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**BROADBAND PARTNERSHIPS:
FOR MANY COMMUNITIES,
A GOOD OPTION AT A GOOD TIME**





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EDITOR'S NOTE



BY: ERICH EISELT
IMLA Assistant General Counsel

Back to the New Reality

As of this writing, IMLA's first in-person Conference since 2019 is scheduled to begin in Minneapolis in less than one month. In many ways, the Conference typifies our collective efforts to get back to reality. On-site attendees will attempt to recapture the social and professional benefits of communal presence, albeit mask to mask. All in attendance will be vaccinated or demonstrate proof of a recent negative COVID test; for those desiring an alternative, real-time online programming will be provided.

IMLA's efforts to accommodate a broad constituency under changing circumstances are only a microcosm of the challenges facing members as their municipalities seek some return to normalcy. Policies affecting local government buildings, schools, businesses, public transportation, and more continue to evolve, generating intense debate and too frequently, litigation. Beyond vaccination and masking policies, the economic consequences of COVID continue to burden communities; added to larger social issues including diversity, equity, income disparity, homelessness, racial justice, and more, the "new normal" becomes difficult to ascertain.

Like many localities, our host city evidences these shifting influences. Minneapolis parents are being asked to form carpools to ferry school children because the city lacks some 300 drivers, off work due to COVID. City Council meetings have been online-only since early 2019 and will remain that way for the foreseeable future. In November, Minneapolis voters will decide whether to replace the city's police department, now short-staffed by some 200 officers, with a new "Department of Public Safety," which will take a "comprehensive public health approach" to public safety. These themes are no doubt familiar to numerous IMLA members.

Against this uncertain backdrop, the September-October 2021 *Municipal Lawyer* endeavors to provide information which should prove useful to local governments regardless of the path forward. Our *Features* cover the rapidly expanding opportunities for local broadband, the growing emphasis on equity in our environmental policies, and strategies for avoiding conflict with an increasingly restrictive view of municipal sign ordinances. *International* brings us more insights into Spanish municipal law, *Amicus* finds the upside in some otherwise problematic Supreme Court decisions, *Animals* argues for considering pet policies within social programs, *Affirmative Action* details the accelerating prospects for major settlements in the opioid litigation, and *Inside Canada* highlights a selection of cases which analyze jurisdictional prerequisites and more.

We look forward to seeing you in Minneapolis, whether in person or via cyberspace, as we begin to move cautiously back to the New Reality.

Best regards-

Erich Eiselt

PRESIDENT'S LETTER



TYRONE COOPER,
*Beaumont, Texas City Attorney
and IMLA President*

IMLA's Continuing Value

When I first embarked upon this journey as your virtual President on October 2, 2020, I recognized that we had experienced a year like no other in recent history. A year where a global pandemic caused the wearing of facial coverings, the washing and sanitizing of hands, and this new thing called social distancing as a way of life. A “new normal,” as it has come to be known. As it turns out, 2021 did not bring much change. Here we are almost a year later when we thought the country would have reached “herd immunity” through the much-anticipated corona vaccine, and the country remains in the middle of the pandemic with an unexpected surge of the raging Delta variant. In the midst of this and other events around us, your IMLA Board of Directors and staff have been busy moving forward with IMLA business.

Executive Director Chuck Thompson announced to the Board that he would be stepping aside as Executive Director/General Counsel of IMLA at the end of the year. Upon accepting his decision with heartfelt thanks for the years of dedicated service to the organization, the Board recognized the future of the organization is dependent on the right person to move the organization forward. After much deliberation, the Board determined that the only logical choice was the promotion of Deputy Director/Deputy General Counsel Amanda Karras as the perfect candidate. Congratulations are in order for Amanda.

Let me again emphasize the overriding importance of marketing and membership to this organization. Without members, IMLA cannot remain viable,

and the effort to attract new members and to retain those we have is a never-ending endeavor. The Board of Directors and the IMLA team recognize that we must provide programming necessary to bring value to you as members. With that in mind, the Board and staff have created several new programs we trust will be of benefit to members.

As an incentive, we introduced a Dividend program to give back a small percentage of your membership dues as a credit toward virtual programs such as webinars or the Kitchen Sink subscription. This program will renew in the upcoming year. To complement the existing IMLA Fellows program, the Board adopted a new Distinguished Local Government Office designation to reward those offices where at least 40% of the lawyers have gone above and beyond to distinguish themselves as IMLA Fellows; itself an exceptional achievement.

In further recognition of someone who has distinguished himself in the field of Municipal Law, the Board has established the Charles Rhyne Local Government Law Scholarship in honor of the distinguished Municipal Law scholar and founder of IMLA. The idea is to award five \$2,000 scholarships to first- or second-year law students from IMLA member jurisdictions who can demonstrate an interest in the practice of local government law as a possible career.

The new Covid-19 Listserv Working Group was added as another effort. This group evolved as a vehicle to help unravel the myriad unanswered ques-

tions and common issues presented by the financial assistance policies and other regulations intended to help local governments get through the pandemic.

In addition to these new programs, IMLA has continued to provide excellent programming such as the Legal Advocacy Program and the amicus assistance provided to member cities, *Municipal Lawyer*, numerous CLE webinars, seminars and conferences, numerous listserv working groups, the resource library and model ordinances, just to name a few. The success of these programs, new and existing, is directly attributable to the hard work of the Board of Directors, Chuck Thompson, and IMLA's hard-working staff.

As President, I had the distinct honor and responsibility given to me by the IMLA bylaws of appointing members to the State and Canadian Provincial Chair positions, as well as the appointment of members to the various committees necessary to the smooth operation of this great organization. Let me take this opportunity to thank each one of you for your dedication and willingness to give your time to accept the responsibilities of your positions in service to IMLA. To the general membership let me thank you for your continued support of the organization. After all, this is your International Municipal Lawyers Association.

It has truly been a pleasure and a privilege for me to have served as President for the year 2020-21 with all of you. Thanks for the virtual ride! **ML**

Broadband Partnerships: For Many Communities, a Good Option at a Good Time

JAMES BALLER, DOUGLAS JARRETT, WESLEY WRIGHT, SEAN STOKES,
and CASEY LIDE, *Partners, Keller and Heckman LLP, Washington D.C.*¹



I. INTRODUCTION

The unfortunate reality in the United States is that the availability of high-speed wireline broadband services varies widely, even within major metropolitan areas. In many second-tier and third-tier communities, the established service providers have opted not to upgrade their networks to provide 21st century broadband services, and for millions of residents of rural communities or low-income urban and suburban areas, high-speed Internet access is either unavailable or unaffordable.

If the United States is to remain a great nation and compete successfully for world leadership in the decades ahead, it must act aggressively to meet two core broadband challenges. One is to ensure that all Americans have affordable access to the Internet at levels sufficient to enable them to participate fully in modern life. The other is to ensure that all of America's communities obtain the advanced communications capabilities they will need to survive and thrive in the increasingly competitive global economy. Broadband partnerships can play a vital role in meeting both of these challenges, especially by taking advantage of the substantial federal and state funds that are becoming available for these purposes.

At the individual level, the COVID-19 pandemic has made unmistakably clear that broadband connectivity is essential, particularly in the face of severe disruptions of the kind that we experienced in

2020. Individuals in households with fast connections to the Internet were able to continue to work, educate themselves, obtain medical care, and maintain social contacts from their homes. Unserved or underserved individuals could not do these things and were increasingly isolated and frustrated. The pandemic also made clear to Congress, the States, and local governments across America that upgrading and expanding America's broadband infrastructure will be difficult, complicated, and expensive, but it must be done.

At the community level, advanced communications capabilities have become platforms, drivers, and enablers of progress in just about everything that matters to communities. This includes economic and workforce development, education, health care, public safety, transportation, energy, environmental protection, government service, and

much more. Communities without access to affordable advanced communications capabilities will inevitably fall behind in all of these areas.

Recognizing the benefits of advanced communications capabilities, hundreds of communities—perhaps thousands—are exploring their options, including working with willing incumbents or new entrants, developing their own networks, creating regional consortia, or pursuing other creative alternatives. As many are realizing, a partnership of some kind may be their best choice, and perhaps even their only feasible one. With sizable federal and state funding now available and significantly more in the pipeline, partnerships are likely to become an even more attractive option.

In this article, we examine the pros and cons of broadband partnerships, the key legal and regulatory considerations involved, the steps that local governments should take—and the questions they should ask—in analyzing, planning, and negotiating partnerships.

II. WHY PARTNERSHIPS?

Broadband networks—be they wireline or wireless; public, private, or mixed; rural, urban, or suburban; single-location, regional, or national; for-profit or

non-profit—must each address several critical functions:

- **Designing, financing, constructing, operating, maintaining, and refreshing the network;**
- **Obtaining and maintaining all required authorizations, including federal, state, and local registrations, right-of-way approvals, permits, easements, pole attachments, etc.;**
- **Providing services to customers and performing related marketing, installation, billing, customer service, and technical support; and**
- **Complying with all legal and regulatory requirements that apply to the particular services provided over the network.**

Local governments typically have substantial experience with designing, financing, constructing, and maintaining major capital projects, but unless they have substantial experience with providing commercial communications services, they may be hesitant to enter that field themselves. At the same time, communications service providers may not have the resources or desire to build and own a network themselves, but would be glad to market, provision, deliver, bill for, and provide customer support for communications services provided over someone else's network. A partnership can readily be designed to allocate the responsibilities, risks, and rewards among the parties so as to take advantage of each partner's goals and strengths.²

For example, some local governments may decide that their best option is to develop the network infrastructure, retain ownership of it, and lease "dark fibers" or other facilities to one or more partners, who will "light" the fibers to provide communications services to the public. Other local governments may prefer to light some of the fibers themselves and sell transmission capacity to service providers on a wholesale basis or to large enterprise partners. Dozens of local governments have gone still further and found success in also providing

retail services to their communities. For example, the municipal fiber network operated by the Electric Power Board of Chattanooga, Tennessee, which has consistently ranked as one of the best broadband service providers in the world and in its first decade generated approximately \$2.69 billion in economic and social benefits, on an investment of



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represents associations, major corporations, and entrepreneurs before the FCC on policymaking, licensing, and enforcement matters. His clients include dark fiber network operators, wireless site operators, specialized services providers, emerging broadband services providers, MDU developers and owners, and critical infrastructure companies. He is a frequent speaker on telecommunications issues and regularly contributes to the Beyond Telecom Law blog. He holds a J.D. from the George Washington University Law School.



James (Jim) Baller

represents clients in matters including high-capacity broadband networks, public-private broadband partnerships, wireless facility siting, right-of-way management, pole and conduit attachments, and impediments to community broadband. He is a past president of the U.S. Broadband Coalition, and the co-founder and president of the Coalition for Local Internet Choice, an alliance working to remove barriers to local governments' ability to make critical broadband infrastructure decisions. He received his J.D. from Cornell University Law School.



Casey Lide

counsels on issues including cable television, broadband Internet, wireless services, right-of-way management, pole and conduit attachments, and barriers to local broadband. His advice covers fiber optic IRUs and leases, easements, franchises, attachment agreements, ISP service agreements, interconnection and collocation agreements, strategic MOUs and others. He collaborates with multi-disciplinary teams to assist government and utility clients in producing comprehensive telecommunications plans. Casey holds a J.D. from the Ohio State University.

about \$200 million.³

Partnerships may also enable public entities to comply with restrictions in some states that might otherwise prevent them from providing communications services themselves. Such restrictions are discussed in greater detail in Section III.A.1 below.

Another key benefit of broadband partnerships is that they can harness the asymmetric goals of the parties. For example, public entities often want to exercise a measure of control to ensure that a network will remain responsive to community needs, and they may place a higher value on advancing community goals—such as economic development, educational opportunity, workforce development, and digital equity—than on maximizing profits. Private parties will probably need to meet revenue and return on investment targets for the project to work for them. Flexible, well-designed partnerships can enable each entity to meet its goals.

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advises on matters including telecommunications compliance and enforcement, state tariff requirements, private wireless licensing, 911 reliability and outage reporting requirements, customer proprietary network information (CPNI), and the 21st Century Communications and Video Accessibility Act (CVAA). He is the Executive Director of the Next Generation 911 Institute and frequently speaks on such matters as the FCC's 911 Reliability Rules and the FCC's New Citizens Broadband Radio Service. He is a graduate of the University of Akron School of Law.



Sean Stokes

represents clients on matters including broadband, cable television, wireless communications, right-of-way management, pole attachments, barriers to community broadband, and public-private partnerships. He counsels on such issues as developing and negotiating agreements involving access to poles, ducts, conduits, dark fiber, and towers. His clients include national and state utility associations, municipal leagues, and numerous public and private entities throughout the U.S. Sean is a graduate of the George Washington University Law School.

Even before the current wave of federal and state broadband funding,⁴ the ability of public and private entities to combine funding available to each was an attractive feature of broadband partnerships. That is even more important now, as the size and scope of federal and state funding for broadband partnerships have grown exponentially.

Broadband partnerships may also diminish political opposition to public broadband initiatives. Today, at the federal level, a sharp divide exists between the Biden Administration, which seeks to prioritize local broadband decision-making,⁵ and some House Republicans, who want to ban community broadband initiatives altogether.⁶ Partnerships may help bridge this divide, especially at the state and local levels. It is noteworthy that opposition to public broadband initiatives and public private partnerships has diminished in some states. For example, the conservative legislature of Arkansas voted unanimously this year to give public entities substantial new options, including entering into public-private partnerships.⁷ Effective July 2021, the Washington State legislature removed its restrictions on public utility districts, ports, and small cities and towns.⁸ Similarly, the legislature of Ohio rejected amendments to a budget bill that would have banned all existing and future municipal broadband projects and public-private partnerships in the state.⁹

III. KEY LEGAL ISSUES

Broadband partnerships often involve community-specific allocations of risks, rewards, and responsibilities among participating entities. How does a local government get started and proceed with such a project? Typically, this occurs in four stages—(A) Analysis and Planning; (B) Identifying Potential Partners; (C) Negotiating a Deal; and (D) Implementing the Partnership. In this section, we address the key legal issues in each stage.



In contrast, twenty states impose either explicit or practical restrictions on local broadband initiatives. Barriers to entry sometimes take the form of onerous procedural requirements that are misrepresented as being necessary to achieve “fair competition” or a “level playing field” for established service providers.



A. Analysis and Planning Stage

Projects resulting in broadband partnerships often begin when local champions commit themselves to doing everything necessary to get an advanced communications network for their community. The champions often include local government officials, business leaders, educators, health care professionals, or young people, all with the energy and ability to inspire and encourage others to follow their lead.

The champions usually start by learning what the incumbent service providers and potential entrants are and are not willing to do; what challenges comparable communities faced and how they addressed them; what federal, state, and other resources may be available; what their community’s strengths, weaknesses, needs, gaps, options, politics, and level of support may be; whether combining efforts with neighboring communities may be worthwhile; and whom to engage for assessing the community’s technological choices, estimating costs and revenues, addressing federal, state, and

local legal issues, and dealing with other critical issues.¹⁰ The following are the key legal issues that typically arise in this stage.

1. Confirmation of Authority.

Until recently, federal law could be characterized as neither for nor against local broadband initiatives. As noted below, federal support of public-private partnerships is becoming more robust and meaningful. However, one must look to state and local law for a local government’s authority to participate in a public-private partnership or to deploy and operate a broadband network by itself. Some states explicitly authorize local governments to engage in such activities. For example, Article XI, Section 9 of the California Constitution empowers both charter cities and non-charter cities to establish public utilities, including those that provide for “means of communication,” and California courts have a long history of ruling in favor of local authority to provide communications services.¹¹ Similarly, Article X of the Connecticut Constitution and Conn. Gen. Stat. Ann. § 7-188 give all of Connecticut’s municipalities broad Home Rule authority, and Conn. Gen. Stat. Ann. §§ 7213, 7-233ii, and 7536 expressly authorize them to provide telecommunications services, cable television services, and broadband services, subject to some limitations. And in Illinois, 20 ILCS 661/35 states that:

Any municipality or county may undertake local broadband projects and the provision of services in connection therewith; may lease infrastructure that it owns or controls; may aggregate customers or demand for broadband services; may apply for and receive funds or technical assistance to undertake such projects to address the level of broadband access available to its businesses and residents. To the extent that it seeks to serve as a retail provider of telecommuni-

cations services, the municipality or county shall be required to obtain appropriate certification from the Illinois Commerce Commission as a telecommunications carrier.

In contrast, twenty states impose either explicit or practical restrictions on local broadband initiatives.¹² Barriers to entry sometimes take the form of onerous procedural requirements that are misrepresented as being necessary to achieve “fair competition” or a “level playing field” for established service providers. One such example involved Wilson, North Carolina, which desired to expand its highly successful municipal internet service to neighboring jurisdictions but was prohibited from doing so by state law. While the Federal Communications Commission (FCC) preempted the North Carolina statute,¹³ the Sixth Circuit reversed, finding that the FCC lacked authority to do so.¹⁴ A number of states have also recently enacted laws encouraging public-private partnerships, but some of these laws do not apply to telecommunications matters, and others do not clearly address existing restrictions.¹⁵

If a state’s constitution or statutes do not deal explicitly with the relevant authority issues, the outcome will often turn on whether the state is a Dillon’s Rule state or a Home Rule state.¹⁶ In Dillon’s Rule states, municipalities are deemed to have only such powers as the state has granted to them, either explicitly or by necessary implication from other grants of municipal authority, and any doubts must be resolved against the existence of the local power. In Home Rule states, the presumptions run in the opposite direction—i.e., municipalities are deemed to have all powers that the state has not expressly or by clear implication denied them, and any doubts must be resolved in favor of the existence of the local power. Unfortunately, Dillon’s Rule and Home Rule standards vary from state to state, and even within states. The outcome of a particular matter may depend on the nature of

the local power at issue, the size of the local government, whether the local government is providing competitive commercial services, and so on.

In each case, it is important to dive deeply into authority issues, as mistakes can be time-consuming and costly, and workable alternatives are often available.

2. Funding Opportunities

Even before the recent wave of new federal and state funding programs, broadband partnerships often enabled public and private parties to come up with sufficient funding to meet project needs by drawing upon resources available to each. For example, local governments could use municipal bonds, Tax Incremental Financing, New Market Tax Credits, Qualified Opportunity Zones, several federal and a few state programs, and many other vehicles to contribute to project financing.¹⁷ For their part, private partners could take advantage of a wide range of options, including equity, debt, contribution of equipment or facilities, in-kind services, buyer discounts, fiber swaps, and many other devices.

According to the National Telecommunications and Information Administration (NTIA), there are now “more than 80 federal programs across 14 federal agencies whose funding can be used for broadband-related purposes.”¹⁸ These programs are described in NTIA’s “BroadbandUSA Federal Funding Guide for Fiscal Year 2021.”¹⁹ In addition, as of the date of this writing, Congress was considering a \$1 trillion bipartisan infrastructure bill that includes an additional \$65 billion for improvement of Internet access, of which \$42.5 billion would be distributed by states to eligible broadband projects.²⁰

Broadband partnerships have fared well under recent federal and state funding programs. For example, the Consolidated Appropriations Act that became law in late December 2020 provided NTIA with \$300 million to

distribute to public-private partnerships.²¹ In addition, the 2021 American Rescue Plan Act has allocated \$350 billion to state and local government infrastructure projects that could be utilized for public-private broadband partnerships. Similarly, several states have adopted funding programs that prioritize public-private partnerships.²²

With so much federal and state funding potentially available to broadband partnerships, it behooves the participants to explore the possibilities and take advantage of them.

3. Access to Public Rights of Way and Infrastructure

Every broadband project must have access to the public rights-of-way (PROW) for the installation of fiber and facilities on poles or in underground conduits. Local governments typically regulate access to PROW, subject to federal and state laws, including non-discrimination and competitive neutrality requirements.²³

Given the importance of speed to market, service providers want local governments to accelerate their processes for reviewing applications for access to the PROW. Providers also often seek to lower their deployment costs by seeking lower PROW access fees. Partnerships may offer the participants multiple ways to accelerate and lower the cost of access to the PROW, but one must be very careful about this.

For example, a broadband partnership will often provide the community benefits that other occupants of the PROW do not provide. While some degree of discrimination is appropriate when dealing with entities that are not similarly situated, drawing distinctions may often be difficult and controversial. Incumbent providers have frequently complained that anything that favors a public project or partnership violates federal and state nondiscrimination and competitive neutrality requirements unless the local government offers similar concessions to the incumbents. So,

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local governments must be deliberate in framing the PROW benefits that they can offer as part of a public-private partnerships.

Existing infrastructure and facilities are among the most important assets that local governments may be able to bring to a broadband public-private partnership. Facilities may include fiber, poles, ducts, conduits, sewers, street-lights, towers, rooftops, and collocation space. Local government-owned land can also be an important and valuable asset to make available.

Until recently, local governments were widely understood to have the proprietary power to control access to the physical infrastructure or facilities they own. With this power, they could deny access to their facilities or grant access on terms and conditions of their own choosing.²⁴ When acting as property owners, they were not subject to federal nondiscrimination or competitive neutrality rules.

Now, however, the Federal Communications Commission (FCC) has partially eroded this power by requiring local governments to make their physical infrastructure and facilities located within their own PROW available, at cost, to entities that seek to mount small cell wireless antennas and related equipment.²⁵ Whether and how far this precedent will evolve remains to be seen. In the meanwhile, local governments still retain substantial flexibility in managing their physical infrastructure and facilities and bringing them into broadband partnerships.

Aside from PROW and infrastructure access issues, there are multiple access-related issues that can arise in the context of broadband partnerships. These include access to municipally-installed fiber and privately-owned towers, sides and rooftops of buildings, private easements, distributed antenna system (DAS)/small cell sites, wetlands, historical or other protected properties, environmental issues, and more. Each



Incumbent providers have frequently complained that anything that favors a public project or partnership violates federal and state nondiscrimination and competitive neutrality requirements unless the local government offers similar concessions to the incumbents.



is governed by its own history, rules, administrative precedent, case law, and politics. It is therefore important for the public and private partners to have access to expertise in all of these areas. A detailed discussion of these issues is beyond the scope of this article.

4. Organizational and Governance Issues

In addition to considering how the broadband partnership itself will be structured, it is important for a local government to consider how it will organize and run its side of the partnership—including whether to use an existing branch of government to oversee the project; whether to create a new division, commission, authority, non-profit, or cooperative; and how to involve the key stakeholders, including the school system and the municipal utility (if one exists).

How a public entity chooses to organize itself is typically based on political, legal, and practical considerations. For example, a local government may simply not have the authority to create a new agency and will thus have to operate within its existing structure. A public entity may also choose its organizational structure based on governance issues, particularly if the project

will involve multiple public entities. All parties benefit when there is a clear chain of command and decision-making process in place, regardless of the organizational structure.

B. Finding Potential Partners

Once a local government has acquired a reasonably good understanding of what it needs, what it wants, what it has to offer, and what it may be willing to bargain away, it must then find the right partner(s). This can happen in many different ways.

Many local governments have found it useful to take the initiative and reach out to potential partners through a “Request for Information,” a “Request for Qualifications,” or a similar informal process. These documents set forth the community’s visions of the future, its assets and strengths, and its reasons for believing that a partnership would be good for all concerned. RFIs and RFQs also identify the community’s goals and what it needs from private partners to achieve them.

The RFI or RFQ process can be particularly valuable because it allows for extensive informal one-on-one communications between local governments and potential partners, which often compete with each other to win the local government’s support. From these communications, local governments may discover even better ways to achieve their goals than they had originally conceived.

RFI or RFQ processes give local governments a better understanding of what it will take to get their projects off the ground in their particular circumstances. They will have a much better understanding of the approximate costs, revenues, and other benefits and burdens of their initiative. They will also have a good sense of who would be a good partner.

With this knowledge, a local government can issue a formal Request for Proposals or engage in whatever other procurement process applicable state and local law requires.

C. Negotiation Stage

Sooner or later, local governments will identify the entity or entities with which they want to partner. Negotiations will typically address a series of distinct issues, largely driven by the unique relationship between the parties, the goals of the project, and state and local law. Allocation of responsibilities, risks, and rewards will involve trade-offs, as the greater the risks and responsibilities each party is willing to assume will depend on the nature and extent of the rewards that it will want to receive. Based on our experience, the process of finalizing the respective responsibilities is often more nuanced and time-consuming than anticipated. In order to be successful, the parties must keep the big picture goals of the project in mind throughout the negotiations.

D. Implementation Stage

Eventually, solid projects will reach the Implementation Stage. By this point, the major issues will have been resolved, and the parties should have a clear path through network construction and years

of ongoing operations. The main legal and regulatory issues at this stage will involve compliance with generally applicable FCC and other federal and state requirements, including, as applicable, grant funding construction milestone reporting and record keeping. There will also be a series of transactional agreements associated with infrastructure access and service delivery all of which require thoughtful drafting and a commitment to a long-term, sustainable relationship.

IV. CONCLUSION

Broadband partnerships have long enabled communities and service providers to join forces to produce impressive results that they would not have been able to achieve individually. But even with all of the advantages that partnerships offer, funding challenges are sometimes too steep to achieve a respectable level of affordable broadband service for all too many of America's unserved and underserved areas and communities. Now, with billions of federal and state

dollars becoming available to improve and accelerate connectivity to the Internet, broadband partnerships can be all the more effective in helping America achieve its key broadband goals. This is an opportunity that local governments should not and cannot afford to miss. **ML**

NOTES

1. The authors acknowledge and thank summer associate Ian Murray for his contributions to this article.
2. For an extensive discuss of the key business and legal considerations that affect broadband partnerships, including numerous detailed case histories, see Coalition for Local Internet Choice ("CLIC"), "Public Infrastructure/Private Service: A Shared-Risk Model for 21st Century Infrastructure" (Benton Institute for Broadband & Society October 2020), https://www.benton.org/sites/default/files/PPP3_final.pdf
3. See, e.g., S. Subramanian, "The best broadband in the US isn't in New

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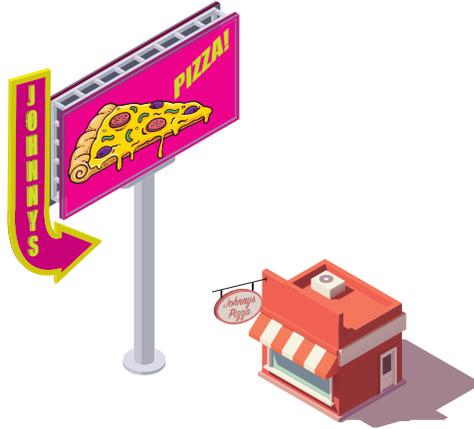
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Can Local Governments Continue to Regulate Signs Using On-/Off-Premise Distinctions?

BY: ERIKA LOPEZ, Assistant City Attorney, Austin, Texas, and
PATRICIA (TRISH) LINK, Assistant City Attorney, Austin, Texas



The number of challenges to sign regulations that include an on-/off-premise distinction has increased post-*Reed v. Town of Gilbert*.¹ There are some recent federal decisions that indicate the on-/off-premise distinction may no longer be viable. To help you understand this trend, this article highlights the Fifth Circuit's decision in *Reagan National Advertising of Austin, Inc. v. City of Austin*.² which is now pending before the Supreme Court.³ Additionally, it addresses drafting considerations and severability if you believe your client's regulations may be vulnerable to legal challenges under the First Amendment.

In *Metromedia, Inc. v. City of San Diego*, the Supreme Court considered whether the First Amendment allowed San Diego to permit on-site commercial advertising but prohibit off-site commercial advertising in most instances.⁴ The Court applied the commercial speech test developed in *Central Hudson*⁵ and concluded that San Diego's regulation was supported by substantial governmental interests – traffic safety and aesthetics.⁶ Ultimately, the Court upheld the City's decision to treat on-site commercial advertising differently than off-site commercial advertising.⁷

Following the decision in *Metromedia*, the City of Austin (Austin) prohibited new off-premise signs (more commonly known as “billboards”). An off-premise sign that existed when the

prohibition was adopted is considered a non-conforming sign. As is common with non-conforming uses, structures, and the like, in order to benefit from its non-conforming status, the sign must remain relatively unchanged. This means that a non-conforming sign may not increase its degree of non-conformity, change the method of technology used to convey a message, or increase the sign's illumination.⁸

In 2017, a billboard owner in Austin applied to convert some of its inventory into digital signs. Because the billboards were non-conforming signs, the applications were denied. Predictably, the billboard owner sued Austin, alleging its 34-year distinction between on-/off-premise signs is an unconstitutional content-based restriction on speech.

The trial court ruled in the City's favor.⁹ However, on appeal, the Fifth Circuit reversed. The Court held that Austin's on-/off-premise distinction is content-based under *Reed*, is subject to strict scrutiny, and violates the First Amendment.¹⁰ As it concerns the constitutionality of Austin's regulation, the Fifth Circuit focused on two questions: (1) whether Austin's distinction between on-/off-premise signs was content-based; and (2) whether Austin regulated commercial speech.¹¹

Beginning with the first question, the Fifth Circuit considered *Reed* and two post-*Reed* cases: *Thomas v. Bright*¹² and *Act Now to Stop War and End Racism Coalition and Muslim American Society Freedom Foundation v. District of Columbia (Act Now)*.¹³ In *Reed*, the Supreme Court considered whether a sign ordinance was content-based because it differentiated between types of non-commercial speech.¹⁴ Specifically, the Gilbert, Arizona regulations applicable to the sign were determined by the kind of non-commercial speech.¹⁵ The Court concluded that the Town regulated non-commercial speech on signs based on communicative content and, as a result, the ordinance was a content-based regulation subject to strict scrutiny.¹⁶

After the *Reed* decision, the Sixth Circuit Court of Appeals decided *Thomas v. Bright*, which concerned a Tennessee law that required sign owners to obtain permits unless an exception applied.¹⁷ One such exception was for “on-premise” signs. A sign owner who was denied a permit for an off-premise sign sued claiming that, as applied, Tennessee’s exception to the permit requirement was an unconstitutional restriction on speech.

The Sixth Circuit acknowledged that, on its face, Tennessee’s prohibition on signs was content-neutral.¹⁸ However, the Sixth Circuit could not acknowledge the same for the on-premise exception to the prohibition. Accordingly, the issue before the Sixth Circuit was whether Tennessee’s exception for on-premise signs (i.e., the state’s on/off-premise distinction) was content-based.

In the litigation, Tennessee argued its on/off-premise distinction was content-neutral because its focus is the location of the sign, not “the content of the message.”¹⁹ The Sixth Circuit, relying on *Reed*, rejected this argument. It explained that if one must read the sign to determine its purpose and its relationship to the activity conducted at the location, the regulation is content-based.²⁰ The Sixth Circuit also dismissed Tennessee’s contention that its distinction between on/off-premise was consistent with the six justices who agreed such a distinction could be content-neutral in *Reed*.²¹ Ultimately, the Sixth Circuit ruled that Tennessee’s regulatory scheme was content-based and failed strict scrutiny.²²

In *Act Now*, the D.C. Court of Appeals (DC Circuit) examined the applicability of *Reed* to the District of Columbia’s (DC) regulation that restricts the amount of time a sign could be placed on a DC lamppost if the sign relates to an event.²³ Under DC’s regulation, a sign could be displayed for 180 days, but if the sign was related to an event, it had to be removed within 30 days after the event occurred. The 30-day removal requirement was challenged as being a content-based restriction.²⁴

The plaintiffs contended that DC’s regulation was similar to the content-based restriction struck down in *Reed*.²⁵ The DC Circuit disagreed and rejected the argument that treating “event-related” signs differently than other signs was a content-based distinction.²⁶ Specifically, the DC Circuit determined that the regulations were different because DC’s regulation merely distinguished between event-related signs and non-event related signs, while in *Reed* the regulations distinguished between types of “communicative content.” Additionally, the DC Circuit rejected the argument that the regulation should be considered content-based because a DC official would need to read the date on the sign to determine if the 30-day window had passed.²⁷ As a result, the DC Circuit applied intermediate scrutiny and held that the regulation was a reasonable content-neutral time, place, and manner restriction that was narrowly tailored to serve a legitimate government interest.²⁸

After considering these cases, the Fifth Circuit concluded that, under *Reed*, Austin’s “off-premise” distinction was content-based. Central to this conclusion is the idea that, to decide if the sign complies with the regulations, Austin must read the sign to determine “who is the speaker and what is the speaker saying.”²⁹ Austin argued that such a review was cursory, like the review the DC Circuit found acceptable in *Act Now*. However, the Fifth Circuit disagreed.³⁰

The Fifth Circuit also explained that, under *Reed*, a regulation can be “content-based if it defines regulated speech by its function or purpose.”³¹ In this instance, off-premise signs “advertis[e] or direct[] attention to a business..., not located at the same location as the sign.”³² Based on this definition, the Fifth Circuit concluded that Austin regulates speech based on its purpose.³³

The Fifth Circuit rejected Austin’s argument that the regulation should be considered under *Central Hudson* because the primary use of the signs was for commercial speech. Relying on

an Eleventh Circuit decision, the Court concluded that, even if the signs were used for non-commercial speech only periodically, it was sufficient to conclude that the off-premise distinction applied to both commercial and non-commercial speech.³⁴ As a result, the Fifth Circuit evaluated Austin’s distinction using strict scrutiny and held that the governmental interests cited by Austin— safety and aesthetics— which many jurisdictions rely on as justifications for their own sign ordinances, were not compelling. As a result, the Court held that Austin’s regulation does not survive strict scrutiny and violates the First Amendment.

In June of this year, the Supreme Court granted Austin’s petition for certiorari.³⁵ In the meantime, you may want to review your client’s regulations to determine whether a redraft is needed to survive a future First Amendment challenge or whether a simpler fix such as severability would mitigate potential vulnerability.

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Before practicing law in Austin, **Trish Link** received a Bachelor of Arts from Louisiana State University and received her law degree from Texas Tech University. After law school, Trish worked for the Texas Workforce Commission and Office of the Attorney General. She started with the City of Austin Law Department in 2005 as a municipal court prosecutor and since that time has worked in the Litigation, Land Use-Real Estate, General Counsel, and Municipal Operations divisions. She advises on a variety of subjects, including affordable housing, code enforcement, fair housing, special events, and sound. She is the Chair of IMLA Code Enforcement Section. Trish was designated an IMLA Fellow in 2020.

If you redraft, there are some considerations to keep in mind. A crucial first step is to determine your client's justification for the regulation. Clearly articulating the justification before drafting will help you craft requirements that will be a reasonable fit with the asserted justification.³⁶ Moreover, knowing the justification at the start will help your client avoid adopting a content-neutral regulation for an impermissible reason. For example, a temporal restriction that is facially content-neutral may be content-based depending on the motivations behind the restriction. In *Fanning v. City of Shavano Park*, the regulation included a temporal restriction that prohibited banner signs except for seven days prior to the first Tuesday in October.³⁷ (The seven-day time period coincided with a particular event.) The district court found that structuring the exception around a particular event was an impermissible legislative motive that resulted in a content-based regulation.³⁸ Another important reason to know the justifications upfront is to avoid creating exceptions that will undermine the justification for the regulation.³⁹

Second, decide what will happen to existing signs that do not fit within the redrafted regulations. If your client wants existing signs removed, will your client pay for removal now or, if allowed, require the signs to be removed after a specified period. Third, identify stakeholders and plan for their concerns. Lastly, be mindful of political considerations and plan for adjustments in the ordinance that are still defensible.

Alternatively, it may be that one or two aspects of your client's regulation would not survive a legal challenge but the balance of the provisions would. In that instance, a severability clause in your code of ordinances or contained within the sign regulation itself can help maintain the balance

of the regulation and limit the potential for a proliferation of unregulated signs. A provision is severable when it is not an integral part of the regulatory scheme.⁴⁰ A regulation includes severable provisions if one or more provisions can be removed without changing the intent of the regulation. To determine whether severability is an option, redraft the regulation without the provisions that may not survive the challenge and determine whether the regulation maintains its intent.

The Supreme Court's decision in *Reagan National Advertising of Austin, Inc.* could end the on-/off-premise distinction in sign regulations and, as a result, could impact local governments and the outdoor advertising industry dramatically. Regardless of the outcome, hopefully the decision in this case will provide much-needed guidance for those tasked with drafting and adopting sign regulations. **M**

NOTES

1. *Reed v. Town of Gilbert*, 576 U.S. 155 (2015).
2. *Reagan National Advertising of Austin, Inc. v. City of Austin*, 972 F.3d 696 (5th Cir. 2020).
3. *City of Austin v. Reagan National Advertising of Austin, Inc., Inc.*, no. 20-1029, 2021 WL 2637836 (June 28, 2021).
4. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981).
5. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980).
6. *Metromedia, Inc.*, 453 U.S. at 507-512.
7. *Id.*
8. Austin City Code Section 25-10-152 (*Nonconforming Signs*).
9. *Reagan National Advertising of Austin, Inc. v. City of Austin*, 377 F.Supp.3d 670 (W.D. Tex. 2019).
10. *Reagan National Advertising of Austin, Inc.*, 972 F.3d 696.
11. *Id.* at 702.
12. *Thomas v. Bright*, 937 F.3d 721 (6th Cir. 2019).

13. *Act Now to Stop War and End Racism Coalition and Muslim American Society Freedom Foundation v. District of Columbia*, 846 F.3d 391, 396 (D.D.C. 2017).

14. For example, under the Town of Gilbert's sign ordinance, political signs were subject to more restrictions than ideological signs. *Reed*, 576 U.S. 155 (2015).

15. *Reed*, 576 U.S. at 170-171.

16. *Id.*

17. *Thomas*, 937 F.3d 721.

18. *Id.* at 728.

19. *Id.* at 731.

20. *Id.* at 730.

21. *Id.* at 732.

22. It is important to note that in *Thomas v. Bright* the Court applied the reasoning in *Reed* to non-commercial speech. *Id.* at 733.

23. *Act Now*, 846 F.3d at 396.

24. *Id.*

25. *Id.* at 404.

26. *Id.* at 405.

27. *Id.* at 404.

28. *Id.* at 409.

29. *Reagan National Advertising of Austin, Inc.*, 972 F.3d at 706.

30. *Id.* at 705.

31. *Id.* at 706.

32. *Id.*

33. *Id.* at 706-707.

34. *Id.* at 708 (citing to *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1269 n. 15 (11th Cir. 2005)).

35. IMLA filed an amicus brief in support of Austin's petition for certiorari.

36. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417-418 (1993).

37. *Fanning v. City of Shavano Park*, 429 F.Supp.3d 320, 331 (W.D. Tex. 2019), vacated and remanded 853 Fed.Appx. 951 (5th Cir. 2021).

38. *Id.*

39. *See Vanguard Outdoor, LLC v. City of Los Angeles*, 648 F.3d 737 (9th Cir. 2011).

40. An example of a successful use of severability is in *Int'l Outdoor, Inc. v. City of Troy*, 974 F.3d 690 (6th Cir. 2020).

Environmental Justice and the Convergence of Social Awareness and Climate Change

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INTRODUCTION

The United States Environmental Protection Agency (EPA) defines environmental justice (EJ) as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” EJ arises in communities that often bear a disproportionate number of hazardous waste sites, suffer poor air quality due to fossil fuel infrastructure and traffic, and face elevated lead and other contaminants in drinking water.

The intense and polarized debates about social inequities and climate change converge and frame EJ. These debates have generated policy pronouncements, legislation, and litigation. This article will discuss federal and state EJ initiatives, and how they may impact your municipalities. Next, this analysis takes a deeper look at the EPA’s lead and copper rule, which is significant for EJ communities that may have older infrastructure which is often associated with lead drinking water contamination. Finally, the discussion will consider resources available to municipal attorneys whose communities seek to address EJ.

1. FEDERAL INITIATIVES

The 2021 change in presidential administrations completely transformed the federal government’s role as the Biden Administration has made EJ a top priority. On the day he was inaugurated, President Biden issued Executive Order 13985, which states:

Our country faces converging economic, health, and climate crises that have exposed and exacerbated inequities, while a historic movement for justice has highlighted the unbearable human costs of systemic racism. Our Nation deserves an ambitious whole-of-government equity agenda that matches the scale of the opportunities and challenges that we face.¹

To that end, the United States Office of Management and Budget (OMB) issued a memorandum to all department and agency heads regarding 21 priority pilot programs to enhance benefits to disadvantaged communities. This is part of the Justice40 Initiative, an effort to make federal agencies work with states and local communities to deliver 40% of the overall benefits of federal investments in climate and clean energy to disadvantaged communities. The 21 pilot programs cover a wide range of agencies and programs, e.g., Department of Homeland Security flood mitigation and building resiliency, Department of Energy solar energy, EPA drinking water state revolving fund and reducing lead in drinking water, Department of Housing and Urban Development lead reduction in homes, Department of Agriculture energy rural areas.²

The EPA also initiated programs to encourage settlement and enhance compliance in overburdened communities. An EPA memorandum encourages the use of various injunctive relief tools in civil enforcement settlements: (i) “advanced monitoring,” which involves equipment and technologies that can

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monitor pollutants on a real-time basis, are less expensive and easier to use, and provide data this is easier to interpret; (ii) independent third-parties to verify compliance with settlement terms; and (iii) supplemental environmental projects (SEPs) which are environmentally beneficial projects that go beyond what could be required by enforcement.³ A follow up memorandum directed the EPA to increase the number of facility inspections in overburdened communities using compliance monitoring tools, strengthen enforcement in overburdened communities through the injunctive relief tools, and increase engagement with communities about enforcement cases.⁴

The EPA is also seeking environmental justice through criminal enforcement. These measures will strengthen detection of environmental crimes in overburdened communities (relying in part on EPA's mapping tool that identifies such communities), improve outreach to victims of environmental crimes to assure they receive the benefits to which they are entitled, and enhance the remedies sought for such crimes to achieve deterrence and obtain restitution for the victims.⁵

The EPA is also repurposing the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund) and the Resource Conservation and Recovery Act (RCRA) to protect overburdened communities. This requires early cleanup of the most dangerous contamination by responsible parties through injunctions and administrative orders, a laundry list of steps to speed cleanups, and increased oversight of enforcement with compliance reviews and monitoring.⁶

In short, the federal government is committing a broad array of benefits and enforcement activities to the EJ cause. This should result in additional funding for agencies and residents and enhanced enforcement for overburdened communities in municipalities.

2. STATE INITIATIVES

Prior to the recent shift by the federal government, state legislatures passed or were working on laws to address the impact of climate change on EJ communities. For example:

- In 2012, California passed Senate Bill 535, requiring 25% of the State's cap-and-trade program auction proceeds to be invested in projects benefiting disadvantaged communities, including projects related to energy efficiency, public transit, low-carbon transportation, and affordable housing.
- Since 2016, California has required each county and city to include an environmental justice element in their general plans under Senate Bill 1000. Those jurisdictions must identify disadvantaged communities, identify objectives and policies to reduce the health risks in disadvantaged communities, and prioritize improvements and programs that address the needs of disadvantaged communities.
- On July 18, 2019, New York passed the Climate Leadership and Community Protection Act (S.6599 / A.8429), which among other things, created a climate justice working group to identify disadvantaged communities for priority in greenhouse gas emissions reductions, reductions in toxic air contaminants, and allocation of investments. The Act's investment provision, seeking to direct 40% of the benefits of state investments to go towards disadvantaged communities, provided a model for the Biden Administration's Justice40 Initiative.
- New Jersey passed environmental justice legislation (S232) on September 18, 2020. It requires the Department of Environmental Protection to evaluate the environmental and public health impacts of the numerous types of facilities on overburdened communities when reviewing certain permit applications, including

gas fired power plants and cogeneration facilities, resource recovery facilities or incinerators, sewage treatment plants, recycling facilities, and landfills. New Jersey's law is the first to mandate permit denials upon a finding of disproportionate negative impact to overburdened communities.

- Virginia passed the Virginia Environmental Justice Act in April 2020, which requires the Governor's Secretaries to develop a policy or strategy to promote environmental justice in ways that are tailored to the specific authority, mission, and programs under their Secretariat.
- On May 17, 2021, Washington adopted the Healthy Environment for All (HEAL) Act, E2SSB5141, which requires the State Department of Ecology to adopt environmental justice principles into its strategic planning and funding decisions, develop a community engagement plan with a focus on empowering overburdened communities and vulnerable populations, and develop metrics and reports for tracking progress toward environmental justice goals.

As an initial step, these state laws strive to identify disadvantaged communities. Thereafter, these laws affect municipalities by imposing State regulatory scrutiny on projects affecting disadvantaged communities, developing programs to address their needs, and/or providing funding to implement those programs.

3. LEAD AND COPPER RULE

Exposure to lead in drinking water can cause serious health effects in all age groups. Infants and children can have decreases in IQ and attention span. Lead exposure can lead to learning and behavior problems. Adults can have increased risks of heart disease, high blood pressure, kidney or nervous system problems.

In January 2021, EPA promulgated revised regulations governing lead and

copper in drinking water (the Lead and Copper Rule). The effective date for the Lead and Copper Rule has been delayed until December 16, 2021 to allow for more input from the public (which closed in July 2021). If promulgated as-is, the revised Lead and Copper Rule will affect water systems, through requirements, including the following:

- **New Lead and Copper Trigger Levels.** The current “action” level of 15 µg/L will now see the addition of a “trigger level” of 10 µg/L. When samples exceed the trigger level, water systems will need to take certain actions, depending on the size of the system and whether the system has corrosion control treatment (CCT) and lead service lines or lines of unknown materials, including re-optimization of the CCT, conducting a CCT study, replacing lead service lines, conducting tap sampling, and providing public notice.
- **Lead Service Line (LSL) inventory.** All water systems must create a publicly accessible LSL inventory that includes the material composition of all LSLs.
- **LSL Replacement (LSLR) program.** All water systems with LSLs or lines of unknown material must create and submit an LSLR plan to their state. The LSLR plan must include a prioritization strategy targeting disadvantaged consumers and sensitive populations. In the case of a lead action level exceedance, the LSLR plan must include a full LSL replacement rate of 3% annualized over a rolling 2-year period.
- **Public Education.** Water systems with known LSLs or unknown materials must provide notice and education materials to persons on properties served by those lines. A revised health effects statement is also included.
- **Tap Sampling.** The Rule includes

revised tap sampling requirements that will increase the likelihood that the highest levels of lead will be captured in the samples.

EJ communities have raised concerns regarding the impacts of the Lead and Copper Rule. One concern is that the Rule treats full replacement of lead service lines as a last resort when lead levels are unacceptable rather than treating replacement as an integral part of a long-term approach. A second concern is that the mandatory replacement rate of 3% is even lower than the current rate of 7%. A third concern is that the Rule allows for partial replacements of lead service lines, which may leave individuals who cannot afford to replace private lines more vulnerable to lead exposure if their lines are disturbed but not replaced during water system replacement activities.

Local communities that own or operate water supply systems may need to plan ahead to address the increasing regulatory requirements on limited ratepayer resources and the potential disparate impacts to EJ communities which are least able to address the harms that may come from implementation of the Rule. Advanced planning may help to prioritize materials investigations and identify grant or financing opportunities.

4. ADDRESSING EJ AT THE LOCAL LEVEL

Because SB 1000 requires California cities and counties to incorporate an EJ element into their general plans, California websites provide helpful resources for municipalities which would like to address EJ:

- California Governor’s Office of Planning and Research (OPR) Guidelines “include a list of scientific based tools developed by other agencies and academia that provide information relevant to EJ considerations, as well as links to EJ Elements and policies in General Plans accepted by several jurisdictions throughout the state.”⁷

- California Attorney General’s SB 1000 webpage includes links to EJ resources including the Attorney General’s EJ-related comments on several city and county draft General Plans, links to CalEnviroScreen pollution indicator maps, and links to CalEPA’s Disadvantaged Communities Mapping tool and other environmental mapping tools.⁸
- California Environmental Justice Alliance (co-sponsor of SB1000) has its SB 1000 Implementation Toolkit which covers how to introduce plan-

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Julia Li practices on the firm’s Environmental Law & Natural Resources team. She assists clients on environmental review and permitting, infrastructure and water quality issues. Additionally, she identifies federal legislative and regulatory priorities and advances solutions for clients.

ning processes to the community, identify disadvantaged communities, engage the community, develop goals, objectives, and policies, and refine and adopt EJ goals, objectives, and policies.⁹

Finally, a Fourth Circuit case provides a precedent that may inform litigation to enforce the legislative and executive actions described above. In *Friends of Buckingham v. State Air Pollution Control Board*, 947 F.3d 68 (4th Cir. 2020), the court vacated permits for stations that compress natural gas for transmission located in a minority EJ community. The court pinpointed the Virginia Air Pollution Control Board's failure to make a finding whether the local community was a "minority" EJ community, which helps determine whether "information

about 'African American populations hav[ing] a greater prevalence of asthma' and other health issues is an important consideration." *Id.* at 88 (brackets in original).

Instead, the Board relied on data that air pollutants in the county were below state and national air quality standards to dismiss EJ concerns. *Id.* at 90-91. Consequently, "the Board failed to grapple with the likelihood that those living closest to the Compressor Station – an overwhelmingly minority population according to the Friends of Buckingham Survey – will be affected more than those living in other parts of the same county." *Id.* at 91-92.

Friends of Buckingham provides a clear roadmap for potential plaintiffs. First, establish that the affected community is an EJ community. Then present evidence of the elevated health risks suffered by the affected minority group.

Finally, connect the increased health risks to the contaminants of concern released by the business operations. Under *Friends of Buckingham*, regulatory standards or health risk assessments that fail to account for the location of the EJ community or its residents' elevated health risks will not withstand scrutiny. From the defense side, the resources for municipalities described above allow planners to better identify the EJ communities, their health risks, and the existing pollution that may be exacerbated by new sources.

6. CONCLUSION

The confluence of political pressures regarding social, economic, and legal inequities, and the growing impacts of climate change have propelled EJ to the forefront, and make it a rapidly emerging area of law. Municipal lawyers will likely be directly affected by these developments. **ML**

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2. Memorandum from OMB, Council of Environmental Quality, and National Climate Advisor to Heads of Departments and Agencies (July 20, 2021), <https://www.whitehouse.gov/omb/briefing-room/2021/07/20/the-path-to-achieving-justice40/>.
3. Memorandum from Lawrence Starfield to Regional Counsels and Deputies, Enforcement and Compliance Assurance Division Directors and Deputies, and Office of Enforcement and Compliance Assurance Office Directors and Deputies (Apr. 26, 2021), <https://www.epa.gov/sites/default/files/2021-04/documents/usingallappropriateinjunctiverelieftoolsincivilenforcementsettlement0426.pdf>.

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7. Michele A. Staples, *Environmental Justice in General Plans: Strategic Considerations for Planning and Land Use Professionals*, 1 Environmental, Energy, & Climate Change Reporter 122 (Jan. 2021); OPR Guidelines, https://opr.ca.gov/docs/20200706-GPG_Chapter_4_EJ.pdf.

8. Staples, *supra* note 7, at 121-122; Cal. Atty. Gen. SB 1000 webpage, <https://oag.ca.gov/environment/sb1000>.

9. Staples, *supra* note 7, at 122; CEJA SB 1000 Implementation Toolkit, <https://caleja.org/2017/09/sb-1000-toolkit-release/>.

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Chapter 6

Integrating Human and Animal Services

By: Best Friends Animal Society, Kanab, Utah

*This article is Chapter 6 in a booklet produced by IMLA and Best Friends Animal Society titled **People, Pets, and Policies: Towards Community Supported Animal Sheltering.***

Introduction

Delivery of truly effective animal services often happens through collaboration with human service providers and vice versa. After all, the needs of pets exist within the complexities of a wide variety of human needs and environments.

Local governments should facilitate the coordination and where appropriate, integration and clustering of these social services in the community. As a first step, they might consider making an inventory of all social services available in a community and explore the ways in which each service might interface with individuals and animals with pets.

The goal of this chapter is to provide helpful information for municipalities wishing to engage in the assessment, coordination and integration of social services and related local laws, regulations and policies related to as they may apply to animal owners. Below are a few common areas in which the connection of social services and animal services are likely to be effective.

Homelessness Prevention Services

Safe, accessible, and affordable housing is a critical need for all communities. Yet, many residents experiencing homelessness often refuse housing services that do not accommodate pets. Other residents who may only be able to afford subsidized housing face additional barriers. Municipal housing laws, regulations, policies and services that address the needs of the most vulnerable pet owners can also help combat homelessness and ensure equal opportunity for all residents by preventing unlawful discrimination. Some communities have taken steps to ensure that residents of all income levels are not unfairly penalized simply for having pets. Such provisions might come in the form of setting maximum thresholds for pet fees and

deposits in a way that aligns with overall rent stabilization policies or prohibiting evictions for residents with pets who would otherwise be legally protected from such proceedings during an emergency.¹ Yet other communities have built partnerships with referral organizations to provide sheltering services for the pets of people experiencing homelessness. With limited exceptions, most housing is also covered by the Fair Housing Act, which prevents discrimination against tenants with disabilities who have assistance animals.² Municipalities should also be mindful of the possibility of potential disparate impact claims for pet owners under the Fair Housing Act, where discrimination against certain types or breeds of animals tend to impact a specific segment of the population more than others.³

Below, are just a few of many ways that municipalities can address the housing needs of people with pets:

Example #1:

In 2019, the Los Angeles County Board of Supervisors passed a motion requiring any county funding housing to allow pets. The motion was advanced after finding that approximately ten percent of people experiencing homelessness had pets for which they would have difficulty leaving behind to secure housing. Supervisor Hilda Solis explained, “A pet may be the only source of comfort for senior citizens and people with disabilities. In addition, many victims of domestic violence hesitate to apply for supportive or permanent housing after they realize they have to abandon a trusted pet. No one should have to sever a bond with a pet to find housing.”⁴ The motion in Los Angeles County followed a similar motion passed by the City of Los Angeles.

Example #2:

As a result of the COVID-19 pandemic, the City of Santa Monica, California extended its eviction moratorium to apply to residents in a variety of circumstances that would ordinarily not be protected from eviction proceedings, including the presence of pets, whether authorized or not.⁵

Example #3:

In New Jersey, *Young v. Savinon* established that tenants that were allowed to have pets at the beginning of a tenancy could not have their leases changed to prohibit those same pets upon renewal.⁶

Municipalities can:

1. Review statutes and case law that govern the rights of pet owners and ensure local laws are in alignment.

2. Encourage animal services to disseminate information about pet-friendly housing options in the community.
3. Ensure that excessive “pet rent” is not allowed to be used as a loophole to circumvent local rent control ordinances.

Hunger Relief Services

Often, if an individual or family needs food and is having financial difficulty affording it, their pets are in need of food, too. However, those experiencing financial difficulty are more likely to give up their pets to a shelter. Pets play a large role in the well-being of families and vulnerable individuals, such as senior citizens, who tend to have lower incomes. Thus, being forced to relinquish a pet may lead to a poorer quality of life, and even greater instability during an otherwise challenging time. Through collaboration with various divisions, a number of municipalities have incorporated the distribution of pet food either through pantries that distribute pet food only, or through food banks that distribute both human and pet food. Often supported by community and company donations and local volunteers, establishing such resources in the community may be achieved through little to no extra cost to the taxpayer.

Below are some examples of innovative partnerships that have preserved the ability of individuals and families to keep their pets:

Example:

The Community Resources Division in Fayetteville, Arkansas consists of the Code Compliance, Community Development and Animal Services Programs. In 2010, the division established the Ranger’s Pantry Pet Food Bank (“Pantry”) after a housing crisis led to a significant increase number of pets being relinquished to the animal shelter simply because families could no longer afford to feed them. During the same year, the city made a goal to “reduce spending, to prevent any tax increase, to avoid wholesale layoffs of workers as has happened in other cities across the nation, and to maintain excellence in programs and services that our citizens expect and deserve.”⁷ Since then, the program has provided over 165,000 pounds of pet food, with 100% of the food being donated by businesses and local residents. The program has also received private grant funding. The Pantry also provides an AniMeals program, which allows distribution to homebound participants in the local Meals on Wheels Program.

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Municipalities can:

1. Establish a pet food pantry through a resolution, motion or order, while encouraging private-public partnerships to help secure food donations.
2. Consider integrating the distribution of pet food through existing programs that provide food for vulnerable individuals and families.
3. Identify opportunities to encourage referrals to local food banks by animal services to individuals who may be relinquishing a pet due to difficulty affording their own meals

Legal Services

Known for their value in providing critical legal services for underprivileged, disabled and elderly members of society, legal aid organizations are often supported by municipalities through appropriations of funds. Likewise, these organizations are often where clients are introduced to the availability of government-supported social services. In many instances, the areas covered by legal aid, such as family, disability and employment law, housing and foreclosure are also directly connected to animal ownership. For example, a client with a service animal protected under the Fair Housing Act may be facing an unlawful eviction under a “no pets” clause in a lease. In this case, effective legal assistance may preserve affordable housing options in the community, avoid potential code enforcement while preventing the unnecessary intake of an animal at a shelter as well as its associated costs. As growing number of states allow animals to be included in protective orders to make it easier and safer for victims of domestic violence to avoid dangerous environments, a proactive legal aid organization might ask a potential client whether they have any pets and wish to include them in such orders. They may also refer the client to a local organization that can help provide temporary housing for pets of victims of domestic violence.

Example #1:

Legal Aid Services of Oklahoma issued a publication, entitled Assistance Animals- Your Rights Under the Fair Housing Act in English and Spanish. The work that provided the basis of the publication was supported by funding under a grant with the U.S. Department of Housing and Urban Development.

Example #2:

Iowa Legal Aid maintains resources for individuals with pets, emotional support and assistance animals in a variety of circumstances including housing and disability law, as well as domestic violence and disaster situations.⁸

Municipalities can:

1. Evaluate the ways in which animal ownership and related services are integrated into government funded local legal aid programs.
2. Offer opportunities for legal service professionals to provide community education around services for clients with animals, especially as they align with local laws and policies.
3. Facilitate the exchange of information between animal services, legal service organizations and social services agencies that accept referrals from those organizations.

211 and 311 Services

Through government CRM technology, 211 and 311 hotlines and mobile services allow residents of the United States and Canada to easily access non-emergency municipal and human services in their communities. The technology is often promoted as a centralized way for municipalities to efficiently and effectively spend tax dollars, while ensuring that a variety of government agencies are able to better focus on their core purposes and manage workloads. These services typically operate by providing free and confidential referrals to a number of city and community services including food, housing, medical care, job training, and much more. Including animal related services among the list of assistance areas can add to even greater positive outcomes for the community.

Municipalities can:

1. Coordinate with animal services to ensure that their services are represented among other important community services referrals.
2. Track incoming requests to assess which specific animal services are most needed.
3. Provide helpful information through referral services which may resolve complaints and reduce the need for code enforcement.

Example:

The 211 service provided by the Greater Twin Cities United Way provides referrals for several resources related to animals, including adoption, spay/neuter, and pet food pantries.⁹

Conclusion

By integrating human and animal services in the community, municipalities can more effectively and efficiently maximize their services to residents with a variety of needs. Ongoing collaboration may also serve to address these issues when they begin and

before they turn into a more complex situation in need of greater resources. Homelessness prevention, food insecurity, and legal services are just a few areas in which services may be integrated with animal services. Municipalities may wish to conduct an assessment of needs specific to their community.

Notes

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An overview of Municipalities in Spain: Government, Structure and Financing

By: *Francisco Javier Durán García*

As discussed in a prior article, Spain is divided into 17 “autonomous communities” which comprise 50 provinces. Within these provinces are more than 8,000 municipalities, which are the basic territorial division in Spain. Municipalities have legal personality and their own territory, population, and organization. They are also sometimes referred to as “Town Halls,” given that the current structure dates back to the nineteenth century. Although municipalities are a common political subdivision in the whole country, they are not the only form of local administration, because there are other administrative entities that vary according to the region. These can be subordinate (minor local entities) or superior, as in the case of community of municipalities or *mancomunidades*, associations formed by municipalities having a common historical bond or shared economic interests which may extend across provincial boundaries. Also superior to the municipal administrative entities are the Provincial Councils (for provinces and, in some cases, regions) and the Island provinces. They are supra-municipal entities that provide services for a larger population but do not have a hierarchical relationship with municipalities.

Size doesn’t matter. This is one of the peculiarities of the municipal organization in Spain. The legal bases of local government (the 1978 Constitution and 7/1985 act) are the same, whether for a municipality of 50 inhabitants or for a city of half a million and, consequently, their organization and operation are similar. In 2003, a specific regime was introduced with special features for municipalities with large populations (those bigger than 250,000 inhabitants, capitals or as agreed upon by law) and—above all—codified that Madrid has its own regulations as the Kingdom’s capital and the municipality with the largest population.

Local government is a government whose members are democratically elected, and an administration made up of public employees. The municipal government is largely managed through three administrations: the Mayor’s Office, the Local Government Board, and the Municipal Plenary Session. In theory, the Mayor’s Office and the Local Government Board have executive powers, whereas the Municipal Plenary Session has legislative powers (authority to enact ordinances and regulations). In this sense, reality is

more complex because this separation is not as clear. The responsibilities are shared in certain areas and are allocated according to the seriousness or budgetary significance of the matter. The governmental organizational chart is completed with the addition of different commissions (e.g., Special Commission of accounts, which is mandatory) and with other bodies depending on the size of the municipality.

Spain is a country with a decentralized structure; therefore, municipalities exercise their own competences under the principle of subsidiarity. This means that the services and needs closest to citizens must be managed by the nearest administration (in this case, municipality). Some of the typical municipal responsibilities include urban planning, water supply, waste collection, local police, urban traffic management, firefighting, fairs and markets, social care, or funeral activities. Municipalities also carry out activities to promote culture, tourism, and sports. In short (and despite the central government’s efforts to contain them), municipalities have a very wide range of powers.

The magnitude of powers provided by municipalities brings us to the question: How are these activities funded? In this regard, we must emphasize that municipalities have recognized financial autonomy and have their own treasuries. Their income mainly comes from their assets and from their own taxes (primarily linked to real estate), but they also receive subsidies and a percentage of the taxes collected by other administrations. The associated rights and obligations are structured through municipal budgets (whose cycles coincide with the calendar year).

Finally, it is important to emphasize that people have the right to participate in municipal administration under transparent criteria and access to public information. In addition, the widespread implementation of the government’s accessibility on the Internet has meant important changes in how it forms relations, speeds up the processing of notifications and facilitates information regarding procedures. Improvements offered by new technologies and other traditionally recognized guarantees, especially in terms of civil liability and review of administrative acts, make local administration in Spain one of the most accessible to its citizens.



INTERVIEW

Francisco Javier Durán García

City Council Attorney, Villafranca de los Barros (population 14,000 in the Province of Badajoz, Autonomous Community of Extremadura, in southwest Spain):

IMLA: *What is the local governmental structure of Villafranca de los Barros?*

Villafranca de los Barros belongs to the Autonomous Community of Extremadura. Both administrations intervene, almost directly, into the lives of their residents. In the specific case of the City Council of Villafranca de los Barros, the government is structured in three bodies: the Mayor's Office, the Local Government Board, and the Municipal Plenary Session.

IMLA: *As an attorney for the City of Villafranca de los Barros, what are your job duties? Who is your client or who do you represent in your current job?*

As a City Council Attorney, I have two functions. On the one hand, I draw up reports and respond to legal inquiries on those matters that require legal involvement either to substantiate an agreement or to resolve disputes through an administrative route. On the other hand, I represent and defend the institution, in the judicial headquarters, against claims we receive from those administered before any of the jurisdictional orders (administrative, labor, criminal, civil).

IMLA: *What do you like the most about your job?*

How directly my work affects the lives of my fellow citizens. If I do my job well, in favor of the City Council, then it's also in the general interest. As a result, it improves the environment, coexistence, and the image of the institution.

IMLA: *How long have you been practicing law?*

16 years--I began practicing in 2005. Despite the time that's passed, I still consider myself a beginner and enjoy learning from my colleagues at ALEL.

IMLA: *And why did you become an attorney?*

When I began my studies at the university, it was clear to me that my vocation was law, but I was not familiar with local government law. It wasn't until the end of my time at the university that I discovered, through a professor, the possibility of continuing my studies in order to make a career in public administration. Of all the options, I chose to be a local government lawyer because I like the practice of law and it allows me to have great job stability.

IMLA: *Please tell us something about Villafranca de los Barros that most people don't know.*

Villafranca de los Barros and its comarca, Tierra de Barros, are one of the areas with the highest wine production in Spain. Here, we produce a great variety of wines thanks to the unique qualities of our soil, the abundant sunlight, and favorable climate.

IMLA: *What is your favorite Spanish tradition?*

Traveling the Camino de Santiago—a network of pilgrimage routes of medieval origin, across Spain, that lead to Apostle Santiago's tomb in the Santiago de Compostela (Galicia) Cathedral. These paths are covered in stages, through many landscapes and regions of Spain (including Villafranca de los Barros) and are a good way to get to know Spain's heritage, culture and nature. It can be done alone, in a group, on foot, on horseback or by bicycle. The average length of daily travel is around 20 km or about 12 1/2 miles.

IMLA: *If I had 24 hours in Villafranca de los Barros, where would you recommend I visit?*

If someone were to pass through Villafranca de los Barros, he or she would be received by a city rich in heritage and traditions and, at the very least, would have to try my two recommendations (one cultural and the other culinary). First, you should visit the Historical Museum where a magnificent collection of antique vehicles is kept. Second, you should try a "stew" in one of the city's restaurants, either of lamb or mushrooms, paired with a good wine.

IMLA: *The most important question of all. What is your favorite Spanish food dish?*

Without a doubt, my favorite food is the "salmorejo." It is a very thick, cold cream made from tomato, bread, garlic, and oil. Some confuse it with gazpacho because they both have tomato as the main ingredient, but they are different in texture and flavor. It is typical of southern Spain (Andalucía y Extremadura), but these days you can find it in almost all restaurants.

IMLA: *Finally, if you could vacation anywhere in the United States, where would you go and why?*

If I could choose a destination in the USA, I would start at the Yellowstone National Park. My family and I love nature and that park has a very large landscape with different ecosystems that are surely worth a visit. If we also find Yogi the Bear, then even better.

AMICUS

BY: AMANDA KARRAS,
*IMLA Deputy Director and Director
of Legal Advocacy*

IMLA's Impact at the Supreme Court in the 2020/21 Term

While there were several high-profile cases that were technically losses for local governments at the Supreme Court this past term, when you look beneath the surface of these decisions and examine “what might have been,” you can see the impact of IMLA’s advocacy on behalf of local governments more clearly. On a practical level, there are some cases that local governments are likely to lose at the Supreme Court. In those instances, the best-case scenario for IMLA is to practice damage control. For example, with the current makeup of the Court, local governments will be hard-pressed to win cases involving private property rights or cases involving religious liberty. *Cedar Point Nursery v. Hassid* and *Fulton v. City of Philadelphia* presented issues in these substantive areas, and both represent scenarios where outcomes could have been worse for local governments.

Cedar Point Nursery v. Hassid

At issue in this case was the California Agriculture Labor Relations Act (ALRA), which allows union organizers access to agricultural employees at employer worksites. The union organizers, under the Act, could access employer worksites during four 30-day periods each year for up to three hours each day before or after working hours or during lunch. Two agricultural employers brought a claim against the California agency in charge of administering the ALRA claiming that the Act amounted to an uncompensated per se physical taking under the Fifth Amendment. The growers argued that as one of

the property rights in their “bundle of sticks,” they have the right to exclude people from their property, and because the Act prevents them from doing so, the State violated the Fifth Amendment’s takings clause.

The question in this case was whether the temporary easement amounted to a per se physical taking under the Fifth Amendment. The reason this matters, as Justice Breyer explains in his dissent, is because if a regulation amounts to a physical appropriation of property, then “there is no need to look further; the Government must pay the employers ‘just compensation.’”¹ However,

if the regulation targets employers’ property rights, Justice Breyer explains under *Penn Central Transp. Co. v. New York City*, 428 U.S. 104 (1978), “the government need pay the employers ‘just compensation’ only if the regulation ‘goes too far.’”²

The Ninth Circuit ruled against the agriculture employers, finding no permanent physical invasion in this case.³ The court compared this case to *Nollan v. California Coastal Commission* (1987), where the California Coastal Commission sought to condition the grant of a permit to rebuild a house on a transfer to the public of an easement across beachfront property.⁴ In that case the Supreme Court required the Coastal Commission to pay for an easement. Here, “[t]he regulation significantly limits organizers’ access to the Growers’ property. Unlike in *Nollan*, the Ninth Circuit reasoned the Act “does not allow random members of the public to unpredictably traverse their property 24 hours a day, 365 days a year.”⁵

In a 6-3 pro-property rights decision authored by Chief Justice Roberts, the Supreme Court reversed the Ninth Circuit, holding that the access regulation at issue is a per se physical taking because it “appropriates a right to invade the growers’ property” thereby preventing the owner from exercising its right to exclude.⁶ The majority likened the protection of property rights to the preservation of freedom, noting the right to exclude is “one of the most treasured rights of property ownership.”⁷ The Court explained that “[w]henver a regulation results in a physical appropriation of property, a per se taking has occurred, and *Penn Central* has no place.”⁸

The majority rejected the State’s arguments and the Ninth Circuit’s reasoning that because the regulation did not provide year-round 365 days a year access, it could not be a per se taking, calling that argument “insupportable as a matter of precedent and common sense.”⁹ On this point, the majority

notes that “a physical appropriation is a taking whether it is permanent or temporary” and the duration only points to the amount of just compensation under the Fifth Amendment.¹⁰

While the case was a loss for the State, looming larger in the case was the question of how the decision could implicate state and local regulations that allow temporary access to private property for things like government inspections and searches. IMLA joined an amicus brief filed by the State and Local Legal Center (SLLC) pointing out that local governments routinely exercise their police power to enter private property for health and safety inspections for everything from restaurants and nursing homes to child welfare visits, and that any rule that would find a per se taking in this case could implicate these important government functions.

Fortunately, the majority opinion directly addressed these concerns, noting first its holding “does nothing to efface the distinction between trespass and takings” and that “[i]solated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right.”¹¹ Additionally, the majority specifically noted that “many government-authorized physical invasions will not amount to a taking because they are consistent with longstanding background restrictions on property rights.”¹² For example, the Court noted that nuisance abatement, the doctrine of public or private necessity, and the execution of reasonable search warrants would all be activities included in the traditional common law privilege to access private property and would not subject the government to a takings claim.¹³ Finally, the majority explained that governments can require property owners to give up their right to exclude and allow access to government officials as a

condition for receiving a benefit, for example, through the grant of a permit, license, or registration for health and safety inspections.¹⁴

Justice Breyer, joined by Justices Sotomayor and Kagan, dissented and raised several questions about the majority’s analysis, including how the decision would impact government regulations allowing access to property, noting he “suspect[s] that the majority has substituted a new, complex legal scheme for a comparatively simpler one.” For example, Justice Breyer questions what kind of invasion would be considered “isolated” such that it would amount to a trespass rather than one that is “temporary,” which would constitute a taking.¹⁵ The dissent also questions what background principles at common law would allow for the exception to access private property.¹⁶ For example, the dissent asks whether only those principles that existed at the time of the country’s founding would count?¹⁷ And finally, the dissent queries the majority’s exception that would allow for government access in exchange for “certain benefits,” inquiring whether having sewage collection, electrical access, or internet accessibility would count as a benefit. Justice Breyer points out that many elected officials would believe that peace brought about through union organizing is also a benefit, but that the regulation here fell outside the Court’s exceptions.¹⁸

While the dissent’s points are well-taken and likely portend more litigation in this area in the future, the fact remains that the majority’s decision does specifically exception certain government invasions. There was no reason the Court had to provide these exceptions in its decision, given that the regulation at issue did not involve government searches or health and safety inspections. And while we will never know exactly what factored into the Court’s decision to include these exemptions, given the arguments made by IMLA and the SLLC, it would seem

our brief helped shape the Court’s decision and limit its impact for state and local governments.

Fulton v. City of Philadelphia

Like *Cedar Point Nursery*, *Fulton v. City of Philadelphia* falls into the category of “it could have been much worse” for local governments. While the City technically lost the case, the Court refrained from overruling an important precedent and issued a somewhat narrow ruling in a case that pit religious liberty on one side versus antidiscrimination principles on the other.

The facts of the case are straightforward. Philadelphia contracts with over 20 outside agencies like Catholic Social Services (CSS) to place children who cannot remain in their homes with foster families. CSS had a contract with the City for the placement of foster children for over 50 years. CSS would not certify same-sex couples as potential foster parents because of its religious views on marriage. In 2018, the City learned that CSS would not consider same-sex couples as prospective foster parents and informed CSS that such a refusal violated the nondiscrimination provision in the parties’ contract as well as the City’s Fair Practices Ordinance (FPO), which forbids discrimination on the basis of sexual orientation in places of public accommodation.

Section 3.21 of the contract between the City and CSS prohibited CSS from rejecting a child or family based on protected characteristics, including sexual orientation “unless an exception is granted by the Commissioner ... in his/her sole discretion.” The City’s FPO forbids “deny[ing] or interfere[ing] with the public accommodations opportunities of an individual or otherwise discriminat[ing] based on his or her race, ethnicity, color, sex, sexual orientation, . . . disability, marital status, familial status,” or several other protected categories. Phila. Code

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§9-1106(1) (2016).

When the City ceased referring foster children to CSS because CSS refused to certify same-sex couples as foster parents, CSS sued, arguing that the City was violating CSS's free exercise rights under the First Amendment.

By way of background, over 30 years ago, the Supreme Court held in *Employment Division, Department of Human Resources of Oregon v. Smith*, that neutral laws of general applicability that incidentally burden religion are not ordinarily subject to strict scrutiny under the First Amendment.¹⁹ The Third Circuit relied on *Smith* and concluded that the City was enforcing a neutral law of general applicability and therefore if CSS wished to continue working as a foster care agency for the City, it needed to comply with the City's anti-discrimination requirements.²⁰ In so holding, the Third Circuit noted that if it accepted CSS's arguments, "then *Smith* is a dead letter, and the nation's civil rights laws might be as well."²¹

All nine Justices of the Supreme Court disagreed with the Third Circuit, ruling in favor of CSS. However, the unanimous decision masked deeper divisions on the Court on the bigger issues, including on whether *Smith* should be overruled.

The majority opinion, authored by Chief Justice Roberts and joined by five other Justices, concluded that Section 3.21 of the City's contract was not generally applicable under *Smith* because it allows for exemptions in the discretion of the Commission, and the City therefore needed to meet heightened scrutiny for the requirement to survive, which it could not.²² Although CSS argued that the Court should overrule *Smith* (and as discussed below, three Justices agreed), the Court declined to do so, concluding that the case fell outside of *Smith*'s parameters of general applicability.²³

And under *Smith*, if a State or local government "has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reasons."²⁴ The Court concluded that because of the ability to provide exemptions, the contract contained no generally applicable non-discrimination requirement.²⁵ The Court rejected the City's arguments that the non-discrimination provision is generally applicable because the City has never granted an exemption.²⁶ The Court reasoned it is the creation of the policy to provide exceptions that renders the contract not generally applicable, not whether the exceptions were actually granted.²⁷

In terms of the City's FPO, which prohibits discrimination based on sexual orientation, the Court concluded that the ordinance does not apply to CSS "because foster care agencies are not acting as public accommodations in performing certifications."²⁸ That is because a public accommodation must "provide a benefit to the general public allowing individual members of the general public to avail themselves of that benefit if they so desire" and "[c]ertification as a foster parent... is not readily accessible to the public" unlike, for example, hotels, restaurants, and pools.²⁹

Once the Court determined that the City's anti-discrimination policies in this case fell outside of *Smith*, the Court next weighed whether the policy could survive strict scrutiny under *Church of Lukumi Babalu Aye, Inc. v. Hialeah*.³⁰ Under this rubric, a government policy / regulation can only survive strict scrutiny if it advances "interests of the highest order and is narrowly tailored to achieve those interests."³¹ (internal quotations omitted).

The City argued its non-discrimination policy should survive strict scrutiny as it serves three com-

PELLING interests: "maximizing the number of foster parents, protecting the City from liability, and ensuring equal treatment of prospective foster parents and foster children."³² The Court outright rejected the first two reasons proffered, because denying CSS the ability to serve as a foster agency might actually reduce the number of foster parents and the City's liability concern was only speculative.³³ As to ensuring equal treatment for gay and lesbian foster parents, the Court agreed this is a "weighty" interest, but stressed on the facts of this case where the ability to provide exemptions in the contract exists, that interest could not justify refusing to provide an exception to CSS to accommodate its religious beliefs.³⁴

Justice Barrett filed a concurring opinion which Justices Kavanaugh and Breyer joined (the latter except to the first paragraph), which questioned the workability of overruling *Smith* and similarly questioned what would replace *Smith* if the Court decides to overrule it. In Justice Barrett's view, because nine Justices could agree that in this case the City could not satisfy strict scrutiny, she saw no reason to tackle the thornier issue of overruling *Smith* though she did seem to leave open that possibility in another case. Specifically, her first paragraph (which Justice Breyer did not join), notes that she finds the "textual and structural arguments against *Smith* more compelling."²⁷

Justice Alito, who was joined by Justices Thomas and Gorsuch, issued a vociferous (and lengthy) concurrence in the judgment only, indicating they would overrule *Smith* given its "severe holding" and that its interpretation can result in "startling consequences." According to Justice Alito, the City can easily sidestep the majority's decision by eliminating "the never-used exemption power. [and if] it does that, then, voilà, today's

decision will vanish—and the parties will be back where they started. The City will claim that it is protected by *Smith*; CSS will argue that *Smith* should be overruled.”

If Justice Alito is correct that all the City needs to do is pull up the contact and delete the discretionary language in it, then the majority’s decision is quite narrow. However, when the decision is read in conjunction with the COVID-19 cases from the Court’s so-called “shadow docket” (i.e., the emergency orders list), it may be that the *Fulton* decision is broader than it appears. For example, in *Tandon v. Newsom*, the Supreme Court issued a short per-curiam decision (before the *Fulton* decision), which indicated that laws are not neutral and generally applicable under *Smith* when “they treat *any* comparable secular activity more favorably than religious exercise.” In this case, the State of California had limited all gatherings in homes to no more than three household whether the gatherings were for religious or secular purposes. In finding the regulation was not neutral and generally applicable, the per curiam decision compared at home religious gatherings of more than three households to hair salons, retail stores, and indoor restaurants, all of which allowed more than three households in the same room at the same time. The *Tandon* decision explained that to determine whether an activity is comparable under the Free Exercise Clause, one looks to the “asserted government interest that justifies the regulation” and here, because the secular activities the State allowed did not pose a lesser risk to the transmission of COVID-19, the State was impermissibly burdening the petitioner’s free exercise rights.

Overall, it is good news for local governments that the Court did not overrule *Smith*. The amicus brief filed by IMLA and the SLLC argued that *Smith* should not be overruled

as requiring a strict scrutiny analysis for requested religious exemptions would be unworkable, fact-intensive, and subjective. Further, IMLA’s amicus brief argued that overruling *Smith* would have a negative cascading effect on local governments: on everything from employment issues and contracts, to almost every type of government regulation, including (but not limited to) non-discrimination ordinances. And although *Fulton* and *Tandon* could both be read as undermining or skirting *Smith*’s holding, further development of the law will be necessary before we know the answer to that.

NOTES

1. Cedar Point Nursery v. Hassid, 594 U.S. ___, p. 1 (2021) (Breyer, J. dissenting).
2. *Id.*
3. Cedar Point Nursery v. Shiro-ma, 923 F.3d 524, 530 (9th Cir. 2019), *cert. granted sub nom.* Cedar Point Nursery v. Hassid, 141 S. Ct. 844, 208 L. Ed. 2d 414 (2020), *rev’d and remanded sub nom.* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021).
4. *Id.* at 532, *citing* Nollan v. California Coastal Commission, 483 U.S. 825 (1987).
5. *Id.*
6. Cedar Point Nursery v. Hassid, 594 U.S. ___, p. 7 (2021).
7. *Id.* at 5, 7.
8. *Id.* at 7.
9. *Id.* at 10.
10. *Id.* at 11.
11. Cedar Point Nursery v. Hassid, 594 U.S. ___, p. at 17 (2021).
12. *Id.* at 18
13. *Id.* at 18-19.
14. *Id.* at 19. In addition to the foregoing points specifically mentioned in the context of government intrusions onto private property, the majority also distinguished this case from a situation where

a business is open to the public, noting that “[l]imitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public.” *Id.* at 14-15.

15. *Id.* at Breyer, J. dissent, p. 14.
16. *Id.* at Breyer, J. dissent, p. 14-15
17. *Id.*
18. *Id.* at 15-16.
19. Employment Division, Department of Human Resources of Oregon v. Smith, 494 U. S. 872 (1990).
20. *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019), *cert. granted sub nom.* *Fulton v. City of Philadelphia*, 140 S. Ct. 1104, 206 L. Ed. 2d 177 (2020), *rev’d and remanded sub nom.* *Fulton v. City of Philadelphia*, , 141 S. Ct. 1868 (2021).
21. *Id.* at 159. *Fulton v. City of Philadelphia*, 593 U.S. ___, p. 7-8, 13 (2021). The Chief Justice was joined by Justices Breyer, Sotomayor, Kagan, Kavanaugh, and Barrett in the majority.
23. *Id.* at 13.
24. *Id.* at 6.
25. *Id.* at 13.
26. *Id.* at 10.
27. *Id.*
28. *Id.* at 11.
29. *Id.* at 12.
30. 508 U.S. 520 (1993).
31. *Fulton v. City of Philadelphia*, 593 U.S. ___, p. 13 (2021).
32. *Id.*
33. *Id.* at 14.
34. *Id.*
35. *Id.* at 1 (Barrett, J. concurring).
36. *Id.* at 1 (Alito, J. concurring).
37. *Id.* at 8.
38. *Tandon v. Newsom*, 593 U.S. ___, p. 1 (2021) (per curiam) (emphasis in original).
39. *Id.* at 3.
40. *Id.*

Local Broadband *cont'd from page 11*

York or San Francisco. It's in Chattanooga." Quartz (April 15, 2021), <https://qz.com/1996234/the-best-broadband-in-the-us-is-in-chattanooga-tn/>; S. Gonsalves, "Study Finds Chattanooga Fiber Network 10-Year ROI: \$2.69 Billion," Community Networks (February 1, 2021), <https://muninetworks.org/content/study-finds-chattanooga-fiber-network-10-year-roi-269-billion>.

4. See e.g., Casey Lide, "An Overview of Broadband Provisions in the Infrastructure Bill (as of July 30, 2021)", August 2, 2021, available at: <https://www.beyondtelecomlawblog.com/an-overview-of-broadband-provisions-in-the-infrastructure-bill-as-of-july-30-2021/> (last visited Aug. 9, 2021).

5. Cite White House press release in March 2021 <https://www.whitehouse.gov/briefing-room/statements-releases/2021/fact-sheet-the-american-jobs-plan/>

6. Cite House Republican bills [https://republicans-energycommerce.house.gov/news/press-release/ec-gop-leaders-unveil-the-boosting-broadband-connectivi-](https://republicans-energycommerce.house.gov/news/press-release/ec-gop-leaders-unveil-the-boosting-broadband-connectivi-ty-agenda/)

[ty-agenda/](https://republicans-energycommerce.house.gov/news/press-release/ec-gop-leaders-unveil-the-boosting-broadband-connectivi-ty-agenda/)

7. <http://www.localnetchoice.org/connections/arkansas-state-legislature-significantly-expands-local-broadband-options/>

8. <https://app.leg.wa.gov/billssummary?BillNumber=1336&Year=2021&Initiative=false>

9. <https://tech.slashdot.org/story/21/06/30/0042239/ohio-gop-ends-attempt-to-ban-municipal-broadband-after-protest-from-residents>

10. The National Information and Technology Administration (NTIA) has issued a useful tool to guide communities through the process of developing a community-led broadband initiative. NTIA, "Planning a Community Broadband Roadmap: A Toolkit for Local and Tribal Governments," https://broadbandusa.ntia.doc.gov/sites/default/files/publication-pdfs/bbusa_planning_community_broadband_roadmap.pdf

11. See, e.g., Cequel III Communications I LLC v. Local Agency Formation Commission of Nevada County, 149 Cal. App. 4th 310; 57 Cal. Rptr. 3d 32 (Cal. Supp. 2007).

12. Coalition for Local Internet Choice, "State Restrictions on Community Broadband Initiatives and Public Private Partnerships (as of July 1, 2021)," <http://www.localnetchoice.org/wp-content/uploads/2021/08/CLIC-List-State-Barriers-7-1-21.pdf>

13. *In the Matter of City of Wilson, Petition for Preemption of North Carolina General Statute 160A-340 et seq.*, FCC Rcd. 2408 (F.C.C.), 2015 WL 1120113; the FCC found that "[t]aken together, these purported "level playing field" provisions single out communications services for asymmetric regulatory burdens that function as barriers to and have the effect of increasing the expense of and causing delay in broadband deployment and infrastructure investment." *Id.* at ¶ 30.

14. *State of Tennessee v. Federal Communications Commission*, 832 F.3d 597 (6th Cir. 2016).

15. CLIC, *supra* note 2, at 8.1.21.

16. "Dillon's Rule" is named after Iowa Judge F. Dillon, who espoused its principles in two cases decided in 1868. <https://www.nlc.org/resource/cities-101-dele->



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17. CLIC, *supra* note 2.

18. NTIA, "NTIA Launches Updated Federal Broadband Program Guide," <https://broadbandusa.ntia.doc.gov/news/latest-news/ntia-launches-updated-federal-broadband-funding-guide>

19. The NTIA Guide is available online at <https://broadbandusa.ntia.doc.gov/sites/default/files/2021-07/FY21%20Federal%20Funding%20Guide%20Updated%2007-12-21-compressed.pdf>

20. *See, e.g.*, C. Lide, *supra* note 4; *see also* J.K. Willcox, "Infrastructure Bill Includes \$65 Billion for Improving Internet Access," *Consumer Reports* (August 5, 2021), <https://www.consumerreports.org/internet/infrastructure-bill-includes-65-billion-for-internet-access-a686102721/>

21. NTIA, "Broadband Infrastructure Program," <https://broadbandusa.ntia.doc.gov/resources/grant-programs/broadband-infrastructure-program>

22. *See, e.g.*, the Virginia Telecommunications Initiative, <https://www.dhcd.virginia.gov/vati>; the Maryland Expansion of Existing Broadband Grants Program, <https://dhcd.maryland.gov/Broadband/Pages/default.aspx>; the Massachusetts Mass Interconnect Program, <https://broadband.masstech.org/recovery-plan-programs/mass-internet-connect>; and the Georgia Broadband Deployment Initiative, <https://www.gacities.com/Resources/Reference-Articles/Resources-to-Serve-Cities-Georgia-Broadband-Deploy.aspx>.

23. *See, e.g.*, 47 U.S.C. §§ 253 and 332.

24. For example, in October 2014, the FCC clarified portions of the Spectrum Act (Pub. L. No. 112-96 § 6409(a), 126 Stat. 156 (2012)) that were intended to address problems relating to state and local government processing of applications for wireless broadband. The FCC directed local governments to approve applications for modification of "an existing wireless tower or base station" (including addition, removal and replacement of equipment) if the modification will not "substantially change." (*Wireless Siting Order*,

¶ 182 *et seq.*). Notably, however, the FCC made it clear that Section 6409(a) does not apply to a state or local government acting in a proprietary capacity, as opposed to a land use regulator. In other words, Section 6409(a) does not apply to modifications of wireless facilities on municipal light poles and other structural property owned by the local government.

25. *In the Matter of Accelerating Wireless Broadband Deployment By Removing Barriers to Infrastructure Investment*, 33 FCC Rcd. 9088 (F.C.C.), 33 F.C.C.R. 9088, 2018 WL 4678555, (rel. September 27, 2018), *aff'd*, *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020), cert. denied sub nom *City of Portland v. Federal Communications Commission*, No. 20-1353 (June 28, 2021).

26. Coalition for Local Internet Choice, "State Restrictions on Community Broadband Initiatives and Public Private Partnerships (as of July 1, 2021)," <http://www.localnetchoice.org/wp-content/uploads/2021/08/CLIC-List-State-Barriers-7-1-21.pdf>

27. *Id.*

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Joint Submission on COVID Charge May Not Introduce New Sanctions

Toronto (City) v. Nawrocki and Zest For Living Etobicoke Inc., 2021 ONCJ 350 <https://canlii.ca/t/jgzxz>

The Defendant was charged by the City of Toronto (City) for operating a non-essential retail store contrary to the *Reopening Ontario (A Flexible Response to COVID -19) Act, 2020*, SO 2020, c. 17 (ROA). At early resolution, the Defendant and the City Prosecutor agreed on a joint submission: two convictions, but only a monetary fine against the corporation and a suspended sentence against the Defendant as personally charged. The Defendant plead guilty, and Prosecutor sought approval of the joint submission and a term of probation for six months, subject to three statutory conditions: not to commit a related or similar offence, attend court when required, and notify the court of a change of address. The Court viewed the probation to be excessive, as the Prosecutor made no mention of it prior to the Defendant entering a guilty plea. The Court adjourned the matter and requested that the Prosecutor make additional submissions about the probation orders with regards to the ROA.

HELD: Fine upheld, probation order denied.

DISCUSSION: The Court highlighted the advantage of joint submissions, specifically as they aid in resolving cases in a timely manner allowing for the efficient and effective operation of the judicial system. The case law supports that “the justice system depends on judges rarely departing from sentences jointly recom-

Skirmishing over Jurisdiction—and More

Claim for Refund from City is Declaratory Judgment Action

Jian v. City of Richmond, 2021 BCCRT 891 <https://canlii.ca/t/jhj54>

The Applicant, a property owner in the City of Richmond (City) was outside Canada for most of 2020 and could not re-enter due to travel restrictions. As a result, he was unable to take care of the exterior of his property. The City’s Property Standards Bylaw (Bylaw) requires an owner to maintain a property in good condition, including keeping it free from long weeds and grass. Upon receiving a complaint about the property, the City’s Bylaw Officer issued an order to comply. The Applicant failed to do so. The City completed the clean-up and invoiced the Applicant, who paid the invoice and sought a partial refund.

HELD: Application dismissed.

DISCUSSION: The application commenced under the Province of British Columbia’s *Civil Resolution Tribunal Act*, [SBC 2012] Chapter 25 (CRTA), that established a dispute resolution body, the Civil Resolution Tribunal (Tribunal). The mandate of the Tribunal is to provide dispute resolution, ordering a party to do or stop doing something or ordering the payment of money, which includes hearing matters of debt or damages. There was no dispute between the parties as to the Bylaw or the City’s authority to invoice the Applicant; the Applicant’s argument was that the

invoice was excessive for the work required. The Tribunal questioned whether the application fell within its jurisdiction, and reviewed *Abbas Khani-Hanjani v. City of Surrey*, 2012 BCPC 346. There, the Court held that reversing a City invoice for penalties under a bylaw contravention was not a claim for debt damages, but rather was a claim for declaration or injunction, and dismissed for lack of jurisdiction. The Tribunal applied *Abbas Khani-Hanjani* to the matter before it and held that the refund sought by the Applicant was a claim for declaratory relief and not within the Tribunal’s jurisdiction. Application dismissed.

mended by counsel in order to operate effectively” *R. v. Thompson*, 2013 ONCA 202. The Prosecutor relied on the Supreme Court of Canada decision, *R. v. Anthony Cook*, [2016] SCC 43 which stated that joint submissions, while not binding on the Court, must be given deference, and may only be rejected if contrary to public interest. The Court requires a high threshold be met to challenge a joint submission, citing *R. v. Druken*, 2006 NLCA 67 and *R. v. B.O. 2*, 2010 NLCA 1 which provides that joint submissions are contrary to the public interest if “markedly out of line with the expectations of reasonable persons...” and that judges should “avoid rendering a decision that causes an informed and reasonable public to lose confidence in the institution of the Courts.”

The Court was not persuaded that *Anthony-Cook* stands for the

proposition that a joint submission remains a joint submission when the other party, in this matter the Defendant, is not in agreement with all details thereof. The Court held that the Prosecutor was mistaken in believing that the plea agreement was within the framework of the joint submission. The Court found that the probation order, while a permitted tool for the Prosecutor, was not proportional to the seriousness of the Defendant’s offence. It upheld the fine and suspended sentence but did not order the probation.

Knowing the Difference: Place of Origin vs. Place of Residency
Renahan v. St. Catharines (City), 2021 HRTO 666 <https://canlii.ca/t/jhhqj>

The Applicant, a resident of the City of Toronto, claimed discrimination after visiting the City of

St. Catharines, for being unable to access Sunset Beach. The Applicant suggested she was discriminated against as a non-resident when she was barred from entering a public beach and public waterway, as City signage limited access to Niagara Region residents only. The Applicant filed an application against the City alleging discrimination because of place of origin contrary to the *Human Rights Code*, R.S.O., 1990, c. H19 (*Code*).

HELD: Application dismissed.

DISCUSSION: The jurisdiction of the Human Rights Tribunal of Ontario (Tribunal) is limited to applications that identify acts of discrimination based on 17 enumerated grounds under the *Code*. *G.L. v. OHIP (General Manager)*, 2014 ONSC 5392. These are: citizenship, race, place of origin, ethnic

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origin, colour, ancestry, disability, age, creed, sex/pregnancy, family status, marital status, sexual orientation, gender identity, gender expression, receipt of public assistance (in housing) and record of offences (in employment). Therefore, the Tribunal is unable to hear matters of alleged unfairness *Hay v. Ontario (Human Rights Tribunal)*, 2014 ONSC 2858. The Tribunal reviewed the application, and determined that although the Applicant claimed discrimination related to place of origin, an enumerated ground under the *Code*, the discrimination actually resulted from the Applicant's place of residence. Given that place of residence is not a protected category under the *Code*, the Tribunal lacked jurisdiction to hear the matter.

Application dismissed.

Pothole Injury not Redressable under Human Rights Code

Kingston v. Ottawa (City), 2021 HRTO 511 <https://canlii.ca/t/jh796>

The Applicant, a resident of the City of Ottawa (City) filed an application under the *Human Rights Code*, R.S.O. 1990, c. H.19 (*Code*) alleging discrimination due to disability, sex, age, and association with a person identified by a prohibited ground. The Applicant suggested that the City discriminated against her when it failed to respond to her complaint about a pothole on City property that resulted in her sustaining injuries.

HELD: Application dismissed.

DISCUSSION: The Human Rights Tribunal of Ontario (Tribunal) juris-

diction requires an application to contain alleged discrimination under an enumerated ground of the *Code*, *G.-L. v. OHIP (General Manager)*, 2014 ONSC 5392. The Tribunal does not have jurisdiction to address allegations of unfairness, *Hay v. Ontario (Human Rights Tribunal)*, 2014 ONSC 2858. Reviewing the application, the Tribunal noted the language used by the Applicant, and citing use of the word "discrimination" in her allegations that the City's negligence resulted in the her injuries. The Tribunal found that the action ought to be classified as a personal injury claim and a matter of negligence law, not a discrimination claim under the *Code*. The Tribunal further clarified that being a resident of a municipality does not establish the necessary service relationship with that City, and in order for the Tribunal to hear the application such a relationship must exist, not merely an interaction between the parties, *Ontario (Attorney General) v. Ontario Human Rights Commission*, 2007 CanLII 56481. Application dismissed.



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Short Term Rentals: No Licence for Self-Contained Dwelling Unit
Curran v Victoria (City), 2021 BCSC 1552 <https://canlii.ca/t/jhgpg>

The Petitioner, a resident in the City of Victoria (City), had rented out the basement suite of her home since 2012 as a short-term rental. In 2018, the City passed a Short-Term Rental Bylaw and the Petitioner applied for a licence. The City issued the licence in 2019 on premise that the Petitioner's short-term rental was offered in her principal residence, not in a separate suite. In 2020, the City denied the Petitioner's licence after a licensing inspector confirmed that the rental was a self-contained dwelling unit. The Petitioner appealed pursuant to section 60(5) of the *Community Charter*, S.B.C. 2003, c. 26 (*Community Charter*). City Council (Council) unanimously voted to deny reconsideration. The Petitioner sought judicial review, arguing that the Council's reasoning was unintelligible and did

not state how or why the decision was made, and was unreasonable as it failed to consider elements of the short-term rental suite.

HELD: Petition dismissed.

DISCUSSION: Relying on *Chishuan Housing Society v. Silver*, 2021 BCSC 1074 the Petitioner argued that an administrative decision maker should explain how and why a decision was reached, and that Council failed its obligation to provide its reasoning. In response, the City referenced section 60 of the *Community Charter* that outlines the appeal process for municipal business licences and does not require Council to provide written reasons for its decisions. The City's argument was further supported by *Maple Ridge (District of) v. Thorhill Aggregates Ltd.*, [1998] B.C.J. No. 1485 (C.A) which held that the Council's decision making does not lend itself to either individual

or collective reasoning by Councillors. The Court was persuaded by the City's argument, notably section 60 of the *Community Charter*, finding that if the legislature had intended to require Council to provide reasons, it would have explicitly said so.

In the alternative, the Petitioner argued that Council's decision was not reasonable because it did not consider the possibility that her short-term rental was permitted prior to the Zoning Bylaw amendment and was a legal non-conforming use. Noting its finding that the Council was not required to provide a rationale for its decision, the Court considered whether the decision made by Council was defensible in light of the facts and the law. It found that the Petitioner's suite constituted a self-contained dwelling unit, and there was no lawful pre-existing use of two self-contained dwelling units. Therefore, Council's decision was reasonable. Petition dismissed.

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BY: ERICH EISELT,
*IMLA Assistant General Counsel
and Director of Affirmative Litigation*

Opioid Update – Settlements on the Horizon

INTRODUCTION

It has now been more than seven years since municipalities filed their first opioid lawsuits. The early cases, brought by the City of Chicago and by Santa Clara County, demanded redress from manufacturers including Purdue Pharma, Johnson & Johnson, Teva, Actavis, Endo, Allergan, Cephalon, and Watson. Tribes, hospitals, third party payors, unions, school districts, Neonatal Abstinence Syndrome (NAS) babies and other plaintiffs rapidly filed. Additional supply chain defendants were named: distributors (AmerisourceBergen, Cardinal Health, and McKesson), pharmacies (Walgreens, CVS, Rite-Aid, Costco, and Walmart), prescribers, and others.

Ultimately, nearly 4000 local governments brought actions, based on public nuisance, negligence, violation of state consumer and deceptive practices laws, false claims, RICO, unjust enrichment, and other counts. Defendants' motions to dismiss, whether challenging the parameters of public nuisance or arguing preemption, statutes of limitation, proximate cause, statewide concern, municipal cost recovery, safe harbor, or other mechanisms, overwhelmingly failed.

While the litigation moved gradually forward, thousands more died of

opioid overdose, bringing the total to nearly 600,000 American deaths over two decades.¹ Fatalities and addiction have accelerated during the anomie of COVID-19, with another 93,000 dead in 2020 alone, and an estimated 1.6 million suffering from opioid use disorder (OUD).²

The Federal Cases

By December 2017, with hundreds of opioid cases clogging district courts, *In re National Prescription Opiate Litigation* was formed. An initial 62 actions cases were transferred to the

docket before Judge Aaron Polster in Ohio's Northern District;³ within days, *City of Chicago* was moved. The MDL now numbers more than 3,300 cases and has produced nearly a dozen bellwethers. Track One generated a \$260 million manufacturer/distributor settlement with two Ohio counties in 2019;⁴ Track Two, brought by two West Virginia municipalities against the distributors, currently awaits a decision by Judge David Faber after a two-month bench trial.⁵ In Track Three, Rite Aid has settled as two Ohio target the pharmacies and prepare for trial beginning October 2021. Chicago, San Francisco, and the Cherokee Nation were designated as bellwether plaintiffs in 2020⁶ and five more localities, in Georgia, New Mexico, Texas, North Carolina, and Ohio were named in May 2021.⁷

The State Cases

Defendants successfully removed numerous state actions to federal courts and ultimately to the MDL, whether through diversity, federal question, federal officer, or other vehicles. Today, an estimated 350 municipal actions remain in limbo before Judge Polster, arguing that removal was improvidently granted and demanding his review of jurisdictional bona fides.⁸ But significant litigation, including Santa Clara's suit and more than four dozen AG actions, remained in state court. Some have resulted in decisive legal determinations and settlements. Former AG Mike Hunter's Oklahoma action was the first to bear fruit, as Purdue Pharma settled for \$270 million in early 2019 to avoid a televised trial. J&J/Janssen declined to settle that case, now appealing a \$465 million judgment. now on appeal.⁹ Aligning with the vast majority of opioid proceedings around the country, *People of Oklahoma* determined that public nuisance actions need not be limited to real property, and that an

injury to the health and welfare of the public at large was fully cognizable. In the “New York MDL” before Judge Jerry Garguilo in Suffolk County, the State and two counties sued the manufacturers, distributors, and pharmacies. J&J settled that suit for \$230 million on the eve of trial in June 2021, in July, the “Big Three” agreed to pay 1.1 billion and the pharmacies settled with Nassau and Suffolk for \$21.5 million each. Proceedings continue against, in a jury trial which has been live-streamed daily.¹⁰ A Tennessee court NAS baby case was recently settled by Endo for \$35 million.¹¹ And trial in the California case originally brought by Santa Clara County in 2014 (now including Orange, Los Angeles, and the City of Oakland) which seeks \$50 billion from opioid manufacturers and ended in July, now awaits a decision as this article goes to print.¹²

The Purdue Bankruptcy

Seeing the early inevitability of recurring courtroom defeats, Purdue Pharma, whose sales practices are credited with a foundational role in the opioid crisis, filed for Chapter 11 protection in September 2019.¹³ After two years of negotiation, a large majority of creditors including states and thousands of municipalities, reached preliminary approval of the Purdue Plan of Reorganization (Plan) on August 9, 2021. But at least nine states and the DOJ have rejected the Plan, many objecting to a novel mechanism which will provide the Sackler family members, none of whom have filed for bankruptcy, with a watertight release from any opioid-related liability. Various Sacklers were on Purdue’s board, authorizing and benefiting from the company’s OxyContin-based profitability. Although they moved an estimated \$11 billion of Purdue distributions to safe havens, they demand complete legal immunity in exchange for a transfer of \$4.5 billion to the estate.

In an unusual move, following creditor approval of the Plan, Bankruptcy

Judge Robert Drain convened an 11-day trial in New York’s Southern District to consider further argument about the adequacy of the \$10 billion estate and the legitimacy of the Sackler releases. He approved the Plan, with somewhat narrowed escape clauses, at a hearing on September 1.

The National Settlements

Early discussions of possible opioid settlements occasionally referenced the \$246 billion in payments required of tobacco industry defendants under their record-setting national 1998 agreements.¹⁴ But it was quickly evident that the national opioid litigation, if settled, would not approach that scale. In August 2019, rumors of a \$10 billion offer by the Big Three pharma distributors surfaced, with AGs demanding \$45 billion.¹⁵ By 2020, details of a potential \$20 billion figure began to emerge. It took until July 21, 2021, with the aforementioned federal and state trials moving towards conclusion, that the “National Distributor Settlement” was formally publicized. As announced by fourteen attorneys general including New York AG Letitia James and North Carolina’s Josh Stein, the Big Three will ante up to \$21 billion over an 18-year period (McKesson will pay roughly 40%, while Cardinal and AmerisourceBergen each pay about 30%). Under a companion agreement, Johnson & Johnson will pay up to another \$5 billion over a seven-year period.

The \$26 billion under the two agreements (Settlements) is a maximum, and obviously has a lower net present value based on the 18-year payment period. More than \$2 billion goes to legal fees, payable over the first seven years. Payouts decline significantly if not all states and their subdivisions accept, potentially being reduced by nearly 50%. And the defendants can decide to abandon the Settlements entirely if they determine that a sufficient “critical mass” of settling plaintiffs has not been achieved.

Dissension In the Ranks

The Plan and the Settlements allocate payments among states based on four factors: OUD cases, overdose deaths, volume of opioids shipped to the state—and population. While population had not been a factor in an earlier allocation model derived by the MDL Plaintiffs’ Executive Committee for a potential “Opioid Negotiation Class,” it now carries an 85% weighting in the Settlements algorithm, decisively moving allocations away from opioid-only metrics, undermining harder hit and sparsely populated states. Nearly 30% of Settlements’ payments will go to four states: California, Texas, Florida, and New York.

West Virginia rejected the Plan and Settlements from the outset, with AG Patrick Morissey denouncing their population bias. In mid-August, the state filed an expert’s report demonstrating that, for example, West Virginians were nearly four times more likely to die of opioid overdose than Texans.¹⁷ Washington’s AG Bob Ferguson also immediately opted out, staking his prospects in a King County circuit court trial slated to begin September 7, 2021.¹⁸

The opt-outs are material. States were given 30 days, until August 21, to accept the deal preliminarily. A minimum target of at least 45 “yes” states was initially discussed, but as of the 30-day deadline, New Mexico had joined West Virginia and Washington in expressly rejecting the Settlements, and three more states—Alabama, Georgia, and Nevada—had not accepted.¹⁸ The defendants have until September 4 to assess the adequacy of state settlers and decide whether to move forward. If they do, the states will have another 120 days, until early January, to rally their political subdivisions towards acceptance.

State-Local Allocation Agreements

With hundreds of millions of dollars on the line, settling states have a significant interest in cultivating buy-in

among local governments. Ohio was a forerunner in that effort. The “OneOhio” plan was announced in mid-2020 by Governor Mike DeWine and AG Dave Yost. Under their proposal, 11 percent of any recovery will go to attorney fees; of the balance, 30 percent will be distributed to local governments, 55 percent to a foundation that will address addiction, and 15 percent to the state.¹⁹ Because Ohio’s own opioid trial was slated to begin September 20, the state could not wait 120 days to gauge local government buy-in. Political subdivisions were given until August 20 to respond, resulting in acceptance by 142 of 143 Ohio’s “Litigating Municipalities.” Only Scioto County (population 80,000) declined, citing the fact that more opioids were shipped to the county than anywhere else in the nation for a time, and dismissing its projected \$100,000 per year allocation under the OneOhio methodology.²⁰

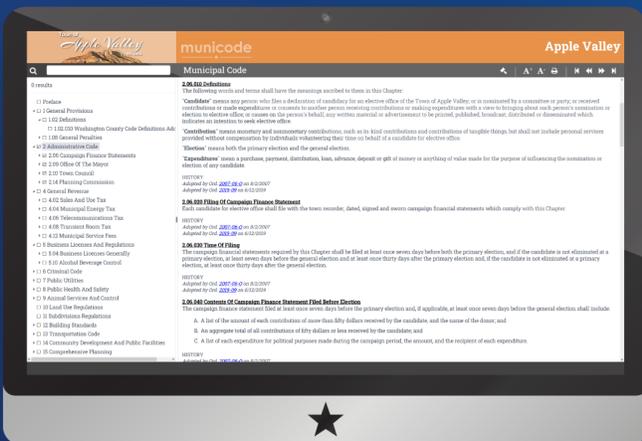
(Other municipalities have found fault with the Settlements: on July 23, Philadelphia sued AG Josh Shapiro, disputing Pennsylvania’s acceptance of the deal and demanding that the city’s suits against the defendants be allowed to continue.)²¹

A few states have allocated significant percentages to local governments. Notable is North Carolina, whose plan calls for a robust 85% of all settlement funds to go locally.²² Arizona provides 56% to its political subdivisions.²³ Others are much less generous. The Texas agreement, which covers all 254 counties and more than 1200 municipal entities in the state,²⁴ allocates only 15% of settlement funds directly to localities: out of a hypothetical \$1 billion, \$700 million would go to the Texas Opioid Abatement Fund, \$150 million would go to AG Paxton’s office, and \$150 million would go to Texas local governments.²⁵ Florida’s plan similarly allocates only 15% to subdivisions.²⁶ (The distribution of large percentages

to statewide “funds” or “foundations” is viewed with suspicion by some critics who point out that they are typically overburdened with large bureaucracies and significant administrative costs; furthermore, the Settlements do not mandate if, when, or how those entities must actually distribute their funds).

While the Settlements’ payout mechanisms may not satisfy hard-hit municipalities who recall that Big Tobacco’s payouts rarely reached city hall and were often not applied to remedy tobacco injury, the Settlements differ in one critical respect: the Big Three and J&J explicitly require that at least 85% of monies paid must be devoted to “Opioid Remediation,” defined as:

Care, treatment, and other programs and expenditures (including reimbursement for past such programs or expenditures except where this Agreement restricts the use of funds solely to future



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Opioid Remediation) designed to (1) address the misuse and abuse of opioid products, (2) treat or mitigate opioid use or related disorders, or (3) mitigate other alleged effects of, including on those injured as a result of, the opioid epidemic.²⁸

Expenditures that qualify as Opioid Remediation include naloxone or other FDA-approved drugs to reverse opioid overdoses; medication-assisted treatment for the opioid-addicted, including the uninsured; education programs; outpatient counseling and therapy; “wrap-around services” including housing, transportation, job placement/training, and child-

care; treatment for NAS, and more.

Beyond monetary payouts, the Settlements also require significant behavioral changes by the defendants. J&J will completely cease producing opioids. The Big Three, which control the vast majority of America’s pharmaceutical distribution, will be required to abandon competitive secrecy and establish a common clearinghouse tracking every opioid shipment. They will also be required to check that database before making an opioid delivery, and if a recipient’s order appears suspicious, extraordinarily large or suggests diversion, the distributor must notify state and federal authorities and withhold shipment.²⁷

Summation

The opioid battles initiated by municipalities eight years ago are finally achieving significant results. More than \$30 billion may be available for allocation to states and their subdivisions beginning as early as next spring. Although too little and too late, funds will gradually make their way to local abatement efforts, helping to offset an ever-rising tide of opioid death and addiction. In the meantime, the jurisdictions who have opted out of the Settlements will continue their courtroom efforts and remaining defendants will face their reckoning. **ML**

NOTES

1. *City of Chicago v. Purdue Pharma L.P.*, no. 14-05834 (Cook Cty. Cir. Ct. June 2, 2014); and *People of the State of California v. Purdue Pharma, L.P.* no. CGC-13-534108 (Orange Cty. Sup. Ct. May 21, 2014).
2. More than 93,000 drug overdoses in the U.S. in 2020, a record driven by fentanyl - The Washington Post; National Survey on Drug Use and Health | CBHSQ Data (samhsa.gov).
3. Conditional Transfer Order 1, *In re National Prescription Opiate Litigation*, no. 17-md-2804 (N.D. Ohio Dec. 5, 2017).
4. *County of Summit v. Purdue Pharma L.P.*, no. 18-45090 (N.D. Ohio).
5. *County of Lake v. Purdue Pharma L.P.*, no. 18-04532 (N.D. Ohio).
6. *City of Huntington v. Amerisource-Bergen Drug Corp.*, no. 17-01362 (S.D. W.Va.).
7. *Board of County Commissioners of the County of Santa Fe, New Mexico v. Purdue Pharma L.P., et al.*, no. 1:18-OP-45776; *Cobb County, Georgia v. Purdue Pharma L.P., et al.*, no. 1:18-OP-45817; *County of Tarrant, Texas v. Purdue Pharma L.P., et al.*, no. 1:18-OP-45274; *Durham County, North Carolina v. AmerisourceBergen Drug Corporation, et al.*, no. 1:19-OP-45346; and *Montgomery County, Ohio Board of County Commissioners, et al. v. Cardinal Health, Inc., et al.*, no. 1:18-OP-46326.
8. Harris and other municipalities have

- moved for a writ of mandamus in the Sixth Circuit, attempting to force Judge Polster to confirm the jurisdictional bases for their presence on his docket or remand them to their originating courts.
9. *State of Oklahoma ex. rel. Mike Hunter v. Purdue Pharma L.P.*, no. CJ 2017-816 (Cleveland Cty. Cir. Ct. Aug. 26, 2019).
10. <https://www.newsday.com/long-island/nassau-suffolk-opioid-settlements-1.50303922>.
11. <https://www.wjhl.com/news/local/attorneys-help-is-on-the-way-following-35-mil-opioid-case-settlement/12>.
12. <https://www.reuters.com/business/healthcare-pharmaceuticals/jj-other-drug-makers-face-trial-california-over-claims-they-fueled-opioid-2021-04-19/>.
13. *In re Purdue Pharma L.P.*, no. 19-23649 (S.D.N.Y. Sept. 15, 2019).
14. Master Settlement Agreement (1998), <http://www.naag.org/assets/redesign/files/msa-tobacco/MSA.pdf>.
15. <https://www.cnbc.com/2019/08/06/opioid-makers-said-to-propose-10-billion-settlement-to-end-state-lawsuits.html>.
16. <https://ag.ny.gov/press-release/2021/attorney-general-james-announces-proposed-26-billion-global-agreement-opioid>
17. Amended Expert Report, *In re Purdue L.P.*, no. 19-23649 (S.D.N.Y. Aug. 15, 2021).
18. <https://www.atg.wa.gov/news/news-releases/ag-ferguson-rejects-insufficient-opioid-distributors-settlement-heads-toward>.

19. <https://www.reuters.com/world/us/six-us-states-will-not-join-26-bln-opioid-settlements-with-distributors-jj-2021-08-23/>.
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28. <https://www.attorney-general.gov/wp-content/uploads/2021/07/2021-07-21-Final-Distributor-Settlement-Agreement.pdf>. (“DSA”), Section I. SS.
29. DSA, Exhibit E.
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