 S.Ct. 2342 (1996); *O'Hare Truck Service Inc. v. City of Northlake,* 518 U.S. 712, 135 L.Ed.2d 874, 116 S.Ct. 2353 (1996).

2. [20.131] Zoning and Building Regulations

Zoning and building regulations have proven to be a fertile source for numerous §1983 claims based on a wide range of legal theories.

a. [20.132] Existence of Property Right

The initial inquiry is whether a "property right" has been created by state law in the issuance of a building permit or a rezoning. If such a state-created right in fact exists, it is conceivable that a' property right has thereby been created. The Eighth Circuit Court, in *Littlefield v. City of Afton,* 785 F.2d 596 (8th Cir. 1986), held that state law did indeed create a "property right" in issuance of the permit because the issuance was "mandatory" rather than "discretionary." A number of other circuit courts are apparently in agreement. 785 F.2d at 600 - 603. Both the First and Seventh Circuits appear to disagree with this theory, however. In *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822 (1st Dist. 1982), the court held that the rejection of a proposed development by the appropriate officials did not implicate the federal Constitution:

> **[T]he conventional planning dispute - at least when not tainted with fundamental procedural irregularity, racial animus, or the like ... is a matter primarily of concern to the state and does not implicate the Constitution. This would be true even were planning officials to clearly violate, much less "distort" the state scheme under which they operate. A federal court, after an, "should not ... sit as a zoning board of appeals."** [Citation omitted.] 680 F.2d at 833.

Similarly, the Seventh Circuit, in *Muckway v. Craft,* 879 F.2d 517 (7th Cir. 1986), held that the benefit of a zoning ordinance is a right secured solely by state law, not the federal Constitution. It therefore rejected the plaintiff's §1983 claim grounded on an alleged violation of the equal protection clause.

b. [20.133] Procedural Due Process

Assuming the existence of a property right, procedural due process must be afforded the petitioner. In *Littlefield v. City of Afton,* 785 F.2d 596 (8th Cir. 1986), the court required a pre-deprivation due process hearing. It held that hearings before the city council, of which the plaintiffs had notice, were sufficient.

On the other hand, it appears that the analysis in the First and Seventh Circuits would focus on the adequacy of post-deprivation state remedies in building and zoning disputes. *Muckway v. Craft,* 789 F.2d 517 (7th Cir. 1986); *Raskiewicz v. Town of New Boston,* 754 F.2d 38 (1st Cir. 1985);

Albery v. Reddig, 718 F.2d 245 (7th Cir. 1983); *Roy v. City of Augusta,* 712 F.2d 1517 (1st Cir. 1983).

c. [20.134] Substantive Due Process

Based on the Supreme Court's recent opinions, it would not appear that zoning or building permits fall within the scope of "fundamental liberty" for substantive due process purposes. *See* discussion at Section 20.91 *supra.*

Even if there were such a case, however, in the Seventh Circuit there are still several defenses available to defend a substantive due process claim arising from land use regulation. First, there is the argument that the benefits of a zoning ordinance are rights secured by state law only, not by the Constitution. *Polenz v. Parrott,* 883 F.2d 551 (7th Cir. 1989), adopting the "property right plus" test for substantive due process violations (see §20.105); *Muckway v. Craft,* 789 F.2d 517 (7th Cir. 1986). Second, in the Seventh Circuit absolute immunity should extend to decisions made by municipal governing boards and quasi-judicial bodies (such as zoning boards of appeal). See § 20.117. Third, the Seventh Circuit has required that land use decisions be "invidious and irrational." *Harding v. County of Door,* 870 F.2d 430 (7th Cir. 1989).

Seventh Circuit precedent in this area has been cited with approval in the land planning case of *First National Bank of Joliet v. County of Grundy,* 197 Ill.App.3d 660, 554 N.E.2d 1089, 144 Ill.Dec. 50 (3d Dist. 1990), and in *PMB Stone, Inc. v. Palzer,* 251 Ill.App.3d 390, 622 N.E.2d 71, 190 Ill.Dec. 661 (3d Dist. 1993), a zoning permit case, the Third District Appellate Court adopted the Seventh Circuit's "property right plus" test, citing *Polenz* and *New Burnham Prairie Homes, Inc. v. Village of Burnham,* 910 F.2d 1474 (7th Cir. 1990).

Zoning decisions may also implicate the Fair Housing Act (42 U.S.C. §3601). *Hemisphere Building Co. v. Village of Richton Park,* 171 F.3d 437 (7th Cir. 1999); *NJ Rooming & Boarding House Owners v. Asbury Park,* 152 F.3d 217 (3rd Cir. 1998).

d. [20.135] Takings Claims

The Supreme Court has rendered several significant decisions with respect to takings jurisprudence. In First *English Evangelical Lutheran Church v. County of Los Angeles, 482* U.S. 304, 96 L.Ed.2d 250, 107 S.Ct. 2378 (1987), the Court endorsed the concept of a "temporary" regulatory taking. Such a taking can occur when a property owner is denied all use of her property for a temporary period of time. In *Nollan v. California Coastal Commission,* 483 U.S. 825, 97 L.Ed.2d 677, 107 S.Ct. 3141 (1987), the Court held that requiring a public access easement to a beach as a condition for a building permit constituted an unconstitutional taking. This test is quite similar to the Illinois standard for land donations, which requires that the dedication be specifically

and uniquely attributable to the development. *Krughoff v. City of Naperville*, 68 Ill.2d 352, 369 N.E.2d 892, 12 Ill.Dec. 185 (1977).

In *Yee v. City of Escondido*, 503 U.S. 519 , 118 L.Ed.2d 153,112 S.Ct. 1522 (1992), the Court upheld the city's rent-control ordinance as applied to a mobile home park. The Court found that the ordinance regulated only the use of the property and therefore did not constitute a taking per se. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L.Ed.2d 798, 112 S.Ct. 2886 (1992), the state legislature, in the wake of hurricane Hugo, passed the Beachfront Management Act. The Act had the effect of prohibiting the plaintiff from building residential dwellings on his property. The Court held that the plaintiff had suffered a compensable taking because he was deprived of any economically viable use of his land.

Takings claims also are appearing in state court actions. In *Beneficial Development Corp. v. City of Highland Park*, 239 Ill.App.3d 414, 606 N.E.2d 837, 179 Ill.Dec. 1005 (2d Dist. 1992), the owner of lots subject to a recapture agreement challenged the agreement on takings grounds. While the court held that the recapture agreement was lawfully executed, it left open the possibility that a takings claim might be stated in the future. *See also Bello v. Walker*, 840 F.2d 1124 (3d Cir. 1988); *Lake Forest Chateau, Inc. v. Lake Forest*, 133 Ill.2d 129, 549 N.E.2d 336, 139 Ill.Dec. 824 (1989); *State Medical Center Commission v. Peter Carlton at Ogden & Oakley, Inc.*, 169 Ill.App.3d 769,523 N.E.2d 1091,120 Ill.Dec. 180 (1st Dist. 1988); *Suhadolnik v. City of Springfield*, 184 Ill.App.3d 155, 540 N.E.2d 895, 133 Ill.Dec. 29 (4th Dist. 1989) (zoning decision was "arbitrary" but did not constitute "taking"); *St. Lucas Association v. City of Chicago*, 212 Ill.App.3d 817, 571 N.E.2d 865, 156 Ill.Dec. 885 (1st Dist. 1991) (denial of rezoning was arbitrary, but no taking occurred because not all use of land was denied). *But see Amoco Oil Company v. Village of Schaumburg*, 277 Ill.App.3d 926, 661 N.E.2d 380, 214 Ill.Dec. 526 (1st Dist. 1995), in which the court held that conditioning issuance of a special use permit upon the dedication of 20 percent of the owner's land for highway expansion constituted an unlawful taking. Although *River Park Inc. v. City of Highland Park*, 281 Ill.App.3d 154, 667 N.E.2d 499, 217 Ill.Dec. 410 (1996), was not strictly styled as a takings case, the court held that the city's failure to consider zoning petitions in good faith and its later acquisition of the owner's property constituted sufficient basis for a tort action based on deprivation of property where the alleged conduct is corrupt, malicious, or otherwise undertaken in bad faith. If an owner purchases property that is already subject to the provisions of a zoning ordinance, the failure of the municipality to allow a rezoning or variation does not constitute a "taking." *Conroy v. Village of Lisle*, 716 F.Supp. 1104 (N.D. Ill. 1989); *Van Duyne v. City of Crest Hill*, 136 Ill.App.3d 920, 483 N.E.2d 1307, 91 Ill.Dec. 672 (3d Dist. 1985). *Conroy* is of special interest to the municipal litigator since it also addresses the substantive due process component of the plaintiff's claim. The rezoning of property does not effect an unconstitutional taking or inverse condemnation, absent a showing that the owner is deprived of all economically viable uses of the property. *Zeitz v. City of Glenview*, 34 Ill.App.3d 586, 710 N.E.2d 849, 238 Ill.Dec. 52 (1st Dist. 1999). In *Groenings v. City of St. Charles*, 215 Ill.App.3d 295, 574 N.E.2d 1316, 158 Ill.Dec. 923

(2d Dist. 1991), property owners brought a constitutional challenge to a boundary agreement between two municipalities. The complaint attempted to state causes of action under various constitutional theories, *i.e.*, equal protection, substantive due process, procedural due process, and takings claims. While the court upheld the boundary agreement, the case is illustrative of the type of civil rights complaint that can be drafted in land use cases. *See also People ex rel. Village of Lake Bluff v. City of North Chicago,* 224 Ill.App.3d 866, 586 N.E.2d 802, 166 Ill.Dec. 844 (2d Dist. 1992).

Neither deprivation of the most beneficial use nor a severe decrease in property value constitutes a "taking." *Rymer v. Douglas County*, 764 F.2d 796 (11th Cir. 1985); *Nasser v. City of Homewood,* 671 F.2d 432 (11th Cir. 1982).

Plaintiffs who bring takings claims in federal court first must clear the hurdle imposed by the *Williamson County* "ripeness" doctrine. In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 U.S. 172, 87 L.Ed.2d 126, 105 S.Ct. 3108 (1985), a land developer brought a § 1983 action predicated on denial of his proposed use. The Supreme Court held that the §1983 action brought under the Fifth and Fourteenth Amendments was premature for two reasons. First, the developer had failed to seek variances, which was permissible under the ordinances. Second, the Court held that the §1983 action was premature because the developer had not sought compensation through available state procedures, *i.e.*, an action for inverse condemnation. *Accord, Forseth v. Village of Sussex,* 199 F.3d 363 (7th Cir. 2000) (substantive due process claim and takings claims were subject to ripeness requirements but not equal protection claims); *Littlefield v. City of Afton,* 785 F.2d 596 (8th Cir. 1986). Since an action for inverse condemnation exists in Illinois, the *Williamson* rule should bar § 1983 takings actions in this state. *Shaw v. Lorenz,* 42 Ill.2d 246, 246 N.E.2d 285 (1969).

e. [20.136] Equal Protection

A plaintiff in a zoning or building regulation case could allege that the ordinances have not been uniformly applied and, therefore, a violation of equal protection is involved. *Village of Willowbrook v. Olech,* ___ U.S. ___, 145 L.Ed.2d 1060 (2000). *See Ossler v. Village of Norridge,* 557 F.Supp. 219 (N.D. Ill. 1983).

In *Safanda v. Zoning Board of Appeals,* 203 Ill.App.3d 687,561 N.E.2d 412,149 Ill.Dec. 134 (2d Dist. 1990), the court refused to dismiss an equal protection claim by a landowner whose lot was the only lot in the original plat of subdivision to have its dimensions reversed by a subsequent zoning ordinance text amendment. The case raised the equal protection claim in the context of the Fourteenth Amendment.

3. [20.137] First Amendment Claims

Occasionally, the zoning of property owned by religious institutions may raise First Amendment issues. In *Bethel Evangelical Lutheran Church v. Morton,* 201 Ill.App.3d 858, 559 N.E.2d 533, 147 Ill.Dec. 360 (3d Dist. 1990), the court upheld the municipality's enrollment cap with respect to a church school. The court adopted a balancing test and found that the governmental interest outweighed any First Amendment concerns.

In summary, the most routine zoning or building decision theoretically can give rise to a number of §1983 claims.

4. [20.138] Licensing

A license traditionally has been considered a privilege, rather than a right, which affords the holder of the license the opportunity to engage in a particular business or occupation. *Weinstein v. Daley,* 85 Ill.App.2d 470, 229 N.E.2d 357 (1st Dist. 1967). In *Boonstra v. City of Chicago,* 214 Ill.App.3d 379, 574 N.E.2d 689, 158 Ill.Dec. 576 (1st Dist. 1991), it was held that a taxicab license was a protected property interest and assignable to third parties. The city council could not pass legislation removing the assignability feature without due process and without providing just compensation. Most recently, however, there has been a trend to recognize a license as a species of property right. *Reed v. Village of Shorewood,* 704 F.2d 943 (7th Cir. 1983); *Do-Right Auto Sales v. Howlett,* 401 F.Supp. 1035 (N.D. Ill. 1975). If a license is a property right, it may not be revoked without adequate procedural due process. In *Triple A Services, Inc. v. Rice,* 174 Ill.App.3d 654,.528 N.E.2d 267, 123 Ill.Dec. 722 (1st Dist. 1988), *rev'd on other grounds,* 131 Ill.2d 217 (1989), the appellate court held that a business license cannot be revoked, nor can a removal be denied, without notice and a due process hearing. *But see Ole, Ole, Inc. v. Kozubowski,* 187 Ill.App.3d 277, 543 N.E.2d 178,134 Ill.Dec. 895 (1st Dist. 1989), and *Las Fuentes, Inc. v. City of Chicago,* 209 Ill.App.3d 766, 567 N.E.2d 1093,153 Ill.Dec. 866 (1st Dist. 1991), holding that a liquor license is a privilege, not a property right, and is not subject to due process protections. Absent acquiring the license required by ordinance, there is no "property" right to do business in the municipality. *Lappin v. Costello,* 232 Ill.App.3d 1033, 598 N.E.2d 311, 174 Ill.Dec. 114 (4th Dist. 1992). *See also Greco v. Guss,* 775 F.2d 161 (7th Cir. 1985) (assuming, but not deciding, that liquor license is property right under Illinois law); *City of Wyoming v. Liquor Control Commission of Illinois,* 48 Ill.App.3d 404,362 N.E.2d 1080, 6 Ill.Dec. 258 (3d Dist. 1977) (liquor license not property interest but due process required for nonrenewal).

These cases strongly suggest that appropriate due process procedures should be used whenever a license is revoked, suspended, or not renewed in order to avoid potential § 1983 litigation. *But see City of Chicago v. Westphalen,* 93 Ill.App.3d 1110, 418 N.E.2d 63, 49 Ill.Dec. 419

(1st Dist. 1981) (notice and opportunity to be heard before revocation not necessary unless required by law).

Assuming the existence of a property right in the license, the rule of *Parratt v. Taylor*, 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct. 1908 (1981), discussed in § 20.102, applies to claims that a license has been illegally revoked. If there are adequate state post-deprivation remedies available, they must be pursued by the licensee. *Greco v. Guss, supra.*

5. Administrative Searches and Seizures

a. [20.139] Searches

In *See v. Seattle,* 387 U.S. 541, 18 L.Ed.2d 943, 87 S.Ct. 1737 (1967) and *Camara v. Municipal Court of San Francisco,* 387 U.S. 523,18 L.Ed.2d 930,87 S.Ct. 1727 (1967), the Supreme Court held that the Fourth and Fourteenth Amendments prohibited warrantless, nonemergency inspection of private dwellings and business premises by municipal inspectors without the owner's consent. Thus, if municipal officials wish to engage in a nonconsensual search in the absence of emergency conditions, an administrative search warrant must be procured. Probable cause need not be shown for issuance of this type of warrant. A reasonable justification for the administrative warrant is all that is necessary.

b. [20.140] Seizures

One of the most common types of administrative seizures of property is the towing of motor vehicles. Towing has raised a number of procedural due process questions, which have been addressed by both the federal and state courts. Three broad categories of vehicles are implicated by these decisions: abandoned vehicles, stolen vehicles, and illegally parked vehicles. The central issue is what process is due vehicle owners before towing. Federal and state case law has required, in the case of abandoned vehicles, that a pre-tow notice *must* be provided. *Graff v. Nicholl,* 370 F.Supp. 974 (N.D. Ill. 1974); *Valdez v. City of Ottawa,* 105 Ill.App.3d 972,434 N.E.2d 1192,61 Ill.Dec. 595 (3d Dist. 1982). A tow sticker is insufficient notice if the owner can be identified readily; notice by certified or registered mail is appropriate notice under these circumstances. *Id*. However, if the vehicle endangers public safety or impedes the movement of traffic, the pre-tow notice requirement may be dispensed with. *But see Conner v. City of Santa Ana,* 897 F.2d 1487 (9th Cir. 1990), holding that automobile owners' vehicles that were a public nuisance could not be seized without a warrant even though pre-seizure process was provided. *See also Towers v. City of Chicago,* 173 F.3d 619 (7th Cir. 1999) (discussing post-deprivation towing remedies).

If the police discover a stolen vehicle, prior notice to the owner before towing and impounding the vehicle is not necessary. *Miller v. City of Chicago,* 774 F.2d 188 (7th Cir. 1985).

Prompt post-towing notice must be given to the owner, however. Impounding and towing a vehicle in which unlawful weapons have been found does not violate the vehicle owner's constitutional rights. *People v. Jaudron,* 307 Ill.App.3d 427, 718 N.E.2d 647, 241 Ill.Dec. 76 (1st Dist. 1999).

Illegally parked vehicles may be towed without prior notice to the owner even though they may not be a traffic obstruction or creating an emergency situation. *Sutton v. City of Milwaukee,* 672 F.2d 644 (7th Cir. 1982). Advance notice before towing is not feasible in the case of an illegally parked car; the car would be gone by the time the owner is notified. 672 F.2d at 647.

Even if a vehicle has been properly towed without prior notice, a prompt notice to the owner and an opportunity to be heard must be given before any further disposition of the vehicle is made. *See Ernst v. City of Chicago,* 63 F.Supp.2d 908 (N.D. Ill. 1999). The owner must be given the opportunity to contest the tow before he can be required to pay any charges or fees. *Valdez, supra; Stypmann v. City & County of San Francisco,* 557 F.2d 1338 (9th Cir. 1977).

In *Town of Normal v. Seven Kegs,* 234 Ill.App.3d 715, 699 N.E.2d 1384, 175 Ill.Dec. 370 (4th Dist. 1992), the court held that a liquor distributor's substantive due process rights were violated by the Town's forfeiture ordinance, designed to prevent underage drinking. The court found that there was no rational basis to penalize the distributor for the actions of the purchasers.

In *Rumbold v. Town of Bureau,* 221 Ill.App.3d 222, 581 N.E.2d 809, 163 Ill.Dec. 655 (3d Dist. 1991), the plaintiff alleged that his semitrailer full of grain was seized when township officials sought to enforce an allegedly illegal road-weight limit. The court held a § 1983 cause of action based on illegal seizure was stated.

Similarly, in *Soldal v. Cook County,* 506 U.S. 56, 121 L.Ed.2d 450, 113 S.Ct. 538 (1992), the United States Supreme Court upheld a §1983 complaint based on an alleged Fourth Amendment seizure. In *Soldal,* it was alleged that deputy sheriffs assisted in the illegal removal of a mobile home from its pod and towing of it to another lot.

VI. [20.141] CONCLUSION

The field of municipal litigation continues to evolve and becomes more complex with each passing year. With the advent of home rule powers under the 1970 Illinois Constitution, an abrupt change occurred in the focus and nature of legal analyses regarding home rule municipal authority. Rather than examine existing statutes for the requisite authority to act, as suggested by Dillon's Rule, home rule authority creates a power to legislate that is subject only to restrictions imposed by the Constitution itself and by certain acts of the General Assembly. Judicial interpretations of the scope of home rule powers have confirmed that this framework of legal analysis is appropriate.

The United States Supreme Court decision in *Monell v. Department of Social Services of City of New York,* 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978), has been the most significant decision affecting municipalities in the past two decades. *Monell* has resulted in increasing numbers of municipal legislative and administrative decisions being subject to review by federal courts under the auspices of 42 U. S.C. § 1983. While the United States Supreme Court has decided cases in recent years that have tended to limit the scope of municipal liability under § 1983, there are obvious advantages to the plaintiff in proceeding under §1983 and the possibility of recouping attorneys' fees under § 1988. Indeed, an expansion of the number of § 1983 cases brought in state courts or appended to state law claims is apparent as these courts become more familiar with §1983 practice and procedures.

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20S Municipal Litigation

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I. Challenges to Municipal Legislation

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F. [20S.47] Taxpayer Suits

4. [20S.51] Taxpayer Derivative Action

I. CHALLENGES TO MUNICIPAL LEGISLATION

A. Litigation and Non-Home Rule Municipalities

1. [20S.2] General and Specific Statutes

Add at the end of the first paragraph:

In *Thompson v. Village of Newark,* 329 Ill.App.3d 536, 768 N.E.2d 856, 263 Ill.Dec. 775 (2002), the court strictly construed the language of the Municipal Code dealing with impact fees and concluded that such fees could be assessed only for school or park real estate acquisition.

3. [20S.4] Preemption

Add at the end of the first sentence of the second paragraph:

Hawthorne v. Village of Olympia Fields, 2003 WL 1889613 (Ill. S. Ct.) (state-licensed day care homes cannot be excluded from residential districts by non-home rule municipality because such exclusion is implicitly preempted by state licensing regulations).

B. Home Rule Units

2. [20S.7] Relation to Local Affairs

Add at the end of the first paragraph:

Property tax levies are matters of local concern and within the scope of home rule powers. *Trust No. 115 v. People ex rel. Little,* 328 Ill.App.3d 1033, 767 N.E.2d 933, 263 Ill.Dec. 207 (2002); *Alpha Gamma Rho Alumni v. People ex rel. Botlaw,* 322 Ill.App.3d 310, 750 N.E.2d 282, 255 Ill.Dec. 701 (2001). *But see City of Joliet v. Snyder,* 317 Ill.App.3d 940, 741 N.E.2d 1051, 251 Ill.Dec. 873 (2000) (housing of sexually violent persons was a matter of statewide, rather than local, concern).

5. [20S.10] Existence of State Statutory Program and Preemption

Add at the end of the fifth paragraph:

However, if a home rule ordinance lacks a leal remedy within its text, the corresponding statutory remedy may be applicable. *Schillerstrom Homes v. City of Naperville,* 198 Ill.2d 281, 762 N.E.2d 494, 260 Ill.Dec. 835 (2001) (statutory damages remedy for failure to approve a plat).

Add at the end of the sixth paragraph:

If a statute which had preempted home rule ordinances is amended to remove the preemption, then the home rule ordinance is reinstated without the necessity of express reenactment. *City of Burbank v. Czaja,* 331 Ill.App.3d 369, 769 N.E.2d 1045, 264 Ill.Dec. 208 (2002).

Add at the end of the second sentence of the seventh paragraph:

Endsley v. City of Chicago, 319 Ill.App.3d 1009, 745 N.E.2d 708, 253 Ill.Dec. 585 (2001).

C. Reasonableness of Ordinance

1. [20S.11] Presumption of Validity

Add at the end of the second paragraph:

An ordinance which imposes increased fines on those who contest the violation on the merits is unconstitutional. *Waicekauskas v. Burke,* ___ Ill.App. ___, 784 N.E.2d 280, 271 Ill.Dec. 62 (2002).

3. Test of Reasonableness

a. [20S.14] Protection of Public Welfare

Add at the end of the second sentence of the first paragraph:

See also U.S.G. Italian Marketcaffe, L.L.C. v. City of Chicago, 332 Ill.App.3d 1008, 774 N.E.2d 47, 266 Ill.Dec. 485 (2002) (litter tax ordinance classifications were not reasonably related to the legislative purpose).

Add at the end of the first sentence of the sixth paragraph:

Alarm Detection Systems, Inc. v. Village of Hinsdale, 326 Ill.App.3d 372, 761 N.E.2d 782, 260 Ill.Dec. 599 (2001).

f. [20S.19] Laches, Estoppel, and Statutes of Limitation

Add at the end of the second paragraph:

City of Belleville v. Illinois Fraternal Order of Police, 312 Ill.App. 561, 732 N.E.2d 592, 247 Ill.Dec. 537 (2000) (agreement between union and mayor was void).

Add at the end of the ninth paragraph:

Presumably, the five-year statute of limitations applies to causes of action based on allegations that an ordinance is unconstitutional as applied. *Raintree Homes, Inc. v. Village of Long Grove,* ___ Ill.App.3d ___, 780 N.E.2d 773, 269 Ill.Dec. 301 (2002); *see also Sundance Homes, Inc. v. County of DuPage,* 195 Ill.2d 257, 746 N.E.2d 254, 253 Ill.Dec. 806 (2001) (impact fee claim).

Add at the end of the first sentence of the last paragraph:

City of Chicago ex rel. Scachitti v. Prudential Securities, Inc., 332 Ill.App.3d 353, 772 N.E.2d 906, 265 Ill.Dec. 535 (2002).

Add at the end of the last paragraph of the section:

However, where the theory of the challenge to the ordinance is based on tortious misconduct, such as "abuse of process" or "corrupt and malicious motives," the Tort Immunity Act's (745 ILCS 10/1-101 *et seq.*) one year limitation will apply. *Village of Bloomingdale v. CDG Enterprises,* 196 Ill.2d 484, 752 N.E.2d 1090, 256 Ill.Dec. 848 (2001).

g. [20S.20] Contracts Implied at Law

Delete the last sentence of the section and substitute therefor:

Based on the Supreme Court's recent decision in *Village of Bloomingdale v. CDG Enterprises,* 196 Ill.2d 484, 752 N.E.2d 1090, 256 Ill.Dec. 848 (2000), it now appears that the Tort Immunity Act (745 ILCS 10/1-101 *et seq.*) and the doctrine of sovereign immunity may bar quasi-contract claims.

II. FORMS OF JUDICIAL RELIEF IN MUNICIPAL LITIGATION

B. Injunctions

1. [20S.26] Test for Permanent Injunctive Relief

Add at the end of the first paragraph:

People ex rel. Birkett v. City of Chicago, 329 Ill.App.3d 477, 769 N.E.2d 84, 263 Ill.Dec. 882 (2002).

3. [20S.31] Municipal Use of Injunctions

Add at the end of the second sentence of the fourth paragraph:

Village of Riverdale v. Allied Waste Transportation, 334 Ill.App.3d 224, 777 N.E.2d 684 267 Ill.Dec. 881 (2002) (preliminary injunction against operation of waste disposal, storage and recycling facility).

C. Mandamus

2. [20S.34] Specific Legal Duty

Add at the end of the second sentence of the second paragraph:

Givot v. Orr, 321 Ill.App.3d 78, 746 N.E.2d 810, 254 Ill.Dec. 53 (2001).

D. Quo Warranto

4. [20S.44] Public and Private Rights

Add at the end of the first paragraph:

However, a taxpayer who lives within the annexed territory has standing to bring a quo warranto action challenging the annexation. *People ex rel. Graf v. Village of Lake Bluff*, 321 Ill.App.3d 897, 748 N.E.2d 801, 255 Ill.Dec. 97 (2001).

F. Taxpayer Suits

4. [20S.51] Taxpayer Derivative Action

Add at the end of the first sentence:

City of Chicago ex rel. Scachitti v. Prudential Securities, Inc., 332 Ill.App.3d 353, 772 N.E.2d 906, 265 Ill.Dec. 535 (2002).

III. ADMINISTRATIVE DECISION-MAKING AND JUDICIAL REVIEW

A. [20S.53] Quasi-Judicial Function of Administrative Agencies

Add at the end of the first paragraph:

Municipal bodies act in administrative or quasi-judicial capacities when those bodies conduct zoning hearings concerning a special use petition. *People ex rel.Klaeren v. Village of Lisle*, 202 Ill.2d 164, 781 N.E.2d 223, 269 Ill.Dec. 420 (2002); *Gallik v. County of Lake*, 335 Ill.App.3d 325, 781 N.E.2d 522, 269 Ill.Dec. 725 (2002). Consequently, the same right to notice, an opportunity to be heard, the right to cross-examine, and the right to impartial rulings on the evidence apply in these types of hearings.

2. [20S.55] Decision Based on Evidence

Add at the end of the third paragraph:

If one decision maker on an administrative tribunal is not disinterested, his participation may render the decision voidable. Questioning by the hearing officer does not imply bias. *Comito v. Police Board of the City of Chicago*, 317 Ill.App.3d 677, 739 N.E.2d 942, 251 Ill.Dec. 9 (2000).

5. [20S.58] Precedential Effects of Agency Decisions

Add at the end of the first sentence:

Monat v. County of Cook, 322 Ill.App.3d 499, 750 N.E.2d 260, 255 Ill.Dec. 679 (2001).

B. Administrative Review Law

1. [20S.61] Commencement of Administrative Review Action

Add at the end of the first paragraph:

The plaintiff must produce evidence of a good faith effort to cause summons to be issued in a timely manner; merely assuming that the clerk of the court will issue a summons is not sufficient. *Carver v. Noll*, 186 Ill.2d 554, 714 N.E.2d 486, 239 Ill.Dec. 567 (1999); *Blumhorst v.*

Illinois Dept. of Employment Security, 335 Ill.App.3d 1075, 783 N.E.2d 654, 270 Ill.Dec. 692 (2002).

2. [20S.62] Scope of Judicial Review

Add at the end of the second paragraph:

An administrative agency's decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident. When an administrative agency's determination involves a mixed question of fact and law, the applicable standard of review is the clearly erroneous standard, which falls between a manifest weight of the evidence standard and de novo review, so as to give some deference to the agency's experience and expertise. *Swoope v. Retirement Board of Policemen's Annuity & Benefit Fund,* 323 Ill.App.3d 526 752 N.E.2d 505, 256 Ill.Dec. 625 (2001).

Add at the end of the first sentence of the third paragraph:

Where an issue of statutory construction is presented, the court will conduct its review *de novo. Siwek v. Retirement Board of Policemen's Annuity & Benefit Fund,* 324 Ill.App.3d 820, 756 N.E.2d 374, 258 Ill.Dec. 392 (2001); *Marion Hospital Corporation v. Illinois Health Facilities Planning Board,* 324 Ill.App.3d 451, 753 N.E.2d 1104, 257 Ill.Dec. 478 (2001).

Add at the end of the third paragraph:

Where an administrative entity gives a practical construction to an ambiguous ordinance, a reviewing court will defer to the agency's construction unless it is clearly erroneous, arbitrary of unreasonable. *LaSalle National Bank v. City Suites, Inc.*, 325 Ill.App.3d 780, 758 N.E.2d 382, 259 Ill.Dec. 259 (2001).

Add at the end of the section:

However, administrative review will not necessarily preclude causes of action which do not implicate the correctness of the administrative decision. *Ross v. City of Freeport,* 319 Ill.App.3d 835, 746 N.E.2d 1220, 254 Ill.Dec. 172 (2001) (fraudulent misrepresentation claim); *Stykel v. City of Freeport,* 318 Ill.App.3d 839, 742 N.E.2d 906, 252 Ill.Dec. 368 (2001) (federal claim under 42 U.S.C. §1983).

Issues that have been finally decided in an administrative proceeding which is judicial in nature preclude the litigation of those same fact issues in any subsequent proceeding. This is the branch of res judicata referred to as "issue preclusion." *Village of Oak Park v. Illinois*

Department of Employment Security, 332 Ill.App.3d 141, 772 N.E.2d 951, 265 Ill.Dec. 580 (2002).

3. [20S.63] Scope of Judicial Remedies

Add at the end of the fourth paragraph:

A municipality may have standing to sue one of its own administrative boards if the board's decision will have a direct and continuing impact on the municipality's duty to levy taxes. *Karfs v. City of Belleville*, 329 Ill.App.3d 1198, 770 N.E.2d 256, 264 Ill.Dec. 362 (2002).

C. Exhaustion of Administrative Remedies

6. [20S.70] Multiplicity of Remedies

Add at the end of the section:

Pecora v. County of Cook, 323 Ill.App.3d 917, 752 N.E.2d 532, 256 Ill.Dec. 652 (2001) (rezoning dispute).

IV. INTERGOVERNMENTAL LITIGATION

A. Municipalities and State Agencies

3. [20S.77] Other Constitutional Provisions

Add at the end of the second paragraph:

However, in *City of Carbondale v. Bower*, 332 Ill.App.3d 928, 773 N.E.2d 182, 265 Ill.Dec. 820 (2002), where the city sought a court order to direct the Department of Revenue to disburse public funds based on the 1990 census, rather than the 2000 census, the appellate court held that the doctrine of sovereign immunity barred the claim in the circuit court. The court of claims had exclusive jurisdiction.

4. [20S.78] Suits Against State Agencies

Add at the end of the first sentence of the first paragraph:

See, e.g., City of DeKalb v. Thomas, 331 Ill.App.3d 9, 770 N.E.2d 730, 264 Ill.Dec. 425 (2002) (trial court lacked authority to appoint private counsel for defendant in ordinance violation case and award attorneys' fees).

D. [20S.84] Municipal Regulation Affecting Other Public Bodies

Add at the end of the third sentence of the first paragraph:

County of Lake v. Fox Waterway Agency, 326 Ill.App.3d 100, 759 N.E.2d 970, 259 Ill.Dec. 909 (2001).

Add at the end of the sixth sentence of the first paragraph:

Board of Trustees v. City of Chicago, 317 Ill.App.3d 569, 740 N.E.2d 515, 251 Ill.Dec. 434 (2000) (building codes).

V. FEDERAL LITIGATION

A. Rights Privileges, and Immunities Protected by §1983

2. [20S.87] Property Interests Under Due Process Clause

Add at the end of the first sentence of the second paragraph:

Miller v. Retirement Board of Policemen's Annuity, 329 Ill.App.3d 589, 771 N.E.2d 431, 264 Ill.Dec. 727 (2002) (pension benefits are a property right, and predeprivation hearing is mandatory).

5. [20S.90] Equal Protection Clause

Add at the end of the third sentence:

Cruz v. Town of Cicero, 275 F.3d 579 (7th Cir. 2001).

Add at the end of the first paragraph:

In *Albiero v. City of Kankakee*, 246 F.2d 927 (7th Cir. 2001), the Court rejected a landlord's equal protection claim when his property was designated on a sign as "slum property" by the City.

Add at the end of the second paragraph:

An equal protection claim will fail if the comparable individuals, upon which the plaintiff relies for the claim, are not similarly situated. *Purze v. Village of Winthrop Harbor*, 286 F.3d 452 (7th Cir. 2002) (developer not similarly situated with respect to plats of subdivision).

B. State Action Requirement and Constitutional Deprivation

3. [20S.98] State of Mind Requirements

Add at the end of the first paragraph:

Nevel v. Village of Schaumburg, 297 F.3d 673 (7th Cir. 2002) (any animus by village officials was not the sole cause of their actions; the board members also had a legitimate interest in ensuring that regulations were upheld).

C. [20S.99] Procedural Due Process

Add at the end of the first paragraph:

L C & S, Inc. v. Warren County Area Plan Commission, 244 F.3d 601 (7th Cir. 2001).

1. [20S.100] Due Process Hearings

Add at the end of the first paragraph:

Procedural due process in an administrative setting does not always require application of the judicial model, and in fact, not all procedures are appropriate in administrative proceedings.

Procedural safeguards mandated by due process in a particular administrative proceeding vary, depending upon: (1) significance of private interest which will be affected by the official action, (2) risk of erroneous deprivation of such interest through procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and (3) significance of state interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural safeguards would entail. *El Sauz, Inc. v. Daley*, 328 Ill.App.3d 508, 765 N.E.2d 1052, 262 Ill.Dec. 444 (2002); *Krocka v. Police Board of City of Chicago*, 327 Ill.App.3d 36, 762 N.E.2d 577, 261 Ill.Dec. 8 (2000).

D. Judicial Standards for Review of Municipal Ordinances

1. [20S.107] Rational Basis Test

Add at the end of the second sentence:

General business taxes are reviewed under the rational basis test even if some of the business activities relate to free speech. *American Multi-Cinema, Inc. v. City of Warrenville*, 321 Ill.App.3d 349, 748 N.E.2d 746, 255 Ill.Dec. 42 (2001).

2. [20S.108] Strict Scrutiny Test

Add at the end of the second sentence of the first paragraph:

Good News Club v. Milford Central School, 533 U.S. 98, 150 L.Ed.2d 368, 121 S.Ct. 2093 (2001) (school facilities may be used for after-school religious activities); *DeBoer v. Village of Oak Park*, 267 F.3d 558 (7th Cir. 2001) (use of village hall for religious activities).

Add at the end of the first sentence of the second paragraph:

In Village of Villa Park v. Stokovich, 334 Ill.App.3d 488, 778 N.E.2d 750, 268 Ill.Dec. 484 (2002), the Court held that, in the context of a demolition case, the property right in issue was to be treated as a "fundamental right," which theretofore triggered strict scrutiny analysis. On the other hand, the right to bear arms is not a fundamental right. *City of Chicago v. Taylor*, 332 Ill.App.3d 583, 774 N.E.2d 22, 266 Ill.Dec. 244 (2002) (city ordinance prohibiting possession of unregistered shotgun under rational basis test).

3. [20S.109] Intermediate Levels of Scrutiny

Add at the end of the first paragraph:

People ex rel. Ryan v. World Church of the Creator, 198 Ill.2d 115, 760 N.E.2d 953, 260 Ill.Dec. 180 (2001) (Solicitation for Charity Act was a valid regulation under the First Amendment).

F. Immunities

1. [20S.117] Absolute Immunity

Add at the end of the second paragraph:

Tobin for Governor v. Illinois State Board of Elections, 268 F.3d 517 (7th Cir. 2001).

2. [20S.118] Qualified Immunity

Add at the end of the third paragraph:

But see Hope v. Pelzer, 536 U.S. 730, 153 L.Ed.2d 666, 122 S.Ct. 2508 (2002) (cases with "fundamentally similar" facts may serve as precedent).

Add at the end of the fourth paragraph:

Niebur v. Town of Cicero, 212 F.Supp.2d 790 (N.D. Ill. 2002) (no qualified immunity for summary termination of police chief and deputy chief); *Herzog v. Village of Winnetka,* 309 F.3d 1041 (7th Cir. 2002) (excessive force).

Add at the end of the seventh paragraph:

Qualified immunity may also be applicable in Fourth Amendment excessive force cases. *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151 (2001).

Add at the end of the third sentence of the ninth paragraph:

Steinbrecher v. Oswego Police Officer Dickey, 138 F.Supp.2d 1103 (N.D. Ill. 2001).

G. Other Defenses

4. [20S.123] Preclusive Effect of Prior State Court Decisions

Add at the end of the first paragraph:

Claim preclusion will bar a Section 1983 action subsequent to an administrative review proceeding since Illinois allows joinder of these claims. *Durgins v. City of East St. Louis,* 273 F.3d 841 (7th Cir. 2001).

H. Judicial Remedies and Attorneys' Fees in Civil Rights Actions Under §1983 Litigation

4. [20S.128] Attorneys' Fees

Add at the end of the fifth paragraph:

In one of the more important decisions regarding prevailing party status, the Supreme Court, in *Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources,* 532 U.S. 598, 121 S.Ct. 1835 (S.Ct. 2001), held that attorneys' fees may not be awarded on a "catalyst" theory simply because the plaintiff achieved the desired result. Rather, to be treated as a prevailing party, the plaintiff must obtain some relief from the court, either in the form of a judgment on the merits or through a court-ordered consent decree.

I. Typical Municipal /Functions Impacted by §1983 Litigation

1. [20S.130] Personnel Matters

Add at the end of the first sentence of the third paragraph:

Gonzalez v. City of Chicago, 239 F.3d 939 (7th Cir. 2001).

Add at the end of the third paragraph:

Delgado v. Jones, 282 F.3d 511 (7th Cir. 2002); *Stone v. City of Indianapolis Public Utilities Division,* 281 F.3d 640 (7th Cir. 2002) (standards for summary judgment in speech-related discrimination cases).

Quinn v. Village of Elk Grove, 2002 WL 318754 64 (N.D. Ill. 2002) (union activities).

Add at the end of the second sentence of the seventh paragraph:

However, the same immunity does not extend to cities or other units of local government. *Evans v. City of Bishop,* 238 F.3d 586 (5th Cir. 2000).

Add at the end of the seventh paragraph:

The Act, however, does not protect persons who are addicted to drugs and alcohol if their conduct warrants discipline or dismissal. *Pernice v. City of Chicago,* 237 F.3d 783 (7th Cir. 2001).

2. Zoning and Building Regulations

c. [20S.134] Substantive Due Process

Add at the end of the second paragraph:

In *Leeandy Development Corp. v. Town of Woodbury,* 134 F.Supp.2d 537 (S.D. N.Y. 2001), a town's denials of building permits and certificates of occupancy, in the absence of evidence of discriminatory animus, did not violate the builder's substantive due process rights because they were based on colorable legal or contractual reasons even though the town's positions may not have been fully grounded in state law, may have been incorrect or, indeed, may have been arbitrary, was not sufficient to establish a denial of substantive due process.

Add at the end of the last paragraph:

Dadian v. Village of Wilmette, 269 F.3d 831 (7th Cir. 2001).

d. [20S.135] Takings Claims

Add at the end of the second paragraph:

Demolition of buildings is insufficient to constitute deprivation of all economically viable use of land. *Ostergren v. Village of Oak Lawn,* 125 F.Supp.2d 312 (2000).

A temporary moratorium on development during the process of devising a comprehensive land use plan did not constitute a *per se* taking. *Tahoe-Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302, 152 L.Ed. 517, 122 S.Ct. 1465 (2002).

Add at the end of the third sentence of the last paragraph:

Geddes v. County of Kane, 121 F.Supp.2d 662 (N.D. Ill. 2000) (takings claim subject to ripeness doctrine but not inverse condemnation or equal protection claim).

Add at the end of the fifth paragraph:

But see Byron Dragway, Inc. v. County of Ogle, 326 Ill.App.3d 70, 759 N.E.2d 595, 259 Ill.Dec. 815 (2001) (cause of action for taking stated regarding a regulation which denied owner of less than 100% of beneficial use).

4. [20S.138] Licensing

Add at the end of the second paragraph:

O'Grady v. Village of Libertyville, 304 F.3d 719 (7th Cir. 2002) (ordinance which created a system for the licensure of massage parlors was not an *ex post facto* law).

Add new paragraph:

In *Watchtower Bible & Tract Society of New York v. Village of Stratton*, 536 U.S. 150, 153 L.Ed.2d 205, 122 S.Ct. 2080 (2002), the Supreme Court held that a village ordinance which required canvassers to obtain a permit was unconstitutional as applied to persons engaged in religious or political advocacy.

5. Administrative Searches and Seizures

b. [20S.140] Seizures

Add at the end of the first paragraph:

In cases where a vehicle is parked on the owner's private property, the vehicle may not be towed without a warrant for the vehicle's seizure. *Redwood v. Lierman*, 331 Ill.App.3d 1073, 772 N.E.2d 803, 265 Ill.Dec. 432 (2002).

Add at the end of the sixth paragraph:

Accord, Johnson v. City of Evanston, 250 F.3d 560 (7th Cir. 2001) (due process and Fourth Amendment claims).

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PROPOSAL TO SERVE AS COUNSEL TO THE DUPAGE WATER COMMISSION

February 3, 2004

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Suite 455
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(630) 955-0662

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PROFESSIONAL QUALIFICATIONS

Wildman Harrold is pleased to respond to the DuPage Water Commission's request for legal services. For several reasons, our firm is ideally suited to serve the Commission in this role:

- Wildman Harrold attorneys have extensive backgrounds counseling municipalities and units of state and local government. We understand your political, social and economic structure, and provide counsel on strategies that will work within that structure.

- Our rates are fair – indeed lower than those of comparable firms with our level of experience and reputation.

- We are a 200-attorney, full service law firm with attorneys concentrating their practices in virtually every substantive area of law. This broad–based practice allows us to stay current and help solve our clients' problems more economically.

- Our firm currently acts as counsel on issues involving the DuPage Water Commission and has represented the Commission in the extension and upgrade of regional municipal water systems to four unincorporated, contaminated well-water areas.

- Wildman Harrold was underwriter's counsel for the $5,495,000 Water and Sewerage System Revenue Bonds, Series 2003A and $3,630,000 Taxable Water and Sewerage System Revenue Bonds, Series 2003 B issuances for the County of DuPage, IL.

- In the areas of municipal and local affairs, members of the firm's Public Finance practice have served as developer's or bond counsel on several significant public/municipal finance transactions across the country with offerings totaling tens of billions of dollars.

- Approximately 15 lawyers concentrate in the government affairs practice area, all of whom have a strong background in legislative and legal matters as they pertain to a number of political corporations.

- As more scrutiny is placed on land utilization in a time of growing demand for resources, Wildman Harrold's land use attorneys have become well versed in matters beyond zoning, including utilities and infrastructure, urban planning, use and preservation of resources, use and preservation of farmland, facilities siting, growth management, density, sprawl, employment and a host of governmental policy matters.

- The firm currently acts as lead land use counsel to LR Development Company LLC in the largest planned development in the City of Chicago's history. The project includes the development of 2,441 housing units, including obtaining approvals for all associated infrastructure and site improvements on approximately 100 acres of land on the City's near West Side.

We look forward to the opportunity to meet you in person and to discuss in greater detail the prospect of serving the DuPage Water Commission.

QUALIFICATIONS / EXPERIENCE

1) *Please describe your firm's range of experience in large construction projects and specifically your experience in underground construction and its relevance to the DuPage Water Commission. This would include your familiarity with construction contracts and particularly drafting specifications and general conditions and their defense. This would also include your experience with various insurance coverage issues, the acquisition of real estate and rights of way and the enforcement of payment and performance bonds.*

Members of Wildman Harrold's construction law practice represent owners, government entities, architects, engineers, contractors and other professionals in public bidding, drafting and negotiation contracts, and general counsel regarding construction and design agreements, project delivery options and construction dispute avoidance. Firm attorneys also represent all such clients in litigation and resolution of design and construction disputes and claims.

Wildman Harrold attorneys have extensive experience concerning claims for design and construction failures and defects; professional errors and omissions claims against architects and engineers; negligent certification or verification of work by design professionals; injuries during construction; concealed, differing site condition and extra work claims; delay and impact claims; construction insurance and surety bond disputes; mechanics liens, bond and payment claims; copyright infringement claims relating to architectural works; and OSHA liability of design professionals and construction managers.

Our construction law practice also includes litigation and resolution of a variety of real estate related disputes. Matters have included litigation of boundaries and easements, foreclosures of commercial mortgages and other liens, injunctions, actions to quiet title and realization of a variety of collateral in commercial loans. Below we have listed a sampling of our representative construction law experience:

Representation of property owners in warranty and construction failure matters:

- Represent the City of Naperville in a variety of design and construction suits, in-ground construction involving portable water reservoirs, public roads and other improvements, and municipal buildings – each involving millions of dollars.
- Represented church congregation following literal disappearance of general contractor for new church construction. Perfected notice to performance and payment bond surety, negotiated "takeover" agreement and ultimately negotiated final resolution of bond claims. Damaged and vandalized work successfully tendered to builder's risk carrier. Project completed and in use, without any lien claims.

- Represented commercial warehouse owner in litigation against roofing membrane manufacturer in U.S. District Court. Claimed breach of warranty and violations of Illinois Consumer Fraud and Deceptive Business Practices Act for manufacturer's use of new membrane product and "toggle bolt" fasteners on gypsum deck roof. Fasteners had never been tested on gypsum decking, resulting in complete destruction of deck and nearly $1

million in repair and replacement costs. Case settled following expert witness depositions, with large cash payment by manufacturer and two insurers.

- Currently handling the development, acquisition and transactional work for the construction of a regional outlet mall (including approximately 80 acres of wetlands management) in Kane County. Work includes the location and relocation water and sanitary mains, and coordinating obtaining approvals from numerous permitting and service providing agencies including the Fox Metro Water Reclamation District, the City of Aurora and Aurora Township, Kane County, the Army Core of Engineers, IDNR, and the Kane County Forest Preserve District, among others.

Representation of property owners in easement or property right disputes:

- Successfully represented owner of commercial business in dispute over neighbor's construction of new building on area governed by utility easement. Obtained temporary restraining order and, following evidentiary hearing, preliminary and permanent injunction to preserve the easement.

- Defended surveyor in "joint driveway" dispute, following Hatfield/McCoy litigation between two neighbors. Losing neighbor claimed survey error and negligent misrepresentation. Case settled for nominal amount following initial aggressive discovery.

Representation in mechanics lien and mortgage disputes:

- Represented numerous municipalities in public fund lien matters.

- Represented excavation subcontractor in builder's risk and extra work claim resulting from project flooding. Project was a $200 million, 7 building, parking and infrastructure improvement to the State Farm Corporate Center in Bloomington, Illinois. Construction began during the summer of Mississippi River flooding. Extricated client from 30 party litigation by negotiating arbitration agreement with general contractor, including guaranteed "high/low" provisions.

- Representing world-renowned architect in mechanics lien prosecution concerning failed condominium project in Chicago.

- Representing general contractor in dispute with park district concerning cost-overruns in pool and park construction.

- Represent many contractors, subcontractors and architects in mechanics lien matters, from perfection of liens through trial or arbitration.

- Represented commercial lender in liquidation of collateral and foreclosure of real estate as varied as an ice rink, a bagel franchise in three states and residential real estate pledged as additional collateral in various loans.

Loss prevention and construction agreements:

Wildman Harrold's construction law practice includes counseling, drafting and negotiation of construction related agreements on behalf of architects, engineers, contractors, lenders and property owners. Our attorneys have been involved with the negotiation and drafting of commercial design/build, guaranteed maximum price, cost-plus and other contractor agreements for the construction of public buildings and infrastructure, homes, warehouses, commercial buildings, schools, parks, banks, public pools, religious institutions and hospitals, and:

- Representing a public library board negotiating CM/at risk agreement for new library construction, where the CM is also providing pre-referendum real estate development and acquisition services, and where public bidding will be required for trade contractors. CM will price and provide a Guaranteed Maximum Price prior to referendum. Trade contracts will be bid, awarded and assigned to CM prior to construction to comply with public bidding laws, but allow owner to a maintain single point of privity.

- Represented a municipality in prequalification, bidding, drafting and negotiating construction agreements and bid documents for large parking structure construction.

- Represent a growing community hospital in drafting and negotiating construction and design agreements for new emergency room, life safety and infrastructure improvements.

2) *The Commission is interested in your firm's experience in the area of municipal law, including Chapter 85, the Local Government Statute, and Chapter 24, the Municipal Code. This would include the Water Commission Act of 1985 as recently amended by PA 93-0226, and your overall knowledge of the regulatory environment in the State of Illinois, which includes the State of Illinois water allocation procedures.*

Wildman Harrold's Government Affairs Practice Group represents numerous units of local government on a regular and specialized basis. Our current and past clients include cities, villages, park districts, fire protection districts, fire and police commissions, zoning boards of appeals, plan commissions, economic development authorities, housing authorities, hospital authorities, water commissions and state-level departments and agencies.

We also represent numerous private sector clients in their dealings with governments. By representing both private and public sector clients, we have the advantage of understanding the private sector's often unstated concerns and goals for a project it is developing in a community. When we represent a local government, our private sector experience and reputation allows us to allay the private sector's fears that the local government will not understand its concerns. It also allows us to provide workable and innovative programs which are beneficial to both the local government, and the private sector – the formula for a successful project. This broad-based practice allows us to stay current and solve problems more economically for our governmental clients.

We are experienced in practically every aspect of municipal law, not only as set forth in Chapter 50, Local Government, of the Illinois statutes (formerly Chapter 85), and the Illinois Municipal Code (formerly Chapter 24). We work regularly with our governmental clients, which include municipal corporations, special districts, governmental agencies, counties, state and local boards, commissions, and other statutory creatures. We are experienced in matters involving:

- employment and compensation, FOIA and Open Meetings, financing, purchasing and contracting;

- government organization and operations, procedures, ordinances and resolutions, jurisdiction, annexation and disconnection and other territorial issues;
- practically every aspect of the powers and authority granted under Article 11 of the Municipal Code, including land planning and use, life safety property acquisition and ownership;
- building, construction, and public improvements, specifically including utilities such as water and sewer systems.

- We also have great experience in home rule matters and intergovernmental relations, including intergovernmental contracting, both under the Illinois Constitution and the Intergovernmental Cooperation Act.

The Water Commission Act of 1985 gave the Commission the authority to finance, design, construct and operate the Lake Michigan to DuPage County water supply system, and as a result, the wholesale water purchase agreements between the Commission and DuPage County municipalities. Our experience with the Water Commission Act of 1985 is primarily through our representation of those municipalities that are the beneficiaries of the Act through membership on the Commission and the purchase agreements. For example, we have worked with Naperville, Downers Grove, Woodridge and Lisle in these matters, as well as all other DuPage municipalities through our representation and extensive involvement with the DuPage Mayors and Managers Conference.

In terms of the recent amendments to the Water Commission Act by PA 93-0226, this has bill has only been in effect for 6 months, so our experience with the amendments is limited. But we understand its effect. P.A. 93-0226 amended both Article 11 of the Municipal Code and the Water Commission Act of 1985, mandating the supply of water to unincorporated areas of the County, and, in particular, where the well-water in the area is tainted or contaminated. It did so without compromising either the unincorporated status of the benefiting property, or the outstanding debt issued by the Commission or its member municipalities.

P.A. 93-0226 also preserved the Commission's status as an independent unit of government, as opposed to becoming a County department, as initially contemplated. And, it gave the Commission for the first time, input by "advice and consent" to the County Chairman, as to successor chairmen of the Commission.

Finally, P.A. 93-0226 generally equalized member rates, froze rates for a period of 5 years, and instituted a 5 year transfer of $15 million dollars from the Commission to the county board for other county purposes.

The State's regulatory and allocation environments are promulgated, administered and enforced through agencies that we are very comfortable working with the Illinois Environmental Protection Agency and the Illinois Department of Natural Resources. Attorneys in our firm routinely and successfully work with these agencies.

The IEPA is primarily responsible for pollution control and enforcement, and IDNR primarily governs water allocation and procedures. Essentially, a 1967 U.S. Supreme Court Decree limits Illinois' diversion of water from Lake Michigan, and in response, the General Assembly tasked IDNR with developing an ongoing program to equitably allocate Illinois' limited supply of Lake Michigan water. IDNR's "Rules and Regulations for the Allocation of Water from Lake Michigan" describe the allocation process, and contains criteria used to evaluate applications for

water allocation and the water conservation practices and other permit conditions required of allocation permit holders.

The goals of Illinois' allocation program are also designed to preserve groundwater resources for communities in northeastern Illinois that do not have access to a Lake Michigan water supply. The program also addresses financing to construct regional water distribution systems, the competing needs of all water users in the region, and water conservation programs. The water allocation program combines a technical methodology with an administrative process that follows legal procedures that involve public participation, identification of available water supply sources, a long-range water demand forecasting methodology, formal allocation hearings, the issuance of an "allocation orders," and ongoing monitoring of water use.

3) *Your firm's utility background would be of particular interest to the Commission with a primary focus on different forms of water purchase and sale contracts, take or pay agreements, and different pricing and rate structure theories that are used from time to time by the Commission.*

Wildman Harrold represented the DuPage Water Commission in the extension and upgrade of regional member municipal water systems to four unincorporated, contaminated well-water areas. The intergovernmental enabling and implementing agreements govern financing and cost recovery, annexation rights and limitations, and construction improvements.

In addition, the firm acted as underwriter's counsel for the $5,495,000 Water and Sewerage System Revenue Bonds, Series 2003A and $3,630,000 Taxable Water and Sewerage System Revenue Bonds, Series 2003 B issuances for the County of DuPage, IL.

We represented the Village of Melrose Park in the comprehensive restructuring of its system for the sale and transmission of water to seven other Chicago suburbs. We also served as bond counsel for the Village's sale of $41,150,000 in revenue bonds to finance the reconstruction of the water distribution system and obtained an Illinois EPA loan that allowed 14 million in bonds to be defeased by the lower interest loan. The attached article describes our collaborative approach to this project.

Wildman Harrold also acted as underwriter's counsel for the city of East Peoria, Tazewell County, Illinois in a $2,535,000 issuance of general obligation refunding bonds (Waterworks and Sewerage Alternate Revenue Source), Series 2002B. Outside of the State of Illinois, the firm has served as bond counsel to the Guadalupe-Blanco River Authority in connection with the $50,000,000 issuance of sewage and solid waste disposal bonds and as bond counsel for River Grove and Richton Park, Alabama, in connection with Water Extension Bonds (GO Bonds).

4) *Please describe your firm's experience representing any regional or intergovernmental water agencies or any similar agencies.*

DuPage Water Commission We represented the DuPage Water Commission in the extension and upgrade of regional municipal water systems to four unincorporated, contaminated well-water areas, and represent the Commission on retainer for ongoing matters.

Associations/Councils of Government Our clients are members of various governmental associations and councils of government on intergovernmental projects. We have been retained by and work regularly with groups such as the DuPage Mayors and Managers Conference, the Illinois Municipal League, and the South Suburban Mayors Conference on matters having regional impact.

Melrose Park Water Project The firm represented Melrose Park for the comprehensive restructuring of its system for the sale and transmission of water to seven other Chicago suburbs. We also served as bond counsel for the Village's sale of $41,150,000 in revenue bonds to finance the reconstruction of the water distribution system.

Metra/South Suburban Commuter Rail Construction Project
We are currently lead counsel in a mass transportation project through the south suburbs known as the Metra/South Suburban Commuter Rail Corridor Project. As such, we are providing analysis of the existing land use policies and regulations of the participating municipalities in the corridor, including a review of the home rule or non-home rule status, existing comprehensive plans, zoning ordinances, other current ordinances, as well as general municipal policies in terms of constraints or supportive ordinances, policies or political predispositions exist with respect to transit oriented developments.

In this project, we are also retained for counsel as to the financings that each municipality has engaged in, including their current audits to determine whether or not financings to support transit oriented developments are available. We are advising as to opportunities for intergovernmental cooperation agreements to combine the authority of the participating municipalities for planning and financing purposes. We are also preparing model provisions for the municipalities' zoning ordinances, comprehensive plans, and recommending methods of financing transit projects.

5) *List your firm's experience in the area of project and/or public finance and specifically your background in representing issuers of public debt either as owner's counsel, underwriter's counsel or bond counsel.*

Members of the Government Affairs group frequently act as bond counsel, underwriters counsel, borrowers counsel, issuers counsel and letter of credit bank counsel. The firm represents borrowers and national bond underwriters for the financing of state convention centers, portions of the toll highway system, hospitals, colleges, museums, manufacturing facilities and solid waste disposal and sewage treatment facilities. We participated in establishing the Illinois state infrastructure bond bank program and have served as bond counsel in the issuance of general obligation tax-exempt bonds to finance tax increment improvements. Several of our members are

listed in the *Municipal Bond Buyer's Directory* of nationally recognized Bond Counsel. Firm members also regularly serve as counsel in the formation of tax increment finance districts, and have represented corporate clients in negotiating tax abatements and obtaining state and local economic development incentives.

We participated in establishing the Illinois state infrastructure bond bank program and have served as bond counsel in the issuance of general obligation tax-exempt bonds to finance tax increment improvements.

In the areas of municipal and local affairs, members of the firm's Public Finance practice have served as developer's or bond counsel on several significant public/municipal finance transactions *across the country* with offerings totaling tens of billions of dollars. We regularly serve as developer's counsel in the formation and procurement of funds from tax increment finance districts and economic redevelopment projects in the City of Chicago, as well as in Cook and the collar counties. We have represented both corporate and municipal clients in negotiating TIF redevelopment agreements, tax abatements and state and local economic development incentives. We advise clients on TIF or TIF-related issues almost daily. Wildman attorneys set-up and attend joint review board meetings, and frequently advise our clients as to auditing questions. One of our municipal clients recently became the owner of 400+ acres of TIF land after the developer defaulted, and we are very involved counseling as to marketing and other aspects of the project, as they relate to the TIF.

Representative Public Finance Experience

- We acted as underwriter's counsel for the $5,495,000 Water and Sewerage System Revenue Bonds, Series 2003A and $3,630,000 Taxable Water and Sewerage System Revenue Bonds, Series 2003 B issuances for the County of DuPage, IL.

- Regularly act as bond and underwriters' counsel on various DuPage County bond issues including a $130 million transportation revenue bond transaction;

- The firm represented Melrose Park for the comprehensive restructuring of its system for the sale and transmission of water to seven other Chicago suburbs. We also served as bond counsel for the Village's sale of $41,150,000 in revenue bonds to finance the reconstruction of the water distribution system and obtained an Illinois EPA loan that allowed 14 million in bonds to be defeased by the lower interest loan. The attached article describes our collaborative approach to this project.

- Wildman Harrold acted as underwriter's counsel for the city of East Peoria, Tazewell County, Illinois in a $2,535,000 issuance of general obligation refunding bonds (Waterworks and Sewerage Alternate Revenue Source), Series 2002B.

- The firm served as bond counsel to the Guadalupe-Blanco River Authority in connection with the $50,000,000 issuance of sewage and solid waste disposal bonds.

- We act as bond counsel for River Grove and Richton Park in connection with Water Extension Bonds (GO Bonds)

- Served as bond counsel and underwriters' counsel on numerous large public financings for the City of Chicago, the State of Illinois and the Metropolitan Pier and Exposition Authority with offerings totaling tens of billions of dollars;

- Acted as borrower's counsel for Columbia College on a $25,000,000 Illinois Educational Facility Authority bond issue;

- Currently working as borrower's counsel on a $50,000,000 refunding bond issue through the Illinois Health Finance Authority, involving Proctor Hospital;

- Currently serve as counsel to Educational Development Company of America with respect to student housing bond deals which benefited Jackson State University, Florida A&M University and Texas Southern University;

- Currently serve as counsel to the City Colleges of Chicago in all of its government as well as a tax-exempt bond financings, including acting as special counsel in its $309 million general obligation bond issued for the benefit of the City Colleges. We have served as bond counsel to the Chicago Park District and served as underwriter's counsel in a $182 million City of Chicago bond deal;

- Currently serve as counsel to Benedictine University, and acted as bond counsel on a tax-exempt bond issue in 1999 and Borrower's counsel on an issue closed in 2000;

- Participated in the drafting as well as initiating legislation for the expansion of McCormick Place and the toll highway system, acting as bond counsel in both transactions;

- Served as legislative counsel, general counsel and bond counsel to the Illinois Farm Development Authority, rendering numerous validity and tax-exempt opinions;

- Participated in drafting virtually all amendments to the Illinois Securities Law, including exemptions for governmental securities as well as participating in the initiation for their passage;

- Represented clients in many industrial revenue bond financings and, in that connection, assisted in drafting the applicable legislation; and

- Acted as legislative counsel and bond counsel in the establishment and funding of tax increment finance districts and economic development commissions.

REPRESENTATIVE MUNICIPAL SECURITIES TRANSACTIONS					
Year	**Issuer**	**Securities**	**Total Offering Price**	**Underwriter/ Placement Agent**	**Wildman Harrold Role**
2003	Village of Melrose Park	Motor Fuel Tax bond issue		Bernardi Securities	
2003	Village of Richton Park	Water and sewer bond issues.	$6,000,000	Bernardi Securities	Bond Counsel
2003	Illinois Development Finance Authority	Variable Rate Demand Revenue Bonds (Rainbow Graphics, Inc. Project) Series 2003	$2,600,000	Bank One Capital Markets, Inc.	Bond Counsel
2003	IDFA	Variable Rate Demand Revenue Bonds (Illinois Central College Project), Series 2003A And Taxable Variable Rate Demand Revenue Bonds (Illinois Central College Project), Series 2003B	$16,050,000 $655,000	Stern Brothers & Co.	Bond Counsel
2002	City of Oak Forest, Cook County, Illinois	Revenue Bonds, Series 1989 (Homewood Pool--South Suburban Mayors and Managers Association Program)	$50,000,000	Fifth Third Securities, Inc. and Bernardi Securities, Inc.	Underwriter's Counsel
2002	East Peoria, Tazewell County, Illinois	General Obligation Refunding Bonds (Waterworks and Sewarage Alternate Revenue Source), Series 2002B	$2,435,000	Bernardi Securities, Inc.	Underwriter's Counsel
2002	East Peoria, Tazewell County, Illinois	General Obligation Bonds (Alternate Revenue Source), Series 2002C	$4,500,000	Bernardi Securities, Inc.	Underwriter's Counsel
2002	DuPage Airport Authority	General Fund Bonds, Series 2002A	$8,485,000	George K. Baum & Company and LaSalle Capital Markets, Inc. (both as underwriters)	Underwriter's Counsel
2002	DuPage Airport Authority	Taxable General Fund Bonds, Series 2002B	$14,985,000	George K. Baum & Company and LaSalle Capital Markets, Inc. (both as underwriters)	Underwriter's Counsel

REPRESENTATIVE MUNICIPAL SECURITIES TRANSACTIONS					
Year	**Issuer**	**Securities**	**Total Offering Price**	**Underwriter/ Placement Agent**	**Wildman Harrold Role**
2002	Village of Melrose Park, Cook County, Illinois	General Obligation Tax Increment Bonds (Alternate Revenue Source) Series 2002A	$2,750,000	Fifth Third Securities, Inc. and Bernardi Securities, Inc. (both as Underwriters)	Bond Counsel
2002	Village of Melrose Park, Cook County, Illinois	General Obligation Tax Increment Bonds (Alternate Revenue Source) Series 2002B	$3,000,000	Fifth Third Securities, Inc. and Bernardi Securities, Inc. (both as Underwriters)	Bond Counsel
2002	Illinois Development Finance Authority	Variable Rate Demand Revenue Bonds (West Central Illinois Education Telecommunications Corporation Project), Series 2002	$4,800,000	Bernardi Securities, Inc.	Bond Counsel and Underwriter's Counsel
2002	Illinois Development Finance Authority	Variable Rate Demand Industrial Revenue Bonds (Flavors of North America Project), Series 2002	$7,200,000	NatCity Investments, Inc.	Bond Counsel and Borrower's Counsel
2002	Village of Sauk Village, Cook and Will Counties, Illinois	General Obligation Tax Increment Refunding Bonds, Series 2002A	$9,7550,000	Bernardi Securities, Inc.	Bond Counsel and Underwriter's Counsel
2002	Village of Sauk Village, Cook and Will Counties, Illinois	General Obligation Tax Cap Appreciation Bonds (Tax Increment Alternate Revenue Source), Series 2002B	$4,999,356.30	Bernardi Securities, Inc.	Bond Counsel and Underwriter's Counsel

6) *Describe your experience working with and monitoring various legislative activities, which would include your familiarity with the appropriation process, and any lobbying experience your firm may have.*

Wildman Harrold has an extensive Government Affairs practice which includes the representation of numerous clients before state and federal executive agencies, departments, boards and commissions. Jim Durkin is a former longtime state representative that brings extensive experience and relationships to the benefit of our clients. One of the firm's attorneys, Kip Kolkmeier, practices in Springfield as well as Chicago, and devotes his entire practice to legislative representation.

The firm's legislative and regulatory practice is premised upon bringing together high-quality legal skill and a keen understanding of governmental and political processes. The firm blends great technical competence with a realistic appreciation of competing interests and political realities. We serve as experienced lawyers, respected lobbyists and utilize years of first-hand experience working as agents of: The United States Department of Commerce, The U.S. Department of Justice, The U.S. Department of State, The Illinois Office of the Governor, The Illinois House of Representatives, The Illinois Attorney General's Office, The Cook County State's Attorney Office, and the Office of the Mayor of the City of Chicago.

The firm's government practice embraces all aspects of the legislative process, including ascertaining client needs, determining appropriate strategies and developing and carrying-out these strategies. Specific legal services provided to firm clients in this are include:

- Development of comprehensive legislative strategies;
- Strategic counsel for bill sponsorship, performing issue analysis, drafting legislation and initiating legislation;
- Shepherding legislation through the legislative process;
- Participating in Committee hearings by assisting in witness preparation, drafting of testimony and/or appearing as witnesses;
- Monitoring related Committee hearings and House and Senate floor action;
- Monitoring and assisting in the passage and defeat of legislation through direct contact with the appropriate legislators and staff, the Governor's office, related state agencies and departments and representatives of interest groups.

Wildman Harrold attorneys regularly review recent bill introductions, amendment filings and conference committee reports to determine if the interests of a client are affected. If an urgent issue arises, our legislative team will immediately notify the client to discuss strategy and receive direction.

Wildman Harrold attorneys regularly review recent bill introductions, amendment filings and conference committee reports to determine if the interests of a client are affected. If an urgent issue arises, our legislative team will immediately notify the client to discuss strategy and receive direction. On issues of lesser urgency, the firm will provide a regular update memorandum to the client as frequently as the client desires. In addition to periodic updates, the firm can supply more detailed information on a particular issue or bill including an analysis of the political dynamics of an issue or proposal.

The firm has a wealth of knowledge on virtually every subject of interest to our business clients. In addition to relationships built upon years of providing quality information on a myriad of complex matters to executive officials, the firm prides itself on bringing substantial technical expertise to the development of administrative regulations. As regular participants in the administrative rule-making process on behalf of firm's clients, Wildman Harrold attorneys review the filings of proposed agency rules and notify clients of pertinent proposed changes. Our lawyers creatively utilize our many areas of expertise to benefit each client, reinforcing Wildman Harrold's reputation as a firm of facilitators, not sole practitioners.

7) Please describe your experience in the areas of employment practices, labor relations and personnel related insurance matters.

Wildman Harrold's Employment and Labor Practice Group prides itself on its ability to provide the highest quality legal representation to management in employment law matters. We have over 15 lawyers and paraprofessionals, who devote all or substantially all of their time to these matters. Our attorneys have defended management in all types of employment litigation, throughout a variety of forums.

Today, our Employment and Labor Practice Group represents management in employment, labor relations, employee benefits matters, and related litigation. The group enjoys a reputation for excellence in all areas of labor relations, employment and benefits law in both the private and public sectors. Group attorneys are dedicated to maintaining the highest standards of responsiveness, skill, quality of service, and tangible, value-added results in all aspects of their legal representation.

Our employment attorneys regularly counsel employers with practical advice regarding legal matters affecting the employment relationship, including:

- reductions in force;
- affirmative action issues;
- wage and hour issues;
- employee safety issues;
- employee benefits;
- COBRA and ERISA issues;
- restrictive covenants;
- trade secrets;
- assisting in developing employment policies and procedures under all federal and state employment statutes and regulations including the Family and Medical Leave Act and the Americans with Disabilities Act, sexual harassment, AIDS, and drug testing;
- designing policies, procedures and training to prevent and remedy harassment and discrimination in the workplace (including diversity strategies);
- designing affirmative action plans and related compliance and training procedures;

- designing procedures related to substance abuse, WARN Act plant closing/mass layoff matters, workplace toxic substance issues, non-compete and confidentiality covenants, violence in the workplace, FLSA and OSHA compliance; and

- labor, employment and benefits due diligence attendant to mergers, acquisitions and other transactions.

The group also possesses highly developed skills in benefits litigation ranging from simple suits for benefits and/or delinquent contributions, to large class action litigation over the distribution of excess plan assets, plan modification and interpretation.

Wildman Harrold is committed to an efficient, dynamic and aggressive approach to employment representation. Given the unique nature of employment litigation, that representation includes a thorough and creative motion practice, which is aimed at eliminating unwarranted claims prior to trial, and cost-effective discovery. That representation also includes strong trial skills and extensive experience in both bench and jury trials.

The firm also has successfully defended clients in litigation involving state law-based claims of wrongful discharge premised on employee handbooks, retaliation, public policy considerations and employment-related torts. Because this area of employment law is being rapidly developed and consistently expanded in nearly every state, the amount of litigation in this area has grown substantially and many employers have experienced a dramatic increase in the number of such suits. Because of the national scope of our practice, we have counseled and defended employers regarding wrongful discharge claims in nearly every state in the nation. Our experience is especially great throughout the central United States, where we have practiced in virtually every major city and metropolitan area.

Wildman Harrold's employment attorneys defend management in all forms of employment litigation throughout the United States and possess substantial experience in litigating actions which arise under:

- Federal discrimination statutes, such as Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Americans With Disabilities Act;

- State discrimination statutes; and

- Employment-related tort and contract claims including wrongful discharge litigation, breach of employment contracts, trade secret litigation and defamation.

Wildman Harrold's experience in these areas includes not only single-plaintiff litigation but also EEOC-maintained actions and employee class actions. We routinely represent clients from the time a charge of discrimination has been filed with the EEOC or other federal or state agency until the ultimate jury or bench trial. In addition, our attorneys have a substantial practice in union-related matters arising under the National Labor Relations Act and other applicable federal and state laws. We advise and represent management regarding union organizing attempts, collective bargaining negotiations, arbitration under collective bargaining agreements, representation or unfair labor practice proceedings before the National Labor Relations Board, and injunction proceedings to restrain striker mass picketing and violence.

Our experience runs from obtaining restraining orders, through administrative, bench and jury trials. Of course, it is better to win cases before trial than after incurring the expense and risk of the jury system. Some of our reported pre-trial successes within the past year include:

- Obtaining summary judgment at the Illinois Human Rights Commission in an age discrimination action;
- Obtaining summary judgment in the Northern District of Illinois in a pregnancy discrimination action;
- Obtaining summary judgment in the Northern District of Illinois in an ADA claim filed by an unsuccessful job applicant; and
- Obtaining summary judgment in the Northern District of Illinois in an age discrimination case arising from the closure of a local facility and its consolidation in another state.
- Our Employment and Labor attorneys regularly speak before associations and clients on employment-related topics. Recent representative employment/labor presentation topics include the following:
- Employment Discrimination and Harassment and Hiring/Interviewing Practices;
- No-Fault Attendance Policies and Practical Tips;
- Work Rules: Money, Time & People;
- Recent Developments in Employment Discrimination Law;
- Abilities, Disabilities and Accommodations: Current Trends in Disability Discrimination Law;
- Managing Employee Absences: Intersection of Americans With Disabilities Act, Family and Medical Leave Act, and Workers' Compensation;
- Preventing Sexual Harassment Claims In Your Company;
- Preventing Violence in the Workplace;
- The ADA, Insurance and Employee Benefits;
- Employment Laws: What a Supervisor Needs To Know;
- The Americans With Disabilities Act;
- How To Protect Your Human Resources Without A Human Resources Department; and
- Litigating Discrimination Cases Before The State, County, And City Human Rights Commissions.

8) Describe your ability and willingness to provide the Commission with any other ancillary legal services that may be required from time to time such as media relations, investigative capabilities, and continuing education seminars and briefings.

Our approach to governmental representation recognizes that people have far more access to local officials than to any other government official. Consequently, local governments need answers quickly, and hands-on legal representation is the most successful way to accomplish this. Experience tells us that this is achieved by assigning one or two of our attorneys to immerse themselves in the full range of issues involved in an assignment. Those attorneys will work closely with the DuPage Water Commission's chief executive, legislature and professional staff to direct the work and provide meaningful responses. A number of our attorneys will also be familiar with your day-to-day concerns and aspects of our engagement so that you will never be without someone to contact if a problem or question arises.

Wildman Harrold is aware that governmental entities are sometimes required to deal with difficult issues on many fronts, especially the court of public opinion. We have worked closely with many clients to assist them in making judgments as they communicate with or respond to the media, federal and state governments and their own employees. We have worked with boards of directors and senior management in litigation crises which have grown out of a wide variety of highly visible problems: antitrust price-fixing allegations, plant explosions, claims of life insurance sales practices abuses, and intensive and inflammatory attacks on products and services marketed by entire industries. Finally, member's of the firm routinely meet with clients to conduct on-site seminars or lead discussion pertaining to current legal issues or other topics of interest.

Wildman Harrold is aware that governmental entities are sometimes required to deal with difficult issues on many fronts, especially the court of public opinion. We have worked closely with many clients to assist them in making judgments as they communicate with or respond to the media, federal and state governments and their own employees.

STAFFING

1) Provide the Commission with some background information regarding one or two principal attorneys that would have responsibility for this engagement with particular emphasis on their background in the above-specified areas. The principal attorney(s) serving the Commission shall be licensed to practice law in Illinois, and should have 15 or more years of experience representing special purpose local government. How would these individuals interface with the Commission and what would be the division of labor between them?

Wildman Harrold has a full team of qualified attorneys that can readily address the legal needs of the DuPage Water Commission. As you'll read in the enclosed profiles, lawyers from Wildman Harrold possess significant expertise working with local government entities.

To ensure efficiency and accountability, we propose that Mike Roth, partner in our Lisle office, serve as the Commission's primary contact. Mike, recently selected as one of the top lawyers in the western suburbs (*West Suburban Living*, January/February 2004), has worked well with the Commission in the past and is a known attorney to Commission members, and formerly served as the City Attorney for Naperville, IL, where he has worked closely with in-house counsel on a broad range of governmental matters. He lives in the western suburbs and has a keen understanding of the unique needs of the DuPage Water Commission. As relationship partner, Mr. Roth will be responsible for all matter staffing, management, periodic reporting, productivity and accountability. Mr. Roth will ensure the following:

- Meetings with the DuPage Water Commission's staff and liaisons to establish procedures for a cost-efficient work relationship;
- An attorney will be on-call 24/7 to address the needs of the Commission;
- Assurance of consistency in staffing all projects with attorneys and paralegals that have lower billing rates when appropriate.

Additional team members include: Mike Castellino, Jim Dukin, Kip Kolkmeier, Eric Singer, and Jim Snyder. Mr. Castellino has sound general local government experience, and would be the principal attorney responsible for this engagement in Mr. Roth's absence. Staffing on each matter would be monitored through frequent reporting to ensure that the appropriate level and number of attorneys are assigned to a matter.

In the following section, we have attached detailed profiles for all team members.

2) *Please describe your firm's depth of experience and particularly the number of qualified attorneys that routinely practice in the above areas that can be made available to the Commission should the volume of work or unforeseen emergencies require it.*

Approximately 15 lawyers concentrate in the Government Affairs practice area, all of whom are experienced in representing governmental entities, and many of whom publish regularly in peer-review journals on the subject of governmental practice. Our attorneys bring the wealth of experience and general local government knowledge that comes from having represented numerous units of government as general attorney and special counsel. We are regularly engaged to act as counsel at public meetings, draft and review ordinances, contracts and requests for bids and proposals and to advise on a variety of issues which affect local governments on a daily basis, including those relating to:

- Open Meetings Laws;
- Parliamentary Procedure;
- Freedom of Information Laws;
- Competitive Bidding;
- Public Works Construction and Maintenance;
- Use, Sale and Leasing of Public Property;
- Appropriations and Tax Levies;
- Election and Appointment of Officers and Their Duties;
- Insurance; and
- General Litigation.

Our approach to local government representation starts with the premise that the attorney must be a counselor, in the truest sense of the word. The nature of local government demands that the attorney do more than simply advise on whether a proposal is legal or not. Rather, the attorney must help create programs that respond to the government's needs. This involves understanding the governmental unit's political, social and economic structure, and counseling it on strategies to make programs work *within that structure*. When representing a local government, we provide advice that is both practically and legally correct.

Our regular policy is to:

- Meet with the governmental unit's staff to see how to achieve efficiencies by making the best use of their talents and understanding their normal operating procedures;
- Meet regularly with the chief executive and the legislature for personal consultations and to provide a monthly report (or more often if necessary) of the status of all pending engagements; and
- To have an attorney available by telephone at all times.

In the pages that follow, we have attached detailed profiles for all team members that may be called upon to provide services to the Commission.

3) *Provide the Commission with an estimate of the hours that you believe will be needed in order to familiarize your firm with the Commission's history, financial structure, legislative background and general business.*

The amount of time needed to familiarize ourselves with the Commission's history, financial structure, legislative background and general business is minimal, but largely dependent on the extent to which the Commission desires that we know the history and financial structure of the Commission. It is also dependent on the nature of specific assignments. We estimate no more than five (5) hours to review Commission ordinances and rules of procedure, and member agreements.

Michael M. Roth
Partner—Lisle
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Practice Areas:

Local Government
Cable Franchising and Telecommunications
Zoning
Land Use
Litigation

Significant Experience:

- Providing legal counsel including negotiating municipal franchises, right-of-way use agreements, tower and lease agreements, service agreements, telecommunications infrastructure maintenance fees, state and local sales and other tax contests, telecommunications taxes and municipal utility and message taxes, and the development of related legislation and ordinances;
- Handling litigation dealing with municipal/cable issues; including franchise transfers, renewals, revocation, sanctions and overbuilds;
- Representing municipalities and cable operators in FCC Form 394 approval of cable franchise transfers; and
- Negotiating statutory amendments to cable overbuild and telecommunications statutes.

Admissions:

Illinois, 1980
U.S. District Court for the Northern District of Illinois
U.S. District Court for the Northern District of California
Supreme Court of Illinois
U.S. Court of Appeals for the Seventh Circuit

Education:

The John Marshall Law School, (J.D., 1980)
University of Illinois, (B.A., Finance, 1976)

Membership/Professional Activities:

Selected by peers as one of the top lawyers in the area of Land Use, Zoning and Condemnation Law, as well as Telecommunications Law, Western Suburban Living, January/February 2004
Illinois State Bar Association
DuPage County Bar Association
Illinois Municipal League's Home Rule Attorneys Committee

James B. Durkin
Partner – Government Affairs
630-955-6590
durkin@wildmanharrold.com

Practice Areas:
Legislative & Regulatory Affairs
Litigation

Representative Legal Experience:
- Comprehensive understanding of problem solving through regulatory and legislative remedies.
- Significant experience and expertise in conducting and coordinating internal investigations for private and public entities.
- Public finance consultation experience for private and governmental entities.
- Pretzel & Stouffer, Chartered (1997-2003)
- Cook County State's Attorney (1991 – 1995)
- Illinois Attorney General (1990 – 1991)

Representative Government Experience:
- Republican Nominee for the United States Senate (2001 – 2002)
- Illinois House of Representatives, R-44th District (1995 – 2003). Past committees: Chairman, Prosecutorial Misconduct; Financial Institutions; Pensions; Energy & Environment; Cities & Villages; Townships & Counties, and Judiciary.
- Triton Community College Trustee (1992 – 1997) and Vice Chairman (1994 – 1997)

Admissions:
Illinois, 1990
United States District Court for the Northern District of Illinois, 1990

Education:
John Marshall Law School (J.D. 1989)
Illinois State University (B.S., Criminal Justice, 1984)

Memberships/Professional Activities:
Chicago Bar Association
President, Proviso Township Republican Organization (1992 – present)
Board of Advisors, Misericordia-Heart of Mercy Home (1996 – present)
Board of Advisors, Giant Steps School for Autism (2000 – present)
Illinois co-chair for Senator John McCain's presidential campaign (2000)
At-large alternate delegate for George W. Bush, 2000 Republican National Convention

Kiplund "Kip" R. Kolkmeier
Of Counsel – Government Affairs
312-339-6540
kolkmeier@wildmanharrold.com

Practice Areas:
Legislative & Regulatory Affairs
Corporate and Governmental Ethics
Association Management
State and Federal Campaign Finance

Representative Experience:

- Comprehensive legislative practice including: development of legislative strategies; research, drafting and initiation of legislation; participation in committee hearings by assisting in witness preparation, drafting testimony and routinely appearing as a witness; monitoring all bill introductions, amendments, relevant committee hearings, as well as all House and Senate floor action; and work with Illinois Governor's Office and related State agencies and departments.
- Advises public and private clients regarding governmental and corporate ethics. Designs and delivers corporate client ethics seminars covering lobbyist registration, limitations on gifts and gratuities to public officials, economic disclosure, conflicts of interest and campaign finance.
- Coordinates client efforts to seek and receive favorable administrative determinations and implementation of administrative rules. Particular emphasis placed on representing heavily regulated industries before the appropriate executive agency, board or commission.

Admissions:
Illinois, 1988

Education:
Loyola University School of Law (J.D., 1988)
Stanford University (B.A., 1985)

Memberships/Professional Activities:
Registered lobbyist, Illinois
Illinois State Bar Association
Legislative Counsel, Illinois Speaker of the House, Michael Madigan (1989)

Board Memberships:
Member-Historical Sites Commission, City of Springfield (2003-present)
Executive Director and General Counsel, Metro Counties Association (1995 – 1998)

Eric L. Singer
Partner – Lisle
630-955-5826
singer@wildmanharrold.com

Practice Areas:
Construction Law & Litigation
Real Estate Litigation
Commercial Litigation

Representative Experience:
- Represents design professionals, contractors, owners and lenders in litigation and resolution of design, construction and real estate disputes;
- Commercial and real estate litigation including mediation, arbitration, trial and appellate work;
- Negotiation of construction and design agreements and counseling in a variety of construction and real estate-related disputes.

Education:
University of Chicago Law School (J.D. 1988)
University of Illinois at Urbana-Champaign (B.A. 1985), Phi Beta Kappa, *magna cum laude*

Recent Presentations/Publications:
- Presenting "When Worlds Collide" at the American Institute of Architects National Convention, May 2002
- IPRA U – Illinois Parks & Recreation Association University, "Structuring Your Professional Services Agreements," Chicago, Illinois, January 2002
- Construction Claims in Illinois – Lorman Education Services: "Insurance Issues," Lisle, Illinois, February 2002
- *AEPronet* – The Flukes of Hazard: OSHA Sets its Sights on Design Professionals," February 2001 and other articles at www.aepronet.org.
- Illinois Law for Design Professionals – Lorman Education Services: "Here, There and Everywhere: Managing Your License in Illinois and Elsewhere," Chicago, Illinois, November 2000

Memberships/Professional Activities:
DuPage County Bar Association; American Bar Association and ABA Forum on the Construction Industry; Allied member of the American Institute of Architects (AIA); Professional Affiliate member and former Director of AIA Chicago; Professional Affiliate member of AIA Northeast Illinois; Member, Society of Illinois Construction Attorneys

Reported Cases:
- *Onsite Engineering & Management, Inc. v. Illinois Tool Works, Inc. et al.*, available at 2001 Ill. App. LEXIS 60 and 2001 WL 114266 (1st District, 2001)
- *Intergovernmental Risk Management v. O'Donnell Wicklund, Pigozzi & Perterson Architects, Inc.* 295 Ill App. 3d 784,692 N.E. 2d 739 (1st District, 1998)

James M. Snyder
Partner
312-201-2695
630-955-5822
snyderj@wildmanharrold.com

Practice Areas:
Government Affairs
Public Finance
Tax

Representative Experience:
- Regularly serves as bond counsel, underwriter's counsel, developer's counsel, issuer's counsel, counsel to bondholder's and counsel to providers of credit enhancement.

- Extensive experience with general obligation and special obligation bonds as well as private activity bonds such as industrial revenue bonds, solid waste disposal facility bonds, sewage facility bonds and 501(c)(3) bonds.

Admission:
Illinois, 1987

Education:
The Ohio State University (J.D. 1986) *cum laude*
The Ohio State University (B.S. 1982)
Certified Public Accountant, 1982

Memberships/Professional Activities:
National Association of Bond Lawyers

Louis P. Vitullo
Of Counsel
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Practice Areas:
Government Affairs
Real Estate
Bonds
Tax Increment Financing

Representative Experience:
- Special Counsel for the South Suburban Mayors and Managers Association.
- General Counsel to the Chicago Area Council, Boy Scouts of America.
- Counsel and advisor to the 1992 and 1998 campaigns of The Honorable Carol Moseley-Braun.
- Chair of the Governmental Affairs Practice, Wildman Harrold, 1987 – 2000.
- Former Assistant and Counsel to Illinois Governor Daniel Walker, 1973 – 1976.

Admissions:
Illinois, 1969
Supreme Court of Illinois
U.S. District Court for the Northern District of Illinois

Education:
United States Army – Captain, Active Duty (1969 – 1971)
Loyola University of Chicago (J.D. 1969)
John Carroll University (B.A. 1966)

Recent Publications:
- Contributing author, Local Government Law Section Council of the ISBA – Reference Guide prepared by the Taxpayers' Federation of Illinois, May 2000
- Frequent Speaker, Illinois Municipal League & Chicago Bar Association, Local Government Committee
- Frequent Speaker, Illinois State Bar Association Commentator on Proposed Eminent Domain Statute
- Witness Before the House of Representatives of the State of Illinois on Economic Development Practices Implemented by the Department of Commerce & Community Affairs
- "Intergovernmental Cooperation and the Insurance Crisis," DePaul Law Review (1982)

Memberships/Professional Activities:
Chicago Bar Association
Illinois State Bar Association (Former Local Government Section Chair)
National Association of Bond Lawyers
Board of Directors of the Misericordia Home
Tax Policy Forum (Jim Houlihan, Founder)

Michael J. Castellino
Associate
312-201-2583
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Practice Areas:
Government Affairs
Municipal Law
Zoning
Land Use
Litigation

Representative Experience:
- Counsels public and private entities on governmental matters including economic development and tax incentive programs, tax increment financing, real estate tax abatements, annexation, zoning, permitting, licensing and general litigation issues.
- Represents municipalities, zoning boards and plan commissions as well as private sector clients interacting with those public bodies.

Admissions:
Illinois, 1994
U.S. District Court for the Northern District of Illinois, 1994

Education:
Notre Dame Law School (J.D. 1994)
University of Notre Dame (B.A., Government, 1991)

Memberships/Professional Activities:
Illinois State Bar Association
Chicago Bar Association

FEES

Please describe your preferred fee arrangement and any alternate arrangements that you might consider. Be specific as to fees that are being proposed and your preferred method of billing. This might include a blended hourly rate of all attorneys involved in the Commission work or a monthly or annual retainer for routine legal representation with a separate hourly rate for all non-routine work items.

The monthly or annual retainer would be a fixed fee for approximately twelve hours to cover attendance at the Commission's monthly meeting and all other routine matters such as review of minutes, ordinances, resolutions, etc.

The traditional attorney/client relationship has been structured around an hourly fee arrangement.

Wildman Harrold's fee approach to local government representation is based on our sensitivity to the budgetary issues, and our commitment to the highest level of professional service to every client. Agreement on a mutually satisfactory fee structure is essential to the establishment of a professional relationship. Any fee arrangement must be structured so that the client feels they are receiving excellent value for the fees they pay, and the law firm providing the services believes it is being fairly compensated for the value it provides. We customarily engage in alternative fee structures and are open to alternative fee arrangements based on the goals/preferences of the DuPage Water Commission. We have concluded, based on the parameters of the RFP, that alternative fee arrangements may be better suited for a long-term partnering relationship.

We customarily engage in alternative fee structures and are open to alternative fee arrangements based on the goals/preferences of the DuPage Water Commission.

We recognize the need to discount our hourly rates for governmental entities, without giving such work anything but the highest priority. Wildman Harrold is able to perform all of your legal work, while strategically packaging its legal services with "set-fee" or "not-to-exceed" arrangements, as well as non-set-fee arrangements. We have found that the benefit to clients of set-fee and not-to-exceed arrangements for services is highly dependent upon the particular legal needs and fiscal philosophies of our clients. For some clients, set-fees are an attractive way to control and pay for base legal services. For others, with different service demands, straight hourly rate services are preferred. We offer blended rates for specialty and litigation work, and we work closely with our municipal clients to develop agreements, ordinances and policies which permit legal fees at competitive market rates to be passed on to the entity or entities benefiting from the unit of local government's legal services.

The Water Commission's RFP does not disclose the scope of legal services being requested. Without having more detail regarding the engagement, it is not possible to propose or even assess the merits of retainers, set-fees, and not- to-exceed fee arrangements.

Wildman Harrold is able to perform all of your legal work, while strategically packaging its legal services with "set-fee" or "not-to-exceed" arrangements, as well as non-set-fee arrangements.

But given that the Water Commission has recently hired experienced in-house counsel, we assume that the Commission is seeking legal services for project specific assignments, and contemplates day-to-day legal services being provided by the in-house attorney, with the outside firm providing services where needed due to special expertise, time commitments and staffing, or other particular reasons determined by the Commission and executive staff. In our experience, this is clearly a sensible and cost-effective approach to overall legal representation of the Commission. As such, we propose to represent the Commission on a per project basis, with the fees for

our services being based either on our discounted hourly rates, or one of the project specific fee arrangements mentioned above.

However, even with the availability of in-house, we envision a fee structure that includes some retainer services, for more or less routine legal matters, such as telephone inquiries and general counseling on a "no charge" basis. An example would be conferences regarding scheduling issues, delegations and coordination with staff and other consultants, and general legal matters relating to a particular project. The advantage to the DuPage Water Commission is that its project group will feel free to utilize the legal resources of our firm and that the arrangement will promote a proactive approach to addressing potential legal issues. Additionally, the Commission will be able to budget with greater certainty.

Also, bond and financial legal services will be billed at competitive, market rates, which will be paid on a percentage basis as part of each bond issue. Reasonable follow-up legal counsel directly related to each bond issue, in addition to the legal work necessary to the bond closing, will be provided free of charge.

One of the benefits of engaging Wildman, Harrold is that we are capable and desirous of providing all of the legal services that will be required for the engagement. Therefore, we emphasize that while our billing rates are set forth as required under the RFP, our proposal is to establish a fee structure that combines set-fees with service caps and milestones for the various aspects and phases of the project.

Our traditional fee structure is as follows:

Wildman Harrold Attorney	Hourly billing rate
Mike Roth – Partner	$270.00
Jim Durkin – Partner	$270.00
Kip Kolkmeier – Of Counsel	$350.00
Eric Singer – Partner	$280.00
Jim Snyder – Partner	$380.00
Lou Vitullo – Of Counsel	$
Mike Castellino – Associate	$250.00

Paralegal hourly billing rates range between $100 and $155.

The rates set forth above apply to both weekdays and weekends

MALPRACTICE INSURANCE

Please submit verification that any and all attorneys in you employ that may represent the Commission are covered by professional malpractice insurance and provide the Commission with certificates of insurance verifying that the firm carries the necessary levels of errors and omissions insurance coverage.

Please see attached.

CONFLICTS

Identify any known or potential conflicts of interest with existing or possible future customers of the Commission that may arise from any undertaking on your part to represent the commission.

N/A.

Description of Melrose Park Water Project

On August 20, 1998, the Village of Melrose Park closed its sale of $41,150,000 in water revenue bonds to finance the reconstruction of the Village's water distribution system. The system distributes water to Melrose Park and seven other communities in Chicago's West Suburbs.

Melrose Park has provided water to these communities for more than 50 years. The long existing troubles with the system, including water loss in excess of 15%, were aggressively addressed by Melrose Park's new mayor, Ronald Serpico, upon his election in April, 1997. Mayor Serpico and his staff called upon Wildman Harrold's **Louis Vitullo** to develop a strategy for financing a comprehensive reconstruction of the water distribution system. Vitullo and other Wildman Harrold attorneys joined a team of professionals called together to develop and implement the overall strategy for Melrose Park's Water Project, including, Melrose Park Village Attorney Joseph Giglio, Melrose Park Controller Louis Panico, Dr. Ronald Picur and John Filan of FTP Management and Pandolfi, Topolski and Weiss (water rate and financial consultants), Anthony Bruno of Gray and Associates (intergovernmental relations consultant), Douglas DeAngelis and Ann Stepan of Mesirow Financial (underwriter), **James Snyder** (a current partner at Wildman Harrold) and Daniel Cronin of Powers & Cronin (co-underwriter's counsel), Vince Ziolkowski and Matti Velkkela of Mesirow Stein (construction manager) and Bret Postl of Clark-Dietz, Inc. (engineers).

At the same time, Melrose Park also discovered that most of its contracts for water with these communities had long been expired. Wildman Harrold's first task was to represent Melrose Park in negotiations for new contracts with representatives of the seven purchasing communities. The work became closely intertwined with Wildman Harrold's public financing work for the Village. Underwriters for the bonds demanded that the Village's new contract for water provision include sufficient protections for bondholders. Negotiations over the new contract took place over seven months, through 16 draft agreements, in meetings with lawyers, financial advisors, engineers, water rate consultants and elected officials.

The *Bond Buyer* called the completed contract "a[n] . . . iron-clad agreement [as] related to the bondholders." Its provisions include:

- A "take or pay" provision, requiring the purchasing communities to pay for their pro-rata share of debt service regardless of whether they receive water from Melrose Park.
- A "cross-default" provision, requiring the purchasing communities to pay for defaults of other purchasing communities on a pro-rata basis, provided Melrose Park is using its best efforts to collect from the defaulter.
- A "rate imposition" provision, allowing Melrose Park to impose a water rate upon a defaulting purchaser, based upon the determination of an independent accountant.

After extensive rehearsals, Vitullo and other members of Melrose Park's Water Project Team presented the contract and other elements of the project to bond rating agencies in New York and Chicago. Based in large part on the strength of the contract, Fitch IBCA Inc. assigned the bonds its A-rating. MBIA Insurance Corporation also provided insurance for the bonds. These protections allowed Melrose Park to obtain a very favorable blended interest rate of 5.18% for the bonds.

Melrose Park and the participating communities have also received and are seeking additional federal funding for the water project in the form of Community Development Block Grant funds, Economic Development Assistance grants and an Illinois Environmental Protection Agency ("IEPA") loan. Wildman Harrold worked with Melrose Park's Water Project Team to submit the application for a $10,000,000 loan to the IEPA. If granted, the loan will bear an interest rate of 2.65% and the proceeds will be used to defease payments on the higher interest rate bonds. With the loan, Melrose Park will pay an effective rate of interest of approximately 4.65% for this financing.