

# LEGALINSIGHTS

FOR LOCAL GOVERNMENTS

OTTOWSEN BRITZ KELLY COOPER & GILBERT, LTD.

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## Second District finds no violation of Open Meetings Act for Village

by Timothy J. Hoppa

**I**n *In re Petition to Disconnect Certain Territory Commonly Known as the Foxfield Subdivision and Adjoining Properties from the Village of Campton Hills*, 329 Ill.App.3d 989 (2009), the petitioners argued that the Village had violated the Open Meetings Act, and as a result the action taken at that meeting should have been voided. The Second District of the Illinois Appellate Court considered several novel aspects of the Open Meetings Act, found that the Village had not violated the Act, and upheld the action of the Village Board.

The case started when a group of Foxfield subdivision residents in the tiny Village of Campton Hills, an area familiar with protracted annexation and disconnection battles filed a court action to disconnect their property from the Village. Rather than allow the disconnection of a substantial portion of its territory, the Village fought back. While the petition to disconnect was pending, the Village held a special Board meeting. At that meeting, in an attempt to thwart the disconnection, the Village Board voted unanimously to annex a piece of land contiguous to the territory the petitioners sought to disconnect. This annexation created a small surrounding pocket of unincorporated territory, which prohibited the disconnection even if the petitioners' motion to disconnect had been allowed. Thus, having made the disconnection impossible, the Village filed a motion to dismiss the petition to disconnect in the

circuit court.

In response, the petitioners filed a motion to invalidate the annexation ordinance arguing the ordinance should be nullified because the Village failed to comply with the provisions of the Open Meetings Act. Specifically, the petitioners argued that the Village failed to indicate explicitly that a certain parcel would be annexed. In addition, the petitioners argued the agenda was posted inside, which provided limited viewing time, and the meeting was held at an inconvenient time and place. Particularly, the petitioners complained that the public was forced to wait outdoors on a very cold night during an extended closed session lasting several hours until the Board reopened the meeting to the public at 1:15 a.m.

The trial court ruled in favor of the Village on all matters. The petitioners appealed the trial court's decision, and the appellate court was charged with the responsibility of determining if the Village had properly followed the provisions of the Open Meetings Act.

With respect to posting requirements, the petitioners alleged that because the meeting agenda was posted indoors, it was visible to the public for less than the statutorily mandated 48 hours. The petitioners argued that for purposes of the Open Meetings Act, only those times when the agenda was

## Due process

by Robert J. Britz

**T**he Fall 2009 issue of *Legal Insights for Local Governments* included my article on due process, which addressed Illinois statutes, which are replete with the terms "legal notice," "public notice," and "public hearing notice." Briefly, the article touched on the Fifth Amendment to the United States Constitution, which provides, in part, as follows: "...no person shall be... deprived of life, liberty or property, without due process of law..." Section 2 of Article 1 of the Illinois Constitution, which provides that "no person shall be deprived of life, liberty or property, without due process of law..." and the two elements of due process: (1) notice and (2) an opportunity to be heard. I asked a rhetorical question, "What is legal notice, and how is it defined?" If you remember, the answer to that question is: read the statute, read the statute, read the statute!

On December 17, 2009, the Illinois Supreme Court ruled in *Passalino v. The City of Zion*, \_\_\_ N.E.2d \_\_\_, 2009 WL 4843389 that merely following the applicable notice statute may not always be sufficient in zoning proceedings. In *Passalino*, the property owner fought to invalidate a zoning map amendment adopted by the City of Zion that would rezone his property. Specifically, he claimed that the City's public hearing notice was insufficient, even though the notice was consistent

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## Revisiting the Public Duty Rule

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by Donald L. Potts

**I**n order for a civil defendant to be found negligent for an injury to another, the plaintiff must first prove three things: (1) that the defendant owed a duty to the plaintiff to act in a safe manner; (2) that the defendant breached that duty; and (3) that the defendant's breach of duty caused an injury to the plaintiff. If the defendant is a local government or an employee of a local government, the Tort Immunity Act or another statutory immunity may be applied to defeat the claim even if the plaintiff can prove all elements of negligence.

Immunities are statutorily driven protections provided to governmental

entities against certain causes of action. If a provision of the Tort Immunity Act is applicable, a prudent local government defendant will use the provision of the Act as a defense even before the elements of negligence are required to be proven. This is often a sensible strategy and can dispose of the case quickly, especially if a statutory immunity applies directly to the facts of the case. However, most tort immunity provisions do not apply to acts of willful and wanton misconduct; therefore, in cases of alleged willful and wanton misconduct, a different strategy is necessary.

One such strategy is to attack the first element of negligence: the existence

of a duty owed to the plaintiff. Recently, the Illinois Appellate Court applied a doctrine known as the "public duty rule" and held that a Village and an Emergency Telephone System Board (ETSB) did not owe a duty to the widow of a man who died in a fire when a radio repeater malfunctioned, preventing a fire department from receiving the 911 call about the fire. *Donovan v. Village of Ohio*, 2010 WL 152660.

In *Donovan*, a fire began in the kitchen of a local restaurant. A witness called 911, and the ETSB dispatched the fire department via a pager signal. Because of the distance between the dispatch

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## No violation of Open Meetings Act

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visible to the public should be counted toward the mandatory posting requirement.

In a matter of first impression, the court held that the legislature did not intend that an agenda be posted in a specific place so that it would be publicly accessible for 48 continuous hours before the meeting. Section 2.02 of the Act only requires that the agenda simply be posted 48 hours before the meeting, at the local government entity's principal office or other building where the meeting will be held. Therefore, the court held that posting the agenda indoors did not constitute a violation of the Open Meetings Act.

The court next considered the specificity required for agenda items. The agenda for the special meeting listed 24 items. The item intended to refer to the annexation was listed as, "Discussion and Consideration of potential annexa-

tion of property." Under this section, the Village Board voted to annex the property.

The petitioners argued the agenda should have specifically identified the parcel to be annexed, and the agenda should have indicated the Board would be taking final action on the annexation at the special meeting. The court held

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**The court held the Open Meetings Act does not require an agenda to be specifically tailored to specific individuals' private interests.**

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that the Open Meetings Act does not require an agenda to be specifically detailed or tailored to specific individuals

whose private interests are likely to be affected. The court noted the annexation was closely related to the agenda item listed in the notice and provided sufficient information to the public. Following well-established case law, the court concluded that the action taken at a special meeting must only be germane to the agenda listed in the notice.

Finally, the court examined the petitioners' final argument that the meeting was held at an inconvenient and inaccessible location because the public was forced to wait outdoors for several hours. The court concluded the legislature did not intend that public bodies could only hold meetings during good weather or at certain times. As a result, the court held that requiring the public to wait outdoors during a closed session was not a violation of the Open Meetings Act. Having found no violation on all three matters, the court upheld the dismissal of the annexation petition. ■

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## Due Process

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with the provisions of Section 11-13-2 of the Illinois Municipal Code, which provides, in part, that a hearing be held and persons interested be afforded an opportunity to be heard. The statute further provides that the notice for the hearing was to be published at least once, not more than 30 or less than 15 days before the hearing, in one or more newspapers published in the municipality. The City published the notice in two newspapers; however, it did not notify individual property owners by mail because neither the statute nor the applicable ordinance required notice by mail. Passalino

argued that the due process clause of the U.S. Constitution required actual notice to him of the proposed zoning change. The City argued that it strictly complied with the requirements pertaining to rezoning as provided by the applicable statute.

The Illinois Supreme Court cited a 1950 decision by the United States Supreme Court, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652 (1950). In *Mullane*, the U.S. Supreme Court relied on the following maxim of law:

“An elementary and fundamental requirement of due process in a proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections...when notice is a person’s due, process which is a mere gesture is not process.” The U.S. Supreme Court went on to state, “The means employed must be such as one desirous of actually

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## Revisiting the Public Duty Rule

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center and the fire department, a radio repeater had been installed at the top of a water tower owned by the Village. Unfortunately, the circuit that the repeater was on tripped, and the repeater’s battery backup failed before anyone noticed the problem. Because the repeater failed, the fire department never received the page. The fire claimed the life of Mr. Donovan, and his widow sued the Village of Ohio and the Bureau County ETSB, alleging that their failure to properly design, install, and maintain the 911 system with respect to the repeater constituted willful and wanton misconduct and resulted in the death of her husband.

The Emergency Telephone System Act provides for immunity against charges of negligence, but not against charges of willful and wanton misconduct as alleged in the complaint. Because this immunity was not available, the ETSB argued that, under the “public duty rule,” it did not owe a duty to the plaintiff and could not be held liable for any injuries suffered as a result of the repeater’s failure.

“The public duty rule is a long-standing precept which establishes that a governmental entity and its employees owe no duty of care to individual members of the general public to provide governmental services...” *Zimmerman v. Village of Skokie*, 183 Ill.2d 30, 32 (1998). The rule is grounded in the principle that a governmental entity’s duty to “preserve the well-being of the community is owed to the public at large rather than to specific members of the community.” *Zimmerman*, 183 Ill.2d at 32. In applying the public duty rule to this case, the court stated: “Once a 911 system was provided, the ETS Act did establish duties applicable to the administration of the system (as [Plaintiff] argues). However, those duties ran to the public at large, not to each citizen individually. The duty element of [Plaintiff’s] cause of action is thus missing.” In other words, the court believed the defendants did owe a duty to maintain the repeater, but they owed that duty to everyone served by the ETSB as a group, not to the plaintiff individually. Because the ETSB did not owe a duty to

the plaintiff, the ETSB could not be held liable for Donovan’s death.

The public duty rule had never been applied to a case involving an ETSB, and the plaintiff argued that doing so would be an improper expansion of the rule. The court rejected this argument stating that the rule applies regardless of the type of governmental entity.

We must note that the public duty rule does not apply in all situations. There is an exception to the public duty rule known as the special duty exception, which applies “in certain limited instances where a governmental entity has assumed a special relationship to an individual so as to elevate that person’s status to something more than just being a member of the public.” *Zimmerman*, 183 Ill.2d at 32-33.

OBKC&G, Ltd. attorneys represented the Bureau County Emergency Telephone System Board in *Donovan v. Village of Ohio*. We are pleased to have been able to obtain a favorable result for our client. ■

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## Due Process

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informing the absentee might reasonably adopt to accomplish it.”

The *Mullane* court held that notice by publication is not sufficient with respect to an individual whose name and address are known and easily ascertainable. Hence, notice by publication was inadequate “not because in fact it fails to reach everyone, but because...it is not reasonably calculated to reach those who could easily be informed by other means at hand.”

In *Passalino*, the Illinois Supreme Court stated, “among the reasonable actions that the City could have taken was to peruse the records of the Lake County Collector and then mail notice to the record owners of the 85 properties affected. It would not “place impossible or impractical obstacles on the City’s zoning efforts.” The Illinois Supreme Court further stated that the City’s random compliance with the statutory requirements of notice was incompatible with the constitutional requirements under these circumstances: “notice pursuant to the statute was not sufficient to satisfy due process requirements as applied to the facts in this case.”

Justice Freeman offered a dissenting opinion. He stated, “Generally, a landowner’s right to use of the property does not include the right to the continuation of an existing zoning classification,” and

“I do not understand what it is about plaintiff’s interest in the property that would entitle them to actual notice of the pending zoning changes. Plaintiff’s right to use the property does not entitle them to a continuation of a particular zoning classification...” Justice Freeman stated:

“What the majority means by perusing the records is unclear to me. ... The majority makes no effort to explain what the guideposts are for decision-making regarding reasonable notice in such situations. Is it a matter of how easy it is to locate those who are affected by the zoning change? Where will this information come from and what is the scope of the reasonable investigation in these circumstances? Does the majority have in mind a title search for all affected parcels? Or perhaps a search of the County’s tax rolls for each affected parcel? ... I note that the majority also states that 85 parcels were affected in this case, implying that number of affected parcels is also relevant. ... At what number of affected parcels would actual notice become unreasonable? Would 100 parcels be too burdensome for the City? The majority further alludes to the

cost of mailing to the City. ... At what price point would the cost become unreasonable? These questions need to be answered or else municipalities will never be certain when constructive notice, as the statute permits, will be sufficient to satisfy due process.”

Justice Freeman’s dissent is best summarized by his statement that, “I am concerned that, despite the majority’s insistence that it is totally limited to the facts of this case, constructive notice in zoning cases will, after today, never be deemed reasonable for purposes of procedural due process. There is nothing about these plaintiffs that would be any different from any other landowner interested in zoning proceedings ....”

Despite the earlier article, “What is due process?” which appeared in this newsletter and emphasized the necessity of complying with the statutory requirements for notice, local governments must now carefully consider all the circumstances surrounding the zoning action and determine how to notify interested parties of a pending zoning action. No doubt, the decision will have future impact and ramifications upon all manner of public hearings conducted by all units of local government. ■

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