ADMINISTRATIVE ADJUDICATION REVISITED!

BIG CHANGES!

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I. INTRODUCTION

In 1987, a process permitting local administrative adjudication of non-moving violations of the traffic code concerning standing, parking, or condition of vehicles was enacted by the General Assembly. This process permitted local enforcement of such things as failure to purchase a motor vehicle sticker or having an expired license plate. The process was a huge success as it reduced the docket of the local circuit courts and (more importantly) allowed the municipality to retain 100% of the fines imposed.

This process appeared to result in a more efficient method to address minor infractions of the law leaving the courts to deal with more serious issues. A decade later, pursuant to Public Act 90-516 (65 ILCS 5/-2.1-1) effective January 1, 1998, home rule municipalities were authorized to enforce all violations of its Municipal Code other than those requiring incarceration or citations for moving motor vehicle violations, through a system of administrative adjudication.

II. ESTABLISHMENT FOR HOME-RULE MUNICIPALITIES

In order to establish a system for administrative adjudication under this law, a municipality is required:

1. To create a "hearing unit", *i.e.*, a "municipal code enforcement department" presided over by hearing officers;
2. Provide all parties receiving a notice of an ordinance violation to be given an opportunity for a hearing during which they may be represented by counsel, present witnesses and cross-examine opposing witnesses;
3. Schedule hearings with reasonable promptness; and,
4. In no event, impose a fine in excess of $50,000.

III. HEARING OFFICERS

1. In order to act as a hearing officer, the law mandates that prior to conducting administrative adjudication proceedings, the hearing officer shall have successfully completed a formal training program which includes the following:

    (a) Instruction on the rules of procedure of the administrative hearings which the hearing officer will conduct;
    (b) Orientation in each subject area of the code violations that they will adjudicate;
    (c) Observation of administrative hearings; and,
    (d) Participation in hypothetical cases, including ruling on evidence and issuing final orders.

In addition, every administrative hearing officer must be an attorney licensed to practice law in the State of Illinois for at least three (3) years.

2. The hearing officer presides over all adjudicatory hearings and has the following powers and duties:

   (a) Presides at an administrative hearing called to determine whether or not a code violation exists;
   (b) Hears testimony and accepts evidence that is relevant to the existence of the municipal code violation;
   (c) Issues subpoenas directing witnesses to appear and give relevant testimony at the hearing upon the request of the parties or their representatives; and,
   (d) Preserves and authenticates the record of the hearing and all exhibits and evidence introduced at the hearing;
   (e) Issues and signs written findings, decision and order stating whether a violation exists; and,
   (f) Imposes penalties, sanctions or such other relief consistent with applicable municipal code provisions and assesses costs upon finding a party liable for the charged violation, except, however, that in no event shall the hearing officer have authority to impose a penalty of incarceration.

3. The Hearing Officer is required under the law to preserve and authenticate the record of the hearing and all exhibits and testimony introduced at the hearing. It is recommended that a court reporter be present whenever the hearing unit is in session. A tape recording of the session is often confusion and does not permit identification of the speaker.

4. The Hearing Officer may set aside a default judgment upon a petition filed within twenty-one (21) days of the date of the order if the Hearing Officer determines that the petitioner's failure to appear on the date set was for good cause or the petitioner had not received notice.

5. The significant impact of this process is due to the fact that the final decision of the hearing officer that a code violation does or does not exist constitutes a final determination for purposes of judicial review and is subject to review under the Illinois Administrative Review Law. Moreover, after expiration of the period in which judicial review under the Illinois Administrative Review Law may be sought for a final determination of the code violation, unless stayed by a court of competent jurisdiction, the decision of the hearing officer is enforceable in the same manner as a judgment entered by a court of law [65 ILCS 1-2.1-8(b)].

IV. ESTABLISHING NON-HOME RULE SYSTEMS

1. The obvious benefit in utilizing administrative adjudication for enforcement of local ordinances was soon realized by the courts. Within one year, new legislation was proposed to include non-home rule municipalities and Public Act 90-777 was enacted which became effective January 1, 1999 (65 ILCS 5/1-2.2-1 *et seq*.). While the administrative adjudication system available to non-home rule municipalities appeared to be the same, several notable differences were included in this legislation.

    (a) The definition of "code" excluded building code violations which must be adjudicated pursuant to Division 31.1 of Article 11 of the Illinois Municipal Code (65 ILCS 5/11-31.1-1 *et seq*.) ("*Code Hearing Department"*). The new law permitting administrative adjudication of all other code violations mirrors the process set forth in said Division 31.1, Article 1 in several ways. For example:

        (i) As in the case of the Code Hearing Department, notice of the hearing date shall not be less than thirty (30) nor more than forty (40) days after the violation has been reported (a notice requirement not found in the home rule statute);

        (ii) The Code Hearing Department statute (11-31.1-6) and 1-2.2-30 of the Illinois Municipal Code provide that no continuances are permitted unless absolutely necessary to protect the rights of the respondent. Both statutes specify that "lack of preparation shall not be grounds for a continuance," but if continued, such continuance may not exceed twenty-five (25) days;

        (iii) A copy of the decision and order of the Hearing Officer must be served upon the respondent within five (5) days after issue.

2. The greatest difference between the administrative adjudication process authorized for home-rule municipalities versus the statute authorizing administrative adjudication for non-home rule municipalities was that the decision and order of the Hearing Officer of a non-home rule was not a final order enforceable as a judgment entered by a court. In order to enforce the decision, the municipality must commence a proceeding before the circuit court for the purpose of obtaining a judgment on the decision and order of the hearing officer after the expiration of the period within which judicial review under the Administrative Review Law may be sought.

V. BIG NEWS FOR NON-HOME RULE SYSTEMS!

Most recently, a bill was presented to the Illinois House (HB 2745) by Representative Steven Andersson proposing that all municipalities be authorized to undertake the enforcement of all municipal code violations using a single of administrative adjudication without regard to whether or not a municipality is home rule or non-home rule. The bill attracted more attention than expected and after much negotiation and suggested amendments, Public Act 99-0293 became law on August 6, 2015. While it does not put home rule and non-home rule on equal status, it has significantly increased the authority of non-home rule municipalities to enforce code violations.

The new legislation provides for the following:

(a) Other than the adjudication of building code violations, the authority and process of administration adjudication shall be derived from Section 1-2.1-1 *et seq.* of the Illinois Municipal Code (65 ILCS 5/1-2.1-1 *et seq*.) and Division 1-2.2-1 *et seq*. of the Illinois Municipal Code (65 ILCS 5/1-2.2-1 *et seq*.) is repealed as of November 4, 2015, being 90 days of the effective date of Public Act 99-0293; and,

(b) Non-home rule unit's adjudication of building code violations must be adjudicated pursuant to Division 31.1 of Article 11 of the Illinois Municipal Code.

The nuances of this legislation are vast and have several unplanned results:

(a) Division 31.1 of Article 11 of the Illinois Municipal Code authorizes a municipality to appoint a hearing officer who is not required to be an attorney licensed to practice law in the State of Illinois for at least three (3) years and are not required to attend a training session.

(b) The law provides that the following are defenses available to any property owner brought before a code hearing department of the municipality:

(i) the alleged code violation did not exist or at the time of the hearing has been remedied or removed;

(ii) the code violation has been caused by property occupants and in spite of reasonable attempts by the owner, the current occupants continue to cause violations; and,

(iii) the occupant or resident of the dwelling has refused entry to the owner to all or part of the dwelling for the purpose of correcting the violation.

(c) Most likely, all hearing on building code violations will return to complaints before the county courts given the inability to enforce the final decision.

Notwithstanding the foregoing, Public Act 99-0293 truly advances the ability of non-home rule municipalities to seek enforcement of those sections of the code which include nuisances, underage drinking, underage smoking, business licensing requirements, and payment of fees, just to name a few.

VI. CONFLICT OF INTEREST

Initially, municipalities often used their local prosecutors to act as hearing officers as it was thought that such persons have extensive experience with the enforcement of the municipal code. In 2013, however, the Illinois Bar Association issued its Advisory Opinion that a lawyer may not serve concurrently as a municipal prosecutor and as an administrative hearing officer for the same municipality. The ISBA in its Professional Conduct Advisory Opinion No. 13-07, October 2013 stated:

> Although *Gigger*[a] applied the principle of impartiality to an administrative law judge, there is no reason to conclude that municipal hearing officers would not also be held to the same standards of impartiality. Administrative hearing officers, like administrative law judges, perform the same quasi-judicial functions of, among other things, hearing testimony and issuing rulings. *Compare* 65 ILCS 5/1-2-4(b) (municipal hearing officers) *with* 5 ILCS 100/10-25, 10-35 (administrative law judges). Indeed, as the Supreme Court held in *Heirich*, the obligation to be impartial applies equally to "administrative agents, commissioners, referees, masters in chancery, or other arbiters of questions of law or fact not holding judicial office as it is to those who are technically judges in the full sense of the word."
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> The fact that, unlike in *Gigger*, the lawyer here would not be acting as a prosecutor and hearing officer in the *same* proceedings also does not alter the conclusion that the lawyer's representation of the municipality as prosecutor may be materially limited by the lawyer's obligation to be a fair and impartial decision-maker in his or her role as a hearing officer in ruling on ordinance violations for the same municipality. The issue is whether the dual role "will

[a] *Gigger v. Bd of Fire and Police Com'rs of the City of East St. Louis*, 23 Ill.App.2d 433 (1959)

materially interfere with the lawyer's independent professional judgment in considering alternatives of foreclose courses of action that reasonably should be pursued on behalf of the client." That is the case here. For example, the dual roles may lead to positional conflicts. In one proceeding, the lawyer, acting as a zealous advocate for the municipality, may take positions that in a second proceeding the lawyer, acting as an impartial hearing officer, would (or should) reject. And, as outlined in the facts of this inquiry, the same lawyer may prosecute a defendant one week for a speeding ticket, and the next week be adjudicating a parking ticket against that same defendant. Even if the lawyer, as hearing officer, could act impartially, a defendant in that situation may not believe that the lawyer could do so, undermining the core principle of judicial impartiality.

VII. **RECENT DECISIONS**

Since the enactment of this legislation authorizing administrative adjudication of local ordinance violations, little litigation has ensued until most recently. In 2014, the Illinois Appellate Court has issued two opinions.

The first case, *Stone Street Partners, LLC v. City of Chicago Department of Administrative Hearings*[b] involved the issuance of a building code violation citation on one of *Stone Street Partners*' buildings in 1999 which citation was sent to the property address. The local caretaker appeared on behalf of *Stone Street Partners* and the hearing officer imposed a fine of $1,050.00. The City did not register the decision and order until 2004 and, thereafter, recorded the judgment with the Cook County Recorder in 2009.

Stone Street Partners had no idea that the 1999 order existed until 2011 when it filed a motion with the City to vacate arguing that it never received notice in 1999 and had never authorized the local caretaker to appear on its behalf. The City responded that it had no authority to vacate the judgment and, thereafter, *Stone Street Partners* filed a count complaint in the circuit court seeking administrative review of the order, a declaratory judgment, quiet title and damages for slander of title. The court granted the City's motion to dismiss on all counts.

On appeal, the court found that the City had made two critical errors, the first being failure to serve the registered agent of *Stone Street Partners* and allowing a non-attorney to appear on its behalf before the hearing officer. Given that service was not accomplished in the manner authorized by the governing ordinance, *Stone Street Partners* was not given an opportunity to present its objections. The Appellate Court affirmed the circuit court that the law did not authorize the City

[b] 2014 Ill.App.1st 123654 March 31, 2014

to vacate a judgment but agreed with *Stone Street Partners* that it had the right to a hearing on the declaratory judgment and the petition to quiet title and remanded the matter for further proceedings. The request for damages due to slander of title was dismissed as the City is protected by the *Tort Immunity Act* (745 ILCS 10/2-107).

In *Stone Street Partners*, the Appellate Court outlined deficiencies in the service of notice of ordinance violations and need to pursue enforcement by registration and recordation within a reasonable time.

The second case, *Village of Lake in the Hills v. Niklaus*[c] was decided May 15, 2014 and confirmed that the decision and order rendered in a home rule municipality following an administrative adjudication proceeding held pursuant to 1-2.1-1 *et seq*. of the Illinois Municipal Code is enforceable in the circuit court.

The issue arose from orders finding the defendant liable for violations of the Village Code and assessing fines totaling $47,500.00 on June 13, June 25, June 27 and August 8 of 2012, after the defendant failed to appear. Thereafter, the Village sought to enforce these orders in the circuit court of McHenry County and filed a memorandum of judgment for each order with the county recorder. On August 21, 2012, the Village filed supplementary proceedings which were denied by the court and on September 19, 2012, ordered the Village to submit a memorandum of law in support of its request to enforce the administrative adjudication orders in the circuit court, which the Village did. Following brief agreement, the court dismissed the cases without prejudice.

The Village, thereafter, amended the petition and this time the defendant responded. Nonetheless, the court again dismissed the petition on the grounds that the Illinois Municipal Code was silent as to the circuit court's involvement in the enforcement of the orders of hearing officers.

The Appellate Court held:

> *8§22 In short, when division 2.1 of the Municipal Code is read in its entirety, it is clear that the legislature intended a home-rule municipality to enforce an order entered by its administrative adjudication hearing officer. Turning to the facts in the present case, the record establishes that on December 17, 2012, the trial court dismissed the Village's actions without prejudice and granted it 30 days to file "an amended petition/registration action to enforce" the administrative adjudication orders. Within the time frame provided by the court, the Village filed amended petitions to enforce the administrative adjudication orders entered on June 13, June 27, and July 11, 2012. It then filed petitions to enforce the

[c] 2014 Ill.App.3d 13064 May 15, 2014

administrative adjudication orders entered on July 25 and August 8, 2012. All five petitions were accompanied by exemplified copies of the relevant administrative adjudication orders. We hold that the method attempted by the Village to seek enforcement in this case was appropriate under division 2.1 of the Municipal Code and that once the orders were properly enrolled the Village could commence collection proceedings "in accordance with applicable law." 65 ILCS 5/1-2.1-8(a) (West 2012).

VIII. **RECENT LEGISLATION**

A. As in the case of litigation regarding administrative adjudication, only one amendment has been made to the original statute for home rule municipalities Public Act 94-616, effective January 1, 2006, added the following language to section 1-2.1-5(a):

> "In municipalities with a population under 3,000,000, if notice requires the respondent to answer within a certain amount of time, the municipality must reply to the answer within the same amount of time afforded to the respondent."

It has always been unclear as to the meaning of this amendment.

B. Most recently, Senator Terry Link sponsored SB 2829 which amends the Civic Code of Procedure which pertains to appeals of any or hearing officer:

> "Section 5. The Code of Civil Procedure is amended by adding Section 5-120.5 as follows:
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> (a) In an administrative review action under Article III of this Code, if the court reverses the decision of a municipal code hearing officer in an action set forth under subsection (c) of this Section, then the court may award the plaintiff all reasonable costs, including court costs and attorney's fees, associated with the action if the court finds that: (i) the decision of the hearing officer was arbitrary and capricious; or (ii) the defendant failed to file a record under Section 3-108 of this Code that is sufficient to allow the court to determine whether the decision of the hearing officer was arbitrary and capricious.
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> (b) The court may award the municipality reasonable costs, including court costs and attorney's fees, if the court finds that

the plaintiff's action under Article III of this Code for administrative review of a decision by the municipal code hearing officer is not reasonably well grounded in fact, is not warranted by existing law, or is not accompanied by a reasonable argument for the extension, modification, or reversal of existing law.

(c) This section applies only to the decision of a code hearing officer that imposes a fine or penalty against the owner of a single-family or multi-family residential dwelling for a violation related to the condition or use of that residential property. This section does not apply to any administrative decision of a municipality with a population of more than 500,000.

(d) The provisions of this Section are mutually dependent and inseverable; if any provision is held invalid, then the entire Section is invalid.

The foregoing new legislation exempts the City of Chicago, the largest jurisdiction with the greatest number of hearings. While costs are required to be recovered when any decision is overturned on Administrative Review (735 ILCS 5/5-120), this new legislation includes attorney's fees. As of this writing, this legislation is awaiting the Governor's signature. If the Governor signs this into law, our local hearing officers will be held to a higher standard than many judges and our municipalities may be penalized in its efforts to improve the housing stock within its boundaries.

IX. CONCLUSION

The value of establishing a system of administrative adjudication for enforcement of local ordinances has proven to be a vital one for municipalities to quickly and efficiently address problems which intercept the daily lives of its citizens and property owners. Some of the practical benefits include:

(a) Court times may be established that are far more convenient to the residents and business owners;

(b) The Village retains 100% of any fines and costs assessed unlike using the county circuit court system which is entitled to a portion of the fines and costs assessed;

(c) Permits the municipality to enforce its ordinances (in addition to building codes) such as prohibition of the purchase of cigarettes by a minor; littering;

loud music, failure to purchase a business license, which ordinances are generally not strictly enforced by the court;

(d) The law prohibits continuances unless absolutely necessary to protect the rights of the defendant which generally expedites the enforcement action; and,

(e) If the alleged ordinance violator is not responsive, enforcement is expedited in the circuit court as the law permits the use of the record made at the local level.