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## BIAS AND PREJUDGMENT IN THE QUASI-JUDICIAL DECISION-MAKING PROCESS

THE PUBLIC RELEASE OF  
BODY CAMERA VIDEOS

PUBLIC NUISANCE:  
MUNICIPALITIES AND  
THE COMMON GOOD





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## EDITOR'S NOTE



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

### The Level Playing Field

“There are many statues of men slaying lions, but if only the lions were sculptors, there might be quite a different set of statues.”

The above aphorism is attributed to Aesop, the quasi-fictional Greek fabulist and storyteller who is alleged to have told his tales some 2700 years ago. Regardless of his mythology, the quote provides accurate insight into human nature: we tend to fashion the world through our own preconceptions. This reality underlies IMLA's continuing efforts, through our DEI initiative and otherwise, to encourage more equitable attitudes in local government. It serves as a lead-in to our January-February *Municipal Lawyer* feature article by Paul Reuvers, which discusses the dangers of self-interest, bias, and prejudice by quasi-judicial municipal actors. The saying is also a preface to our offering in *Diversity*, in which Rita McNeil Danish and Jarrod Hill promote equity in local government contracting practices.

Other features in January-February include Hilary Ruley's in-depth look at widely varying policies among the states regarding rights to view and utilize police body cams, and your Editor's comment on the continuing vitality of public nuisance as a vehicle in municipal affirmative litigation. Newly installed IMLA Executive Director Amanda Karras introduces two Section 1983 cases which have garnered IMLA's interest in *Amicus*, and Monica Ciriello provides a quintet of topical case summaries in *Inside Canada*. Finally, in *Listserv*, Brad Cunningham discusses a topic which too rarely receives public comment--lawyer well-being and mental health.

Somewhat unusual is our provision of multiple leadership letters in a single issue. Because this is her inaugural week leading IMLA, we relate Amanda's message to IMLA members in *Executive Director's Letter*, while providing a New Year's resolution from IMLA President Barbara A. Adams in her usual *President's Letter*.

We wish all IMLA members and their communities a safe and successful 2022.

Best regards,

Erich Eiselt

## EXECUTIVE DIRECTOR'S LETTER



AMANDA KARRAS,  
*IMLA Executive Director  
and General Counsel*

### A New Year and a New Chapter for IMLA

IMLA's mission is to advance the responsible development of local government law through education and advocacy. I have written those words in countless IMLA amicus briefs and yet now they take on new significance as I assume the position of Executive Director. Over the eight years that I have worked at this organization, I have come to know many of you and the incredible work you do, and I am so grateful to have the opportunity to support that work. As public servants and leaders in your community, you work on challenging and novel legal issues that can be politically fraught. New technology, a disaster, or a pandemic can change our communities and the legal issues we face overnight. I am constantly in awe at your ability to deftly handle issues ranging from homeless encampments, qualified immunity, disruptive technology, to novel First Amendment questions, and affordable housing issues, not to mention the ever-changing legal questions associated with COVID-19. Having the opportunity to support the work you are doing provides me with a sense of profound satisfaction. As Executive Director I will continue to help you carry out that important work and will look for ways to improve IMLA's value to members.

As Chuck Thompson steps down as Executive Director, it is an understatement to say that I have big shoes to fill. IMLA is lucky to have had Chuck at the helm these last 15 years. Given the dire financial straits the organization faced when Chuck took over, followed by the great recession, it is not hyperbolic to say that IMLA might not be here today without his leadership. His tenure improved the value of IMLA, and that is a legacy I

will strive to build on.

Fortunately, IMLA has a fantastic team that will help make the leadership transition as seamless as possible. IMLA's success is a direct result of the tremendous efforts of Jenny Ruhe, Trina Shropshire-Paschal, Caroline Storer, Carolina Moore, Erich Eiselt, and Deanna Shannami. I am grateful to be able to work with this talented group. We are also fortunate that while Chuck is stepping down, he is (as he likes to say) "not going anywhere" and he will stay on in a part-time "Of Counsel" capacity.

As Executive Director, here are some of the plans I have to expand benefits and programming.

- Working groups. IMLA offers topical working groups which allow members the opportunity to share strategies and ideas related to challenging or novel legal issues. Deanna is doing a wonderful job leading IMLA's Diversity, Equity, and Inclusion (DEI) working group, which meets regularly via zoom to discuss legal and policy issues associated with DEI. She is also revitalizing our Young Lawyers group, so stay tuned for more information on that. Erich leads IMLA's Affirmative Litigation group, informing members about ongoing and possible future municipal affirmative litigation activity. He also heads IMLA's Opioid Litigation group, which has provided members with detailed updates and calls on the topic for more than four years; you would be hard pressed to find someone more knowledgeable on the subject. IMLA also has working groups on COVID-19, a group for

counties, university cities, and a disaster recovery group. In December, we started a new homeless encampment group, and we have a new climate change working group that will meet for the first time in January. I plan to expand our working group offerings as new challenges and needs arise.

- On-Demand Webinars and New Government Lawyer Bootcamp. We have created an on-demand webinar library that is free for members. I plan to expand this library by adding in additional programming from prior years. We will also expand our New Government Lawyer Bootcamp, which contains several 101 level on-demand courses that provide valuable training for local government lawyers, particularly those new to the practice.
- In-Person and Virtual Programming. As we look to IMLA's future, many aspects of the organization won't skip a beat. We look forward to being back in person in 2022 in Washington DC for our Spring Seminar from April 8-11 and then for our annual conference in Portland, Oregon from October 19-23. These events, which will also be offered virtually for those who cannot attend in person, will provide top-notch CLE courses while also giving you invaluable opportunities to network with your peers from around the country. I look forward to greeting you, whether in person or virtually, at these events!

It is an honor to lead IMLA and to serve you, our members. If I can ever be of assistance, please do not hesitate to reach out to me.



# The Public Release of Body Camera Videos

HILARY RULEY

*Chief Solicitor, Baltimore City Law Department, Baltimore, Maryland*



## I. INTRODUCTION

Despite the near consensus in the United States that body cameras are beneficial, there are a myriad of ways that states respond to public information act requests seeking body camera videos. Some states treat body camera videos as any other investigatory record, while others have elaborate lists of required redactions. Still others mandate disclosure of the footage with few exceptions. Several states have considered legislation to amend their public information laws to address footage from body cameras, but the bills have failed to pass.<sup>1</sup> This article discusses the varying policies around the nation regarding release of body camera footage.

### Investigatory Records

The Federal government and fifteen states classify body camera videos like any other investigatory record requested by the public. However, not all of these jurisdictions handle requests for investigatory records similarly. A few states provide almost a complete bar to access investigatory records in response to public record requests. In Mississippi, investigatory records are not subject to disclosure in response to such requests.<sup>2</sup> However, law enforcement can unilaterally decide to disclose the records and anyone can petition the state's ethics board for the records' release. In West Virginia, all investigatory records are exempt from disclosure, with no exceptions.<sup>3</sup> In Kansas, the subject of the investigatory record can view

it but otherwise the record is not able to be disclosed in response to a record request.<sup>4</sup>

In contrast, most states that place body camera videos within the category of investigatory record take the approach that each investigatory record should be evaluated to determine if release would interfere with an investigation.<sup>5</sup> The emphasis is not on the content of the video but the consequences of release on the government's ability to investigate or prosecute. The federal government's treatment of investigatory records is rooted in the common law protections for law enforcement:

It serves to preserve the integrity of law enforcement techniques and confidential sources, protects witnesses and law enforcement

personnel, safeguards the privacy of individuals under investigation, and prevents interference with investigations.<sup>6</sup>

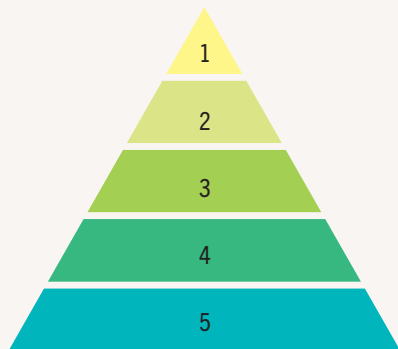
Most every state that categorizes body camera videos as a type of investigatory record highlights the importance of keeping sources or techniques confidential.<sup>7</sup> Maryland and New York also specify that investigatory records need not be disclosed when release would endanger someone or create an unwarranted invasion of privacy.<sup>8</sup> A few states also allow withholding of investigatory records when law enforcement would be endangered by the release.<sup>9</sup> New Mexico allows the government to deny access to investigatory records when disclosure would reveal the identity of victims of sexual crimes or assaults or the identity of someone accused of a crime, but not yet charged.<sup>10</sup> Louisiana allows the withholding of any investigatory record when the identity of a juvenile may be revealed.<sup>11</sup> Idaho's Supreme Court explained that its investigatory exemption was "intended to prevent premature disclosure of the government's case, 'thus enabling suspected violators to construct defenses in response thereto, enabling litigants

to discern the identity of prospective government witnesses, as well as confidential information, or the nature of the government's evidence and strategy, and exposing affiants and potential witnesses to intimidation or harassment."<sup>12</sup>

In these jurisdictions, it is crucial for government lawyers to articulate reasonable anticipated consequences of disclosure. In a New York case, a court held that "respondents have failed to demonstrate that the public's interest in disclosure of the audio footage is outweighed by the speculative safety concerns raised by NYPD. Indeed, this exception may not be applied simply because there is speculation that harm may result."<sup>13</sup> In a more recent case, a New York court similarly held that "NYPD's assertions in response to the FOIL request that disclosure would interfere with an ongoing internal investigation into the incident, which was being conducted by the Force Investigation Division at the time, was conclusory in the absence of any factual showing as to how disclosure would have interfered with that investigation."<sup>14</sup> Although NYPD did not provide concrete evidence of the harm to the investigations that those disclosures would cause, the New York statute provided a framework for the court to weigh harms against benefits.

If state law does not provide a balancing test, courts generally refuse to evaluate the harms of disclosure.<sup>15</sup> In Vermont, records of the detection and investigation of crimes are exempt from disclosure, but records of an initial arrest or citation are required to be disclosed.<sup>16</sup> In one case, a man was detained in his home with pepper spray but never officially arrested. A reporter requested the body camera video of the encounter and the government denied the request, arguing the harms of disclosure weighed against release of the record. The court held that the video was a government record of a detention and had to be

### No Default Rule, But Enumerated Permissible Disclosures



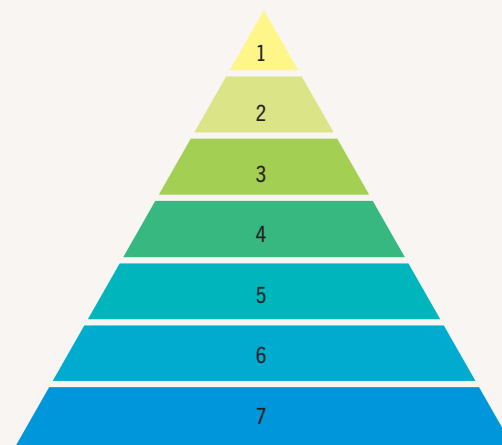
- 1 To anyone filmed in interior location (FL)
- 1 To family after 10 years (LA)
- 1 To anyone with conditions if "reasonably likely to bring shame or humiliation to a person of ordinary sensibilities" (MO)
- 1 Encounter resulting in felony (NH)
- 1 At law enforcement's sole discretion (TX)
- 1 Complaint against law enforcement (WY)
- 1 Public safety requires disclosure (WY)
- 2 To owner of property seen in video (FL, MI)
- 2 Use of firearm (IL, NH) Bodily harm (IL, WY)
- 2 Any death (IL, WY) Death of law enforcement (AK, IL)
- 3 To law enforcement officer (CT, FL, WY); Arrest or detention (IL, KY, NH)
- 4 Use of force (IL, KY, MN, NH)
- 5 Person in interest or her representative: (FL, IL, MI, NC, WA, MN)

disclosed under Vermont's statutory framework. The court was pained to be unable to consider the result of the disclosure:

[M]any other states are guided by statutory criteria that provide police and courts with a far better and more defined framework in making decisions about disclosure of this type of record. The majority of our New England neighbors have adopted an open records rule of reason permitting public access to investigative records absent identifiable harm in disclosure. We leave that issue to the Legislature.<sup>17</sup>

In record requests, lawyers cannot expect courts to enshrine privacy rights or protect investigations without a state law that permits a balancing of harms and benefits.

### No Default Rule, But Enumerated Exemptions



- 1 Interior of private business (OH)
- 1 Suicide (CT)
- 1 Grievous bodily harm (OH)
- 1 Nude body (OH)
- 1 Inside jail (KY)
- 1 Inside school (MO)
- 1 Officer on break or personal (CT)
- 1 Footage of misdemeanor no arrest (TX)
- 1 Discussion between officers (CT)
- 1 ID a victim (PA)
- 1 Special event: hostage, training (KY)
- 1 ID a mass violence victim (FL)
- 1 ID someone not arrested or cited (OH)
- 1 Cannot disclose to police in some situations (AZ)
- 1 Use in misconduct investigation or reveal complainant (WA)
- 1 Violate FERPA (KY)
- 1 Violate CJS (KY)
- 1 Deprive of a fair trial (MI)
- 1 Related to civil action (MI)
- 1 Crime scene (ND)
- 2 Law enforcement officer dies (FL, OH)
- 2 Potential evidence in criminal case (PA, TX)
- 2 Interfere with law enforcement (MI, WA)
- 2 Disclose law enforcement technique (CT, MO)
- 2 Endanger someone (MI, MO)
- 3. Unwarranted invasion of privacy (OH, MI, WI), Homicide (CT, KY, ND), Private place (FL, MI, TX)
- 4. Dead Body (KY, OH, WA, CT)
- 5: Reveal witness or confidential source (KY, MI, OH, CT, MO)
- 6: Sexual nature (KY, ND, OH, TN, CO, CT) Minor (KY, ND, OH, TN, CO, CT)
- 7. Inside Home (FL, KY, MO, TN, UT, WA, MI, ND,) or Medical Facility (FL, KY, MO, TN, UT, WA, OH, CT)

### States with Default Rules

Many state legislatures have recognized that body camera videos require unique considerations that are not served by treating them as any other investigatory record. These

*Continued on page 8*

states have adopted laws specific to the release of body camera videos in response to record requests. These statutes fall into two broad camps: with and without a default rule. A default rule exists when the state enshrines an overarching policy statement that disclosure is or is not the general goal. Some states have the default rule of always releasing the body camera videos in response to a public information request, but with some exemptions to that preferred disclosure. Other states have adopted the opposite default rule with a policy to never disclose the body camera video in response to a public information request except in certain narrow situations where release or viewing is permitted. In contrast, many states have no default policy, instead listing only mandatory or permissive disclosures or mandatory or permissive exemptions from disclosure. Finally, some states articulate a balancing test to evaluate each request to disclose the body camera video on a case by case basis.

Four states—California, Oklahoma, Wisconsin and Kentucky—have a default rule that favors disclosure of the body camera video, with some exceptions.<sup>18</sup> Body camera footage in Wisconsin is subject to disclosure unless it depicts a place where someone has a reasonable expectation of privacy, or it shows a victim of a sensitive or violent crime or a minor, in which case disclosure occurs only if the person or next of kin consents, or if the government can show that public interest in allowing access is so great as to overcome these privacy interests.<sup>19</sup> California allows, but does not require, shielding the face, voice and body parts of victims of rape, sexual assault, child abuse, incest or domestic violence.<sup>20</sup> California's law places the onus on the government to show "the public interest



*[A] vast number of states have no default rules at all when body camera videos are sought in record requests, preferring instead to simply list mandatory or permissive non-disclosures. Collectively, these states have more than thirty different distinct situations when access to the body camera videos can be denied.*



served by not disclosing the recording clearly outweighs the public interest served by disclosure of the recording."<sup>21</sup>

Oklahoma, although adopting the default rule of disclosure in response to a public records request for a body camera video, has the most complex list of situations when disclosure is required and when it is prohibited.<sup>22</sup> Redactions may be made where the footage shows the death of a person, nudity, severe violence resulting in great bodily injury, reveals personal information, or identifies a minor, or a law enforcement officer that is subject to internal investigation but then the video must be released after the investigation is over or before conclusion "if the investigation lasts for an unreasonable amount of time."<sup>23</sup> Subject to these exceptions, footage shall be released that depicts the use of physical force or violence by a law enforcement officer, pursuits or traffic stops, events leading to a person being arrested, cited, charged or issued a written warning,

as well as any detentions, exercise of law enforcement authority that deprives a citizen of liberty or any actions of a law enforcement officer that have become the cause of an investigation or charges being filed; or "recordings in the public interest that may materially aid a determination of whether law enforcement officers are appropriately performing their duties as public servants."<sup>24</sup> In one case, an Oklahoma court ruled that its state records disclosure law, while allowing for redaction or withholding of videos concerning sexual crimes, did not give the victim a statutory right to privacy when the police department released a video of her alleged rape, which was later broadcast on television.<sup>25</sup>

Other states follow a default rule of non-disclosure of the body camera video, with some exceptions permitting limited viewing or release.<sup>26</sup> In Georgia, body camera videos are only subject to disclosure in response to record requests from next of kin, those accused in a criminal case or an attorney who signs a sworn affidavit that she will use it to pursue a civil case.<sup>27</sup> Similarly, in South Carolina, record requests for body camera videos are denied except to subjects of the videos or when needed for litigation.<sup>28</sup> In Oregon, body camera videos are only released in response to record requests if the requestor can show that release is in the public interest, but all faces must be blurred.<sup>29</sup>

#### **States without Default Rules**

In contrast, a vast number of states have no default rules at all when body camera videos are sought in record requests, preferring instead to simply list mandatory or permissive non-disclosures. Collectively, these states have more than thirty different distinct situations when access to the body camera videos can be denied. Most frequently among these is when



the body camera video depicts a home<sup>30</sup> or hospital setting.<sup>31</sup> Six states allow the government to prevent disclosure of body camera videos of a sexual nature<sup>32</sup> or when it depicts a minor.<sup>33</sup> Five states permit non-disclosure of the body camera video when it would reveal a witness or confidential source.<sup>34</sup> Four states allow non-disclosure when the video shows a dead body.<sup>35</sup> A smaller number of states allow the body camera videos to be withheld or redacted when they show a homicide<sup>36</sup> or when release would be an unwarranted invasion of personal privacy<sup>37</sup> or other locations where people may have an expectation of privacy.<sup>38</sup> These nine situations, out of the more than thirty, are the only ones that have at least three states enumerating them as exemptions to disclosure of body camera videos in response to records requests. The remaining statutory exemptions to disclosure have been enacted by less than three states, reflecting the lack of national consensus about which scenes in police body camera videos should be shielded from public view. This includes everything from not showing the interiors of businesses,<sup>39</sup> schools,<sup>40</sup> and jails,<sup>41</sup> to preventing the release of footage that shows a crime scene,<sup>42</sup> a hostage situation,<sup>43</sup> pictures of a suicide,<sup>44</sup> a misdemeanor where no arrest was made,<sup>45</sup> a nude body,<sup>46</sup> grievous bodily harm,<sup>47</sup> a situation where an officer died,<sup>48</sup> a discussion between officers,<sup>49</sup> or an officer on a break.<sup>50</sup> There are also states that permit withholding of body camera videos where the release would interfere with law enforcement proceedings,<sup>51</sup> disclose a law enforcement technique,<sup>52</sup> deprive someone of a fair trial,<sup>53</sup> endanger someone,<sup>54</sup> identify a victim<sup>55</sup> or a victim of mass violence,<sup>56</sup> identify someone not cited or arrested,<sup>57</sup> disclose evidence in a criminal case,<sup>58</sup> or if the footage is related to a civil matter.<sup>59</sup> Some states prevent disclosure when the footage shows a training exercise,<sup>60</sup> when it would reveal a complainant,<sup>61</sup> or would violate the Federal Education Rights Privacy Act or other federal

laws.<sup>62</sup> Arizona even prevents disclosure to the police in certain situations.<sup>63</sup>

A smaller number of state statutes enumerate situations when body camera videos may or should be released in response to public record requests. This includes some states that also have lists of required or permissible non-disclosures. There are approximately seven states that permit disclosure of body camera videos to the person depicted in the video or her representative.<sup>64</sup> Several states also allow disclosure of body camera videos when there is a police use of force.<sup>65</sup> A few state statutes authorize disclosure to law enforcement<sup>66</sup> or when the videos show an arrest or detention.<sup>67</sup> There are less common situations where state legislatures have permitted or required body camera video disclosure in response to record requests: to the owner of the property seen in the video,<sup>68</sup> when there is use of a firearm,<sup>69</sup> depictions of bodily harm,<sup>70</sup> death in general<sup>71</sup> or death of a law enforcement officer,<sup>72</sup> an encounter resulting in a felony,<sup>73</sup> to anyone in a video of an interior location,<sup>74</sup> to the family of the person depicted after ten years have passed,<sup>75</sup> when there is a complaint against a law enforcement officer,<sup>76</sup> when public safety requires disclosure,<sup>77</sup> or at the law enforcement officer's discretion.<sup>78</sup>

Interestingly, some states' enumerated exemptions to disclosure are other states' permissible disclosures. For example, redactions must be made to shield the part of a body camera video showing the death of a law enforcement officer in Florida and Ohio, but it is permissible to release such footage in Arkansas and Illinois. Even when state legislatures articulate specifics, there is still a need to apply the statute to the facts. The appellate court in Washington state held that footage of the inside of a jail would reveal "specific intelligence information" that prevented its disclosure under the Washington

open records statute, but footage of a college campus would not reveal any such information and could therefore be disclosed.<sup>79</sup> In Missouri, the government may put conditions on release when disclosure is "reasonably likely to bring shame or humiliation to a person of ordinary sensibilities,"<sup>80</sup> an analysis that is inherently subjective.

Situational analyses are the bread and butter of the seven states<sup>81</sup> that have no default rules, but instead mandate a case by case balancing test to evaluate body camera video release in response to record requests. In Indiana, disclosure is disfavored if it "would not serve the public interest."<sup>82</sup> In New Jersey, the local or state prosecutor is tasked with determining if "disclosure to that particular person/entity or the public is warranted because the person's/entity's/public's need for access outweighs the law enforcement interest in maintaining confidentiality."<sup>83</sup> In North Carolina, the government must consider whether the video is "confidential," would jeopardize safety, or be "a serious threat to the fair, impartial, and orderly administration of justice."<sup>84</sup> The governing Council of Greensboro, North Carolina filed a court petition requesting to view body camera footage of a police incident.<sup>85</sup> The court granted the right

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**Hilary Ruley** is Chief City Solicitor for Baltimore City. She has been in the General Counsel Division of the City's Law Department for over fifteen years, advising agencies, reviewing city and state legislation and overseeing responses to Public Information Act requests. She was previously a litigator in private practice for several years and clerked for the Honorable Judge James Eyler on the Maryland Court of Special Appeals. She obtained her J.D. and B.S. degrees from the University of Notre Dame and is licensed to practice law in Maryland and the District of Columbia. She is the recipient of the Maryland Bar Association's 2007 Alex Fee Memorial Pro Bono Service award and and IMLA's 2014 William I. Thorton, Jr. Faculty Award.

# Bias and Prejudgment in the Quasi-Judicial Decision-Making Process

PAUL D. REUVERS, *Partner, Iverson Reuvers Law Firm, Bloomington, Minnesota*



*“Government is a trust, and the officers of the government are trustees. And both the trust and the trustees are created for the benefit of the people.”<sup>1</sup>*

## I. INTRODUCTION

Across the United States, quasi-judicial decision-making authority is delegated to municipal public officials. Quasi-judicial conduct is “marked by an investigation into a disputed claim and a decision binding on the parties.”<sup>2</sup> In land use contexts, quasi-judicial decisions typically include “variances, special exceptions, subdivision plats, zoning code violations, site-specific rezoning to PUD, site plan review and the decisions of a board of adjustment, and many decisions of a planning commission.”<sup>3</sup>

As government agents, public officials must comply with Fourteenth Amendment Constitutional due process. In particular, the Constitution protects parties’ rights to an impartial decision maker.<sup>4</sup> A decision maker’s impartiality can be significantly affected by bias and prejudice, conflict of interest, ex parte communications, and of course, bribery. Municipal officers are arguably more prone to these external influences than judges or other quasi-judicial decision makers because they typically live and work in the communities they serve.

This article will review how courts have handled each of these

forms of bias and prejudgment. It will offer suggestions for how to address these issues. And it will outline the types of remedies available to aggrieved parties.

### 1. Bias and Prejudice

Bias is defined as a “prejudice in favor of or against one thing, person, or group compared with another, usually in a way considered to be unfair.”<sup>5</sup>

In the land use context, there are three common forms of bias. The first is procedural bias, which deals with unfair procedures that benefit one party over another. The second is actual bias, which is genuine prejudice for or against a party. And the third is

implied bias, which is bias based on relationships. The existence of any form of bias can be grounds for a reversal.

### Procedural Bias

Procedural bias occurs when all the requirements of a fair hearing are not met.<sup>6</sup>

The most common form of procedural bias arises in pre-hearing decisions. In *Barbara Realty Company v. Zoning Board of Review of the City of Cranston*, a zoning board was set to hear an application that would allow the petitioner to build a motor lodge.<sup>7</sup> Before the hearing, a member of the zoning board told the petitioner that the board would object to the application. When asked why, the board member said “what difference does it make, we are going to shove it down your throats anyways.” The court held that the board member should be disqualified in the interest of justice and to preserve public confidence in his impartiality.

As described previously, the job of quasi-judicial decisions is to do an investigation into a disputed claim and render a binding decision – not arbitrarily deciding ahead of time, without considering the full record. If a decision maker has already made

up his or her mind before the hearing, without consideration of the record at the hearing, this can lead to finding of bias.

(Another form of procedural bias arises in ex parte communications, which will be discussed below).

### Actual Bias

Actual bias is defined as “genuine prejudice that a judge, juror, witness, or other person has against some person or relevant subject.”<sup>8</sup>

Actual bias by one decision maker can invalidate the votes of others, especially when that decision maker is in a unique position of influence. In *Continental Property Group, Inc. v. City of Minneapolis*, a city council member took a closed mind approach to a high rise proposed in her ward of the city.<sup>9</sup> She also organized neighborhood opposition to the project and took an advocacy role to sway the opinions of other voting council members. The council denied the applications at issue in a unanimous 13-0 vote, but the court invalidated the decision because of the impact of the biased council member. Biased opinions by a decision maker regarding projects in their ward/district are often given substantial weight by other officials. Bias by one decision maker can be imputed onto other decision makers and invalidate decisions made with a large majority.

Quasi-judicial decision makers can also create bias by going beyond their roles and interfering with conclusions of independent experts. Municipal officials are often not experts in the fields that they make decisions in. As a result, municipalities frequently hire outside, independent experts to conduct studies to help them understand the impact of their decisions. Public officials cannot interfere with independent experts to favor their own personal beliefs.<sup>10</sup>

In *Living Word Bible Camp v. County of Itasca*, an environmental

scientist was hired by the county to draft an Environmental Assessment Worksheet (EAW).<sup>11</sup> A county commissioner who opposed the proposed development requested that the scientist delete a number of “no-impact” and “mitigation” statements that favored development. Ultimately, the commissioner succeeded in having the scientist remove some conclusory language in the EAW that favored the development. The county board voted 3-1 to require an Environmental Impact Statement. The court held that the commissioner’s actions that altered the independent EAW were biased and rendered the decision-making process arbitrary and capricious. Quasi-judicial decision makers cannot interfere with independent experts to alter or sway their conclusions to favor one side.

### Pre-existing Bias

Unlawful bias can be formed prior to decision makers becoming public officials. In *McVay v. Zoning Hearing Board*, a developer sought a special exception permit to build multi-family dwellings.<sup>12</sup> The city had never staffed its zoning board, so they appointed five new members for the sole purpose of deciding the special exception permit. But before being appointed to the zoning board, a majority of the zoning board members had signed petitions opposing the multi-family development. After a hearing and deliberations, the zoning board unanimously rejected the permit. The court held that the decision was void because of bias. And the court gave little merit to the zoning board members’ claims that the previous opposition was personal, not official.

### Implied Bias

Implied bias is defined as “Bias, as of a juror, that the law conclusively presumes because of kinship or some other incurably close relationship; prejudice that is inferred from the

experiences or relationships of a judge, juror, witness, or other person.”<sup>13</sup>

Relationships can undoubtedly cause bias in municipal decision makers. They can be grounds to invalidate a decision. Implied bias intersects with conflicts of interest. It will be discussed further below.

### Bias Takeaways

Bias is grounds for a reversal. This is true even if a vote was unanimous or had a large majority. Courts have focused on the impact the biased decision maker might have had on the others.

Admittedly, identifying bias can be difficult. It typically is not as obvious as a council member openly organizing opposition in the community. But if bias is actually identified, it is important to remove the biased decision maker from all further proceedings regarding the matter.

If the proceedings have not begun, it is best practice to simply proceed without the decision maker. If the proceedings have already begun, gauge the potential impact the biased decision maker might have had on the other decision makers. If the impact is minimal, proceedings might be able to continue without the biased decision maker. But if the impact was potentially substantive or substantial, consideration should be given to potentially restarting the proceedings without the biased decision maker.

## 2. Conflicts of Interest

Conflicts of interest are easier to spot but difficult to manage. “A conflicting interest arises when the public official has an interest not shared in common with the other members of the public.”<sup>14</sup> Generally, “public officials are disqualified from participating in proceedings in a decision-making capacity when they have a direct interest in the proceedings’ outcome.”<sup>15</sup> But there is not a settled rule as to “whether such an interest will disqualify an official,” and courts must make a case by case decision based on the facts.<sup>16</sup> In municipal quasi-judicial decisions, conflicts are

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often caused by financial considerations and relationships.

### **Financial Conflicts**

The purest form of conflicts are financial conflicts. Municipal officials live and often own property in the communities they serve. For this reason, courts use a balancing approach when analyzing financial conflicts. In Minnesota, the courts consider the following factors:

- (1) The nature of the decision being made;
- (2) the nature of the pecuniary interest;
- (3) the number of officials making the decision who are interested;
- (4) the need, if any, to have interested persons make the decision; and
- (5) the other means available, if any, such as the opportunity for review, that serve to insure that the officials will not act arbitrarily to further their selfish interests.<sup>17</sup>

A common conflict of interest involves property values. There is a conflict of interest any time a public official's property value changes based on their decision. In *E.T.O., Inc. v. Town of Marion*, a town board denied a bar's application to renew its liquor license in a 2-1 vote. One of the board members that voted "no" owned 53 acres across from the bar, and his property had been devalued by \$100,000 after the bar opened. The court held that "A more direct, admitted financial interest is hard to imagine. A public official with a direct conflict of interest should not be permitted to vote in such a situation or our statutes and decisions prohibiting conflict of interest would be a mere mockery."<sup>18</sup> The town board's decision was reversed because of the conflict.

Property conflicts can also be formed through affiliation. In *Grabowsky v. Township of Montclair*, two members of a township board were members and in leadership (trustee) roles in a church.<sup>19</sup> A developer sought to build a large assisted living facility in a lot beside the church. The plan required a zoning application, which was approved by the township board. The court noted that an organization "may have an interest in the [zoning] application by virtue of its proximity to the property in dispute" whether or not the organization participated in the application. Here, a state statute required notice to all properties within 200 feet of a proposed zoning change. Because the church was within 200 feet, the court held that it had an interest. The court declined to impute automatic conflicts for all members of a church or organization with a conflict. Instead, it held that public officials with "substantive leadership" positions in an organization will share the conflict themselves. Therefore, a conflict existed for the two public officials.

Conflicts created by property interests are particularly common for municipal officials because their property values might easily be affected by zoning changes, variances, conditional use permits, or grants of liquor licenses.

### **Relationships**

Relationships can potentially create conflicts of interest. As previously stated, a trustee or leadership role in an organization or church can create a conflict, although mere membership is usually insufficient. The relationship conflict can also be based on legal obligations.

In *Appeal of City of Keene*, the city requested the county board chair make a public necessary determination for properties surrounding an airport.<sup>20</sup> The chair of the board was an attorney whose law partner previously

represented two property owners near the airport and subject to the determination. The county board denied the request for a public necessity determination. The Supreme Court of New Hampshire invalidated the decision because of the chair's conflict of interest. The court reasoned that under the ABA model code, the board chair previously shared his partner's ethical obligations to two former clients—and that they maintained a duty to them as former clients.

### **Conflict of Interest Takeaways**

The same approach regarding biased decision makers should be used with conflicts. Courts will reverse decisions because of impact of a decision maker with an actual conflict. This is true even if they do not vote. "A board member may not cure a conflict of interest by abstaining from the vote after he has already participated in the Board's discussion and voiced his opinion."<sup>21</sup>

An additional step that can be taken to avoid conflicts is a disclosure form. For financial conflicts, "this usually takes the form of a financial disclosure statement that sets forth an official's substantial financial interests."<sup>22</sup> To avoid other forms of conflict (and potential bias), information can be disclosed "on the record any prior knowledge or contacts with the parties to a quasi-judicial hearing."<sup>23</sup> The key is disclosure.

### **3. Ex Parte Communications**

Ex parte communications are defined as "any communication outside of the record of the pending proceeding."<sup>24</sup> In reality, these are the conversations by public officials outside the hearing—often to other public officials, friends, members of the public, or even parties to the hearing itself. Due process "requires a quasi-judicial officer to refrain from ex parte communications."<sup>25</sup>

Courts have used varying approaches to analyzing ex parte communi-



cations.<sup>26</sup> The first, and seemingly minority approach, holds that “an ex parte communication does not deny due process where the substance of the communication was **capable of discovery by the complaining party** in time to rebut it on the record.”<sup>27</sup> The second, and seemingly majority approach, focuses “upon **the nature of the ex parte communication** and whether it was **material to the point that it prejudiced the complaining party** and thus resulted in a denial of procedural due process.”<sup>28</sup>

In *Jennings v. Dade County*, the court applied the second approach.<sup>29</sup> The court reasonably recognized that public officials will “unavoidably be the recipients of unsolicited ex parte communications regarding quasi-judicial matters they are to decide.” But the occurrence of such a communication does not mandate automatic reversal. Instead, the court created a cause of action where the aggrieved party proves that an ex parte communication occurred. Such a showing creates a presumption the communication was prejudicial unless the defendant proves contrary. The burden of persuasion stays with the public official.

The key to the second approach is determining the *prejudicial effect* of an ex parte communication. The court in *Jennings v. Dade County* adopted criteria from the D.C. Circuit to analyze the prejudicial effect of ex parte communications. These criteria have been adopted by other jurisdictions (at least in part).<sup>30</sup> This criteria are:

Whether, as a result of improper ex parte communications, the agency’s decision making process was irrevocably tainted so as to make the **ultimate judgment of the agency unfair, either as to an innocent party or to the public interest that the agency was obliged to protect**. In making

this determination, a number of considerations may be relevant: the gravity of the ex parte communications; whether the contacts may have influenced the agency’s ultimate decision; whether the party making the improper contacts benefited from the agency’s ultimate decision; whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond; and whether vacation of the agency’s decision and remand for new proceedings would serve a useful purpose. Since the principal concerns of the court are the integrity of the process and the fairness of the result, mechanical rules have little place in a judicial decision whether to vacate avoidable agency proceedings. Instead, any such decision must of necessity be an exercise of equitable discretion.<sup>31</sup>

In the context of municipal quasi-judicial decisions, ex parte communications are bound to happen. This is why all ex parte communications are not *per se* grounds for reversal. But when they do happen, it is important to identify them and disclose them. For example, a stray comment in response to a random question on the street will surely have less of a prejudicial effect than speaking in depth to an interested party before the hearing. It is a balancing act that turns on the facts.

#### 4. Bribery

The purest form of bias and prejudice in a quasi-judicial decision is a bribe. Bribery by a quasi-judicial decision maker is plainly a due process violation.<sup>32</sup> Evidence of bribery makes the case at bar undoubtedly reversible. Additionally, evidence of a decision maker’s *past* bribery can render future decisions reversible as well. This theory is called compensatory bias, and it “occurs when a

decision maker, who is taking bribes in some cases, is **biased against those who do not bribe the decision maker**, so he or she avoids being perceived as uniformly and suspiciously soft on the party opposing the government.”<sup>33</sup> Therefore, a decision maker’s acceptance of bribes in the past creates a presumption that they may unfairly decide cases where no bribe is being offered.

Besides being a serious due process violation, it is illegal for public officials to accept bribes in every American jurisdiction.<sup>34</sup> Typically, it is a felony offense.<sup>35</sup> Some states have created limited immunity for quasi-judicial decision makers that protects against criminal liability for incomplete, reckless, or grossly negligent decisions.<sup>36</sup> But this limited immunity is not absolute. The Supreme Court of Pennsylvania has explained that “official behavior involving crimes of corruption such as bribery, extortion, public office crimes, *Crimen falsi*, conspiracy to commit crimes, etc., are not protected by judicial or quasi-judicial immunity.”<sup>37</sup>

Bribery is truly the most blatant unethical form of bias and prejudice. For that reason, it is a reversible error even if the official’s bribery was limited to past cases. Furthermore, officials who accept bribes will be subject to significant criminal liability and will not be protected by any limited immunity that may be afforded to decision makers for poor but otherwise uncorrupt decisions.

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## 5. Remedies

An aggrieved party may request that the court approve/deny the pertinent application, without further proceedings on the basis that rendered the quasi-judicial decision arbitrary and capricious. When a “zoning authority’s decision is arbitrary and capricious, the standard remedy is that the court orders the permit to be issued.”<sup>38</sup> But courts have noted an exception “when the zoning authority’s decision is premature and not necessarily arbitrary” (in applying the incorrect legal standard).<sup>39</sup> In applying this theory to cases of public official bias, courts have held the existence of a biased public official more akin to applying the wrong legal standard, rather than deeming the entire decision as wholly arbitrary.<sup>40</sup>

### Remand

Remand is the typical remedy when faced with bias or prejudicial conduct in quasi-judicial decision making. Municipalities are given quasi-judicial authority by the legislature, and that power is usually exclusive. For example, in Minnesota a county’s “board of adjustment shall have the **exclusive power** to order the issuance of variances from the requirements of any official control.”<sup>41</sup> When there is exclusive authority (as in Minnesota zoning decisions), the Minnesota Supreme Court has stressed the importance that “the judiciary does not encroach upon the constitutional power spheres of the other two branches of the government,” or exceed “the limited role of the judiciary in reviewing zoning decisions.”<sup>42</sup> The best way for the courts to avoid a separation of powers issue is to direct a remand.

In *Continental Property Group, Inc v. City of Minneapolis* (previously discussed where a biased city council member wrongfully lobbied other council members to vote against a project), the Minnesota Court of

Appeals held “the city council relied on factors it was not intended or permitted to consider in denying CPG’s applications.”<sup>43</sup> In discussing the proper remedy, the court explained “the city council’s decision would not necessarily have been arbitrary and capricious had the council followed the correct standards and procedures... namely, **had it not allowed a biased councilmember to participate in the decision.**” Therefore, the court remanded the case back to the city council. This is significant because the vote denying the project was 13-0.

As previously discussed in *Living Word Bible Camp v. County of Itasca*, a biased county board member wrongfully interfered with an independent Environmental Impact Statement.<sup>44</sup> The Minnesota Court of Appeals held that “the record supports the finding that [the board member’s] conduct demonstrated bias and that her ability to alter the EAW to reflect her bias rendered the decision making process arbitrary and capricious.” The court held that a remand was necessary because it was a 2-1 vote (with the biased member in the majority), and because the EIS needed to be redone by the expert without the wrongful input of the biased board member.

When a case is remanded to the quasi-judicial decision makers, the new case must be heard entirely without the participation of the biased official. This was the case in both *Continental Property Group* and *Living Word Bible Camp*. It was also the case in numerous similar state and federal cases.<sup>45</sup> Theoretically, if the reason the quasi-judicial decisions were arbitrary and capricious was the biased official, then their absence should cure the due process faults.

When a quasi-judicial decision is initially challenged at the district or appellate court (depending on state statutes), the court that hears the case is acting as a court of appeals.

Accordingly, they should abide by fundamental rules of appellate proce-

dures.<sup>46</sup> Under these rules, parties cannot raise new issues or arguments for the first time on appeal, and they may not raise the same general issues litigated below on new theories.<sup>47</sup> Remands avoid these issues when courts merely give guidance, remand, and allow the public officials to re-hear the case.

Additional support for a remand as the proper remedy comes from other types of cases where bias has been found. In criminal cases, jurors must “swear that he could set aside any opinion he might hold and decide the case on the evidence.”<sup>48</sup> In a case where a juror did not swear he could set aside any opinion he might hold and decide the case on the evidence, “but only that he would try,” the Minnesota Court of Appeals held that the trial court erred by not striking the juror.<sup>49</sup> The remedy was not an acquittal, but a **new trial** – the functional equivalent of a remand. Additionally, the Minnesota Supreme Court held a trial judge’s act of questioning the veracity of testimony by a defense witness and conducting independent investigation into correctness of witness’s testimony deprived the defendant of his right to a fair trial.<sup>50</sup> But again the remedy was a remand.

### Section 1983 Claims

Finally, the existence of a protected property interest is a prerequisite for a constitutional claim. “The right to procedural due process does not guarantee process for process’s sake; the right to due process guarantees process for the sake of protecting an established property interest.”<sup>51</sup> “It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing.”<sup>52</sup> Because an applicant does not have a protected property interest in a land use application, an applicant has no constitutional right to due process in the application-review process.<sup>53</sup> In other words, there is no section 1983 liability in the application-review process. **ML**

## Notes

1. Attorney and United States Senator Henry Clay.
2. *Meath v. Harmful Substance Comp. Bd.*, 550 N.W.2d 275, 279 (Minn. 1996)
3. <https://www.extension.iastate.edu/communities/legislative-v-quasi-judicial-land-use-decisions>
4. *Humenansky v. Minnesota Bd. of Med. Examiners*, 525 N.W.2d 559, 565 (Minn. Ct. App. 1994), *citing* *Goldberg v. Kelly*, 397 U.S. 254, 267–68, 90 S.Ct. 1011, 1020, 25 L.Ed.2d 287 (1970).
5. Oxford Languages, <https://www.lexico.com/en/definition/bias>
6. David W. Owens, *Bias and Conflict in Land-Use Management Decisions*, University of North Carolina 1997.
7. *Barbara Realty Co. v. Zoning Bd. of Rev. of City of Cranston*, 85 R.I. 152, 128 A.2d 342 (1957).
8. *Black's Law Dictionary*.
9. *Cont'l Prop. Grp., Inc. v. City of Minneapolis*, No. A10-1072, 2011 WL 1642510 (Minn. Ct. App. May 3, 2011).
10. *Living Word Bible Camp v. Cty. of Itasca*, No. A12-0281, 2012 WL 4052868, at \*8 (Minn. Ct. App. Sept. 17, 2012).
11. *Id.*
12. *McVay v. Zoning Hearing Bd. of New Bethlehem Borough*, 91 Pa. Cmwlth. 287, 496 A.2d 1328 (1985).
13. *Black's Law Dictionary*.
14. *Wyzykowski v. Rizas*, 132 N.J. 509, 524, 626 A.2d 406, 413 (1993).
15. 1989 St. Imp. Program (117th St.) v. Denmark Twp., Washington Cty., Minn., 483 N.W.2d 508, 510 (Minn. Ct. App. 1992).
16. *Lenz v. Coon Creek Watershed Dist.*, 278 Minn. 1, 15, 153 N.W.2d 209, 219 (1967).
17. *Id.*
18. *E.T.O., Inc. v. Town of Marion*, 375 N.W.2d 815 (Minn. 1985).
19. *Grabowsky v. Twp. of Montclair*, 221 N.J. 536, 115 A.3d 815 (2015).
20. *Appeal of City of Keene*, 141 N.H. 797, 798, 693 A.2d 412 (1997).
21. *Friends Ret. Concepts v. Bd. of Educ. Borough of Somerville*, 356 N.J. Super. 203, 216, 811 A.2d 962, 969 (Law. Div. 2002).
22. *Owens, supra* note 6.
23. *Id.*
24. *75-80 Properties, L.L.C. v. Rale, Inc.*, 470 Md. 598, 647, 236 A.3d 545, 573 (2020).
25. *Asmussen v. Comm'r, New Hampshire Dep't of Safety*, 145 N.H. 578, 594, 766 A.2d 678, 694 (2000).
26. *See* discussion in *Jennings v. Dade Cty.*, 589 So. 2d 1337, 1340 (Fla. Dist. Ct. App. 1991).
27. *Jennings v. Dade Cty.*, 589 So. 2d 1337, 1340-41 (Fla. Dist. Ct. App. 1991) *citing* *Richardson v. Perales*, 402 U.S. 389, 410, 91 S.Ct. 1420, 1431–32, 28 L.Ed.2d 842 (1971); *United Air Lines, Inc. v. C.A.B.*, 309 F.2d 238 (D.C. Cir. 1962); *Jarrott v. Scrivener*, 225 F.Supp. 827, 834 (D.D.C. 1964).
28. *Jennings v. Dade Cty.*, 589 So. 2d 1337, 1341 (Fla. Dist. Ct. App. 1991).
29. *Id.*
30. *See* Supreme Court of Connecticut (*Martone v. Lensink*, 207 Conn. 296, 306, 541 A.2d 488, 493 (1988)), Appellate Court of Illinois (*E & E Hauling, Inc. v. Pollution Control Bd.*, 116 Ill. App. 3d 586, 606, 451 N.E.2d 555, 571 (1983), *aff'd*, 107 Ill. 2d 33, 481 N.E.2d 664 (1985)), Supreme Court of Hawaii (*Kilakila 'O Haleakala v. Bd. of Land*, 138 Haw. 383, 450, 382 P.3d 195, 262 (2016)), Court of Appeals of Kentucky (*Louisville Gas & Elec. Co. v. Com. ex rel. Cowan*, 862 S.W.2d 897, 900–01 (Ky. Ct. App. 1993)).
31. *Pro. Air Traffic Controllers Org. v. Fed. Lab. Rels. Auth.*, 685 F.2d 547, 563–64 (D.C. Cir. 1982).
32. *See* *Hall v. Superior Ct.*, 3 Cal. App. 5th 792, 809–10, 208 Cal. Rptr. 3d 186, 199 (2016).
33. *Id.* at 809.
34. For example, *see* Minn. Stat. § 609.42, N.Y. Penal Law §§ 200.10, 200.11, 200.12, and Cal. Penal Code, § 68.
35. *See* *Id.*
36. *See* *Petition of Dwyer*, 486 Pa. 585, 597, 406 A.2d 1355, 1361 (1979).
37. *Id.* (emphasis added).
38. *Krummenacher v. City of Minnetonka*, 783 N.W.2d 721, 732–33 (Minn. 2010).
39. *Id.* at 733.
40. *See* *Cont'l Prop. Grp., Inc. v. City of Minneapolis*, No. A10-1072, 2011 WL 1642510, at \*4 (Minn. Ct. App. May 3, 2011); *Living Word Bible Camp v. Cty. of Itasca*, No. A12-0281, 2012 WL 4052868, at \*2 (Minn. Ct. App. Sept. 17, 2012).
41. Minn. Stat. § 394.27, subd. 7.
42. *Big Lake Ass'n v. Saint Louis Cty. Plan. Comm'n*, 761 N.W.2d 487, 491 (Minn. 2009).
43. *Cont'l Prop. Grp., Inc. v. City of Minneapolis*, No. A10-1072, 2011 WL 1642510, at \*6 (Minn. Ct. App. May 3, 2011).
44. *Living Word Bible Camp v. Cnty. of Itasca*, No. A12-0281, 2012 WL 4052868, at \*2 (Minn. Ct. App. Sept. 17, 2012).
45. *See* *Cinderella Career & Finishing Sch., Inc. v. F.T.C.*, 425 F.2d 583, 592 (D.C. Cir. 1970); *Barbara Realty Co. v. Zoning Bd. of Rev. of City of Cranston*, 85 R.I. 152, 154, 128 A.2d 342, 344 (1957); *Texaco, Inc. v. F.T.C.*, 336 F.2d 754, 757 (D.C. Cir. 1964), *vacated and remanded on other grounds*, 381 U.S. 739 (1965).
46. *Leppink v. Water Gremlin Co.*, 944 N.W.2d 493, 501 (Minn. App. 2020).
47. *Id.*
48. *Patton v. Yount*, 467 U.S. 1025, 1036 (1984).
49. *State v. Logan*, 535 N.W.2d 320, 324 (Minn. 1995).
50. *State v. Dorsey*, 701 N.W.2d 238, 249-53 (Minn. 2005).
51. *Cont'l Prop. Grp., Inc. v. City of Minneapolis*, No. A10-1072, 2011 WL 1642510, at \*4 (Minn. Ct. App. May 3, 2011).
52. *Id.* *citing* *Carey v. Piphus*, 435 U.S. 247, 266, 98 S.Ct. 1042, 1054 (1978) (quotation omitted).
53. *Id.* at \*6.

# Public Nuisance: Municipalities and the Common Good

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Long restricted to interferences in the common good which involve real property or illegal activity, public nuisance has increasingly been asserted by municipalities to redress a broader span of injury. The debate about the proper scope of public nuisance in American jurisprudence is vociferous, spotlighted in high-profile combat being waged by local governments across the country.

**The Restatement:** While not binding law, the Restatement of Torts is accorded great deference in many states.<sup>1</sup> In the context of public nuisance, it has engendered widely differing interpretations, defining public nuisance simply as “an unreasonable interference with a right common to the general public.”<sup>2</sup> Factors that make an interference “unreasonable” include:

- (a) whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort, or the public convenience, or
- (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
- (c) whether the conduct is of a continuing nature or has produced a permanent or long lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.<sup>3</sup>

Whether these elements exist in a given fact pattern is subject to great

disagreement, as the following will illustrate.

**The Gun Battles:** More than twenty years ago, firearms became a battleground in the public nuisance war. In 1998, Cincinnati sued a group of manufacturers and distributors, seeking recovery for costs incurred in combating gun violence and diminution in property values. Lower courts dismissed, holding among other things that Ohio’s public nuisance law did not extend to scenarios where third parties played a material role in the injury. But the Ohio Supreme Court reversed and remanded, finding that the involvement by third parties did not foreclose the city’s nuisance cause of action: “Contrary to appellees’ position, it is not fatal to appellant’s public nuisance claim that appellees did not control the actual firearms at the moment that harm occurred.”<sup>4</sup> *City of Cincinnati v. Beretta U.S.A. Corp.* also held that:

[U]nder the Restatement's broad definition, a public-nuisance action can be maintained for injuries caused by a product if the facts

establish that the design, manufacturing, marketing, or sale of the product unreasonably interferes with a right common to the general public.<sup>5</sup>

*City of Cincinnati* would prove to be an outlier. More typical was a parallel proceeding in Chicago. The city had enacted restrictions on the sale and possession of certain types of firearms, but surrounding jurisdictions did not impose the same limitations. Manufacturers flooded nearby towns with inventory, where dealers knowingly sold prohibited weapons to Chicago residents, who inevitably transported them into the urban core. In 1998, plaintiffs brought *City of Chicago v. Beretta U.S.A. Corp.*, (a case in which IMLA filed an amicus brief) asserting that the “existence of illegal firearms in the City of Chicago constitutes a public nuisance because it violates ordinances and laws designed to protect the public from a threat to its health, welfare and safety,” and because the existence of readily available firearms “creates an unreasonable and significant interference” with public safety.<sup>6</sup>

The Illinois Supreme Court ultimately rejected Chicago’s arguments. Holding that makers of lawful products could not be liable for downstream acts by third parties, it drew an analogy sometimes cited by later public nuisance defendants:

If there is a public right to be free from the threat that others may use a lawful product to break the law,

that right would include the right to drive upon the highways, free from the risk of injury posed by drunk drivers. This public right to safe passage on the highways would provide the basis for public nuisance claims against brewers and distillers, distributing companies, and proprietors of bars, taverns, liquor stores, and restaurants with liquor licenses, all of whom could be said to contribute to an interference with the public right.<sup>7</sup>

The Cincinnati and Chicago cases were only two of many nuisance actions brought by local governments in the 1990s to hold the gun industry accountable for misuse of firearms. Capitol Hill soon moved to stop that momentum. In 2005, Congress passed the Protection of Lawful Commerce in Arms Act (PLCAA).<sup>8</sup> The PLCAA characterized the imposition of liability “on an entire industry for harm that is solely caused by others” as an “abuse of the legal system.”<sup>9</sup> It definitively

prohibits “civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages, injunctive or other relief resulting from the misuse of their products by others.”<sup>10</sup> That law has foreclosed most public nuisance gun litigation. But in July 2021, testing the Supremacy Clause, the New York Assembly became the first state legislature in the nation to pass a measure which expressly allows public nuisance civil actions against gun makers and dealers.<sup>11</sup> Not surprisingly, the firearms industry argues that the New York law violates the PLCAA’s preemptive reach and contravenes the Second Amendment. Litigation on those issues has already begun.

**Banking on Foreclosure:** The 2008 mortgage meltdown left many neighborhoods with vacant homes, abandoned by borrowers who had been induced to sign high-risk mortgages. Crime, drug use, and huge declines in property taxes fol-

lowed. Cities brought nuisance actions against lenders who had promoted the loans, often in obviously discriminatory patterns, and failed to maintain the properties once in foreclosure. Here, the municipal plaintiffs were challenged to demonstrate the nexus between lending and the deterioration in neighborhoods. These cases have proved difficult. In one such action, the Sixth Circuit found Cincinnati’s amended pleadings against Wells Fargo to be insufficient:

The failure to tether the damages to nuisance-related problems on Wells Fargo’s properties prevents us from assessing the “directness” of the relationship between the two. That is particularly true for the City’s attenuated theories of damage: decreased tax revenue, increased police and fire expenditures, and increased administrative costs...When tied only to a general “policy” of non-conformance, these damages are difficult

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**PIPR**INDEX

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to connect to Wells Fargo's actions and nearly impossible to disaggregate from other potential causes of these costs.<sup>12</sup>

(Municipalities have sought other avenues to address urban blight caused by foreclosure. IMLA members will be aware of our amicus support for Miami in its action against Bank of America and others under the Fair Housing Act. That route has thus far brought limited satisfaction; while the Supreme Court affirmed in May 2017 that municipalities have standing to sue under the statute, it nevertheless reversed on the issue of causation, finding that mere foreseeability of foreclosure and its attendant harm is inadequate.)<sup>13</sup>

**Painting Over Known Hazards:** As indicated above, a major dispute in public nuisance cases is whether causation has been sufficiently demonstrated. That issue was at the heart of another nuisance litigation commenced two decades ago—the effort to make producers liable for the consequences of lead paint in homes and buildings throughout the nation. There, although the products involved were legal, ample evidence indicated that manufacturers knew about the dangers of lead, particularly to children, but aggressively promoted their wares. Many localities sought public nuisance relief.

These included 26 towns and counties in New Jersey, whose cases were consolidated in *In re Lead Paint Litigation*.<sup>14</sup> In 2007, their public nuisance claims were dismissed by the New Jersey Supreme Court:

Although the complaints initially sought recovery through a wide variety of legal theories, we are called upon to consider only whether these plaintiffs have stated a cognizable claim based on the common law tort of public nuisance. Because we conclude that plaintiffs cannot state

a claim consistent with the well-recognized parameters of that tort, and because we further conclude that to find otherwise would be directly contrary to legislative pronouncements governing both lead paint abatement programs and products liability claims, we reverse the judgment of the Appellate Division and remand for dismissal of the complaints.<sup>15</sup>

A decade later, the California Court of Appeals reached a different conclusion about paint makers' liability. Concluding 17 years of litigation, it found that deceptive marketing of a legal but dangerous product which filled a community with latent toxicity was actionable within the ambit of nuisance:

A rational factfinder could have concluded that defendants' wrongful promotions of lead paint for interior residential use were not unduly remote from the presence of interior residential lead paint placed on those residences during the period of defendants' wrongful promotions and within a reasonable period thereafter. The connection between the long-ago promotions and the current presence of lead paint was not particularly attenuated. Those who were influenced by the promotions to use lead paint on residential interiors in the 10 jurisdictions were the single conduit between defendants' actions and the current hazard. Under these circumstances, the trial court could have reasonably concluded that defendants' promotions, which were a substantial factor in creating the current hazard, were not too remote to be considered a legal cause of the current hazard even if the actions of others in response to those promotions and the passive neglect of owners also played a causal role. The court could therefore have concluded that defendants' promotions were the "legal cause" of the

current nuisance.<sup>16</sup>

The case was remanded for calculation of damages, spurring the three paint makers--NL Industries, ConAgra, and Sherwin Williams—to sign a \$305 million settlement with the municipalities.<sup>17</sup>

**Opioids-The Early Successes:** Begun in 2014, the opioid litigation finally began to yield results for government plaintiffs five years later. The first significant breakthrough came in March 2019, when Purdue, the producer of Oxycontin, agreed to pay the State of Oklahoma \$270 million to avoid an upcoming televised opioid trial. *State of Oklahoma v. Purdue Pharma L.P.*, brought by then-Attorney General Mike Hunter, alleged that Purdue and other opioid manufacturers had systematically deceived Sooner state physicians into improperly prescribing opioids for long-term chronic pain.<sup>18</sup>

Six months later, on the eve of an October 2019 trial in the Northern District of Ohio, a range of opioid defendants settled lawsuits brought by Ohio's Summit and Cuyahoga counties, agreeing to pay \$360 million.<sup>19</sup> And in May 2021, America's three major pharmaceutical distribution companies—Cardinal Health, McKesson, and Amerisource Bergin, proposed a massive \$21 billion settlement (the "Distributor Settlement Agreement" or DSA) to silence opioid suits brought by more than 3,000 local governments and 48 states.<sup>20</sup> Here, the plaintiffs' main contention was that the distributors failed to track and report suspicious orders, blindly sending millions of opioid doses into communities around the nation, far in excess of any conceivable legitimate demand. Johnson & Johnson, through its Janssen affiliate, offered a parallel settlement proposal, adding another \$5 billion to the DSA total.

For each of these litigations, the primary cause of action driving settlement was public nuisance.

*State of Oklahoma* continued to trial after Purdue exited. The outcome, ren-



dered in Cleveland County Circuit Court in August 2019, confirmed that public nuisance could be a legitimate weapon for opioid plaintiffs: the State, which had dropped all other causes of action, obtained a \$465 million judgment against Johnson & Johnson/Janssen.<sup>21</sup> That decision was based on Circuit Judge Thad Balkman’s expansive reading of Oklahoma’s public nuisance law:

The plain text of the statute does not limit public nuisance to the use of real property. Unlike other states’ statutes which limit nuisances to the ‘habitual use, or the threatened or contemplated habitual use of any place,’ Oklahoma’s statute simply says ‘unlawfully performing an act or omitting to perform a duty.’<sup>22</sup>

He found that J&J’s sales and marketing activities ineluctably drove improper use of “Duragesic,” the company’s high-powered fentanyl product. The result—spikes in death, addiction, incarceration, foster care, unemployment,

and social services—constituted a public nuisance under Oklahoma law.

Seeking to add a land-based rationale, Judge Balkman cited voluminous evidence that the company had used Oklahoma’s dwellings, offices, and roadways to perpetrate its injurious acts:

However, and in the alternative, in the event Oklahoma’s nuisance law does require the use of property, the State has sufficiently shown that Defendants pervasively, systemically and substantially used real and personal property, private and public, as well as the public roads, buildings and land of the State of Oklahoma, to create this nuisance.<sup>23</sup>

J&J rapidly appealed the decision to the Oklahoma Supreme Court, staying any opioid abatement payments.

**The California Setback:** While the Oklahoma appeal was being decided, a California court dealt opioid public nuisance its first major defeat. In early

November 2021, the case brought in Orange County Superior Court by Oakland and the counties of Santa Clara, Orange, and Los Angeles, was dismissed.<sup>24</sup> The *People of California* decision cited a lack of evidence of inappropriate prescribing and held categorically that “medically appropriate” prescriptions could not generate public nuisance liability:

Mindful of [statutory] limiting factors, Plaintiffs nevertheless contend: that neither Federal nor California law precludes a finding of liability based on false or misleading marketing and promotion; that Defendants knew increased opioid prescriptions result in increased adverse downstream consequences; and that Defendants’ false or misleading marketing and promotion in fact resulted in increased prescriptions, with increased adverse downstream consequences (the “opioid crisis” alleged).

Most significantly, Plaintiffs also

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contend that they need only prove that the number (and/or the dose and duration) of prescriptions increased, without distinguishing between medically appropriate and medically inappropriate prescriptions.

The Court disagrees. Specifically, the Court finds that even if any of the marketing which caused an increase in the number, dose or duration of opioid prescriptions *did* include false or misleading marketing, any adverse downstream consequences flowing from *medically* appropriate prescriptions cannot constitute an actionable public nuisance. This is so because, as the Federal government and the California Legislature have already determined, and as this Court finds, the social utility of medically appropriate prescriptions outweighs the gravity of the harm inflicted by them and so is not “unreasonable” or, therefore, enjoined.<sup>25</sup>

**Reversal in Oklahoma City:** Within weeks after the California dismissal (now on appeal to the Ninth Circuit), a more resounding setback transpired in Oklahoma. Once Judge Balkman’s case moved from Norman to Oklahoma City, it faced a hostile judiciary. In mid-November 2021, the Oklahoma Supreme Court reversed *People of Oklahoma*, with the 5-1 majority reining in what it saw as the improper expansion of Oklahoma’s public nuisance jurisprudence. It found that the mere use of roads and buildings for sales and marketing purposes was not a property-based predicate for nuisance liability. And it was adamant that public nuisance should not become a vehicle for recovery against those who manufacture, market, or sell lawful products in Oklahoma:

The issue before this Court is whether the district court correctly

determined that J&J’s actions in marketing and selling prescription opioids created a public nuisance. We hold it did not. The nature of the nuisance claim pled by the State is the marketing, selling, and overprescribing of opioids manufactured by J&J. This Court has not extended the public nuisance statute to the manufacturing, marketing, and selling of products, and we reject the State’s invitation to expand Oklahoma’s public nuisance law. . . . The Court applies the nuisance statutes to unlawful conduct that annoys, injures, or endangers the comfort, repose, health, or safety of others. But that conduct has been criminal or property-based conflict. **Applying the nuisance statutes to lawful products as the State requests would create unlimited and unprincipled liability for product manufacturers; this is why our Court has never applied public nuisance law to the manufacturing, marketing, and selling of lawful products.**<sup>26</sup> (emphasis added).

**Juries See Otherwise:** Indicative of the changing tides in public nuisance interpretation, two subsequent jury decisions immediately restored vitality to municipal opioid plaintiffs. In late November 2021, a federal jury in Cleveland agreed with Ohio’s Lake and Trumbull counties in the national opioid MDL “Track 3” bellwether that CVS, Walgreens, and Walmart were responsible for creating a public nuisance by indiscriminately filling suspicious opioid prescriptions.<sup>27</sup> That case, in which damages will be decided by MDL Judge Polster, is already on appeal to the Sixth Circuit. And in an action brought against all three categories of opioid defendants (manufacturers, distributors, and pharmacies) a New York jury held in favor of Suffolk and Nassau counties, and the State, finding Teva Pharmaceuticals liable for public nuisance on December 30, 2021.<sup>28</sup>

**The Continuing Debate:** These litigations, and others where public nuisance is alleged, continue to arouse intense debate. Some detractors argue that the cause of action is being distorted into a legal catch-all, deployed by plaintiffs’ counsel to conjure illusory but lucrative legal actions. Others assert that remedies already exist, at least where products are involved. Typifying this point of view was a *Wall Street Journal* opinion piece by George Washington Law Professor Jonathan Turley endorsing the Oklahoma opioid reversal and pointing to ready-made alternatives available to opioid plaintiffs in tort law, specifically products liability:

Public-health nuisances are acts that involve unreasonable conduct exposing others to harm, like keeping diseased animals or improperly storing explosives in a population center. The concept of nuisance is appealing when dealing with unpopular products that cause social harm. Yet the torts system has an elaborate and well-functioning system of product liability. Companies can be held strictly liable for products that are defective in design, manufacture, or warnings. The product-liability tort gives companies an incentive to minimize risks while empowering litigants to seek redress for injuries.<sup>29</sup>

Public nuisance plaintiffs might argue that, at least in the context of pharmaceuticals, the products liability path to injunctive and financial relief is largely illusory. Most state legislatures have passed measures that virtually eliminate manufacturers’ product liability risk once the drug in question obtains FDA approval. That immunity can then shield their subsequent behavior. A typical interpretation was provided by Michigan’s Court of Appeals as it applied the state’s safe-harbor provision and affirmed denial of liability in a 2018 pharmaceutical case:

MCL 600.2946(5) specifically provides that . . . the manufacturer or seller is not liable, if two conditions are met: (1) the drug was approved for safety and efficacy by the FDA and, (2) the drug and its labeling were in compliance with the FDA’s approval at the time the drug left the control of the manufacturer or seller.<sup>30</sup>

Opioid defendants have explicitly relied on products liability safe harbors, as in this argument citing the Ohio Products Liability Act:

Ohio law is clear, however, that public nuisance \* \* \* actions were intended to be abrogated by the OPLA. *Sherwin Williams*, 2007 WL 4965044. OPLA explicitly abrogates “any public nuisance claim or cause of action at common law in which it is alleged that the \* \* \* promotion, advertising, [or] labeling of a product unreasonably interferes with a right common to the general public. R.C.2307.71(A)(13).<sup>31</sup>

The issue of causation generates even more argument. In dismissing the localities’ opioid action, the California Court of Appeals held causation to be inadequately pleaded, despite voluminous evidence that the industry misled doctors and understated addiction risks. Professor Turley’s view is similar, seeing a learned intermediary defense instead of a massive exercise in deceptive promotion by manufacturers. As he puts it, the opioid purveyors provided doctors with “the underlying medical data,” and the doctors then acted:

In the opioid litigation, the companies were producing a lawful, nondefective product. The complaint was that they encouraged overprescription and failed to address the addictive danger adequately. That also highlighted the disconnection with product-liability law. Under common law, courts recognize the defense of the “learned intermediary,” namely physicians. Companies gave doctors the under-

lying medical data on drugs, and doctors decided whether prescribing the drug (or renewing a prescription) was medically warranted. There is no question that doctors have engaged in malpractice in many of these cases of the over-prescription of opioids.<sup>32</sup>

**Editorial Comment:** As in every litigation, the fact-finder’s consideration of causative evidence is critical in public nuisance. Recall that the Oklahoma Supreme Court’s reversal in *People of Oklahoma* cited language from the *City of Chicago* firearms decision, implicitly analogizing the opioid crisis to garden variety alcohol production and sale.<sup>33</sup> Without wanting to insert pro-plaintiff commentary, the court’s use of that anodyne description avoided the most damning factual elements of the opioid defendants’ conduct, beginning with a decade-long series of guilty pleas and Justice Department settlements. A more comparable description of the alcohol industry, had it behaved in

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the same manner as the opioid defendants, might include: distillers spending millions to promote the message that overconsumption rarely causes alcoholism and that 100% grain alcohol is appropriate for all occasions; retailers and bars serving virtually all clientele, in some cases charging customers a premium for failing to verify minimum age and/or ignoring the fact that buyers were already intoxicated, and so on.

### Conclusion

The utility of public nuisance as a mechanism for injunctive relief and abatement awards continues to be demonstrated. As noted above, statutory limitations such as drug makers' immunity from some product liability claims require alternate strategies. And other factors will compel plaintiffs to plead public nuisance, particularly where the alleged wrongdoing transpired over decades and was committed by numerous corporate actors, some of whom may have sought bankruptcy protection. Public nuisance can allow for a finding of joint and several liability among a cast of defendants with widely differing financial attributes.<sup>34</sup> And in many instances, public nuisance cases are not subject to statutes of limitation.<sup>35</sup>

Whether applied to redress the communal injuries discussed here, or to even more ubiquitous causes such as climate change, it is evident that public nuisance will only grow as a mechanism used by municipalities to protect the common good.

ML

### Notes

1. Restatement 50-State Survey 10.30.19.pdf (primerus.com) (<https://www.primerus.com/files/Restatement%2050-State%20Survey%2010.30.19.pdf>)
2. RESTATEMENT OF TORTS, § 821 (b).
3. *Id.*
4. City of Cincinnati v. Beretta U.S.A.

Corp., 95 Ohio St.3d 416, 768 N.E.2d 1136 (Ohio 2002).

5. *Id.* at 419.

6. City of Chicago v. Beretta U.S.A. Corp., 213 Ill.2d 351, 821 N.E.2d 1099 (Ill. 2004), *rehearing denied* Jan. 24, 2005.

7. *Id.* at 376.

8. P.L. 109-92 (2005), *codified at* 15 U.S.C. § 7901 et seq.

9. *Id.*

10. *Id.*

11. N.Y. S.B. 7196 (July 6, 2021).

12. City of Cincinnati v. Deutsche Bank National Trust Co., 863 F.3d 474 (6th Cir. 2017).

13. Bank of America Corp. v. City of Miami, 137 S.Ct. 1296 (2017).

14. In re Lead Paint Litigation, 191 N.J. 405, 924 A.2d 484 (N.J. 2007).

15. *Id.*

16. People of the State of California v. ConAgra Grocery Products Co., 17 Cal. App.5th 51 (Ca. Ct. App. Nov. 14, 2017)

17. Joshua Schneyer, "Paint makers reach \$305 million settlement in California, ending marathon lead poisoning lawsuit." REUTERS, July 17, 2019 (<https://www.reuters.com/article/us-usa-lead-settlement/paint-makers-reach-305-million-settlement-in-california-ending-marathon-lead-poisoning-lawsuit-idUSKCN1UC26J>)

18. State of Oklahoma ex. rel. Mike Hunter v. Purdue Pharma L.P., no. CJ 2017-816 (Cleveland Cnty. Cir. Ct. Aug. 26, 2019).

19. County of Summit v. Purdue Pharma L.P., no. 18-op-45090 (N.D. Ohio June 17, 2019).

20. <https://www.attorneygeneral.gov/wp-content/uploads/2021/07/2021-07-21-Final-Distributor-Settlement-Agreement.pdf>. ("DSA").

21. State of Oklahoma, supra note 18.

22. *Id.*

23. *Id.*

24. People of California v. Purdue Pharma, L.P., no. 14-cv-725287 (Sup. Ct. Orange Cnty. Nov. 1. 2021).

25. *Id.*

26. State ex rel. Attorney General of

Oklahoma v. Johnson & Johnson, no. 118474 / 2021 Ok 54 (Nov. 9, 2021).

27. County of Lake v. Purdue Pharma L.P., no. 18-op-45032 (N.D. Ohio Nov. 23, 2021); County of Trumbull v. Purdue Pharma, L.P., no. 18-op-45079 (N.D. Ohio Nov. 23, 2021).

28. *In re Opioid Litigation*, no. 400000/2017 (Sup. Ct. Suffolk Cnty. Dec. 30, 2021).

29. Jonathan Turley, "Opioids, Guns and Public Nuisance - Why the Oklahoma Supreme Court was right to reject the state's claim against a lawful product," WALL STREET JOURNAL, Nov. 14, 2021.

30. *Trees v. Pfizer, Inc.*, 2018 Mich. App. LEXIS 3757, at \*11 (Mich. Ct. App. 2018).

31. State ex rel DeWine v. Purdue Pharma L.P., Ohio Ct. Com. Pl. cv 17-cl-000261 (Motion to Dismiss, Sept. 17, 2019).

32. Turley, supra note 29.

33. In the context of firearms, a hypothetical comparator might be the industry's advertising that AR-15s and similar automatic weapons are no more dangerous than BB guns and are great gifts for young people.

34. "Accordingly, the Court finds that O.R.C. § 2703.22 does not bar joint and several liability for abatement of a nuisance. Put differently, there is nothing in this statute that precludes application of the doctrine of joint and several liability on Defendants." In re National Prescription Opiate Litigation, no. 17-md-2804 (N.D. Oh. Sept. 17, 2019).

35. "[T]here is no statute of limitations in an action brought by a public entity to abate a public nuisance. . . ." (*Beck Development Co., Inc. v. Southern Pacific Transp. Co.*, 44 Cal.App.4th 1160 (Cal. Ct. App. 1996)); "A well-settled rule in Ohio is that no length of time can legalize a public nuisance and that therefore the statute of limitations does not run against an action to abate such a nuisance." 72 OHIO JUR. 3d NUISANCES § 22; "Public nuisance, being an action to protect public rights, is generally assumed to have no statute of limitations. See RESTATEMENT (SECOND) OF TORTS § 821C cmt. (e) (1979)."



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but prevented the councilmembers from discussing the video publicly, permitting discussions about the video only amongst themselves for the sole purpose of their work. The appellate court upheld the decision, reasoning that a “gag order does not violate the City’s First Amendment rights because the gag order only restricts the council’s speech about matters that the council, otherwise, had no right to discover except by the grace of the legislature through a judicial order.”<sup>86</sup>

Although states apply many different policies regarding public record requests for body camera videos, almost all jurisdictions require redaction of the videos in certain instances. In fact, redaction is such an obvious requirement for body camera videos that governments should expect to procure appropriate redaction software. A New York court explained five years ago that “the NYPD cannot intentionally fail to update its technology during the procurement process for the BWC program and simultaneously rely on outdated software as the reason to deny a FOIL request.”<sup>87</sup> The court went on to hold that “the NYPD may not pass the costs associated with reviewing or redacting the footage requested onto petitioner.”<sup>88</sup> The court’s decision reflects the obvious fact that redaction and production of NYPD body camera footage is routine and costs should be borne collectively by tax payer not the requestor. This is true not only in big cities but in relatively smaller ones like Jackson, Arkansas where a court held that the government could not charge a deposit fee before producing a body camera video.<sup>89</sup>

Redaction is generally regarded as a process rather than the creation of a new record, which most state record disclosure statutes do not require. This is true even though the video is not static and redacting can be more complex. The California Supreme Court explained that for body camera video “to delete the exempt data, Perez separated the audio and visual material, spliced out

the exempt data from each set of material, and then saved the redacted video as a new MP4. But in video-editing terms, what Perez did was not substantively different from using an electronic tool to draw black boxes over exempt material contained in a document in electronic format.”<sup>90</sup> In short, what the government did “was simply perform redactions of an otherwise producible record, albeit through technologically more advanced means.”<sup>91</sup> When redaction is not possible, states do allow viewing the video rather than denying access completely.<sup>92</sup>

### **Litigation Considerations**

Courts are increasingly familiar with body camera videos mostly from their increasing use as evidence. An Indiana court ruled that a statement heard on a body camera video which implicated another person in a crime was not admissible under the recorded recollection exemption to the hearsay rule but was admissible under the excited utterance exception.<sup>93</sup> In another context, federal courts are grappling with how to treat body camera videos in motions to dismiss. Last year, a North Carolina court was asked to consider body camera video in deciding a motion to dismiss.<sup>94</sup> The video captured the entire set of relevant facts in the tragic death of a paranoid schizophrenic who had been wandering the streets at night. Police caught him and with paramedics looking on, handcuffed and hog-tied him so tightly that he could not breathe. After two minutes in that condition, the paramedics put him on a gurney, he was unresponsive, unconscious and could not be revived. Despite its probative value, the court held that the body camera footage was not relevant in a 12(b)(6) motion because it was outside of the pleadings. There are two exceptions to that rule: one for documents intrinsic to a complaint and the other for information of which the court could take judicial notice. However, the court reasoned that neither exemption applied. The reference to the camera footage in the complaint did not make a document upon which the complaint was based. Nor was it a public document even though North

Carolina law allowed it to be posted on a government website. In contrast, a federal judge in Connecticut reasoned that he “may rely on the police body camera videos (Defs.’ Ex. K) for purposes of this motion to dismiss because Boudreau has incorporated them by reference in his amended complaint.”<sup>95</sup>

Once the body camera footage is in the Court record, it is likely open to the public without the need to submit a public records request. In 2018, an Iowa Court explained that video submitted to the court was no longer subject to the confidentiality provisions in Iowa’s public records law but rather was to be categorized as “judicial records belonging to the Court.”<sup>96</sup> The federal common law right to access judicial record preempted the state record disclosure law, making the video that state law would otherwise shield open for public viewing.<sup>97</sup>

Preemption, as well as the rules of hearsay and civil procedure, provide some jurisprudential guideposts for court decisions about body camera footage. In civil and criminal cases, video footage can be treated like other court records and evidence. This gives government lawyers a pool of existing law to reference in providing advice to clients and formulating arguments in litigation concerning how to use the body camera footage. However, no such road map exists for the government lawyer seeking to navigate the very nascent subject of body camera footage sought pursuant to state record request laws. Even when state laws detail the process or considerations that must be employed in responding to requests for body camera footage, the government lawyer is often using her best guess as to how a court may apply the statutory factors to the video, given that since there is scant precedent. If the jurisdiction in which a lawyer practices has not yet addressed a particular subject depicted in a body camera video, analogies can be made to the handling of similar footage in other states. However, lawyers should determine if the comparison state treats body camera videos as generally subject to disclosure with a

few exemptions, generally unable to be disclosed with a few permissible releases, or has no default rule as this will inform the judicial analysis. Lawyers must remember that some states' enumerated exemptions to disclosure are other states' permissible disclosures. A case cited for the proposition that a particular subject matter should not be disclosed to the public could be countered by opposing counsel with a case from a different jurisdiction arguing for the opposite policy. This underscores that the country is far from coalescing around a uniform body camera video disclosure paradigm.

### Practice Pointers

As the foregoing suggests, courts appear reluctant to recognize privacy rights or government interests where the state legislature has not provided for those concerns in the records request statute. In states where some video content is addressed in the statutory scheme, it may be better for lawyers to argue why the novel scenes in the footage at issue are similar to the content already covered in the law. If lawyers practice in jurisdictions where there is a default rule, an argument for how the court should treat a request for body camera footage that is not enumerated within the state statute would be to explain how the default rule could apply to reach the outcome sought. Alternatively, if lawyers are in a state where body camera records are treated like investigatory records, a successful approach might be to analogize the video footage to similar paper records containing information on the same type of police encounter. Emphasis should be placed on the likely consequences of disclosure of the video to ongoing investigations.

Finally, it is important for government lawyers to encourage clients to purchase easy to use software for redaction of body camera footage if that tool is not already available. The ability for the public to view body camera footage remains a developing area of public information statutes across the country. As the laws evolve to address ever more specific situations, the need for quality, easy redaction

will increase. Just as government lawyers must be familiar with their state's record laws, they should take time to be proficient with the redaction software. The need to redact and release body camera footage is here to stay.

### Notes

1. 2017 Hawaii House Bill 383; Hawaii Senate Bill 331; 2017 Iowa HB 77; 2015 Iowa Senate Bill 2174; Montana 2017 House Bill 5214.
2. Miss. Code Ann. § 25-61-12(2)(a).
3. W. Va. Code § 29B-1-4(a).
4. Kan. Stat. Ann. § 45-254.
5. *See, e.g.,* Coughlin v. Lee, 946 F.2d 1152, 1160 (5<sup>th</sup> Cir. 1991); Alaska Stat. § 40.25.120; Idaho Code § 74-124; La. Rev. Stat. Ann. § 44:3; Me. Rev. Stat. Ann., tit. 16, § 804, Md. Code, Gen. Prov., § 4-351; Mass. Gen. Laws, ch. 4 § 7, twenty-sixth; NY Pub. Off. § 87; R.I. Gen. Laws § 38-2-2(4)(D).
6. Tuite v. Henry, 181 F.R.D. 175, 176-77 (D. D.C. 1998).
7. La. Rev. Stat. Ann. § 44:3(A)(2); Me. Rev. Stat. Ann., tit. 16, § 804(4), Md. Code, Gen. Prov., § 4-351(b)(4), N.M. Stat. Ann. § 14-2-1(D)(1), NY Pub. Off. § 87(2)(e)(iii).
8. Md. Code, Gen. Prov., § 4-351(b)(3), (7), NY Pub. Off. § 87(2), (b)(f).
9. Me. Rev. Stat. Ann., tit. 16, § 804(8) Md. Code, Gen. Prov., § 4-351(b)(1), (6), (7).
10. N.M. Stat. Ann. § 14-2-1(D)(2)(a), (b).
11. La. Rev. Stat. Ann. § 44:3(A)(6).
12. Wade v. Taylor, 320 P.3d 1250, 1257 (Idaho 2014).
13. NY Lawyers for the Public Interest v. NYPD, 103 N.Y.S.3d 275, 284 (N.Y. Sup. Ct. 2019).
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18. Cal.Gov't Code, § 6254.4.5; 51 Okl.St. Ann. § 24A.8.A.9; Wisc. Stat. §

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23. 51 Okl.St. Ann. § 24A.8.A.
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25. Anderson v. Blake, No. 05-0729-HE, 2008 WL 2404040, \*3 (W.D. Okla. June 10, 2008) (unreported).
26. Ala. Code § 12-21-3.1; Ga. Code Ann. § 50-18-72(a)(26.2); Nev. Rev. Stat. Ann. § 289.830.2; Or. Rev. Stat. Ann. § 192.345(40); S.C. Code Ann. § 23-1-240 (G)(1).
27. Ga. Code Ann. § 50-18-72(a)(26.2).
28. S.C. Code Ann. § 23-1-240 (G)(5).
29. Or. Rev. Stat. Ann. § 192.345(40)(c).
30. Fla. Stat. Ann. § 119.071(2)(l)(2)(a); Ky. Rev. Stat. Ann. § 61.168(4)(a); Mo. Ann. Stat. § 610.100.2(4); Tenn. Code Ann. § 10-7-504(u)(1)(C); Utah Code Ann. § 63G-2-302(2)(g); Wash. Rev. Code Ann. § 42.56.240(14)(a)(ii); Mich. Comp. Laws Ann. § 780.313(2); N.D. Cent. Code Ann. § 44-04-18.7.9.
31. Fla. Stat. Ann. § 119.071(2)(l)(2)(b); Ky. Rev. Stat. Ann. § 61.168(4)(b); Mo. Ann. Stat. § 610.100.2(4); Tenn. Code Ann. § 10-7-504(u)(1)(B); Utah Code Ann. § 63G-2-305(66); Wash. Rev. Code Ann. § 42.56.240(14)(a)(i); Ohio Rev. Code Ann. § 149.43(A)(17)(i); Conn. Gen. Stat. Ann. § 29-6d(g)(1)(E), (F).
32. Ky. Rev. Stat. Ann. § 61.168(4)(e); N.D. Cent. Code Ann. § 44-04-18.7.8; Ohio Rev. Code Ann. § 149.43(A)(17)(j); Tenn. Code Ann. § 10-7-504(w)(1); Colo. Rev. Stat. Ann. § 24-72-304(4); Conn. Gen. Stat. Ann. § 29-6d(g)(2)(B)(i).
33. Ky. Rev. Stat. Ann. § 61.168(4)(f); N.D. Cent. Code Ann. § 44-04-18.7.8; Ohio Rev. Code Ann. § 149.43(A)(17)(a); Tenn. Code Ann. § 10-7-504(t)(1)(E), (u)(1)(a), (aa)(1); Colo. Rev. Stat. Ann. § 24-72-304(4.5), Conn. Gen. Stat. Ann. § 29-6d(g)(2)(C).
34. Ky. Rev. Stat. Ann. § 61.168(4)(h), Mich. Comp. Laws Ann. § 780.315(1)(d); Ohio Rev. Code Ann. § 149.43(A)(17)(k); Conn. Gen. Stat. Ann. § 29-

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# DIVERSITY

RITA McNEIL DANISH, *Partner, Taft, Stettinius & Hollister, LLP, Columbus, Ohio,* and JARROD D. BLUE, *Strategic Partnership Agreements Administrator, Oak Ridge National Laboratory, Knoxville, Tennessee*

## Contracting in a New World Requires New Tools

The past year is one that many of us would not like to repeat! Despite the many challenges that 2021 has brought, it has forced governments at all levels, private businesses, and nonprofits to evaluate how contracts are formed and to evaluate how new business ventures may be achieved. These organizations must evaluate new business ventures in a world that is very different: a new White House administration, a dynamic economic environment with shifts in demand and supply, the variable impacts of the coronavirus pandemic on the world, and a social justice awakening reverberating across the United States. Businesses and governments are now tasked with pursuing new projects that balance the changing economic and social climates of the United States.

In the case of procurement lawyers, it is essential to make certain that the best contracting tools are utilized to tackle new business opportunities. Popular contracting tools like public-private partnerships and tax increment financing (TIFs) have their place in the public contracting sphere, but they are subject to scrutiny in a new economic and social world.

### Public-Private Partnerships

A public-private partnership involves a long-term contract between a public entity and a private entity for the delivery of public services, or the development of infrastructure (e.g., roads, buildings, etc.), where the private party assumes substantial financial, technical, and operational risk in the project.<sup>1</sup> Public-private partnerships offer the opportunity to take advantage of

the strengths of either entity for an economic or technical benefit. Specifically, public-private partnerships provide the benefit of shared cost, increased project speed, and risk sharing, while accounting for maintenance costs.<sup>2</sup>

However, a disadvantage of public-private partnerships is the potential to stymie the participation of small and medium-size businesses, leading to a lack of competition.<sup>3</sup> The complexity of public-private partnerships results from the bundling of various project phases. The bundling of phases does not allow for small and minority business owners to engage in the procurement process, as they may have only been available to take part in smaller-valued contracts. As a result, public-private partnerships do not always allow for small and minority businesses to appear on the radar of large contractors pursuing major deals.

### TIFs

Another tool beneficial to procurement lawyers is Tax Increment Financing (TIFs).<sup>4</sup> TIFs serve to stimulate private investment in economically deprived areas that are in need of revitalization.<sup>5</sup> The completion of a TIF-funded project has the potential to enhance the value of surrounding real estate, which ultimately generates added tax revenue or increased sales-tax revenue as businesses create jobs in these newly revitalized areas.<sup>6</sup> There are many examples of TIFs used by cities, like Arlington, Virginia, and the \$28 million TIF for Amazon HQ2 infrastructure upgrades, and the \$250 million TIF by the Detroit Downtown Development Authority for the Red Wings Hockey Stadium.<sup>7</sup> Despite the touted economic benefits of TIFs, they can lead to favoritism for politically connected developers and exclude businesses that do not have the benefit of well-placed connections.

Public-private partnerships and TIFs have been trusted tools for procurement lawyers within state and local governments for decades and serve a



beneficial economic purpose in many instances. However, our world has been forever changed by recent events, and new tools should be considered for community economic prosperity. In particular, the increasing recognition of racial and socioeconomic inequality demands that procurement lawyers consider tools that will allow for all groups to have equal economic opportunities.

### Economic Inclusion Tools

Economic inclusion is a key component of an overarching goal of building a prosperous economy. Economic inclusion tools have achieved significant gains for low-income and multicultural communities. Often, economic inclusion is only an add-on to a fully developed economic development strategy. In addition to general economic strategies, economic inclusion tools need to be developed, implemented, and integrated into large-scale job creation, economic development, and public investment strategies that connect women- and minority-owned businesses to economic and business opportunities. For example, Cincinnati has created a licensing and bidding tool to create opportunities for minority- and women-owned businesses to contract with the city.<sup>8</sup>

Economic inclusion tools have achieved significant gains for low-income communities and multicultural communities. Through assisting diverse entrepreneurs in launching businesses and expanding their existing operations, they establish proven opportunities for inclusive job creation. Studies have shown that entrepreneurs of color are more likely to hire people of color and locate their firms in communities of color, and, therefore, their growth leads directly to more job opportunities for the groups that need them the most.<sup>9</sup> Further, these businesses will ultimately revitalize communities and bring tax revenues into the local economy. Minority-owned firms are also twice as likely to export, indicating that more

diverse business ownership could help the nation connect to global markets and meet its goals to increase exports.<sup>10</sup>

### Disparity Studies

Local governments and utilities can change their economic development models to encourage growth for minority- and women-owned businesses and to create jobs. An important tool in the toolbox for inclusive economic development is the disparity study. A disparity study is methodology used to advance the dialogue regarding the inequities and inform the development of new and innovative solutions for all involved.<sup>11</sup> Government agencies at the federal, state, and local levels typically can commission disparity studies to examine the extent to which minority and women contractors are underutilized in public procurement. For example, Cook County, Illinois, has commissioned a disparity study to determine if women and minority contractors are being underutilized by the County as contractors for public projects.<sup>12</sup> Well-conducted disparity studies present information on actual contracting disparities experienced by minority- and women-owned businesses in a particular industry and geographic region, as well as facilitate an investigation into the extent to which there is discrimination in the marketplace.

A disparity study is a comprehensive effort that analyzes a wealth of data pertaining to the legal, legislative, and contracting environment facing women and minority-owned businesses in a particular jurisdiction or when procuring contracts from a specific federal, state, or municipal agency. Disparity studies typically include an overview of the legal precedent that influences key methodologies, computations, and evidence necessary to justify or support existing or proposed contracting programs, including those that are race conscious. In addition to the legal review, disparity studies typically include an overview of the rules, regulations, and ordinances that govern public contracting for a particular agency. In order to determine the extent

to which disparities exist among different racial and ethnic groups and women, disparity studies compute numerical disparity ratios using agency procurement data, information on winning bidders, and a comprehensive analysis of actual and potential bidders to determine which firms are ready, willing, and able to bid on contracts. This information is used to determine utilization and availability, the two inputs of the disparity ratio calculation.

### Conclusion

As local and state governments begin the process of evaluating the lessons learned from the past year, this should not be a time for them to lean solely on the tools that have served them well in the past. Governments and their attorneys should consider utilizing resources, like disparity studies and economic inclusion tools, that have the potential to serve the need of the public for economic equality for all. **ML**

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## PRESIDENT'S LETTER



**BARBARA A. ADAMS,**  
*General Counsel, Illinois Local Government  
Lawyers Association and IMLA President*

### An Achievable New Year's Resolution

As 2022 approaches, so does the traditional time for making resolutions for the New Year. In the waning days of December, many of us have thoughts about what we might do differently next year. Our friends, family, neighbors, and colleagues often talk about their aspirations for personal change, frequently including some of these:

- “Lose weight!”
- “Eat healthy”
- “Exercise more”
- “Spend time with family”
- “Spend time with friends”
- “Walk more, sit less”
- “Call a friend/relative I haven't talked to in ages”
- “Organize my office”
- “Deep clean my house”

But the busy-ness of our day-to-day routine and the celebratory times over the holidays can keep us from focusing on our career-related goals: How to be a better lawyer and how to better serve our clients and communities. As local government lawyers, we have an awesome responsibility to be our best lawyer-selves for the communities we serve. And sometimes we could use a little help.

How do we get the most current information about new legal developments or get up-to-speed on a topic? Where can we connect with other local government lawyers to consider different approaches to issues? How can we get support from other local governments on issues raised in the appellate courts?

One excellent resource, of course, is IMLA—the only national organization devoted exclusively to local government law. No other group provides greater breadth and depth for us as practitioners. And

IMLA is always evolving to help us address the legal needs of our government clients.

So, for 2022, consider a career resolution for yourself—to use some of the opportunities IMLA provides:

- *The Mid-Year Seminar:* Normally a spring event in Washington, D.C., IMLA took this program virtual in 2020 and 2021; we plan on a hybrid offering in 2022. The Mid-Year Seminar includes a wide range of government topics and Section 1983 sessions—useful to litigators and non-litigators alike.
- *The Annual Conference:* This fall event moves to a different city each year, becoming virtual in 2020 and evolving to a hybrid program (in-person and on-line) program for our recent Minneapolis meeting in 2021. Including a full range of government law topics, the Conference also includes a full-day track of Canadian law programs. Those newer to local government practice will enjoy the Institute for Local Government Lawyers.
- *IMLA in Canada:* This program focused on Canadian law provides a unique opportunity for our Canadian members to gather and share knowledge across the provinces.
- *Webinars:* Wow, does IMLA have webinars! Over 40 new programs are presented each year. You can purchase these individually or as a full set, dubbed “Kitchen Sink.” These are not just great resources for you and your legal team; many members invite clients to join them as a way to start discussions about complex and difficult topics.
- *On-Demand Programs:* Many IMLA programs are available on-demand. Whether you've missed a live program

or need information on a new topic, don't forget to look at the website for a relevant program.

- *Subject Matter Working Groups:* Looking to share information and trade ideas with other practitioners? Check out the list of more than 30 IMLA subject matter working groups. Newer additions are Disaster Relief, Affirmative Litigation, University Cities/Counties, and Diversity.
- *Topical Sections:* IMLA also maintains standing subject matter sections that allow participants with a particular area of interest, such as environmental law, telecommunications, or land use, to stay involved with a regular group of members with similar interests.
- *Legal Advocacy:* IMLA's highly-regarded advocacy program provides support to member governments in the form of *amicus* briefs at the United States Supreme Court, the Federal Circuit Courts, and state supreme courts, providing a focused voice for issues of special importance to local government. You can also volunteer to write or assist in preparation of *amicus* briefs in your area of interest and expertise.

In sum, no other organization provides as many opportunities to make an achievable New Year's resolution to enhance your career and work as a lawyer than IMLA.

Best wishes for career growth and success in 2022!

**JOIN IMLA IN**

**Spain**

**SEPTEMBER 2022!**

One year ago, we announced IMLA's new collaboration with **La Asociación de Letrados de Entidades Locales de España**—The Spanish Local Government Lawyers Association (ALEL). Like IMLA, ALEL is a nonprofit organization whose mission is to serve the interests of local government lawyers through conferences, seminars, and legal workshops.

IMLA has already featured several articles in *Municipal Lawyer* authored by our ALEL colleagues, providing an opportunity to compare local government law in Spain to our own legal structures and processes. Now, IMLA and ALEL are pleased to take our collaboration to the next level—a meeting in Seville, Spain to take place from September 12-17, 2022. IMLA members who have joined our comparative law trips to Cuba, Israel, Germany, and other locales will attest to the incomparable opportunities to meet fellow municipal lawyers and learn about contrasting legal regimes—and most importantly, to experience our host countries' sights, sounds, and culture.

Spain will offer an exceptional background for our next IMLA comparative law program. Stay tuned for more details!

# LISTSERV

BY: BRAD CUNNINGHAM,  
*Municipal Attorney, Lexington, South  
Carolina and IMLA Board Member*

## Let's Take Care of Ourselves So We Can Take Care of Others

Everyone has seen the proverbial presentation where the speaker stands up and says “I had a prepared speech, but I’m not using it tonight...” You all know the story. Well, this is one of those, albeit in a written column.

An event happened late a few weeks ago which is exemplary of a topic we have often discussed on the Listserv and the Water Cooler--the issue of mental health for lawyers. Some are uncomfortable or uneasy talking about it, but as I implied above, something something transpired which brought the subject to the forefront for the legal community here in our fair city.

A few weeks back, I received a call from Judge Jeffcoat informing me that “Tommy” (name changed) a 46-year-old lawyer in Lexington had died. He knew no details yet. Ten minutes later, our Chief of Police came in and asked if I knew Tommy. I said “Yes, the Judge just called and said he had died.” The Chief then told me that Tommy had committed suicide by shooting himself in the chest.

By outward appearances Tommy had a lot to be excited about. According to his obituary, he was a prominent

divorce lawyer here in town, who “loved spending time with his girls, traveling, and collecting art. He loved history, and his personality left an impact on everyone he met. He could easily walk in a room and fill it with humorous storytelling, or intelligent and stimulating conversation. He was an adventurous guy from the time he was young and carried that over with every moment he spent with his loves, his beautiful three girls.”

So, a young, bright, funny, intelligent, successful lawyer with three beautiful young girls (for which he had sole custody due to the death of their mother years ago) decides to end it all? Tommy seemed to have everything, including his health. So, what gives? The answer lies quite literally beneath the surface. Tommy appears to have had problems that nobody could “see.” His family reports in the obituary that “At many stages of his

life he was faced with adversity, but he met each challenge with courage, enthusiasm, and perseverance. His ambition and ability were remarkable.” I suppose at some point folks just get tired of fighting.

For anyone reading this, if you ever get to that point, you need help – counseling, etc.... Actually, it is probably a sign you should already have sought help but I’m no professional. I do not know if Tommy sought counseling and won’t delve too far into the specifics, but it was apparent he couldn’t battle his demons on his own any longer. There is no shame in needing this type of help, and we need to drop the stigma that still seems to surround seeking this type of assistance.

Tommy was a good lawyer, but he is quite far from being alone in his field insofar as this type of problem is concerned. I did a little research on lawyer wellness, and the results are definitely alarming. I consulted an American Bar Association article on the subject of substance use and mental health disorders among law students and lawyers. The article cites findings of two co-chairs of the National Task Force on Lawyer Well-Being – Bree Buchanan, director of the State Bar of Texas Lawyers’ Assistance Program, and James C. Coyle, Attorney Regulation Counsel of the Colorado Supreme Court. Their findings were presented in an ABA webinar “The Path to Lawyer Well-Being: Practical Recommendations for Positive Change.” (IMLA’s May-June 2021 *Municipal Lawyer* featured the same topic).

Buchanan said the task force had engaged in a survey of 3,300 law students from fifteen different law schools. Among the findings were that “25 percent of law students are at risk for alcoholism; 17 percent suffer from depression; 37 percent report mild to severe anxiety; and 6 percent report having suicidal thoughts in the past year.”

In addition, Buchanan reports

“another devastating finding of the task force is the culture of secrecy that surrounds substance use among law students. Law students will not ask for help. They are terrified of somebody finding out that they have a problem, which will result in their not being admitted to the bar or not being able to get a job. It’s really about the stigma that attaches to this issue,” she concludes in the study results.

Buchanan goes on to say “the outlook didn’t improve for practicing lawyers. More than 13,000 working lawyers responded to the task force survey, and reported that 28 percent of lawyers suffered from depression, 9 percent of lawyers had severe anxiety and 11.4 percent of lawyers had suicidal thoughts in the previous year.”

She concludes that “At some point in their career, 11.4 percent felt that suicide might be a solution to their issues,” and “members were surprised to learn how much substance use and abuse, depression and anxiety were affecting younger lawyers. The younger the lawyer, the greater the rate of impairment,” Buchanan said. “The good news is the older the lawyer, the rates of depression and substance use declined.”

Coyle maintains that “these numbers paint a dark picture of the health of those in the legal profession, which begs the question, what can be done about it? We must try to change the culture of the legal profession,” Coyle said. The survey sent by the task force generated 44 practical recommendations directed to various legal stakeholders such as judges, regulators, law firms, law schools, bar associations, professional liability carriers and lawyer assistance programs, all in an effort to change the culture and discussion surrounding attorney well-being.

The moral of all this is that the problem is likely more serious than many think, that it isn’t going

away, and it is likely only going to get worse. We just need to get away from the stigma attached to mental health, and let people know it is ok to seek help and ok to say, “I’m not ok.”

A Go Fund Me page has been created for Tommy’s girls, twins age 15 and the little one age 11, who must now grow up without their mother or father. This one hits home for me. It was often that my family would run across Tommy and his girls at an event or in a restaurant, and we were always able to exchange pleasantries. A 9-iron would be plenty of club to reach his office from mine, as it sat just on the other side of the courthouse from here. The Lexington County Bar members are all in shock after losing a colleague who many enjoyed knowing.

I implore everyone to drop any perceived stigma about mental health and get help if you feel you need it. Let’s work on the statistics and improve things for everyone. Please take care of yourself so that you can take care of others. Let’s stand together on this as we are all in it together.

In my state, the South Carolina Bar has a program titled “Lawyers Helping Lawyers.” It is described by the Bar as follows: “A member benefit of the South Carolina Bar, this program is available to all lawyers, judges and law students experiencing challenges with substance use disorders, mental health illnesses and/or stress-related issues that affect their professional and personal lives. No matter what you’re going through, Lawyers Helping Lawyers is here to help.”

The Bar reports its basis for the program: “It’s no secret that law students and lawyers face stressful circumstances on a regular basis. You or others may have high expectations for success and self-sufficiency or concern for clients and time management. These challenges

too often create an environment in which substance use disorders and other mental illnesses and emotional issues can develop. Lawyers Helping Lawyers exists to help you reduce the pain and loss that result from struggles with alcohol, other drugs and mental and emotional illnesses.”

Lawyers Helping Lawyers provides referral to appropriate treatment services, peer support, five free counseling sessions each year, mental health and wellness CLEs, law student assistance through scheduled office hours and mindfulness sessions at in-state law schools, interviews, evaluations, and case management for bar applicants under Character and Fitness review, oversees court-mandated monitoring for lawyers involved with Office of Disciplinary Counsel, and monitors lawyers at the request of employers when appropriate and for lawyers who want to enhance their success in early recovery through added accountability. (See the South Carolina Bar website-www.scbar.org).

It is likely each state or province has a somewhat similar program, and I urge you to make use of it if you think you need to--or encourage a colleague you think might be struggling to take advantage of this help. We don’t need anyone else to become a statistic. We are all colleagues, sons, daughters, moms, dads, or other relatives cared about and needed by someone. Let’s not let them down. Again, let’s take care of ourselves so we can take care of others who depend on us.

Last but not least, remember that these issues are typically magnified by the holidays, and this article was submitted only nine days before Christmas...

The prosecution rests, your honor.

(\*Source and credit for information and facts goes to the ABA and individual sources cited herein as well as the South Carolina Bar).

**M**



# INSIDE CANADA

By: MONICA CIRIELLO,  
*Ontario 2015*

## Impound Fees, Unplugged Cellphones, Inhospitable Stadiums, and More

### Police Authority to Impose Impound Fees

*King v. City of Charlottetown and Shaw's, 2021 PESC 39*

<https://canlii.ca/t/jjzp0>

In June 2018, the Charlottetown Police (Police), acting on behalf of the City of Charlottetown (City) obtained a search warrant for the Plaintiff's vehicle which was seized and searched thoroughly. Following the search, it was towed to an impound lot where it started to accrue impound fees of \$25 per day. In September 2018, after the Plaintiff was charged and sentenced, the Police advised the impound that the vehicle could be released, but the impound fees were the Plaintiff's responsibility. The Plaintiff paid the fees, but thereafter sought reimbursement from the City.

**HELD:** City liable for impound fees.

**DISCUSSION:** The question for the Court was whether the Police had the authority to place the vehicle in impound and impose the impound fees on the Plaintiff during a criminal investigation. The Police testified that it was standard practice to im-

pound a vehicle and impose the fees on the vehicle owner, but confirmed they were not relying on legislative authority or an internal written policy. The Court held that the Police only have the impound authority pursuant to their seizure and search of a vehicle for at best three days, following which it should be returned to the party. Failing to return a vehicle may have serious financial implications on individual owners for which they have no control.

The Court further found that because the Police practice was not rooted in legislation or internal policy, all the impound fees incurred by the Plaintiff were the responsibility of the Police. Furthermore, the Court held that the Police were negligent in failing to release the vehicle to the Plaintiff after it was determined that the search provided no additional evidence. The Court held that there was no evidence to suggest why this decision could not have been made after three days. Indecisiveness or lack of policy caused the Plaintiff pecuniary loss. The Court found that these actions did not meet the standard of care of a reasonable individual acting in these specific factual circumstances. The

Court held that the City was solely responsible for the damaged incurred by the Plaintiff.

**Disconnecting Cell Phone While Driving is not "Use"**  
*City of Montréal c. Hafez, 2021 QCCM 99*

<https://canlii.ca/t/jjs33>

The Defendant was charged with using a cellular device while operating a vehicle contrary to the *Highway Safety Code*, CQLR c C-24.2 (*HSC*). He argued that the cellular device was not in use, but rather it lit up and caught the eye of a police officer when he disconnected it from the vehicle charger.

**HELD:** Defendant acquitted.

**DISCUSSION:** The Defendant's argument was one of a minor distinction, specifically that disconnecting a cellular device does not constitute usage. Therefore, such an act is not in contravention of the *HSC*. Unfortunately, the legislation does not define what constitutes "using" or "use of" a cellular device. The City of Montreal (City) provided jurisprudence that the act of plugging in or charging a cellular phone constitutes use, *Poulin c. Ville de Rosemere, 2020 QCCS 2010* and argued that disconnecting or unplugging a cellular device should attract the same meaning because both were distractions from the road and distractions while operating a vehicle is what the legislation sought to ban. As a result, the City asserted, the Court must rely on plain language of the word "disconnect" to determine the intent of the legislators, *Poulin c. Ville de Rosemere, 2020 QCCS 2010*.

The Court cited *Collins English Dictionary*; "to disconnect" a piece of equipment means to separate it from its source of power or to break a connection that it needs in order to work. Relying on this definition, the Court rejected the City's argument

that the act of disconnecting is a “use” of a cellular device, because the Court rationalized that disconnecting a charging battery enables a cellular device to be used; however, it does not constitute using a cellular device, which is a separate act. The Court acquitted the Defendant based on this distinction.

### Accommodations Under the Alberta Human Rights Act

*Hort v City of Cold Lake*, 2021 AHRC 168 <https://canlii.ca/t/jjgfp>  
The Complainant alleged discrimination on the grounds of physical and mental disability by the City of Cold Lake (City) for denying access to the City’s Multipurpose Stadium (Stadium), contrary to the *Alberta Human Rights Act*, RSA 2000, c. A-25.5 (*Act*) The City sought to have the application dismissed, arguing that the Stadium was built in compliance with the Alberta Building Code.

**HELD:** Application dismissed.

**DISCUSSION:** The Complainant’s application submitted that persons with physical disabilities cannot access the Stadium and thereby cannot attend events held at the Stadium, contrary to the *Act*. The application made specific reference to one football game. The City acknowledged that there may have been one event where disabled persons were unable to attend as a result of its location at the Stadium. The City argued that the Complainant failed to provide evidence that he was denied access to the football game or any other event, and that the evidence before the Tribunal failed to mention an adverse impact on the Complainant or anyone else. The City further argued that it had made a reasonable accommodation and met the requirements for a barrier-free design in compliance with the Alberta Building Code, as the Stadium offers accessible seating, signage,

wheelchair-accessible washrooms and concession window. Any additional access for one-off events would be cost-prohibitive, resulting in an undue hardship on the City.

The Tribunal acknowledged that the Stadium may be inaccessible to persons with physical disabilities, and there is recognition that disabled persons may not have been able to attend at least one event at the Stadium; however without additional evidence that the Complainant suffered an adverse impact, it did not rise to the level of discrimination. The Complainant’s application was dismissed.

### Did City Terminate Employment Due to Criminal Charges on CRC?

*Farquhar v. City of Nelson and another*, 2021 BCHRT 62 <https://canlii.ca/t/jg24l>

The Complainant alleged discrimination contrary to the *Human Rights Code (Code)* RSBC 1996, c -210 when his employment as a heavy equipment operator was terminated by the City of Nelson (City) after it became aware of his drug-related criminal charge. The City sought to dismiss the application, arguing that it terminated the Complainant for not submitting the required criminal records check (CRC) documentation in a timely manner, which did not violate the *Code*. In contrast, the Complainant argued that he was terminated for the contents of the CRC itself, which listed a criminal drug charge.

**HELD:** Application to deny dismissed.

**DISCUSSION:** The Tribunal reviews complaints to assess whether there is a reasonable prospect that an application would succeed in order to warrant the time and expense of a hearing. The threshold is low: the Complainant must only demonstrate that the evidence is not conjecture, *Workers’ Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49. The

evidence before the Tribunal suggested that the Complainant was discriminated against, contrary to *Code* and was terminated for having a criminal charge. Although the *Code* references criminal “convictions” and not criminal “charges,” the Tribunal was satisfied in applying a liberal interpretation to include criminal charge, *Dore v. Crown Tire Service Ltd.* (1989), 10 C.H.R.R. D15433.

The onus was on the Complainant to demonstrate the nexus between his criminal charge and termination by the City, *Quebec v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39. The Complainant’s evidence was his own statement that the day he submitted his CRC was the day he was terminated. The Tribunal made a reasonable inference based on the circumstances, that although there may be some merit to the City’s concerns unrelated to the CRC, the Complainant’s application had a reasonable prospect of success. The City’s application to dismissed was denied.

### Development Permit Appeals: Proximity Does Not Assure Affected Person Status

*Dimant v Calgary (City)*, 2021 ABCA 396 <https://canlii.ca/t/jl3kg>

The Applicant appeared before the City of Calgary’s (City) Subdivision and Development Appeal Board (Board) to appeal a development permit granted by the City to build a distribution centre approximately one kilometer away from the Applicant’s business. The Board struck down the appeal, finding that the Applicant was not an affected person within the meaning of the *Municipal Government Act*, RSA 2000, c. M-26 (MGA). The Applicant applied under the MGA for permission to appeal the Board’s decision.

**HELD:** Application to appeal dismissed.

**DISCUSSION:** The Court has discretion to grant an appeal if

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# AMICUS

By: AMANDA KARRAS,  
*IMLA Executive Director and  
General Counsel*

## Section 1983 Petitions of Interest

**I**MLA recently filed or will shortly be filing amicus briefs in support of Petitions for Supreme Court certiorari from two Section 1983 cases arising out of the Ninth Circuit: *Bohanon v. Lawrence* and *County of Los Angeles v. Tekoh*. While getting a Petition granted is always a longshot statistically (there is a less than 1% chance of getting the Court to grant any given Petition), both cases involve well developed circuit splits on important issues of federal law involving law enforcement that could draw the Court's attention. Additionally, both cases arise out of the Ninth Circuit, which in the last Term made up 23% of the Court's docket and was reversed 94% of the time.

### *Bohanon v. Lawrence*

In this case, the Ninth Circuit dismissed an interlocutory appeal of the denial of qualified immunity brought by three Las Vegas police officers. Keith Childress, Jr. skipped bail after being convicted of robbery, assault, and kidnapping. When the dispatcher sought officer assistance in apprehending Childress, it was erroneously conveyed that he was wanted for attempted homicide. The dispatcher also indicated that it was unknown if he was armed, but that a gun had been recovered in a vehicle he had been seen exiting earlier in the day.

When the officers located Childress fleeing into a residential neighborhood carrying a black object in his right hand, which at least one officer believed was a firearm, a standoff ensued. The officers repeatedly warned Chil-

dress to get on the ground, to "drop the gun" and not to approach or else he would be shot. Childress disregarded many commands (including that he would be shot if he walked toward the officers), advanced, and was shot multiple times by two officers. Another officer deployed a police canine, which bit Childress for approximately 15 seconds until the officers were able to get him in handcuffs. Virtually all the exchange was captured on video. While the video does not show a gun, Childress' right hand and arm are not visible in much of the footage, given the angle of the cameras. A gun was not recovered on the scene and the black object turned out to be Childress' cell phone.

At the summary judgment stage, the district court denied the officers' request for qualified immunity.<sup>1</sup> The

court separated out the use of force into two incidents: a first round of shots and then a second round of shots 2-5 seconds later, once Childress was on the ground.<sup>2</sup> As to the first round of shots, the court concluded that the officers' use of lethal force was objectively reasonable under the Fourth Amendment given their reasonable mistaken belief that the black object in Childress' hand was a firearm and due to his refusal to obey their commands.<sup>3</sup>

The court concluded that once Childress was on the ground, however, disputed facts existed as to whether the remainder of the officers' shots were reasonable under the Fourth Amendment.<sup>4</sup> The court rejected the officers' arguments that Childress remained a threat because his hands were moving, and they believed he had a gun.<sup>5</sup> The court explained that because the officers testified that they did not see Childress pull a gun out of his pocket, and they could not see a weapon in his hand, it was a disputed material fact as to whether Childress was still a threat after having been shot.<sup>6</sup> The court then denied qualified immunity, concluding the law was clearly established that, assuming the facts in the light most favorable to the plaintiff, shooting a suspect who is lying down bleeding on the ground and who poses no threat of serious bodily injury is unreasonable under the Fourth Amendment.<sup>7</sup> As to the use of the K-9, the court denied qualified immunity because it was clearly established that the deployment of the K-9 after Childress was on the ground having been shot was objectively unreasonable.<sup>8</sup>

On appeal, the Ninth Circuit held that it lacked jurisdiction because disputed material facts existed as to whether Childress continued to be a threat to the officers after the first volley of shots.<sup>9</sup> The court rejected the officers' argument that video evidence "blatantly contradicts" the district court's version of the facts.<sup>10</sup>

By way of background, in *Mitchell v. Forsyth*, the Supreme Court held that

because qualified immunity is an immunity from suit, pretrial orders denying qualified immunity are immediately appealable.<sup>11</sup> Ten years later, in *Johnson v. Jones*, the Supreme Court concluded that defendants cannot immediately appeal “fact-related” determinations related to the denial of qualified immunity.<sup>12</sup> In *Johnson*, Jones claimed that five police officers beat him, resulting in his hospitalization.<sup>13</sup> Three of the officers claimed they not only did not beat him, but were not even present for the alleged excessive force.<sup>14</sup> The Supreme Court held that the district court’s conclusion at summary judgment that there were genuine disputes of fact about whether these officers were involved in the alleged excessive force was not a “final decision” that can be appealed on an interlocutory basis.<sup>15</sup> Nine years later, in *Plumbhoff v. Rickard*, the Court rejected an argument by the Respondent that *Johnson* should preclude review of the case on an interlocutory basis, concluding that the Petitioners were arguing their conduct did not violate the Fourth Amendment or clearly established law, rather than “purely factual issues.”<sup>16</sup>

This case will resolve the question of whether and in what circumstances, federal courts of appeals have jurisdiction over an appeal from a district court’s denial of summary judgment based on qualified immunity. Since the Supreme Court’s decision in *Johnson*, a circuit split has developed on this issue and *Johnson*’s application.<sup>17</sup>

IMLA believes appellate jurisdiction over issues of qualified immunity should be uniform, clear, and predictable for local governments in this country. Additionally, the purpose of qualified immunity is an immunity from suit, not liability. Thus, the denial of appellate jurisdiction implicates important policy considerations for local governments and officials. If courts lack jurisdiction to hear interlocutory appeals in these cases, local governments will be caught up in protracted litigation and costlier settlements.

### *Vega v. Tekoh*

In this case, Deputy Vega responded to a sexual assault report, and he did not *Mirandize* Terence Tekoh, the suspect, prior to asking questions about the incident. The parties’ versions of the facts differ sharply. Tekoh claims the officer essentially trapped him in a small windowless room for 35-40 minutes, put his hand on his gun during the questioning, and used racial epithets while questioning him.<sup>18</sup> Deputy Vega denies Tekoh’s allegations about the questioning. He believed his questioning was non-custodial and therefore did not require *Miranda* warnings.

Though many factual disputes exist, both parties agree that *Miranda* warnings were not provided and that Tekoh ultimately agreed to write down what happened, confessing to the crime both in writing and in conversation.<sup>19</sup> Tekoh was arrested and charged in state court for the sexual assault. The prosecutor introduced the confession against him at trial as evidence of his guilt, and the judge admitted the confession.<sup>20</sup> Despite the confession, the jury returned a verdict of not guilty.<sup>21</sup>

After his acquittal, Tekoh sued Deputy Vega under 42 U.S.C. § 1983 for violating his Fifth Amendment right against self-incrimination. This resulted in two civil trials. At the first trial, the district court refused to instruct the jury that Deputy Vega must be found liable for the Fifth Amendment claim if the jury determined that Vega violated *Miranda* when obtaining the incriminating statements that were later used against the suspect at his criminal trial.<sup>22</sup> In doing so, the court held that *Miranda* announced a “prophylactic rule” and that a Section 1983 plaintiff could not “use a prophylactic rule to create a constitutional right” triggering Section 1983 liability.<sup>23</sup> The jury returned a verdict for Deputy Vega, concluding that there had been no unconstitutional coercion of the confession.<sup>24</sup>

After the first trial, the court determined it had erred in instructing

the jury on a Fourteenth Amendment due process violation, rather than a Fifth Amendment self-incrimination violation. It therefore ordered a new trial. This time, the court instructed the jury to consider the totality of the circumstances of the questioning—including its location, length, whether the person was free to leave, the manner of questioning, as well as whether Vega provided a *Miranda* warning—to determine whether Vega had “improperly coerced or compelled” Tekoh’s confession.<sup>25</sup> Once again, the jury rejected the Fifth Amendment claim and returned a verdict for Deputy Vega.<sup>26</sup>

Tekoh appealed to the Ninth Circuit, arguing that introduction of his un-*Mirandized* statement at his criminal trial on its own constituted a violation of his Fifth Amendment rights remediable under Section 1983.<sup>27</sup> The Ninth Circuit agreed, holding that “the use of an un-*Mirandized* statement against a defendant in a criminal proceeding violates the Fifth Amendment and may support a § 1983 claim.”<sup>28</sup> In coming to its conclusion, the Ninth Circuit acknowledged a circuit split on the issue.<sup>29</sup>

The Petition for Certiorari raises the question of whether a plaintiff may state a claim for relief against a law enforcement officer under 42 U.S.C. § 1983, based on an officer’s failure to provide the warning prescribed by the Supreme Court in *Miranda v. Arizona*. As Judge Butmatay explained in his dissent from denial for rehearing en banc:

[T]his case has nothing to do with whether *Miranda* warnings are required before custodial interrogation—they are. Neither does it deal with whether un-*Mirandized* statements must be excluded from the government’s case-in-chief—Supreme Court case law says they should be. Nor does this case ask whether Tekoh was coerced into confessing—our court deemed coercion irrelevant. Instead,

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the narrow question before the court was whether the introduction of an un-*Mirandized* statement at trial *alone* constitutes the violation of a “right” secured by the Constitution. Our court’s answer? Yes, the lack of *Miranda* warnings violates the Fifth Amendment even if subsequent statements were freely and voluntarily given.<sup>30</sup>

IMLA filed an amicus brief in this case, explaining first that we believe *Miranda* is an important holding, but the result for a *Miranda* violation is the exclusion of a confession in a criminal case, not the creation a substantive right under Section 1983 for which there would be civil liability. This case presents an opportunity for the Court to address the circuit split, which currently results in a scenario in which law enforcement (and local governments) are liable for a Section 1983 violation due to the introduction of an un-*Mirandized* confession at a criminal trial based solely on their geography.

### Conclusion

The Supreme Court requested a response in the *Tekoh* case, which means at least one Justice is interested in the case at this juncture, but it takes four to grant certiorari. Given the briefing schedule, the earliest the Court would possibly grant certiorari in that case would be late January or early February, which means there is an outside chance the Court could hear the case at the end of the current term (if it grants the Petition). The *Lawrence* case was filed later and so if the Court grants certiorari, it would not hear the case until the fall of 2022 at the earliest. As noted at the outset, odds are never in the Petitioner’s favor for getting a grant of certiorari, but both of these cases provide compelling issues that the Court will need to address at some point given the ongoing circuit splits involved.

**M**

1. *Lawrence v. Las Vegas Metro. Police Dep’t*, 451 F. Supp. 3d 1154, 1170 (D. Nev. 2020).
2. *Id.* at 1164-65.
3. *Id.* at 1169.
4. *Id.*
5. *Id.* at 1169-70.
6. *Id.*
7. *Id.* at 1170.
8. *Id.* at 1171.
9. *Lawrence v. Bohanon*, 847 F. App’x 516, 516-17 (9th Cir. 2021).
10. *Id.* at 517.
11. *Mitchell v. Forsyth*, 472 U.S. 511, 525-27 (1985).
12. *Johnson v. Jones* 515 U.S. 304, 307 (1995).
13. *Id.* at 307.
14. *Id.* at 308.
15. *Id.* at 313.
16. *Plumhoff v. Rickard*, 572 U.S. 765, 773 (2014).
17. As Judge Fletcher of the Ninth Circuit recently explained in another case involving this same issue, “the law in this area is extraordinarily confused.” *Est. of Anderson v. Marsh*, No. 19-15068, 2021 WL 139733, \*735 (9th Cir. Jan. 15, 2021) (Fletcher, J. dissenting). In his dissent in the *Marsh* case, Judge Fletcher goes on to cite several cases from other circuits which also note the confusion of the law in this area. *See, e.g., Diaz v. Martinez*, 112 F.3d 1, 3 (1st Cir. 1997) (“The dividing line that separates an immediately appealable order from a nonappealable one in these purlieus is not always easy to visualize.”); *Camillo-Robles v. Hoyos*, 151 F.3d 1, 8 (1st Cir. 1998) (“Cases are clear enough at the extremes. ... [But d]etermining the existence *vel non* of appellate jurisdiction in cases closer to the equator is more difficult. ... If this were not complex enough, the district judge is not legally obliged to explain the basis on which a denial of summary judgment rests.”); *Walton v. Powell*, 821 F.3d 1204, 1209 (10th Cir. 2016) (“[W]e have struggled ourselves to fix the exact parameters of the *Johnson* innovation.”); *Barry v. O’Grady*, 895 F.3d 440, 446 (6th Cir. 2018) (“Each of our too-many-to-count additional glosses on *Johnson* is needlessly complicated.

- ...” (Sutton, J., dissenting)). Judge Fletcher closed his dissent with the following plea to the Supreme Court: “I respectfully ask the Supreme Court to tell us clearly, in an appropriate case, whether and in what circumstances an interlocutory appeal may be taken when the district court, viewing disputed evidence in the light most favorable to plaintiff, has denied a motion for summary judgment based on qualified immunity.” *Est. of Anderson*, 2021 WL 139733 \*742.
18. *Tekoh v. Cty. of Los Angeles*, 985 F.3d 713, 715-16 (9th Cir. 2021).
19. *Id.* at 715.
20. *Id.* at 716.
21. *Id.*
22. *Id.* at 717.
23. *Id.*
24. *Id.*
25. *Id.* at 717-18.
26. *Id.* at 718.
27. *Id.*
28. *Id.* at 723.
29. *Id.*
30. *Tekoh v. Cty. of Los Angeles*, 997 F.3d 1260, 1265 (9th Cir. 2021).

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is satisfied that the issue before it raises a question of law. The Applicant argued that the Board erred in law by failing to consider section 685(2) of the MGA, which allows a person affected by a development permit to appeal. The Applicant argued he was an affected person as the new distribution centre which was planned to be only one kilometre away would result in serious traffic safety issues around his business. The Court found that the Board had considered the MGA and correctly held that the Applicant was not an affected person. The Court noted that although geographic proximity is an important factor for consideration if an applicant is an affected person, so is the consideration of significant impact on the applicant by the proposed development. The

jurisprudence has held that appeals should be dismissed where applicants are unable to demonstrate a nexus greater than any other member of the public.

The Court was satisfied that the evidence did not demonstrate that the Applicant was an affected person, meaning that the Board did not have the jurisdiction to hear the appeal. Therefore, the Court held this was not a question of law. The Applicant argued that the Board erred in law by determining the issue of standing prior to hearing the merits of the argument. The Court noted that procedural fairness does raise a question of law; however, in the matter before it the Board had discretion to hold a merits hearing and was not required to do so as per *Rau v. Edmonton (City)* 2015 ABCA 136. The Court was not persuaded that the Applicant's evidence was sufficient to merit a further appeal. Application to appeal dismissed. **ML**

**Diversity** cont'd from page 27

### Notes

1. Jens K. Roehrich, Michael A. Lewis & Gerard George, *Are Public-Private Partnerships a Healthy Option? A Systematic Literature Review*, 113 SOC. SCI. & MED. 110 (2014).
2. Grame A. Hodge & Carsten Greve, *Public-Private Partnerships: An International Performance Review*, 67 PUB. ADMIN. REV. 545 (2007).
3. Adam Burroughs, *Why Useful Public/Private Partnerships Often Go Undiscovered*, SMART BUS. (May 26, 2020), <https://www.sbnonline.com/article/why-useful-public-private-partnerships-go-undiscovered/>.
4. *Kelo v. City of New London*, 545 U.S. 469 (2005). The Court

held that a governmental taking of property from one private owner to give to another in furtherance of economic development is a permissible "public use" under the Fifth Amendment. The Court ruling moved forward that only a rational relation to a legitimate purpose is needed for economic development takings.

5. Currently, every state except Arizona allows for some form of TIFs, which are considered one of the most popular economic incentive tools. Benjamin Schneider, *CityLab University: Tax Increment Financing*, BLOOMBERG CITYLAB (Oct. 24, 2019), <https://www.bloomberg.com/news/articles/2019-10-24/the-lowdown-on-tif-the-developer-s-friend>.

6. *Id.*

7. Reuters Staff, *Factbox: Amazon to Get Billions in Breaks for HQ2 Development*, REUTERS (Nov. 13, 2018), <https://www.reuters.com/article/us-amazon-com-headquarters-factbox/factbox-amazon-to-get-billions-in-breaks-for-hq2-development-idUKKCN1NI2KR>; John Gallagher, *How Downtown Detroit's Taxes Work and Who Really Pays Them*, DETROIT FREE PRESS (June 4, 2019), <https://www.freep.com/story/money/business/john-gallagher/2019/06/04/downtown-detroit-property-taxes/3626319002/>.

8. *Department of Economic Inclusion*, CITY OF CINCINNATI, <https://www.cincinnati-oh.gov/inclusion/registration-certification/business-enterprise-certification/> (last visited July 6, 2021).

9. See SCOTT ANTHONY VOWELS, NAT'L MINORITY SUPPLIER DEV. COUNCIL, ECONOMIC IMPACT REPORT: THE EFFECTS OF NMSDC CERTIFIED MINORITY BUSINESS ENTERPRISES ON THE U.S. ECONOMY, [https://www.nmsdc.org/wp-content/uploads/Economic\\_Impact\\_Report\\_FINAL.pdf](https://www.nmsdc.org/wp-content/uploads/Economic_Impact_Report_FINAL.pdf); Staff,

*Black Business Hiring Can Reduce Black Unemployment*, GAZELLEINDEX (Apr. 13, 2012), <https://gazelleindex.com/2012/04/13/black-business-hiring-can-reduce-black-unemployment/>; Staff, *Minority Businesses Support Minority Communities*, GAZELLEINDEX (Aug. 15, 2012), <https://gazelleindex.com/2012/08/15/minority-businesses-support-minority-communities/>; Lee Romney, *Minority-Owned Firms Tend to Hire Within Own Ethnic Group*, L.A. TIMES (Sept. 18, 1999), <https://www.latimes.com/archives/la-xpm-1999-sep-18-fi-11575-story.html>.

10. News Release, Minority Bus. Dev. Agency, *Minority-Owned Businesses Are Exporting*, <https://archive.mbda.gov/news/news-and-announcements/2012/04/minority-owned-businesses-are-exporting.html> (last visited July 10, 2021).

11. According to the Minority Business Development Agency, "a disparity study is a comprehensive effort that analyzes a wealth of data pertaining to the legal, legislative, and contracting environment facing MBEs in a particular jurisdiction or when procuring contracts from a specific federal, state or municipal agency." News Release, Minority Bus. Dev. Agency, *Executive Summary—Contracting Barriers and Factors Affecting Minority Business Enterprises: A Review of Existing Disparity Studies*, <https://archive.mbda.gov/news/news-and-announcements/2017/01/executive-summary-contracting-barriers-and-factors-affecting.html> (last visited July 10, 2021).

12. *Cook County Disparity Study*, COOK CNTY., ILL., <http://cook-county.disparity-study.com/> (last visited July 6, 2021).

- 6d(g)(1)(B); Mo. Ann. Stat. § 610.100.3.
35. Ky. Rev. Stat. Ann. § 61.168(4)(g); Ohio Rev. Code Ann. § 149.43(A)(17)(b); Wash. Rev. Code Ann. § 42.56.240(14)(a)(iv); Conn. Gen. Stat. Ann. § 29-6d(g)(2)(B)(iii).
36. Conn. Gen. Stat. Ann. § 29-6d(g)(2)(B)(ii); Ky. Rev. Stat. Ann. § 61.878(1)(q); N.D. Cent. Code Ann. § 44-04-18.7.8.
37. Ohio Rev. Code Ann. § 149.43(A)(1)(ii); Mich. Comp. Laws Ann. § 780.315(1)(c); Wis. Stat. Ann. § 165.87(3)(c).
38. Fla. Stat. Ann. § 119.071(2)(l)(2)(c); Mich. Comp. Laws Ann. §§ 780.313(2), 780.315(1)(c); Tex. Occ. Code Ann. § 1701.661(f).
39. Ohio Rev. Code Ann. § 149.43(A)(17)(q).
40. Mo. Ann. Stat. § 610.100.2(4).
41. Ky. Rev. Stat. Ann. § 61.168(4)(d).
42. N.D. Cent. Code Ann. § 44-04-18.7.8.
43. Ky. Rev. Stat. Ann. § 61.168(4)(n).
44. Conn. Gen. Stat. Ann. § 29-6d(g)(2)(B)(ii).
45. Tex. Occ. Code Ann. § 1701.661(f).
46. Ohio Rev. Code Ann. § 149.43(A)(17)(h).
47. Ohio Rev. Code Ann. § 149.43(A)(17)(f).
48. Fla. Stat. Ann. § 119.071(2)(p)(2); Ohio Rev. Code Ann. § 149.43(A)(17)(c).
49. Conn. Gen. Stat. Ann. § 29-6d(g)(1)(A).
50. Conn. Gen. Stat. Ann. § 29-6d(g)(1)(C).
51. Mich. Comp. Laws Ann. § 780.315(1)(a); Wash. Rev. Code Ann. § 42.56.240(1).
52. Mich. Comp. Laws Ann. § 780.315(1)(e); Conn. Gen. Stat. Ann. § 29-6d(g)(1)(a).
53. Mich. Comp. Laws Ann. § 780.315(1)(b).
54. Mich. Comp. Laws Ann. § 780.315(1)(f); Mo. Ann. Stat. § 610.100.3.
55. 42 Pa. Stat. and Cons. Stat. Ann. § 67A04(a).
56. Fla. Stat. Ann. § 119.071(2)(p)(2).
57. Ohio Rev. Code Ann. § 149.43(A)(17)(l).
58. 42 Pa. Stat. and Cons. Stat. Ann. § 67A04(a); Tex. Occ. Code Ann. § 1701.661(d).
59. Mich. Comp. Laws Ann. § 780.315(2).
60. Ky. Rev. Stat. Ann. § 61.168(4)(n).
61. Wash. Rev. Code Ann. § 42.56.240(14)(a)(vi).
62. Ky. Rev. Stat. Ann. § 61.168(4)(j).
63. *Bolm v. Custodian of Tucson Police Dept.*, 969 P.2d 200, 205 (Ariz. Ct. App. 1998).
64. Fla. Stat. Ann. § 119.071(2)(l)(4)(a),(b); 50 Ill. Comp. Stat. Ann. 706/10-20(b)(1)(A); Ky. Rev. Stat. Ann. § 61.168(5)(d); Mich. Comp. Laws Ann. § 780.314(a); N.C. Gen. Stat. Ann. § 132-1.4A(c); Wash. Rev. Code Ann. § 42.56.240(14)(e)(i), Minn. Stat. Ann. § 13.825, subd. 4.
65. 50 Ill. Comp. Stat. Ann. 706/10-20(b)(2); Ky. Rev. Stat. Ann. § 61.168(5)(a); Minn. Stat. Ann. § 13.825, subd. 2; N.H. Rev. Stat. Ann. § 91-A:5.X(a).
66. Conn. Gen. Stat. Ann. § 29-6d(f); Fla. Stat. Ann. § 119.071(2)(l)(3)(b); Wyo. Stat. Ann. § 16-4-203(d)(xviii)(A).
67. 50 Ill. Comp. Stat. Ann. 706/10-20(b)(2); Ky. Rev. Stat. Ann. § 61.168(5)(b); N.H. Rev. Stat. Ann. § 91-A:5.X(c).
68. Fla. Stat. Ann. § 119.071(2)(l)(4)(c); Mich. Comp. Laws Ann. § 780.314(b).
69. 50 Ill. Comp. Stat. Ann. 706/10-20(b)(2); N.H. Rev. Stat. Ann. § 91-A:5.X(b).
70. 50 Ill. Comp. Stat. Ann. 706/10-20(b)(2); Wyo. Stat. Ann. § 16-4-203(d)(xviii)(B)(II).
71. 50 Ill. Comp. Stat. Ann. 706/10-20(b)(2); Wyo. Stat. Ann. § 16-4-203(d)(xviii)(B)(II).
72. Ark. Code Ann. § 12-6-701(d); 2019 Ill. Atty. Gen. Op. 19-010.
73. N.H. Rev. Stat. Ann. § 91-A:5.X(c).
74. Fla. Stat. Ann. § 119.071(2)(l)(4)(a),(b).
75. La. Stat. Ann. § 44:3(F).
76. Wyo. Stat. Ann. § 16-4-203(d)(xviii)(B)(III).
77. Wyo. Stat. Ann. § 16-4-203(d)(xviii)(B)(IV).
78. Tex. Occ. Code Ann. § 1701.661(e)(3); Tex. Atty. Gen. Op. KP-0186, 2018 WL 1448758, \*2 (Tex.A.G. 2018).
79. *Banks v. City of Tacoma*, No. 52072-9-II, 2021 WL 2229038, \* 11 (Wash. Ct. App. 2021) (unreported) (citing *Jane Does 1-15 v. King County*, 366 P.3d 936, 945-46 (Wash. Ct. App. 2015); *Gronquist v. State*, 313 P.3d 416, 421 (Wash. Ct. App. 2013)).
80. Mo. Ann. Stat. § 610.100.5(3)(c).
81. Ariz. Rev. Stat. Ann. § 39-121.04; Colo. Rev. Stat. Ann. § 24-72-305; Fla. Stat. Ann. § 119.071(2)(l)(4)(d); Ind. Code Ann. § 5-14-3-5.2; La. Stat. Ann. § 44:3(I); NJ AG Directive 2021-5 of May 25, 2021, §10.1; N.C. Gen. Stat. Ann. § 132-1.4A(d).
82. Ind. Code Ann. § 5-14-3-5.2(a)(2)(D).
83. NJ AG Directive 2021-5 of May 25, 2021, §10.1(h).
84. N.C. Gen. Stat. Ann. § 132-1.4A(d)(5); *but see* 2021 North Carolina Laws S.L. 2021-138, § 21(c) (new paradigm for disclosure analysis effective December 1, 2021 for requests occurring thereafter).
85. *Matter of Custodial Law Enforcement Recording Sought by City of Greensboro*, 833 S.E.2d 1, 2 (N.C. Ct. App. 2019).
86. *Id.* at 3.
87. *New York- Time Warner v. NYPD*, 36 N.Y.S.3d 579, 595 (Supreme Court 2016).
88. *Id.* at 597.
89. *Daugherty v. Jackson Police Dept.*, 411 S.W.3d 196, 202 (Ark. 2012).
90. *Nat'l Lawyers Guild v. City of Hayward*, 464 P.3d 594, 608 (Ca. 2020).
91. *Id.*
92. Nev. Rev. Stat. Ann. § 289.830.2(b).
93. *McMillen v. State*, 169 N.E.3d 437, 441-42 (Ind. App. 2021).
94. *Smith v. City of Greensboro*, 1:19CV386, 2020 WL 1452114 (M.D.N.C. 2020).
95. *Boudreau v. Smith*, 2018 WL 4426010, \*3, n. 1 (D. Conn. 2018) (unreported).
96. *Steele v. City of Burlington, Iowa*, 334 F.Supp.3d 972, 981-82 (S.D. Iowa 2018).
97. *Id.* at 982.



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