IMLA
THE MUNICIPAL LAWYER MAGAZINE

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Rising From Ferguson: Body Cams To The Rescue?

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EMPLOYMENT LAW BOOT CAMP (PART 1): WHEN THE EEOC COMES KNOCKING

By: Lawrence Lee and Daniel C. Perkins

The City Attorney successfully procures a Waiver and Release from a disgruntled municipal employee–in exchange for a generous severance package. Days later, the EEOC's Notice of Charge of Discrimination arrives. How is this possible, and more importantly, what to do?

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RISING FROM FERGUSON: BODY CAMS TO THE RESCUE?

By: Nathan LaCoursiere and Terri Lehr

In theory, body cameras induce better behavior by police and the public, while producing an irrefutable record. But they raise issues large and small, from evidentiary privilege to battery life. Duluth, Minnesota--an early adopter--reports from the front lines.

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EDITOR'S NOTE:

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Dear Reader:

Following a belligerent winter, *Municipal Lawyer* returns, bearing two feature articles intended to provide IMLA members with practical, to-the-point insights.

The first of these, by returning writers Lawrence Lee and Dan Perkins of Fisher and Phillips, is our 2015 *Employment Law Bootcamp (part 1)*, a journey along the unwelcome but altogether plausible path presented when the EEOC files a Charge of Discrimination—even after your departing employee has signed a waiver and release. Offered in simple terms are strategies and tactics to get you through this inhospitable terrain.

Our cover feature hails from Duluth, Minnesota, where the Police Department has already put more than 100 body cams into operation, making it one of the nation's earliest users of the technology. In *Rising From Ferguson*, Nathan LaCoursiere and Teri Lehr of the Duluth City Attorney's office report on the merits--and sometimes unanticipated burdens--of the bodycam initiative.

Moving north from Duluth, we include three items of Canadian origin. Mary Ellen Bench describes her enviable work-life balance as an accomplished City Solicitor (and commodore) in Mississauga, Ontario; Monica Ciriello summarizes recent Canadian cases of interest and Christina Reed of Vancouver's Young, Anderson provides an update on Canada's copyright law.

In *Practice Tips*, Carmel, Indiana's Doug Haney translates *Town of Greece* into common sense policy.

Other articles cover the ongoing fracking wars, the unusual request by Colorado's neighbors to stem marijuana traffic, and IMLA's vigorous advocacy efforts.

Finally, we offer a fond farewell from our favorite *Listserv* contributor, Kelly Addy, as he leaves the Billings, Montana City Attorney's office to become a minister on the edge of Glacier National Park.

Kelly's departure from our fold opens additional opportunities for IMLA'ers to write. We are a membership publication, and much of our best work comes from you.

Best regards–
Erich Eiselt

DO YOU HAVE AN ARTICLE FOR THE MUNICIPAL LAWYER?



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.

EXECUTIVE DIRECTOR'S LETTER

Vernal Equinox, Finally



Charles Thompson, Jr.,
General Counsel Executive Director

This was a harsh winter for many of our IMLA colleagues, particularly in the Northeast. While Bostonians may celebrate their most abundant yearly snowfall since record keeping began (9 feet and counting), most of the rest of us look at depleted stores of road salt, potholes appearing everywhere and school calendars extended well into June. But the calendar tells us that Winter 2014 is over.

And through the subzero temperatures and short, dark days, IMLA was working hard to serve our members. We've pulled together the speakers and programs for our annual Spring Seminar in Washington DC in late April, which promises to be excellent. And we think we've produced a robust collection of superior Distance Learning programs for 2015. Our programs include standbys like land use, personnel, and telecommunications—and newer issues like drones, marijuana and railway transport of oil.

Our Legal Advocacy program has already been in high gear this year. We successfully argued for the New York Court of Appeals (its highest court) to take a case and reverse a lower court decision. In the Supreme Court we've succeeded in obtaining certiorari for three cases this term. And in the cases in which we've participated on the merits as an amicus, we have enjoyed wins in *Alabama Dept. of Revenue v. CSX Transp., Inc.*, *Integrity Staffing Solutions, Inc. v. Busk* and (with an asterisk) *T-Mobile South, LLC v. City of Roswell*. In *T-Mobile*, the court reversed the lower court but substantially agreed with IMLA's arguments that the city's reasons for denying a wireless cell tower did not have to be included in the notice of denial itself, so long as they were available elsewhere.

In January, we implemented a program offering each IMLA member ten free Distance Learning programs as a membership benefit and reduced the cost of our package of distance learning programs from $1999 to $499, making each call's cost about $17. We also implemented our program under a license with AIA to deliver model contract amendments to members who have AIA construction documents. As I write this piece, Steven "Tip" Torres of Panonne, Lopes, Devereaux and West is working with the Construction Contract Drafting Initiative to produce a model design-build agreement that we expect to complete and have available to members at our Annual Conference in Las Vegas.

Later this month, we will be showcasing at our Spring Seminar in Washington DC a draft model employment agreement for city/county attorneys developed by a committee of outstanding IMLA member-lawyers. As most of you know, city managers have used a model agreement for years to help them negotiate their contracts with local governments and obtain great benefits. Our model agreement agreement contemplates a contract between a local government and a full-time attorney and we believe, will help city attorneys in their employment negotiations. I want to thank Marion Radson, long-time, but now retired, City Attorney for Gainesville, Florida for chairing this committee and Tom Carr, City Attorney for Boulder, Colorado, Tom Carpenter, City Attorney for Little Rock, Arkansas and Howard Friedman, Chief of the Contracts & Real Estate Division, New York City, New York who served on the committee. We anticipate releasing the model agreement to members in July.

Our next project will be to draft a model agreement for attorneys in private practice who represent local governments as the city attorney, county attorney, or special district attorney.

This is IMLA's 80th year and we're trying to make it special. We have developed initiatives to recruit and retain more members and to pass along to our current members the benefits of increased membership revenue. To find out how you can benefit by enlisting a new member, contact Jenny or Julie Ruhe at IMLA headquarters. But, whatever we do, we cannot fully succeed without our members and especially those of you who volunteer your time and energies.

I want to thank the IMLA'ers who enlighten all of us by speaking at our programs, writing articles for *Municipal Lawyer* and contributing their talents to producing our amicus briefs. In that regard, we pass along a special note of thanks to Kelly Addy, a longtime contributor of thoughts about our collective mission as municipal lawyers, as he leaves the City Attorney's office in Billings, Montana for a higher calling.

As always, I thank our leadership team and IMLA's Board of Directors. And I particularly want to acknowledge our Regional Vice Presidents and State and Provincial Chairs, whose names appear on the next two pages.

We'll see you in Washington, DC! ML



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Employment Law Boot Camp (Part 1): When The EEOC Comes Knocking

Defending Against Charges of Discrimination and Considerations for the Public Employer To Avoid A Cause Determination.

By Lawrence Lee and Daniel C. Perkins, Fisher & Phillips, LLP, Denver, Colorado



The City of Wonderland, USA is a beautiful city with nice homes, well-kept streets and parks, and a local government that prides itself on keeping its citizens happy. Catrina is the first female Captain of the City's Police Department. She is 45 years old, is a recovering alcoholic, was born in South America and is a U.S. Citizen. Catrina has been employed with the Department for 21 years. Her personnel file is filled with consistently high marks for performance, and her internal personnel record is clean.

Catrina reports to the City's Human Resources Director that a respected City Councilman has been calling her during work hours over the past two months and has made lewd sexual remarks to her in an effort to go out on a date. A subsequent workplace investigation finds that Catrina's report could not be substantiated. Two weeks later, Catrina appears at the office intoxicated, and then shouts "F_ _ k the City! The Mayor and all city leaders must be shot and die!"

Catrina is placed on administrative leave and subsequently provided the opportunity to resign in lieu of termination. As the City Attorney of Wonderland, you convince Catrina and her union attorney to sign a valid Waiver and Release on all claims in exchange for one year of separation pay.

Six weeks later, the male Police Chief walks in your office and provides you with a copy of a Notice of Charge of Discrimination with Catrina named as the Charging Party.

How Can Catrina File A Charge After Settlement with the City?

The EEOC or Commission has taken the position that an employee can file a Charge of Discrimination even if the employee signed a general release of rights. As long as the employee carries a belief that she or he was discriminated against during employment or was wrongfully terminated, then, according to the Commission, no agreement between the City of Wonderland and Catrina can limit her right to testify, assist, or participate in an investigation, hearing, or proceeding conducted by the EEOC under the ADEA, Title VII, the ADA, or the EPA. The EEOC opines that any provision in a waiver attempting to waive the employee's rights is invalid and unenforceable. The Commission further contends that Catrina will not have to return the monetary consideration that was provided to her by the City in exchange for her execution of the waiver and release.

Initial Considerations

As the City of Wonderland's City Attorney defending or overseeing Catrina's Charge of Discrimination, what should be done? First, Counsel for the employer must commit to memory basic terminology before proceeding forward. The Charging Party is the present or former employee that believes a federal civil right or employment law has been violated. The Responding Party is the employer. Once in a while, the EEOC will send an employer a Notice of Discrimination without attaching the formal Charge of Discrimination merely to inform the employer ahead of time that the charging party has provided a letter, or "unperfected charge." Unperfected means that the Charging Party has not yet submitted an EEOC questionnaire at the "intake" stage and signed the Charge of Discrimination form containing the claims and allegations. An employer does not have an obligation to respond to the EEOC until it receives a "perfected" Notice and Charge of Discrimination.

Except for a discrimination claim brought under the Equal Pay Act or under Section 1981 or 1983, federal employment laws require the employee to file a Charge with the EEOC prior

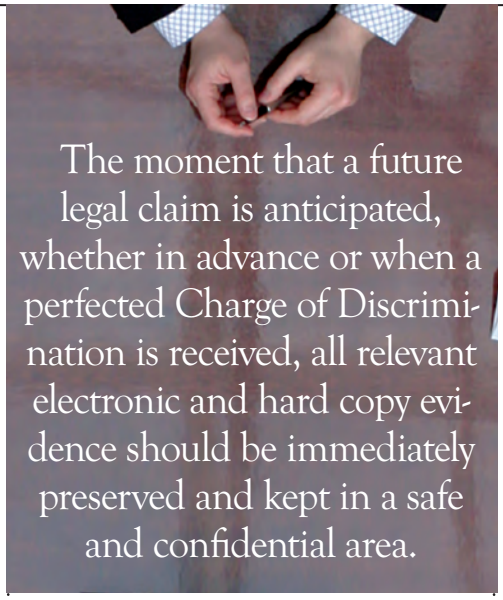
to filing a lawsuit in court. The Charge must be filed with the EEOC within 180 days from the date of the alleged discriminatory violation. The 180 day deadline is extended to 300 days if the charge is covered by a state or local anti-discrimination law. For Charges under the ADEA, only state laws are allowed to extend the filing limit to 300 days.

When a past or present employee files a Charge of Discrimination, it is usually not a surprise. The moment that a future legal claim is anticipated, whether in advance or when a perfected Charge of Discrimination is received, all relevant electronic and hard copy evidence should be immediately preserved and kept in a safe and confidential area. This includes all emails, performance documents, voice mails, personnel files, calendar appointments, and any other records that may conceivably be relevant. Best practices also dictate that initial witness interviews should immediately be conducted by employment counsel to later assess the strengths and weaknesses of the prospective testimonial evidence. During this Q and A of relevant individuals, witnesses should be made to feel free that they can answer all questions candidly without feeling that divulging the truth will result in retaliation or adverse consequences. Finally, the City's risk manager or employment carrier should be notified sooner rather than later so that there is no issue of untimely notice.

Significant consideration should be given to the fact that the EEOC has its own set of in-house litigation counsel in every state and in its Washington D.C. headquarters. This means that the EEOC from the intake stage to the final part of the process is considering whether to issue a reasonable cause determination for future conciliation or to file a future lawsuit on behalf of or in conjunction with future plaintiffs. A determination of reasonable cause is the Commission's belief that discrimination has occurred based on evidence obtained in investigation.

Reviewing Catrina's Notice and Perfected Charge

Catrina's Notice of Charge of Discrimination has the following claims: Title VII (based on sex/gender and national origin), the ADA and the ADEA. Boxes 3 and 4 of the Notice are checked off, demonstrating when the employer's position statement and the responses to the Request for Information or RFI are due. Box 5, invitation for participation in the EEOC's no-cost early mediation program, for purposes of these facts, is not checked off. This means that either Catrina is upset enough not to participate in a free mediation with an EEOC mediator, or the Commission may believe that Catrina's rights were violated and has encouraged her not to settle early.



If the deadlines to file a position statement and respond to the RFI are imminent, then the City Attorney should immediately contact the intake supervisor listed in the Notice, make an appearance on behalf of the Responding Party and request an extension of time to respond at a future date.

Position Statement

The City Attorney will want to prepare a well-drafted position statement with evidence, documentation and witness statements that will help accelerate the investigation and could limit requests for additional information or witness interviews conducted by the EEOC investigator. Clear, concise and complete statements and responses should be provided to the EEOC, while bearing in mind that the employer's response will likely be shared with others, including the Charging Party and other employees in the Commission. If the EEOC's investigation leads to litigation, the Responding Party's position statement could be used as evidence.

Counsel should start strong with an introductory paragraph that provides a brief summary of the City's position. For example, here is suggested language: "This letter responds to the charge of discrimination filed on March 23, 2015 by Catrina, in which the charging party alleges she was discharged because of sex, national origin, age, and disability. The City of Wonderland strongly denies the charge and maintains that there is no evidence to support Catrina's allegations. As explained with the facts and evidence below, the charging party was terminated based solely on her inappropriate and threatening behavior while at work and in violation of the City's Employee Handbook."

The next section should introduce background to set the stage for the specific reasons for the employment action that was taken. It is a given to spell out statements of the City's EEO policies and procedures at this juncture. This demonstrates the City's commitment to a workplace free of discrimination, retaliation and harassment. Further statements about how the City stresses the importance of following the law and policies and how the information is distributed to employees are just as important. The first reference to an exhibit should include the relevant

Continued on page 10





Larry Lee is a partner in Fisher & Phillips' Denver office, focusing on employment litigation, counseling, and defending employers against claims of discrimination, retaliation, wrongful termination and breach of contract. Before entering private practice he was a senior employment attorney the Colorado Attorney General's Office. He is a graduate of the University of Denver Law School.

Dan Perkins litigates a wide range of employment law issues for Fisher & Phillips' Denver office. He has tried to verdict more than 25 jury trials in a wide array of state and federal venues, including the Fifth Circuit. He was previously a senior attorney in the Texas Attorney General's Office, specializing in employment litigation matters at the trial and appellate level.

employment policy as well as a copy of the acknowledgment form signed by Catrina, assuming a copy exists. Describing the sections of the relevant employment policies clearly and concisely is an important precept so that the EEOC investigator does not have to spend time poring over the multiple exhibits that will be provided.

The City Attorney should be confident to address any "bad facts" with the best explanation that can be given without exaggerating or stretching the truth. Under these facts, Counsel must show credibility by acknowledging the truth about Catrina's somewhat clean performance in the past while highlighting her violation of employment policy. It is also wise to include all facts that are relevant to the City's defense of the Charge. This could include other performance issues that were never documented and the potential evidence that may show other City leaders' or employees' concern for safety based on Catrina's threatening statement. Further investigation should be conducted to rule in or out other examples of bad behavior by Catrina.

Similar to a trial attorney providing a story of the facts in an Opening Statement, presenting the written facts chronologically is the best approach in a position statement. Inclusion of Catrina's job description and responsibilities, and translation of the importance of Catrina's duty to the public, may be included in the position statement so that the EEOC investigator understands why Catrina was asked to resign in lieu of termination. Counsel for any employer that is preparing a position statement should address each and every allegation while leaving no unanswered questions. Inclusion of Catrina's spotty attendance records and inappropriate or unprofessional e-mails, if any, may operate as part of the City's factual defenses.

The responsible City Attorney should provide evidence of similar decisions made in the past by the decision-maker to demonstrate that Catrina was treated in a fair and consistent manner. One way to disprove a charge of discrimination, assuming such facts exist, is to explain why similarly situated employees in the past were or were not treated the same way as the Charging Party. If another female officer, like Catrina, that was higher in the chain of command was disciplined similarly for similar conduct, such a reference should be included in the position statement.

[T]he City Attorney should bear in mind that EEOC investigators are not attorneys. While most of them will pay some attention to legal citations that are included in the position statement, it is likely that an EEOC investigator will be more receptive to references to the EEOC *Compliance Manual* as additional guidance.

On the one hand, the City Attorney should bear in mind that EEOC investigators are not attorneys. While most of them will pay some attention to legal citations that are included in the position statement, it is likely that an EEOC investigator will be more receptive to references to the *EEOC Compliance Manual* as additional guidance. On the other hand, a concise and well-thought out legal analysis, if not overdone, is a good practice, especially if the position statement is likely to be provided to the EEOC's in-house or litigation attorneys.

Finally, the City Attorney should end his or her position statement with a firmly stated conclusion that the Charging Party's (Catrina's) claim is not valid and that the City acted fairly, consistently with its policy and practice, and in a nondiscriminatory manner, assuming that all of this can be demonstrated. If the City Attorney does not believe that the law was violated, then he or she should request that the charge be dismissed in plain and respectful language. The written position statement should then be reviewed and cleared for approval with the appropriate client representative. This person may be higher-ranking official, like a City Manager or the Director of Human Resources, or a colleague in the City Attorney's office.

Responding to the RFI

The City Attorney would be wise to tackle the requests for information early with the help of human resources and/or the decision-maker. In its RFI the EEOC usually seeks copies of personnel policies, personnel files, similarly-situated employees, and contact information of every city employee or official that may be involved. If the RFI is too broad, the handling City Attorney should pick up the phone and talk to the EEOC intake person or investigator about narrowing the scope of the request. This conversation should always be cordial, with counsel, with remaining firm on important points. Amicable and respectful relationships with EEOC investigators and agency personnel are just as important as the work product that is provided to the Commission and both can be critical to the final determination or outcome.

If the City Attorney fails to provide information that has been requested by the EEOC, however, then the Commission will likely subpoena the data. City Attorney can challenge the scope of a subpoena, but the EEOC will likely prevail if the information that it seeks is relevant to the investigation. Again, a reasonable investigator will usually be willing to narrow the scope of an information request if contacted in a cordial and timely manner by counsel with a reasonable explanation of the City's position. The best practice is simply to include the requested information in the position statement, if it exists.

Relevant Statistical Trends of the EEOC

Earlier this year, the EEOC released its enforcement statistics for year 2014. The number of Claimants that filed charges all over the U.S. – both in the private and public sectors – totaled 88,778, which was down from 93,727

individuals filing claims with the Commission the year before, a decrease of five percent. In fact, since 2011, when a record 99,947 charges were filed with the EEOC, the number of filings has steadily decreased over the last three years. The decline of filings with the EEOC could be attributed to more settlements taking place prior to charges being filed. The other reason may be due to an increase of charges being filed at the local level, as state anti-discrimination statutes appear to be moving towards stretching out remedies more favorably for employees.

Also noteworthy from the EEOC's statistics is the fact that race remains at 35% of those charges filed, age is at 32% and sex or gender hovers at 29%. Disability claims continue to rise as a percentage since 2008 and last year made up 29% of claims filed with the EEOC. Retaliation is a claim that may be asserted along with a discrimination claim based on one of the above protected classes. Since 2006, Retaliation has steadily increased and was at 43% in 2014, which means charging parties file retaliation claims with the EEOC a little over 4 out of 10 times. Presume that these statistics, at a plus or minus of eight percent, reflect a specific state's demographics for filing. Finally, it is important to note the EEOC, as a named Plaintiff, filed 167 separate civil federal civil rights lawsuits against employers in 2014, which was an increase from 148 in 2013.

Mediation

As noted above, Catrina's Notice did not show that the EEOC's early mediation program was an option because Box No. 5 was left blank. That should not dissuade the City Attorney from calling up the EEOC intake person or investigator and inquiring whether the blank "check" from box no. 5 was inadvertent. This phone call should be made well before the deadline of the position statement and response to the RFI so as to provide the City Attorney plenty of time to prepare for next steps.

Assuming that Catrina is interested in early mediation, then the City Attorney should immediately advise the municipal client decision-maker at the highest level about this option. The early mediation program through the EEOC usually carries no mediation fee, is entirely voluntary, and both the Charging Party and Responding Party must agree to participate in it. Early mediation often provides a faster and cheaper resolution by avoiding a lengthy investigation and possible costly litigation.

The EEOC Mediators usually do not possess law degrees; however, they are neutral third parties and are bound by confidentiality rules. They are not allowed to provide information about mediation discussions to the investigators or the Commission's in-house lawyers. Mediation is an informal resolution process to get the Charge resolved but is not a fact-finding mission. The goal is settlement within a less-than-full day time frame. An advantage of the EEOC's early mediation program is that the City Attorney can retain some control over the outcome, including obtaining a global release of all potential claims against the City. If mediation leads to an agreement, the EEOC will then close the file after monetary consideration is provided to the Charging Party. If the mediation does not lead to an agreement, Catrina's Charge of Discrimination and the file will be sent to the investigator for investigation of the Charge. The City Attorney will not be required to provide a position statement until the mediation process is over.

Of course, a settlement can occur at any time during the investigation. If the parties, and the EEOC, reach a voluntary agreement, the Charge will be dismissed. In general, all employers will want to consider attempting an early settlement if a Charge of Discrimination falls under any of the EEOC's hot-button topics. In 2014, these topics included employment screening based on arrest or conviction records, credit history, or unemployment status, due to the potential disparate impact that these types of screening could have on minority groups. Other enforcement priorities are equal pay; harassment claims; caregiver and pregnancy discrimination; and "systemic bias" cases in which the alleged discrimination has a broad impact on an industry, profession, company or geographic area.

Hurry up and Wait for that Right to Sue Letter

Assuming a Charge has not settled, the investigation may take months if not years before the EEOC makes a determination on the merits of the Charge. If it is determined that the claims and allegations are unfounded, then a Dismissal and Notice of Right to Sue letter is issued to the Charging Party with a copy sent to the Employer. Based on the date of receipt, the Charging Party is entitled to file a lawsuit in federal court within 90 days of receiving the letter. Under the facts in our case, a standard Right to Sue Letter may not be a bad thing from the City of Wonderland's position, especially because it demonstrates the avoidance of a cause determination, which starts the conciliation process and potential litigation.

This prospective part of the EEOC process and other legal issues will be covered in our next article, to be published in the May-June issue of *Municipal Lawyer*, titled: *Employment Law Bootcamp (Part II)*: Handling EEOC Conciliations and Future Litigation, and Considerations Based on Recent Decisions by the Courts. ML



Rising From Ferguson: Body Cams to the Rescue?

By Nathan N. LaCoursiere and Terri Lehr, Assistant City Attorneys, Duluth, Minnesota



Introduction

On December 1, 2014, in the wake of widespread protests and racial unrest following the deaths of Michael Brown in Ferguson, Missouri, Tamir Rice in Cleveland, Ohio, and Eric Garner in Staten Island, New York, President Obama announced a $263 million effort to quiet simmering tensions between law enforcement and communities of color throughout the country.[1] A key component of the plan includes $75 million for the purchase and deployment of 50,000 police body cameras.

The President's announcement signifies that body cameras are here to stay. Well before recent events, several Minnesota police departments were testing and deploying body cameras. Burnsville was the first city to deploy cameras in 2010. Duluth now has 103 patrol officers equipped with mobile video recording devices or "MVRs," making it the single largest user of body cameras in the state. Now Minneapolis – with the largest police force in Minnesota – is field testing 40 cameras, and the city hopes to equip all officers with MVRs by the end of 2015.[2] Several other cities, from Rochester to the Iron Range, are currently testing or deploying body cameras.

Officers in Duluth, Minneapolis, Burnsville and other departments around the country report positive experiences using this new technology. For city attorneys and staff, however, body cameras generate a host of new legal, technical and financial challenges. The Minnesota Legislature has yet to consider amendments to the Minnesota Government Data Practices Act clarifying proper classification of body cam footage obtained by police in a variety of different public and private settings. Given the broader application and reach of body-worn cameras compared to dashboard cams, city attorneys must draft new policies that satisfy a variety of competing interests related to body cam use (evidence preservation, personnel privacy considerations, public access). City and court legal staff are also battling to adapt and stay on top of the tidal wave of new electronic data being created by round-the-clock police use of body cameras. This technology is proving quick to deploy with the assistance of large third-party vendors such as Taser, but city legal staff and courts generally have less funding and resources available to adapt at an equivalent rate of speed.

The purpose of this article is to introduce this significant and rapidly emerging trend, highlight the challenges city attorneys face in implementing body-worn camera programs, and steer readers toward useful resources and sample body cam policies for further study. The law related to body cam use will develop and grow rapidly in the coming years – state legislatures and courts are just beginning to consider the delicate balance between public safety needs and personal privacy rights as it relates to this issue. The only certainty is this: given reports indicating substantial reductions in use-of-force incidents and police complaints following deployment of body cameras, along with the federal government's increased support for their use, body cameras could well be arriving in your jurisdiction soon.

II. The Case For MVRs – Why Police Departments Throughout The Country Are Increasingly Turning To Body Cameras

"Whenever you do a thing, act as if all the world were watching."

–Thomas Jefferson

The import of Jefferson's famous advice is easily understood because it rests on a commonly noted attribute of human behavior – people act better on camera (in other words, they behave better when they think others are watching). Indeed, in one study, simply placing a picture of a pair of eyes on an "hon-

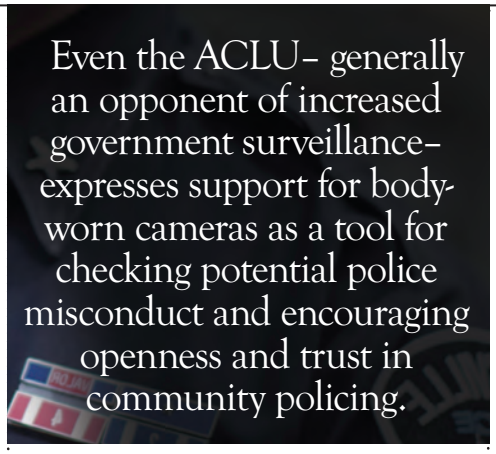
esty box" in a university break room resulted in people unwittingly contributing nearly three times as much for their coffee.[3] Lawyers are acutely aware of this phenomenon. What attorney has not seen another lawyer or witness transform from an ogre into the most charming person in the world upon entrance of the judge or jury?

It is perhaps this trait more than any other that is leading police departments across the country to rapidly test and equip officers with body cameras. The oft-cited 2012 study of the Rialto (California) Police Department found a 60 percent reduction in use-of-force incidents and an 88 percent reduction in citizen complaints following camera deployment.[4] A 2012 pilot program in Mesa, Arizona, reported similar results. Over the course of one year, 50 officers were assigned cameras and another 50 in a control group were not. The two groups were similar in age and race. During the first eight months of deployment, officers without cameras generated almost three times as many citizen complaints. By contrast, officers wearing cameras generated 40 percent fewer total complaints – and 75 percent less use-of-force complaints.[5]

Police chiefs overseeing MVR deployments across the country consistently report that citizen complaints drop significantly following body cam deployment. These chiefs encourage officers to notify citizens as soon as possible that their interactions are being recorded. As one chief put it, "everyone is on their best behavior when the cameras are running. The officers, the public – everyone."[6]

However not everyone is convinced of the efficacy of body cameras. One author concluded that "[t]here is little evidence regarding most of the perceived benefits and drawbacks of the technology . . . little is known about . . . whether the technology increases trust, legitimacy, and transparency of the police."[7] The author concluded that "the privacy implications of body-worn cameras, for both citizens and police officers, are not clearly understood; [d]epartments considering . . cameras should proceed cautiously."

Nevertheless, the bulk of the research and reports agree that body cameras improve police practices, accountability and transparency. Even the ACLU – generally an opponent of increased government surveillance – expresses support for body-worn cameras as a tool for checking potential police misconduct and encouraging openness and trust in community policing. The ACLU urges caution, however, regarding the potential for body cameras to infringe on privacy rights, particularly where officers gather footage following entry into private homes.[8] Such privacy concerns foreshadow the major battle on the horizon as body cam use grows.



III. Data Practices – A Privacy Firestorm Is Approaching

The most serious and pressing issue surrounding MVR deployment in Minnesota--and no doubt around the country--is the question of whether and to what extent state legislatures will craft protections limiting public access to body cam footage. In the wake of recent events in Duluth, the stage has been set for a data practices showdown during the current and next legislative sessions in Minnesota.

At around 4 a.m. on Monday, August 11, 2014, Duluth police officers responded to a report of a domestic disturbance. The city had recently deployed body cameras, and several of the officers were wearing their recorders. On arrival, they found a suicidal man threatening to kill himself. He had cut himself with a large knife and barricaded himself in a room in the home. Officers observed a substantial amount of blood seeping under the door and believed that, if the man did not receive medical attention quickly, he would die. They announced their intention to open the door. A veteran K-9 officer took the lead. As the officer and his K-9 partner entered, he repeatedly ordered the man to drop the knife and attempted to disarm him. The man slashed with the weapon. The officer fired his sidearm twice, then immediately began to render medical assistance. The knife-wielding man survived the incident.

Media immediately requested release of the videos. In light of a notice of potential civil litigation, the city declined to release the videos pursuant to Minnesota's Data Practices Act. The city further noted the unclear classification of the data under state law and the need for further direction from the Department of Administration, the agency responsible for overseeing the Data Practices Act.

On December 16, 2014, Duluth applied to the Department of Administration for temporary classification of body cam data as private or protected nonpublic information until further guidance could be issued by the Legislature. The Department quickly rejected the application and indicated that the Legislature would be the necessary forum to resolve the complex data practices and personal privacy questions presented.

Continued on page 14



Nathan LaCoursiere is an Assistant City Attorney in the Civil Division of the Duluth City Attorney's Office handling affirmative and defensive civil litigation and planning, zoning and development matters. He was recently recognized as one of *Minnesota Lawyer's* 2014 "Up and Coming Attorneys" for his role in prosecuting public nuisance actions arising out of synthetic drugs in downtown Duluth. He received his J.D., *magna cum laude*, from the University of Minnesota Law School



Terri Lehr is an Assistant City Attorney in the Civil Division of the Duluth City Attorney's Office. In counseling the police department on body cam issues, Ms. Lehr brings a breadth of experience following eight years of service as a city prosecutor and four years advising the police department on a host of contract, policy, data practices, and forfeiture-related matters. Ms. Lehr holds a J.D. from the William Mitchell College of Law.

Police Body Cameras *Cont'd from page 13*

In the wake of the Department's refusal to consider Duluth's application, proper classification of body-camera footage under the Data Practices Act remains in limbo. Certain questions are easy to answer – for example, the identities of undercover officers or informants are always confidential, as are the identities of child victims of abuse. But officers are obtaining footage in a variety of potentially sensitive public and private settings – hospitals, treatment centers, private homes.

As if confusion and uncertainty did not already reign, Duluth and Minneapolis have now received data practices requests for *all* body camera footage in their possession. In Duluth's case, a requestor named "Jah Love" has requested via email "[a]ny and all Duluth Police Department body cam videos." Duluth has had over 100 cameras in the field gathering data around the clock for months. The enormous financial and staff costs and burdens of such broad-reaching requests threaten to sink body-cam programs in Minnesota and around the country before they start. If state legislatures do not act quickly to address classification of data created by this new technology, the debate over the potential benefits of body-worn cameras to improve community policing, transparency and trust will be a moot discussion. Few if any departments will have the resources to satisfy data practices requests, and other departments around the country have already terminated their programs as a result.[9]

It is too early to tell how Minnesota's legislature will address these questions. In the words of Twin Cities media attorney Mark Anfinson, however, it seems clear that the State is in for a "knockdown, drag-out battle at the Capitol." How the Legislature chooses to walk the line between public safety needs and personal privacy rights may well decide whether body cameras become a regular part of community policing throughout Minnesota, or whether MVR use will be limited to a handful of larger departments with the resources to handle the data practices burdens and costs associated with their use.

IV. Policies – Implementing A Body Cam Program

Another challenge facing city attorneys is the need to craft body cam policies that satisfy a variety of competing interests related to body cam use: the evidence preservation needs of prosecutors, defendants, and a city's civil defense team; the rights of the public to certain forms of data; police personnel and privacy needs; technical limitations of body cam systems, etc.

As just one example of the challenges of crafting an effective policy, many proponents of body cameras urge departments to keep cams on at all times to maximize transparency and build trust in community policing. City attorneys are also inclined to advise officers to err on the side of keeping cameras rolling to avoid later claims that key information or evidence is lost or missing (a gift to defense attorneys or plaintiffs in Section 1983 actions).

As a practical matter, however, officers need to retain discretion to start and stop cameras for a variety of reasons in a variety of different settings. Most understand that personnel privacy, department security, and general professional police needs require that cameras stay off inside headquarters, during meetings, bathroom breaks, etc. There are other times when officers, in their discretion or as a mandatory matter of state law, need to turn off cameras, such as when they meet with undercover officers or interview child victims of abuse or assault.

There are also innocent technical challenges associated with keeping cameras on at all times. Creating and storing video footage from department-wide, round-the-clock patrols creates an enormous amount of data that must be stored, categorized, and potentially retrieved at a later date – all of which costs a significant amount of money for data storage or the hiring and training of technical staff. Further, Duluth police are finding that new camera batteries last roughly 10 hours during regular use, meaning most officers need to step away from police work during long shifts to recharge cameras if they are constantly rolling. Accordingly, Duluth's policy – and many of the other policies developed around the country – go to great lengths to provide guidance regarding instances in which cameras should be turned on or off.[10]

Given the relative infancy of body cam use in the field, there is little state statutory or common law guidance regarding "best practices" for body cam policies. Fortunately, the Department of Justice, police advocacy groups, and an increasing number of large police departments around the country have created initial policies to help guide other cities as body-cam use grows. Links to several of these policies are provided at the end of this article.

V. From The Streets To The Stand - Body Cams Take Center Stage

Perhaps even more dramatic than the impact of body cameras on community policing is the potential for body cameras to radically change courtroom dynamics, case presentation, and bottom-line liability for cities.

In recent years, use of technology in the courtroom has increased at a rapid pace. These changes are being fueled by state and federal court efforts to achieve completely electronic case filing and management. Accompanying the push to go paperless, courtrooms are adding the tools necessary to facilitate electronic case presentation. These are not just "feel good" or environmentally friendly changes. Tech evolution in the courtroom is necessary to keep pace with the manner in which most Americans obtain their news and information every day. Fill a jury box in 2015, and it is a safe bet that most of the jurors – of all ages and from the lowest wage earner to the top – are familiar with using an iPhone, iPad or other electronic device to communicate with friends and family, watch their favorite legal drama, upload pictures and videos of grandkids, and so on.

When these jurors arrive at the courthouse to fulfill their civic duty, woe to the lawyer who fails to understand or satisfy their expectation for technically seamless presentation of evidence and exhibits. In February 2013, closing arguments proceeded in the *American Steamship v. Hallet Dock*[11] matter in Duluth – a complex, multi-week federal jury

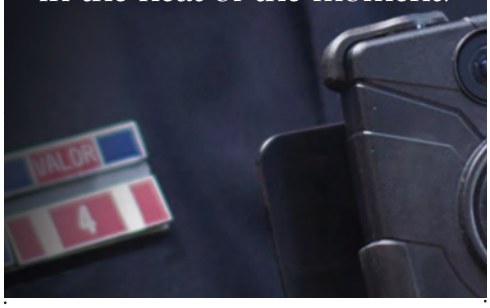
trial involving the 2009 partial sinking of the 1,000-foot Walter J. McCarthy when it struck submerged debris in the Duluth-Superior Harbor. Lead defense counsel gave a solid closing, periodically using the easel or ELMO to highlight particular points or exhibits.

By contrast, plaintiff's legal team walked the jury through an hour-long, extraordinarily tech savvy and fast-moving PowerPoint presentation that highlighted the key evidence at trial. At first, it seemed as if the judge and jury were ignoring plaintiff's attorney completely, until it became clear that every one of them was glued to the video monitor directly in front of them – one monitor for every two jurors in the box. After a surprisingly short deliberation given the complexity of the case, the jury awarded $4.7 million to the plaintiff.

Like it or not, today's jurors have been groomed to expect electronic case presentation. They will have little patience for attorneys that do not satisfy that expectation, and they will almost certainly trust video they see with their own eyes more than any witness that takes the stand. Enter body cams: most prosecutors and civil attorneys defending Section 1983 or use-of-force claims will tell you that jurors have traditionally given officers the benefit of the doubt except in the most serious cases of police misconduct. Now – it's all about the video. Everyone just wants to see the video and decide for themselves whether a defendant is guilty or an officer crossed the line. The danger with this new evidence is that it is as persuasive and striking as it is incomplete. A video can never capture the totality of the circumstances leading up to or surrounding an event, much less an officer's emotions and perceptions in the heat of the moment.

Moving forward, city attorneys and officers will need to be ready to deal with both the good and the bad of body cam footage in the courtroom. Aside from the necessity of being proficient in presenting relevant video clips, counsel will need to consider the likely reactions and judgments of lay jurors to body cam footage, then be ready to explain or satisfy juror doubts or questions through officer

The danger with this new evidence is that it is as persuasive and striking as it is incomplete. A video can never capture the totality of the circumstances leading up to or surrounding an event, much less an officer's emotions and perceptions in the heat of the moment.



testimony or other supplemental evidence. Video of a police shooting may well come across as shocking, abrupt, excessive or unnecessary based solely on what jurors see in the video. Surrounding events and circumstances will need to be carefully presented to ensure that knee-jerk reactions to videos do not decide cases.

City attorneys and police will also need to be careful to preserve all potentially relevant video evidence – or risk dismissals or spoliation sanctions in civil actions. Certain circumstances may warrant turning off cameras to protect citizen privacy, the identities of undercover officers of internal operations, etc. Such gaps in video footage, however, could prove costly to cities, as opposing counsel may retool their entire strategies to focus solely on what evidence may be missing and why. No matter how innocent, judges or juries could well make cities pay dearly for video evidence they *want* to see, but cannot for whatever reason.

VI. CONCLUSION

Body-worn cameras appear to hold great potential for reducing use-of-force incidents and police complaints while building trust and transparency in community policing. MVR programs could well be buried early by data practices requests and privacy concerns, however, unless legislatures act quickly to classify body cam footage obtained in various public, private and investigative settings. The impact of body cameras on city police and attorney work will evolve quickly in the coming years. Stay tuned for legislative action and court decisions in the coming months. In the meantime, the below resources should prove helpful to city attorneys representing police departments considering body-cam deployment.

VII. ADDITIONAL LINKS & RESOURCES

(Editor's Note: Each of the additional resources referenced by the authors is annexed to the digital version of this article, available to IMLA members at the IMLA Archive www.imla.org/publications/magazine-archives.

Reports and Research

Miller, Lindsay, Jessica Toliver, and Police Executive Research Forum. 2014. *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned* at pp. 5-6, Washington, DC: Office of Community Oriented Policing Services, http://www.justice.gov/iso/opa/resources/472014912134715246869.pdf.

White, Michael D. 2014. *Police Officer Body-Worn Cameras: Assessing the Evidence* at p. 35, Washington, D.C.: Office of Community Oriented Policing Services, https://ojpdiagnosticcenter.org/sites/default/files/spotlight/download/Police%20Officer%20Body-Worn%20Cameras.pdf.

Stanley, Jay. October, 2013. *Police Body-Mounted Cameras: With Right Policies in Place, A Win for All*, https://www.aclu.org/files/assets/police_body-mounted_cameras.pdf.

A Primer on Body-Worn Cameras for Law Enforcement, U.S. Dept. of Justice, Office of Justice Programs National Institute of Justice (Sept. 2012), https://www.justnet.org/pdf/00-Body-Worn-Cameras-508.pdf.

Sample Policies

See Duluth Police Department Mobile Video Recorder Policy http://www.duluthmn.gov/media/304979/_duluth_pd_policy_manual.pdf

Continued on page 35

IMLA'S 2015 MID YEAR SEMINAR PROGRAM WASHINGTON, DC APRIL 24-27, 2015



FRIDAY, APRIL 24, 2015

REGISTRATION & EXHIBITS
8:00 am - 5:00 pm

Board of Directors
9:00 am – noon
Lunch (on your own)
noon - 1:00 pm

Work Session I: Community Relations and Litigation–Handling a Police-Involved Shooting
1:00 pm - 2:30 pm
Moderator: **Mark R. Hayes**
Director of Legal Services
Arkansas Municipal League
North Little Rock, Arkansas

Russell (Russ) E. Hamill
Assistant Chief Of Police
Investigative Services Bureau
Montgomery County, Maryland

Anatomy of a Shooting Trial
John Wilkerson
Staff Attorney
Arkansas Municipal League
North Little Rock, Arkansas

Work Session II: IMLA Model Employment Agreement for City/County/Local Government Attorneys
1:00 pm - 2:30 pm
Moderator: **Charles W. Thompson**
IMLA Executive Director and
General Counsel
Bethesda, Maryland

IMLA Model Employment Agreement Committee:
Marion Radson
Law Office Of Marion J. Radson
Gainesville, Florida
Thomas M. Carpenter
City Attorney
Little Rock, Arkansas
Tom Carr
City Attorney
Boulder, Colorado
Howard Friedman
Chief of the Contracts & Real Estate Division
New York City, New York

COFFEE BREAK
2:30 pm - 2:45 pm

Work Session III: Land Use Sustainability Code and Stormwater Issues
2:45 pm - 3:55 pm
Moderator: **Rebecca Tydings**
City Attorney
Centerville, Georgia

Municipal Regulation Of Outdoor Lighting
Alan Bojorquez
Bojorquez Law Firm, PC
Austin, Texas
Timothy S. Hollister
Town Attorney
Colchester, Connecticut
Andre Monette
Best Best & Krieger LLP
Washington, DC

Work Session IV: Exceeding Expectations – Avoiding Evaluation Errors in Employment Settings
2:45 pm - 3:55 pm
Moderator: **Peter Letzmann**
Attorney at Law
Kentwood, Michigan
Shauna R. Billingsley
City Attorney
Franklin, Tennessee
Daniel Crean
Executive Director New Hampshire Municipal Lawyers Association
Pembroke, New Hampshire

Work Session V: Signs, Taxation, and Do Police Need to Provide Reasonable Accommodations – A Review of the 2014 Supreme Court Term to Date
4:00 pm - 5:30 pm
Moderator: **Lisa Soronen**
Executive Director,
State & Local Legal Center
Washington, DC
Paul D. Clement
Bancroft, PLLC
Washington, DC
Shay Dvoretzky
Jones Day
Washington, DC
Gregory G. Garre
Latham & Watkins LLP
Washington, DC

Immediately Followed by IMLA Amicus Service Award Ceremony

SATURDAY, APRIL 25, 2015
REGISTRATION & EXHIBITS
7:00 am - 5:00 pm

State/Province Networking All Seminar Breakfast (Included With Registration Fee)
7:30 am - 9:00 am

THE IMLA CHIEF LEGAL OFFICER FORUM (CLOF)– **ALL DAY**
(*Invitation Only*)

Breakfast (included with registration fee)
8:00 am – 8:30 am

Welcome
8:30 am – 8:45 am

*Joint All Seminar and CLOF Session** (see below)
9:00 am – 10:00 am

Law Office Management
-Hiring, Increasing Diversity, Salary Scales, Effective Evaluation of Attorneys, Retention
-Document Management, Case Management, Matter Management
10:00 am – 10:35 am

Break
10:00 am – 10:45 am

Law Office Management
-Settlement Policies, Caseloads
-Dealing With Insurers and Cases Handled by Insurers
10:45 am – 11:20 pm

Work Session VII: Joint All Seminar and CLOF Session
ACLU Nuisance Properties
11:20 am – 1:00 pm

CLOF Working Lunch
-Dealing With Budget Cuts and Cost Savings Idea
-Law Office Management
-Procurement and Management of Outside Counsel
1:00 pm – 2:00 pm

City Attorney/City Council/City Manager Relations
2:00 pm – 3:00 pm

Break
3:00 pm – 3:15 pm

Ethics—Defending a Legally Enacted Law That the City Attorney Believes to be Unconstitutional
-The Ethical Role of the City Attorney/Appointed City Attorney/Elected City Attorney Attorney
4:00 pm – 4:45 pm

Hot Topics and Tired Topics: Plastic Bag Fees; Uber/Lyft and Taxis; New Financing/Taxing Ideas for Development, Eco-Atm; E-cigs; Gun Control; Occupy Wall Street; FHA/Group Homes/ Disparate Impact
4:45 pm
Wrap Up And Cracker Barrel

Joint All Seminar and CLOF Session*
9:00 am – 10:00 am
Moderator: **G. Foster Mills**
Managing Attorney
New York City, New York
The Impact of the Anonymous Web: Drugs, Weapons, and Contract Killings – Online Anonymity Poses a Growing Threat to City Governments
Jason Thomas
Manager of Innovation, Government
Thomson Reuters
Mclean, Virginia

Work Session VI: Disaster Preparedness-Ebola
10:05 am - 11:05 am
Moderator: **G. Foster Mills**
Managing Attorney
New York City, New York
Isolation and Quarantine-
Thomas Merrill
General Counsel
New York City Department of Health and Mental Hygiene
New York City, New York

Coffee Break
11:05 am – 11:20 am
Work Session VII: Joint All Seminar and CLOF Session*
Nuisance Properties
11:20 am – 1:00 pm
Moderator: **Anthony Fox**
Town Attorney
Weddington, North Carolina
Local Nuisance and Crime-Free Ordinances: Legal Issues and Policy Considerations
Sandra Park
American Civil Liberties Union
New York, New York
Melody Taylor-Blancher
U.S. Department of Housing and Urban Development
Regional Director, Office of Fair Housing and Equal Opportunity
Philadelphia, Pennsylvania

Barbara Delaney
U.S. Department of Housing and Urban Development
Region 3 Deputy Director, Office of Fair Housing and Equal Opportunity
Philadelphia, Pennsylvania

Lunch (on your own)
1:00 pm - 2:15 pm
Work Session VIII: Securities Law Update— How Municipal Officials Can Be Banned for Life
2:30 pm - 3:30 pm
Moderator: **Robert Doty**
AGFS
Annapolis, Maryland
Recent Developments in Municipal Securities Law
Keshia Ellis
Enforcement Division
Securities and Exchange Commission
Washington, DC
Elaine Greenberg
Orrick Herrington
Washington, DC
Discussion of Municipal Advisor Regulation
Saliha Olgun
Municipal Securities Rulemaking Board
Alexandria, Virginia

IMLA State League and Municipal Attorney Association Department Meeting
3:00 pm - 5:00 pm
Special Presentation: Evolving Challenges to Privilege and Confidentiality
3:40 pm - 5:00 pm
Pete Haskel
Dallas Executive Assistant City Attorney
Dallas, Texas
Welcome Reception
6:00 pm - 7:30 pm

SUNDAY, APRIL 26, 2015

Registration & Exhibits
8:00 am - 5:00 pm

Work Session IX: Qualified Immunity After Plumhoff
9:00 am - 10:30 am
Moderator: **Mark R. Hayes**
Director of Legal Services
Arkansas Municipal League
North Little Rock, Arkansas
Timothy J. Longo, Jr.
Attorney, Chief of Police,
Charlottesville, Virginia
Legal Liability & Risk Management Institute Indianapolis, Indiana
John Jack Ryan
Attorney Captain (ret) Providence, Rhode Island Police Department,
Legal Liability & Risk Management Institute
Indianapolis, Indiana

Work Session X: Telecomm-- FCC Regulations
9:00 am - 10:30 am
Moderator: **Joseph Van Eaton**
Best Best & Krieger LLP
Washington, DC
Gerard Lavery Lederer
Best Best & Krieger LLP
Washington, DC
The Legal Landscape Of Municipal Broadband
Sean Stokes
Baller Herbst Stokes & Lide
Washington, DC
Joseph Van Eaton
Best Best & Krieger LLP
Washington, DC
Coffee Break
10:30 am - 10:45 am

Work Session Xi: Transportation
10:45 am - 12:15 pm
Moderator: **Erich Eiselt**
IMLA Assistant General Counsel And Editor
Bethesda, Maryland

Transportation Network Companies (TNCs) – Legislative, Litigation & Policy Update
Matthew W. Daus
Jasmine K. Le Veaux
Windels Marx Lane & Mittendorf, LLP
New York, New York

Work Session Xii: Finance Letter Of Credit
10:45 am - 12:15 pm
Moderator: **Barbara A. Adams**
Village Attorney
Kenilworth, Illinois

New Model Forms For Government Mandated Standby Letters Of Credit
Professor James E. Byrne
Institute Of Int'l Banking Law & Practice
Montgomery Village, Maryland

Letter Of Credit Good Practices & Isp 98
Carter H. Klein
Jenner And Block, LLP
Chicago, Illinois

Lunch (On Your Own)
12:15 pm - 1:30 pm

Work Session XIII: Pension Reform
1:30 pm - 3:00 pm
Moderator: **Amanda Kellar**
IMLA Associate Counsel/Director of Legal Advocacy
Bethesda, Maryland
Cathy Hampton
City Attorney
Atlanta, Georgia
Seth R. Eisenberg
Senior Assistant City Attorney
Atlanta, Georgia
Robin Shahar
Chief Counsel
Atlanta, Georgia

Work Session XIV: Do's And Don'ts Of Writing A Zoning Ordinance; Incentive Based Zoning
1:30 pm - 3:00 pm
Moderator: **Kit Williams**
City Attorney
Fayetteville, Arkansas
Stephen P. Elmendorf
Linowes And Blocher LLP
Bethesda, Maryland

International Committee Business Meeting
3:00 pm - 5:00 pm
Benjamin E. Griffith
Board Attorney - YMD Joint Water Mgm't District
Oxford, Mississippi

MONDAY, APRIL 27, 2015
Registration And Exhibitors
7:00 am - noon

Wonk Breakfast/County Attorney Meeting
7:30 am - 9:00 am
Regional Vice Presidents And State/Province Chairs Breakfast Meeting
8:00 am - 9:00 am

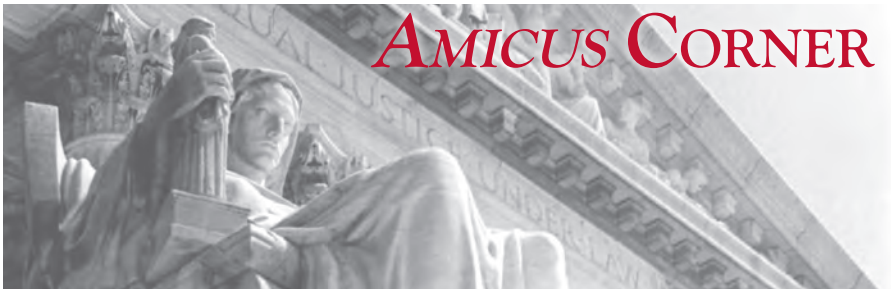
Work Session XV: Detroit – The New "Phoenix": Municipal Bankruptcy And Revival
9:00 am - 10:30 am
Bruce Bennett
Jones Day
Los Angeles, California
Heather Lennox
Jones Day
New York, New York
Sonya Mays
Senior Advisor To Detroit's Emergency Manager
Detroit, Michigan
Evan Miller
Jones Day
Washington, DC

Coffee Break
10:30 am - 10:45 am

WORK SESSION XVI: ETHICS
10:50am - 12:20 pm
Moderator: **Charles W. Thompson**
IMLA Executive Director and General Counsel
Bethesda, Maryland

The Ethical Litigator
John Davis
Pierce, Davis & Perritano, LLP
Boston, Massachusetts
Marc Emden
Emdenlaw
Rockville, Maryland
Ariana Wright Arnold
Jackson Lewis P.C.
Baltimore, Maryland

ADJOURNMENT
12:20 pm
(Tentative Program – Subject To Change)



IMLA at the State Level

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

While the majority of IMLA's legal advocacy program focuses on cases before the Supreme Court (both merits stage and petition stage), the program has been busy with cases of particular importance to municipalities at the state supreme court level as well. Here are just a few examples of cases at the state level in which IMLA has recently participated as an amicus.

• In *City of Dallas v. Arredondo*, Dallas is defending an action brought by former police officers and firefighters claiming the city breached a contract regarding wage increases. In support of their claim, the former employees cobbled together a "contract" for the wage increase by using an ordinance, various referenda, the city charter, and the city code. Despite the fact that these documents were adopted at different times and for different purposes, the Court of Appeals in Texas found that a contract existed and found in favor of the employees. IMLA is supporting Dallas as an amicus in a motion for rehearing to the Texas Supreme Court.

• In *Metropolitan Government of Nashville v. The Board of Zoning Appeals*, the issue before the Tennessee Supreme Court is whether a city has standing to seek certiorari of its own zoning board's decision if the city believes the zoning board's decision violates a city ordinance. IMLA believes this issue is important to cities across the country as we watch the continuing trend of legislatures and courts reducing the powers of local governments. A city should have the ability to establish and enforce its laws and that ability should not be thwarted by an administrative tribunal. At the very least, IMLA believes a city should have the ability to appeal a tribunal's decision in court.

• IMLA is involved as an amicus in another case before the Tennessee Supreme Court in *The Tennessean v. Metropolitan Government of Nashville*. In this case, the police department refused a request by various media outlets pursuant to the Tennessee Public Records Act for access to records regarding an ongoing investigation and prosecution of an alleged sexual assault. The newspapers claimed they were entitled to the information, but the court of appeals sided with the city and concluded that in light of the pending investigation, access to the records under the public records act was not required.

• In *Ardon v. City of Los Angeles*, the issue is whether the inadvertent disclosure of privileged documents waives the attorney-client privilege and work product doctrine if the disclosure is made pursuant to a public records act request as opposed to a discovery request in litigation. The Court of Appeal for California held that such an inadvertent disclosure does waive the attorney-client privilege. IMLA wishes to protect the attorney-client privilege and work product doctrine for municipalities and if this case is allowed to stand, the attorney-client privilege will be severely eroded for municipalities in California.

IMLA continues to be fully involved in Supreme Court cases. In *Kingsley v. Hendrickson*, the Court will consider what standard should apply in excessive force cases for pretrial detainees – i.e., those individuals who are being held without bail or who cannot post bail pending trial. The only relevant facts are that a pretrial detainee brought an excessive force claim against correctional officers after an officer put his knee into the detainee's back and tasered the pretrial detainee.

A different constitutional standard applies in excessive force cases depending on whether a person is an arrestee, a pretrial detainee, or convicted. Specifically, the Fourth Amendment applies to unreasonable force claims against arrestees, the Fourteenth Amendment's Due Process Clause applies to force used against pretrial detainees, and the Eighth Amendment applies to force used against those convicted. The "objectively reasonable" test applies under the Fourth Amendment to arrestees, which is the most plaintiff friendly test. Under the Eighth Amendment, a showing of malice is required in force claims, which is the most defendant friendly test. The Supreme Court has never articulated the specifics of the standard that applies to pretrial detainees.

In this case, the issue is whether the requirements of a 42 U.S.C. § 1983 excessive force claim brought by a plaintiff who was a pretrial detainee at the time of the incident are satisfied by a showing that the state actor deliberately used force against the pretrial detainee and the use of force was ob-

Continued on page 35



Practice Tips

Legislative Prayer

By Douglas Haney, City Attorney, Carmel, Indiana

(Editor's Note: The Supreme Court's decision last year in *Town of Greece v. Galloway* reversed the Second Circuit and upheld the Town's practice of allowing sectarian prayers before city council meetings--subject to a number of important conditions. What does it mean to implement *Town of Greece* on a practical level? Doug Haney (City Attorney, Carmel, Indiana) IMLA member and well-known presenter at IMLA conferences, herewith provides some pointers that should help municipalities comport with *Town of Greece*):

1

Prayer-givers should face legislators.

2

Prayer should be given at the start of the meeting, during the Pledge of Allegiance and opening remarks ("ceremonial portion of meeting") and before beginning the "legislative" portion of the session.

3

The public should not be required to participate in the prayer in any way nor should non-participators be singled out.

4

The public should be able to complain about the prayers and prayer-givers just like any other public remarks.

5

A written policy should be established (a) stating that the local government policy to provide all citizens, regardless of religious beliefs, the free and equal benefits of citizenship does not form any religion or no religion at all, invites all to volunteer to give a prayer, and will not discriminate against anyone due to their participation or non-participation in the prayer; and (b)prohibiting prayers that intentionally proselytize or disparage any person or religion.

6

Publicize on the municipality's website and in public remarks the opportunity for all to give a prayer at a public meeting.

7

Send prayer invitations periodically to all religious institutions within the municipality's corporate limits (don't get used to a few "go-to" prayer-givers) - there should be no religious bias, animus, or favoritism.

8

If recognizing prayer-givers with certificates, plaques or other acknowledgement, be equal in such recognition.

9

Ask each prayer-giver how he/she would like to be introduced.

10

Give time for persons who wish to leave the room during prayer to do so and to return before moving on to other business.

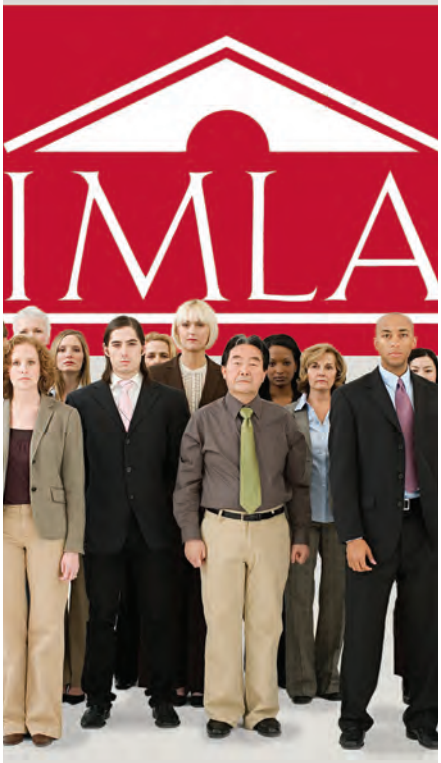
11

Other than not allowing proselytizing or disparagement of others, do not edit or approve prayers in advance nor criticize their content after the fact.

12

Do not permit lengthy religious dogmas. Limit prayers to five minutes.

IMLA's 2014 Local Government Attorney Compensation Report is now available!!



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ORDINANCES

The Fracking Juggernaut: Another Home Rule Casualty

by Erich R. Eiselt, Assistant General Counsel

The battle between municipalities and statehouses over hydraulic fracturing continues apace. While localities in New York and Pennsylvania have thwarted efforts by state authorities to override local controls, many other cities and towns across the country have been less successful.

A Case in Point: Diminutive Monroe Falls, Ohio, a hamlet of 5,500 inhabitants encompassing 2.8 square miles, is a recent case in point. The town's fight to preserve autonomy over fracking faced an uphill battle from the outset in the Buckeye State, where Governor John Kasich has pushed a pro-drilling agenda (and, according to Common Cause, John Boehner received nearly $200,000 from fracking industry contributors over a 10-year period).[1] Monroe Falls' home rule campaign first reached the courts in 2011, when the Summit County Court of Pleas ruled that Beck Energy Corporation needed to follow Monroe Falls' rules applicable to all developers. These prohibit drilling without obtaining a local zoning certificate, which in turn require city council approval and a public hearing, the payment of fees and obtaining performance bonds. The judge in that decision had opined "While this court recognizes and respects Ohio's need for uniformity in oil and gas regulation throughout the state, local communities retain a right to oversee those operations within their territory."[2]

The Ohio Department of Natural Resources (ODNR) supported Beck; ODNR had granted the company permission to drill on private property in Munroe Falls and asserted that no further approval was required. Beck and the ODNR successfully overturned the lower court ruling at the 9th District Ohio Court of Appeals in 2013.

Undaunted, the town appealed to the Ohio Supreme Court. Mayor Frank Larson, who had personally accompanied the town's police department to stop Beck's drilling development, expressed the viewpoint no doubt shared by many locals: "All we're saying is, let's use some common sense. The state says they don't want oil and gas wells to be drilled in certain places. Well, why should the state be the one who is able to pick that and just totally ignore the citizens."[3]

That sentiment would not carry the force of law. In *State ex rel. Morrison v. Beck Energy Corp.*, Slip Opinion No. 2015-Ohio-485 (Ohio, Feb. 17, 2015),[4] the Ohio Supreme Court held, in a 4-3 decision, that Monroe Falls' Home Rule-based permitting ordinances could not supersede Ohio's reservation of authority over gas and oil drilling to the state.

Statutory Framework: In 2004, the Ohio General Assembly amended the state's Revised Code section 1509 to provide "uniform statewide regulation" of oil and gas production within Ohio and to repeal "all provisions of law that granted or alluded to the authority of local governments to adopt concurrent requirements with the state."[5] That law entrusted the Ohio Department of Natural Resources (ODNR) with "sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operations" within Ohio.

Although R.C. 1509.02 preserved municipal corporations' "special power" to control public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts and the power to grant permits to operate certain heavy vehicles on highways within their jurisdiction, it expressly prohibited a local government from exercising those powers "in a manner that discriminates against, unfairly impedes, or obstructs oil and gas activities and operations regulated under [R.C. Chapter 1509]."[6]

Under the Home Rule Amendment to the Ohio Constitution, "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." Article XVIII, Section 3. This amendment gives municipalities the "broadest possible powers of self-government in connection with all matters which are strictly local and do not impinge upon matters which are of a state-wide nature or interest." *State ex rel. Hackley v. Edmonds*, 150 Ohio St. 203, 212, 80 N.E.2d 769 (Ohio 1948).

The Ohio Home Rule Amendment does not, however, allow municipalities to exercise their police powers in a manner that "conflict[s] with general laws." Article XVIII, Section 3; (citation omitted).

Therefore, a municipal ordinance must yield to a state statute if (1) the ordinance is an exercise of the police power, rather than of local self-government, (2) the state statute is a general law, and (3) the ordinance is in conflict with the statute. *Mendenhall v. Akron*, 117 Ohio St.3d 33, 881 N.E.2d 255 (Ohio 2008).

Ohio Supreme Court Analysis: Under the three-part test above, the Ohio Supreme Court concluded that the city's ordinances must yield to R.C. 1509.02. The court found that the Munroe Falls drilling ordinances were an exercise of police power, noting that Ohio jurisprudence has long recognized zoning as such an exercise. "[A]ny municipal ordinance, which prohibits the doing of something without a municipal license to do it, is a police regulation" within the meaning of the Home Rule Amendment. (Violation of the drilling ordinances could carry criminal penalties, making the police power element

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New Federal Fracking Regulations Receive Hostile Response

By: Tukie Falade, IMLA Associate Counsel

In late March, after four years in the works, the Obama Administration finally released a new rule[1] regulating hydraulic fracturing ("fracking") on public lands. Until now, the federal government has been virtually silent on the controversial extraction methodology. Statehouses and municipalities have jockeyed to control fracking in their jurisdictions, testing the viability of home rule and local zoning mechanisms against preemption challenges—as evidenced by the accompanying article discussing Ohio's recent fracking decision in the "Ordinances" department in this issue of *Municipal Lawyer*.

The new federal rule entitled "Hydraulic Fracturing on Federal and Indian Lands," was touted as "a much-needed complement to existing regulations designed to ensure the environmentally responsible development of oil and gas resources on federal and Indian lands."[2]

Interior Secretary Sally Jewell noted that current fracking regulations are nearly 30 years old, and "do not contemplate current techniques in which hydraulic fracturing is increasingly complex and is coupled with relatively new horizontal drilling technology in larger-scale operations that reach greater depths."[3]

The new regulations will take effect in June 2015 and include enhanced oversight and disclosure requirements for well operators, new guidelines for well construction and additional safety measures to protect water quality. Operators planning to conduct fracking activity on public land will be required to make various disclosures and adopt preventive strategies. Mandated actions include:

> Submitting detailed information about proposed drilling operations to the Bureau of Land Management;
> Designing, implementing and monitoring casing and cementing programs consistent with best practices and taking remedial actions if there are indications of inadequate cementing;
> Disclosing chemicals used in operations to the Bureau of Land Management and the public, through www.FracFocus.org, a website managed by non-profit organizations; and
> Managing fluids recovered from fracking operations in enclosed above-ground tanks[4]

As expected, industry reaction was swift and hostile. Wasting no time, fossil fuel proponents filed a lawsuit[5] against the Secretary and the U.S. Bureau of Land Management the day the rule was released. The complaint alleges that the Bureau's action represents a "reaction to unsubstantiated concerns" and that the "administrative record lacks factual, scientific or engineering evidence" necessary to sustain the new rule.[6]

In a press release, the American Petroleum Institute also attacked the new fracking regulations, calling them "duplicative," "unnecessary" and a "barrier to growth."[7]

On the other side of the spectrum, environmental groups seemed equally dissatisfied with the rule. A statement by the League of Conservation Voters called the rule "a missed opportunity to set a high bar for protections that would truly increase transparency and reduce the impacts to our air, water, public lands, and communities by the oil and gas industry."[8] The Natural Resources Defense Council also criticized the measure, arguing that the rules fail to protect the nation's public lands from the risks of fracking.[9]

Reactions on Capitol Hill seemed similarly negative, regardless of party lines. Republicans criticized the rule as another incidence of regulatory overreach by the Obama administration, whereas Democrats complained that the rule does not adequately protect public safety concerns. Sen. Mike Enzi, (R-WY), stressed the need to leave regulation at the state level. "We are 50 unique states. A federal, one-size-fits-all approach increases the power base in Washington, but the public at large benefits more when each state regulates based on what is best for its own residents,"[10] said Enzi. Rep. Rob Bishop (R-UT), Chairman of the House Committee on Natural Resources also weighed in, stating that the Bureau "severely underestimates the added costs and delays that this rule will cause by overlaying upon existing state regulations that have a proven record of safety.[11] Rep. Raul Grijalva (D-AZ), the Ranking Member of the Committee, suggested that the rule did not go far enough to address environmental concerns. "We could have avoided years of uncertainty and environmental risk by setting a strong, clear, consistent standard before the fracking boom took off. Now, at this late date, instead of offering clarity and protecting our resources, today's rule lets industry off the hook. Rather than raising the bar, the Bureau settled for the lowest com-

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Tukie Falade is Associate Counsel at IMLA. She oversees IMLA's construction contract drafting initiative (CCDI), and develops programming for distance learning events. She holds a J.D. from the George Washington University Law School and is licensed to practice in Maryland.



Smooth Sailing in Mississauga

Mary Ellen Bench, City Solicitor, Mississauga, Ontario

Municipal Lawyer recently caught up with IMLA's own Mary Ellen Bench, a long-time member of our leadership group, the chief lawyer in Mississauga and, it develops, a water sports enthusiast.

Q. Let's start with the basics—where are you from, and how did you end up in a legal career?
I'm originally from Niagara Falls, and am the oldest in a family of six kids. My father was a lockmaster on the St. Lawrence Seaway, and there were a lot of farmers (growing great grapes to make Niagara wines) but no lawyers in my family. Like a lot of other people in my school days, I got caught up in the whole "Trudeau mania" and decided to pursue political science and urban studies. I worked part-time for a trucking company handling their Provincial Offences charges, and an opportunity to follow a licensing charge all the way to the Supreme Court of Canada got me interested in a career in law. I received my BA from York University before attending Osgoode Hall Law School in Toronto. I was called to the bar in 1986.
(Because we doubt you'll bring it up, we'll let our American readers know that Osgoode Hall is routinely ranked among the top 2 or 3 law schools in Canada).

Q. And what was your path to becoming the City of Mississauga's Solicitor?
I began my legal career at a private firm that provided legal services to the City of Etobicoke, a municipality of about 300,000 people, which is now part of the City of Toronto. I started there as an articling student in 1984 and after three years as an associate, I knew I wanted to have an exclusively municipal practice, and moved in-house, to the regional municipality of Peel, which is our county level. In 1991, I joined the City of Toronto as a solicitor, and I became director of municipal law in 1992. In 2001, a headhunter called me about the city solicitor's job in Mississauga—it was an offer I couldn't refuse.

Q. That is a pretty meteoric rise. You must be very good at what you do.
I'd like to think that I have been successful because I have always seen lawyers as an intrinsic part of a business team, and not as a regulator or department who comes in to paper the deal after it is done. I don't like the word "no" when it comes to legal issues. I don't want the legal department to be seen as the place you go to get a "no," I want us to be seen as the place that gets you the results you want. I've always told my clients "I may not be able to get you 100-percent of where you want to go, but I'll get you as close as I can," so if I can get to 85- to 90-percent of the way I consider that a win and so do they. It also helps that I have recruited a team of lawyers who are like-minded, creative, and feel connected to the clients and projects at the City that we participate in.

Q. And what is it about municipal law that appeals to you?
The municipality deals with people everyday. We deal with barking dogs, we deal with construction, with planning what buildings are going into a neighborhood, and more. So you're constantly dealing with people, interacting with people and impacting their lives. I can often put a face and a name to the people in a particular neighborhood who are likely to be affected by a council decision that my team had a hand in. It's a fast moving environment where the decisions we make really matter to people. Also, I have had great employers who allow me to get involved in organizations promoting policy development that benefits municipalities. I am proud to participate in working groups at the Association of Municipalities of Ontario (AMO) and in organizations like IMLA, where I have made many contacts that assist me in carrying out my responsibilities. I think that people who are drawn to work in municipal government, myself included, want to make a difference. You want to be able to point to a piece of legislation and say: "I had a say in how that got worded." You want to be able to point to a building and say "I was involved in how that got developed." You leave your mark on a city in a way you don't really get to in private practice. And I get to play different roles. I can be a lawyer one day and the next day be involved in policy,

commenting on different programs or operations, so it's great.

Q. So how has your job changed over the past 13 years?

While my job *title* has stayed the same, the *role* has expanded steadily. For one thing, Mississauga's population continues to expand, and we have huge growth plans. More than 700,000 people now call Mississauga home, which is a 20 percent growth from when I started in my role. We are the sixth largest city in Canada, and are projected to grow another 18 percent by 2040. I had a staff of four lawyers when I first started, now I've got 17. And even at that, we can't keep up with the work. Legal includes Prosecutions and Risk & Insurance at the City, and is part of the Strategic Initiatives group in the City Manager's department; that alone tells a lot about how we are valued as part of the City-building team. I feel that I've truly been a part of our City's growth and development.

Q. That puts management and team-building among your obvious skills. What types of competencies have you been adding to your staff?

I wanted to avoid having to rely on outside counsel in a number of areas, so I've brought in specialists in information technology, labour and employment, real estate and development, tax and environmental law. I believe that having a team of specialists is critical to provide cost effective legal services to the City, as we plan for high-density urban growth and improved infrastructure. My team is focused on finding solutions and on finding efficiencies in City processes. We do the latter by creating template agreements, simplifying processes where possible, training City staff and in many other ways. I most recently added an insurance defense lawyer, to help trim some of our costs in this area.

Q. What are some of insights you've gleaned in your role?

I'd say I have learned that you have to be practical, and totally transparent and accountable. When spending taxpayer dollars, I've learned to always be prepared to justify my actions. I also think that when dealing with council, a city solicitor needs to draw a clear line



between providing legal advice, and political guidance. You have to know your role and keep that separation — you can't cross that line. When you work with the same members of council for a long time and get to know them, it can be hard to remember the role you each play, and to focus on how you just want to help a friend.

Q. Are you saying that you avoid political issues?

Not at all. My desire to avoid getting embroiled in "politics" doesn't keep me from casting my eye over policies. In fact, that is one of the main perks of my job. I leave the political strategy to the politicians however; they are the experts in that, and they will be held accountable for their political decisions, like I am accountable for the advice I provide. To do otherwise compromises the objectivity that the city solicitor has to bring to the table, and my personal integrity.

Q. At the risk of being very un-Canadian, can you point to a couple accomplishments in your role of which you are most proud?

I still do some file work, but a lot of my time these days is spent on administrative matters, attending council and city committee meetings, and participating on steering committees for big projects at the City. The accomplishment I am most proud of is getting others in the corporation to see legal as a valued part of the strategic team on the big city projects. While I am always the lawyer at the table, I think of it as the creative, fun stuff. Projects related to our waterfront development, the development of our downtown, and our transit infrastructure, are the things I am most proud of.

Q. Shifting gears, how do you spend your time when you are not providing legal advice and leading a sizeable team of lawyers?

One priority has been to stay very involved in the lives of my two sons. In fact, that was one reason behind my move from working at Toronto to Mississauga—a shorter commute and the chance to be more engaged with their extra-curricular activities. My younger son is a competitive sprint kayaker, which encouraged me to volunteer with the Mississauga Canoe Club, where I became Commodore, and learned a lot about the sport of sprint canoe kayak. I'm not very good in a tippy boat myself, but I've come to love the sport organization almost as much as he loves paddling, and I'm now the Secretary to the Western Ontario Division of CanoeKayak Canada and am working to get my national level officiating status. Last year I was a starter at an international regatta in Lake Placid hosted by CanoeKayak USA, which was an amazing opportunity. My oldest son is enjoying his studies in golf course management, so I have dusted off my clubs, so I can play an occasional round with him, and better understand what excites him when he comes home. I have been blessed with wonderful children.

Q. And what about other interests?

I've always wanted to be involved in giving back to my community. I think it helps to balance your perspective, in terms of how you see things at work, when you have broader interests in the community. So I've been involved with a local learning disabilities association and on school council. I work with IMLA and the Canadian Corporate Counsel Association (CCCA) on *ad hoc* projects. CCCA and the Rotman School of Business at the University of Toronto recently created the first certification Business Leadership Program for In-House Counsel, and I have enjoyed participating as an 'executive in residence' and evaluator. It's the first program of its kind in Canada and it's been great to know that they value the in-house municipal lawyer perspective.

Continued on page 36



Recent Cases of Interest

By Monica Ciriello

Nuisance: Municipality Liable to Farmer for Salting Roads.

Steadman v. Corporation of the County of Lambton, 2015 ONSC 101
The plaintiffs, Mr. and Mrs. Steadman, reside at and operate a farm within the County of Lambton. The plaintiffs commenced a nuisance action against the County for damages to crops on their farm as a result of the municipality's application of road salt during its winter road clearing operations. Mr. Steadman first observed suspected crop damage as early as the mid-1990s. He had testified as to the steps taken to investigate and record his observations. He attributed the damage to his wheat and soya crops to the road salt used by the municipality on the road adjacent to his property.

HELD: The plaintiffs were awarded approximately $107,000 for crop losses and a drop in property value as a result of the municipality's use of salt during winter road maintenance.

DISCUSSION: The case was a matter of nuisance law. Private nuisance is defined as the unreasonable inference with the use and enjoyment of land. The term 'unreasonable' indicates that only substantial interference, intolerable by the ordinary occupier, will give rise to nuisance. A claim of nuisance against a government for the application of salt upon a farm property is not unprecedented. In *Schenck et al. v. The Queen; Rokeby v. The Queen* found the contamination of peach and apple orchards by salt spray originating from Ontario highways was a nuisance. The case was later affirmed by the Supreme Court of Canada [1987] 2 S.C.R. 289 (SCC)].

Nuisance, unlike negligence, does not focus on the defendant's conduct. A defendant's conduct may be reasonable and yet result in an unreasonable interference with the plaintiff's property rights. As a result, the social utility of the use of salt in road maintenance and the lack of negligence on the part of the County does not excuse liability. Justice Carey accepted the evidence of the environmental engineer commissioned by Mr. Steadman regarding the dispersal, spreading and infiltration of the road salt into the farm's soil. He concluded that the damage caused by the salt to the plaintiff's farm was a significant harm that amounted to an unreasonable interference with his property for which he is entitled to be compensated. Justice Carey held that the damage caused by the salt to the plaintiff's property was a significant harm, which amounted to unreasonable interference with the plaintiffs' property.

The defendant argued that if the road salt was the cause of the damage to the plaintiff's farm, they had a duty to mitigate the effects of the damage. Justice Cary rejected this argument, indicating that such a request would impose an unreasonable burden upon the plaintiffs.

Plaintiffs were awarded $45,000 for crop losses, $5,652 for soil and plant analysis, and $56,700 for diminution of value of property.

Limits on Liability: Municipality Not Liable for Driver's Negligence.

Fordham v. Dutton-Dunwich (Municipality), 2014 ONCA 891
The Court of Appeal has reversed a lower court's decision that found that a municipality had breached its duty to reasonably maintain the highway within its jurisdiction. The 16-year old plaintiff was the driver of a vehicle involved in a single-vehicle accident. The plaintiff was seriously injured when he came to a rural intersection, ignored a stop sign and drove through the intersection at 80 km per hour. The plaintiff sued under section 44 of the *Municipal Act,* 2001 and alleged that the defendant municipality failed to post adequate signage to warn of a change in road alignment at the intersection where the accident occurred, thereby causing a risk of harm. The municipality claimed that had the plaintiff stopped at the stop sign, there would have been no unreasonable risk of harm. The trial judge found the municipality 50% responsible for failing to post a check-board sign warning of the change in the road's alignment. The trial judge went on to hold that it was local practice for rural drivers to go through stop signs and the municipality should have known that ordinary rural drivers do not always stop at stop signs. The municipality appealed the decision.

HELD: Court of Appeal allowed the appeal and dismissed the action.

DISCUSSION: Justice Laskin held that the trial judge misapplied the reasonable driver standard. A municipality's duty of repair is limited to ensuring its roads can be driven safely by ordinary drivers exercising reasonable care. A municipality has no duty to keep its roads safe for those who drive negligently and no amount of general community compliance will render negligent conduct 'reasonable'. A driver who runs a stop sign at 80 km per hour is driving negligently.

Next considered by Justice Laskin was the trial judge's finding of the local practice of rural drivers running stop signs. Justice Laskin held that finding this cannot be used to impose liability on the municipality for two reasons. First,

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Your Local Government Is More Musical Than You Realize: SOCAN And Re: Sound Tariffs

By Christina Reed, Young, Anderson, Vancouver, B.C.



Local governments own and lease many places where live and pre-recorded music is played for public enjoyment, such as halls, convention centres, theatres, skating rinks, sports venues, and fitness and recreational facilities. Parades, fairs, and exhibition events also feature live and pre-recorded music.

Copyright is a property right granted by law to authors, composers, performers, and other creators. To play a song in public, you need the copyright owner's consent. You may think that paying a DJ or a band, or paying for a CD or music track, is sufficient for any piece of music to be played in a public place, but this is not the case. The intellectual property holders in each piece of music played have a potential claim against a local government for music that has been publicly played, whether live or pre-recorded, without permission from every rights-holder with respect to that piece of music. Without such prior authorization, a local government is potentially liable for a claim in damages for infringement of copyright.

It would be impossible to negotiate with each composer, artist, music company, and music publisher for each song that your local government plays in any given year, especially given the network of assignments of copyright that exist internationally. Canada has entered into international conventions and enacted statutes to deal with copyright through collective administration for music performance rights, among other types of intellectual property. The federal government, under the *Copyright Act*, established royalties to provide fair compensation to composers, performers, and record labels for the use of music and sound recordings. The Copyright Board of Canada is the regulatory body for royalties for the use of works protected by copyright, and it has mandated two organizations to be receivers of those royalties, who in turn distribute those royalties to the copyright holders.

SOCAN (Society of Composers, Authors and Music Publishers of Canada) administers the performing rights in musical works on behalf of Canadian composers, authors and publishers, as well as affiliated international groups that represent foreign composers and publishers. Re:Sound (Re:Sound Music Licensing Company) is the not-for-profit music licensing company that administers performance rights of musicians and record companies in their sound recordings within Canada. SOCAN licenses both live and recorded music, while Re:Sound licenses only recorded music.

Both SOCAN and Re:Sound are certified by the Copyright Board of Canada to collect royalties through a system of tariffs for various types of music performance, which SOCAN and Re:Sound then distribute to music creators in Canada and around the world.

Tariffs are certified each year by the Copyright Board of Canada by publication in the Canada Gazette. Various music use patterns are broken into different tariff categories, and the calculation of the actual fees paid for that tariff can vary as set out in the tariff, for example based on a per seat, per event, percentage of gross revenue, or fixed amount calculation.

It is important to remember that tariffs are not taxes. Taxes are collected by the government and spent for government purposes. Tariffs are royalties, paid for the use of intellectual property, collected by not-for-profit collectives and then distributed to individual rights holders. SOCAN and Re:Sound tariffs are separate and distinct performance rights license fees. Paying one collective does not exempt a local government from paying the other if the tariff is applicable.

For some activities and building uses, such as use of pre-recorded music in a sports venue, tariffs to both organizations are payable, whereas for other activities, such as live musical performance, only a tariff to SOCAN is payable (on the expectation that the performer is being paid directly). Re:Sound's tariffs have generally been set lower than SOCAN's tariffs by the Copyright Board of Canada.

When dealing with this subject, local governments may wish to take the position that all other people using music in public spaces (from community hall user groups to parade permit holders) are responsible for paying applicable copyright tariffs before they begin use of those public spaces. For example, for licenses and leases of public spaces such as theatres, halls, and sports venues, local governments could include as a standard clause in the license agreement that the licensee will pay all associated fees to SOCAN and Re:Sound for the rights to have entertainers perform either in person or by means of recorded music. Each local government will need to decide whether it is administratively more cumbersome to spend the time to ensure each licensee actually obtains the required copyright permission, or whether the local government should pay the tariffs itself as part of the service of providing the public space.

Finally, similar copyright collective societies in Canada collect royalties for other forms of intellectual property, such as films, audio-visual media, screenplays, books and other print media and the visual arts. If you find that your local government is displaying, distributing or using these types of intellectual property in a public way, visit the Copyright Board of Canada website to find contact information about these other copyright collective societies.

Copyright Board of Canada: www.cb-cda.gc.ca
SOCAN: www.socan.ca Re:Sound: www.resound.ca



Christina Reed works as a solicitor primarily in matters of municipal real property and real estate development She also advises clients on general matters of local government law and contract negotiation and drafting. Christina holds a B.A. (Honors) in English and Comparative Literature from the University of Alberta, and graduated from the University of Victoria Faculty of Law in 2002. She articled with Young, Anderson and continued with the firm after her call to the bar in May 2003.

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Marijuana Border Wars and The Supremacy Clause

By Erich R. Eiselt, IMLA Assistant General Counsel

One week before Christmas, the attorneys general of Oklahoma and Nebraska filed suit to invalidate Colorado's new laws authorizing state-regulated recreational marijuana, citing a troublesome influx of pot osmotically seeping across their state lines.

On its facts, the action by bordering states against marijuana-friendly Colorado resembles a garden-variety college town dispute between a rowdy fraternity and more conservative neighbors: the complainants grudgingly tolerate what goes on behind closed doors next door, but object to that activity spilling onto their own properties.

That basic plot line is just the beginning. For students of American jurisprudence, the courtroom challenge by Nebraska and Oklahoma against their Centennial State neighbor is significantly more complex and interesting.

Its origins are as old as the Constitution itself.

On September 17, 1787, 39 of the 55 delegates sent to Philadelphia to revise the Articles of Confederation signed off on a newly-crafted United States Constitution. Eight days later, the First Congress of the United States proposed a dozen amendments intended to rein in a potentially overreaching central government. Ten of these would be ratified as the Bill of Rights, protecting individual liberties and reserving unenumerated powers to the states. But even with these seminal restraints on federal power, the Constitution unambiguously provided that, once a law was legitimately passed by the national government pursuant to its constitutional authority, that legislation enjoyed supremacy over state laws. The "Supremacy Clause" is found in Article Six, Clause 2 of the Constitution:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

Nearly two centuries later, in October 1970, the 91st Congress passed the Comprehensive Drug Abuse Prevention and Control Act of 1970.[1] Signed into law by Richard Nixon, the statute included, at Title II, The Controlled Substances Act (CSA), which is the statutory bedrock for the federal war against the abuse of drugs and other substances. The CSA governs the manufacture and distribution of narcotics, hallucinogens, addictive pharmaceuticals, chemicals used in the illicit production of controlled substances and so on. Under the CSA, covered substances are categorized in one of five schedules based upon their medicinal value and potential for harm, abuse or addiction. Schedule I names the most harmful drugs having no medical use, while CSA Schedule V lists the least dangerous substances. Marijuana is a Schedule I drug under the CSA, and the CSA is still the law of the land.

On November 5, 2012, the voters of Colorado passed Amendment 64 to the Colorado Constitution, legalizing the recreational use of marijuana by adults in the state—and authorizing its commercial cultivation and sale. Proponents pointed to the benefits of decriminalizing minor possession, discouraging criminal marijuana distribution and generating massive tax revenues for the public good. It is unlikely that significant thought was devoted to the potential impact of recreational marijuana on neighboring jurisdictions, although they had lobbied against Amendment 64.

The measure passed by an overwhelming margin of 55 to 45 percent, with younger and more densely populated communities in the center of the state driving the results– while every county along Colorado's eastern and western periphery, far removed from Denver's skyline or the collegiate crowd in Boulder, voted down the measure. Governor John Hickenlooper, who had strenuously opposed the amendment, reluctantly conceded to the will of the majority, if not without a prescient bit of humor:

> The voters have spoken and we have to respect their will. This will be a complicated process, but we intend to follow through. That said, federal law still says marijuana is an illegal drug so don't break out the Cheetos or goldfish too quickly.[2]

The focus thus turned to the federal government. The question became whether Attorney General Eric Holder and the Department of Justice would enforce the CSA and its Schedule I classification of marijuana as a dangerous substance, at least insofar as states were attempting to allow purely recreational use. Answers gradually materialized in a series of hearings before Congressional subcommittees, where the Justice Department had previously revealed that it would decline to prosecute state-sanctioned medical marijuana dispensaries and their patients. After Colorado's passage of Amendment 64 (and Washington State's passage of a similar marijuana measure on the same day), the Justice Department's stance was broadened—under certain circumstances, it would now countenance recreational use and commercial cultivation and distribution activities. In August 2013, Deputy Attorney General James Cole updated the now-famous "Cole Memorandum," "in

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Happy Trails

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



Dear ListServ Friends,

"The time has come, the Walrus said, to talk of many things: Of shoes – and ships - and sealing wax – Of cabbages and kings..." My Bishop has offered me an appointment in Bigfork, Montana, on the east shore of Flathead Lake. Their pastor-parish relations committee accepted that appointment after I was introduced to them, and I will become the pastor of Community United Methodist Church in Bigfork on July 1, 2015. My last day in City Law will be May 29th. The possibility has become reality quickly. The demands of packing up 36 years of living and moving it all 450 miles away are growing exponentially, so this is a very fond, if bittersweet, farewell to the good people of IMLA.

My new digs in Bigfork will be a beautiful newer church in a picture book village above a postcard bay on a great freshwater lake in a mountain valley, with a fine parsonage two blocks away at the edge of the woods. When I asked the waitress for directions to the motel I was staying at, she said it was "down the road on the left, past the fly shop, before you come to the bridge." It's that kind of place.

I have moonlighted at my local church for the last 14 years while serving as City Attorney. Having only one job is as much retirement as I can countenance at this point in my life. Keeping the one with all the intangible benefits makes perfect sense. It is a fair-sized church and there is a lot of ministry opportunity in this community and this setting. You don't have to shout, a friend at the City told me, to talk to God there. I went to church camp just across the lake from Bigfork, beginning over 50 years ago, and I spent a lot of my growing up summers over there with my cousins and their friends, learning to water ski and swimming in crystal clear lakes.

It's just 30 miles from Glacier National Park where my brother and I used to backpack every summer, 3 days and 2 nights in, then out at Bigfork for a shower and a shave and a hot meal with all the cold water you could drink before leaning back into a real bed for the best sleep a person can ever get. I roller-skated with Jamie Sue Harris in high school ten miles away at Tally Lake and spent all the vacations I could with my kids at my Uncle Ed's cabin on the west shore.

The hard part is leaving. I am just beginning to awaken to all the ways I have become attached to my present setting. It has become home. My house is MY house with my landscaping and my deck and my colors on every wall, inside and out, equipped with the best comforts I have ever known, and the mortal remains of my last two dogs rest in peace under the Ponderosa pine in the back yard, right where they liked to lay. I am selling it, lock, stock and barrel.

My day job with the City is a lot of busy people trying to get it right with the fewest mistakes in the shortest time for the least money, and I see the fruits of their efforts in our community every day. I know what it took and who did it, and there is a sense of belonging in that. My little church has walked through some deep kimchee with me and we have shared some incredible moments. (More than once I have heard myself say, 'It could all be true!' It could.)

The Rimrocks that rise up at this bend in the Yellowstone – and give the river its name – have become part of my nature and it will be hard to wave goodbye to horizon lines that sprawl from 50 to 100 miles away. Those people in the covered wagons thought they were going to be to the mountains by nightfall, but two weeks later it didn't look like they were any closer. That's where I have spent my life, on the mind-stretching prairies of the Great Plains. When I bought a house up out of downtown 20 years ago, on 'the bench' as they call it, above the river, I felt like I was home again in an old way, because the horizon had telescoped out for me again.

On the way back from Bigfork the day after the deal had been struck, driving through woods and past lakes with mountains on either side of me it dawned on me that I have never lived west of the Divide. From now on, I will have to watch

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Cases



By IMLA Editorial Staff

Adult Entertainment: Merely Copying Other Jurisdictions' Bans is Inadequate

Reversing the District Court, the Seventh Circuit has held that a municipality's ban on nude dancing cannot merely be modeled on other statutes which have been found to pass Constitutional muster; it must demonstrate that the ban actually advances a significant governmental interest within its own jurisdiction.

The Village of Dix, Illinois is a "dry" municipality comprising 500 residents and traversed by US Interstate 57. Dirt Cheap, Inc. and Foxxxy Ladyz Adult World Inc. sought to operate nude dancing establishments in the Village. Although alcohol was not sold in the nightclubs, patrons were permitted to bring alcohol for consumption there.

In an effort to restrain these businesses, Dix enacted ordinances prohibiting consumption of alcohol in a public places and banning public nudity: "No person shall knowingly or intentionally appear nude or in a state of nudity in a public place." (In accordance with Supreme Court precedent, a person could comply with the Village's nudity law by wearing pasties and a g-string).

The Dix municipal code provided that a violation would result in a fine between $100.00 and $750.00 per occurrence.

In March 2013, Dix notified Foxxxy Ladyz that it was violating the ordinances and ordering it to comply with the law immediately. Foxxxy Ladyz responded by filing suit in District Court arguing that the ordinance violated the free speech protections of the First Amendment. Dix answered with a motion to dismiss, which the District Court granted after concluding that the ordinance was content neutral and passed the four-pronged *O'Brien* test. The nightclub appealed.

HELD: The Seventh Circuit reversed, holding that the Village failed to show that public nudity generates adverse secondary effects.

DISCUSSION: Dix argued that its public nudity ordinance was not targeted at nude dancing per se, but at the deleterious secondary effects of nude dancing. The Court thus evaluated the ordinance under the *O'Brien* test, under which it would be upheld if "(1) [it] is within the constitutional power of the government; (2) [it] furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the restriction on alleged First Amendment freedoms is no greater than essential to further the government's interest."

The sticking point for the Seventh Circuit was the second prong—whether the ordinance furthers an important governmental interest. In lieu of proffering its own evidence, Dix cited Supreme Court precedent that stated "relying on the evidentiary foundation of harmful secondary effects set forth in previous caselaw provides an adequate rationale for passing a nudity ban." Accordingly, Dix argued, the ordinance passed constitutional muster because it was "intentionally modeled after public nudity bans that ha[d] been approved by the Courts as consistent with the Illinois and United States Constitution."

Foxxxy Ladyz countered that Dix had to provide data which showed the public nudity ban mitigated some identifiable harm (which it conceded could be from Dix or a similar municipality). The Seventh Circuit came to a similar conclusion in reviewing Supreme Court precedent. It cited the plurality opinion in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) which held that though "a municipality may rely on any evidence that is reasonably believed to be relevant for demonstrating a connection between speech and a substantial, independent government interest . . . . [t]his is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance."

The Circuit had previously applied this precedent in *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460 (7th Cir. 2009), holding that Indianapolis failed to meet the standard:

> "[It] approached th[e] case by assuming that any empirical study of morals offenses near any kind of adult establishment in any city justifies every possible kind of legal restriction in every city . . . . But because books (even of the "adult" variety) have a constitutional status different from granola and wine . . . the public benefits of the restrictions must be established by evidence, and not just asserted. The evidence need not be local; Indianapolis is entitled to rely on findings from Milwaukee or Memphis (provided that a suitable effort is made to control for other variables). But there must be evidence; lawyers' talk is insufficient.

As to the quantum and quality of evidence Dix had to provide, the Circuit Court indicated the Village should look to *Annex Books* again, wherein the Supreme Court made clear that municipalities do not have to conduct independent, new studies every time to justify a public nudity ban. However, evidence from other municipalities must demonstrate the undesirable effects of the behavior being regulated, and an effort must be made to control for the differenc-

es between the sample city and the one enforcing the law in question. ***Foxxxy Ladyz Adult World Inc. v. Village of Dix*, No. 14-1642 (7th Cir. Mar. 10, 2015).**

Police: Qualified Immunity Applies to Shooting of Passenger in Fleeing Vehicle

In a follow-on case arising from the Supreme Court's recent decision in *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014), a Tennessee federal District Court has rebuffed a claim by the estate of the passenger in the vehicle—who was also killed when police fired at the car driven by Donald Rickard—for damages from the West Memphis (Arkansas) Police Department (WMPD) and individual officers.

Kelly Allen was a passenger in the Honda Accord being driven by Rickard when it was stopped in Arkansas by WMPD officers for a missing headlight and then pursued into Memphis, Tennessee at speeds exceeding 100 miles per hour after police attempted to check Rickard for driving under the influence.

When Rickard's car was finally cornered by police cruisers and he nevertheless continued to accelerate towards officers and their vehicles, they fired numerous shots at the Honda, ultimately killing both Rickard and Allen. In *Plumhoff*, the Supreme Court determined that Rickard's endangerment of police and passers-by constituted reasonable grounds for police to use deadly force, defeating Rickard's Fourth Amendment-based Section 1983 action.

Allen's estate alleged that officer Plumhoff and others violated her Fourth Amendment rights when they shot her, that the WMPD was liable under Section 1983 for failure to adequately train and supervise officers and for maintaining a "policy, custom or pattern" that resulted in Allen's death, and that various defendants were liable under state law for negligence and intentional infliction of emotional distress.

HELD: Defendants' motion for summary judgment was granted.

DISCUSSION: To overcome defendants' qualified immunity, plaintiffs had to demonstrate that officers violated a statutory or constitutional right that was clearly established at the time of their conduct. The court looked to a case closely on point, *Cass v. City of Dayton*, 770 F. 3d 368 (6th Cir. 2014), in which a passenger was killed while police were attempting to stop a fleeing motorist. In *Cass*, the driver had driven into two officers in an attempt to escape, and the passenger had been shot. The language from *Cass* was instructive: "in assessing deadly-force claims involving vehicular flight . . . the critical question is typically whether the officer has reason to believe that the fleeing car presents an imminent danger to officers and members of the public in the area." Under that framework, "an officer may fire at a fleeing vehicle even when no one is in the vehicle's direct path..." (In *Cass*, just as in the *Plumhoff* fact pattern, officers were aware that there was a passenger in the vehicle).

Under *Cass*, an officer does not violate the Fourth Amendment where, although ultimately wrong in his or her assessment of the circumstances, a dangerous situation rapidly evolves to a safe one before the officer can discern the change. Based on this calculus, Plaintiffs' Fourth Amendment claim was dismissed; without a viable constitutional claim, their Section 1983 claim also failed.

Geography presented an interesting element of the case, because Tennessee law does not provide immunity for foreign officers. Confronted with an array of Tennessee state law claims, defendants contended that Arkansas law should govern their immunity. Tennessee law would allow the District Court to apply Arkansas immunity principles as a matter of comity, as confirmed in a 2013 Sixth Circuit opinion; however, "[b]ecause applying Arkansas immunity law would not affect the outcome of this case, the Court declines to do so."

Applying Tennessee's substantive law to plaintiffs' negligence arguments, the District Court found that defendants had not acted unreasonably. The reasonableness of defendants' actions also defeated plaintiffs' claims of intentional infliction of emotional distress, false arrest, and assault and battery, as well as their claim that West Memphis was vicariously liable.

The decision reverses a pre-*Plumhoff* denial of immunity for defendants. ***Estate of Kelly Allen v. City of West Memphis*, No. 05-2489 (W.D. Tenn., Mar. 24, 2015).** ML



Ordinances: *Cont'd from page 22*

even more evident).

The court found that R.C. 1509.02 was a "general law," meaning one that (1) is part of a statewide and comprehensive legislative scheme; (2) applies to all parts of the state and operates uniformly throughout the state; (3) sets forth police, sanitary, or similar regulations, rather than purporting only to grant or limit legislative power of a municipal corporation; and (4) prescribes a rule of conduct upon citizens generally. The court rejected the city's argument that the law is not applied uniformly because only the eastern part of the state has viable quantities of gas and oil. "We have recognized that a general law can operate uniformly throughout the state "even if the result * * * is that the statute does not operate in all geographic areas within the state." (*citation omitted*).

The essential question was whether the local ordinances conflicted with state law. The city argued that the Home Rule amendment was a broad grant of power allowing the city to impose reasonable conditions on oil and gas drilling within city limits~ the ordinances and the statute were not in conflict because the former addressed "traditional concerns of zoning" whereas the state statute regulated "technical safety" issues. The court found this distinction "fanciful," noting that the ordinances, which require applications for each drilling site and a one-year waiting period after city council approval, essentially prohibited drilling.

The court further found that the city's actions conflicted with the intent of the legislature, given the language of the statute which prohibits local governments from regulating in a way that discriminates or unfairly impedes the permitting, licensing, location and spacing of oil and gas wells.

Although it acknowledged the city's arguments that state and local governments should share regulatory responsibilities with respect to drilling, the court deferred to the legislature for such a resolution.

Concurrence: In what might be a touchstone for future local government fracking controls in Ohio, the concurrence emphasized that the opinion was limited to five ordinances which specifically regulated oil and gas drilling within city limits.

> I write separately to emphasize the limited scope of our decision; "our holding is limited to the five municipal ordinances at issue in this case." Lead opinion at ¶ 33. This appeal does not present the question whether R.C. 1509.02 conflicts with local land use ordinances that address only the traditional concerns of zoning laws, such as ensuring compatibility with local neighborhoods, preserving property values, or effectuating a municipality's long term plan for development without imposing a separate permitting regime applicable only to oil and gas drilling plan for development, by limiting oil and gas wells to certain zoning districts.[7]

Under this view, the terms "location" and "spacing" in the state statute related to the placement of wells on a tract. "Scientific expertise regarding the physical characteristics of oil and gas reserves is required to efficiently produce oil and gas, prevent waste, and protect the correlative rights of neighbors." In contrast, "that same scientific and regulatory expertise is not required to determine whether an oil and gas well is compatible with the character and aesthetics of a particular zoning district." According to the concurrence, "we generally presume that zoning authorities are far more familiar with local conditions and therefore are better able to make land use decisions." It suggested that the issue of whether the state statute would preempt a general zoning ordinance that addresses "traditional concerns of zoning laws," remains to be decided.

Dissent: The dissent did not find a stark conflict between the state and local laws. The Ohio Constitution had vested the General Assembly with the power to pass laws providing for the "regulation of *methods of mining, weighing, measuring and marketing* coal, oil, gas and all other minerals."

> R.C. 1509.02 has broad language stating that "regulation of oil and gas activities is a matter of general statewide interest that requires uniform statewide regulation" and that R.C. Chapter 1509 constitutes "a comprehensive plan with respect to all aspects" of the locating, drilling and operating of oil and gas wells in the state, including construction and restoration, permitting related to those activities, and the disposal of wastes.
> But the broad language of a preemption clause is not sufficient to create a conflict. We have never held that a preemption statement alone is sufficient to divest municipalities of their constitutional right to home rule. To the contrary, a declaration by the General Assembly of its intent to preempt a field of legislation "does not trump the constitutional authority of municipalities to enact legislation that is not in conflict with general laws. . . While important in determining whether a statute is a general law, a preemption statement alone has no relevance to the existence or nonexistence of any conflict between local and state regulations.[8]

For the dissent, the "vague declaration of intent to occupy the field" in the state statute was insufficient to show an actual conflict: "[N]othing in the statute expressly prohibits supplemental, non-conflicting local regulation. There is room for both state and local regulation for the drilling of oil and gas."

As the dissent noted, the overlapping of state and local laws has already been adopted by the highest courts in other jurisdictions considering fracking. Colorado, Pennsylvania and New York have each concluded that local zoning ordinances—where they do not expressly purport to govern drilling but instead relate to traffic or environmental issues—continue to have legitimacy and permit joint state and local authority over fracking. Such an outcome would be appropriate for Ohio:

There is no need for the state to act as the thousand-pound gorilla, gobbling up exclusive authority over the oil and gas industry, leaving not even a banana peel of home rule for municipalities. I would reverse the judgment of the court of appeals and remand to that court for further proceedings.[9]

Notes

1. http://www.commoncause.org/states/ohio/issues/fracking-in-ohio.html
2. http://www.ohio.com/blogs/drilling/ohio-utica-shale-1.291290/munroe-falls-to-appeal-home-rule-case-to-ohio-supreme-court-1.373583
3. *Id.*
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8. *Id.*
9. *Id.*

ML

Listserv *Cont'd from page 25*

for deer, elk, moose and bear jumping out of the woods every minute. What used to be where I went for a change of scenery will be my home country. The new things and old things were about in even balance, it seemed, as I kept an eye peeled for wildlife, and there appeared to be many coincidences in them. It will be interesting to see what happens next.

I will miss you, my listserv friends. There's a lot we don't know about each other, I suppose, but what we do know we know very well. You have helped me at least as much as I have helped any of you. We have done some good work together.

We work at the place in the machinery of democracy that theories are theories and what works is what works. There is no 'supposed to be' or 'should be.' It is what it is and we either make civilization happen every day, or it doesn't happen. We work on the retail floor of our federal system of government, and we do a mighty fine job of keeping the store stocked, well lit, warm and safe, and keeping the boss out of trouble. We are one of the great bargains in government and we add value to what we touch.

It is an honor to have had the harness on with you. I look forward to walking through this big change – and my new home country – with you.

The job comes with a 4-bedroom parsonage. This is the prettiest corner of the most beautiful region of the grandest run of the Rocky Mountains, with Glacier Park to the north, the Bob Marshall Wilderness to the east and spectacular, freshwater Flathead Lake – 30 miles long, as the crow flies – ringed with cherry orchards, to the south and west. I would have trouble believing my luck – this is so much more wonderful than anything I had dreamed of – if it didn't hurt so much to leave.

I'll keep a light on for you and I will continue to hang out at the Water Cooler. Don't be a stranger. My personal email address, jickaddy@gmail.com, is stable, and the website for the church is http://www.bigforkumc.org/ (Watch for manuscripts and podcasts of sermons and a lot more photos there come this Canada Day).

Now that you know the place, all you have to find is the time. Onward and upward. ML

Police Body Cameras *Cont'd from page 11*

See City of Minneapolis Body Camera Statement of Purpose http://www.minneapolismn.gov/www/groups/public/@mpd/documents/webcontent/wcms1p-133495.pdf

See also the website for the Spokane, Washington, Police Department Body Camera Pilot Program, https://beta.spokanecity.org/police/accountability/bodycamera/, which includes links to several additional body camera policies, including those adopted by Seattle, Denver, Phoenix, and Madison, Wisconsin, to name a few.

Notes

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4. Miller, Lindsay, Jessica Toliver, and Police Executive Research Forum. 2014. *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned* at pp. 5-6, Washington, DC: Office of Community Oriented Policing Services (available online at: http://www.justice.gov/iso/opa/resources/472014912134715246869.pdf).
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10. *See, e.g.,* DPD Mobile Video Recorder Policy at 419.5.1 - .3 (listing circumstances requiring activation of body cams, cessation of recording, and prohibited recording).
11. American Steamship Co. v. Hallett Dock Co., Civil File No. 09-2628 (MJD/LIB) (D. Minn. 2013). ML

Amicus *Cont'd from page 20*

jectively unreasonable. In other words, is there a subjective component (in this case the Seventh Circuit applied a recklessness test, which is similar to a deliberate indifference test) to excessive force claims under the Fourteenth Amendment or should these claims be analyzed like Fourth Amendment claims brought by arrestees?

This case is of particular importance to local governments given the fact that municipalities run the jail facilities that house pretrial detainees and an objective Fourth Amendment type standard will make it more difficult for correctional officers and local governments to win on summary judgment in Section 1983 cases brought by pre-trial detainees. IMLA has joined an amicus brief that is being filed by the State and Local Legal Center in this case. The brief argues that the Eighth Amendment standard should apply to pre-trial detainees given the practical realities of jails. Specifically, convicted inmates and pre-trial detainees are housed together in correctional facilities and officers often have no way of knowing whether an inmate is convicted or a pretrial detainee. Moreover, it is not feasible for officers to segregate pretrial detainees because of safety concerns and high turnover rates in jails housing pretrial detainees. Having one standard that applies to all inmates, whether convicted or pretrial detainees, provides the greatest level of protection for correctional officers and local governments while still ensuring inmates' constitutional rights are safeguarded. ML

Federal *Cont'd from page 19*

mon denominator," said Grijalva.[12]

In response to the new rules, 27 Senate Republicans immediately introduced a bill to block their implementation.[13] Typical of the dissonance on Capitol Hill, House Democrats simultaneously introduced legislation to ban all fracking on federal lands.[14]

It is still too early to determine how (and whether) the new rules will impact fracking. One thing is clear--the regulations only apply to fracking operations on federal lands; meaning that the majority of fracking operations, on private land, will not be affected. While the federal rules may provide valuable guidance, state and local governments will continue to play the major role in regulating America's fracking activities.

Notes

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14. Elana Schor, *Interior's new fracking rules get swift GOP backlash*, Politico, http://www.politico.com/story/2015/03/interiors-fracking-rules-ready-for-launch-116241.html. ML

Day in the Life *Cont'd from page 21*

Q. So even when you're not at "work" you're often thinking about all things legal, it sounds. Take a leap--if you weren't practicing municipal law, what would you be doing?

I'm really quite happy where I am. So unlike people who say they would direct movies or sail around the world, I'd stay close to what I'm already doing. If I wasn't a lawyer, I would probably be in urban planning or possibly an accountability officer somewhere. Policy, strategic planning and the law are a great combination! Nothing could be better. (Mary Ellen Bench was interviewed in March 2014 by *Canadian Lawyer*, from which some portions of this article was derived). ML

Supreme Court *Cont'd from page 28*

light of state ballot initiatives that legalize under state law the possession of small amounts of marijuana and provide for the regulation of marijuana production, processing and sale."[3]

This newest "Guidance Regarding Marijuana Enforcement" reiterated the list of priorities where the federal government would henceforth focus its enforcement energies, whether marijuana was being used as a medicine or for recreation:

1. Preventing the distribution of marijuana to minors;
2. Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
3. Preventing the diversion of marijuana from states where it is legal in some form to other states;
4. Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
5. Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
6. Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
7. Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
8. Preventing marijuana possession on public property.[4]

The memorandum confirmed that federal authorities would defer to vigorous and effective local enforcement activities:

> In jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana, conduct in compliance with those laws and regulations is less likely to threaten the federal priorities set forth above. . . In those circumstances, consistent with the traditional allocation of federal-state efforts in this area, enforcement of state law by state and local law enforcement and regula-

tory bodies should remain the primary means of addressing marijuana-related activity.[5]

However, where marijuana regulation efforts by state and local authorities were not adequately muscular, federal authorities would not only step up enforcement but could also seek to invalidate ineffectual or problematic state laws: "If state enforcement efforts are not sufficiently robust to protect against the harms set forth above, the federal government may seek to challenge the regulatory structure itself in addition to continuing to bring individual enforcement actions, including criminal prosecutions, focused on those harms."[6]

The memorandum also clarified that, while prior Justice Department pronouncements had advised that large-scale, for-profit commercial marijuana enterprises would be appropriate targets for federal prosecution, the emergence of state-sanctioned medical and recreational growers required a more nuanced approach going forward.

The Cole Memorandum and the posture it espoused was welcomed in Colorado and Washington, as well as the nearly two dozen states which allow medical use of marijuana. But subsequent federal inaction, despite the Memorandum's stated aim of preventing diversion from marijuana-friendly states to those where it is illegal, did not satisfy officials in Oklahoma and Nebraska. Faced with what they claim is a growing stream of travelers bringing ever-increasing amounts of ever- more potent cannabis into their states, they sought their day in court—in this case the Supreme Court.

Their Motion for Leave to File a Bill of Complaint, captioned as *Nebraska and Oklahoma v. Colorado*, was filed on December 18, 2014. The primary battering ram in the suit is the Supremacy Clause, which, they argue, requires federal enforcement of the Congressionally-parented CSA over Colorado's recent constitutional fillip.

Under the Supremacy Clause, the plaintiff states allege, Colorado's internal liberalization of a substance on CSA Schedule I cannot stand:

> Although states may exercise their police power in a manner which has an effect on drug policy and trafficking, a state may *not* establish its own policy that is directly counter to federal policy against trafficking in controlled substances or establish a state-sanctioned system for possession, production, licensing, and distribution of drugs in a manner which interferes with the federal drug laws that prohibit possession, use, manufacture, cultivation, and/or distribution of certain drugs, including marijuana.[7]

(In a step sure to further aggravate conservatives, the lawsuit also cites extra-territorial law in support of its argument: the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988).[8]

The pleading further points to deficiencies in Colorado's scheme which, even if it were somehow compatible with Supremacy Clause principles, would doom it on logistical grounds:

> Amendment 64 and its resultant statutes and regulations are devoid of safeguards to ensure marijuana cultivated and sold in Colorado is not trafficked to other states, including Plaintiff States. In passing and enforcing Amendment 64, the State of Colorado has created a dangerous gap in the federal drug control system enacted by the United States Congress. Marijuana flows from this gap into neighboring states, undermining Plaintiff States' own marijuana bans, draining their treasuries, and placing stress on their criminal justice systems.[9]

The suit is interesting on multiple grounds. As a procedural matter, the suit by two states against another could only originate at the high court: Under Article III, Section 2 of the Constitution, disputes directly between the states are heard solely by the Supreme Court. "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction." That exclusivity is further codified at 28 U.S.C. §1251: "Original jurisdiction. (a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States." By definition, there is no inferior, trial level tribunal to develop a record for appellate review, so this species of internecine dispute often requires the appointment of a special master to flesh out factual issues.

The Supreme Court's original jurisdiction is rarely sought and even more rarely granted. During the 170-year span from 1789 until 1959, the Court issued written opinions in only 123 original jurisdiction cases. Since 1960, it has been sought 140 times, with barely half receiving a hearing.[10]

The most typical candidates for such state-versus-state, original jurisdiction contests are disputes over boundaries or water rights. In fact, one such fight was just concluded late in February 2015. Ironically, a defendant in that case--which has been ordered to compensate a neighboring state for groundwater improperly taken from the Republican River Basin in contravention of federal law—is Nebraska.[11] Exercising the broad equitable powers conferred upon the Court under original jurisdiction, Justice Kagan upheld the findings of the special master in *Kansas v. Nebraska and Colorado*, 126 Orig. (Feb. 24, 2015): "Said another way, Nebraska recklessly gambled with Kansas's rights, consciously disregarding a substantial probability that its actions would deprive Kansas of the water to which it was entitled."[12]

Politically, the marijuana lawsuit sets up a curious conversation. Two attorneys general urge federal intervention on behalf of states which have long prided themselves on Tenth Amendment independence from Washington. Nebraska and Oklahoma are reliably anti-Washington on many issues, and Oklahoma AG Pruitt has been one of the more active attorneys general in challenging federal overreach. He filed a first lawsuit challenging the implementation of the Affordable Care Act, has been a leading critic of what he calls "the EPA's activist agenda," and is part of a multistate lawsuit challenging the constitutionality of the Dodd-Frank financial law.

Not surprisingly, the request for Washington's help bothers many constituents. In early January, State Rep. Mike Ritze, a Republican from Broken Arrow, Oklahoma and six other GOP lawmakers sent a letter to Attorney General Pruitt challenging his decision to join Nebraska in asking the high court to invalidate the will of Colorado's voters. They want Oklahoma removed from the fight. "This is not about marijuana at its core

— it is about the U.S. Constitution, the 10th Amendment, and the right of states to govern themselves as they see fit," Ritze said.[13] To this group of Republicans, the lawsuit undermines core principles and sets a dangerous precedent:

> If the Supreme Court can force Colorado to criminalize a substance or activity and commandeer state resources to enforce extra-constitutional federal statutes and U.N. agreements, then it can essentially do anything, and states become mere administrative units for Washington, D.C. Our Founding Fathers intended the states to be laboratories of self-government, free to tinker and experiment with different ideas. The founders, from Jefferson to Madison, were also strong proponents of states nullifying unconstitutional federal actions. If the people of Colorado want to end prohibition of marijuana, while I may personally disagree with the decision, constitutionally speaking, they are entitled to do so.[14]

The dissonance from his own colleagues puts AG Pruitt in a ticklish position. He clarifies that his lawsuit challenges only that aspect of Colorado's law that affects Oklahoma– the interstate trafficking of marijuana. "We will continue to work with the representative and others to ensure this critical distinction is communicated so as to hopefully address any confusion over the lawsuit's objectives. As a strong advocate for states' rights, I can assure the representative that if at any time our lawsuit risks impairment of any states' rights under the Constitution, I will immediately terminate the lawsuit."[15]

Rep. Ritze not only dislikes the lawsuit's legal premise, but he questions its factual foundation. He claims to have discussed the issue with state and local law enforcement and has found no statistical evidence indicating a significant problem with Colorado marijuana coming across Oklahoma's border. "We're kind of scratching our heads," Ritze said. "I would like the attorney general to show us where the problem is."[16] In that regard, there is evidence, anecdotal and documented, that border municipalities are incurring expenses as they prosecute and detain scofflaws.

Whether that inconvenience requires remediation at the Supreme Court is an open question. It is worthwhile noting that Kansas, who fought vigorously over water rights, has a border with Colorado longer than that of Nebraska and Oklahoma put together, and has not joined the marijuana war.

Scholars appear to give the lawsuit not much chance of success. Many argue that the correct defendant should be the federal government itself, which has the power to enforce its own laws. As Cornell Law School's Michael Dorf points out, that power does not morph into a right to compel states to enact laws paralleling federal statutes; under the 1992 Supreme Court ruling in *New York v. United States*[17] such "commandeering" of state legislatures would contravene state sovereignty. Nor may Congress require state executive officials to enforce federal law. That too would be impermissible commandeering under Justice Scalia's opinion for a conservative 6-3 Supreme Court majority in *Printz v. United States.*[18]

Therefore, Colorado is not obligated—and cannot constitutionally be given an obligation—to enact its own laws prohibiting marijuana or to enforce federal laws which do so.

As Professor Dorf sees it, the entire CSA preemption argument is misguided:

> It should now be apparent that the Nebraska and Oklahoma lawsuit rests on a conceptual error. The Colorado laws purporting to "legalize" marijuana in fact do no such thing. What they actually do is to modify state laws that previously prohibited marijuana, so that now people who comply with the state's regulatory requirements will not be subject to state prosecution for marijuana cultivation, distribution, or possession. But because Colorado has and can have no federal obligation to forbid marijuana at all, this substantial loosening of its prohibition does not contravene federal law. There is no preemption of state non-criminalization of marijuana via the CSA—and if there were, that would contravene the anti-commandeering rules of *New York* and *Printz*.[19]

At the end of the day, basic fiscal arguments may prevail over more esoteric and academic discourse. It is hard to quantify the ultimate financial gain to Oklahoma and Nebraska in the unlikely event their lawsuit were to succeed. Meanwhile, scarce resources are no doubt being spent to advance a questionable constitutional premise. Rep. Ritze from Broken Arrow may have a significant six-shooter in the showdown. "In a budgetary crisis, now we're going to go out and spend potentially thousands of dollars on this lawsuit," he says. "We might consider something that would rein in attorney general expenses."[20]

Notes

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7. Plaintiffs' Motion for Leave to File a Bill of Complaint, Nebraska and Oklahoma v. Colorado (filed December 18, 2014).
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12. *Id.*
13. The Oklahoman, January 5, 2015. http://newsok.com/oklahoma-attorney-general-scott-pruitts-lawsuit-against-colorado-pot-law-draws-opposition/article/5381911
14. *Id.*
15. Id. The lawsuit's citation of United Nations law also arouses ire: "That's one of our major concerns, using U.N. treaties to trump states' rights," Ritze said.
16. *Id.*
17. 505 U.S. 94 (1992).
18. 521 U.S. 898 (1997).
19. https://verdict.justia.com/2014/12/31/nebraska-oklahoma-take-colorado-supreme-court-legalized-marijuana
20. *The Oklahoman*, *supra* note 10. **ML**

the local practice endorsed nonetheless amounts to negligent driving and second, the trial judge in effect created two categories of drivers; ill-defined ordinary rural drivers who frequently run stop signs, and all other ordinary drivers who habitually obey stop signs. He noted that the *Highway Traffic Act* creates a uniform set of rules of the road, which applies to all drivers, whether they drive on city roads or rural roads. There cannot be one standard of reasonable driving for rural drivers and another for city drivers. There is one standard of reasonable driving and that standard requires drivers to obey traffic signs.

Procedure: By-law Amendment Quashed Where City Council Breaches Procedural By-law.

***Toronto Taxi Alliance Inc. v. City of Toronto,* 2015 ONSC 685**

The Toronto Taxi Alliance (TTA) commenced an application under section 213 and 214 of the *City of Toronto Act*, 2006, seeking to quash the resolutions and by-law amendments passed by Toronto City Council on the ground that Council failed to give proper notice regarding its intention to enact changes to the taxi licensing regime, failed to follow its own procedural rules, and acted in bad faith. By way of Council resolution, the City of Toronto changed the taxi licensing system in Toronto from a two-tiered model to a one-tiered, owner-operated model. The former taxi licensing system included three forms of taxi owner licenses: Standard Taxicab Owner Licenses (STL), Ambassador Taxicab Owner Licenses (Ambassador), and Accessible Taxicab Owner Licenses (Accessible). Each of these licenses had unique conditions attached to it, most notable were the benefits attached to STLs, which included transferability and leasing. In 2011, the City began consultations to update taxi licensing industry. This led to the recommendation to create a single taxi license, to be known as the Toronto Taxi License (TTL). The TTL would have more favorable conditions attached to it than were attached to the Ambassador licenses, but would reduce some of the benefits attached to the STLs. The applicant, TTA, was composed primarily of those who hold STLs and opposed the proposed new system. City Council at its meeting on February 19, 2014, passed resolutions providing for the implementation of the TTL regime as of July 1, 2014, and for the mandatory conversion of all STL's to TTL by June 30, 2024.

HELD: The mandatory conversion date of June 30, 2024, was quashed.

DISCUSSION: At the onset of the analysis of the issues, Justice Stinson began with the general rule that courts must show deference to municipalities and should be reluctant to interfere with the decisions of municipal governments that address matters within their jurisdiction.

The Court held that the City of Toronto did not have an obligation of procedural fairness that required it to provide notice of its intention to approve the TTL regime at its February 19, 2014, Council meeting. Relying on the well–established case law that a municipal council acting legislatively does not have a common law duty of procedural fairness to parties who may be affected by its actions, the question became whether the City Council changes to the taxi licensing regime, were a legislative or an administrative function. Justice Stinson ultimately determined that it was exercising a legislative function.

The Court found that City Council provided adequate notice of its intention to consider the TTL regime. However, it did breach its own procedural by-law by failing to provide proper notice of its intention to issue an imposed mandatory deadline for all taxi licenses to be converted to a TTL regime.

Justice Stinson considered the effects of any breaches of the procedural by-law on the legality of the amendments to the taxi licensing by-law, noting the courts' power to review the actions of municipalities and to quash by-laws or other enactments on the ground of illegality. The Supreme Court in *London (City) v. RSJ Holdings Inc.,* indicates that the finding of illegality does not necessitate that the resulting enactment be quashed; the decision to quash is within the court's discretion. The Court provides an overview of the distinction between a technical and substantive procedural breach of a procedural bylaw. When a municipality's failure to follow its procedural by-law is 'an error of a substantive nature going to the root of the validity of the by-law', the court is not precluded from intervening and quashing the resulting enactment for illegality. In subsequent decisions where courts have refused to quash by-laws, the courts have consistently referred to 'mere technical breaches'. Justice Stinson found that the breach of failing to provide notice of the mandatory conversion deadline did rise to the level of a substantive breach. This was because the breach of the no notice requirement led to an omission going to the heart of legislative transparency, and cannot be called merely technical. Therefore, Justice Stinson quashed the automatic mandatory conversion date of June 30, 2024. Justice Stinson did not, however find bad faith by Toronto City Counsel. ML



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