

**BURKE, WARREN, MacKAY & SERRITELLA, P.C.**

**MEMORANDUM**

TO: Village of Barrington Hills Zoning Board of Appeals  
FROM: Burke, Warren, MacKay & Serritella P.C.  
RE: Granting relief while Petitioner is in Violation  
DATE: November 15, 2012

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**BACKGROUND**

Over the past several years we have seen many instances where residents have built a structure without a building permit and in violation of certain provisions of the Zoning Code, such as set backs and floor area ratio requirements. When those residents have been cited for such violations they will often file a petition for a variation or other relief with the Zoning Board of Appeals. Both the Board of Trustees and the Zoning Board of Appeals have expressed concern over the ability to simply ask for “forgiveness” rather than “permission” without any consequence.

The Zoning Board has asked us to suggest potential changes to the Village Code that would allow the Village to recoup some of its costs in pursuing these matters as a condition to granting any zoning relief.

**EXISTING CODE**

Under Title 1, Chapter 4 of the Village Code, “Any person convicted of a violation of any section of this Code shall be fined in a sum not to exceed \$750 for any one offense” (section 1-4-1). Under Section 1-4-3, “A separate offense shall be deemed committed upon each day such duty or obligation remains unperformed or such act continues.” This general penalty provision applies to the entire Village Code unless separate penalty provisions apply.

Under the Building Code, Title 4 to the Village Code, there is a variety of penalty provisions. In Section 4-1-2(J)6, the failure to complete construction within the time periods set forth in that Section is subject to a fine of \$50 for each day the building remains incomplete. Section 4-1-7(D) provides that a person who has been cited for a building code violation is liable for a fine of “not less than \$100, or more than \$500. Each day that he continues shall be deemed a separate offense”. Section 4-1-9 provides that anyone who “violates, disobeys, omits, neglects, or refuses to comply with, or resists the enforcement of any of the provisions of this Chapter, including provisions adopted by reference, or to remedy a hazard of fire, explosion, collapse, contagion, or spread of infectious disease found to exist and duly ordered eliminated, shall be deemed guilty of a separate offense for each and every day during which such violation thereof is committed, continued or permitted and, upon conviction of any such violation, such person shall be punished by a fine of not more than \$500 for each

offense”. We suggest that these provisions be amended to provide a consistent scheme of penalties under the Building Code.

Under the Zoning Code, Section 5-10-9 provides for a penalty in the event anyone violates, disobey, omits, neglects, or refuses to comply with, or resists any provision of the Zoning Regulations of the Village in the amount set forth in Section 1-4-1 of the Code (see above).

## **ILLINOIS MUNICIPAL CODE AND HOME RULE AUTHORITY**

Under the Municipal Code (65 ILCS 5/1-2-1.1), municipalities are limited to a maximum dollar penalty of \$750 for each offense and an offense may be determined to occur on a daily basis, such as for a continuing violation of a particular provision of the municipal ordinance. Under 65 ILCS 5/1-2-8, all ordinance violations are to be prosecuted by the municipal attorney, and all fine payments received must be paid into the municipal treasury. If a municipal ordinance contains a minimum fine and the defendant is judged guilty, the court cannot assess a fine in an amount less than the minimum contained in the ordinance. However, as we have experienced, the courts are not fond of imposing what they view as excessive penalties. Having a minimum penalty that a court would find excessive could lead to a finding of not guilty, so we do not suggest imposing minimum fines for code violations.

Home rule municipalities are not bound by the Municipal Code, however adopting fines in excess of those permitted under the Municipal Code, while permissible, may meet with resistance in the courts. Our experience has been that the courts are reluctant to enforce what they see as “excessive” fines relative to the violations for which the defendant has been cited.

While the Municipal Code allows a home rule municipality to utilize administrative adjudication, if a system of administrative adjudication has not been established then an action to recover a penalty for violation of a municipal ordinance is civil in form and must be tried and reviewed as a civil proceeding. This is why all attempts to impose fines are referred to the Village prosecutor and must be tried in the courts.

## **FEES**

As a home rule municipality the Village has the right to enact fees in connection with development activities licensed or permitted by the Village. Under various case law in Illinois, those fees are required to be a reasonable exercise of the Village’s police power. The fee must serve a legitimate governmental interest and the fee must be specifically and uniquely attributable to the activity being licensed or permitted. For instance, a fee to obtain a building permit that does not bear a reasonable relationship to the cost and expense incurred by the Village in reviewing and approving such permit application and conducting inspections required by its code would probably be held to be unenforceable.

## DISCUSSION

In order to address the concerns expressed by the Board of Trustee and Zoning Board of Appeals in connection with the “forgiveness vs. permission” situations that have arisen recently, there are a few actions that could be considered:

1. Increase the filing fee for any Petitioner that is currently the subject of a Village enforcement action as discussed above. The fee must be reasonable and reasonably relate to the costs and effort in processing the application. It must be uniform, so any attempt to base it on the costs and expenses incurred by the Village in any particular case would probably not withstand a challenge.
2. Provide that it is a condition to filing a petition that all violations (including traffic violations) be resolved. This is what the City of Chicago does, so that as part of the application, the petitioner must file an affidavit that it does not have any outstanding violations (an “anti-scofflaw provision”). The problem with this approach is that, in the majority of cases, without the zoning relief being requested, the only way to comply is to demolish the structure, therefore obviating the need for the relief altogether. One thought is that the petitioner in those cases would need to sign an agreement with the Village agreeing to the demolition if the relief isn't granted and have it secured by a letter of credit or bond.
3. Provide that it is a condition to the effectiveness of any relief (variance, etc.) that all other violations be corrected and any fines accrued prior to the issuance of the relief be paid in full. This would deal with the problem above and still allow a petitioner to obtain the relief with the understanding that certain fines would be required to be paid.

We look forward to discussing this with you at the meeting on November 19, 2012.