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**Unsubstantiated opinions are  
insufficient to convince  
court that levy is proper**

by Michelle Grotto

Every year taxing bodies receive tax objections concerning their previous tax year levy. One common tax objection is to allege an excess accumulation of funds by the taxing body. An over accumulation of money in the public treasury violates public policy, and as such any real estate levy or tax rate increase that results in an over accumulation of funds is illegal. Nevertheless, taxing bodies are afforded broad discretion in estimating the amount of levy necessary to accomplish duties and may impose a levy based upon these estimates. A rebuttable presumption arises that a taxing body acted appropriately and, therefore, has not abused its discretion in establishing a real estate levy or tax rate increase. Furthermore, when determining the propriety of the levy, a discrepancy between the amount of money levied in any particular year and the amount of money actually required would carry little weight with the court.

A recent court decision, however, has clarified what factors a court will look at in determining the appropriateness of a levy. In *Allegis Realty Investors v. Novak*, \_\_ N.E.2d \_\_, 2008 WL 614806 (Ill.App.Ct., 2d Dist. 2008), Allegis Realty Investors and other DuPage County taxpayers (Allegis) claimed that the Lisle Township Road District (District) had levied an unnecessary tax for general road and bridge purposes in 1997 and illegally accumulated funds. Allegis argued that the District's levy was void because the District had an excess accumulation of money. Typically, courts have determined that an excess accumulation occurs when the levy exceeds two to three times the foreseeable expenditures of the taxing body. Utilizing this equation, the appellate court found that the District had levied an amount which resulted in an excess accumulation of funds. Based on the court's

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**New amendments to Fire Pension Code  
have impact on municipalities**

by Ericka J. Thomas

The Illinois General Assembly recently passed an amendment to the Downstate Firefighters' Pension Code of which local governments should take note. The amendment to Section 4-112 of the Illinois Pension Code mostly focuses on the treatment of pensioners applying for disability pensions. (40 ILCS 5/4-112) However, a short clause tucked into the middle of the section requires pension boards and municipalities to establish new procedures to address disability pensioners who are being returned to active duty.

Section 4-112 establishes the manner in which a disability pension applicant must prove the existence of his or her disability to the pension board and also addresses the restoration of a disabled firefighter to active duty. Previously, Section 4-112 stated that upon satisfactory proof that the firefighter has recovered from the disability, the fire chief shall order reinstatement to the same rank that he or she had previously held. Although this language is still included in Section 4-112, the amendment has created an affirmative duty on the part of the municipality.

The amendment to Section 4-112 states, in relevant part:

**"Upon satisfactory proof to the board that a firefighter on the disability pension has recovered from disability, the board shall terminate the disability pension. The firefighter shall report to the marshal or chief of the fire department, who shall thereupon order immediate reinstatement into active service, and the municipality shall immediately return the firefighter to its payroll, in the same rank or grade held at the date he or she was placed on disability pension. If the firefighter must file a civil action against the municipality to enforce his or her mandated return to payroll under this paragraph, then the firefighter is entitled to recovery of reasonable court costs and attorney's fees."**

40 ILCS 5/4-112  
(emphasis added)

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## Levy

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ruling, Allegis had overcome the presumption that the District did not abuse its discretion in levying that 1997 tax, and the burden shifted to the District to justify the levy.

Although the District argued that justification of the levy was a question of law, the appellate court disagreed stating that "issues of fact and credibility come into play when the nature, extent, and reasonableness of the accumulation are examined." As justification for the levy, the District proffered the deposition testimony of Michael J. Dow, the Lisle Township Highway Commissioner. Dow's testimony did not address any facts; he simply gave his opinion regarding the existence of the accumulation of funds. Specifically, Dow testified that the amount levied was necessary to maintain a prudent reserve. Dow's testimony did not reveal the calculations used to determine the levy or to determine a lawful reserve. Those calculations in his opinion were "judgment calls" and were "relative." No supporting documentation for the calculations was submitted because all such evidence had been destroyed after the levy was adopted.

As a result, the appellate court characterized the District's evidence as merely an unsubstantiated opinion as opposed to the required substantial justification for the amount of the levy. The court stated that the evidence presented by the District was insufficient to establish that the accumulation was justified and the District was entitled to judgment. Therefore, the court reversed the summary judgment in favor of the District and remanded the case for an evidentiary hearing to determine the justification for the accumulation of funds. ■

## Welcome to the Firm

**OBKC&G, Ltd.** welcomes two law clerks. **Brent Eames** has completed his second year of law school at Northern Illinois University. Brent majored in Political Science at Western Illinois University. **James Prescott** is completing his second year of law school at the University of Illinois. Jim earned his Bachelor's and Master's Degrees from Washington University in St. Louis and previously worked as an auditor for public entities. Brent and Jim will join the firm's Naperville office in May 2008. ■

## New amendments to Fire Pension Code

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The amendment to Section 4-112 will require a pension board to immediately notify the municipality when a firefighter is reinstated. Based upon the language of this amendment, the firefighter will have rights to full pay immediately upon the pension board determining that he or she is reinstated to active duty. The amendment also establishes a cause of action for firefighters against the municipality should the municipality delay in returning the firefighter to its payroll. Most notably, the amendment entitles the firefighter to recover attorney's fees if the firefighter is forced to file an action. This language could make such an action very costly for municipalities.

The language delineates clear responsibilities for municipalities in cases in which the reinstatement is uncontested. The question that remains, however, is what action municipalities should take when the reinstatement goes up on administrative review. On the one hand, if the firefighter is reinstated then he or she has immediate rights to full pay. On the other hand, if the reinstatement is being contested and the municipality delays putting the firefighter on the payroll pending the outcome of the administrative review action, the firefighter may have a cause of action against the municipality. Such a situation should be reviewed on a case by case basis and the municipality, although maybe not a party to the administrative review action, should take a special interest in the proceedings or hire separate counsel to intervene and file appropriate pleadings to protect it from future legal action. Regardless, this amendment to Section 4-112 mandates that pension boards and municipalities must be in constant contact concerning reinstatement of those pensioners who have recovered from their disabilities. ■

## Attorney Notes

- **Donald Potts**, one of the firm's associates in its Naperville office, has been called to active duty with the U.S. Army in Iraq, beginning in May 2008. Don is a Captain in the Army Reserve and a member of the Judge Advocate General's Corps. He will serve as a legal advisor/planner in the office of strategy, plans and assessments at Multi-National Force-Iraq headquarters in Baghdad. Don is expected to return to OBKC&G in June 2009. The firm wishes Don the best during his leave and looks forward to his safe return next year.
- Congratulations to **David Zafiratos** and his wife, **Amy**, on the birth of their daughter, **Nicole Louise**, who was born at Delnor Community Hospital on May 6, 2008, at 1:45 a.m.
- **Brian J. O'Connor** was one of three attorneys presenting at the Lorman Educational Services' all day seminar on "Public records and the Open Meetings Act" held on Friday, April 4, 2008 at the William Tell Holiday Inn in Countryside, Illinois.

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**Are local governmental entities required  
to disclose employee e-mails under  
the Freedom of Information Act?**

**by Bill Thomas and Vicki Johnson**

After a review of the Illinois Freedom of Information Act (FOIA), 5 ILCS 140/1 *et seq.*, Illinois case law, and the case law of other states, the answer is a firm **MAYBE**. Although the Illinois Freedom of Information Act defines the legislative intent of the Act and the definition of terms such as “public body” and “public records”, Illinois courts have not yet ruled regarding the disclosure of employee e-mails pursuant to a FOIA request. Other state courts have addressed the disclosure of employee e-mails in regard to an FOIA request, and in April 2007, the Arizona Supreme Court ruled on the issue in *Griffis v. Pinal County*.

In *Griffis v. Pinal County*, 141 P.3d 780 (Ariz. 2006), Pinal County suspended a county manager during an investigation for alleged misuse of public funds. During the investigation, the Phoenix Newspapers, Inc. sought the disclosure of all e-mail communications sent or received by Griffis during his employment. The county released over seven hundred e-mails, but withheld or redacted e-mails of a personal nature. After the newspaper threatened legal action, the county agreed to release the remaining e-mails. However, Griffis filed a lawsuit to block the release of the remaining e-mails. The trial court ordered the release of all of the manager’s e-mail correspondence. Griffis filed an appeal with the appellate court, and the trial court issued a stay of release order pending the outcome of the appeal. The appellate court affirmed the release of e-mail communications for one date only, but reversed the remainder of the trial court’s order. In April 2007, the Arizona Supreme Court reviewed the appellate and trial court’s decisions and found that there cannot be an absolute assumption that all e-mails generated or maintained on a government-owned computer are public records. The Arizona Supreme Court further held that the nature and purpose of the document should be analyzed to determine if the document should be disclosed.

The Arizona Supreme Court indicated that the content of each document must be reviewed to determine its nature and purpose. If an employee e-mail is of a personal nature, it would not be considered a public record and would not be subject to disclosure pursuant to a state’s FOIA laws. If, however, the nature and purpose of the document is related to an employee’s conduct or performance of his official duties, then the presumption of openness would apply and the document would be considered a public record. This process, however, is only one part of a two step analysis according to the Arizona Supreme Court.

The second part of the process is for the court to determine whether the privacy, confidential nature, and best interests of the state outweigh disclosure of the e-mail. For example, if an employee’s e-mail contains a “substantial nexus” with governmental activities, then favoring disclosure would apply. However, the court

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**Attorney Notes**

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- For the third consecutive year, *Illinois Super Lawyers Magazine* has recognized **Karl Ottosen** as a 2008 Illinois Super Lawyer in the area of Government Law. *Law & Politics* conducts a rigorous review, research, and selection process of nominated attorneys. Only five percent of attorneys in Illinois are recognized as Super Lawyers by their peers for their outstanding professional achievement.
- Congratulations to **Shawn Flaherty** on being selected as a “Rising Star” in the areas of Government/City/Municipal Law in the 2008 issue of *Illinois Super Lawyers* magazine. This designation is awarded to the top 2.5% of Illinois attorneys who are under the age of 40 or have been practicing ten years or less.
- Congratulations to **Karl Ottosen**, who was listed as a leading lawyer in the areas of Governmental, Municipal, Lobbying & Administrative Law in the Leading Lawyers Network section of *Chicago Lawyer Magazine*. For the past three years, Karl has been recognized by his peers in a statewide survey to be among the top government-related attorneys in Illinois.
- **Karl Ottosen, Bob Britz, and Brian O’Connor** spoke at the Illinois Association of Fire Protection District’s Administrative Training Session held at Byron Fire Protection District on Saturday, March 15, 2008. Topics covered in their presentation included: a review of recent legislation; fire district budget and levy highlights; a review of TIF/Enterprise Zone issues; and firefighter benefits. In addition, updates on court rulings, the Equal Employment Opportunity Commission, and code enforcement were discussed.

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## Attorney Notes

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- Several **OBKC&G, Ltd.** attorneys spoke at the Northern Illinois Alliance of Fire Protection Districts Annual Conference held January 31 – February 3, 2008, in Oak Brook, Illinois. **Karl R. Ottosen** discussed “Worker’s Compensation ... How to Get Them Back” and “FLSA Re-Visited...Overtime & 7G’s, Use of Part-Time or Substitute Employees.” **Karl** also served as one of the moderators for the “Open Forum for Trustees.” **Stephen H. DiNolfo** addressed “Employee Free Speech: Is There Any Left?” **Thomas J. Gilbert** spoke on the “Budget/Levy Process.” **John H. Kelly** discussed the “Roles & Responsibilities of New Commissioners” and “Computer, Property, and Workplace Security.” **John Kelly** and **Carolyn Welch Clifford** participated in an “Open Forum for Commissioners.” In addition, **Carolyn** spoke on “New Pension Laws and Their Applications” and conducted a “Legal Update for Pension Funds.” **Joseph Miller III** reported on “Legal Updates for Commissioners,” and **Shawn P. Flaherty** discussed “Referendum Strategies (Legal, Marketing Formula for Success).” ■

## Employee e-mails

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can still decide that an overriding interest such as privacy and confidentiality outweigh disclosure of these records. In *Griffis*, the Arizona Supreme Court concluded in its opinion that it is the trial court’s responsibility to review the content of disputed e-mails to determine if they are subject to disclosure pursuant to the public records law. Although the various Arizona courts discussed the county’s policies, they did not conclude that its policies would classify all employee e-mails as a public record.

In a discussion of Michigan’s public disclosure laws, Daniel F. Hunter stated, “E-mail correspondence is like a telephone conversation in that most messages are short, casual and can travel around the world in minutes. At the same time, e-mail messages are like written memoranda because they can be copied, edited, filed and printed onto paper. E-mail is a medium that has come to replace both telephone calls and documents for many purposes.” Electronic Mail and Michigan’s Public Disclosure Laws: The Argument for Public Access to Governmental Electronic E-mail, 28 U.Mich.J.L. Reform, 977 (1995).

As we explore a local government’s obligation to disclose employee e-mails pursuant to a FOIA request, we must underscore the importance of the entity’s e-mail policies. In addition to e-mail retention and deletion policies and procedures, the lack of overall e-mail privacy must be stressed to employees. Employees must be aware that the employer may monitor e-mails and in the event of future litigation, e-mails can be disclosed to third parties. ■

Ottosen Britz Kelly Cooper & Gilbert, Ltd.’s newsletter, *Legal Insights for Local Governments*, is issued periodically to keep its 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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