

FIRE COUNSEL NOTES



Coping With the COVID Crisis: Points to Ponder

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As this article is being prepared, the State of Illinois remains under lockdown pursuant to a Gubernatorial Disaster Declaration as a result of the COVID 19 virus pandemic. Unprecedented steps have been taken at all levels of government—federal, state, and local—to address the virus outbreak. Major impacts have been felt throughout the economy with the prospect of a more serious recession looming. Hopefully, by the time this article is published in the Fire Call, some of the more serious effects of the virus pandemic, including some of the measures taken to resist it, will have passed. Even so, it is clear that there will be both short and long run issues to consider at all levels of government, as well as throughout society as a whole and the economy at large. This will include the fire service and fire protection districts and their governing boards. At the risk of adding to the deluge of information being disseminated about the COVID CRISIS, this article will highlight just a few of the issues particular to fire protection district trustees and administrators for their consideration as the virus crisis proceeds. Undoubtedly, there will be many more issues that will have arisen by the time this article is published.

Short Term Considerations: Meetings and OMA Compliance

In Executive Order 2020-07, the Governor suspended certain provisions of the Open Meetings Act (OMA) for the duration of the Disaster Declaration. This suspension opened the door to local governing boards' use of digital technology

to meet by conference call and to hold "virtual meetings" rather than traditional in person meetings with a quorum present at a set meeting place open for attendance by the public. Guidance from the Attorney General has further clarified the scope of the Governor's OMA rule suspension and confirmed that other rules of OMA still apply. These include having and timely posting an agenda for the meeting regardless of the manner in which it is held and conducted, providing some means for public comment, and undertaking to afford public access to observe the meeting in some fashion. Fire protection districts, like other units of local government throughout the state, have been innovating since the issuance of the Executive Order regarding various methods to conduct their meetings and the business of their Districts. But once the Disaster Declaration expires or the Governor terminates the suspension of the OMA rules, presumably districts will be required to return to the traditional meeting requirements of the law. What will this mean? Until there is a reliable vaccine available and widespread inoculation using it, the threat of COVID 19 exposure will remain to at least some degree. Medical experts now indicate that a vaccine may not be available for 12 to 18 months. There are predictions of a "second wave" of infection. All of this means that the exposure risk will remain a serious issue for some period of time when the lockdown ends whenever gatherings, like public meetings of District governing boards, fire department meetings, and training programs, occur. For District

board meetings, the attendees often include not only trustees, but also fire department personnel as well as members of the general public. Use of the traditional meeting spaces and formats by district boards may not be prudent and different venues may need to be considered for board meetings which will allow for sufficient "social distancing" to be practiced so that the risk of exposure is reduced. Other questions to consider: Will the general "gathering" limitations of no more than 10 people remain in effect and will they apply to meetings subject to OMA? Will screening and exclusion of meeting attendees be permitted under OMA? The guidance we have now would indicate that if someone is excluded, there needs to be an alternative means for such persons to nevertheless at least listen to the meeting. Will it be necessary, even when traditional meetings come back, to "stream" the meetings for access by the public online? If so, will your district have the capability to do that and should planning for it begin now? Does your district have a method, such as a district email address, by which public comments can be submitted to it by persons who do not attend the meeting? Who will monitor and receive those messages to assure that they are reported to the Board at the meeting? Answers to these and other questions will impact how the business of local government is conducted going forward even when the Disaster Declaration is lifted and the lockdown ended or modified.

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Financial Matters

Multiple financial issues are likely to arise in the short run. Many counties are already announcing deferrals in the payment due dates for real estate taxes this year. Districts which are accustomed to receiving tax money in June and July may not receive it until the fall. If your District is in that situation, will it have sufficient funds on hand to operate during the delay period? If not, the District should consider how it will fund the shortfall. Will it be necessary to borrow funds using anticipation warrants, for example? If so, Districts will be wise to meet with the District's bank or other financial institution to ascertain the terms and the requirements for such a borrowing. If using anticipation warrants will not be available, what other short term funding methods are available to the District?

Likewise, with the delay in property tax receipts, it may be necessary to defer or reduce spending on some items of equipment while at the same time devoting more of the money available to virus related expenditures such as masks, cleaning supplies, disposable PPE and similar items. This will be particularly true for Districts without a ready source of short term financing.

Districts with bond issues outstanding should review the funds being held for the payment of bond principal and interest. Will those funds be sufficient to make scheduled bond payments if property tax receipts are delayed? If not, Districts will need to address that with financial advisers and possibly District legal counsel and/or bond counsel.

The virus crisis is hitting at the time of year when many districts are beginning their annual budget and appropriation preparation and adoption. Under the Municipal Budget Law, there are required steps for this process to occur. Depending on the duration of the Disaster Declaration, it may be necessary for Districts to consider how they will handle the preparation and adoption of the 2020-2021 budget. Some Districts have already encountered the need to spend funds which exceed the amounts appropriated in the current budget for

virus related costs. This will necessitate undertaking budget adjustments to the extent permitted under the Municipal Budget Law and, in some cases, it may require that the 2019-2020 budget be amended to authorize such additional expenditures.

With regard to expenditures necessitated by the COVID-19 virus, Districts need to maintain complete records and substantiation of such expenses. While the availability of federal or state reimbursement for these costs is limited at the time this article is written, further federal legislation is under consideration which may include assistance to local governments and such records will almost certainly be a prerequisite to obtain reimbursement under any program which is established. In contrast to Katrina when records concerning deployments were often not carefully kept, Districts should now be forewarned to document fully how the pandemic financially impacts them. At the state level, it is unlikely that fire protection districts or other units of local government will see any significant assistance from the state. In a Task Force Report of the University of Illinois Institute of Government and Public Affairs, it is estimated that there may be a revenue loss at the state level ranging from a low of \$4.3 billion to a possible high of \$28.3 billion. Press reports indicate that the loss of revenue to the state in fiscal 2020 is pegged by the Pritzker administration at \$2.7 billion and in fiscal 2021 at \$4.6 billion. If these projections bear out, assistance from the state is extremely unlikely. Federal financial assistance will depend on future legislation. The CARES Act, which provided significant relief to local governments with population levels of 500,000 or more, has only limited forms of assistance for other local governments. If additional federal financial relief is forthcoming for local governments, the method by which it is allocated will be a critical feature for specialized units of local government in Illinois like fire protection districts. If the aid is distributed through the state or county governments, obtaining a share of that aid may be problematic for some Districts and Boards and administrators will need to be diligent in watching for developments.

Personnel Matters

Depending on the length of the Disaster Declaration and/or continuing limitations on gatherings of more than 10 persons, some personnel matters will likely be impacted. For example, eligibility and promotional testing may have to be delayed or procedures modified. If there are roster vacancies, temporary appointments may have to be considered. These will need to be carried out as permitted by the Fire Protection District Act in career departments. Districts with collective bargaining agreements in effect should consider conferring with the union representing their firefighters about such matters even if the union contract reserves to the District control of such matters. In the noncareer setting, concern about virus exposure may lead to problems in participation and in recruitment and retention—at least until a reliable vaccine becomes available. An exposure in a noncareer department may be more likely to occur from within the department as members may be responding from a wider "circle of exposure" from work or home once the lockdown ends. This will be a continuing concern even though steps may have already been taken to adjust station operations and incident response procedures to minimize exposure in accordance with Centers for Disease Control and Prevention (CDC) and State and Local Public Health Authority guidelines. Confirming mutual aid resources and their availability on an ongoing basis during the virus crisis will be prudent.

Board Appointments

Board appointments are due to be made in April by appointing authorities such as county boards. Business of this type may be delayed or deferred by the appointing body. Districts need to follow up with board appointments even though the Fire Protection District Act provides that a trustee continues to serve until his or her successor is appointed. It will be important to confer with the District's appointing authority to assure that terms are correctly maintained and when the virus crisis subsides, that appointments which may have been deferred are made.

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Election Matters

Districts considering placing questions on the ballot for the Fall 2020 (and perhaps Spring 2021) election will need to monitor any changes in filing procedure and deadlines under the Election Code which might occur due to the virus crisis.

Contracts and Force Majeure Issues

Some Districts will have pending contracts for apparatus and equipment purchases. Those contracts may have delivery or production deadlines and they may impose late fees or liquidated damages if those deadlines are not met. However, the contracts may also include what is called in contract law a *force majeure* provision which excuses performance by a vendor or manufacturer for causes beyond the control of the seller. The wording of these types of contract clauses varies, and if a District faces a critical need for an apparatus or

equipment being purchased, a careful review of the purchase contract should be made to ascertain exactly under what terms the seller may or may not be excused from performance. Depending on the situation and the contract language, discussions and negotiations with the vendor should be undertaken to address this issue. Districts should not simply accept a vendor's blanket reliance on a *force majeure* provision as an excuse to avoid timely performance.

Long Term Considerations:

While opinions certainly differ on how long it will be before things "open up," it seems clear that the COVID-19 pandemic, like 9/11, will have long term implications. Things will not be the same. What are some of the "long run" questions that Districts may need to consider in addition to the points discussed above?

Operational Changes. Will your District need to re-evaluate what it does and how it does it? Many Districts have in the last several years either added transport emergency medical service (EMS) or fire

department first responder programs to their operations. The virus crisis raises the question of how overlapping EMS with fire and rescue operations may diminish the capability and resources of a District's fire department to perform the essential emergency service functions of fire suppression and rescue. In situations where there are EMS resources independent of the fire department's first responder operation, for example, there will likely not be those same types of capabilities for fire and rescue. That may lead to a re-evaluation of the role the fire department should play in those situations. If EMS is an essential operational component of the District (the District is the primary EMS provider), greater consideration may have to be given to the degree of personnel "overlap" in a combined fire/EMS operation. Virus exposure and infection of personnel during EMS operations may have the effect of significantly reducing fire suppression and rescue capability. The degree of overlap may need to be addressed.

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Even routine department activities, like departmental meetings and training exercises, which are key to maintaining fire department competency, will likely require reconsideration and review in light of virus exposure concerns. Methods to minimize exposure risk while still imparting necessary skills will have to be developed. CDC and other public health guidelines to deal with exposure situations and for the cleaning of equipment will need to be followed well beyond the end of the lockdown. Likewise, station occupancy and use may still need to be restricted with social distancing required in the station for the foreseeable future. All of these limiters will impact the routine operation of the fire department for a long time to come.

Financial Considerations

Depending on the degree to which the virus crisis and the shut down in response to it place the economy in a recessionary condition, there may be long run impacts on the property tax revenues of the District akin to those which arose following the Great Recession in the 2008-2009 time frame. Because fire protection districts rely almost exclusively on real estate taxes to support their operations unlike municipalities and counties which rely heavily on sales tax and shared state income tax revenues, when a recession occurs, it typically will not immediately impact the revenues of districts. But, as a recession progresses, it impacts the real estate market, property assessments are, in turn, affected, and the tax base (assessed value) of units of local government like fire protection districts decline. This, in turn, can lead to reduced property tax revenues of such units of local government if they are operating at their tax rate limits. If the virus crisis recession is of a duration to have this effect, Districts will need to plan for it in the next 2-3-4 year time frame. Decisions regarding the addition of personnel and capital purchases such as new apparatus and fire station construction may need to be re-evaluated.

Pension and Insurance Expense

As a result of an emergency rule change made by the Illinois Workers' Compensation Commission [Section 9030.70 a) 1) and 2)], there will now be a "rebuttable presumption" that a worker's compensation claim based on an injury or incapacity from exposure to the COVID-19 virus made by a first responder "arose out of and in course of the claimant's employment" and that it is causally related to the exposure. This rule will make it easier for worker's compensation claims based on virus exposures to be made by first responders and, consequently, it increases the likelihood that awards and settlements arising from such claims will rise. That, in turn, will be expected to increase the premiums for workers' compensation insurance for fire protection districts in the next few years. All Districts, career and noncareer, will need to consider this in their financial planning.

In the career fire service setting, to the extent that disability pension claims increase from virus exposure and infection, Districts which are required to have an Article 4 pension in place for their career members may incur higher pension fund contribution requirements. Moreover, if a recession persists as a result of the pandemic, the return on pension fund investments

can be expected to be diminished to at least some degree. That, in turn, will mean potentially increased pension funding liabilities. With the changes which are already underway in the consolidation of Article 4 pension fund investments, it will be important for Districts with pensions to monitor and plan for what may be higher costs.

New Duties?

Will new duties for the fire service possibly arise as a result of the pandemic? In some locales, fire departments have been tasked with a monitoring and enforcement role in connection with shut down orders. Fire personnel have been directed to carry out investigations of complaints regarding noncompliance by business establishments with rules issued by local authorities in connection with the virus crisis. To what extent might these public health duties carry forward after the pandemic has passed? What additional costs, if any, will be incurred and how will they be funded? It is not unusual for temporary duties to become permanent duties and if Districts agree to take on such tasks during the crisis, will that become a permanent duty in the future?

Conclusion

The foregoing points are simply some of the considerations arising from the virus crisis. Undoubtedly there will be more. It will behoove District trustees and administrators to begin thinking about how their District will continue to cope with the "COVID CRISIS." Good luck. ■



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