International Municipal Lawyers Association
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IMLA NEWS
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FEATURED CASE:

Police: Mutual Aid Agreements Allow Use of Police from Other Counties; No Private of Action to Contest Interdepartmental Activity

Flores v. Logan, no. 19-000841 (Haw. July 12, 2022)

The Supreme Court of Hawai'i affirms two lower court decisions dismissing a protestor's assertion that use of out-of-county police officers is not lawful and gives rise to his private right of action. *An IMLA amicus brief is cited extensively.*

The building of the Thirty Meter Telescope on Mauna Kea, a volcano rising nearly 14,000 feet above sea level on the island of Hawai'i, was the subject of considerable discord among those who see the technology as an intrusion on sacred ground. In order to assist in quelling ongoing disruptions, including the blockage of the only road leading up to the construction site, in July 2019, the police chief of Hawai'i County sought the assistance of additional officers and entered into interdepartmental agreements with the Honolulu Police Department (HPD) and Maui County Police Department (MPD). Each of those sent officers to assist the Hawai'i County Police Department (HCPD) at Mauna Kea.

E. Kalani Flores (Flores) sued the police chiefs of the three departments, challenging the presence of the HPD and MPD officers, arguing that there was no statutory basis for the mutual assistance agreements and asserting a private right of action. Flores' challenge was based in part on Hawaii Rev. Stat. § 52D-5, "Powers of chief of police outside own county," which states:

> The chief of police of each county and any duly authorized subordinates shall have and may exercise all powers, privileges, and authority necessary to enforce the laws of the State, in a county other than the county in and for which the chief has been appointed, if:
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> (1) The exercise of such power, privilege, and authority is required in the pursuit of any investigation commenced within the county in and for which the chief has been appointed; and

> (2) The concurrence of the chief of police of the county in which the power, privilege, and authority sought to be exercised is obtained.

Flores contended that because the investigation did not commence in Honolulu County or Maui County, the HCPD and MPD officers had no jurisdiction to police the protests in Hawai'i County.

The defendants moved to dismiss, arguing that the plain language and purpose of the statute did not foreclose all other circumstances in which cross-county policing might arise. They also argued that the Hawai'i mutual aid / intra-governmental assistance statute contemplates exactly the types of assistance provided in this case. Haw. Rev. Stat. §72-27 law provides in relevant part as follows:

> (a) With the approval of the respective employer, a governmental unit of this State may participate in any program of temporary inter- or intra-governmental assignments or exchanges of employees as a sending or receiving agency.
> "Agency" means any local, national, or foreign governmental agency or private agency with government sponsored programs or projects.
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> (d) An agreement consistent with this section and policies of the employer shall be made between the sending and receiving agencies on matters relating to the assignment or exchange, including but not limited to supervision of duties, costs of salary and benefits, and travel and transportation expenses; provided that the agreement shall not diminish any rights or benefits to which an employee of a governmental unit of this State is entitled under this section.

The district court granted the defendants' motion to dismiss the complaint, concluding that the purpose of Haw. Rev. Stat. s. 52D-5 is "to provide continuity to police investigations from one county jurisdiction to another and to also protect the local control and assure cooperation through the provision of notification to a county chief of police when investigations are to be pursued within this jurisdiction or another jurisdiction."

The Intermediate Court of Appeal (ICA) also granted the defendants' motion to dismiss.

On appeal, the Hawai'i Supreme Court affirmed:

> We hold that the circuit court did not err when it dismissed Flores's complaint because there is no private right of action pursuant to HRS § 52D-5. In addition, the ICA correctly determined that mutual aid between police departments of different counties is allowed under Hawai'i law. Accordingly, the ICA did not err by affirming the circuit court's Order Granting Motion to Dismiss and we affirm the ICA's Judgment on Appeal.

The Hawai'i Supreme Court opinion devoted significant time to analyzing the legislative history behind the statute in question (sometimes referred to as the "hot pursuit" law), which provides that officers from one Hawai'i county can enter another Hawai'i county in the context of an ongoing investigation. There was no evidence that a private right of action had ever been intended, and nothing in the statue limited cooperation solely to investigations.

On the issue of mutual aid agreements generally, IMLA had submitted an amicus brief in the ICA proceeding, which was cited extensively by the Hawai'i Supreme Court:

> **4. Amicus Curiae Brief**
> The International Municipal Lawyers Association, Inc. (the IMLA) filed a motion for leave to file an amicus curiae brief in support of the Chiefs of Police, which the ICA granted. The IMLA explained that mutual aid by law enforcement is an essential form of intergovernmental cooperation that is common both in Hawai'i16 and throughout the United States. According to the IMLA, mutual aid "enables jurisdictions to access additional resources when the need arises . . . [and] to effectively utilize all available resources, coordinate planning, and minimize conflict in order to ensure a timely and efficient response." The IMLA noted that the sharing of resources within Hawai'i is especially important because people and resources are not evenly distributed throughout the and help from neighboring states cannot arrive in a timely fashion.
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> Second, the IMLA argued that mutual aid is authorized by HRS § 78-27, which provides for temporary assignment of personnel between state agencies, and by HRS § 127A, which provides for rendering of mutual aid during an emergency. The IMLA noted that the Legislature enacted HRS chapter 127A to "ensure that the preparations of this State will be adequate" to address the "existing and increasing possibility of the occurrence of disasters or emergencies." Specifically, HRS § 127A-12(c)(2) permits county mayors to "'[s]ponsor and develop mutual aid plans and agreements for emergency management between one or more counties' for the provision of various services, including 'police services' and 'personnel necessary to provide or conduct those services.'" (Alteration in original.) The IMLA observed that even absent specific statutory authority, courts in other jurisdictions have upheld intergovernmental agreements for mutual aid under general principles of contract law.
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> Third, the IMLA maintained that HRS § 52D-5, Hawai'i's hot- or fresh-pursuit statute, does not limit the ability of *** municipalities to enter into law enforcement mutual aid agreements. The IMLA suggested distinguishing between a mutual-aid statute, which benefits the receiving agency, and a hot-pursuit statute which benefits the sending agency. According to the IMLA, "one is not a substitute for the other, nor does one preclude the other." Thus, the IMLA urged the ICA to affirm the circuit court and send a "clear signal . . . that mutual aid agreements like the one at issue here are broadly authorized under HRS § 78-27."

IMLA is grateful to our pro bono authors, Alan Cohn and Jason Meade with Steptoe & Johnson, for their excellent work in this case.

SCWC-19-0000841.pdf (state.hi.us)

Signs: *City of Austin* Preserves Other Jurisdictions' Off-Premises Sign Regulations

GEFT Outdoor, LLC v. City of Westfield, nos. 20-2915 and 20-3101 (7th Cir. July 11, 2022).

Applying *City of Austin*, the Seventh Circuit reverses a lower court determination that a city's off-premises and sign pole standards regulate speech and require strict scrutiny.

GEFT Outdoor applied for a permit to build a large digital billboard on private property along U.S. Highway 31 in Westfield, Indiana. Because of the proposed sign's noncompliance with Westfield's ordinance, including its off-premises location and use of a pole, the City denied GEFT's application. GEFT brought an action against the City, that its sign ordinance, including its permitting and variance provisions, violated the First Amendment. Relying on the Fifth Circuit's decision in *Reagan National v. City of Austin*, the district court concluded that much of the City's ordinance governing sign standards—including its exceptions, permitting scheme, and off-premises ban—regulated speech on the basis of content and therefore was subject to strict scrutiny.

Based on the Supreme Court's reversal in *City of Austin*, validating intermediate scrutiny for off-premises sign distinctions, the Seventh Circuit vacated and remanded:

> The only responsible course is to remand to allow the district court to revisit its prior rulings within the intermediate scrutiny framework articulated in *City of Austin*. In doing so we leave to the district court's sound discretion whether to permit the parties to supplement the existing summary judgment record to inform, for example, whether challenged provisions of the City of Westfield's ordinance, although content neutral on their face, operate in practice in ways that show impermissible restrictions on speech based on its content.
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> The Seventh Circuit also remanded the issue of whether a prohibition against "pole signs" fails intermediate scrutiny, while expressing skepticism that such a provision is defective:
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> We also remand to allow the district court to reconsider its ruling on the City's pole sign ban. To be sure, the district court correctly concluded that the ban, which prohibits signs "supported by one or more poles, posts, or braces upon the ground, in excess of six (6) feet in height, not attached to or supported by any building," is a content-neutral time, place, and manner restriction. But the district court then found, without any accompanying citations to legal authority, that the exception afforded to certain flag poles—a type of pole sign—showed that the broader pole sign ban lacked the narrow tailoring necessary to meet Westfield's stated interests in promoting community aesthetics and safety.
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> Intermediate scrutiny is not an overly demanding standard, as it does not require a perfect or least restrictive fit. All the City must show is that its pole sign ban furthers its stated interests without burdening substantially more speech than necessary. See *Ward v. Rock Against Racism*, 491 U.S. 781, 798–99, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). We have a difficult time seeing how the exception for flag poles renders the broader pole sign prohibition unconstitutional.

GEFT OUTDOOR, LLC v. CITY OF WESTFIELD, et al., (uscourts.gov)

See also *Norton Outdoor Advertising, Inc. v. Village of St. Bernard*, no. 1:20-cv-350 (S.D. Ohio June 16, 2022) (dismissing advertiser's claim that revocation of permit for off-premises changeable digital billboard failed strict scrutiny review):

> [I]n *Thomas v. Bright*, 937 F.3d 721 (6th Cir. 2019), the Sixth Circuit interpreted the Supreme Court's 2015 Reed decision as supporting its holding that on-/off-premises distinctions in sign codes are not content neutral and therefore are subject to strict scrutiny. *Thomas v. Bright* reasoned that a Tennessee regulation was content-based because it required a state official to read the sign's content to determine whether the display pertained to the real property on which the billboard was located. Norton's motion for summary judgment heavily relies upon *Thomas v. Bright* and its progeny. . . .
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> Unfortunately for Norton, the reasoning of *Thomas v. Bright* was recently rejected by the Supreme Court in *City of Austin v. Reagan National Advertising of Austin*, LLC, 142 S.Ct. 1464 (2022). In City of Austin, a billboard company challenged a similar on-/off-premises sign code on First Amendment grounds. The Fifth Circuit had explicitly adopted the Sixth Circuit's reasoning in *Thomas v. Bright,* holding that the on-/off-premises distinction was subject to strict scrutiny. The Supreme Court reversed, squarely rejecting the expansive interpretation of *Reed* adopted by both circuits.
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> Thus, on the central question presented here - whether on/off-premises regulations should be subject to strict scrutiny as Norton maintains or should be considered to be content-neutral and subject only to intermediate scrutiny - controlling Supreme Court case law now supports the Village.

NORTON v ST BERNARD CASE

SHORT SUMMARIES:

6th Circuit – UNREPORTED – Land Use – Variance – Property Interest-Board of Zoning Appeals

In this case, adjacent and nearby property owners sought to claim violation of their constitutional rights when a variance was granted by a board where a board member had an undisclosed financial interest in the property for which the variance was granted. The board member once owned the property, transferred it to his son, and retained a mortgage on the property. The board consisted of five members, two of which were absent, so each of the remaining three were necessary for the quorum to act. The board member with the financial interest did not recuse himself nor disclose the interest and the variance was unanimously granted. None of the Plaintiffs attended the hearing or submitted objections to the variance. When the board member's financial interest came to the public's knowledge these folks sued to enjoin the variance based on claims of due process violations. Long story short, you need a property right to have your due process trampled upon and a variance involves a discretionary grant.

Despite what may have appeared corrupt (and I think we can all agree was not equal to the best practices that we'd advise our board member clients), the plaintiffs could not succeed on a due process violation claim. What's a bit irksome in the context of why people need to make a federal case out of being upset about things rest upon the plaintiffs not caring enough about the

variance to object at the board hearing or file an appeal of the grant. Clearly, the board member was wrong, but, seriously, why didn't they object at the hearing? This case is unreported, so its main value may be to lead us to each reaffirm to our board members that if they have an interest in a matter they need to comply with whatever local ethics laws are in place.

Brooks v. Butler County
22a0268n-06.pdf (uscourts.gov)

10th Circuit – SWATTING – Excessive Force – Municipal Liability

The idiot in this case is the person who falsely alleged in a 9-1-1 call that a deranged man had just killed his father and was holding the rest of his family hostage at gunpoint to which the SWAT responded. As might be expected, the person in the home was completely taken by surprise when SWAT arrived and SWAT commands to him were chaotic. One of the officers believed the person was reaching for a weapon and shot the man dead. Suit followed by the family against various defendants including the city and the officer. The lower court concluded that a reasonable jury could conclude that the deceased was unarmed and unthreatening and did not grant immunity. That court also concluded that the facts were not sufficient to find the city liable.

The Circuit panel affirmed as to both. Because the court found conflicting facts regarding the shooting it let stand denial of immunity so the facts could be sorted by a jury. The allegations against the city included claims that its policies regarding discipline were so lax that it was deliberately indifferent to the results of those policies on the public when officers violated the constitutionally sound policies in place. The Court reasoned that the Plaintiffs had not advanced sufficient evidence to reach that conclusion or tie their argument into the death of the decedent. (The court noted that the 9-1-1 caller was arrested, pled guilty and sentenced for manslaughter.)

Finch vs. Rapp
Microsoft Word - 20-3132 (uscourts.gov)