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Appellate Court upholds village's contractual right to indemnification for its own alleged negligence

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In representing municipal clients, city and village attorneys often negotiate, draft and/or review contracts with other public agencies and private parties. The nature of the contract may require inclusion of an indemnity and hold harmless provision. In two recent cases of interest, the Illinois Supreme and Appellate Courts have addressed the validity and enforceability of indemnification provisions, specifically provisions that require indemnification for one's own negligence.

In *Nicor Gas Co. v. Village of Wilmette*, No. 1-07-1041 (February 29, 2007), Nicor Gas Company sued the Village of Wilmette for negligence stemming from a broken water main which allegedly punctured one of Nicor's gas mains. The gas main was located within a permanent easement that had been granted by the Village to Nicor via an ordinance in exchange for Nicor providing gas for use by the Village. The Village moved to dismiss the complaint and argued, in part, that Nicor could not recover damages because the ordinance granting the easement contained a provision providing that Nicor would indemnify the Village for any damages resulting from Nicor's occupation of the easement premises. The circuit court granted the Village's motion to dismiss, finding that the indemnity provision was valid and enforceable and, therefore, barred the action for damages.

The appellate court affirmed the dismissal. Citing the Illinois Supreme Court's recent decision

in *Buenz v. Frontline Transp. Co.*,[1] the Appellate Court reaffirmed that Illinois law allows contracts of indemnity against one's own negligence so long as the parties' intent is clear and explicit. The Supreme Court in *Buenz* had held that when a contract contains a provision purporting to provide indemnity for "any and all negligence," such a phrase, absent any limiting language expressly restricting indemnification liability, was sufficient to indemnify a party for its own negligence.[2] The Supreme Court noted that the phrase "any and all" must be read in conjunction with the entire contract in order to determine whether the contract provides indemnification for a party's own negligence.[3] The court concluded that such broad language "may indeed indicate that the parties intended an indemnitee be indemnified, even for the indemnitee's own negligence."[4]

In the Nicor case, the ordinance granting the permanent easement stated as follows:

The Grantee [Nicor] shall indemnify, become responsible for and forever save harmless the Municipality from any and all judgments, damages, decrees, costs and expenses, including attorney fees, which the Municipality may legally suffer or incur, or which may be legally obtained against the Municipality, for or by reason of the use and occupation of any Public Place in the Municipality by the Grantee pursuant to the terms of this ordinance or legally resulting from the exercise by the Grantee of any of the privileges herein granted.

Applying the holding in Buenz, the appellate court agreed with the circuit court that the ordinance did not contain any language limiting Nicor's indemnification liability and, therefore, clearly and unambiguously provided indemnification for the Village's own negligence. The court also rejected Nicor's argument that the ordinance was void under the Construction Contract Indemnification for Negligence Act, 740 ILCS 35/1, because the ordinance was not a construction contract.

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1. 2008 WL 217169, Slip Op. at p. 5 (Ill. Sup. Ct. 1/25/08).
2. Id. at p. 9.
3. Id. at p. 11.
4. Id.