

Item #6:
Village Trustee Marshall
A. Property Maintenance Code - Report

HOLLAND & KNIGHT LLP
11th Biennial Seminar for Local Government Officials

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Abandoned Properties and Failed Developments

Presented by:

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Part I. Responding to Failed Developments

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Part I. Responding to Failed Developments

A. Signs of Impending Failure

Developments do not fail overnight. The problems that ultimately sink a development appear well in advance of the ultimate failure - and those problems can be spotted in advance by local government officials. Below are some examples of common signs that a development is failing:

- Building permits will soon expire or have already expired, and neither the developer nor the general contractor has contacted the local government regarding extensions.
- No work proceeds at the development site for an extended period of time.
- The developer misses deadlines set forth in a development or subdivision agreement.
- The local government is contacted by the financial institution that posted a letter of credit, bond, or other security for the building permits.
- The first tenants or purchasers of property within the development contact the local government regarding problems with the developer or general contractor.

- Foreclosure proceedings commence against the developer.
- The developer or related entity commences bankruptcy.

B. Strategies for Responding to Failed Developments

When a development fails, the local government will be able to pursue one or more remedies in order to avoid the ill effects of the failed development. Below are some of the key governmental responses to developments in distress.

1. Get Cash From the Letter of Credit.

Many local subdivision ordinances and development agreements require a developer to post a letter of credit as security for the proper completion of all or some of the proposed construction. Commonly, the letter of credit must be posted in an amount equal to 110% or 115% of the estimated cost of the construction. If the construction is not completed on time, or is not completed in accordance with the approved plans, the local government may "pull" the letter of credit by presenting the letter to the issuing bank along with an approved statement that indicates that, by the terms of the letter, the local government is entitled to the funds provided by the letter.

A letter of credit is a preferred security because it is intended to provide the holder with broad rights with regard to drawing down the LOC, and limiting, or eliminating altogether, a bank's or a developer's ability to stop a draw requested by the holder. Generally, as explained further below, a bank is required to honor and pay on a LOC properly presented for payment, unless there was significant fraud in the formation of the underlying contract.

Under LOCs prepared by Holland & Knight, the draw procedures are straightforward: if the local government believes one of the triggers has occurred, the local government manager or administrator simply executes a statement and other limited documents to that effect and delivers the statement to the bank. The bank is required to honor the request "immediately." If the draw is not honored within three days, the local government can seek judicial relief for which it will be entitled to reimbursement from the bank for the local government's costs, including attorney's fees.

The LOC used is chosen in advance and usually attached as an exhibit to the development agreement or other approval. It is critical that the form of the LOC does not provide any discretion to the bank regarding the disbursement of funds; otherwise, the bank has the right to (and often will) exploit that discretion to delay or deny the requested payout request.

Litigation between a local government and a bank involving a developer's LOC ordinarily involves an irrevocable, standby LOC, which obligates the bank to pay the beneficiary (the local government) upon presentation of the requisite documents indicating a default. A standby LOC involves three separate contracts:

- a. Between the beneficiary (local government) and the customer (developer), which contract is underlying the LOC (often, a Development Agreement);

- b. Between the customer (developer) and the bank, in which the developer provides collateral in exchange for the bank's issuance of the LOC; and
- c. Between the bank and the beneficiary (local government), in which the bank agrees to pay the local government a specific amount when/if the local government complies with the terms stated in the LOC.

The "independence principle" governs letters of credit: each of the three contracts involved with a standby LOC are independent of one another. Thus, if the local government presents documents conforming to the requirements of the LOC, the bank may not look to the underlying contract between the local government and the developer to determine whether to honor the demand. Illinois law recognizes one narrow exception to this rule: where fraud in the formation or in fact is found in the underlying contract, the bank may dishonor the local government's demand for payment.

Absent significant fraud, many Illinois courts have concluded that performance of the underlying contract does not impact a bank's obligation to pay on an LOC. *See, e.g. Long Grove v. Austin Bank*, 268 Ill. App. 3d 70 (2d Dist. 1994); *Jupiter Orrington Corp. v. Zweifel*, 127 Ill. App. 3d 559 (1st Dist. 1984); see also 810 ILCS 5/5-103(d) ("Rights and obligations of an issuer to a beneficiary or a nominated person under a letter of credit are independent of the existence, performance, or nonperformance of a contract or arrangement out of which the letter of credit arises or which underlies it, including contracts or arrangements between the issuer and the applicant and between the applicant and the beneficiary").

Additionally, a bank does not have authority to refuse to honor an LOC because the bank fears it will not be able to collect from its customer. *Baker v. National Blvd. Bank*, 399 F.Supp. 1021, 1024-25 (N.D. Ill. 1975). Thus, developer's insolvency is not a reason for a bank to refuse to honor a local government's demand for payment of an LOC. The proceeds from letters of credit are not considered "property of the estate" and therefore are not subject to the automatic stay that arises when a company declares bankruptcy. *Duplitronics, Inc. v. Concept Design Electronics and Manufacturing, Inc. (In re Duplitronics)*, 183 B.R. 1010, 1015 (Bankr. N.D. Ill. 1995). The purpose of a letter of credit is to "insure the certainty of payment for services or goods rendered regardless of any intervening misfortune which may befall the other contracting party." *City of Joliet v. Bank One, Chicago, N.A. (In re Christopher Green)*, 210 B.R. 556, 558-59 (Bankr. N.D. Ill. 1997) (quoting *In re Northshore & Central Illinois Freight Co.*, 30 B.R. 377-378 (Bankr. N.D. Ill. 1983)).

Boiled down, all of this means that a local government has fairly broad discretion to draw the letter of credit, so long as the local government is comfortable with the factual basis for concluding that a triggering event has occurred.

2. Call the Bond. Surety bonds are sometimes used in lieu of letters of credit as security for the completion of construction. Like LOCs, the terms of these bonds provide that the local government may call the bond and obtain its proceeds if the developer fails to complete construction on time or in accordance with plans. Unlike LOCs, however, collection of bond proceeds is often anything but automatic. Whereas a bank that issues a letter of credit has little room to maneuver out of payment of the funds provided by the LOC, the bond company often

requires a longer process, by which it verifies both that a triggering event has occurred and that the local government is indeed entitled to the bond proceeds, before it pays those proceeds to the government. So that the secured proceeds can be obtained sooner, and without the increased potential for a dispute with the bonding company, local governments generally prefer LOCs as security for developments.

3. Use of the LOC or Bond Proceeds. Depending on the language of the controlling ordinance or agreement, the local government may then use the proceeds from the LOC or bond to remedy, at least in part, the problems caused by the failed development. Those ordinances and agreements often contemplate that the proceeds will be used to complete partially-built buildings or improvements, or, in the alternative, to remove or demolish partially-built buildings or improvements. Increasingly, governments also use the funds to create a passive recreational area on the subject property after removing the incomplete structures and improvements.

4. Coordination with the Receiver. In some cases, the bank that issued the construction loan for a development forecloses on that loan before the local government has any need to call on the LOC or bond. Depending on the size of the development, the circuit court overseeing the foreclosure may appoint a receiver to manage the property while the foreclosure proceedings are pending. The receiver's job, generally, is to preserve the value and security of the property for the benefit of the foreclosing bank, i.e. the presence of the receiver is meant to ensure that a developer about to lose the property will not abandon it or allow it to become hazardous. To those ends, although a receiver is not likely willing or able to continue the construction required at the development site, the receiver will often be amenable to implementation of certain site security measures demanded by the local government. If the local government is able to threaten the receiver with pulling the LOC (which must be maintained even during the foreclosure proceedings), the receiver will be even more receptive to managing the property in a manner acceptable to the local government, which will help reduce the negative impact of failed developments. Finally, a good relationship with the receiver may assist the local government in dealing with the bank once the foreclosure is complete.

C. Use of Development Agreements

Often, as a condition of approval of special zoning relief – particularly of Planned Unit Developments – local governments require the developer to enter into a Development Agreement that controls the construction, use, and maintenance of the subject property. Development Agreements can provide for a process in the event that a development is abandoned or a developer goes bankrupt.

In addition to requirements that a developer post a letter of credit for the completion of the required construction and improvements, Holland & Knight attorneys have recently used the provisions below to help protect local governments from the consequences of failed developments.

- Site Restoration:

"1. Removal of Partially Constructed Structures and Improvements. Subject to Force Majeure, if Owner fails to diligently pursue all construction as required in, or permitted by, Sections 3 and 4 of this Agreement to completion within the time period prescribed in the building permit or permits issued by the City for the construction, and if a perfected application to renew the building permit or permits is not filed within 30 days after the expiration of the permit or permits, Owner shall, within 60 days after notice from the City: (a) remove any partially constructed or partially completed buildings, structures, or Improvements from the Property; and (b) perform site restoration and modification activities to establish a park-like setting on that portion of the Property in which Owner has failed to complete all such construction, in accordance with plans approved by the City, suitable for passive outdoor recreational activities ("*Site Restoration*").

2. Removal and Restoration by City. In the event Owner fails or refuses to remove any partially completed buildings, structures, and Improvements, or to perform the Site Restoration, as required pursuant to Section 6.F.1 of this Agreement, the City shall have, and is hereby granted the right, at its option, to: (a) demolish and/or remove any of the partially completed buildings, structures, and Improvements from any and all portions of the Property, and to perform the Site Restoration; or (b) cause the buildings, structures, or Improvements to be completed in accordance with the plans submitted. Owner shall fully reimburse the City for all costs and expenses, including legal and administrative costs incurred by the City for such work. If Owner does not so fully reimburse the City, and the Performance Securities described in and provided pursuant to Section 10 of this Agreement have no funds remaining in them or is otherwise unavailable to finance such work, then the City shall have the right to place a lien on Property for all such costs and expenses in the manner provided by law. The rights and remedies provided in this Section shall be in addition to, and not in limitation of, any other rights and remedies otherwise available to the City in this Agreement, at law, and/or in equity."

- Defining "Events of Default"

"A. Owner Events of Default. The following shall be Owner Events of Default under this Agreement:

1. If any representation made by Owner in this Agreement, or in any certificate, notice, demand or request made by Owner in writing and delivered to the City pursuant to or in connection with this Agreement, shall prove to be untrue or incorrect in any material respect as of the date made.

2. Subject to Force Majeure, default by Owner for a period of 30 days after written notice thereof from the City in the performance or breach of any covenant contained in this Agreement; provided, however, that such default shall not constitute an Event of Default if such default cannot be cured within said 30

days and Owner, within said 30 days, initiates and diligently pursues appropriate measures to remedy the default and in any event cures such default within 90 days after such notice.

3. The entry of a decree or order for relief by a court having jurisdiction in the premises in respect of Owner in an involuntary case under the federal bankruptcy laws, as now or hereafter constituted, or any other applicable federal or state bankruptcy, insolvency or other similar law, or appointing a receiver, liquidator, assignee, custodian, trustee, sequestrator (or similar official) of Owner for any substantial part of its property, or ordering the winding-up or liquidation of its affairs and the continuance of any such decree or order unstayed and in effect for a period of 60 consecutive days.

4. The commencement by Owner of a voluntary case under the federal bankruptcy laws, as now or hereafter constituted, or any other applicable federal or state bankruptcy, insolvency or other similar law, or the consent by Owner to the appointment of or taking possession by a receiver, liquidator, assignee, trustee, custodian, sequestrator (or similar official) of Owner or of any substantial part of the Property, or the making by any such entity of any assignment for the benefit of creditors or the failure of Owner generally to pay such entity's debts as such debts become due or the taking of action by Owner in furtherance of any of the foregoing, or a petition is filed in bankruptcy by others.

5. Owner abandons the redevelopment of the Property once construction of the Bank Building has commenced. Abandonment shall be deemed to have occurred when work stops on such construction for more than 30 days for any reason other than Force Majeure, unless otherwise permitted by this Agreement."

- Defining "Force Majeure"

"Force Majeure: Strikes, lockouts, acts of God, or other factors beyond a party's reasonable control and reasonable ability to remedy; provided, however, that Force Majeure shall not include: (i) delays caused by weather conditions, unless the weather conditions are unusually severe or abnormal considering the time of year and the particular location involved; or (ii) economic hardship, impracticability of performance, or commercial, economic, or market conditions."

D. Force Majeure (Don't Be Fooled).

As indicated above, "Force Majeure" is often defined to include "strikes, lockouts, acts of God, or other factors beyond a party's reasonable control and reasonable ability to remedy; provided, however, that Force Majeure shall not include delays caused by weather conditions, unless the weather conditions are unusually severe or abnormal considering the time of year and the particular location involved."

A lot of questions concern whether developers will have some excuse for contractual nonperformance as a result of the real estate market, credit contraction, and overall economic downturn that has taken place over the last few years. The following is a full explanation of the issues involved.

As a general rule, contracting parties create a duty upon themselves and must abide by the contract to make good on their promises. Subsequent contingencies that are not addressed in the contract, and that render performance impossible, do not bring the contract to an end. *Leonard v. Autocar Sales & Svc. Co.*, 392 Ill. 182, 187 (Ill. 1946). There are two primary exceptions to the general rule that parties must adhere to their contractual obligations regardless of subsequent contingencies: (1) impossibility of performance: parties may be excused from contractual obligations when the subject matter of the contract is destroyed; and (2) commercial frustration: parties may be excused from contractual obligations where a sudden change in conditions renders performance impossible. *Id.* at 187-190.

Analysis of these exceptions (which could be claimed as affirmative defenses by the developer if it breaches the development agreement) is important. First, courts evaluate whether an event constitutes "force majeure" simply by looking at the language of a particular "force majeure" clause. The fact that economic conditions do not ordinarily excuse performance of contracts in Illinois supports the position that the parties did not intend for the force majeure provision to cover economic downturns. If the parties had wanted economic downturns covered under force majeure, then they should have done so explicitly in the Agreement.

Regardless of whether economic conditions constitute force majeure under a development agreement, a developer could still argue that its performance of the development agreement is excused based on "impossibility of performance" or "commercial frustration." Thus, in some cases, a breaching party will argue three defenses in support of its claim that contract performance is excused: force majeure, impossibility of performance and commercial frustration. Therefore, it is important to be able to argue: (1) economic conditions are not force majeure, and (2) under Illinois law, economic conditions do not excuse nonperformance on the grounds of impossibility of performance or commercial frustration.

In general, economic conditions do not excuse contract performance. Under Illinois law, economic conditions, such as inability to secure financing, do not trigger either of the exceptions to the general rule that contracting parties must adhere to the contract.

The following is a summary of some cases that illustrate that: (1) economic/market conditions do not constitute force majeure; and (2) a developer should not be able to claim either impossibility of performance or commercial frustration as grounds for non-performance of development agreement.

In *NI-Gas v. Energy Cooperative*, 122 Ill. App. 3d 940 (3d Dist. 1984), NI-Gas, a public utility, entered a contract and was later denied a request for rate increase. After NI-Gas failed to renegotiate the contract, it filed a lawsuit with the court, seeking a declaratory judgment that it had no further obligations under the contract, and replied to a counterclaim for damages by claiming that its nonperformance was justified by force majeure, impossibility of performance, and commercial frustration. The force majeure clause at issue excepted liability for "non-

performance caused by circumstances beyond the control of the party affected, including but not limited to... compliance with any law, regulation, requisition, request or direction made by any governmental authority... or by reason of any similar or dissimilar causes...."

The court held: (1) although the denial of NI-Gas' request for a rate increase meant that NI-Gas could not raise its rates to cover production costs, the denial was not a force majeure event; (2) market factors claimed to be unforeseeable and beyond NI-Gas' control did not excuse performance on grounds of commercial frustration; (3) changing and shifting markets and prices from multitudinous causes is endemic to the economy, and executives should have been aware of potential for adverse market shifts now claimed as a defense against enforcement of contract (and could have included specific terms in the contract to provide relief when adverse market events came to pass), and thus could not claim that changes in prices, supply, and demand were unforeseeable; and (4) NI-Gas failed to establish impossibility of performance based on substantial increase in cost of performance.

In *Mouhelis v. Thomas*, 95 Ill. App. 3d 181 (2d Dist. 1981), the contract purchaser of real estate obtained a loan commitment subject to credit approval. The contract purchaser subsequently lost its job, and its loan application was denied. The property sellers informed the contract purchaser that they would retain the earnest money, and then sued the realtor and contract purchaser for the earnest money, principal, and interest. The Court held: (1) loss of employment did not excuse performance of contract on grounds of impossibility of performance; and (2) inability of the contract purchaser to secure financing did not excuse performance on grounds of commercial frustration, because contract purchaser had agreed to be bound by terms of contract with regard to loan contingencies.

In *Gianni v. First Nat'l Bank of Des Plaines*, 136 Ill. App. 3d 971, 982-83 (1st Dist. 1985), a contract purchaser of a condominium unit in a building that was constructed, but never declared a condominium, sued for specific performance of the purchase agreement. The mortgage holder argued against enforcement of the contract, claiming that declaration of the building as a condominium would be uneconomical. The court held in part that the fact that the contract cannot be performed without great or unanticipated expense is not such an impossibility that will usually excuse performance.

Opinions from other jurisdictions also support the position that economic downturns do not constitute grounds for nonperformance under a contract. In *OBWR LLC v. Clear Channel Communications*, 266 F.Supp.2d 1214 (D. Hawaii 2003), the federal District Court of Hawaii held that a conference organizer could not claim nonperformance due to economic hardship as a result of the 9/11 attacks, because the claimed hardship did not fall within the contract's force majeure provision. In *Langham-Hill Petroleum v. Southern Fuels*, 813 F.2d 1327 (4th Cir. 1987), the Court of Appeals for the Fourth Circuit rejected claims by a contract purchaser for oil that the collapse of prices in the global oil market constituted force majeure.

In light of this caselaw, it should always be very difficult for a developer to establish a force majeure defense. To make this even more of a certainty, we now recommend including the following type of defined term in place of the more traditional definition of force majeure --

"Uncontrollable Circumstance": Any of the following events and circumstances that materially change the costs or ability of the Developer to carry out its obligations under this Agreement:

- a. a change in the Requirements of Law;
- b. insurrection, riot, civil disturbance, sabotage, act of public enemy, explosion, nuclear incident, war, or naval blockade;
- c. epidemic, hurricane, tornado, landslide, earthquake, lightning, fire, windstorm, other extraordinary weather condition, or other similar act of God;
- d. governmental condemnation or taking other than by the Village; or
- e. strikes or labor disputes, other than those caused by the unlawful acts of the Developer, its partners, or affiliated entities.

Uncontrollable Circumstance shall not include economic hardship, impracticability of performance, commercial, economic, or market conditions, or a failure of performance by a contractor (except as caused by events which are Uncontrollable Circumstances as to the contractor)."

Part II. Abandoned Residential Properties

As the economy turned south a few years ago, abandoned properties mushroomed at an exponential rate throughout the State. To help municipalities address the problems posed by so many abandoned residential properties, the General Assembly adopted, and Governor Quinn signed into law, Public Act 96-0856, effective March 1, 2010, clarifies and strengthens municipal authority to respond to abandoned residential properties.

A. Unified Lien Provision for Abandoned Residential Properties

Public Act 96-0856 establishes a unified lien process for abandoned residential properties. This process, set forth in Section 11-20-15.1 of the Municipal Code (65 ILCS 5/11-20-15.1) allows municipalities to file a priority lien over abandoned residential properties for costs incurred by a municipality in maintaining the properties ("*Abandoned Property Lien*"). Abandoned Property Liens have priority over all other liens and encumbrances, with the exception of tax liens, and can only be enforced at the confirmation hearing for the foreclosure sale. Subsection (h) of the statute defines "Abandoned Residential Property" as follows:

- Any permanent residential dwelling unit, including detached single family structures, townhomes, condominium units, multifamily residential structures and manufactured homes;
- That has been unoccupied by a lawful occupant for at least 90 days; and

- For which the municipality has made good faith efforts to contact the legal owners or owners listed in the last recorded mortgage or their agents and no contact has been made; but
- Not including any property for which an order of confirmation of sale has been entered in a foreclosure action.

65 ILCS 5/11-20-15.1(h).

Municipalities are empowered to file Abandoned Property Liens for costs incurred performing the following property maintenance activities on abandoned residential properties:

- Removal of nuisance greenery pursuant to Section 11-20-7;
- Pest-control activities pursuant to Section 11-20-8;
- Removal of infected trees (including Dutch Elm and emerald ash borer-infected trees) pursuant to 11-20-12;
- Securing or enclosing the property pursuant to Section 11-31-1.01;
- Removal of garbage, debris, and graffiti pursuant to Section 11-20-13.¹

To perfect an Abandoned Property Lien, the municipality must file a notice of lien with the County Recorder's office within one year after incurring the cost of the maintenance activity. The notice must include a sworn statement with the following information:

- A description of the abandoned residential property that sufficiently identifies the parcel;
- The amount of the cost of the maintenance activity;
- The date or dates when the municipality incurred the cost for the maintenance activity; and
- A statement that the lien has been filed pursuant to one of the maintenance statutes listed above.

65 ILCS 5/11-20-15.1(c). If the municipality has incurred maintenance costs on multiple occasions throughout one calendar year, it may include all of these costs in a single notice of lien. 65 ILCS 5/11-20-15.1(b). However, to enforce an Abandoned Property Lien, the municipality must maintain a detailed set of records supporting the municipality's determination that the property is indeed abandoned. 65 ILCS 5/11-20-15.1(c).

¹ Section 11-20-13 explicitly does not apply to "any municipality that is a home rule unit." Although unusual, this clause precludes a home rule municipality from filing an abandoned property lien for costs incurred in clearing property of trash, debris and graffiti under Section 11-20-15.1.

An Abandoned Property Lien may only be enforced at the confirmation hearing for the foreclosure sale held pursuant to Section 15-1508 of the Code of Civil Procedure and the municipality's recovery is limited to the proceeds of the foreclosure sale. Section 15.1 gives the mortgage holder an opportunity to contest the municipality's lien on the grounds that: (a) the municipality did not comply with all of the requirements of Section 15.1; (b) the maintenance work performed exceeded the statutory authorization; or (c) the costs incurred were not commercially reasonable.

A municipality is barred from filing an Abandoned Property Lien with respect to any property for which it has received notice that the mortgage holder or servicer has performed or intends to perform the required property maintenance work, and for which the work is initiated in good faith within 30 days after the notice. Abandoned Property Liens may only be filed for costs incurred by the municipality after March 1, 2010. The authority to file Abandoned Property Liens will expire upon the date that the Illinois Department of Financial and Professional Regulation certifies that the Mortgage Electronic Registration System² ("MERS"): (i) is effectively registering substantially all mortgaged residential properties located in Illinois; (ii) is accessible by all municipalities in Illinois without charge; and (iii) includes the telephone number of the mortgage servicer of each mortgage in the system (See 65 ILCS 5/11-20-7(d), 65 ILCS 5/11-20-8(d), 65 ILCS 5/11-20-12(d), 65 ILCS 5/11-31-1.01(c)). There is no indication that the Department has made such a determination to date.

B. Authority to Enclose and Secure Abandoned Residential Property

Section 11-31-1.01, an addition to Division 31 (The "Unsafe Property Statute") of Article 11 of the Illinois Municipal Code, also became effective on March 1, 2010. This Section grants municipalities the power to "secure or enclose the exterior" of an abandoned residential property (as defined in Section 11-20-15.1) without application to the circuit court. "Securing" is defined as "boarding up, closing off, or locking windows or entrances or otherwise making the interior of a building inaccessible to the general public," and "enclosing" is defined as "surrounding part or all of the abandoned residential property's underlying parcel with a fence or wall or otherwise making part or all of the abandoned residential property's underlying parcel inaccessible to the general public." 65 ILCS 5/11-31-1.01. The authority granted by this Section allows a municipality to address abandoned residential properties that remain unsecured (i.e. missing doors, windows, open swimming pools) without having to obtain a court order.

Municipalities seeking to exercise their authority under this new statute should prepare the records required to enforce an Abandoned Property Lien as set forth in Section 11-20-15.1. These records will not only permit the municipality to recover its costs through an Abandoned Property Lien, but will also provide the municipality with the necessary evidence if its actions are subsequently challenged by the property owner who reemerges after the municipality takes

² The Mortgage Electronic Registration System is the nationwide Mortgage Electronic Registration System approved by Fannie Mae, Freddie Mac, and Ginnie Mae that has been created by the mortgage banking industry with the mission of registering every mortgage loan in the United States to lawfully make information concerning each residential mortgage loan and the property securing it available by Internet access to mortgage originators, servicers, warehouse lenders, wholesale lenders, retail lenders, document custodians, settlement agents, title companies, insurers, investors, county recorders, units of local government, and consumers. 65 ILCS 5/11-20-15.1(h).

action. Municipalities should also amend their local ordinances to specifically take advantage of this new statutory authority.

Part III. Demolition: The Unsafe Property Statute

A. Introduction: Regulation of "Unsafe Buildings" Through Court Approval

Section 11-31-1 of the Illinois Municipal Code, 65 ILCS 5/11-31-1 *et seq.*, and Section 5-1121 of the Illinois Counties Code, 55 ILCS 5/5-1121 (the "Unsafe Property Statutes"), authorizes a municipality or county to "demolish, repair, or enclose or cause the demolition, repair, or enclosure of dangerous and unsafe buildings or uncompleted and abandoned buildings... and may remove or cause the removal of garbage, debris, and other hazardous, noxious, or unhealthy substances or materials from those buildings." To proceed under this authority, a municipality or county must give the building's owners 15 days' written notice to either make the building safe or demolish it, and then must obtain a court order to take the requested action. The costs incurred by the municipality or county (including attorneys' fees) are a lien upon the subject property, and the lien is superior to all prior liens except tax liens.

Municipalities may only seek demolition under the Unsafe Property Statutes for buildings located within their corporate boundaries. Similarly, counties may only seek demolition of buildings located within their boundaries and not within any municipality.

Where a building is located on property that is (or will be) the subject of a development agreement, it will likely be easier and faster to apply the agreement's provisions (see, for example, the samples listed above) than to follow the procedures set forth in the Unsafe Property Statutes. However, for all other buildings – such as single-family homes – municipalities and counties can use this statute to secure or demolish an abandoned building and to recover its costs.

The circuit court is required by the Unsafe Property Statutes to "expedite" the municipality's petition and to give it "precedence over all other suits." 65 ILCS 5/11-31-1(a); 55 ILCS 5/5-1121(a).

B. Recommended Strategies and Procedures for Obtaining a Court Order for Demolition

1. Notice to Interested Parties. The Unsafe Property Statutes only require notice to "owners and lien holders of record." Nevertheless, to avoid disputes during the court process that could delay a judgment, the local government should issue notice broadly to any entity claiming an interest in the property. A title report can be utilized to derive the list of entities to which the notice should be sent. Local governments should also search their own utility billing and code enforcement databases to identify any other entities that may claim an interest.

2. Defining "Dangerous and Unsafe". It is not necessary that the local government prove that the structure is dangerous to the general public. So long as there is a danger to those "connected to" the structure, the Unsafe Property Statutes may be applied. *See Village of Ringwood v. Foster*, 405 Ill. App. 3d 61 (2010). Noncompliance with generally-applicable building and property maintenance codes is often cited as proof that a structure is dangerous or

unsafe. Other factors that relate to the determination that a structure is dangerous and unsafe include:

CHAPTER 14

PROPERTY MAINTENANCE CODE

SECTION:

4-14-1: Adopted
 4-14-2: Amendments

4-14-1: **ADOPTED:** There is hereby adopted by the village the 2009 international property maintenance code, as hereinafter amended (hereinafter the "property maintenance code"). At least one copy of the property maintenance code has been on file in the office of the village clerk for a period of at least thirty (30) days prior to the adoption of these provisions and now is and remains on file in the office of the village clerk, and the same is hereby adopted and incorporated as fully as if set out at length herein. (Ord. 2009-O-32, 9-8-2009)

4-14-2: **AMENDMENTS:** The following sections of the 2009 international property maintenance code are hereby amended, revised, and changed as follows:

Passim Wherever the phrase "[name of jurisdiction]" or the word "jurisdiction" appear, they shall be deemed to refer to the village of Long Grove, Illinois.

Passim Wherever the phrase "code official" appears, it shall be deemed to refer to the village of Long Grove village superintendent or such superintendent's duly designated agent or agents.

Passim Whenever there is a reference to the "village of Long Grove fee schedule" or any other general reference to fees or charges, it shall mean the then-current ordinance of the village setting forth fees, charges, and other costs payable to the village relating to activities covered by, and the administration of, this code.

Section 103.5 Fees. Insert the following language in the parentheses provided:

See the village of Long Grove fee schedule.

Section 111 Means Of Appeal. Delete the text of the section in its entirety, including sections 111.1 – 111.8, and replace with the following language:

Appeals shall be made available and pursued in the manner set forth in section 113 of the ICC building code 2009, as amended by the village code.

Section 302.4 Weeds. Add the following at the end of the first paragraph:

Weeds or grasses in excess of 8 inches in height shall be mowed.

Section 302.4 Weeds. Insert the following exception:

Exception: Weeds or grasses within a conservation and scenic corridor easement designated by the village of Long Grove are not required to be mowed in accordance with section 302.4.

Insert the following new subsection:

Subsection 302.10. Owner Of Property Required To Cut Or Remove Weeds, Grasses Or Bushes.

- (A) Unmanaged ground cover, weeds, grasses and bushes, including nonnative prairie species such as buckthorn, goldenrod, yellow and white sweet clover and ragweed, shall not be allowed to grow in excess of eight inches on all property within the village.
- (B) The village may require the property owner to cut weeds, grass, trim trees or bushes or remove bushes, trees, buckthorn, teasel and garlic mustard which constitute a public nuisance or threat to public health, safety or welfare.

Insert the following new section:

Section 302.11 Regulations Regarding Lawn Fertilizer Use And Application. See village of Long Grove village code title 8, chapter 13, titled "Regulations Regarding Lawn Fertilizer Use And Application."

Section 304.14 Insert Screens. Where the text reads from [date] to [date] insert the dates April 15 and October 15 so the text reads "from April 15 to October 15".

Section 404.5 Overcrowding. Delete the text in its entirety and replace with the following:

Dwelling units shall not be occupied by more than permitted in accordance with the following table 404.5:

Table 404.5			
Minimum Area Requirements			
Minimum Area In Square Feet			
Space	1-2 occupants	3-5 occupants	6 or more occupants
Living room ^{a,b}	No requirements	120	150
Dining room ^{a,b}	No requirements	80	100
Bedrooms	Shall comply with section 404.4		

- a. See section 404.5.2 for combined living room/dining room spaces
- b. See section 404.5.1 for limitations on determining the minimum occupancy area for sleeping purposes

Insert the following new subsection:

Subsection 404.5.1 Sleeping Area. The minimum occupancy area required by table 404.5 shall not be included as a sleeping area in determining the minimum occupancy area for sleeping purposes. All sleeping areas shall comply with section 404.4.

Insert the following new subsection:

Subsection 404.5.2 Combined Living And Dining Rooms. Combined living room and dining room spaces shall comply with the requirements of table 404.5 if the total area is equal to that required for separate rooms if the space is located so as to function as a combination living room/dining room.

Section 602.3 Heat Supply. Insert dates "from October 15 to April 15".

Section 602.4 Occupiable Work Spaces. Insert dates "from October 15 to April 15"; delete "65°F(18°C)" and replace with "68 degrees F (20°C)".

Chapter 8 Referenced Standards.

Delete ICC electric code and insert 2008 national electrical code.

Delete international plumbing code and insert the Illinois state plumbing code - 2004. This change affects all references to the international plumbing code in the entire code. (Ord. 2009-O-32, 9-8-2009)