the complaint, finding that the developers' takings claim was not ripe, and that the other constitutional claims rested on the same factual foundation and, therefore, were also unripe. The developers appealed.

The U.S. Court of Appeals for the Tenth Circuit affirmed, finding that the takings claim was not ripe, and that the interference with property rights did not constitute a physical per se taking where the regulatory action was a restriction on how developers could use their land should they choose to subdivide it, or payment of a fee in lieu. Applying the ripeness test in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985), the court noted that it was uncontested that the developers had not sought compensation by bringing an inverse condemnation action under state law, and rejected the argument that *Williamson County* did not apply to facial challenges where injunctive relief was sought. The claim the developers brought was not a facial claim challenging the validity of the regulation itself (the complaint was not that the ordinance did not substantially advance a legitimate state interest, but that it failed to provide just compensation). Waiver of *Williamson County* requirements was appropriate in the first instance because no amount of compensation would alter the outcome of a claim that the regulatory action exceeded the scope of government authority. Courts considering claims alleging a regulatory taking without just compensation, even when characterized as facial claims, had applied the second *Williamson County* requirement, and the claim here was unripe because the developers did not utilize the available state procedure to seek compensation for the alleged taking, as required. Addressing the second line of argument advanced by the developers, the court held that neither *Nollan* nor *Dolan* featured a discussion of the ripeness analysis in *Williamson County* and, thus, could not "be the source to create a new breed of facial challenges that [could] be brought in federal court without regard to the *Nollan* requirements." *Alto Eldorado Partnership v. County of Santa Fe*, 634 F.3d 1170 (10th Cir. 2011).

Personnel and Employment

Calculation of FLSA Offsets

The plaintiffs were employees of the City of Lowell, Massachusetts, and members of a union. The collective bargaining agreement (CBA) established the terms and conditions of employment and provided for three pay augmentations: employees could receive a $3.00/hour augmentation to their pay for plowing snow, a 5% differential for working undesirable night shifts, and a $150 weekly "standby" payment for employees at a water distribution system. The CBA also allowed employees to earn overtime pay of one-and-one-half times their regular pay if they worked in excess of eight hours in one day, or 40 hours in one week. The crux of this dispute was whether the three pay augmentations had to be included in the employees' regular rate of pay for the purpose of calculating overtime wages and, if so, how the City was permitted to "net out" those augmentations against other "premiums" paid to employees beyond the requirements of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 207 *et seq*.

The plaintiffs claimed that the City was under-calculating the "regular rate" of pay used to determine overtime wages. More specifically, section 207(h)(2) of the FLSA provided that: "[e]xtra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) of this section shall be creditable toward overtime compensation payable pursuant to this section." The parties did not dispute that the extra compensation provided for in the CBA fell within the compensation described in subsection (5), (6) and (7), and could be used to offset the City's underpayment, pursuant to § 207(h)(2). What was in dispute was whether premium compensation earned in one week could be used to offset an underpayment in a different week. The plaintiffs argued that their damages for unpaid overtime should be calculated on a work-week basis, and that any offsets pursuant to § 207(h)(2) could only be attributed to the singular work-weeks in which the premiums and overtime were earned. Accordingly, an underpayment one week could not be offset by a premium payment made in a different week. The City, however, argued that it was entitled to a "cumulative offset," consisting of all premium payments, against any FLSA overtime it owed, regardless of when the premium payments were earned or made. The FLSA did not expressly address this, and the circuit courts of appeal were divided on the issue.

The district court held that, based on the purpose of the FLSA and its interpretation by the Department of Labor (DOL), and the First Circuit's language in *O'Brien v. Town of Agawam*, 350 F.3d 279, 289 (1st Cir. 2003), § 207(h)(2) offsets should be calculated on a work-week, and not cumulative, basis. The FLSA overtime requirement used a single work-week as its basic unit of measurement (29 U.S.C. § 207(a)(1)), and the "focus on the unitary workweek [was] prevalent throughout § 207 and the DOL's interpretation of that section." Similarly, 29 C.F.R. § 778.104 provided that "[t]he Act takes a single workweek as its standard" and that cumulative offsets were not contemplated. "[P]erhaps most importantly, the DOL [had] also issued an opinion letter stating that 'surplus overtime premium payments, which may be credited against overtime pay pursuant to section 7(h) of FLSA, may not be carried forward or applied retroactively to satisfy an employer's overtime pay obligation in future or past pay periods.'" The purpose of the FLSA, to protect workers from "excessive work hours and substandard wages," was also best served by the work-week offset model. Accordingly, the plaintiffs' damages for unpaid overtime were to be calculated on a work-week basis, and any offsets pursuant to § 207(h)(2) were to be attributed only to the singular work-weeks in which both premiums and overtime were earned. Only the premium portions of the extra payments (i.e., the extra one-half of the regular rate) could be used to offset the City's overtime liability. *Rudy v. City of Lowell*, No. 07–11567–NMG, 2011 WL 915334 (D. Mass. March 14, 2011).

Search & Seizure

Overnight Guest and Common Areas

In a ruling of first impression for the circuit, the U.S. Court of Appeals for the Tenth Circuit has ruled that an over-

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Inside Canada

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The judgment was appealed to the Supreme Court of Canada. Four days before the January 28, 2011 date that the case was to be heard by the Supreme Court of Canada, the Berendsens discontinued their appeal.

What does this mean for municipalities and other governmental authorities? Well, it means that today's harm from contamination from the 1960s was not foreseeable at that time. Without foreseeability, there is no liability in negligence. It also means that plaintiffs in environmental litigation must show a causal link between the actions of a polluter and the harm suffered.

So, can you sleep soundly at night knowing that even if the past won't stay buried, its ability to haunt you is limited? Not quite. The Berendsens based their claim only in negligence. Generally, plaintiffs can advance environmental claims in several other causes of action in addition to negligence, including nuisance, trespass, strict liability and statutory breaches. These other causes of action do not require the plaintiff to prove foreseeability. They don't even require intention: they only require that the polluter released a contaminant on a plaintiff's land, and that harm resulted.

The moral? When past contamination is brought to the surface, you will need to sit up and take notice.

Marc McAree is a partner with Willms & Shier Environmental Lawyers LLP in Toronto, Canada, and is certified as a Specialist in Environmental Law by the Law Society of Upper Canada. Joanna Vince is a Student-at-Law with the firm. She has a degree in biology and environmental science, and a certificate in environmental studies. **ML**

Cases

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night guest at one triplex unit does not have a reasonable expectation of privacy in a shared garbage storage area adjacent to the triplex.

Local police officers working with the Federal Bureau of Investigation arranged to make an undercover drug buy from Moses Earnest Maestas at a triplex residential unit in Albuquerque. The residence was actually rented by a man known as "Road Dog," but Maestas had spent a lot of time there in the preceding three months. On the day in question, Maestas arrived at the home and was seen taking out a gun and a ziplock bag of methamphetamine crystals. When he received a call from the law enforcement officers that they had the house surrounded, he stepped out into the fenced-in garbage storage area adjacent to the residence (but common to all three units), and disappeared from view momentarily. On reemerging, Maestas was arrested. The officers subsequently searched the garbage area and discovered a handgun placed near a fence and behind a garbage can, plus a ziplock bag of crystalline-type methamphetamine inside one of the garbage cans.

Maestas moved to suppress the methamphetamine and firearm recovered at the home on the basis that he had a reasonable expectation of privacy in the enclosed garbage storage area, as he was a guest in the home and, consequently, should be afforded the protections of the Fourth Amendment; second, the Fourth Amendment protections applicable to the unit extended to the enclosed garbage storage area within the curtilage. A defendant invoking the protection of the Fourth Amendment was required to show that he personally had an expectation of privacy in the place searched, and that his expectation was reasonable. This burden had a subjective and an objective component: the defendant had to show that he had a subjective expectation of privacy in the premises searched, and that society was prepared to recognize that expectation as reasonable. The privacy expectation in the home generally extended to the curtilage of the property. The district court denied the motion, finding that Maestas failed to show he had a legitimate, reasonable expectation of privacy in that area. His "connection to the home had been [too] tenuous and he was [not] the type of overnight guest to which Fourth Amendment privacy expectation has been assigned."

On appeal, the Tenth Circuit affirmed. Although Maestas was not the owner or renter of the unit, courts had recognized that a social guest had a reasonable expectation of privacy in the host's property unless the guest was present solely for commercial or business reasons and otherwise had no meaningful connection with the home. The court assumed, without deciding the question, that Maestas was a social or overnight guest and that, for Fourth Amendment purposes, his expectation of privacy was "coterminous with the expectation of privacy of the tenant." The court further assumed, for the sake of argument, that the garbage storage area outside the unit was within the curtilage.

Nonetheless, Maestas failed to demonstrate that he had a reasonable expectation of privacy in the area. The expectation of privacy in the home was distinguishable from one regarding the shared garbage storage area. That area was not used exclusively by the tenant and his guests, and it was accessible by the other units' occupants, as well as the landlord and his agents. The Second, Third, Eighth, Ninth, and Eleventh Circuits had previously held that shared or common areas (such as hallways, entryways, and basements) in apartment complexes or multi-unit dwellings were not areas over which an individual tenant could have a reasonable expectation of privacy. The court here declined to "establish any bright-line rules that would generally define the Fourth Amendment's reach over common or shared areas of multi-unit residential dwellings" but held that, on the particular facts here, Maestas failed to demonstrate that he had a subjective expectation of privacy in the garbage storage area which society was willing to accept as being objectively reasonable. *U.S. v. Maestas*, No. 10–2226, 2011 WL 1534573 (10th Cir. April 25, 2011). **ML**

Code Enforcement

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can't take them with you. Once you're away from your vehicle, no one can associate you with your tricked-out rims. Perhaps we could elevate the belt-buckle to a status symbol, like rims. Wearing one's pants cinched below the butt might vanish because people wouldn't be able to see the fancy buckle. If this doesn't catch on, I've got another solution which may be a surefire cure: Once Grandma and Grandpa start wearing saggy pants, I think the trend will come to a screeching halt. **ML**