

LEGALINSIGHTS

FOR LOCAL GOVERNMENTS

OTTOSEN BRITZ KELLY COOPER GILBERT & DINOLFO, LTD.

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Levies, budget, and legal authority

by Brian J. O'Connor

Local governments generally adopt levies for property tax revenues in the fall in order to file the levy with the county clerk on or before the last Tuesday in December as required by law (35 ILCS 200/18-15). For many units of local government, revenue from property taxes provides the vast majority, if not all, of their operating capital. The levy forms the basis for fiscal planning for the following year.

Levies, budgets, and appropriations have a statutory basis. General levy authority varies by each unit of government: e.g., municipal corporate purposes (65 ILCS 5/8-3-1) or emergency services (65 ILCS 5/8-3-16), fire protection by municipalities (65 ILCS 5/11-7-1) or fire districts (70 ILCS 705/14), emergency medical service (70 ILCS 705/22), or forest preserve corporate purposes (70 ILCS 805/13.1). Additional levy authority may exist for certain units of government that have full-time police officers or firefighters (40 ILCS 5/3-125 and 40 ILCS 5/4-118, respectively) or other employees under the Illinois Municipal Retirement Fund (IMRF, 40 ILCS 5/7-171).

Elected and appointed officials and staffs work diligently early in each calendar year preparing draft budgets, usually in the form of appropriations (Illinois Municipal Code, 65 ILCS 5/8-2-9, or Downstate Forest Preserve District Act, 70 ILCS 805/13.3) or budget

and appropriations ordinances (Illinois Municipal Budget Law, 50 ILCS 330/3), which are adopted by the units of government in the first quarter of the fiscal year.

So, is there a problem when a unit of government levies for a fund (citing proper statutory authority) in November or December, and actually appropriates monies for the levied purpose only months later?

In *First American Bank Corp. v. Henry*, 239 Ill. 2d 511, January 21, 2011 ("Henry"), the Illinois Supreme Court upheld the validity of this approach. In *Henry*, the DuPage County Forest Preserve District ("District") included \$981,511 for its IMRF contribution in its November 1999 levy. In June 2000, the District's IMRF contribution in its appropriations ordinance was \$1,102,628. Four taxpayers objected, asserting the District levy needed to reflect the "amount appropriated" (past tense from the IMRF levy language in 40 ILCS 5/7-171) where in fact the appropriation occurred several months after the levy.

In affirming the circuit and appellate courts' rulings in favor of the District, the Supreme Court opinion included a thorough analysis of the language of the statutory levy authority (40 ILCS 5/7-171) as well as the underlying governmental levy authority in the

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Administrative search warrants

by Robert J. Britz

A question frequently raised by units of local government, particularly villages, fire districts, townships, and counties, is the procedure for gaining access to properties for code enforcement purposes. The U.S. Supreme Court in *Camara vs. Municipal Court of the City and County of San Francisco*, 387 U.S. 523, 87 S.Ct. 1727 (1967), held that the Fourth Amendment to the U.S. Constitution applies to code enforcement inspections. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Absent the property owner's consent or other exigent circumstances, a warrant must be obtained to search private property for code enforcement purposes. The Illinois Second District Appellate Court in *People vs. Sojourners Motorcycle Club, Ltd.*, 480 N.E.2d 840, 89 Ill.Dec. 358 (2d Dist. 1985),

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The Illinois Employee Credit Privacy Act

by Meganne Britton

As of January 1, 2011, it is illegal for Illinois employers to discriminate against employees and applicants on the basis of their credit histories. Last summer the Illinois General Assembly passed the Employee Credit Privacy Act (820 ILCS 70/1) (the “Act”), to prevent employers from inquiring about or discriminating against employees or potential employees based on their credit histories or reports.

The legislation came at a time of high unemployment rates because of the

economic downturn. Before the Act was signed into law, some employers were using credit checks as an evaluation and screening tool for potential employees. Legislators were concerned that this practice could slow economic recovery efforts because unemployed individuals were seeing significant drops in their credit scores, and, thus, those individuals could not eventually become employed because of their poor credit scores.

Under the law an employer cannot (1) fail or refuse to hire or recruit, dis-

charge or discriminate with respect to employment, compensation, or a term, condition or privilege of employment because of the individual’s credit history or credit report; (2) inquire about an applicant’s or employee’s credit history; and (3) order or obtain an applicant’s or employee’s credit report from a consumer reporting agency. However, the Act still allows employers to conduct thorough background investigations on employees as long as the investigations do not involve credit history or re-

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addressed the fact that neither a statute nor an ordinance need necessarily provide for the issuance of an administrative warrant. It is sufficient if the power to inspect can be necessarily implied from another grant of authority. In *Sojourners*, the court held that the statute conferring zoning powers to counties, together with Lake County’s zoning ordinance, necessarily implied that Lake County had the power to inspect. The court stated that the “implied power is essential and necessary to accomplish the purpose behind the statutory grant of power... An express legislative grant of power or authority includes the grant of power to do all that is reasonably necessary to execute that power or authority.”

Notwithstanding the foregoing, an applicable statute and ordinance, standing alone, are an insufficient basis for conducting an inspection. A warrant issued by a judge is required. As pro-

vided by the Fourth Amendment, “. . . no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched”

Procedurally, how is an administrative search warrant obtained in Illinois? It is initiated in the same manner as any litigation initiated in Illinois, by filing a complaint with the courts, and serving the complaint and summons on the named defendants. The complaint, at a minimum, needs to allege:

- (a) The names and addresses of the owners of the property to be searched (a title search of the property is strongly recommended to ensure that the owners named in the complaint are in fact the legal owners of the property);
- (b) The names and addresses of any tenants or other persons in possession of the property;
- (c) The statutory authority and the applicable code/ordinance of the unit of local government that establishes the authority to conduct the inspection (many villages, counties, and fire districts have adopted national codes that expressly address the authority);
- (d) Set forth explicit facts establishing probable cause for believing violations exist and the need for the inspection (most complaints will have an affidavit attached, signed by the local code official establishing probable cause); and

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ports. Credit history is defined by the Act as “an individual’s past borrowing and repaying behavior, including paying bills on time and managing debt and other financial obligations,” and credit report is defined as “any written or other communication of any information by a consumer reporting agency that bears on a consumer’s creditworthiness, credit standing, credit capacity or credit history.”

Furthermore, the Act contains a retaliation provision. Under the provision, an employer cannot retaliate against an employee for filing a complaint under the Act, participating in an

action or proceeding concerning a violation of the Act, or opposing a violation of the Act.

The Act applies to most employers, applicants and employees with a few limited exceptions. Among those exceptions are State law enforcement and any State or local government entity that otherwise requires the use of an employee’s or applicant’s credit history. Because the exception language in this area is broad, and has not been interpreted by any Illinois court, it is unclear which State and local government positions may fall under the exception. Therefore,

State and local government agencies should abide by the Act unless establishing a credit history is a necessary pre-requisite for the position.

Despite the Act’s provisions, an employer also can inquire into the credit history of an employee or potential employee if a satisfactory credit history is an “established bona fide occupational requirement” of a particular position or a particular group of the employer’s employees. A satisfactory credit history can only be an “established bona fide occupational requirement” if at least one of the following circumstances is met:

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- (e) A statement setting forth reasons why the unit of local government’s codes and ordinances need to be enforced.

In addition to the complaint, affidavit, and summons, an administrative search warrant will need to be prepared and submitted to the court. It should, at a minimum, clearly describe the property and the parameters of the search.

After filing the complaint and serving the summons, the matter will proceed similar to any other legal action. Parties and their witnesses will have the right to appear, present testimony and evidence, and cross-examine witnesses.

It is incumbent upon units of local government desiring to search private property to first consult with legal counsel. Failure to follow appropriate constitutional procedures may expose the unit of local government to adverse consequences before federal and state courts. ■

Attorney Notes

■ Several **Ottosen Britz** attorneys participated in the Illinois Association of Fire Protection Districts Annual Conference held June 9-12, 2011. **Bob Britz** spoke on “Having It Your Way: Board Meetings and the Open Meetings Act Today.” **Karl Ottosen** participated in “Different Strokes for Different Folks: A Labor and Management Dialogue” and **John Kelly** moderated this program. **Steve DiNolfo** addressed “Social Media, Smartphones, PDAs and the Fire Protection District.” **Tom Gilbert** spoke on “Fire Protection District Consolidation: Is It a Merger, Acquisition, or Takeover?” **Joe Miller & Tony Andrews** presented “The Judge Said What?! Annual Legal Update.” **Shawn Flaherty & David Zafiratos** spoke on “Current Issues Facing Illinois Firefighter Pension Funds.” **Shawn Flaherty** taught “Advanced Trustee Training Part 3 Personnel and Human Resources.” **Carolyn Clifford, Shawn Flaherty,** and

Ericka Thomas presented “Disability Terminations: A Live Demonstration.” **Carolyn Clifford** spoke on “Administering the Smaller Pension Fund” and “Due Diligence for Pension Fund Trustees.” **Brian O’Connor** moderated “Assessing Pension Fund Liabilities and Insuring Proper Funding.”

■ **Carolyn Clifford** and **Donald Potts** represented the Board of Trustees of the Naperville Firefighters’ Pension Fund in a recent appellate court decision, *Lindemulder v. The Board of Trustees of the Naperville Firefighters’ Pension Fund and the City of Naperville*, 408 Ill.App.3d 494 (2nd Dist. 2011). As a matter of first impression, the court held a firefighter must prove that specific working conditions caused - or were a contributing cause of - his chronic pulmonary obstructive disorder, dispelling a commonly held belief that the legislative findings in the occupational disability disease statute can substitute for cause. ■

Levies and budget

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Downstate Forest Preserve District Act (70 ILCS 805/13.1). The *Henry* court noted that the District appropriately cited to the authority of the IMRF statute to levy the funds; but that the District's governing law (the Downstate Forest Preserve District Act) controlled the timing of both the District's IMRF and general tax levy.

In light of the *Henry* ruling, local government entities should:

- Adopt and file your levy on time.
- Note the proper authority for each fund component of your levy.
- Include appropriations for levied funds in your subsequent appropriations and budget ordinances.
- Note that the timing for filing of levies is governed by each entity's statutes (Municipal Code for municipalities, Fire Protection District Act for fire districts, etc.)

If you have any questions regarding levies, budget, and legal authority, please contact one of our attorneys. ■

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- (1) State or federal law requires bonding or other security covering an individual holding the position;
- (2) the duties of the position include custody of or unsupervised access to cash or marketable assets valued at \$2,500 or more;
- (3) the duties of the position include signatory power over business assets of \$100 or more per transaction;
- (4) the position is a managerial position which involves setting the direction or control of the business;
- (5) the position involves access to personal or confidential information, financial information, trade secrets, or State or national security information;
- (6) the position meets criteria in administrative rules, if any, that the U.S. Department of Labor or the Illinois Department of Labor has promulgated to establish the circumstances in which a credit history is a bona fide occupational requirement;

or

- (7) the employee's or applicant's credit history is otherwise required by or exempt under federal or State law.

If an employer is covered under the Act, but the position applied for or held by an employee meets one of the listed bona fide occupational requirement exceptions, then the employer is not subject to the Act for the purposes of that particular position. The employer may, however, be subject to the Act for other positions that do not fall under any exceptions.

Employees or applicants who are injured by a violation of the Act can bring suit in a State circuit court to obtain either or both injunctive relief or damages. Additionally, the Act allows a successful plaintiff to recover costs and reasonable attorney's fees. All employers should be acting in accordance with the Act at this time. If you have questions regarding the Act's provisions or whether a position may fall under an expressed exception in the Act, please contact one of our attorneys. ■

Ottosen Britz Kelly Cooper Gilbert & DiNolfo, Ltd.'s newsletter, *Legal Insights for Local Governments*, is issued periodically to keep clients and other interested parties informed of legal developments that may affect or otherwise be of interest to its readers. Due to the general nature of its contents, the comments herein do not constitute legal advice and should not be regarded as a substitute for detailed advice regarding a specific set of facts. Questions regarding any items should be directed to:

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