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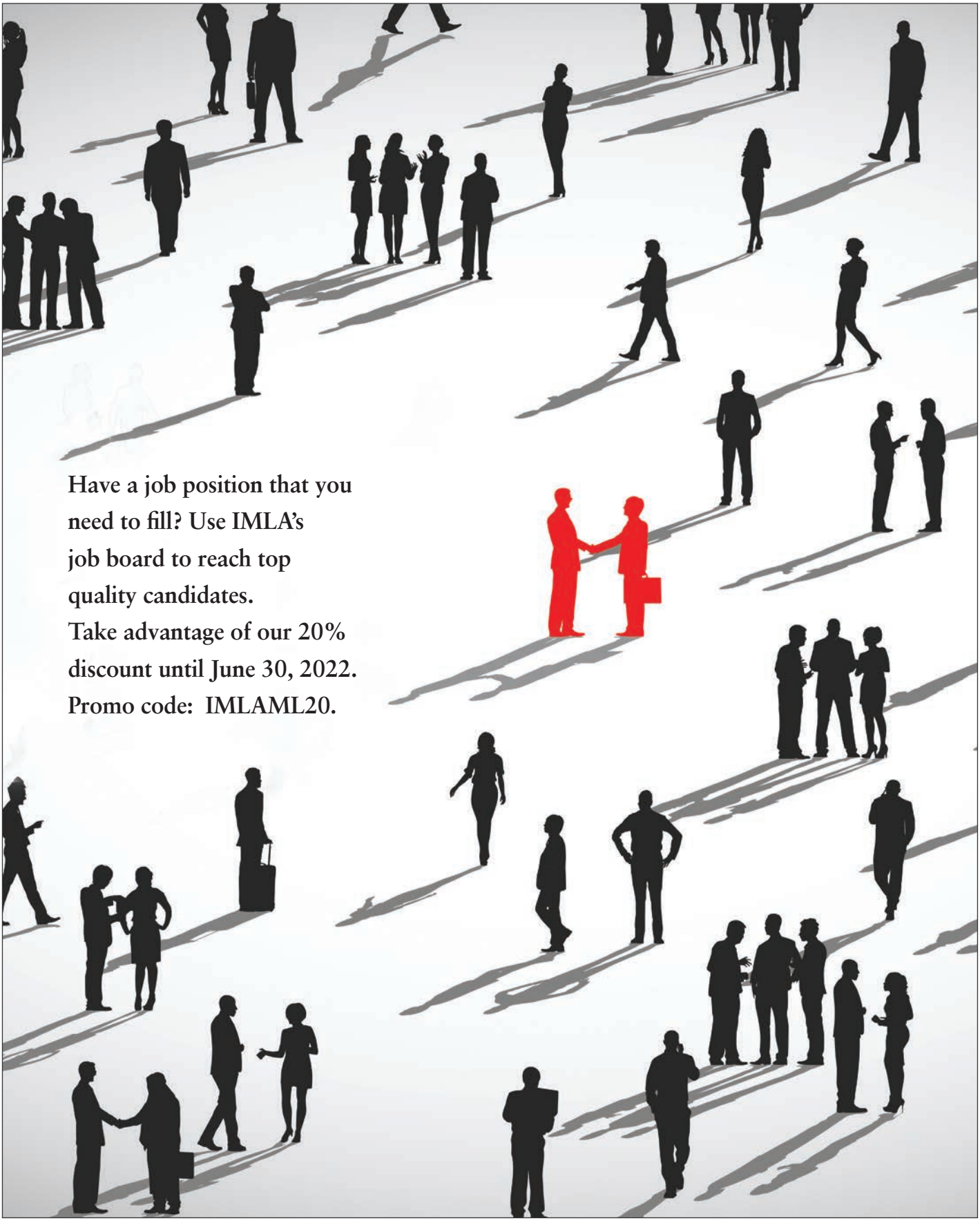
ECONOMIC DEVELOPMENT FINANCING: INCENTIVIZING GROWTH IN TEXAS

EMPLOYERS AND THE EVOLVING WORK PLACE: 2022 EMPLOYMENT LAW UPDATE

BURNOUT: YOU ARE NOT ALONE

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EDITOR'S NOTE



BY: ERICH EISELT
IMLA Assistant General Counsel
and Director of Affirmative Litigation

First World Problems

This Term, the Supreme Court will consider some of the more monumental social issues dividing our country, including whether states can limit access to abortion and whether businesses can decline to serve customers based on religiously-grounded sexual mores. Many other battles will be fought in forums small and large, from city councils to legislatures to judiciaries, testing our basic tenets—the separation of powers, the right to vote, the meaning of the Constitution. Conflict seems to pervade the nation, arising from right, left, and center. .Some see the fraying as a prelude to America in free-fall.

It takes but a few seconds of footage from halfway around the world to put our anxieties in their proper aspect. As we bicker over which telling of history will be taught in our schools, or which economic measures will accelerate our prosperity, a young democracy is facing annihilation before our very eyes. Forty million people who had barely begun to experience freedom are struggling to preserve their entitlement to self-determination, and many may pay the ultimate price in defense of that right.

In comparison, our concerns seem trivial. No one in our country doubts the primacy of "government of the people, by the people, and for the people." We may debate *how* that architecture should take shape, but never its underlying legitimacy. In that regard, municipal lawyers are pivotal in safeguarding the rule of law in our most basic embodiment of self-determination—local government. We see the turmoil at ground level and recognize that, for all its vehemence, it does not presage the death of democracy, but instead reveals its vitality.

As amply illustrated in this issue of *Municipal Lawyer*, IMLA strives to provide members with the fine points of domestic municipal law practice. But IMLA also endeavors to present the opportunity to see other forms of governance at work. We've gone to Havana, Prague, Jerusalem, Berlin and, only nine years ago, to the very cities now most in the world's focus—Lviv and Kyiv. These comparative law sessions provide ample occasion to reflect upon—and embrace—the freedoms that we take for granted.

IMLA hopes you will find the March-April *ML* informative. And, to echo Barb Adams in her President's Letter, we express our support for the people of Ukraine in their struggle to preserve self-government.

Best regards-

Erich Eiselt

PRESIDENT'S LETTER



BARBARA A. ADAMS,
General Counsel, Illinois Local Government Lawyers Association and IMLA President

Acting Locally and Learning Globally

As I write this, I've just finished watching the Closing Ceremonies for the Winter Olympics. The 2022 Winter Paralympic Games will follow soon, starting on March 4. Both of these gatherings showcase remarkable athletes from all around the world.

I don't know about you, but I always enjoy having the opportunity to watch competitors from so many different countries participating in so many different sports. And new events are added every year—for example, this year included "freestyle ski big air" for men and women. Like most of us, my everyday routine doesn't typically include a view from the incredible elevations reached by those big-air skiiers, or such a world-wide perspective, with information about so many other countries in front of me all at once. The Olympics and Paralympics provide an opportunity for a horizon-broadening perspective that comes around every two years.

As local government lawyers, our professional perspective is naturally focused more locally, on the clients and issues that immediately surround us. And especially in these pandemic-related times, it is easy to get even more locally focused on those concerns. But in reality, our ethical duties promote going beyond that purely local perspective. Model Rule 1.1 of the ABA Model Rules of Professional Responsibility imposes a duty of competent representation, which "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

We know that trends in the law arise from a variety of sources. Some start in one locality or region and then move to other geographic areas. Others originate in larger population centers and then extend outward, moving to smaller communities. Still others arise from actions of the national government, with a ripple effect down to the states and provinces, and to local governments. The Commentary on Model Rule 1.1 highlights that "a lawyer should keep abreast of changes in the law and its practice."

IMLA provides us with terrific opportunities to identify and learn about trends in law affecting our local government clients. IMLA helps us expand our knowledge and skills beyond our local perspective through a variety of offerings, such as: Articles in this magazine. Weekly case updates by email. On-line webinars and meetings. Working Groups and listservs. And more.

And this year, IMLA will be back with its two largest events, providing programs in a hybrid format, so you can choose to attend in person or electronically. The April Mid-Year Seminar will be in person in Washington, D.C., with presentations available on a virtual platform. The October Annual Conference will be in person in Portland, Oregon and will also include a virtual attendance option. And it includes Canada Day too. This learning will broaden our horizons, not only through the content of the programs but also through networking with our counterparts around the U.S. and Canada.

IMLA also offers an international perspective. The IMLA International Committee is working on plans for IMLA's International Comparative Law Program in Seville, Spain, to be held in September 2022, with details to be announced soon. Previous comparative law programs by the International Committee have taken members to extremely interesting locales, presenting the opportunity to more fully understand the many versions of governance practiced around the world. These include Berlin (2018), Jerusalem (2018), Havana (2016), and Prague (2011).

In addition to organizing its own international comparative law events, IMLA members participate with other groups that conduct comparative law programs around the world. One such session took place in Kyiv and Lviv, Ukraine (2013). We keep participants in those two cities in our thoughts in light of recent events there.

This ambitious program of learning and networking would not be possible without the dedicated contributions of so many people, including the volunteer speakers on all programs and seminars, leaders of our subject matter Sections, the working groups that identify topics of interest and importance, members of the International Committee and our able IMLA staff.

The results of all of these efforts are always terrific. All of this brings me back around to the reason the International Municipal Lawyers Association does all these things:

"Our mission is to serve local government lawyers and to advance the interests of local government law locally, nationally, and internationally."

We look forward to seeing you and learning with you in the months ahead, both at home and abroad. And don't forget to bring a colleague!

Employers and the Evolving Workplace: 2022 Employment Law Update

LAWRENCE LEE *and* BLAINE K. BENGTSON, *Jones & Keller, P.C., Denver, Colorado*



INTRODUCTION

As the world experiences yet another year under the heel of COVID-19, it's unsurprising that developments in local, state, and federal employment laws continue to focus principally on responses to the pandemic. A review of these developments yields a few key themes, including the scope and limits of vaccine mandates, expanded paid employee sick and medical leave benefits, and the circumstances under which employees will continue to work remotely.

Of course, noteworthy trends in employment law are not limited to pandemic responses. In particular, lawmakers continue to strengthen worker anti-discrimination protections. They have done so by, among other things, expanding the categories of individuals to whom anti-discrimination laws apply and by enacting pay transparency laws. This article highlights changes in employment law for 2022 that may impact employers in the local, state, federal, and international workplaces, with special considerations for work-from-home policies.

1. Upward Trend in Passage of States' Leave and Job Protection Laws

Responding to both the pandemic and general employee sentiment regarding paid time off and other types of leave, lawmakers in several jurisdictions continue to expand employee rights to medical benefits.

In 2020, the Colorado General Assembly enacted the Healthy Families and Workplaces Act ("HFWA"). For larger employers, the HFWA went into effect in January 2021. Since January 1, 2022, the HFWA has applied to all employers in Colorado (except the federal government) regardless of size, including municipalities.[1] Among other things, it requires all employers to provide at least 48 hours of paid sick leave each year to employees and increases the requirement to 80 hours of paid sick leave during a public health emergency. The law includes time off for treatment, counseling, and legal services for victims of domestic violence among the reasons employees must be able to use their paid leave.

California recently updated the state's family care and medical leave law for public sector employees to authorize employees to take available medical leave to care for a parent-in-law.[2]

Similarly, Illinois recently enacted House Bill 3582, which requires employers to provide victims of, and family members of victims of, any violent crimes with unpaid leave to seek medical attention for physical or psychological injuries caused by the crime, to obtain services from a victim services organization, to obtain counseling, and to seek legal assistance.[3]

Since January 1, 2022, workers covered by the British Columbia, Canada Employment Standards Act are eligible to take up to five days of paid sick leave per year for illness or injury.[4] These five paid sick days are in addition to the three days per year of unpaid sick leave that were already required under the Employment Standards Act.

The COVID-19 pandemic played a part in at least one municipality's decision to extend employment displacement protections for workers providing essential services under city contract. Specifically, in the summer of 2021, the City and County of Denver, Colorado adopted

Ordinance No. 21-0818, in part to respond to COVID-19's exacerbation of worker displacement.[5] The ordinance provides that when a covered contract expires, or a change in control occurs, the successor contractor must offer covered workers under the former contract a right of first refusal of employment.[6] The intent of the ordinance was to retain experienced and trained workers, which maintains a certain level of institutional knowledge and provides certain cost savings.

2. **Renewed Attention to Anti-Discrimination Laws**

Beyond employer responses to COVID-19 and its effects, lawmakers continue to bolster anti-discrimination laws on numerous fronts, including equity in pay, expanding the categories of individuals protected from discrimination, broadening protected conduct, and further protections for pregnant workers.

Transparency in worker pay remains a key issue for lawmakers throughout the United States and in other countries. In the past several years, numerous states have adopted pay scale disclosure laws. In Colorado, for example, all employers must disclose in each posting for any job openings the hourly or salary compensation, or a range of the hourly or salary compensation, and a general description of all the benefits and other compensation to be offered to the hired applicant.[7]

These trends will continue into 2022 as local and state governments adopt similar pay transparency laws like the rule that will go into effect in New York City on May 15, 2022 requiring employers to include minimum and maximum salary information in job postings.[8] Many states have adopted laws prohibiting employers from seeking pay history or relying on pay history when considering a job applicant or deciding the applicant's pay. One such state is Rhode Island, where a pay history law[9] goes into effect January 1, 2023.

The Illinois legislature recently expanded anti-discrimination protections on two fronts. First, it added individuals associated with a person with a disability to the category of those who are protected from discrimination based on a disability.[10] It also has imposed a new requirement on the increasing number of employers using artificial intelligence in their hiring processes to report the race and ethnicity of all screened applications in order to monitor whether there exists any racial bias in the technology used for hiring.[11]

In California, legislators updated an existing law specifically prohibiting employers, including cities, from including non-disparagement clauses in agreements with employees that limit an employee's ability to disclose information about unlawful acts in the workplace, unless the agreement includes the following language: "Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful."[12] Previously, the law only precluded non-disparagement clauses relating to gender-based harassment but now precludes such clauses for any type of harassment, including harassment not based on sex.

The state of Oregon enacted a law that includes protection against discrimination for natural hairstyles.[13] This follows several other jurisdictions that have adopted "CROWN" laws ("Create a Respectful and Open World for Natural Hair"), including California, New Jersey, Colorado, Connecticut, New Mexico, Nebraska, and several others. CROWN acts have been introduced but not yet passed in other states like Illinois.[14]

Moreover, Oregon recently made it an unlawful employment practice for employers to require current or prospective employees to possess or present a valid driver's license as a condition of new or continued employment.[15] The law recognizes an exception where the ability to drive legally is an essential function of the job.

In Montana, lawmakers have added marijuana use during non-work hours as an activity for which employers, including local governments, cannot discriminate against employees.[16]

Since the beginning of this year, Minnesota employers now are required to provide reasonable break times each day for nursing mothers to express breast milk, and cannot reduce an employee's compensation for lactation breaks.[17] Nursing mothers must be afforded the opportunity to take paid lactation breaks for the twelve months following birth of the child.[18]

At the time of this writing, the U.S. Senate is anticipated to vote on the Pregnant Workers Fairness Act ("PWFA"), which would bolster protections for pregnant employees by prohibiting employers from denying a reasonable accommodation during a normal pregnancy rather than accommodating only "difficult" pregnancies, similar to denying a reasonable accommodation to disabled employee under the ADA. The PWFA has been championed as a bipartisan bill and support from both sides of the aisle may be enough to get support from the Executive Branch.[19]

3. **Government Responses to the COVID-19 Pandemic in 2022**

While employers are cautiously optimistic that COVID-19 infection rates will continue to decline in the wake of the Omicron variant, they nevertheless continue to face infections and outbreaks in their workplaces and diverging employee stances regarding vaccinations.

By now, circumstances surrounding the federal government's attempt at employer vaccine mandates are well known by practitioners. In November 2021, the U.S. Occupational Safety and Health Administration

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("OSHA") issued an Emergency Temporary Standard ("ETS"),[20] imposing a vaccine mandate on certain employers or mandating that unvaccinated workers wear masks and undergo frequent testing.[21] In a highly publicized decision, the U.S. Supreme Court stayed and essentially rejected implementation of the ETS on January 13,2022.[22] In response the Supreme Court's decision, OSHA withdrew the ETS on January 26, 2022.[23]

Notwithstanding OSHA's withdrawal, the ETS remains relevant for some local government employers. Twenty-two states and territories in the United States have OSHA-approved State Plans, all of which cover state and local government workers in those states or territories.[24] Under OSHA, State Plans must be at least as effective as the federal occupational safety and health program.[25] Thus, before OSHA's withdrawal of the ETS, several of the states with State Plans had already adopted the federal ETS and others had initiated the process to implement the ETS for employees covered by their State Plan.[26] Some of these states, like Minnesota,[27] responded to OSHA's withdrawal of the ETS by suspending their enforcement of the ETS against covered employers. On the other hand, states like California[28] adopted their own emergency temporary standards that were unaffected by OSHA's withdrawal of the federal ETS.

In contrast to the vaccine mandates, several states have prioritized worker exemptions to any such employer mandates. In Alabama, for example, employers are prohibited under a new law from requiring an employee to receive a COVID-19 vaccination as a condition of employment without first providing the employee an opportunity to seek a religious or medical exemption.[29] Under the new Alabama law, an employee's submission of a completed exemption



Three years into the COVID-19 pandemic, employees' preference to work remotely is not a new development. Even so, in 2022, public and private sector employers continue to wrestle with whether, when, and how they will allow their employees to work remotely.



form creates a presumption that the employee is entitled to the exemption.[30] Similarly, legislators in West Virginia recently passed a law requiring employers with vaccine mandates to accept certifications from licensed medical providers indicating that an employee's or prospective employee's religious beliefs prevent them from receiving the COVID-19 vaccine.[31]

While vaccines remain at the forefront of the latest response to COVID-19, some states have amended existing laws to bolster other mitigation measures, such as contact tracing. California recently updated its law requiring private and public employers to provide their employees with notice of potential exposure to COVID-19. The updated law directs employers to notify the relevant local public health agency within 48 hours or one business day, whichever is later, if they become aware that the number of cases among their employees meets the definition of a COVID-19 outbreak.[32] The law also specifies the categories of employees and other individuals who must be notified of potential exposure to an infected person in the workplace.[33]

4. To Continue or Not to Continue Allowing Remote Work: That is the Question

Three years into the COVID-19 pandemic, employees' preference to work remotely is not a new development. Even so, in 2022, public and private sector employers continue to wrestle with whether, when, and how they will allow their employees to work remotely. Despite the typically obvious benefits of allowing office employees to work from home, remote work can come with a downside; that is, the inability for diligent employees to disconnect outside of normal work hours. Striving to solve this problem, the Ontario, Canada government passed legislation, set to take effect June 2, 2022, that will help employees disconnect from their employment responsibilities after work hours.[34] The law requires Ontario employers with 25 or more employees to develop a written policy giving employees the right to disconnect from their work at the end of their workday. "Disconnecting" under the new law includes not engaging in work related communications such as e-mails, telephone calls, video calls,[35] and other messages.

Employers allowing allowing for remote work must decide whether to continue being flexible in allowing some or all of their employees to work remotely even after COVID exposure and hospitalization rates diminish. During the height of the pandemic, employers allowing remote work faced their own concerns of worker productivity, administrative management challenges, and the lack of interpersonal interaction of a traditional workplace. In 2022, most if not all employers continue to allow some work from home as their new

normal based on helpful technology, employer accommodation and flexibility. Surveys conducted in the private sector shed some light on key remote work statistics in 2022:

- 16% of companies in the world are 100% remote.
- 44% of companies don't allow remote work.
- Better work-life balance is the main reason why people choose to work remotely.
- 77% of remote workers say they're more productive when working from home.
- The average annual income of remote workers is $4,000 higher than that of other workers.
- 85% of managers believe that having teams with remote workers will become the new norm.
- 74% of workers say that having the option to work remotely would make them less likely to leave a company.
- The three biggest challenges associated with remote work are unplugging after work (22%), loneliness (19%), and communication / collaboration (17%).

Of course, public-entity employers have greater challenges in allowing remote work for the majority of their workforce based on the services provided to the public that usually require personal interaction, such as courts, law enforcement, land use, and overall governmental functions. Further, city and state attorneys' offices are losing potential applicants to law firms where entry-level or less-tenured attorney positions are lured to lucrative compensation packages being offered in the private law firm sector. Governmental attorney employers are seeing fewer candidates for hire as well as facing challenges in retaining younger attorneys because public sector salaries cannot competitively meet scale. If not done already, public sector employers with assistance from their employment counsel should consider creating work-from-home policies for some office workers, and should evaluate the prospect of other benefits to stay competitive in onboarding and retaining their valued workers.

Conclusion

In 2022, employers and their legal counsel should pay close attention to labor law changes in their states, including new anti-discrimination rules and greater protections and benefits for employees as a result of the pandemic. The effect of the pandemic on employment law likely will be felt for many years to come. One can only hope the same cannot be said of the pandemic itself. Even as the pandemic (hopefully) subsides, employers should consider having their employment counsel prepare thorough and compliant work-from-home plans or guidelines and update existing non-wage benefits with the goal of staying competitive in a tight labor market and retaining high-performing employees. **ML**



Lawrence ("Larry") Lee is 27-year practitioner, shareholder and labor and employment attorney for Jones & Keller, PC. He represents numerous employers in the private and public sectors. Larry has successfully defended many employers in federal and state courts, arbitrations, and federal circuit appeals courts. He regularly provides advice and counsel to employers around the country on various employment laws and regulations to ensure compliance as well as to avoid claims.



Blaine Bengtson is an associate attorney in the litigation group of Jones & Keller, P.C. His practice includes representation of clients in the public and private sectors in matters involving labor and employment law and complex commercial matters. He also has provided extensive preventive advice and counsel to employer clients, including annual revisions to their employee handbooks to ensure compliance with the latest developments in employment law.

Notes

1. C.R.S. §§ 8-13.3-402(5)(a) & 403(c).
2. Assemb. B. 1578 (Cal. 2021) (codified in Section 12945.2 of the Government Code).
3. 102d Gen. Assemb., H. B. 3582 (Ill. 2021).
4. Employment Standards Act, R.S.B.C. 2021- B. 13.
5. City and County of Denver, Ordinance No. 21-0818 (2021).
6. *Id.*
7. C.R.S. § 8-5-201.
8. N.Y.C. Council Law No. 2022/032 (2022).
9. Gen. Assemb., H 5261A (R.I. 2021).
10. 102d Gen. Assemb., H.B. 1838 (Ill. 2021).
11. 102d Gen. Assemb., H.B. 53 (Ill. 2021).
12. S.B. 331 (Cal. 2021) (clarifying Section 12964.5 of the Government Code).
13. 81st Leg. Assemb., H.B. 2935 (Or. 2021).
14. 101st Gen. Assemb., H.B. 3499 (Ill. 2019).
15. 81st Leg. Assemb., S.B. 569 (Or. 2021).
16. Mont. Code Ann. § 39-2-313.
17. 91st Leg., S.B. 9 (Minn. 2020).
18. Id.
19. https://www.natlawreview.com/article/labor-and-employment-law-what-s-new-2022
20. Occupational Safety and Health Administration, Department of Labor, COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 FR 61,402 (November 5, 2021).
21. Of course, state and local governments are excluded from coverage under the federal OSHA laws and regulations except where a state adopted a federally approved workplace safety and health program that includes municipal employees, under Sec. 18 of the OSH Act.
22. Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, No. 21A244 (Jan. 13, 2022); Ohio v. Dep't of Labor, No. 21A247 (Jan. 13, 2022).

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BURNOUT: You Are Not Alone

KAREN BLAKE, *Conflicts Attorney, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Ft. Lauderdale, Florida and* GINGER E. WALD, *Partner, Billing, Cochran, Lyles, Mauro & Ramsey, P.A., Ft. Lauderdale, Florida*



Headlines contain the word "Burnout" nearly every day in these difficult, pandemic times. It's a red flag waving "We Need Help," but so often many don't see it in themselves and many deny it completely. Others acknowledge it--but don't know what to do or where to go for help. It's our hope that this article can give you some information and tools to fight the Beast that is Burnout.

INTRODUCTION:

As lawyers, we were trained from an early age to soldier on. Even in law school, professors assigned such voluminous reading that all knew we were burning the midnight oil. They knew it was preparing us for what loomed ahead. Many of them had experienced burnout themselves.

Karen Blake: I was no exception. Caught in a City Attorney role, with two kids, a failing marriage and two parents with cancer, I felt the effects of life without really knowing if how I was handling work was "normal." Six days a week with some days going extremely long (7 a.m. to 12:35 a.m. was my longest), it didn't leave time for playing with the kids, relaxing on weekends, taking vacations or doing the things I enjoyed. I felt robbed by a lack of sleep—and when I could sleep, it was always interrupted and often horrific. Ambien became my bed buddy and, contrary to its indications, I lived on it for about a year and a half just to get enough shuteye to maintain focus.

I was kidding myself.

Walking in the morning, if I had the time, I was vomiting on the side of the road—for no "reason." It became apparent that one of my higher profile matters involving an alderman who stalked women and their teenage daughters was also starting to target me. This is a lengthy story, so suffice it to say I was feeling deep physical and emotional effects from burnout.

But I got through it.

And if you are feeling it, you aren't alone. You will get through it, too.

This article is structured to be used as another tool you might turn to during the day: meditation. It's not the stereotypical "guru-on-a-pillow-chanting-ohm" style, but one that gives instant relief when the world seems to throw you a curve ball. It's designed to accompany the ABA's suggestions, indicated below.

Our discussion of burnout will touch on most of the following items:

<u>The Problem</u>

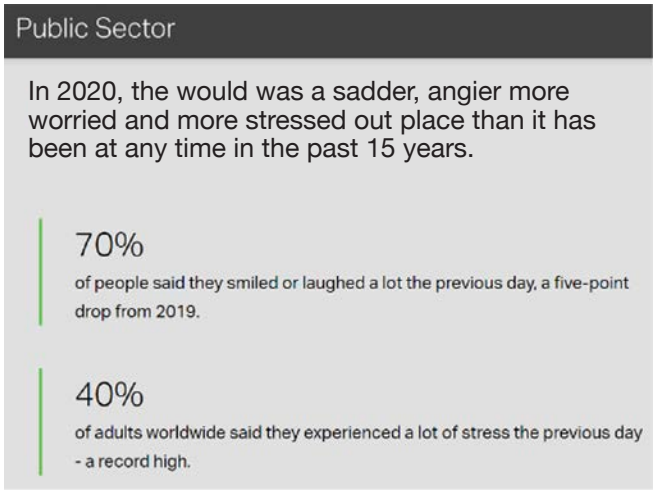
- Statistics and Identifying Burnout; Pandemic effect
- Anonymous poll on % of class feeling burnout, with results at the end of class
- Steps to confront burnout, addiction and depression
- Triggers
- Videoconference Fatigue
- Boundaries and Challenges
- Some solutions
  - ○ Breathing
  - ○ Navy Seal Box Breathing
  - ○ Exercise
  - ○ Sleep
  - ○ Nutrition
  - ○ Teamwork

<u>The Ethical Rules</u>

- ○ ABA
- ○ Canada
- ○ Example Tribal Ethical Code

The Message to Take Home

We will not cover all these topics in this article, just the ones that need further elaboration or those with statistical information that can lose an audience. We will add a list of articles that may prove helpful if you have areas of interest or particular concerns. And, as always, please feel free to reach out to us by email or phone if you need further information.



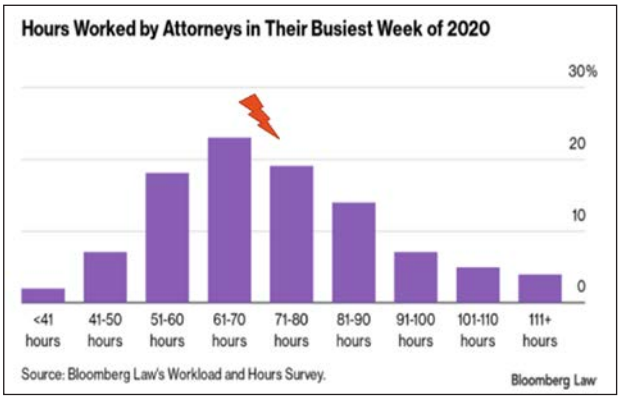
The Problem

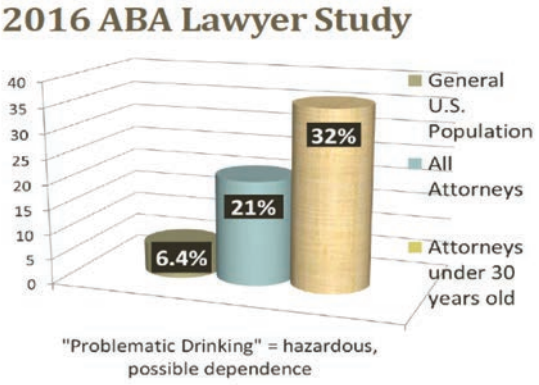
160,000 people in 116 countries around the world were asked by pollster Gallup about their mood and Gallup produced a Global Emotions Report, in 2020 and early 2021. The results showed more people felt "stressed, sad, angry and worried in 2020 more than at any point in Gallup's global tracking." Gallup didn't attribute these feelings solely due to the worldwide pandemic; though it found it is a major contributor. The experience of happiness had been trending down for over a decade.[1]

A study by Indeed found the following:

- Fifty-three percent of Millennials were already burned-out pre-pandemic, and they remain the most affected population, with 59% experiencing it today. However, Gen-Z is now neck and neck, as 58% report burnout—up from 47% who said the same in 2020.
- The pandemic's toll is also more apparent among older generations. Baby Boomers show a 7% increase in burnout from pre-pandemic levels (24%) to today (31%). And at 54%, more than half of Gen-Xers are currently burned out—a 14% jump from the 40% who felt this way last year.
- Among all respondents, 80% believe Covid-19 has impacted workplace burnout—though, how and to what extent vary. A 67% majority say burnout has worsened during the pandemic, though 13% believe it has gotten better.[2]

As for lawyers, in 2020 we were working probably harder than ever, with most working between 61-70 hours in their busiest week. One-fifth of law firm lawyers report billing over 80 hours in their busiest week (though Bloomberg Law reports that most actually worked more than 100 hours. But lawyers on average worked 53 hours a week. While the authors are unaware of what City Attorney and Assistant City Attorney statistics are, it would not be unrealistic to suggest that if night meetings for city/town/tribal councils were added, our averages could be higher.[3]





Compare some of this recent information with a study done in 2016 by ABA and the Betty Ford/Hazleton Clinic. Of the 13,000 lawyers practicing that answered the poll, 21-36% qualified as problem drinkers; 28 % had depression; 19 % had severe anxiety; 23 % had stress; and 11.5% had suicidal thoughts during their career.[4]

The ABA had commissioned the studies because too many good lawyers were being lost. The statistics bore that out.

So, how do most people handle burnout?

Turns out, most people "just power through."[5] Or, they find ways to "cope"—but, in fact, that's not what they are doing, as the ABA study indicated. Most commonly, stressed out people turn alcohol—binge drinking--and this pandemic has provided the backdrop to some scary statistics. Binge drinking is defined as women consuming four or more drinks or men consuming five or more drinks in two hours. 60% of Americans reported that they are drinking more than they did pre-pandemic. Alcohol sales grew 20% from February 2020 to February 2021. We are seeing worrying trends, especially among women drinking more-and there's been a sharp rise in alcoholic liver disease among young women.

One-third of those reporting

Continued on page 12

Burnout *cont'd from page 11*

While anyone in any profession can absolutely experience burnout, lawyers are particularly prone to suffering the consequences.

alcohol or other addiction issues said it has affected their work more since the pandemic began. Nearly half of employees surveyed reported problematic use of alcohol, drugs or prescription medication, with one in five noting at least weekly usage.[6]

In fact, Gallup found stress spikes were particulary acute for women in the last year: 62% of working women in the U.S. and Canada reported daily feelings of stress compared with 52% of men. Pre-pandemic, 43% of new mothers were leaving the workforce within a year of having a baby— now, over 2.4 million women are currently suffering from burnout.[7]

So, we've seen lawyers particularly suffer, so let's step back and review what Burnout is with a view on how to battle it.[8]

Burnout Defined

Burnout is defined in the World Health Organization's the 11th Revision of the International Classification of Diseases (ICD-11) as an occupational phenomenon.

"Burnout is a syndrome conceptualized as resulting from chronic workplace stress that has not been successfully managed. It is characterized by three dimensions:

- feelings of energy depletion or exhaustion;
- increased mental distance from one's job, or feelings of negativism or cynicism related to one's job; and
- reduced professional efficacy."[9]

What Are Some Triggers of Burnout?

We're going to discuss four common triggers that have been especially common during the pandemic.

A. Zoom/meeting fatigue is real.

If you find yourself in back-to-back meetings, assess which meetings are essential. Also, which ones need to be in person, virtual or could be phone calls. Virtual meetings consume a lot more energy—they require us to focus on the other person much more than we naturally do in person and can leave us feeling more drained. Switching up the mode of meeting can make a huge difference in your overall energy level.[10]

Jeremy Bailenson, founding director of Stanford University's Virtual Human Interaction Lab recently discussed why Zoom Fatigue leads to burnout:

1) Videoconferencing forces users to make extended eye contact.
2) Nonverbal signals like nodding require more effort.
3)The little box where users see themselves is unnatural.
4)Users are forced to sit in one place.

He recommended these solutions:

- Hide self-view.
- Shrink the Zoom window to make other people a little bit smaller. Make it 1/3rd of the screen instead of maximized-- or place your chair a little farther away from the webcam.
- Turn off your camera and take a five-minute audio-only break during a long meeting to give yourself a chance to move around.
- Set cultural norms with your co-workers that it's OK to turn off the camera sometimes.[11]

B. Poor Sleep

This is an entire topic by itself. So much has been written about poor sleep, so we just wanted to highlight some solutions that have proven helpful to those suffering from insomnia. Consider nutrition and the role it plays in your sleep cycle, as well as helping you to stay asleep. Consider exercise earlier in the day and meditation any time of day as stress busters that will help ease you into sleep, along with a night time routine. Remember that poor sleep has been shown to sabotage new memories[12]

C. Perfectionism

Deep Patel, entrepreneur, marketer and former *Forbes* contributor, points out:

> Voltaire, the French writer, said, "The best is the enemy of the good." Confucius said, "Better a diamond with a flaw than a pebble without." And, of course, there's Shakespeare: "Striving to better, oft we mar what's well."[13]

Get it done. Focus on the process, he says, and adjust later. Great advice, we think. His article is worth a read if you suffer from this malady.

D. Over-meeting and Other Expectations.

This is a particular dilemma in the municipal world because so many decisions must go before committees, boards and council. It may be difficult, but some things to try would be to draw boundaries on what meetings you or staff will attend. Remember, we are in risk management and it's entirely reasonable to hold off attending a mundane, run-of-the-mill committee meeting when minutes are available and staff can come to you with their post-game concerns. The flip side of not attending meetings is to appoint someone in your stead and to delegate. Work on delegating more, if possible. And question yourself honestly if you think nothing can be delegated.

Set boundaries. This also works in situations where your co-workers and clients to expect immediate responses and it creates overwhelm, start experimenting with boundaries. Take longer to respond—notice how this feels and also, how they respond. Start with people who are more understanding. Most of the time, others respect boundaries. Problems arise when we don't communicate clearly or we are inconsistent in our behavior. During down times, turn off your phone or put it on do not disturb (and yes, that means on weekends, too). Check email once a day (or not at all, if you're able) at night, on vacation, and on the weekends.

"No" is a boundary you can become adept at delivering well. One of the best articles on how to soften the blow of a "no" comes from *"How to Say No to Grabbing Coffee."*[14] In the article, Jenny Taitz and Greg McKeown offer examples on how to decline with grace. Here are just a few examples:

- "It is so nice to hear from you, and I appreciate you thinking of me during what must be a stressful time. I hope you're doing well in this transition. I'm increasingly realizing that I have too much pulling at me, so I'm taking a break from in-person networking. That said, I'd still like to keep in touch and be helpful, so can we set up a call instead?"
- "I hope you're well! I'm stretched now and cutting back on networking meetings. I hope you understand, and I'm rooting for you during your round of fundraising."

But sometimes, City Attorneys don't have the ability, they feel, to say no to a council person, especially one who demands instant answers. Consider refering those types of demands to your City Administrator/Manager (after you discuss it with that person first, of course.) This way, your message will be consistent and cost the city less of your time. This would be a good time to delegate with, "I'm sorry I can't get back to you at the moment, as I'm currently handling something time-sensitive for the city, but please give my assistant a call. He's very knowledgable and give you what you need. I've copied him here and asking him to get back to you." It's efficient and shows that you know how to manage your time while giving the councilman great attention.

What is a Recommended Approach to Stopping Burnout?

One technique that has had success was developed by Jon Kabat-Zinn, founder of the Stress Reduction Clinic and Center for Mindfulness in Medicine, Health Care and Society at the University of Massachusetts Medical School. It's called STOP:

- ▶Stop. Stop what you're doing and put your thoughts and actions on pause.
- ▶Take. Take a short break by inhaling and exhaling deeply two or three times. Relax and focus on what's happening now, rather than on any sort of outcome.
- ▶Observe.
  - ▷Physical sensations
  - ▷Feelings (nervous, stressed, sad or something else)
  - ▷Why you're feeling this way
- ▶Proceed. Go back to whatever it is you were doing, making a conscious decision to incorporate what you just learned.

Cyberspace has a lot of information out there about taking the time to pause, studied by Victor Frankl. Creating a space between instinctively reacting and pausing to reflect before acting can help with better decisions because you have given yourself the power of choice. For more, see his book *Man's Search for Meaning*,[15] and learn about his experiences in a Nazi death camp. The ones with hope, he said, were the survivors.

Taking a Mindfulness-Based Stress Reduction course may be helpful. Check out the free course and resources on Paulouse's MBSR page: https://palousemindfulness.com/MBSR/ataglance.html.

If you enjoy quick, one-shots, consider getting yourself a meditation app, like Headspace, or the moodtracker, Daylio. Keeping a regular practice, usually in the morning for meditation, can often

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Karen Blake is a member of the internal Conflicts Review group of Baker Donelson, responsible for evaluating potential ethical conflicts in new matters before the firm. She previously advised Tennessee municipal courts for the Municipal Technical Advisory Service of the University of Tennessee, and has represented, advised, and trained municipalities, boards, commissions, counties and other public officials in Tennessee and Georgia, both in-house and as outside counsel. She was formerly the first in-house city attorney of Franklin. Karen holds a J.D. from Golden Gate University School of Law, and B.A. Cum Laude in International Relations and Communication from the University of Delaware. She was just awarded the firm's BakerFit Award 2021 for leading her firm in wellness.



Ginger E. Wald is a partner at Billing, Cochran, Lyles, Mauro & Ramsey. She was previously an Assistant City Attorney for the City of Fort Lauderdale, engaged in civil litigation, labor, land use, zoning and building codes. In that role, Ginger drafted substantial changes to Fort Lauderdale's code enforcement ordinances and educated staff on the best practices for code and zoning enforcement. She has also served as a trial attorney in South Florida handling insurance defense cases. She represents special purpose governmental districts, community development districts, municipalities, as well as land developers, builders, and other business clients in connection with land use, code compliance, and other civil matters. Ginger has a J.D. from the University of Florida College of Law and a B.S from the University of South Florida.

Burnout *cont'd from page 13*

battle stress before it's begun. Again, the internet is replete with valuable information, or consider taking a course to get the full benefits of these types of practices, whether stationary or movement based. See our PowerPoint slides and Facebook page (Wellness Committee Coalition) for more resources.

The Ethics Rules

It's important to consider that burnout can cause an unintentional breach of one or more ethical rules, so awareness is prevention. We will list some applicable rules in three types of jurisdictions (using model rules mostly), understanding that some states' rules and local rules may vary.

A. Relevant ABA Model Rules

- Rule 1.1 of the ABA's Model Rules of Professional Conduct requires lawyers to "provide competent representation."
- Rule 1.3 requires diligence in client representation.
- Rules 4.1 - 4.4 regulate working with people other than clients.
- The Preamble calls lawyers to "strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service."
- Model Rule 5.1 imposes a duty on law firm management and other partners in the firm to make reasonable efforts to ensure that the firm puts in place measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
- Model Rule 5.3 requires that partners and firm management make reasonable efforts to ensure that the conduct of a nonlawyer is compatible with the professional obligations of the lawyer.

B. Relevant Canadian Rules

2.1-1 A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

> [2] Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety.
> [3] Dishonourable or questionable conduct on the part of a lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession and the administration of justice. Whether within or outside the professional sphere, if the conduct is such that knowledge of it would be likely to impair a client's trust in the lawyer, the Society may be justified in taking disciplinary action.
> Competence 3.1-2 A lawyer must perform all legal services undertaken on a client's behalf to the standard of a competent lawyer.
> Quality of Service 3.2-1 A lawyer has a duty to provide courteous, thorough and prompt service to clients. The quality of service required of a lawyer is service that is competent, timely, conscientious, diligent, efficient and civil.
> Honesty and Candour 3.2-2 When advising a client, a lawyer must be honest and candid and must inform the client of all information known to the lawyer that may affect the interests of the client in the matter.[16]

C. Example Tribal Rule: United Cherokee Nation of Indians

(general ethics applicable to all, not a legal ethical rule)

15. Keep yourself balanced. Your Mental self, Spiritual self, Emotional self and Physical self all need to be strong, pure and healthy. Work out the body to strengthen the mind. Grow rich in spirit to cure emotional ails.
16. Make conscious decisions as to who you will be and how you will react. Be responsible for your actions.
18. Be true to yourself first. You cannot nurture and help others if you cannot nuture and help (yourself.)[17]

The Message

It's clear from the rules above and the statistics we shared that an attorney has a duty to care not only for the self, but also for the whole department. For it is in doing so that the attorney complies with the rules and ensures longevity in the team and in each individual's career. This means you'll need to make an effort to check in and see how your team is doing. See if any member exhibits signs of burnout, or isn't performing as well they usually do. Above all, lend an ear or make a knowledgable referral. Extending an empathetic offer of support can be meaningful in itself. Encourage breaks and vacations. Consider gamifying a wellness routine which can boost morale in the office.[18] Assist lawyers in learning to delegate, if they can, where they can. Sometimes, that means staffing a project better, so consider alternate resources like staffing services.

The bottom line is that we are not alone in this. We do better together when we share the same core values to support each other through burnout phases. Realize what they are, phases that come and go…for each of us.

The Cherokee Rule really nails it here: "Be true to yourself first. You cannot nurture and help others if you cannot nuture and help yourself."

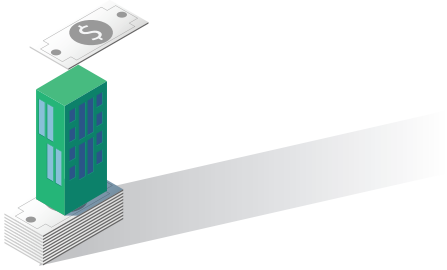
Authors' additional comment: After informally polling our colleagues at our IMLA Minneapolis Conference in October 2021, we found that our results were consistent with similar burnout studies. A strong majority scored in the Burnout category, scores for women showed more stress than men, and less experienced city attorneys suffered more than their experienced colleagues. ML

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Economic Development Financing: Incentivizing Growth in Texas

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Local governments face competing challenges as they seek to encourage development while providing the infrastructure needed to accommodate growth. This article discusses some mechanisms available to local governments and developers in one of the America's fastest growing states: Texas. While the specifics may vary by degree, analogous tools are available in many jurisdictions across the country.

Texas municipal bond issuers have only limited tools in their toolbox to incentivize economic development. In Texas, property value is king because Texas municipalities receive a majority of their tax revenue from the levy of an ad valorem tax on the assessed value of taxable property within their jurisdictions. For many Texas cities, all taxable assessed value is not equal. The higher the taxable assessed value, the more revenue the municipality receives, and for cities, which must provide basic services such as fire and police, incentivizing higher quality development minimizes the chance that the revenue received from a property is less than the value of the services provided by the city.

It isn't lost on anyone that Texas has been a hotbed of development for the past several years. Most of this is demand for residential housing, which will eventually spur commercial development. The explosion of people moving to Texas and buying homes has left many cities with multiple developers at their door asking for incentives to bring their housing development within the city's borders. Ten or fifteen years ago, developers came to cities, developed their project pursuant to the city's zoning, dedicated the public infrastructure to the city and then developed their property. Today, those same developers line up at City Hall to ask for incentives and for the city to pay the costs of the public infrastructure that will be necessary for the development or to provide other incentives for that developer to provide housing and commercial development within the city.

For many Texas cities, getting ahead of this development and shaping it in a way that manages growth and results in residential housing that fits within the city and will at least pay for the level of service it receives with the tax dollars generated from it, has led them to use several economic development tools. While cities in Texas have limited avenues for attracting and retaining development, they are not without certain financing mechanisms. Three of the most common tools used by Texas cities are (i) public improvement districts, (ii) tax increment reinvestment zones, and (iii) economic development grants or incentives.

Public Improvement Districts

One of the tools that cities have begun to utilize extensively in the last ten to fifteen years is a public improvement district, or "PID." Established pursuant to Chapter 372 of the Texas Local Government Code, as amended, a PID is not a separate political subdivision, but rather, a designated area within the municipality or within its extraterritorial jurisdiction, that allows a city to finance public improvements that benefit the property owners within the designated area.

Creation:

A PID is created pursuant to a petition of (i) the owners of taxable real property representing more than 50% of the appraised value of taxable real property liable for assessment in the proposed PID or (ii) more than 50% of all record owners of property liable for assessment in the PID or those owning more than 50% of the area of all taxable real property that is liable for assessment in the PID. The majority of PIDs are formed when all the property within the proposed

PID is owned by a single developer or landowner, but there are some instances where a developer owns less than 50% of the property and can convince the owners of the remaining property to sign the petition prior to the developer's purchase of the land.

Purpose and Assessment:
The purpose of the PID is to levy assessments on the property owners within the PID to pay the costs of public infrastructure within that area. The amount of assessment paid by each property owner is proportional to the benefit they receive from the public infrastructure being financed. How the assessments are distributed among the properties within the PID is determined by a benefit analysis conducted by a special assessment consultant. The assessment levied by the city acts much like a tax and is enforceable by the city in the same manner as an ad valorem tax, including subjecting the property to foreclosure by the city in the event of non-payment of the assessment. PID assessments are superior in lien priority and are subordinate only to ad valorem taxes levied by the city and other taxing jurisdictions who levy an ad valorem tax within the boundaries of the PID. Once levied, however, the assessment has superior lien priority to a mortgage, and the city can foreclose on a property for nonpayment and subsequently sell the property, still subject to payment of the assessment lien in future years. Assessments are paid in annual installments and nonpayment of any annual installment can subject the property to foreclosure.

A city can issue revenue bonds backed by a pledge of the assessments levied to fund the public improvements the property owners are assessed for. Assessment revenue bonds issued by a city are city bonds but are non-recourse such that bondholders cannot demand payment from any other source of city revenue. PID bonds are typically non-rated and are sold to a limited number of buyers. The annual payment of assessments must be sufficient to pay debt service on the PID bonds being issued, and a city's only obligation with respect to the bonds is the enforcement of collection and a continuing disclosure obligation.

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Financing the Assessments:
While assessment revenues may be collected annually and the cash received can reimburse a developer for public improvement costs, most developers want to leverage the assessments into a bond issuance by the city which delivers cash to them on a much faster timeline. The statute allows for the assessments to be financed with bonds and there are a couple of different structures, or a combination of the two, that are utilized by cities:

(i) Upfront Financing: The city may issue bonds payable from the assessments before construction of the public improvements has begun. At the time of assessment, the property on which the assessments are levied is undeveloped. In these financings, the proceeds of the bonds are used to pay the construction costs of all or a portion of the public improvements. The city controls those proceeds and their payment for the costs of the public improvements. While this type of financing may contain more inherent risk, cities mitigate the risks through contractual arrangements with the developer by putting parameters around when and how much debt they will issue. For example, cities will often establish a minimum "lien to value" ratio for the assessment such that the property being assessed is at least three times more valuable than the amount of the assessment levied on it so that in the event of a foreclosure, the land would sell for a price high enough to pay off the assessment due. In addition, cities often require evidence of developer private financing before "up front" bonds are issued, to ensure that the developer has the financial ability to fully develop lots within the development. These "up front" financings are valuable to developers because they reduce the amount of capital developers must raise, and most developers request this method. However, depending on the size of the development, the value of the property, and the developer's experience and financial ability, up front financings are not always the best option for a city. Making this determination requires the city's financial advisor, development staff, and bond counsel.

(ii) Reimbursement Financing: Where "up front" financing is not possible, whether because of market conditions, the nature of the specific development, the developer, or just as a result of politics, a city can levy assessments within a PID and either (i) provide an annual cash flow from those assessments to the developer to reimburse the costs of the public improvements or (ii) after construction of the public improvements, leverage the assessments into a bond financing, the proceeds of which are used to reimburse the developer for the costs of the already-constructed public improvements. Reimbursement financing requires the developer to finance the construction costs of the public improvements privately, but it does add value to the property which then raises the "lien to value" ratio. Cities may often require more than mere construction of the public improvements in these types of reimbursement financings. Cities may require a certain amount of value to be on the ground or a certain number of homes to be constructed or building permits to be issued before reimbursements. All of these parameters reduce risk of an unsuccessful development and require the developer to significantly invest into the project before the city issues debt.

In an up-front financing, the issuer holds the proceeds of the bonds and will oversee the construction of those public improvements by the developer who makes periodic draws on the bond proceeds to pay for construction of the public improvements that have been assessed. In reimbursement financing, the developer constructs the improvements and the city levies assessments before land is sold to homebuilders and the annual payment of the assessment funds are reimbursed to the developer for the costs of the public improvements. Deciding which type of bond financing to utilize depends on the facts and circumstances of each development and of each developer, the value of the land and the financing costs. In general, PID bond financings are more costly than the issuance of other types of city-issued debt. The financings involve multiple consultants and their fees, as well as reserve funds and delinquency funds to ensure that there are monies to draw on in case of late payments or when foreclosure proceedings are ongoing. In addition, in an up-front financing, a developer may be required to deposit cash at bond closing if the bond proceeds are not sufficient to fully pay for the costs of the public improvements. In that event, the developer must bridge the gap with cash to ensure that there are sufficient funds available to fully construct the public improvements.

Benefits of PID Financing:
Initially, PIDs were passed into law and utilized as an annual cash flow tool primarily for downtown urban areas. These "cash-flow" PIDs developed an annual budget for things like annual plantings, security patrols, sidewalk improvements, and so on. In the early 2000's, the PID started

to become a tool to enable residential housing developers to be reimbursed for public improvement costs they expended or to use the proceeds of PID bonds to construct the public improvements necessary to serve a residential development. Historically, public improvements installed and constructed by developers in a residential subdivision were dedicated to a city free of charge. In the last fifteen years, developers have begun asking cities to pay for these improvements as a way to increase their internal rate of return and to mitigate their own financing costs.

For a developer, PID financing (especially bond financing) for all or a portion of the costs of public improvements reduces the amount of private capital needed for a development. A few million dollars of cash up front for the developer can make a very big difference in the financing and rate of return. Even in the instance of a reimbursement financing where the developer constructs the public improvements and the city reimburses the costs, such reimbursement can be a part of the developer's capital stack they can leverage into financing and reduce their construction or development loan. For a city, there are several reasons why a PID financing is attractive. First, it can allow the issuer to achieve a higher standard of development than zoning alone would allow, which in turn can lead to higher home values. With a PID financing, the issuer has leverage to entice the developer to agree to a higher quality development in exchange for the PID bond financing. Second, for certain troubled properties within a city, a PID bond financing may be a useful incentive to attract development that would not otherwise occur. Third, a PID financing places the payment obligation for an improvement only on the property owners benefitting directly from the improvement, as opposed to all citizens having to bear the cost of the improvements even if they don't benefit directly. Finally, a PID is often more attractive to a city than a municipal utility district or other water district formed and operating within the city or its extraterritorial jurisdiction. A water district is a separate sovereign entity with the power to tax and issue debt, where a PID is merely a financing vehicle used by the city, and the land within the PID remains under the city's control. Using a PID, a city can maintain control of development.

As a part of a PID financing, a city should consider the additional benefits to the city from incentivizing the developer with the creation of a PID and the levy of assessments for financing public improvements. In Texas, zoning can only regulate certain matters with respect to development. A PID gives a city the opportunity to add requirements and standards that they would not otherwise be able to require through their land use regulation process alone. Items such as additional park improvements, connectivity to a

Continued on page 20



city trail system, additional set back requirements, oversized or additional neighborhood amenities or the regulation of building materials are all items a city can require from a developer contractually before the city will pursue a PID financing. Many cities have developed a policy for the use of PIDs as a financing tool in order to be transparent with developers and consistent in the types of development they incentivize.

Cities often use PIDs to incentivize development that is above the normal standard they would receive through zoning alone. Higher value, more amenitized housing and retail development generates more ad valorem tax revenue to the city and attracts similar development. Cities should only incentivize those developments, residential, mixed use, or commercial, that add value to the city beyond what they would normally achieve through zoning alone. Some cities use PIDs as a way to attract developers who would otherwise utilize a water district to provide services. This allows a city to control its own destiny and not be subject to another political subdivision operating within its boundaries. While water districts absolutely have their place in development and development financing, they are not always the best vehicle for development within or surrounding a city and can sometimes impede a city's growth. PIDs can be especially helpful when they are within a city's extraterritorial jurisdiction (a ring of land around a city which the city can annex into its corporate limits). As an inducement to be annexed into a city via a petition by the developer landowner, a city can offer a PID for financing purposes in exchange for a voluntary annexation.

Risks of PID Financing:

PID bonds are payable solely from assessments levied within the PID, and a city is never required to pay debt service on PID bonds from any other sources of revenues. A city's general fund is not at risk. Because PID bonds are often issued before development occurs in an upfront bond issuance, or before all lots have been delivered to builders, including in a reimbursement financing, these issuances do carry additional risk that is not present with a city's general obligation debt or water and sewer revenue debt. The risks associated with issuing PID bonds can be mitigated by a cities in a series of ways, such as: (i) requiring a higher lien to value ratio; (ii) limiting the amount of bonds issued; (iii) requiring the developer to disclose his financing to ensure that lots are developed; (iv) requiring that the developer have lots already under contract with homebuilders; (v) requiring that the developer already have tenant commitments in place or contracts for sale for commercial development; or (vi) issuing the bonds as reimbursement financing after all of the infrastructure is on the ground and vertical development has reached a certain point.

The riskiest period for the PID bonds with respect to a default is the time period when the developer owns the property and is responsible for all or a majority of the assessments. Generally, when bonds are sold, the developer will have to disclose his private sources of financing, both to the city and to the market, in order to give assurances that the developer has the funds necessary to fully the develop the property, including private costs, and is able to deliver developed lots to builders. If a developer cannot complete lots and sell them to builders, then the developer would remain responsible for paying all of the assessments on the property. In that scenario, if a developer did not or could not pay its assessments, either (i) the developer's lender with a mortgage on the property would step in and pay the assessments in order to preserve their lien; (ii) the city would foreclose on the property and use the proceeds to pay off the PID bonds; or (iii) if the foreclosure proceeds are insufficient or not timely, the PID bonds would default and the reserve fund would be drawn upon to pay debt service.

Many cities' financial advisors advise issuers that a default of assessment PID bonds is not a default that affects the city's general obligation debt capacity or rating. In the event of nonpayment by a developer and/or a default on the bonds, while the city's credit rating may not be affected, the issuer would not get the development it bargained for but, because the city controls the proceeds of the PID bonds, it should at least be able to complete the public infrastructure that would hopefully work for a new property owner and developer. The PID bonds are often issued in the name of the city, however, and in the event of a default, while not legally responsible for the payment of the PID bonds, a series of city bonds would be in default and disclosed to the market as such.

Tax Increment Financing

Texas has adopted a statute that identifies a geographic area within the city that may be designated as a "Tax Increment Reinvestment Zone" or "TIRZ." The purpose of the statute is to incentivize an underdeveloped area within the city to be developed by providing a source of revenue to achieve that development. Within the boundaries of the TIRZ, the taxable assessed value of all the property is frozen as of January 1 of the year in which the TIRZ was designated by the city. Increases in assessed valuation after that year are designated "tax increment" and a city may allocate a portion of its tax revenue from the tax increment to pay for or reimburse projects within the TIRZ, including public improvements and to a certain extent, economic development projects. Other taxing

jurisdictions that levy taxes within the TIRZ may also participate by allocating a portion of their tax increment to projects within the TIRZ. Revenues from the tax increment are often used as incentives to developers, allowing for reimbursement for public improvement costs within a TIRZ, or even for economic development incentives in certain circumstances.

While a city may issue revenue bonds with a pledge of its tax increment, those bonds can be difficult to market, especially on a newly formed TIRZ without a long revenue history. As such, the most common use of tax increment revenues is a reimbursement to developers within the TIRZ for the costs of public improvements. However, cities can also use tax increment revenues within a PID context. In these instances, the PID and TIRZ are typically coterminous and the projects assessed within the PID must also be projects that qualify under the TIRZ statute. In a PID financing, the city uses its tax increment revenues to essentially subsidize or buy down the assessments levied on properties within the PID, applying those tax increment revenues to pay debt service on PID bonds or as direct reimbursement to the developer. Utilizing TIRZ revenues can allow for a higher initial assessment, despite the underlying land value and provide additional bond capacity for the PID bonds.

While popular with developers, the use of a TIRZ should be closely analyzed by a city. Tax increment revenues are not additional taxes, but rather are a siphoning of future tax revenue growth to provide financing to a developer for qualifying projects within the TIRZ. The theory is that this investment by a city in its TIRZ will facilitate development; however, a city will still be required to provide basic city services within the TIRZ, including fire and police, but will have reduced tax revenues to provide such services because it is diverting those future revenues to a developer or to a PID bond financing. Understanding of a city's costs of service and the nature of the proposed development is important in determining how much of its tax increment a city should contribute to a TIRZ.

Economic Development Funding

Texas Local Government Code Chapter 380 authorizes a city to create programs, including programs for loans and grant of public money to promote state or local economic development and to stimulate business and commercial activity in the city. Cities often enter into economic development agreements with developers to reimburse both public and private costs of development or simply to incentivize job creation and growth.

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Economic Development *cont'd from page 21*

Cities in Texas cannot use ad valorem taxes to fund such agreements without a vote, and bonds can only be issued for economic development capital projects with a vote and a permissive city charter provision. However cities often pledge other surplus revenues or their sales tax revenues to economic development agreements. The city should receive a benefit for such grants and loans of money to a developer. Requiring job creation, or value on the ground or a certain amount of sales tax revenues are typical measures of the "benefit" the city receives for entering into an economic development agreement.

Conclusion

Development deals involving a combination of PID bonds, TIRZ tax increment revenues and economic development grants are often used to attract larger scale and higher quality development within a city. Like all tools, they are not without risks, but with careful thought and consideration and the involvement of experienced professionals, a city can effectively utilize a PID, a TIRZ and/or economic development funding to obtain a development that it would otherwise not be able to achieve with zoning. Issuers may want to create thorough policies and procedures for using public improvement districts and Tax Increment Reinvestment Zones as an economic development tool. Once a PID or a TIRZ is utilized, the issuer may be inundated with developer requests for this financing vehicle. Identifying what types of development the issuer wants to incentivize and in what instances the issuer will consider a PID and/or a TIRZ will help focus the issuer's economic development program and hone in on those developments that bring something "extra" or "special" to the issuer or its residents. ML



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PRACTICE TIPS

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Square PEG in a Round Hole: Limits on Municipal Use of Public, Education, and Government Fees

Balancing a local government's budget to ensure funding for important services can be a difficult task. Some types of revenue and funding sources carry no restrictions regarding how they may be spent and are designated for the general fund to be used anywhere needed. The use of other funds, however, is restricted; this includes public, education, and government ("PEG") fees paid by cable operators under the federal Cable Communications Policy Act of 1984 (the "Act") to support local government PEG channels. If you are a cable customer, you may have even noticed PEG fees as a separate line item on your cable bill.[1]

Although trying to fit PEG fees into a local government budget may be challenging at times, Federal Communications Commission ("FCC") orders and court cases provide guidance on the purposes for which local governments may and may not use PEG fees. This article contains a series of PEG "FAQs" to assist municipal lawyers in advising local government clients about the legal restrictions on the use of PEG fees.

Question 1
What costs may local governments pay for with PEG fees?

Answer
PEG fees may only be spent on capital costs for facilities and equipment for PEG channel capacity. PEG fees may not be used for operating costs.

The Act requires cable operators to pay franchising authorities, such as local governments, a maximum of 5% of their gross revenues in franchise fees.[2] The Act also provides that franchising authorities *may* require cable operators to provide channel capacity for PEG use as well as facilities or *financial support*.[3] Some states, including Texas, California, and Illinois, require cable operators to provide PEG financial support to local governments in the form of PEG fees, often calculated as a small percentage of gross revenues, e.g., 1%.[4] While the Act imposes no restrictions on the use of franchise fees, PEG fees may only be used for limited purposes, in particular, *capital costs*. *See* Question 2.

Notably, PEG financial support does not count against but is *in addition to* the 5% franchise fee cap if used for PEG capital costs required under the franchise to be incurred by the cable operator for PEG facilities.[5] Under the Act, PEG facilities are: channel capacity designated for PEG use; and *facilities and equipment* for the use of such channel capacity.[6]

Local governments also incur *operating costs* to run the business of the PEG channel, but the Act restricts PEG fees from being used for those costs. *See* Question 3. It is important to note that PEG fees improperly spent on operating costs count as franchise fees, and cable operators may offset future franchise fee payments by deducting the value of those earlier PEG fees used to pay for operating costs. *See* Question 4.

Question 2
What are PEG capital costs?

Answer
PEG capital costs are costs incurred in acquiring or improving capital assets for PEG access facilities,[7] in particular, long-term assets[8] with useful lives of more than one year.[9] The FCC has found that capital costs include both construction-related and non-construction-related capital costs contributed to PEG access facilities.[10]

The following list provides examples of PEG access facility capital assets. PEG fees may be used for the costs incurred to acquire or improve these capital assets as long as they have useful lives of more than one year:

- Studios[11]
- Vans[12]
- Cameras[13]
- Studio equipment[14]
- Portable production equipment, editing equipment, program playback equipment[15]
- Other equipment needed to produce PEG access programming or relating to the use of PEG channel capacity[16]
- Installation of PEG transport facilities[17]

Question 3
What are PEG operating costs?

Answer
PEG operating costs are expenses incurred in running the business of the PEG channel and producing output,[18] specifically, the costs of operating and using PEG facilities.

The FCC distinguishes operating costs, which are incurred in *using* PEG facilities, from capital costs, which are incurred in *building* PEG facilities.[19] PEG fees may not be spent on operating costs, or the cable provider may offset future franchise fee payments. *See* Question 4. The following list provides examples of PEG operating costs:

- Salaries of employees[20]
- Training and travel expenses[21]
- Rent[22] (*see* Question 6)
- Some maintenance expenses,[23] including the ongoing costs associated with the maintenance or operation of PEG transport facilities[24]

Question 4
What are the consequences to local governments for using PEG fees to pay for operating costs?

Answer
When PEG fees are improperly spent on operating costs, cable operators may offset future franchise fee payments by deducting the value of those earlier PEG fees.

The FCC has found that "payments made to support the operation of PEG access facilities," i.e., operating costs, are subject to the 5% franchise fee cap and must be offset from the cable operator's future franchise fee payments.[25] Thus, if a local government improperly uses PEG fees to pay for operating costs, cable operators may reduce future franchise fee payments by the corresponding amount. Additionally, the FCC acknowledged that the Act does not preclude a cable operator from auditing a local government's use of PEG fees and that the Act even allows a court to order such an audit in an appropriate situation.[26]

Question 5
May PEG fees be used to pay for the costs of an audiovisual company to run the broadcast of meetings of the city council and other city boards?

Answer
No. Costs to hire an audiovisual company are operating costs, as opposed to capital costs, and may not be paid for with PEG fees.

A local government's PEG channel programming may include broadcasting meetings of the city council and other city boards. Instead of handling the broadcast of such meetings "in-house," a local government may choose to hire an outside audiovisual company. These types of costs associated with running the business of the PEG facility and producing output are operating costs as opposed to capital costs paid to acquire or improve a specific capital asset of the local government. *See* Question 3. If a local government does not hire an audiovisual company, this broadcasting work would likely be performed by local government employees whose salaries may not be paid for with PEG fees. *See* Question 3. Thus, a local government may not use PEG fees to pay for the broadcasting services of an audiovisual company.

Question 6
May PEG fees be used for rental payments to lease PEG studio space?

Answer
No. Rental payments made to lease studio space are operating costs, not capital costs, and may not be paid for with PEG fees.

If a local government does not own a PEG studio, it may consider leasing studio space. In most lease situations, the local government will not end up owning the studio,[27] so it is not an asset,[28] let alone a *capital* asset, of the local government. *See* Question 2. Rental payments made to lease studio space are not costs incurred in acquiring or improving a capital asset for PEG access facilities *owned* by the local government, and thus are not capital costs. Instead, rental payments to lease studio space are operating costs to run the business of the PEG facility, and PEG fees may not be used to pay for them. *See* Question 3.

Conclusion
Although the use of PEG fees is restricted under federal law and cannot resolve every budgetary challenge, PEG fees can still be a useful tool to fund facilities and equipment for a local government's PEG channel, delivering valuable programming and content to the community. ML

Notes
1. 47 U.S.C. § 542(c)(2) (2022).
2. 47 U.S.C. § 542(b) (2022).
3. 47 U.S.C. §§ 531(b) & 541(a)(4)(B) (2022).
4. *See e.g.*, Tex. Util. Code § 66.006(b)–(c) (West 2021); Cal. Pub. Util. Code § 5870(n) (West 2022); & 220 Ill. Comp. Stat. 5/21-801(d)(1) (2022).
5. 47 U.S.C. § 542(b) & -(g)(2)(C) (2022).
6. 47 U.S.C. § 522(16) (2022).
7. Third Report and Order on Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, ("Third Report and Order") 34 FCC Rcd. 6844 (2019), at ¶ 33; *see also* ¶¶ 27 & 38 (Review

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INSIDE CANADA

MONICA CIRIELLO
Ontario 2015

Expensive Dinners, Blanket Exemptions, Ashinaabe Water, Intensification, and More

Dinner for Two: $750 Under the Emergency Management and Civil Protection Act
Durham (Regional Municipality) v. Gonsalves-Borrice, 2022 ONCJ 37 https://canlii.ca/t/jm1dp

During the height of the COVID-19 pandemic, an officer with the Durham Regional Police charged the Defendant and three other individuals who were socializing and eating in a car, contrary to the Province of Ontario stay-at-home order. The Defendant disputed the charge.

HELD: Conviction registered.

DISCUSSION: Since March 2020, the Province of Ontario took additional measures to suppress the spread of COVID-19. The Province enacted regulations under the Emergency Management and Civil Protection Act, R.S.O. 1990, c. E.9. O.Reg 265/21 which included a provincial wide stay-at-home order (Order) requiring individuals to remain in their residence unless leaving was necessary. The Order listed a few exceptions, including to "obtain food, beverages, and personal care items." However, attending an organized public event or social gathering was explicitly prohibited under the Order. The onus was on the Defendant to prove on a balance of probabilities that there was an exception under the Order that applied to the charge.

The Defendant did not challenge the observations or testimony of the officer, but rather was under the impression that he was permitted to leave his residence under the Order to obtain food. While the Court agreed with that exception, it rightly pointed out that the Order was "not an invitation for the Defendant and his buddies to grab a meal and hang out." The Court held that the Defendant did not meet the onus, as he was more likely to be an individual socializing in a group rather than an individual who left his residence to get food out of necessity. The Court registered the conviction and upheld the $750 fine.

Court Cannot Grant Blanket Exemption under the Municipal Conflict of Interest Act
Re: Town of Laurentian Hills, 2022 ONSC 705 https://canlii.ca/t/jm3d2
The Town of Laurentian Hills (Town) sought an order from the Court exempting all the Town Councillors from the conflict of interest legislation under the Municipal Conflict of Interest Act, RSO 1990, c. M.50 (Act). The Town claimed that Councillors had a potential conflict of interest with the Town's major employer, Canadian Nuclear Laboratories (CNL). The Court held that it did not have the authority to grant a blanket exemption under the Act and directed the Town to prepare a draft order of potential pecuniary conflicts of interest. The Town failed to do so and instead filed a new notice of motion and sought the same relief.

HELD: Draft order issued with limited exemptions.

DISCUSSION: The Town's new notice of motion meant that the Court was faced with the same issue it had already decided; that it did not have the authority to grant Councillors a blanket exemption under Act. The Court had requested that the Town submit the directed information in preparation of a draft order for the Court to approve. The Town failed to do so, and a court order was never issued. The Court correctly questioned whether a court order was still required as requested again by the Town, given that two years had passed, and Council was not impeded from performing its role. The Court arrived at the same conclusion: that the Town's new notice of motion and proposed exemption was exactly what it could not rule on, namely the fact that an issue may come before Council and may involve a pecuniary interest of CNL is insufficient. The Court signed a draft order for the Town with which outlined limited and specific exemptions based on evidence provided at the original hearing.

No Right to Intervene in Anishinaabe Action for Taking of Water
Iskatewizaagegan No. 39 v. The City of Winnipeg, 2022 ONSC 535 https://canlii.ca/t/jm188
Since 1919, the City of Winnipeg (City) has relied on the water from Shoal Lake as its municipal drinking water. Iskatewizaagegan No. 39 (No. 39) and Shoal Lake No. 40 (No. 40) are Anishinaabe communities locat-

ed in the northwest part of Ontario on the shore of Shoal Lake. No. 39 brought an action for damages claiming that the City violated a 1913 Order in Council (Order) when it took water from Shoal Lake without providing compensation. No. 40 filed a motion to intervene in the action claiming that it has also suffered losses as a result of the City taking and diverting water from Shoal Lake. No. 39 opposed the motion brought forward by No.40.

HELD: Motion dismissed

DISCUSSION: The Province of Ontario granted an Order allowing the City to divert and use water from Shoal Lake as its drinking water source. The Order provided that full compensation must be made by the City to parties whose lands may be "injuriously affected or in any way interfered with" as a result. No. 39 argued that it suffered ecological, financial and cultural losses arising from the City taking the water from Shoal Lake and submitted that no compensation had been provided for these losses. The City and Province of Ontario agreed that No. 39 met the definition of "party" in the Order.

Rule 13.01 of the Rules of Civil Procedure provides that a person who is not a party can bring a motion for leave to intervene if the person claims an interest in the subject matter of the proceeding. No. 40 argued that it had an interest in the subject matter of the claim. The Court disagreed, finding that No. 39's claim is for damages not an action seeking a declaration or a court interpretation. It is a claim for compensation which No. 39 argues it is entitled under the Order and is therefore more of a private dispute, Authorson (Guardian of) v. Canada (Attorney General), 2001 CanLII 4382 (ONCA). The Court was not persuaded that No. 40 met the burden to intervene. Motion dismissed.

Can Legal Counsel Also Be a Witness to the Proceeding? Court Says No.

Goldie v. Kings (County), 2021 NSSC 342 https://canlii.ca/t/jlbs7

The Appellant filed a motion against the Municipality of the County of Kings (Municipality). In response, legal counsel for the Municipality prepared and filed an affidavit which it intended to rely on in the appeal. This resulted in the Municipality's legal counsel being a witness and cross-examined by an Appellant in the matter it is litigating. Legal counsel for the Municipality argued that providing testimony would not compromise the proper administration of justice and should be permitted.

HELD: Municipality must find new counsel.

DISCUSSION: The sole question before the Court was whether legal counsel may represent the Municipality and be a witness for the Municipality in the same matter. Common law provides that a lawyer appearing as both legal counsel and a witness in the same proceeding is a violation of the rules, but does not necessarily require that the lawyer be removed as counsel, Lavender-Smith v. Smith, 2021 NBCA 34. The inherent objective of the aforementioned violation is to preserve the integrity of the justice system.

In reviewing the matter before it, the Court determined that the Municipality retained legal counsel not only to represent it, but also to review, redact and produce thousands of documents on its behalf. The legal counsel's affidavit explained why certain redactions were done and remains the sole individual with the knowledge necessary to testify about the produced documents. The Court determined that in a cross-examination the Appellant would not be limited to asking questions of the affidavit. The Court found that it would be reasonable to expect that legal counsel would have his credibility challenged while on the stand.

Acknowledging the importance of the Municipality's right to be represented by counsel of its choice, and counsel should not be removed unless required to preserve the integrity of the justice system, Harder v. Sartorio, 2020 ABQB 404, the Court found that legal counsel's proposed dual role would create an unacceptable risk to the proper administration of justice and to public confidence in the integrity of the justice system. Legal counsel would have to rely on his own evidence in his submissions and will likely have to comment on his own credibility. Therefore, the dual role would not allow legal counsel to fulfil an obligation of detachment and objectivity to the Court. The Court held that the Municipality must find new legal counsel.

Intensification Does not Invalidate Prior Legal Non-Conforming Use

Belleville (City of) v. Reid's Insulating Inc., 2022 ONSC 714 https://canlii.ca/t/jm4m5

The City brought an application and sought a permanent injunction from the Court to enforce its Zoning Bylaw to prohibit the Respondent from using its property as a storage lot and driveway. The Respondent argued that the property complies with the Zoning Bylaw as a legal non-conforming use.

HELD: Application dismissed.

DISCUSSION: Under the Planning Act, R.S.O. 1990, c. P. 13 (Act) a municipality may enact zoning bylaws that may restrict a landowner's use of its own land. However, if the landowner's use was lawfully established under a prior zoning bylaw, so long as the use is a continuation the Act allows it as a legal non-conforming use. The onus is on the landowner to demonstrate a legal non-conforming use. If the use of the property changes prior to the zoning prohibiting the use, then the exception is lost, *Glenelg (Township) v. Davis* 1992 CanLII 8648 (ONCA).

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LAND USE

ERICH EISELT
IMLA Assistant General Counsel and Director of Affirmative Litigation

Sidewalks and the Takings Clause

Every first-year law student knows that the Constitution prohibits governmental taking of private property for public use without just compensation. But applying that precept across diverse fact patterns can be an elusive exercise.

IMLA is currently involved as an amicus in a Sixth Circuit case testing the parameters of the Takings Clause. *Knight v. The Metropolitan Government of Nashville and Davidson County,* no. 21-6179 (6th Cir. Dec. 13, 2021) involves a city ordinance that conditions the grant of a residential building permit on the landowner's agreement to build a sidewalk across their lot, or make an in-lieu contribution to Nashville's pedestrian benefit fund, based on the length of their road frontage. A homebuilder constructed a residence and paid the fee, while a second landowner declined to build based on the sidewalk requirement. Both challenged the ordinance on Fifth/Fourteenth Amendment grounds. The district court upheld the measure, and the two appealed.

The Standards: *Knight* reignites the continuing debate about the Takings Clause as applied to real property. Numerous precedents are instructive in the case, including a trilogy of now-familiar Supreme Court decisions:

Nollan v. California Coastal Commission, 483 U.S. 825 (1987), involved a California couple who wanted to expand their oceanfront residence, located on a lot between two public beaches. The state's Coastal Commission required that, as a condition of obtaining the building permit, they would have to grant a lateral easement across their land, so that the public could walk along the tideline between the two public beaches. The state's rationale was that, because the new larger residence would further obscure the public's limited view of the ocean, the waterfront easement would restore viewing opportunities. That rationale did not survive Supreme Court review, which found a taking without just compensation.

In *Dolan v. City of Tigard,* 512 U.S. 374 (1994), the owner of an Oregon electrical supply business sought to expand her store and pave the parking lot. The city planning commission conditioned approval of the project on her dedicating land to an adjacent public greenway and developing a bicycle and pedestrian walkway, contending that the larger structure would create additional stormwater runoff and increase congestion for passers-by. This explanation also failed a challenge at the Supreme Court.

And in *Koontz v. St. Johns River Water Management District,* 570 U.S. 595 (2013), an owner desiring to develop 3.7 acres of his wetland property was informed by the water management district that he must either significantly reduce the scope of his project or pay for improvements to property owned by the district several miles away. Again, the Court found this structure to violate the prohibition on the taking of property without just compensation.

What emerged from that trilogy and their progeny are the parameters of permissible governmental exactions: first, the concession or payment required by the government must bear a substantial nexus to the right sought to be exercised by the landowner; and second, that concession or payment must be proportional to the right sought to be exercised.

Two lower court cases help illustrate the application of the nexus and proportionality tests.

The Tree Ordinance: One such decision involves a Michigan tree ordinance. In *F.P. Development v. Township of Canton,* 16 F.4th 198 (6th Cir. 2021), the township passed an ordinance aimed at forest preservation (Ordinance). The Ordinance required a permit for the removal of larger trees, landmark or historic trees, trees within a forest canopy dripline, and so on. While there were exceptions for agriculture and tree farms, and for occupied lots of fewer than two acres, all others had to apply for a permit. Issuance was conditioned on the property owner replacing trees or paying into Canton's tree fund. Each "landmark" tree required replacement with three trees or payment of $450; "non-landmark" trees required replanting one tree or payment of $300.

F.P. Development owned 62 acres in Canton. In 2016, the company divided the property into two parcels, removing 159 trees (14 of which were "landmark"), without a permit. Under the Ordinance, F.P. would have to replant 187 trees or pay $47,898 into Canton's tree fund. F.P. chose neither. It sued under 42 U.S.C. § 1983, claiming that the Ordinance constituted a facial and as-applied unconstitutional taking, in violation of the Fifth/Fourteenth Amendments. (It also claimed an unreasonable seizure and excessive fines, but these were not determinative).

Upholding the district court, the Sixth

Circuit agreed that the Ordinance violated F.P.'s Fifth Amendment rights. The Circuit looked to *Nollan, Dolan,* and *Koontz* for support. F.P. had not challenged the "essential nexus" between Canton's "legitimate" interest in forest and natural resource preservation and the permit conditions, so the court needed only to address the "rough proportionality" prong of *Nollan* and *Dolan*:

> The "required relationship" does not have to be "exacting," but it cannot be "generalized." It must be "rough[ly] proportional[ ]." Of course, "[n]o precise mathematical calculation is required, but the [township] must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[1]

Here, the Circuit found that the township had failed to demonstrate the required "individualized determination":

> Canton has pointed to nothing indicating, for example, that F.P.'s tree removal effects a certain level of environmental degradation on the surrounding area. Nor does it demonstrate whether it considered that F.P.'s clearing of the clogged ditch on its property or its removal of dead trees may have improved the surrounding environment.... At bottom, Canton's support fails to get it over the bar set by *Nollan and Dolan*.[2]

The Roadway Easements: The F.P. court referenced a contrasting scenario where proportionality had been demonstrated. In *Sparks v. Douglas County,* 127 Wa.2d 901 (Wa. 1994), the landowners sought to short-plat various parcels for development. The County conditioned the grant of plats on dedication of easements for rights of way to allow improvements to adjoining public roadways. The property owners sued on the basis of the Takings Clause.

The County prevailed below but was stopped at the Washington Court of Appeals, which found no evidence that the plaintiffs' development of their properties for residential purposes would create greater burdens on the adjacent roadways. On appeal, the Washington Supreme Court reversed. It found that the County's rationale was supported by particularized statistical evidence: the four short-plat parcels would accommodate up to 32 duplex units, generating up to 304 additional average daily vehicle trips. This satisfied the "rough proportionality" needed to justify wider roadways and related enhancements:

> It is undisputed that the developments would generate increased traffic on adjacent roads which are not adequate for safe access under county standards. The County has, in the process of individualized analysis, satisfied the final step of the *Dolan* test.[3]

Another View--Individualized versus General Application: Although the *Knight* district court discussed the *Nollan/Dolan/Koontz* standards, it saw a distinction common to each of those cases that made them inapposite: in each, the unconstitutional action had been taken by an adjudicative body, responding to a specific landowner scenario. In contrast, the sidewalk ordinance was a legislative enactment, applicable generally to all would-be home builders:

> The *Koontz* majority, however, "emphasized the individualized, property-specific nature of the exaction that falls within *Nollan/Dolan*," as distinct from regulations that "apply generally to parcels of land" and, as such, are akin to "property taxes, user fees, and similar laws and regulations." Although the plaintiffs' concerns are certainly understandable, the legislatively imposed Sidewalk Ordinance and alternative in-lieu fee are more in the nature of a tax or user fee than the "individualized, property-specific" exactions at issue in *Nollan, Dolan,* and *Koontz*.[4]

This distinction, said the court, meant that the nexus/proportionality tests did not apply to the sidewalk ordinance. Instead, *Penn Central* applied, requiring a balancing of (1) the economic impact of the regulation on the plaintiffs; (2) the interference with plaintiffs' investment-backed expectations; and (3) the "character of the governmental action"—whether it was a physical invasion or merely an incidental impact arising from a program "adjusting the benefits and burdens of economic life to promote the common good." Under those criteria, the ordinance was constitutional.

The *Knight* Appeal: On appeal, the Nashville landowners challenge the court's application of the adjudicative versus legislative inquiry, arguing that the precedents validating that distinction have now been reversed. They also argue that if the *Nollan/Dolan/Koontz* nexus and proportionality tests are applied, the sidewalk ordinance will fail.

The municipality can point to a wide range of purposes served directly by the building of sidewalks, including a most obvious benefit—reducing the number of people killed while walking on city streets. Nashville believes that its sidewalk program is not only a vital enhancement to the community, but constitutionally sound. IMLA is pleased to support that position. **ML**

Notes

1. F.P. Development LLC v. Township of Canton, 16 F.4th 198 (6th Cir. 2021).
2. *Id*.
3. Sparks v. Douglas County, 127 Wa.2d 901 (Wa. 1994).
4. Knight v. The Metropolitan Government of Nashville and Davidson County, no. 20-cv-0922 (M.D. Tenn. Nov. 16, 2021).

Practice Tips *cont'd from page 25*

Granted in Part, Denied in Part by City of Eugene, Ore. v. F.C.C., 998 F.3d 701 (6th Cir. 2021)).
8. *Id.* at ¶ 36, *citing* Black's Law Dictionary (10th ed. 2014) & Merriam-Webster ("capital asset").
9. *See* Third Report and Order at ¶ 37 & n. 158 (finding that certain types of PEG equipment "often have useful lives of *several years*") (*emphasis* added) & ¶ 36 (finding that capital expenditures "benefit *several accounting periods*" and that capital assets are "*long-term* assets") (*emphasis* added). *See also* Governmental Accounting Standards Boards (GASB) Statement No. 34 (June 1999), at ¶ 19 (finding that capital assets include "land, improvements to land, easements, buildings, building improvements, vehicles, machinery, equipment, works of art and historical treasures, infrastructure, and all other tangible or intangible assets that are used in operations and that have *initial useful lives extending beyond a single reporting period*." (*emphasis* added).
10. Third Report and Order at ¶¶ 27, 32–33, & 38–39.
11. Third Report and Order at ¶ 39 & Alliance for Cmty. Media v. F.C.C., 529 F.3d 763, 784-785 (6th Cir. 2008), *citing* H.R. Rep. No. 98-934, 98th Cong., 2nd Sess. 1984 at 45 (legislative history of the Act).
12. *Id.*
13. *Id.*
14. Third Report and Order at ¶¶ 37 & 39.
15. *Id.* at ¶ 35 & n. 146.
16. *Id.* at ¶ 39 & Alliance for Cmty. Media, 529 F.3d at 784-785, *citing* H.R. Rep. No. 98-934 at 45.
17. Third Report and Order at ¶¶ 27 & 49.
18. Third Report and Order at ¶ 36, *citing* Black's Law Dictionary (10th ed. 2014) ("operating expense").
19. *Id.* at ¶ 36.
20. Third Report and Order at ¶ 41, n. 170; & Congressional Research Service Report, Public, Educational and Governmental (PEG) Access Cable Television Channels: Issues for Congress ("PEG CRS Report"), No. R42044, at 16, (Jan. 4, 2013), Charles B. Goldfarb, https://www.everycrsreport.com/reports/R42044.html (accessed Jan. 31, 2021). *See also* City of Glendale v. Marcus Cable Associates, LLC, 231 Cal. App. 4th 1359, 1362, 1373, & 1388 (2014) (finding that the city improperly and contrary to law used PEG fees to pay for the salaries of employees to record and edit programs to produce the PEG channel's film library).
21. Third Report and Order at ¶ 41, n. 170 & PEG CRS Report at 16.
22. PEG CRS Report at 16.
23. *Id.*
24. Third Report and Order, at ¶¶ 27 & 49.
25. Second Report and Order on Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, 22 FCC Rcd. 19633 (2007) at ¶¶ 11 & 13 (Review Granted in Part, Denied in Part by Montgomery County v. F.C.C 863 F.3d 485 (6th Cir. 2017)).
26. Third Report and Order, at ¶ 40 & n. 166, *citing* 47 U.S.C. § 555(b) (2022).
27. In some situations, depending on the facts, rental payments for a studio under a "capital lease", or "lease-purchase agreement," may qualify as capital costs because this arrangement is a rent-to-own purchase plan, which is usually treated as an installment sale, in which the buyer ultimately takes possession and *ownership* of the property, thus making the "rental" payments essentially installment payments toward a final purchase. Black's Law Dictionary (11th ed. 2019) ("capital lease" & "lease-purchase agreement").
28. Black's Law Dictionary (11th ed. 2019) (defining "asset" as "an item that is *owned* and has value") (*emphasis* added).

INSIDE CANADA *cont'd from page 27*

An intensification of a use can also terminate an existing legal non-conforming use, *Saint-Romuald (City) v. Olivier,* 2007 SCC 57. The Supreme Court of Canada outlined intensification factors that may destroy a legal non-conforming use, including the intensity of the activity which may bring about a change in the type of use, an addition of a new activity, or the new activity creates an undue problem for the municipality or neighbours compared to the previous activity. The City's Zoning Bylaw came into effect in 1987 and all parties agree that it applies to the Respondent's property. The Court was provided with affidavits and photographic evidence from the prior property owner who owned the property from 1975-2010, which provided that the property was used as a storage lot. The City relied on evidence of the neighbours, who had resided at their homes adjacent to the Respondent's property since 2004 to suggest that the storage use was not continuous. In the alternative, the City argued that the Respondent's use of the land had intensified to a "change in kind" which therefore terminated the existing legal non-conforming use.

The Court disagreed, finding that the Respondent had established a legal non-conforming use and it was satisfied that it was continuous, and any intensification had not resulted in a termination of the legal non-conforming use. The City also argued that the Respondent's use of a driveway violated the Zoning Bylaw and ceased in 2009 when the Respondents used the driveway for storage. The Respondent provided the Court affidavits and satellite photographic evidence to demonstrate that the property was always open and used as a driveway. The Court held that whether the use was abandoned was a question of fact and was satisfied that the property owner met the onus to show that the use was continuous. Application dismissed. ML

YOUNG LAWYERS

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Things I Wish I'd Known as a Young City Lawyer

Wow! Where should I begin? I think I really need to go all the way back to law school. I believe law school is the best course of education upon which one can embark. Law school teaches us to look at and process facts differently. It is hard to explain, and it has been mentioned to me on several occasions; lawyers just think differently, and I believe it. The analytical skills a person acquires during a legal education uniquely qualifies that individual for life in general, and more specifically for government life.

While a legal education provides lawyers with a different perspective of analysis, law school (at least my legal education) can fall short in many respects. The most evident and most important shortcoming in typical legal education curricula is what I call the "practicality gap.". By way of example, lawyers learn about the different types of real estate conveyances: fee simple, life estates, conveyances with reversionary clauses, easements, rights of way and future interests, but there is limited access to training on how actually to prepare these documents, and what is done after they are prepared. We know that a deed is the vehicle to convey title to real estate, but students receive no practical instruction on how to prepare a deed or what should be contained in a deed. We learn of metes and bounds descriptions, but probably never encounter one until our first assignment as a city attorney where the municipality wants to acquire or vacate a small section of right of way. We learn in law school the basics of the law concerning planning and platting and zoning, but in practicality do not know the first thing about a plat; what it does or its legal significance.

The mechanics of a litigation practice is another area where I wish I had the benefit of a task-specific and practical education. I am embarrassed to say that I went through law school without taking a clinic class. My mistake. I was so concerned about learning all the substantive aspects of the law that I lost sight of the practicalities and implementation of what I had learned. I think it should be a mandatory requirement that every law student have some clinical experience before being "released into the wild". I had my first jury trial within a year after being licensed. I did not know the first thing about picking a jury, preparing and responding to interrogatories or taking or defending a deposition. These, in retrospect, are essential functions of the job.

I wish I had known just what a complex business it is to operate a municipality. In addition to the obvious: law enforcement, fire, emergency services, water/wastewater, refuse, street maintenance, parks and recreation, and zoning, there are many aspects of local governance that impact the municipal attorney, that are really only learned through practical experience and involvement. Areas such as municipal finance, particularly the sources of municipal revenues and how and under what circumstances such monies can be spent, are complex and are rarely taught institutionally. Bonding and the imposition of taxes are areas where some basic understanding of the process and legal implications would have been beneficial to the inexperienced practitioner of local government law. Before becoming a municipal attorney, I had never set foot in a city council meeting. Boy, was I surprised--and continued to be surprised--as time went on and I realized just how complex the business was, and how little practical knowledge or experience I really had.

The toughest lessons I learned, and the area where I often wished I had better training or a better understanding were in the realm of human resources. As a young municipal attorney, I was suddenly thrust into the role of leader as well. I was responsible not only for practicing law and ensuring that the activities of the municipality were conducted properly; I was also responsible for running a law department. The first major hurdle I had to overcome was how to properly prepare, submit and adhere to a budget.

Having no prior experience and even less training from my predecessor, I quickly learned about municipal budgeting and the budget submis-

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sion and adoption process that was peculiar to the municipality I represented. On top of the budget concerns came the personnel issues. I was not prepared for the challenges involved in managing multiple personalities, all with their quirks and idiosyncrasies. I had a small staff that largely got along, but there were significant bumps along the way. It is one thing to know from a legal perspective the steps and requirements involved in human resource management. It is quite another to actually take those steps. The first time I had to counsel and discipline an employee was one of the most awkward moments of my career. I knew and understood the municipal personnel policy, and I understood the legal issues and ramifications of the actions I was about to take; yet the process of actually taking the action and imposing discipline on a member of my team was most difficult. I realized at that time that I personally had the ability to either positively or adversely affect the lives of other human beings. That feeling never left me and became part of the fabric of my representation of the municipality as well as forming the foundation for advice I gave to elected officials for the next two decades; particularly when the issues of disciplining and dismissing employees from employment were part of the conversation. I wish I had known about the personal cost of employment-related decisions. These costs and considerations go far beyond the legalities and mechanics of personnel decisions learned in law school.

I wish I had known the intensity of politics in local government life. I knew on an intellectual level that local government elections in my state were non-partisan. I came to realize quite soon that local governments were non-partisan in name only. Many of the elected officials I worked for had aspirations for higher office and were voting, supporting initiatives and taking action along party allegiances. Balancing the needs of the municipality, as presented by its staff of experts with the political realities of which party had the majority at any given time was a continuing challenge. Later in my career, when I became *de facto* city attorney for 100+ municipalities, a/k/a State League Counsel, I came to realize that "politics" is even more prevalent and its influence is stronger in smaller municipalities. Some of the most ruthless and cutthroat politicians I have ever known served at the local government level. I wish I had brought to that first job a true understanding of the depth of influence politics has at the local level.

Coinciding with my naivety concerning the politics of local government law was a lack of understanding of the legislative practice. Of course, I was familiar with the mechanics of transforming an idea into a bill and working the bill through both legislative chambers and up to the Governor for signature; but I was totally unprepared for the actual "sausage-making" process that takes place. There were countless committee hearings and delays where one party or the other would adjourn to caucus. There was the inevitable attempt to amend the bill even to the point that it became another idea. There was the endless debate and discussion of the bill and the questions that seemingly come out of nowhere. Finally, the helplessness that you feel when the bill is in the hands of a politician for presentation to the full chamber and who might not fully appreciate the nuances involved in the legislation. At this time, at least in my state, lobbyists and others are generally barred from the chamber floor, so I was unavailable to assist the member in answering questions concerning the bill . It takes great patience, perseverance and dedication to shepherd a bill through this process.

I wish I had fully appreciated the value of a mentor. In my state there are only a handful of municipalities that had full-time city attorneys. For the first few months I really felt alone and isolated. I felt so overwhelmed that I did not know what I did not know.

I was fortunate to have two very competent and "seasoned" city attorneys that were patient with me during my learning process. I will never forget and will always be grateful to Jay Burnham of the City of Farmington and Robert White of the City of Albuquerque. Without them, I would not have survived. Find a mentor and learn as much as you can from them. Trust their instincts, and let their wisdom guide you. It will serve you well in years to come.

Along these same lines is the power of networking. I wish I had known early on about the vast nation-wide network of municipal attorneys. Many of these colleagues have gone through or are going through the same trials and tribulations that you are experiencing. Do not be reluctant to seek out fellow municipal attorneys and ask for help. Put your ego on the shelf. I found out very early that we belong to a unique group of professionals who have no hesitation to help a fellow member of group. All we need to do is ask. Our group is also among the most patient and generous with their time. The people in this category are too numerous to name, but you know who you are. I hope that I can only begin to pay back the enormous debt I owe to members of this special group of lawyers.

Finally, even though research and analytical skills are so important to a legalcareer, what is more important is the ability to translate what we know as lawyers into plain English. A significant amount of what we do as municipal attorneys is to communicate, both orally and in writing, with people who lack the benefits of a legal education. We must do a better job of translating *legalese* into English to be successful in a local government career. ML

AMICUS

By: AMANDA KARRAS,
IMLA Executive Director and General Counsel

Prayer at Midfield: Public Employee Speech and Religion

The Supreme Court's 2021 term is packed with major First Amendment cases for local governments, including: 1) whether distinctions between on/off-premises signs are content based and potentially the definition of "content-based" under the First Amendment (*City of Austin v. Reagan National Advertising of Texas, Inc.*); 2) government speech, forum analysis, and the Establishment Clause (*Shurtleff v. Boston);* and 3) whether the First Amendment restricts the ability of an elected body to issue a censure (*Houston Community College System v. Wilson*). The Court rounded out its First Amendment docket in January by granting certiorari in *Kennedy v. Bremerton School District,* an important public employee speech and religious liberty case.

In *Kennedy*, the Supreme Court will resolve the following questions: (1) Whether a public-school employee who says a brief, quiet prayer by himself while at school and visible to students is engaged in government speech that lacks any First Amendment protection; and (2) whether, assuming that such religious expression is private and protected by the free speech and free exercise clauses, the Establishment Clause nevertheless compels public schools to prohibit it. It is worth noting that the Petitioner and Respondent paint vastly different pictures of the facts in this case. The Petitioner's version, which can be gleaned by the question presented, portrays a high school football coach praying at midfield immediately after each game as conduct that is entirely private and quiet. The Respondent on the other hand, through both words and photographs, depicts a different set of facts, including that while praying, Kennedy was most often surrounded by players and his prayers were fully audible to those around him.[1]

Ordinarily, factual disputes of this magnitude would render a case inappropriate for certiorari. But the Court nevertheless granted the case, and it will likely be argued this term (as of this writing, oral argument has not been set). Although the case arises in the public school context, the Court's holding will have broad implications for all public employers.

Kennedy was an assistant football coach at a Washington State public high school who felt compelled by his religious beliefs to kneel and pray at the 50-yard line immediately after each game. At first, he did this by himself, but over the years, students would join him in the middle of the field while he knelt, said prayers, and gave motivational speeches involving religious themes. The group that joined Kennedy eventually grew to be the majority of the team. At least one parent complained to the principal that his son "felt compelled to participate" in the prayers, even though the student was an atheist, because he worried about his playing time.[2]

The school had a policy entitled "Religious-Related Activities and Practices." Pursuant to that policy, "[a]s a matter of individual liberty, a student may of his/her own volition engage in private, non-disruptive prayer at any time not in conflict with learning activities."[3] Additionally, according to the policy, "[s]chool staff shall neither encourage nor discourage a student from engaging in non-disruptive oral or silent prayer or any other form of devotional activity."[4] The school contacted Kennedy regarding what it indicated was a breach of this policy and told Kennedy that he was free to continue to engage in religious activity, but that activity should not interfere with his job responsibilities and should be "physically separate from any student activity, and students may not be allowed to join such activity."[5]

At first Kennedy complied with this directive, but shortly thereafter, he sent a letter from his attorney challenging it and indicating he planned to kneel and pray at the 50-yard line after the conclusion of the next game, and that he would allow students to join him.[6] Kennedy widely publicized his plan in a number of media outlets and interviews.[7] A Satanist religious group contacted the school district and indicated that it would conduct ceremonies on the field following football games if others were allowed to exercise their religious beliefs on the field after games.[8]

After the next game, Kennedy went to the 50-yard line and knelt and prayed with students, coaches, a state elected official, and other members of the public, who had apparently jumped the fence to get on the field, all joining him.[9] The principal described a chaotic scene after

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the game where students were knocked to the ground as members of the public jostled to get onto the field to pray with Kennedy.[10]

The school district then sent Kennedy a letter telling him that it would accommodate his religious exercise, providing several suggestions on how to do so in private, but that the school could not be perceived as endorsing it.[11] Kennedy's response was through the media indicating that the only outcome he would accept was allowing him to pray on the 50-yard line immediately after games.[12]

Kennedy's behavior resulted in significant disruption at the school, including the head coach ultimately resigning due to concerns about his own safety (resulting from public backlash at the school) and the principal indicating that they "could not supervise effectively" or "keep the kids safe" when the public sought to access the field with Kennedy.[13] The school sent Kennedy a letter indicating he had "failed to follow district policy," "his actions demonstrated a lack of cooperation with administration," he "contributed to negative relations between parents, students, community members, coaches and the school district," and he "failed to supervise student-athletes after games due to his interactions with [the] media and [the] community."[14] The district did not renew Kennedy's contract and he sued, alleging violations of both the Free Speech and Free Exercise Clauses of the First Amendment.

The Ninth Circuit applied *Pickering v. Board. of Education*. to his free speech claim and concluded that when he was engaging in the prayer activity, he was speaking as a public employee and not a private citizen.[15] The court concluded that because he was speaking as a public employee, his speech was not protected, and his behavior was therefore not insulated from discipline under *Pickering* and *Garcetti v. Ceballos*.[16] The court reasoned "his expression on the field—a location that he only had access to because of his employment—during a time when he was generally tasked with communicating with students, was speech as a government employee."[17] The Ninth Circuit also concluded that even if Kennedy were speaking as a private citizen, the school district had an adequate justification under *Pickering* to treat him differently due to the school's Establishment Clause concerns.[18]

The Ninth Circuit also rejected Kennedy's Free Exercise arguments, finding that the district could satisfy strict scrutiny in this case.[19] (The school conceded that the rule was not neutral and generally applicable and therefore under *Church of Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520 (1993), strict scrutiny would apply).[20] The court reasoned that a school's interest in avoiding Establishment Clause violations was a compelling interest and the policy was narrowly tailored because, according to the court, there was no other way to accomplish the objective, particularly given Kennedy's refusal to accept any accommodations offered by the school.[21]

This is the first public employee speech case the Court has taken in eight years and it is therefore significant for all local governments.[22] The Court has consistently recognized that the government is subject to fewer restrictions in the First Amendment context when acting as an employer rather than a Sovereign.[23] The reason for the distinction is that "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services."[24] The Court in *Garcetti* also highlighted the inherent federalism and separation of powers concerns which would result from a contrary holding and create a "new, permanent, and intrusive role" for state and federal courts "mandating judicial oversight of communications between and among government employees and their superiors in the course of official business."[25]

An area of concern for this case is the Petition's focus on job descriptions / duties. In terms of the free speech analysis, the first step in the case will be to determine if Kennedy was speaking as a private citizen on a matter of public concern or if the speech was related to his official duties, which would render it unprotected.[26] In concluding that the employee was not entitled to First Amendment protection in *Garcetti,* the Court reasoned that the employee's speech was as a result of his official job duties.[27] The Court rejected "the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions."[28] Instead, the Court explained that the listing of a task in a job description is "neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes."[29]

In his Petition for Certiorari, Kennedy argues that the district is "restrict[ing] employees' rights by creating excessively broad job descriptions."[30] Specifically, the Petition argues if the Court were to accept the district's claim that "demonstrative communication as a role model for players" is a job duty, then "there is nothing left of the First Amendment rights of" public employers.[31]

This issue has come up previously in this case. Kennedy had sought certiorari on his claims several years ago at the preliminary injunction stage and certiorari was denied. Though they agreed in denying certiorari due to factual disputes, Justice Alito, writing for himself and Justices Thomas, Gorsuch and Kavanaugh also homed in on the issue of job descriptions/duties and an overly broad reading of *Garcetti* as potential issues in this case. In criticizing the Ninth Circuit's decision denying the preliminary injunction, Justice Alito explained:

> According to the Ninth Circuit, public school teachers and coaches may be fired if they engage in any expression that the school does not like while they are on duty, and the Ninth Circuit appears to regard teachers and

coaches as being on duty at all times from the moment they report for work to the moment they depart, provided that they are within the eyesight of students. Under this interpretation of *Garcetti*, if teachers are visible to a student while eating lunch, they can be ordered not to engage in any "demonstrative" conduct of a religious nature, such as folding their hands or bowing their heads in prayer. And a school could also regulate what teachers do during a period when they are not teaching by preventing them from reading things that might be spotted by students or saying things that might be overheard.[32]

Justice Alito went on to explain that *Garcetti* should not be read to allow a public employer to "convert private speech into public speech by creating excessively broad job descriptions."[33]

When the Court denied certiorari at the preliminary injunction stage three years ago, there seemed to be four votes leaning toward Kennedy already. Even without counting votes, this case presents an uphill battle for the school district, particularly given the thorny Free Exercise issues that it presents that are interwoven with the speech issues. IMLA's position is focused on the employment speech context and trying to prevent the Court from expanding liability for local governments as employers. Additionally, as the Court pointed out in *Garcetti,* IMLA has concerns about the federalism implications with having judicial management over public employment issues. ML

Notes

1. Pictures of Kennedy's prayer practice that included most of the team can be found in the Respondent's Brief in Opposition, p. 4, 8, available at: https://www.supremecourt.gov/DocketDF/21/21-418/204295/20211207122626202_21-418%20BIO%20final.pdf
2. Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004, 1010-11 (9th Cir. 2021)
3. *Id.* at 1011.
4. *Id.*
5. *Id.*
6. *Id.* at 1012.
7. *Id.*
8. *Id.*
9. *Id.* at 1012-13
10. *Id.* at 1013.
11. *Id.* at 1013.
12. *Id.*
13. *Id.* at 1013-14.
14. *Id.* at 1014.
15. *Id.* at 1016.
16. *Id.* at 1015-16.
17. *Id.* at 1015.
18. *Id.* at 1016-17.
19. *Id.* at 1020.
20. *Id.* at 1019-20.
21. *Id.* at 1020-21.
22. In *Lane v. Franks,* the Supreme Court held that truthful testimony under oath by a public employee is citizen speech entitled to First Amendment protections even if the content of the speech relates to information learned during the employment. 573 U.S. 228, 238 (2014).
23. *See* Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, 391 U.S. 563, 568 (1968) (explaining "it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general"); Waters v. Churchill, 511 U.S. 661, 671, (1994) (plurality opinion) ("[T]he government as employer indeed has far broader powers than does the government as sovereign").
24. *Garcetti* 47 U.S. 410, 418 (2006).
25. *Id.* at 423.
26. *See Garcetti*, 47 U.S. 410, 421 (2006).
27. *Id.* at 421-22.
28. *Id.* at 424-25.
29. *Id.*
30. *See* Petition, p. 22.
31. *Id.*
32. Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634 (2019) (Alito, J.).
33. *Id.*

Evolving Workplace *cont'd from page 9*

23. Occupational Safety and Health Administration, Department of Labor, COVID-19 Vaccination and Testing; Emergency Temporary Standard, 87 FR 3928 (January 26, 2022).
24. U.S. Dep't of Labor, Occupational Safety and Health Administration State Plans, https://www.osha.gov/stateplans/ (last visited February 4, 2022).
25. 29 C.F.R. § 1902.3(d)(1) ("The State plan shall provide a program for the enforcement of the State standards which is, or will be, at least as effective as that provided in the [OSH] Act.").
26. See, e.g., 46 Minn. Reg. 789 (Jan. 3, 2022); Maine Dep't of Labor, Maine Board of Occupational Safety and Health to Meet on January 18 on OSHA's Emergency Temporary Standard Requiring COVID-19 Vaccination or Testing for Public Sector Employees, (Jan. 3, 2022) ("[T]he U.S. Department of Labor informed the Maine Department of Labor that its requirement will apply to public sector employers in Maine, including state, county, and local governments, and public school systems.").
27. Minn. Dep't of Labor and Indus., Minnesota OSHA suspends enforcement of COVID-19 Vaccination and Testing Emergency Temporary Standard, available at https://www.dli.mn.gov/about-department/rulemaking/minnesota-osha-rulemaking.
28. California Dep't of Indus. Relations, Revisions to the COVID-19 Prevention Emergency Temporary Standards (effective January 14, 2022) Frequently Asked Questions, https://www.dir.ca.gov/dosh/coronavirus/Revisions-FAQ.pdf.
29. S.B. 9, 2d Spec. Sess. (Ala. 2021) (codified in Ala. Code § 25-1-4).
30. *Id.*
31. H.B. 335, 3d Extra. Sess. (W. Va. 2021).
32. Assemb. B. 654 (Cal. 2021) (amending Section 6409.6 of the Labor Code).
33. *Id.*
34. Working for Workers Act, 2021, S.O. 2021, c. 35 – B. 27.
35. https://findstack.com/remote-work-statistics/

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