

Ethics
Waiver of Privilege

This case arose out of a class action challenging the strip-search practices at the Erie County jail and asserting that the written policy of the County Sheriff's Office (requiring an invasive strip search of all detainees) was violative of the Fourth Amendment. During discovery, a magistrate ordered the County to produce ten e-mail communications between the offices of the Erie County Attorney and the County Sheriff, all of which addressed the law concerning strip-searches of detainees, assessed the County's current search policy, recommended alternative policies, and monitored the implementation of these policy changes. The County alleged these were protected by attorney-client privilege. The magistrate held that communications passing between a government attorney without policy-making authority and a public official did not involve legal advice or analysis, but only administration and policy; thus, they were producible. On appeal, the Second Circuit disagreed, finding that the disputed e-mails were "sent for the predominant purpose of soliciting or rendering legal advice....This advice—particularly when viewed in the context in which it was solicited and rendered—does not constitute general policy or political advice unprotected by the privilege." On remand, the district court determined that the defendants had impliedly waived the privilege by "placing the information in those communications at issue in the litigation." In reaching this conclusion, the court referred to the testimony of a jail employee who testified at his deposition that the County Attorney's Office was involved in rewriting the strip-search policy, and cited *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. 24 Wash. 1975) (privilege may implicitly be waived when defendant asserts a claim that in fairness requires examination of protected communications).

On further appeal, the U.S. Court of Appeals for the Second Circuit vacated the district court's order requiring production, finding the *Hearn* test cut "too broadly" and, therefore, the district court erred in applying it in this case. "[I]t seems to us that there is a need for clarification of the scope of the at-issue waiver and the circumstances under which it should be applied." Privileged information could, in some sense, be relevant in any lawsuit, and a "mere indication" of a claim or defense certainly was "insufficient to place legal advice at issue." Citing to an assertion of an "advice-of-counsel" defense as a "quintessential example," the court noted that the key to a finding of implied waiver in the third instance was "some showing by the party arguing for a waiver that the opposing party relies on the privileged communication as a claim or defense or as an element of a claim or defense." Accordingly, the waiver required a showing that a party *actually* relied on privileged advice from his counsel to make his claim or defense. Here, the fact that the individual defendants raised a defense of qualified immunity was insufficient to place the disputed communications in issue, as entitlement to qualified immunity involved an objective, not a subjective, test. Thus, reliance upon the advice of counsel could not be used to support the defense; in fact, in the circumstances, any legal advice rendered by the County Attorney's Office was "irrelevant" to any defense. The district court was directed to enter an order protecting the confidentiality of the privileged communications. *In re the County of Erie*, No. 075702, 2008 WL 4554920 (2d Cir. Oct. 14, 2008).

First Amendment
Denominational Prayers

Both the Cobb County Commission and the Cobb County Planning Commission had a long tradition of opening their meetings with a prayer. The prayers were made by volunteer clergy or others in the community who were invited, on a rotating basis, to offer the prayers, and represented a variety of faiths (e.g., Christianity, Islam, Unitarian Universalism, and Judaism). Oftentimes, the prayers included brief expressions of the specific religious faith and references to "Jesus," "Allah," or "God of Abraham, Isaac, and Jacob." Each commission used a different method to compile a list of those to ask. The County Commission had a staffer who compiled a list of religious organizations in the County using several sources (phone book, the Internet, and business cards). The list was organized by denomination or faith, then by individual congregations. The staff person randomly selected the speaker, but avoided having speakers from the same religious group at consecutive meetings. A majority of the congregations on the list were Christian. The Planning Commission staff person relied mainly on the phone book listings, as well as the list of clergy who volunteered for the police and fire department chaplain program. The evidence suggested that this staff person eliminated Jehovah's Witness, Jewish, and Mormon clergy out of hand. Apart from the invitations, neither commission had any input on the content of the prayers. The County expended some municipal funds, in the form of materials and personnel time, to select, invite, and thank the speakers. Seven county taxpayers filed suit, seeking to enjoin the prayers on the basis that the sectarian references violated the Establishment Clause of the First Amendment. They argued that only nonsectarian prayers were constitutional, alleging that between 1998 and 2005, 96.6 percent of the clergy invited (to the extent their faith was discernable) were Christian. (During the same period, Jewish, Unitarian Universalist, Muslim, and Baha'i faiths were also represented.) The commissions, for their part, asserted that this

reflected the composition of the religious institutions in the County. The district court denied the taxpayers' request for an injunction. It upheld the invocation practices of the County Commission, but ruled that the Planning Commission violated the Establishment Clause because of its selection procedure. Lastly, the court held that the taxpayers had standing to challenge the selection procedures used by the Planning Commission in 2003/2004 and awarded them nominal damages ($1 each to the seven plaintiffs). Both parties appealed.

In a 2-1 decision, the U.S. Court of Appeals for the Eleventh Circuit affirmed, declining "to embark on a sensitive evaluation or to parse the content of a particular prayer." The decision in *Marsh v. Chambers*, 463 U.S. 783 (1983) made it clear that "[t]he content of the prayer is not of concern to judges where...there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." The district court had correctly applied this standard in finding that the County Commission's prayer selection process had not been exploitive, and that the practice of the Planning Commission had been exploitive and unconstitutional during 2003-2004. In the absence of a clear error in either finding by the district court, the appellate court determined that the issue of whether invocations of "Lord of Lords" or "the God of Abraham, Issac, and Mohammed" were sectarian was something "best left to theologians, not courts of law." *Pelphrey v. Cobb County*, No. 0713611, 2008 WL 4710693 (11th Cir. Oct. 28, 2008).

Land Use

Takings

The plaintiffs sought to develop a parcel of land they owned in the City of Sumner. When applying for the proper development permits, they learned that an underground storm drain pipe did not meet an ordinance that required new developments to include pipes of a minimum diameter of 12 inches. (The reason for the ordinance was "considerable flooding" in the City previously.) The City Engineer, in order to help offset the costly improvement, offered to waive certain development fees if the plaintiffs agreed to install a 24-inch, instead of a 12-inch, pipe as a condition of development. The plaintiffs agreed and made the change without objection, but later filed suit against the City, claiming the pipe-size requirement was a taking in violation of the Fifth Amendment.

The issue, one of first impression in the U.S. Court of Appeals for the Ninth Circuit, was whether a legislative, generally-applicable development condition that did not require the owner to relinquish rights in his real property, as opposed to an adjudicative land-use exaction, should be reviewed pursuant to the ad hoc standards of *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), or the nexus and proportionality standards of *Nollan v. Calif. Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The Ninth Circuit held that the City's requirement was subject to review under the *Penn* analysis. In *Penn*, the City of New York denied, by relying on a local landmarks preservation law, a permit to build an office tower above Grand Central Terminal. In *Nollan* and *Dolan*, the cases dealt with a scenario where the government demanded an easement allowing public access to private property in exchange for the granting of a development permit. Here, the Ninth Circuit determined that the City's ordinance was similar to the ordinance in *Penn*, in that the law did not involve an individual, adjudicative decision, nor did the plaintiffs relinquish any rights in their real property. Although the plaintiffs claimed that the request by the City to install a 24-inch pipe was an individualized request, the court found that this was not a land-use exaction, but rather, a contract that waived certain fees in return for the increased costs of installing a larger pipe than the mandatory minimum. "[W]e conclude that the McClungs voluntarily contracted with the City to install the 24-inch pipe and thus the installation of that pipe was not a 'taking' by the City." The district court's grant of summary judgment in favor of the City was affirmed. IMLA participated in this case as an *amicus*. *McClung v. City of Sumner*, No. 07-35231, 2008 WL 4349848 (9th Cir. Sept. 25, 2008).

Litigation and Liability

City Not Liable for Mayor's Misconduct

Philip Giordano was elected the mayor of the City of Waterbury in 1995. He had previously met Jones, a prostitute and crack addict, who provided him with sexual favors in exchange for money. In 2000, Giordano requested that Jones introduce younger women to him, and she brought him her ten-year-old niece ("Jane Doe, Jr.") and her eight-year-old biological daughter ("Susan Roe, Jr."). From late 2000 until July 2001, Giordano—who was aware of the children's age—solicited sexual acts from Roe and Doe through encounters arranged through Jones, using cell phones paid for and issued by the City. The encounters took place in Giordano's office, his home, and in his City-issued police cruiser. (Ironically, the court in this case noted "Giordano promulgated the City's Sexual Harassment Policy".) In 2001, Giordano was arrested, charged with, and convicted of acting under the color of law to deprive the Roe and Doe of their constitutionally protected right to be free from unwanted sexual abuse under 18 U.S.C. § 242. Both plaintiffs subsequently brought civil actions against Giordano, in both his official and individual capacities, and against the City, seeking damages for violations of 42 U.S.C. § 1983 and state law violations based on the same conduct that resulted in Giordano's convictions. Both plaintiffs moved for summary judgment, arguing, among other things, that no genuine issues of material fact existed as to whether Giordano violated their rights, and that there was no genuine issue as to whether the City "was the moving force behind the violations" because Giordano acted as "the City's authorized final policymaker." The City filed a motion seeking summary judgment on the basis that Giordano's actions did not represent any official policy of the City; therefore, as a matter of law, there was no basis for holding the City liable under Section 1983 for

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