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The Constitutionality and Wisdom of Legislative Prayer

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Religious Accommodation in the Workplace: Your Rights and Obligations

The Regulatory Challenges of Building a "Tiny House"







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Since the founding of our country, legislative prayer has survived even as other blending of government and religion has been found incompatible with the Establishment Clause. The author examines—and challenges— the legal rationale for allowing prayer at city hall and town council meetings. The Supreme Court has just granted cert in a legislative prayer case, making this issue very timely.



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The Regulatory Challenges of Building a "Tiny House"
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Religious Accommodation in the Workplace: Your Rights and Obligations
Courtesy of the Anti-Defamation League

This tutorial provides a concise discussion of the rights employees have to religious expression in the workplace. They are extensive—but not unlimited. Employers, including municipalities, can craft policies and guidelines that avoid litigation and make for a more productive workforce.

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INSIDE IMLA

More Timely Than Ever!



By Steven Moore, IMLA President

Our recent Mid-Year Seminar was a tremendous success, on many levels. Our venue, Washington DC, provided springtime blooms and mild temperatures. The Omni Shoreham Hotel, our long-time home, could not have been more welcoming. Our speakers were outstanding—well prepared, informative and worth every minute spent listening. Our attendee/members were attentive, engaged, collegial and well, just plain good to be around. And I thought IMLA did another great job planning the event and bringing it all together, seamlessly. As President of your organization I felt honored to be a part the proceedings.

But behind the aesthetics and first impressions, I also saw clearly how relevant IMLA's mission is—to provide a focus, voice and exchange of ideas among men and women who are devoting their legal careers to public service as municipal attorneys. That message was especially strong as our seminar came to a close. One of the more interesting last-day sessions was organized by Chuck Thompson--he convened the group of local leaders in Montgomery County, Maryland who had weathered the terrifying "Washington sniper" era 10 years ago: a county executive, a public relations officer and a county attorney. Along with the county's new police chief, they discussed lessons learned from the experience, including the best protocols for an orderly dissemination of information to a public anxious for the latest news.

That session may have seemed like an interesting history lesson at the time. But events were unfolding in Boston that made it very relevant. A few days after we walked out of that ballroom at the Omni, much of Boston was in lockdown as a massive manhunt ensued for suspects who had killed and maimed. Those terrible Marathon bombings brought front and center the very same issues we had just been discussing—how do federal, state and local law enforcement officials work together, who controls the flow of information to the public, what role do politicians, police leaders and public relations officers have, and so on.

This is not an isolated instance of IMLA's programs being timely and useful. At the Austin Conference in October 2012, we had held a session on disaster management and recovery. Speakers from America's gulf coast and southeast (and a guest from Queensland, Australia) discussed how to rebound from devastating natural disasters. Within a month after that meeting, Hurricane Sandy ripped through the Northeast, leaving many towns and municipalities without basic governmental structure. IMLA quickly organized a teleconference to link local counsel looking for answers with those who had successfully survived similar traumas.

At our Mid-Year Seminar in Washington DC, we had also heard from speakers who worked successfully with FEMA to expedite Hurricane Sandy rebuilding efforts. We discussed how contractors could be quickly selected, contracts rapidly written and results achieved. Again, we could not have known how quickly that information might be useful.

Barely one month after our Mid-Year Seminar, Moore, Oklahoma was leveled by a level EF-5 tornado. Winds topping 200 miles per hour reduced the entire town to rubble in seconds. And more tornados and flooding continue to upend lives across the country. Our hearts go out to fellow Americans who suffer so greatly. From our particular vantage point into local government, we can recognize the basic fibers of community being strained—and then emerging: rescue and recovery, emergency shelter, food and medical services, law enforcement, debris removal, restoration of basic infrastructure and even early talk of rebuilding.

The kinds of people who have chosen to become members of IMLA are an integral part of that story. They have the skills and desire to be part of the solution and to keep government serving its constituents, no matter how challenging the environment.

As we move into summer 2013, I am thankful for my association with all of you and with IMLA. From towns, cities and counties across the country, we continue to enrich one another while playing a vital role in our national well-being. I look forward to our continuing friendships and for many more opportunities to learn together.

And I hope to see many of you at our upcoming Conference in San Francisco. It promises to be another excellent IMLA gathering.

Are you receiving IMLA's Member Newsletter with case summaries and legal updates? These newsletters are sent out to our members every other Thursday, with a separate monthly Newsletter for our Canadian members. If you are not receiving these, please contact the Editor, Erich Eiselt, at eeiselt@imla.org.



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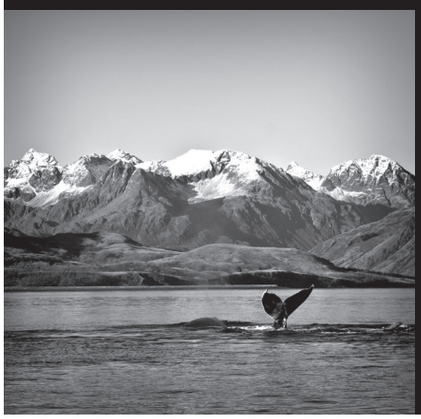

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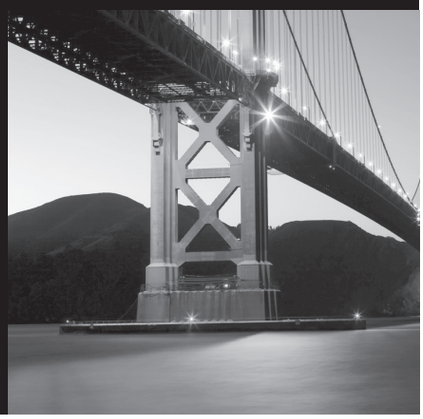

CORRECTION

In our March/April 2013 issue, we inadvertently identified Kimberley Mickelson, author of "Drafting Regulations: The Power of Clarity," as a partner at Olson & Olson LLP. She is Of Counsel to the firm.

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Establishment Clause Limitations on Local Government— The Constitutionality and Wisdom of Legislative Prayer

By Brian R. Herman



The Establishment Clause of the First Amendment has long been a guiding light in American jurisprudence. But despite the passage of more than 200 years, many questions remain open today about the role religion should play in society. These questions include the propriety of prayer in public forums. At the local government level across the country, many state and county legislatures, town councils, and school boards open with a form of prayer. Are these religious exercises proper under the First Amendment? Or, are public governmental prayers an establishment of religion forbidden by the Constitution?

This article will analyze the constitutional implications of legislative prayer at the local government level. It will review relevant decisions in order to formulate a clearer picture of what is constitutionally permitted. It will then conclude with a policy discussion arguing that legislative prayer stands on weak constitutional footing and that local governments should end the practice.

The First Amendment

In late 1789, Congress approved what is now the First Amendment for submission to the states for ratification, which occurred in December 1791. The Religion Clauses make up sixteen words of the Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[1] To understand its meaning, one must be familiar with the history which influenced the Founders. As the Supreme Court has made clear, history plays an important, if not decisive, role in First Amendment jurisprudence.[2]

By the late 1700's, the England had maintained for more than two centuries a religious establishment in the form of the Anglican Church, controlled by the monarch.[3] Other faiths were generally prohibited or suppressed, giving Anglicans favor in matters of state.[4] Church attendance was mandatory and citizens were required to provide financial support.[5] The result of this establishment was civil war, strife and persecution, driving many early settlers to America.[6] Similar practices arose in various colonies but were eventually met with backlash, playing out most spectacularly in the fight over religious assessments in Virginia in 1785-1786, the immediate precedent for the First Amendment.[7]

The Virginia assessment controversy revolved around a bill proposed by Patrick Henry that would tax citizens of Virginia and direct their support to designated Christian teachers.[8] Strong opposition to the assessment was led by James Madison.[9] In 1785, Madison published his *Memorial and Remonstrance Against Religious Assessments* ("Memorial").[10] The Memorial set forth a number of arguments against religious assessments. These continue to live in the separationist view underlying the First Amendment.[11] First, religion is a matter of each person's conscience and cannot be created or harmonized by force; it is not a matter for civil society or for legislatures.[12] Second, establishing taxes in support of religion is an initial step on a slippery slope toward the establishment of one sect against all others, a "first experiment on our liberties."[13] Third, every man is entitled to the free exercise of his religious

beliefs.[14] Madison's other arguments include that assessments would in fact weaken religion by making it dependent on the state, and perhaps most importantly, that religious establishments only produce negative outcomes – ignorance, superstition, bigotry and conflict.[15]

The immediate effect of Madison's Memorial was the defeat of the assessment bill.[16] It also resulted in Virginia's passage of Thomas Jefferson's "*Bill for Establishing Religious Freedom*" which proscribed compulsory support of religion and advocated free religious exercise.[17] When the First Congress began to debate the Bill of Rights only a few years later, these concerns influenced the drafters.[18] The end product – the First Amendment to the Constitution – reflects a foundational concern about personal free exercise and religious conscience, as well as the protection of religious diversity in America by the prevention of a predominant religion. Today, the First Amendment is the Founders' legacy to a thriving nation of republican government disconnected from religious establishment.

Incorporation To The States

By its terms, the First Amendment was a limitation on the federal government only, stating that "Congress shall make no law . . . ."[19] The Fourteenth Amendment expanded that reach, providing that "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."[20] Two important twentieth century Supreme Court cases demonstrate that incorporation has made the First Amendment, including the religion clauses, applicable to the states.

Murdock v. Pennsylvania assessed the constitutionality of applying a city licensing ordinance to the evangelizing activities of Jehovah's Witnesses.[21] The Court noted, almost in passing, that the Fourteenth Amendment makes the First Amendment applicable to the states; there was no further analysis of the issue.[22] Shortly afterwards, in a student-aid case under the Establishment Clause, the Court cited *Murdock* as it summarily noted the application of the First Amendment to the states: "The First Amendment, as made applicable to the states by the Fourteenth, commands that a state 'shall make no law respecting an establishment of religion . . . .'"[23]

In a more recent case, the Court reaffirmed First Amendment incorporation. Rebuffing a district court's claim that the First Amendment did not prevent Alabama from establishing a state religion, the Court underscored the fact that states have no more power to infringe individual rights protected by the First Amendment than does Congress, emphasizing this foundational part of constitutional jurisprudence.[24]

Today, the First Amendment is the Founders' legacy to a thriving nation of republican government disconnected from religious establishment.

The Establishment Clause Framework: *Lemon v Kurtzman*

In *Lemon v. Kurtzman*, the Supreme Court attempted to reconcile a number of earlier Establishment Clause cases and announced a three-part analysis which has come to be known as the "*Lemon* test."[25] Although in more recent years its scope has in some measure been trimmed by the Court, *Lemon's* role in Establishment Clause cases, is still seminal.

Lemon is a distillation of principles. Three characteristics present possible *Lemon* Establishment Clause problems: "sponsorship, financial support, and active involvement of the sovereign in religious activity."[26] Under the three-pronged *Lemon* test, a statute: 1) must have a secular purpose; 2) must not have the primary or principal effect of advancing or inhibiting religion; and 3) must not foster excessive government entanglement with religion.[27] It is important to note that, while the Court states that Establishment Clause analysis "must begin" by measuring against these criteria, it does not explicitly indicate this is the singular standard.[28]

In *Lemon*, Pennsylvania and Rhode Island had similar statutes providing aid or reimbursement to private religious schools for the teaching of secular subjects, with numerous restrictions and oversight requirements to ensure no such aid was diverted to religious purposes.[29] The Court credited the schemes with legitimately promoting enhancement of secular education, thereby satisfying the first prong of the *Lemon* test.[30] However, the arrangement failed the third prong, which prohibits "excessive entanglement" of government and religion.

In order to ensure that teachers did not introduce religious subject matter into the secular classes, the states had created in-depth monitoring programs. This produced an impermissible melding: continuing state surveillance of the religious content of school curriculum. This was excessive government entanglement and unconstitutional.[31]

The result was a lasting framework for Establishment Clause analysis. The three-part *Lemon* test could be applied to legislative prayer and a determination made as to its constitutionality. But other developments altered the path. The first was a new test, or perhaps a new gloss on *Lemon* itself, stemming from two subsequent Supreme Court cases:

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Brian Herman is a 2013 graduate of the George Washington University Law School, where he received his undergraduate degree in Political Science in 2010. He has a special passion for constitutional law and First Amendment issues in particular. A native of New York, Brian is an avid sports fan and roots for the New York Mets. His ultimate sports goal is to attend a game in all 30 Major League Baseball stadiums–and he is already about one-third of the way there. Brian is taking the Missouri bar exam this summer and will be moving to Missouri to begin his career.

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Lynch v. Donnelly and *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*.

In *Lynch*, the Court dealt with an Establishment Clause challenge to a Christmas display that included a crèche, erected in a city's shopping district.[32] The Court upheld the display and found it did not violate *Lemon*.[33] However, Justice O'Connor's concurrence introduced a new (or altered) analysis, the endorsement test.[34] To her, the Establishment Clause's purpose was to prohibit "government from making adherence to religion relevant in any way to a person's standing in the political community."[35] Excessive entanglement, which interferes with independence, can create favored access to government, and draws political lines based on religious identification.[36] In addition, the First Amendment is violated by governmental endorsement or disapproval of religion, which sends a message to those not part of that religion that they are outsiders, while relaying a message to believers that they are favored insiders.[37] Justice O'Connor wrote that focusing on these principles reinforced *Lemon* as an analytical tool.[38]

In practice, Justice O'Connor called for the application of her "endorsement principle" to the first two prongs of *Lemon*.[39] This allowed for an analysis of the subjective and objective components of the government action at issue.[40] Under the purpose prong, the test should be whether the government's purpose was to endorse or disapprove religion, while the effect prong asked whether the action conveys a message of endorsement or disapproval. A "yes" to either question would invalidate the law.[41] Using her new framework, Justice O'Connor voted to uphold the display.[42] While this was only a concurrence joined by no other justices, the next case solidified the grounding of the "endorsement" test in the Court's Establishment Clause jurisprudence.

County of Allegheny was also a holiday display case.[43] A majority of the *Allegheny* Court joined Justice Blackmun's opinion stating that the endorsement focus was a refinement of *Lemon* analysis.[44] The Court reaffirmed the foundation of *Lemon*, with a particular focus on whether the action has a purpose or effect of endorsing religion; it held that at a minimum the Establishment Clause "prohibits government from appearing to take a position on questions of religious belief or from making adherence to a religion relevant in any way to a person's standing in the political community."[45] In application then, a majority of the Supreme Court has supported the continuance of *Lemon* with an "endorsement" refinement.

One of the earliest actions taken by the first Congress was to authorize and appoint chaplains for the House and Senate; it was only three days thereafter that Congress approved the First Amendment.

Local Government and Legislative Prayer

While *Lemon*, as amended, might appear to provide a sufficient framework for analyzing legislative prayer—whether in state legislatures, county legislatures, town halls or school boards—the Court has provided specialized guidance on the subject. *Marsh v. Chambers* considered Nebraska's practice of selecting and paying a chaplain to provide a prayer for the opening of state legislative sessions.[46] The same chaplain (and thus the same denomination) had been continuously selected for the eighteen years preceding the Court's opinion.[47] This practice was challenged by a Nebraska state legislator as a violation of the Establishment Clause.[48] In an opinion by Chief Justice Burger – the author of *Lemon* – the Court upheld Nebraska's legislative prayer.[49]

Rather than engage in *Lemon* analysis, the Court provided a long description of the history of legislative prayer in the United States.[50] It noted that opening sessions of deliberative public bodies with prayer is an integral part of the nation's history and tradition, even occurring at the opening of the Supreme Court.[51] One of the earliest actions taken by the first Congress was to authorize and appoint chaplains for the House and Senate;[52] it was only three days thereafter that Congress approved the First Amendment.[53] The Court reasoned that it would be illogical for the men who approved the First Amendment to intend that it prohibit something they had just authorized, while at the same time continuing with that practice.[54] These original legislators could not have viewed the practice of paid legislative chaplains delivering opening prayers as violating the First Amendment.[55]

The Court credited the actions of the First Congress as highly persuasive evidence of the meaning of the First Amendment and found that the longstanding practice was conclusive support that legislative prayer is not forbidden by the Establishment Clause.[56] Part of the acceptability of the prayer, in the eyes of the founding generation and the Court, came from the lack of proselytizing and the view by the First Congress that prayer did not symbolically place a seal of approval on one religious view.[57] The Court concluded that

> [I]nvok[ing] Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.[58]

This point seems to be a contortion by the Court to uphold the longstanding practice. Divine guidance is an inherent part of religion. Prayer brings a religious element into the legislative session and

establishes it within the deliberative body. The Court's claim that a religious leader continuously praying at the opening of a legislative session is not an "establishment" of religion deserves some skepticism.

The Court's final inquiry in *Marsh* was whether any specific characteristics of Nebraska's prayer system violated the generally-approved historical practice.[59] It found that the long tenure of the same chaplain of the same denomination and the public financing of that chaplain was not problematic.[60] It also said that analyzing the content of the prayer was an unacceptable judicial inquiry where there is no indication the prayer had been used to proselytize or advance any one faith or disparage any other.[61] This elaborated upon the analytical framework – beyond not proselytizing, acceptable prayers should not raise up or diminish any specific faith.

Justice Brennan dissented, joined by Justice Marshall.[62] Brennan pointed to the fact that the Court did not use the *Lemon* analysis. It could not, he said, because such an analysis would require the Court to strike down the practice of legislative prayer as violating the Establishment Clause.[63] Prayer, according to Justice Brennan, was self-evidently religious, not secular.[64] Invoking the divine guidance the Court spoke of was simply a religious act.[65] Any secular purpose, such as bringing the legislature to order and bringing its attention to the seriousness of its duty, could be done in a non-religious fashion.[66] Furthermore, legislative prayer improperly linked religious observance to the "power and prestige of the State."[67] Finally, choosing the chaplain and assuring the suitability of the prayers was excessive government entanglement.[68]

Justice Brennan's dissent is important to the issue of legislative prayer. It provides a perspective contrary to the *Marsh* Court's circumstantial and historical decision. Brennan used Jefferson's "wall of separation" analogy and would place something as religious as prayer beyond the power of government.[69]

While *Marsh* could be read to provide a general exemption from Establishment Clause jurisprudence for prayers opening legislative sessions, lower court litigation on the issue shows that *Marsh* is neither straightforward nor absolute. A more sensible reading of *Marsh* limits acceptable legislative prayers to those which are non-proselytizing and do not draw lines differentiating faiths.[70] This should disfavor denominational or sectarian prayer. In *County of Allegheny v. American Civil Liberties Union*, the Court later reflected upon *Marsh* and the role of history, indicating the case was not as broad as some would read it:

> However history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed.[71]

It rejected any sweeping or broad interpretations of *Marsh*, stating that even history does not justify prayers that affiliate the government with one specific faith or belief, noting that the prayer in *Marsh* lacked any references to Jesus or Christ.[72] Thus the Court reinforced that constitutionally acceptable legislative prayer under the *Marsh* exception must be non-denominational.

To further see the contours of the exception, a review of the subsequent lower level cases addressing legislative prayer is informative. It provides factual settings for comparison and a background against which *Marsh* and relevant policy considerations can be judged.

In *Wynne v. Town of Great Falls*, the town council opened all meetings with invocations and prayers in the name of Jesus, Jesus Christ, Christ or Savior. The town council conceded that its prayer practice violated *Lemon* but argued that it fell within *Marsh*'s legislative prayer exception.[73] However, the Fourth Circuit focused on *Marsh* and *Allegheny*'s limitation to nonsectarian prayer, noting that the *Marsh* Court emphasized how the Nebraska prayer did not proselytize or advance any one faith.[74] The *Wynne* decision held that a legislative prayer in the name of Jesus Christ is sectarian and exploits the opportunity to promote one religion over others, violating *Marsh* and the Constitution.[75]

Conversely, in *Simpson v. Chesterfield County Board of Supervisors*, where a county board maintained a prayer policy which tracked the nonsectarian language of *Marsh* and allowed Judeo-Christian prayers given by invited clergy of congregations in the county, the policy was permissible under *Marsh*.[76] Because the county did not insist on invoking Jesus' name and there was a wide variety of prayers, the invocations were constitutional.[77]

The Fourth Circuit opinion in *Simpson* may reflect a broad view of *Marsh* and its requirement of nondenominational prayers. The prayers were upheld despite occasional references to specific faiths, such as "the G-d of Abraham, of Moses, Jesus, and Mohammad," because the rotation of prayers given by different religious leaders served to defeat any possible proselytization.[78] That is, occasional sectarian references did not make the prayer policy unconstitutional because there was no advancement of one faith in relation to another.

One problem with the holding in *Simpson* is that the plaintiff was a Wicca who saw all Judeo-Christian prayers as sectarian because they were not so general as to incorporate her spiritual beliefs.[79] Whereas the court viewed general Judeo-Christian prayers given by Jewish, Christian and Muslim leaders as nonsectarian,[80] those not part of that heritage would understandably see the prayers as sectarian. Yet the Fourth Circuit found specific prayers acceptable.[81] The fact that the *Simpson* court held a prayer to be "nonsectarian" over the objections of a member of a different faith raises various interpretations: a narrow-mindedness that generalizes Judeo-Christian prayers as "nonsectarian;" a misunderstanding of the Supreme Court's requirement for nonsectarian prayers; or the fact that "nonsectarian prayers" are inherently impossible and thus *Marsh* is unsound and inconsistent with the Establishment Clause.

The Fourth Circuit itself provided a refinement to *Simpson,* however. A similar prayer policy, where congregations of the county were invited to give invocations at county board of commissioners meetings, was found unconstitutional because it empirically resulted in overwhelmingly sectarian prayers.[82] Prayers were offered by local religious leaders to start meetings, but almost every prayer closed with a phrase referencing Jesus and a specific tenet of

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Christianity such as the Virgin Birth.[83] Even after the enactment of a formal policy that was facially neutral, the prayers continued to display a preference for Christianity.[84] Emphasizing that prayer still has a generally acceptable place in legislative and other public meetings, the Fourth Circuit strove to show that it is based upon the nonsectarian nature of such prayers.[85]

That nonsectarian requirement is not undermined by infrequent, isolated references to specific deities; it is undermined by repeated references to tenets of Christianity which imply government weight behind the religion.[86] This is not cured by the fact that the prayers are given by religious leaders rather than board members, nor is it helped by a neutral policy which does not discourage sectarian prayers and results in a strongly sectarian factual record.[87]

Where the Lord's Prayer was the only prayer recited at the beginning of a county council's meetings for six years, it likely violated the Establishment Clause as an unconstitutional promotion of Christianity.[88] Specifically, the council president stood, faced the audience, and recited the Lord's Prayer, while the audience also stood and bowed its heads.[89] Finding that the appropriate analysis was the *Marsh-Allegheny* formulation of whether the prayer creates an unconstitutional affiliation with one faith,[90] the court granted plaintiffs' preliminary injunction against the prayer.[91] But, where a prayer policy invited all religious leaders of the community to give invocations, the list of eligible clergy included multiple faiths, and the policy required that no invocations proselytize or advance a single faith, a preliminary injunction was denied, despite references to specific aspects of the Christian faith.[92]

Some circuits have rejected a strict sectarian line-drawing approach to legislative prayer.[93] The Second Circuit advocates a totality of the circumstances test to determine whether a reasonable observer would believe that the prayer practice conveys the view that the government favors or disfavors certain religious beliefs.[94] This has overtones of Justice O'Connor's endorsement test. The question, according to the Second Circuit, is whether the governmental body, by its prayer practice, has established particular religious beliefs as more acceptable.[95] It focuses on *Marsh*'s prohibition of religious advancement and affiliation, saying that the sectarian analysis runs into the impermissible problem of establishing a theistic civic religion.[96] Also, the Second Circuit believes the sectarian test would wrongly condemn a single denominational prayer or a series of denominational prayers from different sects, neither of which it believes runs into the advancement/affiliation concern.[97] As such, it propounds a fact-intensive and case-specific use of "legal judgment," which the court acknowledges provides little help to municipalities going forward.[98]

Courts will bar prayers that proselytize, advance one faith, dismiss another, or affiliate the government with a particular denomination. These characteristics are the crucial focus. Neutral policies that proactively lead to nonsectarian prayers (or a wide diversity of prayers) and the avoidance of proselytization or advancement would be a wise approach for local legislatures.

In that case, *Galloway v. Town of Greece*, the town invited prayers by local clergy, almost all of whom were Christian.[99] For an eight year period, the town's list from which clergy were invited contained only Christian congregations.[100] Two-thirds of the prayers delivered contained references to Jesus or other specific aspects of Christianity such as the Trinity.[101] Based on the selection process's lack of neutrality among creeds and the repeated Christian references, the Second Circuit found the practice conveyed to a reasonable observer that the town had affiliated with Christianity.[102]

The Ninth Circuit is another such circuit. In *City of Lancaster* it faced the common fact pattern of clergy from the community being invited to give prayers.[103] Similar to the Fourth Circuit, it rejected the argument that a single sectarian reference stemming from such a policy violates *Marsh* and the First Amendment.[104] But it took the broader view of the Second Circuit that nonsectarian prayers are not required by the Constitution and stand on the same footing with sectarian prayer; the measuring stick is proselytization, advancement or disparagement.[105] Thus the Ninth Circuit upheld the challenged prayer practice because a single denominational prayer (in that case in the name of Jesus), does not create the impermissible affiliation barred by the Amendment.[106]

These cases present an arguably clear picture of the status of legislative prayer for local governments. Generally, legislative prayer is constitutionally acceptable. Courts have embraced the role that prayer has played in America's history and continues to play today. Courts will bar prayers that proselytize, advance one faith, dismiss another, or affiliate the government with a particular denomination. These characteristics are the crucial focus. Neutral policies that proactively lead to nonsectarian prayers (or a wide diversity of prayers) and the avoidance of proselytization or advancement would be a wise approach for local legislatures. Prayers that continue to espouse specific deities or tenets of one particular faith will be impermissible violations of the Constitution. Local legislatures can continue to invoke divine guidance and solemnize their activities by prayers that do not

advance, proselytize or affiliate with a given faith.

School Board Prayer

One unique species of local government prayer may require different analysis. Prayer by school boards might need to be treated differently than other legislative prayer because of the school element and connection to school-age children, which courts have typically treated with greater caution in Establishment Clause cases.[107] *Lee v. Weisman* is a relatively recent school prayer case. [108] There, principals in public schools were permitted to invite members of the clergy to deliver benedictions and invocations at middle and high school graduations. The school provided pamphlets to clergy on guidelines for their prayers.[109] The Supreme Court, per Justice Kennedy, described the case as one where state officials directed the performance of a formal religious exercise, which, although technically voluntary, was in reality obligatory.[110] It found the prayers unconstitutional, as the school, and hence government, involvement was "pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school," which violated well-settled principles of the Establishment Clause.[111]

The government involvement with which the Court took issue was the principal's power to decide whether to have a prayer, who would give it, and what the tenor of the content would be.[112] Religious practice or doctrine, even of a civic variety, is not to be prescribed by the government.[113] The First Amendment provides that no creeds are to be favored.[114] The school's supervision along with peer involvement placed coercive pressure on other students to participate, which was impermissible.[115]

Lee was distinguishable from *Marsh*, according to the Court, because the opening sessions of legislatures where adults are free to leave or enter as they choose is quite different from a school graduation ceremony which all students must essentially attend.[116] In light of that distinction, where do school board prayers fall within the Court's Establishment Clause jurisprudence? The Sixth Circuit has held that school board meetings are in the same class as other public school activities because they take place on school property and are "intertwined" with the public schools.[117] It said that the Supreme Court's school prayer cases make clear that the coercive environment of a school classroom is not the only problematic element in school prayer cases.[118] There is a problem where the very institution society has designed to foster democratic and pluralistic values intermingles with religion.[119] Both coercion of "impressionable young minds" *and* endorsement of religion in the public school context are prohibited.[120] The court's holding was supported by the factual realities it noted: the meetings occurred in school buildings, were conducted by school officials, were attended regularly by participating students, and discussed school matters.[121] This sufficiently aligned the case with school prayer cases, not *Marsh*. As a result, the school board prayer required analysis under *Lemon*.[122] The Sixth Circuit felt that solemnization could have occurred without prayer. All three *Lemon* test elements were violated, and the court granted summary judgment for the plaintiffs.[123]

The Third Circuit reached the same result in *Doe v. Indian River School District*. It highlighted the Supreme Court's focus on the protection of young students from the coercion of endorsed or sponsored religion. Because it found *Marsh* to be ill-suited to these concerns, the Third Circuit held that *Lee* and the school prayer cases were the appropriate framework for school board prayer.[124]

It too found the school board prayer to be unconstitutional under the *Lemon* test.[125] Regardless of any alleged secular purpose, the primary effect of opening school board meetings with prayer was to advance religion.[126] The result is that the legislative exception of *Marsh* and its progeny does not extend to cover school board prayer cases. While deliberative public bodies such as town or county councils may begin with prayers that do not advance or denigrate a specific faith or proselytize, school boards are contextually different and do not have the same leeway. There has been no Supreme Court case ruling school board prayers unconstitutional per se, but at the very least they are standing on infirm constitutional ground. It would be extremely difficult to imagine a school board prayer that would survive the secular purpose, effects, and entanglement prongs of *Lemon*. As such, the cautious approach for local governments would be to section off school board prayer as impermissible under the First Amendment, while leaving other legislative prayer as permissible within the bounds of *Marsh*.

Moving From "Can" To "Should": A Policy Discussion

Current jurisprudence shows that within certain boundaries, legislative prayer outside of public school boards is constitutionally permissible. But should its use continue? Is *Marsh* even a sound constitutional decision? The answer is no. And even if *Marsh* is accepted, what approach should public deliberative bodies take in today's world? In light of the ever-increasing social and religious diversity of the United States and with a view toward the true purposes of the framers of the First Amendment, public bodies should avoid the use of legislative prayer.

Marsh is wrong in light of the First Amendment and the Court's earlier jurisprudence. The First Amendment prevents Congress from making a law "respecting an establishment of religion."[127] "Respecting" is defined as "considering" or "concerning."[128] To "establish" can mean to "set up" or "bring about."[129] As a textual matter then, the First Amendment prohibits laws that consider or concern the setting up or bringing about of religion. Prayer is often the central ritual act of religion, invoking divinity and often taking place in houses of worship. It cannot be argued with seriousness that laws or policies creating legislative prayer at different levels of local government are not laws concerning the setting up of religion. Prayer is fundamentally religious, and laws setting forth prayer policies in public deliberative bodies are an establishment of religion.

While the continuing historical practice the *Marsh* Court cites is strong evidence, as is the temporal connection between the passage of the First Amend-

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The Regulatory Challenges of Building a "Tiny House"

By Jay Surabian



In an era where millions of mortgages remain underwater, more people are becoming environmentally conscious, and where many municipalities are looking to create affordable housing, tiny houses are seen by some as an ideal housing alternative. However, there can be barriers to building a tiny house as the desire for less space can conflict with regulations designed to protect health and safety. This paper examines the regulatory challenges that exist under current building and zoning codes for those looking to build and reside in a tiny home.

The Benefits of a "Tiny House"

In the past decade, the concept of tiny houses has gained popularity in the United States. Tiny houses resemble traditional houses, but on a drastically smaller scale. Some are as small 100 to 200 square feet, but provide most of the features of a traditional house, including a living area with a toilet and shower and a kitchen with a sink and cooking facilities. The sleeping area can be in a small bedroom or in a loft, which might be as small as 6'x7' with a ceiling height of no more than 3 to 4 feet. Several companies now sell ready-made tiny houses for purchase that can be shipped to customers on a trailer—or a do-it-yourself homebuilder can purchase the plans and construct the house.

Tiny houses have attracted attention from national media outlets, including CNN and *The New Yorker*, where it was speculated that there could be as many as a thousand tiny houses in the U.S.[1] Tiny houses have even appeared in the Washington, DC area as the *Washington Post* reported last year.[2]

Tiny house owners are certainly bucking the trend on house size. In 2011, the average size of a new single family house was 2,480 sq. ft., while in 1973 it was only 1,660 sq. ft.[3] While many Americans may believe that "bigger is better," tiny house owners seem to relish living in their affordable and environmentally responsible homes. Numerous tiny house owners have created blogs to document their experiences building and living in one.

Advocates of tiny houses state that they have significant advantages over conventional homes. A tiny house can cost as little as $20,000-$50,000 to build. Comparatively, in 2011, the average sales price for a new single-family home in the United States was $267,900.[4] Of course, in urban areas housing can be far more expensive.

Housing costs in the District of Columbia are especially high. The median value of a single-family house is approximately $442,600.[5] Nearly 60% of home owners in the District have monthly housing costs in excess of $2,000.[6] The costs for renters are also taxing, as more than 40% of renters spend over 35% of their household income on rent.[7]

The economic benefits also bring a much more sustainable way of living. Tiny houses obviously require less lumber and materials, which makes it cheaper to build, but also results in less deforestation and a smaller carbon footprint. Similarly, a small house does not have the massive heating and utility bills of a larger house, which is again both significantly less expensive and more environmentally friendly.

There are many other costs beyond purchase price and utilities that come along with conventional homeownership that are significantly less or non-existent with a tiny home. An owner of a bigger home pays higher property taxes, has higher insurance premiums, pays more for renovations and upgrades, and spends more time cleaning and maintaining the house. Thus, for some, a tiny house provides a simpler lifestyle with the freedom of not being saddled with a large mortgage and all of the costly and time consuming responsibilities of owning a home.

Unfortunately for prospective tiny house owners, local and state zoning and building codes prevent many tiny houses from being lawfully built or inhabited.

Building Code Issues

In the U.S., building code standards are generally set by the International Code Council (ICC). The ICC is a non-profit organization that has created a series of code books, including the International Building Code (IBC) and the International Residential Code (IRC).

ICC code books have been adopted (or adopted with some limitations) in every state in the U.S., including the District of Columbia.[8]

The IRC, which applies specifically to the construction of one and two family dwellings, has numerous design standards, which serve to ensure that a structure is strong enough to protect against the weather and exterior elements and that the interior living environment is safe and sanitary. Municipalities require builders to demonstrate compliance with this code before issuing a building permit and before allowing a dwelling to be occupied.

The first hurdle for a builder of a tiny house to consider is the IRC's minimum size requirements. The purpose of these rules is to create a comfortable and healthy living environment as odors, moisture, and disease transmission can be affected by room size. *See* IRC Code and Commentary § R304.1 (2006). The IRC provides that every dwelling shall have at least one habitable room with a minimum of 120 sq. ft. *See* IRC § R304.1 (2012). Any other habitable rooms must be at least 70 sq. ft. *See* IRC § R304.2 (2012). No habitable room shall be less than 7 feet in any horizontal direction. *See* IRC § R304.3 (2012).

Similarly, every habitable room must have a minimum ceiling height of 7 feet (6'8" for bathrooms). *See* IRC § R305.1 (2012). The ICC codes state that minimum ceiling heights are necessary to ensure adequate light and circulation of air. *See* IBC Code and Commentary § 1208 (2006). Therefore, the design feature, which is common to tiny houses, of having a sleeping space in a low ceilinged loft is impermissible. These design standards make it impossible to live in a house with less than 200 sq. ft., unless the living, sleeping, and kitchen are all in one small room.[9]

Some jurisdictions, including the District of Columbia, supplement the IRC with its own, more restrictive requirements. The District's Housing Code requires a dwelling to be a minimum of 130 sq. ft. for the first occupant, with an additional 90 sq. ft. for each additional occupant. *See* D.C. MUN. REGS. tit. 14, § 402.1. Rooms used for sleeping must be a minimum of 70 sq. ft. *See* D.C. MUN. REGS. tit. 14, § 402.2. Rooms used by two or more people for sleeping must have a minimum of 50 sq. ft. per occupant. *See* D.C. MUN. REGS. tit. 14, § 402.3. In order to meet these standards, a tiny house for two people would have to have at least 220 sq. ft. of habitable space, not including the bathroom or any space that does not have a ceiling height of at least 7 ft. *See* D.C. MUN. REGS. tit. 14, § 405.1.

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In terms of utilities, the IRC also requires every home to have a toilet, bathtub or shower, and a kitchen with a sink. *See* IRC § R306.1-2 (2012). All plumbing fixtures must be hooked up to a sanitary sewer or approved septic system. *See* IRC § R306.3 (2012). Hot and cold water must be provided from an approved water supply. *See* IRC § R306.4 (2012). The IRC sets minimum size requirements for plumbing fixtures and specifies minimum clearance space between them. *See* IRC § R307.1 (2012). The result of these regulations is that it's not possible to design a bathroom that's smaller than approximately 18-20 sq. ft.

A dwelling must also be heated. Portable space heaters are not acceptable heating systems under the IRC, thus a permanent heat system must be installed. *See* IRC § R303.9 (2012). There must also be room for electrical fixtures, including an electric meter, outlets and switches. *See* IRC §§ E3405, E3901.2, E3903.2 (2012). All these features take up space and may push a prospective tiny home builder into increasing the amount of living area.

These are only some of the design considerations. The structure must be properly ventilated, the exterior walls must be strong enough to withstand the wind load, and windows must also meet certain specifications. *See* IRC §§ R301, R303, and R308.

Tiny homes that are constructed on wheels by a manufacturer can fall under the federal regulations for mobile homes. The National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. § 5401 et seq., sets forth construction standards for manufactured (i.e. mobile) homes that are 320 sq. ft. or more in floor area. *See* 24 CFR § 3280.2. The federal construction standards are not identical to the IRC, but do regulate minimum unit size. The federal standards require habitable rooms and bathrooms to have a minimum a ceiling height of 7 ft. for at least 50% of the room's floor area. *See* 24 CFR § 3280.104(a). Manufactured

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homes must contain at least one habitable room with not less than 150 sq. ft. *See* 24 CFR § 3280.109(a). Bedrooms must be a minimum of 50 sq. ft. for one person, 70 sq. ft. for two people, and an additional 50 sq. ft. for each person in excess of two and contain a closet at least 22 inches deep. *See* 24 CFR § 3280.109(b)-(c). Mobile homes that are being used as permanent dwellings cannot remain on wheels. The IRC requires mobile/manufactured homes be installed on a foundation. *See* IRC § AE501.1 (2012).

In sum, these laws do not create an absolute barrier, but they do present significant design challenges to a builder of a tiny home who is trying to meet the requirements of the IRC and local codes.

Zoning Issues

Unlike the International Code Council series, which creates a widely accepted set of construction standards, zoning regulations are inherently designed to deal with local concerns and therefore differ in each jurisdiction. Nevertheless, there are many commonalities from city to city and consequently, similar obstacles for tiny home owners wherever they may be.

Municipalities began to implement zoning laws in the early part of the 20th century to deal with the complex problems that arose as urban and suburban areas saw increased development and populations. *See Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 376-7 (1926). Many zoning ordinances, including the District of Columbia's, recite similar purposes to provide adequate light, air and privacy, to prevent undue concentration of population and overcrowding of land, and to lessen traffic congestion, all for the health and safety of the community. *See e.g. id.*; D.C. MUN. REGS. TIT. 11, § 101.1; ZONING RESOLUTION OF THE CITY OF NEW YORK. § 21-00; ZONING CODE OF BALTIMORE CITY § 1-401.

The District of Columbia's zoning regulations do not set forth a minimum house size, but some municipalities do. *See e.g.* ARLINGTON COUNTY, VA ZONING ORDINANCE § 7(A)(2) (requiring a minimum of 1500 sq. ft. of habitable living area for each semi-detached or townhouse dwelling). In some jurisdictions, developers have challenged such regulations by arguing that they do not relate to any legitimate purpose of zoning and instead are simply designed to regulate aesthetics and create economic segregation. In cases where a minimum floor area requirement was found to have no relationship to the occupancy of the dwelling, courts have agreed and found those regulations to be invalid. *See Builders Service Corp., Inc. v. Planning & Zoning Comm'n of Town of East Hampton*, 545 A.2d 530 (Conn. 1988) (finding a minimum floor area requirement of 1300 sq. ft. for a single-family home was not rationally related to the legitimate objectives of the zoning statute); *Home Builders League of South Jersey v. Twp. of Berlin*, 405 A.2d 381 (1979) (holding that the minimum floor area requirement lacked connection to health or safety and was solely directed towards economic segregation). *But see Gackler Land Co., Inc. v. Yankee Springs Twp.*, 398 N.W.2d 393 (Mich. 1986) (finding a 720 sq. ft. floor area requirement for single family dwellings and mobile homes to be constitutional).

Many zoning ordinances, including the District of Columbia's, recite similar purposes to provide adequate light, air and privacy, to prevent undue concentration of population and overcrowding of land, and to lessen traffic congestion, all for the health and safety of the community.

Even if there is no zoning regulation prescribing a minimum floor area, some developments are subject to covenants and bylaws of home owners associations that may set forth home design standards, including minimum size.

Zoning regulations can also affect house size by regulating other aspects of land use. For example, in the District of Columbia, a single-family house in the most restrictive residential district must have a minimum lot size of 7,500 sq. ft. and a minimum lot width of 75 ft. *See* D.C. MUN. REGS. tit. 11, § 401.3. Setting minimum lot sizes prevents larger tracts of land from being subdivided into smaller lots that would be more proportional to a tiny house. Set backs are also used to push development away from property lines and towards the center of the lot. The most restrictive residential district in the District requires a minimum rear yard of 25 ft. and side yards of 8 ft. *See* D.C. MUN. REGS. tit. 11, § 405.9.

These regulations indirectly create economic disincentives to owning a tiny house. Would a person looking to build a 200 sq. ft. house choose to do it on a 7,500 sq. ft. lot? In a city like the District of Columbia where land comes at a premium, that may not be the most economically viable location.

Additionally, the Zoning Regulations permit only one principal building on a single lot. *See* D.C. MUN. REGS. tit. 11, § 2516.1. An accessory building, like a garage, is allowed, but it generally cannot contain a dwelling unit, unless a special exception is granted by the Board of Zoning Adjustment. This prevents multiple tiny houses from being built on a single lot and prohibits an owner of a lot with an existing house from erecting a tiny house in the backyard for guests or tenants.

Changes on the Horizon?

The International Building Code and International Residential Code are revised in 3 year cycles. The next cycle will produce the 2015 edition. Requirements such as room size and ceiling height have remained relatively unchanged since the advent of the ICC code series, which may not bode well for prospective tiny house owners.

In the Washington, DC region, some jurisdictions are recognizing the changing needs of the population and the need for more affordable and sustainable housing. Although no jurisdiction is permitting a house as small as 100 sq. ft., the changes are reflecting a need for more

flexible housing options.

The District is currently rewriting its zoning regulations.[10] Some of the changes to come will open up more opportunities to create affordable housing. For example, off street parking will no longer be required for single family homes and residential buildings with fewer than 10 units. Home owners will be allowed as a matter-of-right to add a dwelling unit to an accessory building. The proposed regulations also are designed to make it less restrictive to utilize alley lots for housing in certain zones. Alley lots are lots that have frontage on an alley instead of a street. In years past, alley buildings were limited to use as storage or parking, but can now be used as an artist studio or a single family house.

A sister of the tiny house has recently been allowed in Virginia. In 2010, the Commonwealth enacted a statute that overrides local zoning ordinances and permits "temporary family health care structures" as a matter-of-right. *See* VA. CODE ANN. § 15.2-2292.1(A). This legislation arose from an increasing desire to provide care for relatives with health issues at home. The temporary health care structures are essentially, portable, tiny homes that are used, as an alternative to a nursing home, to house an elderly or disabled family member. Consequently, they have been dubbed "granny pods."[11]

The Virginia statute allows the granny pod as an accessory structure on a lot with a detached single family home. *See* VA. CODE ANN. § 15.2-2292.1(A). The granny pod is limited for use as a dwelling for one family member who is physically or mentally impaired. *See* VA. CODE ANN. § 15.2-2292.1(B). Use of the structure must remain temporary, as it must be removed once it is no longer needed. *See* VA. CODE ANN. § 15.2-2292.1(F). The statute provides that the structure can be no larger than 300 sq. ft., but it must still comply with the state's building code, which is the IRC. *See* VA. CODE ANN. § 15.2-2292.1(B). While, this law still requires compliance with the IRC, it does remove a major zoning hurdle and provides for a more affordable and flexible housing option for families who need to care for disabled relatives.

As the population ages, housing costs keep increasing, and more people look to live in more environmentally sustainable homes, more municipalities may see proposals for tiny houses. This necessitates that both builders and municipalities understand the building code and zoning issues that can arise in processing permit applications and in code enforcement. It may also prompt some jurisdictions to consider regulatory changes aimed at creating more affordable and flexible housing options.

Notes

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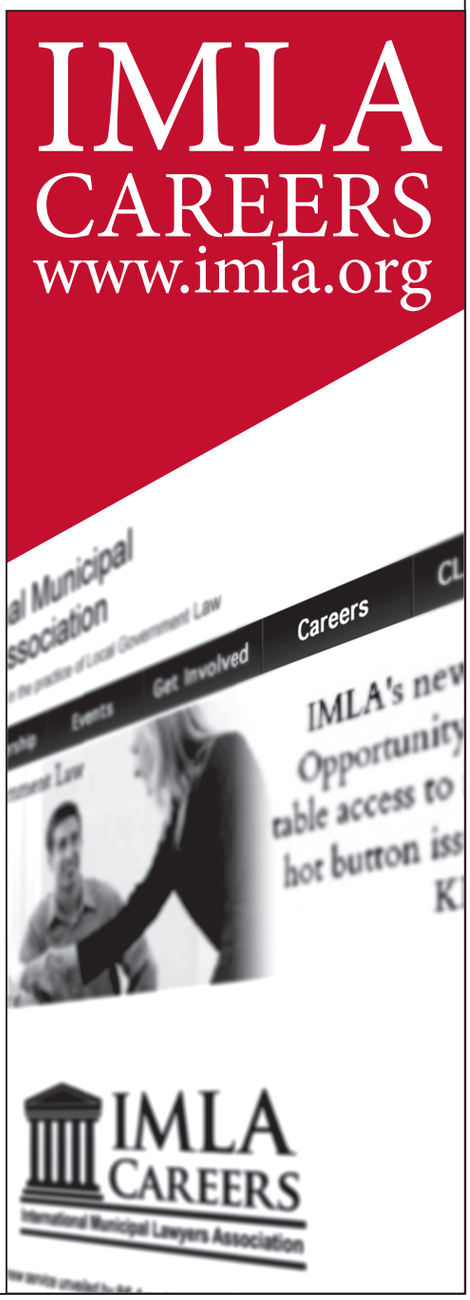
2. Emily Wax, *Home, squeezed home: Living in a 200-square-foot space*, Washington Post, November 27, 2012, http://articles.washingtonpost.com/2012-11-27/lifestyle/35509773_1_diminutive-homes-affordable-homes-tiny-house; Donna Peterson, *Fairfax County woman building livable 'tiny house' as part of sustainability movement*, Washington Post, October 9, 2012, http://www.washingtonpost.com/blogs/the-state-of-nova/post/fairfax-county-woman-builds-livable-tiny-house-as-part-of-sustainability-movement/2012/10/09/77ce89c4-11bc-11e2-ba83-a7a396e6b2a7_blog.html
3. U.S. Census Bureau. (2010). http://www.census.gov/const/C25Ann/sftotalmedavgsqft.pdf
4. U.S. Census Bureau. (2012). Characteristics of New Housing. http://www.census.gov/construction/chars/
5. U.S. Census Bureau. (2010). http://factfinder2.census.gov/faces/nav/jsf/pages/community_facts.xhtml
6. *Id.*
7. *Id.*
8. http://www.iccsafe.org/gr/Pages/adoptions.aspx. The District of Columbia currently uses the 2006 edition of the IBC and IRC, but is in the process of adopting the 2012 edition.
9. Tiny home builders might think that they can take advantage of the exception found in the IRC that allows for the construction of a structure less than 120 sq. ft. in size without a building permit or inspections, but that exception applies only to accessory structures like storage sheds and playhouses, which cannot be used as habitable dwellings. *See* IRC § R105.2 (2012).
10. See http://www.dczoningupdate.org/ for additional information.
11. Frederick Kunkle, *Pioneering the granny pod: Fairfax County family adapts to high-tech dwelling that could change elder care*, Washington Post, November 25, 2012, http://articles.washingtonpost.com/2012-11-25/local/35509146_1_care-granny-population. **ML**



Religious Accommodation in the Workplace: Your Rights and Obligations

Courtesy of the Anti-Defamation League



Religion in the American workplace is among the most contentious and difficult areas for employees and employers to navigate. In our increasingly diverse and religiously pluralistic society, conflict is bound to occur, and if Equal Employment Opportunity Commission (EEOC) statistics are correct, it is occurring at an ever quickening pace. EEOC religion-based charges of discrimination have increased approximately 41% since 1997, and payouts have increased approximately 174%. [1] The risks of getting it wrong - and, we believe, the rewards of getting it right - are powerful motivators to businesses to pay careful attention to this issue.[2]

Overview Of The Law

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employers, except religious organizations [3][4][5] from discriminating against individuals because of their religion in hiring, firing, and other terms and conditions of employment. Title VII also requires employers to reasonably accommodate the religious practices of an employee or prospective employee, unless to do so would create an undue hardship upon the employer. This means that:

- Employers may not treat employees more or less favorably because of their religion.
- Employees cannot be required to participate "or to refrain from participating "in a religious activity as a condition of employment.
- Employers must reasonably accommodate employees' sincerely held religious practices unless doing so would impose an undue hardship on the employer.
- Employers must take steps to prevent religious harassment of their employees.
- Employers may not retaliate against employees for asserting rights under Title VII.

Religious Accommodations

Introduction

Religious employees often confront conflicts between their employment obligations and their religious obligations; federal law (and many state and local laws) require employers to try to accommodate those obligations. Specifically, Title VII provides that an employer must reasonably accommodate an employee's religious beliefs and practices unless doing so would cause "undue hardship on the conduct of the employer's business."

What is a "reasonable accommodation"? A reasonable accommodation is one that eliminates the employee's conflict between his religious practices and work requirements and that does not cause an undue hardship for the employer.

Requested accommodations vary - an employee may need a particular day off each year for a religious holiday; or to refrain from work every week on his or her Sabbath; or to wear religious garb; or to have a place to pray. An employer must try to arrange to allow the employee to meet these religious obligations. Examples of possible accommodations may include shift swaps between employees, voluntary assignment substitutions, flexible scheduling (allowing an employee to work on Sundays, Christmas or other national holiday in place of the day he or she needs off), lateral transfers to other positions in the company, and use of lunch time in exchange for early departure. An employer could allow an employee who is a Friday-night Sabbath observer to work longer hours on Monday through Thursday to enable the employee to leave early on Friday to be home for the Sabbath. An employer may require an employee to use paid time off, such as personal or vacation days, to meet an employee's required accommodation.

An employer may not simply refuse to accommodate an employee. If the employer claims that accommodation is not feasible because it would result in an undue hardship (see below), the employer must demonstrate the effect

accommodation would have on the business; that is, the employer must prove the undue hardship.

Therefore, employers are obligated to (1) try in good faith to resolve the conflict between the employee's religious needs and job requirements; and, where an accommodation cannot be granted, (2) identify an actual monetary or administrative expense.

The employer is not mandated to provide the specific accommodation requested by the employee. As long as the employer has reasonably accommodated an employee's religious needs, the employer need not consider the employee's alternative suggested accommodations even if the employee's preferred accommodation would not cause undue hardship to the employer. [6]

An employer should not schedule tests or training in a manner that totally precludes the participation of Sabbath or religious holiday observers. As with the scheduling of work, the employer must attempt to accommodate the religious needs of the employee. The employee cannot be unreasonable in demanding accommodation. For example, if the same test or training is being given at another location on another day, the employee may be required to take it elsewhere. In addition, the employee may be required to use personal time to take the test or training.

What is an "undue hardship"? An employer is not required to provide an accommodation that causes it an "undue hardship." The Supreme Court has ruled that this means that an employer need not incur more than minimal costs in order to accommodate an employee's religious practices. The EEOC has interpreted this to mean that an employer can show that a requested accommodation causes it an undue hardship if accommodating an employee's religious practices requires anything more than ordinary administrative costs, diminishes efficiency in other jobs, infringes on other employees' job rights or benefits, impairs workplace safety, causes coworkers to carry the accommodated employee's share of potentially hazardous or burdensome work, or if the proposed accommodation conflicts with another law or regulation.

The employer is not mandated to provide the specific accommodation requested by the employee. As long as the employer has reasonably accommodated an employee's religious needs, the employer need not consider the employee's alternative suggested accommodations even if the employee's preferred accommodation would not cause undue hardship to the employer.

For example, an employer probably does not have to train a part-time employee at substantial cost in order to cover for another employee who is unable to work on Saturdays. Also, if a collective bargaining agreement is in force which sets forth rules regarding seniority and assignments, it may be an undue hardship to ask the employer to violate that agreement. An employer is also not required to pay premium or overtime costs in order to accommodate the religious needs of employees. Some employers do voluntarily pay these costs; however, this is up to the employer.

Are all employers required to try to accommodate their employees' religious needs? Federal law applies only to companies with more than 15 employees, although many state and local employment laws protect employees of smaller companies. Many employers also have come to realize that in addition to the legal requirement to accommodate religious employees, a commitment to religious accommodation can improve employee morale and help retain valued employees who are religious.

What are the employee's responsibilities? Employees seeking to observe their religious beliefs and practices have a responsibility to do their part to help resolve conflicts between job duties and religious needs. To this end, an employee must tell his or her employer about the religious commitment at the time the job is accepted or immediately upon becoming observant or aware of the need for an accommodation. Employees must also be clear when explaining why they need an accommodation. Vague objections such as saying that he or she cannot work on a particular day because of cultural tradition will not suffice; the employee must clearly state that he or she is required not to work because of religious beliefs.

Employees do not have to justify or prove anything about their religious belief to the employer (for example, the employee need not provide a note from clergy): an employer is required to accommodate- subject to the undue hardship rule - any of the employee's sincerely-held religious beliefs.

What counts as a religious belief that needs to be accommodated? Although the law requires that employers must accommodate "sincerely held" religious beliefs that conflict with work requirements, courts rarely question either the sincerity or religiosity of a particular belief. The law's intention is to provide protection and accommodation for a broad spectrum of religious practices and belief - not merely those beliefs based upon organized or recognized teachings of a particular religion. Therefore, religious beliefs need not be acceptable, logical, consistent, or comprehensible to others to be entitled to protection and courts must not presume

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Religion in the Workplace *Cont'd from page 17*

to determine the place of a particular belief in a religion or the plausibility of a religious claim. In short, the fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief.

However, it is equally clear that Title VII was intended only to protect and accommodate individuals with sincere religious beliefs and not those with political or other beliefs unrelated to religion. Thus, the religious accommodation rules do not apply to requirements based on personal preferences rooted in non-theological bases such as culture, heritage or politics.

May an employee wear religious garb or symbols to work? Employers must attempt to accommodate employees who, for religious reasons, must maintain a particular physical appearance or manner of dress in keeping with the tenets of their religion. Again, accommodation is required only if it can be made without undue hardship to the employer. When it comes to religious apparel, typically only safety concerns constitute undue hardship.

Can an employer ask about religion on my job application? No. Questions concerning an applicant's religion or the religious holidays observed by an applicant are impermissible. For example, an employer may not ask an applicant: "does your religion prevent you from working weekends or holidays?" or "What church do you attend?" However, during an interview an employer may describe the regular days, hours, or shifts of the job. Again, it is the employee's responsibility after he or she is hired to alert the employer of religious observances which require an accommodation.

Can an employee object to a diversity program or pledge on religious grounds? This issue is likely to arise in the context of workplace diversity initiatives that include acceptance of certain people (such as gays and lesbians) or lifestyles (such as unwed motherhood) that some religious people claim to find offensive on the basis of religion. For example, in one case, an employee told his employer that his sincerely held religious beliefs against homosexuality conflicted with his employer's requirement that he sign a code of conduct that contains a diversity policy requiring each employee to "fully recognize, respect and value" differences among co-workers. He claimed that there was a conflict because he claimed he could not value any "difference" that is "contrary to God's word." [7]

Although the law is still evolving in this area, an employer may have to accommodate the objecting employee's religious point of view - but not to the extent that it causes the employer an undue hardship. As in a "typical" accommodation request, employers are obligated to (1) try in good faith to resolve the conflict between the employee's religious needs and the employer's needs; and, where an accommodation cannot be granted, (2) identify an actual, minimal monetary or administrative expense.[8]

May an employee wear religious garb or symbols to work? Employers must attempt to accommodate employees who, for religious reasons, must maintain a particular physical appearance or manner of dress in keeping with the tenets of their religion. Again, accommodation is required only if it can be made without undue hardship to the employer.

Do Public Employees Have Accommodation Rights Under Other Laws?

In addition to Title VII, public employees can seek religious accommodations under the First Amendment and other state laws. The First Amendment's Free Exercise Clause may require a public employer to accommodate an employee's religious observance or practice. If the employer adversely treats religiously-motivated conduct compared to similar secular conduct, it can only justify its actions by demonstrating a narrow and compelling interest.[9] Demonstrating such an interest is much more difficult than establishing an undue burden under Title VII. For instance, a U.S. Court of Appeals invalidated a police department policy prohibiting officers from wearing beards for religious reasons, but allowing beards for medical reasons. [10]

Additionally, twenty states currently have laws - either by statute or court decision - called Religious Freedom Restoration Acts (RFRAs), which also require the government to demonstrate a narrow and compelling interest where a religious observance or practice is substantially burdened by a law, rule or practice.[11] For the purposes of these laws, it is irrelevant whether or not the law, rule or practice is general in nature or neutral towards religion. State courts have generally not ruled on whether or not RFRAs are applicable to the public workplace. Therefore, they may be another avenue for public employees to seek religious accommodation.

The First Amendment's Free Speech Clause may also require a public employer to accommodate an employee's religious expression. To be protected by the Free Speech Clause, the expression must not be made pursuant to the employee's official duties. [12] Furthermore, the employee must demonstrate that his or her expression is a matter of legitimate public concern, and the employee's interest in commenting on the matter must outweigh the employer's interests in operating efficiently and effectively. [13]

Recap:

To show that an employee has had her rights violated under the religious accommodation rules, she must show that:

1. She has a bona fide religious belief that conflicts with an employment requirement;
2. The employer was made aware of the conflict; and
3. She was subjected to an adverse action (such as dismissal) for not complying with the employment requirement.

To avoid liability, an employer must show must show that

1. The employer offered a reasonable accommodation; or

2. After a good faith effort, no accommodation that did not cause an undue hardship could be found.

Religious Harassment

Introduction

Under Title VII, an employer has an affirmative obligation to maintain a work environment free of harassment, intimidation and repeated insult.

What is harassment based on religion? Just like sexual harassment, religious harassment can occur in either or both of two forms: quid pro quo harassment and hostile environment harassment. [14]

1. *Quid pro quo* harassment occurs when a harasser seeks to exchange a "tangible employment benefit" for compliance with a harasser's religious demands (for example conversion and participation in religious worship) and, when the demand is not complied with, the harasser engages in an adverse employment action.[15]
2. A hostile work environment occurs when there is offensive conduct directed at an employee because of that employee's religion, and where the conduct is so severe or pervasive that it affects the terms or conditions of employment and the employer fails to take reasonable steps to stop the conduct. To determine this, a court will look at the overall facts of the case, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The Supreme Court held that harassment need not seriously affect employees' psychological well-being in order to be problematic under Title VII so long as the environment would reasonably be perceived, and is perceived, as hostile or abusive.[16]

When is an employer liable for a hostile work environment? If co-workers are creating a hostile work environment through religious harassment, an employer is liable if it knew or should have known of the religious harassment and failed to implement prompt and appropriate corrective action.

If a supervisor is creating a hostile work environment through religious harassment, an employer is liable. The employer can show, as a defense, that the harassment resulted in no tangible adverse employment action (such as demotion or termination).[17]

The only way an employer can avail itself of this "no tangible action" defense, however, is if (a) it exercised reasonable care to prevent and correct promptly any harassing behavior, and (b) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

What about teasing and jokes? There will be a hostile work environment only "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." [18]

The Supreme Court has consistently held that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.

Recap:

To show that he was subject to workplace harassment based on religion, an employee must show that:
1. he was subjected to unwelcome religious harassment;
2. the harassment was based on religion;
3. the harassment had the effect of unreasonably interfering with his work performance by creating an intimidating, hostile, or offensive work environment; and
4. the employer was liable for the harassment

Retaliation

Introduction

An employer retaliates against an employee if, because the employee engaged in "protected activity," (such as opposing, complaining about, or testifying about discrimination) the employer took an adverse employment action against the employee.

This is important because the rapid rise in religion claims to the EEOC are being eclipsed by the increased in retaliation charges. Over 37% of all EEOC filings contain a retaliation charge, and retaliation charges are the fastest growing category of complaint.[19] The Supreme Court's 2006 *Burlington Northern v White* decision makes it even more likely that more retaliation charges will be filed - and will be successful – because it expands the kinds of actions that will be counted as retaliation. [20]

What is retaliation? Title VII forbids employment discrimination against "any individual" based on that individual's "race, color, religion, sex, or national origin." 42 U.S.C. §2000e-2(a). A separate section of the Act - its anti-retaliation provision - forbids an employer from "discriminat[ing] against" an employee or job applicant because that individual "opposed any practice" made unlawful by Title VII or "made a charge, testified, assisted, or participated in" a Title VII proceeding or investigation. § 2000e-3(a).

What kind of conduct is protected from retaliation? Filing a charge of discrimination; threatening to file a charge; complaining about, opposing or protesting perceived discrimination against yourself or another employee; assisting someone else in opposing discrimination; giving evidence or testimony to an investigator; refusing to engage in conduct that you believe to be unlawful; and refusing to assist an employer (by testimony or otherwise) in discriminating.

Can an employee allege retaliation if the employee is wrong about the discrimination they allege? Retaliation is a separate charge. So, even if the underlying claim of discrimination ultimately is unfounded, an employer may be responsible for its conduct in response to the filing of that complaint. [21]

Workplace Proselytizing and Expression

Introduction

Workplace proselytizing presents a special challenge to employers, because the failure to respond to employees' complaints about proselytizing could lead to charges of reli-

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Brick and Mortar Fights Back: $23 Billion at Stake for State and Local Governments

by Erich R. Eiselt, Assistant General Counsel

On May 6, 2013, The Marketplace Fairness Act of 2013[1] (MFA) passed the United States Senate by a lopsided margin of 69 to 27. If enacted, the MFA (commonly referred to as the "Internet Sales Tax Act") will allow states to require that out-of-state vendors collect and remit sales taxes even though they have no physical presence in the taxing state.

The potential benefits to states and municipalities are immense. The legislation will unlock an estimated $23 billion a year in uncollected sales taxes, according to the National Conference of State Legislatures.[2]

In so doing, the MFA would overturn a status quo that has long frustrated state taxing authorities. For nearly 50 years, the Supreme Court has firmly barred states from extracting sales or use taxes from out-of-state vendors without a substantial nexus to the taxing state. Two decisions form the barrier:

In *National Bellas Hess v. Department of Revenue of Ill.*, 386 U.S. 753 (1967), a Missouri mail order house had been directed to collect Illinois use taxes. The State's tax law required collection by entities 'Engaging in soliciting orders within this State from users by means of catalogues or other advertising, whether such orders are received or accepted within or without this State.'[3] Bellas Hess owned no tangible property in Illinois, and had no retail outlets or sales representatives there. It did not advertise in Illinois on radio, television, billboards, or newspapers. But it did send occasional catalogues to Illinois customers and shipped goods to them.

The Court rebuffed the State of Illinois. It held that Bellas Hess' contacts with the State were too tenuous to sustain jurisdiction under the Due Process Clause. And it found that the State sustained too little burden from Bellas Hess' activities to justify interfering in interstate commerce under the Dormant Commerce Clause. Illinois could not impose a duty of use tax collection on an out-of-state seller whose only connection with customers was by common carrier or by mail.

Twenty-five years later, *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) presented a similar question. Quill, a seller of office supplies and equipment, had no offices or warehouses in North Dakota, and no retail locations, no employees, or sales representatives there. Yet, by mailing more 230,000 catalogs and flyers--some 24 million tons of advertising--into the State each year, Quill sold roughly $1,000,000 of goods to 3,000 North Dakota customers. And it facilitated their purchases by providing floppy disks containing order entry software. North Dakota law required payment of sales taxes by "retailers," who were defined as "every person who engages in regular or systematic solicitation of a consumer market" in the State.[4]

The North Dakota Supreme Court had held for the State. Citing the meteoric growth of mail order sales since 1967, it referred to "tremendous social, economic, commercial and legal innovations" that had made *Bellas Hess* obsolete.[5] It discerned a softening of the traditional "minimal contacts" needed to satisfy Due Process. And it saw a relaxation of the requirement that an out-of-state business must have a "physical presence" in the taxing state in order to avoid friction with the Dormant Commerce Clause.

The Supreme Court agreed with North Dakota's Due Process analysis: Quill's intentional contacts with the State satisfied the fundamental fairness and notice elements essential to Due Process. But the Court emphatically reaffirmed the continuing vitality of *Bellas Hess* and its teaching that the Commerce Clause prohibits taxation of out-of-state entities with no physical presence in the taxing state.

The solution, Justice Stevens wrote for a unanimous Court, lay with Congress: "Accordingly, Congress is now free to decide whether, when, and to what extent the States may burden interstate mail order concerns with the duty to collect use taxes."[6]

The twenty years since *Quill* have witnessed a global proliferation of cyber-based sales and marketing virtually unimaginable to the Court. As of 2009, internet-based sales were $145 billion, roughly four percent of the nation's $3.6 trillion in total retail sales.[7] By 2012, e-commerce sales had grown to $226 billion, or 5.2 percent of the total.[8] This year, the figure will top $250 billion.[9]

The unfairness which the states were challenging in *Bellas Hess* and *Quill* is greatly magnified in the e-commerce context. A brick and mortar business spends many thousands of dollars to rent, outfit and maintain a store. It pays salaries, utility bills and premises insurance. It can operate only during "business hours." It keeps inventory on hand to satisfy buyers who demand on the spot purchasing. And it must collect and remit state and local sales taxes, sometimes nearing 10 percent of the purchase price.

The "virtual" business spends nothing in the taxing jurisdiction. It has no store. It relies on a robust website and a network of connections to manufacturers, distributors and shippers. It does not need to ship catalogues or flyers. It pays no utilities, rent or salaries in the taxing jurisdiction—but stays open 24 hours a day, often through the use of off-shore call centers. And it sells in the taxing jurisdiction free of any sales tax obligations. Internet buyers may go to brick-and-mortar establishments in local malls and town centers to see and touch goods—and then purchase them on-line.

Although they are legally obligated to pay a use tax on those transactions, the vast majority of consumers are unaware that such laws even exist. Even when they do know, compliance is minimal.

State and local governments are particularly victimized. They are deprived of vital tax revenues that would fund education, health, safety and infrastructure, even as their in-state businesses fall prey to unseen commercial internet predators. Storefronts on Main Street are shuttered and local unemployment climbs.

States have moved to redress the problem while trying to live within *Bellas Hess* and *Quill*. One approach has been to establish so-called "Amazon laws." Originated by New York in 2008[10] and now adopted by a half-dozen states including Texas, California and Pennsylvania, these statutes assert taxability where an out-of-state vendor (often Amazon, as the name implies) uses in-state on-line "associates" to generate sales. For example, a Virginia-based discount camera seller might place an advertisement in the *Los Angeles Times* website, providing the paper with commissions where Times readers "click through" to the camera seller's website and make a purchase. California's Amazon law would tax such transactions. Enacted in 2011, it defines a "retailer engaged in business in the State" as including "any retailer entering into agreements under which a person or persons in this state, for a commission or other consideration, directly or indirectly refer potential purchasers, whether by an Internet-based link or an Internet Web site, or otherwise, to the retailer. . . "[11]

The "Amazon laws" are not free from litigation or Constitutional challenge. It is true that the New York Court of Appeals recently upheld that State's Amazon law, finding that, where an out-of-state entity pays an in-state website owner for referring sales, enough nexus exists to satisfy Commerce Clause concerns.[12] But that case, and the "click through nexus" rationale in general, has not yet been tested at the Supreme Court. And some large on-line sellers, including Amazon.com and Overstock.com, have simply curtailed their in-state associate arrangements so as to circumvent the taxation statutes.[13] A more sweeping answer is needed.

As Justice Stevens advised, the solution would appear to lie with Congress. The MFA may be that solution. It is a bipartisan offering, intended to redress unfairness and overrule the Supreme Court. Republican Senators Mike Enzi (R-Wyoming) and Lamar Alexander (R-Tennessee) joined Democrat Dick Durban (D-Illinois) to introduce legislation in 2011 that would clearly allow states to collect sales taxes on internet sales.[14] MFA's intent should cheer Democrats and Republicans alike: it is styled as "An Act to restore States' sovereign rights to enforce State and local sales and use tax laws, and for other purposes."[15]

The MFA as passed by the Senate in early May is straightforward and perhaps deceptively simple, at only 5 pages (fewer than 2,000 words) in length. Its primary accomplishment is to deal with what has been a major obstacle to passage--the complex thicket of state and local sales tax regulations that would drown all but the largest of vendors in bureaucracy and paperwork. Indeed, both *Bellas Haas* and *Quill* had referenced the compliance burden as part of the Court's rationale, referring to a "welter of complicated obligations" that would confront sellers.[16]

That complexity has been greatly reduced, as a website established by proponents of the MFA asserts.[17] States cannot simply "opt in" under the MFA to begin reaping taxes; they must affirmatively simplify their sales tax structure. They must also designate a single, centralized state tax organization and provide retailers with free tax calculation software.

States can comply on an a la carte basis, or by passing legislation which conforms to the Streamlined Sales and Use Tax Agreement (SSUTA)[18], as twenty-four states have already done.[19] Although the SSUTA is a daunting 204-page document, it does inject uniformity into as many as 6,000 or more disparate taxing structures around the US.

The MFA has also been designed, say its advocates, to spare small business. It applies only to entities that generate more than $1 million in annual revenues from out-of-state sales.

The overwhelming Senate win was heartening for MFA proponents, including municipalities that stand to gain tax revenues. Large brick and mortar retailers including Wal-Mart and Home Depot support the law, for obvious reasons. Even Amazon has come on board as it builds more warehouses and infrastructure around the country to assure ever more rapid product shipments.

But it is far too early to predict a win for the states. Prospects for passage of the MFA in the House, where the "fairness" argument meets strong crosswinds, are hardly rosy. Many Republicans challenge the assertion that streamlined compliance obligations solve the problem for small business. As the main corporate antagonist to the MFA, eBay, points out, the "small business" threshold may need to be increased: at an average profit margin on internet sales of 8.3 percent, businesses making just $83,000 per year in profits will now have to spend time and money paying sales taxes across the country. It has strenuously sought to push the MFA minimum to $10 million for out-of-state revenues. (While not directly on point, it is worthwhile noting that the Small Business Administration defines a "small business" at a $7 million revenue threshold, in some categories going up to $30 million).

And many conservatives, including Grover Norquist, view the taxes as "new" despite a longstanding duty in most States for consumers to pay use taxes on purchases where sales taxes are not collected. Some critics go even farther, characterizing the MFA as yet another step in a liberal agenda to maximize the shifting of private dollars to public coffers.[20]

Behind the rhetoric, billions in tax revenues hang in the balance. Municipalities should keep tuned to the Marketplace Fairness Act of 2013 as the summer progresses.

Notes

1. S.743 113rd Cong. (2013); text at http://thomas.loc.gov/cgi-bin/query/D?c113:2:./temp/~c113dUmWNe: (last accessed May 13, 2013.
2. http://www.ncsl.org/press-room/ncsl-thanks-senators-for-passing-marketplace-fairn.aspx (last accessed May 10, 2013).
3. Ill.Rev.Stat. c. 120, 439.2 (1965).
4. N.D. Cent. Code §57-4.2-01(6) (Supp. 1991).
5. *State ex rel v. Quill Corp., 470 N.W.2d 207, 208 (N.D. 1991).*
6. *Quill corp. v. North Dakota, 504 U.S. 298, 318 (U.S. 1992).*
7. http://www.census.gov/compendia/statab/2012/tables/12s1055.pdf (last accessed May 12, 2013)
8. http://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf (last accessed may 12, 2103)

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Resistance Is Futile! You Will Be Assimilated!

by Kelly Addy

The professional environment of the North American municipal lawyer is evolving exponentially and it is a challenge to keep pace with our skill level. It is no longer a question of whether we are going to 'opt in' or 'opt out', however.

With the American Bar Association's new Comment 8 to Rule of Professional Conduct 6.1, the issue is not whether seasoned attorneys are going to engage with all the new technology available for research, case management and document creation, but when...and when needs to start pretty soon.

Rule 6.1 stated the obvious, that the attorney was obligated to provide 'competent representation' which required 'the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.'

Now we are being sent where no generation of lawyers has ever gone before – into cyber space – by the simple (and not so simple) observation that 'a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.'

As our State Bar Counsel said rather emphatically to a roomful of Yellowstone Area Bar Association members, 'How in the world can you advise your client competently if you have only the dimmest understanding of the tech-based environment in which they now must operate... or die?'

Her point was that everyone who represents people these days has to be able to perform competently at a work station. If you can't, she said, you are committing malpractice.

The days of having an associate do that stuff are over. If you want to keep doing it the way you have always done it, you are betting your retirement account on every outcome in every case.

Harkening back to the 1990s television series, 'Star Trek-The Next Generation', the episodes dealing with the attack of the Borg come to mind. The Star Ship Enterprise Captain Jean-Luc Picard is captured by people who have been modified so that machine parts are melded into their bodies.

He comes back at the end of one of the more vivid episodes in the series, modified as a full-fledged Borg and informs his stunned shipmates in a monotone voice, 'Resistance is futile. You will be assimilated.'

Anyone who watches the dizzyingly complex and numerous posts at CityAttorneyTech has frequent flashes of techitis. This manifests itself as a feeling of being lifted out of your desk chair and suddenly being inserted into the text of a science fiction novel.

Timelessness and weightlessness give way to feelings of cluelessness and helplessness. You can grasp the concept of the new device or software that is being discussed, and you can see that it is a complete game-changer that will shift outcomes in cases. How can we adjust to new realities at Warp Nine?

Our listServs, available to attorneys who practice municipal law provide a life line to practitioners who access the list and the topics that regularly run across the screen. It is better to be concerned about emerging issues than it is to be completely surprised by them.

If email listServs are not the perfect medium to raise and discuss these issues, they are as close to perfect as anything I can name. They operate in real time and we have additional opportunities to hear what is coming next before the blow strikes, alongside 700 proactive municipal law partners who know that my success is their success and their problem is my problem.

We are literally re-wiring our brains. We have come a long way, but we still have a long way to go. The challenges range from simply proofreading – which is different than taking ye olde red pencil to a piece of paper – to which predictive coding service we need to complete a judicially acceptable search of our digital database.

We are analogue creatures, living our lives inexorably from birth to death, but we now live in a digital world, that requires us to jump from our calendar to our email to online meetings to live council sessions. We don't do it all in a matter of days anymore, either, but in hours if we are lucky and in minutes if we are having the postmodern version of an Average Day.

'How can anyone possibly keep up?' you ask. With 700 of your closest cyber-partners, I reply. I can't think of a better tool for the municipal lawyer today than the email program at your desk at City Hall.

Now more than ever we are confronted by a baseline task that will take a total team effort to address professionally, competently and successfully. Now more than ever we require a little help from our friends. Now more than ever I need you to succeed if I hope to do the same.

Isn't it interesting to live in a day where the written word isn't just written any more? What Guttenberg did with moveable type printing, moving human history out of the Dark Ages and catapulting it into the Renaissance, was so big a sea change for civilization that it took centuries to see how the world was transformed by it.

We are in a similar time, with all the institutions and conventions of the past becoming unhinged in a way that we are still guessing at today. If ever there was a time that needed the abiding comfort of the Rule of Law we live in it.

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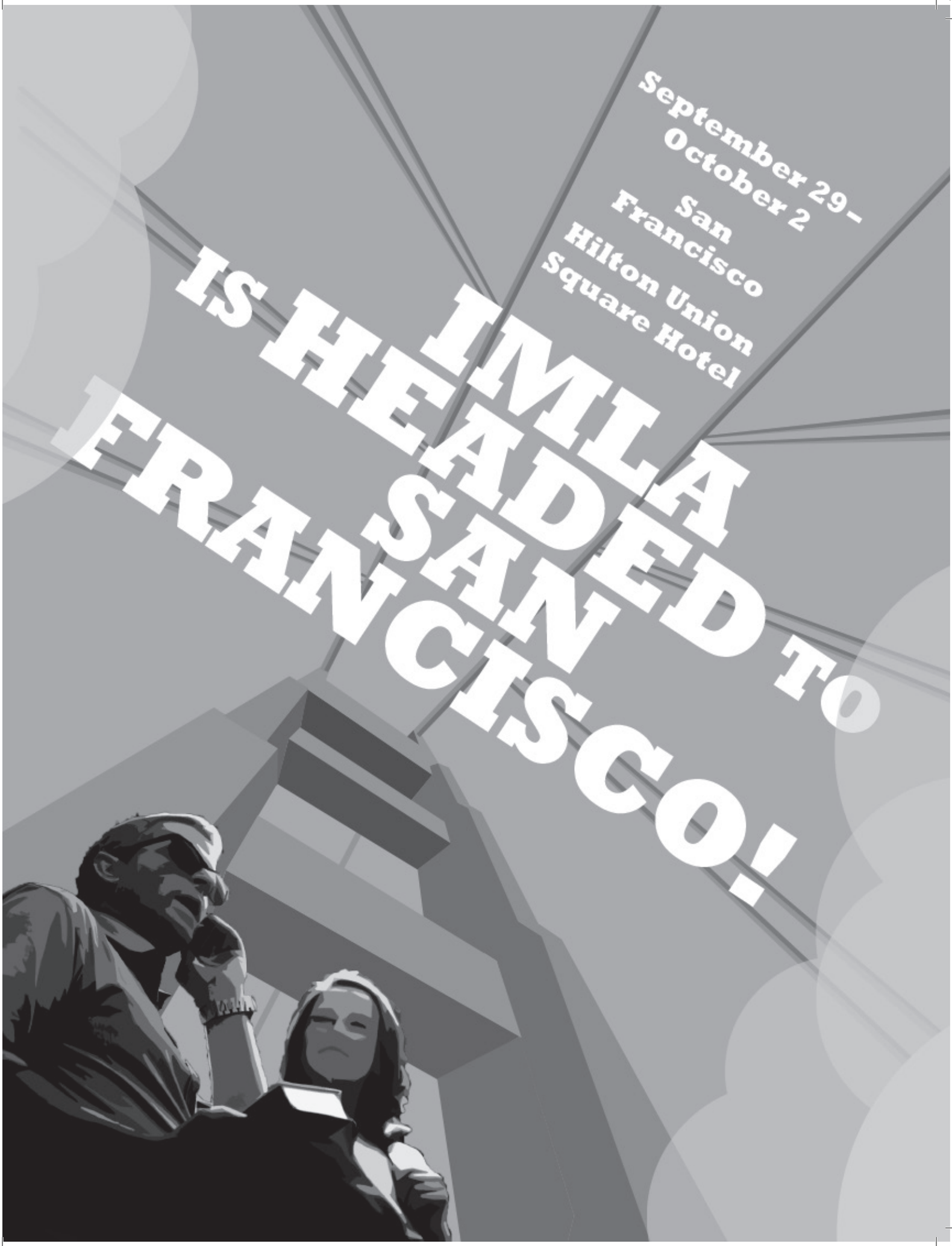
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WHAT TO LOOK FORWARD TO

Sunday, September 29 thru Wednesday, October 2- Programming to include Work Sessions and Concurrent Panel Discussions on the following:

NOTE—TENTATIVE SUBJECT LISTING AND CONTENT. Stay tuned to www.imla.org for the latest updates to our Program:

Social Media
Ethical and practical considerations of lawyers using Facebook, LinkedIn, Twitter, YouTube, blogs, etc.

First Amendment
Panhandling and vagrancy, legislative prayer, assembly, time/manner/place restrictions, etc.

Law Enforcement
Excessive force actions, qualified immunity, filming/recording issues, etc.

Electronic Records
Technical issues, confidentiality, etc.

Collective Bargaining
Ramifications of dealing with unions, etc.

Municipal Bonds
Disclosure requirements, municipality liability, SEC enforcement actions, MSRB decisions, etc.

Construction Contract Drafting Initiative (CCDI)
A-201 Model Contract, etc.

Medical Marijuana
Zoning and ordinances, cooperatives, dispensaries, *City of Riverside* decision, etc.

Adult Entertainment
Regulation, signage, zoning, etc.

Water Quality
EPA standards, citizen suits, etc.

Telecommunications
Cell tower leases, zoning, FCC shot clock issues, etc.

Employment
Hiring and firing, employee rights, etc.

Environmental
Remediation, damages, PCB's in municipal buildings, etc.

Taxation
Markeplace Fairness Act of 2013, taxation of Online Travel Companies, etc.

Construction Insurance
8 traps for the unwary, etc.

Drafting Ordinances
Practical advice on drafting effective regulations, etc.

Code Enforcement
Practice tips to avoid litigation while enforcing codes, etc.

Land Use
Zoning, "Big Box" retail, variances, eminent domain, etc.

Hot Topics
Other timely topics including Food Trucks, Tiny Houses, etc.

Ethics
Updates and practice insights, etc. (to meet CLE requirements)



SAN FRANCISCO HOTEL AND DISCOUNTS

IMLA has secured a block of sleeping rooms and a special room rate at the Hilton San Francisco Union Square Hotel, a first class facility, The IMLA room rate is $275 for a single or a double; plus applicable state and local taxes.
Reservations may be made by calling the Hilton San Francisco Union Square directly at (415) 771-1400 or the toll-free reservation number at 1-800-HILTONS. In order to receive the preferred room rate you must identify yourself as an International Municipal Lawyers Association (IMLA) 2013 Annual Conference attendee.

American Airlines and AVIS Car Rental Discount:

American Airlines offers a 5% discount off the lowest applicable fare. When you and your guests need to make airline reservations, call American Airlines at 1-800-433-1790 from anywhere in the United States or Canada and refer to your Promotion Code or go to www.AA.com, click on "Plan Travel," then "Flights" and then enter your information and insert the promotion code 9693BM in the appropriate box at the bottom of the page. This discount is valid for travel from September 25, 2013 to October 5, 2013 to San Francisco, CA. American Airlines partners with AVIS to offer you great car rental rates when you book with them.

AVIS also offers a separate discount for IMLA members if you are only interested in a rental car. Your Avis Worldwide Discount or AWD number is J867718 use this number to obtain your discount when calling 1 (800) 331-1600 to make a reservation or when visiting www.avis.com

Special offer - it's a real zinger!

If you are a City Attorney and you bring your County Attorney to the San Francisco Conference you will each get 3 free teleconferences from IMLA.

If we already have both your City and County Attorneys registered, then each bring an assistant with you to San Francisco and you will each get 3 free teleconferences from IMLA.

For further details on this offer and membership inquires, please e-mail IMLA's Membership Director, Jenny Ruhe, at jruhe@imla.org.



NOTICE TO IMLA MEMBERS:

Formal notice of two votes to be taken at IMLA's Upcoming Annual Conference in San Francisco (September 29-October 2, 2013):



1. Election of IMLA Board of Directors and Regional Vice Presidents: IMLA announces the 2013 Nominating Committee for Vacant Positions on the IMLA Board of Directors and for IMLA Regional Vice Presidents.

Open Positions: There are six current Board members whose terms are expiring and one additional open Board position where no incumbent can apply. (There are no expirations or vacancies among the Regional Vice Presidents and it is anticipated that all current Regional Vice Presidents will be reappointed by the nominating committee).

Nominating Committee Meeting: The Nominating Committee will be meeting on Monday morning, September 30, 2013 at the San Francisco Hilton at Union Square. PLEASE PLAN TO ATTEND THE MEETING IF YOU ARE INTERESTED IN SUBMITTING YOUR NAME FOR NOMINATION AS A DIRECTOR OR PROVIDE THE COMMITTEE WITH A COPY OF YOUR RESUME IN ADVANCE OF THE MEEETING.

Vote: Interviews will be conducted during the Annual Conference (if the individual seeking a Board position is in attendance). The Nominating Committee will recommend individuals to serve on the Board and they will be voted on by IMLA members at IMLA's General Business Meeting at the Annual Conference on Wednesday October 2, 2013.

Nominating Committee Members:
The Nominating Committee consists of:

Ms. Karen M. Kennard
City Attorney - Austin, Texas
301 W. 2nd Street
Austin, TX 78701
Phone: (512) 974-2268
Email: karen.kennard@austintexas.gov

Mr. Stephen M. Kemp
City Attorney, Peoria, Arizona
Office of the City Attorney
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Email: Steve.kemp@peoriaaz.gov

Mr. DeWitt (Mac) McCarley
City Attorney - Misenheimer, North Carolina
Partner, Parker Poe Adams & Bernstein
Three Wells Fargo Center
401 South Tryon Street, Suite 3000
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Phone: (704) 351-6757
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Mr. William C. Mathewson
General Counsel – Michigan Municipal League
P.O. Box 1487
1675 Green Road
Ann Arbor, MI 48106-1487
Phone: (734) 662-3246 (6305)
Email: wmathewson@mml.org

Bylaws: A current copy of IMLA's By Laws can be found on IMLA's web site at www.imla.org

Board Size and Composition: The Board consists of up to 25 members. The Executive Director, for the purposes of increasing diversity and regional representation on the Board or in IMLA's best interests, can recommend up to 5 members for appointment to the Board with the consent of a majority of the President, Vice-President, and Immediate Past President (The Executive Committee).

Terms of Office: Each Board member will have a 3 year term, with a 3 year renewal option. No Board member may serve more than 2 consecutive terms unless the first term was less than a full 3 years. Board members will have a staggered term format with a minimum of 4 Board positions open for election each year.

2. Vote to Amend IMLA By Laws: IMLA announces two proposed By Law amendments. The first amendment will create IMLA Canadian Provincial Chairs and the second will provide updating and housekeeping of the existing IMLA By Laws. The proposed amendments will be voted on by IMLA members at IMLA's General Business Meeting at the Annual Conference on Wednesday October 2, 2013. For additional information, including a copy of the proposed amendments, please contact IMLA at www.imla.org. Thank you.



Summer's Here Or, Code Enforcement Begins to Bloom

By David Wesner

Thankfully, spring finally came to my little neck of the woods in East-Central Illinois. And, with spring having sprung, we were thankful to avoid any late snowstorms (especially me, who still remembers the time it snowed on my birthday at the end of April). While everyone has a smile on their face as they greet the sunshine and warmer days, Code Enforcement officials have a different look ... trepidation. For those officials, early summer means the onslaught of typical code enforcement issues, not the least of which stem from spring cleaning.

While it is understandable to be concerned about how others perform their spring cleaning, code enforcement officials should consider their own version of spring cleaning. My municipality doesn't do it every year, but I do recommend a periodic review of the codes. And, what better time to perform such a task than during spring cleaning. I believe that such a review can be very beneficial. Not only is there an opportunity to determine if any codes should be updated, but it is also an opportunity for code enforcement officials to re-familiarize themselves with the codes that they enforce (especially those that they may not come across everyday). We are currently reviewing our codes and anticipate adopting the current versions of the building code and property maintenance codes. My city council members will comment on a regular basis with the famous line: "Why can't we do something about that?" So, we believe it is beneficial to review the codes to try and ensure they are up-to-date and capable of allowing necessary enforcement of the problems we all face in our communities.

One of the codes we recently reviewed and updated was the provision related to spring cleaning garbage set-outs. Historically, my municipality would pick up any and all amounts of garbage set out at the curb for pick-up. We felt it was important to our community to offer that service to residential customers in conjunction with the amount they paid for such service (which was well below what private haulers charge, and they would rarely pick up everything that might be set out by a customer). One of the bases for providing such service was a hope that it would cut down on illegal dumping and the many dumpsites we would find throughout our community. We seemed to find some success with providing such service. However, with our cutbacks in personnel over the last several years, we do not have enough staff to be able to offer this service in the same fashion. We have also moved away from three-person manual garbage trucks to single-person automatic trucks which require the use of particular toters. As such, we are no longer able to provide the same service in the same way, especially at no additional cost to the residents. An additional problem we were seeing was related to landlords. Once they saw the benefit of the service we were providing, we found landlords hauling large amounts of material from a location not served by the City to locations that were (obviously to avoid the cost to themselves of the private hauling they were required to have for their apartments). We found this occurring typically after an eviction of a tenant.

Currently, my municipality has personnel to staff one truck for special pick-ups. Our ordinance provides for three different types of special pick-ups. The first type is classified as a "large item collection". A "large item" is defined as an item that is larger than the toter and not capable of being broken down in order to fit inside a toter. A "large item collection" allows for up to three "large items" to be set out for pick-up. The ordinance allows for three such collections per year at no cost to the customer. If a fourth or subsequent such collection is necessary, the customer must call at least two working days in advance of their collection date and pay the required fee for such collection. The second type of special collection is classified as a "minor cleanup collection." This type of collection involves more than three "large items" but is not to exceed an area of five feet wide by ten feet long by three feet high. Customers are allowed one such collection per year at no charge. For a second or subsequent "minor cleanup collection", the customer must call in at least two working days in advance and pay the required fee for such type of collection. The third type of special collection is classified as a "major cleanup collection." This type of collection involves a set-out where the dimensions exceed those of a "minor cleanup collection". Customers are not entitled to any such pickup at no additional cost. Any time a customer needs such a pick-up, they are required to call in at least two working days before their scheduled pick-up and paying the required fee. Under a "minor cleanup collection" and a "major cleanup collection", the dimensions of the set-out are determined by the Director of the Public Works Department or his designee.

In conjunction with this change, we have a few other ordinances that could be used to deter illegal dumping to avoid returning to the days when that was rampant within the city. One

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Case Update

The following are recent cases of interest as provided by John Mascarin, Esq. Partner in the Toronto office of Aird & Berlis, LLP.

Elections – Compliance Audits

The respondent elector applied under s. 81(1) of the Municipal Elections Act, 1996 to request a compliance audit of the appellant candidate's election campaign finances from a by-election. The city's election campaign finances committee found no compelling and credible information to raise a reasonable probability of breach of the Municipal Elections Act, 1996 and denied the application. The respondent successfully appealed to the Ontario Court of Justice which, in dealing only with the issue of the appellant's recorded rent expenses, directed a compliance audit of the appellant's campaign finances. The candidate appealed the decision on the basis that judge erred in his application of the standard of review and in his interpretation of s. 66(3) of the statute as requiring an assessment of "fair market value" of the rent.

Held – The appeal was allowed.
Where a compliance audit committee has relevant expertise, and is independent of the political process, and where the procedure before the committee involves an opportunity for each side to present evidence and to make submissions, the decisions it is authorized to make will be reviewed on a reasonableness standard. Subsection 66(3) of the Municipal Elections Act, 1996 requires a consideration of the particular circumstances in which the goods or services in question are supplied. It was within the range of reasonable outcomes for the committee to have accepted the appellant's explanation, to conclude that there had not been an apparent violation of the Municipal Elections Act, 1996, and to refuse to appoint an auditor. The function of a compliance committee is to consider an application for the appointment of the auditor in the context of the information that is provided by the applicant as well as information that is provided by the candidate in response to the application. The decision of the committee was restored and the application for a compliance audit of the election finances of the appellant was dismissed. *Vezina v. Mississauga Election Campaign Finances Committee* (April 29, 2013), Doc. DC-12-0046-00, Rensburg J. (Ont. S.C.J.)

Refusal to Issue Building Permit Where Applicant Does Not Own Property

The respondent town's chief building official denied the appellant's application for a building permit on the basis that the appellant was not the owner of the parcel of land and as the legality of its deed was in question. The deed was created under a fraudulent scheme to evade the Planning Act. The appellant's application for an order compelling the respondent town's chief building official to issue a building permit was dismissed and he appealed.

Held – The appeal was dismissed.
Chief building officials have the authority and jurisdiction to refuse the issuance of building permits to individuals not entitled to apply for them. Individuals applying for building permits must meet the eligibility requirements for permits as set out in s. 8(1.1) of the Building Code Act, 1992. Only the owner of the land or an authorized agent is entitled to make an application for a building permit. An application for a building permit appeals must be determined on the basis of the state of law that was applicable at the time the initial application to the chief building official was made. An appeal must be determined on the same basis. *Matwijow v. Pelham (Town)* (April 30, 2013), Doc. DC-12-00000373-0000, Matlow, Aston, Swinton JJ. (Ont. Div. Ct.)

Adult Entertainment– City Authorized to Implement Licensing System

The appellant corporation operated an adult entertainment establishment in the respondent city. The corporation brought an application for orders declaring invalid certain parts of the city's adult live entertainment licensing by-law enacted under the Municipal Act, 2001. The corporation argued that the sections of the by-law requiring owners and operators of adult entertainment parlours to be licensed, and the sections requiring "entertainers" who perform live performances of a specified nature in such facilities to be licensed, exceeded the city's statuary licensing and by-law making authority. The applications judge dismissed the corporation's application regarding the validity of the licensing provisions. The corporation appealed.

Held – The appeal was dismissed.
The provisions of the adult live entertainment licensing by-law were validly passed by the respondent city in the exercise of its general licencing and by-law making powers under ss. 8(3) and 10 of the Municipal Act, 2001 to implement a system of licensing in connection with matters relating to health, safety and the well-being of any person in the municipality. Pursuant to s. 151(1) of the Municipal Act, 2001 the city also had express statutory authority to provide for a system of business licensing. The respondent city had the power to implement a licensing system concerning "adult entertainment establishments," as contemplated by s. 154 of the statute. However, the operator licensing requirements of the by-law applied only to persons operating premises for a commercial purpose. Furthermore, the term "entertainer" as defined in the by-law did not extend to anyone who performs a live performance of an adult nature at an adult entertainment parlour,

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CANADIAN SCHOLARSHIPS



Young Canadian Lawyers—Be IMLA's Guest at our San Francisco Conference September 29-October 2, 2013! IMLA's Canadian Scholarship Fund Will Underwrite Your Attendance – Here Are Our Rules:

Eligibility:

Eligibility is limited to lawyers who are practicing law in Canada; a significant component of whose practice in the 12 months preceding the date of their application has been in municipal law; and who are under 40 years of age as of December 31, 2013. Eligibility is not restricted to IMLA members.

Applications:

1. Those interested should apply in writing to IMLA by BOTH fax to (202) 785-0152 AND e-mail to: info@imla.org.
2. Applications must include the following information about the applicant:

a. name, address, e-mail address, fax number and telephone number;

b. details of the applicant's municipal law experience, including approximate percentage of the applicant's practice spent on municipal law;

c. a proposal of not less than 300 words describing the applicant's presentation on Canadian municipal law; and

d. a statement that the applicant will be under 40 years of age as of December 31, 2013; and a brief sample of the applicant's written work.

3. The applicant may also include other information that he or she feels will be helpful.
4. Deadline: The deadline for applications to be received is **5:00 pm EST on Monday July 8, 2013.**

Selection Process:

The successful applicant will be chosen by a panel of three IMLA Canadian Department members. IMLA will notify the successful applicant on or about July 31, 2013.

Applicant's Obligations:

The successful applicant must be available to attend IMLA's Conference and must prepare a paper and presentation (on the topic indicated in his or her application) for the Conference. The presentation time and date during the Conference will be scheduled by IMLA. The paper must be between 15 and 35 pages long, and is subject to the same requirements and deadlines as other IMLA speaker papers. Information on deadlines and speaker/paper requirements is available at the Conferences page at IMLA's website—www.imla.org.)

Expenses Covered:

The Canadian Scholarship Fund will cover the following costs:

1. the reasonable cost (coach or economy class) of airfare or other transportation;
2. the Conference registration fee; and
3. hotel accommodation (at IMLA Conference rates). The fund will NOT cover the cost of meals or any other expenses, and these remain the responsibility of the successful applicant.

Other:

IMLA can change or add to these rules as may be necessary or desirable. For further information on the Canadian Scholarship Program, please contact Veronica Kleffner at vkleffner@imla.org, or by calling (202) 466-5424, ext. 7111.



In God We Trust: The Supreme Court Takes on the Issue of Legislative Prayer

by Erich R. Eiselt, Assistant General Counsel

The United States of America was founded in a climate of thanks and obedience to the Almighty. Without affirming any particular denomination (and sharply rejecting the primacy of The Church in European governments), the Founding Fathers unabashedly invoked a higher power, starting with the first session of Congress.

That tradition played a seminal role in a leading Supreme Court case on legislative prayer, *Marsh v. Chambers*, 463 U.S.783 (1983). There, Nebraska's long-time practice of employing a Christian chaplain to provide invocations at legislative sessions was upheld, because the prayers were not overtly denominational, did not proselytize on behalf of a specific faith or criticize any other. Furthermore, the chaplain had removed all references to "Jesus" or "Christ" in the year before litigation began.

As documented in the excellent article on legislative prayer elsewhere in this issue of *Municipal Lawyer*, varying interpretations have been made of *Marsh* in jurisdictions around the country. Some, like the Ninth Circuit, have found in *Marsh* a reason to uphold "voluntary chaplain" arrangements, where a cornucopia of differing religious beliefs are welcomed behind the lectern. Others, like the Second Circuit, have been less hospitable to voluntary arrangements and look to the overall effect of a given prayer protocol, irrespective of its neutral intent. Virtually every Circuit has construed whether or not sectarian prayers are permissible, with widely divergent conclusions.

Now the Supreme Court will have the opportunity to refine its position. On May 20, it granted certiorari in *Town of Greece v. Galloway*, a Second Circuit opinion handed down in May 2012.

The Town of Greece, New York had followed the *Marsh* tradition for several decades, allowing local representatives to start the monthly five-member Town Board meetings with prayer. The Town ostensibly welcomed any sect or denomination and contacted religious entities within the Town's boundaries to make them aware of the prayer opportunity. But there were virtually no non-Christian places of worship in the Town--not a single synagogue, mosque or temple, and no non-Christian speakers were contacted. In practice, every prayer was delivered by a Christian, and the majority invoked the name of Jesus or Jesus Christ, and ended with "in Jesus' name."

In 2008, Town residents Susan Galloway (who is Jewish) and Linda Stephens (who is an atheist) brought suit against the Town in the form of a Section 1983 action, asserting that the prayer practice violated the Establishment Clause. Although they had each lived in the Town for more than 30 years, and could not identify a single non-Christian place of worship within Town boundaries, they argued that the prayer selection practice was either (1) overtly Christian in nature or (2) at a minimum, clearly sectarian, and constituted a "custom or policy" of excluding non-Christians. (Publicity surrounding their complaint subsequently led to members of the Wicca, Jewish and Ba'hai faiths providing a small number of Town Board prayers).

The Western District of New York had held for the Town (*Galloway v. Town of Greece*, 732 F. Supp. 2d 195 (W.D.N.Y. 2010). It found that, where the prayer forum had been rotated among voluntary speakers, no volunteer had been rejected, the Town did not interfere in the content of prayers, and the prayers did not proselytize or demean, the process was consistent with *Marsh*—notwithstanding references to "Jesus."

The Second Circuit disagreed, reversing and remanding. Noting that the legislative prayer issue was a matter of first impression before it, the Circuit Court acknowledged the seminal role that *Marsh* must play in any such case.

But the Second Circuit then pointed to *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 583 (1989). There, the Court had found *Marsh's* tradition-based paradigm to be insufficient when applied to a public crèche display: "However history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed."(492 U.S. at 603).

Assessing the Town's practice in its totality, the Circuit Court found little randomness or openness in the prayer program. The Town essentially sought out only Christian speakers, resulting on an overwhelmingly Christian tone to its public meetings. Out of 121 prayers delivered between 1999 and 2010, all but four were Christian, and fully two-thirds had specifically referenced "Jesus," "Christ" or incorporated some other specifically Christian symbol or dogma. This did not comport with *Marsh* and violated the First Amendment: "We conclude, on the record before us, that the town's prayer practice must be viewed as an endorsement of a particular religious viewpoint."

The Second Circuit did not ascribe "any animus" to the Town's leaders, and did not state that a single denominational prayer, standing alone, would be constitutionally suspect. But using a "totality of the circumstances" test, the Town's scheme was impermissible.

The holding in *Town of Greece* appeared to be in direct conflict with a Ninth Circuit opinion rendered earlier this year (*Rubin v City of Lancaster*, no. 11-56318 (9th Cir. March 26, 2013)), which upheld

a "voluntary legislative prayer" scheme even though it resulted in an overwhelming percentage of Christian invocations.

This brings the country and the Supreme Court to the crux of the matter: is a legislative prayer process that does not intentionally discriminate in favor of a given sect—but nevertheless results in a near-total dominion of the prayer content by a single denomination, including specific sectarian references permissible under the Establishment Clause? A loose analogy would seem to lie in "facial" versus "as applied" analyses of other statutes and policies.-

Question Presented: The specific issue before the Supreme Court will be: "Whether the court of appeals erred in holding that a legislative prayer practice violates the Establishment Clause notwithstanding the absence of discrimination in the selection of prayer-givers or forbidden exploitation of the prayer opportunity."

The Court will consider the matter during its October 2013 Term.

***Town of Greece v. Galloway*, No. 10-3635 (2d Cir. May 17, 2012) cert granted (U.S. May 20, 2013) (No. 12-696).**

The (Continuing) Rise of Executive Power: Agencies Have Authority to Determine Their Own Jurisdiction Under *Chevron*

City of Arlington examined whether an administrative agency (in this case the Federal Communications Commission (FCC)) may determine its own statutory authority. A trade association of wireless providers (CTIA) had petitioned the FCC for an interpretation of provisions of the Telecommunications Act of 1996 (Act). The Act limits the ability of state and local governments to impede the establishment of cell towers in their communities. It specifically requires that localities "shall act . . . within a reasonable period of time" on requests to construct or modify cell towers. 47 U.S.C. § 332(c)(7)(B)(ii).

In responding to the CTIA petition, the FCC had issued a Declaratory Ruling which provided time periods in which states and localities must respond to wireless facility siting applications.

Arlington and San Antonio, Texas (Cities) challenged the FCC's authority to issue the time frames. They argued that because Congress had not clearly delegated such authority in the Act, the FCC was overstepping its jurisdictional bounds.

The Fifth Circuit had applied *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) to assess the FCC's interpretation of the Act. Under *Chevron*, if a court determines that Congressional intent is clear from the wording of a statute, the court's task is simply to assess whether the agency has complied with that expressed intent. And where a statute is not clear, *Chevron* directs that courts should defer to the agency's interpretation of the law, so long as that construction is permissible—even if the court might have interpreted the statute differently.

What had not yet been settled until *City of Arlington* was whether *Chevron* allowed an agency to determine its own jurisdiction under a statute. The FCC and CTIA argued that *Chevron* did give the agency such authority. The Cities urged *de novo* consideration of the jurisdictional question, saying that *Chevron's* scope was more circumscribed. Circuit courts had split on the issue, prompting the Supreme Court to grant certiorari.

The Court agreed with the FCC and affirmed the Fifth Circuit decision that the *Chevron* framework applied and required deference to the agency's interpretation of the Act, and rejected the argument that "jurisdictional" questions were separate from the generalized *Chevron* parameters. Writing for a 6 to 3 majority, Justice Scalia discounted the Cities' argument that "jurisdictional" issues were a discrete species: "[T]he distinction between 'jurisdictional' and 'nonjurisdictional' interpretations is a mirage. No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*." He provided the example of a hypothetical statute, a "Common Carrier Act," written in two versions with minor variations in "jurisdictional" wording; the Cities' approach would lead to the illogical result that an agency had authority to construe the statute in one instance but not in the other.

IMLA had provided a brief as intervenor in support of the Cities' position, propounding that "jurisdictional issues are the *who, what, where* and *when* of regulatory power: which subject matters may an agency regulate and under what conditions." Justice Scalia specifically referenced the IMLA brief but disagreed, finding that each of these elements could also arise when an agency's jurisdiction was clearly established and it was simply considering the *application* of a statute. "In sum," said Scalia "judges should not waste their time in the mental acrobatics needed to decide whether an agency's interpretation of a statute is "jurisdictional" or "nonjurisdictional."

The majority's concern extended beyond the relatively narrow issue at hand. Justice Scalia posited that if courts must determine, *de novo*, the question of an agency's "jurisdiction," the entire *Chevron* architecture would be at risk; and the judiciary would be inserting itself into a huge swathe of legislatively-defined and delegated authority.

Chief Justice Roberts disagreed, joined with justices Kennedy and Alito. He viewed the majority as undermining a critical function of the judiciary and facilitating a massive land-grab by the executive branch. "My disagreement with the Court is fundamental. It is also easily expressed. A court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference." He pointed to a continuing unbridled expansion of administrative power (citing Congress's launching 50 new agencies in the last 15 years) and the imbalance it posed in our constitutional system, and cited the bedrock principle declared in *Marbury v. Madison* that "It is emphatically the province and duty of the judicial department to say what the law is." Noting that an agency's interpretative authority derives legitimacy from a delegation of power by the Legislative branch to the Executive, he wrote "Our duty to police the boundary between the Legislature and the Executive is as critical as our duty to respect that between the Judiciary and the Executive." He referenced a line of cases where the Court, applying *Chevron*, had found that an agency did not have authority to take proposed action.

NOTE - IMLA Intervenor Brief: As referenced above, Paul Clement's excellent brief for IMLA as intervenor was quoted in the Court's opinion. His arguments were paralleled by the Chief Justice's but in this instance did not command a majority of the Court.

***City of Arlington v. FCC*, No. 11-1545 (U.S. May 20, 2013).**

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CASES



by Erich R. Eiselt, Assistant General Counsel

Excessive Force: "Possibility of Acceleration" Justifies Close-Range Shooting of Driver By Police Officer

Officers on the Anaheim, California Police Department noticed a van being driven erratically. They checked the van's plates, found that it had been involved in a prior narcotics stop and pulled the vehicle over after it continued to weave in its lane.

As two officers approached, the driver (Gonzalez) appeared to be hiding contraband in his clenched fist. He ignored orders to open his hands. One officer on the driver's side began hitting Gonzalez's arm with a flashlight. When Gonzalez moved one hand towards his mouth while reaching down below the seat with his other hand, one officer applied a carotid restraint (a "sleeper hold") to Gonzalez's neck while his partner entered the van on the passenger side and began punching Gonzalez's head and face.

Gonzalez attempted to put his vehicle in gear, and the passenger-side officer began hitting him in the head with his flashlight. The van lurched forward with the passenger-side officer still inside. He tried to knock the gearshift but Gonzalez slapped his hand away. As the vehicle began to accelerate, the officer shot Gonzalez in the head at close range without further warning, killing him. The officer testified that less than 10 seconds had elapsed and the vehicle had traveled 50 feet at most.

Gonzalez's father and daughter sued the officers and the City of Anaheim (City) under 42 U.S.C. § 1983 for violation of their Fourteenth Amendment right of familial association and of Gonzalez's Fourth Amendment right to be free from unreasonable and excessive force.

The district court granted summary judgment for the City, holding that the force used throughout the encounter was reasonable; the officers' conduct did not violate plaintiffs' Fourteenth Amendment rights.

On appeal Gonzalez's representatives again alleged that the officers used excessive force in hitting Gonzalez with their flashlights, using a carotid restraint and finally shooting Gonzalez in the head at close range.

Under the Fourth Amendment, police may use only such force as is "objectively reasonable in light of the facts and circumstances confronting them." *Graham v. Connor,* 490 U.S. 386, 397 (1989) (internal quotation marks omitted). *Graham* provides three factors to be considered when evaluating the need for force: (1) the severity of the crime, (2) whether the suspect posed an immediate threat to the officers or others, and (3) whether the suspect was actively resisting arrest. *Id.* at 396.

The Ninth Circuit analyzed each element of the alleged excessive force.

1. The flashlight strike to Gonzalez's arms: Officers may use a reasonable level of force to gain compliance from a resisting suspect who poses a minor threat; the initial flashlight strike was reasonable given Gonzalez's refusal to listen to the officers' demands to open his hands.

2. The carotid restraint, the punches to Gonzalez's face, and the flashlight strikes to Gonzalez's head: The court applied the three *Graham* factors:

- The first factor, the severity of the crime, weighed in the officers' favor; they had reason to believe the suspect had committed a "felony-grade offense."
- The second factor, the immediacy of the threat, also weighed in favor of the officers, because Gonzalez was reaching down between the door and the seat with his left hand, potentially locating a weapon.
- The last *Graham* factor was whether Gonzalez was "actively resisting arrest or attempting to evade arrest by flight." Here again, the balance weighed in favor of the officers: When Gonzalez attempted to put the van in drive, his active resistance became attempted flight.

3. The shot to Gonzalez's head. Case law supported the proposition that, as an unbuckled passenger in a fast-moving vehicle driven by an escaping suspect, the officer had "probable cause to believe that the suspect pose[d] a significant threat of death or serious physical injury to the officer or others." *Tennessee v. Garner*, 471 U.S 1, 3 (1985); (various additional cases were cited).

Plaintiffs countered that the officers' testimony that the van traveled only 50 feet indicated that the vehicle was traveling so slowly that it could not have been a threat.

The court found that the "possibility of acceleration" created a threat to the officer's life. The vehicle's tires had squealed as Gonzalez "floored" it, and the officer had no duty to await further risk before taking action: "absolute certainty of harm need not precede an act of self-protection" (citation omitted).

Gonzalez's representatives also alleged that the officers' conduct violated their due process right to familial association. The substantive due process claim required that they show that the officers' conduct "shock[ed] the conscience." Because the officers had no time to deliberate, plaintiffs had to show that the officers had a "purpose to harm" Gonzalez for reasons unrelated to legitimate law enforcement objectives. This they could not do. The Ninth Circuit upheld the district court's decision, finding that the officers had not used excessive force.

Circuit Judge Clifton dissented: "'Deadly force cases pose a particularly difficult problem, because the officer defendant is often the only surviving eyewitness.' This is one of those cases. Rafael Gonzalez is dead and cannot speak for himself."

He saw a "glaring inconsistency" in the record, and could not accept the majority's conclusion that the officer was "an unbuckled passenger in a rapidly accelerating van with an escaping and noncompliant suspect." To the contrary, the elements

of the story—the vehicle's speed, the time elapsed and the distance traveled—were not physically reconcilable. The fact that the vehicle was a 1991 Mazda MPV van made claims about rapid acceleration within five seconds highly suspect.

He felt strongly that this record clearly called out for more analysis by a jury and that summary judgment for defendants was completely unwarranted.

Gonzalez v. City of Anaheim, No. 11-56360 (9th Cir. May 13, 2013).

Student Apartments Are Not "Lodging Houses" In Worcester, Massachusetts

In Worcester, Massachusetts, like many municipalities across the country, local residents own multi-bedroom units they rent to college students. In common parlance these units – multiple bedrooms with a common kitchen, living area, bathroom, and, potentially, a dining room – are called apartments. In 2009 the City of Worcester determined the defendants, who rented out such multi-bedroom units to students, were operating "lodging houses" in violation of Massachusetts' WWI-era Lodging House Act. The City issued citations ordering the owners to reduce the number of occupants from four unrelated adults (the college students) to no more than three unrelated adults in any one unit to comply with the Act.

The district judge agreed with the City that the units were "lodgings" as defined in the Act and issued preliminary injunctions. When the defendants did not comply with the injunctions, the district judge issued civil contempt orders. While the case was playing out in court, the student-tenants were in the midst of final exams and refused to leave voluntarily.

The Appeals Court affirmed the district court judgment, and denied the defendants subsequent petition for rehearing.

The Massachusetts Supreme Court reversed, holding the units are not "lodgings."

The City argued the buildings at issue were lodging houses, defined in the Act as "a house where lodgings are let to four or more persons not within second degree of kindred to the person conducting it, " and that the dwelling units were "lodgings," not apartments. The property owners countered that the City's view essentially ignored the common understanding of "apartment buildings" and the historical and legal difference between lodging houses and apartment buildings.

The Massachusetts Supreme Court wholeheartedly agreed with the property owners that there is a difference between a lodging house and an apartment. First, the interests of tenants and of lodgers are different: tenants have exclusive control and the right to occupy an apartment, thereby acquiring a property interest; while lodge owners retain legal possession and lodgers acquire only a contractual interest. Second, both the Massachusetts sanitary code and fire safety code demonstrate the legislature's intent to distinguish between the two in the statutory scheme. And the licensing requirements for lodging house owners do not apply to apartment building owners.

Finally, the court determined that, to construe lodgings as the City suggested would lead to absurd results and foster selective enforcement. For example, under Worcester's interpretation, a rental unit would change regulatory category depending solely on the relationship of the occupants to one another . The possibility of selective enforcement was evident in that the City "acknowledged that, under its interpretation of 'lodgings,' the Lodging House Act . . . would apply if a new baby were added to a family of three, but asserted [it] would not enforce the statutory provisions in those circumstances."

In the end, the Massachusetts Supreme Court appreciated that the City wanted to protect student safety, but said "such concerns are better addressed through enforcement of applicable zoning ordinances and provisions of the sanitary and fire safety codes" rather than trying to apply such an arcane law.

City of Worcester v. College Hill Properties, SJC-11166 (Mass. May 15, 2013). **ML**

Supreme Court *Cont'd from page 31*

DNA Samples May Be Taken From An Arrestee Without A Warrant or Probable Cause

In 2009 Alonzo King was arrested in Wicomico County, Maryland on first-and second-degree assault charges for menacing a group of people with a shotgun. On the authority of the Maryland DNA Collection Act (Act), police took a swab of saliva from King's cheek and ran a DNA test. It showed that King had committed a rape in Salisbury Maryland in 2003. He was convicted and sentenced to life without parole.

The Court of Appeals of Maryland reversed the rape conviction on the grounds that the cheek swab constituted an unlawful search. Because various federal and state courts had reached differing conclusions about the constitutionality of taking DNA samples from people arrested for felonies but not yet convicted, the Supreme Court granted certiorari.

On June 3, 2013 the Court reversed by a narrow 5-4 margin, with Justice Kennedy writing an opinion upholding the search and the conviction.

The majority acknowledged that swabbing the inside of an arrestee's mouth clearly constitutes a "search." The relevant Fourth Amendment question was whether such a search was "reasonable," based upon balancing governmental interests against the individual's privacy rights.

Justice Kennedy produced an expansive list of factors weighing in favor of the government. The legitimacy of searching arrestees for weapons and contraband was already beyond question; it served obvious safety imperatives. Here, the taking and analysis of DNA further served the legitimate governmental interest in making safe and effective arrests. First, it clearly identified the person in custody. Second, it linked to databases documenting the arrestee's prior criminal behavior, revealing dangers to the arresting authorities. Third, the prior criminal record provided insights about the arrestee's flight risk. Fourth, it might predict further violent behavior, including retaliation, which endangered other members of the public and should inform incarceration decisions.

Finally, by using DNA to apprehend actual offenders, wrongly-arrested suspects would be freed.

In contrast, the privacy expectations of the individual who had been arrested for a felony based on probable cause were significantly reduced. Touching the inside of the arrestee's cheek with a buccal swab was not excessively intrusive under those circumstances. The majority traced the use by police of technology over the years, including photographs and fingerprints of wanted criminals; DNA was

Continued on page 39

ment and laws appointing congressional chaplains, the Court has itself acknowledged the fact that "historical patterns cannot justify contemporary violations of constitutional guarantees . . . ."[130] The First Amendment stands as a barrier to government combination with religious institutions.[131] By choosing prayer, government is involved with religion and creates divisiveness, violating the Amendment, history notwithstanding.

Besides failing a textual and purpose-oriented analysis of the First Amendment, *Marsh* also fails the Court's earlier Establishment Clause test, *Lemon*.[132] *Lemon* requires a secular purpose, that the action involved not have the primary effect of advancing or inhibiting religion, and that there be no excessive government entanglement with religion.[133] Justice Brennan's dissent in *Marsh* makes clear how legislative prayer fails all three prongs.[134] The purpose of such prayer is "preeminently religious," as invoking divine guidance is "nothing but a religious act."[135] Because legislative prayer places indirect coercive pressure upon minorities to conform and because, even more importantly, it links religious belief to the "power and prestige of the State," legislative prayer's primary effect is to advance religion.[136] Finally, there is excessive entanglement in both the selection of suitable clergy to deliver prayers and in the "divisive political potential" of passing laws regarding prayer.[137]

Even accepting *Marsh*, *arguendo*, its foundation may no longer be valid. The Court said the legislative prayer exception reflected a part of our social fabric, "a tolerable acknowledgment of beliefs widely held among the people of this country."[138] Perhaps that is no longer the case. The Pew Forum U.S. Religious Landscape Survey concluded that religious affiliation is "both very diverse and extremely fluid."[139] 16.1% of all Americans are unaffiliated with any faith, while one-in-four people ages 18-29 are not affiliated with any particular religion.[140] The unaffiliated category experienced the greatest rate of growth.[141] Catholicism experienced the greatest loss in affiliation and only 51% of Americans continue to identify as Protestant.[142] This indicates an increasing lack of religiosity among Americans and can perhaps imply a growing secularization. Moreover, the survey indicates at least eight distinct religions in its listing, such as Christianity or Buddhism, along with "other" religions, and numerous sects within each designated religion, such as Sunni and Shia Muslims.[143]

The picture this paints is one of exceeding religious diversity. What it means is that it may no longer be true that legislative prayer reflects tolerable acknowledgement of widely held beliefs. Legislative prayer then runs into Justice O'Connor's endorsement concerns.[144] To the many believers who do not subscribe to a Judeo-Christian faith, opening legislative sessions with "nonsectarian" prayers in the Judeo-Christian tradition would send a message that they are outsiders, disfavored in the political community based upon their religion. That is unacceptable under the First Amendment. America's religious diversity emphasizes that there may truly be no such thing as a nonsectarian prayer. Thus as the United States continues to experience religious affiliation shifts, it may be that the Supreme Court could reconsider *Marsh* and hold that there is no principled way to continue a legislative prayer practice in light of the endorsement message that it sends to different religious adherents. Alternatively, courts may view the religious diversity and find that legislative prayers fail *Marsh* because they advance or put down certain faiths, even if they are only generically Judeo-Christian.

Local governments would do well to heed the increasing religious diversity of America and note the tension and incompatibility between an amendment designed to create separation between church and state and a practice of religion not followed by all. Part of the reason there is so much lower-level litigation over local government prayers is because those suing feel like outsiders. They are Wiccans facing a Judeo-Christian prayer[145] or non-Christians facing distinctly Christian prayers.[146] The Establishment Clause stands as a guardian against such religious divisiveness in society.[147]

Conclusion

As a matter of legal advice to a local government reviewing its legislative prayer policy or considering the adoption of one, such prayer is constitutional under the First Amendment pursuant to *Marsh v. Chambers*. This prayer must not advance one faith or put down another, nor can it proselytize. A generic and nondenominational invocation would be a proper prayer under current constitutional jurisprudence. Prayers consistently invoking tenets of Christianity would likely be impermissible.

Besides the legal question however, local governments must think carefully about the political and social implications of legislative prayer. Prayer creates favored and disfavored persons depending on their religion. It places religion in the sphere of government. Crafting an appropriately nondenominational prayer may be next to impossible, inviting litigation because of the wide and increasing religious diversity of America. Local governments should move away from the use of prayer in legislative sessions. This would restore the proper balance of our constitutional design, one that Thomas Jefferson once described as placing religion "solely between Man & his G-d... building a wall of separation between Church & State."[148]

Notes

1. U.S. Const. amend. I.
2. *E.g.,* Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1 (1947).
3. Michael W. McConnell, John H. Garvey & Thomas C. Berg, Religion and the Constitution 15 (3d ed. 2011).
4. *Id.* at 15-17.
5. *Id.* at 17.
6. *Everson,* 330 U.S. at 8-9.
7. *Id.* at 11-12.
8. McConnell, *supra note* 3, at 48-49.
9. *Id.* at 50.
10. Id. at 51.
11. *Id.*
12. *Id.*
13. *Id.* at 52.
14. *Id.*
15. *Id.* at 52-53.
16. *Id.* at 50.
17. *Id.* at 56-57.
18. *Id.* at 58-59.
19. U.S. Const. amend. I.
20. U.S. Const. amend. XIV, § 1.

21. Murdock v. Pennsylvania, 319 U.S. 105(1943).
22. *Id.* at 108.
23. *Everson,* 330 U.S. at 8 (citation omitted).
24. Wallace v. Jaffree, 472 U.S. 38, 48-49 (1985).
25. Lemon v. Kurtzman, 403 U.S. 602 (1971).
26. *Id.*, (citing Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).
27. *Lemon*, 403 U.S. at 612-13.
28. *Id.* at 612.
29. *Id.* at 607-10.
30. *Id.* at 613.
31. *Id.* at 619-20.
32. Lynch v. Donnelly, 465 U.S. 668, 671 (1984).
33. *See id.* at 685.
34. *Id.* at 687-88.
35. *Id.* at 687.
36. *Id.* at 688.
37. *Id.*
38. *Id.* at 689.
39. *Id.* at 690.
40. *Id.*
41. *Id.* at 690.
42. *Id.* at 694.
43. Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 578-79 (1989).
44. *Id.* at 592.
45. *Id.* at 592-94 (internal quotation marks and citations omitted).
46. Marsh v. Chambers, 463 U.S. 783, 784-85 (1983).
47. *See id.*
48. *Id.* at 785.
49. *Marsh,* 463 U.S. at 784-86; *Lemon,* 403 U.S. at 606.
50. *See Marsh*, 463 U.S. at 786-92.
51. *Id.* at 786.
52. *Id.* at 787-88.
53. *Id.* at 788.
54. *Id.*
55. *Id.*
56. *Id.* at 790-91.
57. *Id.* at 792.
58. *Id.*
59. *Id.* at 792-93.
60. *Id.* at 793-94.
61. *Id. at* 794-95.
62. *Id.* at 795.
63. *Id.* at 796.
64. *Id.* at 797.
65. *Id.*
66. *Id.*
67. *Id.* at 798.
68. *Id.* at 798-99.
69. *See id.* at 802-03.
70. *See id.* at 794-95.
71. *Cnty. of Allegheny,* 492 U.S. at 603.
72. *Id.*
73. *Id.* at 302 n.8.
74. *Id.* at 297.
75. *Id.* at 298-300.
76. Simpson v. Chesterfield Cnty. Bd. of Supervisors, 404 F.3d 277, 278-79 (4th Cir. 2005).
77. *Id.* at 283-84.
78. *See id.* at 284.
79. *See id.* at 279-80.
80. *See id.* at 279.
81. *Id.* at 284.
82. Joyner v. Forsyth Cnty, 653 F.3d 341, 343, 350 (4th Cir. 2011).
83. *Id.* at 342.
84. *Id.* at 344.
85. *Id.* at 346-47.
86. *Id.* at 349.
87. *Id.* at 350, 353-54.
88. Mullin v. Sussex Cnty., 861 F. Supp. 2d 411, 426-27 (D. Del. 2012).
89. *Id.* at 415-16.
90. *Id.* at 420.
91. *Id.* at 429.
92. *See* Jones v. Hamilton Cnty., 2012 WL 3763963, at *1-2, 17 (E.D. Tenn. 2012).
93. Galloway v. Town of Greece, 681 F.3d 20, 29 (2d Cir. 2012).
94. *Galloway,* 681 F.3d at 29.
95. *Id.* at 30.
96. *Id.* at 28-29.
97. *Id.* at 29.
98. *Id.* at 30.
99. *Id.* at 23.
100. *Id.* at 24.
101. *Id.*
102. *Id.* at 30-33.
103. Rubin v. City of Lancaster, 710 F.3d at 1087, at 1089-90 (9th Cir. 2013).
104. *See id.* at 1092-95.
105. *Id.* at 1094.
106. *Id.* at 1095.
107. *See, e.g.,* Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203 (1963); *see also* Lee v. Weisman, 505 U.S. 577, 592 (1992).
108. *Lee,* 505 U.S at 580.
109. *Id.* at 581.
110. *Id.* at 586.
111. *Id.* at 587.
112. *Id.* at 587-88.
113. *See id. at* 589.
114. *Id.* at 590.
115. *See id.* at 593.
116. *Id.* at 596-97.
117. Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 377 (6th Cir. 1999).
118. *Id.* at 378.
119. *Id.*
120. *Id.* at 379.
121. *Id.*
122. *Id.* at 383.
123. *Id.* at 385.
124. *Doe,* 653 F.3d at 275, 278-82.
125. *Id.* at 290.
126. *Id.* at 283-84.
127. U.S. CONST. amend. I.
128. *Respecting Definition,* MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/respecting?show=0&t=1365182835 (last visited Apr. 5, 2013).
129. *Establish DEFINITION*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/establishing (last visited Apr. 5, 2013).
130. Marsh v. Chambers, 463 U.S. 783, 790 (1983).
131. *See* MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, RELIGION AND THE CONSTITUTION 51 (3d ed. 2011).
132. *Marsh,* 463 U.S. at 796.
133. *Lemon*, 403 U.S. at 612.
134. *Marsh,* 463 U.S. at 797.
135. *Id.*
136. *Id.* at 798.
137. *Id.* at 798-800.
138. *Id.* at 792.
139. THE PEW FORUM ON RELIGION & PUBLIC LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY RELIGIOUS AFFILIATION: DIVERSE AND DYNAMIC 5 (2008).
140. *Id.*
141. *Id.*
142. *Id. at 5-6.*
143. *Id. at 5.*
144. *See* Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).
145. *E.g.,* Simpson v. Chesterfield Cnty. Bd. of Supervisors, 404 F.3d 277, 278-79 (4th Cir. 2005).
146. *E.g.,* Galloway v. Town of Greece, 681 F.3d 20, 29 (2d Cir. 2012).
147. Van Orden v. Perry, 545 U.S. 677, 704 (2005) (Breyer, J., concurring).
148. Letter from Thomas Jefferson to the Danbury Baptists (Jan. 1, 1802) (on file with the Library of Congress). ML

ListServ *Cont'd from page 22*

The old power centers of brick and mortar are being torn down again, but this time it's not the vandal hordes at the walls of Rome. In the midst of the chaos, a consensus in the land that the individual can still receive equal justice under law would be as effective a stabilizing element as any I can conceive.

The pursuit of happiness ain't what it used to be, and it is going to take some very dedicated, socially-conscious, diligent lawyers, particularly in the public sector, to continue the world's greatest experiment in government of the people, by the people and for the people, as we all go where no one has gone before. ML

Religious Workplace *Cont'd from page 19*

gious harassment, but requiring a religious employee to cease proselytizing may result in liability for failure to reasonably accommodate the employee's beliefs.

What kind of guidance is available to deal with workplace proselytizing? Although the law is developing in this area, some guidance is available. An employee has a right to engage in religious conduct to the extent that it is not an undue hardship on the employer. Harassing another employee is likely to be an undue hardship. Recall, however, that harassment is a fairly high - but not impossible - standard.

So, while the line between permissible proselytizing and workplace harassment is blurry, important factors that bear on the analysis include:

- the pervasiveness of the proselytizing;
- its impact on coworkers and work performance (including profitability) and;
- the capacity and willingness of the employer to take steps to accommodate the aggrieved parties, such as by moving the proselytizing employee and the offended employee to different work stations.

May a company hire a "corporate chaplain?" Some companies hire corporate chaplains to serve their workplace. This practice is not inherently unlawful and may even prove beneficial. Although the courts have not weighed in on this subject, all of the above employment law rules likely apply to such a situation:

- An employer cannot lawfully require an employee to engage in religious activity, and so employers must take care that no employee is required or coerced into engaging in religious activity as a term or condition of employment.
- Evangelism (especially sustained evangelism) by a minister may constitute or serve as evidence of- a hostile work environment.
- An employee is likely to be entitled to opt out of meeting with the minister if her religious beliefs prohibit it.

May a company allow prayer groups? Yes, so long as participation in the prayer group is voluntary and that there are no employment-related consequences to participating or not participating. For example, if access to a supervisor who is involved in a prayer group leads to preferred assignments for an employee, other employees may have a claim for discrimination. If an employer insists on an employee's participation, that company may be liable for quid pro quo discrimination, as well. Finally, if pressure to attend is applied by supervisors or co-workers, an employer may be liable for a hostile work environment.

May an employee post posters, bible quotes, or other religious slogans? Employees do have certain rights to express their religious views in the workplace. For example, most employers will not be able to show that it would be an undue hardship to permit one employee to wear a yarmulke or another to display a cross in his or her private office. Title VII does not compel employers to accommodate employees' religious expression that could reasonably be perceived by patrons as an expression of the employer's views.[22] An employer can also restrict expression that disrupts operations or that is hostile or demeaning to customers or colleagues. [23]

Sample Scenarios

Scenario: A shipping company refused to hire a Jewish man as a driver because of his beard, which he wears for religious purposes. The company required him to either shave his beard or apply for an "inside," lower paying position that would not have contact with the public.

Answer: Title VII of the Civil Rights Act of 1964 requires employers to make reasonable accommodations to employees' and applicants' sincerely held religious beliefs as long as this does not pose an undue hardship. If the company cannot show why a beard is a hardship, it must hire the man as a driver. Notably, the company may not argue that its customers would prefer non-bearded drivers as "customer preference" is not a valid basis for a hardship.

Scenario: A restaurant chain fires a server because he has small, quarter-inch wide ring of tattoos on his wrist. He wears these tattoos as a part of his sincerely held belief that his faith, the Kemetic religion, requires them. Once he explained his religion to management, he was fired. At a corporate meeting, management stated that the company has "Christian" values and that the company seeks out "that all-American kid" from the suburbs for its server positions. The restaurant maintained that any change to its dress code – including prohibitions on tattoos -- would detract from its "wholesome image," and would thus be an undue hardship.

Answer: An employer is required to support its claims of undue hardship with more than hypothetical hardships based on unproven assumptions about image. Moreover, as noted above, customer preference is not a legitimate reason for not accommodating a religious need.

Scenario: An employer of a particular faith requires her employees to read passages from her preferred religious text out loud at company meetings, offers paid days off to attend religious gatherings, and works closely to help advance the careers those employees who adopt her faith.

Answer: An employee who refuses to participate in such activity must not be penalized An employer is not permitted to treat acceptance of religion or participation in religious rituals as a condition of employment, including

advancing the careers of adherents or providing benefits not open to non-adherents, such as paid days off.

Scenario: A co-worker occasionally teases a Muslim employee about her *hijab* (headscarf). Although the Muslim employee is offended and tells her colleague to stop, she continues to work productively and does not report it because the company has no reporting process in place. Later, a manager begins to constantly criticize her for wearing the *hijab*, and, as a consequence of his disapproval of her wearing it, moves her into a lower-paying back office position. In addition, in a fit of anger, he grabs at the *hijab* and tears it and knocks the employee down to the floor.

Answer: The company is probably not liable for a hostile work environment on the basis of the co-worker's actions. The harassment was neither severe or pervasive and did not effect her terms and conditions of employment. The manager's actions probably gives rise to a hostile work environment. The constant criticism plus the physical assault are both likely to meet the "severe or pervasive" test. Moreover, there was a clear adverse employment action (the move to the back office). The employer will not be able to avoid liability because there was an adverse employment action and there was no reporting mechanism.

Scenario: A co-worker refuses to sign a workplace pledge concerning tolerance of differences because he believes it is immoral and against God's word to tolerate homosexuals. Her manager orders him to sign it and he refuses. He fires him on the spot.

Answer: The employer has an obligation to determine whether his refusal to sign the pledge could be accommodated. By immediately firing him, the employer failed to determine if there was an accommodation available.

Scenario: An employee had a religious belief that required her to wear an anti-abortion button that showed a color photograph of an eighteen to twenty-week old fetus. The button caused disruptions in the workplace, and the employee's co-workers complained about the button. In response, the employer offered the employee three accommodations: (1) wear the button only in her cubicle; (2) cover the button while at work; or (3) wear a different button with the same message but without the photograph. When she refused these accommodations, she was terminated.

Answer: Title VII does not require an employer to allow an employee to impose her religious views on others. The employer is only required to reasonably accommodate an employee's religious views. In light of the workplace disruption and complaints, and given that the proposed accommodations allowed her religious expression, she was offered a reasonable accommodation and her refusal to accept them justified her termination.

NOTES

1. These statistics do not include monetary benefits obtained through litigation. See http://www.eeoc.gov/eeoc/statistics/enforcement/religion.cfm
2. What follows is meant to serve as a general guide about protections for religious rights provided by federal employment law. Importantly, state law may provide different protection for employees. Government employees - including members of the armed services - may also have different rights in the workplace than private employees. Title VII of the Civil Rights Act of 1964 only applies to employers with 15 or more employees; however, many state employment anti-discrimination statutes apply to employers with fewer employees.
3. See Section 702(a) of Title VII, 42 U.S.C. §2000e-1(a).
4. See Section 703(e)(2) of Title VII, 42 U.S.C. Sec. 2000e-2(e)(2).
5. According to the EEOC Compliance Manual, "[t]he exception applies only to those institutions whose "purpose and character are primarily religious" That determination is to be based on "[a]ll significant religious and secular characteristics" Although no one factor is dispositive, significant factors to consider that would indicate whether an entity is religious include: Do its articles of incorporation state a religious purpose; Are its day-to-day operations religious (e.g., are the services the entity performs, the product it produces, or the educational curriculum it provides directed toward propagation of the religion); Is it not-for-profit; [or] Is it affiliated with or supported by a church or other religious organization?" (Citations omitted). See U.S. Equal Employment Opportunity Commission, EEOC Compliance Manual, Section 12: Religious Discrimination, Directives Transmittal Number 915.003 (July 22, 2008), http://www.eeoc.gov/policy/docs/religion.html#_Toc203359493
6. Ansonia Board of Education v. Philbrook, 479 U.S. 60 (1986).
7. *See, e.g*, Buonanno v. AT&T Broadband, LLC, 313 F.Supp.2d 1069, 1083 (D.Colo. 2004); *and see* Peterson v Hewlett-Packard, 358 F.3d 599 (9th Cir. 2004).
8. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).
9. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993); Rex Shrum v. City of Coweta , 449 F.3d 1132 (10th Cir. 2006); FOP Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999), cert denied, 528 U.S. 817.
10. *FOP Newark Lodge No. 12*, *supra*.
11. The twenty states are Alabama, Alaska, Arizona, Connecticut, Florida, Idaho, Illinois, Indiana, Massachusetts, Minnesota, Missouri, New Mexico, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, Washington, and Wisconsin.
12. Garcetti v. Ceballos, 547 U.S. 410 (2006).
13. *Garcetti*, 547 U.S. 410; City of San Diego v. Roe, 543 U.S. 77 (2004); Pickering v. Board of Education of Township High School Dist. 205, 391 U.S. 563 (1968); Berry v. Department of Social Services, 447 F.3d 642 (9th Cir. 2006); Daniels v. City of Arlington, 246 F.3d 500 (5th Cir. 2001), rehearing, en banc, denied by, 254 F.3d 72, cert. denied, 534 U.S. 951.
14. Most courts use sex-based harassment as a model for handling religious-based harassment.
15. An adverse employment action is anything that affects the "compensation, terms, conditions, or privileges of employment" or that "deprive[s the employee] of employment opportunities or otherwise adversely affect his status as an employee." Section 703(a)(1) & (2) of

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Religious Workplace *Cont'd from page 37*

Title VII, 42 USC §2000e-2(a)(1) & (2).
16. Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993).
17. *See* Burlington Indus. v. Ellerth, 524 U.S. 742, 765 (1998); Faragher v. Boca Raton, 524 U.S. 775, 807 (1998).
18. *Harris,* 510 U.S. at 21.
19. See http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm
20. 548 U.S. 53 (2006) (held, the anti-retaliation protections of Title VII are not limited to actions and harms that are related to employment or occur at the workplace. Title VII's anti-retaliation protections extend to employer actions that would have been materially adverse to a reasonable employee or job applicant).
21. Clark County v. Breeden, 532 U.S. 268 (2001).
22. *E.g.,* Anderson v. U.S.F. Logistics (IMC), Inc., 274 F.3d 470, 476 (7th Cir. 2001).
23. Wilson v. U.S. West Communications, 58 F.3d 1337 (8th Cir. 1995) and Peterson v. Hewlett-Packard Co., 358 F.3d 599 (9th Cir. 2004). ML

Code Enforcement *Cont'd from page 27*

such ordinance provides that anyone hauling garbage or debris within the city must be licensed for such activity and follow certain guidelines. If I were a betting man, I would bet that no landlord or customer has such a license to haul garbage or debris away from their property to another location. The other ordinance that should be more of a deterrent is our vehicle seizure and impoundment ordinance. The offense of illegal dumping is one of the violations that will result in the seizure and impoundment of the vehicle.

As with any code enforcement ordinance or issue, we are hoping for compliance versus continual enforcement. Our community has come a long way in dealing with litter, garbage and related issues. Our citizens continue to comment that the City looks better now than it ever has. And, with periodically reviewing and updating our ordinances, we are hoping to continue that trend.

Happy Summer Everyone! ML

Federal *Cont'd from page 21*

9. *Id.; Forrester Research predicted in 2010 that the $250 billion number would be achieved by 2014, but even that forecast was overly conservative:* http://techcrunch.com/2010/03/08/forrester-forecast-online-retail-sales-will-grow-to-250-billion-by-2014/ (last accessed May 12, 2013)
10. N.Y. Tax Law §1101(b)(8)(vi)
11. http://www.boe.ca.gov/lawguides/business/current/btlg/vol1/sutr/1684.html (last accessed May 12, 2013); Cal. Rev. and Tax Code §6203, ch. 313 (6).
12. Overstock.com, Inc. v. New York State Dep't. of Taxation and Fin., no. 33 (N.Y. Mar. 28, 2013) http://www.nycourts.gov/ctapps/Decisions/2013/Mar13/33-34opn13-Decision.pdf (last accessed May 13, 2013)
13. http://www.cbiz.com/page.asp?pid=9111 (last accessed May 13, 2013)
14. A companion bill (H.R. 684), was introduced in the House in February 2013, also with bipartisan sponsorship: Republicans Steve Womack (R-Arkansas) and Kristi Noem (R-South Dakota) joined Democrats Jackie Speier (D-California), John Conyers (D-Michigan) and Peter Welch (D-Vermont).
15. S.743 113rd Cong. (2013); text at http://thomas.loc.gov/cgi-bin/query/D?c113:2:./temp/~c113dUmWNe: (last accessed May 13, 2013
16. National Bellas Hess v. Department of Revenue of Ill., 386 U.S. 753, at 759-60 (1967).
17. http://www.marketplacefairness.org/what-is-the-marketplace-fairness-act/ (last accessed May 10, 2013)
18. http://www.streamlinedsalestax.org/uploads/downloads/Archive/SSUTA/SSUTA%20As%20Amended%205-24-12.pdf (last accessed May 13, 2013)
19. Those states include Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming.
20. http://www.forbes.com/sites/peterferrara/2013/05/02/overreaching-internet-sales-tax-is-obamas-calculated-deception-of-gullible-voters/ (last accessed May 11, 2013) ML

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but only to those individuals who do so in pursuance of trade, calling business or occupation. Persons who perform or participate in a performance at a facility while nude or partially nude for reason other than commercial activity related to adult live entertainment are not "entertainers" for the purpose of the licensing provisions. *2211266 Ontario Inc. v. Brantford (City)* (May 8, 2013), Doc. CA C56299, Doherty, Cronk, Lauwers JJ.A. (Ont. C.A.)

Termination of Employment by Municipality During "Lame Duck" Period

Municipalities are prohibited by s. 275 of the Municipal Act, 2001 from taking certain actions during the "lame duck period" unless the power to do so has been properly delegated prior to the nominations day. Among these restricted actions is the hiring and dismissal of employees. The applicant employee was terminated from her employment with the respondent municipality during the 2010 election period. The dismissal was delegated to and conducted by senior staff members in accordance with the respondent county's policy, which was adopted by the respondent's council in 2005 (but not by by-law). The applicant sought a declaration that the termination of her employment violated s. 275 of the Municipal Act, 2001 and was unlawful. The applicant submitted that pursuant to s. 5(3) of the Municipal Act, 2001 the hiring and firing of employee's is a power that must be exercised by by-law unless the municipality is authorized to do otherwise. The applicant argued that while the county had the general power to delegate to hire and fire employees, such delegation must be authorized by by-law. The respondent county's policy under which the power to hire and terminate employees was delegated and was not adopted by by-law. The applicant submitted that only the county council could dismiss an employee. The issue on application was whether the respondent county's policies were properly enacted such that the power to hire and dismiss employees was delegated to senior management prior to the nominations day of September 10, 2010.

Held – The application was dismissed. The Municipal Act, 2001 allowed the powers of a council to be interpreted broadly in a manner that enabled the municipality to govern its affairs as it considers appropriate and to enhance its ability to respond to municipal issues. A strict interpretation of the statute was not appropriate. The hiring and termination of employees are administrative functions. While s. 270 of the Municipal Act, 2001 required the county to "adopt" and maintain policies with respect to the hiring of employees it did not specifically require adoption by by-law. The respondent county's policy manual constituted such a policy and it was adopted by the council through a process similar to that required for by-laws, that is, by democratic vote in open council. The power to hire and dismiss employees was therefore delegated to senior management with the adoption of the policy manual in 2005. The policy was in effect prior to the September 2010 nominations day and complied with s. 275(6). The intention of s. 275 was to control the actions of a council that, without limitations, could take certain actions for which it would never be held accountable. The delegation power set out in the policy manual complied with the intent of s. 275 and enabled the county to govern its affairs. In any event, a by-law is not required for every act of a municipality. *Person v. Grey (County)* (May 10, 2013), Doc. 11-065, Bielby J. (Ont. S.C.J.)

City Wins Injunction to Prevent Use of Trailer as Residence

The plaintiff city brought an application seeking injunctive relief against the individual defendant, who had permitted the residential use of a trailer on his property, contrary to the city's zoning by-law. It was not disputed that the city had not issued an occupancy permit and that the defendant was in violation of the city's zoning by-law. The issue was whether the city should be granted injunctive relief in order to enforce its by-law.

Held – The application was allowed. The court has a very limited discretion to deny a statutory injunction to enforce the public right. Where the right to an injunction is created by statute and the public interest must be weighed against any hardship which an order may impose upon a defendant, the scope of that discretion to deny a statutory injunction is narrow. The circumstances of this case fell directly within the scope of the mischief which the legislation sought to prevent. An injunctive order to cease using or allowing the residential use of the trailer was issued. However, due to the fact that the elderly tenant was suffering from cancer, the order would not come into force for six months, allowing the tenant reasonable time in which to relocate. *Powell River (City) v. Sliwinski* (April 16, 2013), Doc. S110981, Maisonville J. (B.C. S.C.)

Land Use Permit Quashed Where Proposed Use Conflicts With Management

The respondent credit union owned land which was zoned as a public service district under the town's land use by-law. In 2011 the credit union applied for a permit to allow the continued occupation of the premises by a law firm. The development appeal board held that the proposed use fell within the discretionary category of "professional, financial, health and office services" under the land use by-law. The appellant sought to appeal the development appeal board's decision, on the basis that the board erred in interpreting the land use by-law in a manner contrary to or inconsistent with the 2010 Banff National Park of Canada Management Plan.

Held – The appeal was allowed.

The town incorporation agreement specified that every land use by-law must comply with an applicable management plan, and also that every decision made pursuant to such by-law must conform with the management plan. In this case, the development appeal board never considered whether the application complied with the incorporation agreement, whether the law office constituted a commercial use, or whether the amendments to the management plan were decisive. The permit was quashed, as the commercial use proposed was inconsistent with the management plan, which was not permitted under the incorporation agreement. *Canada (Attorney General) v. Banff (Town) Development Appeal Board* (April 17, 2013), Doc. 1201-0098-AC, Slatter, Rowbotham, Veldhuis JJ.A. (Alta. C.A.) ML

Supreme Court *Cont'd from page 21*

simply the latest step in this evolution.

In an example of unusual bedfellows, Justice Scalia penned a scathing dissent, joined by Justices Kagan, Sotomayor and Ginsburg. Usually a reliable conservative, Scalia found the majority opinion completely without foundation. He reminded his colleagues that "The Fourth Amendment forbids searching a person for evidence of a crime when there is no basis for believing that the person is guilty of the crime . . . .The Court's assertion that DNA is being taken, not to solve crimes, but to *identify* those in the state's custody, taxes the credulity of the credulous."

He likened the free-range search for DNA to "general warrants" which had been employed by the King's henchmen in the colonies and were emphatically invalidated more than two centuries ago by the Fourth Amendment. Tracking each step in King's arrest, the taking of the DNA sample and finally, testing the DNA, Scalia documented that the process took more than four months. This revealed that the alleged justification for the DNA swab to begin with—the correct identification of King—was a complete fabrication. **Maryland v. King, No. 12-207 (U.S. June 6, 2013).** ML



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