



# Municipal Lawyer

THE JOURNAL OF LOCAL GOVERNMENT LAW

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Sanctuary for Sanctuary Cities**

**Regulating Drones: What  
Municipal Lawyers Need to Know**

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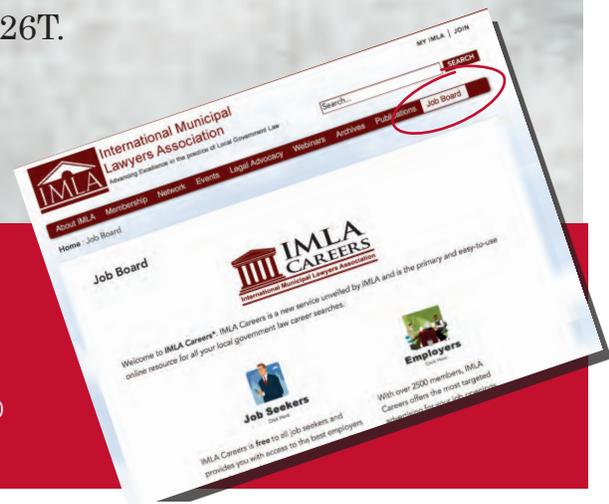
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By: *Erich R. Eiselt, IMLA Assistant General Counsel*

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Dear IMLA Reader:

After six weeks into the 45<sup>th</sup> President's tenure, it is becoming clear that municipal attorneys will have no shortage of new issues to deal with. Already evident is a dramatically changed executive attitude about immigration, border security, gun rights, abortion, transgender issues, environmental protection, school choice, drug laws, business regulation and much more. Many law departments are working overtime to develop strategies which will protect local autonomy against controversial presidential orders. Some of these have already instituted legal action. The courts—in particular the federal judiciary—have rarely been more pivotal in articulating and applying the Constitutional principles that undergird our democratic system.

At the same time, the new administration's pro-American employment policies and promise of a massive national infrastructure program can infuse jobs and dollars into stagnant economies around the country. Here too, municipal lawyers should play a significant role helping to craft the policies and contractual architecture needed to bring these projects to life.

The two features in the March-April *Municipal Lawyer* reflect this duality. One references sanctuary cities and the challenges facing those jurisdictions in the face of threatened funding cuts. The other discusses drones and a newly-simplified regulatory scheme which should enable municipalities to derive ordinances that protect the public while spurring innovation and commerce.

ML also examines the use of foreign driver's licenses on American roads, cases of interest (stateside and in Canada), the career of a peripatetic Ontario lawyer, one city's foray into performance management, IMLA's advocacy efforts and the unwieldy fact patterns that arise on the IMLA ListServ.

We look forward to reconnecting with you at our Mid-Year Seminar next month in Washington D.C.

Best regards-  
Erich Eiselt

## PRESIDENT'S LETTER

### IMLA—Diverse and Forward-Looking



Mary Ellen Bench, IMLA President

**I**t is the year of the Fire Rooster; a new day is dawning and change is here in many ways. 2017 is moving fast!

The meeting of IMLA's International Committee was an amazing opportunity for me to learn more about the outreach IMLA does, and the projects IMLA is involved in with the World Jurist Association and others. I appreciate the insights I came away with, and look forward to the Seminar in April, where Ben Griffith (Griffith Law Firm, Oxford, Mississippi) and Sven Kohlmeier of Berlin, Germany will compare American and EU laws and approaches to data protection in an age of open data, government transparency, cyber theft and individual privacy concerns.

Our new Policy Committee is off to a good start. Douglas Haney (Corporation Counsel, Carmel, Indiana) has undertaken to conduct a survey to ensure that our programming meets the needs of rural and suburban municipalities under 100,000 in population. We have a greater awareness of addressing the issues that our county members face as well. IMLA is working hard to serve you best, and any input you have in this regard is welcome.

Wednesday, March 8th is International Women's Day, recognizing the economic, political and social

achievements of women. The United Nations theme for International Women's day 2017 is "Women in the Changing World of Work: Planet 50-50 by 2030." The International Women's Day 2017 campaign theme is #BeBoldForChange. Change, to ensure women's economic and social empowerment is being championed around the world under the banner of change.

International Women's Day celebrations can be traced back to the women's suffrage movement in the United States and as early as 1909. The actual March celebration has its roots in a celebration that took place on March 19, 1911 in Austria, Switzerland, Germany and Denmark, following a planning session held in Copenhagen in 1910. Either way, it is a longstanding event to recognize and celebrate the women who have served as role models and agents for change in the world, and is now celebrated in over 100 countries. I am pleased to have been asked to participate as a panelist in a discussion that day called ConnectHer, on the topic of increasing women's participation in municipal government.

This year it has special meaning to me as I think of the change that has been achieved at IMLA by women. One role model that cannot be forgotten is Susan Rocha, who was IMLA President the year I joined the Board. Susan took an interest in helping me understand the important role I signed up for. She was a woman who devoted her career to municipal law and inspired change. She was a driving force behind our Vision 20/20, and in shaping IMLA's outreach to all municipal lawyers. Susan's vision for change at IMLA planted a seed that has grown into today's diverse organization that supports all municipal lawyers and encourages us to share our stories, provides a forum for education and advocacy and much more. IMLA embraces diversity in many forms, whether defined by gen-

der, race, geography, age, or those who represent small, large, county or other forms of municipalities. Our passion for the law and for serving municipal government brings us all together. As municipal lawyers we have amazing opportunities to make change happen.

I look forward to seeing you all in Washington, DC and then in Niagara Falls. **ML**

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**OCTOBER 14-18 2017**



# The Tenth Amendment — Sanctuary for Sanctuary Cities

By: Erich Eiselt, IMLA Assistant General Counsel



**THE ORDER:** Five days after taking office, President Trump declared war on American states and municipalities that do not cooperate with Federal immigration authorities. Convening a media event at the Department of Homeland Security (DHS), he signed a new Executive Order titled “Enhancing Public Safety in the Interior of the United States” (Order).<sup>1</sup>

Issued with a related pronouncement labeled “Border Security and Immigration Enforcement Improvements”—which calls for building “a physical wall” across America’s southern border and hiring 5,000 more Border Patrol agents—the Order is intended to fulfill one of Trump’s signature election promises: to remove illegal aliens from the United States. It reprises popular themes from the President’s campaign trail, referencing an imminent risk being visited upon our nation by millions of unauthorized immigrants, ranging from “bad hombres”—drug lords and miscreants who have surreptitiously infiltrated our boundaries—to laborers and graduate students with expired visas:

Section 1. Purpose. Interior enforcement of our Nation’s immigration laws is critically important to the national security and public safety of the United States. Many aliens who illegally enter the United States and those who overstay or otherwise violate the terms of their visas present a significant threat to national security and public safety. This is particularly so for aliens who engage in criminal conduct in the United States.<sup>2</sup>

At the apogee of his campaign, Trump promised to deport all 11 million aliens thought to be on American soil illegally. After the election he refocused on the “two to three million” most dangerous of these.<sup>3</sup> The Order instructs the DHS to “prioritize for removal” criminal immigrants. This is a flexible standard. It covers not only those actually convicted of (or charged with) a crime and anyone who has “committed acts that constitute a chargeable criminal offense,” but also those who “in the judgment of an immigration officer, otherwise pose a risk to public safety or national security.”<sup>4</sup>

That flexibility was broadened in late February, as DHS issued additional policy directives stating that it “will not exempt classes or categories of removable aliens” from deportation, even if their only violation is driving without a license.<sup>5</sup>

Locating and removing such a massive population will require an army of enforcers. The Order directs DHS, through its Immigration and Customs Enforcement agency (ICE), to hire 10,000 additional immigration officers,<sup>6</sup> and looks to augment the federal force with state, county and city police. The Order will “empower State and local law enforcement agencies across the country to perform the functions of an immigration officer in the interior of the United States to the maximum extent permitted by law. . . . Such authorization shall be in addition to, rather than in place of, Federal performance of these duties.”<sup>7</sup>

The Order targets a single species—jurisdictions which “willfully violate Federal law” and are inflicting “immeasurable harm” upon the American people:

Sanctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States. These jurisdictions have caused immeasurable harm to the American people and to the very fabric of our Republic.<sup>8</sup>

The Administration proposes to reverse this unpatriotic behavior through monetary sanctions. It will “ensure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law.”<sup>9</sup>

**THE SANCTUARY CITIES:** The “sanctuary cities” (and counties and states)—are jurisdictions that have chosen—for logistical, constitutional, humanitarian and fiscal reasons—to decline cooperation with federal immigration activities, including those under the Immigration and Nationality Act of 1952, as amended (INA).<sup>10</sup> As outlined in a 2015 Congressional Research Service report, sanctuary policies include restricting police from inquiring into a person’s immigration status; limiting the authority of local police to make arrests for immigration violations; refusing to authorize the sharing of individual immigration data with federal authorities; and declining to honor federal detainer requests that lo-

cal arrestees be held for ICE agents.<sup>11</sup>

There is no specific definition that accords sanctuary status, making the tally of sanctuaries imprecise. According to Center for Immigration Studies (CIS), sanctuary jurisdictions comprise four states that have passed “Trust Act” type legislation (California, Colorado, New Mexico and Connecticut), scores of cities with sanctuary ordinances including New York, Chicago, Los Angeles, San Francisco, Denver and Washington D.C. and hundreds of counties spread across nearly 30 states.<sup>12</sup>

Although “sanctuary cities” and their often-vocal mayors rightfully garner much publicity, the Immigrant Legal Resource Center (ILRC) points out that in reality it is at the county level where INA policies have greater impact.<sup>13</sup> Immigrants to be held under ICE detainers are more often housed at county jails, putting substantial burdens on county sheriffs and jail officials to cooperate (or decline to cooperate) with federal authorities.<sup>14</sup>

According to the ILRC, an ICE compliance report indicates that the vast majority of some 11 million undocumented immigrants in America are located in 168 counties. While 69 of these (primarily in California and Northeast urban centers) do not honor ICE detainer requests, a substantial majority—99 counties located primarily along the Mexican border—do cooperate with ICE.<sup>15</sup> This acquiescence to federal immigration requests is even higher when the national map is assessed. Examining 2,556 counties, the ILRC finds that 1,922 (fully 75%) “will hold immigrants on detainers, willingly violating these individuals’ Fourth Amendment rights.”<sup>16</sup>

**THE SAN FRANCISCO STORY:** Among the more notable sanctuary policies is San Francisco’s, which openly designates itself as “a City and County of Refuge.”<sup>17</sup> San Francisco prohibits the use of its finances or resources to assist in federal immigration efforts or to collect individual immigration data unless required by law or court order:

**SEC. 12H.2. USE OF CITY FUNDS PROHIBITED.**

No department, agency, commission, officer or employee of the City and County of San Francisco shall use any City funds or resources to assist in the enforcement of Federal immigration law or to gather or disseminate information regarding the immigration status of individuals in the City and County of San Francisco unless such assistance is required by Federal or State

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statute, regulation or court decision.<sup>18</sup>

The San Francisco policy also prohibits local law enforcement from honoring civil immigration detainers unless a magistrate has found probable cause that the detainee has committed a violent felony:

**SEC. 12I.3. RESTRICTIONS ON LAW ENFORCEMENT OFFICIALS.**

- (a) Except as provided in subsection (b), a law enforcement official shall not detain an individual on the basis of a civil immigration detainer after that individual becomes eligible for release from custody.
- (b) Law enforcement officials may continue to detain an individual in response to a civil immigration detainer for up to 48 hours after that individual becomes eligible for release if the continued detention is consistent with state and federal law, and the individual meets both of the following criteria:

- (1)The individual has been Convicted of a Violent Felony in the seven years immediately prior to the date of the civil immigration detainer; and
- (2)A magistrate has determined that there is probable cause to believe the individual is guilty of a Violent Felony and has ordered the individual to answer to the same pursuant to Penal Code Section 872.<sup>19</sup>

Sanctuaries such as San Francisco were condemned by candidate Trump on the campaign trail. As an example of what can happen when sanctuary cities ignore the law, he repeatedly cited the tragic and much-publicized story of 32-year old Kathryn Steinle, who was fatally shot in the back in July 2015 while walking on a San Francisco pier. She was killed by Juan Francisco Lopez-Sanchez, a Mexican citizen who had already been convicted of seven felo-

nies and deported from the US five times.<sup>20</sup>

Having again apprehended Lopez-Sanchez on American soil, federal authorities turned him over to the San Francisco Sheriff’s Department on an outstanding California marijuana possession warrant. ICE issued a detainer notice, requesting notification of Lopez-Sanchez’s release and asking that he be held beyond normal release so that ICE could again take him into custody. However, the ICE detainer notice did not reference any active federal warrant, which meant that under San Francisco’s policies, no additional hold was triggered for Lopez-Sanchez.

All parties agree that Steinle’s death was unforgivable and could have been avoided with better coordination between federal and local authorities. But many sanctuary jurisdictions defend their non-cooperation policies as actually enhancing public safety overall. They worry that local law enforcement efforts will be undermined if undocumented residents stop reporting crimes or refuse to assist police for fear of deportation. As Houston Sheriff Garcia explained in rebutting a local bill which would have essentially deputized Houston police to act as de facto immigration officers, “In order to meet our goal of keeping the community safe, I need all people with critical information to be willing to come forward and share it with deputies. I am concerned that this bill would keep or push people and their information further into the shadows, which harms public safety.”<sup>21</sup>

Localities also cite the additional drain on scarce manpower and facilities if they serve as uncompensated immigration agents of the federal government. This is not a hypothetical problem. While the Order instructs the DHS to seek out “Federal-State Agreements” under the INA which would essentially deputize local law enforcement to perform immigration activities, the INA states that no federal funds are to be spent to reimburse localities for their costs in enforcing detainers.<sup>22</sup>

The legislative history behind San Francisco’s sanctuary law reflects just such a concern: its Board of Supervisors determined that complying with immigration detainer requests would require the municipality to redirect scarce local law enforcement personnel and resources—noting that the costs of “responding to a civil immigration detainer can include, but [are] not limited to, extended detention time, the administrative

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costs of tracking and responding to detainees, and the legal liability for erroneously holding an individual who is not subject to a civil immigration detainer,” the Board concluded that “[c]ompliance with civil immigration detainees and involvement in civil immigration enforcement diverts limited local resources from programs that are beneficial to the City.”<sup>23</sup>

**INTERNECINE CONTROVERSY:** In states like New York, city and state officials are united in their hostility to the Order and the Administration’s threat that the flow of federal funds from Washington D.C. could be stopped in retaliation for local intransigence. New York City Mayor Bill deBlasio stated “We think it’s very susceptible to legal challenge. If they make an attempt to pull that money, it will be from NYPD, from security funding to fight terrorism. . . . If an attempt is made to do that, we will go to court immediately for an injunction to stop it.”<sup>24</sup> That resistance is echoed by the New York’s Attorney General, Eric Schneiderman, whose office produced, just days before the President’s signing of the Order, a 20-page primer for New York municipalities titled “Guidance Concerning Local Authority Participation in Immigration Enforcement and Model Sanctuary Provisions.”<sup>25</sup> As Schneiderman puts it “Any attempt to bully local governments into abandoning policies that have proven to keep our cities safe is not only unconstitutional, but threatens the safety of our citizens.”<sup>26</sup>

But such symmetry is not seen everywhere. In Texas, Governor Greg Abbott has demanded that newly-elected Sheriff Sally Hernandez of Travis County (home to state capital Austin) recant her announced refusal to honor ICE detainer notices except in cases of violent criminals, and has threatened her with curtailment of \$1.8 million in funds.<sup>27</sup>

And various state legislatures, unhampered by principles of federalism that constrain the national government, are exercising their prerogative to preempt municipal sanctuary policies. In Virginia, where current law gives local police wide discretion regarding detainees, and despite a veto last year by Governor Terry McAuliffe, the Republican-controlled House of Delegates passed a bill on January 27, 2017 again seeking to require that state and local jailers hold detainees under ICE detainer notices.<sup>28</sup>

Texas is pushing through a more explosive

piece of state preemption, which would waive sovereign immunity and hold municipalities liable for all felony-related damages resulting from any person freed from custody while subject to an ICE detainer request—for ten years following release.<sup>29</sup>

Although some localities are doubling-down on their resistance, as seen in a flurry of newly-minted sanctuary ordinances, not all jurisdictions have stood resolute. On January 25, 2017, Miami-Dade County became the first major municipality to accede to the President’s financial threat, as Mayor Carlos Gimenez announced that the County would no longer serve as a sanctuary jurisdiction and would henceforth cooperate with Federal authorities.<sup>30</sup> Wary of losing out on \$355 million in federal funding the County is slated to receive for 2017, Mayor Gimenez speedily signed his own order, directing his corrections department to begin honoring all requests by ICE to hold immigration suspects in Miami-Dade County jails—while again requesting that ICE pay Miami-Dade’s additional incarceration costs.<sup>31</sup>

**“WILLFUL VIOLATION”:** The Order, and the President’s conversation on the topic, may encourage public perception that sanctuary jurisdictions refuse to cooperate with federal law enforcement, period. The fact is that all state and local law enforcement entities nationwide send the fingerprints of anyone arrested for a criminal act to the Federal Bureau of Investigation (FBI). Since 2008, under the INA’s “Secure Communities” program and its successor, the “Priority Enforcement Program,” the FBI has been forwarding its analyses of those fingerprints to DHS and ICE, which link criminal and immigration data—and look to localities for assistance.

The Order focuses on two specific practices of sanctuaries—reluctance to communicate with federal authorities about unlawful immigrants and failure to hold them as may be requested by ICE in a detainer notice. As discussed below, it is far from clear that either of these practices constitutes “willful violation” of the law.

**1. Communication with Federal Authorities:** One of the Order’s goals is to obtain greater information regarding the whereabouts of undocumented immigrants. It refers to communication directives contained in 8 U.S.C 1373 (Section 1373), and threat-

ens sanctions for non-compliance: Sec. 9. Sanctuary Jurisdictions. It is the policy of the executive branch to ensure, to the fullest extent of the law, that a State or a political subdivision of a State, shall comply with 8 U.S.C. 1373.

(a) In furtherance of this policy, the Attorney General and the [DHS] Secretary, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants. . . . The Attorney General shall take appropriate enforcement action against any entity that violates 8 U.S.C. 1373 . . . .<sup>32</sup>

Contrary to what the public might expect, Section 1373 does not require states or localities to obtain—or even relay—information from private individuals about their immigration status. It simply forbids prohibiting or restricting the provision of such data to federal authorities:

**§1373. Communication between government agencies and the Immigration and Naturalization Service**

(a) In general  
Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official **may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from,** the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.<sup>33</sup> (emphasis added).

Section 1373 has been applied against a facially-violative policy only once. Ironically, in 1996, New York City and then-Mayor Rudy Giuliani challenged the law as unconstitutional because it invalidated a City Executive Order which had expressly prohibited City officers or employees from transmitting information about any individual’s immigration status to federal authorities. In *City of New York v. United States*<sup>34</sup> the Second Circuit held that because Section 1373 did not force New York to transmit data but merely prevented the city from restricting transmission, it was a valid exercise of Congressional preemption: “We therefore hold that states do not retain under the Tenth Amendment an untram-

meled right to forbid all voluntary cooperation by state or local officials with particular federal programs.”<sup>35</sup>

*City of New York* has not been tested at the Supreme Court, and the two cases citing it have not dealt specifically with communication of immigration data.<sup>36</sup> The decision would not appear to cover policies in San Francisco and many other sanctuaries, which do not authorize the collection of such citizenship and immigration data to begin with.

The Order’s threat to punish such jurisdictions based on Section 1373’s prohibitions relating to *transmittal* of data would seem to be subject to serious legal challenge. And, as discussed below, various sanctuary cities are again attacking the very constitutionality of Section 1373 in light of the Order, on the grounds that it impermissibly interferes with state sovereignty and the state’s delegation of authority to its municipalities.<sup>37</sup>

**2. Enforcement of ICE Detainers:** The second alleged “willful violation” cited in the Order is the refusal of sanctuary jurisdictions to honor ICE detainer notices and hold arrested illegal immigrants in local jails for the DHS. Again, the typical citizen might assume that local law enforcement officers are obligated, *carte blanche*, to detain illegal immigrants when requested by the federal government—a misperception that the Administration has done little to correct. The public might therefore be puzzled to discover that the Order’s only sanction for ignoring detainers is a “name and shame” threat, publicizing crimes committed by released detainees and identifying the releasing locality:

(b) To better inform the public regarding the public safety threats associated with sanctuary jurisdictions, the Secretary shall . . . on a weekly basis, make public a comprehensive list of criminal actions committed by aliens and any jurisdiction that ignored or otherwise failed to honor any detainers with respect to such aliens.<sup>38</sup>

Confusion about detainers is not limited to the average American. The language of the detainer regulations under the INA is hardly crystal-clear, and has led to considerable uncertainty at all levels of government. Contained in Section 287 of the INA, the detainer language is a grammatical conundrum. It can be construed to make compli-

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ance voluntary or mandatory:

(a) *Detainers in general.* Any authorized immigration officer may at any time issue a Form I-247, Immigration Detainer-Notice of Action, to any other Federal, State, or local law enforcement agency. . . . **The detainer is a request** that such agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible.

(d) *Temporary detention at Department request.* Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency **shall maintain custody** of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department. (*emphasis added*)<sup>39</sup>

The Section 287 draftsmen might be justifiably criticized for pairing the term “request” with the term “shall.” That duality bred confusion in many states and localities about whether compliance with federal detainers was optional or mandated.

Some jurisdictions took the lead in clarifying the issue. In 2012 Kamala Harris, then California’s Attorney General, issued a memorandum entitled “Responsibilities of Local Law Enforcement Agencies under Secure Communities” program. Harris stated that Secure Communities “does not require California law enforcement agencies to determine an individual’s immigration status or to enforce federal immigration laws.”<sup>40</sup> She was wary of the fact that

immigration detainers could be issued by any border patrol agent—and other categories of ICE employee—“without review of a judicial officer and without meeting traditional evidentiary standards.”<sup>41</sup> She concluded that “individual federal detainers are requests, not commands, to local law enforcement agencies, who make their own determination as to whether to use their resources to hold suspected unlawfully present immigrants.”<sup>42</sup>

While California determined early on that detainer notices did not command state or local cooperation, other jurisdictions had a different interpretation of Section 287. In fact, during 2012 and 2013 federal district courts in Pennsylvania and Tennessee decided that the detainer language was mandatory, requiring local compliance.<sup>43</sup>

The opposite view began to emerge in 2014 from the Third Circuit, in *Galarza v. Szalczuk*,<sup>44</sup> which involved an erroneous ICE-initiated detention of a United States citizen in the Lehigh County (Pennsylvania) jail. That court found that the plaintiff’s Fourth and Fourteenth Amendment rights had been violated by his unwarranted incarceration under a federal detainer notice.

The following month, an Oregon federal district court reached a similar conclusion. In *Miranda-Olivares v. Clackamas County*,<sup>45</sup> Clackamas County, Oregon (County) interpreted an I-247 Detainer Notice to require continued incarceration of Maria Miranda-Olivares (Olivares) who had been arrested for violating a domestic abuse restraining order. Fined \$5,000 for contempt, she ordinarily would have been able to post \$500 bail and immediately leave detention. However, the County read the ICE detainer as mandatory, meaning she would be jailed for 48 additional hours after her normal release date, irrespective of bail.

Ultimately the County sentenced Olivares to time served, then held her under the detainer until ICE authorities arrived. She sued under § 1983, seeking damages based on the County’s policy of enforcing a non-mandatory provision that needlessly incarcerated her for more than two weeks, violating her Fourth Amendment rights. The County sought to avoid *Monell* liability on the grounds that the detainer was mandatory. The court disagreed:

Assuming, as the County argues, that the Immigration and Nationality Act (INA), 8 USC §§ 1101, *et seq.*, occupies and preempts the field of detaining and removing illegal aliens, then the INA would bar the County

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## Sanctuary Cities Cont'd from page 9

from exercising any discretion on the subject . . . However, as explained below, the federal regulation in question, 8 CFR § 287.7, does not mandate detention by local law enforcement, but only requests compliance in detaining suspected aliens. As the Second Circuit posited, albeit without deciding, “if a municipality decides to enforce a statute that it is authorized, but not required, to enforce, it may have created a municipal policy,” subjecting it to *Monell* liability. (citation omitted).

In this case, any injury Miranda-Olivares suffered was the direct result of the County exercising its custom and practice to hold her beyond the date she was eligible for release based solely on the ICE detainer.<sup>46</sup>

Almost immediately after the decision, nine Oregon counties announced that they would no longer honor all ICE requests to hold detainees, joining a growing trend.<sup>47</sup>

That analysis is now permeating other circuits. On January 17, 2017, in *Mercado v. Dallas County*,<sup>48</sup> the Federal District Court for the Northern District of Texas refused to dismiss a § 1983 claim brought by a group of Hispanic men who, like the plaintiff in *Clackamas County*, had been frustrated from posting bond and were held in pretrial detention when they would otherwise have been free to go.

Dallas County had interpreted the INA detainer language as a command to hold the men. In doing so, it was required to draw the (unsupportable) conclusion that the infraction alleged by ICE—violation of immigration law—was a criminal offense, which would give rise to the element of probable cause needed to justify detention. But the Supreme Court has, since at least 2010, made it clear that immigration violations are civil infractions, not criminal,<sup>49</sup> compelling the Northern District of Texas to deny Dallas County’s motion to dismiss.

These Fourth Amendment violations have been costly. In *Galarza*, Lehigh County and the United States settled with the plaintiff for \$95,000 while the City of Allentown paid him another \$50,000. In *Olivares*, Clackamas County settled for \$30,100.<sup>50</sup>

In 2015, DHS replaced its “Secure Communities” program, which had increas-

ingly become the subject of criticism and constitutional challenge, with its “Priority Enforcement Program” (PEP).<sup>51</sup> Significantly, PEP no longer authorized the issuance of a detainer merely for an arrestee—the subject of the ICE request must have been *convicted* of a “high priority” offense.<sup>52</sup> Under PEP, Form I-247 was replaced with successor forms—each of which prominently employ the words “request” and “voluntary:”

Form I-247N “Request for Voluntary Notification of Release of Suspected Priority Alien” **requests** the local law enforcement agency (LEA) to notify ICE of the pending release of a “suspected priority removable” detainee at least 48 hours prior to release, if possible. It does not request or authorize holding an individual beyond the point at which he or she would otherwise be released and requires ICE to identify the enforcement priority under which the individual falls.

Form I-247D “Immigration Detainer-Request for Voluntary Action” **requests** that the LEA hold the priority individual for up to 48 hours beyond the time when he or she would have otherwise been released. ICE must identify the enforcement priority under which the individual falls and the basis for its determination of probable cause. The LEA must serve a copy of the request on the individual in order for it to take effect. (emphasis added).

(As a parenthetical, it should be noted that the Order also requires an immediate reversion to the controversial “Secure Communities” program).<sup>53</sup>

The revised DHS documents and the federal court decisions referenced above indicate without doubt that “sanctuary jurisdictions” need not hold all detainees on behalf of Federal immigration authorities. More significantly, such a practice risks violating the Fourth Amendment.

In sum, despite the rhetoric accompanying the Order, the vast majority of sanctuary jurisdictions are not “willfully violating” any federal law by refusing to collect data about immigrants or to hold immigration violators without probable cause. As one ILRC spokesman stated, “The narrative that has been out there is that these jurisdictions are standing up to the government and are out of compliance with the law, but in fact they

are within the law.”<sup>54</sup> Los Angeles Mayor Garcetti issued a press release along similar lines: “The idea that we do not cooperate with the federal government is simply at odds with the facts. We regularly cooperate with immigration authorities — particularly in cases that involve serious crimes — and always comply with constitutional detainer requests.”<sup>55</sup>

**THE EMPIRICAL EVIDENCE:** The Order states that America is at significant risk from undocumented immigrants—and the sanctuaries that shelter them. The facts are not cut and dried. CIS provides a 2014 DHS report tracking 8,811 detainer requests that were ignored by 276 jurisdictions in 42 states and the District of Columbia.<sup>56</sup> Of that total, 6,397 (73%) had no further arrests for criminal activity, while 2,414 (27%) were subsequently arrested, most often for drug possession and driving while intoxicated.<sup>57</sup> The DHS report cited six significant felonies subsequently committed by this group, although none for murder.<sup>58</sup>

Those statistics will no doubt encourage debate. It seems likely that at least some of these felonies could have been avoided had the detainers—if constitutional—been honored. This discussion is a subset of the larger query—the relationship, if any, between sanctuary policies and violent crime in general. The President has repeatedly asserted that sanctuary cities “breed crime,” without substantiation. While some sources do report such a correlation, a larger number appear to see no crime increase in sanctuaries.<sup>59</sup> And at least one frequently-cited study concludes that sanctuary policies actually engender safer, more prosperous communities:

The data are clear: Crime is statistically significantly lower in sanctuary counties compared to non-sanctuary counties. Moreover, economies are stronger in sanctuary counties—from higher median household income, less poverty, and less reliance on public assistance to higher labor force participation, higher labor-to-employment ratios, and lower unemployment.<sup>60</sup>

**THE CONSTITUTIONAL ANALYSIS:** In attacking sanctuary jurisdictions, the Administration is instigating yet another argument about the parameters of federalism. True, the national government exercises the sole authority to determine who may

enter—and who may be deported from—American soil. As the Supreme Court articulated in a case preempting Arizona’s “S.B. 1070” which purported to vest certain immigration responsibilities in state and local law enforcement, “The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens.”<sup>61</sup>

However, that power does not authorize Congress or the President to “commandeer” state resources to perform immigration activities on behalf of the federal government. The states’ prerogative to resist federal demands to expend their own dollars, manpower or facilities on immigration matters flows from the Tenth Amendment, which provides that “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>62</sup>

Two anti-commandeering precedents are particularly illustrative. In *New York v. United States*,<sup>63</sup> the Court invalidated a federal statute requiring that states enact legislation providing for the disposal of their radioactive waste. In *Printz v. United States*,<sup>64</sup> the Court struck down a provision of the Brady Handgun Violence Prevention Act that required state and local law enforcement officers to perform background checks on prospective firearm purchasers. (In an interesting challenge for the Trump Administration, these decisions were championed by the conservative wing of the Court, with Antonin Scalia having authored *Printz*—making it questionable whether similar commandeering efforts over sanctuary cities would succeed today, even with Justice Gorsuch on the bench).

Just as the Constitution prevents federal authorities from coercing state assistance in immigration matters, it also prohibits the federal government from penalizing noncompliant jurisdictions through the deprivation of funds unrelated to the subject of the noncompliance. The cancellation of all (or even a significant percentage of) federal funding to a sanctuary jurisdiction would almost certainly be challenged as “coercive” activity by Congress, not permissible under the Constitution’s allocation of power to the legislative branch under the Spending Clause in Article I.<sup>65</sup>

In sum, despite the rhetoric accompanying the Order, the vast majority of sanctuary jurisdictions are not “willfully violating” any federal law by refusing to collect data about immigrants or to hold immigration violators without probable cause.

This point was recently highlighted in *National Federation of Independent Businesses (NFIB) v. Sibelius*,<sup>66</sup> where the Court, with Justice Roberts writing the majority opinion, derailed the federal government’s plan to withhold all Medicaid funding from states that refused to agree with an extension of Medicaid under the Affordable Care Act. The Chief Justice described such a threat as a coercive “gun to the head” of the states. *NFIB* involved a potential loss to the states of ten percent of their overall budgets if they did not accede to the Obama Administration’s push for Medicaid expansion. Sanctuary jurisdictions could stand to lose even larger proportions of their budgets if the Order curtailed all federal funding.

*NFIB* also provided two additional hurdles that would obstruct wholesale federal defunding. First, Washington must apprise states and localities, in advance, if the funding they are requesting will be subject to any conditions. Second, those conditions must bear a logical nexus to the funding being threatened.

These legal parameters have not dulled the President’s enthusiasm for using fiscal measures as a carrot and a stick. The *Los Angeles Times* recounts this explication in a prime time White House broadcast on February 6, 2017:

“If we have to, we’ll defund,” Trump said. “We give tremendous amounts of money to California. California in many ways is out of control, as you know.”<sup>67</sup>

If the Constitution will not permit cutting all federal funding to noncompliant jurisdictions, what monies could the Order actually withhold from sanctuaries without

involving Congress?

One source<sup>68</sup> lists only three modest federally funded programs, each administered by the Department of Justice, which could actually be blocked without Congressional approval: The Edward Byrne Memorial Justice Assistance Grant Program (JAG); the Community Oriented Policing Services (COPS); and the State Criminal Alien Assistance Program (SCAAP):

- JAG monies defray various state and local law enforcement expenses, including crime prevention, drug treatment and education programs. In 2016, \$274.9 million in JAG funds were allocated to the U.S. states and territories, according to the Bureau of Justice Statistics.<sup>69</sup> Provision of JAG grants is conditioned upon a state’s certification that it, and sub-grantees within the state including municipalities, are complying with applicable law including Section 1373.
- COPS grants are intended to build trust between communities and law enforcement, by developing innovative policing strategies and funding training and technical assistance to community members and local government. Over the past 5 years, COPS grants have averaged about \$200 million per year.<sup>70</sup>
- SCAAP helps fund local police departments with the costs of housing undocumented immigrants. Although SCAAP was awarded \$210 million in 2016, the program’s website indicates that no funding is being sought for 2017 and the program is not being renewed.<sup>71</sup>

It therefore appears that, even if the Order were properly targeted at a handful of jurisdictions that might be found to violate Section 1373, the President’s unilateral authority to cut funding covers only a miniscule dollar amount. For example, New York City’s annual budget is roughly \$80 billion, of which some ten percent is provided by the federal government; however only \$60 million of that total comes from the grant programs referenced above—a scant .75 percent of the City’s budget.<sup>72</sup>

**THE SANCTUARIES FIGHT BACK:** There is nothing to suggest that the Administration will voluntarily limit its funding cuts. Not willing to passively await whatever pressure the White House may next exert, various jurisdictions have launched immediate preemptive

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# Regulating Drones: What Municipal Lawyers Need to Know

By: Gregory S. McNeal, Professor of Law and Public Policy, Pepperdine University; co-founder, AirMap



In cities across the country, drones are taking flight. According to the Federal Aviation Administration (FAA), 2,000 new drones are being registered with the agency every day, and more than 600,000 commercial operators could be licensed by the FAA by summer 2017, with sales of recreational and commercial drones soaring to seven million in 2020.<sup>1</sup> Over the next ten years, drones will provide billions in benefits to our economy, creating 100,000 U.S. jobs and generating \$82 billion in economic impact.<sup>2</sup>

Cities and counties are on the cutting edge of drone innovation. In Modesto, California, drones assist search-and-rescue efforts and deliver aerial imagery to law enforcement during criminal pursuits. In Somerville, Massachusetts, drones are improving public safety by surveying snow buildup on municipal buildings during the winter. And in Tampa, Florida, drones inspect and monitor port construction projects.

As new uses of drones become part of

everyday life, cities – and the lawyers who guide them – will also be among the first to grapple with how to balance their interest in innovation with their mandate to ensure the safety and security of residents.

Drones are governed by a rapidly evolving legal framework that presents a particular challenge to municipal lawyers. These attorneys are asking: “How can I help my city council or city manager craft drone rules that ensure both innovation and accountability? How can I stay abreast of recent developments? Does my city even have the authority to regulate drones?”

Fortunately, the legal environment for drones is becoming more clear, not less. With the advent of Part 107 (the FAA’s regulations for small unmanned aircraft – drones under 55 pounds), the FAA is beginning to clarify the role that cities will play in ensuring that drones are effectively integrated into community life.

## Know the Categories of Operators

Before Part 107 took effect in June 2016, pilots of unmanned aircraft were required by federal law to operate in one of the following ways: (1) as a “model aircraft” operator; (2) under an FAA exemption for non-recreational flight; or (3) as a public operator. While Part 107 has established a new avenue for drone pilots to earn access to the national airspace, the regulations that created these initial categories remain in effect, at least for the time being.

### **Category 1: Model Aircraft Operators under Section 336/Part 101**

In 2012, the Modernization and Reform Act (Act) was signed into law. Section 336 of the Act charged the FAA with creating regulations to govern “model aircraft.”

That designation, codified as Part 101 by the FAA, outlines strict criteria that now differentiate model aircraft operators from drone operators. In order to be considered a model aircraft operator, the operator must:

- Fly exclusively for hobby or recreation;
- Not operate a drone weighing more than 55 pounds;
- Not interfere with manned aircraft;
- Notify the airport operator and air traffic control tower prior notice to operation when flying within five miles of an airport;
- Register the aircraft with the FAA; and
- Operate in accordance with a community-based set of safety guidelines.

To date, the only set of community-based guidelines recognized by the FAA is the Academy of Model Aeronautics’ safety code. This code prohibits model aircraft operators from flying over people or structures, and in practice, this requirement will oftentimes limit these operators to model aircraft fields and other open spaces. With that said, the vast majority of people who believe they’re operating as model aircraft operators are not aware of the safety code, or choose not to operate within its parameters.

### **Category 2: Section 333 Exemption Holders**

The Act also included a process that created Section 333 exemptions. Those exemptions allowed flight for non-recre-

ational purposes. Before Part 107, Section 333 was the designation used by commercial drone operators to fly. To acquire the exemption, operators were required to obtain a pilot's certificate (i.e. learn to fly a manned aircraft), and an exemption that would specify the circumstances under which these operators could fly.

Despite the introduction of Part 107 and more detailed rules for drone operations, the Section 333 exemption is still in effect for those who received it. However, these exemptions are slowly being phased out. Operators with this exemption are entitled to fly under the conditions of their individual Section 333 exemption until their exemption expires, two years after it was issued.

### Category 3: Public Operators

Public agencies and those operating drones for government purposes can also apply for a Certificate of Waiver or Authorization (COA) from the FAA, defining how and where the drone can be used. This process is labor-intensive, and municipalities should carefully weigh whether it is justifiable for them to become a public operator. Becoming a public operator is an option, not a requirement. The other option available to municipalities is to have their employees pass the Part 107 test. Many cities will find that it is cheaper and easier for them to have their employees take and pass the Part 107 test, and operate municipal drones under Part 107 rules, rather than dealing with the complexity of public operator status.

### Category 4: Part 107 Operators — “The New Normal”

On June 21, 2016, the FAA released Part 107 regulations that govern the use of “small unmanned aircraft,” or drones, under 55 pounds. Part 107 establishes a new pathway for drone operators to access U.S. airspace, whether those operators are flying recreationally or commercially, and whether those operators are public or private.

To become a Part 107 operator, an individual must be 16 years of age or older and pass a simple knowledge test. The overwhelming majority of those who take the test are expected to pass: the FAA has announced that the present pass rate is 91% for first-time takers and they estimate that all test takers will pass on the second attempt.<sup>3</sup>

In return for passing the test and a TSA

## Part 107 establishes a new pathway for drone operators to access U.S. airspace, whether those operators are flying recreationally or commercially, and whether those operators are public or private.

background check, Part 107 operators earn significant privileges. They can:

- Fly any drone weighing up to 55 pounds, up to 100 miles per hour, for any purpose;
- Fly up to altitudes of 400 feet, unless they are within 500 feet of a building;
- Fly anywhere within line of sight; or
- Fly in controlled airspace as long as they have authorization from air traffic control.<sup>4</sup>

These privileges offer significant advantages over the previous operator classifications. Now, any new drone operator has a few options: 1) take and pass the Part 107 test and fly for any purpose (whether commercial or recreational) in nearly any location; or 2) elect not to take the test and be limited to model aircraft rules under Part 101, and thus a restrictive set of community-based guidelines, or (in the case of municipalities) go through the laborious process of obtaining public operators status.

It should come as no surprise that more than 16,000 people have taken and passed the Part 107 test to date.<sup>5</sup>

### Are Part 107 operations the same as commercial operations?

Part 107 operations are often incorrectly referred to as “commercial operations.” While Part 107 certainly allows the operator to conduct drone flights for business purposes, a pilot with a Part 107 certificate may operate for *any reason*, whether recreational or commercial.<sup>6</sup>

In fact, classifying operators as

either commercial or recreational is not a particularly helpful way to think about the drone ecosystem, and municipal attorneys should caution their city council against making such simplistic distinctions. Part 107 offers privileges that either kind of operator will want to take advantage of. Moreover, commercial and recreational flights are indistinguishable from one another from the ground. Hobbyists and commercial drone operators often use the very same drone for their flights. That drone may be used by one operator to conduct a building inspection, and by another to film a ski trip. A person may be taking photos of a home for fun or for a real estate sale. The passing police officer or a neighbor will have no idea what the purpose of the operation is. Similarly, the drone may be in the exact same location, at the same time, flying in the same manner. The purpose of the operation is immaterial to the issues that it may raise in a community.

Because of this reality, local ordinances that make commercial and recreational distinctions are doomed to fail. Operators with a Part 107 certificate may be irresponsible, but if a local ordinance makes a carve-out for commercial operators, those operators may have a defense merely because they took and passed the Part 107 test. In short, the simple retreat to making a commercial versus recreational distinction will not solve any of the problems that a municipality may be concerned about. Rather, a municipality should focus on reasonable time, manner, and place rules.

Municipal lawyers, city councils, and other local stakeholders should avoid equating Part 107 operations with commercial operations, as these classifications will have very little meaning in the future of drones.

“Part 107 is not the “commercial” rule. It is the visual line of sight rule. Recreational operators may fly under part 107, and they likely will because it gives them more privileges. Distinctions between recreational and commercial are vestiges of our old rules. Part 107 is the new normal and is the future.”

-Earl Lawrence,  
FAA UAS Integration Office, 2016

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**Category 5: The “I Don’t Know, Don’t Care” Operator and Creating a Culture of Accountability**

While in law there are four distinct categories of operators, in actuality there remains a fifth operator– the “I Don’t Know or Care” (IDKOC) operator.

This is the operator who gets a drone for Christmas, opens the box, and immediately starts flying. For municipal lawyers, this is the operator that makes you squirm in your seat. The IDKOC operators may believe they are model aircraft operators, but they fail to obey the safety code. They may fail to provide notice to the nearby airport. They may choose to fly where prohibited - above 400 feet, or over people, structures, or objects, recklessly endangering others.

The reality is that some operators don’t follow the rules, whether it’s because they weren’t aware of the requirements or simply chose to ignore them. Not all IDKOC operators are bad apples. While it’s not a defense, some may not have understood the rules or were discouraged by the perceived complexity of the process.

The key for regulators – whether local, federal, or somewhere between – is to empower operators that want to follow the rules, and help those who don’t know and don’t care learn how to act as responsible members of the community. In order to make this possible, the rules must be clear, accessible, and easy to follow.

Thanks to advances in technology, today’s drones can already access detailed information about where they can and cannot fly, from nearby airspace restrictions and infrastructure (prisons or schools, for example), to real-time information about wildfires, presidential visits, or community events. Drone operators also have the ability to provide their location and flight information to airports with just a tap from digital applications – making notification a seamless process and thus, encouraging compliance with rules. This is a technology we can all imagine being implemented by cities to facilitate local rules, should they choose to do so.

Fortunately, the operators that cities want to empower – the roof inspectors, the realtors, the journalists and photographers – already want to fly responsibly. They understand that following the rules is one of the keys to a long and success-

ful career in the drone industry. If cities make the rules clear, simple, and accessible, these operators will do their best to follow them.

**Best Practices for Municipal Lawyers**

Municipal lawyers are in a position to help ensure that drone rules are easy to implement and easy to follow. Already, local attorneys are beginning to receive direction from their city councils and city managers that they should craft local drone ordinances. Before a foray into the world of drone regulation, municipal lawyers should consider the following:

**Does the FAA and Part 107 preempt local regulation?**

Part 107 represents the minimum federal rules that govern drone operations. To date, the FAA has chosen not to issue a blanket preemption of local regulation, instead addressing preemption issues on a case-by-case basis. The FAA has pointed to “land use, zoning, privacy, trespass, and law enforcement operations” as areas that are typically outside the scope of federal regulation and potentially appropriate for local rules.<sup>7,8</sup> While this may seem vague at first glance, in the next section, we’ll identify pitfalls that municipal lawyers should avoid when crafting rules and best practices to avoid Federal preemption.

**How can municipal lawyers craft enduring ordinances?**

First, ensure that the requirements of any local ordinance avoid issues that are clearly preempted by federal regulation. Cities should:

- Avoid any laws related to equipage of the aircraft.
- Avoid any laws related to knowledge testing or training.
- Avoid regulating any airspace that can be deemed as navigable airspace for manned aircraft.
- Avoid laws that are so difficult to comply with that they amount to a prohibition on operations.

Examples of drone rules that are likely to be preempted include:

- Outright bans on drones.
- Limiting drones to narrow bands of airspace, such as 100 feet above the

ground.

- Requiring a flight permit that is subject to a lengthy approval process of multiple days or weeks.
- Requiring that drones have certain types of equipment like transponders or “geofencing.”
- Requiring that operators in the city take a flight test.

In addition to these pitfalls, cities should consider the following best practices when crafting local drone rules:

**Focus on areas of traditional local authority:** Cities have substantial authority if they stay focused on regulations enacted with the stated purpose of protecting public safety, public health, aesthetics and general welfare—all regularly found to be a legitimate exercise of a state’s or municipality’s police power.<sup>9</sup> When thinking of how to draft rules, municipal lawyers should focus on a city’s traditional police power in areas such as land use, zoning or law enforcement. Think in terms of how the police power allows for reasonable time, manner, and place restrictions on even protected constitutional conduct like free speech, and consider applying this to where drones may take off and land, rather than creating outright bans on the overflight activities of the drone. Another way to think about drafting rules is to focus on the conduct of the operator rather than the flight of the drone.

**Leave room for flexibility:** Effective drone ordinances recognize that requirements may change over time, rather than setting specific restrictions for specific areas. One approach is to craft an ordinance that states a set of “reserved powers” that may be implemented at a future date and time (permitting, notice requirements, etc.) For example, local authorities may think prohibiting drone takeoff and landing on public school property is a good idea – but may not realize that the school may want to fly a drone for science class or building maintenance. Or an airport runway may not be the right place for a drone – until an airline requests permission to use one to inspect a plane after a lightning strike. Enacting a flexible set of rules, rather than prescriptive set of rules, can allow for rules to evolve.

Cities may also consider how the

flexibility to implement rules through administrative procedures, rather than through the ordinance itself, may provide benefits. In doing so, they can ensure the evolution of drone rules according to the needs of the city, without requiring the passage of a new ordinance or hampering local innovation.

**Make communication easy (and digital) for both operators and administrators:**

For tech-savvy drone operators, paper permits or lengthy waiting times are likely to discourage responsible pilots from following the rules. Flight notices (the who, what, when, and where of a flight) can be delivered and processed digitally with existing technology, while requirements about when and where is safe to fly can be posted to a city's website or delivered via an app or online map. (Full disclosure: AirMap, the company I co-founded, provides some of these services to cities).

**On the Regulatory Horizon:**

While drone regulation evolves rapidly at the federal level, it also follows a clear timeline of expected milestones. Over the next three years, municipal lawyers should watch for three developments in drone law.

**Flights over people:** At the time of this writing, the FAA has yet to publish its rules for flight over people. In the spring of 2016, the FAA's advisory rulemaking committee convened to discuss this issue and publication of the rules were expected to be announced before the end of 2016. Shortly thereafter, on January 6, 2017, Michael Huerta, Administrator to the FAA, spoke at the Consumer Electronics Show (CES) in Las Vegas, and noted various safety and security concerns. Those concerns specifically focused on the challenges law enforcement faces in identifying who is operating a drone. Those concerns postponed the publication of their rules.<sup>10</sup> Despite the delay, Mr. Huerta confirmed his commitment to advancing the rulemaking process for flight over people, working with both interagency partners and industry stakeholders to "ensure drones can fly over people without sacrificing safety or security."<sup>11</sup>

Earlier this year, I participated in a task force assembled by the FAA – MICRO ARC – that was asked to recommend reg-

ulations that would allow an unmanned aircraft to fly over people not involved in the aircraft's operations. The drone manufacturers, operators, consensus standards organizations, researchers and academics on the task force suggested the following general recommendations (among others):

- Certain small drones should require no additional operational restrictions beyond Part 107
- Larger drones may require mitigation techniques and coordination with local authorities prior to flying over people
- To fly over crowds, the operation must be conducted in accordance with a documented risk mitigation plan

The proposed rules will be released soon, and municipalities may want to consider commenting on the rules to ensure their input is included. Regardless of whether the FAA implements these regulations, the passage of new rules for flight over people will mean that flights in populated areas will become far more common, and will become a matter of concern for municipal attorneys.

**Beyond Visual Line of Sight (BVLOS):**

While Part 107 currently requires flights to be within the visual line of sight of the operator, when we think of the not so distant future, beyond visual line of sight (BVLOS) operations will become the norm, not the exception to the rule. Currently, under limited circumstances, the FAA has begun to administer waivers for BVLOS operations. On December 28, 2016, for example, the FAA approved a certificate of authorization for oversight of BVLOS operations at the Northern Plains UAV test site in North Dakota.<sup>12</sup> The FAA is currently operating on a timeline that will allow for regular BVLOS operations by 2020, with regular shorter range operations (where the operator can't see the drone, but can see the sky) as soon as 2018. In short, the present ways in which municipalities think about drones will quickly give way to new technologies and newer, more permissive federal rules.

\* \* \* \*

As these regulatory milestones become reality, drones will become more

common and more important to cities and their citizens. Municipal attorneys will be responsible for crafting laws that protect residents, while ensuring that cities benefit from the contributions drones will make to our economy and society. Fortunately, this is a perfect time for cities to act: the regulatory environment is becoming clearer, and the expansion of drone technology is only beginning. My advice to municipal attorneys: for drones operated by residents, start with a common-sense and flexible ordinance that focuses on time, manner, and place restrictions and your city will be well-prepared to make the most of the drone opportunity. For more resources on how to craft an ordinance or for insights into how to create rules for drones operated by municipalities, feel free to contact me at [greg@airmap.com](mailto:greg@airmap.com).

**Notes**

1. ALINA SELYUKH, "FAA Expects 600,000 Commercial Drones in The Air Within a Year," NPR, (August 29, 2016) <http://www.npr.org/sections/thetwo-way/2016/08/29/491818988/faa-expects-600-000-commercial-drones-in-the-air-within-a-year>; see also JOAN LOWRY, "FAA Faces Big Drone Demand," TIMES UNION, (September 16, 2016) <http://www.timesunion.com/news/article/FAA-faces-big-drone-demand-9228572.php>.
2. Fact Sheet: New Commitments to Accelerate the Safe Integration of Unmanned Aircraft Systems; <https://obamawhitehouse.archives.gov/the-press-office/2016/08/02/fact-sheet-new-commitments-accelerate-safe-integration-unmanned-aircraft>
3. Huerta, Michael, Drones: A Story of Revolution and Evolution, Consumer Electronics Show (January 6, 2017), [https://www.faa.gov/news/speeches/news\\_story.cfm?newsId=21316](https://www.faa.gov/news/speeches/news_story.cfm?newsId=21316).

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related to technology, law and policy and previously worked in a city law department. He was appointed by the Secretary of Transportation to serve on the UAS Registration Task Force and was appointed by the FAA Administrator to serve on the Micro UAS Aviation Rulemaking Committee.



## PRACTICE TIPS

# Performance Management Systems

By: Sherrie Farstveet, Law Office Administrator, Arvada, Colorado

Many cities across the United States and Canada have been involved with developing performance management systems. Although referred to by different names such as “performance metrics” or “performance-based budgeting,” these systems build a framework for aligning the City Council’s objectives and the day-to-day activities of the organization. Performance management systems link the annual allocation of resources to the achievement of results that are measured in definable service levels. These systems generate data that allows program managers to shift resources in order to achieve results that are expressed in both qualitative and quantitative measures.

In summary, these systems are the foundation for building a data-driven, results-oriented, customer-focused and responsive local government organization.

### Performance management systems:

- Link the customer experience and customer service to the level of budgeted resources;
- Provide taxpayers with reports summarizing the results generated by the allocation of public funds;
- Allow elected officials to make a business case based on the impact of their decisions; and
- Provide the best information to hold the city manager and his/her entire organization accountable for their performance.

“Elite” local governments utilize per-

formance management systems to measure, track, and report performance and use this information to achieve the community’s highest priorities.

### THE ARVADA EXPERIENCE

In 2011, Arvada, Colorado’s City Council hired a new City Manager who instituted a performance based budgeting (PBB) system called “FOCUS.” In 2013, the City Manager created and filled a position titled Performance Budget Manager. All departments within the City, including the City Attorney’s Office, took time to identify issues on the horizon and create performance measures to address these issues. The City also implemented a robust software system to input and monitor performance and budget data.

As an internal service department of the City of Arvada, the City Attorney’s Office was tasked with developing a variety of performance measures. It was a challenge to determine which measures would not only reflect the work accomplished but, even more importantly, would demonstrate the impact of that work on our clients. In other words, what performance measures would be meaningful to both our office and to our customers?

This is a challenge facing many departments within a municipality. When attempting to implement such systems it is common to hear the following:

1. “We can’t measure that.”
2. “We don’t have customers.”
3. “Our attorneys won’t like this.”
4. “We are just counting things to make the City Manager happy.”

Some examples of the Arvada City Attorney’s Office measurements in 2014 through early 2015 included:

- Number of prosecution cases reviewed and processed;
- Number of pretrial conferences conducted;
- Prosecution matters resolved within plea bargain guidelines;
- Number of prosecution related motions prepared, reviewed and filed with the municipal court;
- Percentage of prosecution cases involving juvenile offenders evaluated for alternative sentencing programs;
- Number of claims responses provided;
- Number of lawsuits managed;
- Number of federal, state and administrative filings completed;
- Number of client legal inquiries handled by CAO attorney staff;
- Number of attorney-client communications provided;
- Number of contracts written or reviewed;
- Number of resolutions and ordinances written;
- Number of liens prepared; and
- City Council, board, and commission decisions complying and/or not complying with legal advice.

Once such performance measures are created, the team celebrates and hopes that their work is complete. What really happens is the realization over time that performance measures:

1. May not focus on the customer experience;
2. May not be important to the department;
3. May be counting for the sake of counting;
4. May have targets that are too easy or too difficult to achieve; or
5. May just be invalid or inaccurate measures.

After considerable reflection, the City Attorney’s Office modified various of the measurements listed above-or discontinued them entirely-because they did not yield the customer impact information that is a crucial aspect of PBB. Finally, in mid-2015, after crafting and re-crafting performance measurements, the City Attorney’s Office began sending client satisfaction surveys so that we could gain feedback directly from our customers.

The survey requests are delivered to clients through a Google Form and the responses submitted anonymously. Clients provide a rating of 1 to 5 (from lowest to highest) on the following topics:

The IMLA Legal Assistant Section and Listserv is a recently-organized group of professional Legal Assistants. The group was formed to provide an opportunity for all legal professional staff, including

detail to the Oklahoma City Bombing Prosecution Team and for nearly two years with the United States District Court in Colorado as a Judicial Assistant. Sherie is married and has three sons and one grandson. Sherie is the Chairperson for the IMLA Legal Assistant Section.

<b>SURVEY TOPIC</b>	<b>CUSTOMERS/CLIENTS</b>
<b>Effectiveness of prosecution</b>	<b>Municipal Judge, relief judges, court staff, police officers</b>
<b>Effectiveness of legal training</b>	<b>Training attendees</b>
<b>Effectiveness of litigation</b>	<b>Customers/Clients</b>
<b>Effectiveness of legal advice and counsel</b>	<b>Leadership team members, managers, staff</b>
<b>Timeliness, accuracy and completeness of legal documents</b>	<b>Leadership team members, managers, staff</b>

The City Attorney's Office goal is to "Strive for 5" on the surveys. We are finally, because of the survey responses, better able to determine the impact of the services we provide to our clients. We utilize this data in quarterly STAT meetings, where we discuss performance measure progress with the City Manager, Deputy City Managers, Performance Budget Manager, Deep Divers, and the Core STAT Team. Enhancements and/or changes to performance measures are reviewed during these meetings.

Will we continue sending out this type of customer survey indefinitely? For now, we appreciate the feedback we receive from our clients and rely on that feedback in making sure we are serving the City of Arvada in the best way possible.

**Next steps in the Arvada journey will include:**

1. Breaking down silos to create cross-departmental performance measures between the City Attorney's Office, Police Department and Municipal Courts. This is an important step given that none of us works in a vacuum. Having a better understating of the intersection points between our departments will enhance internal and external customer service.
2. Implementing process improvement initiatives. The City has a team of Ninjas trained in Lean principles who will work in collaboration with the City Attorney's Office to streamline and document processes in order to be consistent and reproducible.
3. Annual review of performance measures to ensure validity and relevance.

**We will keep you apprised of our progress.**

About IMLA's Legal Professional Assistant Section and ListServ:

legal administrators, office managers, paralegals, legal assistants, and specialists to brainstorm, network, and share experiences and resources. We believe we can work together to identify ways in which law offices can improve the use of legal assistants to increase productivity and reduce costs, in the same manner that the medical profession makes excellent use of para-professionals to be more effective. We hope this IMLA Section can advance the profession both for lawyers and legal assistants.

Please join the Legal Assistant list-serv [http://lists.imla.org/mailman/listinfo/legalassistant\\_lists.imla.org](http://lists.imla.org/mailman/listinfo/legalassistant_lists.imla.org)

For more information, please contact Sherie Farstveet, Law Office Administrator for the City of Arvada, Colorado via email ([sfarstveet@arvada.org](mailto:sfarstveet@arvada.org)) or phone (720) 898-7188 for more information.

Thanks to Kelley Hartman, Performance Budget Manager for the City of Arvada for her assistance on this article. Prior to her work with the City of Arvada, she was the CFO for a division within the State of Colorado, Director of Student Retention at Regis University, Director of Client Development at Sloans Lake Managed Care and an Occupational Therapist. Kelley holds a BS in Occupational Therapy from Texas Tech University MBA and MSA from Regis University. Kelley and her husband are longtime residents of the City of Arvada.



**Sherie Farstveet** is the Law Office Administrator for the City of Arvada, Colorado. Sherie has worked for Arvada for 15 years. Prior to working for the City Attorney's Office, Sherie worked for ten years with the United States Attorney's Office in Denver, including an 18-month



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**APRIL 21-24, 2017**



## Recent Decisions of Interest: From Nova Scotia to British Columbia and Elections to Marijuana. . .

By Monica Ciriello, Ontario 2015

### Elections: Why Can't Candidates Accept Election Defeats?

**Oh v. Langley (City), 2017 BCCA 43 (CanLII)** <http://canlii.ca/t/gx9r2>

**M**s. Oh (Appellant) unsuccessfully ran for a City Council seat in a by-election in the City of Langley (Respondent). The successful candidate was elected with 740 votes, while the Appellant received 57 votes. Following the election, the Chief Election Officer completed a report on the election finding “no fraud or irregularities.” The Appellant sought an order under s. 153 of the *Local Government Act (Act)* declaring that the by-election results were invalid because it was not conducted in accordance with the *Act* and sought a judicial recount under s.148 and s.145. The Respondent argued that the Appellant was beyond the nine-day statutory requirement for a judicial recount. The Court agreed and dismissed the Appellant’s petition. The decision was appealed.

**HELD:** Appeal dismissed.

**DISCUSSION:** The Appellant argued that over 100 residents in the City had voted for her, but they did not count in the election results and that the chambers judge had dismissed this evidence. The Court concluded that the Appellant’s evidence was her personal expectation

to receive over 100 votes. When she received only 57 votes, she concluded fraud must have occurred. The Court found that the chamber was accurate in finding the Appellant’s evidence unreliable to conclude any wrongdoing by the Respondent under the *Act*. In addition, the Court held that even if the evidence was reliable, the Appellant failed to demonstrate that the chambers judge erred in accepting the Respondent’s argument that the petition was filed more than nine days after the close of general voting. Concluding that the chamber judge did not err in its findings, the Court dismissed the appeal.

### Marijuana: Cannabis Dispensary’s Challenge to City Zoning Bylaw Goes up in Smoke

**Abbotsford (City) v. Mary Jane’s Glass & Gifts Ltd., 2017 BCSC 237 (CanLII)** <http://canlii.ca/t/gxhkj>

The sole operator of Mary Jane’s Glass and Gifts Company (Operator), a medical marijuana dispensary located in the City of Abbotsford (City) submitted two separate business licensing applications to the City for the premises. The first application described the business as a medical cannabis retailer and the second described the business as a glass products and gifts retailer. A City licensing inspector contacted the Operator, provided a refund for the first application and sought confirmation that the first application would be

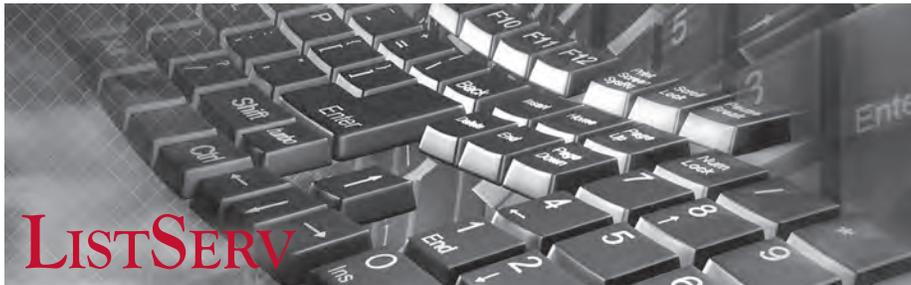
withdrawn; as the City does not issue business licences for uses that are not permitted under the zoning bylaw—the retail sale of cannabis is unlawful and operating without a licence is an offence.

Municipal officers attended the premises a few weeks later and observed the medical marijuana dispensary in operation with no business licence. The City brought a petition before the Court seeking a declaration that the Operator was in breach of the City’s zoning and business licensing bylaw. The Operator raised a constitutional question arguing that the City’s bylaws were of no force and effect, as both infringed on s.7 and s.15 of the *Canadian Charter of Rights and Freedoms* and part 1 of the *Constitution Act, 1982* by restricting access to medical marijuana. The Attorney General of British Columbia appeared to address the constitutional matter.

**HELD:** City’s zoning and business licensing bylaws are valid and enforceable and the Operator’s constitutional argument is dismissed.

**DISCUSSION:** The Court began by assessing the validity of the City’s business licensing bylaw and zoning bylaw to determine if the Operator was operating in contravention of the municipal regulations. The City’s business licensing bylaw indicates that unless a business fits into an exemption, every business is required to have a licence to operate within the City and operating without a licence is an offence. The Court found that the Operator’s business did not fit into an exemption and the Operator did not have a licence to operate. The City’s zoning bylaw outlines the permitted land uses in specific areas of the City and specifies that no one shall use any land in an unspecified manner. The premises where the Operator is located is zoned City Centre Commercial which does not permit “the retail sale of cannabis or cannabis products or related uses.” The Court was satisfied that the City proved on a balance of probabilities

*Continued on page 28*



## Who Says No to More?

By: Brad Cunningham, City Attorney, Lexington, South Carolina

Yes, I have borrowed the above title from a television commercial. We have all seen it. The kid gets one more birthday present, but says “No thanks!” The business worker gets raise but refuses it. Each act leaves the offeror confused and puzzled. After all, indeed, who says no to more?

Well, a real life example of the subject arose in an IMLA Listserv discussion not so long ago. A colleague sent the following request for input:

“An employee who will become eligible for overtime under the new rule adamantly desires NOT to be paid any overtime. Nor does (s)he want his/her salary raised to meet the new threshold.... Has anyone faced such a scenario... Or have dire warnings of such?”

“Adamantly” desires not to be paid overtime? This reminds me of Demi Moore in *A Few Good Men*: “Your honor, the defense *strenuously* objects.” “Strenuously? Really Jo?” So, if the employee only politely objects, you can ignore him/her? Does the adjective really make any difference?

The issue provoked a lively discussion of the potential reasons for such a request, and offered a few options or alternatives. It also evoked memories of an episode of *Gomer Pyle, USMC*. In that episode, Sgt. Carter jumps all over Pyle for being slack, and at one point tells him he should feel bad for accepting all of his pay this month because he hasn’t done a decent day’s work all week. Taking the criticism and suggestion to heart, once the Paymaster gives

Pyle his loot, Pyle counts out a certain sum and gives it back. Of course, the Paymaster reacts like the folks in the aforementioned commercial, and tells him he has to accept it. Pyle refuses and walks away.

What ensues is a calamity of scenes where each level of Government tries to figure out what to do with the money Pyle returned. At each step along the way, a Government official ponders the situation and reaches the same conclusion that “This Pyle is either very conscientious or he’s a nut!” Not knowing what to do in such an unprecedented situation, each official pushes the matter up the chain until it reaches from Camp Henderson all the way through military channels to the Pentagon.

All sorts of trouble ensues, and the “twist” comes when the General congratulates Carter for instilling such an attitude in his recruits, and Gomer offers to work “extra” to earn the money back. But, was it worth all the trouble? Our Listserv example and the responses evoked were pretty decent comparisons to Gomer’s saga. What does an employer do with an employee who doesn’t want to earn more money, even though the law requires it?

The City probably wishes it could clone workers with such an attitude, but soon the troublesome issues came forth. The first suggestion was to have the employee donate the money back to the city along with a clearly written waiver indicating the voluntary nature of the act. Or, it was suggested the employee could be advised (s)he could

take comp time up to the maximum number of hours, but then not use it. But, each suggestion met with regulatory problems and potential legal compliance issues.

The doubters felt there might be some sort of tax avoidance or child support issue at hand, i.e., “I don’t want to make more because somebody else is going to want to get it.” As I remember the Internal Revenue Code, receiving the money and then donating it doesn’t negate the fact that YOU received it and owe the tax—and assume other ramifications of the income. Regardless of its ultimate destination, you received it and controlled the decision. That’s the definition of income.

Most responses felt the act, be it altruistic or not, was worth more trouble than it caused and the masses generally concluded it was in the city’s best interest to just pay the employee as the law required. Too many implications arose, including potential non-compliance with the FLSA among them. “Law beats personnel preference in my book,” concluded one contributor.

Furthermore, if the employee were truly altruistic, as one contributor suggested, (s)he could donate the money after receiving it and accomplish the mission. “Why do you NOT want to receive it?” was a common question. The potential good intentions of the employee were not totally dismissed, but the overriding thought through the whole discussion ended as “This employee is either trying to hide money, or he’s either very conscientious – or he’s a nut!”

\*\*\*\*\*

Even more recently, a Listserv member advised of a situation where the city’s W-2’s were inadvertently delivered to a private party instead of the city. The private party opened the package, only to discover what it was and advised the city of the error. The W-2’s were then taken to their proper destination. Problem solved? Probably not likely!

The collective wisdom was that the city should disclose the error to

*Continued on page 20*

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the employees, regardless of who was at fault. But, as one contributor suggested, is that enough? Does notice that your employees' information may have been "compromised" require further action? There was no suggestion of ill-intent on the part of the private party who "received" the information, as it had no idea the W-2's were in transit and dutifully notified the city of what appears to be a delivery error. But, does that "lack of intent" nullify the fact that the information was "exposed" or "compromised?" "Probably not," most contributors thought, and there were suggestions about what (if anything) the city should do beyond giving notice to the employees. Everyone likes the notion thought that a city (or any employer) should protect its employees.

There were many calls for the city to provide a free year of credit monitoring to all employees by signing up with a well-known identity theft / credit monitoring company. This can actually be done for less cost than one would think. Several years ago, the Department of Revenue here in South Carolina was hacked. Information from anyone who had filed tax returns electronically was supposedly compromised. The State offered ID theft and credit monitoring as one remedy, and made other changes to help ensure the safety of our electronic information. Most notably, this year we have to provide a South Carolina driver's license number to file electronically. "Now the thieves can get that information too," I thought.

Municipalities, like any other employers or businesses, want to be sure our employee- and customer information is safe. It seems there is always an impulse to rely on one of those well-known identity theft protection organizations. Many folks seem to point to those firms as the panacea and know all / tell all of ID theft protection. (Just as everyone heads for Snopes.com when they want to know "definitively" if something is true) Query - What happens if the ID theft company is hacked?

I realize those companies are in the business, but how are they any less vulnerable than the rest of us? What makes their systems impervious to breach? Probably nothing! But, yes, perhaps this

is the best we can do. There is a point at which you have done all you can do to protect online information, and then you just have to hope for the best.

Be it good or bad, we are living in a digital age. We just have to get used to a different kind of protection. Hacking digital communication is the contemporary version of stealing the mail out of someone's post mail box. I guess the problem has always been around, but has merely changed formats. It has also gotten quicker and easier due to automation. (Big Sigh!) Are we ever safe?

Hopefully, many of you have already signed up for the IMLA Mid-year Seminar, taking place in mid-April in Washington DC, again at the Omni Shoreham Hotel. Another top-notch program is in store, and we look forward to conjuring up another Water Cooler Mid-Year gathering. Be sure to also book your plans for the 2017 Annual Conference in Niagara Falls, Ontario, where we will stage our 6<sup>th</sup> Annual Water Cooler Reunion. Suggestions for a location are welcome. Please be sure to join us if at all possible. This will be our first Water Cooler foray outside of the United States, and it is sure to be worthwhile. Feel free to bring a friend.

From the humor corner, we had a man in court recently who represented himself in a jury trial. During the closing argument as he realized his goose was cooked, he turned to the Judge and said "Your Honor, may I have a mulligan?"

Another gentleman appeared in Municipal Court and requested a change in venue. When asked for the reason, he shifted back and forth from foot to foot as he looked at the floor. The Judge again asked "Why do you request a change in venue? Do you know what that means?" Continuing to shift back and forth from foot to foot, he finally looked up and said "No Sir."

"Well, how do you know you want one then?," the Judge asked. "Well, I read about it in a book once and it worked then," he replied. "Motion denied," responded the Judge.

Not to pick on *pro se* defendants, but there is certainly a risk to representing yourself. Another story came out of a shoplifting trial. During the prosecutor's closing argument, the Defendant jumped out of his chair and screamed "Objec-

tion!" The Judge asked for his objection and the defendant screamed "He's trying to make me look like a thief!" The Judge smiled broadly without laughing and said "Overruled!" An inmate busted out laughing, as did a couple of onlookers. Even the jurors cracked a smile. And they rendered a guilty verdict, too.

Lastly, lest you wonder, these incidents all really did happen in our Municipal Court. On some days, it's better than the State Fair.

The prosecution rests, your honor... **M**



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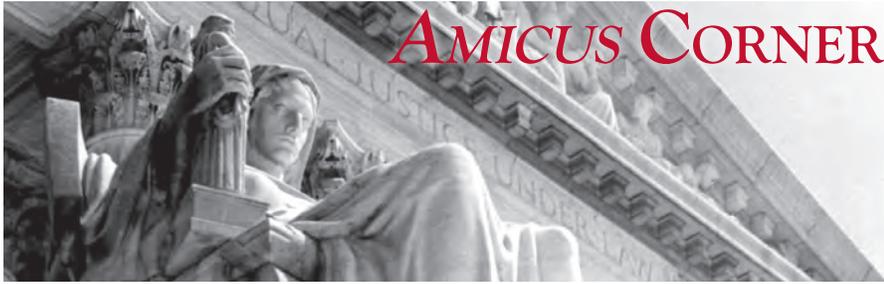
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## AMICUS CORNER

### Highlighting Local Autonomy

By: Amanda Kellar, IMLA Associate  
General Counsel and Director of Legal Advocacy

The big headline in Supreme Court news is the nomination of Judge Neil Gorsuch to the Court. Judge Gorsuch was appointed to the Tenth Circuit by George W. Bush and many commentators have noted his similarities to the late Justice Scalia, from his views on interpreting the Constitution to his sharp wit. Much has been written about the appointment of Judge Gorsuch, but time will tell what it means for local governments.

Meanwhile, IMLA has had recent success at the Supreme Court, with two cases in which we recently participated as an amicus at the certiorari stage being accepted. The first case is *District of Columbia v. Wesby*, which was featured in the July–August 2016 issue of *Municipal Lawyer* and involves the question of whether a police officer assessing probable cause is entitled to credit one set of conflicting statements over another and if the officer cannot, whether the law was clearly established on this point for the purposes of qualified immunity. The second case is *Town of Chester v. Laroe Estates, Inc.*, which asks whether a party seeking to intervene as a matter of right needs independent Article III standing to do so. Both of these cases involve important issues for municipalities and IMLA is pleased to have brought them to the Court’s attention. We will also be filing amicus briefs in these cases at the merits stage.

IMLA’s amicus program continues to stay busy at all levels, not just at the High Court, as we support members with issues ranging from a challenge to a local beverage tax to a challenge of a city’s benefit plan for same-sex couples. Although each of these cases, discussed below, involves

state court litigation, we believe they are important not just to IMLA members within the affected jurisdictions, but more broadly to IMLA’s goal of promoting local autonomy wherever possible.

#### **Williams v. City of Philadelphia**

*Williams* involves questions of preemption and arises out of a suit seeking to invalidate the Philadelphia Beverage Tax (PBT), which was passed in June 2016. The PBT would impose a 1.5 cent tax per fluid ounce on sugar sweetened beverages (SSBs) transferred by distributors to dealers. The PBT states that the tax is imposed only when the “supply, acquisition, delivery or transport is for the purpose of the dealer’s holding out for retail sale within the City the [SSB]...” Generally, distributors are responsible for the payment of the tax to the City, but if the distributor does not pay, then the dealer becomes responsible for payment. Consumers are not responsible for the tax (though distributors like Coca Cola may decide to increase prices as a result of the tax). The PBT’s definition of SSB specifically excludes things like baby formula, medical food, milk, and products which contain more than 50% fruit and/or vegetables as well as products that a purchaser can add sugar to at the point of sale.

Plaintiffs—retailers and beverage and food associations—filed suit in state court, seeking injunctive and declaratory relief to invalidate the PBT, claiming the Philadelphia taxation initiative is preempted by both state and federal law.

In Pennsylvania, the Sterling Act (Act) empowers the City of Philadelphia to levy and assess certain taxes for general rev-

enue purposes, subject to various restrictions. The district court held that while the purpose of the Act is to prohibit double-taxation, Philadelphia’s PBT was not preempted by the Act simply because a business is also taxed on certain aspects of its operations pursuant to Pennsylvania’s Sales and Use Tax. Instead, the court noted, the Act only prohibits a local government from imposing a tax on the same aspects of a business that is also being taxed by the Commonwealth. The district court reasoned that the respective taxes apply to “two different transactions, have two different measures and are paid by different taxpayers,” even though the Sales and Use tax also applies to soft drinks. Notably, the PBT only applies when SSBs are distributed to the dealer, regardless of whether the dealer sells the product to the consumer, whereas the Sales and Use tax is imposed at the retail level and paid by the consumer.

The district court similarly held that the law was not preempted by the federal government’s Supplemental Nutrition Assistance Program, administered by the Department of Agriculture (SNAP) because again, it does not impose a tax on the consumer, but rather on the distributor.

The issue on appeal is whether the PBT is preempted by Pennsylvania’s Sales and Use tax and/or federal government’s SNAP program. This case is significant to IMLA members for a number of independent reasons. First, IMLA believes we should fight against unwarranted preemption of local laws, thereby supporting local government autonomy and in this case, a municipality’s ability to impose tax schemes. Obviously, a local government’s ability to tax its residents as well as businesses that operate within its jurisdiction has significant consequences on the municipality’s ability to raise funds, to administer and pay for necessary services, and so on.

Second, more local governments will likely be looking at taxes like the one at issue here to effect important local policy; whether to curb the nation’s obesity epidemic, to reduce litter, or to move away from use of plastic bags. There is little doubt that Americans’ high consumption of sugar increases obesity, which has significant negative health effects including diabetes, increased risk of heart attacks, and the like. These negative consequences directly impact municipalities as they are costly to combat and risk the lives of their residents. Today’s local governments are the “laboratories for democracy” envisioned by Justice Brandeis, and their powers must be solidi-

*Continued on page 22*

## Amicus Cont'd from page 21

fied rather than eroded if we are to maintain the integrity of our federalism as envisioned in the Constitution.

### *Pidgeon v. Mayor Turner and City of Houston*

In this case, the City of Houston (City) offered benefits to same-sex spouses of City employees legally married in other jurisdictions prior to the Supreme Court's decision in *Obergefell v. Hodges* (which held that the Fourteenth Amendment requires a state to license a marriage between two people of the same sex and to recognize a such a marriage when lawfully licensed and performed out-of-state). Private citizens brought suit as taxpayers against the City seeking to prevent it from providing these benefits.

A Texas district court entered an injunction against the City and ordered the City to discontinue the benefits. The City appealed, which stayed the order and while it was on appeal, the Supreme Court decided *Obergefell*. The City then argued the case was moot in light of the Supreme Court's decision and the appellate court agreed, reversing the district court's original decision and remanding it for proceedings consistent with *Obergefell*.

The case went up to the Texas Supreme Court and the City argued a number of procedural infirmities. Ultimately the Texas Supreme Court denied the petition for review, on jurisdictional grounds, which would have doomed the taxpayers' suit.

One of the Justices dissented from the denial, stating: "Marriage is a fundamental right. Spousal benefits are not. Thus, the two issues are distinct, with sharply contrasting standards for review... This case, however, involves employment benefits, which the City obviously has no constitutional duty to offer to its employees, let alone their spouses. Though the laws in *Obergefell* denying access to marriage were subject to strict scrutiny, the laws in this case allocating benefits among married couples are not."

The Texas Supreme Court's denial for review would have sent the case back to the trial court and ultimately would have resulted in its dismissal. However, the appellants filed a petition for rehearing and a number of amici came in supporting them, including a number of state legislators. The amici argue that *Obergefell* only held that same-sex couples have a constitutional right to marry, and that it did not invalidate laws that provide more benefits to heterosexual couples. They also argue that *Obergefell* should not apply retroactively. The

Texas Supreme Court (which is comprised of elected Justices) thereafter granted the petition for rehearing.

The issues before the Texas Supreme Court are:

1. Should *Obergefell* be extended narrowly as the appellants claim i.e., does *Obergefell* extend beyond the state's requirement to simply issue marriage licenses and thus require employers to offer the same benefits to same-sex couples as are offered to heterosexual couples?
2. Does the Supreme Court's decision in *Obergefell* retroactively apply to benefits the City of Houston provided to its employees for same-sex spouses married outside of the state?

While the *Obergefell* holding specifically related to marriage licensing, the City believes the decision is clear that marriage is more than a piece of paper and it relates to the attendant benefits associated with marriage as well, including those at issue in this case. Additionally, the City argues that the Court has long-standing precedent about the retroactive effect of its constitutional holdings. (The other side claims these holdings do not apply to rights like the right to marriage because those rights are based on the Court's interpretation of a "living" Constitution).

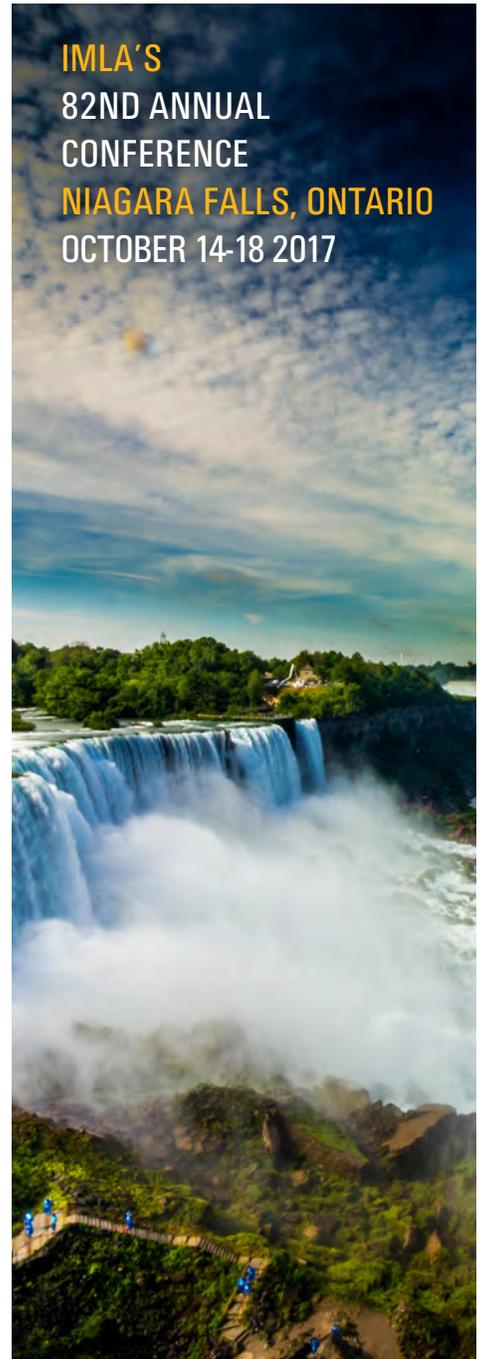
IMLA has taken the position that discriminatory laws impair the ability of municipalities to treat their residents with dignity and respect. These laws also detract from municipalities' economic growth and ability to attract talented employees, including those who identify as LGBTQ. IMLA believes *Obergefell* settled this issue and lawsuits like the one in this case are costly distractions and will ultimately fail.

More importantly, IMLA believes this case is not just about the interpretation of *Obergefell*, but rather it has significant implications for local government autonomy. Municipalities should be empowered to offer their employees whatever benefits they wish, absent some specific mandate by the State. Thus, it seems that the issue is being turned on its head in this case. This case shouldn't be about whether a city was *required* to provide benefits to same-sex couples before *Obergefell*. Rather, this case should be about whether a municipality that *voluntarily* provides these benefits to its employees can be *prevented* from doing so.

Additionally, it seems likely that the Constitution requires the City to provide the benefits to same-sex couples married out of state because it provides those benefits to other married couples. Where a local government recognizes the lawful decisions of other jurisdictions and then provides some benefit as a result, IMLA does not believe the state (or in this case the taxpayers) are in a position to claw those benefits back.

For more information about these cases or IMLA's legal advocacy program, please contact Amanda Kellar at [akellar@imla.org](mailto:akellar@imla.org). **ML**

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# Driving Without Borders: The Legal Authority of Foreign Driver's Licenses on U.S. Roads

By: David S. Johnson, Assistant City Attorney,  
Chief Municipal Prosecutor, City of Arlington, Texas

Foreign driver's licenses present legal issues that regularly affect many municipal law practitioners, especially those who advise police departments or prosecute traffic violations in municipal court.

At a traffic stop, drivers may present a foreign driver's license or an "international driving permit" to police officers, purportedly to demonstrate that they are exempt from holding a state-issued driver's license. Additionally, such drivers, after being charged with a violation for not holding a valid driver's license, may appear in municipal court and present their foreign license in support of a request to dismiss the charge.

There are some circumstances when foreign driver's licenses do provide the requisite legal authority to drive in the United States, and others where they do not. Federal treaties provide guidance to municipal law practitioners related to the legal authority of foreign drivers to drive lawfully on U.S. roads.

## Legal Authority of Foreign Driver's Licenses:

In general, under federal treaties, foreign drivers may lawfully drive on U.S. roads with a driver's license from their home country if they meet the following requirements:

1. Drivers must be citizens of a country that has entered into a treaty or other agreement with the United States granting reciprocal driving privileges to drivers of each country;
2. Drivers must have their home country driver's license or an international driving permit in their possession while driving;

3. Drivers must be at least 18 years of age; and
4. Drivers must have been in the United States for one year or less, proof of which may be established by a passport, visa, or other travel document.

Please note that certain Central and South American countries, including Mexico, are exempt from requirement #4 above (i.e. being in the United States for one year or less) due to the fact that they are party to a treaty without such a requirement. When foreign drivers change from being visitors to new residents, however, state laws related to obtaining a state-issued driver's license may be implicated and such drivers may no longer be authorized to drive lawfully on U.S. roads with their home country driver's license under the protection of federal treaties.

## General Driver's License Rules and Federal Treaties for Foreign Drivers

Many U.S. states require that a person have a state-issued driver's license to drive on roads within that state, subject to reciprocity exemptions for persons who hold a driver's license issued by another state.<sup>1</sup> There are, however, two federal treaties to which the United States is a party that allow for persons visiting from certain foreign countries to drive lawfully on U.S. roads:

1. The *Convention on the Regulation of Inter-American Automotive Traffic* of 1943,<sup>2</sup> ("Inter-American Treaty"), and
2. The *Convention on Road Traffic* of 1949 ("Road Traffic Treaty").<sup>3</sup>

The provisions under the two treaties are similar: drivers from all participating countries, who are at least 18 years of age, may drive on the roads of other participating countries with their home country driver's license.<sup>4</sup> The Road Traffic Treaty is more comprehensive and involves more countries than the Inter-American Treaty. In fact, many of the countries that joined the Inter-American Treaty also joined the Road Traffic Treaty—and accordingly, for the countries that joined both treaties, the Road Traffic Treaty controls.<sup>5</sup> Because many more countries are subject to the Road Traffic Treaty, this article will primarily focus on its provisions.

A list of countries that have joined each treaty can be accessed through the websites of the Organization of American States (for the Inter-American Treaty) and the United Nations (for the Road Traffic Treaty), as noted on the "Treaties in Force" page of the U.S. Secretary of State website.<sup>6</sup> A list compiling these countries is included at the end of this article.

## International Driving Permits

Under the Road Traffic Treaty, participating countries may require foreign drivers to hold an international driving permit ("IDP"),<sup>7</sup> essentially a reproduction of the person's home country driver's license translated into multiple languages, including English. When foreign drivers present their home country driver's license to police officers or municipal court personnel and it is not in English, it may be difficult to determine whether the card presented is actually a driver's license.

*Continued on page 24*



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## Driving Cont'd from page 23

For this reason, it may be beneficial for foreign drivers visiting the United States to obtain an IDP since police officers and court personnel may require presentation of an IDP to verify that the person has lawful authority to drive on U.S. roads.

### “One Year Rule” and Different Standard for Certain Central and South American Countries

Under the Road Traffic Treaty, international driving privileges are limited to *one year* from the date that the foreign driver entered the country.<sup>8</sup> There is, however, a different standard for certain Central and South American countries. Nine of the countries that joined the Inter-American Treaty did not also join the subsequent Road Traffic Treaty,<sup>9</sup> and are bound only by the Inter-American Treaty, which does not have the corresponding “One Year Rule.” These countries are: Brazil, Colombia, Costa Rica, El Salvador, Honduras, Mexico, Nicaragua, Panama, and Uruguay.<sup>10</sup>

The only requirements for citizens of these nine countries to have international driving privileges are that: (1) they are at least 18 years of age, and (2) they have a driver’s license from their home country.<sup>11</sup> There is, however, a legal distinction to be made as to whether the person is a visitor or a new resident, which may affect the validity of a foreign driver’s license under either treaty.

### Visitors Versus New Residents

Both treaties appear to contemplate international driving privileges for *visitors* from foreign countries as opposed to *new residents*. Evidence of the person having a passport or visa would tend to support that the person is indeed a visitor to the United States and covered by one of the treaties. Without such travel documents, foreign drivers may be suspected of being new residents, having established residence in the state lawfully or unlawfully,<sup>12</sup> and thus may be subject to applicable state laws requiring new residents to obtain a state-issued driver’s license. For example, in Texas, people who enter as new residents must obtain a Texas driver’s license within 90 days of their date of entry in order to drive lawfully.<sup>13</sup>

For drivers from countries governed by the Road Traffic Treaty, which contains the “One Year Rule,” the length of time that they have been in the United States could be established through a passport, visa, or other travel document. For citizens from coun-

tries governed by the Inter-American Treaty, which does not have the “One Year Rule,” it is unlikely that they could drive on U.S. roads for an unlimited amount of time under the protection of the treaty. This is primarily due to the fact that the longer a person is present in the United States, the more likely it is that the person is no longer a visitor, but a new resident, especially if the person does not have a passport, visa, or other travel document which would tend to support visitor status.

This scenario would present an interesting evidentiary matter for a court to decide, if, for example, the person is charged with not holding a valid driver’s license and contests the charge at a hearing or trial.

### Temporary Visitor Driver’s Licenses

Foreign drivers may be able to obtain a state-issued temporary visitor driver’s license as an alternative to driving only under the authority of their home country driver’s license or an IDP. Like Texas, some states may provide authority for the state agency that issues driver’s licenses to enter into agreements with foreign countries providing reciprocal driving privileges and allowing foreign visitors to obtain a temporary visitor driver’s license under certain circumstances.<sup>14</sup> This option may be beneficial to foreign drivers because having a state-issued temporary visitor driver’s license would clear up any issues about whether the person is a visitor or a new resident. Also, such driver’s licenses have an expiration date showing police officers and municipal court personnel the length of time that the person is authorized to drive.

### Conclusion

A foreign driver’s license may provide a visitor from a foreign country the lawful authority to drive on U.S. roads under certain circumstances. When dealing with the legal authority of a foreign driver’s license, it is beneficial for municipal law practitioners to be cognizant of issues regarding whether the driver is truly a visitor or a new resident, which could affect protections under federal treaties and implicate state laws requiring new residents to obtain a state-issued driver’s license.

### Notes

1. See e.g. TEX. TRANSP. CODE §§ 521.021, 521.030(b) (West 1995).
2. Convention on the Regulation of Inter-American Automotive Traffic, Oct. 29, 1946, 3 Bevens 865, TIAS 1567, 1943 U.S.T. LEXIS 185.
3. Convention on Road Traffic, Mar. 26,

1952, 3 U.S.T. 3008, TIAS 2487, 1952 U.S.T. LEXIS 558.

4. See Inter-American Treaty, arts. 6-7, 3 Bevens 865 at \*4\*5; & Road Traffic Treaty, art. 24 § 1, & Annex 8, 3 U.S.T. 3008 at \*16 & \*86.

5. Road Traffic Treaty, art. 30, 3 U.S.T. 3008 at \*22.

6. See <https://www.state.gov/s/l/treaty/tif/index.htm>, in particular the Transportation treaties on page 556 of the “Treaties in Force 2016” PDF document. This web site notes that:

- (1) the records of the *Organization of American States* serve as the official depository for the Inter-American Treaty; see [http://www.oas.org/en/sla/dil/treaties\\_agreements.asp](http://www.oas.org/en/sla/dil/treaties_agreements.asp); and
- (2) the records of the *United Nations* serve as the official depository for the Road Traffic Treaty; see <https://treaties.un.org/pages/participationstatus.aspx>.

Accordingly, the list of countries that are parties to the Inter-American Treaty are found online at

[http://www.oas.org/dil/treaties\\_C-11\\_Convention\\_on\\_the\\_Regulation\\_of\\_Inter-American\\_Auto-Motive\\_Traffic\\_sign.htm](http://www.oas.org/dil/treaties_C-11_Convention_on_the_Regulation_of_Inter-American_Auto-Motive_Traffic_sign.htm); and the list of countries that are parties to the Road Traffic Treaty are found online at <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20XI/XI-B-I.en.pdf> (All websites last visited on Jan. 30, 2017).

7. Road Traffic Treaty, art. 24, 3 U.S.T. 3008 at \*16\*18.

8. *Id.*, art. 1 § 2, 3 U.S.T. 3008 at \*3.

9. *Id.*, art. 30, 3 U.S.T. 3008 at \*22. The

Road Traffic Treaty controls over the Inter-American Treaty for the 10 countries that joined both treaties: Argentina, Chile, Dominican Republic, Ecuador, Guatemala, Haiti, Paraguay, Peru, United States, and Venezuela.

10. See <https://www.state.gov/s/l/treaty/tif/index.htm>, & note 6 *supra*.

11. Inter-American Treaty, art. 6, 3 Bevens 865 at \*4\*5. This treaty alternatively allows drivers to hold an “international driving license,” which is valid for one year, if their home country does not require its citizens to hold a driver’s license. *Id.* at arts. 6, 13, 3 Bevens 865 at \*4\*5, \*9\*10.

12. Please note that neither treaty discusses whether international driving privileges are contingent upon the person having entered the United States lawfully.

13. TEX. TRANSP. CODE § 521.029(a) (West 2009).

14. See e.g. *Id.* at § 521.0305

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# AUTOMOTIVE AND ROAD TRAFFIC TREATIES: PARTICIPATING COUNTRIES

## ***Convention on the Regulation of Inter-American Automotive Traffic,***

Oct. 29, 1946. TIAS 1567; 3 Bevans 865, 1943 U.S.T. LEXIS 185.

### **Participating Countries:**

Brazil  
Colombia  
Costa Rica  
El Salvador  
Honduras  
Mexico  
Nicaragua  
Panama  
Uruguay

### **Source:**

[http://www.oas.org/dil/treaties\\_C-11\\_Convention\\_on\\_the\\_Regulation\\_of\\_Inter-American\\_Auto-Motive\\_Traffic\\_sign.htm](http://www.oas.org/dil/treaties_C-11_Convention_on_the_Regulation_of_Inter-American_Auto-Motive_Traffic_sign.htm)  
(last visited Jan. 30, 2017)

## ***Convention on Road Traffic,***

Mar. 26, 1952. 3 UST 3008; TIAS 2487; 1952 U.S.T. LEXIS 558.

### **Participating Countries:**

Albania  
Algeria  
Argentina  
Australia  
Austria  
Bangladesh  
Barbados  
Belgium  
Benin  
Botswana  
Bulgaria  
Burkina Faso  
Cambodia  
Canada  
Central African Republic  
Chile  
Congo, Democratic Republic of the  
Congo, Republic of the  
Cuba

Cyprus  
Czech Republic  
Denmark  
Dominican Republic  
Ecuador  
Egypt  
Fiji  
Finland  
France  
Georgia  
Ghana  
Greece  
Guatemala  
Haiti  
Holy See  
Hungary  
Iceland  
India  
Ireland  
Israel  
Ivory Coast (Côte d'Ivoire)  
Italy  
Jamaica  
Japan  
Jordan  
Kyrgyzstan  
Laos (Lao People's Democratic Republic)  
Lebanon  
Lesotho  
Luxembourg  
Madagascar  
Malawi  
Malaysia  
Mali  
Malta  
Monaco  
Montenegro  
Morocco  
Namibia  
Netherlands  
New Zealand  
Niger  
Nigeria  
Norway  
Papua New Guinea  
Paraguay  
Peru  
Philippines  
Poland  
Portugal  
Romania  
Russian Federation  
Rwanda  
San Marino  
Senegal  
Serbia  
Sierra Leone  
Singapore  
Slovakia  
South Africa  
South Korea (Republic of Korea)  
Spain  
Sri Lanka  
Sweden  
Switzerland  
Syrian Arab Republic  
Thailand  
Togo  
Trinidad & Tobago  
Tunisia  
Turkey  
Uganda  
United Arab Emirates  
United Kingdom  
United States of America  
Venezuela  
Vietnam  
Zimbabwe

### **Source:**

<https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20XI/XI-B-1.en.pdf>  
(last visited Jan. 30, 2017)

## Sanctuary Cities Cont'd from page 11

strikes against the Order.<sup>73</sup> One of the earliest was San Francisco's, in a 29-page Complaint for Declaratory and Injunctive Relief dated January 31, 2017 (Complaint).<sup>74</sup> As the Complaint puts it:

This lawsuit is about state sovereignty and a local government's autonomy to devote resources to local priorities and to control the exercise of its own police powers, rather than being forced to carry out the agenda of the Federal government . . . The Executive Order purports otherwise to wrest this autonomy from state and local governments, and a court order is needed to resolve this controversy.<sup>75</sup>

San Francisco declares that it fully complies with all federal detainer laws in refusing to honor ICE notices unless accompanied by indicia of probable cause. And it specifically cites Board of Supervisors' concerns that responding to civil immigration detainees "diverts limited local resources from programs that are beneficial to the City."<sup>76</sup>

San Francisco also asserts compliance with Section 1373, because nowhere does its policy restrict or prohibit employees from communicating about "citizenship or immigration status." The Complaint further argues that recent DOJ guidance has subtly been attempting to enlarge the scope of Section 1373 to include communication about detainer matters (including when a non-violent criminal is about to be released from municipal custody) within the rubric of "citizenship and immigration status."<sup>77</sup>

Beyond its criticism of Section 1373's secretly expanding breadth, San Francisco launches a frontal assault—that Section 1373 is itself unconstitutional by virtue of its undue interference in the internal workings of municipal government: "By preventing state and local governments from directing employees how to handle information about citizenship and immigration status, Section 1373 makes it impossible for local jurisdictions freely to choose and clearly to establish how they will handle this information."<sup>78</sup>

The Complaint focuses directly on the financial sanctions threatened in the Order. San Francisco relies on more than \$1.2 bil-

lion in federal monies annually, for Medicare and Medicaid, for nutrition, welfare, foster care and child support programs, and for infrastructure, transportation, veterans programs, public health and more. Only a small fraction of such funding relates to immigration or law enforcement. Most of those federal payments are in the form of reimbursements—San Francisco funds such services to its residents up front and seeks reimbursement from the federal government.

Although one analysis of the lawsuit has questioned whether it is ripe for consideration, given that San Francisco purports to comply with Section 1373 and the government has not yet taken any specific actions against it,<sup>79</sup> San Francisco would strongly disagree. It argues that doubt about future reimbursement creates an immediate Hobson's choice: should it curtail spending on services for which future reimbursement might be slashed? The dilemma is heightened because San Francisco's annual budgeting process must be completed by March.<sup>80</sup>

In its prayer for relief, San Francisco seeks a declaration that it complies with Section 1373, and asks to enjoin enforcing Section 1373 or using it as a condition for receiving federal funds. As referenced above, it also challenges the very constitutionality of Section 1373 on Tenth Amendment grounds.

**CONCLUSION:** President Trump's January 25, 2017 Order targeting "sanctuary jurisdictions" is a foreseeable follow-up to the campaign theme that energized his voters. But despite its ambitious declarations, the Order appears to lack serious legal horsepower. While condemned by the Administration, the refusal of sanctuary jurisdictions to collect immigration data does not, per se, violate Section 1373, and their snubbing of unsupported civil immigration detainer notices has already been validated in the courts.

More significantly, the right of states and municipalities to protect their personnel and resources from performing federal government functions is itself protected by a substantial sanctuary—the Tenth Amendment. Given the scale and vehemence with which the Order is targeting sanctuary cities, the Administration appears headed for a difficult courtroom battle against federalism itself.

## Notes

1. Executive Order, "Enhancing Public Safety in the Interior of the United States," January 25, 2017; Exec. Order No. 13,768, 82 Fed. Reg. 8799; <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>
2. Executive Order, *supra* note 1 at Section 1.
3. <http://www.nationalreview.com/article/442244/immigration-enforcement-criminal-illegal-aliens-should-be-deported>
4. *Id.* at Section 5(g).
5. Q&A: DHS Implementation of the Executive Order on Border Security and Immigration Enforcement, Feb. 21, 2106, <https://www.dhs.gov/news/2017/02/21/qa-dhs-implementation-executive-order-border-security-and-immigration-enforcement>.
6. *Id.* at Section 7.
7. *Id.* at Section 8.
8. *Id.*
9. *Id.*
10. 8 U.S.C. §§1101 *et seq.*
11. MICHAEL JOHN GARCIA AND KATE M. MANUEL, "State and Local 'Sanctuary' Policies Limiting Participation in Immigration Enforcement," Congressional Research Service, July 10, 2015 <https://fas.org/sgp/crs/homsec/R43457.pdf>
12. JESSICA VAUGHN, "Sanctuary Cities Continue to Obstruct Enforcement, Threaten Public Safety," Center for Immigration Studies, December 14, 2016; <http://cis.org/Sanctuary-Cities-Map>
13. "Searching for Sanctuary," Immigration Law Resource Center, December 2016, [https://www.ilrc.org/sites/default/files/resources/sanctuary\\_report\\_final\\_1-min.pdf](https://www.ilrc.org/sites/default/files/resources/sanctuary_report_final_1-min.pdf)
14. *Id.*
15. DARLA CAMERON, "How Sanctuary Cities Work, and How Trump's Executive Order Might Affect Them," WASHINGTON POST, Jan. 25, 2017, <https://www.washingtonpost.com/graphics/national/sanctuary-cities/>
16. "Searching for Sanctuary," *supra* note 11.
17. Immigration Status, SF ADMIN CODE, Chapter 12H (1989), <https://law.resource.org/pub/us/code/city/ca/SanFrancisco/Administrative%20Code/chapter12h.pdf>
18. *Id.*
19. *Id.*
20. [https://www.nytimes.com/2015/07/08/us/san-francisco-murder-case-exposes-lapses-in-immigration-enforcement.html?\\_r=0](https://www.nytimes.com/2015/07/08/us/san-francisco-murder-case-exposes-lapses-in-immigration-enforcement.html?_r=0)

21. <http://www.houstonpress.com/news/stop-calling-houston-a-sanctuary-city-6729418>
22. Order, *supra* note 1 at Section 8; Immigration and Nationality Act, Section 287(e).
23. Complaint, City and County of San Francisco v. Trump, Jan. 31, 2017; <http://www.sfcityattorney.org/wp-content/uploads/2017/01/Complaint.pdf>
24. <http://www.cnn.com/2017/01/26/politics/sanctuary-cities-bill-de-blasio-trump-court/index.html>
25. [https://www.scribd.com/document/337017252/Guidance-concerning-local-Authority-participation-in-Immigration-enforcement-1-19-17#from\\_embed](https://www.scribd.com/document/337017252/Guidance-concerning-local-Authority-participation-in-Immigration-enforcement-1-19-17#from_embed)
26. <http://money.cnn.com/2017/01/27/news/economy/funding-sanctuary-cities/>
27. <https://www.texastribune.org/2017/01/23/abbott-demands-hernandez-reverse-new-sanctuary-pol/>; thus far, there is no confirmation that such de-funding has been carried out.
28. <http://wtvr.com/2017/01/27/house-passes-bill-targeting-undocumented-immigrants/>
29. S.B.4 purports to add a new Section 101.0216 to the TEXAS CIVIL PRACTICE AND REMEDIES CODE <http://www.legis.state.tx.us/tlodocs/85R/billtext/pdf/SB00004E.pdf#navpanes=0>
30. <http://www.usatoday.com/story/news/2017/01/26/first-sanctuary-city-caves-donald-trump-demands/97111048/>
31. *Id.*
32. Executive Order, *supra* note 1, at Section 9.
33. <https://www.gpo.gov/fdsys/pkg/US-CODE-2011-title8/pdf/USCODE-2011-title8-chap12-subchapII-partIX-sec1373.pdf>
34. City of New York V. United States, 179 F.3d 29 (2d Cir. 1996), *cert. denied* 129 S. Ct. 932 (2000).
35. *Id.*, 179 F.3d 29 at 35.
36. See *United States v. Campbell*, 111 F.Supp.3d 340 (W.D.N.Y. 2015) and *New York Soc’y. of Professional Engr’s, Inc. v. City of New York*, 78 A.D. 3d 477 (N.Y. App. Div. 1st Dep’t. 2010), (citing *City of New York v. United States*’ holding regarding presumption of legislative validity).
37. See for example, lawsuits challenging the Order by San Francisco, and Chelsea and Lawrence, Massachusetts, *infra* notes 70 and 71.
38. *Id.* at Section 9; <http://www.washington-times.com/news/2017/jan/26/donald-trump-creates-name-and-shame-list-embarrass/>.
39. 8 CFR 287.7 – “Detainer provisions under section 287(d)(3) of the Act.”
40. [https://www.aclunc.org/docs/immigration/ag\\_info\\_bulletin.pdf](https://www.aclunc.org/docs/immigration/ag_info_bulletin.pdf)
41. *Id.*
42. *Id.*
43. *Davila v. North Regional Joint Police Board.*, 979 F. Supp. 2d 612 (W.D. Pa. 2013) (“[t]he Court is not aware of, nor is the plaintiff able to cite to, a case that has held a local government entity’s decision to rely on and comply with this federal regulation to be unconstitutional on its face”); *Rios-Quiroz v. Williamson County*, no. 3-11-1168 (M.D. Tenn. Sept. 10, 2012) (finding the detainer provision to be “mandatory”); *Ramirez-Mendoza v. Maury County*, no. 1:12-CV-00014 (M.D. Tenn. Jan. 25, 2013).
44. *Galarza v. Szalczyk*, No. 12v-3991 (3d Cir. Mar. 4, 2014).
45. *Miranda-Olivares v. Clackamas County*, No. 3:12-cv-02317-S (D. Ore. Apr. 11, 2014).
46. *Id.*
47. [http://www.oregonlive.com/pacific-northwest-news/index.ssf/2014/04/federal\\_ruling\\_sparks\\_halt\\_on.html](http://www.oregonlive.com/pacific-northwest-news/index.ssf/2014/04/federal_ruling_sparks_halt_on.html)
48. *Mercado v. Dallas County*, no. 3-15-cv. 3481-D (ND Tex. Jan. 17, 2017).
49. *Padilla v. Kentucky*, 559 U.S. 356 (2010).
50. TOM K. WONG, *The Politics of Immigration: Partisanship, Changing Demographics and the American National Identity* (Oxford University Press, 2016).
51. <https://www.ice.gov/pep>
52. MICHAEL JOHN GARCIA and KATE M. MANUEL, “State and Local “Sanctuary” Policies Limiting Participation in Immigration Enforcement,” *supra* note 10.
53. Executive Order, *supra* note 1 at section 10.
54. <http://money.cnn.com/2017/01/27/news/economy/funding-sanctuary-cities/>
55. <https://www.lamayor.org/mayor-garcetti-president-trumps-executive-order-immigration>
56. [http://cis.org/sites/cis.org/files/Declined%20detainers%20report\\_0.pdf](http://cis.org/sites/cis.org/files/Declined%20detainers%20report_0.pdf)
57. *Id.*
58. *Id.*
59. LOREN COLLINGWOOD, BENJAMIN GONALES O’BRIEN AND STEPHEN EL-KHATIB, “Sanctuary cities do not experience an increase in crime,” *THE WASHINGTON POST*, Oct. 3, 2016, [https://www.washingtonpost.com/news/monkey-cage/wp/2016/10/03/sanctuary-cities-do-not-experience-an-increase-in-crime/?utm\\_term=.2bed1c9d861e](https://www.washingtonpost.com/news/monkey-cage/wp/2016/10/03/sanctuary-cities-do-not-experience-an-increase-in-crime/?utm_term=.2bed1c9d861e)
60. TOM K. WONG, “The Effects of Sanctuary Policies on Crime and the Economy,” Center for American Progress (Jan. 26, 2017), <https://www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/the-effects-of-sanctuary-policies-on-crime-and-the-economy/>
61. *Arizona v. United States*, 132 S. Ct. 2492, 2497 (2012).
62. U.S. CONST., amend. X.
63. *New York v. United States*, 505 U.S. 144 (1992).
64. *Printz v. United States*, 521 U.S. 898, 935 (1997).
65. U.S. CONST., art. 1, sec. 8.
66. *National Federation of Independent Businesses v. Sebelius*, 132 S. Ct. 2566 (2012).
67. MICHAEL A. MEMOLI, “Trump calls California ‘out of control,’ says withholding federal funds ‘would be a weapon’ against sanctuary cities,” *LOS ANGELES TIMES*, Feb. 6, 2017, <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-trump-calls-california-out-of-1486332113.htmlstory.html>
68. <http://ktla.com/2017/01/27/trumps-threat-to-take-federal-funding-away-from-sanctuary-cities-may-have-started-fight-he-cant-win/>
69. <https://www.bjs.gov/content/pub/pdf/jagp16.pdf>
70. <https://cops.usdoj.gov/about>
71. [https://ojp.gov/about/pdfs/BJA\\_SCAAP%20Prog%20Summary\\_For%20FY%2017%20PresBud.pdf](https://ojp.gov/about/pdfs/BJA_SCAAP%20Prog%20Summary_For%20FY%2017%20PresBud.pdf)
72. CAMERON, *supra* note 13.
73. In addition to several California cities, Chelsea and Lawrence, Massachusetts have sued the Trump Administration over the Order, <https://www.bostonglobe.com/metro/2017/02/08/chelsea-lawrence-sue-trump-over-sanctuary-city-penalties/tXbFN0dM6WY88gHEjwxdYO/story.html>
74. Complaint, City and County of San Francisco v. Trump, Jan. 31, 2017; <http://www.sfcityattorney.org/wp-content/uploads/2017/01/Complaint.pdf>
75. Complaint, *supra* note 61, at par. 9.
76. *Id.* at par. 34.
77. *Id.* at par 41-46.
78. *Id.* at par. 77.
79. VIKRAM DAVID AMAR AND MICHAEL SCHAFFS, “How Strong is San Francisco’s ‘Sanctuary City’ Lawsuit Against the Trump Administration?,” [https://verdict.justia.com/2017/02/10/strong-san-franciscos-sanctuary-city-lawsuit-trump-administration?utm\\_source=Justia+Law&utm\\_campaign=05aa0b566b-summary\\_newsletters\\_jurisdictions&utm\\_medium=email&utm\\_term=0\\_92aabbfa32-05aa0b566b-406431949](https://verdict.justia.com/2017/02/10/strong-san-franciscos-sanctuary-city-lawsuit-trump-administration?utm_source=Justia+Law&utm_campaign=05aa0b566b-summary_newsletters_jurisdictions&utm_medium=email&utm_term=0_92aabbfa32-05aa0b566b-406431949)
80. *Id.* at par. 87 and 89.



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a breach of its business licensing and zoning bylaws.

In addition, the Operator challenged the validity of the City's business licensing and zoning bylaw on the basis of paramountcy and inter-jurisdictional immunity. The Operator suggested that the City was violating the Constitution by refusing to permit the operation of the Operator and therefore ultimately restricting access to medical marijuana. While the Court only addressed the Operator's zoning bylaw challenge, as the Operator admitted it operated a business. The Attorney General relied on s.479 of the *Local Government Act* which "authorizes the City to enact bylaws that regulate the use of land, buildings, and structures and expressly includes the power to prohibit uses" thereby permitting the City to exclude "the retail sale of cannabis or cannabis products or related uses" in City Centre Commercial. Relying on this, the Attorney General argued that the pith and substance of the zoning bylaw is land use regulation; "the zoning bylaw is intended to regulate the use of land and buildings by prohibiting the cultivation, storage or sale of marijuana unless specifically allowed" and the Court agreed.

The next step of the constitutional challenge was to examine s.91 (federal jurisdiction) and s.92 (provincial jurisdiction) of the *Constitution Act, 1867* and determine what jurisdiction the zoning bylaw would fall within. The Attorney General argued that the main feature of the zoning bylaw relates to land use and land use zoning falls under provincial jurisdiction in s.92(13). The Court agreed, and clarified that in this matter there is a degree of overlap with the federal government's regulation of the use of drugs such as marijuana, under criminal law s.91(7); however this does not invalidate the provincial jurisdiction as the "dominant feature" of the zoning bylaw is land use regulation and not criminal sanctions. Therefore, the zoning bylaw is within provincial jurisdiction. The Court dismissed the Operator's claim of paramountcy, finding that the provincial law does not conflict with any existing federal law.

**Negligence: County Liable Where Experienced Mountain Biker Fell Off Wooden Obstacle in County Park**

*Campbell v. Bruce (County)*, 2016 ONCA 371 (CanLII) <http://canlii.ca/t/grpz1>

The Municipal Corporation of the County of Bruce (Appellant) opened the Bruce Peninsula Mountain Bike Adventure Park (Park), which consisted of bike trails and obstacles. The Appellant installed signs throughout the Park indicating the difficulty rating of the trail, caution signs advising riders to wear helmets and warnings to "ride within their own abilities and at their own risk." In addition, the Appellant established a 1-800 number and an email address to act as a reporting system for individuals at the Park.

Stephan Campbell (Respondent), an experienced mountain biker, fell while attempting to ride over a wooden obstacle in the trails area of the Park. The Respondent fell on his head, broke his neck and was rendered a quadriplegic. The matter went to trial, and the Appellant was found to breach the duty of owed to the Respondent under s.3 of the *Occupiers Liability Act*. The Respondent was not found to be contributorily negligent for the accident. The Appellant appealed the final decision of the trial judge.

**HELD:** Appeal dismissed.

**DISCUSSION:** The Appellant raised five issues on appeal. The Appellant argued that the trial judge's view of the duty owed to the Respondent went beyond reasonable care as an occupier and rose to the level of an insurer. The Court disagreed with the Appellant, finding that the trial judge correctly relied on and applied the Supreme Court decision in *Waldick v. Malcolm*, 1991 CanLII 71 the leading case dealing with the duty of care when assessing "the knowledge, decisions and actions of the appellant with respect to the design, construction and operation of the Trails Area of the Park." The Court

*Continued on page 34*

## CASES



# Perennial Issues: Gun Control and Legislative Prayer

By: IMLA Editorial Board

**Guns: Maryland's Assault Weapons Ban is Upheld**

*Kolbe v. Hogan*, No. 14-1945 (4th Cir. Feb. 22, 2017).

**Reversing its prior invalidation of Maryland's Firearm Safety Act which bans assault weapons and large-capacity magazines, the Fourth Circuit has now upheld the ban, citing *Heller's* language which excluded M-16's and similar weapons of war from Second Amendment protection and applying intermediate scrutiny review.**

In 2013 the Maryland General Assembly passed the Firearm Safety Act (FSA) which prohibits the possession, sale, offer to sell, transfer, purchase or receipt of an "assault weapon," which includes the "Colt AR-15," "Bushmaster semi-auto rifle," and "AK-47" in all forms. "Assault long guns" and "copycat weapon[s]" are also covered by the ban. The FSA further prohibits the sale, purchase, receipt or transfer of ammunition magazines exceeding 10 rounds. Penalties for violation include up to three years' incarceration and fines not to exceed \$5,000, with longer terms for those who use an assault weapon or large-capacity magazine in the commission of a felony or crime of violence (i.e., five to 20 years for the first such violation, and 10 to 20 years for each subsequent violation).

The FSA allows possession of an assault weapon or large-capacity magazine by a retired Maryland law enforcement officer if the weapon or magazine was obtained from the officer's law enforcement agency or in connection with the officer's law enforcement employment.

Two Maryland residents who wanted to purchase assault weapons sued, asking for declaratory and injunctive relief. They alleged that the FSA is facially unconstitutional because the assault weapons ban and magazine ban contravene the Second Amendment; the exception for retired Maryland law enforcement officers violates the Equal Protection Clause; and the FSA provision outlawing "copies" of the banned weapons is so vague as to violate the Due Process Clause.

The district court had upheld the ban, only to be reversed by the Fourth Circuit. However, reconsidering the case en banc, the 14-member Circuit vacated its prior decision, 10-4, and found that the FSA did not violate the Constitution. The Circuit quoted *Heller's* statement that "another important limitation on the right to keep and carry arms" is that the right "extends only to certain types of weapons." In *Heller*, the Supreme Court had explained that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes," and expressly stated that "weapons most useful in military service" including M-16's would not be protected under the Second

Amendment as a means of defending one's home.

The Fourth Circuit found that assault weapons are analogous to M-16's, and are therefore not protected under the Second Amendment. Even if those weapons were deemed to be protected under the Second Amendment, said the Circuit, the FSA would only need to meet the intermediate scrutiny standard, because it does not unduly burden the core Second Amendment right to own and use firearms for self-defense. Thus the FSA was merely required to be "reasonably adapted to achieve a substantial governmental interest"—in this case, Maryland's legitimate interest in reducing the potentiality for mass murder within its borders.

The court dispensed with plaintiffs' Equal Protection argument, finding little comparability between the plaintiffs and retired law enforcement officers who have been required to undergo significant assault weapons training. It also found that the FSA's provisions applicable to "copycat" AR-15-type weapons was not unduly vague and survived Due Process challenges.

In sustaining Maryland's FSA, the *Kolbe* court aligned with four other Circuits that have upheld similar restrictions. These include the D.C. Circuit, Second and Ninth Circuits (all finding that an assault weapon/large magazine ban survived intermediate scrutiny), and the Seventh Circuit (which did not specifically articulate the appropriate judicial scrutiny). But the Fourth Circuit became the first to draw from *Heller* that commonly-owned military-grade firearms, are outside the ambit of Second Amendment self-defense protection.

**DISSENT:** The dissent criticized the majority for conjuring up a new "useful for military purposes" test not representative of *Heller*—the fact that the AR-15 and other similar assault weapons are

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already owned by over eight million U.S. citizens, the vast majority of whom use them lawfully, makes comparisons to the M-16—which was never commonly available to retail purchasers—invalid. “Simply put, if the firearm in question is commonly possessed for lawful purposes, it falls within the protection of the Second Amendment.” Furthermore, the dissent opined, the only appropriate standard of review for this potential deprivation of the fundamental right to self-defense was strict scrutiny, and the state had not demonstrated that the FSA was narrowly tailored to achieve a compelling governmental interest. <http://www.ca4.uscourts.gov/Opinions/Published/141945A.P.pdf>

### **Legislative Prayer: Christian-Only Invocations and the Establishment Clause**

***Bormuth v. County of Jackson, No. 15-1869 (6th Cir. Feb. 15, 2017).***

***The Sixth Circuit has found that a municipality’s practice of opening every meeting with a Christian prayer delivered by a member of the Board of Commissioners, all of whom are Christian—while excluding invocations by any other faith or belief system and ostracizing the plaintiff for objecting—is a violation of the Establishment Clause.***

Jackson County, Michigan (County) opens every Board of Commissioners’ meeting with a request that all in attendance rise and bow their heads, after which a Commissioner delivers an invocation. All nine Commissioners are Christian, as are all prayers; many invoke the name of the Lord and Jesus. Peter Bormuth, a self-described Pagan and Animist resident of the County, challenged the Board’s policy on First Amendment grounds, arguing that it constituted an establishment of religion and was coercive to non-Christians. He further argued

that, following his objections about the prayer policy, the Commissioners refused to consider his application to join the County’s Solid Waste Committee, despite the fact that he had already worked with the County on the subject of solid waste for more than three years.

The district court held in favor of the County, finding that the Commissioners’ policy was merely a function of their own religious makeup, was not inconsistent with Town of Greece and did not constitute an establishment of Christianity.

The Sixth Circuit disagreed. It found that the County’s policy differed significantly from that of Marsh and Town of Greece in a crucial respect—the prayer givers were not clerics or volunteers from the community, they were the County’s own elected officials, who ensured that only Christian invocations would be heard at their meetings. “To exclude prayers that Jackson County Commissioners did not want to hear, the Board of Commissioners forbade anyone but Commissioners from giving prayers. Excluding unwanted prayers is not a policy of nondiscrimination. Excluding unwanted prayers is discrimination.”

The Circuit also saw evidence of coercion in that all members of the public were directed to stand and bow their heads as the Commissioner’s prayer was given, making it very obvious if any attendee did not follow suit. And the fact that Bormuth was ostensibly passed over for a position for which he seemed eminently qualified only added to the suspicion that allegiance to Christianity (or not objecting thereto) was a de facto predicate for consideration by the Commissioners.

**DISSENT:** The dissent challenged the decision on the basis of the recent Fourth Circuit *Lund v. Rowan County* opinion (upholding a North Carolina county’s practice which was very similar to the Jackson County Commissioners’ policy). However, as the majority noted preemptively, the Fourth Circuit subsequently reheard *Rowan County* en banc, and the coercive behavior by Jackson County would

distinguish it from *Rowan County* in any event. (IMLA had questioned *Rowan County* in the November–December 2016 *Municipal Lawyer*; a decision on the Fourth Circuit’s en banc rehearing in *Rowan County* is expected shortly).

<http://www.opn.ca6.uscourts.gov/opinions.pdf/17a0036p-06.pdf>

### **Taxation: ACA Requirement that States and Municipalities Contribute Additional Funds to Insurers Does Not Violate Tenth Amendment**

***State of Ohio v. United States of America, No. 16-3093 (6th Cir. Feb. 17, 2017).***

***Ohio and its local governments have failed in a challenge to the “premium-stabilization arrangement” of the ACA, which requires them to contribute additional monies to offset shortfalls incurred by insurers covering high-risk individuals. The Sixth Circuit found that such a requirement does not constitute commandeering under the Tenth Amendment and does not violate the Intergovernmental Tax Immunity Doctrine.***

One of the lesser known elements of the Affordable Care Act (ACA) is a “premium-stabilization arrangement.” Its goal is to reduce volatility in the health care market by collecting payments from “health insurance issuers” and “group health plans” and then distributing those payments over a three-year period to health insurers that cover high-risk individuals in the individual market. Ohio and its local governments, all of which have been paying these contributions – totaling \$5.4 million in 2014 alone – filed suit alleging this tax provision should not apply to state and local government as it does to private employers.

Specifically, Ohio *et al* alleged “1) [t]he United States illegally or erroneously assessed or collected tax revenue from Plaintiffs; 2) [t]he Secretary’s interpretation of group health plans is arbitrary, capri-

cious, an abuse of discretion, or otherwise not in accordance with the law; and 3) Defendants collected tax revenues in violation of the Tenth Amendment to the United States Constitution, anti-commandeering principles, and the Intergovernmental Tax Immunity Doctrine.” The district court granted the United States’ motion to dismiss for failure to state a claim, finding the ACA applies to state and local government and does not violate the Tenth Amendment.

The Circuit tackled Ohio’s argument that it cannot be required to remit a tax for its group health plans because Congress never made a “plain statement” regarding such a tax against the states. While the Court agreed that in *Michigan v. U.S.*, 40 F.3d 817 (6th Cir. 1994) it stated “before a federal tax can be applied to activities carried on directly by the States . . . the intention of Congress to tax them should be stated expressly and not drawn merely from general wording of the statute applicable ordinarily to private sources of revenue,” but determined Ohio makes too much of this and “asks too much of the ACA.” It found the “cross-reference scheme” in the ACA makes perfect sense since the Supreme Court has “never required that Congress make its clear statement in a single section or in statutory provisions enacted at the same time.”

Ohio’s charge that the tax cannot be applied under the anti-commandeering doctrine by commandeering the state’s regulatory apparatus relied on in *Printz* – where a federal fire-arms law required that the chief law-enforcement officer in each local jurisdiction conduct certain checks to ensure compliance with the statute – and *New York* – where the federal government mandated that the States provide for disposal of certain low-level radioactive waste. In both of these cases the Supreme Court held the federal laws at issue

“commandeered” the state’s apparatus unconstitutionally.

The Circuit Court determined these cases were not on-point and that instead *SAMTA* – where federal law required state government employers to meet the overtime and minimum-wage requirements of the Fair Labor Standards Act and which was upheld against a commandeering challenge – was on-point because it shows the *federal government can require state government entities to comply with generally applicable laws* on par with private employers. Ohio’s argument that the payments violate the intergovernmental tax immunity doctrine, under which federal and state governments should not tax each other, also failed. The Circuit rejected this theory because it only applies to *discriminatory* taxes levied on one by the other, and here the ACA applies the mandatory contributions to private-sector employers and state and local government employers *equally*. The Circuit thus affirmed the lower court. <http://www.opn.ca6.uscourts.gov/opinions.pdf/17a0040p-06.pdf>

***Jails: “State Created Danger” Liability Did Not Arise Where Repeat Offender Inmate Allowed to Work Unsupervised Outside Jail and Murdered Nearby Resident***

***Long v. County of Armstrong, No. 16-3027 (3d Cir. Feb. 14, 2017).***

***Without additional factors indicating foreseeability by jail officials that a particular inmate would use his position as a trustee to escape and murder a nearby resident, the decedent’s estate could not succeed on a § 1983 action under a State Created Danger theory.***

Robert Crissman violated his parole and was incarcerated in Pennsylvania’s Armstrong County Jail (Jail). Despite his history of convictions for theft, breaking and entering, use and possession of drugs-and, allegedly, the prison officials knowing he was addicted to heroin and going through withdrawal, he was assigned to the Jail’s Trustee Program. Under the program he worked outside the jail without supervision and in civilian clothing.

Once outside the prison walls one day, Crissman escaped by running into the woods. He ran to an acquaintance’s house, in which Tammy Long lived and, after the acquaintance left, he beat and murdered Long. Long’s family filed suit against Armstrong County (County) under a state-created danger theory of § 1983 liability. Long’s estate claimed deficiencies in the Jail’s policies and decisions with respect to Crissman resulted in a violation of Long’s Fourteenth Amendment rights, a theory the district court dismissed for failure to state a claim.

The Circuit began with a review of the state-created danger theory, namely that although the Fourteenth Amendment does not obligate the state to protect citizens from private conduct, under the this exception a claim lies when: “(1) the harm ultimately caused to the plaintiff was foreseeable and fairly direct; (2) the state-actor acted in willful disregard for the plaintiff’s safety; (3) there was some relationship between the state and the plaintiff; and (4) the state-actor used his authority to create an opportunity for danger that otherwise would not have existed.”

The district court had dismissed the case because of a failure to meet the third element, and the Circuit agreed that Long was not a foreseeable victim. The element requires a “sufficiently close” relationship such that the victim was a foreseeable one. No such relationship exists “where the state actor creates only a threat to the general population.” Long’s estate argued that Crissman’s friendship with Long’s roommate created the relationship needed between the state and Long, but the claim lacked any allegation that the Jail knew of the relationship itself, let alone that Long was living in the house with the acquaintance. The alternative argument that Long lived in “close proximity” to the Jail and this created a sufficient relationship for the County to be liable also failed. The Circuit found this fact more appropriately analyzed under the first element – where the Court asked “whether the harm ultimately caused was a foreseeable and a fairly direct result of the state’s actions.” It affirmed the lower court.

<http://www2.ca3.uscourts.gov/opinarch/163027np.pdf>

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# A DAY IN THE LIFE

## The Lure of New Horizons

By: Monica Ciriello, Ontario 2015



Janice Atwood-Petkovski  
City Solicitor, Hamilton, Ontario

When asked to reflect on a single most memorable aspect of an illustrious legal career, Janice Atwood-Petkovski, the current City Solicitor at the City of Hamilton, has a difficult time narrowing it down to just one. Not that this is surprising, as Janice has spent 30 years practicing municipal law, holding a variety of positions in multiple cities across southwestern Ontario. After an extremely successful career Janice has set her sights on her next challenge, a transition into a new career as an Integrity Commissioner.

*Municipal Lawyer* recently had the opportunity to sit down and find out more about Janice's journey before she closes this most recent chapter in March 2017.

Never one to turn down an opportunity, Janice left her budding corporate career to study for the LSAT in early 1981, recognizing at a young age the invaluable advantage that a legal degree would provide. She began her studies at Osgoode Hall Law School in Toronto. When asked about the typical struggles of adjusting to first year law, it was clear Janice was a natural multitasker, applying that skill in unusual circumstances: she even studied her law notes and read textbooks at concerts while her musician husband (now of 33 years) was on stage performing.

As much as she loved classroom learning, she could not wait to get out and apply her developing legal knowledge. In second year she was in court almost everyday as she began work at Parkdale Community Legal Services, which paved the way to becoming an advocate. All of that in-court experience paid off when she was hired by the Ministry of Municipal Affairs and Housing—and her career in the public sphere was off and running. Always up for a challenge

and wanting to expand her municipal understanding, Janice talked herself into a new position at the Ministry, representing them at Ontario Municipal Board matters.

When queried about her prior planning experience, Janice laughs. "I had hardly any." But that was not a barrier because she was ready, willing and able to learn directly from the planners in the field. Looking back, she still impresses even herself with the number of hours she dedicated to mastering this new and highly valuable discipline. And she is quick to encourage young lawyers to do the same: "Never turn down an opportunity, even if it is out of your comfort zone—you need to be willing to take on challenges."

Following her own advice, Janice again moved beyond her comfort zone when she left the Ministry and went to the City of Brampton, her hometown. There, she served for 15 years, in the process raising three daughters in the same municipality where she grew up. Janice also had the opportunity to work at the City of Mississauga and the City of Vaughan before finally joining the City of Hamilton in 2013.

Looking back at her career, Janice recalls the days before case law was online, where cities would fax another cases or outcomes to ensure that counterparts across the province could rely on the most recent decisions. What remains true today, she says, although the faxes having long since disappeared, is the cooperation among lawyers across the municipal sector. "Despite being located in separate cities many miles apart we are always working together. And a special

thanks to IMLA for linking us and ensuring that we do cross paths."

Janice may be stepping out of her current role, but she is not going far from our municipal circles. She will be transitioning into an Integrity Commissioner position to ensure greater governance and accountability of municipalities. Her rich and varied career path clearly demonstrates the many opportunities available to those so lucky to have chosen to practice in the field of municipal law, if they are up for the challenge!

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4. Fact Sheet—Small Unmanned Aircraft Regulations (Part 107), FAA, (June 21, 2016), [https://www.faa.gov/news/fact\\_sheets/news\\_story.cfm?newsId=20516](https://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=20516).

5. Huerta *supra* note 3.

6. Unmanned Aircraft Systems (UAS) Frequently Asked Questions/Help, FAA, <https://www.faa.gov/uas/faqs/> (last visited January 25, 2017).

7. State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet, FAA, <https://www.faa.gov/news/updates/?newsId=84369> (last visited January 25, 2017).

8. Skysign International, Inc. v. City and County of Honolulu, 276 F.3d 1109, 1115 (9th Cir. 2002).

9. Koscielski v. City of Minneapolis, 435 F.3d 898, 902 (8th Cir. 2006), Grace United Methodist Church v. City Of Cheyenne, 451 F.3d 643, 659 (10th Cir. 2006), Restigouche, Inc. v. Town of Jupiter, 59 F.3d 1208, 1214 (11th Cir. 1995), *See also* FAA Docket No. 16-04-01 (Dec. 15, 2005), Aircraft Owners & Pilots Ass'n (Aopa) Members: Bill Bahlke, Reagan L. Dubose, Howard G. Soloff, Laurence K. Mellgren, David Watkins, Joseph Haughey, Robert Kwass, Herbert Jacobs, & Levent Erkmen, Complainants, 2005 WL 3722717, at \*9 (“An airport may limit any given type, kind, or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public.”); *See, e.g.*, Gustafson v. City of Lake Angelus, 76 F.3d 778, 791 (6th Cir. 1996) (city’s prohibition on landing seaplanes on lake within city limits did not violate riparian owner’s equal protection rights, since all similarly situated persons were similarly regulated, and ordinance was rationally related to legitimate land use concerns over noise, danger, apprehension of danger, destruction of property values, and interferences with other lawful uses of lake); Casciani v. Nesbitt, 659 F. Supp. 2d 427, 439 (W.D.N.Y. 2009), *aff’d* 392 F. App’x 887 (2d Cir. 2010) (finding ordinance that permitted ultralight aircraft but not helicopters “quite plainly, rationally related to the protection of the health, safety and welfare of [the municipality’s] residents”);

Caswell v. City of Bloomington, 430 F.Supp.2d 907, 914 (D. Minn. 2006) (city’s zoning ordinance regulating land use surrounding a newly constructed runway at municipal airport passed rational-basis test, since it was rationally related to legitimate government interest of protecting public safety).

10. Michael Huerta, Drones: A Story of Revolution and Evolution, Address at Consumer Electronics Show (January 6, 2017), [https://www.faa.gov/news/speeches/news\\_story.cfm?newsId=21316](https://www.faa.gov/news/speeches/news_story.cfm?newsId=21316).

11. *Id.*

12. Steven Crowe, *FAA to Approve Drone Flights BVLOS at Test Site*, ROBOTICS TRENDS, (December 28, 2016) [http://www.robotictrends.com/article/faa\\_to\\_approve\\_drone\\_flights\\_bvlos\\_at\\_test\\_site](http://www.robotictrends.com/article/faa_to_approve_drone_flights_bvlos_at_test_site).

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held that the trial judge’s conclusions were accurate and were supported by case law that assessed whether the Appellant as an occupier had taken reasonable and appropriate care.

The Appellant next challenged the trial judge’s finding that it had breached its duty to warn the Respondent of the dangers associated with the obstacle itself. The Appellant agreed with the trial judge in finding not only the principle of inherent risk but also that the Respondent was aware of the inherent risk associated in the sport of mountain biking. The Appellant took issue with the trial judge’s final conclusion that the Respondent may have been an experienced mountain biker but he was not experienced with wooden obstacles or apparatuses. This led the trial judge to conclude that “Although [Stephan Campbell] foresaw risk of some injury, he did not foresee the severity of the potential injury.”

The Court found the trial judge’s conclusion proper, and dismissed the Appellant’s argument. Next, the Appellant raised concern that the trial judge did not clearly articulate an appropriate standard of care it had to meet dispute concluding that the standard was not met. The Court disagreed; finding numerous examples of the trial judge outlining what the Appellant could have done to differently to avoid liability:

There were no instructional signs, no requirements to complete an easy trail or [a difficult trail]... no warning of serious

injury, and no instruction on how to extricate oneself from the feature.

The Appellant challenged trial judge’s application of “but-for” test which concluded that the Appellant caused the Respondent’s injuries. The Court indicated that the Appellant could only succeed if it demonstrated that none of the causation conclusions could stand, which it could not do. The Court found that the trial judge’s conclusion that the Appellant breached its duty of care and but for that breach the Respondent would not have attempted the obstacle or sustained his injury. The trial judge found that the Respondent was not contributorily negligent and cannot be found liable for falling, as the risks were not obvious. The Appellant argued that the trial judge failed to broaden his view beyond the Respondent’s actions attempting to avoid the accident instead of considering the Respondent’s decision to attempt the obstacle in the first place. The Court again disagreed, finding that it was reasonable for the trial judge to have that viewpoint as the trial judge had already concluded that the Appellant breached its duty of care under s.3(1) of the *Occupiers Liability Act*.

The Appellant also argued two other interpretations of the trial judge’s language during the trial to indicate contributory negligence on behalf of the Respondent. The Court dismissed both, stating that it was not prepared to accept that the interpretive language used during the trial amounts to a formal admission of some liability. The appeal was dismissed and the Respondent was awarded \$25,000 in costs.

## Standing: No Standing to Challenge Procedural Fairness of Zoning Bylaw on Behalf of Third Parties

### **Miner v Kings (County), 2017 NSCA 5 (CanLII)** <http://canlii.ca/t/gx0t7>

The Appellants are mother and son residents in the Municipality of the County of Kings (Municipality). The Glooscap First Nation Economic Development Corporation (Glooscap) owns the property across the road from the Appellants and sought to rezone it to commercial for development. The appropriate application was submitted

and approved by the Municipality. In addition to rezoning the land, the Municipality also approved a land use bylaw text amendment that amended the uses permitted in commercial zones. Simultaneously, this also changed the permitted uses in Avonport, the only other commercial zone in the Municipality.

The Appellants filed an application for judicial review under s.189 of the *Municipal Government Act (Act)* S.N.S. 1998, arguing that the Municipality denied the property owners in Avonport procedural fairness in passing the bylaw text amendment and should be quashed for illegality; despite themselves acknowledging that they received procedural fairness. The reviewing judge granted the Appellants standing but dismissed the application holding that procedural fairness had to do with the owners in Avonport, not the Appellants. The Appellants appealed the dismissal. The Municipality and Glooscap together are the Respondents. Glooscap filed a cross-appeal that the reviewing judge erred in granting standing to the Appellants.

**HELD:** Appeal dismissed, cross-appeal allowed

**DISCUSSION:** The Court began by highlighting the importance of standing in this case. The Appellants argued that they have standing as a right under s.189 of the Act, however in the alternative they argued they have public interest standing. The reviewing judge found the Appellants had standing under s.189:

**Procedure for quashing by-law**

189(1) A person may, by notice of motion which shall be served at least seven days before the day on which the motion is to be made, apply to a judge of the Supreme Court of Nova Scotia to quash a by-law, order, policy or resolution of the council of a municipality, in whole or in part, for illegality.

The Appellants argued that the reviewing judge did not err in granting them standing, as residents of the Municipality. s. 189 afford them standing to challenge a municipal action. The Court disagreed and as did the case law; decisions out of the Nova Scotia Supreme Court have rejected the argu-

ment that s.189 is to be interpreted as providing “automatic standing to any person.” In *Solid Waste Association of Nova Scotia v. Halifax (Regional Municipality)*, 2005 NSSC 89 (CanLII) Hood, J. wrote about s.189 stating “in my view it does not provide as of right standing to anyone seeking to challenge municipal bylaws.” The Court found that the legislature could not have intended to permit unlimited persons to advance court challenges to municipal bylaws, orders, policies or resolutions of council without a personal quarrel with the Municipality.

The Court held that the reviewing judge was incorrect in finding that the Appellants had standing under s.189. Going through three factors, the Court examined if the Appellants should have been granted public interest standing. First, the Court concluded it was provided little context to determine if there was a serious justiciable issue to resolve. Second, the Court failed to find any indication as to why the Appellants had an interest in whether Avonport landowners were afforded procedural fairness. Third, the Court was not satisfied that the Appellants’ request for judicial review was the most reasonable means to deal with this issue. The Court held that the Appellants were not entitled to public interest standing. Since the Appellants did not have standing it was not necessary for the Court to determine the substantive issues raised by the Appellants. Appeal dismissed.

**Trials: Police Service Board Is Independent from Municipality and Is Not Precluded from Jury Trial**

**Brignall v Lynch, 2017 ONSC 479 (CanLII) <http://canlii.ca/t/gx17n>**

The Plaintiff claims excessive force was used against him by police officers with the Woodstock Police Services Board (Defendants) during an arrest and brought forward a claim for the injuries he sustained. In response to the allegations by the Plaintiff, the Defendant filed a jury notice. The Plaintiff brought forward this motion to strike the Defendant’s jury notice.

**HELD:** Motion to strike dismissed.

**DISCUSSION:** The Plaintiff relied on two arguments. First, allegations involving the Ontario Provincial Police (OPP) cannot be heard by a jury; therefore the Defendants in this matter should not be permitted a jury trial. The Court found this argument without merit and relied on case law where the court has permitted juries to hear matters against the OPP (*Perrier v. Sorgat*, 1979 CanLII 1772 (ON SC)). The crux of the Plaintiff’s second argument concentrated on discounting the Defendant’s reliance on *Brown v. Thunder Bay* (1986), 11 C.P.C. (2d) 159 (Ont. Dist. Ct.). The Plaintiff argues that a jury trial is precluded as the *Courts of Justice Act* states that “any action that includes relief against a municipality shall be tried without a jury” and as the Defendant is financed by the municipality and “any lawsuits brought against them are technically seeking relief from the municipality.” The Defendants rely on *Brown* which ultimately concluded that if the legislature wanted to prohibit police from jury trials it would have expressly excluded this right in the *Police Act*, R.S.O, 1980. The *Police Act* was the governing legislation when *Brown* was decided.

The Plaintiff unsuccessfully attempted to differentiate the current case from *Brown* by distinguishing s. 14 of the *Police Act* and s.39 of the current *Police Services Act* which speaks to police board funding. The Plaintiff suggested that the language in s.39 made the police board more reliant on a municipality than the language under s.14 when *Brown* was decided. The Defendants argued that the wording provided the same inherent meaning and relied on numerous cases where a jury trial was used in a police matter following the enactment of s.39 (*Oniel v. Metropolitan Toronto (Municipality) Police Force*, 2001 CanLII 24091 (ON CA); *Jeremiah v. Toronto Police Services Board*, 2007 ONCA 671 (CanLII); *Porter v. York Regional Police* 2002 CanLII 53280 (ON CA)). The Court dismissed the Plaintiff’s motion finding that the Woodstock Police Services Board is independent from the municipality.

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