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Uber Comes to Town: How to Level the Playing Field in a TNC World

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THE MUNICIPAL LAWYER MAGAZINE



PREEMPTION FOCUS:

UBER COMES TO TOWN: HOW TO LEVEL THE PLAYING FIELD IN A TNC WORLD

By: Matthew W. Daus, Windels Marx Lane & Mittendorf LLP, New York, NY

Deftly wielding political influence at statehouses around the country, Uber has forestalled much local regulation and created a privileged class of transportation providers. Many steps can be taken to produce more parity while enhancing public safety.

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AVOIDING THE WALK OF SHAME: SHORT-TERM RENTALS IN MIAMI BEACH

By: Jesse T. Greene, LLM, George Washington Law School, June 2017

In 2009, Florida's legislature pronounced that municipalities in the state could not thereafter enact or broaden laws limiting short term rentals. Miami Beach proceeded to implement first-time fines of $20,000 for illegal STRs. Are the new sanctions sustainable?

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OPIOID ABUSE AT WORK: NOT JUST ANOTHER DAY IN EMPLOYER PARADISE

By: Lawrence L. Lee and David C. Roth, Fisher Phillips, Denver, Colorado

The number of American workers addicted to pharmaceuticals is skyrocketing. While illegal drug use at work may justify termination of employment, addiction to prescription pain killers requires a far more nuanced response from employers.

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Drowning Out Local Government

Municipal autonomy is under attack. From notorious cases--Florida's recent attempt to deprive localities of the basic authority to regulate businesses, North Carolina's banning of local LGBTQ prerogatives or Texas' defunding of 'sanctuary' cities (and threatened prosecution of their officials) come to mind--to lower-profile incursions like prohibitions against controlling plastic containers, state legislatures are inexorably depriving cities and counties of the initiative needed for effective self-government. Whether the issue is broadband, fracking, drones, zoning, transportation, marijuana, environmental control, civil rights or a host of others, city councils and their constituents increasingly find their voices ignored.

IMLA has always spoken out on behalf of municipal autonomy and is amplifying that effort in the current environment--through IMLA Executive Director Chuck Thompson's formation of a newly dedicated preemption task force, and redoubled amicus advocacy on behalf of localities battling state overreach.

Municipal Lawyer adds its support. Our July-August lead writer critiques the unequal, two-tiered regulatory environment established by Uber and the transportation network companies—driven in no small part by preemptive statewide policies. A second feature looks closely at the Miami Beach short term rental ordinance, including its massive fines for violation, in light of Florida's preemptive legislation freezing local STR laws. And our Code Enforcement article explores the critical role played by local enforcement authorities despite being undermined by centrally-mandated uniformity.

Our final feature covers a different--but no less worrisome--threat to local governments. The growing nightmare of opioid addiction, as fentanyl, oxycodone and scores of other over-prescribed pain killers reduce high-functioning workers to unreliability, presents significant pitfalls for municipal employers, and caution is required. Here, ironically, is where localities desperately need outside involvement.

IMLA will do its best to continue informing our members of developments in local government law, and to promote vigorously the rights of municipalities—including through sessions specifically devoted to preemption at our upcoming Conference in Niagara Falls. Please let us know how we can be even more effective in that endeavor.

Best regards,

Erich Eiselt

PRESIDENT'S LETTER

Professional Development and Wine Country



Mary Ellen Bench, IMLA President

Happy Canada Day to IMLA members on both sides of the border!

I have had a busy couple of months attending IMLA events including the mid-year, IMLA in Canada Day in Port Credit, and the amazing Top 50 in Philadelphia. I learned a lot and was happy to see so many engaged members at each of these events. We all have so many new issues to deal with and new challenges in managing law offices, that IMLA can help us build the networks we need to keep on top of it all.

Now that those events are behind me, I am doing what I consider to be my duty to host the upcoming IMLA Annual Conference in Niagara Falls and visiting some of the local establishments to be best able to make recommendations on places to go for lunch or dinner, or just a tour, when time allows. With so many apps that provide all manner of information about locations and rate restaurants, I may not need to do this, but one cannot be too careful!

Here's an insider's hint: When you see "VQA Ontario" on a bottle of wine, it tells you the wine is made from 100% Ontario-grown grapes. VQA stands for Vintners Quality Alliance, the body that sets the standards for wine making in the Province, and the Niagara region is one of three appellations that are within the Ontario VQA system. Ontario has a cool climate, excellent for growing grapes, and is well-known for its "coolest" wine, Icewine—which I may have mentioned previously. Icewine can be made from several varietals of grapes and by allowing them to freeze naturally on the vine, the flavours become more intense and so does the sugar. Please take an opportunity to try it when you are at the Niagara Conference.

I suggest that those who are interested in taking a few days to explore Ontario's wine country check out this website: www.winecountryontario.ca, and take turns being the designated driver so all can have a turn to enjoy! The site has a lot of information about the various vineyards, restaurants and accommodations in both Niagara-on-the-Lake and in nearby Twenty Valley and the Niagara Escarpment. It also has a great trip planner. If you are staying a few days and looking for a small but wonderful town to stay in, I can highly recommend Niagara-on-the-Lake. The town is old by North American standards, with buildings dating back to the War of 1812 era. I mention the War of 1812 because it appears to be an event in our shared history that we may have different views about, depending on which side of the border you grew up on. Niagara -on-the-Lake features many superlative places to stay that can be found under the banner of the Vintage hotels (www.vintage-hotels.com)--my personal favourite is the Prince of Wales.

Now for my research. If you head out towards Niagara-on-the-Lake (where our Executive Director Chuck Thompson says he experienced "the best meal ever," so ask him for specifics), you will find some extraordinary places to eat and drink. If you are looking for someplace casual and small, at the entry to the town there is Backhouse, with a seasonal menu, and the Garrison, with the best burgers in the area, made from brisket. The wineries have created fabulous restaurants as well, and I highly recommend a visit to neighbouring properties at Peller Estates and the Two Sisters. Wayne Gretzky just opened a new distillery as well, and for hockey fans, he and his dad have been known to frequent it. They have a great mixologist on staff at the bar so remember to ask Zac to make you something special. Many craft breweries are popping up as well that are worth a visit. Before you get all the way to the actual town of Niagara-on-the-Lake you will pass through an area still known as St. David's where Ravine Winery serves a very nice meal with their own wines to compliment.

If you head in the direction of the Niagara Escarpment, you can enjoy a wonderful meal with award- winning wines at the Coach House Café at Henry of Pelham (please note I have a conflict as my cousins own and operate this establishment). They are famous for their Baco Noir and Icewine, among others. And last week I discovered a winery called the Good Earth that was exceptional. It has an outdoor pizza oven as well as an interesting menu, and the best pink Pinot Grigio around. While out that way, please look up Upper Canada Cheese, which pairs well with any of the wines. All of these, and many more, can be found on the wine country website and built into a trip planner, so it couldn't be simpler. Best is to do a couple of days at each. If you sign up for the land use tour at the Conference you may even get to visit one of them on official business!

With the Conference now only months away, please check out the excellent program and register if you have not already done so. Our IMLA team has created some great events for you including an opening reception at Table Rock at the brink of Niagara Falls, a walk under the Falls, and a great movie ride for your enjoyment. I hope you also take a few minutes to check out our sponsors, as without their support and enthusiasm, it would be a very different event. Your Host Committee (Heather Salter (City Solicitor, St. Catharines), Ken Beaman (City Solicitor, Niagara Falls) and me, with help from Nicole Auty (City Solicitor, Hamilton) and Jennifer Feren (Niagara Region school board), look forward to greeting you! ML

Uber Comes to Town: How to Level the Playing Field in a TNC World

By: Matthew W. Daus, Partner, Windels Marx Lane & Mittendorf LLP, New York, NY



Since the advent of Transportation Network Companies (TNCs) such as Uber and Lyft, many laws have been enacted to permit them to enter the market, through partial deregulation and self-regulation. In the US, these statutes have been primarily passed at the state level after TNCs circumvented local opposition.[1] The result is that TNCs–a hybrid form of "on-demand" taxi service using a taximeter–like fare calculator inside a smartphone application (app)–often operate with unlicensed vehicles and drivers, and with little or inadequate insurance coverage. These new cookie-cutter laws define TNCs as performing the same exact activity performed by taxicabs and limousines, i.e. transporting a paying passenger from point A to point B, but specifically exclude incumbent operators who could benefit economically from relaxed regulatory burdens.[2]

There is no question that the disruption created by TNCs has set the stage for a paradigm shift. Decades of transportation policy, which sought to minimize personal motor vehicle (PMV) usage, is now swamped by millions of additional TNC miles being driven, often by less experienced and part-time drivers. TNC drivers are encouraged by so-called "surge pricing" to work during peak demand times when traffic and environmental conditions may be at their worst.[3] They may also be encouraged, due to significant fare reductions recently enacted, to work even longer hours to achieve the same economic benefits, possibly contributing to driver fatigue and unsafe working conditions.

With every cloud, there is hope for a silver lining. With TNCs, the solution could be an awakening of high-level transportation policy planning that re-imagines the transportation ecosystem for our sustainable future, with all modes and technologies in mind. Whether regional and metropolitan planning organizations. local for-hire or taxicab regulators, or local or regional departments of transportation and/or traffic agencies, all sectors of the industry must work together to plan the future role of taxicabs, for-hire vehicles, TNCs, and all other forms of transit. Further, governmental bodies must work with the private sector, as well as academia, to quickly envision comprehensive multi-modal transportation plans.

Allowing disruptive profit-motivated companies to make their own laws and policies while violating established regulations that, inconveniently, do not conform to their business models, leaves decades of mobility management and transportation planning to discourage PMV use at the curb. The goal should be to fit these new modes into a broader plan that encourages equitable, safer, and more environmentally sustainable transportation solutions, while preserving or redirecting the roles of incumbent stakeholders.

In the aftermath of TNC disruption, governments are now beginning to view this planning process as not just about road and mobility management, but also involving shared mobility,[4] connected[5] and autonomous vehicle technology,[6] smartphone technology, and data sharing platforms. All of these new technologies can increase inter– and intra-modal connections among public and private transit, including airports. To this end, seminal questions that must be addressed include: Should federal, state and/or local governments regulate, and should there be street enforcement, automated enforcement, and/or self-regulation with auditing?

I. Who Should Regulate? – Federal, State and/or Local Roles

Taxicab service (street hails, taxicab stands, and pre-booked service) has traditionally been regulated locally. For-hire services, which include liveries, black cars, sedans, and limousines that are pre-arranged or pre-booked (not street hails) have been regulated more loosely than taxicabs at the state and local levels. Federal regulation is unlikely to work logistically or legally, given the parameters set by the Constitution, which only permits regulation for vehicles engaged in interstate commerce. However, federal laws and appropriations to provide research, incentives, disincentives, and technology pilot programs could help guide more uniform state and local policy.

TNCs have, for the most part, pushed for statewide regulation, because doing so involves less lobbying, legal, and media-related resources than engaging with a much larger number of municipalities. TNCs recognize that states typically lack the same enforcement capabilities as localities, and it is no mistake that state regulation has

been sought. They have been largely successful in this effort; today, 46 states have passed TNC laws, in many cases preempting localities from enacting their own regulations.[7] The result has often been an inadequate patchwork. While it is difficult to enforce safety standards at a state level, some safety standards could be uniform with regard to basic safety and licensing of professional drivers. For all private for-hire transportation including TNCs, minimum requirements should include: uniform insurance coverage (whether on- or off-duty); biometric (fingerprint) background checks;[8] reasonable licensing fees that cover the cost of issuing licenses; driving record licensing restrictions; and uniform rules of driver conduct. Although states could set licensing criteria or issue licenses, enforcement should always be either local or regional for all for-hire modes.

Other issues are best left to municipalities: setting fares; regulating for consistency and transparency, when necessary, for for-hire vehicles or pre-arranged fares; limiting the number of permits; and assessing supply and demand.

These rules should be locally-sourced, given diverse standard of living and wage considerations, and demand for myriad types of services, across localities, regions and neighborhoods.[9] Sustainability initiatives should also be implemented at a local level, as street grids and transport systems, population density and road configurations vary widely. Managing the growth of TNCs is a worthwhile endeavor, both for the economic benefit of drivers and for traffic congestion, and this analysis is simply better performed at a local or regional level.

Despite these challenges, states can, in theory, effectively protect consumers and set overall "baseline" licensing standards for professional drivers, including the safety and accountability of the vehicle, driver and transportation business. These protections should apply to every community and passenger in the state, and could include penalties for overcharging passengers and having improper levels of insurance, as well as mandating vehicle inspections, emissions and licensing standards,– all to be enforced at a local level. (Multiple permits and redundant local licensing fees can be reduced by regulating at a state or regional level, as many car services currently must display multiple municipal permits on their vehicles to transport passengers between adjoining intra-state jurisdictions).

II. How to Most Effectively Level the Playing Field between TNCs and Taxicabs

The term "Leveling the Playing Field" (between TNCs and taxi companies) was first used in early 2015 at a conference of transportation regulators, and is now common parlance among industry stakeholders, officials, the media, and academics. The phrase seeks to address the regulatory and financial advantages that TNCs have over the incumbent taxicab, for-hire and limousine industries, all of which are engaged in virtually the same regulated activity. There are many ways a "level playing field" can be accomplished, and the bigger question is: do policymakers apply a "Band-Aid" approach that does not narrow the equity gap, or do they engage in radical, but necessary, reconstructive surgery to permanently fix the underlying conditions?

The same basic public safety and fiscal responsibility standards should apply for all vehicles and drivers - whether TNCs, taxicabs, liveries or limousines. The activity subject to regulation involves a simple premise: passengers reserving or hailing a vehicle for hire to go from one point to another. Ensuring that drivers meet basic safety standards, subjecting them to accurate criminal background checks, and requiring them to obey conduct standards, is a universal necessity, and the process should be exactly the same for any drivers, vehicles or businesses engaging in for-hire transportation. Several cases have addressed the disparity in treatment between taxis and TNCs.[10] Most recently, in June 2017, the U.S. District Court for the Eastern District of Pennsylvania refused to dismiss Philadelphia taxicab operators' claims that the Philadelphia Parking Authority (PPA) violated their Equal Protection rights and that the PPA's refusal to regulate TNCs amounted to an unlawful taking of the value of their medallions.[11] Irrespective of constitutional challenges, there are also ethical and fair competition issues regulators and policy-makers must address. The question is not how TNCs and incumbent industry players differ – because, in terms of safety concerns, they do not.

It may be just a matter of time before TNC laws are vacated or revised due to the realization that disparate standards without a rational basis is bad policy. Either way, legislators may find themselves back at the proverbial drawing board. The question then becomes not whether the playing field is leveled, but where will that level be? The answer is probably somewhere in between the two constituents' positions: There will be stricter standards than in current TNC laws, but partial deregulation for all modes may also occur (benefitting both TNCs and incumbents).

Thus far, TNCs have avoided serious legal challenge, allowing them to gain market share–while expecting that at some point, courts and/or public opinion may shift the balance. This shift may only happen after years of legal, media, and public relations battles, but there lies an opportunity to re-craft the entire system in a manner that benefits all stakeholders. The key issues in such a re-balancing will be: (A) Driver Criminal Background Checks and Vetting; (B) Automobile Liability and Related Insurance Coverage; (C) Licensing Fees, Limits and Market-Entry; (D) Data Security and Privacy: (E) Sustainability; (F) Equity and Underserved Community Service; (G) Wheelchair Accessibility; (H) Universal Taxi Apps; and (I) Self-regulation.

A. Criminal Background Checks- Name Checks or Biometric Fingerprints

The issue is not to create a different scheme of background checks for TNCs, but to have consistency in the type of checks, and who performs them. State laws should require all drivers of vehicles for hire to undergo biometric fingerprinting performed by the government (or a government contractor), and every state should authorize federal access and rap-back service[12] for localities, so as to be notified of new convictions.

In 2015, Uber found that more than 500 of its Houston drivers were operating

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Matthew W. Daus is the former Commissioner/Chair and General Counsel of the New York City Taxi and Limousine Commission, and currently serves as: Distinguished Lecturer at US Department of Transportation's University Transportation Research Center (UTRC Region 2 – New York, New Jersey & Puerto Rico) at the City University of New York (CUNY); pro bono President of the International Association of Transportation Regulators (IATR); and Partner & Chair of the Transportation Practice Group at the law firm of Windels, Marx, Lane & Mittendorf, LLP.

How to Level the Playing Field Cont'd from page 7

without a proper license and had not undergone the City's fingerprint-based background check.[13] In April 2017, it was revealed that Massachusetts had revoked the operating authority of more than 8,000 TNC drivers under a new state background check system. The state reviewed the records of nearly 71,000 drivers who had already passed the TNCs' own background check and rejected 8,206 (about 11 %). According to the report, "[h]undreds were disqualified for having serious crimes on their record, including violent or sexual offenses, and others for driving-related offenses, such as drunken driving or reckless driving."[14]

In a May 2015 study that I co-authored, a panel of academics, criminologists, law enforcement officials, and security experts endorsed several conclusions.[15] The following are our findings and recommended best practices:

Biometric criminal background checks are more accurate than self-regulated name checks. Name checks or social security checks are prone to data entry errors, rely on potentially erroneous information provided by the applicant, and do not automatically include "hits" for aliases. Fingerprint checks have a potential error rate of less than 1%,[16] while a name-based background check can have a potential error rate of 43%,[17] according to statistics developed by the Terrorist Screening Center.

Governmental regulatory agencies – not private companies – should apply uniform licensing standards to TNCs, taxicabs, and limousines. A uniform licensing standard and review procedure for driver criminal conviction histories provides for more accountability when the licensing decisions are made by the government– a neutral party with more secure and thorough background information.

Lesser criminal background checks for TNCs than for taxicabs and limousines may be unconstitutional;[18] it is bad policy, endangers the public, and fosters unfair competition. Requiring biometric checks for taxicabs and limousines, but only name checks for TNC drivers may result in an adverse report being placed in personnel files unseen by any government regulator. This double standard lacks a rational basis and is possibly unconstitutional. Drivers engaged by transportation apps and dispatch systems used by taxicabs, limousines, and TNCs are all performing the same service, regardless of the number of hours driven per week or the means by which the trip is procured.[19]

B.Insurance – 24/7 Commercial or Supplemental App On/Off Coverage

Insurance underwriting is typically regulated state-wide and is based upon risks associated with the types of licensed vehicles and their size or seating capacity. TNCs in many jurisdictions allow drivers to use personal auto insurance policies, which may not cover commercial uses such as TNCs, leaving passengers uninsured. In other jurisdictions, TNCs use supplemental insurance that attributes different coverage for different "periods" (*e.g.* when the app is on, when the driver has received a request but is not yet engaged in a TNC trip, and when the passenger is in the vehicle). This varied insurance raises concerns about potential gaps in coverage and the risk that claims may be denied. Even in those jurisdictions which require full commercial insurance, there are difficulties associated with verifying that the insurance is in fact in place. Accordingly, a uniform licensing standard, based upon vehicle capacity, risk and performance, and not simply upon the type of license, should be adopted. The same insurance products should be offered to all who fit into various underwriting categories, including workers' compensation coverage and supplemental policies.

What does not make sense is to allow PMV policies, which contain commercial or for-hire exclusions, to insure TNC drivers when backed with supplemental coverage by the TNC enterprise. This inequity allows TNCs to entice taxicab and black car owners/drivers to turn in their more expensive commercial policies and obtain cheaper personal primary auto insurance providing minimal coverage, with the extra insurance costs paid for by a multi-billion dollar company. It is a model that small and mid-size taxicab and limousine businesses cannot afford, and another instance where the TNCs' massive financial power is crushing an incumbent industry.

C. High TNC License Fees = Another Medallion System?

Also overlooked in the TNC debate are high licensing fees that may serve as a barrier to entry for small businesses or the incumbent industry. This not only hinders for-hire and limousine drivers from becoming TNCs, but also may be creating a new quasi-medallion system. For example, in Virginia and New York, there is an initial TNC license fee of $100,000 and a fee of $60,000 each year to renew.[22] New Jersey and Arkansas charge annual permit fees of $25,000 and $15,000 respectively. Georgia applies an fee system that scales depending on how many vehicles a TNC has operating. For 1,000 or more vehicles, the state charges $300,000 plus $1,000 for every additional 100 vehicles annually. For all the criticism levied by TNCs against entry limitations and the taxi medallion system, the TNCs have created a unique category wherein only well-financed companies can operate. These high licensing fees serve as a barrier to entry and create an even more uneven playing field.[25]

The long-term concern is that the TNCs, which are attempting to decimate taxicab medallion values, will, at some point - after completely controlling the market or being forced to limit the number of vehicles - acquiesce to a property right-based TNC medallion system. This move would be the ultimate in hypocrisy, but would nevertheless aid these billion-dollar companies to move forward with an Initial Public Offering (IPO); or, alternatively, to offset IPO-related criticisms of their alleged valuation once made public and scrutinized by financial experts.

D. Data Security and Privacy Protections

Data privacy and security standards are in place for taxicabs and limousines to ensure that the use of credit and debit cards is secure, and that passengers' personal and private data is not hacked or breached. There have been incidents of TNC data being hacked and accessed, and the same security measures that apply for data security standards (such as

Payment Card Industry (PCI) compliance standards) should also be in place for TNCs.[26]

A good model for smartphone app fare payment processes to protect passenger information would be the New York City for-hire vehicle standards. In New York City, if a base collects or maintains passenger "Personal Information," or passenger geolocation data, the base owner must file with the Taxi and Limousine Commission ("TLC") a current detailed information security and use of personal information policy. Such policy must address, at a minimum, access to passenger and driver personal information; passenger consent; legality of the purpose for data processing; notification procedures in the occurrence of a security breach; compliance with payment card industry standards; and use of passenger geolocation information.[29]

New York City law specifically requires any base that files a privacy policy with the TLC to comply with such policy. In addition, if the =base is required to make disclosures under New York State or Federal law regarding security breaches, the base owner must inform the TLC immediately following such disclosure(s).[31]

E. Ensuring Sustainable & Shared Mobility Growth

Unbridled growth is not good for driver economics, and could lead to market failures as well as increased traffic congestion and externalities. The taxicab medallion system was created following the Great Depression to address an oversupply of taxicabs and the inability of taxi drivers to earn a livable wage.[28] The best way to level the playing field is to monitor TNC growth and restrict it under certain circumstances.

In order for localities to better analyze the volume and nature of TNC activities on their roads, TNCs should be required to provide data in an anonymized format or lockbox via a third party administrator hired by the government. The law can create an exemption from Freedom of Information Laws (FOIL)[29] - which could otherwise be an open platform for public use of the data –and allow access exclusively to government regulators for clearly defined investigatory or data collection purposes (i.e. for fare increases; traffic or environmental studies; to investigate crimes and complaints; or to return lost property). There is a precedent where some states have made FOIL exemptions for information from financial firms managing the state's pension funds, finding that such information is proprietary.[30]

TNC growth could be capped, or monitored and managed, with incentives for vehicles and services that promote environmental sustainability, mitigate against emissions and congestion, and promote equity via wheelchair accessibility and service to underserved areas. Localities could tap into data and limit growth of traditional point-to-point TNC service while allowing for more clean air vehicles, wheelchair accessible vehicles, and shared ride services. Road, traffic planning, and mobility management should be factored into the incentive plan, which can include dedicated airport areas and stands, and dedicated lanes used exclusively for those services that assist in overall public policy goals. A variety of methods could be employed, including requiring that TNCs utilizing a certain number of vehicles commit to equitable and sustainable growth, or be subject to limits on growth that would only be relaxed following Environmental Impact Studies from independent and objective consulting firms hired by the government, but paid for by TNCs.

The future of urban transportation will rely, in part, on micro-transit and shared mobility. Long before autonomous and semi-autonomous or connected vehicles become commonplace, passengers will need to share common destinations and rides, not only to help the environment, but also to address economic inequality and to plug public transit gaps. The TNC model, through services such as Lyftline and Uberpool, as well as the first such service, Via in NYC, are true ride-sharing models that should be encouraged if TNCs are allowed to continue to their explosive growth.

F. Ensuring Equity - Affordable Rides and Fair Competition for All Passengers

A primary concern raised repeatedly relates to so-called "surge" or demand pricing. There are serious issues as to transparency for consumers, as well as the pressure on drivers to work during peak demand times that may include rush hour in dense urban environments and central business districts. To level the playing field, there are two possible solutions: (1) eliminate double and triple demand pricing for TNCs; or (2) allow taxicabs to engage in demand pricing on a similar scale. If "surge pricing" is allowed, it should be limited in some way during certain hours and locations throughout the community (i.e. central business districts during rush hour; or prohibited during emergencies like storms, blizzards or other catastrophes). The surge system should not be manipulated by TNCs or their drivers, and TNCs should supply data to regulators who can ensure that underserved communities are not surge-priced, or that a certain number of vehicles can be dedicated to operate in underserved areas.

G. Wheelchair Accessibility & Public Paratransit Reforms

One area where TNC laws fall short is the obligation, shared with taxicabs and for-hire vehicles, to provide equivalent service to disabled passengers.[31] The United States enacted laws such as Section 504 of the Rehabilitation Act of 1973[32] and the Americans With Disabilities Act (ADA) which prohibit discrimination on the basis of disability in, among other areas, transportation, and which require government-sponsored/subsidized transportation to provide accessibility for all U.S. residents, including for individuals with disabilities. The ADA specifically addresses the issue of private entities that provide taxicab service– a passenger cannot be discriminated against due to his or her disability and must be provided service at the same cost and without refusal by the driver to stow mobility devices.[33] This is also true for private entities that provide other transportation services, such as limousine companies and car services.[34]

Progress in transportation accessibility has been exhibited at both the federal and state level for taxicabs[35] and the for-hire vehicle industry[36] but slowed with the proliferation of TNCs. An inherent problem with the TNC business model in terms of providing accessible transportation for people with disabilities rests with "drivers who use their own vehicles." There are few TNC drivers who operate a wheelchair-accessible vehicle, and even those who do may not be properly trained to deal with the needs,

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Opioid Abuse in the Workplace: Not Just Another Day in Employer Paradise

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The City of Paradise Beach has a population of 200,000 residents, a highly-ranked public school system, and takes pride in its low crime rate. Paradise Beach is also known for its spacious and well-maintained parks, public swimming pools, municipal golf courses, and bike trails that cover approximately 25 square miles of lush green landscape. The City's Parks, Recreation, and Links department maintains these amenities with 19 employees, which include landscapers, tree trimmers, groundskeepers, regular maintenance staff, and two office assistants.

Sloan Waverly has been the Assistant Director of Parks, Recreation, and Links for12 years, and has always received above average to outstanding scores on her performance evaluations. Although she is generally in the office three days per week, Waverly's duties require that she drive in her City vehicle to ensure that her staff's work is being safely completed and that no dangerous conditions exist for the public. One year ago, while helping to trim a large elm tree, she fell and injured her back, sustaining a concussion. Since that time, Waverly has received prescriptions of the opioids Demerol, Vicodin, and Percodan for frequent headaches and constant back pain. She generally presents well when providing reports to management or to the Paradise Beach City Council. She has also received accolades from her workers and members of the community for her leadership and hard work.

Due to the effects of opioids, Waverly has on occasion fallen asleep in her office and has seemed lethargic in staff meetings. She has even been heard vomiting in the office restroom. It has become apparent to her supervisor, the Director of Parks, Recreation, and Links, Marty McGavin, that Waverly may be addicted to opioids. Because Ms. Waverly drives a City vehicle and helps the outdoor staff with numerous tasks involving gas-powered lawn mowers, battery-operated tools, and construction equipment, McGavin approaches the Paradise Beach City Attorney, Penny Schumacher, for advice and counsel.

Scope of the Opioid Epidemic:

As a recent report to the United States Senate concluded, the abuse of, and addiction to, opioids such as heroin, morphine, and prescription pain relievers is a serious problem affecting many aspects of American society.[1] Indeed, the U.S. Centers for Disease Control and Prevention (CDC) noted an alarming increase in opioid addictions, overdoses, and deaths for nearly all demographics of the U.S. population.[2] Close to two million Americans have abused or are dependent on prescription opioids, and from 1999 to 2015, more than 183,000 individuals have died from opioid-related overdoses.[3] Overdose rates are highest among individuals between 25 and 54 years old.[4] Although men are more likely to die from overdose, the mortality gap between males and females is closing.[5] One in four people receiving long-term prescription opioids for non-cancer pain struggles with addiction.[6] Over 1,000 people are treated in emergency rooms every day across the country for misusing prescription opioids, with the most commonly overdosed opioids being methadone, oxycodone (e.g. OxyContin), and Hydrocodone (e.g. Vicodin).[7] The reality is that many of these addictions do not start because of illegal drug use. Rather, the addiction starts in a doctor's office after a patient receives a legal and valid prescription designed to combat pain and suffering, and then descends into an illegal drug habit.

Of course, employers in both the public and private sectors are not immune from the consequences of this opioid epidemic. The National Safety Council (NSC), a non-profit organization chartered by Congress, recently conducted a survey finding that 70% of employers have felt the effect of an employee's prescription drug abuse, whether through absenteeism or missed work, decreased job performance, failed drug tests, or other indicia.[8] Although the NSC found that most employers suffered because of their employees' abuse of prescription drugs, relatively few employers had policies or procedures in place to deal with such issues.[9]

Employers who want to address an opioid problem with an employee not only face sensitive human resources and communication issues, but also a complex set of legal rules and regulations. Compliance obligations arise under the Americans with Disabilities Act, the Family and Medical Leave Act, and even federal and state Occupational Safety and Health Act laws. Accordingly, employers need to act carefully and thoughtfully

when dealing with an employee suffering from opioid abuse so as not to violate any laws offering protections to suffering or addicted employees.

ADA Legal Refresher:

Title I of the Americans with Disabilities Act (ADA or the Act)[10] applies to employers with 15 or more employees, and includes private employers, state and local governments, employment agencies, labor unions, and joint labor-management committees.[11] The ADA prohibits discrimination against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. Congress enacted the ADA in 1990, and broadened its definition of "disability" in 2008 with the Americans with Disabilities Act Amendments Act.

The ADA prohibits employment discrimination against "qualified individuals with disabilities."[12] The Act specifically defines a person with a "disability" as an individual who has a physical or mental impairment that substantially limits one or more of his or her major life activities, has a record of such an impairment, or is regarded as having such an impairment.[13] Additionally, in order to be a qualified individual with a disability, the disabled individual must be one who also satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.[14]

An employer is required to make a reasonable accommodation to the known disability of a qualified applicant or employee if it would not impose an undue hardship on the operation of the employer's business.[15] Reasonable accommodations are adjustments or modifications provided by an employer to enable people with disabilities to enjoy equal employment opportunities. Accommodations vary depending upon the needs of the individual applicant or employee, and may include: making existing facilities used by employees readily accessible to and usable by persons with disabilities; restructuring jobs; modifying work schedules; reassigning to a vacant position; acquiring or modifying equipment or devices; adjusting or modifying examinations, training materials, or policies; and providing qualified readers or interpreters.[16]

However, an employer does not have to provide a reasonable accommodation if it imposes an undue hardship.[17] The ADA defines undue hardship as an action requiring significant difficulty or expense when considered in light of factors such as an employer's size, financial resources, and the nature and structure of its operation.[18] Employers are not required to lower quality or production standards to make reasonable accommodations, nor are they obligated to provide personal-use items such as glasses or hearing aids.[19] Moreover, an employer generally does not have to provide a reasonable accommodation unless an individual with a disability asks for one.

An employer who believes that an employee's medical condition is causing a performance or conduct problem may ask the employee how to solve the problem and whether the employee needs a reasonable accommodation.[20] Once a reasonable accommodation is requested, the employer and the individual should discuss the individual's needs and identify the appropriate reasonable accommodation. Where more than one accommodation would work, the employer may choose the one that is less costly or that is easier to provide.

Once an employer becomes aware of an employee's disability and need for a reasonable accommodation, it is incumbent upon both the employer and the employee to engage in an "interactive process."[21] This is a necessary but informal process intended to clarify what the individual needs and what an appropriate reasonable accommodation may entail. An employer is permitted to ask the individual relevant questions that will enable it to make an informed decision about the request for accommodation, including asking what type of reasonable accommodation is needed.[22]

The exact nature of the interactive process will vary on a case-by-case basis. Often, both the disability and the type of accommodation required will be obvious, and there may be little or no need to engage in detailed discussions. Other times, however, the employer may need to ask questions concerning the nature of the disability and the individual's functional limitations in order to identify an effective accommodation. While the individual with a disability does not need to be able to specify the precise accommodation required, he or she does need to describe the problem being faced. Suggestions from the disabled individual may help the employer determine what type of accommodation to provide. Ultimately, however, the determination about what kind of reasonable accommodation to be provided is up to the employer. An employee may refuse to accept an offered accommodation, but just as an employer may be found to have not participated in the interactive process in good faith, so too can an employee who does not cooperate with his or her employer, or who refuses reasonable accommodations.

Legal Considerations for Workplace Drug Use

The ADA specifically states that persons who currently use drugs illegally are not protected by its provisions because such users are excluded from the definition of the term "qualified individual with a disability."[23] The ADA's regulations provide that "illegal use of drugs" refers both to the use of unlawful drugs, such as cocaine, and the unauthorized use of legal prescription drugs.[24]

With respect to current illegal drug use, the Equal Employment Opportunity Commission (EEOC) states that currently engaging in illegal drug use is not intended to be limited to the use of drugs on the day of, or within a matter of days or weeks before, the employment action in question. Rather, the provision is intended to apply to the illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in such conduct, or has an ongoing problem with drug abuse. When employees are currently using drug illegally, the ADA specifically states that an employer: 1) may prohibit the illegal use of drugs at the workplace by all employees; 2) may require that employees not engage in the illegal use of drugs at the workplace; 3) may require that all employees behave in conformance with requirements established under the Drug-Free Workplace Act of 1988; and 4) may hold an employee who engages in the illegal use of drugs to the same qualification standards for employment or job performance and behavior to which the organization holds its employees, even if any unsatisfactory performance or behavior is related to the employee's drug use.[25]

However, the illegal use of drugs does not include the use of a drug taken under

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the supervision of a licensed health care professional, or other uses permitted by federal law.[26] Accordingly, the EEOC provides that the following examples would not be considered illegal uses of drugs: experimental drugs for people with AIDS, epilepsy, or mental illness; morphine taken under the supervision of a licensed physician for the control of pain caused by cancer; and participation in a methadone maintenance treatment program.[27] The EEOC, however, is silent on the use of drugs, including opioids, to treat workplace injuries.[28] Importantly, the ADA's protections do apply to individuals who are former illegal drug users and who have been rehabilitated successfully or who are currently participating in a supervised rehabilitation program and no longer use drugs illegally.[29] Additionally, an employee will also be protected under the ADA if he or she is not illegally using drugs but is erroneously perceived or regarded as being a drug addict or as currently using drugs illegally.[30] The rationale behind this provision is that employers should not assume that, for example, a groggy employee with bloodshot eyes is abusing drugs. Instead, the employee's appearance may be the side effect of lawfully prescribed medication or other medical issues.

Drug Testing Provisions under the ADA

An employer may not require a job applicant to take a medical examination, to respond to medical inquiries, or to provide information about workers' compensation claims before the employer makes a job offer.[31] A job offer may be conditioned upon the satisfactory result of a post-offer medical examination or medical inquiry if this is required of all entering employees in the same job category.[32] A post-offer examination or inquiry does not have to be job-related and consistent with business necessity, and may ask questions about previous injuries.[33] After a person starts work, a medical examination or inquiry of an employee must be job related and necessary for the business.[34] Accordingly, employers may conduct employee medical examinations where there is evidence of a job performance or safety problem; the examination is required by other federal laws; the examination is to determine current fitness to perform a particular job; or the examination is a voluntary examination part of an employee health programs.[35]

Because the ADA does not protect individuals who currently use drugs illegally, the Act does not interfere with employers' programs to combat the illegal use of drugs in the workplace.[36] An employer may make certain pre-employment, pre-offer inquiries regarding the illegal use of drugs, and may ask whether an applicant is currently using drugs illegally.[37] However, an employer may neither ask whether an applicant is a drug addict, nor inquire whether he or she has ever been in a drug rehabilitation program, because individuals who were addicted to drugs--but are not currently using drugs illegally--are protected under the ADA.[38] After a conditional offer of employment, an employer may ask any questions concerning past or present drug or alcohol use.[39]

Since an employer may conduct tests to detect the illegal use of drugs, the ADA does not classify drug screenings as medical examinations, and an applicant can be required to take a drug test before a conditional offer of employment has been made.[40] Current employees also can be required to submit to drug tests, whether or not such tests are job-related and necessary for the business. Employers are free to refuse to hire an applicant or to discharge or discipline an employee based upon a test result that indicates the illegal use of drugs.[41] The employer may take these actions even if an applicant or employee claims that he or she recently stopped illegally using drugs.[42] If the result of a drug test indicates the presence of a lawfully prescribed drug or reveals information about a disability, such information must be kept confidential.[43] When tests for illegal drug use disclose the presence of lawfully used drugs, employers must be careful not to erroneously regard an individual as a drug addict or abuser. If they do, they would be violating the employee's rights under the ADA.

In addition to drug testing, the ADA does not prevent employers from obtaining certain information necessary to evaluate the ability of applicants and employees to perform essential job functions or to promote health and safety on the job.[44] However, once a person is hired and has started work, an employer generally can only ask medical questions or require a medical exam if the employer needs medical documentation to support an employee's request for an accommodation or if the employer believes that an employee is not able to perform a job successfully or safely because of a medical condition. Accordingly, any medical examination or inquiry required of an employee must be job-related and justified by business necessity.[45]

Federal Leave Law and Substance Abuse

The federal Family and Medical Leave Act (FMLA) provides protections for employees with "serious health conditions" and for their family caregivers.[46] The FMLA requires covered employers—which includes both public and private employers—to provide, as relevant here, up to 12 weeks of unpaid leave annually for an employee's illness.[47] Moreover, the FMLA requires reinstatement in the employee's position or an equivalent position upon return from leave. These protections include leave for substance abuse treatment.[48]

The term "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves in-patient care in a hospital, hospice, or residential medical care facility, or that requires continuing treatment by a health care provider.[49] The condition must involve such care as a period of incapacity or treatment in connection with or consequent to in-patient care; a period of incapacity requiring absence from work of more than three days and that involves continuing treatment by a health care provider; or continuing treatment by a health care provider for a chronic or long-term health condition that is incurable or so serious that it would likely result in a period of incapacity of more than three days if left untreated.[50] "Continuing treatment by a health care provider" must involve: two or more treatments by a health care provider; two or more treatments by a provider of health care services under orders of or on referral by a health care provider; at least one treatment by a health care provider that results in a regimen (e.g., a course of medication or therapy) of continuing treatment; or being under the continuing supervision of a health care provider due to a serious long-term or chronic condition or disability which cannot be cured.[51]

According to the Department of Labor's regulations implementing the FMLA, treatments for substance abuse may qualify as serious health conditions under the appropriate circumstances.[52] That is, the treatment for substance abuse may qualify for FMLA leave if it is an impairment requiring inpatient care, or requires continuing medical treatment by a health care provider.[53] However, congruent with the ADA, FMLA requirements do not prevent an employer from drug testing employees for detection of illegal substances, nor do they excuse employees from prohibiting the illegal use of drugs.[54] For example, the regulations do not interfere with an employer's requirement that an individual taking certain drugs may not perform safety-sensitive functions. Just as an employee who tests positive for drugs does not necessarily have a "disability" for ADA purposes, such an employee does not necessarily have a "serious health condition" for purposes of the FMLA.[55]

Therefore, absence from work because of the employee's use of the substance, without treatment, does not qualify for FMLA leave. Additionally, an employee may not use FMLA leave to recover from the side effects of substance abuse (such as a hangover or drug-induced incapacity). FMLA leave may only be taken for substance abuse treatment or rehabilitation provided by a health care provider or by a provider of health care services on referral by a health care provider.[56] The employer may not take action against the employee because the employee has exercised his or her right to take FMLA leave for substance abuse treatment. However, if the employer has an established, well-communicated, and non-discriminatory policy which provides that under certain circumstances an employee may be terminated for substance abuse, then pursuant to that policy, the employee may be terminated regardless of whether he or she is presently taking FMLA leave. Thus, the inclusion of substance abuse as a serious health condition does not preclude an employer from taking action against an employee who is unable to perform the essential functions of the job, provided that the employer complies with the ADA and does not take action against the employee for exercising his or her right to take FMLA leave for treatment of that condition. Accordingly, an employer cannot fire an employee for taking FMLA leave alone, but may terminate an employee because of the employee's underlying illegal drug use that led to the taking of FMLA leave.[57]

> [A]n Employee will also be protected under the ADA if he or she is not illegally using drugs but is erroneously perceived or regarded as being a drug addict or as currently using drugs illegally. The rationale behind this provision is that employers should not assume that, for example, a groggy employee with bloodshot eyes is abusing drugs. Instead, the employee's appearance may be the side effect of lawfully prescribed medication or other medical issues.

Federal Occupational Safety and Health Act

Finally, it bears mentioning that both the federal and related state OSHA plans can be relevant when drug use or abuse is implicated. OSHA recognizes that impairment by drug use may constitute an otherwise avoidable workplace hazard and that drug-free workplace programs help improve employee safety and health.[58] Accordingly, OSHA strongly supports comprehensive drug-free workforce programs, especially within certain workplace environments, such as those involving safety-sensitive duties like operating machinery.[59] However, OSHA further recognizes that a reasonable procedure must be in place to balance the interests of workplace safety with those of employee privacy.[60] Therefore, OSHA maintains that drug testing policies should limit testing to situations in which employee drug use is likely to have contributed to workplace accident, and for which the drug test can accurately identify impairment caused by drug use.[61]

Importantly, the ADA does not override health and safety requirements established under federal workplace safety laws, even if a safety standard adversely affects the employment of an individual with a disability.[62] Therefore, if a certain drug testing or drug tolerance standard is required by OSHA (or a similar workplace safety law), an employer must comply with that federal law.[63] Nonetheless, the ADA still may remain applicable. If a workplace safety law allows for an employer to make a reasonable accommodation, and the accommodation will not conflict with workplace safety, then the employer must work with the employee and within the confines of the ADA to make the necessary accommodation.[64] In other words, if an employer can comply with both the ADA and OSHA, then the employer must do so.

Considerations for the Paradise Beach City Attorney

Because the ADA and the FMLA both apply to the City of Paradise Beach, the City Attorney must adhere to strict federal laws when determining how to handle Ms. Waverly's condition. Waverly's supervisor, Mr. McGavin, knows that she is likley addicted to opioid pain killers. What is unknown—and what will be critical in determining how the City deals with Waverly's addiction—is whether she has become addicted through the normal and legal use of the drugs as prescribed by her doctor, or whether her addition arises from her procuring the drugs illegally (such as by buying them off the street without a

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Avoiding The Walk of Shame: Short-Term Rentals in Miami Beach

By: Jesse T. Greene, LLM, George Washington Law School, June 2017



Miami Beach Draws a Line in the Sand

Between March and October, 2016, the City of Miami Beach issued a remarkable $4 million in fines for violations of the City's ordinance restricting short-term rentals (STRs).[1] The ordinance, originally passed in 2010 and found at City Code Section 142-1111 (Ordinance), prohibits leases "for periods of less than six months and one day" in all single-family areas of the City and in 95% of its multi-unit buildings.[2] Revised in February 2017 to include massively-increased penalties, it is clearly aimed at online services like Airbnb.com, which the City's Mayor, Phillip Levine, believes have no place in the City.[3] The prohibitions not only punish owners of illegal STRs, but also apply to unwitting renters who may be evicted spontaneously--giving rise to the Miami Beach ad campaign advising visitors to "avoid the walk of shame" by being unceremoniously discharged onto City streets.[4]

Although the local Hotel Association hopes that the fines will reduce illegal STRs, which compete with the hotel industry,[5] the City takes the position that the enhanced penalties for violating the STR restrictions were not imposed to protect hotels. According to City Commissioner Michael Grieco, "the city is fighting for the residents who do live on the Beach year-round."[6] But as a local luxury property broker points out, a significant number of City residents are themselves transient tourists.[7] He cites lost business when potential purchasers are informed that the City will impose fines if they rent their properties for less than six months and one day.[8]

It is evident why buyers interested in living in the City for part of the year, but who need to defray mortgage costs through short-term renting, would shy away. Even a first-time violation can result in a $20,000 fine, the highest in the United States--more than twice that charged by New York City for violating its STR law.[9] The Ordinance not only applies to rentals themselves, but also to advertisements for illegal STRs.[10] In fact, some of the largest fines imposed by the City – $40,000, $60,000, and even $80,000 – have resulted from advertising violations.[11]

These sanctions may sound repugnant to free-market proponents. However, neither the draconian penalties, nor the dissatisfaction of City residents who rely on incremental rental income, nor the intense lobbying of the STR industry, inherently renders the Ordinance susceptible to challenge. Under the Florida Constitution, "municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law."[12] While it has been suggested that "the fines [do] nothing but protect the hotel industry from fair competition," and that "[i]t just shows the hotel lobby has a much stronger hold on [the City]],"[13] The Florida Supreme Court has held:

> It is settled that the courts will not inquire into the motives of the legislature in enacting laws. And by analogy to this rule it is very generally held that the courts cannot inquire into the motives of members of a municipal council for the purpose of determining the validity of ordinances enacted by them.[14]

The United States Supreme Court has also pronounced, in the context of a zoning ordinance, that "exercise of discretion...is a legislative, not a judicial, function."[15]

Courts can, of course, review the validity of an ordinance on other grounds, such as whether it has been preempted or infringes upon fundamental Constitutional rights. While the original Ordinance, passed in 2010, rests on firm legal ground in many respects, its post-2011 amendments may attract preemption challenges under Florida Statute 509.032 (Florida STR Law), and might be argued to implicate the First, Fifth and Eighth Amendments to the U.S. Constitution as well as 47 U.S.C. § 230–Section 230 of the Communications Decency Act (CDA).

A Destiny with Tourism

In the beginning there was a slender sand-spit of mangroves and swamp, mosquitoes and crocodiles, palmetto scrub and sea-stroked beach.[16]

In 1870, during a sailing trip up the east coast of Florida from Key West, Henry Lum and his son, Charles, discovered three coconut trees on the spit of land that would become Miami Beach.[17] Finding those trees "on the weed-, mosquito-, rat-, and rabbit-infested island, they came up with the idea of developing a coconut plantation," which led them to "purchase a good deal of land from the government for 35 cents an acre."[18] With the help of investors, they eventually acquired vast tracts and "planted somewhere in the vicinity of 155,000 coconuts along the beach."[19] But the future of Miami Beach was not in agriculture.

Ezra Osborn and Ethan Field, the investors who bought-out the Lums, eventually "realized that they could not and would not become rich by farming," so, "they elected to sell their acreage to others."[20] One of those others, John Collins, "realized that a bridge to connect the then-named Ocean Beach to the mainland was a necessity."[21] When Collins ran out of money, Carl Fisher, "generally considered to be the founder and builder of Miami Beach," finished the Collins Bridge, which opened on June 12, 1913.[22] The persona of Miami Beach as a tourist mecca began to emerge following the bridge's opening:

> There would soon be several companies selling Miami Beach land, and they would all be consolidated into the Miami Beach Improvement Company. Eventually, the first hotel, Brown's, would be built at what became First Street and Ocean Drive, and four great bathing casinos would, for many years, be part of the landscape.[23]

On March 26, 1915, two years after the opening of the Collins Bridge, the City of Miami Beach incorporated.[24] Since then, tourism has driven the City's economy, and that of the greater Miami-Dade area. In 2014, almost a century after the City's incorporation, some 14.6 million people visited the area, spending an estimated $23.8 billion, according to the Greater Miami Convention and Visitors Bureau.[25]

But not all of those travelers stayed in hotels. While the City's fabled beach-front continued to add ever more lodging capacity year after year, other forces were rocking the hospitality industry. By 2013, one hundred years after the Collins Bridge first connected Miami Beach to the mainland, Airbnb.com – with 250,000 rooms in 30,000 cities, in 192 countries – was already renting private dwellings to 40,000 people a night.[26] The online, peer-to-peer sharing economy had fundamentally altered the nature of tourism.[27]

Tallahassee versus the City Council

We, the people of the City of Miami Beach, in order to secure for ourselves the benefits and responsibilities of home rule and in order to provide for a municipal government to serve our present and future needs, do hereby adopt this Charter...[28]

Miami Beach is a home rule municipality, meaning – at least since enactment of the Municipal Home Rule Powers Act (MHRPA) in 1973 – that the City retains "governmental, corporate, and proprietary powers," enabling it "to conduct municipal government, perform municipal functions, and render municipal services."[29] The powers granted to the City by the MHRPA "may not be curtailed except as otherwise provided by law;"[30] foreclosing "the preexisting presumption that local government action must be narrowly confined to only the immediate needs of the residents."[31] The MHRPA "further dictate[s] that local governments should be allowed to act if not clearly directed otherwise by the state."[32]

The state does, sometimes, clearly direct otherwise. Preemption may occur where a local government exercises authority that is inconsistent with the state constitution or a state statute.[33] The preemption "may be either expressed or implied."[34] When analyzing the effect of a particular statute, one must realize that, "no magic words exist signifying an express preemption," and a given statute will not always be "explicit as to the breadth of its coverage or as to whether the preemption will preclude the specific proposed action."[35] At a minimum, the "language should make clear that the legislature intended to preempt any local regulation on the subject."[36]

The Florida STR Law

The Florida legislature's intent to preempt the authority of local governments to regulate the duration or frequency of vacation rentals in the Florida STR Law seems clear As words go, paragraph 7 of the statute, titled "Preemption Authority," with its list of activities that are "preempted to the state," leaves little to the imagination.[37] And its statement that "[a] local law, ordinance, or regulation may not prohibit vacation rentals or regulate the duration or frequency of rental of vacation rentals," explicitly precludes local governments from specific actions.[38]

However, the Florida STR Law's scope is not unlimited. It "does not apply to any local law, ordinance, or regulation adopted on or before June 1, 2011."[39]

The Ordinance, as Amended

Miami Beach initially enacted the Ordinance on June 19, 2010, nearly a year before the Florida STR Law was passed.[40] It specifically identified areas of the City where STRs were prohibited:

> Sec. 142-1111. - Short-term rental of apartment units or townhomes.
> (a) Limitations and prohibitions.
> (1) Unless a specific exemption applies below, the rental of apartment or townhome residential properties in districts zoned RM-1, RM-PRD, RM-PRD-2, RPS-1 and RPS-2, CD-1, RO, R0-3 or TH for periods of less than six months and one day.[41]

It also required written leases for STRs, terms of not less than seven days, the identification of a named party responsible

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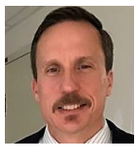

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for the STR who could be contacted at any time, night or day, compliance with all building codes and various additional terms.[42]

The original Ordinance established significant fines for violations. A first infraction would incur a $500 fine; with a second, third or fourth violation within a 12-month period garnering fines of $1,500; $5,000; and $7,500 respectively.[43] Revisions to the Ordinance prohibited "signs advertising the property for short-term rental...on the exterior of the property or in the abutting right-of-way, or visible from the abutting public right-of-way," but no fines for improper advertising were specifically referenced.[44]

Subsequent iterations of the Ordinance[45] would infuse substantial sanctions into the grandfathered original.[46]

Upping the Ante

In February 2017, Miami Beach exponentially raised the penalties for violating the Ordinance. An initial infraction now incurs a $20,000 fine. Penalties for each subsequent violation rise by another $20,000--a fifth violation within 18 months now carries a fine of $100,000, and suspension or revocation of the certificate of use.[47] Fines for repeat violations by the same offender increase regardless of locations.[48]

The February 8, 2017 version also broadened restrictions against advertising the availability of illegal STRs, whether online or otherwise, by prohibiting:

Any advertising or advertisement that promotes the occupancy or use of the residential property for the purpose of holding commercial parties, events, assemblies, gatherings, or the occupancy of a residence for less than six months and one day, as provided herein, or use of the residential premises in violation of this section.[49]

And the 2017 amendments unambiguously made the massive fines for hosting illegal STRs also applicable to advertising them.[50]

A Revision--or a New Law?

Do the increased fines and restrictions on advertising constitute permissible amendments to the grandfathered pre-2011 Ordinance, or so change its character that it is effectively new legislation, and is preempted, at least in part? That question, as yet, has no clear answer.

In February 2017, Miami Beach exponentially raised the penalties for violating the Ordinance. An initial infraction now incurs a $20,000 fine. Penalties for each subsequent violation rise by another $20,000--a fifth violation within 18 months now carries a fine of $100,000, and suspension or revocation of the certificate of use.

At least one Florida landowner has argued that such changes are not permissible under the preemption law: In a Motion for Reconsideration of the order denying his Motion for Final Summary Judgment, the landowner's counsel asserted that the lower court erred when it adopted "Vero Beach's position that since Vero Beach prohibited and/or regulated 'guest house and transient quarters' prior to June 1, 2011, it may continue such prohibition/regulation."[51] He further argued that "[i]f the Florida Legislature intended to allow local governments to prohibit vacation rentals or regulate the frequency or duration of rental of vacation rentals as long as they were doing so prior to June 1, 2011, it would have expressly said so in the statute."[52] In support of that proposition, he cited Florida's 1st Circuit in *Hostetter v. Escambia County*, where the court concluded, in striking a post-2011 STR amendment to a local code, that "[t]he more logical interpretation is that every amendment of the LDC that impacts or prohibits vacation rentals passed after June, 2011 is preempted by § 509.032(7)(b)."[53]

The 19th Circuit, however, ultimately rejected the landowner's argument, finding that Vero Beach's code provisions prohibiting the operation of a "guest house or transient quarters" in a residential area were well established as early as 1977, decades before enactment of the Florida STR Law, and that Vero Beach's post-2011 amendments – modifying and adding definitions – did not substantively change those land use provisions.[54] In particular, the court found that Vero Beach's new definition of "transient occupancy" to include a rebuttable presumption that tenancies of 30 days or less are transient did not affect the efficacy of the original 1977 code language.[55]

A Neighboring Ordinance Under Fire

Where a Florida municipality cannot document the robust history of short-term land use restrictions demonstrated by Vero Beach, the STR proponents may be more aggressive. A current Florida STR case attacks a pre-2011 zoning codification which differentiates "residential" activity from "lodging" as preempted and ineffectual under the Florida STR Law.

In March 2017, the City Council of Miami--Miami Beach's much larger sibling--passed an STR ordinance which it characterized as merely enforcing existing law designed to protect single-family home neighborhoods.[56] The existing law relied upon was Miami's 2009 zoning ordinance known as "Miami 21." It defines "Lodging" in Article 1(b) as a category "intended to encompass land use functions predominately of sleeping accommodations occupied on a rental basis for limited periods of time. These are measured in terms of lodging units: a lodging unit is a furnished room of a minimum two hundred (200) square feet that includes sanitary facilities, and that may include limited kitchen facilities."[57]

"Residential" use, covered in Article 1(a) is "intended to cover land use functions predominantly of permanent housing." Miami 21 had not mentioned short term rentals when written in 2009, and subsequently clarified such applicability in post-2011 codifications.

In April 2017, Airbnb and several Miami STR owners successfully obtained a temporary injunction blocking enforcement of the Miami ordinance, primarily on the basis that Miami's generic definition of "lodging" in an otherwise unspecific zoning law could not now be construed to circumvent the Florida STR Law.[58] The court did not accept Miami's argument that, unless specifically authorized in the zoning law, other uses of property were not permitted.

The Miami court referenced an Opinion construing the Florida STR Law by Florida Attorney General Pam Bondi to the Fort Lauderdale City Attorney,

wherein she stated:

> [w]hile a local government may regulate vacation rentals, it may not enact a local law, ordinance, or regulation which would operate to prohibit vacation rentals. *To the extent a zoning ordinance addresses vacation rentals in an attempt to prohibit them in a particular area where residences are otherwise allowed, it would appear that a local government would have exceeded the regulatory authority granted in section 509.032(7)(b), Florida Statutes.*[59] (Italics added)

Unlike the Miami law, Miami Beach's Ordinance contained a clear restriction on the duration of vacation rentals when enacted in 2010 and, with respect to that pre-2011 restriction, has unquestionably been grandfathered. The post-2011 amendments raising the fines for violations arguably do not change the substantive regulatory nature of the grandfathered restriction. Similarly, prohibiting advertising of illegal STRs and making such promotion subject to massive fines would seem to survive preemption. A restriction on advertising is, arguably, not a restriction on the duration or frequency of vacation rentals. A court might well characterize the advertising restriction as the kind of regulation the 2014 amendments to the Florida STR Law were intended to permit.

> As further articulated by the Florida Attorney General: "The bill removes the total preemption to the state for the regulation of vacation rentals, and permits local governments to regulate vacation rentals, provided those regulations do not prohibit vacation rentals or restrict the duration or frequency of vacation rentals."[60]

But how would the Ordinance fare if challenged on the ground that it violates certain fundamental Constitutional rights?

Police Power, Private Property and Free Speech

Airbnb and VRBO, relying in part on "I own it and can use it as I wish," a traditional real property belief, collide in numerous battlegrounds across the state with another traditional belief, the ability of communities to restrict perceived disruptive uses.[61]

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In his dissent to the majority opinion in *Village of Belle Terre v. Boraas*,[62] Justice Marshall acknowledged that "local zoning authorities may properly act in furtherance of the objectives asserted to be served by the ordinance at issue here: restricting uncontrolled growth, solving traffic problems, keeping rental costs at a reasonable level, and making the community attractive to families," since, "[t]he police power which provides the justification for zoning is not narrowly confined."[63]

While residents of a municipality may disagree, "questions of zoning policy, of benefit or detriment, and of what is good or bad for the city and the public are essentially matters within the realm of the legislative power of the city."[64] As the Supreme Court of Florida has stated:

> We will determine the reasonableness of the regulations as applied to the factual situation meanwhile keeping before us the accepted rules that the court will not substitute its judgment for that of the city council; that the ordinance is presumed valid...and that the legislative intent will be sustained if 'fairly debatable.'[65]

The legislative intent behind the Ordinance rises, at a minimum, to the level of "fairly debatable." The Commission Memorandum prepared by the Miami Beach City Attorney, includes the following justifications:

> WHEREAS, single and multi-family residences used on a transient basis, or other form of commercial gathering, creates excessive numbers of guests, vehicles and noise, causing inappropriate impacts on the surrounding residences and residential neighborhood; and WHEREAS, the City has a substantial interest in maintaining the aesthetics, character and tranquility of its residential neighborhoods, as well as in regulating traffic flow; this ordinance directly advances these interests; and this ordinance is narrowly tailored to serve those interests...[66]

Given those justifications, it would prove difficult to argue that the Ordinance's application to vacation rentals within purely residential zones, but not to vacation rentals in zones where hotels operate, renders it arbitrary or unreasonable.

Justice Marshall's dissent in *Village of Belle Terre*, however, went on to emphasize that "deference does not mean abdication," since the "[c]ourt has an obligation to ensure that zoning ordinances, even when adopted in furtherance of such legitimate aims, do not infringe upon fundamental constitutional rights."[67] The Fifth Amendment guarantees one such right.[68]

The Fifth Amendment and Florida Landlords

In *City of Venice v. Gwynn*, a Florida court decided an appeal by Venice from a ruling that the Venice STR ordinance was unconstitutional as applied.[69] That ordinance mandated that "owners of single-family dwellings may rent their property for a period of less than thirty days only three times in a calendar year unless they had complied with the preexisting use requirements of the ordinance prior to July 14, 2009."[70]

Gwynn, who purchased her property in 2004, failed to comply with the preexisting use requirements, yet continued to advertise her property as available for lease for less than 30days, in violation of the ordinance.[71] The City of Venice Code Enforcement Board found her in violation.[72] Gwynn appealed to the Circuit Court, which rejected her argument that the ordinance was facially unconstitutional but accepted her challenge that "the ordinance's prohibition on short-term rentals substantially interfered with her rightful use of and reasonable expectation for her property without substantial advancement of any legitimate governmental interest," ruling in her favor.[73]

On appeal, the Second District acknowledged that "[a] use restriction on real property may constitute a taking 'if it has an

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unduly harsh impact on the owner's use of the property.'"[74]

But the court also explained that a proper analysis "includes a comparison of 'the value that has been taken from the property with the value that remains in the property,'" and that "[a] party challenging the constitutionality of a regulation has the burden to establish that he or she has suffered significant financial loss from the imposition of the regulation."[75]

The Second District observed that the Circuit Court improperly "focused on Gwynn's loss of the potential rentals available before the enactment of the ordinance but did not weigh this loss with the property's value based on the residual uses after the enactment."[76] It quashed the Circuit Court's order.

City of Venice v. Gwynn thereby strongly suggests that the Ordinance would withstand a challenge based on economic valuation grounds.[77] A challenge arguing that the Ordinance's advertising prohibition violates the First Amendment or Section 230 of the CDA may prove more difficult to answer.

The First Amendment (and Section 230 of the CDA)

On November 8, 2016 the U.S. District Court for the Northern District of California denied the request for preliminary injunction filed by Airbnb and HomeAway (STR Companies) against the City and County of San Francisco, California.[78] The STR Companies sought to bar "enforcement of a City and County of San Francisco ordinance that makes it a misdemeanor to provide booking services for unregistered rental units."[79] They argued that the ordinance violated Section 230(c)(1) of the CDA, which states "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[80]

The STR Companies argued that "a criminal penalty for providing and receiving a fee for Booking Services for an unregistered unit requires that they actively monitor and police listings by third parties to verify registration," which is "tantamount to treating them as a publisher because it involves the traditional publication functions of 'reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content.'"[81]

Finding that the STR Companies had not demonstrated a likelihood of success on the merits, the court concluded that "the text and plain meaning of the Ordinance demonstrate, it in no way treats plaintiffs as the publishers or speakers of the rental listings provided by hosts," since it neither regulates "what can or cannot be said or posted in the listings," nor creates an "obligation on plaintiffs' part to monitor, edit, withdraw or block the content supplied by hosts."[82] Rather, the court accepted San Francisco's argument that the "[o]rdinance holds plaintiffs liable only for their own conduct, namely for providing, and collecting a fee for, Booking Services in connection with an unregistered unit."[83]

The STR Companies also argued that the practical effect of the ordinance "will be to burden speech, and that it is subject to 'heightened' scrutiny because it restricts particular content, namely advertisements for unlawfully registered rentals."[84] Again finding that the plaintiffs failed to demonstrate likelihood of success of the merits, the court stated, "[t]o the extent the Ordinance can be said to affect speech at all, it involves speech that 'does no more than propose a commercial transaction' and consequently is 'commercial speech.'"[85] The ordinance survives scrutiny, the court found, because if "'the transactions proposed in the forbidden [communication] are themselves illegal in any way,'" then "the speech is unprotected and the government may freely regulate it."[86]

The facts in Miami Beach are slightly different. The Ordinance prohibits "any advertising or advertisements," for short-term rentals "through various media including...websites," without defining a class of advertisers in such a way to limit liability to property owners rather than web service providers like the STR Companies.[87] In fact, the City fined Airbnb five times for advertising between March 19 and August 15, 2016, for a total of $120,000.[88]

Unlike San Francisco's ordinance, which made it "a misdemeanor to collect a fee for providing booking services for the rental of a unit not registered with the city,"[89] the Ordinance does not limit liability to the conduct of web service providers, as distinct from the content of an advertisement. Consequently, the City has little basis to argue, as San Francisco did, that the "[o]rdinance holds plaintiffs liable only for their own conduct..."[90]

In fact, consistent with the STR Companies' argument against San Francisco, the Ordinance regulates "what can or cannot be said or posted in the listings,"[91] and therefore creates an "obligation on plaintiffs' part to monitor, edit, withdraw or block the content supplied by hosts"[92] in order to avoid fines. A plaintiff might conceivably argue that the Ordinance treats a "provider...of an interactive computer service...as the publisher or speaker of any information provided by another information content provider,"[93] in violation of Section 230 of the CDA.

As to the First Amendment, however, the Ordinance's prohibition against advertising "involves speech that 'does no more than propose a commercial transaction' and consequently is 'commercial speech.'"[94] Since the prohibited advertisements propose transactions that "are themselves illegal," then "the speech is unprotected and the government may freely regulate it."[95]

If the Ordinance's prohibition on illegal commercial speech survives scrutiny, do its large fines also pass constitutional muster?

When Fines Become "Excessive"

Excessive bail shall not be required, nor excessive fines imposed...[96]

In November 2004, Ray Locklear appealed a final order of the Florida Fish & Wildlife Conservation Commission which imposed a $5,000 fine for illegal gill net fishing.[97] The District Court of Appeals of Florida, Fifth District, affirmed the Commission's decision holding that "Locklear does not explain how a $5,000 fine following his second conviction for illegal gill net fishing activities is grossly disproportionate to the crime."[98] The court pointed out that "[w]ell-settled Florida decisional authority provides that a statutorily authorized civil fine will not be deemed so excessive as to be cruel or unusual unless it is so great as to shock the conscience of reasonable men or is patently and unreasonably harsh or oppressive."[99]

While the court did not specifically analyze the harm – "harming mullet, seatrout and other fish populations beyond repair, as well as killing sea turtles, birds and dolphins accidentally ensnared in their nets"[100] – to determine proportionality, other Districts have done so. In *State of Florida v. Jones*, the court, while considering whether a $5,000 fine for solicitation of prostitution was excessive, stated:

> [t]o determine whether a fine is grossly disproportional, a court considers:
> '(1) whether the defendant falls into the class of persons at whom the criminal statute was principally directed; (2) other penalties authorized by the legislature ...; and (3) the harm caused by the defendant,'" which looks "beyond appellee's immediate actions to the harm the legislature has sought to redress.[101]

In *State of Florida v. Cotton*, the court, also considering whether a $5,000 fine for solicitation of prostitution was disproportional to the harm, noted "[t]he federal government acknowledges the link between prostitution and trafficking in women and children, a form of modern day slavery."[102] In both *Jones* and *Cotton*, the courts found that the $5,000 fines for solicitation of prostitution were not disproportional given the harm.

However, when contrasted to a $5,000 fine aimed at preventing significant environmental damage or human trafficking, a court might consider a $20,000 fine disproportional given harm that merely involves the potential for "excessive numbers of guests, vehicles and noise," which may affect the "aesthetics, character and tranquility" of residential neighborhoods.[103]

Whether the Ordinance can withstand legal assault, however, may ultimately prove less important than its ability to withstand political assault.

A Way Forward?

Airbnb says it wants to work with the city to develop "clear, fair rules" to operate short-term rentals and start paying resort taxes — 6 percent in Miami-Dade County plus a 2 percent tourist development tax on Miami Beach — that in turn supports the local tourism industry.[104]

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Despite politicians' assertions that the Ordinance is designed to protect residents, a February 2017 poll found that "a full 94 percent of South Floridians want Airbnb (and similar home-sharing services) to operate legally in their hometowns."[105] The *Miami New Times* notes that the poll "only fuels critics who argue that city governments are acting to protect wealthy hotel owners rather than average citizens."[106] Those average citizens, according to the results of the poll, "resoundingly told local governments to quit meddling with their local property rights," with a majority of South Florida residents responding that "vacation rentals were a 'very important' component of the local economy."[107]

Airbnb has expressed a desire "to work with the city to develop 'clear, fair rules' to operate short-term rentals and start paying resort taxes."[108] More recently, it has urged Mayors to 'come to the table and consider common-sense regulations consistent with the desires of their residents.'"[109] Although constrained by the preemptive scope of the Florida STR Laws, Miami Beach may have flexibility to adjust its policies. It could, for example, explore the viability of an annual percentage limit on rental use, rather than the current duration restriction– permitting residents within certain zones to rent their property, at any time, for any length of time, up to a cumulative total of six months out of the year.[110] If the City were open to discussing relaxation of current restrictions, analysis might show that the collection of appropriate taxes – perhaps in conjunction with special assessments in some areas – could offset costs of increased traffic and additional police patrols.

Concerns of full-time residents about tranquility and aesthetics could be addressed through regulations that limit occupancy and numbers of vehicles per residence, based on square footage and lot size. Some commentators have suggested that "local governments should enact stricter 'noise limits, property care standards, public gathering ordinances, curfews, and general parking restrictions."[111] Fees, charged to those who engage in short-term renting, could cover the additional cost of administering compliance programs.

The Hotel Association's legitimate concerns with unfair competition could be addressed, in part, through permitting. Permits might "require hosts to meet the same standards as a hotel to protect transient guests--for instance, clearly marked fire escapes and locking windows and doors could be required."[112] Permit fees could pay for administration of the program, including periodic inspections.

The benefits of those changes could inure far beyond owners of vacation rentals. According to a survey conducted by Airbnb, their guests spent about $50 million at Miami area restaurants from 2015 to 2016.[113] That number would, presumably, expand in proportion to an expansion in STR opportunities.

Regardless of opinion polls or potential economic benefit, however, the City may choose to reject Airbnb's offers of compromise. In fairness, the City has a rational basis for its STR restrictions within certain residential zones. And, its Ordinance stands on strong legal footing in many respects. However, it may be vulnerable to challenge with respect to its post-2011 amendments, Section 230 of the CDA, and the size of its fines.

Miami Beach can await and contest those challenges. Or it can bargain from its current position of strength, taking advantage of offered concessions that might be withdrawn if a court were to rule against the Ordinance. In the tradition of its earliest founders – who recognized, and took

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etiquette and precautions appropriate for disabled passengers. Indeed, in a post on its website entitled "Greater accessibility for riders and drivers," Uber makes the claim that "all drivers on the Uber platform are able to accommodate folding wheelchairs," but offers no promise regarding those using motorized wheelchairs or who cannot be removed from the wheelchair itself.[37]

All TNCs should maintain a ratio of wheelchair accessible vehicles to the riding population, in accordance with demand. Public paratransit subsidies, which are being uniformly wasted on multi-passenger vans that operate on non-fixed routes without efficient or maximized usage,[38] could be redirected to wheelchair accessible taxicabs, liveries and/or black cars. This is already being done in jurisdictions such as New York City, as well as through a private contractor brokerage model between for-hire vehicle and taxicab companies and public transit agencies to deliver subsidized paratransit services under the ADA.[39] Allowing this model to be utilized only for taxicabs and for-hire vehicles would be a way to level the playing field, and TNCs should be compelled to purchase vehicles that are operated through government authorized/contracted brokerage companies. This would provide point-to-point and more affordable service via on-demand taxicabs or pre-arranged service at less than the cost on the open market.

In order to implement such a comprehensive plan, many options are available, but the essential ingredients are to consolidate funding and implementation resources for one established hotline or app for states and/or localities to deliver on-demand taxi, sedan and TNC services. This could be accomplished though establishing a Wheelchair Accessible Vehicle Fund via a third party administrator that would manage an accessible "lockbox" to consolidate all public and private funding. Standards could be developed to utilize such monies for brokerage contracts, dispatch centers, and/or app-based dispatching through public transit authorities and other localities, with specific compliance and allocation standards.[40]

H. Universal Taxicab Apps

One of the most promising new initiatives to increase the competitiveness of the taxi industry vis-à-vis TNCs is the development of new mobile e-hail applications for all taxis. An easy-to-use universal e-hail application will give customers the ability to electronically hail the entire fleet of available taxis and allow local taxi industries to more effectively compete with the user-responsiveness of TNCs. For TNCs and taxis, speed and reliability is dependent on the density of cars on the road.

There are currently several public projects underway in this area. A report which I authored entitled: *Study for a Centralized Application for Taxis in Montréal* analyzes various approaches by regulators to implement (either partially, or completely) the universal taxi application model. The report is based on a thorough analysis of primary data collected from regulators, the incumbent industry, other new market entrants, the riding public, and other sectors with a vested interest in the success of the for-hire industry. The study also provides a comprehensive review of the different app configurations being implemented by various jurisdictions: multiple government sanctioned applications;[45] single government branded applications;[46] single government branded application with competing applications;[47] open shared platform; government regulatory dashboard with competing applications; and private sector solutions.

In January 2016, the Mayor of Chicago announced that the City had chosen two providers, Arro and Curb, to provide universal taxi app service in Chicago.[50] All taxi drivers were required to use either Arro or Curb through their in-vehicle tablets or dispatch equipment starting February 1, 2016.

Each jurisdiction has unique characteristics not addressed by a "one-size-fits-all" approach. At this stage, it is too early to identify best practices that should be ubiquitously applied, but a universal app can help level the playing field and promote tourism and the taxi brand for the host city. Rebranding can also be used to revitalize a struggling taxi industry. In April 2017, Montreal announced a new branding initiative to standardize the look of the city's cabs in an effort to make them instantly recognizable and boost the local taxi industry.[51]

I. Self-Regulation, Government Regulation or a Hybrid-Tech Based Model?

The essence of TNC self-regulation is that "we can do it faster and better than government." TNCs claim that college students and part-time workers would be discouraged by the process of purchasing insurance, completing physical paperwork, leaving their homes or computers and undertaking a simple five-minute fingerprint check. While there may be some truth to the convenience factor, the motive of TNCs is to attract ever-more drivers, while managing and assuming the risks of some potentially unsafe or inexperienced drivers who slip through the cracks and cause harm to others. The self-regulation model allows the TNCs to control information pertaining to incidents such as sexual assaults and crashes. It discourages media coverage because such information – which is of public interest – is labeled as "proprietary" and not subject to public disclosure laws that keep such stories and criticism alive.[43] The self-regulation model is an effort to control information, reduce licensing standards and ultimately to facilitate a market takeover.

Objectively speaking, it is possible to permit modified self-regulation of transportation companies, as is done by the U.S. Department of Transportation's Federal Motor Carrier Safety Administration (FMCSA) with trucking and limousine companies engaged in interstate commerce. The FMCSA requires that interstate truckers and drivers obtain medical exams[44] and not work more than a certain number of hours during a time period for public safety reasons.[45] FMCSA-licensed carriers must collect information subject to Federal auditor compliance.[46] As such, the key ingredients for the success of a self-regulation system are auditing resources and significant penalties and fines to serve as an effective deterrent. Without unfettered access to TNC data to audit real-time performance and compliance at all levels, including the ability to impose significant fines, this model is doomed to fail. In general, governments, and not private parties, should be the ones who regulate; but if TNCs are allowed to engage in self-regulation, they should be required to pay for the enforcement resources and turn over their data to facilitate auditing and compliance.

Without unbridled access to TNC data to audit real-time performance and compliance, and the ability to impose significant fines, public safety is jeopardized and regulators' ability to make policy decisions hampered. Due to the lack of appropriate TNC standards or any commitment to enforcement at

the local level, TNCs should be required to provide data in an anonymized format or lockbox via an approved third party administrator hired by the government. The law can create an exemption from FOIL- which could otherwise be an open platform for public use of the data – and allow exclusive access to government regulators for clearly defined investigatory or data collection purposes (*i.e.* for fare increases; traffic or environmental studies; to investigate crimes and complaints; or to return lost property).

TNCs have lived up to their self-proclaimed identity as disrupters. They have often done so by operating illegally in jurisdictions and then arguing for new and less stringent laws than those regulating other for-hire vehicle services. When states have adopted these new, less stringent regulations, they have put the incumbent industry at a disadvantage, even though it provides virtually the same service as TNCs. One positive development from this disruption is that many jurisdictions may now re-evaluate all of their for-hire vehicle laws and overall transportation systems, as was done by Seattle and King County, in Washington State. When localities can implement laws that require TNCs to meet more stringent standards to protect public safety (and maybe deregulate in some areas–such as setting fares), the incumbent industry can better compete, moving closer to a middle ground where all can operate on a truly level playing field.

III. Recommended Solutions and Next Steps

Urban and transportation planners have their work cut out for them, but planning for the future must be done swiftly, with all parties at the table, and with "out-of-the-box" thinking. The Federal role should not be to regulate or force specific solutions, but to appropriate funding for conducting state-wide and regional planning studies to integrate all modes and technologies–and solve longstanding regional rivalries and jurisdictional disputes for the common good. The policy emphasis should be on promoting shared rides and micro-transit, zero emission- or clean air vehicles, wheelchair accessibility and affordable fares, with all modes working together to move people in a sustainable and efficient manner.

The TNCs must become part of the mainstream and the playing field leveled, not with "Band-Aid" approaches like allowing older cars for taxicabs, getting rid of security cameras for drivers or other insignificant and ineffectual deregulation attempts for the incumbent industry. Instead, safety and accountability standards must be increased for TNCs on background checks and insurance. Universal apps and smaller measures could help, but the most significant impact would be to: (1) institute growth limitations coupled with incentives that promote clean air, accessibility and service to underserved areas; (2) to equally apply, limit and/or eliminate surge pricing; and (3) to reform public paratransit by redirecting wasted multi-passenger van subsidies to wheelchair accessible taxicabs and for-hire vehicles with uniform dispatch systems or apps.

To plan these changes, transit planning agencies, airports, business improvement districts, incumbent for-hire and taxi industries, the TNCs and others must all be at the table, with government taking the lead. Self-regulation should be limited, and regulation and enforcement should be at the local level, especially economic and fare or curb space management. State regulations for uniform safety and licensing standards could work, but that must be coupled with local enforcement and appropriate penalties for non-compliance.

There are solutions for our transportation future, but our moment of opportunity is passing us by. We just need to think carefully, plan quickly and act, with government taking the lead–working closely with the private transit and technology industries.

Notes

1. As of June, 2017, 46 states and the District of Columbia have enacted some type of statewide TNC legislation. *See* https://tti.tamu.edu/policy/technology/tnc-legislation/.

2. For example, although many taxicab and limousine companies utilize a digital platform allowing passengers to book trips, Tennessee defines a TNC as "a business entity operating in this state that uses a digital network to connect riders to TNC services by TNC drivers" and explicitly distinguishes a TNC "from a taxi service, limousine service, shuttle service, or any other private passenger transportation services that are regulated pursuant to present law". *See* https://trackbill.com/bill/tn-hb992-transportation-dept-of-as-enacted-enacts-the-transportation-network-company-services-act-amends-tca-title-7-title-54-title-55-title-56-and-title-65/1135990/

3. http://time.com/3633469/uber-surge-pricing/.

4. "Shared mobility" is defined as "the shared use of a vehicle, bicycle, or other mode…that enables users to gain short-term access to transportation modes on an 'as-needed' basis…includ(ing) various forms of carsharing, bikesharing, ridesharing (carpooling and vanpooling) and on-demand ride services." Susan Shaheen, Nelson Chan, Apaar Bansal, and Adam Cohen, Transportation Sustainability Research Center, *Shared Mobility: Definitions, Industry Developments and Early Understanding.* (Nov. 3, 2015).
See: http://innovativemobility.org/wp-content/uploads/2015/11/SharedMobility_WhitePaper_FINAL.pdf

5. "Connected vehicle technology" is defined as a "multimodal initiative that aims to enable safe, interoperable networked wireless communications among vehicles, the infrastructure, and passengers' personal communications devices." *See* https://www.its.dot.gov/meetings/aeris__workshop.htm.

6. "Autonomous, or self-driving, vehicles" are defined as "those in which operation of the vehicle occurs without direct driver input to control the steering, acceleration, and braking and are designed so that the driver is not expected to constantly monitor the roadway while operating in self-driving mode." *See* https://www.transportation.gov/briefing-room/us-department-transportation-releases-policy-automated-vehicle-development.

7. Federal law provides a minimum set of rules and requirements applicable to limousine companies. However, individual states may levy stricter rules.

8. *Supra* note 1.

9. *See* Matthew W. Daus and Pasqualino Russo, *One Standard for All: Criminal Background Checks for Taxicab, For-Hire and Transportation Network Company (TNC) Drivers.* May 2015, MPA Newsletter of John Jay College of Criminal Justice, City University of New York (http://www.whosdrivingyou.org/wp-content/uploads/2015/06/background_check_report.pdf)

10. http://furmancenter.org/files/publications/FurmanCenterBIDsBrief.pdf

11. Examples of these cases include: Illinois Transp. Trade Ass'n v. City of Chica-

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go, 134 F. Supp. 3d 1108 (N.D. Ill. 2015) aff'd in part, rev'd in part, 839 F.3d 594 (7th Cir. 2016), cert. denied (U.S. Apr. 24, 2017); Newark Cab Ass'n v. City of Newark, 2017 WL 214075 (D.N.J. Jan. 18, 2017); Gebresalassie v. District of Columbia, 170 F. Supp. 3d 52 (D.D.C. 2016). In almost all of these cases, the taxicabs' Equal Protection claims were based on the disparity between two regulatory frameworks that were allegedly unequal.

12. *See* Checker Cab Philadelphia Inc. v. Philadelphia Parking Authority, No. 2:16-cv-04669 (E.D. Pa. June 6, 2017). Plaintiffs allege that defendants violated their constitutional rights by simultaneously enforcing strict regulations on taxis and failing to regulate TNCs at all. In reaching its decision, the court relied on Boston Taxi Owners Ass'n, Inc. v. City of Boston, 180 F. Supp. 3d 108 (D. Mass. 2016), wherein the court denied Boston's Motion to Dismiss, holding that the plaintiffs had adequately alleged an Equal Protection violation. (The case was ultimately dismissed on preemption and mootness grounds due to subsequent state legislation preempting Boston's ability to regulate taxis and TNCs (Boston Taxi Owners Assn, Inc. v. City of Boston, No. CV 15-10100-NMG, 2016 WL 7410777 (D. Mass. Dec. 21, 2016)).

13. In April 2017, the U.S. Supreme Court declined to take up the case *Illinois Transp. Trade Ass'n v. City of Chicago,* wherein Chicago taxi companies asked the Court to hear their arguments that city regulations governing ride-hailing platforms like Uber and Lyft violate the cab businesses' constitutional rights. *See* Illinois Transp. Trade Ass'n v. City of Chicago, 134 F. Supp. 3d 1108 (N.D. Ill. 2015) aff'd in part, rev'd in part, 839 F.3d 594 (7th Cir. 2016), cert. denied (U.S. Apr. 24, 2017).

14.A "rap back" or "hit notice" program will inform a designated entity when an individual whose fingerprints are retained by a criminal history repository after a fingerprint check is subsequently arrested. Fingerprints obtained after the arrest, are matched against a database; designated entities are then notified. *See* Bureau of Justice Statistics' Website, https://www.bjs.gov/index.cfm?ty=tdtp&tid=4.

15. Michael Barajas, *Uber Outlines Plan to Ensure All Drivers Comply with City Regs*, Houston Press (Apr. 17, 2015), http://www.houstonpress.com/news/uber-outlines-plan-to-ensure-all-drivers-comply-with-city-regs-7373113.

16. *See* Adam Vaccaro and Dan Adams, *Thousands of current Uber, Lyft drivers fail new background checks*, The Boston Globe (April 5, 2017), http://www.bostonglobe.com/business/2017/04/05/uber-lyft-ride-hailing-drivers-fail-new-background-checks/aX3pQy6Q0pJvbtKZKw9fON/story.html.

17. *See supra* note 7.

18. The FBI reports that the Advanced Fingerprint Identification Technology (AFIT), completed in February 2011, has increased identification performance and machine matching accuracy from 92 percent to more than 99 percent. https://www.fbi.gov/services/cjis/cjis-link/ngi-officially-replaces-iafis-yields-more-search-options-and-investigative-leads-and-increased-identification-accuracy.

19. *See also*, Report of the National Task Force to the U.S Attorney General (July 1999).

20. *See* notes 9 and 10.

21. *See* note 7.

22. http://mercatus.org/expert_commentary/expensive-licensing-can-drive-away-entrepreneurs; http://legislation.nysenate.gov/pdf/bills/2017/S2009C

23. http://www.njleg.state.nj.us/2016/Bills/A4000/3695_R1a.PDF; http://www.sos.arkansas.gov/rulesRegs/Arkansas%20Register/2016/march2016/126.04.16-002.pdf

24. http://www.legis.ga.gov/Legislation/20152016/153884.pdf

25. *E.g.*: In Seattle, the local TNC law provides that TNCs shall pay $0.10 per ride for all trips originating in Seattle to cover the estimated enforcement and regulatory costs of TNC licensing, vehicle endorsements and driver licensing. However, total TNC industry fees shall not exceed $525,000 in year one. (Seattle Municipal Code, Title 6, subtitle IV, §6.310.150 B.). In the state of Virginia, the fee to accompany an application for a permit is $100,000, and the annual fee to accompany an application for a renewal thereof is $60,000. (Code of Virginia, Title 46.2., Chapter 20, §46.2-2011.5). Colorado state TNC law provides for an annual permit fee of $111,250 (Colorado Revised Statutes, Title 40, §40-10.1-606. (2)).

26. In March 2015, a former Uber driver filed a lawsuit alleging that Uber failed to secure and safeguard its drivers' personally identifiable information, including names, driver's license numbers and other personal information, and failed to provide timely and adequate notice to Plaintiff and other class members that their private information had been stolen, in violation of California state law (Antman v. Uber Technologies, Inc., No. 3:15-cv-01175-JCS (N.D. Ca)). Uber subsequently filed a John Doe lawsuit in an attempt to identify the perpetrator of the breach (Uber Technologies, Inc. v. John Doe I, No. C 15-00908 LB (N.D. Cal. March 16, 2015)). In January 2016 Uber agreed with New York State Attorney General Eric Schneiderman to pay a $20,000 penalty for failure to provide timely notice of the breach to its drivers and the Attorney General's office, and to adopt data security protection practices. (*See* New York State Attorney General's Website, https://ag.ny.gov/press-release/ag-schneiderman-announces-settlement-uber-enhance-rider-privacy.)

27. A Base is a Taxi and Limousine Commission-licensed business for dispatching For-Hire Vehicles and the physical location from which For-Hire Vehicles are dispatched. A For Hire Base can be any of the following: (1) a Black Car Base, (2) a Livery Base (or Base Station), (3) a Luxury Limousine Base. *See* Rules of the City of New York, Title 35, **§ 59A-03(e)**.

28. As defined by New York General Business Law §899-aa(1)(a): "any information concerning a natural person which, because of name, number, personal mark, or other identifier, can be used to identify such natural person[.]"

29. *See* Rules of the City of New York, Title 35 **§59B-21(g)**.

30. *See* Rules of the City of New York, Title 35 **§**59B-21(h).

31. *See* Rules of the City of New York, Title 35 **§59B-21**(i).

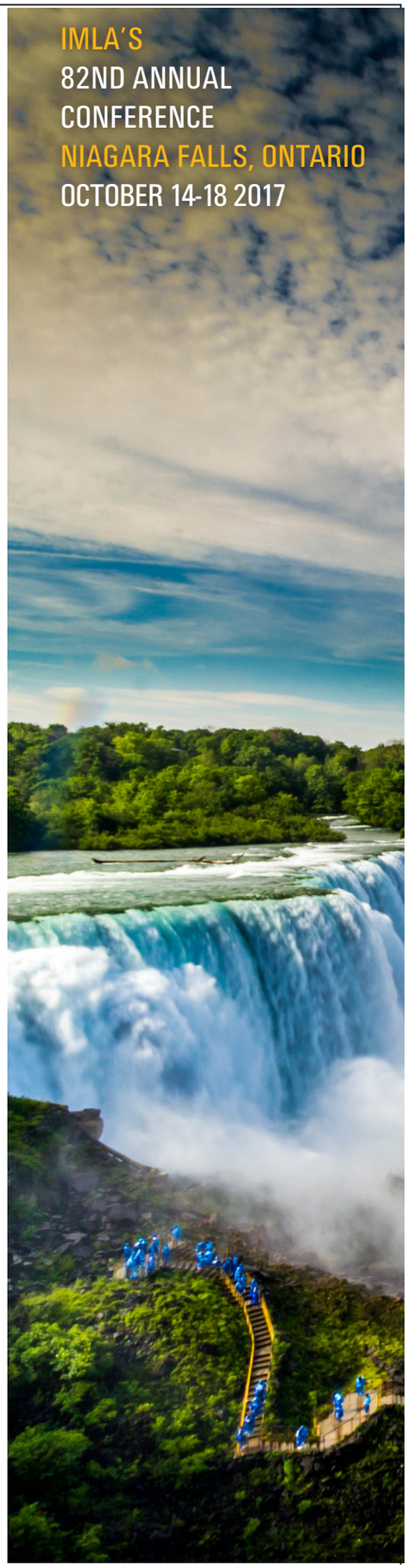
32. http://www.nytimes.com/1996/05/11/nyregion/medallion-limits-stem-from-the-30-s.html.

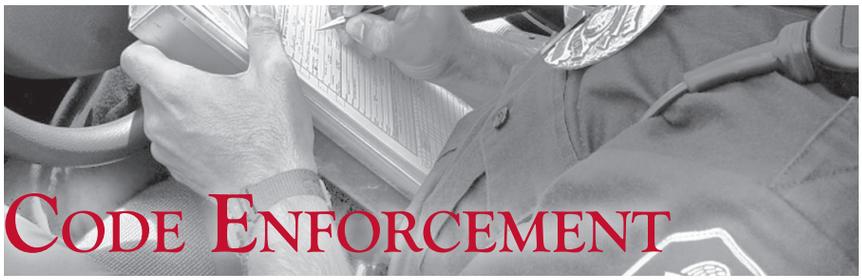
33. FOIL laws usually have provisions for information determined to be exempt to disclosure for public policy reasons. For instance, New York State's FOIL Law contains exemptions for certain information including proprietary information received from a commercial enterprise. NYS Public Officers Law §87(2)(d). The newly adopted New York State TNC law exempts TNC drivers' records as an "invasion of personal privacy;" and information about drivers obtained for an audit is exempt from public disclosure.

34. http://www.pionline.com/article/20040405/PRINT/404050728/disclosure-exemption.

35. For example, all of New York City's for-

hire vehicle bases, including black car and luxury limousine bases, must have the capability to dispatch a wheelchair-accessible vehicle. See http://www.nyc.gov/html/tlc/html/faq/faq_access_veh.shtml.
36. *Section 504, Rehabilitation Act of 1973*. United States Department of Labor, *available at* http://www.dol.gov/oasam/regs/statutes/sec504.htm.
37. *Id.*
38 42 U.S.C. §12184: *Prohibition of discrimination in specified public transportation services provided by private entities, available at* http://codes.lp.findlaw.com/uscode/42/126/III/12184.
39. *See, e.g.*, New York City's commitment to providing a 50% wheelchair-accessible taxicab fleet. *Notice of Promulgation of Rules*. New York City Taxi and Limousine Commission, *available at* http://www.nyc.gov/html/tlc/downloads/pdf/newly_passed_rule_accessibility_and_surcharge.pdf.
40. *See, e.g.*, New York City's commitment to a 50% wheelchair-accessible fleet of green outer borough livery vehicles that can be utilized for street hails or for dispatched pre-arranged trips. http://www.nydailynews.com/new-york/nyc-taxis-accessible-tlc-plan-article-1.1817161
41. https://newsroom.uber.com/greater-accessibility/.
42. Matthew W. Daus and Jason R. Mischel, *Accessible Transportation Reform: Transforming The Public Paratransit And Private For-Hire Ground Transportation Systems*. 17 Transportation Lawyer 37 (2015), *available at* http://nuridetransportation-group.com/wp-content/uploads/2015/04/Accessible-Transportation-Reform-Study-Daus-Mischel-7.30.14-2.pdf.
43. In New York City, government-subsidized paratransit costs in excess of $60 per passenger. Point-to-point transportation via taxicab or sedan can be delivered for around $15 per passenger, resulting in savings in just one year of approximately $281,000,000. If applied throughout the US, taxpayer savings would be astronomical, as a 2013 Paratransit Survey conducted by Metro Magazine reported that 24.9 million riders were provided trips in 7,024 vehicles nationwide. *See id.*
44. In 2015, the International Association of Transportation Regulators published its *Model Rules for Accessible Taxicabs and For-Hire Vehicles*, including sections for Vehicle Accessibility, Driver Training, Accessible Dispatch Programs and App Technology and Financing Mechanism that proposes the implementation of such a lockbox to achieve the goals stated herein. http://www.windelsmarx.com/resources/documents/IATR%20Accessibility%20Model%20Regs%2012.11.15%20(11157211).pdf
45. Local government approves one or more private e-hail applications; all taxis are required to use at least one.
46 All taxi drivers are required to use the single e-hail application branded by the local government.
47. All taxi drivers are required to use the single e-hail application branded by the local government, while allowing the option to simultaneously utilize other private apps.
48. Local government approves multiple private sector apps able to communicate on an open platform, regardless of which company a vehicle is affiliated with, or which app the driver or customer used. The government can also develop or brand an app that communicates on the open platform.
49. Government branded platform ensures that every taxi uses e-hail capable technology that integrates with the platform, but does not require cross-dispatching.
50. *Mayor Emanuel Announces Arro and Verifone Selected to Provide Universal Taxi App Service in Chicago*, Mayor's Press Office Jan. 6, 2016, *available at* https://www.cityofchicago.org/city/en/depts/mayor/press_room/major_speeches/2016/january/Universal-Taxi-App.html.
51. Paul Cherry, *Montreal Taxi Bureau Seeks a Standard "Look" for its Fleet*, Montreal Gazette (Apr. 23, 2017), http://montrealgazette.com/storyline/montreal-taxi-bureau-seeks-a-standard-look-for-its-fleet.
52. *See* note 25, *supra.*
53. *What Does the Medical Examination Involve*, Federal Motor Carrier Safety Administration, https://www.fmcsa.dot.gov/faq/what-does-medical-examination-involve (last accessed June 19, 2017).
54. Who must Comply, Federal Motor Carrier Safety Administration, https://www.fmcsa.dot.gov/regulations/hours-of-service (last accessed June 19, 2017).
55. *Certification of Safety Auditors, Safety Investigators and Driver/Vehicle Inspectors*, Federal Motor Carrier Safety Administration, https://www.fmcsa.dot.gov/international-programs/certification-safety-auditors-safety-investigators-and-driverve-hicle (last accessed June 19, 2017).





Code Enforcement

One Size Doesn't Always Fit All

By: Frank M. Johnson, Assistant City Attorney, Gaithersburg, Maryland

Most would agree that civil code enforcement in the United States, involving basic quality of life issues in our neighborhoods and communities, ought to be considered within the primary purview of the government closest to its residents – that is, municipal and county governments. That's in part because code enforcement issues are often made up of local complaints about a specific problem, involving a particular person or business within the community. That's also in part because enforcing basic home maintenance codes, noise ordinances, sign ordinances seem to be most effectively handled within comamunities at the local level, where local officials and government staff know best what the community needs – and wants.

In fact, as described below, many aspects of code enforcement are mandated, and that's true both in the United States and Canada. In Canada, municipal governments, as in the United States, have local planning and zoning authority, but provinces, such as Ontario, may specify planning and development processes and civil code enforcement procedures, as well as establish building codes and even lay out standards for weed control requirements. While the government structure of the United States may allow more local autonomy in theory, in fact, mandates may include some of the same procedural and notice requirements as from Canadian provinces. These are usually imposed by states on counties and municipalities and as noted below, in many cases states and the federal government go further to lay out the specific code that is to be enforced.

Local Code Enforcement in the United States. As Robert F. Kennedy once said, "every community gets the kind of law enforcement it insists on," meaning that one size does not fit all, either as to what local codes require, or how those requirements are enforced. What each community demands, through voters' election of local mayors and town and city councils, depends on local needs as well as local culture, values and characteristics. Thus many municipalities have ordinances limiting or prohibiting farm animals, such as roosters and pigs, while more rural communities would not consider such a limitation. It's not a restriction rural residents would want, or need.

Local enforcement is also more convenient, as residents and businesses generally will not want to call the state or federal government when they have a complaint about someone violating a home maintenance requirement or noise ordinance. They will look to their local government for help, where staff will likely know better how to reply and address the problem.

Dillon's Rule. It's axiomatic, at least since broad acceptance of "Dillon's Rule," that local ordinances typically cannot conflict with federal or state law. This is the basic concept, first established in an 1868 Iowa case, that municipalities are essentially creatures of the state legislature and have only those powers expressly so granted. *See Clinton v Cedar Rapids and the Missouri River Railroad*, 24 IA 455, 475 (1868). Almost all courts have adopted the "Dillon" rule, and the Supreme Court has long held that municipalities are "political subdivisions of the state." *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907). As such, the Court held that municipal powers are "in the absolute discretion of the state," and may be expanded, modified or withdrawn "at its pleasure." *Hunter*, 207 U.S. at 178-79.

Even so, it falls to the towns, cities and counties to handle code enforcement violations and complaints within their communities. As such, code enforcement is almost universally seen as a primary local government function. Even the smallest towns will enforce their laws and may issue civil citations. Larger cities and counties often have departments devoted to code enforcement – as well as attorneys who will prosecute citations in court.

Mandates That One Size Fits All, Even If It Doesn't. While code enforcement may be considered a local priority, in many ways local officials and staff increasingly must work within a "one size fits all" environment, as the laws we enforce, and how we go about enforcing them, are often dictated by the state legislature. And in many ways, local laws must follow mandates passed by the U.S. Congress and enforced by Federal agencies.

Examples of Federal Mandates. For example, at the Federal level, disability access requirements are imposed under the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq*. The Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §2000cc *et seq*. limits local zoning or land use regulations which impose a substantial burden on a person's religious practices. And the Federal Communications Commission has limited the ability of local and state government to regulate satellite dishes and small cell or distributed-antenna systems in many ways, starting with a prohibition on any local ordinance prohibiting the ability of any entity to provide wireless services. 47 U.S.C. §332(c)(7). These provisions all limit or specify requirements for local ordinances.

Examples of State Mandates. States have also passed a number of mandates which, in many ways, dictate not only the laws to be enforced thorough code enforcement, but also the manner in which local governments can do so. For example, where I practice in Maryland, municipalities have, as in most states, been granted home rule under the Maryland Constitution, Article XI-E, §3. But also, as in other states, no local law can conflict with state law. Md. Constitution, Article XI-E, §6; Md. Local Government Code Ann., §5-203(b). Town, city and county staff handle code enforcement matters within their jurisdictions and, in most cases, they are enforcing the local ordinances – even as the content of those laws is often mandated, to some extent, by federal or state law. Local rather than statewide building codes are in place, and indeed authorized for municipalities by Md. Local Government Code §5-211(a). Even so, state law imposes certain basic requirements, such as, for example, specifying local storm water management requirements and reviewing local inspection programs. Md. Environmental Code Ann., §§4-203 and 4-206. While issuing notices and handling initial complaints are largely handled at the local level, once an actual civil citation is issued, under Maryland law all local governments must all follow the state's Municipal Infractions process under Title 6 of the Local Government Article, Md. Local Government Code Ann., §6-101 *et seq*., which has generally been in place since 1987. This process dictates what is included on the citation and the process thereafter, including how long defendants have to pay the fine, and the court hearing thereafter. *See* Md. Local Government Code Ann., §§ 6-103, 6-106, 6-109.

The State of California similarly allows local governments to establish their own building and property maintenance codes, but specifies, in some detail, the fine limits counties and municipalities may impose. Thus, Cal. Government Code §25132 specifies that each violation of a county ordinance is limited to a fine of $100 for the first violation; $200 for the second, and not more than $500 for the third, except that local building and safety code violations have maximum fines of $100 for the first, $500 for the second, and $1,000 for the third. The same limits are imposed for municipalities, at Cal. Government Code § 36900.

Many states go further than proscribing processes for code enforcement. Indeed, building and property maintenance codes may seem to be local issues, but in many cases even plumbing codes are now dictated by state law. Oregon's state building code, including the mechanical, heating and ventilating code, applies statewide, and municipalities are prohibited from enacting or enforcing any differing requirements without Department of Consumer and Business Services approval. Or. Rev.Stat., Title 36 §455.040. While local enforcement and permitting is in place, the state also requires uniform permit and inspection requirements. Or. Rev. Stat., Title 36 §455.055. Pennsylvania has similarly adopted the Uniform Construction Code statewide, 34 Pa. Cons. Stat. §403.1(a), but allows municipalities to enact their own building codes which at least meet (or exceed) the statewide standards. 34 Pa. Cons. Stat. §403.102(i).

In Virginia, however, the state's construction code expressly supersedes any local regulations, allowing enforcement only of those local construction code provisions which do not conflict with state law. Va. Code Ann. §36-98. While most states permit local regulations which do not conflict with state law, that's not always the case. For example, municipal regulations in New Hampshire must be specifically authorized by state law. *Girard v. Allenstown*, 121 N.H. 268, 271 (1981). As such, they are unenforceable, even if not in conflict, unless a specific provision of state law enables local governments to act, *Girard*, 121 N.H. at 271-272, in which case the courts find that municipalities are "not estopped from creating more restrictive rules" such as for wetlands. *Cherry v. Town of Hampton Falls*, 150 N.H. 720, 725 (2004).

Along the lines of Virginia, the State of Michigan, in 1999, passed a statewide "Single State Construction Act" which adopted the International Code Council's Residential Code, Building Code, Mechanical Code and Plumbing Code, as well as the National Electrical Code and the Michigan Uniform Energy Code. Mich. Comp. Laws Ann. §125.1504(2). The Act specified it applied statewide and precluded local governments from enacting their own local building codes. Mich. Comp. Laws Ann. §125.1508(a). While local enforcement is permitted, the law proscribes the process a local government must follow in doing so, such as by requiring notice to the alleged person or business in violation and authorizing emergency action to correct the violation when health or safety is threatened. Mich. Comp. Laws Ann. §125.1508(b). Interestingly, in Michigan there was one exception to the ban on local building codes, which actually involved a maintenance code. This was the International Property Maintenance Code, which was not specifically adopted by the Michigan Single State Construction Act. Even so, the state agency handling building code enforcement asserted it had been adopted by reference, at Section 101.4.5 of the Michigan Building Code, and was thus part of the mandated set of state codes. Accordingly, when a few years later the City of Grand Rapids attempted to enforce its own building maintenance code, the defendant challenged the City in court and asserted that law had been preempted. Only because the IPMC was not specifically adopted did the Michigan Court of Appeals find the Grand Rapids property maintenance code still applied, as the single exception to the overall state building code mandates. *Azzar v. City of Grand Rapids and Schaeffer*, No. 260438 (MI Ct. App. Sept. 22, 2005), 2005 WL 2327076 (unpublished) at 3.

In New York, the state has, like Michigan, passed a number of uniform building codes, including the Residential Code, Building Code, Plumbing Code, Mechanical Code, Fuel Gas Code, Fire Code and the Property Maintenance Code. N.Y. Executive Law §§377, 378. As such, it is applicable statewide rather than being adopted by each local government. Even so, while considering building codes entirely a state responsibility, municipalities must enforce the state's building code – unless they opt out by passing a local law declining to handle such enforcement, in which case enforcement would pass to the

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Don't Forget to Put a Napkin Over the Steering Wheel

By: Brad Cunningham, City Attorney, Lexington, South Carolina

Forgive me as I digress for a few moments before reaching the point of this column. I unfortunately had to attend the funeral of a relative this past month in Charlotte, NC. Attendance was robust, and I saw relatives I haven't seen in over 40 years. We talked and chatted like we hadn't skipped a beat. A lunch / reception followed, wherein stories were told and relived of the "old days" of growing up in the mountains of Western North Carolina. Four generations of family members spun yarns and told tales late into the afternoon before we headed back to South Carolina, Georgia, Florida, Nebraska, Arizona and places beyond.

As I hit the interstate for the return trip, I couldn't help but think "Where did all the time go? Will I ever see some of these people again?" It was a melancholy drive home, but left me with plenty of time to think. And, I came up with the answer to my question "Where did all the time go?" I know where it went. It's no real mystery. We are all guilty of it. *I spent it all at the office! Darn it!*

For many of us, it is in our blood. We are in a race to see how productive we can be. Get up early... Eat breakfast on the run... Hit the highway... Thanks to technology, we are able to make a few business calls and even send emails without taking our eyes off the road or our hands off the wheel... Get to work, barely say hi to the co-workers and we're on the phone, online and typing away before our seat gets warm...

If we're really lucky, there is a break in the action long enough to allow us to eat a sandwich at our desk around mid-day. But, we keep at it even during our lunch "break." If we do leave our desk, lunch is often accompanied by work talk and most likely interrupted by phone calls and texts that for some reason seem to command more attention than the person across the table from us. After choking down a chicken breast the size of a golf ball, accompanied by two miniature sprigs of asparagus, a mad dash back to the office ensues.

If we're lucky again, we get to leave the office by 6:00 pm. On the way home, we're still using the phone and dictating emails. Maybe we might begin to think about dinner. But, even that often gets rushed as our day approaches its "end." I once had a colleague in Atlanta who considered a formal dinner as an occasion where he put a napkin over the steering wheel.

True to form, as I hit the door at home in Lexington, I took the opportunity to answer a few work emails and even edit a document. I couldn't help but laugh to myself. Even a funeral on Saturday doesn't get me out of work.

Recently, I have been literally blind-sided by several reminders of the consequences of living a lifestyle like this. I lost a First Cousin this week at the ripe old age of 56. She spent her life working her tail off in the frantic pace of the restaurant business, and unfortunately passed away this week out in Ephrata, Washington, after a long illness.

Closer to home, two legal colleagues who frequently appear in our municipal court both passed away within the last two weeks. Neither had reached the age of 60, and neither had suffered any immediate illness. Colleague number one left work one day, said "See you tomorrow" to the staff, and then never returned to work. He reportedly suffered a massive heart attack at age 55, and just simply dropped dead at home. Colleague number two also died unexpectedly from heart failure, leaving his law partner (who was his wife) scrambling to manage a funeral, a difficult business and her emotions all at the same time.

For all the smears, jokes and laughs we have to endure as lawyers, we have a very stressful profession. Quite often the failure to plan by others becomes our emergency, and we are met with frustration at our perceived failure to "fix" a co-worker's (or client's) problem. And by not having it done YESTERDAY! I wonder how long the average person should be expected to keep up with this pace. And, if we can't slow down, what are we to do about it?

Slowing down, or what to do in our spare time (if there is any) was a recent well-discussed topic on the Water Cooler. A colleague began a discussion about hobbies and what others like to do when they shed their lawyer suits. The variety of answers was very interesting, and shall remain anonymous herein.

As for me, I fish and am an avid sports fan, and I like to travel if possible. One of my bucket list items is to see every major league baseball team play a game. To date, I have seen all but four of them. If anyone wants to invite me to a game in Seattle, Minnesota, Cleveland or Kansas City, please let me know!

Another bucket list item is to visit all 50 states, even if for only a brief time. So far, I have been to 42 states and am missing Ohio, Wisconsin, Oklahoma, North Dakota, Hawaii, Maine, New Hampshire and Vermont. Again, to anyone in these locales, I'd like to come visit.

I also work at night during the summer for a Coastal Plain League baseball team, and when invited, I do radio play by play for high school sports. My next anger vacation (in the early planning stages) is a fly fishing trip to Poudre Canyon in Colorado, the former stomping grounds of my late friend Brad Bailey. I understand his ashes were scattered there.

Other answers to the query (edited) included:

" I crochet. Started 3 years ago, after attending a class at the public library. I went straight to the store and bought yarn and hooks, and watched hours of "how to" videos on YouTube. I joined a chapter of the Crochet Guild of America... Our local guild makes caps for preemies at a few local hospitals, as well as chemo caps and lapghans. We had been making squares to send to Africa as part of a charitable activity ... I have made baby blankets for teachers, coworkers, and a Spiderman cap for a little girl who loves her Spidey!"

"I used to garden, but the two dogs ate or tore up everything green and lovely in the back yard and my sons and I tore out over half of the garden last weekend (sniff). Reading is a favorite pastime, as well as playing card and board games with the family, neither of which get done as much as I'd like."

"Beyond music and walking the dog (or hold-

ing him if weather is bad), I drive for Mobile Meals every other Saturday, volunteer one evening a week at a local community center and spend a lot of time assisting my 95 year old mother.

"My particular hobbies are gardening and home canning. I am helping my youngest son earn his BSA gardening merit badge, trying to cultivate (pun intended) his interest in planting, growing and weeding (hard work, patience, fortitude that goes with any farming venture and the pride in reaping what you sow).

I like being able to learn about different plants - and now have a cause!! I try to help save our bees and Monarch butterflies."

"Cycling and driving, and occasionally still or motion photography. I recently fulfilled a lifelong dream to own a Porsche 911. Now my passions have come into conflict as I can't put my bike on my car, so I have to borrow my wife's SUV when I take the bike out. I usually ride hike/bike trails with minimal on road activity as I figure that increases my odds of avoiding a bike/car collision or other hazard of on-road riding."

"I am a railroad fan, both of current and historical locomotives. I decorate both my office and home study with railroad collectibles and artifacts. I subscribe to *Trains* magazine. A road trip isn't complete unless it includes at least one stop at a rail museum, historic display, ride on an excursion train, or an evening dinner train. *Polar Express* is my favorite modern Christmas movie... And yes, I am very comfortable killing an hour or two just observing the activity in a busy rail switching/classification yard."

"I play badminton competitively. I will be competing in the National Senior Games in Birmingham, AL this June which will be my third National Senior Games competition. I also teach dog training and compete in AKC dog obedience trials. Plus, I serve as an officer in our local dog obedience training club. And I also have a small backyard garden – blueberries, blackberries, a pear tree, and a small vegetable garden."

"I ride quarter horses. I have way too many, and ride 1 – 4 horses most days, unless I have a city council or Cub Scout meeting. My mare won her event at the American Quarter Horse World Championship Show with my trainer, and was reserve the next year with me riding. I've slowed down on showing while my son is young, but I have to keep riding to keep my mind right.

I also think that most horse skills translate into lawyer skills. Knowing what battles to pick-and not to pick one you can't or aren't willing see through right then. Compromise. Working with horses also gives you insight into yourself because they offer immediate and sometimes dramatic feedback as to whether or not your approach is working.

Some days it gives me peace. Other days, I have a horse on its hind legs pawing the air over my head while I try to give him his spring shots, but that makes the angry citizen 30 minutes later seem much more tame in the grand scheme of things."

"My favorite hobby that I do not get to enjoy as much as I would like is scuba diving. The beauty of the ocean and reefs combined with the peaceful underwater world is the best way to unwind and completely de-stress for me. The other bonus is it allows me to sleep very peacefully after diving all day."

"On a regular basis, I work out at least three times a week. Not only to stay in shape but to feel better about sitting most of the day while at work. The job is very sedentary."

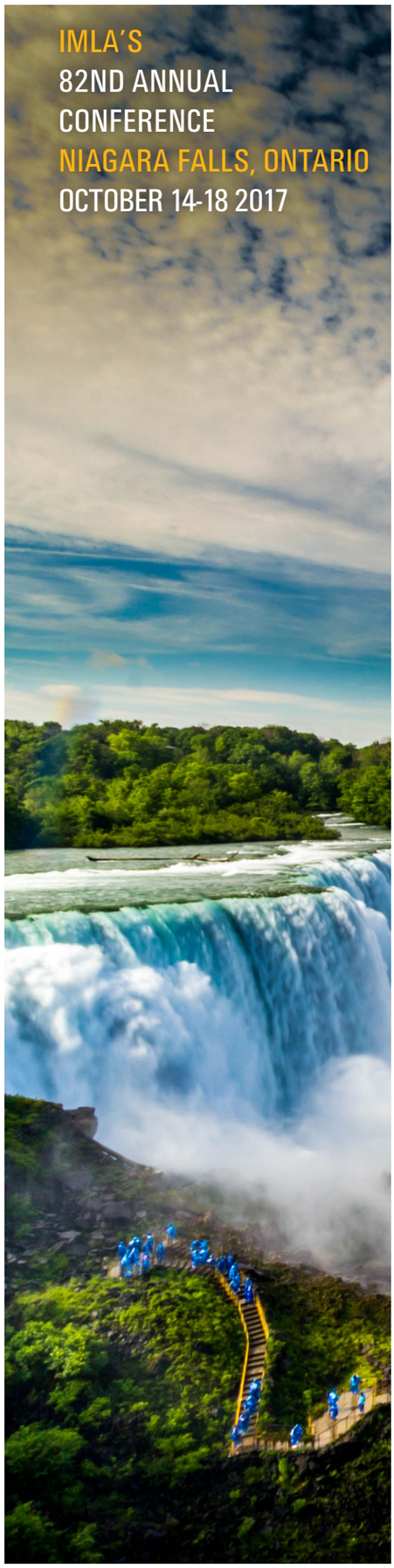
"I teach a fitness class at the local YMCA. It's called BodyPump and was developed by a company out of New Zealand. You get a new release (music, choreography notes, education) every 3 months from the Les Mills company that you have to memorize in order to teach the class. It's both a mind and body challenge (for me anyway)."

There you have it. We are a very diverse group in talent and interests. But, a common thread seems to be that none of us get to do these things as much as we would like. Stress can cause very real problems and conditions, and can be the undoing of a person. I'd like to challenge everyone who reads this to figure out more ways to incorporate relaxation and stress reducing activities such as these into our daily lives.

We are not promised tomorrow, folks. And, it seems such a shame in ways to spend most of our time doing something that causes so many headaches, at the expense of something we enjoy. Sure, of course we must be realistic, but I really don't' want to end up like my father. He led a very productive life and had planned a terrific retirement. But, he died suddenly of a heart attack only six weeks before retirement.

My advice? Keep up that hobby... Buy the shoes...Order the good wine... Wait for the head barber... Get the leather seats... Eat steak... Go ahead and take that trip to Europe... Does anyone remember the guy who on his deathbed said "I wish I had spent more time at the office?"... Neither do I ...

The prosecution "rests," your honor... (Hey, is that my phone ringing?) ML











Thank you, Washington DC attendees, for making our 2017 Spring Conference one of the most successful in recent memory!



























IMLA thanks member Jim Lampke for his photos of our event–



Recent Decisions of Interest

By Monica Ciriello, Ontario 2015

Municipalities Entitled to Appoint and Instruct Separate Counsel under Insurance Policies

***The Corporation of the City of Markham v Intact Insurance Company,* 2017 ONSC 3150 (CanLII) http://canlii.ca/t/h3wcl**

The Applicant, City of Markham (City) brought an application seeking relief against the Respondent, Intact Insurance (Intact) following a slip and fall on the City's sidewalk. The City had contracted its sidewalk winter maintenance of ploughing, sanding and salting to contractor VTA. VTA took out a Commercial General Liability policy with Intact naming the City as an additional insurer pertaining to liability arising out of the operations of VTA. On February 24 2014, the Plaintiff fell on an icy sidewalk in the City and brought a negligence action against both the City and VTA for failing to keep the sidewalk free of snow and ice. The City had requested VTA to clear the sidewalks everyday between February 18-22 2014, and no snow had accumulated beyond that date.

Intact defended VTA but maintained that it did not have a duty to defend the City. Intact submitted that the City was not an additional insured in this claim as the claim did not arise from VTA's operations, given that no operations were undertaken on February 24. The City commenced this application against Intact and sought: (1) A declaration that Intact is required to defend the City; (2) An order that the City is entitled to appoint and instruct counsel of its choice at the expense of Intact; (3) An order reimbursing the City for all past legal expenses incurred in defending the main action; and (4) costs of the application.

HELD: The Court found in favour of the City on all grounds.

DISCUSSION: The Court found that Intact is required to defend the City on all claims made against it by the Plaintiff. The elements of the test to determine if there is a duty to defend are outlined in the Ontario Court of Appeal decision *Carneiro v. Durham (Regional Municipality),* 2015 ONCA 909:

> First, when pleadings allege facts that, if true, require the insurer to indemnify the insured, the insurer is obliged to defend the claim. The mere possibility that a claim may fall within the policy is sufficient to trigger the duty to defend. In assessing whether the facts pleaded fall within the policy, the court must consider the substance and true nature of the claim. Extrinsic evidence expressly referred to in the pleadings may be considered.

In reviewing the Plaintiff's Statement of Claim, the Court concluded that the Plaintiff alleged identical negligence claims against both the City and VTA: that the parties failed to maintain the sidewalk and permitted it to be in an unsafe condition leading up to and on the date of the fall. The Court found that the Intact policy applied, and "Intact has a duty to defend the City...for the same reasons it has already agreed to defend VTA."

The Court also agreed with the City that it was entitled to appoint and instruct its counsel of choice without reporting to Intact, due to a conflict of interest. The Court highlighted VTA's Statement of Defense and Cross-claim which established VTA's attempts to shift liability to the City.

Finally, the Court found that Intact was required to pay for the City's defense and reimburse past costs in defending the action. Citing *Carneiro*:

> Where there is no practical means of readily distinguishing the costs of defense between the covered and not covered claims, or where it is impossible to do so, it is not appropriate to attempt to allocate defense costs and, therefore, the insurer should absorb them all.

The Court found no practical means of separating the covered and uncovered claims, and therefore held that Intact was responsible to cover the City's defense in its entirety.

Additional Parking Charges Allowed under *Housing Services Act* and *Residential Tenancies Act*

***El Sayed v Ottawa (City),* 2017 ONSC 3702 (CanLII) http://canlii.ca/t/h4bh5**

The Applicant is a recipient of rent-geared-to-income (RGI) and occupies a subsidised housing unit owned by the Ottawa Community Housing Corporation (OCHC) in the City of Ottawa (City). (OCHC and City are collectively Respondents). The Applicant is seeking judicial review of the decision made by Respondents to add an amount for parking at the unit, submitting that parking was always included in the RGI.

HELD: Application dismissed.

DISCUSSION: Citing ***Simpson v. Toronto Community Housing Corporation,*** 2016 ONSC 76 the Court found that the standard of review of the Respondents' decision is reasonableness. The Court noted that the "decisions were not only reasonable, but were the only decisions that could reasonably be made." The Applicant's position was that Respondents acted illegally and ultra vires to the authority provided to them in the *Housing Services Act, 2011 (HSA)* by adding a parking chare over and above the RGI amount. The

Court agreed that no language in the *HSA* provided the Respondents such authority, but noted that no language prohibited it.

In addition, the Court directed the Applicant's misguided argument to examine the landlord tenant relationship outlined in the *Residential Tenancies Act, 2006 (RTA)* as the *HSA* does not exclude the operation of the *RTA* unless specifically outlined in Section 7. The evident purpose of Section 7 is to allow the *HSA* and the *RTA* to be complementary and to function without a conflict. Section 7 of the *RTA* does not include s.123 which permits a landlord to increase the rent charged a tenant for a rental unit at any time if the landlord and tenant agree that the landlord will add any of the following: s.123 (1) a parking space. There was no evidence presented by the Applicant suggesting that the Respondents ever offered or agreed to provide free parking. Rather, the Respondent pointed to language in the tenancy agreement that clearly stated there were parking charges in addition to the cost of the subsidised rent.

City Did Not Meet the Pre-Trial Appropriateness Test to Proceed

Barriault v. Corner Brook (City), 2017 CanLII 38631 (NL SCTD) http://canlii.ca/t/h4ffr

In 1979 the City of Corner Brook (City) built a road and installed a culvert pipe on property owned by John Barriault (Plaintiff). In 2009, the Plaintiff submitted a plan to the City to develop his property. The development permit was denied on the grounds that the Plaintiff is required to carry out specific changes to correct the drainage on his property. The Plaintiff filed an action against the City alleging trespass and abuse of public authority. The City filed this application under s. 38.01(a) of the *Rules of the Supreme Court, 1986* for a pre-trial to determine questions of law prior to trial.

HELD: Application is dismissed.

DISCUSSION: The City maintains that the Plaintiff's trespass claim is not valid, as the City is authorized under the *City of Corner Brook Act,* R.S.N.L. 1990 *(Act)* to enter property during reasonable hours to perform required work. In the alternative, the City argues that *Limitations Act*, S.N.L. 1995, bars the Plaintiff's trespass claim from 1979. The City further argues that the Supreme Court is the not appropriate forum to hear the appeal of the Plaintiff's development permit. The Newfoundland West Regional Appeal Board has jurisdiction to review the Plaintiff's development permit in accordance with the *Urban and Rural Planning Act*.

It is established law that the Court has discretion to determine a question of law prior to trial. As outlined in *Ind-Rec Highway Services Ltd. v. Miawpukek Band* (1999) CanLII 19592, the onus is on the applicant to establish that a question or questions are appropriate for a pre-trial. Appropriateness is outlined in *Ind-Rec Highway Services Ltd* as:

—Agreed Statement of Facts or Matters of Public Record
—Determination of Factual Dispute
—Suitable Vehicle to Determine Questions of Law
—Discernable Advantage

The Court found that the City did not meet pre-trial appropriateness test, determining that not only is there no agreement of facts, there are factual disputes between the City and the Plaintiff. The Court found value in proceeding to trial to allow for additional facts to be examined by the trial judge, and found that there would be no reduction of time at trial if these issues were dealt with at the present. The Court ordered the matter to trial.

City Cannot Waive Material Element Outlined in Invitation To Tender When Granting Bid

Maglio Installations Ltd. v Castlegar (City), 2017 BCSC 870 (CanLII)

The City of Castlegar (City) put out a tender contract for the construction of three pools within the City. Marwest was successful in obtaining the bid from the City. The Plaintiff, an unsuccessful bidder for the contract, filed an action alleging that the City was in breach of contract. The Plaintiff suggested that the City failed to deal with all bidders fairly and in accordance with the material terms of the invitation to tender when it awarded the contract to Marwest, who submitted a deficient bid by failing to include the required Preliminary Construction Schedule (PCS) as outlined in Appendix 2 of the invitation to tender. The City maintained that the PCS was not a material element of the bid.

HELD: City breached contract with Plaintiff.

DISCUSSION: At issue was determining whether the PCS was a material element of the bid. Consistent with the Supreme Court of Canada decision *M.J.B. Enterprises v. Defence Construction (1951) Ltd.* 1999 CanLII 677 (SCC), a bid contract often includes an implied term that the City can accept only minor or non-material defects in a bid submission. Both parties agreed that if the Marwest's bid lacked a material element in its submission, then the City's award of the bid to Marwest breached the terms of its contract with the Plaintiff. Neither party challenged that a contract existed, recognizing that the City's invitation to tender was an offer and the Plaintiff's bid submission was acceptance.

The Court began by reviewing the plain meaning of the definition of "material," which is defined in the Oxford Dictionary as "important, essential, relevant... concerned with the matter not the form of reasoning..." Additionally, the court set the two-pronged test for non-material compliance as outlined in *Graham Industrial Services Ltd. V. Greater Vancouver Water District*, 2004 BCCA 5 (CanLII):

> The court must first assess whether the defect was as to an important or essential element of the invitation to tender and second determine on an objective basis whether there was a substantial likelihood that the defect would have been significant in the deliberations of the owner in deciding which bid to select.

In reviewing the facts of the case, the Court arrived at the conclusion that the PCS satisfied both prongs of the material test. The requirement for the PCS was clearly outlined in the invitation tender and there was nothing optional about this submission–with good reason, as the PCS would outline for the City if work could be completed within the required construction windows. The Court held that the importance of the PCS made it a material element of the bid, and the City did not have the authority to waive such material requirement. ML

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advantage of, the opportunity to shift from an economy based on agriculture to one based on real estate and tourism – Miami Beach has the opportunity to take advantage of the economic shift occurring with peer-to-peer sharing, not just across the country, but all over the world.

Notes

1. Chabeli Hererra, *How $20,000 fines have made Miami Beach an Airbnb battleground*, Miami Herald (Nov. 27, 2016) *available at* http://www.miamiherald.com/news/business/biz-monday/article117332773.html.
2. City of Miami Beach Code of Ordinances Sec. 142-1111(a)(1) *available at* https://www.municode.com/library/fl/miami_beach/codes/code_of_ordinances?nodeId=SPBLADERE_CH142ZODIRE_ARTIVSUDIRE_DIV3SUUSRE_S142-1111SHRMREAPUNTO.
3. Hererra, *supra* note 1.
4. The City's "practice safe renting" campaign admonished visitors to "avoid the walk of shame," and portrayed three women towing garments and roller suitcases through a residential neighborhood, presumably after having been ejected from an illegal STR. See, Jerry Iannelli, *Miami Beach Plans to Use Alarming Ads to Scare Away Airbnb-Style Renters*, Miami New Times (Sep. 8, 2016) *available at* http://www.miaminewtimes.com/news/miami-beach-plans-to-use-alarming-ads-to-scare-away-airbnb-style-renters-8757440.
5. Hererra, *supra* note 1.
6. Jerry Iannelli, *Miami Beach's Airbnb Crackdown Might Not Be Legal Under State Law, Opponents Argue*, Miami New Times (Aug. 26, 2016) available at http://www.miaminewtimes.com/news/miami-beachs-airbnb-crackdown-might-not-be-legal-under-state-law-opponents-argue-8722454.
7. *Id.*
8. *Id.*
9. City of Miami Beach Code of Ordinances Sec. 142-1111(a)(1) *supra* note 2, and Hererra, *supra* note 1.
10. *Id.* at Sec. 142-1111(a)(2).
11. Jimmy L. Morales, City Manager, *Letter to Commission 339-2016, Short-Term Rental Violations* (Aug. 17, 2016) *available at* miamibeachfl.gov.
12. West's F.S.A. Const. art. 8 § 2.
13. Jerry Iannelli, *Miami Beach Might Crack Down Harder on Airbnb, Spend Fines on Affordable Housing*, Miami New Times (Dec. 8, 2016) *available at* http://www.miaminewtimes.com/news/miami-beach-might-crack-down-harder-on-airbnb-spend-fines-on-affordable-housing-8978021. In fairness, one must acknowledge the importance of the hotel industry to the local economy. According to the Greater Miami Convention & Visitors Bureau, Miami's hotels sold 1,383,625 rooms in 2015 at an average daily room rate of $250.93. See, Marilyn Bowden, *Hotel room rates for the Miami area nation's highest*, Miami Today (May 10, 2016) *available at* http://www.miamitodaynews.com/2016/05/10/hotel-room-rates-miami-area-nations-highest/.
14. City of Coral Gables v. Coral Gables, Inc., 119 Fla. 30 (1935).
15. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). In Belle Terre, the ordinance limited occupancy of single family dwellings to traditional families or no more than two unrelated persons. The Court held that the ordinance was "reasonable, not arbitrary and bears a rational relationship to a (permissible) state objective."
16. Andres Viglucci, *The 100-year story of Miami Beach*, Miami Herald (Mar. 21, 2015) *available at* http://www.miamiherald.com/news/local/community/miami-dade/miami-beach/article15798998.html.
17. Seth Bramson, Miami Beach, Images of America 7 (Arcadia Publishing, Charleston, SC, 2005
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. Ruby Leach Carson, *40 Years of Miami Beach*, Tequesta, Historical Association of Southern Florida 3 (1955).
25. Kyle Munzenrieder, *Miami Tourism Breaks Records Again: 14.6 Million People Visited in 2014*, Miami New Times (May 15, 2015) *available at* http://www.miaminewtimes.com/news/miami-tourism-breaks-records-again-146-million-people-visited-in-2014-7618105.
26. *Peer-to-peer rental, The rise of the sharing economy: On the internet everything is for hire*, The Economist (Mar. 9, 2013) *available at* http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy.
27. *Id.* noting that Airbnb launched in 2008.
28. Charter of the City of Miami Beach, Florida, Preamble (Nov. 3, 1993), *available at* https://www.municode.com/library/fl/miami_beach/codes/code_of_ordinances?nodeId=SPACH.
29. Judge James R. Wolf and Sarah Harley Bolinder, *The Effectiveness of Home Rule: A Preemption and Conflict Analysis*, Fla. Bar J. Vol. 83, No. 6, 92 (Jun. 2009) *available at* https://www.floridabar.org/divcom/jn/jnjournal01.nsf/Author/2D1A62818F4C4796852575C5004B3C64. The Municipal Home Rules Power Act (MHRPA) is now codified in Ch. 166 of the Florida Statutes.
30. *Id.*, citing City of Miami Beach v. Fleetwood Hotel, 261 So. 2d 801, 803 (Fla. 1972).
31. *Id.*
32. *Id.*
33. *Id.* at 93.
34. *Id.*
35. *Id.*
36. *Id.*
37. FL ST § 509.032(7), stating "[t]he regulation of public lodging establishments and public food service establishments, including, but not limited to, sanitation standards, inspections, training and testing of personnel, and matters related to the nutritional content and marketing of foods offered in such establishments, is preempted to the state."
38. *Id.* The "duration or frequency" language was added in a 2014 amendment which modified the original language of para. 7(b), passed in 2011. The relevant amendments to the Ordinance occurred after the 2014 amendment to paragraph 7 of the Florida STR Law.
39. *Id.*
40. City Of Miami Beach Fl. Code Of Ordinances, Sec. 142-1111 (May 16, 2012) *available at* https://www.municode.com/library/fl/miami_beach/codes/code_of_ordinances/174532?nodeId=SPBLADERE_CH142ZODIRE_ARTIVSUDIRE_DIV3SUUSRE_S142-1111SHRMREAPUNTO. The May 16, 2012 version of Sec. 142-1111 is the oldest version of the ordinance archived on municode.com. Paragraph b of the 2012 version of Sec. 142-1111 states that June 19, 2010 was "the effective date of the ordinance enacting this section."
41. City of Miami Beach Fl. Code of Ordinances, Sec. 142-1111 (Feb. 8, 2017) *available at* https://www.municode.com/library/fl/miami_beach/codes/code_of_ordinances?nodeId=SPBLADERE_

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CH142ZODIRE_ARTIVSUDIRE_DIV3SUUSRE_S142-1111SHRMREAPUNTO (last visited Feb. 14, 2017).
42. *Id.*
43. *Id.* at para. e(1). The listed fines were, expressly, for violations of paragraph b. That disconnect was not addressed until the September 22, 2014 version which stated, "[v]iolations of [sub]section 142-1111(a) or (b) shall be subject to the following fines." See CITY OF MIAMI BEACH FL. CODE OF ORDINANCES, Article IV, Supplementary District Regulations, Division 1, Generally, Sec. 142-1111. - Short-term rental of apartment units or townhomes (Sep. 22, 2014) *available at* https://www.municode.com/library/fl/miami_beach/codes/code_of_ordinances/219510?nodeId=SPBLADERE_CH142ZODIRE_ARTIVSUDIRE_DIV3SUUSRE_S142-1111SHRMREAPUNTO. The September 22, 2014 version of Sec. 142-1111 also raised the fines for the first time (from $500 to $1500 for a first violation).
44. *Id.*
45. *Id.* Municode.com does not list any pending amendments. However, Miami Beach Mayor Philip Levine told the Miami Herald on November 27, 2016 that he thinks "[the fines] can be increased," and that "$20,000 is not enough." See, Hererra, *supra* note 1.
46. Sec. 142-1111 (May 16, 2012), *supra* note 40. 47
Sec. 142-1111 (Feb. 8, 2017), *supra* note 41.
48. *Id.*
49. *Id.* "'Advertising' or 'advertisement' shall mean any form of communication for marketing or used to encourage, persuade, or manipulate viewers, readers or listeners for the purpose of promoting occupancy of a residential property . . ."
50. *Id.*
51. Plaintiff's Motion for Reconsideration of Order Denying Plaintiff Charles Fitz's Motion for Final Summary Judgment and Incorporated Memorandum of Law, Charles Fitz v. City of Vero Beach, Florida, No. 312015CA000266, Fla. 19th Cir. Ct. (Mar. 14, 2016).
52. *Id.*
53. *Id.*, citing Hostetter v. Escambia County, No. 2015-CA-1383, L.T. No. CE#15-02-00416, Fla. 1st Cir. (Dec. 16, 2015).
54. Fitz v. City of Vero Beach, No. 312015CA000266, Fla. 19th Cir. Ct. (May 3, 2016). The decision was affirmed in February 2017, in Fitz v. City of Vero Beach, No. 4D16-1587, Fla. 4th Dist. Ct. App. (Feb. 9, 2017).
55. *Id.*
56. Katherine Kallergis, "City of Miami passes Regalado's resolution, could sue platforms like Airbnb" THE DAILY DEAL, March 23, 2017.
57. http://www.miami21.org/PDFs/Amended_Codes/Miami_21_May_2017.pdf.
58. Airbnb Inc. v. City of Miami, No. 17-08999 CV 43 (11th Judicial Cir., Miami-Dade Cty. May 30, 2017).
59. Mr. Kerry L. Ezrol, Fla. AGO 2016-12 (2016), citing House of Representatives Final Bill Analysis, Local & Federal Affairs Committee, CS/HB 307, dated June 19, 2014. Ms. Bondi was responding to a question from the Fort Lauderdale City Attorney regarding "whether the city could limit vacation rentals through a proposed ordinance (1) imposing distance separation requirements or (2) limiting the percentage or number of vacation rentals, in light of the preemption language regarding vacation rentals in s. 509.032(7), Fla. Stat."
60. *Id.*
61. William P. Sklar, Jerry C. Edwards, *Florida Community Associations versus Airbnb and VRBO in Florida*, 91 FLA. B.J. no. 2, at16 (Feb. 2017).
62. Village of Belle Terre v. Boraas, 416 U.S. 1, 13 (1974).
63. *Id.* at 13-14.
64. City of Coral Gables v. Sakolsky, 215 So. 2d 329 (Fla. Dist. Ct. App. 3d Dist. 1968).
65. City of Miami Beach v. Ocean & Inland Co., 147 Fla. 480, 486 (1941).
66. Raul J. Aguila, City Attorney, Commission Memorandum, *An Ordinance of the Mayor and City Commission of the City of Miami Beach, Florida*, Amending the Code of the City of Miami Beach (Jan. 13 2016) *available at* www.miamibeachfl.gov.
67. Village of Belle Terre, *supra* note 62.
68. U.S. CONST. amend. V.
69. City of Venice v. Gwynn, 76 So. 3d 401, 402 (Fla. 2d DCA 2011).
70. *Id.* at 403.
71. *Id.*
72. *Id.*
73. *Id.* at 403-404.
74. *Id.* at 404, citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).
75. *Id.* at 404-405.
76. *Id.* The Second District noted that "In focusing on Gwynn's denied expectations for the use of her property, the court failed to recognize record evidence that Gwynn's property had continued value as a monthly rental, as a short-term rental for three periods, or as investment property which could be sold." The court then pointed out that "[t]he standard is not whether the landowner has been denied those uses to which he wants to put his land; it is whether the landowner has been denied all or substantially all economically viable use of his land," citing Corn v. City of Lauderdale Lakes, 95 F.3d 1066, 1072–73 (11th Cir.1996).
77. According to Zillow.com, the home value index in Miami Beach has risen from $244,000 in June 2010, when City Code Section 142-1111 was enacted, to $402,000 as of April 2017. See, Miami Beach Home Prices & Values, *available at* https://www.zillow.com/miami-beach-fl/home-values/.
78. Airbnb, Inc. v. City and County of San Francisco, 2016 WL 6599821 (Nov. 8, 2016).
79. *Id.* at 1.
80. *Id.* at 3.
81. *Id.*
82. *Id.* at 4.
83. *Id.*
84. *Id.* at 6.
85. *Id.* at 8.
86. *Id.*, citing Fla. Bar v. Went For It, Inc., 515 U.S. 618, 623–24 (1995). The Judge also noted that, "the Supreme Court has consistently held that speech proposing an illegal transaction is excluded," citing United States v. Williams, 553 U.S. 285, 297, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008).
87. Sec. 142-1111(a)(2), *supra* note 2.
88. Jimmy L. Morales, City Manager, *Letter to Commission 339-2016, Short-Term Rental Violations* (Aug. 17, 2016) *available at* web.miamibeachfl.gov.
89. Practical Law Real Estate, *Airbnb Loses Communications Decency Act Argument in San Francisco, Wins Temporary Block* (Nov. 28 2016) *available at* https://1.next.westlaw.com/w-004-6547?__lrTS=20170414155115182&transitionType=Default&contextData=(sc.Default).
90. Airbnb, Inc. v. City and County of San Francisco, *supra* note 78 at 4.
91. *Id.*
92. *Id.*
93. *See* 47 U.S.C.A. § 230(c)(1).
94. Airbnb, Inc. v. City and County of San Francisco, *supra* note 78 at 8.

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95. *Id.*
96. U.S. CONST. amend. VIII.
97. Locklear v. Florida Fish & Wildlife Conservation Comm'n, 886 So.2d 326, 327 (Fla. 5th DCA 2004).
98. *Id.* at 329.
99. *Id.*
100. Jim Waymer, *Net ban turns 20 on July 1, but was it a success?*, Florida Today (Jun. 30 2015) *available at* http://www.floridatoday.com/story/news/local/2015/06/30/net-ban-turns-july-success/29532739/.
101. State v. Jones, 180 So.3d 1085, 1089 (Fla. 4th DCA 2015), citing Gordon v. State, 139 So.3d 958, 960 (Fla. 2d DCA 2014).
102. State v. Cotton, 198 So.3d 737 (Fla. 2d DCA 2016), citing Coyote Publ'g, Inc. v. Miller, 598 F.3d 592, 600 (9th Cir.2010) (citing U.S. Department of State, The Link Between Prostitution and Sex Trafficking (November 24, 2004)).
103. Aguila, *supra* note 66.
104. Hererra, *supra* note 1.
105. Jerry Iannelli, *Unlike Miami Beach Mayor Levine, 94 Percent of South Floridians Want Legal Airbnb*, MIAMI NEW TIMES (Mar. 7, 2017) *available at* http://www.miaminewtimes.com/news/unlike-miami-beach-mayor-levine-94-percent-of-south-floridians-want-legal-airbnb-9190438.
106. *Id.*
107. *Id.*
108. Hererra, *supra* note 1.
109. Iannelli, *supra* note 105.
110. Miami Beach should seek a State Attorney General's opinion to ensure the State does not view an annual percentage restriction as regulating the frequency of vacation rentals, implicating 509.032 preemption.
111. Lara Major, Comment, *There's No Place Like (Your) Home: Evaluating Existing Models and Proposing Solutions for Room-Sharing Regulation*, 53 SAN DIEGO L. REV. 469, 503 (Spring 2016). Citing, Charles Gottlieb, *Residential Short-Term Rentals: Should Local Governments Regulate the "Industry"?*, 65 PLAN. & ENVTL. L. 4, 6 (2013).
112. *Id.*
113. Laine Doss, *Fighting Back: Airbnb Says Its Guests Spent $50 Million at Local Restaurants Last Year* MIAMI NEW TIMES (Oct. 24, 2016) *available at* http://www.miaminewtimes.com/restaurants/fighting-back-airbnb-says-its-guests-spent-50-million-at-local-restaurants-last-year-8866832. ML

Code Enforcement Cont'd from page 25

applicable county – and if the county passes a local law declining enforcement, the New York Department of State would seek to enforce the building code. N.Y. Executive Law §381. But under these provisions, even if the local government does not pass a local law declining enforcement of the state's building code, the municipality or county will have to pass a local ordinance empowering a local enforcement program for the building code.

Impact of Local Enforcement. Clearly, counties and municipalities in the United States are generally required to follow state law in enacting their own ordinances, if not enforce state law directly, as in New York. In some cases, there is little local option, such that the presumption is that "one size fits all," regardless of local preferences. Even so, anyone involved in the code enforcement process knows that discretion in actual enforcement almost always remains. Indeed, the person who as a practical matter has the most discretion when it comes to code enforcement is the inspector or code enforcement officer – the person out in the community, interacting directly with persons who may be complaining about violations as well as those who are allegedly committing code violations.

What this means is that despite state and federal mandates in the United States – or, for that matter, provincial mandates in Canada – it still remains a matter of local discretion how a law will be enforced. It remains for the inspector, the person initially communicating with the alleged violator, to determine whether a violation exists. It falls to that inspector or code enforcement officer to attempt to solve the problem – to gain compliance – and then to follow up to check on that compliance. And it falls to that inspector or officer to conclude whether an alleged violator is, in good faith, making sincere and effective efforts to address the problem leading to the complaint. The primary focus of any successful code enforcement effort will always remain: to solve the problem by having the violation corrected. Thus, state, provincial or federal law may specify the standard to be enforced, but cannot dictate how a violation of that standard is addressed, such as requiring immediate issuance of citations, any more than it can dictate the actual facts or what steps will actually solve the problem. That still falls to those of us in the trenches, if you will, in towns, cities and counties, where we can – mandates aside – still make a difference. ML



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IMLA NOMINATING COMMITTEE FOR 2017 ELECTIONS

Pursuant to the IMLA By-Laws, IMLA is announcing the 2017 Nominating Committee. The Committee encourages people interested in being nominated for Vacant Positions on the IMLA Board of Directors and for IMLA Regional Vice Presidents to make their interest known to the Committee. In addition to filling vacancies, the Committee is charged with nominating the Board's officers: including, Treasurer and President-elect. Some members of the board will be term limited and cannot seek reelection. As a result there will be a vacancy or vacancies open. It is IMLA's goal to have a Board that represents the organization's diversity of region, gender, race, age and ethnicity and the Board welcomes all who wish to serve. Unlike other non-profit boards, IMLA does not require board members to contribute money to the organization, but does seek persons who are interested in advancing its mission, increasing its membership and attendance at its programs.

The Nominating Committee is as follows. This year, the nominating process will be different in that the Nominating Committee will be conducting phone interviews PRIOR to the Annual Conference and will introduce its slate of nominees at its meeting at the Conference. It is important to hear of your interest as soon as possible to allow for the phone interviews to be set up. Our hope is to reduce the amount of time members must spend away from our educational programming and to thoroughly consider each applicant. In applying, the Committee hopes that you can offer the Committee an explanation about how you can advance the mission of IMLA and increase its membership and attendance as well as innovative ideas for advancing the interests of our membership.

The Nominating Committee is charged with trying to find candidates that will work to increase the value of IMLA to its members, strengthen the organization and ensure the diversity of the Board.

MLA Regional Vice Presidents are also selected by the Nominating Committee and it has been our practice in the past to nominate the current Regional Vice Presidents unless there is a vacancy.

The current copy of the amended By-Laws can be found on IMLA's web site at www.imla.org and the By-Laws describe the qualifications for service on the board or other office.

The Board of Directors hopes that all interested members will apply.

Vote to Amend IMLA By Laws. IMLA announces one proposed By-Law amendment. The amendment will change IMLA's address to its current address of 51 Monroe St., Suite 404, Rockville, MD 20850. The proposed amendment will be voted on by IMLA members at IMLA's General Business Meeting at the Annual Conference on Wednesday, October 14, 2017. For additional information, including a copy of the proposed amendments, please contact IMLA at info@IMLA.org. Thank you

Please Contact The Committee Members Below For Consideration:

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Opioid Abuse Cont'd from page 13

doctor's prescription) and her using them in violation of varying state drug laws and the federal Controlled Substances Act.

If Ms. Waverly illegally obtained, and is illegally using, opioid painkillers, then neither the ADA nor the FMLA will protect her. The ADA will not consider her to be a qualified individual with a disability. Although Waverly's physical condition (i.e., her lethargy and her stomach/intestinal problems) may substantially limit her ability to perform the major life activity of working, the law specifically carves out an exception to the protections normally afforded to disabled individuals. Simply put, the law does not protect individuals who use illegal drugs.

Accordingly, if the City determines that Waverly's opioid addiction stems from illegal use or activity, then it can insist that she abide by the City's normal policies and procedures governing workplace performance and drug policies. The City could: 1) hold Ms. Waverly accountable for using drugs in the workplace (assuming that she uses opioids while at work; 2) require that she not engage in the illegal use of opioid painkillers while at work; 3) require that she behave in conformance with all federal drug laws; 4) hold her to the same qualification standards for employment or job performance and behavior to which the City holds its other employees; and, 5) if it desires, terminate her employment without repercussion. If Ms. Waverly's actions are illegal, the City is not required to engage in the accommodation or interactive processes.

Similarly, the FMLA does not provide protection for Ms. Waverly if her use of opioids is illegal. Although she may receive FMLA leave for substance abuse treatment if the treatment involves inpatient care and is provided by a health care provider, she cannot request leave to deal with the day-to-day side effects of her illegal opioid use. Additionally, nothing in the FMLA prohibits the City from disciplining or terminating Waverly for her underlying illegal use of drugs, so long as the City does not terminate her simply for taking FMLA leave to seek appropriate medical attention.

On the other hand, if Ms. Waverly's lethargy and stomach illness is a side effect of her legal and proper use of doctor-prescribed opioids, then the City must be certain to comply with the ADA and FMLA. Under the ADA, her side effects must substantially limit her ability to perform her job duties in order for her to qualify as an individual with a disability (assuming that she otherwise would still be capable of performing them). If they do, the City would need to provide Waverly with a reasonable accommodation, so long as accommodating her condition was possible and did not impose an undue hardship. Human Resources and Ms. Waverly's manager, Mr. McGavin, would have to determine whether she is able to perform her assigned job duties. If the answer is yes, then the City should engage Waverly in the interactive process. It should:

1. Determine the duties that Ms. Waverly are required to actually perform and are fundamentally important to the City, versus the duties that are not essential and are marginal in importance;
2. Discuss with Waverly her ability to perform job-related functions and request that she contact her health care provider to provide any physical or cognitive limitations;
3. Discuss with Waverly the potential performance barriers due to her limitations; and
4. Determine possible options for an effective and a reasonable job accommodation that does not impose an undue hardship for the City as an employer, and then discuss those options, if any, with Ms. Waverly.

For example, if Waverly's lethargy is problematic, then the City could agree to provide extra rest breaks for her. If she needs to be within close proximity to a bathroom because of her upset stomach, then perhaps the City could temporarily relocate her desk to be nearer to those facilities. Similarly, if she is unable to assist other Parks and Recreation employees in manual labor, then the City could assign her only tasks involving a minimal amount of physical exertion. Lastly, if she is unable to travel to the City's different parks locations to oversee her employees, then perhaps the City could permit Waverly and her employees to communicate electronically such as via a cell phone or videoconference. Provided that these or similar accommodations would permit Ms. Waverly to meet her job duties and would not be unduly burdensome for the City to implement, then the City could propose these accommodations and fulfill its requirements under the ADA.

Under the FMLA, if Ms. Waverly's addiction to opioid painkillers resulted from legal use and required treatment by a health care professional, then she would be considered to be suffering from a serious health condition. Accordingly, if FMLA leave was available to Waverly, then the City would be required to permit her to utilize such leave to seek treatment for her opioid-induced medical complications.

How should legal counsel approach this issue? The City Attorney must first determine whether Waverly's opioid-induced side effects stem from the legal or illegal use of drugs. The City may request that she submit to a drug test with a third-party drug screener, and check to see whether the test reveals abnormally high concentrations of opioids. Additionally, the City may observe Waverly and her side effects, and draw conclusions about the likelihood of her illegal use of drugs based upon the observed severity or duration of the side effects. However, caution with either of these methods must be taken, because there is always the possibility of a falsely positive drug test or inaccurate observations. The ADA provides specific protections for individuals wrongly regarded as disabled. Accordingly, the City's best course of action may simply be to speak withWaverly. Information about legal or illegal use of opioids may come out during ADA-related conversations and the interactive process.

Once the City determines the extent of the drug use, it can take further steps. If the drug use is illegal, it may discipline or terminate Ms. Waverly. If the use is legal, the City will need to follow ADA and FMLA procedures to ensure that reasonable accommodations are offered, and opportunity for leave is available. Ms. Waverly would likely be considered disabled and afforded legal protections by the federal government.

Take-Aways for Employers

Given the scope of the opioid epidemic sweeping through America, employers, including state and local governments, need to be mindful of the legal and practical implications accompanying both the legal and illegal use

of opioid drugs. To better facilitate safe and efficient workplaces, employers should consider taking several steps.

First, employers should have a clear drug policy that includes provisions for the legal and illegal use of prescription drugs. Employers should also be certain that their drug tests include screening for the presence of opioids and prescription painkillers. Make clear that abusing prescribed drugs is a violation of the organization's drug policy. Establish specific and careful procedures for investigating employees who may be abusing drugs, and for taking corrective action once an employee has been determined to be in violation of a drug policy.

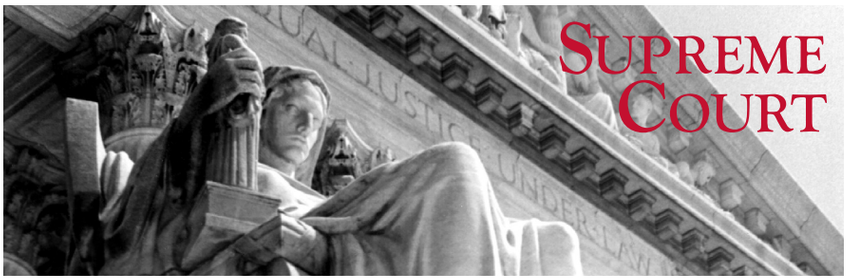
Second, consider educating employees about the dangers of prescription painkiller abuse. Employees should know about the high risk of addiction with opioid painkillers, and should be aware of the adverse side effects that often accompany even legal opioid use. Moreover, employees should be aware that opioid use may adversely impact their job performance, and may necessitate that they and their employer try to find ADA-compliant reasonable accommodations.

Third, employers should train supervisors to detect and respond to employees who may be suffering from illegal drug use, which would include coverage of opioid abuse. Training on detecting a disability, drug use and abuse, and how to handle such situations are paramount. All managers and supervisors should not only be fluent in the organization's drug policies and processes, but should know how to spot the symptoms of abuse. Additionally, all supervisors and managers should understand that while an individual may suffer from the side effects of opioid medication, the employee may not actually be using opioids illegally. When an employee's use is legal, supervisors need to know that they will have to accommodate the employee's disability. Supervisors should not be quick to make adverse employment decisions based off an erroneous perception of drug abuse.

Fourth, and finally, employers need to recognize that opioid abuse is a complex matter. Dealing with opioid abuse will necessarily involve many different individuals and departments. The employee, the employee's medical providers, the employee's supervisors, the human resources department, and the legal department may all need to take an active role to resolve potential workplace problems stemming from the use of opioid medications. By taking a compliant and well-informed approach, employers can better ensure that all interested parties are involved, and that there is consensus regarding the most appropriate course of action to keep the workplace safe and liability-free. Working closely and speaking openly and honestly will benefit all parties involved and can help combat the negative workplace effects of America's opioid epidemic.

Notes

1. National Institute on Drug Abuse, America's Addiction to Opioids: Heroin and Prescription Drug Abuse, https://www.drugabuse.gov/about-nida/legislative-activities/testimony-to-congress/2016/americas-addiction-to-opioids-heroin-prescription-drug-abuse.
2. Centers for Disease Control and Prevention, Prescription Opioid Overdose Data, https://www.cdc.gov/drugoverdose/data/overdose.html.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. National Safety Council, How the Prescription Drug Crisis is Impacting American Employers, http://www.nsc.org/NewsDocuments/2017/Media-Briefing-National-Employer-Drug-Survey-Results.pdf.
9. *Id.*
10. *See* 42 U.S.C. § 12101 et seq.
11. *Id.* at § 12111.
12. *Id.*
13. *Id.* at § 12102.
14. *Id.*
15. 29 C.F.R. § 1630.2.
16. *Id.*
17. 42 U.S.C. § 12112.
18. 29 C.F.R. § 1630.2.
19. *Id.*
20. *See id.*
21. *Id.*
22. *Id.*
23. 42 U.S.C. § 12114.
24. 29 C.F.R. § 1630, Appx.
25. 42 U.S.C. § 12114.
26. 29 C.F.R. § 1630.3.
27. EEOC's Americans with Disabilities Act Title I Technical Assistance Manual.
28. *Id.*
29. 29 C.F.R. § 1630.3.
30. *Id.*
31. 29 C.F.R. § 1630.13; *see also* EEOC Enforcement Guidance: Disability-related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA), https://www.eeoc.gov/policy/docs/guidance-inquiries.html.
32. EEOC Enforcement Guidance: Disability-related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA).
33. *Id.*
34. *Id.*
35. *Id.*
36. 42 U.S.C. § 12114.
37. 29 C.F.R. § 1630.3.
38. *Id.*
39. EEOC Enforcement Guidance: Disability-related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA).
40. *Id.*
41. EEOC's Americans with Disabilities Act Title I Technical Assistance Manual.
42. *Id.*
43. *Id.*
44. EEOC Enforcement Guidance: Disability-related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA).
45. *Id.*
46. 29 U.S.C. § 2601 et seq.
47. *Id.* at § 2612.
48. 29 C.F.R. § 825.119.
49. 29 U.S.C. § 2611.
50. 29 C.F.R. § 825.115.
51. *Id.* at § 825.102.
52. *Id.* at § 825.119.
53. *Id.*
54. *See id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *See* https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=22577.
59. *Id.*
60. *Id.*
61. *Id.*
62. EEOC's Americans with Disabilities Act Questions and Answers, https://www.ada.gov/employmt.htm.
63. *Id.*
64. *Id.*



Religion and the Swing Set

By: Erich Eiselt, IMLA Assistant General Counsel and Editor

The First Amendment's Establishment and Free Exercise Clauses have coexisted for more than two centuries. Their relationship requires mutual deference. Guaranteeing every individual's right to express a religious belief (or none at all) while ensuring that the government does not establish religion can be a devilishly challenging proposition.

On its last day of the October 2016 Term–when many observers were preoccupied with the Supreme Court's decision to consider the Trump travel ban–the Court issued what may well have been the Term's most significant decision. This time, the establishment versus exercise argument arose on a children's playground.

Trinity Lutheran Church of Columbia, Inc. v. Comer, **No. 15-577 (U.S. June 26, 2017)** involves the Trinity Lutheran Church Child Learning Center (Center), a preschool and daycare in Columbia, Missouri operating under the auspices of Trinity Lutheran Church (Church). In 2012, desiring to better protect its youthful clientele against tumbles from swings and monkey bars, the Center sought funds to replace its pea gravel playground with a rubber surface. It applied to the Missouri Department of Natural Resources (DNR) for a grant under Missouri's Scrap Tire Program, which reimburses qualifying nonprofits that install surfaces made from recycled tires.

Although the Center ranked fifth among 44 applicants seeking a recycled surface grant, DNR declined the Center's request on the basis of its Church affiliation, in obeisance to Article I, Section 7 of the Missouri Constitution, which states:

> That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.

The Center sued, alleging violation of its Free Exercise rights. The Western District of Missouri dismissed, holding that although the government cannot restrict the exercise of religion, it is not prohibited from withholding an affirmative benefit on account of religion. As support it cited *Locke v. Davey*, 540 U.S. 712 (2004), where the Supreme Court upheld the State of Washington's denial of scholarship monies to an applicant who intended to use the funds to pursue a theology degree.

A divided panel of the Eighth Circuit affirmed, finding that the Free Exercise Clause did not compel Missouri to disregard the broader anti-establishment principles reflected in its own Constitution. The Church successfully petitioned for certiorari.

Although the Governor of Missouri announced in April 2017 that religious entities would henceforth be eligible to compete for DNR grants on the same terms as secular organizations, that declaration did not unequivocally moot the issue. The Court heard argument on April 19 and returned a decision on June 26. Writing for a 7-2 majority, Chief Justice Roberts reversed. He held that the DNR was impermissibly singling out the Center for discriminatory treatment based solely on its religious character. As Roberts framed it, the DNR policy essentially put the Center to a choice: it could either function as a religious entity or it could be eligible to obtain benefits under the playground resurfacing program. The evil that Roberts identified was not merely the denial of funding but the denial of eligibility, based on religion: "The express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant." This practice necessitated the most rigorous review possible: "It has remained a fundamental principle of this Court's free exercise jurisprudence that laws imposing 'special disabilities on the basis of . . . religious status' trigger the strictest scrutiny."

DNR's response did not demonstrate the requisite compelling interest. As Roberts characterized it, DNR could only offer "Missouri's preference for skating as far as possible from religious establishment concerns." This was inadequate in the face of DNRs "clear infringement on free exercise."

Roberts also disagreed that *Locke v. Davey* was controlling. In *Locke*, the scholarship applicant was denied state funding, ostensibly available to any applicant, only because he wanted to apply those funds to a religious education. For Roberts, this was a critical difference, however nebulous: "Davey was not denied a scholarship because of who he was; he was denied a scholarship because of what he proposed to do. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church." Furthermore, in *Locke,* the funding had been requested for a divinity degree–an "essentially religious endeavor." In contrast, resurfacing playgrounds could hardly be characterized as a religious activity.

The majority opinion also included "footnote 3." Although not written by Roberts, the note appeared to limit the scope of the opinion: "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination."

Justices Kennedy, Alito, Thomas, Gorsuch and Kagan joined, with Thomas, Gorsuch and Breyer filing concurrences. Justice Breyer was concerned with limiting the scope of the decision, and not setting a precedent where religious entities could begin claiming entitlement to even greater public funding. The Court had said in *Everson* that "cutting off church schools from" such "general government services as ordinary police and fire protection . . . is obviously not the purpose of the First Amendment." The DNR program

here was similarly general, designed to improve the health and safety of children. But Breyer did not want to expand the decision's scope, and took the opportunity to buttress the sentiments expressed in footnote 3: "We need not go further. Public benefits come in many shapes and sizes. I would leave the application of the Free Exercise Clause to other kinds of public benefits for another day."

On the other hand, Justice Gorsuch evidenced a desire to expand the opinion far beyond Justice Roberts' ring-fencing. He questioned the majority's "status-use" distinction inferred in *Locke*-and implied a willingness to revisit that decision:

> But can it really matter whether the restriction in *Locke* was phrased in terms of use instead of status (for was it a student who wanted a vocational degree in religion? or was it a religious student who wanted the necessary education for his chosen vocation?). If that case can be correct and distinguished, it seems it might be only because of the opinion's claim of a long tradition against the use of public funds for training of the clergy . . .

And he expressly challenged the limitations implied in footnote 3, expressing "worry that some might mistakenly read it to suggest that only 'playground resurfacing' cases, or only those with some association with children's safety or health, or perhaps some other social good we find sufficiently worthy, are governed by . . . the Court's opinion." Gorsuch asserted that First Amendment principles "do not permit discrimination against religious exercise—whether on the playground or anywhere else."

DISSENT: Justice Sotomayor vehemently disagreed, joined by Justice Ginsburg. This was not, as the majority described, "a simple case about recycling tires to resurface a playground." The decision represented a sea-change in the relationship between religious institutions and the civil government:

> The Court today profoundly changes that relationship by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church. Its decision slights both our precedents and our history, and its reasoning weakens this country's longstanding commitment to a separation of church and state beneficial to both.

For Sotomayor, that the funds went to improve a playground did nothing to lessen the fact that the playground was under auspices of the Church, which by its own words "operates . . . for the express purpose of carrying out the commission of . . . Jesus Christ as directed to His church on earth." Its mission is to "make disciples." The Center serves as "a ministry of the Church and incorporates daily religion and developmentally appropriate activities into . . . [its] program." This mission required denial of governmental funding:

> The Church seeks state funds to improve the Learning Center's facilities, which, by the Church's own avowed description, are used to assist the spiritual growth of the children of its members and to spread the Church's faith to the children of nonmembers. The Church's playground surface—like a Sunday School room's walls or the sanctuary's pews—are integrated with and integral to its religious mission. The conclusion that the funding the Church seeks would impermissibly advance religion is inescapable.

Sotomayor traced seminal developments in the nation's history as state after state, beginning with James Madison and the Virginia Act for Establishing Religious Freedom, put in place express prohibitions against using taxpayer monies to support religious activity. As she noted, today 38 states have enshrined such measures in their constitutions. Those laws have inherently resulted in religious groups being treated differently on occasion, which the Court has countenanced: "When reviewing a law that, like this one, singles out religious entities for exclusion from its reach, we thus have not myopically focused on the fact that a law singles out religious entities, but on the reasons that it does so."

The majority viewed excluding the Center from funding consideration solely because it is a religious entity as crossing a constitutionally impermissible line based on religious "status" that requires strict scrutiny. Sotomayor disagreed, noting that the Constitution itself "creates specific rules that control how the government may interact with religious entities. And so of course a government may act based on a religious entity's 'status' as such."

Although appreciative of Justice Breyer's effort to narrow the majority opinion, Sotomayor found his larger analytical framework to be flawed: "Justice Breyer, like the Court, thinks that 'denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest of the highest order.'" As she pointed out, the scrap tire program was hardly a "generally available benefit," but one only available to a select few recipients each year.

She cautioned that the decision discounted "centuries of history" and put at risk the government's ability to remain secular, and cited *Town of Greece v. Galloway*:

> Just three years ago, this Court claimed to understand that, in this area of law, to 'sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent.'. . . It makes clear today that this principle applies only when preference suits.

Whether *Trinity Lutheran* does in fact signal a barely-perceptible but altogether tectonic shifting of Free Exercise over the venerable Establishment Clause remains to be seen. The decision has already produced significant consternation among some Constitutional scholars, with University of California's Erwin Chemerinsky opining in *Scotusblog* that "Despite a footnote that attempts to limit the scope of this holding, the decision is going to engender a great deal of litigation as religious institutions now will claim a constitutional right to a wide array of benefits provided by the government to non-religious institutions."

It is perhaps noteworthy that, on the same day Justice Roberts issued *Trinity Lutheran*, the Court announced that it would hear the argument of a Colorado baker who refuses to produce a wedding cake for a gay couple—on the grounds of religious exercise. Given the current tenor of the Court, *Masterpiece Cakeshop v. Colorado Civil Rights Commission* may well provide more evidence that individuals' religious rights--and those of religious institutions in general--will exert evermore pressure to bully the Establishment Clause. **ML**

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