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THE Extra Mile

GOING THE EXTRA MILE SO YOU DON'T HAVE TO

PARK DISTRICT EDITION

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Ordinance Declaring a Potential Need for Future Condemnation Action Did Not Violate Property Owner's Rights

A recent Illinois Appellate Court case, *Stahelin v. Forest Preserve District of DuPage County*, 376 Ill. App. 3d 765 (2d Dist. 2007), arose out of the filing and subsequent dismissal of a condemnation action by the Forest Preserve District of DuPage County (the "District").

In the case, the plaintiffs' land was surrounded on three sides by the Morton Arboretum ("Arboretum"). Hoping to prevent the plaintiffs from developing the land and thereby preserve the property in its current state for the benefit of the public, Arboretum officials petitioned the District to condemn the plaintiffs' land and create a forest preserve in its place.

An expressed desire to acquire private property in the future does not constitute a "taking."

The District negotiated with the plaintiffs to purchase the property and, when negotiations failed, initiated a condemnation proceeding. The District later decided to voluntarily dismiss its condemnation action, but noted in the ordinance authorizing the dismissal that "the abandonment of [the condemnation action] shall not constitute a finding that the [District] does not 'need' this property, and the [District] hereby expressly states that the acquisition of the property in the future would be important to furthering the statutory purposes of the [District]."

Plaintiffs considered this language to be a drastic limitation on their property, sufficient to constitute a taking. The court quickly disposed of this claim, noting that the District's expressed desire to acquire the property in the future simply did not affect the plaintiffs' present use of the land, and therefore was not a taking. Rather, under the language of the ordinance, plaintiffs remained free to use the land as they pleased, with no interference from the District.

The plaintiffs also claimed the Arboretum had conspired with the District to use the District's eminent domain power for its own benefit. The court noted that private parties are allowed to petition the government for governmental action favorable to themselves, except where the petition is a "sham." This rule of law, known as the *Noerr-Pennington* doctrine, allows public bodies considerable latitude to exercise their powers in response to constituents' requests. In *Stahelin*, the Arboretum's petition was not a "sham," because there was a substantial likelihood that the District would succeed in a condemnation action against the plaintiffs, and thus the plaintiffs' conspiracy theory was dismissed.

For a complimentary copy of this decision, please contact Jeff Goelitz or Cindi DeCola.

Illinois Minimum Wage

Under *Public Act 94-1072*, signed into law by Governor Blagojevich on December 18, 2006, Illinois employers are required to pay no less than $7.75 per hour to employees who are 18 years of age or older* beginning on July 1, 2008. Under the Act, the minimum wage is scheduled to increase by $0.25 per hour on July 1st of each year through 2010, reaching a rate of $8.25.

**Certain exceptions are permitted for new employees, individuals under 18 years of age and "learners."*

Please contact Cindi DeCola for further information concerning the minimum wage law.

HLERK/ IPRA Present:

What Are Taxable Benefits & What Should Employers Do about Them?

Please join **Cynthia L. DeCola** and **Barbara A. Erickson** on May 29, 2008 at the Bartlett Park District from 9:00 a.m. - 12:30 p.m. To register, contact Susan Leninger at (630) 540-4812, or email sleninger@bartlettparks.org.

.3 CEU credits are available for this session.

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info@hlerk.com

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Trial Judge Blocks Newspaper's Access under FOIA to Internet Records of Former Superintendent

A state court judge in McHenry County has granted a "preliminary injunction" which bars a school district from releasing a former superintendent's internet browsing records pursuant to a newspaper's request under the Freedom of Information Act ("FOIA").

After the superintendent left the district in late January, a newspaper submitted a FOIA request for web browser logs and firewall logs pertaining to the former superintendent's computer use.

The district initially denied the request citing FOIA's exemption for information that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy. The newspaper appealed the denial internally, arguing that the information was not exempt because FOIA specifically provides that "information that bears on the public duties of public employees and officials" is not an invasion of personal privacy, and here the websites were visited on a taxpayer-funded computer during working hours.

While the district was still considering the newspaper's FOIA appeal, the former superintendent filed a lawsuit (*Rood v. Board of Education*) seeking to prevent the district from releasing the records and asking the court to declare the records exempt under FOIA.

After privately reviewing the internet browsing records, the court issued a preliminary injunction barring the district from releasing them on April 3, 2008, citing a public official's reasonable expectation of privacy in the workplace. The newspaper has not yet determined whether to appeal.

Please contact Heather Brickman or Rob Swain with questions concerning this decision or your obligations under FOIA.

Family and Medical Leave Act ("FMLA") Amended to Include Leave Related to Military Service

On January 28, 2008, President Bush signed the National Defense Authorization Act ("NDAA") which, among other things, amends the FMLA to include two new categories of protected leave available to eligible employees with family members serving in the military.

The first category of protected leave, "Active Duty Leave," entitles an eligible employee to a total of 12 workweeks of leave during any 12-month period "because of 'any qualifying exigency' arising out of the fact that the employee's spouse, or a son, daughter or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation."

Eligible employees requesting Active Duty Leave must provide notice to the employer as soon as reasonable and practicable, and an employer may require such requests to be supported by a certification as prescribed by the Secretary of Labor regulations. The U.S. Department of Labor ("DOL") has stated that employers are *not* legally required to provide Active Duty Leave to eligible employees until the Secretary of Labor issues regulations defining the meaning of "any qualifying exigency." Notwithstanding the foregoing, the DOL is encouraging employers to provide Active Duty Leave to qualifying employees until the new regulations are issued. The DOL stated that it is "expeditiously preparing" the regulations.

The second new category of leave, "Servicemember Family Leave," provides an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember a total of 26 workweeks of leave during a 12-month period to care for a "member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness."

The term "next of kin" is defined as an individual's "nearest blood relative," and "serious injury or illness" means "an injury or illness incurred in the line of duty on active duty in the Armed Forces that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating." This leave is available only during a single 12-month period, and the 26-week entitlement includes any other FMLA leave taken in that period.

By way of example, if an employee has taken three weeks of FMLA leave because of the placement of a child with the employee for adoption, the employee could take up to 23 weeks of leave to care for a covered servicemember. This leave provision is effective immediately.

When administering leave requests under either of these new categories of leave, keep in mind that all of the other requirements, limitations and protections of the FMLA, such as the notice requirements, method of taking leave (i.e. intermittent basis or reduced leave schedule), reinstatement to prior position, and health insurance continuation, are applicable. ***Once final regulations have been issued, HLERK will amend its model FMLA policy. Should you have any questions, please contact John DiJohn or Cindi DeCola .***

Court Finds City of Chicago Failed to Negotiate in Good Faith Before Exercising Power of Eminent Domain

In the recent case ***City of Chicago v. Zappani***, an Illinois appellate court found that the City of Chicago failed to make a good faith effort to negotiate with a landowner before filing lawsuits to acquire the landowner's property under the *Eminent Domain Act*. Under the *Act*, a local government entity is required to make a good faith effort to voluntarily negotiate the purchase of private property with the owner before it may file suit in court to acquire the property through condemnation proceedings.

In *Zappani*, the City of Chicago sent the owner three form letters with offers for three separate parcels. Each letter stated the amount of the City's offer and that the owner had ten days from the date of the letter to respond, and if it did not hear back from the owner within that timeframe, it would consider the offer rejected. In the letters, the City claimed its offer of just compensation was based upon its consideration of two independent appraisals of the property. The City made no other efforts to contact the owner, nor did it provide further detail of the appraisals. Within the next few months, the City filed separate suits against the owner to condemn all three parcels. The City also obtained new appraisals for the property, which were significantly higher than its original written offers.

Based on these circumstances, the appellate court ruled the City could not condemn the property because it had failed to make a good faith effort to agree on just compensation with the owner. Specifically, the court pointed to three main facts as evidence of the City's lack of good faith: (1) the significant discrepancy between the City's initial offer and the subsequent appraisal value it obtained mere months later, (2) the City's failure to explain its reliance on the initial appraisal or to attach the appraisal to the letters, especially in light of the fact that there was a limited timeframe for a response, and (3) the City's failure to attempt to make any further contact with the owner once it knew the offer letters had been received by the owner. This case illustrates that depending on the circumstances, the concept of "good faith effort" may extend beyond a mere written offer to purchase. ***City of Chicago v. Zappani***, 376 Ill. App. 3d 927 (1st Dist. 2007).

Please contact Debra Kaplan for more information.

IMRF Allows Taxable Reimbursements to Be Treated As Reportable Earnings

At the January 2008 IMRF Board meeting, the Board modified its reportable earnings treatment of taxable expense allowances. Historically, most expense allowances were not considered IMRF earnings. This modified rule now allows an employer to elect to report taxable expense allowances (such as uniform allowances, automobile allowances, travel allowances, and moving expenses) as IMRF earnings. Such election must be by a governing body resolution and employers will need to complete IMRF Form 6.74, "Suggested Resolution to Include Taxable Expense Allowances as IMRF Earnings." Non-taxable expense reimbursements are not included as earnings and are not to be reported.

http://www.imrf.org/pubs/er_pubs/gen_memos/2008_gm/gm_566.pdf

Illinois Supreme Court Reverses Lower Courts' Rulings in *Smith v. Waukegan Park District*

In the last issue of *The Extra Mile*, we reported that the Illinois Appellate Court for the Second District affirmed the dismissal of a claim of workers' compensation retaliatory discharge against the Waukegan Park District, holding that, under the *Local Governmental Employees Tort Immunity Act* ("Act"), 745 ILCS 10/1-101 *et seq.,* park districts and other local public entities have complete immunity from actions seeking damages for retaliatory discharge. On April 17, 2008, the Illinois Supreme Court issued an opinion reversing the Second District's decision and holding that public entities are not immune from workers' compensation retaliatory discharge claims under the Act. The case has been remanded back to the circuit court for a trial on Smith's allegations he was fired in retaliation for filing a workers' compensation claim. *Smith v. Waukegan Park Dist.,* No. 104960, 2008 WL 1746664 (Ill. Apr. 17, 2008). (Notice: This opinion has not been released for publication in the permanent law reports. Until released it is subject to revision or withdrawal.)

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