

Volume 25, No. 2 -- Summer 2018

Third District Appellate Court considers village's motive in determining whether annexation is valid

by John H. Kelly

A recent case from the Third District Appellate Court is raising questions about what information a court may consider when reviewing the legitimacy of annexations. In the case of *Chicago Title Land Trust Company v. County of Will*, 2018 IL App (3d) 160713, a landowner whose property was forcibly annexed by the Village of Bolingbrook after the Village annexed a Commonwealth Edison ("ComEd") property to create contiguous boundaries to the Plaintiff's property challenged the annexation as a "sham" transaction.

The Appellate Court, in a 2 to 1 decision, held that the Village's annexation of the ComEd property was a "sham" and the resulting annexation of the plaintiff's property was not valid. This case seems to be a departure from the holdings of other courts in which the intentions of the parties to an annexation agreement are not relevant to the transaction. *In re Petition for Annexation to the Village of Bull Valley*, 392 Ill. App. 3d 577 (2d Dist. 2009).

In late 2015, the Village of Bolingbrook approached ComEd with a proposal to voluntarily annex a parcel of ComEd property. The Village indicated to ComEd that the purpose of the annexation was to gain the ability to annex properties adjacent to its property. ComEd submitted a petition for voluntary annexation under Section 7-1-8 of the Illinois Municipal Code (65 ILCS 5/7-1-8). In its petition, ComEd asked that the annexation be "subject to the satisfaction of the Conditions Precedent and the

Conditions Subsequent in the ComEd Annexation Agreement." The Village and ComEd negotiated an extensive Annexation Agreement that spelled out a number of conditions, both precedent and subsequent, that the Village would have to meet in order for the annexation to be effective. Among those conditions was a provision that the Village could not place any additional restrictions on the ComEd property and, if the annexation of the contiguous property did not go through, then the ComEd annexation would be nullified. In addition, the Village promised that no Village regulations would be applied or enforced against the ComEd property. The Village also waived any fees or charges that might be associated with the annexation and agreed not to impose any taxes, other than property taxes, on the property.

On March 8, 2016, the Village of Bolingbrook adopted both the ordinance approving the Annexation Agreement with ComEd and the ordinance actually annexing the property. On April 12, 2016, the Village enacted an ordinance authorizing notice to the now-contiguous landowner of the Village's intent to forcibly annex his property. On May 9, 2016, the landowner sent a written objection to the Village. The plaintiff's objection alleged that the sole purpose of the Village's annexation of the ComEd property-to annex his property by manipulating boundaries-was against Illinois public policy. On May 18, 2016, the Village

Do local governments need to provide accommodations for the deaf and blind?

by John E. Motylinski and
Amanda McDonough

It is well known that the Americans with Disabilities Act ("ADA") requires state and local governments to provide accommodations for individuals with disabilities. What is lesser known, however, is that the ADA obligates state and local governments to implement auxiliary aids and services upon request to communicate with individuals who have vision, hearing, or speech impairments. These auxiliary aids and services may include a variety of acceptable forms of communication but commonly include using a sign language interpreter and providing documents in Braille. This is to ensure that disabled individuals can meaningfully communicate with their elected representatives and local governments. If, for instance, a deaf citizen cannot communicate in real time at a local government's board meeting, the citizen cannot participate in a consequential fashion. Similarly, if a blind individual cannot read a locality's public meeting agenda, they cannot digest the information presented by the agenda.

The ADA's mandate poses a number of questions for localities. For one, are units of local government required to provide interpreters for the hearing impaired at their regular meetings? Correspondingly, are local governments obligated to provide agendas and minutes in Braille for those who have impaired vision?

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Village's motive

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forcibly annexed the plaintiff's property under Section 7-1-13 of the Municipal Code (65 ILCS 5/7-1-13).

The plaintiff filed a *quo warranto* suit challenging the Village's annexation of his property. A *quo warranto* complaint challenges the legal authority of a governmental body's actions. In his complaint, the plaintiff alleged that the annexation of his property violated Illinois law and was contrary to public policy. The plaintiff argued that the Village had not annexed the ComEd property for typical purposes, such as increasing Village land, subjecting the property to its ordinances, or generating tax revenue. Instead, the sole purpose of this annexation was to gain contiguity and force annexation of the plaintiff's property. The Village argued that the court should not look at the conditions under which the property was annexed, but only should review the legal basis for the annexation. If the conditions of the statute have been met, then the annexation should be deemed valid. After cross motions for

summary judgement were filed, the trial court found for the Village, holding that the annexation was valid.

The plaintiff appealed to the Third District Appellate Court arguing that the annexation of the ComEd property was a "sham." The Village renewed its argument that the focus of the annexation should be solely on whether the Village followed all of the necessary legal steps to perfect the annexation.

In its opinion, the court held that Illinois courts can and have considered "any matter going to the validity" of the annexation ordinance citing *City of East St. Louis v. Touchette*, 14 Ill. 2d 243, 248 (1948). The court also cited a number of cases in which the courts have reviewed "creative" attempts by municipal governments to annex property, particularly where the annexation may provide contiguity to other desired property. The court reasoned that ComEd lacked any independent interest in being

annexed into Bolingbrook. The court focused on the conditions spelled out in the Annexation Agreement, particularly the language allowing ComEd to disconnect if the Village was not successful in forcibly annexing the plaintiff's property. The court ruled that the ComEd property annexation was a nullity, which means the plaintiff's property was not "wholly bounded" by one or more municipalities, as required by Section 7-1-13 of the Municipal Code, and thus could not be forcibly annexed into the Village.

Municipal officials considering annexations, particularly those involving the reach for non-contiguous property, should heed the warnings of this case when negotiating with landowners to voluntarily annex and should prepare the annexation agreement in a manner that minimizes the chance that the annexation could be considered a "sham." For assistance with annexation matters, contact your attorney. ■

John Kelly honored at the NENA conference in Nashville

John Kelly received the Hall of Fame award from the National Emergency Number Association ~ John Kelly was given one of the highest honors the organization bestows at the recent NENA conference in Nashville. John received this honor because of his significant contributions and major accomplishments that have contributed to the betterment of the association. His assistance to public safety telecommunications has been of lasting importance to the advancement of the profession. The National Emergency Number Association has promulgated a policy that limits eligibility for this award to those who meet stated criteria.



John Kelly included in the 9-1-1 History and Heroes Wall: 50 Years of Saving Countless Lives ~ John Kelly was honored for his years as an industry expert in 9-1-1 law as well as serving as counsel for the NENA Executive Board and IL NENA Executive Board. He continues to teach 9-1-1 laws as they relate to liability in the public safety answering point. The History and Heroes wall celebrates the first 50 years of 9-1-1 service in the United States. The first 9-1-1 call was made in Haleyville, Alabama in February, 1968.



Unequal enforcement of building codes can result in legal judgments against municipalities

by Ericka J. Thomas

It is not uncommon for municipalities to encounter the same businesses or citizens over and over on code or zoning violations. Despite the frustration that these types of repeated contacts may produce, municipalities must ensure that violations are dealt with equally and in the same manner for all violators and that frequent violators are not singled out or targeted.

The Village of Park Forest found itself embroiled in a decade long legal skirmish over a large townhouse complex within its boundaries in *Thorncreek Apartments, LLC v. Village of Park Forest*, 886 F.3d 626 (7th Cir. March 27, 2018). In 1989, the complex changed ownership and was divided into three separate limited liability corporations. In 2007, the owner sold one section of the complex. However, because that section housed the leasing office for the entire complex, the owner was required to move the leasing office to an unoccupied townhouse in one of the remaining areas of the complex. In order to legally accomplish this, the owner needed the Village to grant a conditional use permit to use the vacant townhouse as a business office.

After applying for the permit, but before it was granted, the owner began to conduct business out of the vacant townhouse. The Village, in turn, refused to issue the permit and cited the complex for zoning violations and operating a business without the required permit. The Village also attempted to enforce a new electrical upgrade ordinance for that portion of the complex. After several months, the Village filed suit to shut down the unpermitted business operations of the complex.

Soon thereafter, foreclosure notices were filed against the townhouse complex. The townhouse complex blamed the foreclosure on the regulatory overreach by

the Village and filed a lawsuit alleging civil rights violations. The townhouse complex alleged that the Village violated its equal protection rights under a “class of one” theory and violated its civil rights by interfering with its business operations, refusing to grant the conditional use permit, and unequally enforcing a building-code provision. The basic theory of the case was that the Village caused the mortgage default by unfairly singling out the complex for regulatory action based on irrational animus against the owner and racial bias against its mostly black residents.

What started as a simple permit application turned into a decade long legal battle that cost both the Village and the complex owners significant time and attorney’s fees

After a two-week jury trial, the jury found the Village, the Village Manager and the Director of Community Development liable and awarded the complex \$2 million in compensatory damages and \$6,000 in punitive damages. The trial judge vacated the jury’s verdict against the Director of Community Development as being contrary to the evidence. The trial judge later awarded almost \$500,000 in attorney’s fees and costs. The trial judge also awarded over \$1 million in pre-judgment interest. Both sides appealed the verdict.

On appeal, the parties mostly contested the damages awarded. The Village asserted that the nominal damage award was inconsistent with the evidence. The court determined that there had been evidence introduced that, before the foreclosure, the complex was set to be sold to a third-party and, but for the Village’s interference, the sale would have gone through. The appellate court noted that the jury’s award of the contract value minus the mortgage was consistent with the evidence. The amount of the nominal damage award also made it clear that the jury had not incorporated

prejudgment interest in its ultimate award. The appellate court found no error in the award of prejudgment interest itself or the amount of the award.

Similarly, the appellate court concluded that the amount of attorney’s fees awarded by the district court was appropriate. Ordinarily, attorney’s fees are calculated by multiplying a reasonable fee by the number of hours reasonably expended on the litigation. In this case, that would have resulted in an award of attorney’s fees close to \$1.3

million. However, this is not an automatic calculation and the trial judge has broad discretion on the amount of attorney’s fees to award. The trial judge considered the amount of damages sought from the jury (\$20.5 million) versus the amount that was actually awarded (just over \$2 million) as one of the factors in determining attorney’s fees. The appellate court concluded that the trial court reasonably exercised its discretion in reducing the amount of attorney’s fees awarded based on the unique factors of this case.

What started as a simple permit application turned into a decade-long legal battle that cost both the Village and the complex owners significant time and attorney’s fees. It is always advisable to consult with your counsel when dealing with repeat violators to ensure that all actions are being dealt with in a fair and even-handed manner. In many cases, these violations can be worked out by the parties before issues escalate or end up in court. ■

Accommodations for the deaf and blind

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The short answer is: maybe—it depends on all the facts surrounding a given request. Indeed, determining whether a locality is compliant with the ADA's charges is a fact-specific inquiry that takes into consideration the nature, length, complexity, and context of the information being relayed, the individual's typical form of communication, and the sophistication of the local government involved.

Furthermore, although state and local government services are obligated to provide effective methods of communication, the ADA is sensitive to the practical limitations on local governments to provide such auxiliary aids. The result is the "undue burden" exception. Under the ADA, if the requested accommodation places an undue burden on State and local government entities, such as significant difficulty or expense, then the entity does not have to provide that specific form of accommodation.

What constitutes an undue burden is also decided on a case-by-case basis. Broadly speaking, though, the undue burden inquiry weighs the nature of the request and the locality's available resources. If, for instance, an impoverished special district receives a request to simulcast its meetings in sign language, the district may well deny that request as unduly burdensome if obtaining a sign language interpreter is prohibitively expensive. On the other hand, if a bigger, more sophisticated municipality were to receive the same request, providing that auxiliary aid when viewing the totality of the circumstances might not be unduly burdensome. Accordingly, there is no black or white answer as to whether a request for auxiliary aids constitutes an undue burden—the answer exists on a continuum that takes into account the individual's disability, the requested services, and the cost to provide those services.

Localities must nevertheless be aware that failure to abide by the ADA's requirements is a serious matter that may result in litigation. For one, the federal or State government may step in and prosecute the matter. By way of example, the United States Department of Education's Office of Civil Rights ("OCR") has recently been very critical of the way local governments are maintaining their websites. In fact, some prominent school websites have been found to be inaccessible for those with mild visual or auditory disabilities. Generally, fixing these issues is not very expensive, making the burden on the local governments low. For those reasons, OCR has taken action against non-compliant governments and required website modifications to enhance accessibility.

In addition to action by regulators, aggrieved disabled individuals may also be able to sue local governments for violating the ADA. For instance, in *Prake v. Indiana*, 100 F. Supp. 3d 661, 683 (S.D. Ind. 2015), a deaf individual wanted to observe criminal court proceedings. He asked the court system to provide an interpreter. The court system denied the request and did not take any other action to help the individual. Consequently, he filed a lawsuit alleging that the court system violated the ADA. The court hearing that case agreed and found that the defendant court system failed to show that those interpreter services would cost too much or otherwise create an undue burden. Therefore, localities must be aware that the ADA may be enforced by individuals as well.

In the end, there is no "one-size-fits-all" answer as to whether a given local government must provide auxiliary aids in response to a request for those services. Clearly, state and local government services must comply with the ADA and,

therefore, must provide effective methods of communication to those with vision, hearing, or speech impairments. However, this demand is counterweighted by the nature of the request and the cost in providing those services. As such, if a request is impossible to fulfil by a given locality, it might not have to comply with the strict requirements of the ADA. But, this needs to be decided on a case-by-case basis. Consequently, it is imperative that localities seek counsel immediately if they receive a request for auxiliary aids or services. ■

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