Click! A Snapshot of Automated Traffic Enforcement Issues

— by Carie A. Torrence —



Automated traffic enforcement systems are quickly growing in popularity as an effective tool to assist municipalities with traffic control, and to reduce the number of costly traffic accidents. The use of such automated enforcement, however, has resulted in public opposition, as well as litigation. This opposition presents a challenge to municipalities wishing to employ automated enforcement. Municipalities should be adequately informed of the advantages and risks when considering whether to implement automated enforcement.

The two primary methods of automated enforcement are speed cameras and red light cameras.[1] A small number of jurisdictions also use cameras for toll booths, railroad crossings, and high-occupancy-vehicle lanes. As of May 2009, speed cameras were being used by 48 communities in twelve states and the District of Columbia.[2] Red light cameras are far more popular, and are currently being used by over 428 communities in 24 states and the District of Columbia.[3]

Less Accidents

The primary justification for automated enforcement is the reduction in traffic accidents, injuries, fatalities, and the related economic losses. According to statistics compiled by the Insurance Institute for Highway Safety (IIHS), speeding is a factor in one-third of all fatal traffic accidents.[4] In 2007, speed-related collisions resulted in 13,040 deaths and $40 billion in economic losses.[5] "Red light running" resulted in nearly 900 deaths and 153,000 injuries.[6]

Studies conducted by the IIHS show that speed cameras substantially decrease speeding and speed-related accidents.[7] In a 2007 study conducted in Montgomery County, Maryland, speed cameras resulted in a 70% decrease in drivers exceeding the speed limit by more than ten miles per hour.[8] In a similar 2006 study, drivers in Scottsdale, Arizona, were up to 95% less likely to exceed, by ten miles per hour or more, the posted speed limits on highways utilizing camera enforcement.[9] A 2007 National Highway Traffic Safety Administration (NHTSA)-sponsored review of 13 published studies reported a 20 to 25 percent reduction in accidents for fixed

speed cameras, and a 21 to 51 percent decrease in accidents for mobile speed camera programs.[10]

Red light cameras have also been shown to substantially reduce red light violations. The IIHS studies show that camera enforcement has reduced red light running violations by about 40 percent.[11] In addition to reducing red light violations, cameras have been shown to reduce intersection crashes. In Oxnard, California, significant reductions in crashes, citywide, followed the introduction of red light cameras, and injury crashes at intersections with traffic signals were reduced by 29 percent.[12] Front-into-side (or right angle) collisions, the type of accident most commonly resulting from red light violations, were reduced by 32 percent, and crashes involving injuries were reduced by 68 percent.[13]

Opponents of red light cameras argue that the cameras increase rear-end collisions. However, a study sponsored by the Federal Highway Administration (FHA) concluded that the economic benefits related to the decrease in right-angle collisions offset the economic costs of the increase in rear-end collisions.[14] This study evaluated red light camera programs in seven cities. It reported a 15 percent increase in rear-end collisions, but a 25 percent decrease in right-angle collisions, resulting in a cost savings of $39,000 to $50,000 per site per year.[15] Based on studies, both the FHA and the NHTSA concluded that red light cameras can be an effective tool in preventing red light traffic violations and reducing the costs associated with accidents.[16]

Lack of Legislation Increases Litigation

Currently, 17 states and the District of Columbia have enabling legislation which expressly authorizes some or all municipalities in the jurisdiction to adopt ordinances establishing some type of automated enforcement program.[17] A handful of other states have regulations or limitations on automated enforcement which implicitly permit some use.[18] However, in 2009, Mississippi and Montana imposed bans on previously approved programs, increasing the number of states which expressly prohibit automated enforcement to five.[19] The bulk of the remaining states have no statutory provisions relating to automated enforcement.[20]

The lack of statutory guidelines in nearly half of the states has led to litigation challenging the authority of municipalities to enact automated enforcement ordinances. The first two courts to consider the issue, in Colorado and Minnesota, held that automated enforcement ordinances were preempted, entirely or in part, by state statutes.[21] Subsequent decisions by courts in Ohio and Iowa reached the opposite conclusion – that the ordinances were not preempted by state law.[22]

Invalidated Ordinances

The Colorado Supreme Court was the first high court to consider automated enforcement ordinances. In *City of Commerce City v. State of Colorado*, that court considered a challenge filed by several cities, claiming state statutes regulating automated enforcement were preempted by local ordinances.[23] Commerce City and Fort Collins had implemented the use of automated vehicle identification systems (i.e., photo radar and photo red light), and other cities were considering the adoption of similar ordinances.[24] The Colorado General Assembly, concerned that there should be uniform state standards, adopted regulations to govern the use of automated enforcement systems.[25] The state regulations differed from the local ordinances in some respects, and several home-rule cities challenged the constitutionality of the state law, arguing it infringed on the municipalities' home-rule powers.[26]

Under Colorado law, if a matter is one of local concern, the home-rule provision supersedes the state legislation, but if the matter is one of statewide or mixed concern, the state statute supersedes the home-rule provision.[27] The cities argued that the local provisions governing traffic enforcement were a matter of local interest and, thus, the state legislation was superseded by the local charters and ordinances.[28] The court recognized that the cities had an interest in regulating traffic and ensuring public safety;[29] however, it also recognized that the state had a significant interest in the uniform regulation of automated enforcement systems.[30] Concluding that the nature of the interest at stake – automated enforcement – was a matter of mixed local and state concern, the court held that the state statute superseded any conflicting provisions of the local ordinances or charters.[31]

In the second case, *State v. Kuhlman*, the Minnesota Supreme Court considered the validity of a red light camera ordinance enacted by the City of Minneapolis, imposing criminal liability on the owners of vehicles violating the ordinance.[32] The court recognized that Minneapolis, as a home-rule charter city with a general welfare clause, had some authority to enact traffic regulations, provided these regulations did not conflict with state law.[33] Kuhlman, a vehicle owner issued with a citation for a failure to stop at a red light, argued that the ordinance conflicted with state law because it imposed liability on the vehicle owner, rather than on the driver at fault.[34] Kuhlman also argued that the ordinance conflicted with state law because it provided fewer procedural protections for those charged with violations than the state law, and shifted the burden of proof from the state to the vehicle owner.[35] The court agreed, finding that the ordinance was invalid because it conflicted with state law.[36]

Rulings Upholding Ordinances

In *Mendenhall v. City of Akron*, the Ohio Supreme Court considered whether a municipality could constitutionally

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use its home-rule power to enact an ordinance imposing a civil fine on the owner of a vehicle that was identified as speeding by speed cameras.[37] The primary issue was whether Akron's ordinance conflicted with state law.[38] In determining if there was a conflict between the ordinance and the state law, the court applied the test of whether the "ordinance permits or licenses that which the statute forbids and prohibits, and vice versa."[39]

Mendenhall, the vehicle owner who received civil speeding citations as result of the automated enforcement system, argued that a conflict existed, because the state law held the driver responsible for traffic violations, while the ordinance imposed liability on the vehicle owner.[40] The court was not persuaded that this difference created an impermissible conflict, reasoning that, "regardless of the actor who performs it, the actual conduct prohibited – exceeding speed limits – is the same."[41] Mendenhall had also argued that a conflict existed because the ordinance decriminalized behavior that was criminal under state law.[42] The court rejected this argument as well, finding that the ordinance did not replace the criminal penalty with a civil penalty.[43] Rather, the ordinance complemented the state law by imposing an additional civil penalty on the owners of vehicles photographed running a red light.[44] Accordingly, the ordinance was an act of concurrent police power, providing a supplemental system of civil enforcement which did not conflict with state law.[45]

In *City of Davenport v. Seymour*, Seymour – another vehicle owner contesting a speeding citation – argued that Davenport's automated enforcement ordinance, which imposed a civil fine on vehicle owners, was preempted by Iowa's statewide traffic laws.[46] Like Mendenhall, Seymour argued that Davenport's ordinance conflicted with state law because it provided for a civil, rather than a criminal, penalty, and shifted liability from the driver to the vehicle owner.[47] In addition, Seymour complained that the standard of proof and procedural protections under the ordinance were different than those in the state law.[48]

As did the court in the Ohio case, the Iowa Supreme Court found that the ordinance and state statute did not impermissibly conflict – the ordinance did not authorize what the statute prohibited, or prohibit what the statute authorized.[49] The court then considered whether or not the statute was designed to preempt the field, thereby prohibiting local regulations.[50] After considering the introductory language in Iowa's traffic legislation – which expressly reserved the right of municipalities to enact ordinances not inconsistent with state provisions – the court rejected the claim of field preemption.[51] It concluded that the municipality's automated enforcement was not inconsistent with state traffic laws and, therefore, not preempted.[52] The *Seymour* decision was reaffirmed subsequently in *Rhoden v. City of Davenport*, where the same court rejected claims that Davenport's automated enforcement ordinance was preempted by state statutes that regulated the collection of criminal fines for traffic violations and the procedures for the collection of civil penalties for municipal infractions.[53]

No State Legislation? Beware!

The primary difference between the Minneapolis ordinance and the ordinances in Akron and Davenport was the nature of the violation. In Minneapolis, a violation of the ordinance was a petty misdemeanor; in Ohio and Iowa, the ordinances provided for a civil penalty. However, Minneapolis adopted its ordinance in the absence of express enabling legislation at the state level.

Prior to the *Kuhlman* decision, over 14,000 individuals received citations under the Minneapolis ordinance, and paid approximately $2.6 million in fines to the City.[54] In May 2006, a class action lawsuit challenging the red light ordinance and asserting violations of the U.S. and Minnesota Constitutions, as well as various state law torts, was filed against Minneapolis.[55] The parties negotiated a settlement which required Minneapolis to create a settlement fund, consisting of all funds obtained and received under the ordinance. On April 2, 2009, the court entered a final judgment approving the proposed settlement: it awarded the three class representatives $1,500, and awarded class counsel more than a half-million dollars in attorney's fees. The remaining money was to be distributed to class members in proportion to the fines they paid.[56]

The aftermath of the *Kuhlman* decision demonstrates the risk to municipalities that adopt automated enforcement ordinances without specific enabling legislation. In response to the Minnesota settlement, state legislators in Alabama and Florida have attempted to pass legislation that retroactively approves the use of automated traffic enforcement. The City of Montgomery, Alabama, began using red light cameras in May 2008. In order to prevent potential lawsuits seeking recovery of $1 million in fines for prior tickets issued by the City, the Alabama legislature adopted Senate Bill 59, which retroactively approved the use of red light cameras by the City.[57]

A similar provision was passed by the Florida House of Representatives in its 2009 Session.[58] However, the version passed by the Florida State Senate did not contain the retroactive provision in the House version.[59] In any event, the Florida Legislature ended its regular session without reaching agreement on either version.

Constitutional Challenges

The courts have considered a handful of constitutional due process and equal protection challenges to automated enforcement ordinances. Many of these have been based on claims of inappropriate financial incentives or challenges to the manner of service, the presumption of liability of registered owners, or the adequacy of the hearing or appeal process.[60] As of the time of this article, all of these constitutional challenges have failed.[61] Challenges grounded in double jeopardy, self-incrimination, and Confrontation Clause arguments have also failed.[62]

Public Opposition

The use of automated enforcement systems has led to a public outcry in some communities. Besides the citizenry at large, many public interest groups

oppose such systems. Recently, initiative petitions have been circulated in some municipalities, seeking to repeal automated enforcement ordinances or to amend city charters to prohibit the use of automated systems.

For example, in Cincinnati, council members considered using red light cameras to raise $1 million in revenue.[63] In response, a group called Citizens Opposed to Additional Spending and Taxes teamed up with the National Association for the Advancement of Colored People and the We Demand A Vote coalition to collect 14,015 signatures on a petition to amend the City's Charter and prohibit red light cameras.[64] They succeeded: on November 4, 2008, voters narrowly passed Issue 7, banning the use of the cameras.[65] When the city council of Sulphur, Louisiana voted, in 2008, to approve a contract with a private company for the installation of speed cameras,[66] one of the opposing council members led a drive to collect signatures for a ballot measure to repeal the ordinance.[67] Residents overwhelmingly voted for repeal.[68]

Based on such success at the polls, initiative petitions appear to be on the rise. Petition drives have been launched in the Ohio cities of Toledo and Chillicothe,[69] and activists in Longview, Washington, are collecting signatures for a referendum to severely restrict the use of automated enforcement.[70]

The public debate has also led to increased legislative action. In 2009, many states adopted or had considered legislation aimed at prohibiting or limiting automated enforcement devices, primarily red light cameras. Two states which had previously permitted automated traffic enforcement passed legislation banning the systems. In March 2009, Mississippi's Governor approved House Bill 1568, banning the use of automated traffic enforcement systems and requiring any municipality using an automated system to remove the equipment or system by October 1, 2009.[71] On May 5, 2009, Montana's Governor signed House Bill 531, banning automated cameras in all locations in the state, with the exception of railroad crossings.[72] Legislation in Louisiana and Missouri unsuccessfully attempted to ban such devices,[73] and legislation is pending in Texas to ban the cameras.[74]

On the other side of the debate, Alabama has passed legislation authorizing such cameras.[75] Indiana, Florida, and Nevada attempted to pass legislation expressly authorizing camera enforcement, but none of these bills was successful.[76] Other states have adopted legislation to expand existing speed camera enforcement programs – in Maryland, for example, the use of cameras was expanded from Montgomery County school districts and residential areas to school districts and residential areas statewide.[77] The New York legislature increased the number of red light cameras in New York City from 100 to 150, and expanded the use of red light cameras to Nassau and Suffolk Counties, as well as Rochester, Buffalo, and Yonkers.[78]

Conclusion

Automated enforcement can be a valuable tool to aid municipalities in their efforts to improve traffic safety and reduce accidents. Municipalities, however, face credible risks of litigation without state legislation authorizing the use of such automated systems. With such legislation, the risk of a successful legal challenge is significantly reduced. There are many resources available to municipalities considering automated enforcement – useful information and statistics are available from the FHA, NHTSA, Governors' Highway Safety Association, and the IIHS. In addition, a model ordinance on automated traffic law enforcement is available at the website of the National Committee on Uniform Traffic Laws and Ordinances.[79]

Notes

1. Robin Miller, *Automated Traffic Enforcement Systems*, 26 A.L.R. 6th 179, § 2 (2007).
2. IIHS, Highway Loss Data Institute, *Communities Using Red Light and/or Speed Cameras* (May 2009) at http://www.iihs.org/research/topics/auto_enforce_cities.html.
3. *Id.*
4. IIHS, Highway Loss Data Institute, *Q&As: Speed and Speed Limits* (Mar. 2009) at http://www.iihs.org/research/qanda/speed_limits.html.
5. *Id.*
6. IIHS, Highway Loss Data Institute, *Q&As: Red Light Cameras* (Jan. 2009) at http://www.iihs.org/research/qanda/rlr.html.
7. IIHS, Highway Loss Data Institute, *Q&As: Speed – Law Enforcement* (Mar. 2009) at http://www.iihs.org/research/qanda/speed_lawenf.html.
8. *Id.* (citing Richard A. Retting, et al., *Evaluation of Automated Speed Enforcement in Montgomery County, Maryland*, 9 Traffic Inj. Prevention 440-45 (2008)).
9. *Id.* (citing Richard A. Retting, et al., *Evaluation of Automated Speed Enforcement on Loop 101 Freeway in Scottsdale, Arizona*, 40 Accident Analysis & Prevention 1506-12 (2008)).
10. *Id.* (citing Lawrence E. Decina, et al., *Automated Enforcement: A Compendium of Worldwide Evaluations of Results* (NHTSA Report No. DOT HS 810 763, 2007)).
11. IIHS, Highway Loss Data Institute, *Q&As: Red Light Cameras* (Jan. 2009) at http://www.iihs.org/research/qanda/rlr.html (citing Richard A. Retting, et al., *Evaluation of Red Light Camera Enforcement in Fairfax, Va., USA*, 69 ITE J. 30-34 (1999); Richard A. Retting, et al., *Evaluation of Red Light Camera Enforcement in Oxnard, California*, 31 Accident Analysis & Prevention 169-74 (1999)).
12. *Id.* (citing Richard A. Retting & Sergey Y. Kyrychenko, *Reductions in Injury Crashes Associated with Red Light Camera Enforcement in Oxnard, California*, 92 Am. J. Pub. Health 1822-25 (2002)).
13. *Id.* (citing Richard A. Retting, et al., *Effects of Red Light Cameras on Violations and Crashes: a Review of the International Literature*, 4 Traffic Inj. Prevention 17-23 (2003)).
14. *Id.* (citing Forrest M. Council, et al., *Safety Evaluation of Red-Light Cameras – Executive Summary* (FHA Report No. FHWA HRT-05-049 (2005)).
15. *Id.*
16. FHA and NTHSA, *Red Light Camera Systems Operational Guidelines*, Publication No. FHWA-SA-05-002 (2005).
17. IIHS, Highway Loss Data Institute, *Automated Enforcement Laws* (May 2009) at http://www.iihs.org/laws/automated_enforcement.aspx.
18. *Id.* (Louisiana prohibits reporting of camera convictions on a driver's record; New Mexico requires municipalities using camera enforcement to post warning signs).
19. *Id.*

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Pleasant Grove v. Summum

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significance of the endorsement test for determining when governmental display of religious imagery or text violates the Establishment Clause."). *See also* http://www.americanhumanist.org/news/details/2009-02-in-wake-of-summum-humanists-will-target-ten-commandments-monuments (Feb. 25, 2009) ("In the wake of today's U.S. Supreme Court ruling in *Pleasant Grove City v. Summum*, 07-665, the American Humanist Association announced it has been given just what it needs to pursue the removal of Ten Commandments monuments on public property all over America").

57. 129 S. Ct 1125, 1141 (2009) (Souter, J., concurring in the judgment).

58. *Id.* at 1135.

59. *See, e.g.*, Allegheny v. ACLU, 492 U.S. 573 (1989). The parameters of the test, and whether it still can command a majority of the Court in any context, are subject to ongoing debate.

60. 129 S. Ct. at 1133 (noting that viewers reasonably interpret park monuments as conveying some message from the government). *Compare id.* at 1142 (Souter, J., concurring in the judgment) (concluding that the "best approach" is to use the identical "endorsement test," assuming a "reasonable and fully informed observer," to determine both whether the challenged expression is "government speech" and whether it violates the Establishment Clause by sending a message that the government is endorsing religion).

61. Dolan 2008, *supra* note 4, at 50-51 (asserting the fact that monuments' meanings change over time as one reason that *Van Orden* may not continue to resolve such cases after *Summum*).

62. Buono v. Kempthorne, 527 F.3d 758 (9th Cir. 2008), *cert. granted*, Salazar v. Buono, 129 S.Ct. 1313 (U.S. Feb. 23, 2009) (No. 08-472).

63. Duchesne City v. Summum, 482 F.3d 1263 (10th Cir. 2007), *cert.granted*, 129 S. Ct. 1523 (U.S. Mar. 02, 2009). The Supreme Court vacated judgment and remanded the case to Tenth Circuit for further consideration in light of *Pleasant Grove City v. Summum*. **ML**

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20. *Id.*

21. City of Commerce City v. State, 40 P.3d 1273 (Colo. 2002) (*en banc*); State v. Kuhlman, 729 N.W.2d 577 (Minn. 2007).

22. Mendenhall v. Akron, 881 N.E.2d 255 (Ohio 2008); City of Davenport v. Seymour, 755 N.W.2d 533 (Iowa 2008).

23. *City of Commerce City*, 40 P.3d 1273.

24. *Id.* at 1276-77.

25. Senate Bill 97-36, codified as Colo. Rev. Stat. Ann. § 42-4-110.5 (West 2001).

26. *City of Commerce City*, 40 P.3d at 1278-79.

27. *Id.* at 1279.

28. *Id.* at 1277-78.

29. *Id.* at 1284.

30. *Id.*

31. *Id.* at 1285.

32. 729 N.W.2d 577 (Minn. 2007).

33. *Id.* at 580.

34. *Id.* at 582-83.

35. *Id.* at 583-84.

36. *Id.* at 584.

37. 881 N.E.2d 255 (Ohio 2008).

38. *Id.* at 262.

39. *Id.* at 262-63.

40. *Id.* at 263.

41. *Id.*

42. *Id.* at 264.

43. *Id.*

44. *Id.*

45. *Id.*

46. 755 N.W.2d 533 (Iowa 2008).

47. *Id.* at 541.

48. *Id.*

49. *Id.* at 541-42.

50. *Id.* at 542.

51. *Id.* at 542-43.

52. *Id.* at 543.

53. Rhoden v. City of Davenport, 757 N.W.2d 239, 241 (Iowa 2008).

54. Summary Notice of Class Action Settlement at 1, *Shapira v. City of Minneapolis*, U.S. Dist. Court Case No. 06-CV-02190-MJD_SRN (D. Minn. Dec. 30, 2008).

55. Shapira v. City of Minneapolis, U.S. Dist. Court Case No. 06-CV-02190-MJD_SRN.

56. *See* Order for Final Judgment and Approval of Remuneration to Class Representatives, Award of Attorney Fees and Litigation Costs and Expenses at 7, *Shapira v. City of Minneapolis*, U.S. Dist. Court Case No. 06-CV-02190-MJD_SRN (D. Minn. 2009).

57. S. 59, 2009 Leg., Reg. Sess. (Ala. 2009).

58. H.R. 439, 2009 Leg., Reg. Sess. (Fla. 2009).

59. S. 2004, 2009 Leg., Reg. Sess. (Fla. 2009).

60. Robin Miller, *Automated Traffic Enforcement Systems*, 26 A.L.R. 6th 179, §§ 2, 4-7. (2007).

61. *Id.*; *see also* Idris v. City of Chicago, 552 F.3d 564 (7th Cir. 2009).

62. Sevin v. Parish of Jefferson, No. 08-802, 2009 WL 1402332 (E.D. La. May 14, 2009).

63. Jane Prendergast, *Voters Ban Traffic-Light Cameras*, Cincinnati Enquirer (Nov. 05, 2008) at http://news.cincinnati.com/article/20081105/NEWS0106/811050418/1168/NEWS.

64. *See* theNewspaper.com, *Ohio: Anti-Camera Voter Referendum Push Expands* (Nov. 08, 2008) at http://www.thenewspaper.com/news/25/2590.asp.

65. *Voters Ban Traffic-Light Cameras*, *supra,* n. 63.

66. City of Sulphur, La., City Council Minutes (Sept. 8, 2008) at http://www.sulphur.org/minutes/2008%20Minutes/Minutes090808.pdf.

67. *See* theNewspaper.com, *Louisiana City to Vote on Banning Speed Cameras* (Mar. 26, 2009) at http://www.thenewspaper.com/news/27/2728.asp.

68. *See* the Newspaper.com, *Louisiana: Public Slams Traffic Cameras in Referendum* (Apr. 5, 2009) at http://www.thenewspaper.com/news/27/2738.asp.

69. COAST Candidates PAC, *Red Light Cameras Retreat Throughout Ohio* (Apr. 07, 2009) at http://coast-usa.blogspot.com/2009/04/red-light-cameras-retreat-throughout.html.

70. Amy M.E. Fischer, *Red-Light Camera Foes Preparing Initiative Petition*, The Daily News (May 13, 2009) at http://tdn.com/articles/2009/05/13/area_news/doc4a0a11b8bc037425446033.prt.

71. H.R. 1568, 2009 Leg., Reg. Sess. (Miss. 2009).

72. H.R. 531, 61st Leg., Reg. Sess. (Mont. 2009).

73. H.R. 480, 2009 Leg. Reg. Sess. (La.

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2009); S. 211, 95th Leg., 1st Reg. Sess. (Mo. 2009).
74. H.R. 300, 81st Leg., Reg. Sess. (Tex. 2009).
75. S. 59, 2009 Leg., Reg. Sess. (Ala. 2009).
76. S. 389, 116th Leg., 1st Reg. Sess. (Ind. 2009); A.B. 504, 75th Leg., Reg. Sess. (Nev. 2009); S. 2004, 2009 Leg., Reg. Sess. (Fla. 2009); H.R. 439, 2009 Leg., Reg. Sess. (Fla. 2009).
77. S. 277, 2009 Leg., Reg. Sess. (Md. 2009).
78. *See* theNewspaper.com, *New York Legislature Approves Massive Traffic Camera Expansion* (Apr. 09, 2009) at http://www.thenewspaper.com/news/27/2742.asp.
79. NCUTLO, *Automated Traffic Law Enforcement Model Law*, at http://www.ncutlo.org/autoenforce622.htm. ML

Federal

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ciliation Act of 2005 (May 17, 2006).
3. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5.
4. National Association of Counties (NACo), *Toolkit on Repeal of New Non-Wage Withholding Requirement*, undated.
5. A letter sent to IRS Commissioner Douglas Shulman by a coalition of organizations, including IMLA, and urging the Commissioner to hold public hearings on Section 511, is available online at www.imla.org/irsletterimla.pdf.
6. GFOA Issue Brief, *Withholding Requirement on Government Payments and Other General Tax Issues* (Feb. 2009) states that "[i]n 2006, the Congressional Budget Office estimated the cost to state and local governments for administering this provision to be $62 million per year."
7. NACo Fact Sheet, *Repeal Three Percent Withholding Tax on County Purchases* (March 2007).
8. National Defense Industrial Association, *Little Known Legislation Takes Federal Contractors By Surprise* (March 2007).
9. Statement available at http:/www.acec.org/advocacy/committees09priorities /3percent.cfm. ML

Supreme Court

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sorts. The Court placed great emphasis on test design and essentially held that a professionally prepared, content-valid test was a near impregnable defense to a Title VII disparate-impact lawsuit. Municipalities faced with adverse impact and the possibility of a lawsuit by minority candidates must now be prepared to stand by and defend their content-valid tests. At the same time, municipalities are free to explore selection procedures that have less adverse impact on minority candidates than traditional tests. The hope is that these alternative procedures will not only generate a more diverse promotion list, but will also do a better job of selecting candidates with intangible qualities, such as leadership, good judgment, and interpersonal skills. ML

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the requester appealed. Section 6 (1)(b) provided that a record that revealed "the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public," was exempt from disclosure. To benefit from the exemption, the City was required to show that a statute – in this case, s. 239 of the *Municipal Act* – authorized the holding of the meeting in the absence of the public. That Act did so in the case of a meeting addressing "a proposed or pending acquisition or disposition of land by the municipality."

After reviewing the report at issue, the hearing officer concluded that the meeting (and consequently, the report) did not come within the "closed meeting" category because "most of the report" did not deal with "a proposed or pending acquisition or disposition of land" – "the bulk of the report contain[ed] background information and set[] out other options." There was, however, sufficient evidence to establish that council's actual deliberations at the meeting included the land disposition; thus, disclosing those limited portions of the report would have the effect of revealing the substance of city council's deliberations.

He concluded that only limited portions of the report qualified for exemption under s. 6(1)(b) of the MFIPPA (the portions addressing whether the City should dispose of the encroached-upon land to the requester and the position of staff on that issue), and that the remainder had to be disclosed. Second, he "also found that the City did not take all relevant factors into account when it exercised its discretion to withhold those portions of the report from the [requester]." These factors included whether the requester had "a sympathetic or compelling need to receive the information," and whether disclosure would "increase public confidence in the operation of the institution." Consequently, the City was ordered to re-exercise its discretion in this respect.

The CanLII website lists IPC decisions at http://www.canlii.org/en/on/onipc/index.html. The CanLII cites are, respectively, *Ottawa (City) (Re)*, 2009 CanLII 16569 (Ont. I.P.C.) and *St. Catharines (City) (Re)*, 2009 CanLII 29180 (Ont. I.P.C.). Both rulings are also available from the IPC website at http://www.ipc.on.ca. ML

Ordinances

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nesses (other than restaurants) to conduct outdoor sales on their own property and adjoining streets or sidewalks, on a temporary basis, five times a year.
8. Christensen also claimed a violation of his rights under the Equal Protection Clause and the Fourth Amendment, but these claims were dismissed by the trial court and the dismissal was affirmed by the Tenth Circuit, so they are not discussed in this column.
9. 129 S. Ct. 808 (2009).
10. *See* Bery v. City of New York, 97 F.3d 689 (2d Cir. 1996); ETW Corp v. Jireh Pub. Inc., 332 F.3d 915 (6th Cir. 2003); White v. City of Sparks, 500 F.3d 953 (9th Cir. 2007). ML