

LEGALINSIGHTS

FOR LOCAL GOVERNMENTS

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When the money runs out: Is municipal bankruptcy an option?

by Timothy J. Hoppa

In difficult economic times, the demands for municipal services increase while revenues from declining property values or decreasing sales tax diminish. For some municipalities or units of local government, the lack of adequate revenues may create a financial disaster. In such a case, a municipality may imitate the private sector and seek protection through a bankruptcy filing. The federal Bankruptcy Code provides a method for a local government to file for bankruptcy; however, state law makes the actual filing exceedingly difficult, if not impossible.

Many people are familiar with the three most common types of bankruptcy filed under Chapters 7, 11, and 13, especially in light of recent high profile bankruptcy filings such as General Motors. However, municipalities cannot seek protection under the traditional bankruptcy chapters because those chapters are reserved exclusively for private individuals and corporations. Instead, a municipality must seek relief under the lesser-known Chapter 9. Although similar to reorganization under Chapter 11, Chapter 9 contains several significant and noteworthy differences. First, and perhaps most importantly, the municipal government must have a *specific* grant of authority by the state legislature to be a debtor in bankruptcy. This grant of authority cannot be general in nature, but must specifically mention and

reference the bankruptcy code. (*County of Orange*, 183 B.R. 594 (C.D.Cal 1995)) Secondly, the municipality must: (1) have the agreement of its creditors; (2) fail to obtain an agreement with its creditors after good faith negotiations; (3) show that negotiations would be impractical; or (4) reasonably believe that a creditor will attempt to obtain a preference as the term is defined by the Bankruptcy Code.

Until July 6, 2009, only one Illinois local government -- Slocum Lake Drainage District of Lake County -- had filed for bankruptcy in Illinois in the previous twenty years. (*Slocum Lake Drainage District of Lake County*, 336 B.R. 387 (N.D.Ill. 2006)) However, on the creditors' motion, the bankruptcy court dismissed Slocum Lake's bankruptcy petition thereby denying Slocum Lake the protections provided by the Bankruptcy Code. The *Slocum Lake* case is extremely instructive for an Illinois local government currently experiencing severe financial distress. In finding that *Slocum Lake* (and indeed, *any* Illinois municipality) could not directly file for bankruptcy, the court held:

The Debtor has the burden of proof to establish that it is eligible to be a debtor under Chapter 9. The court finds that the Debtor has not met that burden. ... [T]he Court finds that the general authori-

Continued on page 4

Illinois Supreme Court narrows FOIA exceptions

by Thomas Farnell

The Illinois Supreme Court recently determined that a public school superintendent's employment contract is not exempt from disclosure under the Freedom of Information Act (FOIA) even if it is located in the superintendent's personnel file.

In *Stern v. Wheaton-Warrenville Community Unit School District 200*, 233 Ill.2d 396 (2009), a resident of the school district Mark Stern, submitted a FOIA request to the school district requesting a copy of the employment contract of the school district's then superintendent, Dr. Gary Catalani. The school district's record keeper denied Stern's FOIA request on the basis that the contract was contained within the superintendent's personnel file and thus exempt from disclosure.

After the denial, Stern contacted the Illinois Attorney General's Office. The Attorney General's Public Access Counselor sent a letter to the school district stating that employment contracts are considered public information under the FOIA. Stern renewed his FOIA request. The school district's legal counsel denied Stern's request, and Stern appealed the decision to the school board president, who also denied the appeal.

After both requests were denied,

Continued on page 2

What is due process?

by Robert J. Britz

The Illinois statutes are replete with instances where the term “legal notice,” “public notice,” “public hearing notice,” and assorted variations are used. Legal notice, along with the opportunity to be heard, is a right found in both the United States and the Illinois Constitutions. Due process envisions two elements: notice and the opportunity to be heard. The statutes creating units of local government contain numerous instances whereby legal notice is required to be given, often combined with an opportunity to be heard.

What is legal notice, and how is it defined? That question can best be an-

swered if you remember three points: read the statute, read the statute, read the statute! What may constitute legal notice for the purpose of one statute may not necessarily be the same requirement for another statute. Some statutes explicitly and with great detail set forth how the notice should be worded. Other statutes merely impose a requirement for legal notice without specifying what the notice is to include.

In what manner is the notice to be given? It is critical that the specific statute be read. Must the notice be published, and if so, how and in what newspaper? With regard to the Illinois Municipal Code, some ordinances, unless

otherwise specified, can be published in pamphlet form and merely posted on a public bulletin board in the village office. Often a notice must be published in a newspaper that is published in the community, or in a newspaper that is generally circulated in the community. What does the term “published in the community” mean? Illinois courts have generally held that publication means where available for distribution.

Is the notice to be mailed? If so, to whom? If mailed, must the notice be sent by regular mail, certified mail, or registered mail? May the notice be hand-delivered in

Continued on page 3

FOIA exceptions

Continued from page 1

Stern again contacted the Attorney General’s Office. This time the Attorney General’s Public Access and Opinions Division sent a letter to the school district’s legal counsel restating its position and requesting that the school district reconsider Stern’s request. However, the school district still did not comply with the request. As a result, Stern filed a complaint against the school district in the Circuit Court of DuPage County seeking injunctive relief under FOIA.

In May 2006, a local newspaper staff reporter (not Stern), conducting research for an article on superintendents’ salaries, submitted a FOIA request for the superintendent’s employment contract. Two days after receiving the request, the superintendent himself faxed the reporter a copy of his contract.

In court, Stern argued that the school district waived any statutory exemption when it disclosed the employment contract to other individuals, in-

cluding members of the media. He further argued that the personnel file exemption found in FOIA did not apply because the superintendent’s employment contract “bears on his public duties” and must be disclosed.

The school district filed a motion for summary judgment, claiming that the exemption in Section 7 of FOIA for personnel files applied to the superintendent’s contract. The Circuit Court adopted the school district’s argument, holding that the employment contract could reasonably be expected to be found in the employment file. Furthermore, the court held that exemptions under Section 7 are *per se*, or automatically exempt from disclosure, therefore, the superintendent’s contract was *per se* exempt from disclosure.

On appeal, the Second District reversed the summary judgment and remanded the matter to the circuit court. The Second District stated that Section 8

allows for the disclosure of nonexempt material contained in exempt items through redaction. Citing Section 11(f), the Second District directed the circuit court to make an *in camera* inspection of the requested records to determine which parts are exempt from disclosure.

The Illinois Supreme Court stated that the purpose of the FOIA is “to open governmental records to the light of public scrutiny.” Therefore, under FOIA, public records are presumed to be open and accessible. When a party denies a FOIA request, it must demonstrate that the records requested fall within the claimed exemption. The Court reasoned that the superintendent’s contract is not exempt from disclosure because it constitutes “information that bears on the public duties of public employees and officials.” While Section 7 does identify specific items such as personnel files that are exempt from disclosure, the General Assembly has placed limitations on the reach of the personal privacy

Continued on page 4

What is due process?

Continued from page 2

lieu of mailing? With regard to a mailed notice, to whom is it sent? How do you determine the names and addresses to which the notice is sent? Does the statute require the notice be sent to addresses on real estate tax bills or the actual owners of the property?

Is notice required to be posted on the property? Often, with regard to zoning matters, the notice is required to be posted on the property. Some statutes only require published notice if the population of the community exceeds a certain number. Some smaller communities are allowed to provide notice by posting it in several public places throughout the community. When is notice required to be given? Is notice to be given not less than a certain number of days before the public hearing? Is there a requirement that notice cannot be given any earlier than a specified number of days before the hearing? There is no universal answer to any of the above questions. As previously indicated, the key to answering the question is to review the applicable statute.

The second prong of the due process requirement is an opportunity to be heard. Local governments are required to conduct public hearings for a myriad of reasons. With regard to public hearings, there are a number of issues that need to be considered. As many different units of local government as there are, there are that many different procedures to open and close public hearings. For the most part, most statutes are silent on the procedures of opening and closing a public hearing. When opening and closing a public hearing, the key is to pass motions on the opening and closing so they are accurately reflected in the minutes of the meeting. Typically, a roll call vote is not required.

The main purpose for a public hearing is to allow citizens an opportunity to speak, ask questions, and hear the state-

ments and questions of others. Each person attending must be allowed an opportunity to be heard. However, a public body can establish reasonable rules and regulations regarding public hearings. For instance, the public body need not consider repetitious testimony by a number of individuals. The public body need not entertain public comment attacking the character or integrity of individuals participating in the public hearing. The public body may maintain order at the public hearing. The public body may require speakers to take an oath or affirmation and state their names and addresses or require those attending the public hearing to sign in.

May a public body limit the amount of time that each person may speak or ask questions? Certainly, a public body is not obligated to allow a public hearing to go on *ad infinitum*. It may certainly impose "reasonable" rules regarding time limits to make statements and ask questions; however, public bodies are urged to be generous with the time allotted. The public body must allow attendees to submit documentation supporting their statements and allow others an opportunity to review said documentation.

Must the public body have a court reporter present? Typically, few statutes require the presence of a court reporter. On the other hand, depending upon the seriousness of the matter and the potential for future litigation, a court reporter may be appropriate. At a bare minimum, the local government's clerk or secretary should be present to take minutes of the proceeding. Under some instances, some units of local government are statutorily allowed to appoint hearing officers to take testimony at a public hearing rather than having the public body conduct the hearing.

Units of local government that routinely conduct public hearings, such as

municipal planning commissions and zoning boards, are strongly urged to adopt and follow written procedures and scripts. Procedures and scripts not only guide the inexperienced local governmental official, but also ensure that all the requirements for the public hearing are satisfied.

A typical script for public hearings should include: 1) a motion to open the public hearing; 2) a statement as to the reason for the public hearing citing the statutory provision requiring the public hearing; 3) a reading by the secretary or clerk of the items and reports filed with the public body; 4) a time period for testimony in favor of the proposition or petition and presentation of any supporting plans, exhibits, or evidence (It is recommended that all such documentation be expressly identified by description and exhibit number, and marked accordingly.); 5) a time period for citizens attending the public hearing to question the petitioner, make their own statements, and offer supporting plans or exhibits; 6) an opportunity for the petitioner to ask questions of the citizens testifying and provide rebuttal testimony; 7) an opportunity for the members of the public body conducting the public hearing to ask questions of the petitioner and citizens who testified; 8) an opportunity for the staff of the public body to respond to questions and report; and 9) a motion to close the public hearing. The public body, either at that meeting or a future meeting to which it may reconvene, should formulate its necessary findings of fact and recommendations, and submit a written report to the applicable governing body that will make the final decision.

What if the meeting place for the public hearing is overflowing with people and those attending cannot squeeze into the meeting room to hear the testimony given and questions asked. It is not improper for the public body to table further discussion and reconvene the meeting to a later date and time at a facility capable of accommodating all desiring to attend. ■

Municipal bankruptcy

Continued from page 1

ty contained in [Illinois statutes] is insufficient to meet the "specifically authorized" requirement...Had the Illinois General Assembly intended to specifically authorize this Debtor or other municipalities to seek relief under Chapter 9, it could have easily drafted appropriate legislation, but has not done so.

However, this long history of unsuccessful municipal bankruptcies in Illinois ended when the Village of Washington Park filed for Chapter 9 bankruptcy on July 6, 2009. While this case is in its earliest stages, as of publication of this article no creditor has made an objection to the Village of Washington Park's eligibility to be a debtor in bankruptcy. As the only municipal bankruptcy filing in Illinois in the last twenty years or more, the negotiations and outcome of the Village of Washington Park's bankruptcy filing are sure to become a roadmap for any future Chapter 9 filings in Illinois.

Perhaps the only state subdivision with a specific grant of authority for bankruptcy in Illinois is the Illinois Research Park Authority, a division of the state executive branch. All other municipal governments must follow the procedures required by the Local Government Financial Planning and Supervision Act (the "Act") (50 ILCS 320/1 *et seq.*). The

Act provides a means by which an Illinois municipal government undergoing a financial emergency may seek relief. The Act creates a special financial planning and supervision commission to manage insolvent municipal governments. To obtain relief, the Act requires that an insolvent municipal government petition the financial planning and supervision commission and essentially enter into receivership under the control of the commission. Under this process, the commission or its appointed financial planner has broad powers to restore solvency to the municipal government. One of the powers afforded the commission is to recommend that the municipality seek relief under Chapter 9. Only upon the commission's recommendation can Illinois local governments seek relief under the Bankruptcy Code. (*Slocum Lake Drainage District of Lake County*, 336 B.R. 387 (N.D.Ill. 2006))

While a bankruptcy filing remains an option for an Illinois municipality experiencing an extreme financial crisis, the difficulty in obtaining the requisite authority and the necessary ceding of local control to a state agency makes bankruptcy an impractical option for all but the most severe financial emergencies. The difficulty of the process likely explains why no municipality has successfully undergone the Chapter 9 process in Illinois in the past twenty years until the Village of Washington Park filed in July 2009. ■

FOIA exceptions

Continued from page 2

exemption. The Illinois Supreme Court stated, "An employment contract is not the kind of record that the General Assembly intended to keep from public view and does not fall within the exemption for personnel files in section 7 (1)(b) of the Act." Furthermore, the court held that the mere commingling of exempt and non-exempt material does not prevent a public body from disclosing the nonexempt portion of the record.

According to the court, a public record is "all information in any account, voucher, or contract dealing with the receipt or expenditure of public or other funds of public bodies." (5 ILCS 140/2(c)(vii)) The court also held that an *in camera* inspection of the contract is appropriate, but solely to determine whether it contains personal information such as a social security number or bank account information. Any personal information must be redacted. Thus, with the exception for personal information, Catalani's employment contract must be disclosed under FOIA.

FOIA requests received by local governments regarding employment contracts must be disclosed, with only personal information such as social security numbers or bank information redacted. Municipalities may not reject a FOIA request for a document solely on the basis that it is contained in the personnel file. Any non-exempt information, even if located in an otherwise exempt location, must be disclosed. ■

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