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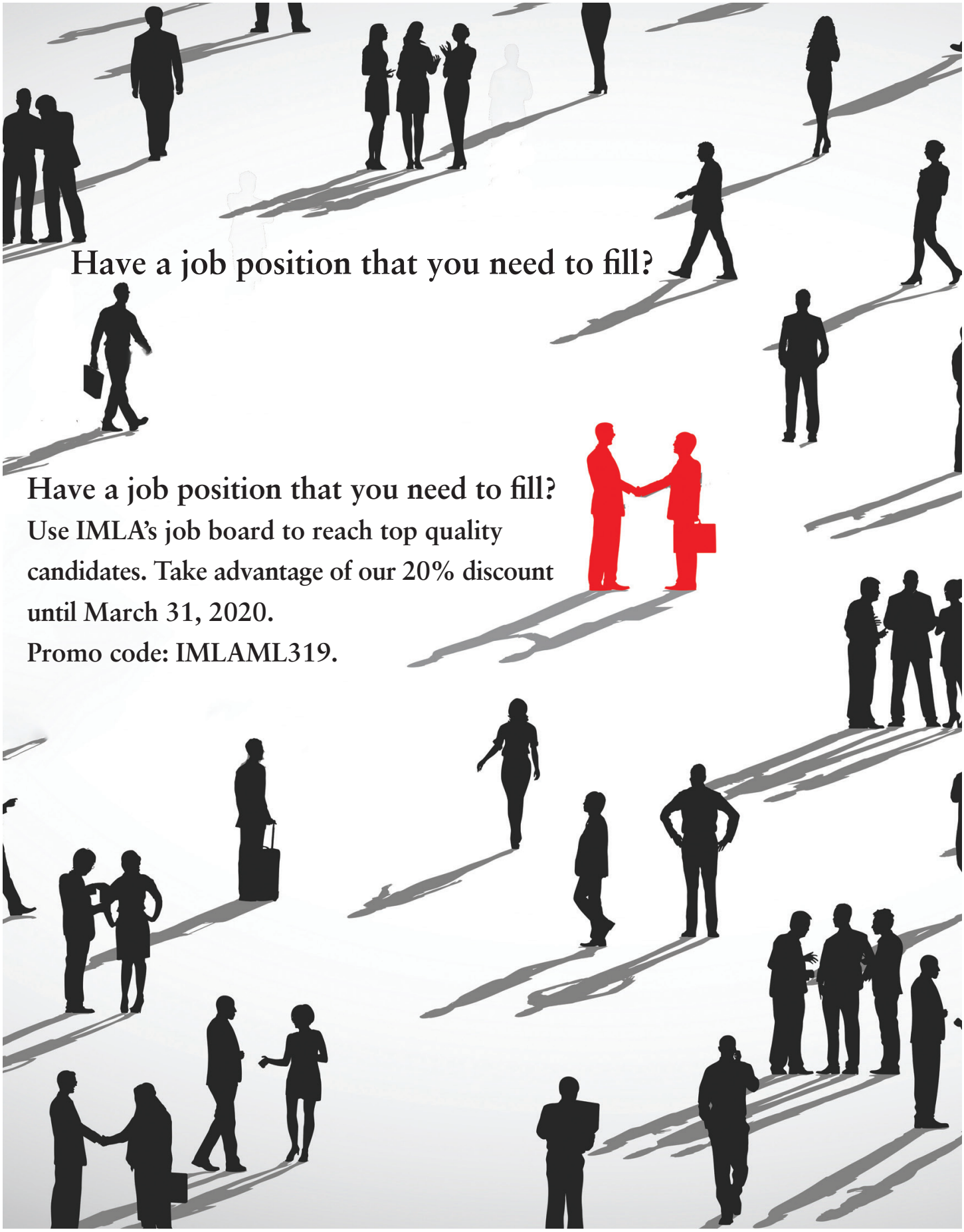

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Editor's Note



BY ERICH R. EISELT
IMLA Assistant General Counsel

Bring on the Morning After

Another year draws to a close, and IMLA has many people to thank. Virtually everyone on the list has full-time responsibilities elsewhere: our President and Board who offer continuing leadership, members who help configure IMLA conference programming, domain experts and participants who energize our work groups, committees who drive IMLA's international vision and outreach to smaller communities, colleagues who determine which amicus causes we will pursue, and without doubt, the many professionals who enlighten us through webinars and conference presentations, author our amicus briefs and provide the content for these pages.

This latter group has delivered a foursome of feature articles for this January-February 2019 issue of *Municipal Lawyer*. Three of these touch on the code enforcement function but have far broader applicability—with a fourth exploring the labyrinthine subject of blockchain technology at the municipal level. We add case summaries and consider, again, controversies that emanate from two of the most foundational pillars in our Constitutional architecture—the First and Second Amendments.

As this *ML* makes its way to you, most IMLA members are experiencing the winter solstice. For the 88% of mankind living north of the equator, December 21 will be the longest night of the year, most pronounced at higher latitudes. Our colleagues in Anchorage will see only 328 minutes of sunlight—a span that would be generous in Fairbanks, where skies will brighten for a mere three and a half hours.

A few observers might perceive the continuing loss of light, however seasonal, as paralleling a lengthening shadow cast by dark and ominous developments in our national life. Recurring natural disasters, economic uncertainties, simmering global antagonisms (including friction even between IMLA's two home countries), political havoc and widening rifts among our countrymen may seem to dim prospects for the future.

But history counsels that our republic will still flourish, driven by the intricate machinery of tripartite government. And we can rest assured that the source of our continued daylight will steadfastly remain centered at its perfect aspect 93 million miles away.

Much of the rest is up to us. In the New Year's advice of Ben Franklin, statesman, scientist, diplomat and philosopher, offered more than 250 years ago: "Be at war with your vices, at peace with your neighbors, and let every new year find you a better man."

Thank you for a most successful 2018. We end the year with optimism for an even better 2019—and we look forward to our mutual journey with you as we serve our fellow citizens. The days begin to lengthen tomorrow.

ML

President's Letter



BY ANDREW J. WHALEN
IMLA President City Attorney, Griffin, Georgia

A lot of great things are happening with IMLA since our Annual Conference in Houston. As final evaluations from the Conference are received, they bear witness to what we all knew in October…the Houston Host Committee put on a tremendous Conference so, again, our thanks go out to them for a job well done.

As I stated in my inaugural IMLA President's Letter, which appeared in the November-December issue of *Municipal Lawyer*, one of the areas that I want to focus on this year is the work of our International Committee, chaired by Ben Griffith. As I write this, a contingent of IMLA Members is returning from this year's mission to Israel and Palestine. Ben reports the following:

> Greetings from Jerusalem! Our IMLA Mission to Israel comes to an end tomorrow, and it has been quite a success. We met with one of the Israel Supreme Court justices, the city attorney for Tel Aviv, and representatives of Tel Aviv University's Law Department. We also heard from leading authorities on municipal-state relations, the status of settlements in the West Bank, the complicated historical, political and religious aspects that define Israel's relationship and status with its neighbors, representatives of NGOs, and key governmental departments, including the Ministry of Foreign Affairs. In short, the wealth of information that our counterparts and colleagues in Israel have shared with us was comprehensive, detailed and balanced, with diverse viewpoints reflected throughout our time here.

I sincerely appreciate those members who were able to travel with Ben, all at their own expense, and represent IMLA on this mission. The Committee will offer a full report at our upcoming Seminar in March 2019. Hopefully more of you will become involved with this Committee.

Speaking of committees, I have just completed appointments to our various sections and committees for 2018-2019. I trust those of you who contacted me with specific requests now find you were appointed to the committee(s) requested, and that you will contribute by actively participating in your committee's work over the course of the next year. Like most large organizations, the committee structure is where the real work gets done. Most committees have Co-Chairs, generally one of whom is a younger municipal lawyer. Each committee should also appoint a Director to serve as liaison to the Board, but I encourage our Chairs, at any time, to contact me or IMLA staff as needed. Staff will be sending out notices of committee assignments, which will also be posted on the IMLA Website. If you are not on a committee already, please contact Jennifer Ruhe at IMLA and let her know you want to become more involved.

Also in my first President's Letter I urged you to contact your local government counterparts and tell them about IMLA. Recruiting and sustaining membership is the life blood of this organization. Ask your peers to get their jurisdictions to join as a member so that they may become involved. The Membership Committee and IMLA staff are ready to help you. We cannot be complacent when it comes to recruiting and sustaining members. Help new prospects better understand the value IMLA offers.

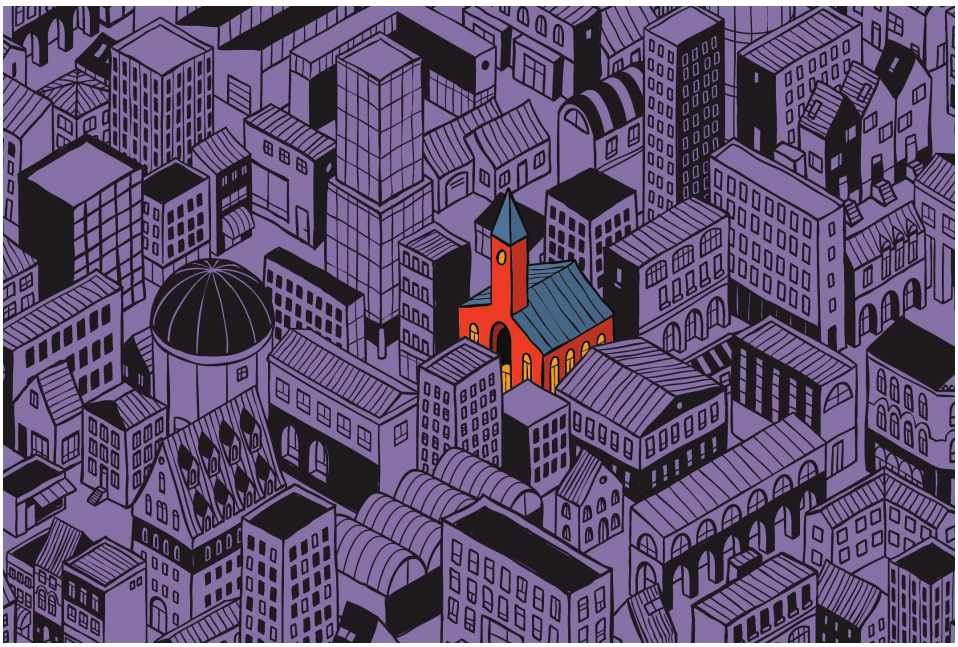
And speaking of value, I solicit your ideas on how to improve the organization. President Elect Patrick Baker is also a Co-Chair of the Vision 2020 Committee. Patrick has shown outstanding leadership on the Board of Directors and will be ready to lead IMLA into the next decade, beginning next September in Atlanta. We both would like to hear from members about where IMLA achieves, and its shortcomings. While I believe IMLA already offers great benefits to those members willing to participate actively, we are committed to improvement.

Finally, if you haven't registered for the Washington D.C. Seminar in March and reserved your room at the Omni Shoreham, now is the time to do so. IMLA will again be running parallel program tracks on hot municipal law topics and focusing on Section 1983 defense. The schedule and registration forms can be found on the website.

While registering for the Seminar, go ahead and sign up for the Annual Conference, September 18-22 in Atlanta. The Host Committee is hard at work on making this another great conference to remember. You don't want to miss it!

What You Didn't Know You Needed to Know About RLUIPA

By: **RUSSELL HILDEBRAND** | *Jones & Mayer, Roseville, California*



INTRODUCTION

The Religious Land Use and Institutionalized Persons Act ("RLUIPA"), enacted in 2000, prohibits municipalities from implementing zoning and other land use regulations that impose a substantial burden on a person's or group's religious exercise.[1] In addition to injunctive relief, a prevailing plaintiff can recover its legal fees, which in addition to the municipality's own legal fees can reach the hundreds of thousands or even millions of dollars.

1. History RLUIPA's guidelines are best understood by examining its legislative history. It is the result of a longstanding disagreement between Congress and the United States Supreme Court.

The Free Exercise Clause of the First Amendment, which has been applied to the states through the Fourteenth Amendment, provides that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof…"[2] Starting in 1963, the Supreme Court determined that strict scrutiny was the appropriate legal standard for laws that burden the free exercise of religion.[3]

However, in 1990, the Court, in *Employment Division v. Smith*, clarified that strict scrutiny was not the appropriate test for determining the constitutionality of neutral laws of general applicability that incidentally burden religion.[4] Justice Scalia stated, "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[5] The effect of this decision was clear—neutral laws of general applicability must only pass a rational basis test to survive constitutional scrutiny, regardless of incidental burden upon religion. This meant that the government need only show that the law bears a reasonable relationship to the attainment of some legitimate governmental objective.

The decision greatly tipped the scales back in favor of the government by significantly lowering the standard needed to justify these laws. After *Smith*, citizens could no longer rely on the Free Exercise clause to challenge neutral laws, such as zoning ordinances.

Congress rapidly responded to *Smith* by passing the Religious Freedom Restoration Act of 1993 ("RFRA").[6] RFRA broadly prohibited both the federal government and the states from substantially burdening a person's religious exercise "even if the burden results from a rule of general applicability"—unless the government could demonstrate that the burden survives strict scrutiny.[7]

Four years after its enactment, the Supreme Court invalidated RFRA as applied to the states and their subdivisions. In *City of Boerne v. Flores*[8] (holding that RFRA exceeded Congress's power under Section 5 of the Fourteenth Amendment).

In this arena, Congress' powers are limited to enacting legislation that is "remedial" in nature. Such powers are limited to correcting documented constitutional violations; there must be "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[9] In most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry. It is a reality that numerous state laws, such as zoning regulations, impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs.[10] Thus, the RFRA was struck down as applied to states and local governments.

Congress' second attempt at restoring strict scrutiny, RLUIPA, was a direct result of this tug-of-war between Congress and the Supreme Court. To avoid RFRA's fate, Congress wrote RLUIPA so that it only applied to regulations regarding land use and prison conditions, in response to a demonstrated record of discrimination in these areas.[11] Thus, RLUIPA provides "remedies aimed at areas where ... discrimination has been most flagrant;" an area where RFRA was lacking.[12] RLUIPA's constitutionality has been upheld by the Second, Ninth and Eleventh Circuits.[13]

As for enforcement and remedies under RLUIPA, the United States may bring an action for injunctive or declaratory relief to enforce RLUIPA, while *any* person may assert a violation and obtain "appropriate relief" against a government.[14] Appropriate relief means that civil damages could be available against the municipality for RLUIPA violations.

2. Section 2 of RLUIPA Targets Two Areas of Municipal Land Use Law

RLUIPA's first general rule prohibits a government from implementing a land use regulation that imposes a "substantial burden" on religious exercise, including a religious assembly or institution, unless the government demonstrates that it furthers a "compelling government interest" by the "least restrictive means."[15] Note the strict scrutiny standard.

RLUIPA contains three other rules related to discrimination and exclusion:

> (1) Equal terms. No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.
> (2) Nondiscrimination. No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.
> (3) Exclusions and limits. No government shall impose or implement a land use regulation that- (A) totally excludes religious assemblies from a jurisdiction; or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.[16]

The "equal terms" and "substantial burden" provisions have been the most litigated language concerning local land use regulation and are the focus of this article. The statute includes a rule of construction, applicable to both Sections 2 and 3, that it "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."[17]

Importantly, the sections operate independently, and court rulings holding that a claim based on the Equal Terms clause must show a substantial burden have been routinely overturned by the Appellate Courts.[18]

RLUIPA expressly provides a cause of action for violations of its requirements: "A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government."[19] The phrase "appropriate relief" does not include money damages against states.[20]

In contrast, money damages are available under RLUIPA against political subdivisions of states, such as municipalities and counties.[21]

The "equal terms" and "substantial burden" provisions have been the most litigated language concerning local land use regulation and are the focus of this article. The statute includes a rule of construction, applicable to both Sections 2 and 3, that it "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."

3. Burden of Proof

Under RLUIPA, the government bears the burden of persuasion once a religious plaintiff establishes a prima facie case of a violation: If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of Section 2 of RLUIPA, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.[22]

The statute does not provide for "strict scrutiny" of a "compelling governmental interest" to see if the government can excuse the equal terms violation. The Constitutional phrases "substantial burden," "compelling governmental interest," and "least restrictive means," are all included in the "substantial burden" provision, not the "equal terms" provision.

The statutory burden of proof provision speaks to all parts of the statute, and also the Free Exercise Clause of the Constitution. It does not impose new language on any provisions of the statute. The equal terms provision does not use language from the Free Exercise Clause, or otherwise support the conclusion that Congress meant merely to meaninglessly say "the Constitution applies to land use provisions."[23]

The Ninth Circuit has held that an ordinance that expressly differentiates religious land uses from nonreligious land uses establishes a prima facie case for a facial Equal Terms Clause claim. As that court stated in *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, "[T]he express distinction drawn by the ordinance establishes a prima facie case for unequal treatment."[24] This construction is widely followed by other circuits and accepted.

The critical statutory phrase "on less than equal terms with a nonreligious assembly or institution" is the focus in most cases. A leading case construing this language is *Elijah Group, Inc. v. City of Leon Valley*.[25] The court explained in Elijah Group that this statutory language "requires that the religious institution in question be compared to a nonreligious counterpart, or 'comparator.'"[26]

The Fifth Circuit would later elaborate that the approaches of other circuits to facial Equal Terms Clause challenges "fall roughly into two camps."[27]

> In one camp is the Eleventh Circuit, which treats all land use regulations that facially differentiate between religious and nonreligious institutions as violations of the Clause, but will nonetheless uphold such a regulation if it survives strict scrutiny review. *See* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1231–35 (11th Cir. 2004).
>
> The other camp includes the Third, Seventh, and Ninth Circuits. Those circuits hold that a violation of the Equal Terms Clause occurs only if a religious institution is treated less well than a similarly situated non-

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religious comparator. The Third Circuit requires the comparator to be "similarly situated as to the regulatory purpose." Lighthouse Inst., supra note 18, 510 F.3d at 266. The Seventh and Ninth Circuits require a comparator that is similarly situated with respect to "accepted zoning criteria." *Centro Familiar, supra* note 21, 651 F.3d at 1172–73; River of Life Kingdom Ministries v. Vill. of Hazel Crest, , 611 F.3d 367, 371–73 (7th Cir. 2010) (en banc).[28]

4. Application to Local Jails and Holding Facilities

One set of issues that may arise for a municipal attorney does relate to Section 3 of RLUIPA regarding religious freedoms for institutionalized persons, and may be of concern in your local jurisdiction. Be aware of requests for religious accommodations in your local jail or holding facility. A 2011 Ninth Circuit Court of Appeals case in Orange County, California held that the term "institution" includes "a jail, prison, or other correctional facility" and "*a pretrial detention facility*."[29]

Section 3 of RLUIPA provides that:

> [n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in [42 U.S.C. § 1997], even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

In considering whether the Orange County Santa Ana Courthouse holding facility, where every day hundreds of individuals are detained in connection with court proceedings, is an "institution" as defined by RLUIPA, the court concluded in *Khatib v. County of Orange*[30] that the holding facility was included within the scope of "institution" under RLUIPA, which thus covers persons detained at the facility. RLUIPA requires accommodation of requests for religious sacrament and dress by detainees and prisoners however short the duration of their detainment in a local holding facility.[31]

In that case, at the booking counter a male officer ordered Khatib to hand over her belongings and remove her headscarf. Having her head uncovered in public, especially in front of men outside of her immediate family, is a "serious breach of [Khatib's] faith and a deeply humiliating and defiling experience." Weeping, Khatib explained that her religious beliefs forbade her from taking off her headscarf and pleaded with the officers to allow her to keep it on. Khatib was warned that the male officers would remove the headscarf for her if she did not voluntarily do so. Wanting to avoid being touched by the male officers—another violation of her religious beliefs— Khatib reluctantly complied. Khatib filed suit and the defense of the County was that the jail holding facility was not an institution and not governed by RLUIPA. The court disagreed and found liability on the part of Orange County.

5. Types of Cases Often Litigated Under RLUIPA

Numerous cases litigated under RLUIPA are Equal Terms Clause zoning cases in addition to substantial burden claims. A good example is *Opulent Life Church v. City of Holly Springs Mississippi*.[32] In *Opulent Life Church*, the City sought to enforce a zoning ordinance which "explicitly singled out churches for unfavorable treatment."[33] The Opulent Life Church, a small but growing congregation, sought to acquire space for a new worship center since its current place of worship could not accommodate a sufficient number of worshipers. The church also wished to have space to conduct various ministry activities including Vacation Bible School and Movies in the Park.

The church soon found an acceptable facility in Holly Springs' central business district. The church signed a lease agreement whereby the lease would commence when the church obtained the required land use and building permits from the City. The church submitted all proper paperwork to the City, but the City refused to approve the permits because it claimed the church did not meet the requirements of the City's zoning ordinance regarding churches. Among other things, the ordinance required churches to be subject to the approval of neighboring property owners, the mayor, and the board. Churches were the only use subject to this requirement.

The church brought suit in federal court alleging violations of RLUIPA and the Constitution. The church filed a motion for a preliminary injunction along with its complaint. The motion for the preliminary injunction sought to prevent the City from enforcing the discriminatory zoning ordinance. The district court denied the motion for preliminary injunction and concluded that the church had not shown a "substantial threat of irreparable harm." The judge issued this opinion before the City had even responded to the church's motion.

On appeal, the Fifth Circuit reversed the district court and found that the church had indeed shown a "substantial threat of irreparable harm." The court came to this conclusion based largely upon the church's claims under the First Amendment and RLUIPA. In one notable passage the court said: "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[34] The court also included the following language: "When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary" [for purposes of an injunction], and found that "Opulent Life has alleged violations of its First Amendment and RLUIPA rights and thereby satisfied the irreparable injury requirement."[35] The Fifth Circuit ultimately remanded the case to the district court for further proceedings.

San Jose Christian College v. City of Morgan Hill[36] was a substantial burden case in which Morgan Hill, California prevailed on a RLUIPA challenge. In 1999, Catholic Healthcare West ("CHW") closed the 60-bed St. Louise Hospital and adjoining medical offices in Morgan Hill. The 30-acre property then went on the market with the restriction that it could not be used for medical purposes, as CHW had moved its operation to nearby Gilroy. The city zoning for

the site is "planned unit development," which allows all uses shown on the development plan. But the PUD for the site was directed solely at medical uses.

The college filed an application for a zoning amendment so that the college could develop a school for 1,200 students, outdoor sports fields, a gymnasium, a theater/chapel and dormitories. City planners told the college the application was incomplete because it lacked a site plan, building elevations and a landscaping plan. The college responded with a scaled back version of the application, encompassing only the existing buildings and 400 students. At the same time, the college's marketing material trumpeted the original, larger project — a conflict that concerned planners because the California Environmental Quality Act ("CEQA") prohibits piecemealing a project. Ultimately, the Planning Commission rejected the zoning application because it failed to comply with the city's application requirements.

Among other things, the college argued that the city's application of its zoning ordinance and CEQA to the project violated RLUIPA because it posed a substantial burden to the college's religious exercise. The court rejected the argument.

> "[I]t appears that College is simply adverse to complying with the PUD ordinance's requirements," Judge Johnnie Rawlinson wrote for the court. "The city's ordinance imposes no restriction whatsoever on College's religious exercise; it merely requires College to submit a complete application, as is required of all applicants. Should College comply with this request, it is not at all apparent that its rezoning application will be denied."

Rawlinson continued, "[T]here is no evidence in the record demonstrating that College was precluded from using other sites within the city. Nor is there any evidence that the city would not impose the same requirements on any other entity seeking to build something other than a hospital on the property."[38]

Moreover, CEQA "adds nothing to the inconvenience otherwise imposed by the city's zoning application requirements," Rawlinson said. Being required to delineate the scope of development does not burden one's free exercise of religion, the court ruled.

A critical principle to consider and not quickly dismiss is that a court may not second-guess a religious entity's sincere belief that certain activities are central to or required by its religion. This principle is likely to arise in a code enforcement situation and is critical to a municipal attorney's evaluation of potential RLUIPA challenges.

The court also rejected the College's arguments that the city violated its rights to freedom of speech and assembly because the college could not convene for education and worship on that specific site. The court held that city's ordinance and its enforcement of the law were content-neutral. "[T]he fact that the church's congregation cannot assemble at that precise location does not equate to a denial of assembly altogether,"[39] the court ruled.

The court in *San Jose Christian College* held "[f]or a land use regulation to impose a "substantial burden," it must be "oppressive" to a "significantly great" extent. That is, a "substantial burden" on "religious exercise" must impose a "significantly great restriction or onus upon such exercise."[40]

6. Religious v. Secular Uses

A critical principle to consider and not quickly dismiss is that a court may not second-guess a religious entity's sincere belief that certain activities are central to or required by its religion.[41]

This principle is likely to arise in a code enforcement situation and is critical to a municipal attorney's evaluation of potential RLUIPA challenges. A complaint routinely arises in many situations where the facts of the case are far outside of societal norms and may seem to be farfetched to most of us. A good example to reference is *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*.[42]

Though this case is based on a Section 1983 civil rights claim under religious freedom, it is a good example of how certain practices offensive to many citizens are still protected activity. Petitioner church and its congregants practice the Santeria religion, which employs animal sacrifice as one of its principal forms of devotion. The animals are killed by cutting their carotid arteries, and are cooked and eaten following all Santeria rituals except healing and death rites.

After the church leased land in respondent city and announced plans to establish a house of worship and other facilities there, the city council held an emergency public session and passed, among other enactments-

Resolution 87-66, which noted city residents' "concern" over religious practices inconsistent with public morals, peace, or safety, and declared the city's "commitment" to prohibiting such practices;

> Ordinance 87-40, which incorporates the Florida animal cruelty laws and broadly punishes "[w]hoever . . . unnecessarily or cruelly . . . kills any animal," and has been interpreted to reach killings for religious reasons;
>
> Ordinance 87-52, which defines "sacrifice" as "to unnecessarily kill . . . an animal in a . . . ritual . . . not for the primary purpose of food consumption," and prohibits the "possess[ion], sacrifice, or slaughter" of an animal if it is killed in "any type of ritual" and there is an intent to use it for food, but exempts "any licensed [food] establishment" if the killing is otherwise permitted by law;

Ordinance 87-71, which prohibits the sacrifice of animals, and defines "sacrifice" in the same manner as Ordinance 87-52; and Ordinance 87-72 which defines "slaughter" as "the killing of animals for food" and prohibits slaughter

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outside of areas zoned for slaughterhouses, but includes an exemption for "small numbers of hogs and/or cattle" when exempted by state law.

Petitioners filed suit under 42 U.S.C. § 1983 alleging violations of their rights under, inter alia, the Free Exercise Clause of the First Amendment. Although acknowledging that the foregoing ordinances are not religiously neutral, the district court ruled for the city, concluding, among other things, that compelling governmental interests in preventing public health risks and cruelty to animals fully justified the absolute prohibition on ritual sacrifice accomplished by the ordinances, and that an exception to that prohibition for religious conduct would unduly interfere with fulfillment of the governmental interest, because any more narrow restrictions would be unenforceable as a result of the Santeria religion's secret nature. The Court of Appeals affirmed. The U.S. Supreme Court reversed the judgment.

Staying with the animal theme, we now move from chickens to bears. In *Blackhawk v. Pennsylvania*[43] the Appellate Court examined the Commonwealth of Pennsylvania's refusal to waive a wildlife permit fee for a Native American who kept two bears for religious reasons although the statute contained categorical waivers for zoos and "nationally recognized circuses."[44] In holding that the statute violated the Free Exercise clause, the court focused on the fact that categorical waivers for circuses and zoos — exemptions intended to "serve the Commonwealth's interest in promoting commerce, recreation, and education" and which "undermine the interests served by the fee provision to at least the same degree as would a [religious] exemption" — were available, but the Commonwealth refused to extend an individual religious waiver, which would have served "these or analogous interests."[45]

A case decided by the U.S. District Court for the Northern District of California was *Harris v. City of Clearlake*.[46] In that case the Right Reverend Smiley Harris obtained rights to a property in the City of Clearlake and openly and in violation of the City's ordinance, grew approximately 30 to 40 marijuana plants outdoors on the property without screening from public view. The City had declared such uses to be a public nuisance and the City's Code Enforcement Division issued a notice of code violation and abatement orders to the property owner to abate the nuisance by removing the plants.

Reverend Harris, whose Church of the Greater Faith and Redemption used marijuana in its services, filed suit against the City of Clearlake, the City Council members, and various staff, over the code enforcement action to remove the cannabis plants. The plethora of legal claims brought by Reverend Harris included a RLUIPA challenge to the City ordinance limiting cultivation of cannabis to six plants as allowed under California law.

The City argued that the ordinance was one of neutral and general application to all citizens of Clearlake. As such, though it may minimally intrude on Plaintiffs' religious activities, those activities must yield to the City's obligation to protect the health, safety and welfare of City citizens.[47] The City prevailed on a Rule 12(b)(6) motion to dismiss. The case was appealed to the Ninth Circuit, and was dismissed by the Court on procedural grounds prior to hearing the appeal.

7. Situations Likely to Involve Code Enforcement and Example Cases

Prayer meetings in homes - Chabad *Lubavitch v. Borough of Litchfield*[48] was a case involving a Chabad Lubavitch Orthodox Jewish congregation seeking to expand a house to use as a synagogue. The brief argued that discrimination does not need to be proven to make out a claim under RLUIPA's substantial burden provision. It also argued that in evaluating RLUIPA's nondiscrimination provision, the appropriate test is the multi-factor test outlined by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[49] for housing discrimination cases. The Court of Appeals agreed in a decision in September 2014.

Prayer meetings in commercial buildings - The U.S. Attorney Civil Rights Division in *United States v. City of St. Anthony Village*[50] brought a suit against the city in federal court in Minnesota in August 2014, alleging that denial of approval for the AbuHuraira Islamic Center to open a prayer facility in the basement of an office building in a light industrial zone violated RLUIPA. The suit alleged that the denial imposed a substantial burden on the Center, and that allowing "assemblies, meeting lodges, and convention halls," but not religious assemblies, violated RLUIPA's Equal Terms provision. A federal court in Minneapolis entered a consent order that permitted the Center to use the building as a place of worship on January 5, 2015.

Homeless services provided by religious groups - *Westgate Tabernacle, Inc. v. Palm Beach County*,[51] Westgate Tabernacle, Inc. is a not-for-profit corporation which operated a church located in West Palm Beach. The church and its pastors, the Reverends Avis Hill and Sherry McGee-Hill, opened the church property as a shelter for the homeless in Palm Beach County as a part of its Christian mission. Because Westgate was operating a shelter for more than six people without a CUP, the County issued a May 4, 1998, notice of violation entitled, "Operating a Homeless Shelter is Prohibited in this Zoning District." The notice gave Westgate two months to comply or attend a hearing before the Code Enforcement Board for the imposition of fines. Westgate filed, but then later withdrew, an application for a conditional use permit. Westgate then filed suit in state court under the Florida Religious Freedom Restoration Act and RLUIPA claiming a substantial burden on their right to the free exercise of religion. The substantial burden language in the Florida RFRA and RLUIPA are equivalent. The Florida Court of Appeal found that although running a homeless shelter may have been a deeply-held religious belief, under the specific facts before it, the church failed to prove that operating the shelter at that particular location was fundamental to its religious exercise. The court also affirmed the jury finding that the County's zoning code was a compelling government interest. The court stated "Neither FRFRA nor RLUIPA prohibits the application of valid, neutral zoning provisions to church property to curtail uses not permitted in the area."[52]

Expansion of existing facilities – In *Westchester Day Sch. v. Vill. of Mama-*

roneck,[53] The school contended that its expansion was necessary to provide adequate facilities for the religious education of its students, and that the board's unwarranted denial of a permit for the expansion unlawfully burdened the school's exercise of religion. The appellate court agreed, holding that the denial of the permit imposed a substantial burden on the school's exercise of religion without a compelling governmental interest. The board's action forced the school to continue teaching in inadequate facilities, and the board's stated reasons for denying the permit were based on the board's speculation and its own errors of relevant facts concerning traffic and parking. Further, there were no available alternatives for the school's expanding needs, and the board arbitrarily denied the permit application in its entirety rather than conditioning permit approval upon remedial efforts by the school. Also, the board's general interest in enforcing zoning and safety laws was not a compelling interest which justified imposing the burden on the school's exercise of religion, and the board in fact acted out of undue deference to the opposition of a small group of neighbors of the school.

8. Best Practices

The best way to avoid a RLUIPA claim is to plan for religious use. Regulation of religious uses and RLUIPA compliance are not mutually exclusive. Religious uses are not exempt from zoning. A religious group "has no constitutional right to be free from reasonable zoning regulations nor does [it] have a constitutional right to build its house of worship wherever it pleases."[54] Courts have consistently recognized "that land-use regulation is one of the historic powers of the [s]tates."[55]

A checklist for review and planning for religious uses would include:

(1) Understand where religious uses are permitted in your city and make sure the locations zoned for the use are not unreasonably limited.

(2) Do not distinguish between religious and secular assembly uses in your zoning ordinance. Rather, regulate assembly uses by size, where larger assemblies are permitted in the zones that better accommodate crowds and the impacts associated with crowds. Similarly-sized assembly uses should be subject to the same development standards, regardless of whether they are religious or secular.

The best way to avoid an RLUIPA claim is to plan for religious use. Regulation of religious uses and RLUIPA compliance are not mutually exclusive. Religious uses are not exempt from zoning. A religious group "has no constitutional right to be free from reasonable zoning regulations nor does [it] have a constitutional right to build its house of worship wherever it pleases."

(3) Understand any special development standards for assembly of religious uses that in application may also significantly limit locations where religious uses may be established.

(4) Continue to train your appointed and elected officials about RLUIPA.

(5) Remind your city officials not to make remarks that are discriminatory or could be perceived as being discriminatory.

(6) Avoid public discussions over whether a particular activity is religious. Development applications should be focused on land use impacts and issues, not on whether a particular activity is religious enough to be covered by RLUIPA.

(7) If the City is inclined to deny a particular application, make a good record to support the denial. Verify that the reasons cited by the decision-makers are actually supported by the City's code and past practices. Analyze whether there are quick, reliable and financially feasible alternative sites available, which may require the use of experts. Encourage applicants to redesign or reapply if a development proposal is unsatisfactory to the City.

RLUIPA itself provides that local governments may be protected from enforcement actions by taking corrective action, such as changing the policy or practice that results in a substantial burden on religious exercise, retaining the policy or practice and exempting the substantially burdened religious exercise, providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden or other violation of RLUIPA

According to the US Supreme Court, compelling interests are interests of the "highest order"[56] Although the legal standard for demonstrating a compelling interest is high, existing case law provides several examples, including:

- Protecting public health and safely objectives.[57]
- Preserving the rural and rustic, single-family residential character of a residential zone.[58]
- Enforcing zoning regulations to ensure the safety of residential neighborhoods.[59]
- Preventing crime.[60]

A compelling interest must be more than pro forma reliance on traditional zoning interests. It must be supported by a complete and comprehensive record of the municipality's interests, and local action must be tailored to meet those interests. Creating a complete and comprehensive record is especially important to defeat substantial burden claims, which are the perhaps the most fact-intensive type of RLUIPA claim.

9. **Two Final Points of Concern**

Review the basic provisions in your zoning code for churches. If your code singles out churches and has specific

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requirements that differ from other similar secular non-religious uses such as community halls and fraternal organizations, then you're in trouble and wide open to a successful RLUIPA challenge. Look at your zoning code so you are prepared. Consider amending the code now, rather than waiting for a challenge.

Be prepared to deliver bad news when seemingly outlandish behavior is presented to the agency as religious sacrament and therefore protected activity under RLUIPA.

All of this doesn't mean a municipality loses all zoning and regulatory control over the approval of a religious activity, it just means you have to do an analysis grounded on factually supported land use impacts of the development, without consideration that the use is for a religion. In *Civil Liberties for Urban Believers v. City of Chicago*,[61] the court found regarding RLUIPA:

> [W]e find that these conditions [the costs of applying for and complying with special land use permitting requirements] do not amount to a substantial burden on religious exercise. While they may contribute to the ordinary difficulties associated with location (by any person or entity, religious or nonreligious) in a large city, they do not render impracticable the use of real property for religious exercise, much less discourage churches from locating or attempting to locate in Chicago. Significantly, each of the five individual plaintiff churches has successfully located within Chicago's city limits. That they expended considerable time and money so to do does not entitle them to relief under RLUIPA's substantial burden provision. Otherwise, compliance with RLUIPA would require municipal governments not merely to treat religious land uses on an equal footing with nonreligious land uses, but rather to favor them in the form of an outright exemption from land-use regulations.
>
> Unfortunately for Appellants, no such free pass for religious land uses masquerades among the legitimate protections RLUIPA affords to religious exercise.

Conclusion

In closing, RLUIPA issues are complex and fact-specific. A short checklist to consider before initiating a code enforcement action comes from the Department of Justice. According to the DOJ, when a city takes one of the following actions, it may constitute a substantial burden:

- effectively barring the use of a particular property for religious activity;
- imposing a significantly greater restriction on religious use of a property; or
- creating significant delay, uncertainty, or expense in constructing or expanding a place of worship, religious school, or other religious facility.[62]

The bottom line is that municipal lawyers stand the best chance of success by approaching RLUIPA issues methodically. Look at the situation with an open mind, consider all of the facts, and develop a thorough record.



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1. 42 U.S.C. §2000cc- 2000cc-5
2. Church of the Lukumi Bablu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993).
3. Sherbert v. Verner, 374 U.S. 398 (1963) (Plaintiff had been denied unemployment benefits because she refused to work on Saturdays, which as a member of the Seventh Day Adventist Church, was her day of Sabbath. In ruling that the state's denial of benefits was a violation of her Free Exercise rights, the court applied strict scrutiny).
4. 494 U.S. 885 (1990) (plaintiff was challenging an Oregon law which criminalized the use of peyote. The Native American plaintiff claimed that the law burdened his Free Exercise of religion because his religious beliefs required that he use this hallucinogenic plant in ceremonial rituals).
5. 494 U.S. at 885.
6. 42 U.S.C. § 2000bb *et seq*
7. 42 U.S.C. § 2000bb1.
8. 521 U.S. 507, 532–36 (1997).
9. *Lukumi Bablu, supra* note 2, 508 U.S. 520 at 520.
10. *Id*. at 534-35.
11. Guru Nanak Sikh Soc. of Yuba City, 456 F.3d 978, 986, 994 (9th Cir. 2006) (citing H.R. Rep. No. 106–219, at 18–24 (1999) (summarizing the evidence from these hearings)).
12. *See Guru Nanak,* 456 F.3d at 994, *citing* South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966).
13. *Guru Nanak*, 456 F.3d at 994–95; Westchester Day School v. Village of Mamaroneck, 504 F.3d 338 (2d Cir. 2007); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004).
14. 42 U.S.C. § 2000cc-2(a), (f).
15. 42 U.S.C. §2000cc(a)(1) (*emphasis added*).
16. 42 U.S.C. § 2000cc(b)
17. 42 U.S.C. § 2000cc-3(g).
18. *See* Lighthouse Institute for Evangelism v. Long Branch, 510 F. 3d 253, 3d Cir. (2007) citing to Courts of Appeals cases that have interpreted RLUIPA's Equal Terms provision that a plaintiff need not show substantial burden to prevail under it.

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Walking the Fine Line: Code Enforcement and the Fourth Amendment

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ILLUSTRATION:TRUJILLO DESIGN

Introduction

Illegal searches under the Fourth Amendment can be one of the biggest risks for a code enforcement officer. This article discusses how to reduce that risk.

The Inspection: Inspections are probably the greatest challenge in code enforcement:

First, ***inspections can be dangerous***. Most code enforcement officers are unarmed. Yet, they often must venture into some of the most dangerous neighborhoods and sometimes must deal with persons who think they are allowed to defend their homes against even the government, or are simply unstable. Most code enforcement departments have stories about officers being threatened-- with job loss, arrest, or physical violence; or actually being assaulted and battered (such as being spit upon, beaten or struck, including with a hatchet). Sadly, in August 2018, during a re-inspection in West Valley City, Utah, a code enforcement officer was shot and killed in the driveway at the home of an angry violator.

Second, ***inspections can be legally complicated***. The Fourth Amendment, and to a lesser extent the Substantive Due Process provision of the Fourteenth Amendment, provide arcane limits upon the code inspection process. State constitutions, statutes, and even local regulations often impose additional limitations upon inspections. Knowing whether an inspection is required or appropriate, where the code enforcement officer may be located when viewing a violation, whether consent is required or effective, whether a warrant is needed or justified, and whether the evidence can be used in an enforcement case—are all examples of the legal complexity of inspections.

Third, ***if wrongful, inspections can have major adverse consequences.***

For the case--Evidence gained by a defective inspection cannot be admitted or considered.

For the government--A lawsuit alleging deprivation of civil rights under 42 U.S.C. Sec. 1983 can be brought for violation of federal constitutional or statutory prohibitions. States have similar causes of action for wrongful inspections. A civil rights suit against the city or county will claim existence of a policy or practice of allowing illegal searches, deliberate indifference to the rights of citizens,[1] or failure to train or supervise properly. Compensatory damages and attorneys' fees can be awarded.

For the code enforcement officer--A civil rights action against the municipality will normally include a claim against the code enforcement officer individually, based upon the actual illegal inspection. The officer will likely have qualified immunity, but that could be lost if the inspection was clearly unlawful.[2] In the worst-case scenario, the code enforcement officer can be subject to individual liability for damages, including compensatory and even punitive damages--plus attorneys' fees; which is rare but possible. The code inspector can also be subject to disciplinary action from the government employer.

Tension between Public Welfare and Privacy: The tension between the government's police powers—to protect the public health, safety and welfare—and individual property and privacy rights is at least as old as the concept of private property ownership.

Castle Doctrine--The legal concept of the home being one's "castle" was analyzed in England at least as long ago as 1604. "The house of every one is to him as his castle and fortress as well as for his defence against injury and violence as for his repose."[3] Of course,

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the Castle Doctrine did not then, and does not now, mean the that the King, or the local police officer or code enforcement officer could never enter the "castle" or its surroundings when acting under appropriate circumstances. Such a misunderstanding has led to deadly consequences over the years, often in standoffs between the owner or occupier and law enforcement.

History of the Fourth Amendment—At the times leading up to the Declaration of Independence and the Revolutionary War many colonists were black-marketing goods out of their homes, buggies and boats to avoid taxation, including taxation of alcohol, under the despised British Stamp Act and Townshend Acts. The British were confiscating bootlegged contraband, as well as the buggies, boats and documents (papers) that might incriminate the smugglers.

In 1761, John Adams (attorney and later President) was present when attorney James Otis, Jr. and a group of colonial merchants went to the Superior Court of Massachusetts to block Writs of Assistance (authorizations similar to search warrants)—unsuccessfully. Adams said, "…[T]hen and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born."[4] Adams later defended a smuggler of untaxed Madeira wine whose sloop, the *Liberty*, was confiscated by the British. Although the defendant was not convicted, the sloop was retained, renamed the *HMS Liberty* and then used to confiscate other colonial black-market vessels. Enraged, the colonists burned the *Liberty*. The bootlegger's name was John Hancock.[5]

The Fourth Amendment did not make it into the Constitution in 1787-1789, but was adopted in 1791 as part of the Bill of Rights. Many of the Framers did not want to trade one despot (King George III) for another (the new federal government). Curiously, the Fourth Amendment was not adopted in its original language. James Madison, the author, had written the Amendment so that there could be no search at all without a warrant. However, the final version as approved by the States reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Applicability--The Fourth Amendment is one of the most litigated and thoroughly interpreted (and reinterpreted) provisions in the U.S. Constitution. Not only is it fact-intensive, but the term "unreasonable" opens it up to fundamental policy interpretations, and leads to many close court decisions.

Plain meaning--As with any other regulation, it is crucial to read the actual words. Notably, the Amendment is limited in scope to: *persons, houses, papers and effects*. For code enforcement purposes the "search" (inspection) is likely to be primarily of the "house," for conditions upon the property; and possibly of "papers" such as computer information, or "effects" such as a boat stored illegally, or an inoperable vehicle.

As to real property, the common law of trespass has some applicability. The old writ for trespass "Quare Clausum Fregit," (i.e., "Wherein he broke the close") refers to the line enclosing private property. Hence, earlier search and inspection jurisprudence makes reference primarily to trespass law. However, the Fourth Amendment does not prohibit non-consensual searches of all of the owner's real property—it covers only the "house" which includes the "curtilage" (discussed below).

Open fields vs. house and curtilage--Many of the Founders owned vast areas of open land, so the main worry was over privacy of the actual house and those areas and structures closely associated with the house. From this distinction came two legal concepts—"*open fields doctrine*"—Open fields do not have protection from searches and inspections (if truly "open") and *curtilage*—Curtilage has essentially the same level of protection from searches and inspections as the "house" itself. "Curtilage" or "homestall" is the area immediately surrounding and associated with the home and is considered part of the home for Fourth Amendment purposes. For the house and curtilage, the property owner has the right to determine who is allowed upon the property and to grant or withhold consent to those the owner wishes to exclude, including government "intruders."

Thus, the "curtilage" protection ("No man may set his foot upon his neighbor's close without his permission") has permeated court decisions in England from at least 1765 to U.S. Supreme Court case law as of May 29, 2018.[6] Without consent (or an exception), the government must obtain a search warrant or inspection warrant. The identity of home and what Blackstone called the "curtilage or homestall," thereby "protects and privileges all its branches and appurtenants."[7] This area around the home is "intimately linked to the home, both physically and psychologically," and is where "privacy expectations are most heightened."[8] Areas that have been deemed by courts to be "curtilage" include: porches, garages, carports, car patios, back yards—and even a driveway next to a house where the code violation was partially covered. In *Florida v. Jardines*, a 2013 Supreme Court case,[9] the Court determined that a police officer who was on the front porch ostensibly to ask permission to search, but was accompanied by a drug-sniffing dog, needed consent or a warrant to search the house.[10] In the most recent case, in 2018, the Court invalidated a search for a stolen motorcycle that was covered with a white tarp, located at the top of the driveway, in a partly enclosed car patio. The officer had received a tip that the motorcycle might be at that location; when the officer lifted the tarp to verify the Vehicle Identification Number and license plates on the motorcycle, the search was held to be illegal. Code enforcement officers routinely do the same thing in order to identify inoperable vehicles. It is now clear that this cannot be done without consent or a warrant.[11]

License and Plain View Doctrine--So, can the inspector go onto private property and to the front porch or front door to seek the owner's consent to inspect? Yes. This is sometimes called "knock and talk" or "knock and announce". In *Jardines*, the Court said that there is a "license" to go onto the property for the purpose of seeking consent, just as the National Girl Scouts and trick or treaters might do. While on the "baseball path" to the door, the inspector can observe anything that may be in "plain view". (Justice Scalia was known for his witticisms.) The Plain View Doctrine allows prosecution of violations that are in plain view of the officer, *if* the search is otherwise lawful. Officers need not "shield their eyes" when passing by a home on public thoroughfares. However, the inspector cannot go out of the path and snoop (inspect) into areas not in plain view.

Posted Property—Most states have a statute providing for posting of property. This is an indication that the owner or occupant has a subjective *expectation of privacy*. Does that prohibit the inspector from using the "Girl Scout" or "trick or treater" license? Probably not—Posting is only one attribute of the "expectation" of privacy. Of course, this may depend upon each individual state's own statute.

In a 2017 Tennessee Supreme Court case (post-*Jardines*), the court held that Defendant's posting of "No Trespassing" signs near the unobstructed driveway leading to the residence did not, under the federal and state constitutions, establish a reasonable expectation of privacy precluding officers from driving up the driveway and approaching the front door in order to conduct a warrantless "knock-and-talk" encounter. Even if defendant had an actual, subjective expectation that his signs would keep all persons from entering his property under all circumstances, a reasonable member of society would view the signs as simply forbidding any unauthorized or illegitimate entry onto the property.[12]

Reasonable Expectation of Privacy—In many cases, the courts look to the factual situation and determine whether there is an *expectation of privacy* that is *objectively reasonable*. This is more important with respect to places or devices that might otherwise be considered as public but privacy is reasonably expected, such as a phone booth (place);[13] or an IPhone, IPad, computer or tracking device (equivalent to papers or effects).[14] Much of the current Fourth Amendment litigation deals with the adaptation of 1791 concepts to today's technology.

> The Fourth Amendment is one of the most litigated and thoroughly interpreted (and reinterpreted) provisions in the U.S. Constitution. Not only is it fact-intensive, but the term "unreasonable" opens it up to fundamental policy interpretations, and leads to many close court decisions.

Examples of personal property that cannot ordinarily be searched or inspected without consent, warrant or exception include:

Conversations—Wiretapped in a public telephone booth. "The Fourth Amendment protects people, not places," wrote Justice Potter Stewart for the Court.[15]

Animals—The ability to go onto property to search for or inspect for animal neglect or cruelty depends upon the *location* of the animal and the likely *condition* of the animal or animals. As with most Fourth Amendment cases the answer depends upon the specific facts. As to the location—dog in a hot car or cows in a barn, for example--the curtilage analysis may not apply, as opposed to an animal located in a house or back yard. Most successful animal cases are those where the inspector can articulate a real and imminent danger to the welfare of the animal and that there is no reasonable opportunity to get consent or a warrant to save the animal from death or severe injury or illness. A generalized concern for the animal would not suffice. Exigent circumstances (below) is one of the recognized exceptions.

Is a Code Enforcement Inspection a Search? Yes. In the seminal cases of *Camara v. Municipal Court of City & County of San Francisco*[17] and *See v. Seattle*[18] the Supreme Court held that civil code enforcement inspections are a type of "search" within the meaning of the Fourth Amendment. However, the Court did provide a lower hurdle dealing with what constitutes sufficient "cause" for an administrative inspection as opposed to a criminal "search." While a law enforcement officer must show "probable cause" to believe that a crime has been committed, the Court said that for a code inspection "cause" is either:

Reasonable cause to believe there is a violation; or

The existence of a written policy for allowing the conduct of periodic inspections or area inspections.

Additional policies may exist in state statutes or local ordinances (such as fire, building, property maintenance, housing, and land use regulations). These should be reviewed to ensure that they are actually in effect. If these ordinances do not exist, the local government should at least adopt the policies into an administrative regulation, such as a Standard Operating Procedure ("SOP").

In summary, for a code inspection to be valid, there must one of the following: consent, a lawful inspection warrant, or an exception to the requirement (such as public view, plain view, open fields, or exigent circumstances).

Consent—Consent to the inspection must be given by an owner or person in legal dominion over or control of the premises, to the inspector. "Premises" means the area subject of the inspection.

Apartment or Condo--The dwelling

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unit is in the renter's or condo owner's control. Common areas are in control of landlord or association. Caution: *Consent by a landlord based upon a lease provision or condo declaration allowing the landlord or association to inspect the unit at reasonable times does not inure to the benefit of the code inspector*. Consent must be given *knowingly* and *voluntarily*—without duress.

Building Inspections—Consent from a contractor to inspect the permitted work does not empower the building code inspector to inspect unless the consent is attributable to the owner, and within the scope of the area necessary for permit compliance. The Supreme Court says that if one owner consents and the other specifically refuses, a warrant is required.[19] Consent may be *withdrawn* at any time.

Exceptions: There are several exceptions that may allow a non-consensual and warrantless search. Here are the most-used:

1. Hot Pursuit or Fresh Pursuit—Allows search or seizure without a warrant to prevent harm to persons or destruction of evidence. The exception applies mainly to law enforcement, and is a type of Exigent Circumstances (discussed below).

2. Special Needs—The government has a special need, usually based upon national, homeland or domestic security concerns. Its application to code enforcement would appear to be limited.

3. Open Fields—(Discussed above).

4. Public View or Open View—Public View allows observation from an area open to the public. Open View permits observation from an area not necessarily open to the public, but from an area in which the inspector is allowed to be, such as a neighbor's yard. General rule—If the inspector is at a location where she or he is allowed by law to be, the inspector may cite what is seen.

5. Plain View—As discussed above, Plain View applies also to *back yards*. A fenced back yard (curtilage) can be viewed and a violation prosecuted if the officer lawfully is on another property and the violation can be seen in plain view. This is so even if there is a *privacy fence, and even if the fence is only partially open*.[20] As applied to curtilage inspections, this is sometimes interchangeable with "Public View" and "Open View," above. As a U.S. District Court indicated in a post-*Jardines* civil rights case against a city and its code enforcement officers individually:

> Clearly established Fourth Amendment law holds that which a person knowingly exposes to *public view* is not subject to Fourth Amendment protections, and that City employees are not required to close their eyes to avoid observing that which is *visible from a place where the public is lawfully able to be*. See *Florida v. Riley*, 488 U.S. 445, 449 (1989) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."); *California v. Ciraolo*, 476 U.S. 207, 213 (1986) ("That the area was within the curtilage does not itself bar all police observation. The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible."); *United States v. Whaley*, 779 F.2d 585, 591 (11th Cir. 1986) (defendant did not have a reasonable expectation of privacy as to activity which could be viewed with naked eye *from position on neighboring property*, and "could not have reasonably expected the activity in his basement to be private as long as he failed to cover his windows. He conducted his activity in plain view ....") (emphasis added).[21]

If the officer must use an aid such as ladder to see the violation, some courts may be less apt to find the inspection of the home or curtilage to be lawful, especially if the view is aided by a telescope.[22] Obtaining evidence by sophisticated sense-enhancing technology, such as GPS, that cannot be obtained without physical intrusion is a search.[23] Binoculars have been approved, while telescopes with lighting aids have not.[24] Likewise, if the search and prosecution is dependent upon use of *high-tech thermal imaging devices* (such as detecting heat from "Grow House") it will be a Fourth Amendment violation.[25]

The Supreme Court's delineation based upon the level of need for high technology not readily available to the public[26] has less meaning as advances permit formerly sophisticated technology to get into hands of people easily and cheaply. A recent law review analysis of the interplay between new technology and privacy concludes: "As the evolution of Fourth Amendment jurisprudence suggests, the privacy standard guaranteed by the Amendment must focus on unlawful intrusion, not the mechanism by which the intrusion is or may be perfected."[27] Thechnology such as Drones,[28] Selfie Sticks,[29] Smart Televisions, Echo/Alexa, Social Media, and the Internet itself immediately come to mind.

Courts, including the U.S. Supreme Court, have allowed prosecution where there is a *lawful fly-over* that shows the curtilage and the violation.[30] However, some courts are questioning the lawfulness of certain continuous fly-overs where they are overly intrusive.[31]

6. Public Records and State Laws—The potential use of aerial photography as public records evidence of a violation should not be overlooked. Public records are normally admissible evidence. Aerial photography of this nature is not conducted or compiled by law enforcement or code enforcement, or for surveillance purposes. Photos are in the public domain. Admissibility may depend upon state law. While the Fourth Amendment may permit a particular inspection, state law may not. For example, Florida law does not permit issuance of an inspection warrant for an owner-occupied family residence even though the Fourth Amendment would permit it. In a somewhat infamous 2001

case, the U.S. Supreme Court did not find a prohibition *under the Fourth Amendment* for an arrest that led to a strip search for a misdemeanor seat belt violation.)

7. Exigent Circumstances—This exception includes circumstances constituting emergencies or imminent danger to life, health, or safety. The theory is that nobody should have to die while the inspector is filling out paperwork. However, the inspector will likely be called upon to testify as to the nature of the exigent circumstances, whether there were reasonable attempts to contact the violator, or why consent or a warrant was not sought. This is often after-the-fact, so the code enforcement officer is likely to be second-guessed in cross-examination. Examples of exigent circumstances include housing violations such as abandoned and dilapidated structures where children have been seen to play, businesses where gasoline or chemicals are known to be present, or attractive nuisances. Potentially irreparable or irreversible circumstances include imminent danger to animals (above) and imminent environmental damage such as pollution, or destruction of trees.

Papers: Occasionally, a code enforcement officer may want to refer to "papers" to prove a violation. Some states permit issuance of *administrative subpoenas* for documents. This is an underutilized tool. In some code cases, the "papers" (trash or hoarder's junk) *are* the violation. Once papers are put outside for trash hauling or are just located in plain view, they are fair game for evidence or for citation (subject to house/curtilage rules, of course). The code inspector must never go into a mailbox for any reason.

Other Cautions: While it is wise to coordinate prosecutions with law enforcement, *the code enforcement officer should not perform a code inspection in lieu of a police search*. Since the standard of probable cause for a search warrant is greater than the standard for cause for an inspection warrant, law enforcement's search may be invalidated by the use of only an inspection warrant or code inspection. Law enforcement cannot use code enforcement to do an inspection as a prequel to a search warrant. Some states have statutes to that effect.

Conclusion: The best way for code enforcement officers to avoid governmental and personal liability stemming from violations of the Fourth Amendment and other applicable regulations is to be fully aware of the law and its pitfalls--and above all to exercise caution when conducting inspections. This is an area where effective training and accurate, timely advice can prevent the municipality and its code enforcement professionals from being caught up in needless litigation. Local government attorneys have a major role to play in that mission.

1. Canton v. Harris, 489 U.S 378 (1989).
2. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
3. Sir Edward Coke, Coke's Institutes of the Lawes of England Fifth, 5 Coke Rep. 91; commenting on Semayne's Case, 77 Eng. Rep. 195 (January 1st, 1604).
4. *See* most recent recounting of this history in Carpenter v. U.S., No. 16–402, 585 U.S. ___ (Slip Op. at 5) (2018).
5. For a humorous take on this serious incident *see*, Kevin Bleyer, Me the People 247 (Random House, 2012). Wikipedia-"HMS *Liberty*" has a nice review of the fate of the Liberty as one of the first overt acts of defiance before the Revolutionary War.
6. *See* Entick v. Carrington, 19 Howell's State Trials (1765), discussed in Silverman v. U.S, 81 S.Ct. 679 (1961); and see, Collins v. Virginia, Case No. 16-1027, 584 U.S.____ (2018).
7. 4 W. Blackstone, Commentaries on the Laws of England 223, 225 (1769)
8. California v. Ciraolo, 476 U.S. 207, 213 (1986).
9. 569 U.S. 1 (2013).
10. *Id*.
11. *Collins*, *supra* note 6.
12. State v. Christensen, 517 S.W.3d 60 (Tenn. 2017).
13. Katz v. United States 389 U.S. 347 (1967) was a wiretapping case that overruled Olmstead v. United States 277 U.S. 438 (1928). It held that the "trespass" doctrine of Olmstead v. United States, 277 U. S. 438, and Goldman v. United States, 316 U. S. 129, was no longer controlling. 389 U. S. 347, at 351, 353. (It is interesting that the U.S. was wiretapping phone wires in 1926 and that Sheriff Olmstead was making the equivalent of about $28 million a year in current valuation—through bootlegging and smuggling. John Hancock would have been proud.)
14. Riley v. California, 573 U.S. __, 134 S. Ct. 2473 (2014) and United States v. Wurie 573 U.S. ____(consolidated)--the Court unanimously held that the warrantless search and seizure of digital contents of a cell phone seized during an arrest (without exigent circumstances) is unconstitutional. Carpenter v. United States, no. 16-402, 585 U.S. ____ (June 22, 2018) (review of cell-site records from wireless carriers was a Fourth Amendment search).
15. Katz, *supra* note 13.
16. *Cf*. Broden v. Marin Humane Society, 83 Cal. Rptr. 2d 235 (Cal. Ct. App. 1st 1999) (reliable complaint, combined with the smell, the officer's past experience, and the flies trying to get into the building, provided strong grounds for a warrantless entry) with Brinkley v. County of Flagler, 769 So. 2d 468 (Fla. Dist. Ct. App. 2000) (vague foreboding alone cannot justify a warrantless entry).
17. 387 U.S. 523 (1967).
18. *Id*. at 541.
19. Georgia v. Randolph, 547 U.S. 103 (2006).
20. United States v. Dunn, 480 U.S. 294 (1987), perimeter fence surrounding a barn and home was not one that was designed to keep people in open fields from observing what was going on behind the fence; in point of fact, the fence was designed to corral livestock.
21. Thomas v. City of Palm Coast, WL 1179961 (Middle District, Fla. Unrep. (2017). (Notably, although the judge denied the claims for damages against the City and individual officers, he did admonish the City that this was a close case and that *training was lacking*.)
22. *Cf*. United States v. Bellina, 665 F.2d 1335 (4th Cir. 1981) (stepladder on runway to peer into airplane) and State of Hawaii v. Kender, 60 Haw. 301 (1978) (officer climbing neighbor's fence, peering through thick "California grass" and using telescope).

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The Winning Edge: Preparing Witnesses for Depositions and Trial

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ILLUSTRATION:TRUJILLO DESIGN

INTRODUCTION

Testimony, particularly when provided in depositions and live appearances before a fact-finder, is fundamental to the American system of justice. The opportunity by judges and jurors to evaluate the demeanor and words of a deponent or live witness is critical to their assessment of guilt or liability. Accordingly, perfecting this aspect of trial practice—as much as knowledge of the law and superior advocacy skills — should be a priority for every litigator.

I. Preparation is Key!

Without a doubt, preparation and planning are key to successful depositions and trial examinations. Although witness testimony may appear free flowing and off-the-cuff, it is usually anything but. The process is much more involved than merely sitting down with a witness and conducting an interview, and starts well before the actual date of the deposition or trial. It is a joint effort between attorney and witness, an interactive process where the attorney must be well-prepared which, in turn, will result in successful witness preparation.

A. Attorney Preparation

A well-prepared attorney is vital to a successful deposition and/or trial examination. The attorney must know in advance what testimony the witness or opposition will elicit and what exhibits to introduce, the anticipated order of the proceedings, the issues that are likely to arise, and what to emphasize and make persuasive. Therefore, it is imperative that the attorney knows the file inside and out, is familiar with all documents and available evidence, and can identify the potential issues in anticipation of opposing counsel's questions. Further, an attorney must know all the reports created in the case, the relevant law, and their role in the case.

1. Think Big!

One of the most common mistakes any attorney can make in preparation is being bogged down in particular questions or specific aspects of a witness' anticipated testimony. As such, it is important that the attorney consider the bigger picture of the case. What are the essential elements of the claims and defenses? What do I know, and not know, about the case? What do I think I can prove about the case? How am I going to prove it? Once you understand the big picture, you can then look to individual witnesses and determine their strengths and weaknesses for every aspect of the case, and tailor the questions and witness preparation to those aspects.

Remember, examinations and depositions are not simply about asking a witness to tell everything he or she knows. It is important to select the topics to cover based on your theory of the case. Your preparation and big picture understanding will tell you which issues to pursue, what facts to emphasize, and which items of evidence will resolve disputes. At a minimum, you should be looking for sufficient facts to make out your prima facie case on every issue on which you bear the burden of proof, factual support for your main points of emphasis, information about witnesses' background that increases credibility, and testimony necessary to lay the foundation for other evidence.

2. Goals and Objectives

For each witness, as a well-prepared attorney, you have specific goals and objectives. You will consider where the witness fits in the overall strategy of the case and will know exactly what you are trying to accomplish with this witness. Are you looking for admissions, contradictions or impeachment? Are you seeking facts into the particular situation and surrounding circumstances, or merely background information?

Moving into the witness preparation phase, it is important to consider four items: 1) the who, what, when, where, and why – the story of the case; 2) the strengths and weaknesses of each witness and their testimony; 3) the record – how to build it and fill in any missing gaps required to argue your point, in anticipation of motion practice and expert review; and 4) the preservation of testimony for trial in the event a witness becomes unavailable.

B. Witness Preparation

When preparing a witness the key focus should be to establish their "core" posture in providing testimony. . Have your witness understand their message and what their role in this case is. This will allow a witness to narrow focus and limit

mistakes. When witnesses are provided with an overview and how it relates to the details of their knowledge, they are better able to understand the overall nature of his or her testimony. As such, it is important for a witness to understand the objective of his or her testimony. Going over a witness' testimony question by question is relevant; however, in the absence of the overall context, this strategy will likely result in a witness who becomes confused or unable to respond entirely when questions are phrased differently or unanticipated interrogation arises.

Finally, it is important to review with the witness the pleadings and how to handle questions concerning allegations, denials, and affirmative defenses. This not only provides for the aforementioned context of the testimony, but also makes sure a witness is comfortable with his or her testimony.

II. As Applied to Code Enforcement Officers

In addition to the points outlined above, there are particular witness preparation priorities for Code Enforcement Officers. For example, the Code Enforcement witness should be familiarized with all applicable ordinances, statutes, codes, and other regulations, and should understand his or her role – as officer or investigator, for example. Most importantly, the jury and/or the trier of fact needs to understand what is meant by Code Enforcement: it is the act of enforcing a set of rules, principles, or laws and ensuring adherence to a system of norms. A municipal authority enforces a civil code, a set of rules, or a body of laws and compels those subject to that authority to behave in a certain way. This involves the prevention, detection, investigation and enforcement of violations of statutes or ordinances regulating public health, safety, and welfare, public works, business activities and consumer protection, building standards, land-use, or other municipal affairs.

To accomplish this, additional preparation of Code Enforcement Officers is required. They must be prepared to explain what is meant by Code Enforcement, their particular duties, and what statutes, ordinances, and codes are encompassed in the enforcement action in question. Accordingly, attorneys representing the municipality need to ensure that the Code Enforcement witness has not only read, but fully understands the subject regulation. . Further, the Code Enforcement Officer needs to know whether the opposing party has an expert to contradict his or her testimony. If applicable, a return to the scene to refresh the witness' memory may be required, and if such access is not practicable (such as with a building or dwelling that is occupied) an empty identical area should be utilized. Above all, given that Code Enforcement Officers and municipal employees can be very busy, ample advance notice of depositions and trial dates is critical.

The final phase in readying a Code Enforcement Officer for deposition or trial is the ultimate question of preparation: "Is there anything you are concerned about and want to share with me?" As an attorney, the last thing you want at a trial or deposition is a surprise.

Surprise leads to confusion, confusion leads to scrambling, scrambling leads to a lack of focus-- and when there is less focus there is the potential for questions to not be asked, points not emphasized, and entire information missed. Attorneys must make sure they have all pertinent information. If something is "keeping the Code Enforcement Officer up at night," an attorney has to know about it. Thus, developing a relationship of trust and keeping lines of communication open with the witness is key.

III. Outlines

It is crucial that an attorney prepare a good outline prior to deposition or trial. An outline will reduce confusion or floundering when attempting to phrase questions which strengthen your position and lead to better, more accurate answers. There are also important substantive reasons to prepare an outline: for some testimony--namely evidentiary foundations--the way a question is propounded can be highly significant. Further, it is important that your outline include anticipated questions from the opposition counsel, so you know what is required to combat or deemphasize opposing counsel's points.

However, the outline should not evolve into a script. When attorneys create a script, they tend to become inflexible. By sticking to a script, you may not ask follow-up questions on very important topics or even be fully and properly listening to the witness' responses. More often than not, by following a script, you will miss information or the opportunity to ask more targeted and beneficial questions, potentially hurting your case severely down the road. An outline allows for the ability to think on your feet and get down to the important and vital information and details, while a script promotes rigidity and could result in missed information.

IV. Depositions

A deposition is a formal discovery process in which counsel take sworn testimony from a witness (the deponent), about the facts of the lawsuit. A deposition is used to develop facts and evidence in preparation for trial, determine what the witness knows about the case, observe the witness' demeanor, responsiveness, and general appearance, and/or to impeach the witness' credibility. A deposition is taken outside of the courtroom, usually at the offices of one of the party's attorneys, but has the same effect as if the witness were testifying in court. As such, the witness is placed under oath and will swear or affirm to tell "the truth, the whole truth, and nothing but the truth." Once the witness is sworn in, everything

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stated in the deposition becomes part of the record. Only counsel may agree to go off the record.

From this point, opposing counsel will ask the witness a series of questions and, if necessary, show documents relating to the facts and events of the lawsuit. It is important that the witness wait for counsel to complete a question before starting an answer. This will maintain a clear record in the transcript, ensure that the answer is a correct response to the question asked, and allow defending counsel the opportunity to object to an improper question. When counsel objects to questions, unless instructed not to answer, the deponent is nevertheless required to answer the question, even after an objection is made.

The entire deposition is transcribed word-for-word by a court reporter and may be videotaped. As such, all responses must be oral and spoken clearly and slowly with absolutely no gestures. The deposition will be attended by counsel for all parties and the court reporter/videographer, and may be attended by non-testifying parties. The deposition will go into a new day or another session until it is completed; however, breaks may be taken throughout the deposition as needed.

A. Exhibits

During the course of a deposition, exhibits in the form of documents and materials may be introduced to refresh a witness' memory, obtain clarification or information about the details of the exhibits and the events surrounding them, or even to impeach the credibility of the witness. It is important that the witness take ample time, read the materials from top to bottom, and ask questions if need be. The witness is not on a timer, and should take as much time as needed to review the materials and ensure a thorough grasp on what is being presented. It is possible, for example, that the way the materials are presented could be deceiving. Something as innocuous as the positioning of staples can create misperceptions, so the witness will need to make sure that all pages stapled together relate to a single exhibit. In addition, the witness should not begin speaking about an exhibit until the proponent of the exhibit has asked a question requiring a response.

B. Objections

Throughout a deposition, counsel may object to questions for various reasons. As a witness, it is therefore crucial to pause after each question to allow counsel time to object. While a deposition may seem like a conversation, and a witness may want to answer and continue the free flow of dialog, it is important that the witness remember it is a formal discovery process, with every answer having the potential to make or break a case. However, unless instructed not to answer, the witness is still required to answer the question.

Common objections that may arise during the deposition include:

- Form of question
- Asked and answered
- Document speaks for itself
- Argumentative
- Vague or ambiguous
- Mischaracterizing testimony
- Compound or complex
- Privileged
- Private work product/prepared in anticipation of litigation; and
- Attorney-client privilege.

C. Five Keys to Success

1. Do Not Volunteer Information

As mentioned above, the deposition may feel like an informal conversation, but it is important for the witness to remember it is not. An unprepared witness may be tempted to provide responses that he or she believes are being requested. Lawyers are in charge of deciding which topics to bring up and as such a witness should scrupulously limit answers to the subject-matter of the question.

To avoid this pitfall, it is essential to emphasize to your witness that he or she should not be concerned with appeasing the deposing counsel. Opposing counsel may try to get the witness to budge, and even imply that a lack of acquiescence is somehow improper, so it is important that the witness have confidence that what he or she is doing is correct. The witness must listen carefully to the question and answer only the question that is asked; there is no need to anticipate or provide explanations – make counsel work to get the answer. Answers should be accurate, but also short and direct, and information that was not expressly requested should never be divulged. Finally, before answering a question a witness should consider whether the question is an opportunity to present information favorable to your defense and/or damaging to the opposition.

2. Beware of Tricky Questions

An attorney's questions may be loaded with statements of fact or assumptions that are not supported by the record. If the witness is not sure of the answer to a question, he or she should just say so. The lawyer may be trying to trick the witnesses into giving testimony that they are not competent to give. Unless they know answers in their entirety, it is important that witnesses not speculate or guess.

Tn avoid tricky questions, witnesses should listen carefully to the question, in particular the wording and phrasing, and make sure to pause before giving an answer. This not only gives the witness time to think of the best and most appropriate answer, but gives counsel time to object, if necessary. Finally, if a question seems loaded, the witness should ask for clarification or clarify the issue in the answer. Witnesses should not be afraid to interrogate the interrogator – a witness can ask questions back. The witness is entitled to a question with a clear, simple meaning.

3. Beware of Ambiguous Terms

Many questions contain terms or phrases that are susceptible to multiple interpretations. As a result, a witness' answers to these types of questions, without clarification, may be used by the opposition for a purpose or meaning the witness did not intend. For example, a statement that a witness "participated" in a meeting could simply mean the witness attended the meeting, or could mean that the witness actively spoke there. These interpretations are drastically different and can make or break a case, so it is important that a witness gets the necessary clarification.

To avoid getting caught in the web of ambiguity, it is important for witnesses to harken back to their preparation and remember the important points and notes of the case. That way, when a question comes up that seems ambiguous, a witness understands the context and the need to ask follow-up questions of their own. Specifically, if a word's meaning is unclear, the witness must ask the attorney what was meant by the question. In that regard, it

is important to remember the witnesses' oath to tell the truth. If the ambiguity of a term can lead to multiple answers, it is important to clarify the intended meaning to ensure that the testimony is truthful.

4. Never Guess at an Answer
Counsel's questions may request that witnesses discuss facts, events, or dates that are not known or not recalled specifically. These questions could be related to incidents many years in the past. In these circumstances, it is important for witnesses to remember that if they are unsure of an answer, they are entitled to say they do not know or do not recall. If they only testify to what they actually know personally, they will not get caught speculating under oath. An alternative approach could be to rule things out that did not happen. For example, if a witness is not sure of what he or she had for dinner, but is allergic to shellfish, that could be stated. What a witness wants to avoid is guesswork or answers that are purely speculative.

5. Honesty is Critical
Whether the result of extensive preparation or the questions asked by opposing counsel, a witness may feel the temptation or pressure to give a false statement where truthful testimony is perceived as embarrassing or damaging to the case.

It is critical to remember that credibility is essential in any testimony. One proven false statement could not only damage an individual witness's credibility, but an entire case. While giving a false statement might appear to a witness to provide short-term relief, it is far more likely to create serious problems to the witness's side down the road. False statements made in the deposition can be researched by counsel and used to impeach the witness's credibility at trial. Further, at the deposition itself counsel could be in possession of documents that could refute any false statement and be used to show that the witness lied under oath. Finally, for attorneys, knowing that a false statement was given under oath could subject you to punishment by the court.

D. Advice, Tips, and Recommendations
The following are very important pointers that counsel should review with every witness in anticipation of a deposition:

It is critical to remember that credibility is essential in any testimony. One proven false statement could not only damage an individual witness's credibility, but an entire case. While giving a false statement might appear to a witness to provide short-term relief, it is far more likely to create serious problems to the witness's side down the road.

- Eat a good breakfast
- Dress code is up to you – what will make you comfortable?
- Turn your smart-phone off
- Do not bring documents (such as a diary, calendar, or address book)
- Do not take notes during the deposition
- Appearance (sit straight up, avoid smirks, fidgeting, rocking, hand position)
- Conserve battery life – set your own pace and finish strong – you want to be effective throughout the questioning
- Stay within your game (vocabulary, diction, and so on)
- Do not over-lawyer or over think your answers
- Awkward silence is okay
- Do not share feelings or your interpretations of the facts
- Keep your opinions to yourself – what did you actually see, say, do, hear?
- If you are doing a good job, do not change your approach
- Keep an even keel (avoid anger, frustration, or becoming flustered)
- Your main objective is to be credible, and nothing more

In addition, there are uniform questions that are a part of almost every deposition, including name, date of birth, residence address, and so on. Despite the seemingly simplistic nature of these questions it is important that the witness also expect to be asked about medications being taken and how they might affect his or her your capability as a witness, to be asked about what he or she did to prepare for the deposition and how much time was spent doing it, and to be asked about how documents were produced. While these questions may seem adversarial, it is important that the witness answer them truthfully.

V. Trial
A. Subpoenas
If your opponent subpoenas a Code Enforcement Officer or municipal employee for trial, it is important to begin thinking immediately about witness preparation. Just as for depositions, it is essential for an attorney to be prepared. Be sure to utilize the deposition transcript to get up to speed on all the issues in the case. In addition, it is important to make clear to the subpoenaed witness that he or she will be subject to cross-examination if the court acknowledges their status as an "Adverse Witness." Making this scope clear to the witness and being prepared yourself will be instrumental as you move towards trial.

B. Preparation
Part of the trial preparation process is preparing your witness to communicate effectively with jurors. Throughout a trial, attorneys address the jury with their own words; however, during direct and cross examinations it is up to the witness to address the jury while the attorney stays silent. Preparation for trial begins with an initial meeting. Here, it is important for an attorney to have available all relevant codes, statutes, and/or ordinances. Additionally, the witness must be familiarized with the pleadings, interrogatories, and responses that set forth the causes of action, and review all relevant documentary evidence to understand its purpose within the scope of the case. Finally, if an expert report was drafted for the opposition, it is vital that the witness review the

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report to aid with anticipating questions from opposing counsel. Once this initial preparation is complete, it is now time to focus the witness' attention to procedure and the substance of their testimony.

1. Courtroom and Procedure

It is vital that a witness is familiarized with courtroom procedures. As a first step, the witness should know where the courthouse and courtroom are, where to park, where they will wait, where the witness stand is, whether they should sit or stand, and even where the restrooms are located. A witness who is not frazzled and not in a rush is far superior to one who is stressed and unfocused. Next, the witness should be familiar with the procedure: the order of questioning, questions from a judge, objections by counsel and the need to wait for a ruling before answering are all important to be aware of. If the witness has not testified before, it may be beneficial to have him or her to visit the courthouse to relieve anxiety and ask questions.

2. Prior Testimony

With procedural preparation out of the way, the substance of the testimony becomes crucial. It is important for witnesses to review their past deposition transcripts. This will ensure that witnesses will not be impeached and may refresh their recollections to ensure they are not only comfortable, but appear credible on the witness standard. The review must include exhibits used in past deposition testimony; this helps with credibility, eliminates surprises and allows a witness to become familiar with the procedures in handling and referencing to exhibits to ensure the examination runs smoothly with a minimum of confusion or error.

C. Direct Examination

Just as with a deposition, a direct examination requires careful and considered planning. The following is a checklist to work through in preparation for a direct examination:

- Explain the attorney/client privilege, if applicable
- Have the witness give an initial quick recitation of facts in narrative form
- Review with the witness the nature and purpose of their testimony
- Discuss applicable law including elements
- Have the witness review all applicable facts in light of the above review of the law
- Review with the witness past depositions and documents previously produced
- Practice direct examination
- Practice cross-examination
- If necessary, conduct a full dress rehearsal

VI. Ethical Obligations

Every attorney knows that perjury or the fabrication of evidence is wrong, unethical, and illegal. As attorneys, ethical witness preparation is an essential part of the groundwork for depositions or trial. The crucial mandate is that a lawyer not falsify, distort, improperly influence, or suppress the substance of the testimony to be given by a witness. The key to staying above-board is understanding the clear and fundamental principle that, while witness preparation is essential, an attorney may neither personally fabricate evidence nor induce another to do so.

Fabrication on a grand scale, like hiring an actor to be a witness, is very rare, but smaller scale fabrication is far more common. In fact, attorneys preparing a witness may not even realize they are coaching the witness to change some aspect of his or her testimony to make it more persuasive or in line with the relevant law. To avoid this, it is essential to elicit all relevant facts and help marshal the client to express his or her case as persuasively as possible. This is done by carefully listening to the client and explaining the importance of the information they are sharing. In short, the attorney may not procure changes to the substance of any testimony, but may orient the form of the testimony to maximize its effectiveness without changing its meaning.

This is largely common sense and no rule should be required to state the obvious--that a lawyer may not use witness preparation as an excuse to tell the witness what to say and/or to create false evidence. However, when in doubt, attorneys must follow the Model Rules of Professional Conduct Rule 3.3(a)(3) which requires that a lawyer not "offer evidence that a lawyer knows to be false."

Conclusion

Once you have completed the demanding yet vital work of properly preparing your witnesses for a deposition or trial, the game begins. Your thoroughness in preparation will allow you to proceed with confidence that you know the law, you know the evidence, you know the facts and circumstances, you know how to build and protect the record, and you know exactly what you want and need from each and every witness. ML

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Moving up the Technology Food Chain: Implementation of Blockchain in Municipalities

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"…it's not bitcoin, the still speculative asset, that should interest you, unless you're a trader. It's about the power and potential of the underlying technological platform."[1]

Introduction

Blockchain technology is most readily associated with Bitcoin, the revolutionary cryptocurrency that has taken the tech world by storm. Blockchain is the underlying technology behind Bitcoin; and since the Bitcoin White Paper was published by Satoshi Nakamoto in 2008, people all around the world have realized new and innovative uses for blockchain. With technology giants like IBM, Samsung and Microsoft increasingly getting involved with and offering blockchain-based services, it seems likely that the question has saervices, shifted from *whether* blockchain will transform organizations, to *when* and *how* it will do so.

In much the same way that you do not need to have in-depth knowledge of the way Microsoft Office works at an operational level in order to implement it successfully, you also do not necessarily need to have a computer sciences-level understanding of how blockchain works in order to appreciate its potential. Our role as legal advisers is to understand the benefits and risks of technology and to have the ability to communicate this knowledge in a helpful, constructive manner as our organizations decide whether they can afford to miss out on the opportunities presented by this emerging technology.

Innovation does not just happen, it requires organizations to make time, and give time, to employees to be inventive. Leaders can organize sessions where a cross-section of departments is represented and the sharing of ideas and problems alike is encouraged. Municipalities need to encourage a bridging of the gap in understanding within their own departments, helping them to understand what blockchain is, why it matters, and why it will likely be relevant to them. Legal departments can assist by having lawyers who focus on Information Technology and are therefore equipped to provide proactive advice and guidance to their clients, rather than just reactive advice when things go wrong. This article will provide general background on blockchain technology, identify use cases, present benefits and risks, and ultimately encourage thoughtful consideration of how blockchain fits into the future technology roadmap of your municipality.

The Basics: What is Blockchain?

Before transformative effects from blockchain can be achieved in government, participants need to learn the basics of this new architecture. While blockchain is often treated synonymously with Bitcoin, cryptocurrencies are actually only one of many implementations of the underlying technology. Blockchain was developed to support Bitcoin, but it is and has become so much more than that. Early examples of blockchain provided trust between strangers for digital currency transactions, but the participants in a blockchain can be any group of stakeholders or members of a network who seek to eliminate a gap in trust or inefficiency in some type of record-keeping.[2] Blockchain is anticipated by some to be as transformational as the Internet has been.

Blockchain is referred to as distributed ledger technology, or DLT. A blockchain records all transactions that take place between the participants in its network. These transactions can be financial, like Bitcoin, but they don't have to be; transactions can also be exchanges of countless types of data. The record is shared, replicated and synchronized among the members of a decentralized network. The blockchain has a set of pre-defined rules for how the ledger is appended by the consensus of the participants in the system. Once a transaction is recorded, it cannot be changed or retracted. The only way to change the blockchain is to add to it. Whereas with a traditional ledger, participants would maintain independent records of transactions that would require reconciliation at the end of a predetermined examination period; with blockchain, the transaction is the record.

Every record in the blockchain (every "block") has a "header" and "content." The header contains a timestamp and unique cryptographic features – hash and a digital signature. The hash is fundamentally what creates the chain – it represents the current state of the blockchain – every single transaction that has been made on the blockchain is represented. The content of each block contains the new transaction(s) that are being appended and now form part of the chain. The very first block is called the genesis block, and it is where

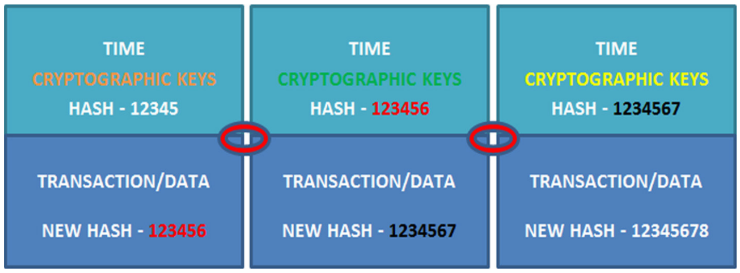

Figure 1

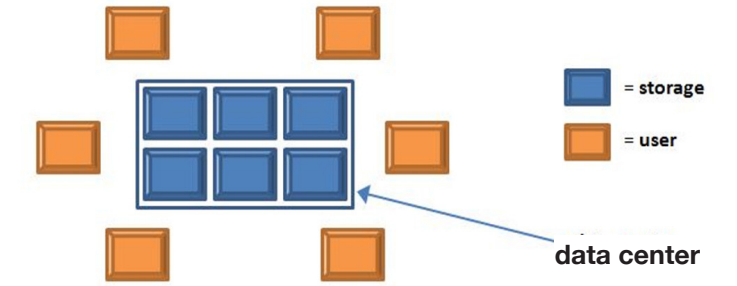

Figure 2

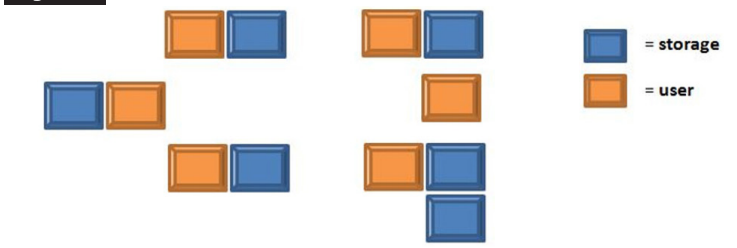

Figure 3

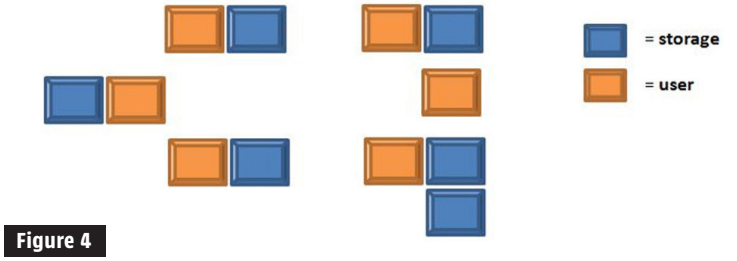

Figure 4

the hash originates. As each new transaction is recorded, the hash changes, but each block must link back to the previous block through its hash – thus, forming a chain, as illustrated in ***Figure 1*** above. Including the previous block's hash in the current block incorporates the entire history of the chain into the current block. This makes the database an auditable, immutable history of all transactions in the network, making third party intermediaries such as financial institutions or clearinghouses, unnecessary.

The characteristics and specifics of the protocol of any given Blockchain vary based on numerous factors. Blockchain protocol can be public ("permissionless"), meaning access to the chain is open to anyone; or private ("permissioned"), meaning there is pre-vetting of membership. Often a permissionless blockchain will have a more robust and demanding consensus protocol required to add a block, in order to ensure trust. This aspect of the protocol becomes important when considering the risks related to privacy, which will be discussed later in this article. To further explain how blockchain works, I will use the simple example of a phonebook. A phonebook is what we would consider a relational database with structured data. This type of database contains highly organized compilations of data, which are easily searchable using simple, straightforward search engine algorithms. While a database can be stored locally, large databases today typically reside on a server in a data centre. This is referred to as a centralized database, an example of which is shown in ***Figure 2***. This type of database is located, maintained and stored in one single location and to access data a user must connect to the server.

The second traditional option is a decentralized database, where data does not have to be (but could be) stored by all participants, and the database of each individual user does not operate any differently than it does in the centralized data centerexample. In fact, none of the database users would be aware, simply by using their database, that the data centers were structured one way or the other. A decentralized data centre can look something like ***Figure 3***, but it can also have many different variations.

Although these two types of database are different, at their core they are the same. Whether a data center is centralized or decentralized, it has a central authority – a system administrator. This is a core characteristic of a traditional database. All of the rights to the database are controlled by the organization that creates it, and as the central authority it controls a number of variables or permissions: who can access, who can alter/edit, who can delete.

Blockchain is different because it is distributed; it has no central authority. Every participant in a blockchain has a copy of the database – the blockchain – on their computer. The blockchain is a shared, and continually reconciled, database. A distributed ledger, or database, would look like ***Figure 4***.

Returning to my earlier example, take a phonebook and duplicate it thousands of time across a network of computers. The network is designed to regularly update the phonebook and can only be updated if there is a consensus from all of the participants. In the phonebook example, the software could be programmed so that only the owner of any given phone number in the database has the authority to change the number. Once a participant makes the change, it has to be authorized by consensus of the other participants. In order to provide consent, a participant verifies the cryptographic features discussed earlier – the hash and digital signature. Once consensus is achieved, a new block is created and added to the blockchain, which means every database on every participant's device is updated. Once a block is added, it is immutable; blocks are only added, never deleted. This "trustworthy global platform for our transactions" is referred to as the Trust Protocol – "trusted transactions directly between two or more parties, authenticated by mass collaboration and powered by collective self-interests, rather than by large corporations motivated by profit."

> "…by accelerating transactions and simultaneously lowering their costs, blockchain can help to eliminate layers of redundancy, ease regulatory compliance burdens, introduce recordkeeping efficiency, and generally smooth government operations across a number of areas. Harnessing those

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advantages and applying them toward public institutions' mission goals provides an opportunity for realizing both agency-specific and whole-of-government benefits that can foster more efficient and effective mission delivery in these challenging times."[5]

To summarize, the key characteristics of blockchain technology are: [6]

1. Decentralized and distributed
   - Every participant has a full copy of all transactions
   - There is no single point of failure
   - Transactions are verified cryptographically and updated immediately to all participants
2. Irreversible and Immutable
   - The ledger is append-only, meaning no block can be changed once consensus adds it to the chain
   - All transactions are encrypted and include, time, date, participants and hash to previous block
   - Trust is enabled via consensus protocols, cryptography and collective recordkeeping
3. Near real time
   - Transactions are verified and settled within minutes, not days
   - Parties interact directly – no inte mediary required

Current Uses

There are many examples of different levels of government as well as private enterprise exploring blockchain use. Land registration by blockchain is being explored on every continent but Antarctica. The use of blockchain technology to enable voting is being tested in New York, Texas, Denmark, Ukraine and Australia, to name a few.[7]

Walmart has filed a patent for two different blockchain-based tools – a marketplace that would enable customers to resell purchased products, as well as a tool for tracking package contents, environmental conditions, and locations. In addition, Walmart has stated that it is ready to use blockchain technology in its live food business in order to improve contamination management and overall transparency.[8]

Ghana has partnered with BenBen to create a land registry and verification platform that will capture transactions and verify data to allow an automated and trusted property transaction between all parties. Currently, property rights in Ghana are unenforceable in court, and therefore banks will not accept property as collateral. The changes being implemented by BenBen using blockchain will build a land registry and history of transactions that can be verified.[9]

Korea has partnered with the IT arm of Samsung (Samsug SDS), to develop a blockchain-powered platform that will be used for export customs logistics. The platform is expected to enable the country to streamline and secure document sharing at each step, from goods declarations to delivery, while detecting and preventing the use of forged documents.[10]

Dubai is one of the more progressive participants in blockchain implementation to-date, with a goal of fully-integrating all paper-based transactions to blockchain technology by 2020. The Dubai Blockchain Strategy has three pillars: government efficiency, industry creation and international leadership.[11] The goal of Dubai's city-wide pilot to introduce blockchain technology is to decrease wasted time, effort and the use of government resources by replacing government services with interoperable blockchains.

Even more forward-thinking than Dubai, is Estonia. Estonia refers to itself as a "digital society". Estonia designed its own blockchain technology, called KSI, which is now used around the world. With digital services already in use, the Government of Estonia introduced blockchain to afford its citizens full control over their personal data. For example, Estonians have the ability to log into the Healthcare Registry records through the use of their digital identities. They can then find out who else has accessed their records and when. Prosecution can result for anyone, government officials included, who views someone else's records without good reason.[12]

Potential Use Cases for Municipal Government

Obviously, as set out in the examples above, there are many different potential applications of blockchain technology; and, these are only a few of the numerous instances of use/development. The key prerequisites to look for when considering blockchain as a solution are: i) a need for multiple parties to share data and ii) for all parties to have a common view of the information. If these characteristics do not apply, blockchain is likely not the right solution. Once those prerequisites are met, consideration of other characteristics of the project can be evaluated to see if blockchain is the right fit, things such as: the need for multiple parties to be able to update the data; the need for trust that the actions recorded are valid; and removal of dependency on intermediaries.

Smart Contracts: Smart contracts are not really contracts in the legal sense, in that there is nothing that needs to be complied with or upheld by them. Instead, smart contracts are a set of self-executing business rules that determine how two participants transact on a blockchain. A smart contract puts paper processes into a standard format so they can be executed on the blockchain. To enable a smart contract, code is included in the blockchain that can test for specific conditions to be met and, once met, act accordingly; essentially, "if X, then Y" actions are built into the transaction, fostering automation and enforcement.[13] A smart contract can be established in a supply chain that automatically executes an organization's procure-to-pay process from end-to-end. In other words, the contract itself takes care of purchase orders, it knows the precise number of units required, at what time and where, and it secures the best price from the best supplier. Once the product is delivered, the smart contract executes to make payment right away. Because automatic matches are made between purchase orders, goods received, and invoices, the blockchain establishes that there are no disputes as a result of missing documents or human error. This type of solution eliminates the need for a number of expensive and often inefficient intermediaries – financial institutions, internal approvers, purchasing agents, goods-ver-

ifiers, etc. The result is a faster process with complete transparency at each stage of the transaction.

> With blockchain, we can imagine a world in which contracts are embedded in digital code and stored in transparent, shared databases, where they are protected from deletion, tampering and revision. In the world every agreement, every process, every task and every payment would have a digital record and signature that could be identified, validated, stored and shared. Intermediaries like lawyers, brokers and bankers might no longer be necessary. Individuals, organizations, machines and algorithms would freely transact and interact with one another with little friction. This is the immense potential of blockchain.[14]

One example of a smart contract type blockchain use case for municipalities is smart contract dealing with office supplies. This use case could be implemented in any office in the world, whether government or private industry. Imagine an office where Internet of Things devices are designed to track office supply levels. A smart contract utilizes these devices to execute and order supplies when needed. The entire supply chain is executed without manual intervention, all based on actual need. The ordering would be more economical because the smart contract would only be enabled to order supplies that are necessary to the functioning of the organization; personal requests and desires would be removed from the equation. The contract can be established with one supplier who will serve every department so that shipping can be coordinated to save time, money and reduce the carbon footprint.

Voting: Governments around the world are investigating use cases for blockchain-based voting platforms. These platforms are said to be able to achieve "secure, anonymous and unique voting in a decentralised and digitized manner by removing inefficiencies and complexities that characterise other forms of voting."[15] One basic concept of blockchain-based voting is to have citizens cast their vote via a token that would be deposited in their account. The ballot would be cast by sending the token to a specific address (the address of the candidate the person wants to vote for). In actuality, there would be a user interface that would do all of this, but would hide the process of sending the token from the voter and instead have a simple interface where they could click to select a candidate. The process is actually fairly complicated, however, because voter identity has to be verified and anonymity must be maintained; but the concept is there and companies are working towards viable solutions.[16]

The very first question, even before identifying the potential risks posed by contracting for and implementing blockchain technology, should be this: Have you identified who or which business function owns responsibility for managing the implications and exploring the potential of disruptive technologies such as blockchain?

Registries: Although not often controlled by local levels of government, registries are one of the buzzwords when it comes to ideas on how to utilize blockchain in government applications. Business registries, where corporations can be managed from registration to dissolution, all while giving the public a 360-view in a trustworthy manner; land registries, which in developed nations can eliminate cost and increase efficiency and in underdeveloped countries can help to codify land ownership; and civil registries for everything from birth to death.[17]

Infrastructure: There are a number of potential uses for blockchain when it comes to infrastructure management.

Renewable energy invested in by individual citizens can be used to supply day-to day personal use, with the remainder being sold back to the grid on a blockchain-based system. Smart tracking meters can be combined with smart contracts to automate water supply management in **water and wastewater** systems ensuring an efficient distribution of water.

Waste management can be revolutionized through the use of smart sensors that can track levels of waste and provide more efficient and well-aligned strategies to dealing with waste.[18]

Challenges and Limitations: The very first question, even before identifying the potential risks posed by contracting for and implementing blockchain technology, should be this: Have you identified who or which business function owns responsibility for managing the implications and exploring the potential of disruptive technologies such as blockchain? Especially when it comes to cutting edge technology, it is important to make sure that there is an ultimate decision maker, or group thereof, and that they are identified and educated. Technology offers amazing opportunities in innovation, cost savings, and efficiency. People are going to want to use technology to make their lives better; but it is important that there is oversight on each implementation, to ensure that the risk tolerance of the organization is appropriate and consistently applied.

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Security: As with any technology solution, security should be at the forefront when considering how and what to implement. The data that will be stored on the system will drive the rigor with which you evaluate security. At its core, blockchain is a ledger system. While the technology is complicated, the basic idea is not. Blockchain offers a way to validate information reliably and securely without allowing for the ability to edit or delete previous entries. It is essentially a creation of trust.[19] Where the trust comes from can differ, depending on what type of blockchain protocol is employed. As with anything, whichever blockchain system you choose, it will only be as strong as its weakest link. While there is much excitement about the security features of blockchain, it should not be taken for granted. Any potential system should undergo a security and privacy assessment, without any preconceived notion of inherent security just because it is blockchain. Blockchain solutions can be decentralized, but they aren't always. Where the systems differ, so too can their levels of security.

In a permissioned (private) blockchain, there will be a central authority that controls who has write permissions to the system. In this way, trust will come from the same place it often does with a typical database structure. If the system that houses the blockchain uses single-factor authentication, the user will require a certain username and password, for example, to be able to access the system and thus, the blockchain. These identifying features will be enough to tell the blockchain to trust this person because it will know that the person in question has the authority to access it. "Private blockchains are a way of taking advantage of blockchain technology by setting up groups and participants who can verify transactions internally."[20] The risk of a security breach on this type of system is essentially the same as any other centralized system; if one user is hacked the entire system could be impacted.

In a public blockchain, such as Bitcoin, the decentralized nature of the system requires different authentication to create trust. Public blockchain protocols are based on Proof of Work (PoW) consensus algorithms that are open source and not permissioned. In the Bitcoin protocol, this is a mathematical PoW referred to as mining. The PoW in Bitcoin is very hard to generate because there is no way to create them other than by trying billions of calculations per second. This requirement makes it very difficult for any one participant to consecutively add new blocks of transactions into the blockchain.[21] This creates a different kind of trust, because the trust does not reside in a particular person/their identity, it comes from the verification of many users that the block in question is verified.

All this is to say that when contemplating a blockchain solution, the same steps must be taken to assure yourself and the organization with respect to security as you would take with any other technology solution: understand who has access, what kinds of access and where the potential for a breach is.

Privacy: An interesting issue of potential conflict has been raised with respect to blockchain and privacy law compliance, specifically in relation to the new General Data Protection Regulation ("GDPR") requirements in the EU. While one of the significant features of blockchain is the general immutability of its data, one of the most discussed features of the GDPR is its "erasure" right. Article 17 of the GDPR requires that companies erase the personal data of individuals when they ask to be "forgotten." Because GDPR requirements are new, there is a lack of interpretation about how exactly they will be interpreted and enforced. There is no definition of "erase" in the GDPR, and "personal data" is very broadly defined; combine the two and some practitioners and scholars have expressed the opinion that an "individual's publicly available cryptocurrency wallet address would be considered personal data under the GDPR", and thus, subject to the erasure right.[22] Only time will tell how all of this will play out, but certainly on the fact of it the technology appears to be in conflict with the regulation.

While the GDPR likely has limited applicability to the activities of a Canadian municipality, it is important to note that the federal government is giving thought to updating Canada's privacy laws. There have been some indications that these changes may come in the form of an alignment to GDPR requirements and penalties.[23] These changes could have a trickle down effect on municipal privacy laws.

The way we currently deal with data and the sharing of information certainly needs improvement.

> When we share vital information such as our name, date of birth, address, and social security number, that sensitive data is passed to third-party companies that require it. This creates two additional problems: We have to repeatedly fill out forms every time we interact with a new organization, and the firms that make copies and store our information in centralized databases are easy targets for hackers.[24]

The problem is, it is unclear whether blockchain technology will actually improve this scenario. As with most things, the blockchain is only as strong as its weakest link and it will be imperative that municipalities engage with compliant, trusted vendors, and have in-house legal and information technology expertise, who can identify those weak links in any given implementation.

Contractual Considerations: One of the biggest challenges for implementing blockchain in a municipal organization will be determining what the governance model will be that applies to a blockchain-based project. For example, what are the rights of different participants, what are their obligations, how are conflicts to be resolved, and how is liability handled? It is important to take the time now to carefully draft and evaluate policies established around blockchain technology to ensure that there are no unintended consequences that ultimately end up thwarting innovation and development.[25] The establishment of master plans that address these types of issues is a good starting point.

Power: In order to make it run at decent speed, blockchain requires a large amount of computer processing power, which in turn requires a large amount of cooling and thus, electricity. Cryptocurrencies in particular create a large energy demand that is a significant drain on the world's electricity resources. As discussed above, in the Bitcoin blockchain, blocks are added to the chain when they are authenticated. Part of the authentication process is the solving of a complex mathematical puzzle known as the "nonce". This is accomplished through a massive computational trial and error process, which requires a large amount of processing power.26 There are estimates that, "by 2019, the Bitcoin network alone will require more energy than the entire United States currently uses and that by February 2020 it will use as much electricity as the entire world does today."27 However, even with those predictions, experts consider this a solvable problem, aided by the fact that computing power becomes more efficient by the day. Municipalities will need to be aware of the possible infrastructure requirements of implementing blockchain. If implementing a system in-house (as opposed to a Blockchain as a Service (BaaS) type system), processing power will be needed to ensure the system runs efficiently. Cooling of the extra servers required is another consideration not to be overlooked.

Strategies for Moving Forward:
First and foremost, start small. Single-use applications minimize risk because they aren't new and they involve little to no coordination with third parties. The use of (private) blockchain internally for applications like managing physical and digital assets, recording internal transactions, and verifying identities are just a few examples of starting points. Organizations that are struggling to reconcile multiple internal databases might benefit from combining them onto blockchain technology. Testing these single-use applications will help employees to develop the skills they need to move towards more advanced applications, as well as for organizations to develop comprehensive plans on for larger implementations that are enterprise-wide.[28]

Education and engagement of citizens will be key to the success of emerging technology implementation. The Infrastructure Canada Smart Cities Challenge that is currently underway puts a large focus on community engagement. "Smart cities should aim to engage their citizens, by offering them a place where they want to live, love, grow, learn and care. And in doing so giving them the will to change and the will to act."[29] As technology solutions like blockchain become more pervasive in society, it will be vital to ensure that all citizens are able to continue to be active participants in society.

Understanding the potential impact of blockchain and the best use cases for your organization is as much an exercise in thinking through transformative business models as it is about the actual technology solutions. When developing the Dubai Blockchain Strategy, Dubai held forty blockchain related workshops. Thirty different government bodies were in attendance at these workshops, which were used to determine the effectiveness of performing transactions through blockchain, as well as to create sound blockchain policies prior to implementation of the technology. Industry creation is another of the pillars of the Dubai Blockchain Strategy. Dubai sought to allow citizens and business partners to develop new businesses leveraging blockchain technology.[30]

While places like Dubai and Estonia have been focused on technology and becoming digital societies, for most municipalities this will not be the case. To ensure a successful project the focus should be on the problem you are trying to solve, or the result you wish to see, rather than the technology solution. Agile policy formation is something all governments should start getting comfortable with as technology development in the private sector continues to move faster than policy. Formulating digital master plans is essential so that there is a foundation to fall back on as new technologies enter the mix. Organizations should also make a conscious decision as to what role they intend to play when it comes to technology – will your organization follow a path, or forge one? If innovation is the chosen course, recognition that sometimes things go wrong will be essential; and when they do, it is important to stick to the principles established at the outset, learn from those mistakes and talk about them openly. While it may be premature for municipalities to start making significant investments in blockchain technology, developing the required foundations for this platform, including skills, standards and best practices, is still forward thinking and a worthwhile objective.

First and foremost, start small. Single-use applications minimize risk because they aren't new and they involve little to no coordination with third parties. The use of (private) blockchain internally for applications like managing physical and digital assets, recording internal transactions, and verifying identities are just a few examples of starting points.

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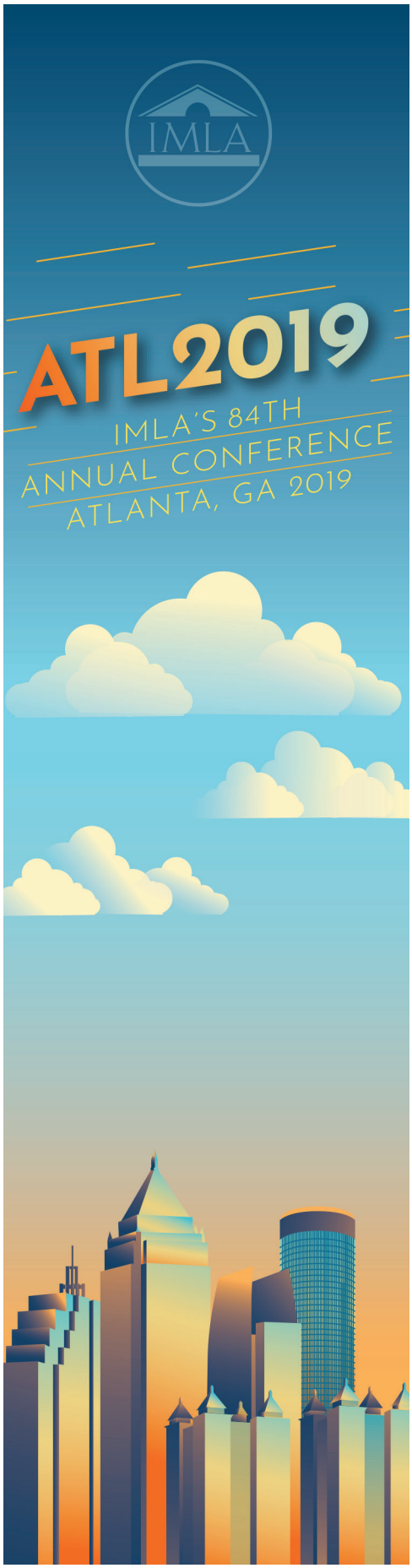

Inside Canada

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A Trio of Zoning Cases and More

Council Has Broad Discretion to Refuse Reduction in Setbacks
1139652 B.C. Ltd. v. Whistler (Resort Municipality), 2018 BCSC 1806 http://canlii.ca/t/hvmvc

The Petitioner sought to build a residential home on an irregularly shaped lot in Whistler, British Columbia (City). The lot was created by the Surveyor General, and as such, did not follow statutory subdivision requirements. The applicable zoning by-law required minimum front and rear setbacks of 7.6 meters, and a minimum side setback of 3 meters. Due to the irregular shape of the lot, the as of right development permissions allowed a building footprint of only 197 square feet. The Petitioner applied to the Board of Variance for a minor variance to reduce the required setbacks pursuant to s. 536 of the *Local Government Act,* S.B.C. 2015, c.1. The application was denied. Subsequently, the Petitioner unsuccessfully applied to Council pursuant to s. 498 of the *Local Government Act,* S.B.C. 2015, c.1. The Petitioner brought an application for judicial review of Council's decision.

HELD: Application dismissed.

DISCUSSION: The Petitioner raised two issues before the Court: first, the issue of procedural fairness and second, a challenge with the substantive decision of the Municipal council. Both arguments were unsuccessful. With respect to the allegations of procedural unfairness, the Petitioner argued that it was entitled to make representations before Council. This argument was rejected by the Court as no oral hearing was mandated by statute; therefore, the Council was not required to grant the Petitioner an opportunity to be heard. With respect to the substantive challenge, the Petitioner's arguments were once again rejected by the Court. Applying the Supreme Court of Canada holdings in *Dunsmuir v. New Brunswick*, 2008 SCC 9 and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, the Court held that the municipality was entitled to broad discretion when determining this particular application. The Petitioner's attempt to parse the record for small errors by the Council did not affect the overall reasonableness of its decision.

Further Search for Records Required under *MFIPPA*
Appeal MA16-446-2 Township of Oro-Medonte http://canlii.ca/t/hw7ll

This is an appeal stemming from a request made to the Township of Oro-Medonte (Township) pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*). *MFIPPA* codifies a legislative regime whereby persons may request access to records held by a municipality (and certain other institutions). *MFIPPA* creates a presumption that records should be disclosed upon request, unless an exemption applies. In this case, the respondent Township received a request from the Appellant to disclose records related to consultations with any Aboriginal group with respect to a specific property. The Township released certain records but refused to release others. The Appellant appealed the refusal to disclose, and further sought an order that the Township did not conduct a thorough search.

HELD: Appeal granted.

DISCUSSION: The Appellant made two contentions before the Adjudicator. First, the Appellant submitted that the Township improperly withheld records that should have been disclosed. Second, the Appellant submitted that the Township failed to conduct an adequate search for records. With respect to the first submission, the Adjudicator determined, after reviewing the impugned records, that they were in fact responsive to the Appellant's request. With respect to the second submission, the Appellant argued that many records that were not disclosed ought to exist, despite the Township's claims to the contrary. In assessing this submission, the Adjudicator considered the broader obligations that the Township has with respect to First

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Op-Ed

BY JOHN J. ZIMMERMANN
Past IMLA President

Something to Think About

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In light of recent events . . . terrorist attacks, school shootings, etc. . . . from time to time our ILGL Listserv has been swamped with questions and comments regarding gun control and regulation as well as pressures on our police and municipalities nationwide. That's not surprising, given all of the national and local news of shootings, including the massacring of people gathered for events, religious or secular. The media is rife with calls by its talking heads, politicians, and others for more legislation, as if the bad guys obey any laws. I write this having been asked in times past to draft home rule ordinances requiring the owners of firearms to register them with the police department. What's to come of all of this legislation?

On March 23, 1775, Patrick Henry said, "I have but one lamp by which my feet are guided, and that is the lamp of experience. I know of no way of judging the future but by the past." Reading that brought to mind George Santayana's now famous quote, "Those who do not learn history are doomed to repeat it." So, to attempt a view of the future, let's take a look back. In my estimate there is no better gun-control experience from which we can learn than by briefly revisiting what happened in Germany in relatively modern times following World War I (1914-1918) and the German Revolution of 1918.

By 1919 Germany's infrastructure along with a devastating loss of human lives had been torn apart by the World War I and the military. In August of 1919, a German republic – the Weimar Republic (1919-1933) – was proclaimed and Friedrich Ebert, leader of the Social Democratic Party was confirmed the first President (serving 1919-1925) of the new German republic, ending the monarchy of Kaiser Wilhelm, II and The Second Reich. On June 29, 1919, Germany and the Allied powers signed the Treaty of Versailles, France. It took effect on January 19, 1920, and was the instrument that officially ended the war.

In 1919, the post-war (and post-revolution) government in Germany enacted gun control laws mandating that "All firearms, as well as all kinds of firearms ammunition, are to be surrendered" immediately. The German military enforced this law throughout Germany. On August 7, 1920, the German government enacted a more stringent rule, the "Law on the Disarmament of the People," which created the office of "Reichskommissar for Disarmament of the Civil Population" and required military weapons to be seized immediately and all citizens with knowledge of anyone hoarding ammunition or owning now outlawed weapons to give the names of those people to the Reichskommissar. On a personal note, one day shortly after the enactment of Law on the Disarmament the author's father, born and raised in Essen, Germany, was sitting with other young people on a five or six foot high masonry wall surrounding an Essen city square. Many of the gun owners in Essen had determined not to surrender their military weapons and were certainly not going to inform on one another. That day, with much fanfare, armed German military marched into town, rounded up all of those men, confiscated their arms and herded them into the square. A teen at the time, my father told me he became very uneasy and nudged his friend and they both slid off the wall, landing behind it. As soon as they hit the ground, the troops began firing their guns, mowing down and killing everyone on the wall and all in the square! [Somehow, a few years later in 1925, my father managed to escape Germany and immigrated to the United States to live with relatives.]

"A free people ought not only be armed and disciplined, but they should have sufficient arms and ammunition to maintain a status of independence from any who might attempt to abuse them, which would include their own government."

George Washington

There's more. The next step for the complete disarmament of the German populace came in 1928. This law required all who possessed a firearm to carry a license, issued at the will of the government, provided an applicant could demonstrate a need for a firearm and could show he was reliable. The law ensured that the police had records of all firearm acquisitions and that the keeping and bearing arms were subject to police approval.

It should be noted here that in 1933, after his release from jail for having conducted his Nazi Party's failed coup of the government ten years earlier, Adolf Hitler re-built the Nazi Party and began to seize power by illegal means, took control of German government, ended the Weimar Republic and became the most powerful and infamous dictator of the 20th century. Hence, the era of 1933 – 1945 became known as "Nazi Germany" or the "German Third Reich."

In 1933, the Reichstag (parliament) enacted "The Enabling Act" permitting Adolf Hitler, the "supreme leader" of the Nazis, to make law without consulting parliament. Within a week of his having been given that power, Hitler issued a law inviting every German man to join German military units, including the infamous SS, and anyone who did not belong to one of these units and nevertheless kept a weapon or hid it would be viewed as an enemy of the national government to "be dealt with the utmost severity." Hitler could easily enforce his law because he knew or could determine the whereabouts of every registered gun, not just who owned them. Hitler said:

"The most foolish mistake one could possibly make would be to allow the subject races to possess arms. History shows that all conquerors who have allowed their subject races to carry arms have prepared their own downfall by so doing."

In sharp contrast to the above, George Washington said:

"A free people ought not only be armed and disciplined, but they should have sufficient arms and ammunition to maintain a status of independence from any who might attempt to abuse them, which would include their own government."

The Second Amendment of our United States Constitution reads:

"A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed."

Today, what about the statutes and home rule ordinances requiring the owners of firearms to register them? Merely requiring registration does not amount to infringement. However, I have often wondered, does every statute and/or ordinance that calls upon owners to register their firearms and/or carry a card really represent progress in controlling unlawful acts and ending gun violence? OR after almost 90 years, are we Americans taking the route of 1928 Germany? There is no question of the role gun registration had in facilitating disarmament of the German citizenry. These regulations resulted in ordinary German people becoming prisoners in their own country, which in turn cleared the way for a fascist regime to assume absolute power and with it a tyrannical government that led to World War II.

Something to think about. ML

John J. Zimmermann's career in Illinois local government law spans five decades. He served as chief legal officer for numerous municipalities in Northern Illinois, including Highland Park for 20 years and the Village of Mettawa for more than 30 years, has been lead counsel in some of the state's most significant economic development projects and annexation efforts, and is nationally recognized as an expert in local government and land use law. John is a past President of IMLA and in 2015 received the Charles S. Rhyne Lifetime Achievement in Municipal Law Award, the highest honor bestowed by IMLA in recognition of excellence in government law practice. He is admitted to all Illinois state courts, the Illinois Northern District and Seventh Circuit and the United States Supreme Court. John was a founding partner in Raysa & Zimmermann, which merged with Tressler LLP in 2012.



Amicus Corner

BY AMANDA KELLAR
IMLA Director of Legal Advocacy and Deputy General Counsel

The First Amendment's competing Establishment Clause and Free Exercise Clause obligations can make local government attorneys feel like they are traversing a mine field. What's more, it's not just local government attorneys who struggle in this area. Establishment Clause jurisprudence, and in particular the "*Lemon* test," referring to *Lemon v. Kurtzman*, 403 U.S. 602 (1971), has been recently described by one Eleventh Circuit Judge as a "hot mess."[1] And Justice Scalia famously offered the following criticism of the *Lemon test*:

> As to the Court's invocation of the *Lemon* test: Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys ….[2]

The Establishment Clause provides, "Congress shall make no law respecting an establishment of religion . . . ." Courts generally analyze claims under the Establishment Clause pursuant to *Lemon*. Under the *Lemon* test, a challenged government action must: (1) have a secular purpose; (2) not have a "principal or primary effect" that advances, inhibits, or endorses religion; and (3) not foster "an excessive entanglement between government and religion."[3] "If a state action violates even one of these three prongs, that state action is unconstitutional."[4]

While *Lemon* has been the subject of a good deal of criticism, in 2005, the Supreme Court decided another Establishment Clause case that further muddied the waters for these claims, particularly regarding passive monuments. In *Van Orden v. Perry,* 545 U.S. 677, 681 (2005), the Court held that the state of Texas had not violated the Establishment Clause by displaying a monument inscribed with the Ten Commandments on its State Capitol grounds. A four-member plurality of the Court indicated "[w]hatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds."[5] "Instead," the Court explained, its "analysis is driven both by the nature of the monument and by our Nation's history."[6]

Because five Justices could not agree on a single opinion, the four-member plurality opinion was not controlling in *Van Orden*. Instead, Justice Breyer's concurrence was the controlling opinion because it was the narrowest decision upholding the majority.[7] He explained that to analyze "borderline cases," courts should exercise "legal judgment" reflecting the underlying purpose of the First Amendment, and also take into account "context and consequences," including the historical meaning of the monument, its physical setting, the circumstances of its placement, and how long the monument has stood unchallenged.[8] Unlike the plurality opinion, which would not have applied *Lemon,* Justice Breyer noted that the *Lemon* test still acts a "useful guidepost[]" for passive monuments.[9]

Where do these decisions leave local governments? As Judge Newsom of the Eleventh Circuit, noted "I don't pretend to know…exactly how the questions surrounding the constitutionality of [passive monuments] should be analyzed or resolved."[10] There may yet be reason for local governments to hope that the Supreme Court may finally put the ghoul that is *Lemon* test to bed and provide much needed clarity to local government attorneys in the area of passive monuments.

Maryland-National Capital Park & Planning Commission v. American Humanist Association

IMLA filed an amicus brief in a recent Supreme Court petition-stage case, *Maryland-National Capital Park & Planning Commission v. American Humanist Association,* urging the Court to grant certiorari based on the confusion in this area of the law. The Court granted certiorari and will hear oral arguments in the case later this term and issue a decision in by the end of June 2019.

American Humanist Association

involves an Establishment Clause challenge to a large Latin cross located on public land and has been maintained by the Maryland-National Capital Park and Planning Commission (Commission) for many decades. Specifically, in 1925, the American Legion and a group of bereaved mothers erected a memorial to honor residents of Prince George's County, Maryland, who fought and perished in World War I. To evoke the grave markers on the battlefields in Europe, the memorial bears the shape of a cross. It includes a large plaque listing the names of the 49 county residents who died in World War I and the words "valor," "endurance," "courage," and "devotion" are inscribed on the sides of the memorial. The memorial is situated in Veterans Memorial Park, which also contains monuments to the War of 1812, World War II, the attack on Pearl Harbor, the Korean and Vietnam wars, and the events of September 11, 2001. Standing at 40 feet, the cross is by far the largest memorial in the park.

The community has never used the memorial for a religious ceremony, and the only mention of a religious event in connection with the memorial occurred 87 years ago. However, some invocations have been offered by private citizens during war memorial events, which have been predominantly Christian.

In 1961, the Commission acquired the memorial and the roadway median on which it sits due to traffic safety concerns arising from the placement of the cross in the middle of a busy intersection. The Commission has since expended $117,000 in costs to maintain and repair the memorial.

The cross stood unchallenged until 2014, when the American Humanist Association and three individuals filed suit against the Commission, claiming that because the memorial bears the shape of a cross, it constitutes an unconstitutional endorsement of Christianity and therefore violates the Establishment Clause.

The district court granted summary judgment to the defendants, explaining that it is "uncontroverted" that the maintenance and display of the memorial is not "driven by a religious purpose whatsoever," and that the memorial's long history and context would lead any reasonable observer to conclude that the monument does not "hav[e] the effect of impermissibly endorsing religion," but instead serves exclusively as a war memorial[11]A divided panel of the Fourth Circuit reversed, finding that although the Commission had a legitimate secular purpose in terms of safety concerns, it violated the second and third prongs under *Lemon* because the primary / principal effect of the cross was endorsing Christianity and because it represented excessive entanglement between the government and religion.[12] The Fourth Circuit concluded that a "reasonable observer would fairly understand the Cross to have the primary effect of endorsing religion" given that its "sectarian elements easily overwhelm the secular ones," and in particular, given the immense size of the cross in comparison to the other nearby displays[13]

Although the Establishment Clause is violated under *Lemon* if even one of the prongs is violated, the court went on to conclude that the third prong was also violated based on both the fact that the Commission spent $117,000 to maintain the cross as well as the fact that the cross was so large that the display "aggrandizes [it] in a manner that says to any reasonable observer that the Commission either places Christianity above other faiths, views being American and Christian as one in the same, or both."[14]

Judge Gregory dissented and noted that "the majority's decision would lead to per se findings that all large crosses are unconstitutional despite any amount of secular history and context, in contravention of Establishment Clause jurisprudence."[15] Local governments across the country maintain and own public memorials, like the one at issue here, that employ religious imagery to convey a historical or secular message. As judge Niemeyer pointed out in his dissent from denial from rehearing en banc, the Fourth Circuit's decision "needlessly puts at risk hundreds of monuments with similar symbols standing on public grounds around the country, such as those in nearby Arlington National Cemetery…"[16]

By granting certiorari, the Supreme Court may have five Justices prepared to overrule *Lemon*, or at the very least, conclude that *Lemon* is not the appropriate test for passive monuments, as four Justices believed in *Van Orden*. We will know the answer to that question, as well as the fate of the monument in this case, by the end of June 2019.

Morris County Board of Chosen Freeholders v. Freedom from Religion Foundation

Morris County Board of Chosen Freeholders v. Freedom from Religion Foundation is another First Amendment case in which IMLA participated as an amicus recently, urging the Supreme Court to grant certiorari to help provide clarity to local governments. *Morris County* concerns the County's neutral historic preservation grant program, which did not exclude churches from potential grants for historic preservation. The issue in the case is whether excluding churches from the County grant program that uses the public money for historic preservation purposes in addition to improving active worship space violates the Free Exercise Clause of the U.S. Constitution.

In 2002, the voters of Morris County authorized the County Freeholder Board to permit historic preservation funding under a trust funded by a county property tax. Four kinds of entities could apply for grants: municipal governments within Morris County; Morris County government; charitable conservancies whose purpose includes historic preservation; and religious institutions. At the time of the grants in question, the trust considered applications to stabilize, repair,

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rehabilitate, renovate, restore, improve, protect, or preserve historic properties. All grantees were required to meet the same conditions for the grant and the type of grantee applying for the grant was not considered in the criteria for awarding grants.

From 2012 to 2015, the Freeholder Board approved a total of over $11 million in grants for historic preservation, of which $4.6 million, or 42%, was awarded to twelve churches. All twelve churches "have active congregations" and all "have conducted regular worship services in one or more of the structures" for which grant funds have been or will be used.

Some of the grant applications that the churches submitted, indicated that funds were needed to allow the church to offer religious services. However, whenever such a statement was made in the application, the applicant also indicated that the funds were needed to allow the community and others outside the organization to use it as well. At least one of the churches also used the grant funds to replace a broken stained-glass window, which had religious imagery on it.

The Freedom from Religion Foundation (FFRF) and a member of the group who is a Morris County resident and taxpayer, filed a complaint in New Jersey state court, asserting that the grants violated the Religious Aid Clause of the New Jersey Constitution.[17] The defendants argued that if the Religious Aid Clause was violated, the Clause conflicts with the Free Exercise Clause of the U.S. Constitution.

By way of background, the Supreme Court recently held in *Trinity Lutheran Church of Columbia Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017), that the Missouri Department of Natural Resources' express policy of denying grants for its playground resurfacing program to any applicant owned or controlled by a religious entity violated the rights of Trinity Lutheran Church under the Free Exercise Clause by denying an otherwise available public benefit on account of religious status. *Trinity Lutheran* distinguished its holding from a prior Supreme Court holding, *Locke v. Davey,* 540 U.S. 712 (2004). *Locke* involved the State of Washington's scholarship program, which allowed high achieving students to use scholarships for both religious and non-religious schools, but they could not use the funds to pursue a devotional theology degree.[18] In *Locke,* the Court concluded the Washington program did not violate the Free Exercise Clause because the student was denied a scholarship because of what he proposed to do with it – i.e., study theology, and states have a "historic and substantial interest" in excluding religious activity from public funding.[19]

Threading the needle between *Locke* and *Trinity Lutheran* may prove challenging for local governments. To further complicate matters, only four of the six Justices from the majority opinion in *Trinity Lutheran* joined footnote 3, which indicated that the decision was limited to "express discrimination based on religious identity with respect to playground resurfacing" and that those four Justices were not addressing "religious uses" of government funding.[20] Thus, it is not entirely clear how broad *Trinity Lutheran's* holding is.

Back to *Morris County,* the New Jersey Supreme Court concluded the County violated the state constitution's Religious Aid Clause, which prohibits using public money to build or repair churches.[21] The court then analyzed whether the Religious Aid Clause is at odds with the U.S. Constitution, ultimately concluding that the clause does not violate the U.S. Constitution's Free Exercise Clause.[22] After analyzing *Trinity Lutheran* and *Locke,* the New Jersey Supreme Court determined that this case was more akin to *Locke,* noting that the churches are not being denied public funds because they are religious institutions, but rather, because they plan to, use public funds to repair church buildings so that religious worship services can be held there.[23]

A split of authority has developed after *Trinity Lutheran,* with the highest courts in New Jersey and Massachusetts on one side, and the Sixth Circuit and the Supreme Court of Vermont on the other[24] *American Atheists, Inc. v. Detroit Downtown Development Authority,* involved Detroit's facially neutral grant program to revitalize the downtown area. The Sixth Circuit concluded that, "[b]y endorsing all qualifying applicants, the program has endorsed none of them, and accordingly it has not run afoul of the Establishment Clause."[25]. Similarly, the Supreme Court of Vermont concluded that plaintiffs were unlikely to demonstrate that providing grant funds to repair and paint the exterior of a church was distinguishable from funding playground resurfacing as in *Trinity Lutheran*. The Court in *Taylor* warned that, "[i]n fact, denying the [church] secular benefits available to other like organizations might raise concerns under the Free Exercise Clause of the United States Constitution."[26] *Id*. at 323.

This split in authority underscores the challenges local governments face in this area of the law. In *Trinity Lutheran,* churches were categorically excluded from the public grant program. In *Morris County*, churches were allowed to apply for a neutral grant program, along with other charitable organizations. Yet, in both cases, the government was sued and found liable for a violation of the First Amendment.

Conclusion

Both *American Humanist Association* and *Morris County* highlight the difficulty local government attorneys face in interpreting the Supreme Court's Establishment Clause and Free Exercise jurisprudence. IMLA does not endorse religion or promote government entanglement with religion, but we believe the current state of the law is too nebulous for local government attorneys and ultimately results in increased liability for local governments. After all, if judges around the country cannot decipher the Supreme Court's Establishment Clause and Free Exercise jurisprudence, local government attorneys will continue to struggle to advise their clients. Our hope is that these cases present the Supreme Court with an opportunity to provide local governments with clear guidelines in this area of the law.

Endnotes

1. *See Kondrat'Yev v. City of Pensacola*, 903 F.3d 1169, 1179 (11th Cir. 2018) (Newsom, J. concurring).
2. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993).
3. *Lemon*, 403 U.S. at 612-13.
4. *Am. Humanist Ass'n v. Md.-National Capital Park & Planning Comm'n*, 874 F.3d 195, 204 (4th Cir. 2017).
5. *Van Orden,* 545 U.S. at 686.
6. *Id.*
7. *See Marks v. United States*, 430 U.S. 188, 193 (1977).
8. *Id.* at 702-03.
9. *Id.* at 700.
10. *See Kondrat'Yev*, 903 F.3d at 1182 (Newsom, J. concurring) .
11. *Am. Humanist Ass'n v. Md.-National Capital Park & Planning Comm'n,* 147 F. Supp. 3d 373, 387 (D. Md. 2015).
12. *See Am. Humanist Ass'n v. Md.-National Capital Park & Planning Comm'n,* 874 F.3d 195, 210-12 (4th Cir. 2017).
13. *Id.* at 211-12.
14. *Id.*
15. *Id.* at 219 (Gregory, J. dissenting).
16. *Am. Humanist Ass'n v. Md.-National Capital Park & Planning Comm'n,* 891 F.3d 117, 123 (4th Cir. 2018) (Niemeyer, J., dissenting).
17. The Religious Aid Clause of the New Jersey Constitution provides that "[n] o person shall…be obligated to pay … taxes … for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry." N.J. Const. art. I, ¶ 3.
18. *Locke,* 540 U.S. at 715.
19. *Id.* at 725.
20. *Trinity Lutheran,* 137 S. Ct. at 2024 n.3.
21. 181 A.3d 992, 1012 (N.J., 2018).
22. *Id.* at 1006.
23. *Id.* at 1012.
24. *Compare Morris County, Id.* at 1012 and *Caplan v. Town of Acton,* 479 Mass. 69, 103-04 (Mass. 2018) (Kafker, J. concurring) *with Am. Atheists, Inc. v. Detroit Downtown Dev. Auth.,* 567 F.3d 278, 282 (6th Cir. 2009) and *Taylor v. Town of Cabot,* 178 A.3d 313, 323-25 (Vt. 2017).
25. *Am. Atheists*, 567 F.3d at 282.
26. *Taylor,* 178 A.3d at 323. ML

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Nations communities. In particular, the common law 'duty to consult' imposes obligations on the Crown and its delegates, including municipalities. In order to discharge the duty to consult, the Township may be required to follow a consultation process that is consistent with provincial and federal guidelines. Without making a determination as to whether the Township did or did not follow provincial and federal guidelines, the Adjudicator held that the mere existence of these guidelines wase suggestive that certain documents were likely produced in the course of an ostensibly mandatory consultation. Since these documents were not disclosed, the Adjudicator determined that the Township had not conducted a sufficient search for records.

Marijuana Growing Operation Must Relocate

Tay (Township) v. Fan, 2018 ONSC 6375 http://canlii.ca/t/hvp1p

The Township of Tay (Township) brought a motion for interlocutory relief, seeking to enjoin the Respondent from continuing to grow marijuana in a residential structure within the Township. The marijuana cultivation was not illegal *per se* as the Respondent was growing medical marijuana for himself and three other individuals, ostensibly in compliance with the legal regime for medical marijuana cultivation and production. The marijuana growing operation was extensive, involving approximately 800 individual plants. The property was zoned residential and large-scale marijuana production was not explicitly permitted under the zoning by-law. To the contrary, medical marijuana production facilities were permitted in general industrial zones as "processing plants." Despite repeated attempts by the Township to force the Respondent to comply, the Respondent refused. The issue before the Court was zoning.

HELD: Interlocutory injunction granted.

DISCUSSION: It is well settled that the test to be applied on an interlocutory injunction is the three-part test from the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)* [1995] 3 SCR 199. However, the *RJR Macdonald* test is modified slightly in the context of a municipality seeking to enforce its by-laws. First, the Township was required to demonstrate that it had a strong *prima facie* case that Respondent's conduct breached the zoning by-law. The Court ruled that this branch of the test was satisfied on the facts. Although it is not entirely clear at what point a grow operation reaches the threshold of "production facility," the Court easily determined that the scale of the operation in this case satisfied that threshold. Second, the Township was required to demonstrate irreparable harm. This test was met because the Township was attempting to enforce its zoning by-law in furtherance of the public good. Finally, in considering the balance of convenience the Court weighed the Respondent's right to access medical marijuana with the prejudice suffered by the Township by virtue of its zoning by-law being flouted. To assuage the concerns of the Respondent, however, the Court did delay the injunctions effect for several months to grant the Respondent time to locate an alternative growing facility.

Specific Municipal Purpose Not Required to Support Expropriation

58663 Newfoundland and Labrador Ltd. v. Kippens (Town), 2018 NLSC 223 http://canlii.ca/t/hvzw4

The Applicant brought an application for judicial review of an expropriation affecting the Applicant's lands (Property). The Applicant was a land owner in the Town of Kippens (Town) who had previously applied for, and was denied, permission to develop a residential subdivision on the Property. For a period of time, the Property was used as a turning circle for municipal vehicles. After the Applicant erected a steel barrier preventing such use, the Town commenced the expropriation process in order to construct a temporary turning circle on the Property. The expropriation was approved by the Minister of Municipal

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Affairs and Environment (Minister). The Applicant sought an order quashing the Minister's approval, as well as a declaration that the expropriation was illegal, in bad faith and *ultra vires* the *Urban and Rural Planning Act, 2000*, S.N.L. 2000 c. U-8.

Held: Application dismissed.

Discussion: The Applicant raised multiple issues before the Court, taking what could be described as a scattershot approach. The Applicant argued that a statute enabling expropriation ought to be interpreted restrictively, and in favour of the party subject to the land taking. The Court rejected this position, and instead held that a broad and purposive interpretation of the statute is the correct approach. The Applicant further argued unsuccessfully that the Minister's decision was invalid because the expropriating authority did not clearly identify a proper municipal purpose that was accomplished by the expropriation. The Court appeared to adopt a position that the Town was not required to identify a municipal purpose that would support an expropriation. In any case, the Court found that expropriation for the purpose of providing municipal services, as was stated by the Town, was sufficient. The Applicant further argued unsuccessfully that the proposed turning circle constituted either a subdivision or a development pursuant and that the subdivision or development was contrary to governing law and policy. Finally, the Applicant's argument of bad faith was rejected as it was unsupported by any evidence.

Zoning By-law Must Be Read Harmoniously with Official Plan

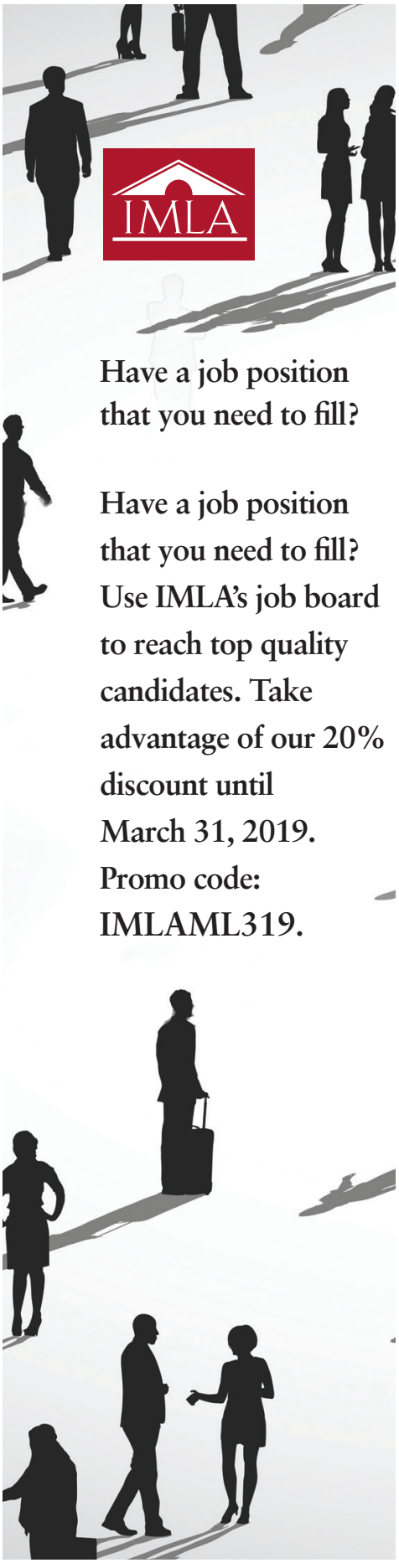
Southside Construction v. Ingersoll (Town of), 2018 ONSC 6561 http://canlii.ca/t/hvvnp

The Applicant, a property owns in the Town of Ingersoll (Town) sought a declaration interpreting the zoning by-law applicable to its lands. The Applicant's lands are zoned Highway Commercial (HC)-9, a site-specific designation. A dispute arose between the parties with respect to the interpretation of a specific provision of the applicable zoning by-law which falls under the heading "community shopping center." The term "community shopping center" is not defined in the zoning by-law. The impugned provision provides a limit on the gross leasable commercial floor area of 50,000 sq. feet for a commercial shopping center within the HC-9 zone. Absent a definition of commercial shopping center, the Applicant sought a declaration that accords with its interpretation of the zoning by-law, an interpretation favourable to a contemplated development.

HELD: Application was denied.

DISCUSSION: The Township's submitted interpretation of the applicable zoning by-law is that any project that exceeds the prescribed 50,000 sq. foot limit cannot be built without a zoning by-law amendment and an Official Plan amendment. By the Applicant's interpretation, a defined term found elsewhere in the zoning by-law, "shopping center," which is defined as a building of *six or more* separated spaces, should inform the interpretation of the undefined term "community shopping center". The Court noted that the two interpretations were irreconcilable. In its analysis, the Court first noted that courts will be hesitant to grant a declaration which will resolve a hypothetical issue that may arise at some point in the future. In this case, however, the Court determined that the matter should proceed because the issue raised was not hypothetical, speculative, or merely academic.

The issue before the Court was to resolve a matter that of practical importance to both the parties. In resolving the question of by-law interpretation, the Court stressed the importance of reading a by-law harmoniously with the Official Plan. After canvassing the history of the site-specific zoning by-law applicable to the Applicant's site, as well as the policy behind the Town's Official Plan, the Court was satisfied that the definition of "shopping center" could not be ported into the impugned provision. Accordingly, the declaration sought by the Applicant was not granted. ML



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19. § 2000cc-2(a).
20. *See* Sossamon v. Texas, 131 S. Ct. 1651, 1655, 1658–59 (2011) (holding that RLUIPA does not unambiguously abrogate the sovereign immunity of the states from damages claims).
21. *See, e.g.*, Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163, 1168–69 (9th Cir. 2011) (holding that municipalities and counties may be liable for money damages under RLUIPA; *see also Lighthouse Inst.*, *supra* note 18, 510 F.3d at 260–61; Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280–81 (1977) (recognizing that political subdivisions of states do not enjoy Eleventh Amendment immunity)
22. § 2000cc-2(b).
23. *See Centro Familiar*, *supra* note 21, 651 F.3d at 1171-1172.
24. 651 F.3d 1163, 1168 (9th Cir. 2011).
25. 643 F.3d 419 (5th Cir. 2011), cited by the court in Opulent Life Church v. City of Holly Springs, 697 F.3d 279 (5th Cir. 2012).
26. Elijah Group, Inc. v. City of Leon Valley, 643 F.3d 419 at 422 (5th Cir. 2011).
27. Opulent Life Church v. City of Holly Springs, 697 F.3d 279, 291 (5th Cir, 2012), *(citing Centro Familiar*, *supra* note 21, 651 F.3d at 1169, n. 25).
28. *Id.*
29. Khatib v. County of Orange, 639 F.3d 898 (9th Cir. 2011).
30. *Id.*
31. *Id.*
32. 697 F.3d 279 (5th Cir. 2012).
33. 697 F.3d 279 at 281.
34. 697 F.3d 279 at 295.
35. 697 F.3d 279 at 296.
36. 360 F.3d 1024 (9th Cir. 2004).
37. 360 F.3d 1024 at 1035.
38. *Id.*
39. *Id.*
40. 360 F.3d 1024 at 1034.
41. *See* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144 n.9 (1987) ("In applying the Free Exercise Clause, courts may not inquire into the truth, validity, or reasonableness of a claimant's religious beliefs."); Merced v. Kasson, 577 F.3d 578, 590 (5th Cir. 2009) ("The judiciary is ill-suited to opine on theological matters, and should avoid doing so." (*citing Smith*, 494 U.S. at 887)).
42. 508 U.S. 520 (1993).
43. 381 F. 3d 202 (3d Cir. 2004),
44. *Blackhawk*, 381 F.3d. at 211
45. *Id.*
46. No. 4:17-cv-05126-YGR (2017).
47. *Citing to Employment Division v. Smith* (494 U.S. 885 (1990) and *San Jose Christian College*.
48. 768 F.3d 183 (2d Cir, 2014).
49. 429 U.S. 252 (1977).
50. 14-cv-3272 (D. Minn. 2014).
51. 14 So. 3d 1027 (Fla. Ct. App. 2009).
52. *Citing to* Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 762-63 (7th Cir.2003).
53. 504 F.3d 338 (2d Cir. 2007)
54. Alger Bible Baptist Church v. Township of Moffatt, 2014 WL 462354, at *6 (E.D. Mich. 2014).
55. City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 744 (1995).
56. *Lukumi Babalu Aye*, *supra* note 2, 508 U.S. 520 at 546.
57. Wisconsin v. Yoder, 406 U.S. 205 (1972).
58. Eagle Cove Camp & Conference Ctr., Inc. v. Town of Woodboro, 734 F.3d 673 (7th Cir. 2013).
59. Murphy v. Zoning Comm'n of New Milford, 289 F. Supp. 2d 87, 108 (D. Conn. 2003), vacated, 402 F.3d 342 (2d Cir. 2005).
60. Harbor Missionary Church Corp. v. City of San Buenaventura, 642 F. App'x 726 (9th Cir. 2016).
61. 342 F.3d 752, 762-63 (7th Cir. 2003).
62. DOJ September 22, 2010 Statement. ML

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23. United States v. Jones, 565 U.S. 400 (2012).
24. United States v. Kim, 415 F.Supp. 1252 (D. Haw. 1976).
25. Kyllo v. United States 533 U.S. 27 (2001) (Thermal sensing device to detect "grow house" is a search—illegal without warrant).
26. *Id.* The problem with this approach is discussed in *Jardines*, above.
27. Stefan Ducich, *These Walls Can Talk! Securing Digital Privacy in the Smart Home Under the Fourth Amendment*, 16 Duke L. & Tech. Rev. 278 (2018).
28. Drones are now regulated to some extent by the Federal Aviation Administration. 14 CFR, Title 17 Part 107. Unfortunately, there is nothing permitting or prohibiting drone searches or protecting curtilage privacy. Some states have prohibited police and code enforcement from using drones for close-up searches due to expectations of privacy.
29. Extended selfie sticks can be purchased cheaply on the open market so the *Kyllo* sophisticated- device-not-readily-available-to-the-public analysis would not provide assistance. They are much like a ladder over a back yard fence.
30. California v. Ciraolo, 476 U.S. 207 (1986). Marijuana viewable from lawful 1000 feet.
31. Order Granting Defendant's Motion to Suppress, United States v. Vargas, No. CR-13-6025-EFS, at 19 (E.D. Wa. Dec. 15, 2014). *See also*, State v. Davis, 360 P.3d 1161, 1172 (N.M. 2015) (holding that "prolonged hovering [by a helicopter] close enough to the ground to cause interference with [the defendant's] property" was an unconstitutional violation of the subject's expectation of privacy). These are discussed in a thought-provoking article: Rachel Levinson-Waldman, *Hiding in Plain Sight: A Fourth Amendment Framework for Analyzing Government Surveillance in Public*, 66 Emory L.J. 527, 554 (2017) at fn. 99 & 100.
32. Fla. Stat. § 933.21 (2018).
33. Atwater v. Lago Vista, 532 U.S. 318 (2001).
34. Fla. Stat. § 933.30 (2018). ML

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