

# ORDINANCES

## Smoking (Weed), Fast Food Restaurants, and Outdoor Feeding Ordinances

*by Sophia M. Stadnyk, Senior Associate Counsel*

There have been several emerging new issues in ordinances. Here's a look at some recent decisions on these topical matters.

### Outdoor Smoking Ban

The plaintiff in *Gallagher v. City of Clayton*, No. 4:11-CV-392 CAS, 2011 U.S. Dist. LEXIS 141828 (E.D. Mo. Dec. 09, 2011) challenged a Clayton, Missouri ordinance that banned outdoor smoking on all City "grounds, parks, playgrounds ... playing fields, parking lots and parking structures." Gallagher, a resident, claimed that he "'ecstatically enjoy[ed] smoking tobacco products' while in the City's parks," and that the ban denied smokers' substantive due process rights because the health threat of secondhand smoke from outdoor tobacco use was *de minimis*; therefore, the ban failed rational basis review. He also argued the law was arbitrary and capricious because it delegated, to the city manager, the authority to ban outdoor smoking at festivals and events, but failed to provide standards for a determination in such decisions. The court, however, while crediting the plaintiff "for his enthusiastic, novel and, at times, entertaining argument in favor of his smoking rights," found he failed to state a plausible claim for relief, and ruled the defendants were entitled to judgment as a matter of law. The plaintiff could not "plausibly meet his burden of establishing there [was] no rational or conceivable basis to support the smoking ban. The preamble to the Ordinance sufficiently identifie[d] facially legitimate governmental goals and show[ed] the City considered health studies before passing the Ordinance." Even assuming the public health rationale was unpersuasive, the City's interests in the reduction of litter and park aesthetics were legitimate government interests. As for the scope of discretion, the city manager could either ban smoking on the City's streets and sidewalks during fairs and festivals, or not: either way, compliance with the ordinance was "not left to the moment-to-moment judgment of policemen, prosecutors, or juries."

### Medical Marijuana Dispensaries

California's Compassionate Use Act of 1996 (CUA), as implemented by the "Medical Marijuana Program" (MMP), was intended to ensure that seriously ill Californians had the right to obtain and use marijuana for medical purposes. The CUA provided a limited defense from prosecution for cultivation and possession of marijuana, but did not create a statutory or constitutional right to obtain marijuana. The plaintiffs ("Inland Empire" and others) operated medical marijuana dispensaries (MMDs) in the City of Riverside. However, because the zoning code prohibited MMDs, the City brought proceedings for injunctive relief to abate the MMDs as a public nuisance. (Under the zoning code, any violation of Riverside's municipal code was deemed a public nuisance.) The trial court granted the motion, rejecting the argument that the local land use restriction was preempted by state law. On appeal, the Court of Appeal of California affirmed, in *City of Riverside v. Inland Empire Patient's Health & Wellness Center*, Inc., 200 Cal. App. 4th 885 (Cal. Ct. App. Nov. 09, 2011).

"We reject the proposition that local governments, such as Riverside, are preempted by the CUA and MMP from enacting zoning ordinances banning MMDs. Riverside's zoning ordinance does not duplicate, contradict, or occupy the field of state law legalizing medical marijuana and MMDs." The zoning code did not "mimic" or duplicate state law and could be reconciled with the CUA and MMP, and neither of the latter "spoke" to local zoning laws. Although section 11362.775 of the MMP exempted an operator of a MMD from liability for nuisance, Inland Empire was being prosecuted for a zoning violation and not "solely on the basis" that it used its premises for operating a MMD.

### "Street Feeding" Events

The City of Dallas's Food Establishments Ordinance regulated food establishments, including organizations that fed the homeless. The purpose of the ordinance was "to safeguard public health and provide to consumers food that is safe, unadulterated, and honestly presented." The law had a so-called "Homeless Feeder Defense" that allowed a "church, civic, or other charitable organization" to distribute food to the homeless outside the regulatory structure of the ordinance, provided the organization met certain food-safety criteria (e.g., location approval by the agency, portable toilets, equipment for waste and wastewater, hand-washing facilities for servers, the written consent of the property owner, on-site staff who had attended a City-sponsored food-safety training class, and temperature-controlled food storage). Big Hart Ministries and other religious organizations, which believed their faith required them to go out into the streets to feed and minister to the homeless, challenged these requirements under the Texas Religious Freedom Restoration Act (TRFRA), claiming that the ordinance hampered their ministries, and that local law enforcement had threatened them with tickets, fines, or arrests for their feeding activities. The City, in turn, contended that, regardless of the plaintiffs' beliefs, the plaintiffs had not demonstrated that their religious beliefs compelled them to share food with the homeless in a manner that violated the ordinance, and moved for summary judgment. The court denied the motion.

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## Inside Canada

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I have also been advised by municipal operations managers that, in cold windy conditions, it is not advisable to salt a roadway when some snow accumulation will occur due to blowing snow or drifting, since this will actually *create* an icy condition. In such circumstances, based on *Giuliani*, the municipality will have to present evidence that preventative measures were not appropriate and that it did not fail in its duty under s. 44(1), *Municipal Act, 2001*. Unfortunately, the MMS were intended to prevent this very fact-driven type of litigation, and the Court of Appeal has, in effect, encouraged this kind of litigation again given the narrowness of its ruling on the applicability of the MMS.

Does a municipality owe a higher duty of care when it adopts a higher level of service (LOS) than what is prescribed by the MMS? The simple answer is maybe. Strictly speaking, adopting a higher LOS than prescribed does not negate the defences available under s. 44(3) of the *Municipal Act, 2001* and the MMS. However, it is now clear that the alleged default must fall squarely within the saving provision of the MMS. If the municipality adopts a certain maintenance policy and then negligently carries it out, it may be held liable: if the LOS requires the application of a certain mixture to prevent icing, and the road crew uses an improper mixture that *causes* the accident, there may be liability. Thus, the wording of the policy is crucial in determining whether there is a negligent breach. If the municipality adopts standards that exceed the MMS, it would be wise to use words such as "it is the objective of the municipality to attempt to achieve the following LOS," and "due to practical considerations, such levels of service may not be achievable in all circumstances." (The LOS should, at a minimum, meet the requirements of the MMS.)

In view of *Giuliani*, municipalities also are well advised to create LOS with respect to those matters that are now identified as not being covered by the MMS, such as preventative measures to prevent icing. It may be that, due to budgetary and manpower constraints, a policy that only addresses potential icing *after* the commencement of a snowstorm would be considered reasonable in the circumstances. The main lesson from *Giuliani* is that the defendant municipality did nothing to address the icing until the icy condition actually existed.

Many municipalities adopt LOS policies because they contract out certain services, like winter maintenance. In most cases, if the LOS are not maintained by the contractor and liability results, the liability passes to the contractor by means of insurance and indemnification clauses. One issue that has arisen is whether the LOS dictated by contract, to a third-party contractor, creates a higher duty of care to users of the roadway. In *Giuliani*, the Regional Municipality of Halton had contracted out winter maintenance to the Town of Milton for all roads under Regional jurisdiction; Milton was the Region's contractor and was required to indemnify the Region for any liability resulting from the negligent winter patrolling and maintenance of the road in question. In the trial decision, Justice Murray stated:

> The law does not impose a higher standard of care on the contractor, ...the Town of Milton, than on the Regional Municipality. Even if the provisions of the [LOS] agreement...imposed higher standards for road maintenance than do the relevant provisions of the *Municipal Act*, the Town will not be liable to users of the highway by virtue of breach of contract with the Regional Municipality.[2]

### Conclusion

Municipalities should now be on guard against simply relying on the MMS for winter patrolling and maintenance, as the courts have sent a strong message that they will find liability when the municipality, given reasonable diligence, could have prevented the unsafe condition, even if it did comply with the MMS, when the cause of the accident is based on a default not covered by the MMS. The courts have also given a narrow interpretation to the application of the MMS in determining what constitutes a default. Municipalities should be seeking amendments to the underlying legislation, as well as the MMS regulations, to ensure that the prescribed LOS in the MMS are all-encompassing and do not create hybrid situations which eviscerate the very reason underlying the enactment of the MMS.

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### Notes

1. The reference to deploying forces to treat icy roadways "as soon as practicable after becoming aware that the roadway is icy" was repealed by Ont.Reg.23/2010. The former section was still in effect for *Giuliani*, but the Court of Appeal noted the amendment made no difference to the result.
2. 2010 ONSC 4630 at para. 174. **ML**

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Under TRFRA, the court applied a four-part test of (1) whether the government's regulation burdened the plaintiffs' free exercise of religion; (2) whether the burden was substantial; (3) whether the regulations furthered a compelling governmental interest; and (4) whether the regulations were the least restrictive means of furthering that interest. The court found sufficient evidence existed from which a jury could conclude the ordinance substantially burdened the plaintiffs' free exercise of religion, as it hampered their ability to spontaneously share food with homeless people, and to actively seek them out in hard to reach, unpredictable, and ever-changing locations. The case is *Big Hart Ministries Ass'n v. City of Dallas*, No. 3:07-CV-0216-P, 2011 U.S. Dist. LEXIS 128443 (N.D. Tex. Nov. 04, 2011).

### Fast Food Outlets Ban

The Village Code of the Village of Victor prohibited what it defined as "Formula Fast-Food Restaurants" (FFFRs) in the Central Business District, on the basis that the ban helped to maintain the unique village character and vitality of the commercial district. FFFRs were defined as facilities with: standardized menus, ingredients, food preparation and/or uniforms; prepared food in a "ready to consume" state; food that was selected from a limited menu, sold for immediate consumption on or off premises, and sold over the counter in disposable

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