November/December 2014

THE JOURNAL OF LOCAL GOVERNMENT LAW

Airbnb: Innovation and Its Externalities

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IMLA

THE MUNICIPAL LAWYER MAGAZINE

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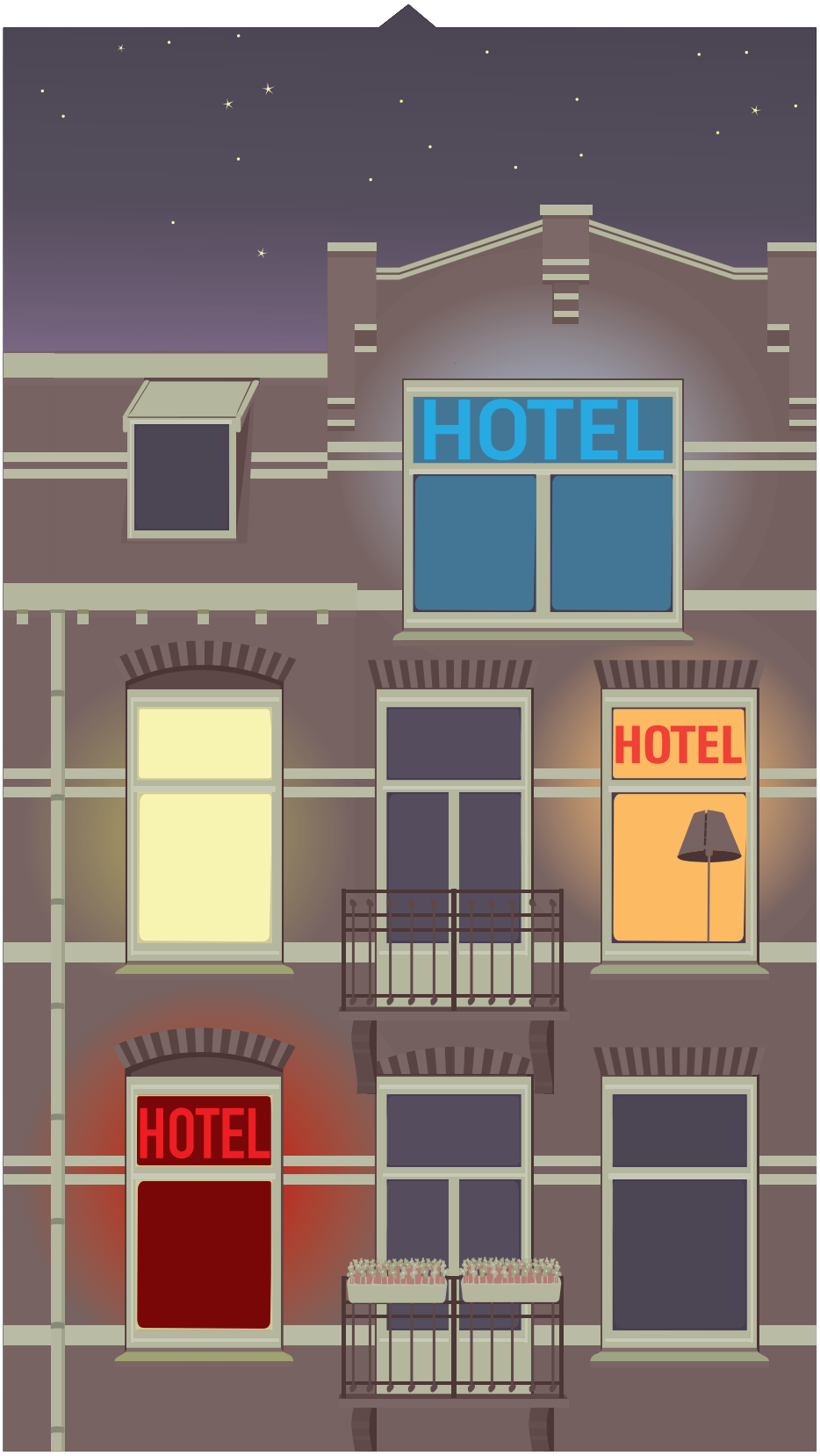



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Cell Towers—Beware of the "Substantial Change" Ahead

By: Matthew K. Schettenhelm

The FCC has proposed rules under now-infamous Section 6409(a) which may allow major expansion of existing cell towers—without constituting a "substantial change." Local governments, take note and act!

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Airbnb: Innovation and Its Externalities

By: Erich R. Eiselt

New "sharing economy" apps entice property owners to become short-stay landlords. But they avoid taxes, skirt regulations and threaten long-term housing. Municipalities are fighting back, enforcing existing laws while devising new approaches.

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The Transportation Network Company Litigation Explosion

By: Matthew Daus and Jasmine Le Veaux

Uber, Lyft and other ridesharing companies are flooding America's streets. Most consumers welcome the newcomers, but other stakeholders are unhappy. Expect heavy traffic at the courthouse.

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PRESIDENT'S LETTER

IMLA – A Part of Your Practice



G. Foster Mills, IMLA President

One of the principal attractions of the practice of municipal law is the breadth of issues that come our way. Depending on how your municipality is structured, you may come across problems in any number of areas, including land use, civil rights defense, economic development, procurement, election law, municipal finance, the never-ending examples of federal and state regulation of practically everything your municipality does, and the defense of your municipality in the federal and state courts. It seems we are constantly learning new areas of law all the time, in addition to keeping up with the changes in the law in those areas we are familiar with.

If the breadth of issues is a major attraction, it comes at a cost: the time it takes to learn a new practice area well enough to confidently advise our clients, or even have a mutually understandable conversation with outside counsel.

Probably the easiest way to shorten the time necessary to come up the learning curve is to have access to those who have come up the curve themselves, and who know not just law but how the law interacts with policy – all within the singular world of municipal law practice.

This is where IMLA comes in.

Nowhere else will you find as many colleagues dealing with the same issues as you are. I have been told time and again how important it is to have someone who has been through an issue tell you of problems and pitfalls to avoid, the little tips that will make life easier, or just reassurance that you are on the right track. It is especially helpful when that person has experience dealing with the issue while practicing in an environment that resembles yours.

IMLA helps with this process in a couple of ways. It presents continuing legal education courses on the hot topics of the day – many given by IMLA members themselves. This is an excellent way of getting a start on a new topic or coming back up to speed on an issue you haven't handled for a while. There are also groups that converse regularly on specific topics, such as civil rights defense, affirmative litigation, e-discovery, code enforcement and issues particular to university cities.

Through them you can take a deep dive into a subject and get to know municipal attorneys across the country who are dealing with the same problems.

But the best way to keep abreast of the subjects you need to know is to come to the IMLA annual meetings and the mid-year seminars and meet your colleagues from all across the United States and Canada personally. Not only will you develop irreplaceable professional friendships, but through both the formal and informal interactions among the other members you will learn about issues that are affecting you now or soon will. There is really no substitute for that.

This is why I believe that you should think of IMLA as an extension of your practice. Whenever something comes up that is unfamiliar, IMLA and its members – and the enormous amount of experience they have – are a resource that you shouldn't pass up. Make it a point to get to know other lawyers who you can go to for help. Make yourself available to others as well. We really do all need each other. IMLA is the forum.

Of course it takes some work to make IMLA as valuable to us as we need it to be. One of the easiest things we can do is to attend the IMLA events and participate in the various practice groups. This is how your experience and expertise can be made available to the other members. Recruiting your colleagues who are not IMLA members into the organization broadens our knowledge base and makes IMLA a healthier organization. Get involved in one or more of the many committees we have. Think about whether you are willing to take the time to help with the governance of IMLA. Vacancies in ranks of State Chairs, Regional Vice-Presidents and the Board of Directors come up from time to time and need to be filled. Also think about involving other members of your office in IMLA events. This can multiply the benefits of membership and bring yet more expertise to the organization.

But even if you can't put in the time to be an officer of IMLA, we still want to hear from you. We want to be part of your practice and that means providing the services that you need. If there is something we can do, or do better, let us know. If there is something we shouldn't be doing, let us know that too. Find your State Chair or Regional Vice-President and discuss any issues with them. The Board of Directors is in regular contact with them for just this purpose.

I have found IMLA to be a wonderful resource. It has become a part of the practice at the New York City Law Department. I have met many people I consider friends and have learned an awful lot from them.

I want every member to have that experience.

I hope to see you in Washington in April. ML



FROM THE EDITOR:

IMLA
THE MUNICIPAL LAWYER MAGAZINE

Dear Reader:

As a very successful year for IMLA comes to a close, we are pleased to open this issue of *Municipal Lawyer* with a note from new IMLA President, G. Foster Mills, who has already begun implementing an ambitious program for 2015.

Our feature articles deal with technology that is impacting municipalities: ML editor Erich Eiselt writes about the fracas being fueled by Airbnb, Matt Daus and Jasmine Le Veaux of Windels Marx discuss new litigation involving Uber, and Best Best & Kreiger's Matthew Schettenhelm returns to our pages with an alert about the super-sizing of cell towers.

ML's valued repeat contributors provide their usual spectrum of interesting and useful insights: Pete Haskel on the nuances of organizing and producing ESI, David Wesner on dealing with student housing, Amanda Keller on IMLA's amicus activities and Monica Ciriello on recent Canadian cases of interest—including a note about Uber in Toronto.

We hope readers will enjoy our temporary departure from *ML's* traditional "Day in the Life" format as we cover a *chapter* in the life, written first-person by Seattle municipal attorney Brendan Brophy. And courtesy of prolific Kelly Addy, we weave the *Sonnets* of Elizabeth Barrett Browning into thoughts about our vibrant ListServ community.

With New Year's clearly visible just around the corner, we wish our readers a peaceful holiday season and a most fulfilling 2015. Those born in the upcoming Year of the Sheep (1919, 1931, 1943, 1955, 1967, 1979, and 1991) are said to be the most creative among us. We will all aspire to apply that trait—and many other superlatives—as we aim for high achievement next year.

IMLA Editorial Team

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IMLA members are involved in some of the most challenging and interesting legal issues of our time—First Amendment questions, environmental debates, law enforcement policies, taxation and finance, and many others.

Share your experience, insights and practice tips. Our readers include a wide range of government attorneys at the state, city, county and local level, many lawyers in private practice who specialize in municipal law, and law libraries across the country.

To Submit An Article, please contact the **Editor, Erich Eiselt, at eeiselt@imla.org** with a brief description of your topic.

Municipal Lawyer is published 6 times per year, and feature articles should be between 2,500 and 4,000 words in length.

Submitted articles are subject to review by IMLA staff, and IMLA reserves the right to edit articles (for style, clarity, length, etc.).

We look forward to hearing from you!

Questions? Please contact IMLA at info@imla.org.

Airbnb: Innovation and Its Externalities

By Erich Eiselt, IMLA Assistant General Counsel



Chapter Two—The Online Lodging Revolution. *Municipal Lawyer* recently discussed the "ridesharing" revolution led by Uber and its ilk. The mobile app upstart and other "Transportation Network Companies" are inciting showdowns at local governments across the country as an indigenous taxi industry battles to preserve its turf against a nimble swarm of web-enabled ninja-cabbies.[1]

An analogous upheaval has emerged in the housing arena. Airbnb, a San Francisco startup, was founded in 2008 by two roommates who offered space on air mattresses to help pay their rent. It is in some ways a second cousin to Uber and the TNC's--from a technology perspective, they may well share analogous genetic material. Just as Uber transforms everyday auto owners into self-employed taxi drivers, Airbnb enables the ordinary homeowner or apartment dweller to generate dollars (or euros, pounds, rupees, or yen) by renting out a home, room or even a couch. The company now numbers some 600,000 "hosts" across 192 countries around the globe.

Along with other web-based lodging sites including Austin based HomeAway.com (Nasdaq-"AWAY") and its subsidiary VRBO.com, Airbnb has revolutionized the world of short-term rentals, bringing landlords and tenants together in cyberspace, often avoiding taxes and regulations. These "disruptive" lodging websites allow armchair travelers to preview accommodations, room by room, whether a loft overlooking the Seine, a Mont Tremblant ski chalet or a second bedroom in Boston. Prior visitors' comments are scrutinized, features compared, and deals signed—with rents generally paid in advance. But unlike the other short-stay companies, which focus substantially on vacation locales, Airbnb has also become especially proficient in the alchemy of urban lodging, converting downtown residential condos and apartments into goldmines. And whereas its competitors make their money largely by collecting listing fees,[2] Airbnb positions itself in the middle of the rental transaction, charging the renter a commission of between 6% to 12% above the lodging price (while still exacting a 3% listing fee from the host).[3] The company's web site describes the merits:

> Our convenient payment system supports many currencies and several types of payment and payout methods. Airbnb collects guest payments from the moment they make a reservation and waits until 24 hours after arrival before releasing funds to the host. This way, guests and hosts can feel confident knowing that Airbnb will process and deliver payments when a reservation is honored.[4]

As with Uber, the middleman role can be highly profitable—Airbnb is reputed to have pocketed some $250 million last year,[5] with nothing but growth on the horizon. Like Uber, Airbnb is already valued in the billions (some sources refer to a four-fold jump in valuation just since last July, vaulting the company's presumptive worth to an amazing $13 billion today).[6] Not surprisingly, like Uber, Airbnb is considering a public offering. And it has displayed similar political savvy—whereas Uber recently hired David Plough, formerly strategist to Barack Obama, in July Airbnb added Bill Hyers, New York Mayor Bill De Blasio's campaign manager.

Not a Boxing Match—A Riot. The similarities do not end there. In terms of diverse interests and market implications, the "lodging wars" are at least as complex as the "taxi wars" described in a companion article in this issue.[6] Disputes over housing involve an even broader array of litigants jostling to protect their interests--more of a riot than a boxing match--creating significant

challenges for municipalities.

On one front, the traditional hoteliers are battling the new entrants.[7] Municipalities with large hotel constituencies are supportive. In New York City, home to the largest aggregation of hotel rooms in the nation, the lodging industry has gotten the attention of Attorney General Eric Schneiderman and Mayor De Blasio, who have joined forces to pressure Airbnb. And with good reason—New York City hoteliers are estimated to generate a staggering $1.4 billion yearly in real estate and hotel occupancy taxes, as well as hundreds of millions of dollars in annual payroll taxes. In addition, New York hotels employ some 400,000 union members, giving them significant power at the ballot box.[8] Not surprisingly, the industry's primary trade group, the Hotel Association of New York City,[9] has been threatening class action warfare directed at Airbnb. It alleges unfair competition, pointing to the fact that Airbnb hosts do not pay lodging taxes or comply with safely and zoning standards.[10]

Another group of stakeholders are landlords—individual or corporate-- who find that their supposed long-term tenants are secretly reaping handsome rewards by offering nightly or weekly stays to strangers. A small-time version of this battle unfolded in June, as a New Yorker began eviction proceedings and sought recovery on unjust enrichment grounds where her tenant was re-renting her $1,463 a month, rent-stabilized two bedroom Tribeca apartment for $250 per night.[11] And a Manhattan building owner recently brought suit after discovering that one tenant had long ago remodeled her unit to add a washing machine and baseboard heating—both in violation of building rules and safety ordinances—so that she could rent out her apartment via Airbnb. She allegedly pocketed more than $500,000 over a multi-year period. Despite losing her counsel after misrepresenting that an occupant in her unit was a "stepbrother" visiting from out of town," the miscreant nevertheless wrangled a $12,500 settlement payment in exchange for vacating the space.[12]

[U]nlike the Uber revolution, which arguably increases the supply of publicly-available transportation, drives down taxi fares, improves quality and expands service to remote areas, the Airbnb movement can reduce a city's housing and drive prices up.

Larger landlords have taken a more proactive approach. The Airbnb-enabled illegal sublet movement has led at least one large New York City property owner, the Ideal Companies, to "deputize" resident managers as "Airbnb marshals." Their mission? To identify renters who have become short-term landlords and are skirting rent stabilization laws.[13]

Still other fights are instigated on a more granular level, by individual Airbnb lessors who discover that their dwellings have been trashed or used for illicit activities. In July 2011, renters savaged an apartment owned by a San Francisco-based executive. The company responded by issuing a $1,000,000 retroactive insurance guarantee to protect hosts from property damage caused by Airbnb guests. In March of this year, a New York-based comedian rented out his apartment via Airbnb to a man who then used it to host an advertised "XXX Freak Fest." Not surprisingly, the prostitution trade finds that high-end urban apartments, rented from unknowing owners in short increments via Airbnb, can provide far better profits and greater privacy than costly hotels with nosy front desk clerks. As one sex-trade worker told the New York Post "It's more discreet and much cheaper than The Waldorf").[14]

Beyond Lost Tax Revenues: Municipalities themselves are also becoming combatants against Airbnb, for a variety of reasons. Obviously, they seek lost tax revenues from *sub rosa* commercial activities thriving within their jurisdictions—in some cases they would collect 20% or more as hotel taxes. They also require better knowledge about how and where short-term rentals are springing up so that they can ensure safety and enforce zoning standards. They respond to residents' complaints that neighborhoods are being overrun by weekly cycles of short-term vacationers, bringing with them noise, trash, traffic and a shortage of respect.

And some cities and towns have concerns about a more subtle Airbnb externality: unlike the Uber revolution, which arguably increases the supply of publicly-available transportation, drives down taxi fares, improves quality and expands service to remote areas, the Airbnb movement can reduce a city's housing and drive prices up. As owners triple or quadruple their incomes by converting long-term leases into weekly or daily lodging, the supply of long-term housing—places that will provide a stable home for permanent residents who are employed within the city, who form family units, who vote, who volunteer, who care for others, or who simply have no other place to live within city limits—is diminished. The laws of economics intercede, and prices for the remaining stock of long-term rentals are driven further out of reach. Against a flood of transients paying sky-high prices for overnight stays, cities struggle to preserve the shrinking stock of long-term housing that is still within the budgets of working-class residents.

New York on the Attack: States and municipalities have a variety of mechanisms to combat the short-term rental siege: zoning that restricts or prohibits commercial activity, occupancy codes limiting the number of guests, durational maximums (or minimums) for short stays, parking restrictions, requirements for notifying neighbors,

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Erich Eiselt is IMLA's Assistant General Counsel and Editor of *Municipal Lawyer.*

safety inspections, tax filings, business licenses, fees and the like. These can be buttressed with individual building rules and condo or homeowner association by-laws. The appropriate vehicle(s) will vary with the objective—from eliminating short stays altogether, to complete *laissez-faire*, with many gradations in between.

In New York, home to vigorous litigation on the subject, the State's Multiple Dwelling Law (the "MDL"), was amended in 2010 to implement a virtual prohibition against rentals of less than 30 days in a "Class A" multiple dwelling:

> A Class A multiple dwelling shall only be used for permanent residence purposes. For the purposes of this definition, "permanent residence purposes" shall consist of occupancy of a dwelling unit by the same natural person or family for thirty consecutive days or more and a person or family so occupying a dwelling unit shall be referred to herein as the permanent occupants of such dwelling unit. The following uses of a dwelling unit by the permanent occupants thereof shall not be deemed to be inconsistent with the occupancy of such dwelling unit for permanent residence purposes: (1) (A) occupancy of such dwelling unit for fewer than thirty consecutive days by other natural persons **living within the household of the permanent occupant such as house guests or lawful boarders, roomers or lodgers**; or (B) incidental and occasional occupancy of such dwelling unit for fewer than thirty consecutive days by other natural persons when the permanent occupants are temporarily absent for personal reasons such as vacation or medical treatment, **provided that there is no monetary compensation paid to the permanent occupants for such occupancy**.[15]

In other words, under New York law, it is unlawful to rent out an apartment in a "Class A" multiple dwelling (one occupied by three or more separate tenants) for fewer than 30 days unless a "permanent resident" is present during the rental period. If the "permanent resident" is absent, the temporary occupancy must be uncompensated.

The purpose of this prohibition is to protect permanent residents who "must endure the inconvenience of hotel occupancy in their buildings" and ensure that proper fire and safety codes are being enforced.[16] (Because transient, short-term residents are not as likely to be familiar with fire escape routes as long-term tenants, New York buildings used for short term tenancy are required to comply with a host of Fire Department safety-oriented provisions that are not required of long-term rental facilities. These include sprinkler systems, fire extinguishers, illuminated escape path lighting and so on. When ordinary apartment buildings become hostels and do not adopt these greater safety measures, they subject unknowing transient visitors to heightened risks—and building owners to fines and other penalties).

Armed with the MDL and other tools, New York has begun a frontal assault on Airbnb's activities. In May, Attorney General Eric Schneiderman served a subpoena on the company, seeking records about the number and nature of Airbnb leases in the state. After a series of legal maneuvers to avoid the subpoena, the company complied, at the same time removing some 2,000 New York City listings from its site. (Predictably, the provision by Airbnb of this data gave rise to its own lawsuit. Calling themselves "New Yorkers Making Ends Meet in the Sharing Economy," a group of property lessors filed a lawsuit in September against Airbnb in state supreme court to prevent the firm from sharing their private information with the the Attorney General).[17]

In mid-October, AG Schneiderman released his report.[18] Among other things, it found that the vast majority of Airbnb's New York City leases violate State and City laws including the aforementioned MDL. It also determined that, despite Airbnb's image as a collection of small-time mom and pop landlords picking up occasional income on the side, a substantial number of big commercial players have worked their way into the mix.

Among Schneiderman's findings were:

- **Up to 72% of New York Airbnb listings are illegal:** Of 35,354 private, short-term listings, more than 25,000 violated either the MDL and/or New York City's Administrative Code (zoning laws).
- **Commercial users run multi-million-dollar businesses on Airbnb:** Over 100 landlords controlled 10 or more apartments rented on Airbnb. These big-time players booked 47,000 reservations and earned $60 million in revenue. The most prolific landlord administered 272 unique listings, booked 3,024 reservations and made $6.8 million.
- **Numerous units appear to serve as illegal "hostels:"** In 2013, approximately 200 units were booked through Airbnb for more than 365 nights during the year, indicating that multiple, unrelated guests shared the same unit on the same night, as they would in a hostel (or other use). The ten most-rented units were booked for an average of 1,900 nights in 2013, with one top listing averaging thirteen reservations per unit per night.[19]

The Big Apple has already begun taking action. In October it obtained preliminary injunctions against two building owners who were using their lower Fifth Avenue properties for Airbnb-fueled short term rentals.[20]

The California Offensive: In California, the fight over Airbnb's short term housing bloom is part of a larger conversation, veering into Fifth Amendment territory. The Golden State's Ellis Act has long been a focal point of landlord-tenant hostilities. Passed by the California legislature in 1985, the Ellis Act was adopted in response to local measures which were making it increasingly difficult for owners to leave the rental housing business. One decision in particular, *Nash v. City of Santa Monica*, 37 Cal.3d 97, 688 P.2d 894 (Cal. 1984) engendered Ellis. In *Nash*, the owner wished to evict the one remaining tenant in his six-unit property and raze the structure, leaving the empty lot available for redevelopment. The Santa Monica City Charter had been amended to prohibit landlords from demolishing a

building without obtaining a permit. This required a showing that: (1) the building was not occupied by persons of low or moderate income, (2) it could not be afforded by persons of low or moderate income, (3) removal would not adversely affect the housing supply, and (4) the owner could not make a reasonable return on his investment.

The trial court agreed with Nash's contention that he would not be able to fulfill the criteria for the demolition permit, and it found that the challenged provision operated to deprive Nash of property without due process of law and without just compensation. It ordered that the City and the Santa Monica Rent Control Board grant Nash a removal permit for his property.

The California Supreme Court reversed, upholding the Santa Monica permit requirement and its application to Nash. Operating in a pre-*Nollan*, *Dolan* and *Koontz* context, it reasoned that *Penn Central* standards had been satisfied because the owner could still make a profit from his leasing activities and his investment-backed expectations had been preserved: "It is undisputed that both prongs of the Penn Central test are met here. We are aware of no authority which would impose different requirements under the California Constitution."[21] (The court did state in passing that Nash was protected by Thirteenth Amendment proscriptions against involuntary servitude, and could not be compelled to be a landlord).

The California legislature rapidly stepped into the breach with the Ellis Act of 1986, Cal. Gov't Code §§ 7060-7060.7. The Act explicitly states that the legislative intent was "to supersede any holding or portion of any holding in Nash v. City of Santa Monica, 37 Cal.3d 97 to the extent that the holding or portion of the holding, conflicts with this chapter, so as to permit landlords to go out of business." Under the Act, governmental entities cannot require a residential owner to remain in the rental business:

> No public entity, as defined in Section 811.2, shall, by statute, ordinance, or regulation, or by administrative action implementing any statute, ordinance or regulation, compel the owner of any residential real property to offer, or to continue to offer, accommodations in the property for rent or lease, except for guestrooms or efficiency units within a residential hotel . . . [22]

"Airbnb is committed to making cities stronger and more affordable, and the vast majority of our hosts do just that," the company stated. "If a small number of predatory landlords are abusing platforms like ours to illegally evict tenants in search of a quick buck, we wholeheartedly support efforts to bring those landlords to justice and applaud the City Attorney for his actions."

The Ellis Act allows the eviction of tenants where the owner has decided to take a property off the market. It is limited in its application and by no means a free ride for landlords. Under the Act and local regulations promulgated in its wake, owners must give up to one year's notice of eviction and pay upwards of $5000 per-person relocation costs. They are required to pay damages to a displaced tenant if they attempt to re-lease the property within two years—and must offer it first to that tenant, at rent-controlled rates. If they demolish a building to construct a replacement residential structure, they are prohibited from leasing the property for five years at anything above rent-controlled rates.[23]

Despite these ostensible protections against abuse, profit-oriented owners and builders hungry for redevelopment opportunities have predictably found ways to skirt California's Ellis Act barriers. Tens of thousands of moderately-priced units across the state have disappeared. In San Francisco, the birthplace of Airbnb, affordable housing has become an endangered species. City Attorney Dennis Herrera describes the shortage, and the brewing war against lawbreakers, in no uncertain terms:

> "In the midst of a housing crisis of historic proportions, illegal short-term rental conversions of our scarce residential housing stock risks becoming a major contributing factor. We intend to crack down hard on unlawful conduct that's exacerbating – and in many cases profiting from – San Francisco's alarming lack of affordable housing."[24]

Herrera has invoked the full power of available laws. The city brought suit against defendants Darren and Valerie Lee, who had invoked the Ellis Act when they ceased leasing three Pacific Heights dwellings in 2005. One of the displaced tenants was disabled. He had been living in the unit for ten years and was paying $1,087 a month. The city's suit alleges that in 2009, the Lees began short-term rentals of the three properties via VRBO.com and HomeAway.com for up to $595 per night—rates that would generate nearly $18,000 per month if all units were leased every night.[25]

Another San Francisco lawsuit cited defendants Lev, Tamara and Tatyana Yurovsky for similar violations – one of which also involved a disabled resident – at two Fisherman's Wharf properties they began renting through Airbnb and GreatSFVacation.com for as much as $320 a night.[26]

In a public statement, Airbnb expressed its support for Herrera's offensive, saying that it did not condone the use of its platform to violate regulations.

> "Airbnb is committed to making cities stronger and more affordable, and the vast majority of our hosts do just that," the company stated. "If a small number of predatory landlords are abusing platforms like ours to illegally evict tenants in search of a quick buck, we wholeheartedly support efforts to bring those landlords to

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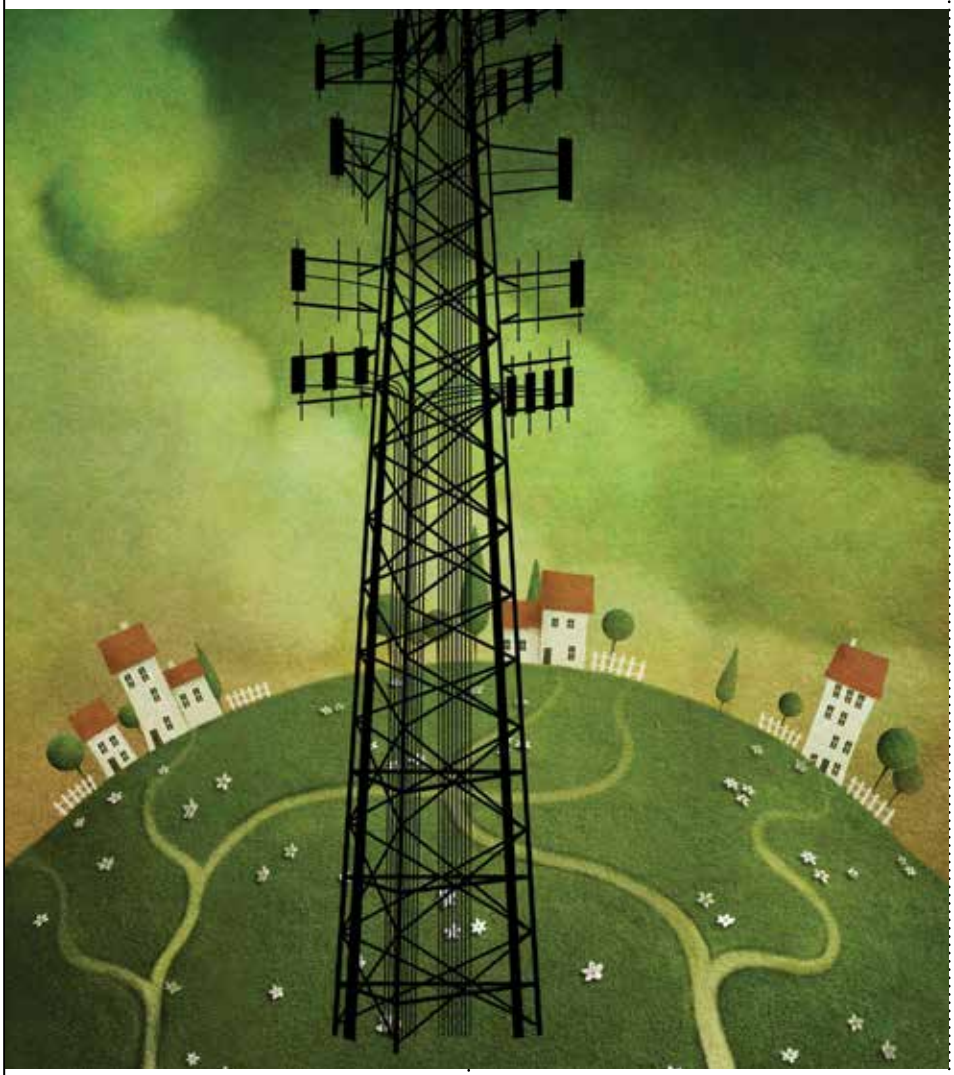
Cell Towers—Beware the "Substantial Change" Ahead

By Matthew K. Schettenhelm



How did *that* happen? Three recent changes in your community leave you scratching your head:

- A small wireless antenna, no more than the size of a deck of cards, in the heart of your vibrant downtown corridor, suddenly changed. It grew to more than 20 times its previously approved size. It now reaches up an additional 10 feet up and has added arms protruding 6 feet out in all directions. Other small wireless facilities are now changing in similar ways.

- A building that hosts an antenna at the very top of the community's general height limit now defies that limit. To accommodate a new antenna, the building itself exceeded the height of any other structure in the community.

- A nonconforming use structure hosting antennas has long been a community eyesore. But previously it could not expand further without complying with the community's zoning code. Now, however, the grandfathered facility has expanded. It has added many more antennas—*without* complying with the code.

Who voted to permit these changes? The answer might surprise you. It is not the zoning board, the city council, or even the state legislature.

It is a federal agency.

The Federal Communications Commission, by a 5-0 vote, ruled that a 2012 federal law commands your community to approve these requests. In fact, the FCC did more than that: its rule deemed that your local zoning authority approved the requests—even though it did no such thing.[1]

Here's the good news: your community does not have to accept these mandates. Local governments have serious arguments that the FCC's rules conflict with the statute, defy fundamental constitutional principles, and undermine the very policy that the FCC intended the rules to serve. For these reasons, a coalition of local governments is assembling now to challenge the rules in federal court. This article describes the rules, outlines some of their potential vulnerabilities, and discusses how communities are beginning to formulate a challenge.[2]

Section 6409(a) and the FCC's New Rules

As you might guess from the law's title, in the Middle Class Tax Relief and Job Creation Act of 2012, Congress did not focus on telecommunications. In fact, five of the Act's substantive titles address other topics, including Medicare payments, unemployment benefits, and the Social Security payroll tax. But title VI of the law concerns public safety communications, and tucked in the middle, Congress added a critical provision, section 6409(a), which concerns states' and local governments' authority over communications-facility modification. It states that, notwithstanding any other provision of law:

> [A] State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.[3]

Although section 6409(a) includes many important concepts—"eligible facilities request," "modification," "existing," "wireless tower," "base station," and "substantially change the physical

dimensions," it defines only one: An "eligible facilities request" is "any request for modification of an existing wireless tower or base station that involves
(A) collocation of new transmission equipment;
(B) removal of transmission equipment; or
(C) replacement of transmission equipment."[4]

Congress's lack of definitions in section 6409(a) led the FCC to initiate the current rulemaking to define the statute's key terms and operation.[5] The wireless industry, local governments, and other interested persons filed more than 200 comments. And on October 21, 2014 the FCC released its new rules implementing section 6409(a).[6]

How do the FCC's rules implement the statute, including the "may not deny, and shall approve" language? Here are key questions that the rules answered:

What services do the new rules govern? The FCC decided that section 6409(a) applies to equipment used for "any Commission-authorized wireless communications service."[7] This differs from the other federal-law provision that addresses wireless siting, 47 U.S.C. § 332(c)(7). That provision addresses only those facilities used to provide "personal wireless service." In the FCC's view, Congress intended section 6409(a) to apply more broadly.

What is "transmission equipment?" Understanding what qualifies as "transmission equipment" is important because section 6409(a) applies only to a modification request that involves collocation, removal, or replacement of this equipment. Local governments argued that facilities that do not transmit communications, such as back-up power supplies, are not transmission equipment. The FCC rejected that view. It found that the term includes antennas and other equipment associated with and necessary to their operation, including power supply cables and backup power supplies.[8]

What is a "wireless tower?" The FCC defined "wireless tower" by looking to the structure's purpose. It defined the term as any structure "built for the sole or primary purpose of supporting any Commission-licensed or authorized antennas and their associated facilities... and the associated site."[9] Any structure that was not built "primarily" to support wireless facilities would not qualify. Local governments generally supported this approach. Note, however, that the FCC defines "tower" more broadly than the support structure itself: it also includes "associated facilities . . . and the associated site."

Local governments have serious arguments that the FCC's rules conflict with the statute, defy fundamental constitutional principles, and undermine the very policy that the FCC intended the rules to serve.

What is a "base station?" Many local governments strongly disagreed with the FCC's definition of "base station." They argued that the term encompasses the equipment that communicates with other "stations," which may be "fixed" or "mobile." They maintained that Congress's use of the term "wireless tower or base station" makes perfect sense: Congress was addressing one form of support structure—a "wireless tower"—and the communications equipment that is situated with it. Local governments emphasized that a "base station" is certainly not any *other* support structure that a "base station" happens to sit upon.

The FCC disagreed. It ruled that a "base station" includes not just communications equipment but also any "non-tower supporting structure at a fixed location."[10] Through this maneuver, the FCC expands section 6409(a)'s "may not deny, and shall approve" language to apply also to any request to modify any facility that houses or supports an antenna, including street signs, utility poles, street lights, water towers, and buildings.

What is "existing?" The FCC adopted a definition of "existing" that many local governments can support. By its terms, section 6409(a) applies only to modifications of "existing" wireless towers or base stations. The FCC clarified that "existing" means a facility that was "reviewed and approved under the applicable local zoning or siting process or that the deployment of existing transmission equipment on the structure received another form of affirmative State or local regulatory approval (e.g., authorization from a State public utility commission)."[11] As a result, if a facility was constructed or deployed "without proper review, was not required to undergo siting review, or does not support transmission equipment that received another form or affirmative State or local regulatory approval,"[12] the facility is not governed by section 6409(a). A femtocell on a home that never received local zoning approval, for example, could not be modified under the statute.

What modifications "substantially change the physical dimensions of [a] tower or base station?" Defining "substantially change the physical dimensions" properly is essential because it serves as the primary limitation on the statute's direction that a local government "may not deny, and shall approve" a modification request. If a "modification" is a "substantial change," a local government need not approve it. Local governments argued that evaluating whether a modification would substantially change a particular tower or base station's physical dimensions must start with context—with evaluating *the particular* wireless tower or base station that would be modified. It must start with that facility's size, its location, and any conditions that a local government placed on later changes to it.

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In significant part, the FCC took the industry's preferred approach: its "substantial change" test largely relies on predetermined measurements of permitted changes and ignores the context of the actual "wireless tower" or "base station" that would be modified. In the FCC's view, a "substantial change" occurs only if it meets specific criteria regarding height, width, equipment cabinets, excavation, concealment elements, or noncompliance with other conditions. Of particular "importance, with respect to height, a substantial change" occurs only if it increases a facility in the right-of-way's height by the greater of 10 percent or 10 feet. For other facilities, a height increase may be even larger without qualifying as "substantial." With respect to width, a facility in the right-of-way may be extended by an appurtenance that protrudes from the facility's edge "more than six feet" without constituting a substantial change. Again, width increases may be even larger for other facilities.

One positive for local governments is that the FCC recognized that a modification would be a substantial change if it "would defeat the concealment elements" of the wireless tower or base station. But the FCC's treatment of preexisting conditions on the underlying facilities is more troubling. The FCC found that a "substantial change" occurs if the modification would conflict with conditions on the underlying tower or base station, but only if those conditions do not limit modifications more than the Commission's standards for height, width, equipment cabinets, and excavation. Therefore, a modification conflicting with a condition that limits a base station's future expansion to two feet by two feet by would not constitute a "substantial change," because the FCC's standard decrees that height and width changes of 10 feet by 6 feet are never "substantial," regardless of the underlying structure's physical dimensions.[13]

Must a local government approve a modification to a nonconforming-use structure? Local governments argued that any physical-dimension change to a nonconforming use structure—a grandfathered facility that does not comply with the community's current zoning code—should be considered "substantial." The FCC concluded otherwise. It said that these grandfathered facilities may be modified just as any other "wireless tower" or "base station."[14]

Of particular importance, with respect to height, a "substantial change" occurs only if it increases a facility in the right-of-way's height by the greater of 10 percent or 10 feet.

Can local governments require that an application comply with other codes? Yes. One positive aspect of the FCC's rules is that local governments "may continue to enforce and condition approval on compliance with generally applicable building, structural, electrical, and safety codes and with other laws codifying objective standards reasonably related to health and safety."[15]

What can a local government require in a Section 6409(a) application? A local government may only require "documentation that is reasonably related to determining whether the request meets the requirements of the provision."[16] A local government may not inquire about the need or business case for the requested modification.[17]

How quickly must a local government act on an application? A local government must act on a section 6409(a) request 60 days after it receives a complete application.[18] The 60-day period may be tolled by agreement or when the local government notifies the applicant within 30 days that the application is incomplete.[19]

What is the remedy if a local government does not grant or deny an application within 60 days? The FCC deems the application granted by federal rule.[20] The FCC found that "withholding a decision on an application indefinitely, even if an applicant can seek relief in court or in another tribunal, would be tantamount to denying it."[21] (The FCC does not explain why the logical remedy is not therefore to treat the application as denied, not approved.) Whether the application *actually* qualifies for approval under section 6409(a) is irrelevant: if a local government does not act, the FCC's rule *assumes* that the application qualifies. The local government cannot undo its "deemed approval" by subsequently denying the application. Its only option is to sue, and to attempt to undo the approval in court.[22]

Local Governments' Concerns

Do the FCC's rules properly implement section 6409(a)? Many in the local government community have doubts. The rules appear vulnerable to challenge on a number of fronts. Here are some examples:

- **Modification of small facilities.** A key focus for the FCC was facilitating the deployment of "small cells" and Distributed Antenna Systems, which the record evidence showed could be as small as a deck of cards. But the FCC's rules arguably misapply section 6409(a) to these facilities. For example, if a community approved a small facility, when an applicant seeks to modify that facility using section 6409(a), a key question would be whether the modification would "substantially change [the facility's] physical dimensions." This analysis must start with a basic fact: *what are the underlying facility's physical dimensions?* But the FCC's rules effectively ignore this question. For both a facility the size of a deck of cards and one that is 100-feet tall, the FCC's rules allow *the same* automatic height and width expansions: 10 feet by 6 feet. Local governments therefore have a strong argument that the rules do not evaluate what the statute requires: the change in the facility's physical dimensions.

The FCC's failure to consider the features of the underlying facility also undermines the agency's chief policy goal: it discourages local governments from approving small facilities at all.

- ***Modification of non-communications facilities.*** Section 6409(a), by its terms, does not mandate that a local government approve modifications to buildings, water towers, street signs, or utility poles. The FCC nevertheless strained to bring these non-communications structures under section 6409(a). It did so by defining "base station" not only as the communications equipment that exchanges information with "mobile stations" and "fixed stations," but also as the *structure* on which the communications equipment sits. This expanded definition arguably conflicts with the Communications Act, the record, past FCC rules, and the FCC's own orders in this proceeding. Local governments have a strong argument that Congress did not intend Section 6409(a) to govern modifications to these non-communications facilities.

- ***Deeming local approvals granted.*** By deeming that a local government has granted an approval that it has not, the FCC arguably defies the 10th Amendment to the United States Constitution and raises serious due-process concerns—when there is no evidence that Congress intended this. The Supreme Court has established that the federal government may not commandeer local officials to administer a federal program.[23] Here, the FCC furthers its own policy by deeming that a local government granted a regulatory approval. Its rule *automatically* transforms local inaction "tantamount to a denial" into the opposite, an approval, and it does so without any neutral third party—a court or the FCC—evaluating whether the request actually qualifies for section 6409(a) approval. Local governments have a strong argument that if an applicant is deserving of any remedy under section 6409(a), the *applicant* must pursue and obtain it before a neutral decision-maker. Both section 6409(a) and core constitutional principles prevent the FCC from decreeing that the application automatically qualifies for approval or that a local government has granted it.

Local Governments' Response

Because the FCC's rules present real problems for local governments, including those described above, a coalition of local governments is assembling now to challenge the rules.

A "petition to deny" must be filed in a federal circuit court no later than 60 days after the rules are published in the Federal Register. That should occur by year-end, according to the FCC's latest estimate. After the 60-day deadline passes, other local governments likely can join the effort by filing a petition to intervene. The coalition may also pursue a stay of the rules. In addition, the coalition will be monitoring the FCC docket for reconsideration activities, and participating if necessary to protect its interests.

Local governments should consider whether they can join or support the coalition effort. They should also begin evaluating how the FCC's rules affect or alter their current siting policies. If the FCC's rules are not stayed, most will become effective 90 days after they are published in the Federal Register.

Note

1. *In re Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, WT Docket No. 13-238, FCC 14-153 (Oct. 21, 2014).
2. This article will provide a general overview of the rules. More information is available here: http://www.bbklaw.com/?t=40&an=34267&format=xml
3. 47 U.S.C. § 1455(a)(1).
4. 47 U.S.C. § 1455(a)(2).
5. *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket No. 13-238, Notice of Proposed Rulemaking, 28 FCC Rcd. 14238 (2013).
6. This article focuses on the FCC's rule implementing Section 6409(a). The FCC also revised its own rules under the National Environmental Policy Act of 1969 and the National Historic Preservation Act of 1966. In addition, the FCC clarified its "shot clock" rules under Section 332(c)(7).
7. Report and Order at ¶ 149.
8. *Id.* at ¶ 158.
9. *Id.* at 1.40001 (b)(9); *id.* at ¶ 166.
10. *Id.* at ¶¶ 167-172.
11. *Id.* at ¶ 174.
12. *Id.*
13. *Id.* at 1.40001 (b)(7).
14. *Id.* at ¶ 201.
15. *Id.* at ¶¶ 188, 202.
16. *Id.* at ¶ 214.
17. *Id.*
18. *Id.* at ¶ 215.
19. *Id.* at ¶ 217. The FCC adds other specific requirements about how local governments must review applications for incompleteness.
20. *Id.* at ¶ 227.
21. *Id.*
22. *Id.* at ¶ 231.
23. New York v. United States, 505 U.S. 144 (1992); Printz v. United States, 521 U.S. 898, 935 (1997). ML



The Transportation Network Company Litigation Explosion

By Matthew Daus and Jasmine Le Veaux



The introduction of new transportation network companies (TNCs) has had a game-changing impact on the traditional transportation industry. TNCs offer smartphone applications which provide free online booking for for-hire transportation and/or ridesharing services.[1] Passengers request rides through an app from either (1) a private passenger vehicle driven by a non-commercially licensed driver; (2) a commercially licensed vehicle and a commercially licensed driver; or (3) some other configuration of licensed/unlicensed vehicles and/or drivers. Passengers generally pay for such services through a credit card, the information for which is saved electronically in the passenger's online profile on the app.

The fact that anyone may pick-up a passenger, in any type of vehicle, when the app communicates the passenger's location to a driver, has resulted in an onslaught of potential legal violations of local, state, and federal law. As a result, several public safety and consumer protection issues have been raised and are currently being litigated in lawsuits across the nation. There are a panoply of claims, incorporating a broad spectrum of overlapping causes action. They include the following: (i) personal injury litigation and insurance coverage issues; (ii) labor law violations and worker misclassification claims; (iii) contractual claims; (iv) false advertising, unfair business practices and consumer protection lawsuits; (v) racketeering; (vi) antitrust violations; (vii) disability discrimination; (viii) tortious interference with business; (ix) government actions; (x) constitutional challenges; (xi) environmental law violations; and (xii) other legal claims and forms of relief such as requests for injunctions and/or temporary restraining orders.

Notwithstanding the spectrum of claims asserted, the lawsuits fall into three main categories (1) injured passenger/bystander suits; (2) driver/industry suits; and (3) government actions.

All of the cases discussed in this article are active and have not reached a final ruling. However, they are nonetheless having a direct impact on public opinion, policy and legislation throughout the country.

Personal Injury Suits: There are currently several suits pending in California Superior Court in which a TNC and affiliated TNC driver are being sued due to injuries incurred during the course of TNC services.

The case that has gained the most notoriety, and which precipitated much of the national discussion regarding insurance coverage issues, is *Jiang Liu, et al. v. Uber Technologies, Inc.*, a personal injury case pending in San Francisco.[2] On December 31, 2013, an UberX driver was cruising through San Francisco when he struck a family of three (Mother, Huan Kuang, 39, her son, Anthony Liu, five, and daughter, Sofia Liu, five), killing the seven year old, and severely injuring her mother and brother. Uber very quickly denied any involvement in the accident, but has since admitted that the driver arrested and charged in the accident, was in fact an UberX partner. However, Uber emphasizes that the driver was not on an Uber call at the time of the accident. Uber has since terminated the services of the driver, and although the company has expressed its condolences to the family on its blog, it is distancing itself from the accident or any liability for same.

The Liu family suit alleges that, at the time of the crash, the Uber driver was logged onto the UberX smartphone app and was available to provide rides. As such, Uber is alleged to have breached its duty of care by entrusting the driver to provide transportation

services for the company, and by failing to learn, through background checks, that the driver might cause a danger to the public. Further, because he was allegedly in the course of providing such services for Uber when the accident occurred, and Uber requires its drivers to use a smartphone to pick-up trips, such requirements may have distracted the Uber driver and resulted in injury to the family. As such, Uber is alleged to be liable for the accident involving the driver.

The *Liu* case, though still in the early stages, has had a huge influence on the national conversation regarding TNCs. In particular, since *Liu* was filed in January 2014, twenty-one states and the District of Columbia have issued insurance advisories to officially warn the public and potential TNC drivers that one's personal insurance policy may not cover commercial TNC trips.[3] Additionally, recent regulations enacted in Colorado to implement the state's new TNC law have required that TNCs post a notice to drivers and passengers that personal vehicle insurance may be insufficient to cover for any injuries or damage caused during the course of a TNC trip.[4] Moreover, on September 17, 2014, the governor of California signed AB 2293, the insurance bill which officially recognized TNCs as a new category of passenger carriers in the state. This new law will require TNCs to provide primary commercial insurance coverage for drivers and passengers during TNC services. In an effort to address one of the specific issues raised in the *Liu* lawsuit (i.e., whether the driver was providing TNC services at the time he was operating the vehicle - with the app on - but no passenger in the car), AB 2293 requires TNC insurance to be primary and in the amount of one million dollars for death, personal injury and property damage from the moment a participating driver accepts a ride request on the app until the driver completes the transaction. TNC insurance coverage must also provide for uninsured motorist coverage and underinsured motorist coverage in the amount of one million dollars from the moment a passenger enters the vehicle of a participating driver until the passenger exits the vehicle. A lesser amount of coverage is required when a TNC driver logs onto the TNC app, but no match to a passenger has been made.

Adequate insurance coverage is just one issue among many that will be explored and addressed through the many lawsuits commenced around the United States and abroad.

The impact of the *Liu* case on the TNC debate illustrates the influence that lawsuits already have and will have on policy and legislation in the future. Adequate insurance coverage is just one issue among many that will be explored and addressed through the many lawsuits commenced around the United States and abroad. Judges will soon decide whether TNCs have exerted control over their drivers sufficient to classify them as employees rather than independent contractors. Rulings will be issued to determine if TNC services are anti-competitive and whether some TNCs themselves are liable for operating a national enterprise of illegality.

Labor Law Violations and Worker Classification Claims: In addition to the personal injury and wrongful death lawsuits like the *Liu* case, drivers have initiated legal action against TNCs for labor law violations particularly with respect to wage and hour issues. In many of these cases, drivers are seeking damages in the form of wages and/or overtime that went unpaid due to their misclassification as independent contractors rather than employees and/or unpaid gratuities that were pocketed by the TNC rather than the drivers. [5]

Breach of Contract Claims by Drivers: As an extension of the foregoing, drivers have also sued TNCs for failure to comply with terms of their driver agreements concerning wages and gratuities. The breach of contract suits also include claims that the TNCs have been unjustly enriched by the conversion of drivers' gratuities as well as the equitable claims of *quantum meruit* and promissory estoppel, which allow for a claimant to ask the court to enforce a promise, or an offer that was made to and accepted by the claimant, even if the specific agreement at issue does not satisfy the required elements of a legally enforceable contract.

False Advertising, Deceptive Trade Practices and Misrepresentations: In addition, plaintiffs have invoked federal statutes such as the Lanham Act, and similar state corollary statutes, to assert, *inter alia*, claims of false advertising. These claims allege that TNCs have made false statements regarding their compliance with the law, which has deceived or has the tendency to deceive the public, thereby resulting in damages in the form of commercial injuries, or money spent to purchase TNC services. The false statements alleged include misrepresentations TNCs have made regarding insurance coverage and proper licensing of the vehicle and/or drivers with the governing agency.

Unfair Competition and Consumer Protection Law Violations: Cases also have been brought by passengers as well as members of the transportation industry – trade associations, competing taxicab companies and black car/limousine companies– alleging unfair business practices and consumer protection violations. There are numerous state and federal statutes which serve to protect the consumer and to promote fair competition, thus the theories upon which several of these claims are based are varied and broad. Many of the state claims are based on state common law or consumer protection statutes. However, federal consumer protection stat-

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utes, such as the Telephone Consumer Protection Act, have also been used to challenge the unscrupulous business practices of some TNCs.

The District Attorneys for San Francisco and Los Angeles have both recently filed consumer protection lawsuits against Uber alleging that the company misleads the public about the safety of its service and overcharges passengers.[6] Lyft, which was also being investigated by the San Francisco and Los Angeles DA's settled similar allegations and agreed to pay up to $500,000 in civil fines. Similarly, a class-action complaint filed in Suffolk County, Boston alleges that Uber has been adding a fictitious "Logan Massport Surcharge & Toll" in the amount of $8.75 to the fares of tens of thousands of Logan Airport-bound and outbound passengers and continues to do so.[7]

Antitrust Law Violations and Price Fixing: Antitrust laws, also referred to as "competition laws," are designed to protect consumers from unfair business practices. State and federal laws prohibit: (i) conduct that unreasonably restrains trade or commerce; (ii) attempts to monopolize a particular market; (iii) price discrimination; and (iv) exclusive dealing agreements which may have anticompetitive effects. At least one case has been filed which charges a TNC with violating state antitrust laws. The alleged illegal activity includes (i) charging mandatory prices that have not been approved by the state; (ii) charging fares that are below cost with which reputable transportation companies are unable to compete (predatory pricing); and (iii) charging uniform rates which restrain trade and constitute an effort to monopolize the industry and destroy competition.[8]

Racketeering – Civil RICO Claims: The federal Racketeer Influenced and Corrupt Organizations Act, commonly referred to as "RICO," was originally intended to impose criminal penalties for acts performed as part of an ongoing criminal organization. However, RICO has been used in the context of TNC litigation as a means to assert a civil cause of action for damages to businesses caused by the TNCs' vast commercial enterprise which flouts for-hire vehicle regulations throughout the world.[9]

Disability Discrimination: TNCs are also being brought to court for allegedly discriminating against passengers on the basis of disability in violation of the Americans with Disabilities Act, for refusing to provide service to individuals with disabilities, refusing to have accessible vehicles, and refusing to assist with the stowing of mobility devices.[10]

Interference with Business Relationships: Tortious interference with a business is the intentional, damaging intrusion on another's potential or existing business relationship. The interference is usually alleged when a defendant induces a contracting party to break a contract or steals customers away from a third party by unlawful means. Within the context of TNC litigation, this claim has been asserted when disruptive TNCs are illegally operating taxicab services without proper permits or insurance, and are stealing drivers and taking passengers away from legitimate taxicab companies.

Government Lawsuits to Stop Unlicensed For-Hire Activity: Several lawsuits are pending which involve municipalities or government agencies in which the government is seeking a restraining order or an injunction against TNCs to cease operations because they have failed to comply with local regulations. All government agencies and municipalities have enforcement procedures they must follow to punish those that violate the law. However, when it is part of a company's *modus operandi* to "shoot first and ask questions later", as has been the case with several disruptive TNCs, cities have sought to shortcut enforcement protocol, that may only momentarily curb unlawful TNC operation, by seeking judicial assistance to permanently shut down such unlawful and dangerous business operations.[11]

Constitutional Law Violations – Denials of Equal Protection and Regulatory Takings: There are also a number of lawsuits in which government agencies or municipalities are being sued for violating state and/or federal constitutional rights that require laws to be enforced equally amongst similarly-situated persons or businesses. Plaintiffs in these cases believe that the government is not adequately or equitably enforcing its laws against TNCs. For instance, having different levels of insurance, criminal background checks and other licensing requirements for TNCs as compared to limousines and taxicabs, all of which are engaging in the same exact activity of transporting passengers for hire, raises equal protection concerns: what is the rational basis for maintaining two separate license classifications? Also, Fifth Amendment actions have been commenced alleging regulatory takings of private property (medallion values) without just compensation, due to the government's failure to regulate unlicensed ridesharing or TNC services, leading to the devaluation of medallion values.

Environmental Law Violations: In additional to constitutional requirements, governments must comply with their own administrative procedures when initiating new rulemaking and/or implementing new regulations/legislation. In many cases, an environmental assessment of new legislation is required before such laws are implemented. At least one state lawsuit is asking a court to review the procedures by which new TNC legislation was passed in order to ensure that the government agency followed state law procedures for rulemaking and if not, to strike the law as void for failing to comply with the requirement to conduct an environmental quality assessment.[12]

What Will Happen Next? How to regulate TNCs is no longer a question for only local regulators. High-profile politicos and lobbyists are being retained to influence policy and public perception. However, because the review of TNCs is taking place in our halls of justice, federal judges who are required to be impartial and fair will begin to weigh-in on the matter. There is no question that it is highly unlikely that either side will win all of the lawsuits. Time will soon reveal how such an objective review will impact the TNC movement. The regulatory clock is ticking for TNCs - and although the court system's wheels of justice turn slow – this is clearly one factor that is ongoing litigation is clearly influencing

the mad race among TNCs to quickly acquire as much market share, and pass as much legitimizing legislation as they can. The TNCs are motivated, in part, by the progression and increasing number of lawsuits; as they have become even more aggressive over the last year in expanding and operating outside the law. This is also due in part to the proactive response of many regulators who have issued cease and desist letters, commenced administrative and enforcement actions, and/or adopted or followed the spirit of the Model Regulations for Smartphone Applications issued by the International Association of Transportation Regulators (IATR) (of which one author of this article serves as President). The TNCs responded to the IATR's Model Regulations by creating and seeking passage of their own model regulations in the form of "light regulation" TNC laws being introduced and passed around the country. Thanks to the efforts of the IATR and various other opponents and stakeholders, at least the debate is no longer about "whether to be licensed," but instead that "TNCs will be licensed, and what should the requirements be?" The race to deregulate by TNCs is motivated by a desire to become an essential or permanent part of the for-hire transportation system before the court decisions either put an end to these light or inconsistent new regulations, or otherwise modify the scope of these new TNC laws consistent with existing constitutional provisions, federal and/or state laws. The TNCs are looking to become "too big to fail" or are taking a "you can't get rid of us, we are here to stay!" approach. Well, we will see about that!

(Windels Marx recently released a report which summarizes the *Liu* case and several other lawsuits in which TNCs are being sued or TNC legislation is being challenged. This report, entitled "The Disruptive Transportation Technology Movement – A Litigation Primer & Roadmap" outlines the major and/or novel legal claims that have been asserted in TNC litigation across the U.S., including an explanation of potential legal theories upon which TNC and disruptive app litigations may be based. This Litigation Report is available at the following link for downloading and distribution: http://www.windelsmarx.com/resources/documents/The%20Disruptive%20Transportation%20Technology%20Movement%20(10990519).pdf.[13] The authors recommend the Report for review by government and private lawyers, legislators and legislative staff, as well as regulators around the country and beyond. It is critical that those making and influencing these important regulatory decisions be aware of the many claims and lawsuits that may completely declare illegal or modify in some way the many new pieces of TNC legislation that are being introduced and passed around the country. Windels Marx has and will continue to make its staff available to assist those who are looking to understand the panoply of new and existing laws and lawsuits as regulatory experts. *Please feel free to contact Matthew Daus at mdaus@windelsmarx.com or 212-237-1106, or Jasmine Le Veaux at jleveaux@windelsmarx.com or 212-237-1112).*

Notes

1. For purposes of this report, we refer to "ridesharing", although we neither concede nor endorse the proposition that such apps are providing ridesharing services as may be defined by local regulation.
2. Case No. CGC-14-536979 pending in the Superior Court of the State of California, County of San Francisco.
3. http://www.whosdrivingyou.org/insurance-warnings.html
4. *See* Temporary Rules Regulating Transportation Network Companies at http://cdn.colorado.gov/cs/Satellite?blobcol=urldata&blobheadername1=Content-Disposition&blobheadername2=Content-Type&blobheadervalue1=inline%3B+filename%3D%22Temporary+Rules+Regulating+Transportation+Network+Companies.pdf%22&blobheadervalue2=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1252008491858&ssbinary=true
5. O'Connor v. Uber Technologies, Inc., No. 3:2013-cv-03826 (N.D. Cal., filed Aug. 16, 2013).
6. *See* http://www.latimes.com/business/technology/la-fi-tn-uber-lyft-20141209-story.html
7. *See* http://www.boston.com/news/local/massachusetts/2014/11/26/uber-faces-class-action-suit-for-mysterious-logan-massport-surcharge/QIaqx1hW9sIoSn6ReuIKHP/story.html
8. *See, e.g., The Yellow Cab Company v. Uber Technologies, Inc.*, No. 24C14004064 (Cir. Ct. Md., City of Baltimore Cir., filed July 3, 2014).
9. Greenwich Taxi, Inc. v. Uber Technologies, Inc., No. 3:14-cv-733 (D. Conn., filed May 21, 2014); Boston Cab Dispatch Inc. v. Uber Technologies, Inc., No. 13-10769-NMG (D. Mass., filed Apr.3, 2013); Greater Houston Transportation Company v. Uber Technologies, Inc., No. 14-941 (S.D. Tex., filed April 8, 2014).
10. *See, e.g., Ramos v. Uber Technologies, Inc. and Lyft, Inc.*, Case No. 5:14-cv-00502-XR (W.D. Tex., filed June 2, 2014).
11. *See, e.g., City of St. Louis Metropolitan Taxicab Commission v. Lyft, Inc.*, Case No.1422-CC00890 (22d Jud. Cir. Ct. Mo., St. Louis Cir., filed Apr. 18, 2014).
12. *See, e.g., Taxicab Paratransit Association of California v. Public Utilities Commission of the State of California*, Case No. S218427 (Cal., filed May 9, 2014).
13. http://www.windelsmarx.com/practice_detail.cfm?id=20



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Code Enforcement

Student Housing—Pass or Fail

By David Wesner, Corporation Counsel, Danville, Illinois

One of the most difficult situations to work through for code enforcement officials is a dispute between neighbors. Each neighbor may have legitimate complaints about violations at the other's property. But the complaints may not rise to a level that requires immediate attention. And, the complaints are often driven mainly driven by a neighbor's feelings toward the other, and not necessarily driven by the need to address a broader community concern. Regardless, each neighbor will likely continue to call municipal authorities trying to force the issue and get back at the other neighbor or create unnecessary problems for them. This in turn requires that code enforcement staff get involved and stay involved.

If you add to this mix a large age difference between the neighbors, such as the scenario where a group of twenty-somethings are living among a more mature age cohort, the situation can become even more problematic. This is a frequent occurrence in municipalities which are home to a university or college. Student housing may be located across different areas of the community. Some will likely be centered in the heart of the university or college setting, which may lessen some of the potential causes of conflict. But some are likely to be situated within established neighborhoods. This juxtaposition may well bring with it the elements described above and give rise to neighbor disputes.

Student housing almost always brings increased noise and traffic. It may also result in increased littering and many other issues that could likely impact residents and property values—not only those adjacent to the students' dwellings but throughout the neighborhood as well. As such, communities ask themselves which way to turn in trying to address these issues.

A starting point may be in looking at whether—and how--pressure on certain individuals may make a difference. Of course the first person to look at would be the landlord. Depending on the individual or entity, the lessor may be amenable to pressure. For example, if students are not keeping up the condition of their building, creating issues for properties next door or elsewhere the neighborhood, the landlord may be able to approach them and deal with the situation. But that pressure will only go so far if the lease does not contain provisions that would truly enable the lessor to tackle the problem. Another angle (one which was used in the apartment building where my own mother is a tenant) might be used if the students in question happen to be athletes: contacting the appropriate coaches or athletic directors. These officials will likely not tolerate negative publicity about their athletic programs and will have the means to pressure students to stop the problem behavior.

As mentioned above, pressure on a landlord may only be successful if the lease contains provisions the landlord can use to address the issue. One provision that could be made a part of a lease would be a "good neighbor agreement." Some landlords may provide for this concept on their own. Some municipalities adopt ordinances regulating the landlord/tenant relationship and require landlords to insert such clauses in their lease documents. The "good neighbor agreement" may be similar to another type of lease attachment that has been promoted by municipalities—the "crime-free lease addendum." Both of these types of lease attachments attempt to accomplish the same goal. The agreement will specify that tenants need to abide by certain rules which prohibit them from engaging in various activities--and also holds them responsible for their guests who may engage in the prohibited activity. The agreements will provide that any violation would be considered a breach of the lease, triggering a right of eviction.

Another vehicle for coping with unruly student housing (and problem rental properties generally) is a nuisance ordinance. The applicable ordinance in my community (Danville, Illinois) is titled "Maintaining a Public Nuisance." Danville is a municipality of about 35,000 and includes a community college. Our city, as perhaps with yours, has dealt over the years with landlords who do not take an interest in the activity occurring on their property nor responsibility for dealing with the tenants who are engaging in that activity. We have discussed whether we should regulate the landlord/tenant relationship outright, but we are not considering moving in that direction. This leaves the nuisance ordinance as the best alternative. The ordinance could be viewed as a codification of the lease agreement provisions mentioned above.

But in this version, the rules are directed at the landlord rather than the tenants. The ordinance provides a list of offenses, including state criminal offenses and city code violations, which would provide the basis for declaring the property a public nuisance. Some of the offenses listed would likely pertain to student housing. A property would be declared a public nuisance if more than one offense occurs within a six-month period, or if it is a single offense which is a felony. Once a property constitutes a public nuisance pursuant to the definition in the ordinance, a notice is sent to the owner indicating that it must take measures to ensure the improper activity ceases. If the activity continues, the city may seek the penalties described in the

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It Takes A Village To Keep Up The Neighborhood

Brendan Brophy, Assistant City Attorney, Seattle

(Editor's Note: In this article, taken with permission from the current Seattle City Attorney newsletter, we take liberties with our traditional Day in the Life format to bring you a "chapter" in the life–recounted first-person by a municipal lawyer serving his community).

In early July 2014, Seattle Police Department (SPD) Officer Dave Gordon came to me with a small problem that would later become enough of an issue to make the local news.

A house at 1903 N. 137th St. in the Haller Lake area had been the subject of many complaints, including suspected drug activity, excessive garbage and constant traffic. The house was functioning as a temporary home for the tenant's friends and the yard – a temporary landfill.

I first checked with my usual contacts and learned that all of them had already visited the house at one time or another. The Department of Planning and Development (DPD) had completed some cursory inspections, the SPD Anti-Crime Team (ACT) team was watching the house carefully for drug activity, and the SPD Community Police Team (CPT) had contacted the residents of the home to warn them to get into compliance.

Second, I had to determine the legal status of the residents. Were they trespassers? There was no indication that the home had been previously boarded or abandoned, so no, they were not. Were they legal tenants? Possibly, but in order to determine that, we had to find out who owned the property. Officer Gordon tracked down the owner, but that didn't solve the problem as the property itself was tied up in a bankruptcy declaration. What we finally determined was that, despite the legal proceedings, the owner had maintained legal ownership of the property. Unfortunately, this was news to her because she believed she gave up the house in the bankruptcy.

The owner had relocated to California and, because of her mistaken belief that she lost the property in bankruptcy, she had stopped monitoring it. The last action she took was to lease the home to the current tenant's brother. The current tenant had moved in with his brother shortly after it had been leased and helped share the cost of utilities. It was discovered that the tenant also took it upon himself to make some "improvements" to the property, which resulted in the barrage of complaints.

Based on this information, we determined that the current tenant (brother) was a legal tenant and he was subject to a month-to-month tenancy. He could only be removed from the home through the eviction process under the Residential Landlord Tenant Act (RCW 59.18).

Just as we were gathering this information, Haller Lake community residents held a meeting on July 9. At this meeting I explained the differences between tenants and trespassers and discussed why the property did not amount to a chronic nuisance property under Seattle Municipal Code 10.09. Surprisingly, everyone at the meeting, with their new understanding of the home's legal status, decided to take up a collection to assist the property owner in hiring a landlord tenant attorney to file eviction proceedings against the occupants. On the spot, they managed to collect more than $1,000.

By mid-August, the owner of the home had hired an attorney, who was well into the eviction process. He had already served the required notices on the tenant and filed for eviction in court. However, many of the neighborhood residents were dissatisfied with the lengthy process and took their complaints to the media. Despite the discussions at our July meeting, the neighbors portrayed the situation as one where "squatters" took over the house and inexplicably gained legal protection. Understandably, these statements concerned several councilmembers,

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Brendan Brophy, Assistant City Attorney, is assigned to the Seattle Police Department's North Precinct. He implemented "STOP" (Specially Targeted Offender Program) to identify high-risk domestic violence offenders and has prosecuted various jury trials for assault, harassment, theft, and DUI. He is also a Staff Judge Advocate for the Washington State Army National Guard. Brendan attended the University of California, Davis and holds a JD from Seattle University School of Law.

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Cases of Interest

By Monica Ciriello

On January 29, 2011 a water line servicing 96 Ross St. (96 Ross), a multi residential apartment complex located in the City of Barrie (City) broke. An inspector from the City advised 96 Ross that the City was not responsible for the repair, despite being on City property. The inspector recommended that 96 Ross use Rumball, a repair company to complete the repairs. Rumball completed the repairs immediately, as it was classified as an emergency repair situation. Upon completion Rumball presented a $9469.58 bill to 96 Ross, which refused to pay. 96 Ross stated that the City was responsible for the bill as the break occurred on City property. Rumball sued for the payment primarily from 96 Ross, and if 96 Ross was not responsible, then the City was.

Held: This matter was brought before Small Claims Court. It was held that 96 Ross was responsible for payment to Rumball. The City's lack of responsibility stemmed from its by-law whichset out the fees associated with the installation and renewal of water services. For services involving pipes exceeding 19 mm (as in the 96 Ross case) the City's approved fee was "full cost recovery." Accordingly, if the City had paid for the cost of restoring the water service, it would have been entitled to recover those costs from 96 Ross. If 96 Ross had refused to authorize the repairs and the City had incurred those costs, 96 Ross would still have been ultimately liable. The claim against the City was dismissed.

96 Ross St. Inc v. Corporation of the City of Barrie, 2014 Canlii 65319

The plaintiff, a homeowner, initiated an action against the City of Dauphin (City) for failing to enforce city zoning and business by-laws. The non-compliant property was a home-based business located adjacent to the plaintiff's residence. The statement of claim indicated that the plaintiff suffered loss of use, enjoyment, and comfort in his property as a result of the failure of the City to enforce the municipal by-law. The City moved for an Order striking out the Statement of Claim for failure to disclose a reasonable cause of action. The City argued that the claim did not establish a legal relationship between the City and the plaintiff and in the absence of such relationship the City had no cognizable 'duty,' requiring dismissal. The court had to determine the legal relationship, if any, between the plaintiff and the City.

Held: The duty of care applies to a public authority unless there is a valid basis for its exclusion. A true policy decision undertaken by a government agency would constitute such a valid basis for exclusion. However, once the agency authorized a particular property to be used as a home-based business, there is a strong argument that such permission or licensing was an operational act, falling outside the exclusion for policy decisions.

The court found that such licensing carries an inherent duty to the business being permitted, as well as the duty not to act negligently and cause harm to the neighbours. Therefore, it was not plain and obvious that the plaintiff failed to plead a reasonable cause of action; the claim if true demonstrated legal proximity between the plaintiff and the City. The City's motion to strike was dismissed.

Dmitruk v. City of Dauphin, 2014 MBQB 189

In the last issue of *Municipal Lawyer*, we indicated that British Columbia Supreme Court Justice Brown had dismissed the injunction by the City of Burnaby (City) injunction prohibiting Trans Mountain Pipeline, its agents or employees from continuing to carry on work in the City in contravention of City bylaws. However, reasons for dismissing the injunction had not been published.

Held: The City must meet the requirements for an equitable injunction, as set out in *RJR-MacDonald*. The test is: 1) Is there a serious question to be tried? 2) Will there be irreparable harm? 3) Does the balance of convenience favour the applicant?

With regards to the first issue, Justice Brown found that there was not a serious question to be tried because there was another forum in which the matter could be determined. In the second prong, Justice Brown contemplated conflicting evidence but ultimately concluded that the investigations to be conducted by Trans Mountain constituted irreparable harm as contemplated in *RJR-MacDonald*. In the final element, it was found that the balance of convenience did not favour the City's position, as there was another forum with the jurisdiction to determine these matters, and an injunction would enjoin further orders from that forum.

The court found that the matter is properly before the National Energy Board (NEB), and the City has the ability to pursue the relief that it seeks in that proceeding. In the event that the NEB reaches conclusions that the City contests, it may pursue an appeal to the Federal Court and may seek an injunction in that forum.

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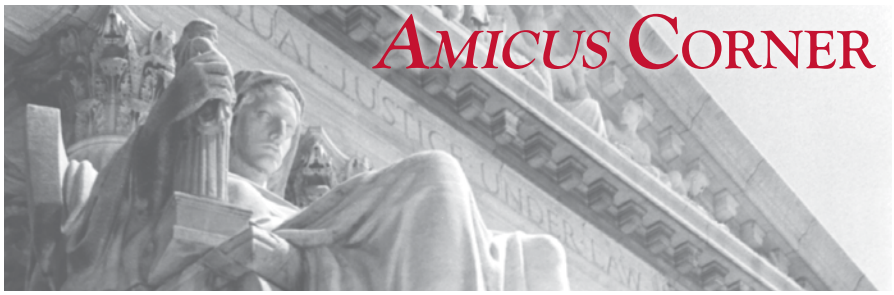

Religious Accommodation Requires "Actual Knowledge"

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

IMLA's amicus activities continue at a rapid pace. Two of the more interesting cases we are involved in on behalf of IMLA members are *Abercrombie* and *Patel,* described below:

EEOC v. Abercrombie & Fitch Stores, Inc.- Supreme Court Merits Stage – Religious Accommodation Case

This case involves a question of whether an employer should be held liable for failing to offer a religious accommodation to an applicant for employment who did not request an accommodation or even mention her religion. Put another way, should an employer be required to ask a prospective employee about his or her religion in order to ascertain whether a religious accommodation is necessary?

Facts: Abercrombie & Fitch is a clothing store chain that depends on its sales associates, called "Models"—to represent its brand and promote its products. Abercrombie accordingly maintains a "Look Policy" designed to ensure that employees display brand-consistent looks at all times. Part of that Look Policy forbids employees from wearing headwear (Though the Tenth Circuit decision does note that Abercrombie grants accommodations to its Look Policy if doing so will not harm the brand. According to the respondent's attorney, Abercrombie has routinely allowed employees to wear head scarves when they ask to do so for a religious accommodation).

In 2008, Samantha Elauf applied for a position with Abercrombie in Oklahoma. Before her interview, Elauf was aware that Abercrombie had a Look Policy for its employees. Elauf arrived at the interview wearing a black head scarf ("hijab").

Elauf was interviewed by an assistant manager. Neither the assistant manager nor Elauf mentioned the scarf or Elauf's religion in the interview. The assistant manager did, however, inform Elauf that Abercrombie had a Look Policy that comprehensively governed the appearance of its sales associates; Elauf asked no questions and expressed no need for an accommodation. While the assistant manager later testified that she *guessed* and *assumed* that Elauf was Muslim because of the scarf, she also testified that she did not *know* Elauf's religion at the time of the interview. Indeed, Elauf could not have *known* of Elauf's need for a religious accommodation based on her appearance alone because, as the EEOC's own expert testified, headscarves can be worn for religious as well as non-religious, cultural reasons.

Ultimately, Elauf was not hired because head coverings are generally not permitted under Abercrombie's Look Policy. The EEOC then brought a failure-to-accommodate claim against Abercrombie, winning on summary judgment. Elauf was subsequently awarded compensatory damages of $20,000. Abercrombie challenged that outcome at the Tenth Circuit.

Tenth Circuit Ruling: In *EEOC v. Abercrombie & Fitch Stores, Inc.*, No. 11-5110 (10th Cir. Oct. 1, 2013), the Tenth Circuit held in favor of Abercrombie. It found that a plaintiff "ordinarily must establish that he or she initially informed the employer that the plaintiff adheres to a particular practice for religious reasons and that he or she needs an accommodation for that practice ...", which Elauf had not done. It further held that even if the employee herself need not give notice of her religious conflict, Abercrombie would still prevail because an employer must have "particularized, *actual* knowledge of the key facts that trigger its duty to accommodate," and Abercrombie indisputably lacked actual knowledge—"*from any source*"—that Elauf wore her scarf for religious reasons or needed an accommodation for it.

The EEOC petitioned for certiorari, which was granted on October 2, 2014.

Issue: Whether an employer can be liable under Title VII of the Civil Rights Act of 1964 for refusing to hire an applicant or discharging an employee based on a "religious observance and practice" only if the employer has actual knowledge that a religious accommodation was required and the employer's actual knowledge resulted from direct, explicit notice from the applicant or employee.

Significance to Local Government: Under the EEOC's proposed rule an employer can be held liable—and ordered to pay compensatory and punitive damages—for failing to provide a religious accommodation to an employee or applicant who never notified the employer of a religious practice or asked for an accommodation. In other words, on the EEOC's proposed rule, employers would be liable for failing to inquire about and accommodate religious practices—even if the employer did not know for a fact that the employee's conduct had a religious motivation, and thus could not have known that a religious accommodation

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A Tribute to the Portuguese

By Kelly Addy, Civil Deputy City Attorney, Billings, Montana

I confess at the outset that I love Elizabeth Barrett Browning and her *Sonnets From the Portuguese* too much. If that is too obvious by the time you finish reading this, my apologies, to you and Ms. Browning. Let us begin.

O, ListServ, how do I love thee?
Let me count the ways.
I love thee to the depth and breadth
and height My weary mind can reach,
when feeling out of sight For the ends
of being and ideal grace.

It is easy to think you are the only one who has a problem when you practice municipal law, but even more so when that practice is in a remote, sparsely-populated corner of a great country. In Montana, we look to larger states for persuasive authority on many issues because 'something like that has never happened here before.'

But Montana is not California, no matter how much we think that would be a good thing for them. It's likely that whatever I am wrestling with has happened there, and there is probably a case on it, but a lot of stuff we have never thought about has happened there, too.

Where can we turn for guidance as we try to guide our clients between our duty to Protect and Defend and a Taking? How can we translate a distant court's holding in a megalopolis to our cultural setting? The facts are the same, but they don't mean the same thing here. Justice in one community may not fit another.

That is why it is invaluable to talk to people all over the country as the issues pop up here, to see if they have confronted this, or dealt with that, or ever had to come up with a solution to our knotty problem. Somewhere in our 800-member cadre of well-intentioned do-gooders, someone has seen it, dealt with it, and can tell you whether you might want to try one thing or avoid something else.

Our friends from there understand the holding in a case, but they also have an idea which fact, which statute or which judge made it turn out that way. The court's opinion is only a snapshot of justice in that state; I have friends who know why the face in the picture is smiling or scowling or looking away. You convey an organic sense of the task we have and put us on the alert for crucial things we would have overlooked.

I love thee to the level of every day's
Most quiet need, by sun and candle-light.

Friends on the ListServ comfort and stand by each other. But they are also able to speak to each other in a way that cuts through the fog of predilections and tell me what I need to hold onto and what I need to let go of.

No one is always right, but that's the target, and filling in the blind spots is what friends can do for each other. Opposing counsel can't or won't. It's hard for me to hear them when they try.

It took Grandma Addy to teach me how to sort my laundry so my underwear wouldn't turn out pink. Anybody else would have been meddling, but not her. I had to hear it from her.

The credibility of friendship shakes away our dearest hopes and reveals the situation for what it is. There is never just one way to solve a problem. Sometimes it's not a matter of finding better law, but doing things a better way. More than once, I have posted, 'Thanks. I needed that.' I did, too.

I love thee freely, as honest lawyers strive
for right; I love thee purely, as they turn from praise.

Elizabeth wins my heart with that 'honest lawyers strive for right' stuff. A client in private practice managed to be charged with an offense by telling the arresting officer what had really happened just before the police arrived.

I asked them why they had blabbed. They said, 'I was already in so much trouble I figured the truth was only way out!' Happily, we were able to negotiate a deferred prosecution, because they blabbed.

In my municipal practice I sometimes feel like that client. I remember the lesson they gave to me that day. I know from the postings how lonely and overwhelming it can feel to be in a case that is as likely to be decided on the basis of a morning editorial as controlling precedent.

But as we share our challenges, we see we are not alone. This is not just happening to me. We have a role to play that does not include knowing what the outcome might be.

We tell the truth *anyway*, because it is the only thing that can bring an honest and lasting resolution. A tip of the hat here to friends who have responded quickly in emergencies and to others who have whispered their wisdom off-list at challenging times.

In Montana, we refer to it as 'herd immunity'. When enough of us have been vaccinated by raw experience and survived because we didn't blink when we didn't have better facts, we all can hope the danger *du jour* will not prove fatal. We might even find the grace to laugh at it.

I love thee with the passion put to use
In my old griefs, and with my childhood's faith.

We can remind each other better than we can convince our own selves that people call us when they don't know what to do because Trouble is what we handle. Then we can saddle up to do the next right thing in an honorable way and call it a day's work for a day's pay.

I love thee with a love I seemed to lose
With my lost saints. I love thee with the breath,
Smiles, tears, of all my life; and, if God choose,
I shall but love thee better after death.

The ListServ helps us in another way. When we read of a problem someone else has and we can speak to their issues out of our experience the way others have spoken to us, we realize that we know something of real value.

We don't just have problems. We have solutions, too. We don't just need help. We are help, too. Each day becomes brighter than the last, because we all are here. ML



SECOND LOOK

Organizing ESI Production: What do Federal Rule 34 and State Equivalents Really Mean?[1]

By Pete Haskel, Executive Assistant City Attorney, Dallas, Texas

Forms of permitted production under Rule 34.

Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request.

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.

Fed. R. Civ. P. 34(b)(2)(E)(i).

We have all read the rule about how document and ESI production must be organized a thousand times. So often that we probably have ceased actually reading it as our eyes jump to another provision. That may be a mistake if a new Northern District of California magistrate judge's decision becomes a leading case.[2] This decision requires labelling of ESI produced in the form or forms ordinarily maintained to indicate custodians or other source/location. This is not a practice that I have observed – and not one that I think should normally be required absent court order or party stipulation.

I read Rule 34(b)(2)(E) to allow for the following production organization options for "documents" and to not include any organization or labelling requirement for ESI:

1. As the parties may stipulate[3];
2. As directed by a judge's order[4];
3. Documents as kept in the ordinary course of business[5]
4. Documents organized and labeled to correspond to the categories in the request.[6]

Rule 34(b)(2)(E)(i) governs the organization and labelling of non-ESI documents. This provision does NOT govern the organization of ESI production. Rule 34(b)(2)(E)(ii) governs the "form or forms" of ESI production, not the organization or labeling of such production. There is no provision in Rule 34(b)(2)(E) governing the organization or labelling of ESI production, just as there is nothing in the rule directing the "form or forms" of non-ESI paper documents.

This makes sense. There is no need to specify a "form" for producing paper. Paper documents will be produced on paper unless the parties stipulate or the court orders otherwise. In practice, assuming no formal agreement or stipulation, if one party's RFP requests production of paper documents in PDF format the producing party's compliance creates a stipulation for production in PDF, at least for the producing party's papers. If the producing party refuses to produce its paper documents in electronic form the court can always make an order. Similarly, I do not think that that specifying the organization or labelling of ESI should ordinarily be required. If the files are in the form or forms specified in an RFP or in the form in which they are "ordinarily maintained" they usually will be searchable or at least include metadata that will provide file properties. Further information if needed can be obtained via interrogatories or depositions if timely requested.[7]

The Venture Corp. Gloss on Rule 34's Organizational Requirements.

Magistrate Judge Grewal read Rule 34(b)(2)(E) to combine the requirements of subdivisions (i) and (ii) so that they each apply both to documents and to ESI.

This prong of *Venture Corp.* ignored the plain language of the rule, which plainly distinguishes between "ESI" and "documents" – treating the organization of paper discovery in subdivision (i) and the form of ESI production in subdivision (ii). Moreover, the distinct and separate treatment of ESI and other documents as I read Rule 35(b)(2)(E) is required by the unambiguous language of the rule and is consistent with the existence of special rules for ESI discovery in Federal Rule of Civil Procedure 26(b)(2)(B) (standards for not producing "not reasonably accessible" ESI or shifting associated costs, without mention of any similar rule of production of paper documents) and 26(f)(3)(C) (pretrial conference can cover ESI discovery issues "including the form or forms in which it should be produced"). Significantly, Rule 26(f)(3)(C) does not call for conferring about the organization or labelling of ESI production, nor the "form" of production of paper documents.

The BTLB entry supports the *Venture Corp.* result on the ground that litigants often need more information about ESI and should not have to search the ESI to get it. I agree with those sentiments, but do not agree that this requires a re-writing of Rule 34 as accomplished, in my view, by *Venture Corp.*

Venture Corp. also adopted requirements that a party producing "documents" (but in context the court clearly included ESI in this term) label the materials with the name of the custodian or otherwise indicate the organization

of the materials as they were ordinarily kept:

"A party selecting the alternative method of production bears the burden of demonstrating that the documents made available were in fact produced consistent with that mandate.... To carry this burden, a party must do more than merely represent to the court and the requesting party that the documents have been produced as they are maintained."[19] At a minimum, the court would expect to see the documents and ESI kept by the name of the employee from whom the documents were obtained or at least which Venture entity had produced the documents.[20] But here, there was nothing in the way of any such source information.

19. *See Pass & Seymour, Inc. v. Hubbell Inc.*, 255 F.R.D. 331, 334 (N.D.N.Y.2008) (*citing Johnson v. Kraft Foods N. Am., Inc.*, 236 F.R.D. 535, 540–41 (D.Kan.2006); *Cardenas v. Dorel Juvenile Group, Inc.*, 230 F.R.D. 611, 618 (D.Kan.2005)). *See also Google, Inc. v. American Blind & Wallpaper Factory, Inc.*, Case No. 03–cv–5340, 2006 WL 5349265, at *3 (N.D.Cal. Feb. 8, 2006).

20. *Cf. MGP Ingredients, Inc. v. Mars, Inc.*, Case No. 06–2318–JWL–DJW, 2007 Wl 2010343, at *1 *(D.Kan. Oct. 15, 2007).*[8]

Providing information about how documents and ESI are kept under subsection (i) "[a]t a minimum ... mean[s] that the disclosing party should provide information about each document which ideally would include, in some fashion, the identity of the custodian or person from whom the documents were obtained, an indication of whether they are retained in hard copy or digital format, assurance that the documents have been produced in the order in which they are maintained, and a general description of the filing system from which they were recovered."[25]

25. *Pass & Seymour, Inc.,* 255 F.R.D. at 337.[9]

However, as I stated above, I do not believe that subdivision (i) of Rule 34(b)(2)(E) applies to ESI at all, and that sufficient information about produced ESI is either available in metadata or easily discoverable through interrogatories and depositions. If a party wants to ensure that it will get certain information about the ESI that it received in discovery, that can be achieved by insisting that "ESI" includes metadata identifying the author, source location, and other information about each file, and by carefully specifying the form or forms for ESI production.

Conclusion.

My reservations about *Venture Corp.* are limited to the court's construction of Rule 34 and the imposition of new default obligations on parties to produce ESI. There is no question that under Rule 34(b)(2)(E) a court could impose the additional labelling requirements for ESI that the *Venture Corp.* court holds to be required by the Rule without judicial intervention. I just do not agree that ediscovery requires the additional organizational and labelling mandates for every case absent court order or party stipulation. I also fear that routinely requiring labelling for ESI production could significantly increase the burden and expense of ediscovery with little corresponding benefit.

Notes

1. I wish that I could treat the term document to include electronically stored information ("ESI") for this column, but to make my point I will have to respect the federal rules distinction between the two data types. Federal Rule 34 and the corresponding state discovery rules that I have read continue to distinguish between ESI, as the federal rules call electronic or magnetic data, and other (usually paper) documents. The state rules sometimes have their own definitions for electronic and magnetic data instead of ESI. One cannot assume that the state definitions are always necessarily synonymous with the federal definition of ESI, so we must check before applying federal decisions to state rules on ediscovery. I think the distinction has become counterproductive and just plain silly. I always define "documents" to include "ESI" in my requests for production ("RFP") and hope all practitioners do. Failure to do so, in additional to probably being malpractice except in unusual situations where we seek only paper documents, merely sets up a "gotcha," invites unnecessary pretrial motions, and fails to advance the discovery process. The Committee Notes to the 2006 amendments to Rule 34 explain that the rule uses ESI to capture dynamic data bases is an example of ESI that might not have any precise equivalent in "documents." This concern should be addressed by simply defining "documents" to include ESI. However, to avoid confusion, that definition should be for purposes of what must be produced but not for purposes of the organization or labeling of production. I do not see dynamic data bases as fundamentally different from the contents of a file or filing cabinet of paper documents. The computerized data can be more readily indexed, searched, and queried than papers, but both the electronic database and the paper file set are subject to addition, deletion, and amendment of specific data over time. In response to an RFP they both are subject to production as they exist when the RFP is served – a snapshot of a dynamic data set. I think that obligations to supplement production would apply to paper files and databases in the same way too. However, for purposes of organizing production, Rule 34 imposes differing rules between ESI and paper, a critical point that Magistrate Judge Grewal does not recognize.

2. The decision is Order re: Motion to Compel, Venture Corp. Ltd. v. Barrett, No. 5:13-CV-03384-PSG, ECF No. 44, 2014 WL 5305575, 2014 U.S. Dist. LEXIS 147643 (N.D. Cal. Oct. 16, 2014) (Paul S. Grewal, M.J.) ("*Venture Corp.*"). It was thoughtfully parsed and favorably discussed in the always-worthwhile e-discovery blawg, Bow Tie Law's Blog ("BTLB") (by Joshua Gilliland), on November 26, 2014, in "Rule 34: As Basic As You Get | Bow Tie Law's Blog," https://bowtielaw.wordpress.com/2014/11/26/rule-34-as-basic-as-you-get/ (last visited Nov. 28, 2014). Also on November 26, I posted a link to the BTLB entry on my CityAttorneyTech blawg in post # 22718. *See* "ND Cal:?Rule 34: As Basic As You Get | Bow Tie Law's Blog" City Attorney Tech - Yahoo Groups, https://groups.yahoo.com/neo/groups/CityAttorneyTech/conversations/messages/22718 (last visited Nov. 28, 2014) (free registration & membership approval required).

3. Fed. R. Civ. P. 34(b)(2)(E).

4. *Id.*

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Takings: Exigent Circumstances Justify Bypassing Notice and Hearing

On June 1, 2011 a devastating tornado ripped through Springfield, Massachusetts, heavily damaging many parts of the City. Both the Governor of Massachusetts and the Springfield Mayor declared a state of emergency. Although the South Commons Condominiums (South Commons) were not fully destroyed by the storm, the City rapidly concluded--without having undertaken an engineering study--that they were in imminent danger of collapse. The next day, pursuant to City order, South Commons was leveled by Charlie Arment Trucking (Arment).

Neither South Commons' owners nor residents were notified in advance that the City considered the buildings to pose an immediate threat. They were not given an opportunity for a hearing prior to the City's actions to destroy the condominiums. The South Commons owners sued Arment and the City under 42 U.S.C. §1983 alleging violation of its substantive and procedural due process rights. The District Court for the Western District of Massachusetts dismissed the suit.

HELD: On appeal, the First Circuit affirmed, finding that, although defendants bypassed some of the traditional elements of Fifth Circuit due process protections, the exigent circumstances and availability of a post-taking remedy under Massachusetts law made the City's action constitutional.

DISCUSSION: The Court of Appeals asked two questions: (1) Did these facts present a case where traditional pre-destruction notice and hearing could justifiably be bypassed by defendants? And if so, (2) did Massachusetts law afford a sufficient remedy after the fact?

Both questions were answered in the affirmative.

No Hearing or Notice: Plaintiffs had relied on *Zinernon v. Burch*, 49 U.S. 113 (1990) for the proposition that the Massachusetts laws allowing demolition without a hearing was constitutionally deficient. But the Florida law at issue in *Zinernon* involved decision-making powers delegated to state mental hospital employees, who had virtually autonomous authority to avoid notice and hearing processes when committing patients involuntarily. *Zinernon* had no relevance to the limited scope afforded by Massachusetts law to officials confronting an imminent threat to public safety.

Here, the probability of a looming building collapse provided ample justification for expedited action by City officials. "If a building is so badly damaged it must be demolished immediately to protect life and limb, then it surely poses a serious danger to the public safety that must be addressed with dispatch." (*citation omitted*).

The Massachusetts statutes in question did in fact call for pre-demolition notice and hearing in the ordinary course. But they provided a specific exception where public safety was involved: "If the public safety so requires and if the aldermen or selectmen so order, the inspector of buildings may immediately enter upon the premises . . . and cause such unsafe structure to be made safe or taken down without delay . . . ." Mass. Gen. Laws ch. 143, § 7.

The First Circuit was fully aware that the rapidity allowed under Massachusetts law might result in mistakes, but that did not invalidate the process: "Such a practicably workable standard is sure to be imprecise enough to require the official to make judgment calls about the urgency of the need to act. That some such calls may be mistaken does not show that the process for making them was constitutionally improper."

The Court of Appeals also found an additional level of protection in the fact that the decision to demolish came from elected officials (aldermen or selectmen) rather than inspectors themselves.

Post-taking Remedy: Massachusetts law clearly provided for a post-taking remedy.

A person aggrieved by such order may appeal to the superior court for the county where such building or other structure is situated, if, within three days after the service of such attested copy upon him, he commences a civil action in such court. Trial by jury shall be had as in other civil causes. The jury may affirm, annul or alter such order . . . . [I]f it is annulled, he shall recover from the town his damages, if any, and costs . . . . Mass. Gen. Laws ch.139, § 2

Discussion of the post-taking remedy was made more interesting because the City had issued formal orders authorizing the demolition *after* the buildings had been destroyed. Plaintiffs had therefore not availed themselves of the statute, and argued that it did not apply. But the court found that the remedial language above was not invalidated by such timing. (And unfortunately for plaintiffs, they had not brought their action until one year following the demolition, far after the three-day period cited in the remedial statute. While the court found this timeframe to be brief, it had no authority to modify the statute).

Substantive Due Process: Plaintiffs' substantive due process claim was dispatched rapidly. The First Circuit did not find a fact pattern that objectively "shocks the conscience."

Plaintiffs were therefore directed to pursue their post-demolition remedies in state court:

> [W]hen a city decides buildings are sufficiently damaged that they must immediately be demolished to protect

life and limb, and when the city does so pursuant to a state law that anticipates such an emergency and authorizes the use of summary procedure to respond to it, the remedy for any wrong, absent conscience shocking behavior, must come from the remedies the state itself supplies rather than from a federal suit premised on the federal Constitution's Due Process Clause.

***South Commons Condominium Association v. Charlie Arment Trucking Inc.,* Nos. 13-2244, 13-2248 (1st Cir. Dec. 23, 2014)**

Native Americans: Tribes "Recognized" by the Federal Government as Recently as 2002 Qualify to Receive Casino Lands

In a classic battle (featuring 9 plaintiffs and 14 defendants) by gaming businesses against a potential new entrant, a Washington D.C. federal court has applied *Chevron* analysis to uphold an Interior Department decision to take Washington State land into trust for an Indian tribe which intends to develop a casino complex.

The Cowlitz Indian Tribe (Cowlitz) of southwestern Washington has been without land since President Lincoln signed a proclamation in 1863 that opened Cowlitz lands to non-Indian settlement. In 2002, the Interior Department acknowledged the Cowlitz, finding that the tribe had existed as an Indian entity on a "substantially continuous basis" since at least 1878. The Cowlitz, numbering some 3,000 members, immediately requested that the Interior Secretary take into trust 152 acres of land in Clark County, Washington (Parcel) and declare it the Tribe's "initial reservation" under the Indian Reorganization Act of 1934 (IRA). The Secretary complied.

The Cowlitz claimed their purpose was to "create a federally-protected land base on which the Cowlitz Indian Tribe can establish and operate a tribal government headquarters to provide housing, health care, education and other governmental services to its members, and conduct the economic development necessary to fund these tribal government programs, provide employment opportunities for its members, and allow the Tribe to become economically self-sufficient." To further that goal, the tribe produced a plan to develop the Parcel with 20,000 square feet of tribal offices, sixteen elder housing units, a 12,000 square foot cultural center and a 600,000 square foot casino-resort-convention center complex with a 250-room hotel.

Plaintiffs, including tribes with existing casinos in the area, other gaming-related businesses and community groups, came together to challenge the Secretary. Their action arose under a matrix of federal laws: the IRA, the Administrative Procedure Act (APA), the Indian Gaming Regulatory Act (IGRA), and the National Environmental Policy Act (NEPA). Their key argument was that, under applicable law, the Cowlitz had to have been formally "recognized" by the federal government since 1934. The Secretary argued that the statutory language was ambiguous and that recognition was only necessary as of the date the land was taken into trust.

HELD: The Secretary's interpretation of the applicable statutes is reasonable, and under *Chevron* must be given deference.

DISCUSSION: The IRA authorizes the Secretary to acquire land in trust for "Indians," which include, *inter alia,* "members of any recognized Indian tribe now under Federal jurisdiction." While the Supreme Court had determined that the word "now" was used by Congress to mean 1934, when the IRA was enacted (*Carcieri v. Salazar,* 555 U.S. 379 (2009)), it was not clear that "now" applied to "recognized" as well as "under Federal jurisdiction."

It was this ambiguity that the Secretary construed. The Secretary reasoned that the term "recognized" had historically been used in two distinct senses: (1) the "cognitive" or "quasi-anthropological" sense, under which an official "simply knew or realized that an Indian tribe existed," and (2) "the more formal or `jurisdictional' sense to connote that a tribe is a governmental entity comprised of Indians and that the entity has a unique relationship with the United States." The formal or jurisdictional sense of recognition, the Secretary explained, evolved into the modern notion of "federal recognition" or "federal acknowledgment" in the 1970s, and eventually regulations established procedures pursuant to which an entity could demonstrate its status as an Indian tribe.

The Secretary reasoned that "whatever the precise meaning of the term recognized tribe,' the date of federal recognition does not affect the Secretary's authority under the IRA" because "the IRA imposes no time limit upon recognition," and "the tribe need only be `recognized' as of the time the Department acquires the land into trust."

The Secretary concluded that the Cowlitz tribe had been "recognized" since at least 2002, when it received federal acknowledgment, and therefore it satisfied the recognition requirement.

Although plaintiffs countered that the only plausible interpretation of the IRA was that the Cowlitz had to be "recognized" and "under Federal jurisdiction" in 1934, the court disagreed. It found significant ambiguity in the IRA and its legislative history regarding the issue.

This opened the door to the *Chevron* standard of review for evaluating an agency's interpretation of a law it administers. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). Where, as in the Cowlitz case, the statute is "silent or ambiguous with respect to the specific issue,"the court must determine whether the agency's response to the question at issue is reasonable and based on a permissible construction of the statute." If the agency's interpretation is reasonable, the court must defer. The agency's interpretation need not be "the only possible interpretation, nor even the interpretation deemed most reasonable by the courts."

The court is "principally concerned with ensuring that [the Agency] has examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational

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justice and applaud the City Attorney for his actions."[27]

The Ellis Act had always left open the possibility of additional mitigation in favor of tenants. Sections 7060.1-7060.1(c) go on to explain that "[n]otwithstanding Section 7060, nothing in this chapter" . . . "[d]iminishes or enhances any power in any public entity to mitigate any adverse impact on persons displaced by reason of the withdrawal from rent or lease of any accommodations."[28]

In June 2014, San Francisco took additional–and detractors would say extreme–legislative steps to protect incumbent tenants from being displaced. The new measure significantly increased the cost to landlords for displacing renters above the then-existing levels (which allowed a maximum of $13,500 per unit, plus an additional $3,000 for elderly or disabled tenants).

San Francisco's new ordinance applies to all tenants who had not actually moved out as of June 1, 2014—even if they had received notice under the prior ordinance. Under the 2014 Ordinance, the landlord must pay the greater of the payout required by the prior ordinance, or an amount equal to twenty-four times the difference between the unit's current monthly rate and the fair market value of a comparable unit in San Francisco, as calculated by a schedule developed by the Controller's Office.[29]

The law was imediately challenged. Plaintiffs Daniel and Maria Levin own a two-unit house on San Francisco's renowned and picturesque Lombard Street. Earlier this year, they notified the occupant of one unit that they were taking it off the market. Under the new city ordinance, they would be required to pay nearly $118,000 to that single tenant, according to court documents. The Levins and other property owners filed suit against the city in late July.[30]

In October, the ordinance was found to be constitutionally deficient.[31] Northern District of California Judge Charles R. Breyer said in his decision that while the city was well-intentioned in attempting to solve its housing shortage, the recent ordinance did not survive Fifth Amendment scrutiny.

"San Francisco's housing shortage and the high market rates that result are significant problems of public concern, and the city legislature's attempts to ameliorate them are laudable," Judge Breyer wrote. "The ordinance apparently is unprecedented in requiring a massive lump-sum payout from one private party to another in exchange for regaining possession of property. But that trail had not been blazed before for good reason."[32]

The decision concluded that "the city has crossed the constitutional line between permissible government regulation of land and an impermissible monetary exaction that lacks an essential nexus and rough proportionality to the impact of an Ellis Act withdrawal." [33] In essence, the imposition of such a high barrier to taking one's leasehold off the rental market amounted to a virtual taking of the property—or a significant portion of the property's value—by the city. While requiring an owner to compensate a displaced tenant for moving and moving costs, as required under the Ellis Act, was constitutionally acceptable, holding the landlord responsible for skyrocketing rental rates was not.

"I think [Judge Breyer] got it right. This is an unprecedented law that forced a few property owners to solve a larger societal problem by paying a king's ransom to stop being landlords," said Pacific Legal Foundation pro bono attorney J. David Breemer on behalf of his clients. "There may be a broader crisis, but that doesn't justify forcing the burden of solving the crisis on the backs of a few property owners."[34]

Dennis Herrera announced an appeal in short order. "There should be no doubt that when a landlord evicts a rent-controlled tenant, the immense rent increase the tenant faces is the direct result of the landlord's decision to evict. . . .San Francisco is facing a housing affordability crisis that's historically unprecedented, and our tenant relocation law serves a legitimate and lawful public purpose in helping tenants to adjust to the loss of rent control and mitigating the harms of displacement."[35]

Levin and other landlord-tenant cases lay bare many of the complex—and often conflicting-best intentions of state and municipal governments as they try to reconcile free enterprise with societal goals. In San Francisco, New York City and other metropolises, one major reason for the huge disparity between existing rents and fair market value is obvious – the artificial ceiling on annual rent increases for occupied units. San Francisco's rent control plan, for example, covers nearly all rental property in buildings constructed before June 1979, thereby affecting a large proportion of the city's leasehold inventory. Rent increases are strictly limited to a rate lower than inflation under the guidelines published by the San Francisco Rent Control Board-specifically, to sixty percent of the Bay Area Cost of Living Index. Under this rubric, rent increases generally hover between one and two percent per year, resulting in an ever-diminishing return on investment for property owners.[36]

An Attempt at Compromise

Even as San Francisco has continued to fight the loss of long-term affordable housing, it recognizes the syllogism that by allowing permanent residents to rent out their properties on occasion, their prospects for staying in the city may actually increase. In October, the City Board of Supervisors passed an ordinance explicitly *authorizing* short -term rentals—within reason. In explaining its about-face, the Board cited a fuller appreciation of the role that Airbnb and its cohorts play in the city's housing market:

> The widespread conversion of residential housing to short-term rentals, commonly referred to as hotelization, was prohibited by this Board because, when taken to extremes, these conversions could result in the loss of housing for permanent residents. But, with the advent of new technology, the rise of the sharing economy, and the economic and social benefits to residents of sharing resources, short-term rental activity continued to proliferate. This has not only led the City to strengthen enforcement of short-term rental laws, but also prompted an examination of parameters to regulate short-term rentals and create a pathway to legalize this activity. The goal of regulation is to ensure compliance with all requirements of the Municipal Code, including but not limited to the Business and Tax Regulations Code

and the Residential Rent Stabilization and Arbitration Ordinance, and accountability for neighborhood quality of life.

(1) Notwithstanding the restrictions set forth in this Section 41A.5, a Permanent Resident may offer his or her Primary Residence as a Short-Term Residential Rental if:

(A) The Residential Unit is occupied by the Permanent Resident *for no less than 275 days* out of any given the *calendar year* in which the Residential Unit is rented as a Short-Term Residential Rental or, proportional share thereof if he or she if the Permanent Resident has not rented or owned the Residential Unit for the full preceding calendar year, for no less than 75% of the days he or she has owned or rented the Residential Unit.[37]

This measure seems to be a creative and forward-thinking solution. Whether it will actually help curb San Francisco's runaway rental rates and protect long-term housing is unclear. Enforcement will become more complex if greater numbers of owners get into the short-term act. Some detractors will no doubt carp that, if apartments come with a legalized sublease profit opportunity, owners will boost rents even more to participate in the potential upside.

In fact, a challenge has already been launched against the new law--but from a most unexpected source: HomeAway.com. The Airbnb competitor brought suit against the city in November, raising unfair competition and even Commerce Clause challenges because Airbnb is a California-based company.[38] HomeAway objects to the 90-day annual limitation on short term leasing, given that it specializes in second homes rented out to vacationers for most, if not all, of the year. Although Airbnb will lose some San Francisco listings under the new law, the majority of Airbnb landlords rent out primary residences and do not vacate them for extended periods.[39] HomeAway may also be threatened by provisions requiring the payment of lodging tax—unlike Airbnb's system, which puts the company in the middle of the payment process from the outset, making collection of taxes relatively easy, HomeAway is only a listing service. It cannot ensure that its clients are complying with tax laws.

Economic Infusion or Code Violation?: The competing considerations behind San Francisco's give and take are evident across the country. Many jurisdictions are only now beginning to grapple with the right balance. Local governments continue to seek the right balance between residential stability and free market entrepreneurialism. In vacation areas that are not fighting the loss of long-term housing and want to accommodate the proprietors of short-term rentals, whose transient tenants are a vital part of the locality's economy, the focus is on registration, notice, safety–and fees.

San Bernardino's mountains, to the east of Los Angeles, are such a locale. There the San Bernardino County Development Code provides that: "A short-term private home rental, within the Mountain Region, shall be allowed, provided that a Special Use Permit is first obtained and all of the standards and conditions contained in this Chapter are fulfilled." The San Bernardino Code further specifies that a short term rental is 30 days or less, that fire and safety standards must be met, that the number of occupants cannot exceed available "raised sleeping beds" (furniture on which to sleep, elevated at least two feet above the floor) and that sufficient parking must be available at each house. In addition, owners of contiguous properties must be notified.[40]

The 5-page San Bernardino Special Permit application requires payment of a $671 fee (renewal is biennial) and includes a "Uniform Transient Occupancy Tax" form, to be filed directly with the County Tax Collector.[41]

In Fort Meyers Beach, the rules are a bit less generous to landlords. Owners are permitted to rent out their residential properties, but only once in any calendar month, and for not less than one week at a time.[42]

In sunny Gilbert, Arizona the policies are stricter still. There, big-time profits have led homeowners to open their residences to winter-weary Northerners. The city has no intention of seeing established neighborhoods overrun with short-term out of towners. The Gilbert Code prohibits any leases of less than 30 days, period. Violators are charged $255 for the first offense with more costly disincentives thereafter. Some Gilbert homeowners associations have gone further, requiring minimum stays of 90 days or more. [43]

And in Ashland, Oregon, an R-1 zoning designation means that the owner cannot legally offer any short term rental whatsoever, with or without Airbnb—there is no process for registering and no standards or fees that will enable compliance.[44]

The response to regulation varies around the country. There appears to be little patience for a recent legislative solution in Austin, Texas. There, the city is more interested in safety and tax revenues than preserving affordable housing. The Lone Star State mecca for leading-edge music and laid-back lifestyles ("Keep Austin Weird" is a local bumper sticker and tee-shirt theme) is home to a number of heavily attended festivals during the year. Many residents have built a healthy income by offering up their properties—on a temporary basis or as year-round vacation rentals. Operating through Airbnb, HomeAway.com, VRBO.com and others, owners have been skirting safety requirements and ignoring lodging taxes (recall that Texas has no state income tax).

In August 2012, the Austin City Council determined that the situation required action. It voted overwhelmingly to pass Ordinance No. 20130926-144, which imposed new requirements on Short Term Rentals (STR's). The definition of "STR" was expanded to virtually anyone in city limits who made accommodations available for less than 30 days at a time, if they charged $2 or more per day. The number of "secondary" STR's—those where the rented property was not the owner's principal residence—was limited to no more than 3% of each census tract in the City. STR operators were required obtain licenses, be inspected, obtain at least $500,000 in liability insurance and file reports of lodging activities. Finally, made STR income became taxable under "Hotel Occupancy Tax" and other laws—resulting in a 7% hotel impost to Austin, an additional special 2% Austin assessment, plus a 6% Texas state sales tax. Application fees were set at $235, with a further $241 charge to cover the municipality's cost of notifying all neighbors within 100 feet of the short-term rental property. Penalties for non-compliance could reach $2,000 per night.[45]

According to press accounts, the new rules were met with non-compliance and anger. Although they went into effect in October 2012—shortly before the Austin City Limits music festival and the City's first ever Formula 1 race (preparations for that event were evident to IMLA

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2012 Annual Conference attendees in Austin) only four landlords had fully registered as the ACL began. The City estimated that over 1,000 had not.[46]

The City Council has recently softened one of the most objectionable portions of the short-term tax package—it reduced the charge for notifying neighbors to $50, resulting in a $285 annual license application cost. [47]

But the bigger disagreement continues. In a convergence reminiscent of the legalized marijuana movement, conservatives and liberals have joined to decry the intrusion of government into Austin's way of life. Further massaging of the city's hotel occupancy tax ordinance will be needed, it seems.

More Work to be Done: As with the ride sharing wars, enforcement of short-term lodging rules is a challenge. It is difficult to catch scofflaws in the act, expensive to deploy already-busy code enforcement officers, and time-consuming to litigate when Airbnb and its free-market disciples take to the courts. The impact of Airbnb and its web-lodging relatives on municipal governments is certain to increase—whether they bolster local economies or undermine safety and tax laws and threaten long-term housing. Despite their broader spectrum of litigants and potential constitutional implications, the short-term lodging wars do share one significant characteristic with the battle over ride sharing. Both involve leading edge (for the moment) technologies, which are embraced by the younger cohort in our society and worldwide--with older converts joining every day. Airbnb and HomeAway are not going to disappear anytime soon, any more than are Uber or Lyft. The challenge for local lawmakers is to fashion rules that allow the benefits of entrepreneurship and new technology, while comporting with Constitutional parameters, protecting the public and meeting fiscal responsibilities. Municipal decision makers—and IMLA members as their counselors—need to devise effective and responsible regulations that protect the best parts of the status quo but allow innovation to take root and flourish.

Notes

1. The TNC uprising continues to undermine traditional taxis. A recent New York Times article describes the precipitous decline in the value of taxi medallions across the US. Medallions, which are often a bigger investment than a home mortgage, have dropped 20 percent or more in the past 2 years in New York (to an average of $872,000), Boston and Chicago. Philadelphia recently scrapped a new medallion auction altogether. N.Y. Times, Friday November 27, 2014, page a-1.
2. Homeaway's 10Q dated November 5, 2014 indicates that, for the 9 months ended September 30, 2014, roughly $290 million of the company's $350 million in revenues came from listings. http://files.shareholder.com/downloads/ABEA-6A2WZS/3667792059x0xS1193125-14-398235/1366684/filing.pdf
3. http://www.nbcnewyork.com/news/local/Airbnb-NYC/-Data-Battle-227773671.html
4. https://www.airbnb.com/help (see "getting paid").
5. "An Airbnb Rival Challenges San Francisco's Airbnb Law," Businessweek, Nov. 3, 2014. http://www.businessweek.com/articles/2014-11-03/san-francisco-faces-a-lawsuit-over-its-airbnb-law
6. *Id.*
7. http://rochester.twcnews.com/content/lifestyles/780202/hotel-industry-weighs-impact-of-airbnb/
8. http://betabeat.com/2014/04/schneiderman-smacks-airbnb-at-crains-breakfast/#ixzz3JLYf25bn
9. http://www.hanyc.org
10. http://therealdeal.com/blog/2013/08/19/hotels-seek-to-file-class-action-lawsuit-against-airbnb
11. http://mashable.com/2014/06/10/new-york-airbnb-lawsuit/
12. http://therealdeal.com/blog/2013/10/01/nolita-landlord-pays-thousands-to-boot-airbnb-buff/
13. http://therealdeal.com/blog/2014/10/03/airbnb-has-a-new-adversary-related/
14. http://nypost.com/2014/04/14/hookers-using-airbnb-to-use-apartments-for-sex-sessions/
15. Laws of New York, Chapter 225 (emphasis added) http://www.nyc.gov/ html/dob/downloads/pdf/NYS_chapter_225.pdf
16. *See* New York State Assembly Memorandum in Support of Legislation (S. 6873-B, 233rd Leg. (N.Y. 2010 (Sponsor's Memo) Bill No. A10008).
17. http://time.com/3260313/airbnb-sued-by-group-of-users-in-new-york-city-for-breach-of-privacy/
18. http://www.ag.ny.gov/press-release/ag-schneiderman-releases-report-documenting-widespread-illegality-across-airbnbs-nyc
19. http://www.ag.ny.gov/pdfs/AIRBNB%20REPORT.pdf
20. http://www.nydailynews.com/new-york/de-blasio-administration-files-lawsuit-apartments-operating-hotels-sites-liairbnb-article-1.1977461
21. Nash v. City of Santa Monica, 37 Cal.3d 97, at 102 (Cal. 1984).
22. Cal. Gov't Code § 7060(a).
23. Cal. Govt Code §7060.2 (d).
24. http://www.sfexaminer.com/sanfrancisco/city-attorney-files-lawsuits-against-landlords-renting-property-as-illegal-hotels/Content?oid=2778976
25. *Id.*
26. *Id.*
27. *Id.*
28. Cal. Govt Code §7060.1-7060.1(c).
29. Ordinance No. 54-14, S.F. Admin. Code. § 37.9A(e)(3)(E).
30. http://www.sfaa.org/pdf/levin-complaint-july-2014.pdf
31. Daniel Levin et al. v. City and County of San Francisco, no. 3:14 cv 03352 (Oct. 22, 2014).
32. *Id.*
33. *Id.*
34. http://www.sfexaminer.com/sanfrancisco/city-attorney-to-appeal-federal-judges-ruling-against-tenant-relocation-law/Content?oid=2909951
35. *Id.*
36. *see generally* S.F., Cal., Admin. Code §§ 37.2(r)(5), 37.3(a), and 37.9.
37. https://sfgov.legistar.com/View.ashx?M=F&ID=3292337&GUID=67C37394-6A63-49DC-A886-675E294384C1
38. Businessweek, *supra*, footnote 5.
39. Airbnb claims that 87% of its San Francisco rentals are primary residences. The San Francisco Chronicle disputes that number, finding that 30% of Airbnb landlords in the city are offering two or more locations. Carolyn Said, "Window Into Airbnb's Hidden Impact on S.F.," S.F. Chronicle http://www.sfchronicle.com/business/item/airbnb-san-francisco-30110.php
40. http://cms.sbcounty.gov/Portals/5/CodeEnforcement/Short%20Term%20Rental%20ORD%2084. 28%202014.pdf
41. *Id.*

Airbnb *Cont'd from page 32*

42. Fort Meyers Beach Development Code Ch. 34 sec. 622k. http://www.fortmyersbeachfl.gov/DocumentCenter/Home/View/320
43. http://www.azcentral.com/community/gilbert/articles/2010/05/14/20100514gilbert-vacation-homes-0515.html
44. http://www.kdrv.com/short-term-rentals-against-city-code/
45. http://austintexas.gov/str
46. http://www.statesman.com/news/news/local/as-austin-short-term-rental-rules-take-effect-hund/nSZbj
47. http://austintexas.gov/sites/default/files/files/Code_Compliance/STRs/S ML

Day in the Life *Cont'd from page 20*

the mayor's office, and even a state senator. Because of the community's demands for immediate action, several governmental entities felt compelled to join an already complicated situation.

On Sept. 5, the final show cause hearing for the tenant's eviction was held. The tenant failed to appear at the hearing, the order was issued, and the King County Sheriff posted notice the following day. Over the next week, I visited the home with officers and the home owner, verified that the tenants had not yet vacated, and developed a timeline with the sheriff's detective assigned to execute the eviction. Additionally, I was the point person to keep the increasing number of governmental agencies up to date on our progress and plans.

As eviction day grew closer it became evident that simply kicking the tenants out would not solve all the problems. Their mess still had to be cleaned up and it was clear that the tenants weren't going to do it. One of our office's land use attorneys, Tamera Van Ness, pushed DPD to issue a citation and expedite the abatement process. Once the citation was posted, the owner consented to a voluntary abatement. This cleared the City to have the property cleared immediately after the eviction.

In the weeks leading up to the eviction I worked closely with SPD to make sure all the pieces were in place. I maintained contact with the sheriff's office to make sure all parties would be present as required. The owner, with neighborhood cooperation, secured a contractor to board up the doors and windows of the home. The owner and neighborhood volunteers would clear out any "valuables" left behind by the tenant. CPT conferenced with the Conservation Corps to confirm they had the necessary tools, namely a large dumpster, standing by to clear the garbage off the property.

Finally, the day had arrived. On Sept. 18, we all headed out to the property for the 10 a.m. eviction. When we arrived, the Conservation Corps was ready to go with a large dumpster and a back hoe! This was important because as we quickly realized using a hand shovel to clear the garbage would have taken days. All we needed was the sheriff and the owner, who both arrived on schedule. The eviction went smoothly and the tenants left peacefully, despite the media's attempts at encouraging confrontation. Once the tenants had left, the cleanup frenzy began and, by 3:00 p.m., the place was unrecognizable. Almost everything proceeded according to plan. The only issue remaining was a need for a second dumpster that we were told we just couldn't have; that was easily remedied with calls from the North Precinct operations lieutenant and an assistant city attorney doing his best to sound intimidating. Overall, the day went smoothly, and the biggest reward was the neighbors' gratitude that the tenants were gone and the property was clean.

Since the property is still in the process of being listed as a short sale and technically abandoned, I worked with the owner to draft and sign a trespass agreement. That gives SPD authority similar to that in the retail trespass program (http://www.seattle.gov/law/precinct_liaisons/seattletrespass.htm). Between the neighbors' vigilance and SPD's ability to enforce trespassing with the owner's permission, the home should remain secure until it is sold and demolished. ML

Second Look *Cont'd from page 27*

5. Fed. R. Civ. P. 34(b)(2)(E)(i).
6. *Id.*
7. Although the magistrate judge makes light of this fact, the requesting party in *Venture Corp*. waited until shortly before the end of discovery to seek clarification about the produced ESI and documents, and may therefore have improperly sought to extend discovery. *See* 2014 WL 5305575 *2.
8. 2014 WL 5305575 *2.
9. 2014 WL 5305575 *3. ML

Code Enforcement *Cont'd from page 19*

ordinance. One of the orders the city may seek is closure of the building for a period of not less than 30 days. With the possibility of a closure order being put in place where the landlord would potentially lose rental income, we anticipate that landlords will be far more likely to address the problems at their property once they receive a notice from the city. In fact, we have used this tactic with successful results.

One peripheral issue that has arisen with respect to nuisance ordinances of this nature was framed in an e-mail from IMLA Executive Director Chuck Thompson. His note related that the ACLU is challenging these types of ordinances on the basis that they can have a negative impact on victims of crime. An example they cite is a woman who was being evicted from her residence—because the property had been found to violate nuisance ordinances due to her repeated calls to law enforcement about domestic violence against her, taking place in her rental. In essence, her complaining about intolerable (and likely criminal) actions occurring against her in her own apartment caused the property to be classed as a nuisance and taken off the rental rolls.

These are challenging problems. Like many issues in municipal law, there are valid concerns to be considered on both (or many) sides of the argument. I believe that nuisance ordinances can be drafted to accommodate the concerns raised by the ACLU. (I would encourage those of us who use these types of ordinances to send a copy to IMLA, along with any comments on your experience with the provision; as IMLA seeks to work with the ACLU on this issue, I am certain that any additional information would be useful).

To sum up, one element of a successful college town – whether home to a major university or a smaller community college—is adequate student housing. When a younger, transient student population lives within established, stable neighborhoods, conflicts are sure to arise. I am confident most of these issues can be resolved via some of the ideas I have referenced above, including carefully crafted housing ordinances. ML

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Cases *Cont'd from page 29*

connection between the facts found and the choice made,' that the Agency's `decision was based on a consideration of the relevant factors,' and that the Agency has made no `clear error of judgment.'" (*citation omitted*).

Finally, when interpreting an ambiguous statutory provision involving Indian affairs, "the governing canon of construction requires that statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Cal. Valley Miwok Tribe v. United States,* 515 F.3d 1262 (D.C. Cir. 2008).

Under these principles, the Secretary's interpretation prevailed. "[T]he Court finds that the term "recognized" does not unambiguously refer to recognition as of 1934, but rather is an ambiguous statutory term. Moreover, given the above discussion and Justice Breyer's concurrence in *Carcieri,* this Court finds the Secretary's interpretation of the term "recognized" to be reasonable and defers to it."

Confederated Tribes of the Grand Ronde Community of Oregon v. Jewell, No. 13-849 (BJR) (D. D.C. Dec. 12, 2014). ML

Inside Canada *Cont'd from page 22*

***Oil v. Trees Update on Burnaby BC: Burnaby (City) v. Trans Mountain Pipeline* ULC, 2014 BCSC 1820**

Toronto to Uber–"Get Out of Town!"

Municipalities throughout Canada are taking a stand against Uber. Uber, the start-up based out of San Francisco, has created a mobile application that allows anyone with a smartphone to hail a taxi or a limousine at the press of a button. Uber users can chose to order privately operated cabs (called UberX), regular licensed cabs (UberTaxi) or fancy limos with licensed drivers (UberBlack). The app uses GPS technology to match available drivers and a passenger based on their locations, calculates the estimated fare ahead of time and transfers the money electronically, so no physical cash is exchanged. Uber uses surge pricing, where prices go up in bad weather or on holidays. Uber makes money by taking 20% of every fare, and by charging a $1 "safe ride fee" on every trip. Everything else is governed by the market.

This app has managed to insert itself into taxi marketplaces around the world, angering cab companies, drivers and city hall regulators on every continent. Municipalities throughout Canada have taken measures to keep Uber out. Calgary, Alberta banned Uber after providing the results of a study conducted on Uber drivers and their unsafe driving conditions to council in August. Vancouver, British Columbia is in the midst of its own six-month Uber study, and has temporarily banned the service until the study is complete. Mississauga, Ontario also deemed UberX service to be against its regulations this summer and vowed to fight it under bylaws. Ottawa, Ontario was ready to attack as soon as Uber started its operations in the city, in one weekend two Uber drivers were fined $650 each.

The City of Toronto has gained tremendous media attention, after filing an injunction to stop all local operations of Uber last week. Beginning in August 2012, five months after Uber launched its initial UberBlack app, the City of Toronto charged the company with operating an unlicensed limousine business. Uber then launched UberTaxi. The City of Toronto once against charged Uber in December 2012 with operating an unlicensed taxi business. These charges, totalling 36 alleged offences in all, have been slowly making their way through the courts. On December 3, 2014 Uber and City of Toronto prosecutors met in court to set a trial date.

The City of Toronto is now seeking a court injunction against all Uber operations after Uber introduced another app, UberX, which recruits non-licensed taxi drivers in unmarked cars to pick up users and take them to their ultimate destination for a fee. The City argues that Uber has been operating illegally in Toronto since it arrived in 2012.

The city has two major issues with the service: that it is not properly licensed to operate as a taxi or limousine brokerage and that it is also using unlicensed and unregulated drivers that may pose a risk to the public's "health and safety." A taxi brokerage, which costs $300 per year, acts as a

middleman between passengers and drivers. The City is arguing that by definition, Uber's taxi and also its limousine service works as a brokerage "without the lawful authority to do so." The city's court application states "it is abundantly clear from Uber's operations that it is not engaged in or facilitating carpooling. It brokers vehicle transportation for compensation only."

Uber has maintained it exists as a technology provider and is not directed by taxi licensing standards. It does not own one car, nor does it have the middleman infrastructure of dispatchers and staff relaying phoned-in taxi orders.

Under Toronto's licensing rules, an individual who would like to become a licensed taxi driver would go to City Hall, pay a fee ($634 in Toronto), undergo a police check, prove his or her work status and take a 17-day training course. A vehicle is also required. This necessitates obtaining the new Toronto Taxicab Licence, which costs $4,742 and requires that the owner do most of the driving. What is the wait time to get the new Licence? Long--there are 1,095 individuals currently on the waiting list. This approach has created a system where there is a limited number of licensed cabs and an unlimited number of licensed cab drivers.

Perhaps the argument by Uber proponents is that the new company is not the problem, but is merely introducing a breakthrough technology and changing transportation paradymes, whether cities like it or not.

At this point it remains unclear whether ongoing legal challenges against Uber will be successful. The City of Toronto's legal bid for a quick shut-down of Uber faces a frustrating six-month delay. After filing the injunction and asking for an 'expedient' treatment the City has learned that the case will not be heard until May 19, 2015. ML

Amicus Corner *Cont'd from page 23*

was needed. This proposed rule is in direct contradiction to current EEOC guidance and Title VII cases admonishing employers to *avoid* discussions about religion.

As noted in the Tenth Circuit decision, individuals wear head coverings for a number of reasons, some religious and some cultural, and Title VII does not require accommodations for a cultural practice. Additionally, other practices that may or may not be religious in nature further illustrate the difficulties that the EEOC's position would create for employers. Many male religious believers must maintain facial hair either continuously or at certain times of the year. Under the EEOC's proposed rule, a government employer with a reasonable policy prohibiting facial hair might (or might not, depending on the post hoc judgment of a judge or jury) have to ask every beard-wearing applicant about his religious beliefs during the interview, and it might have to ask any non-compliant employee about those views before disciplining him for failing to conform.

IMLA will be writing an amicus brief (or joining as an amicus) in *EEOC v. Abercrombie*. Respondent's brief is currently due by January 21, 2015.

City of Los Angeles v. Patel–Supreme Court Merits Stage–Fourth Amendment / Facial Challenge to Municipal Hotel Records Ordinance

This case raises the question of whether a municipality can require hotel and motel operators to provide guest records to police without a warrant.

Facts: Los Angeles Municipal Code § 41.49 requires hotel and motel operators to keep specific information about their guests like their name, address, room number, and information about their vehicle parked at the hotel. Section 41.49 also states that hotel guest records "shall be made available to any officer of the Los Angeles Police Department for inspection." In a facial challenge to the ordinance, motel operators objected to § 41.49 authorizing warrantless inspection of guest records.

Issues: (1) Whether facial challenges to ordinances and statutes are permitted under the Fourth Amendment; and (2) whether a hotel has an expectation of privacy under the Fourth Amendment in a hotel guest registry where the guest-supplied information is mandated by law and an ordinance authorizes the police to inspect the registry, and if so, whether the ordinance is facially unconstitutional under the Fourth Amendment unless it expressly provides for pre-compliance judicial review before the police can inspect the registry.

Lower court ruling: In *Patel v. City of Los Angeles*, no. 2:05-cv-01571 (9th Cir. Dec. 24, 2013), the Ninth Circuit ruled in favor of the motel operators. In an en banc opinion reversing the Central District of California decision, the majority concluded that § 41.49 is facially unconstitutional because it fails to expressly provide for pre-compliance judicial review before the police can inspect the registry. The Ninth Circuit noted that the "procedural deficiency" with the ordinance affected all searches authorized by that ordinance and therefore there are "no circumstances in which the record-inspection provision may be constitutionally applied." Both dissenting opinions agree that the ordinance in this case isn't facially invalid because the standard for facial invalidity is so high and the motel operators failed to meet it. The challenger must establish that the ordinance wouldn't be valid under any set of facts. The Tallman dissent points out, for example, that police officer may routinely seek warrants before searching hotel guest registries regardless of the fact they are not required under the ordinance and that warrantless searches would be valid in some circumstances under the exigent circumstances or community care exception, (for example if someone in a hotel room is suicidal).

Significance to local government: This case involves at least two issues relevant to local governments. First, a number of municipalities have ordinances like the one adopted by Los Angeles and if the Ninth Circuit is correct all of these ordinances are invalid. The second and broader issue is whether someone can make a facial challenge to an ordinance based on the Fourth Amendment at all. The cornerstone of the Fourth Amendment is reasonableness, and reasonableness requires a factual analysis. Thus, it is difficult to understand how a facial challenge could be met under the Fourth Amendment.

IMLA joined the State and Local Legal Center's brief; the case will be argued March 3, 2015. ML

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