

LISTSERV

The Municipal Attorney List – Quick! What Do I Do?

by Warren Kraft

Prior to the Internet, a municipal attorney seeking outside guidance for a local issue used a now-old fashion method to gather information—a telephone call to trusted, generally nearby, colleagues. If time permitted, the attorney could make several calls to gain some insight and, perhaps, consensus. The targeted audience was limited to the amount of time available and the extent of the attorney's Rolodex contacts. During the conversation, there might be a reference to a court decision, usually limited to that local or state jurisdiction.

Not so today.

"We have an interesting situation that may come up tonight," began the e-mail posted to the IMLA/MCC Municipal Attorney List. It was sent at 10:51AM, so time was critical. The council would review the city's position concerning a project, outside the city, to which a non-resident objected. At a prior meeting, the non-resident had continued speaking beyond the permitted one-minute rule, until the mayor threatened to call police. Seeking guidance from colleagues on how to avoid another confrontation, the attorney asked, "If this person speaks again and refuses, again, to stop at the end of the time limit, what authority does a city have to enforce the rule? Can the person be arrested (not that anyone wants to, but that is the ultimate sanction, I guess)?" The Attorney List to the rescue! Within hours, colleagues across the country chimed in with opinions, personal experiences, and legal guidance.

Clarifying the distinction between "public hearing" requirements and "public comment," Terry Jaywork of Delaware wrote, "If the public does not have a right to speak in the first place, then I think you are within your rights to establish reasonable rules to govern public comment if you choose to allow it." He suggested a clear announcement of the rules at the beginning of the meeting. "If the rules are announced up front and the speaker refuses to comply, then he should be given verbal warnings, gaveled down, have the microphone cut off, or consider declaring a recess or adjournment of the meeting—and if all that fails, then disrupting a public meeting is a type of disorderly conduct offense in Delaware and I think the police could forcibly remove him from the meeting—but be sure to give him one last warning that the police will remove him before the officer steps forward."

Commenting on postings that discussed the reasonableness of one-minute, three-minute and five-minute time frames, Brad Bailey of Colorado provided some legal authority. "The Summer 2009 *Urban Lawyer* addresses this specific issue. The Fourth and Sixth Circuits have held that a public meeting is a limited public forum. As such, the governing body may place reasonable, content neutral, time place and manner restrictions on speech. Look at *Norse v. City of Stanta Cruz*, 2004 WL 2757528 for a Ninth Cir. decision — it's unpublished."

Within an hour, Chad A. Jacobs of Oregon provided a link to the most recent decision in *Norse*, released just six days earlier. Steve Kemp of Arizona and Susan L. Trevarthen of Florida sent their memos directly to the poster. Phil Sparks of Northern Kentucky University provided a link to a recent decision, concerning the aftermath of a Nazi salute accompanying an individual's comments to the government body. Brad Cunningham of South Carolina, Frank Feilmeyer of Iowa, and Neil Lehto of Michigan recounted personal experiences.

Ken Fellsman of Colorado provided his perspective from his days as mayor:

> When I served as mayor we allowed three minutes as public comment at the start of the agenda, and added an unlimited period for public comment as the last item on the agenda, for anyone who just couldn't get it all said in three minutes. The thought was that we had regularly-scheduled agenda items and we wanted to respect those coming to address Council on those issues. But if a citizen truly felt like they needed more time and was motivated to wait until the end of the meeting, we'd accommodate him or her. In my opinion, it was beneficial to offer citizens this opportunity in order to avoid claims that the Council was only interested in limiting public comment. In eight years (two meetings per month), we had someone wait until the public comment item at the end of the meeting agenda and ramble on about their issue three or four times. These soapbox speeches usually ran about 15 minutes. Once, someone went on for about 40 minutes. The same citizen did it twice. He felt better, and the Council was even less inclined towards his position when he finished. But that's not a surprise, is it?

The Immediate Value of Electronic Access to Colleagues

The original poster summarized the effect of such results: "[This] is a great example, though, of how the listserv can take a pop-up issue six hours from show time on Council meeting night

and provide—what—20 comments from across the country richly laced with legal theories and actual experience so the city attorney can walk into the meeting looking, if not brilliant, then at least surprisingly well-informed." And, as Karen Emerson of Florida added, "When folks are reminded that the details are important and that the long-term legal impact should be considered, it sometimes is just not what they want to hear. But if you can look to your colleagues on the LIST to bolster your position or provide some great guidance, then it's like someone has your back."

Surely, the telephone conversation with a nearby colleague offered opportunity for collegial conversation plus the much-appreciated guidance. In the 21st century, however, municipal attorneys have much broader access to colleagues for both socializing and legalizing.

For those of you who still haven't joined the listserv and would like to, here's how: go to http://www.municode.com and select the *Listservs* link to get the page on *Mailing Lists*. In the first paragraph, click on *Municipal Attorneys* to bring up the subscription page. Fill it out and hit *Subscribe*.

Warren Kraft is an Assistant City Attorney/Director of Human Resources for the City of West Bend, and serves as of counsel to the Murphy-Desmond law firm of Madison and attorney for the Village of McFarland, Wisconsin. A 2006 IMLA Local Government Fellow, he is a commissioned lay pastor, an active Scout leader, and a substitute lifeguard at the local YMCA.

Federal

cont. from page 18

- The city's choice of a private developer from a group of applicants rather than picking out a particular transferee beforehand;
- The identities of most of the private beneficiaries being unknown at the time the city formulated its plan; and
- The city's compliance with elaborate procedural requirements that facilitated the review of the record and inquiry into the city's purposes.[14]

In this case, Columbia's and the ESDC's actions could not be more different when compared to the redevelopment of New London. The court noted that Manhattanville was not labeled as being in a "depressed economic condition when EDC and ESDC embarked on their Columbia-prepared-and-financed quest."[15] The study summaries which found the area to be blighted were characterized by the court as "preposterous" and that "[e]ven a cursory examination of the study reveals the idiocy of considering things like unpainted block walls or loose awning supports. [V]irtually every neighborhood in the five boroughs will yield similar instances of disrepair that can be captured in close-up technicolor."[16] The court also noted that the only alternative plan considered was a plan presented by West Harlem Community Board 9, which was rejected by ESDC because it "[did] not meet Columbia's needs as Columbia had defined them."[17]

With the U.S. Supreme Court recently hearing[18] its first takings case since *Kelo*, and federal and state courts still coming to varying versions on interpreting *Kelo*, municipal attorneys should keep a close watch on cases such as the ones described above—IMLA will bring you the latest on these cases and other eminent domain cases.

Notes

1. 545 U.S. 469 (2005).
2. Goldstein v. New York State Urban Development Corp., No. 178, 2009 WL 4030939 (N.Y. Nov. 24, 2009).
3. N.Y. Uncons. Law § 6253(6)(c) (McKinney 2009).
4. Goldstein v. Pataki, 488 F. Supp 2d 254 (E.D.N.Y. 2007).
5. Goldstein v. Pataki, 516 F. 3d 50 (2nd Cir. 2008), *cert denied*, 128 S.Ct. 2964 (2008).
6. N.Y. Const. art. I, § 7(a).
7. N.Y. Const.. art. XVIII, § 1.
8. N.Y. Const. art. XVIII, § 2.
9. Cannata v. City of New York, 11 N.Y.2d 210 (N.Y. 1962).
10. *Goldstein*, No. 178, slip op. at 16.
11. Kaur v. New York State Urban Develop. Corp., No. 778, 2009 WL 4348472 (N.Y.A.D. Dec. 03, 2009).
12. *Id.* at 5.
13. *Id.* at 7.
14. *Id.* at 8-9.
15. *Id.* at 9.
16. *Id.* at 12.
17. *Id.* at 9.
18. Stop the Beach Renourishment, Inc. v. Florida Dept. of En'l Protection, 998 So.2d 1102 (Fla. 2008), *cert. granted*, 129 S. Ct. 2792 (U.S. June 15, 2009) (No. 08-1151). ML

INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION



IMLA CAREERS

JOBS! In 2008, IMLA introduced an online job board, *IMLA Careers,* aimed specifically at serving the needs of the local government legal community.
See http://careers.imla.org (or click on *Careers* on the IMLA homepage, www.imla.org).
Rates are posted on the site—and IMLA members are entitled to discounted rates for using the site!

