

Inside IMLA

From a Legal Perspective

by Charles Thompson, Jr., IMLA General Counsel and Executive Director



It has now been two years since I took over as IMLA's Executive Director. During that period, I have found that writing this column is one of the more difficult jobs assigned to me. Sure, it is only three times a year, but I am afraid each time it seems more difficult. Not only am I faced with a fairly long lead time, which translates into writing something that can only be current if one has a surprising amount of foresight, but I really question if I have much that is new or compelling to say. Essentially, my task involves bringing members up to date on things that are happening at IMLA and the issues we face. Having said that, let me try to discuss a few of the issues confronting IMLA and local governments.

From a purely legal perspective, our participation, through our legal advocacy program, in some compelling cases highlights some of the challenges local government lawyers face. IMLA successfully participated in an important takings case in the Ninth Circuit, *Tapps Brewing v. City of Sumner*. The case involves a city's efforts to adddress stormwater runoff by making property owners, who improved their property, build and size storm sewers to conform to the city's storm sewer plan. The Ninth Circuit issued an excellent opinion unanimously upholding the right of state and local governments to impose reasonable development conditions and ensure a sustainable balance between environmental concerns and land use, and which incorporated many of the points made in our *amicus* brief. The property owners sought a rehearing (which the court denied) but the court issued an amended decision, adding only a footnote reflecting the court's conclusion that the city's regulation was materially related, in scope and effect, to the problem the regulation addressed. We expect the plaintiffs to seek certiorari in the Supreme Court and will be following this case closely.

These cases enjoy one central theme—the potential increased cost to local government should a decision adverse to local government either be made or upheld. Most local governments are already suffering in a down economy and adverse results in these cases can exacerbate that suffering.

Rose Acre Farm v. U.S. is another takings case we are following, but one that we have not participated in, so far. It involves a federal regulatory action. The case was recently argued in the Court of Appeals for the Federal Circuit. Almost 20 years ago, an outbreak of salmonella prompted the government to issue emergency regulations affecting the egg industry. Essentially, the regulations sought to protect public health by requiring egg producers whose facilities tested positive for salmonella to remove eggs from the raw table-egg market until the facilities were retested and then tested negative for salmonella, or until the facilities were depopulated, cleaned, disinfected and inspected. Instead of selling the eggs in the raw table-egg market, the eggs could only be sold in what is called the "breaker" egg market. There is a substantial difference in value between a table egg and a breaker egg in the marketplace. Thus, taking into account the 700 million eggs that Rose Acre Farms sold during the period it was subject to the restriction, the farm lost substantial monies by virtue of the difference; nevertheless, the farm continued to profit by selling its eggs during this period. Accordingly, the issue before the court is whether a taking occurs when a government regulation diminishes the profit a person can make from a regulated enterprise. The lower court ruled in the plaintiff's favor. Obviously, the issues in this case (if decided adversely to the government) will expand greatly the cost of regulatory action—in many cases, well beyond those damages that are readily apparent.

IMLA agreed to support the State of Alabama in its request for certiorari to the Supreme Court in another case, *Pope v. Alabama*, having significant potential adverse consequences. The case involves an old order designed to protect against discrimination in hiring. As with many 30-year-old orders, much has changed since the order was originally issued—so much so that the State sought to have

the order vacated and authorized a study to provide the factual basis to support its request. In the interim, a person who was adversely affected by the order filed suit. Later, that person's lawyer learned that the State was seeking to vacate the order and moved to intervene (according to one Assistant Attorney General, the lawyer stated he was doing so to jump the State's claim). Ultimately, the court agreed to vacate its order. When it did, the intervener's attorney sought attorney's fees as a "prevailing party." The Eleventh Circuit granted his request. IMLA joined as an *amicus* to urge the Supreme Court to review whether a prevailing party can obtain attorney's fees from another prevailing party with which that party is aligned. Sadly, the Supreme Court has decided not to grant certiorari in this case.

Another interesting case, *U.S. ex rel Wilson v. Graham County Soil Conservation District*, that IMLA has not yet joined and is pending a decision on whether certiorari should be granted involves the False Claims Act. An employee of a Soil Conservation District raised a number of concerns about the operations of the District with the local county commissioners and with the State. Believing those concerns serious enough, the County opted to conduct a review and determined that the District had acted improperly. The State conducted a similar review and reached a similar conclusion. Both the State and County acted promptly to correct the deficiencies. Nevertheless, the employee filed a False Claims Act action which the District sought to dismiss, based on a provision in the Act that precludes suits brought based on facts found in administrative reviews. The Fourth Circuit concluded that the Act was intended only to exempt suits that were derived from federal administrative reviews, not reviews conducted by state or local governments. The court has asked the Solicitor General to provide that office's insight into the case and as to whether certiorari should be granted. Should the Court grant certiorari, I expect that IMLA will participate as an *amicus*, as this case poses dire consequences for local governments and acts as a disincentive to local and state governments to conduct audits of, and report on wrongdoing in, federally-funded programs.

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IMLA cannot support local governments in these and other cases without your help. Our advocacy programs (as well as our other programs) all require sufficient resources to keep them effective. For that reason, I am asking you to help us attract and retain members. I am also asking that you support our educational programming. We try very hard to provide excellent CLE programs in a cost-effective manner, and the evaluations of our programs confirm we are successful in pursuing that goal.

Because so many of our members report that travel budgets are being slashed, we are now offering audio/webinar programming at very affordable rates. By comparison, our fees are substantially less than many other CLE providers; yet, in comparison to others, who can subsidize their programming through substantially greater membership revenue, our rates are a little higher. Thus, if we can increase our membership base (or be assured of a "sell out" audience), we should be able to reduce some of our programming costs in the webinar/audio marketplace.

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Member News

IMLA Past President Appointed to Queen's Bench



On December 12, Bruce Noble, Q.C., an IMLA Past President (2004-2005) and the City Solicitor for Fredericton, New Brunswick, was appointed by Canada's Minister of Justice and Attorney General to the Court of Queen's Bench, Family Division, in the Province of New Brunswick. This is a tremendous honor and distinction. Bruce was sworn in on January 9, 2009, and will be serving in the City of Saint John. As a Canadian judge in a senior or superior level of trial court, he will be the Honourable Mr. Justice Noble.

Bruce has been an active IMLA member for very many years and, among his many distinctions, he served as the first Canadian President of IMLA. On leaving the world of local government law, Bruce notes: "Municipal law has provided me with a wonderful career and a fascinating life filled with what can only be called stimulating challenges. I have enjoyed the company and the advice of great attorneys on both sides of the border." Although he'll be leaving the municipal legal world, we're pleased to note that the Honourable Mr. Justice Noble intends to remain an IMLA member.

We're extremely proud and happy for Bruce, and wish him every success in the new chapter of his professional life. **ML**

probable cause was sufficient to support his traffic stop and any subsequent arrest. Rodriguez's constitutional rights were not violated even if his detention was an arrest, since the initial stop was permissible. *United States v. Rodriguez-Rodriguez,* No. 07-2214, 2008 WL 5340311 (10th Cir. Dec. 24, 2008).

Extra-Jurisdictional Arrests

Engleman, while staying with his parents in Oklahoma, noticed some prowlers and dialed 911. The call was routed to the local county sheriff's office, located in Arkansas, and Deputy Sheriff Murray and others were sent to investigate. The call was taken from a telephone number with an area code assigned to northwestern Arkansas, and the address given was a street address in Arkansas. While en route, the officers learned of an outstanding warrant for Engleman. The officers arrived and informed the parents about the warrant, and located Engleman in the home. Both Engleman and his father took the position that, as the house was actually in Oklahoma, not in Arkansas, the officers could not arrest Engleman. (Arkansas law authorized law enforcement officers to execute its arrest warrants "in any county in the state," but did not authorize out-of-state arrests.) Nonetheless, the officers arrested Engleman and took him to the county jail. Engleman brought suit under 42 U.S.C. § 1983, alleging that the officers used excessive force in violation of the Fourth Amendment, and that the arrest in Oklahoma was unreasonable under the Fourth Amendment: by arresting him in Oklahoma on an Arkansas warrant, Deputy Murray exceeded his jurisdictional authority, which violated Engleman's Fourth Amendment right to be free from unreasonable seizures. In the course of litigation, a satellite positioning system revealed that, while the postbox for the Engleman property was in Arkansas, the actual house itself was located in Oklahoma. The defendants moved for summary judgment, arguing that they were entitled to qualified immunity.

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These revenues help support our advocacy program and some of our other services, such as this magazine and our e-newsletters. The revenues also support some of our newer projects. As you know, we have started some groups for people with common interests. These groups include dedicated listservs and regular conference calls. The groups include "code enforcement," "coastal communities," "capital cities," "sports cities," "university cities/college towns," "counties," and will include "border communities," and "young lawyers." While the listservs are fairly inexpensive to operate, the conference calls are another matter. These groups provide great opportunities for our members to network with attorneys in other communities with common interests and common practice areas. We need additional revenues to sustain them.

Enough whining! We have a terrific program planned for the Seminar in April and we are already developing, with the City of Miami, a program for the Annual Conference that will be one of our best ever. If you have a construction project that has been affected by the economic slowdown and is late, in default, or you have claims, you will not want to miss our Annual Construction Law program, scheduled for March 1–3, 2009 in San Diego. **ML**

The Americans with Disabilities Act *continued from page 11*

Accord, Jarvis v. Potter, 500 F.3d 1113, 1121-22 (10th Cir. 2007) (court upholds termination of a postal worker who suffered from post-traumatic stress disorder, PTSD, and who would physically attack coworkers who startled him, under a "direct threat" defense).
37. *Id.* at 1087.
38. Sista v. CDC Ixis North America, Inc., 445 F. 3d 161 (2d Cir. 2006).
39. *Id.* at 169-74.
40. 117 F. 3d 351, 353 (7th Cir. 1997).
41. *Sista,* 445 F. 3d at 172-73. *But see* Husowitz v. Runyon, 942 F. Supp. 822, 832 (E.D.N.Y. 1996) (noting the Second Circuit rejects the distinction between a handicapping condition and specific conduct resulting from the condition in determining if an employer's decision to take action against an employee is based on the plaintiff's disability, relying on *Teahan v. Metro-North Commuter R.R. Co.*, 951 F. 2d 511, 515-17 (2d Cir. 1991)).
42. The majority of municipal employees have property interests in their employment, requiring cause for discharge. *See, e.g.*, Gilbert v. Homar, 520 U.S. 924, 928-29 (1997) (employees who can be discharged only for cause have a constitutionally-protected property interest in their tenure and cannot be fired without due process).
43. Generally, "just cause" factors include: (1) whether the employee had forewarning or foreknowledge of possible disciplinary consequences of his misconduct; (2) whether the employer's policy or rule is reasonably related to the orderly, efficient, and safe operation of the agency; (3) whether a fair investigation was conducted prior to imposing discipline; (4) any proof of misconduct; (5) whether the policy or rule was applied evenhandedly to all similarly-situated employees; (6) whether the punishment fit the severity of the conduct, in light of progressive discipline; and (7) any mitigating circumstances. *See* Discipline & Discharge in Arbitration, 33-35 (Norman Brand, ed., BNA Books 1998).
44. *See* Pence v. Tenneco Auto. Operating Co., Inc., 169 Fed. App. 808, 811 (4th Cir. 2006) (upholding an employer's decision to send an employee to the employer's doctor for medical evaluation for egregious behavior before interviewing him).
45. An excellent resource that addresses these questions is Beth Bates Holliday, Annotation, *Use of "Last Chance" or "Return to Work" Agreements Under Americans with Disabilities Act,* 6 A.L.R. Fed. 2d 453 (2005).
46. *See supra,* note 33. **ML**

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