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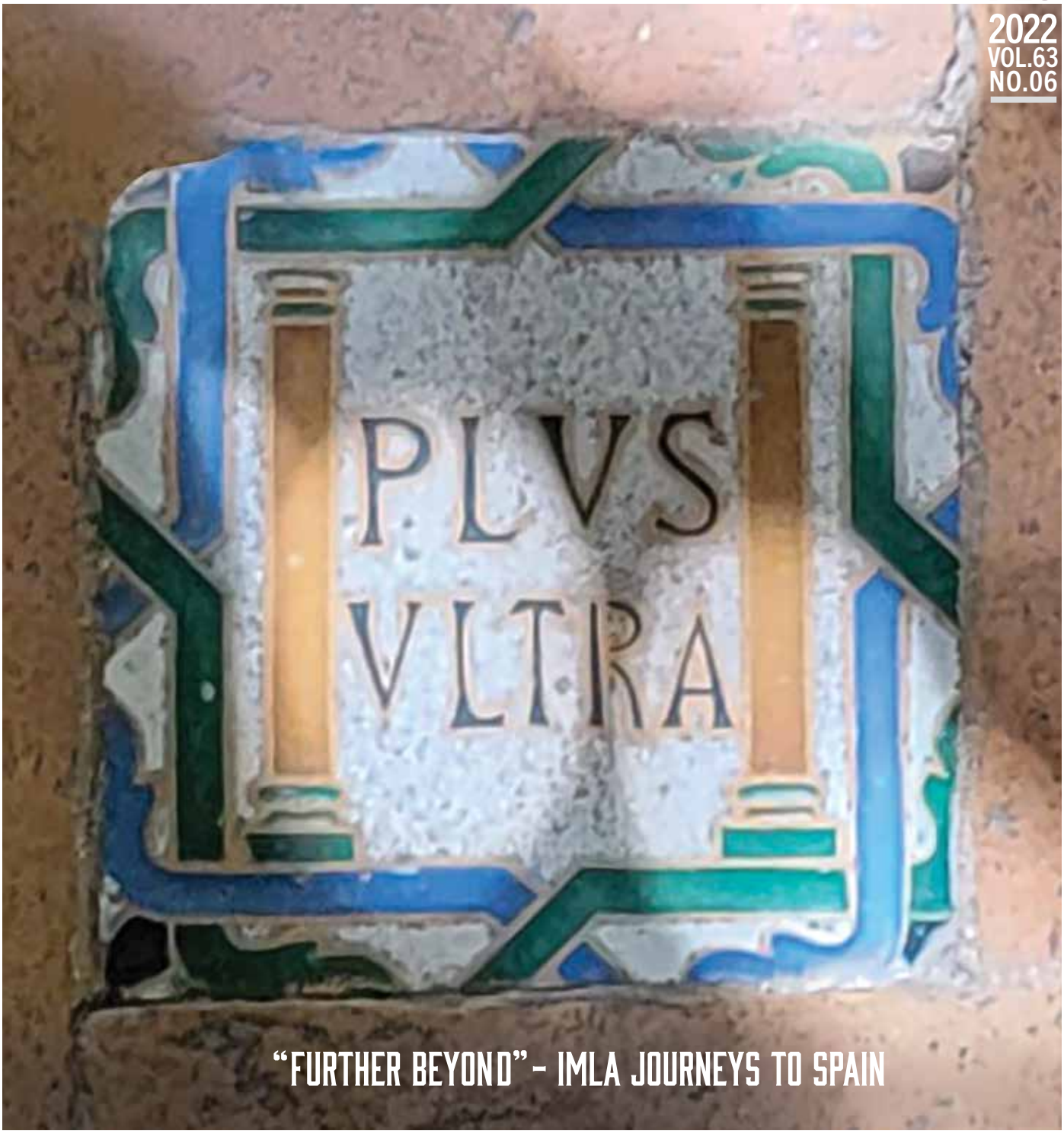
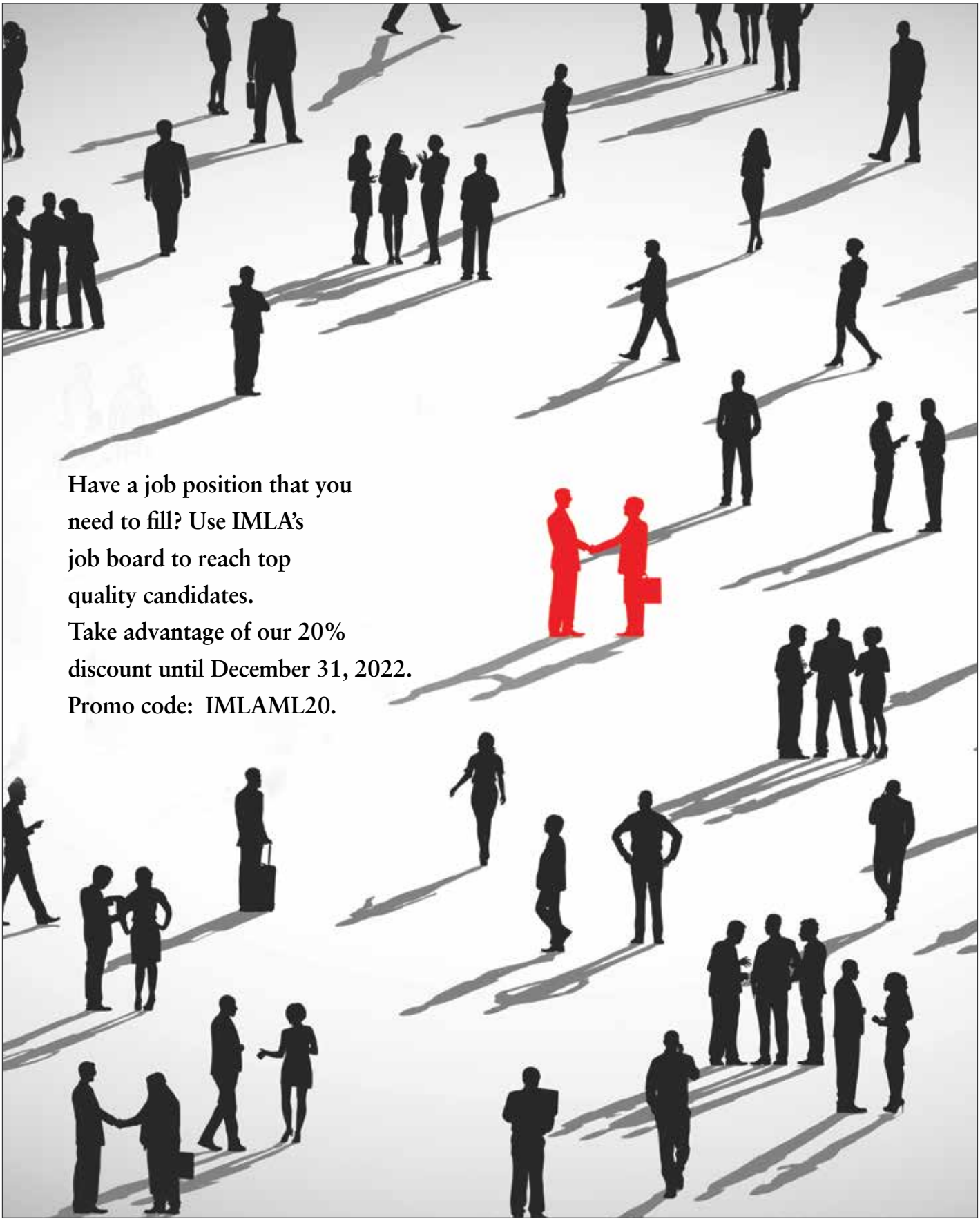


"FURTHER BEYOND" – IMLA JOURNEYS TO SPAIN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CONTENTS

NOVEMBER / DECEMBER 2022

DEPARTMENTS

Cover:
Detail from Alcazar floor tile, Seville, Spain

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BY: **ERICH EISELT**
IMLA Assistant General Counsel
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Further Beyond

For nearly 800 years, much of the Iberian peninsula was controlled by the Moors, who brought with them advances in science, mathematics, and astronomy. That influence is perhaps most visible today in the many Andalusian architectural wonders they left behind: the Great Mosque in Cordoba, Grenada's incomparable Alhambra, and Alcazar, the magnificent Moorish-inspired palace in Seville, host city of IMLA's recent comparative law meetings.

Well known as a tourist mecca, Seville plays a larger role in the historical tableau than one might first assume. Its cultural offerings are certainly spectacular: twin spires of the largest gothic cathedral in the world (if measured in cubic feet, as our enthusiastic guide explained) tower above the city, only a stone's throw from the Alcazar. But there is much more to Seville's provenance, particularly for North Americans. It begins with the fact that Seville is sited on the Guadalquivir, the only navigable river linking Spain to the Atlantic Ocean. That geography made Seville the locus for untold treasure brought back by mariners who circumnavigated the globe. At one point, it was among the wealthiest cities in the European continent.

Seville's fortunes would bankroll the wars waged by European royalty as they sought to dislodge the Moors from Spanish soil. Of more interest to Americans, it also financed the voyages of explorers, one of whom will be particularly familiar to IMLA readers: Christopher Columbus. Although born in Genoa, Columbus had relocated westward to Iberia when he began asking Spanish royalty in Seville for financing. He was initially rebuffed due to the massive expenses being incurred in fighting the Moors. But in a year now well-known in North America—1492—the Spanish sovereigns finally defeated the Muslim forces. Wartime finances became available for other purposes. Columbus again requested funding, and the rest, as they say, is history.

This fact—that Columbus was funded by the Spanish and departed from Spanish soil on his journey to the Americas—has led Spain to claim him as their own. That assertion is more substantiated by the fact that Columbus is buried in a large crypt in the above-referenced Seville cathedral. The voyager who is credited with "discovering" America thus has an undeniable Spanish linkage.

Fast forward to far more recent North American-Iberian connections. In mid-September 2022, two dozen IMLA members met with Spanish municipal lawyers during a four-day program in Seville. Convening in an expansive, well-appointed conference facility with on-demand translation headphones, we exchanged information about our respective legal structures and principles: zoning, law enforcement, respect for diversity, procurement, and more. Our hosts from the Spanish local government lawyers association (ALEL) and the Montero Aramburu law firm—one of the country's largest, who financed many of our activities—were overwhelmingly gracious, attentive, and interested in connecting, as were the IMLA participants. Through our sessions, our intermissions, and most certainly during a number of social events, we came to better understand one another and our respective legal systems.

The cover of this issue depicts a tile in the floor of Seville's Alcazar. "Plus ultra"—further beyond—is Spain's national motto. This inspirational axiom replaced a predecessor phrasing: "Non plus ultra," which is said to have been inscribed on the Pillars of Hercules in the straits of Gibraltar, warning navigators of the edge of the known world, with nothing beyond.

As IMLA ends one year and begins another, "further beyond" seems a fitting aspiration. We offer this issue of *Municipal Lawyer* in that spirit, intended to further IMLA's mission of promoting excellence in the practice of local government law.

Best regards-

Erich Eiselt

PRESIDENT'S LETTER

BY: **LORI GRIGG BLUHM**
City Attorney, Troy, Michigan
and IMLA President

A Wealth of Opportunities

I am so honored to serve as your 2022-2023 IMLA President and look forward to working with all of you to further our mission "to serve local government lawyers and to advance the interests of local government law locally, nationally and internationally." IMLA fulfills this mission every day, with its exceptional staff led by Executive Director Amanda Karras, its exemplary committee leadership, and its inspiring members. As with any great organization, constant introspection and evaluation are critical, and on behalf of the Board of Directors, we would like to know how we can we can enhance your membership. Hopefully, you are maximizing your benefits in this great organization!

Our 2022 Annual Conference in Portland Oregon has just concluded, and we hope you had the chance to obtain cutting-edge programming, mixed with excellent networking opportunities. The Program Planning Committee is now focused on the 2023 Mid-Year Seminar, providing a substantive municipal law track as well as a program devoted to defending Section 1983 cases. These programs are now being offered in a hybrid fashion, allowing for in-person and virtual attendees to obtain valuable Continuing Legal Education.

There are many other working groups and targeted practice offerings that may not be as familiar, but I encourage you to explore the IMLA website for more information. IMLA offers opportunities for leaders in our larger communities, such as the Top 50 program, as well as our smaller jurisdictions, such as the Small/Rural Communities program. There are also sections devoted to particular areas of practice, such as Employment Law and Environmental Law. IMLA's Mentoring Program may be of interest to you as either a prospective mentor or a mentee. IMLA is perhaps best known for its amicus advocacy, and we are so fortunate to have IMLA attorneys Amanda Karras, Erich Eiselt, and Deanna Shahnami, and/or other volunteers and experts willing to author briefs in cases significant to municipalities. Our active Young Lawyers Program (age based or years of experience based), is capably led by Todd Sheeran. The Local Government Fellows program allows IMLA members to pursue a unique certification of excellence in municipal law. IMLA also offers in-person training for new municipal attorneys through the Institute for Local Government Lawyers. Our Kitchen Sink provides substantive webinars and additional downloadable training. And *Municipal Lawye*r delivers to your desk outstanding articles by domain experts..

Last month, I was fortunate to be among a brilliant contingent of IMLA members who ventured to Sevilla, Spain for our International Comparative Law Program. Biennially, IMLA provides a unique opportunity to exchange ideas, successes, challenges, and experiences with attorneys from outside North America, which inevitably strengthens the participants' knowledge of their own laws. In addition to the great comradery amongst IMLA members and guests, we received exceptional hospitality from our Spanish colleagues in the Association of Lawyers of Local Entities of Spain (ALEL). All speakers were clearly experts in the field, and all participants were provided great information about the similarities and differences between our respective legal systems. As a bonus, we were temporarily immersed in Spanish culture, and visited some very impressive historical sites. Interpreters fluent in both languages provided immediate translations through headphones. Special thanks to the IMLA International Steering Executive Committee, and especially Tyler Wallach and David Warner, for their leadership.

IMLA could not achieve its successes without the small but mighty IMLA staff: exceptional attorneys Amanda Karras, Chuck Thompson, Erich Eiselt, and Deanna Shahnami, and indispensable staff members Jenny Ruhe, Caroline Storer, Trina Shropshire-Paschal, Carolina Moore and Lori Lawson. I am also indebted to other IMLA leaders, in particular the impressive IMLA Board of Directors, our Committee Members, Past Presidents, Regional Vice Presidents and State Chairs and other wonderful volunteers. Most especially, I want to thank Immediate Past President Barbara A. Adams for her exemplary leadership during this past year. Throughout her association with IMLA, Barb has remained active, always willing to share her time and talent, experience, and friendship. She sets the bar high for all of the rest of us!

In closing, I want to reiterate my appreciation for the opportunity to play a role in leading this organization. I look forward to working with each of you to make IMLA even more successful and impactful over the coming year. ML

Understanding Tribal Sovereignty: An Essential Primer for Productive Native American Relations

JOSH NEWTON AND ELLEN GROVER, *Best Best & Krieger LLP, Bend, Oregon*

INTRODUCTION

American Indian tribes[1] possess ancient sovereignty predating the founding of our Republic. Tribal sovereignty is recognized and protected by the U.S. Constitution, which vests Congress with plenary authority over Indian affairs. Congressional policy supports tribal self-determination and self-government as separate political communities. There, however, remains a general lack of knowledge of their legal status and culture among local governments. This paper aims to provide legal professionals in the continental United States with a primer on tribal sovereignty and its relationship to local governments in the continental United States. The paper addresses this history of recognition of tribal sovereignty, tribal self-determination and self-governance, government-to-government relations with tribes, civil and criminal jurisdictional issues, taxation, and other contemporary issues.

I. Recognition of Tribal Sovereignty in the United States. American Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of self-government.[2] Tribal sovereignty is ancient in that it predates the founding of our Republic.[3] Before contact with European explorers, American Indian tribes were distinct political communities with the sovereign right to regulate their internal and social relations.[4] During the colonial period, Indian tribes did not lose their sovereignty; rather, they retained the right to govern their internal relations.[5] At that time, the settled doctrine of the law of nations was that "weaker power [did] not surrender its independence — its right to self government, by associating with a stronger [power], and taking its protection."[6]

Under British law, the "crown possessed 'centraliz[ed]' authority over diplomacy with Tribes to the exclusion of colonial governments."[7] After the American Revolution, the Constitutional Congress debated whether national or state authorities should manage Indian affairs and reached a compromise that "proved unworkable."[8] The Articles granted Congress the "sole and exclusive right and power of … regulating the trade and managing all affairs with the Indians."[9] The Articles also provided, however, that the "legislative right of any state[,] within its own limits," could not be infringed or violated."[10] Those provisions resulted in discord among the national and state governments over the authority to regulate Indian affairs.[11]

The flawed design of the Articles of Confederation vis-à-vis regulation of Indian affairs was one of the issues that the framers of the Constitution sought to remedy.[12] The Constitution vests the federal government with "broad general powers" over the Indian affairs.[13] While no longer "possessed of full attributes of sovereignty," tribes remain a "separate people, with the power of regulating their internal and social relations."[4] Indian tribes retain the sovereign power to make substantive law in internal matters and to enforce that law in their own forums.[15] But Indian tribes are not foreign nations or States; they are "domestic depen-

dent nations that exercise inherent sovereign authority."[16] Indian tribes are subject to plenary control by Congress, but they "'retain' their historic sovereign authority" in every respect "'unless and until' Congress acts."[17]

II. Tribal Self-Determination and Self-Governance.

After ratification of the U.S. Constitution, the United States federal government entered into hundreds of treaties with American Indian tribes.[18] In 1824, Secretary of War John C. Calhoun created the Bureau of Indian Affairs ("BIA"); the BIA was subsequently transferred to the United States Department of the Interior ("Interior") in 1849.[19] And, in 1871, Congress ended treaty making with Indian tribes.[20] Over the next hundred years or so, Congressional policy was uneven with respect to tribal self-determination and self-governance, arguably reaching its nadir on August 1, 1953, when it adopted House Concurrent Resolution 108.[21] The resolution provided, in part: "[I] t is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship …".[22] While non-binding, the policy declared in the resolution "dominated Indian affairs" for much of the next decade, which became known as the "Termination Era."[23] During this time, Congress acted to terminate federal recognition of over seventy (70) tribes and bands. Id. The social and cultural harms to the terminated affected tribes, were profound.[24]

By the early 1960s, however, the pendulum of Congressional policy began to swing back towards tribal self-determination.[25] And, in 1971, the U.S. Senate passed Concurrent Resolution 26, which reversed the federal termination policy and announced a commitment to a government-wide effort of tribal self-determination.[26] Since that time, Congress has passed many acts promoting tribal sovereignty and self-determination. Two of the primary acts are the Indian Self-Determination and Education and Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. § 5301 et seq.) and the Tribal Self-Governance Act of 1994, Pub. L. 103-413, tit. III, 108 Stat 4270 (codified at 25 U.S.C. § 5361 et seq.) The express Congressional policy underpinning both actions includes recognition of the "obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities."[27] Some observers have concluded that the Acts have provided a "chance for tribal governments to govern."[28]

III. Tribal Sovereignty and Municipal Governments

A. Government-to-Government Relations

American Indian tribes have sovereign-to-sovereign relationships with the United States and state governments. Tribes have jurisdiction over nearly all levels of governmental service — e.g., public safety and courts, economic development and commerce, human services, healthcare, natural resource management, transportation and roads, infrastructure and utilities, housing, environmental regulation, energy development, telecommunications, and education and culture. The United States has a trust responsibility to assist in providing some of these services, but such responsibilities are chronically under-funded. This creates an imperative for Indian tribes to engage in economic development activities, such as gaming or timber management, to generate tribal revenues to support governmental services and economic sovereignty. In "Indian country,"[29] economic development activity is a governmental activity, which is often administered by wholly-owned tribal business enterprises. This dynamic provides unique and pervasive opportunities for consultation, cooperation and coordination with tribes, as well as mutual aid and assistance. State laws typically authorize local governments to enter into intergovernmental agreements for a variety of

Continued on page 8

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purposes; however, this authority should be examined to determine if a proposed area of coordination may require additional statutory or regulatory authorization.

Tribal forms of government vary. For example, tribes organized under the Indian Reorganization Act, typically have elected tribal councils, but these can vary with internal heritage or cultural appointments. When considering consultation with a tribe, the local jurisdiction should recognize that tribes are diverse and do not all share the same interests. Indian tribes may have competing claims or dispute authority of other tribes. It is not the role of a municipal governmental to mediate or determine any such disputes. A municipal government should understand consultation and available coordination resources and policies and become knowledgeable about the governing structure of the tribe(s), as well as their governmental affairs functions.

Your state's policies related to engagement with tribal nations can provide a helpful framework on policies for engagement. Some policies may require or encourage tribal consultation at the state level as well as for specific local government actions.[30] State resources can include executive and legislative commissions and state historic preservation offices. Many states have ongoing agreements or understandings related to co-management of resources, such as hunting, fishing, water rights, and water quality standards. The co-management of these resources can originate from reserved treaty rights or federal law delegations (among other sources), such as reserved treaty fishing and hunting rights and Clean Water Act treatment in same manner as a state for water quality standards and Section 401 certification.

It is equally important for local governments to understand that federal agencies, as a companion for their federal trust responsibilities, have consultation obligations to tribes. Executive Order 13175, Consultation and Coordination with Indian Tribal Governments (November 6, 2000) requires all executive departments and agencies to engage in regular, meaningful, and robust consultation with tribal officials in the development of tribal policies that have tribal implications. Tribal governments also have numerous collaborative-management agreements with federal agencies, for example related to wildfire management or fisheries. Most federal agencies have tribal affairs functions such as appointed tribal liaison positions. National, regional or industry specific intertribal organizations, may also be relevant for the specific consultation effort.[31]

"Consultation" (with a capital "C") is considered a formal two-way government-togovernment dialogue between official representatives of the tribes and of the municipal government. Indian tribes can engage in informal (staff level) consultation as well. Requests for consultation should be respectful of the difference. Typically, a tribal governmental affairs office can help coordinate such engagement and the appropriate manner in which to request consultation, coordinate agendas, and determine attendance.

The most effective way to have productive coordination with tribes is to invest in the resources and policies that can support relationships with tribes. For a local government with ongoing or regular tribal government coordination, it is best practice to designate a tribal liaison or primary point of contact. While tribal communities are often comprised of distinct geographic homelands, tribal members and their member and non-member family members are still part of the broader local community, both physical and politically. Adoption of "good neighbor" policies can assist in productive and pragmatic relationships with tribal governments.

B. Civil and Criminal Jurisdictional Issues

Civil and criminal jurisdictional issues in Indian country are notoriously complex. The jurisdictional determination often turns on some combination of whether the defendants are nonIndians and whether the cause of action arose on "trust" or "fee" lands.

1. Civil Jurisdiction

a. Tribal Civil Jurisdiction. With respect to civil jurisdiction, Indian tribes are generally understood to have exclusive authority to regulate and adjudicate their internal relations among their members.[33] Indian tribes also retain "the inherent sovereign authority to 'regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements.'"[33] Indian tribes also retain "'inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'"[35] Indian tribes may also "regulate the conduct of nonmembers on non-Indian fee land when that regulation is expressly authorized by federal statute or treaty."[35] There is also a presumption against tribal jurisdiction over nonmember activity on non-Indian fee land.[36] Indian tribes bear the burden of rebutting that presumption.[37]

b. State Civil Jurisdiction. Absent contrary federal law, Indians going beyond reservation boundaries have generally been held "subject to non-discriminatory state law otherwise applicable to all citizens of the State."[38] Within Indian country, however, state courts lack jurisdiction over Indians absent Congressional authorization.[39] Common law immunity from suit, however, is one of the "core aspects of sovereignty" retained by Indian tribes.[40] Sovereign immunity from suit is a "necessary corollary to Indian sovereignty and self-governance."[41] An Indian tribe is subject to suit "only where Congress has authorized the suit or the tribe has waived its immunity."[42]

2. Criminal Jurisdiction

a. Tribal Criminal Jurisdiction. Indian tribes have inherent sovereign authority to punish tribal offenders.[43] Tribes, however, mostly lack criminal jurisdictions over non-Indians absent Congressional authorization.[44]

b. State Criminal Jurisdiction. The general rule is that "states lack jurisdiction in Indian country absent a special grant of jurisdiction." In 1953, however, Congress enacted Public Law 280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326; 28 U.S.C. §§ 1360, 1360 note). Among other things, Congress delegated to the states of Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin the "jurisdiction over offenses committed by or against Indians in … Indian country."[45] States may also assume criminal jurisdiction over criminal offenses committed by or against Indians in Indian country with the consent of the tribe.[46] Finally, the Supreme Court has recently determined that the State of Oklahoma has jurisdiction to prosecute crimes by non-Indians against Indians in Indian country in that state.[47]

C. Taxation

1. Tribal Taxes. Indian tribal authority to impose taxes is an "essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management."[1] Indian tribes have broad authority to impose taxes on non-Indians for activity on tribal trust lands. Id. The Montana test, however, applies to (and limits) taxation of non-Indians on non-Indian fee lands.[49]

2. State and Local Taxes. Absent federal authorization, States and local jurisdictions are "without power to tax" Indian tribes and their members inside Indian country.[50] The key question in Indian tax cases is "who bears the legal incidence of a tax." For example, if the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization.[51] On the other hand, if the legal incidence of the tax rests on non-Indians, there is "no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy."[52]

IV. Contemporary Issues.

A full review of the many contemporary issues affecting American Indian tribes and municipal governments is beyond the scope of this paper. Nonetheless, we highlight briefly two issues: The Infrastructure Investment and Jobs Act of 2021, Pub. L. No. 117-58, 135 Stat. 429 (2021); and the "Fee to Trust" land acquisition process administered by the BIA.

A. Infrastructure Investment and Jobs Act of 2021.

On November 15, 2021, President Biden signed the Infrastructure Investment and Jobs Act, which is commonly referred to the Bipartisan Infrastructure Law.[53] The Act provides $931 billion over five years beginning Fiscal Year 2022.[54] There is $550 billion in new investments for all modes of transportation, water, power and energy, environmental remediation, public lands, broadband and resilience.[55]

The Act will cause municipal governments to authorize and oversee once in a generation infrastructure projects in their jurisdictions, which may implicate Indian tribal interests in innumerable ways. We focus on two: the inadvertent discovery of Native American human remains or cultural items; and acquisition of rights-of-way across Indian lands.

1. Inadvertent Discovery of Native American Human Remains and Cultural Items. The infrastructure projects funded by the Act will cause millions of cubic yards of soil to be excavated, moved, or otherwise disturbed. Municipal governments should, therefore, be familiar with applicable federal and state laws governing the inadvertent discovery of Native American human remains and cultural items. At the federal level, the principal law is the Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. § 3001 et seq ("NAGPRA"). NAGPRA requires that any person who knows, or has reason to know, that such person has discovered Native American cultural items on federal or tribal lands to notify appropriate federal officials and the appropriate Indian tribe. 25 U.S.C. § 3002(d). If the discovery occurs in connection with an activity, the person

Continued on page 28

Model Rule 1.13 and the Municipality as Client

CHARLOTTE FERNS AND MATT GIGLIOTTI,
City Attorney's Office, City of Kansas City, Missouri

INTRODUCTION

Without question, the mission of municipal attorneys is to serve their communities, working to create and preserve effective and equitable local government. Behind that obvious principle, however, is a far more nuanced issue: to whom, specifically, does the local government attorney owe the duty of legal representation?

I. Who's The Client?

One observer has noted that:

> Government lawyers must navigate across a sea of conflicting loyalties, ambiguous objectives, and ethical pressures. But as they do so, they include themselves among the ranks of many of the noblest public servants this nation has ever known.[1]

But as any person who has worked as an in-house city attorney[2] knows, many elected officials and government employees have a different view. When the issues are personal, when the issues are critical to a program's implementation or even success, it is often time to "get a real lawyer." No advice is better than the advice of a consultant or better yet a lawyer friend of an elected official (although the names are never given and the "research" is never shared). Lawyers may have themselves to blame.

> Having said all that, there is often some kernel of truth at the core of a stereotype. The image of lawyers as backward-looking, ass-covering, wordsmithing, risk-averse, non-value generating, fine-distinction-drawing deal killers, who spend most of their time trying to separate the pepper from the fly poop, and the rest of the time saying "no you can't do that" to their clients, probably has some empirical basis.[3]

Of course, the truthiness[4] or falseness of this stereotype sometimes depends upon who is making the observation. More directly – is it a client? But who's the client?

City attorneys practice in an environment regulated by many sources of law including legislation, administrative regulations, common law and judicial regulation, rules of procedure and evidence, local laws and procedures, and rules governing their own professional conduct and ethical standards. They "…must navigate across a sea of conflicting loyalties, ambiguous objectives, and ethical pressures."[5] "Dealing with such issues is particularly challenging when the ethics rules leave lawyers in limbo by not prescribing a clear course of conduct."[6] On any given day, a city attorney may be asked to represent and advise an entity or multiple entities, their officers and employees on a variety of issues; draft legislation; exercise discretion to file suit, decide settlements, seek or appeal judgments on behalf of the city; and always remain cognizant of legal requirements and the public interest the entity is organized to serve.

The foundational question of "WHO'S THE CLIENT" is something every city attorney must answer. A city attorney should look to the source of its representational authority, ethical rules and court opinions for guidance on how to resolve client identification issues and conflicts of interest.[7] Unfortunately, these often fall short of providing an answer.

A. Identification of the Client.

A lawyer cannot preserve confidences, avoid conflicts or protect interests without first knowing who the client is. "A lawyer employed or retained by an organization represents the

organization acting through its duly authorized constituents."[8] A critical determination for the municipal lawyer is who is a duly authorized constituent? There are many possibilities: Mayor, City Council, City Manager, Appointed Officials, Boards and Commissions, Department Directors, Municipal Corporation.

"An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents."[9] Comment 9 to Model Rule 1.13 notes that precisely defining the identity of the client and prescribing the resulting obligations may be more difficult in the government context and is a matter beyond the scope of the Model Rules.[10]

"No universal definition of the client of a governmental lawyer is possible."[11] The Restatement (Third) of Law Governing Lawyers acknowledges that a government lawyer ultimately represents the public (or the public interest). Such a definition is less than helpful. The Restatement proposes as the "preferable approach" to regard the respective governmental agency as the client—the lawyers subject to the direction of those officers authorized to act in the matter involved in the representation.[12] But even when the city attorney can identify the duly authorized constituent, the duty remains to the organization.[13]

B. Duty to the Organization.
What is the duty to the organization? Every attorney owes a duty to the client which includes the general requirements of competence, diligence, timeliness, communication and the like. Generally, "[w]hen constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province."[14]

City Attorney Advice	Constituent Response
That's illegal.	It's done that way.
Your division is going to violate the law.	It's his call.
If your department does this the city is on the hook for big dollars.	You'll have to defend us.
To the boss: Make 'em stop!	You're talking to me about this because…?

In some circumstances, however, a city attorney's duty to the organization may require a lawyer to respond to specific acts or omissions by an organization's constituent related to the representation. "If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law."[15]

Knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.[16] "… [A] lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations."[17] In an attempt to clarify this responsibility, annotations indicate that "a city attorney must also seek an appropriate balance between maintaining confidentiality and assuring a potential wrongful act by any constituent is prevented or rectified, since the organization is conducting public business."[18]

As a city attorney, you might routinely encounter this obligation in a variety of circumstances. Common examples include a constituent who refuses to do or avoid doing something unlawful, recklessly disregards the potential for risk and liability, refusal to make needed decisions, and making decisions that are beyond the authority of the constituent.

In these instances, it is important for the city attorney to consider whether the advice is legal advice related to the representation (as opposed to business advice or personal advice). A city attorney also has to consider who can make the decision about the underlying matter. Is it the constituent, the supervisor, another department, official, employee?

> **SCENARIO:** Who directs settlement of a claim? A department director might say "I pay your salary. I pay the claims. I'll tell you when to settle and when not to settle." Not so quick. Which department budget picks up the tab for an attorney is not determinative of who makes the decision. What is the lawyer's role? The question is, what does the client (organization) want from the lawyer, not what does the representative of the client want from the lawyer.

To answer the question, who directs settlement of a claim, a structural analysis is necessary. How is the law department established? What are its duties? What type of decisions does the law delegate to the City Attorney? What's the relationship of the law department to other departments? The question: "Who's the client?" can't be answered with an easy analysis. It depends upon the circumstances.[19]

Continued on page 12

Again, Model Rule 1.13 gives us guidance. It is applicable to representing governmental organizations, and in comment notes that the attorney-client relationship in the government context has the added consideration of preventing or rectifying wrongful official conduct.

So back to the issue using Kansas City, Missouri as the setting: "I pay your salary. I pay the claims. I'll tell you when to settle and when not to settle." A structural analysis is appropriate. The City's Code of Ordinance provides that the city attorney may settle claims in favor of or against the city up to $25,000.00 without further approval. The risk management committee can approve settlement up to $50,000.00. Claim payments in excess of $50,000.00 are subject to approval by the City Council upon the recommendation of the risk management committee and the city attorney.[20] That means an ordinance must be passed, and the city's legislative body must authorize the settlement. Nowhere is the department director given the right to dictate the settlement of cases –even those cases arising from the director's department.

Surely this is a mistake. No. The City Council has given department directors the authority to enter into non-construction contracts up to $400,000 and construction contracts up to $1,000,000.[21] It retains the authority, however, to make decisions on all but the most minor claims. The structure of Kansas City government defines the client. It's not the director.

Kansas City is a charter city. The answer may be less clear for a non-charter city. Missouri statutes provide that:

> It shall be the duty of the city attorney to prosecute and defend all actions originating or pending in any court in this state to which the city is a part, or in which the interests of the city are involved, and shall, generally, perform all legal services required in behalf of the city.[22]

The statue does not specifically address settlement authority.

SCENARIO: Was the attorney-client privilege invoked by plaintiff's counsel during depositions of two defendants and two non-defendant employees? An employee files suit against an organization ("Organization"). While discovery was proceeding, events transpired which caused the Organization to consider whether to terminate the plaintiff's employment. The Organization's attorney was brought into the discussion to give related legal advice. Two non-party witness employees who investigated the "events" were part of the discussion with the attorney. During later depositions, the non-party witnesses were instructed not to answer questions if the only basis for the answers is to recall a conversation about the events in the presence of the attorney. The court found that:

> When the client is an organization, such as a corporation or, as in this case, a township, questions arise as to which employees of the organization are considered "clients" for purposes of the privilege. The answer to that question is that it depends upon the circumstances.

Noting that attorneys must ascertain legally relevant facts in order to give sound and informed advice to the client, and that the privilege exists to protect both decision makers who can act on the advice and those who can provide relevant facts. The court found that since the non-defendants were involved in the discussion with the attorney for the purpose of helping the attorney ascertain relevant facts, the attorney-client privilege extended to their conversation. The privilege, however, extends only to the communications and not to the underlying facts which a witness may still have to disclose in any other context.

C. Application in Reality.
Discussed above in the context of client identification, Comment 9 to Model Rule 1.13 goes on to provide a sobering warning of the importance of client identification in the government sphere:

> Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved.[23]

Example 1: *In re Schuessler,* 578 S.W.3d 762 (Mo. 2019).[24]

Background:
- **The attorney *knew* of a criminal act and potential civil rights violation.**
- **The attorney *knew* the suspect was falsely charged in order to cover up the assault.**
- **The attorney failed to report the misconduct and protect the client.**

Katherine Dierdorf became licensed to practice law in Missouri in 2011. In February 2014, Ms. Dierdorf accepted a position as an assistant circuit attorney in the office of the circuit attorney of the city of St. Louis (OCA). Ms. Dierdorf was assigned to the misdemeanor division. Ms. Dierdorf was good friends with Ambry Schuessler and Bliss Worrell, who were all also assistant circuit attor-

neys in the misdemeanor division.

On Tuesday, July 22, 2014, Ms. Dierdorf and Ms. Worrell went to a St. Louis Cardinals baseball game. While there, Ms. Worrell received a telephone call from a detective (and friend) with the St. Louis police department—Det. Tom Carroll. Two important facts:
1. Det. Carroll's daughter's vehicle had been broken into and her credit card stolen.
2. A suspect was apprehended with the daughter's credit card.

On Wednesday, Ms. Dierdorf was in her office when Ms. Worrell entered the office and stated, "Tom beat up that guy" who stole his daughter's credit card. Ms. Worrell left Ms. Dierdorf's office soon thereafter. Ms. Dierdorf did not report to her supervisors Det. Carroll's assault of the suspect immediately following Ms. Worrell's disclosure of it. That afternoon, Ms. Worrell went to the warrant office and issued charges against the suspect Det. Carroll had assaulted, including a felony.

On Thursday, Ms. Dierdorf was again in her office when Ms. Worrell entered and reported that she had issued the case against the suspect Det. Carroll beat up for stealing his daughter's credit card. They also discussed some details of the assault. Ms. Dierdorf then went to Ms. Schuessler's office where she stated the suspect had been falsely charged with fleeing custody to explain why the suspect was injured.

> Ms. Schuessler: "We could get in trouble just for knowing this."
> Ms. Dierdorf: "How would they find out. I'm not going to say anything."

As these things go, everyone found out, including St. Louis Police Internal Affairs and the FBI. Det. Carroll and Ms. Worrell were subsequently indicted on federal criminal charges and pleaded guilty. Ms. Worrell was disbarred. Ms. Dierdorf testified at the grand jury proceedings and then had to face her own disciplinary proceeding—it did not go well. The court saw it the following way:

> Ms. Dierdorf – a lawyer for OCA – knew another assistant circuit attorney – Ms. Worrell – had violated the law by filing false charges against a suspect to cover up a police officer's brutal assault of the suspect. The failure to report such conduct was a violation of Ms. Dierdorf's legal obligation to the circuit attorney's organization and could have resulted in a civil rights violation or lawsuit against OCA. Accordingly, it was reasonably necessary in the best interest of OCA that Ms. Dierdorf report Ms. Worrell's conduct…. The record, therefore, reflects, by a preponderance of the evidence, that Ms. Dierdorf violated Rule 4-1.13 when she failed to report Ms. Worrell's misconduct.[25]

Troubled by Ms. Dierdorf's repeated dishonesty and finding that government attorneys are held to a higher standard given the nature of their work to protect the public, it was not a surprise when the court disciplined her with an indefinite suspension with no leave to file for 3 years.

Example 2: *Crandon v. State*, 897 P.2d 92 (Kan. 1995), cert. denied sub nom. *Crandon v. Dunnick*, 516 U.S. 1113 (1996).

Background:
- **Potential wrongdoing within a government agency.**
- **Role of lawyer as part of the team.**
- **Role of lawyer is to advise, not to prosecute, the government client and its representatives.**

Joyce Crandon served as general counsel of the Kansas Office of the State Bank Commissioner. In that capacity she was informed by someone believed to be credible that the Deputy Commissioner was engaging in improper banking behavior. Ms. Crandon was told the Deputy Commissioner had done business with at least two banks chartered by the State of Kansas. Ms. Crandon faced a conundrum. Did she confront the Deputy Commissioner or inform the Commissioner, or did she report the possible violations to the Federal Deposit Insurance Corporation.

Ms. Crandon told the FDIC. The FDIC told the Commissioner. There were no violations involving the Deputy Commissioner. Ms. Crandon was fired.

Ms. Crandon's First Amendment rights, pre-*Garcetti*,[26] gave her no claim to damages claimed as a result of her termination. As an attorney, Ms. Crandon had an obligation to her client, the Office of the State Bank Commissioner. By taking her investigation outside her office she failed in her obligations.

The Kansas Supreme Court succinctly observed: "The attorney's duty is to advise and counsel, not prosecute her client." The attorneys working for government have a different relationship than other employees. Because of that difference an attorney's conduct is measured by a different standard.[27] It is not so much that the standard is "higher" but that it is different.

Example 3: *In re Harding*, 223 P.3d 303 (Kan. 2010).

Background:
- **Small town politics.**
- **Bar complaints and aftermath.**
- **Personal destruction.**

WaKeeney, Kansas is the county seat of Trego County, located midpoint between Kansas City and Denver in western Kansas along Interstate 70.

Continued on page 14

The entire county has about 2,800 people; over 60% of the residents of Trego County live in WaKeeney. For people in WaKeeney, politics is a contact sport.

David Harding was WaKeeney City Attorney in 2006, having served in that position since 1978. He was also the Trego County Attorney. Since 1978 Mr. Harding had been a member of KPERS, the Kansas Public Employees Retirement System, even though he was a part-time employee of WaKeeney.

Mr. Harding was paid a monthly retainer that covered basic work for the City. He billed the City hourly for additional work. In 2006 he asked the City Council to run his monthly bills through the City's payroll to treat him as a City employee – and increase his KPERS contributions – and thus increase his retirement benefits. The Council's response may not have been what Mr. Harding expected.

Councilwoman Neish responded by suggesting Mr. Harding shouldn't be a member of KPERS in the first place. No decision was made on the request by Mr. Harding, but Ms. Neish volunteered to call KPERS.

The people at KPERS explained that a person had to have 1,000 hours of service per year to qualify for benefits for that year. KPERS then disqualified Mr. Harding for six years, 21.5% of his time as WaKeeney City Attorney.

Mr. Harding began hearing things. Possibly Councilwoman Neish and the Mayor and the Police Chief were up to no good. With a suspicion of criminal acts afoot Mr. Harding talked to the Ellis County Attorney. Ellis County is directly east of Trego County. Mr. Harding had to talk to someone; he was the Trego County Attorney, too.

The Ellis County Attorney gave this advice: "Call the Disciplinary Administrator." Good advice. The Kansas Disciplinary Administrator's Office told Mr. Harding he needed to talk to the people at the City about the situations. This, of course, is the lesson of Joyce Crandon. Mr. Harding set up a meeting.

He then accused them of unlawful behavior and threatened investigations. The Disciplinary Administrator's advice was correct and to the point. Mr. Harding's implementation of the advice was horrible. The meeting didn't go well.

As Trego County Attorney Mr. Harding asked Ellis County Attorney Tom Drees to serve as special prosecutor to investigate three allegations of wrongdoing:

- Did Mayor Deutscher and Councilwoman Neish commit a crime by using their city cell phones for private calls and running over on their minutes?
- Did Police Chief Eberle commit a crime by buying rock from the City at the City's price, $60 - total?
- Did Mayor Deutscher commit a crime by buying a meal for utility crews, including his son, during storm repairs?

On the assumption that the best defense is a good offense, Mayor Deutscher filed a complaint with the Disciplinary Administrator over Mr. Harding's behavior. Councilwoman Neish then filed a complaint. As did Chief Eberle. The City Council then fired Mr. Harding. He chose not to run for re-election as Trego County Attorney.

In addition to the breach of confidentiality – the information given to the special prosecutor included City records obtained by Mr. Harding as its City Attorney – the failure to recognize who was his client caused the Kansas Supreme Court to reject the Disciplinary Administrator's recommendation of a public censure, which was also recommended by the committee, in favor of a 90-day suspension. The Supreme Court wrote:

> We are concerned about the harm done, the respondent's disclosure of confidential information, and the damage caused to the reputations of some of the city officials. We may not ignore respondent's angry and selfish response. A minority of the court would impose a greater discipline.[28]

II. GREAT. SO…WHO'S THE CLIENT?

Ms. Dierdorff, Ms. Crandon and Mr. Harding all failed to consider the question: Who is my client? There are many possibilities, but even those possibilities have problems.

A. The People

If you work in public service, surely the public must be high on the list of potential clients. But which public do you serve? Is it racial? Of course not. Is it based on politics? Of course not. Is it those who make campaign contributions? Or those who engage in community volunteerism? Of course not. "The people" is simply too vague to be of any assistance.

Unless you're elected. Then it can be even more complicated. Although not common nationally, some city attorneys are elected. They seem to express a freedom not necessarily appropriate for appointed officials. Who's the client? Is it someone who chooses you and who can fire you? Elected officials are turned out of office by the people. But it is still necessary to engage in a structural analysis of the office and the government.

We can clearly this process in California, where elected city attorneys are common, and where politics and the law get muddled. The Los Angeles City Charter makes this clear statement:

> The civil client of the City Attorney is the municipal corporation, the City of Los Angeles. The City Attorney shall defend the City in litigation, as well as its officers and employees as provided by ordinance. The City Attorney may initiate civil litigation on behalf of the City or the People of the State of California, and shall initiate civil litigation on behalf of the City when requested to do so by the authority having control over the litigation as set forth below. The City Attorney shall manage all litigation of the City, subject to client direction in accordance with this section, and subject to the City Attorney's duty to act in the best interests of the City and to conform to professional and ethical obligations. In the course of litigation, client decisions, including a decision to initiate litigation, shall be made by the Mayor, the Council, or boards of commissioners in accordance with this section.[29]

Likewise, the San Diego City Charter provides:

> The City Attorney shall be the chief legal adviser of, and attorney for the City and all Departments and offices thereof in matters relating to their official powers and duties, except in the case of the Ethics Commission, which shall have its own legal counsel independent of the City Attorney.[30]

But that didn't keep City Attorney Mike Aguirre from investigating and suing – more than once – the City of San Diego during his only term in office. He promptly dismissed the City as his client and held out the "people" as his client. A political foe described the situation this way:

> It is a fundamental principle that an attorney may investigate and pursue an entity or represent an entity, but not both. In a representative democracy, the mayor and council are the representatives of the people. . . . Nevertheless, claiming to represent "the people," Aguirre has initiated major investigations of his own client in direct contravention of the Rules of Professional Conduct that govern lawyers. Aguirre has done this on the premise that he has "special powers."[31]

B. Mayor and Council.
Elected officials might be a client. This raises a multitude of problems. Foremost is the basic issue: Which one? Is it the Mayor? Is it the sponsor of legislation? Is it the committee chair? Is it the one who supports the Law Department's budget the strongest? Is it the group that has the most votes?

The latter question helps us identify how the client makes decisions, but it doesn't help us identify the client. A little math may show the problem.

In Kansas City, Missouri there are 13 members of the City Council, which includes the Mayor. To adopt most ordinances seven votes are required. How many groups of seven Council members can you make out of 13 members of the City Council? The answer: 1,716 different theoretical combinations of elected officials. That doesn't work.

C. Department Directors / Agency Heads.
Most local elected officials are part-time public servants. Daily contact with the city attorney is not always ensured. The people doing the work of the city implementing the policies put into place by the elected officials – the department directors, division heads, section leaders, and crew chiefs may be more frequent consumers of law department services. But what about inconsistent goals:

- I want to get all the grass in all the parks cut before the week of July 4.
- I want to have money in the budget left so I can cut the grass in most of the parks before Labor Day, too.

There is more to the client than just giving directions. Department directors are, generally, representatives of the client. They are not the client.

D. The Public Interest.
We earlier saw former San Diego City Attorney Mike Aguirre take the approach that he, and apparently he alone, would determine what was best for the people of San Diego and would act on those beliefs. The fact that the City Attorney stood for election did not give the position greater policy making powers than the Mayor or City Council. The election was a means of selecting the client's attorney.

E. The Municipal Corporation.
The textbook answer, of course, defines the client of a local government lawyer as the government – the municipal corporation. How do you take direction from a corporation? Through the majority.[32] This is most often expressed through ordinances or resolutions.

The Mayor and City Council, the City Manager or City Administrator or Mayor's Chief of Staff in some cities all may be from time to time constituents of the client. The structural analysis of the City's governing laws will provide a means to identify the decision maker. A most succinct description of the "client problem" was described recently this way:

> The client problem is that a city attorney works for all of the city's elected officials but represents none of them.[33]

III. WHY DOES IT MATTER?
The ramifications of not identifying the client can be devastating to a city, its elected officials, appointed bureaucrats and employees. A handful of situations will reveal the problem.

Continued on page 30

INSIDE CANADA

MONICA CIRIELLO,
Director of Municipal Law and Licensing Compliance, City of Hamilton, Ontario

INTRODUCTION

The COVID-19 pandemic exacerbated the visibility of homelessness and the use of encampments on public and private property within municipalities across Canada.[1] The volume, size, and scale of encampments have increased in recent years particularly in small to mid-size municipalities, including the City of Hamilton ("City") in Ontario, Canada. With no end in sight, municipalities across the country, like Hamilton, have spent time and considerable resources to lay out plans on how to deal with the challenge of urban encampments.

Hamilton is a large municipality with a population of approximately 600,000 located about 60 km west of the City of Toronto. The City forms part of what is considered the Greater Toronto and Hamilton area ("GTHA"), also collectively referred to as the 'golden horseshoe', named for its densely populated and highly industrialized geography. Over 20% of Canada's population lives in this quickly expanding, urban region of Ontario. While homelessness is not new to the City, encampments have traditionally been concentrated closer to the urban core of the larger centre, Toronto. During the Covid pandemic, the locations of encampments have expanded almost exponentially into the outer regions of the GTHA, including communities like Hamilton. In 2020, the City's municipal law enforcement officers (a law enforcement agency separate from the Hamilton police) were directed by the City Council to enforce the City's Park By-law that prohibits camping and the erection of tents or other structures in City parks.

The City Council's decision, although hotly contested, ultimately passed with a narrow majority of Councillors, fueling a polarizing public debate within the City. At one end of the spectrum, residents pushed Councillors to rid their parks of tents, citing frustrations and concerns over safety, accumulating garbage, discarded needles, noise, theft, violence, sex trafficking and human urination and feces. At the other end, advocates for the unhoused within the community urged Councillors to let the homeless stay in encampments until affordable housing options that consider the breadth of challenges facing these individuals, including substance addiction,and mental health, were more readily available.

Encampments are a complex issue, with multiple factors contributing to individuals staying outdoors or "sleeping rough." Those experiencing homelessness often perceive staying in an encampment as a safer option than staying on their own in low-quality

housing, an unsheltered location, or in the shelter system. However, encampments create both real and perceived challenges not only for the occupants, but also for neighbours and the broader community. As the visibility of encampments within municipalities increases, so does the community's expectation for elected municipal leaders to respond appropriately to the challenge. This places additional pressure not only on the elected officials, but also on undertrained and understaffed municipal departments, and more recently on municipal law enforcement departments.

As elected officials and municipal leaders seek to respond, they are faced with the challenge of having to balance competing priorities and demands from a diverse group of voting stakeholders. These include community residents that are concerned for their safety, business owners who are losing customers, and advocates for the homeless populations in the encampments. Further complicating these issues are the competing priorities of internal municipal stakeholders including but not limited to housing, public health, police, emergency services, and of course municipal law enforcement. Local responses to encampments are evolving in many communities, as stakeholders seek to identify the best strategies to address this growing phenomenon with limited resources. Currently, as indicated below, approaches vary, from sending in police to sweep the encampment, to formally sanctioning encampments and providing onsite services).

Municipal law enforcement officers have evolved into playing a critical role in responding to homelessness, finding themselves responsible for enforcing various pieces of legislation to control and regulate public spaces, including the enforcement of the Parks By-law.. Municipal law enforcement departments are increasingly embroiled or intertangled in the larger issue of managing homelessness, a portfolio traditionally completed by public health, housing, and social workers. This new emerging reliance reinforces the need for greater service integration and coordination between municipal departments.

Approach	**Factors**
Law and Order: Clearing an Encampment with No Support	Enforcement led Short notice of clearing provided if at all No shelter services/referrals provided Regulatory or physical barriers introduced to secure the site and prevent new encampment from forming No temporary storage options
Supports: Clearing an Encampment with Support	Outreach led Notice of clearing provided in advance Shelter services/referrals are provided Temporary storage options available Encampment cleaned following clearing
Acceptance: Formal Sanction Encampment Site	Encampments permitted on public or private property May have regulations to govern the size, location or duration of encampments May have infrastructure or public services on site Storage options available on site Services come to the encampment site

Poff v. City of Hamilton.

In the fall of 2021, the City was challenged for having municipal law enforcement officers enforce its Parks By-law. In *Poff v. City of Hamilton*,[2] an application was brought by the Hamilton Community Legal Clinic ("Legal Clinic") on behalf of five homeless individuals living in encampments across the City. The Legal Clinic sought an interlocutory injunction to prohibit the City from enforcing its Park By-law until the section 7 of the *Canadian Charter of Rights and Freedoms*[3] ("*Charter*") challenge was decided by the Court. Although the Court denied an application for an interlocutory injunction, thereby allowing the City to resume enforcement of its Parks By-law, the *Charter* challenge remains scheduled to proceed in 2023.

Poff v. City of Hamilton, 2021 ONSC 7224, argued in October 2021, was decided by Justice A.J. Goodman on November 2, 2021.

1. Background and Facts

The Applicants--Ashley Poff, Darrin Marchand, Gord Smyth, Mario Muscato, and Shawn Arnold--are homeless individuals living in encampments throughout the City. The Applicants sought an interlocutory injunction to prohibit the City from enforcing its Parks By-law No. 01-219 that prohibits camping and the erection of tents or other structures in City Parks ("Parks By-law") until the full merits of the *Canadian Charter of Rights and Freedoms*[4] application is decided by the Court.

Throughout the COVID-19 pandemic, there has been a significant increase in the visibility of homeless individuals residing in encampments, prompting the enforcement of the Parks By-law and the dismantling of encampments thereunder. In the summer of 2020, the Legal Clinic sought an injunction

Continued on page 32

DAY IN THE LIFE

CHRISTOPHER BALCH,
Principal, Balch Law Group, Atlanta, Georgia

Making a Difference

How Chris Balch Carries out his Family's Calling to Serve and Effect Change.

Chris Balch's family was called to serve. His grandfather was a submarine commander and the Imperial Japanese Navy sank his submarine on Oct. 10, 1943 when his birth mother was almost two. His adoptive father was a Tennessee United Methodist minister and a huge advocate for civic liberties and civil rights who participated in early sit-ins in Nashville.

A proud Marine ("there is no 'former' Marine. You are always a Marine," he says), Balch found his calling to serve through the law with his firm, the Balch Law Group.

"I come from a family of volunteers who believe in sacrifice in the service of others. I recognize the sacrifice that elected officials make to step up for their communities and seek to do the right thing," he says. "These officials make a huge sacrifice in time and energy. It takes them away from their families and their vocations. They have to listen to people at public forums where often people are rude, and it takes a toll."

As the City Attorney for Brookhaven and an advisor to other municipalities, Balch and his firm bring their experience and understanding of the rule of law to provide guidance for the municipality and the elected officials.

"Our team helps them remember that they are having a positive impact on their community and to learn to deal with the negativity," he says. "What we try to do is bring an understanding of the difference between governance and the ruling and what the appropriate use of governing authority means. We provide the experience and advice to help navigate those waters."

Still, his family devotion to service weighs on him. "I balance how I was raised with what I do for a living. I look for ways to affect change from within the system rather than the outside. One of the things I tell my clients and future clients is not to hire me if they expect a "yes" man. Hire me to be the "no" man. We can discuss the policy choices of a particular goal and then I will work to find a legal way to get where you want to go because what you're describing [now] isn't legal."

Balch didn't set out to be an attorney. While in the Marines he found himself working for some lawyers and figured if "those fellows could go to law school and succeed, then I certainly can. At my grandmother's memorial service I remarked that I was the only professional arguer in the family and that everyone else, including her, were just amateurs (my grandparents and my father were famous for their 'disagreements')."

For two years after graduating from Mercer University School of Law, he clerked with U.S. District Judge Duross Fitzpatrick in the Middle District of Georgia, who made a profound impact on the young attorney. "Even today I look at myself in a virtual mirror and ask what he would do. The time spent clerking

was a perfect training ground for a wannabe trial lawyer. I didn't want to be just a litigator; that's boring. I wanted to try cases in front of a jury."

During his clerkship, some of his father's passion for civil rights lit a fire in him and he "most enjoyed observing and discussing how Section 1983 sought to hold police officers accountable." [Section 1983 allows an individual to sue state government employees and others acting under the "color of state law" for civil rights violations.] Adding, "I became interested in the Constitutional intricacies of the defenses and why qualified immunity matters and how it's implied. There are gray areas law enforcement officers often face and what the law says they're entitled to do and what they are not entitled to do. Thirty years later we're still drawn into this."

Indeed. The conversation about what the role of the rule of law means in the 21st century is "still a conversation that boils down to is the rule of law a means to an end or an end in itself. It's been debated throughout U.S. history and, though it's not a new conversation, it hasn't been in everyone's awareness as it is now."

Although he has more than 25 years building consensus so that local governments can navigate complex legal matters, spur economic development, and encourage community development, he is most proud of his work with Brookhaven. As an independent counsel he has been Brookhaven's city attorney for the last six years. "I work with the council and the administration on laying the foundation for the city for the next 50 years. That's the challenge is to get that 50-year vision."

He cites several accomplishments including the Peachtree Creek Greenway trail that is part of the 12.3-mile North Fork Peachtree Creek trail that will eventually connect to Atlanta's BeltLine and the Silver Comet Trail, a 90,000-square foot Atlanta Hawks Practice facility, helping draft and pass a $40 million general obligation bond to rehab and refurbish most of the city's parks, as well as being in the planning stages for a new city hall.

"These are concrete examples as well as working on regional and statewide partnerships with other jurisdictions and counties to help influence how connectivity happens across the north end of the Metro area," he says. He is also proud that he has the support of the council and mayor. "I'm grateful that they listen and take our advice. We don't always agree and that is their prerogative as the client. But, they are willing to put their money where their mouths are to defend their ordinances. If it's in the best interest of the city, they are willing to go to the mat."

And, getting back to his civil rights instincts, he says Brookhaven has an excellent chief of police and command staff. "My job, again, is to support our department heads and public-facing employees to the greatest extent possible. Chief Yandura and his Command Staff are consummate professionals and have been open to new ways of doing things and having conversations with groups or representative organizations they serve." Brookhaven initiated a Latinx Citizens Police Academy and works extensively to communicate with the Latin American Association, headquartered in Brookhaven. When the Police Department wanted to bring Unmanned Aerial Systems ("Drones") to the City as a force multiplier, the leadership met with representatives from the ACLU and from prosecutor's offices to review and discuss the plan and proposed policies before deploying the systems.

Right now, he says it's a narrow path for police forces everywhere when there are calls to defund the police while others want to be tough on crime. "That's a challenge for all local governments, especially with tax revenues shrinking."

Balch and his team work with a variety of municipalities on such issues as ordinance rewrites, rezoning, employment law, civil litigation, and advising and rewriting land use ordinances. They also do substantial land use litigation across the state, he says.

The firm plans to add a lawyer by Thanksgiving and another in the spring. "I started the firm in 2008 and we have focused on remaining relatively small. I feel we have a better handle on what we're doing as a smaller firm," he says.

Adding, "We have demonstrated that we have the answers people are looking for — and the experience."

Editor's Note: As our readers will know, *Municipal Lawyer* introduces various of our IMLA members from time to time. Is this November-December 2022 Day in the Life, we are pleased to provide some insights into IMLA Board member and long-time Atlanta lawyer Chris Balch. We thank publisher Bill McGill for permission to republish this article which appeared in the November 2021 *Atlanta Attorney at Law* and writer Mary Welch for her authorship. ML

Chris Balch serves as the City Attorney in Brookhaven, the 11th largest city in Georgia in the heart of the Metro Atlanta area. He has been called the go-to crisis response lawyer for cities and counties across the state, assisting local governments with out-of-control elected officials, employees whose conduct and misconduct ends up on national news feeds, and employees and supervisors who create a hostile work environment or undertake retaliatory acts. A Marine Corps veteran, Chris speaks nationally on issues of governance and the intersection between the First Amendment and elected officials' use of social media.

EMPLOYMENT

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Unionization of Public-Sector Jobs in Colorado: The Collective Bargaining by County Employees Act

In 2018, the Supreme Court of the United States decided Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018), holding that public sector unions cannot require non-member employees to pay union fees. In anticipation of, and in response to, this outcome, bills relating to public-sector employee unions were introduced in state legislatures across the nation.[1]

INTRODUCTION

For employers and employment law practitioners in states where these laws are new, or not yet in effect, the repercussions on their workforce should not be understated. Based on the latest data concerning union membership released by the U.S. Department of Labor's Bureau of Labor Statistics,[2] on average, in states where public employers are "permitted," but not legally required, to collectively bargain, 7.7% of employees were represented by a union in 2021.[2] This is in stark contrast to states with legislation requiring public employers to collectively bargain, where on average 14.1% of employees were represented by a union in 2021.[3] Overall, states that have enacted laws related to public-sector employee unions see significantly higher union membership rates in both the public and private sector. This article focuses on the latest state, Colorado, to move forward with unionization of employees in most of the state's counties.

Unionization in Colorado.
Starting on July 1, 2023, county employees across Colorado will have the right to be represented by unions and to bargain collectively with their employers for salary, benefits and other terms and conditions of employment under the Collective Bargaining by County Employees Act ("Act").[4] Colorado joins states like California and New York, which have had similar laws in their books for years.[5] In 2021, when 7.5% of employees in Colorado were represented by a union, 17.8% of employees in California and 24.1% of employees in New York were represented by a union.[6]

Below, we highlight the Act's key elements and explore its application.

Applicability
The Act does not apply to the city-counties of Denver and Broomfield and counties with fewer than 7,500 residents. Only county employees in 38 of Colorado's 64 counties will be allowed to form a union if they choose.[7]

Definitions
Under the Act, a "county employee" means a person employed by one of the affected 38 counties, including a person whose employment with that county has ceased due to an unfair labor practice or a discharge, if such discharge is subject to appeal under an applicable appeals process.[8]

"Bargaining unit" means a group of county employees in a unit deemed appropriate for the purpose of collective bargaining.[9]

"Employee organization" means a nonprofit organization that engages with a county concerning wages, hours, and other terms and conditions of employment and that represents or seeks to represent county employees in a bargaining unit.[10]

"Exclusive representative" means the employee organization certified or recognized as the representative of employees in a bargaining unit.[11]

"Collective bargaining agreement" means an agreement negotiated between an exclusive representative and a county, including an agreement reached through an impasse resolution process.[12]

"Collective bargaining" or "collectively bargain" means the performance of the mutual obligation of a county and an exclusive representative to:[13]

> Meet at reasonable times and places and negotiate in good faith with respect to wages, hours, and

other terms and conditions of employment;
Resolve questions arising under a collective bargaining agreement through a negotiated grievance procedure culminating in final and binding arbitration; and
Execute a written contract incorporating any agreements reached.

Regulation and Enforcement

The Act charges the director—of the Division of Labor Standards and Statistics of the Colorado Department of Labor and Employment (the "CDLE")—with the power to enforce, interpret, apply, and administer the provisions of the Act through rulemaking, hearing, and appeals, including the establishment of procedures for:[14]

Designating "appropriate" bargaining units; Selecting, certifying, and decertifying exclusive representatives; and Filing, hearing, and determining complaints of unfair labor practices.

The Act also gives the CDLE the authority to adjudicate disputes between parties through hearings and to issue subpoenas to compel the attendance of witnesses and the production of records. This authority may be delegated to hearing officers, who under the Act must make a decision "on each relevant issue raised, including findings of fact, conclusions of law, and an order."[15] Such decision and order constitutes a final agency action appealable pursuant to C.R.S. § 24-4-106 (the State Administrative Procedure Act).

The penalties that may be imposed for violations of the Act include:

Appropriate administrative remedies; Actual damages related to employee organization dues; Back pay, including benefits; Reinstatement of the county employee with the same seniority status that the employee would have had but for the violation; Other remedies to address any loss suffered by a county employee or group of county employees from unlawful conduct by a county; and Declaratory or injunctive relief or provisional remedies, including temporary restraining orders or preliminary injunctions.

The CDLE will be required to maintain on its website, among other information about the Act, all hearing officer decisions and orders, all final judgments and written decisions of fact regarding any impasse resolution, and all determinations by the CDLE of certification and decertification of an exclusive representative.

How Unionization Starts

The process prescribed for unionization under the Act would begin when at least 30% of county employees in a bargaining unit, as claimed by an employee organization seeking certification, file a petition with the CDLE that contains a "showing of interest" for an election.[16]

The CDLE would then direct the county to distribute notice to all county employees in the applicable bargaining unit that must identify the petitioner-employee organization, the bargaining unit sought by the petitioner, the election process, and an advisement of county employee rights under Section 103 of the Act.[17]

Within ten days after the date of such notice, other employee organizations may seek to intervene in the certification process. [18] The "intervener organization" must file a petition with the CDLE "containing the signatures of not less than thirty percent of the county employees in the bargaining unit claimed to be appropriate by the intervener."[19] If there is a dispute regarding the positions to be included in the appropriate bargaining unit, the CDLE would "promptly order a hearing" to determine the composition of the appropriate bargaining unit. [20] The CDLE would then determine "the sufficiency of the showing of interest" of each employee organization petitioning for certification.[21] Any petitioner that lacks a sufficient showing of interest would be provided with a ten-day opportunity to demonstrate a sufficient showing of interest in the bargaining unit that the CDLE deems appropriate. [22]

The CDLE would then "designate the appropriate bargaining unit for collective bargaining[,]"[23] which must be determined by the consent of the county and the employee organization, or, if there is not agreement between the parties, by an administrative determination of the CDLE. In determining the appropriateness of a bargaining unit, the CDLE would consider:[24]

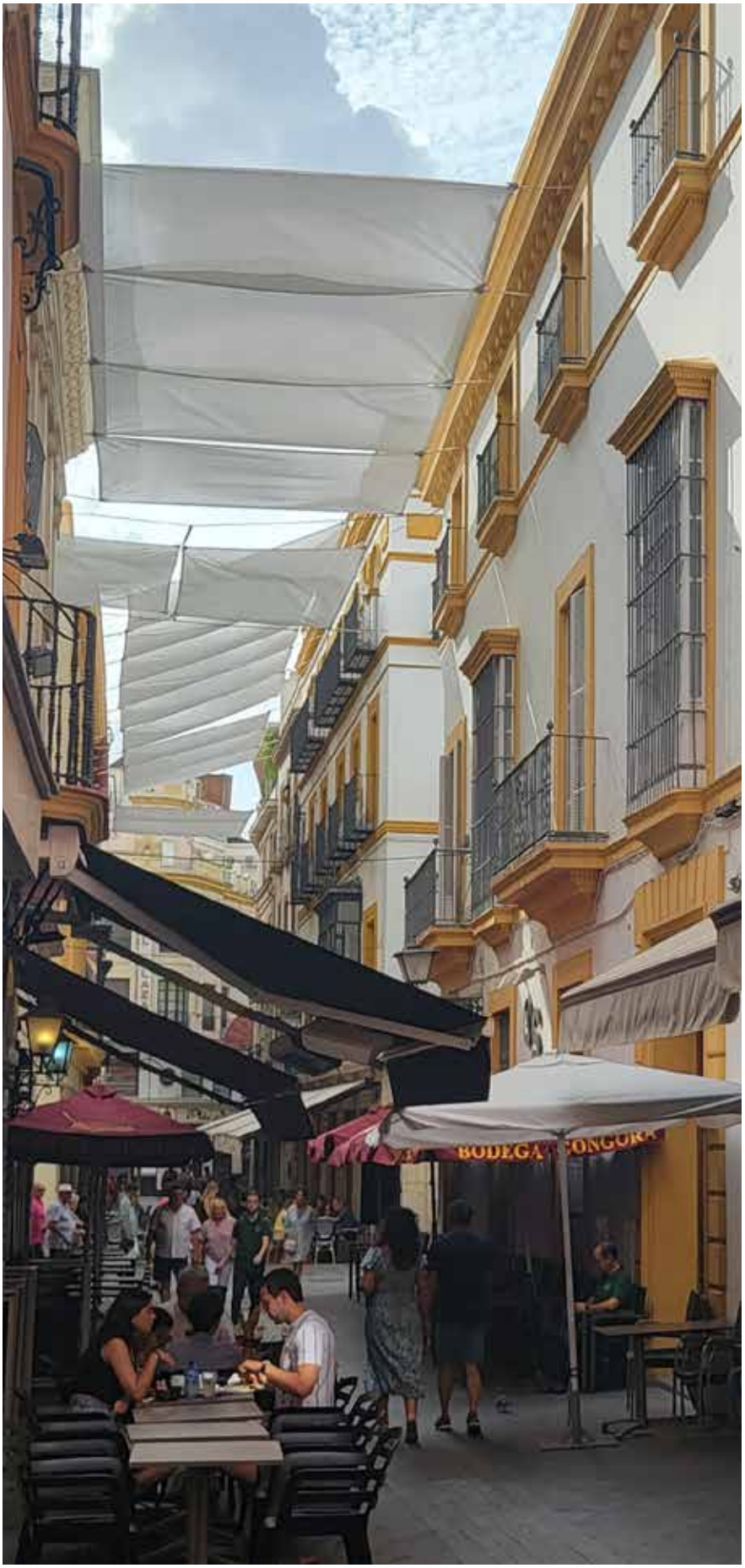
The desires of the public employees; The similarity of duties, skills, and working conditions of the public employees involved;
The wages, hours, and other working conditions of the public employees; The administrative structure and size of the public employer; The history of collective bargaining with that public employer, if any, and with similar public employers; and Other factors that are normally or traditionally taken into consideration in determining the appropriateness of bargaining units in the public sector.

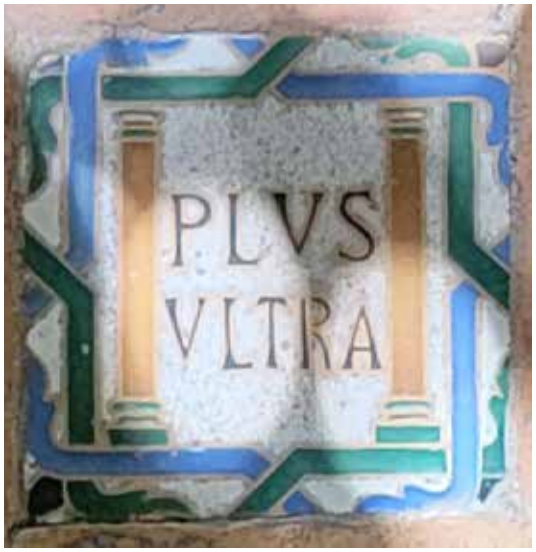
Within ten days after the CDLE's determination that an employee organization has provided a sufficient showing of interest by the appropriate

Continued on page 31

IMLA IN SPAIN

In September, IMLA's International Committee led a group of members to Seville for four days of comparative law education, cultural immersion, sightseeing, and above all, great comradery with our Spanish municipal lawyer colleagues. We present a few images from our trip and invite you to stay tuned for our next IMLA International experience!

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IMLA IN SPAIN


Inscripción

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AMICUS

AMANDA KARRAS
IMLA Executive Director and General Counsel

The Continuing Battle over Governmental Takings

As we return from our successful IMLA Conference in Portland, Oregon, the leaves in Washington DC are showing off their full fall colors, Thanksgiving is around the corner, and we are reminded that 2022 will be coming to an end soon. It therefore seems appropriate to look back at the success of the IMLA legal advocacy program this last year, while highlighting some emerging federal court trends IMLA has observed.

As of this writing, IMLA has filed twenty-one amicus briefs this year, with another nine pending that will be filed before year end. IMLA filed eight amicus briefs at the Supreme Court merits stage, six were or will be filed at the Supreme Court petition stage, and the remainder were filed in state and federal appellate courts. All the cases involved issues of national concern for local governments, including everything from liability under Title II of the ADA for sidewalk curb ramps to battling aggressive preemption issues under state law.

An emerging trend this year in federal courts is that advocacy groups are pursuing an expansive view of the Takings Clause. One area under attack stems from the 2021 Supreme Court decision in *Cedar Point Nursery v. Hassid*, which held that California's regulation that granted union organizers access to agricultural employees at employer worksites constituted a per se physical taking.[1] The Court rejected the application of *Penn Central Transp. Co. v. New York City*, 428 U.S. 104 (1978) to the regulation, concluding it was a per se physical taking because the regulation "appropriates the right to invade the growers' property," which in turn prevented the owner from exercising the right to exclude.[2]

Justice Breyer explained why the decision was problematic in his dissent in *Cedar Point Nursery*, explaining if a regulation amounts to a physical appropriation of property than "there is no need to look further; the Government must pay the employers 'just compensation.'"[3] However, if the regulation targets employers' property rights, Justice Breyer explains under *Penn Central,* "the government need pay the employers 'just compensation' only if the regulation 'goes too far.'"[4]

Since *Cedar Point*, we have seen property rights' advocates take the decision and seek to apply it in novel ways. For example, in *Yim v. City of Seattle*, a group of landlords sued the City over its Fair Chance Housing Ordinance, which prohibits landlords from asking anyone about prospective or current tenants' criminal or arrest history and from taking adverse action against them based on that information.[5] The landlords argued that, among other things, the Ordinance was unconstitutional because under *Cedar Point Nursery*, it prevents them from exercising their "fundamental right to exclude individuals" from their property. The landlords take the foregoing language from *Cedar Point Nursery* and argue that the Ordinance violates their substantive due process rights because the right to exclude is a "fundamental right" which is "implicit in the concept of ordered liberty," and cannot, per *Cedar Point Nursery*, be "balanced away."[6] The landlords argue that strict scrutiny should apply to the deprivation of a fundamental right, and the district court erred by applying rational basis review to the Ordinance.[7]

IMLA argued in its amicus brief authored by Victoria Wong, Deputy City Attorney with the San Francisco City Attorney's office, that the landlords' arguments are conflating "the attributes of property ownership protected by the takings clause with fundamental rights receiving enhanced protection under substantive due process."[8] While the right to exclude may be "fundamental" in terms of someone's property rights, it does not follow that a landlord has a right to deny someone housing based on their criminal history such that a fundamental right is triggered under the substantive due process clause when a City prevents the landlord from doing so. The landlords are trying to take language from the *Cedar Point Nursery* case, calling the right to exclude "fundamental" under Substantive Due Process analysis, triggering strict scrutiny. But this is akin to using a square peg meant for the Takings Clause and jamming it into the round hole of the Substantive Due Process Clause. It simply does not fit and should be rejected before local governments are subjected to additional challenges seeking to apply strict scrutiny to other ordinances based on such an analysis. The case is still pending at the Ninth Circuit as of this writing.[9]

Another area of possible expanded liability under the Takings Clause

Continued on page 37

must "cease the activity in the area of the discovery, make a reasonable effort to protect the items discovered before resuming such activity, and provide notice" required under NAGPRA. Id. Some states have enacted similar laws.[56]

2. Obtaining Rights-of-Way Over Indian Lands. Rights-of-way over Indian land are governed by 25 C.F.R. Part 162. Examples of rights of way subject to the regulations include railroads, public highways, public water and sewer lines, oil and gas pipelines, electric transmission lines, and telecommunications facilities. These regulations impose a formal application process as well as consent and compensation requirements. Right-of-way grants are issued by the BIA unless the tribes has assumed the function in accordance with 25 C.F.R. Part 162.

A complete application requires title information, a consent for a land survey, and a grant consent from the Indian landowners. The BIA can provide contact information for Indian landowners for applicants to coordinate these consent requirements. Title to Indian trust lands is maintained by the BIA, Division of Land Titles and Records. The BIA can produce certified Title Status Reports (TSRs) that state the status of title ownership and encumbrances.

A complete application requires, among other requirements, a survey as well as environmental, and cultural resource/archeological assessments that satisfy the requirements of a federal action. The BIA will not grant a right-of-way without a majority of consent by the Indian owners. Compensation will be a key term. The federal standard is "fair market value," and the BIA will use market analyses, appraisals and other appropriate valuation methods. Such valuation reports can be waived by the tribe where compensation has been negotiated and the tribe determines that the negotiated amount is "in its best interests." The BIA will defer to the negotiated amount in this circumstance. Right-of-way terms are presumptively 50 years for purposes other than oil and gas related (20 years) but the BIA will defer to a tribe's determination of right-of-way term.

B. Fee to Trust Land Acquisitions. Between 1887 and 1934, it is estimated that the United States took 90 million acres of tribal lands — or nearly 2/3 of tribal reservations. And, as noted above, the federal termination policy of the 1950s and 1960s further ruptured the territorial and cultural integrity of many tribes across the nation. Reconstituting Indian country is a central national policy to promote tribal self-determination and self-governance. The relationship between tribal lands and tribal sovereignty is particularly strong for lands for which title is held by the federal government in trust for tribes ("trust status"), where tribes exercise primary regulatory authority. Not all land owned by tribes, however, is held in trust status. Tribes can hold land in fee status for many purposes. For example, many tribes participate in cooperative mitigation or management programs that return aboriginal lands to tribes for conservation purposes. These lands remain subject to state regulatory jurisdiction but allow tribes to expand their traditional natural resource management programs.

Land can be placed into trust status directly by federal legislation or, as authorized by Indian Reorganization Act or other authorizing federal legislation, by the United States Secretary of the Interior ("Secretary") through an administrative fee-to-trust process under 25 C.F.R. Part 151. Municipal governments can play a direct role in the fee-to-trust acquisition process.[57]

Land may be acquired for a tribe in trust status when the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or off-reservation subject to certain standards; when the tribe already owns an interest in the land; or when the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.[58] Interior has initiated consultation with Indian tribes on draft revisions to the fee-to-trust regulations. Under the consultation draft, this statement of acquisition policy is under review for possible revision to the following:

> to strengthen self-determination and sovereignty, ensure that every tribe has protected homelands where its citizens can maintain their tribal existence and way of life, and consolidate land ownership to strengthen tribal governance over reservation lands and reduce checkerboard ownership. In addition, the consultation draft would create certain presumptions for trust acquisitions.

There are three primary categories of fee-to-trust acquisitions:

1. Discretionary Trust Acquisitions. A trust acquisition authorized by Congress that does not require the Secretary to acquire title to any interest in land to be held in trust by the United States on behalf of an individual Indian or a Tribe. The Secretary has discretion to accept or deny the request for any such acquisition. These acquisitions include consultation with state, local and tribal governments.

a. On-Reservation Discretionary Acquisitions and State/Local/Tribal Government Consultations, 25 C.F.R. § 151.10. On-reservation acquisitions include

land located within or contiguous to an Indian reservation. Subject to any specific legislative requirements, the Secretary will consider the need of the tribe for additional land, the purposes for which the land will be used, the impact (if any) on state and local property taxes, jurisdictional problems and potential land use conflicts, and the ability of the BIA discharge its trust responsibilities. This process includes consultation with state and local governments, including Tribal governments, having regulatory jurisdiction over the proposed acquisition property.

b. Off-Reservation Discretionary Acquisitions and State/Local/Tribal Government Consultations, 25 C.F.R. § 151.11. In addition to the criteria in 25 C.F.R. § 151.10, tribes must provide a plan which specifies the anticipated economic benefits associated with the proposed use for off-reservation discretionary acquisitions that are intended for economic purposes. The Secretary will also evaluate the location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation. This process includes consultation with state and local governments, including Tribal governments, having regulatory jurisdiction over the proposed acquisition property.

2. Mandatory Trust Acquisitions. A trust acquisition directed by Congress or a judicial order that requires the Secretary to accept title to land into trust, or hold title to certain lands in trust by the United States, for an individual Indian or Tribe. The Secretary does not have the discretion to accept or deny the request to accept title of land into trust. Because these are nondiscretionary, these acquisitions are not further addressed.

3. Gaming Acquisitions. For many tribes, Indian gaming can be an important means of tribal economic and community development. To qualify (non-exempt) new trust land acquisitions for gaming eligibility such requests must meet one of several exceptions to the prohibition on gaming on new lands after 1988. The exception most relevant to local governments is the Secretarial "two-part" Determination under 25 C.FR. Part 292 — viz., the gaming establishment on land subject to this part is in the best interest of the tribe and its members and is not detrimental to the surrounding community.[59] A favorable two-part determination is subject to concurrence by the Governor of the state.[60] This procedure and the related policies are complex and will not be addressed further in this presentation except to note that the process includes consultation with appropriate state and local officials, including officials of nearby Indian tribes.

CONCLUSION

This article has sought to assist legal professionals representing municipal governments better understand American Indian tribal sovereignty and its implications for their clients. We hope that you find it useful. ML

NOTES

1. This article refers to the indigenous peoples of the continental United States as "American Indians" or "Indians" to be consistent with conventional legal nomenclature set forth in federal statute and judicial precedent. The scope of this article does not include the indigenous people of Alaska and Hawaii, which have a relationship with the United States that is historically and, at times, legally, distinct from the Indian tribes of the continental United States.
2. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978) (quoting Worcester v. Georgia, 6 Pet. 515, 559, 8 L.Ed. 483 (1832)).
3. *See id.* (tribes remain "separate sovereigns pre-existing the Constitution"); *see also* Oklahoma v. Castro-Huerta, 124 S.Ct. 2486, 2505 (2022) (Gorsuch, J. dissenting).
4. *Castro-Huerta*, 124 S.Ct. at 2505 (Gorsuch, J. dissenting).
5. *Id.* (citing Worcester, 6 Pet. at 561).
6. *Worcester*, 6 Pet. at 561.
7. *Castro-Huerta*, 124 S.Ct. at 2505 (Gorsuch, J. dissenting) (citing C. Berkey, United States-Indian Relations: The Constitutional Basis, in Exiled in the Land of the Free 192 (H. Lyons ed. 1992)).
8. *Castro-Huerta*, 124 S.Ct. at 2506 (Gorsuch, J. dissenting).
9. *Id.* (quoting Art. IX.).
10. *Id.*
11. *Id.* (citing G. Ablavsky, Beyond the Indian Commerce Clause, 124 Yale L.J. 1012, 1033-35 (2015)).
12. *Castro-Huerta*, 124 S.Ct. at 2506 (Gorsuch, J. dissenting).
13. United States v. Lara, 541 U.S. 193, 200 (2004).
14. *Id.* (quoting United States v. Kagama, 118 U.S. 375 (1886)).
15. *Id.* at 56.
16. Michigan v. Bay Mills Indian Community, 572 U.S. 782, 788 (2014) (quoting Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla., 498 U.S. 505, 509 (1991)).
17. *Id.* (quoting United States v. Wheeler, 435 U.S. 313, 323 (1978)).
18. See Self-Governance Communication and Education Tribal Consortium, Tribal Self-Governance Timeline, https://www.tribalselfgov.org/resources/milestones-tribal-self-governance/ (last visited Sept. 18, 2022).
19. *Id.*
20. *Id.*
21. Cohen's Handbook of Federal Indian Law (Nell Jessup Newton ed. 2012), § 1.06 at 90.
22. House Concurrent Resolution 108.
23. Cohen's Handbook, § 1.06 at 90.
24. *Id.* at 90-91.
25. *See* Self-Governance Communication and Education Tribal Consortium, Tribal Self-Governance Timeline, https://www.tribalselfgov.org/resources/ milestones-tribal-self-governance/ (last visited Sept. 18, 2022).
26. *Id.*

Continued on page 36

What information is confidential? If there is an attorney – client privilege between the city attorney and the city, the representative of the client must be identified. There can't be an attorney – client privilege without a client! So state Open Records laws, such as the Missouri Sunshine Law or the Kansas Open Records Act.[34] For the work product doctrine to apply the litigation must be against your client. All of these issues of confidentiality necessitate the question (and answer): Who's the client?

Conflicts of interest must be navigated, but cannot be done successfully until the client and the client's interests are identified. Likewise, who has control of litigation is critical. Consider this scenario:

The Mayor and City are sued. The City Council wants to settle. The Mayor does not want to settle. The City Attorney is representing the City. The City Council authorized the Mayor to obtain a private attorney, to be paid for by the City. The City Council doesn't want to spend any more money on the defense of the Mayor. The Mayor wants to keep fighting.[35]

It has been suggested that since "Who's the boss?" is a different question from "Who's the client?" that the determination can follow, again, a structural analysis of the government and the issue being confronted.[36] The practical ramifications are navigated every day. Who wants to explain to an elected official that yes, she is your boss, but no, she is not your client. But knowing the client determines the entire character of the City Attorney's work. ML

Notes

1. Randy Lee, Symposium: Legal Ethics for Government Lawyers: Straight Talk for Tough Times, 9 Widener J. Pub. L. 199 (2000).
2. For the sake of brevity, "city attorney" includes the assistants serving in law departments.
3. Jeff Lipshaw, More on Lawyers as Leaders, Legal Profession Blog (Jan. 10, 2007) available at http://lawprofessors. typepad.com/legal_profession/2007/01/lipshaw_on_hein.html
4. *See* Stephen Colbert, The Colbert Report (October 17, 2005) available at https://www.cc.com/video/63ite2/the-colbert-report-the- word-truthiness.
5. *Lee*, supra note 1.
6. Susan Saab Fortney, Ethical Quagmires for Government Lawyers: Lessons for Legal Education, 69 Wash. U. J. L. & Pol'y 17, 21 (2022).
7. Adam Edris, Issues of Client Identification for Municipal Attorneys: An Agency and Public Interest Approach, 24 Geo. J. Legal Ethics 517 (2011).
8. 1.13 Organization as Client, Ann. Mod. Rules Prof. Cond. § 1.13.
9. *Id*. at Comment 1.
10. *Id*. at Comment 9.
11. Restatement (Third) of the Law Governing Lawyers § 97 (2000).
12. *Id*.
13. 1.13 Organization as Client, Ann. Mod. Rules Prof. Cond. § 1.13 annotations.
14. *Id*. at Comment 3.
15. *Id*. at § 1.13(b).
16. *Id*. at Comment 3; 1.0 Terminology, Ann. Mod. Rules Prof. Cond. § 1.
17. 1.13 Organization as Client, Ann. Mod. Rules Prof. Cond. § 1.13 Comment 4.
18. 1.13 Organization as Client, Ann. Mod. Rules Prof. Cond. § 1.13 Annotations.
19. *See* Dzierbicki v. Township of Oscoda, 2009 WL 1491116, (E.D. Mich. May 26, 2009).
20. §2-302, Code of Ordinances, Kansas City, Mo.
21. §3-41, Code of Ordinances, Kansas City, Mo. These figures are current at the time of this writing in August 2022.
22. Mo. Ann. Stat. § 98.330.
23. 1.13 Organization as Client, Ann. Mod. Rules Prof. Cond. § 1.13 Comment 9.
24. This is a case that has a nightmare list of ethical disasters, resulting in an FBI probe and jail time for some of the characters. For Model Rule 1.13 purposes, we focus on Ms. Katherine Dierdorf, but this case could serve as a case study in what not to do under multiple rules of professional conduct.
25. In re Schuessler, 578 S.W.3d 762, 771-772 (Mo. 2019).
26. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) ["We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."].
27. Crandon v. State, 897 P.2d 92 (Kan. 1995), cert. denied sub nom. Crandon v. Dunnick, 516 U.S. 1113 (1996).
28. In re Harding, 223 P.3d 303 (Kan. 2010). After almost 3 years the special prosecutor decided to not bring charges based on the failure to get rollover minutes on the City's plan; based on the spreading of gravel on the alley between the WaKeeney Methodist Church and the Chief of Police's house, or based on charges that the City paid for a meal for utility crews working to repair utility service to WaKeeney after a winter storm. The day after Mr. Harding's suspension took effect KPERS reinstated his previously disqualified six years.
29. § 272, City Charter of Los Angeles, California (1999).
30. §40, City Charter of San Diego, California (1931).
31. Dan Coffey, City attorney is unfit for office, San Diego Union-Tribune (Apr. 24, 2005).
32. There are always exceptions. For example, the U.S. Senate apparently can only act, short of challenging the very foundation of our republic, through a 3/5 super-majority. However, that type of issue is not great for local governments. People expect their local governments to actually accomplish things and they must be able to make decisions and move on to the next problem.
33. Brigham Smith, Who's the Boss: Deciding Who Your Client Is When You're A City Attorney, 11 T.M. Cooley J. Prac. & Clinical L. 1, 2 (2009).
34. Chapter 610, RSMo.; K.S.A. §45-

215, et seq.
35. All characters appearing in this example are fictitious. Any resemblance to real persons, living or dead, is purely coincidental.
36. *Smith, supra* note 33, 1, 16.

The authors would like to express their gratitude to their mentor, colleague, and friend Bill Geary, retired City Attorney for the City of Kansas City, Missouri, IMLA Fellow, and James H. Epps III Award winner. This work is derivative of Bill's efforts during his career to further municipal lawyers' understanding of their ethical and professional responsibilities.

Charlotte Ferns joined the Kansas City, Missouri's City Attorney's Office in 1996. As an Assistant City Attorney, she has represented the City in both litigation and transactional capacities, including work as a municipal prosecutor, litigator, and representing both of the City's enterprise fund departments. After several years as general counsel for Kansas City's water, sewer and stormwater utilities, she now represents the Aviation Department. Charlotte received her juris doctor from the University of Missouri Kansas City Law School and was named a Local Government Fellow by the International Municipal Lawyers Association in 2017.

Matt Gigliotti joined the Kansas City Attorney's Office in 2007 as an Assistant City Attorney and was named City Attorney for the City of Kansas City in November 2021. He provides legal support to virtually every department in the City, in both litigation and transactional capacities. He currently advises the City, the City Manager, and the City Council in all facets of municipal law.
A graduate of the Greater Kansas City Chamber of Commerce's Centurions Leadership Program, Gigliotti is certified as a "Local Government Fellow" by the International Municipal Lawyers Association. In 2016 Missouri Lawyer's Media named him an "Up and Coming Lawyer" in Public Service. He is a graduate of the University of Central Missouri and the Tulane University School of Law where he focused on environmental law and was an editor for the Tulane Environmental Law Journal.

Unionization *cont'd from page 21*

bargaining unit, the CDLE will:[25]

> Order the county to provide to the petitioning employee organization or organizations the names, job titles, work locations, home addresses, personal e-mail addresses, and home or cellular telephone numbers of any county employee in the appropriate bargaining unit unless directed by the county employee not to provide some or all of the information;
> Establish by consent or order the procedures for a secret ballot election; and Order the county to distribute a notice prepared by the director that describes the procedures of the secret ballot election to all county employees in the appropriate bargaining unit.

A secret ballot election would then take place,[26] and the ballot used would contain: [27]

The name of any employee organization submitting a petition containing a showing of interest of at least thirty percent of the county employees in the appropriate bargaining unit; and

> A choice of "no representation" for county employees to indicate they do not desire to be represented by an employee organization.

To become certified by the CDLE and formally recognized by a county under the Act, the employee organization must receive "more than fifty percent of the valid ballots cast."[28] If multiple employee organizations are seeking certification, and none receive a majority of the ballots cast, the CDLE would conduct a runoff election between the two employee organizations that received the largest number of votes.[29] The employee organization that receives the majority of votes would then be certified by the CDLE as the exclusive representative of all county employees in the appropriate bargaining unit.[30]

The Act states that "any party" may file objections to the results of the election. [31] For the CDLE to invalidate the results of an election and order a subsequent election, the objecting party must show, and the CDLE find, that "misconduct affected the outcome of the election[.]"[32]

How Collective Bargaining Works

Under the Act, any collective bargaining agreement negotiated between an exclusive representative and the county must be approved by the board of county commissioners of the county.[33] The agreement can only be for a term of at least one year, but not more than five years.[34] It must also contain an arbitration provision for "disputes over the interpretation, application, and enforcement of any provision of the collective bargaining agreement."[35] Moreover, certain agreements are precluded under the Act, such as any agreement to use paid time for any part of a suspension that is properly imposed, "in accordance with applicable standards or procedures, or where a supervisor, employer, administrative law judge, hearing officer, or a court has found a deprivation of rights under the state or federal constitution[.]"[36]

In negotiating the terms of a collective bargaining agreement, a county and exclusive representative are obligated to "collectively bargain in good faith."[37] Under the Act, this obligation:[38]

Requires a county, upon request of the exclusive representative, to provide information that may be relevant to the terms and conditions of employment or the interpretation of the collective bargaining agreement;

Includes a county's duty to furnish data to the exclusive representative that:

Is normally maintained by the

Continued on page 34

Homelessness *cont'd from page 17*

against the City[5] and the matter was settled following the City's adoption of an "Encampment Protocol."[6]

On August 9, 2021 Hamilton City Council repealed the Encampment Protocol that had permitted encampments in certain areas and of certain sizes within City Parks, in favour of resuming the enforcement of the Parks By-law.

The relevant sections of the Parks By-law read:

> 12. (a) Unless expressly authorized by permit, no person shall encroach upon or take possession of any park, or any part or area within a park, by any means whatsoever, including but not limited to the placing, construction, installation or maintenance of any fence, structure or other thing, the dumping or storage of any materials, or by planting any plant or otherwise cultivating, grooming or landscaping any part of the grounds thereof;
>
> 17. Unless authorized by permit, no person shall dwell, camp or lodge in any park.

The encampment enforcement under the Parks By-law follows a six-step process that begins with a complaint to Municipal Law Enforcement ("MLE") and ends with enforcement by Hamilton Police Services ("HPS"), and cleanup of the site. The process is initiated by a complaint (Step 1). MLE attends the site to determine if there is a violation of a By-Law, provides education and seeks voluntary compliance (Step 2). If there is no voluntary compliance, Housing Focused Street Outreach attends the site and provides various types of support (Step 3). If a violation of the by-law continues, MLE re-attends and issues a trespass notice and notifies Hamilton Police (Step 4). The next step is for the police to response under the *Trespass to Property Act*, R.S.O. 1990, c. T.21 (Step 5). The final step is clean up of the site after the encampment is gone (Step 6).[7]

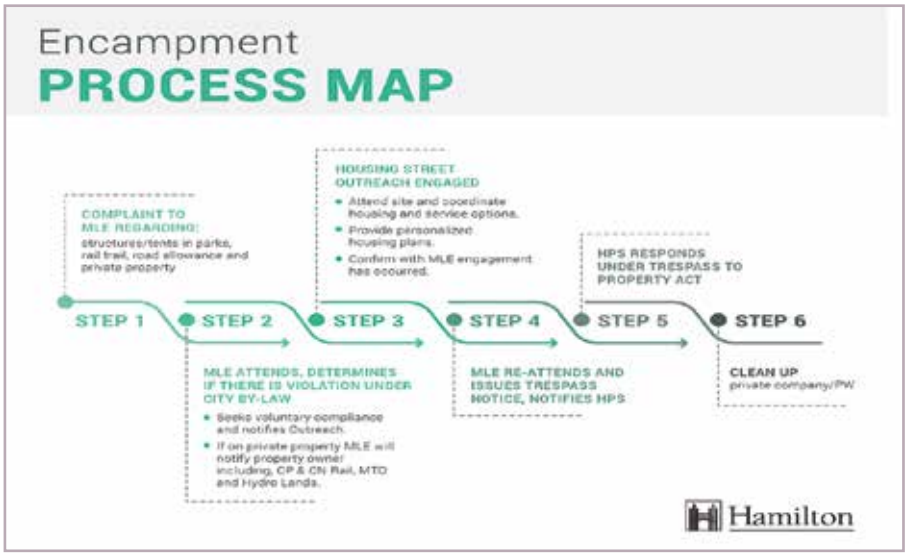
Arguments

The Court applied the three-pronged test outlined in *RJR-MacDonald Inc. v. Canada* (Attorney General)[8] to determine whether an interlocutory injunction should be granted. First, the Court considered whether there was a serious issue to be tried. The Applicants argued that the removal of homeless individuals from encampments in City Parks invoked constitutional protections guaranteed under section 7 of the *Charter*.[9] The City argued that the first prong could not be met as the Applicants' claim under section 7 of the *Charter* as housing is not a Charter-protected right. The Court, without weighing the potential success of the arguments, was satisfied that the Applicants' evidence supported that a *Charter* protected right may be violated, which was a serious issue to be tried.

Second, the Court considered whether irreparable harm would result if an injunction was not granted. The Applicants argued that as a result of the City's housing crisis the City does not have enough space to accommodate homeless individuals and as a result they must live in encampments. Further, the Applicants would suffer irreparable harm if they were removed from encampments without housing. The Applicants also took issue with the City's enforcement strategy, suggesting that housing was not a pre-requisite for enforcement.

The City argued that the Applicants failed to demonstrate that enforcement of the City's Park By-law leads to irreparable harm, as there was no evidence that the Applicants' rights under the *Charter* were violated , given that section 7 does not confer a general freestanding right to housing. Further, the City argued that parks are a valuable public asset that should be available for to everyone. With the proliferation of encampments, City park users now encountered fatalities, sex trafficking, discarded needles, drugs and garbage. The Court held that case law does not grant homeless individuals a freestanding right to erect encampments or to reside in public parks, as City parks are not intended for these activities.

Third, the Court considered whether the balance of convenience favours granting an injunction. *RJR MacDonald* provides that public interest issues that contribute to tipping the balance of convenience may include concerns of society generally and that of identifiable groups. Based on the evidence presented, the Court held that the Parks By-law was quite clear, as it attempted to balance what people can and cannot do in parks, so as to allow all to enjoy them. Furthermore, the City provided

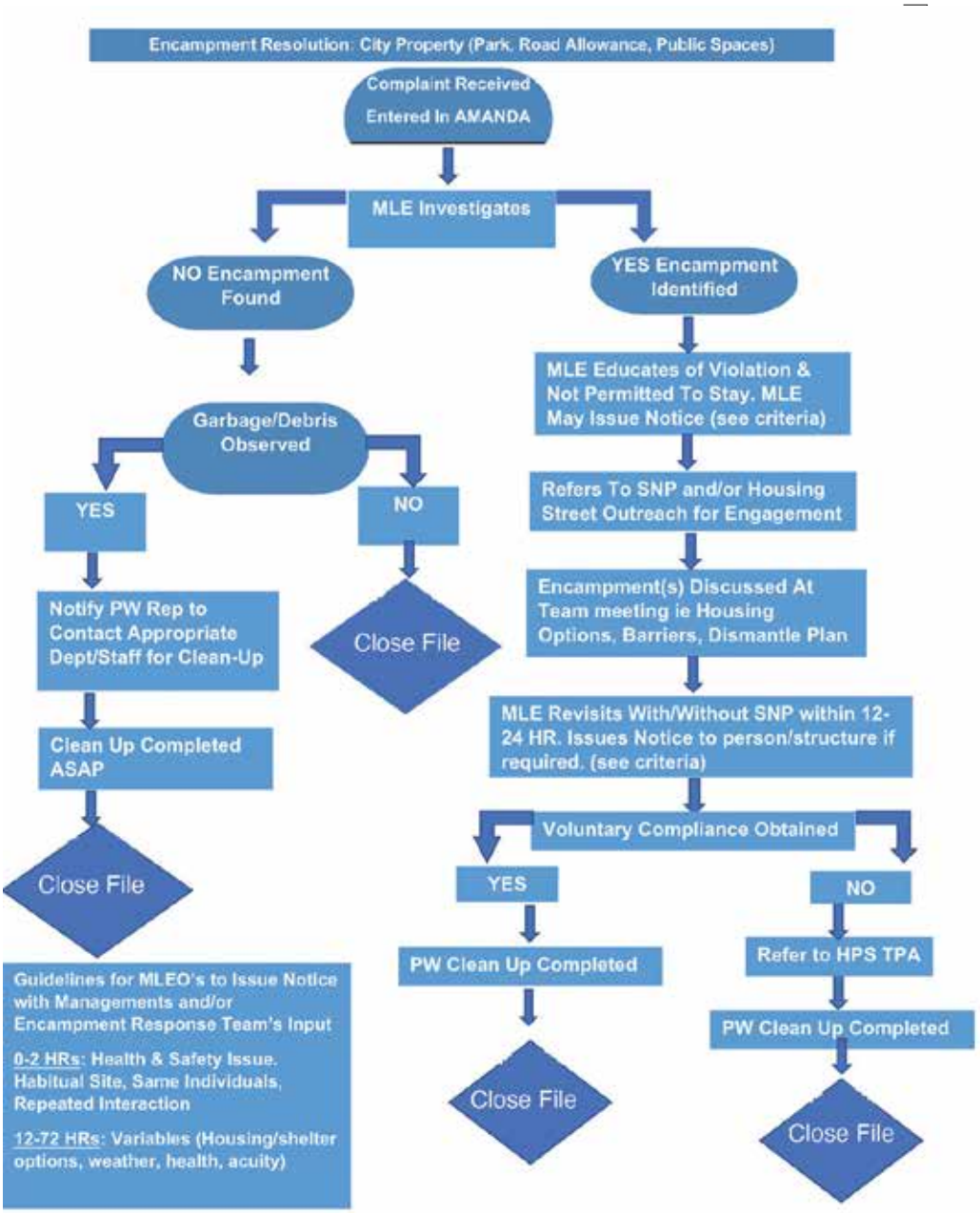


affidavits from staff which demonstrated that shelter and housing spaces were available within the City, suggesting that some were choosing to sleep in City parks contrary to the valid Parks By-law.

Decision

The Court held that the Applicants did not meet the burden of establishing harm to the public interest that would rationalize suspending the City's ability to enforce the Parks By-law. Justice Goodman stated,

> I am persuaded that accommodations such as shelters and hotels have been made available and are responsive to the needs of encampment residents with the provision of necessary social supports. It is not perfect, but most homeless occupants can be reasonably accommodated by the City. Accordingly, in considering the litigants and the homeless-at-large in Hamilton, the applicants have not met the burden of establishing harm to the public interest that would rationalize suspending the City's ability to enforce its By-Law preventing camping and related activity in all of its parks. The relief sought would unjustifiably tie the City's hands in dealing with encampments that raise serious health and safety concerns for an indefinite duration, and would unduly prevent the use of parks by others.[10]



Suspending enforcement would unduly prevent the use of City parks by others. The Court held that the Parks By-law is a valid exercise of City power under the Municipal Act, 2001, S.O. 2001, c. 25. The request for injunctive relief overreached as it asked the Court to prevent, for an indeterminate time, any implementation of the City's valid authority. Justice Goodman concluded that,

> No reasonable person in Canada would disagree with the proposition that homelessness, wherever and however it occurs, is a tragedy in Canada. However, the narrow issue before me is whether the City's enforcement of the By-Law should be restrained by court order. It is not a wide-sweeping review of the underlying issue of whether more should be done to help the homeless.[11]

In conclusion Justice Goodman provided that "[…] it bears repeating that the applicants neither advocate nor suggest that encampments are a permanent solution to the plight and challenges facing the homeless and marginalized members of society. Clearly, encampments are not places where the homeless should be residing."[12] The Applicant's motion for interlocutory injunction was denied.

CONCLUSION

Life after *Poff*. On November 2, 2021 following the Superior Court's decision, the City resumed enforcement of Parks By-law that prohibit camping on City

Continued on page 36

Unionization *cont'd from page 31*

county in the regular course of business; and

Is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining or subject to a grievance under a collective bargaining agreement; and

Does not include an obligation to furnish information that constitutes guidance, advice, counsel, or training provided for managerial employees or executive employees relating to collective bargaining.

Although the parties should "make a good faith effort to complete negotiations[,]"[39] neither party is compelled "to agree to a proposal or make a concession."[40] The Act sets forth procedures that a county and exclusive representative must follow to address any impasse that arises during negotiations of a collective bargaining agreement.[41] If the parties cannot reach an agreement on any issue "subject to collective bargaining," either party may request the assistance of a mediator.[42] Collective bargaining between the parties would then proceed with the aid of a mediator.[43] If, on the other hand, the parties cannot agree on a mediator, they must request mediation assistance from the Federal Mediation and Conciliation Service.[44]

If the parties remain at an impasse following mediation, either party could "request fact finding" in accordance with the rules promulgated by the CDLE, which would require the parties to select one of seven "qualified fact finders" from the Federal Mediation and Conciliation Service or the American Arbitration Association.[45] Next, unless the parties otherwise agree, the fact finder would make a recommendation on each issue in dispute, and in doing so would need to consider:

> The financial ability of the county to meet the costs of any proposed settlement; The interests and welfare of the public;
> The compensation, hours, and terms and conditions of employment of the county employees involved in the collective bargaining in comparison with the compensation, hours, and terms and conditions of employment of other employees in the public and private sectors in comparable communities; The stipulations of the parties; The lawful authority of the county; Changes in the cost of living; and Other factors that are normally or traditionally taken into consideration in the determination of compensation, hours, and terms and conditions of employment through voluntary collective bargaining, interest arbitration, or otherwise between parties in public and private employment.

The exclusive representative would then have the option to approve or reject the recommendation of the fact finder.[46] If the exclusive representative approves of the recommendation, the board of county commissioners of the county would "vote to accept or reject the recommendation at a regular or special meeting open to the public immediately following notification by the exclusive representative that the bargaining unit has accepted the recommendation."[47]

Any costs of mediation services or the fact finder would be shared "equally" by the parties.[48] If mediation fails and, after considering the fact finder's recommendations, the parties remain at an impasse, "each party remains obligated to collectively bargain in good faith to resolve the impasse."[49]

Counties' Obligations

The Act establishes certain requirements and procedures that county employers must follow, including:

> Annually informing its employees who are represented by an exclusive representative of their rights under Section 103(3)(b) of the Act to have their exclusive representative be present at an examination by a representative of the county in connection with any investigation that the employee reasonably believes "may result in disciplinary action against the county employee," and the county employee "requests representation."[50]
> Give the exclusive representative "reasonable access" to county employees at work, the scope of which "must be determined through collective bargaining."[51]
> Provide the exclusive representative with certain information about county employees at the end of each calendar quarter, unless directed by the county employee not to provide some or all of their information, specifically:
> The name, employee identification number, department, job classification, job title, work telephone number, work e-mail address, work address, work location, salary, and date of hire of each county employee as contained in the county's records; and The home address, home and personal cellular telephone numbers, and personal e-mail address of each county employee.[52]

When hiring a new employee, the county must follow certain procedures to comply with the Act, including providing the exclusive representative with an opportunity to meet with the new employee during work time (as determined through collective bargaining), and paying its employee for that time at the same rate of pay that the employee is paid during normal work hours.[53] The county must also provide the exclusive representative notice at least ten days in advance of a new employee orientation, except that a shorter notice may be provided when there is an urgent need, "critical to the county's operations, that was not reasonably foreseeable."[54] Moreover, the county must provide the exclusive representative with access to a county employee's orientation and orientation materials and information. [55]

Make payroll deductions for membership dues and other payments that county employees voluntarily authorize to be made to a union and related entities.[56]

A county cannot refuse to negotiate in good faith with respect to wages, hours, and other terms and conditions of employment, including refusing to cooperate in any impasse resolution procedure.[57]

The Act sets forth numerous "unfair labor practices" that are prohibited, such as any act by anyone acting on behalf of a county

that functions to:[58]

> Discriminate against, coerce, intimidate, interfere with, or impose reprisals against, or threaten to discriminate against, coerce, intimidate, interfere with, or impose reprisals against, any county employee for forming or assisting an employee organization or expressing the county employee's views regarding county employee representation or workplace issues or the rights granted to the county employee under the Act; Deter or discourage county employees or county employee applicants from becoming or remaining members of an employee organization or from authorizing payroll deductions for dues or fees to an employee organization; except that the county may respond to questions from a county employee pertaining to the county employee's employment or any matter described under the Act, as long as the response is neutral toward participation in, selection of, and membership in an employee organization; Dominate or interfere in the administration of an employee organization; Discharge or discriminate against a county employee because the employee has filed an affidavit, petition, or complaint or given any information or testimony pursuant to the Act or a collective bargaining agreement or chosen to be represented by an exclusive representative; or Fail to comply with the requirements of the Act in any way.

Key Takeaways

The Act goes into effect on July 1, 2023. The city-counties of Denver and Broomfield and counties with fewer than 7,500 residents are excluded.

In a process administered by the CDLE, unions would be formally recognized after a secret ballot election in which 30% of the county employees of a proposed bargaining unit submit a petition showing an interest in an election.

If a majority of the county employees in the appropriate bargaining unit vote in the secret ballot election in favor of unionizing, the CDLE would certify the employee organization as the exclusive representative for that bargaining unit, and collective bargaining agreement negotiations would proceed between the county and the exclusive representative.

Both the county and exclusive representatives are obligated to collectively bargain in good faith, including if an impasse arises on any issue subject to collective bargaining.

If the parties are unable to collectively bargain, a mediation-based, fact-finding process begins, administered by the CDLE.

Ultimately, the collective bargaining agreement negotiated between the county and the union must be approved by the board of county commissioners.

Counties have certain obligations under the Act, such as providing unions with "reasonable access" to county employees.

The Act prohibits certain "unfair labor practices," and any violation of the Act may result in the imposition of civil penalties.

Employers affected by the Act and by similar laws in other states have an obligation to establish policies and procedures to ensure compliance. Reach out to your employment attorney for guidance.

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NOTES

1. Ballotpedia, Public-sector union policy in the United States, 2018-present, https://ballotpedia.org/Public-sector_union_policy_in_the_United_States,_2018-present1. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982).
2. U.S. Bureau of Labor Statistics, Union Members – 2021, https://www.bls.gov/news.release/pdf/union2.pdf
3. Compare.Ballotpedia with Bureau of Labor Statistics.
4. *Id.*
5. C.R.S. § 8-3.3-101.
6. Cal. Gov't Code § 12926(d); N.Y. Civ. Serv. Law § 200.
7. Bureau of Labor Statistics, *supra* note 2.
8. C.R.S. § 8-3.3-102(6)(b). County employees of certain schools and hospitals are also excluded from the Act.
9. C.R.S. § 8-3.3-102(7).
10. C.R.S. § 8-3.3-102(1).
11. C.R.S. § 8-3.3-102(12).
12. C.R.S. § 8-3.3-102(13).
13. C.R.S. § 8-3.3-102(3).
14. C.R.S. § 8-3.3-102(2)(a)-(c).
15. C.R.S. § 8-3.3-106(1)(a)-(c).
16. C.R.S. § 8-3.3-106(3)(a).
17. C.R.S. §§ 8-3.3-115(1); 8-3.3-108(1)(a), (b).
18. C.R.S. § 8-3.3-109(1).
19. C.R.S. § 8-3.3-109(2).
20. C.R.S. § 8-3.3-109(2)..
21. C.R.S. § 8-3.3-109(3).
22. C.R.S. § 8-3.3-109(3).
23. C.R.S. § 8-3.3-109(3).
24. C.R.S. § 8-3.3-108(1)(a).
25. C.R.S. § 8-3.3-110(2)(a)-(f).
26. C.R.S. § 8-3.3-109(4).
27. C.R.S. § 8-3.3-108(1)(a).
28. C.R.S. § 8-3.3-109(5).
29. C.R.S. § 8-3.3-108(1)(a).
30. C.R.S. § 8-3.3-109(6)(b).
31. C.R.S. § 8-3.3-109(6)(a), (b).
32. C.R.S. § 8-3.3-109(7).
33. C.R.S. § 8-3.3-109(7).
34. C.R.S. § 8-3.3-113(1).
35. C.R.S. § 8-3.3-113(2).
36. C.R.S. § 8-3.3-113(4)(a).
37. C.R.S. § 8-3.3-113(5)(b).
38. C.R.S. § 8-3.3-112(1).
39. C.R.S. § 8-3.3-112(2).
40. C.R.S. § 8-3.3-112(4).
41. C.R.S. § 8-3.3-112(1).
42. C.R.S. § 8-3.3-114(1).
43. C.R.S. § 8-3.3-114(2)(a).
44. C.R.S. § 8-3.3-114(2)(a).
45. C.R.S. § 8-3.3-114(2)(b).
46. C.R.S. § 8-3.3-114(4)(b).
47. C.R.S. § 8-3.3-114(5).
48. C.R.S. § 8-3.3-114(5).

Continued on page 38

Homelessness *cont'd from page 33*

property, including park areas. The City's enforcement approach aimed to balance the safety and well-being of individuals experiencing homelessness, with the interests of the broader community, including access to green space for safe outdoor recreational activity.

In enforcing the City's Parks By-law, municipal law enforcement is the first point of contact when responding to Park By-law violations, which allows the housing outreach team to remain focused on their core role of engaging and connecting homeless individuals to housing and available services. Ticketing those who are homeless is not a course of action; however, if necessary after all efforts to connect individuals to appropriate alternative options are exhausted, a trespass notice is issued. Once a trespass notice is issued, the continued occupation is enforced by Hamilton Police Services. Often this results in homeless individuals being moved to another area within the City, rather than relying on police responses, such as ticketing or formally arresting individuals. Public works plays a significant ongoing role to ensure that encampment sites are cleaned and cleared in a timely fashion.

On March 30, 2022, Hamilton City Council gave approval to step up enforcement and the dismantling of encampments in City parks. City Council voted in favour of issuing trespass notices within 72 hours after a first complaint is received and implementing a seven-day-a-week municipal law enforcement operation. Despite the challenges, the City reimaged the opportunity it was presented,:to meet timelines staff sought approval to create a Coordinated Response Team ("CRT"), made up of stakeholders from a variety of municipal departments, including housing, municipal law enforcement and public works-parks. The CRT comprises a Director, Manager, Senior Project Manager, Supervisor, and four municipal law enforcement officers. The CRT leads daily roundtable discussions with a variety of agencies, including the police, to discuss daily challenges including encampment locations, cleanliness, risk factors, number of individuals, whether the encampment is on private or publicly owned property, and agreed upon next steps. This coordinated approach has allowed for greater service integration and has allowed staff to maximize enforcement efforts, while minimizing the impact on those who need assistance.

Since March 2022, the CRT have actioned approximately 737 encampment investigations on public and private property, resulting in 32 notices of trespasses issued. Voluntary compliance was achieved at the remaining sites.

NOTES

1. In Canada approximately 235,000 people experience homelessness per year. Strobel, S., Burcul, I., Dai, J. H., Ma, Z., Jamani, S., & Hossain, R. (2021). Characterizing people experiencing homelessness and trends in homelessness using population-level emergency department visit data in Ontario, Canada. Health Reports, 32(1), 13–23. https://doi.org/10.25318/82-003-x202100100002-eng
2. 2021 ONSC 7224.
3. Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11.
4. *Ibid.*
5. Court File No. CV-20-73435
6. The Enforcement Protocol provides that: Prohibited Areas: all individuals experiencing homelessness in encampments – even when deemed high acuity or engaged with outreach in the 14-day grace period outlined above – are subject to the following restrictions and may be removed or moved if not in compliance with them:
   - No more than 5 in an encampment;
   - No encampments on sidewalks, roadways or boulevards;
   - Encampments must not encumber an entrance or exit or deemed fire route;
   - Encampments must be 50 metres from a playground, school or childcare centre;
   - No encampments within any property with an environmental or heritage designation; and
   - Situations where health and safety concerns exist for those living within or adjacent to an encampment will be addressed in a reasonable fashion, in good faith, on a case by case basis by the City in its sole discretion that balances the needs of both the person experiencing homelessness/encamped individuals and community members. In these situations, the City will consult with the Encampment Task Force and the City's Mental Health and Street Outreach team to determine how to best balance the needs of persons experiencing homelessness/encamped individuals and other community members.
7. Poff v. City of Hamilton, 2021 ONSC 7224 at para. 13.
8. [1994] 1 S.C.R. 311.
9. Section 7 of the Charter provides for "life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."
10. Para. 247.
11. Para. 249.
12. Para. 244.

Tribal Sovereignty *cont'd from page 29*

27. 25 U.S.C. § 5302(a).
28. Cohen's Handbook, § 1.07 at 99.
29. "Indian country" generally includes "formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States." Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 453 n. 2 (1995) (internal quotation marks and citation omitted).
30. *See e.g.*, Oregon Executive Order 96-30, codified into Senate Bill 770 (2001).
31. *See, e.g.*, https://www.ncai.org/tribal-directory/tribal-organizations (listing of Regional Intertribal Organizations and National Intertribal Organizations); see also, e.g., https://www.itcnet.org/ (Intertribal

Timber Council), https://critfc.org/ (Columbia River Intertribal Fish Commission).
32. *See, e.g.,* Fisher v. Dist. Ct. , 424 U.S. 382, 389 (1976) (exclusive tribal court jurisdiction for tribal member adoption proceedings).
33. FMC Corporation v. Shoshone-Bannock Tribes, 942 F.3d 916, 932 (9th Cir. 2019)(quoting Montana v. United States, 450 U.S. 544, 565 (1981).
34. *Id*. (quoting *Montana*, 450 U.S. at 566).
35. *Id*.
36. *Id*.
37. *Id*.
38. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973).
39. *See* Williams v. Lee, 358 U.S. 217 (1959); *see also* 28 U.S.C. § 1360 (providing jurisdiction to six states over civil causes of action between Indians or to which Indians are parties with arise in Indian country); 25 U.S.C. § 1322 (state may assume civil jurisdiction with tribal consent).
40. Bay Mills Indian Community, 572 U.S at 788.
41. *Id*. (quoting Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C., 476 U.S. 877, 890 (1986)).
42. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 754 (1998).
43. United States v. Wheeler, 435 U.S. 313, 327-28 (1978); accord Denezpi v. United States, 142 S.Ct. 1838, 1845 (2022).
44. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (Indian tribes do not have inherent criminal jurisdiction over non-Indians); see also United States v. Lara, 541 U.S. 193 (2004) (Congress may relax restrictions on Indian tribes criminal jurisdiction over nonmember Indians).
45. 18 U.S.C. § 1162.
46. 25 U.S.C. § 1321.
47. *See generally Castro-Huerta*, 142 S.Ct. 2486 (2022).
48. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982).
49. Atkinson Trading Co. v. Shirley, 532 U.S. 654, 652-53 (2001).
50. Oklahoma Tax Comm'n, 515 U.S. at 458.
51. *Id*. at 459.
52. *Id*.
53. National Association of Counties Executive Summary of The Bipartisan Infrastructure Law, https://www.naco.org/sites/default/files/documents/2022%20IIJA_ExecSumm_update_v1.pdf (last visited Sept. 18, 2022).
54. *Id*.
55. *Id*.
56. S*ee, e.g.,* Cal. Pub. Resources Code, § 5097.98; Or. Rev. St. 97.745.
57. *See* https://www.bia.gov/bia/ots/fee-to-trust for more resources.
58. 25 C.F.R. § 151.3.
59. Under Secretarial Order 3400, Delegation of Authority for Non-Gaming Off-Reservation Fee-to-Trust Acquisitions (April 27, 2022), all non-gaming off-reservation fee to trust applications have been re-delegated to the Regional BIA offices, which all off-reservation gaming fee to trust applications remains with the Assistant Secretary for Indian Affairs.
60. 25 C.F.R. § 292.23.

Unionization *cont'd from page 35*

49. C.R.S. § 8-3.3-114(2)(b), (4)(e).
50. C.R.S. § 8-3.3-114(6)(a).
51. C.R.S. § 8-3.3-103(5).
52. C.R.S. § 8-3.3-104(1).
53. C.R.S. § 8-3.3-104(2).
54. C.R.S. § 8-3.3-104(3)(b).
55. C.R.S. § 8-3.3-104(3)(a).
56. C.R.S. § 8-3.3-104(3).
57. C.R.S. § 8-3.3-104(4).
58. C.R.S. § 8-3.3-115(1)

Amicus *cont'd from page 27*

for local governments presented itself in *Baker v. McKinney*. This case is reminiscent of one in which IMLA participated as an amicus in *Lech v. Jackson* back in 2018 and unfortunately, it is the kind of case that draws a lot of media attention and amici on the other side.[10]

In this case, an armed fugitive entered the home of Vicki Baker with a fifteen-year-old hostage. Baker's daughter, Deanna Cook, was in the home at the time and left when the suspect arrived and called the police to inform them of the hostage situation. When police arrived, they surrounded the home, and the suspect released the hostage. Cook informed the police that the suspect, who she knew, had several guns, and did not intend to come out alive.

The officers followed standard procedures to compel the armed suspect to surrender, first using tear gas, and eventually breaking down both the front and garage door. They also knocked down part of the backyard fence. Once the officers made it inside the home, they found the suspect had taken his own life. While the police actions were lawful and proper, they caused damage to the home.

Baker sued under Section 1983, claiming the police actions amounted to an unlawful taking under the Fifth Amendment and sought $50,000 for the damage to her home. The City moved to dismiss the case for failure to state a claim and the district court concluded that it would not adopt a rule foreclosing recovery for the destruction of private property arising out of the valid exercise of a local government's police power. Thus, even though nobody disputes that the police acted lawfully in exercising their police power, the district court allowed the claim to go forward to determine if the officers should pay just compensation for a taking.[11]

Continued on page 38

Amicus *cont'd from page 37*

As noted above, IMLA was involved as an amicus in support of the City of Greenwood, Colorado in *Lech v. Jackson*, a similar case at the Tenth Circuit. In *Lech*, an armed suspect also barricaded himself inside of an innocent third party's home. The police followed standard police procedures and performed their duties lawfully, ultimately arresting the suspect after a 19-hour standoff wherein he fired at the police multiple times, endangering their lives. Fortunately, nobody was injured, but in the process, the Lechs' home suffered significant damage such that it needed to be rebuilt.[12]

The Lechs also brought a Section 1983 claim, arguing the destruction of the home pursuant to the officers' valid use of their police powers amounted to a taking. The Tenth Circuit ultimately rejected the Lechs' argument, concluding that "when the state acts pursuant to its police power, rather than the power of eminent domain, its actions do not constitute a taking for the purpose of the Takings Clause."[13] And in the *Lech* case, the court concluded that the damage to the home was "not a taking for public use, but rather its was an exercise of the police power."[14]

IMLA maintains the position that local governments should not be sued under the Fifth Amendment for a taking based on valid uses of their police powers. In addition to hostage situations like those in *Lech* and *Baker*, it is not difficult to imagine other emergency scenarios where creative plaintiffs may seek to expand the Takings Clause. In *United States v. Caltex*, the Supreme Court touched on a similar issue involving the U.S. Military's purposeful destruction of oil refineries in the Philippines in the immediate aftermath of the bombing on Pearl Harbor and the enemy's imminent arrival on the island and potential capture of the refinery.[15] In *Caltex*, the Supreme Court held the federal government was not liable for an uncompensated taking under the Fifth Amendment, concluding "the common law had long recognized that in times of imminent peril—such as when fire threatened a whole community—the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved."[16] Indeed, one of IMLA's concerns with the expansion of takings claims into local governments' valid use of their police powers is in the area of firefighting. Should a local government be liable because its firefighters had to destroy a house or structure to prevent a fire from spreading to a whole neighborhood? The problem with imputing liability on the local government under such a scenario played out during the Great Fire of London in 1666:

> "We find, indeed, a memorable instance of folly recorded in the 3 Vol. of Clarendon's History, where it is mentioned, that the Lord Mayor of London, in 1666, when that city was on fire, would not give directions for, or consent to, the pulling down forty wooden houses, or to the removing the furniture, &c. belonging to the Lawyers of the Temple, then on the Circuit, for fear he should be answerable for a trespass; and in consequence of this conduct half that great city was burnt."[17]

IMLA believes there would be significant consequences for local governments and their ability to act in emergency situations if plaintiffs could bring takings claims for valid use of local government police power in these types of situations. The *Baker* case is currently pending before the Fifth Circuit where IMLA will file an amicus brief. ML

NOTES

1. Cedar Point Nursery v. Hassid, 594 U.S. __, p. 7(2021).
2. *Id*
3. *Cedar Point Nursery* 594 U.S. __, p. 1 (2021) (Breyer, J. dissenting).
4. *Id*
5. *See* Yim v. City of Seattle, No. 21-35567 (Ninth Circuit); Seattle Municipal Code § 14.09 et seq. "Adverse action" is defined as refusing to rent to the person, evicting the person, or charging higher rent. S.M.C. §14.09.010.
6. *Yim*, No. 21-35567, Dkt Entry 9, p. 45-46.
7. *Id*. at 46.
8. *See* IMLA Amicus Brief, Yim v. City of Seattle, No. 21-35567, Dkt Entry 28.
9. The *Yim* case involves other arguments as well, including those under the First Amendment, but those arguments are not the focus of this article.
10. *See* Nick Sibilla, Forbes, "After Texas City Refused to Pay For Destroying Her Home, Woman Wins Landmark Fifth Amendment Case," July 11, 2022, available at: https://www.forbes.com/sites/nicksibilla/2022/07/11/after-texas-city-refused-to-pay-for-destroying-her-home-woman-wins-nearly-60000/?sh=485887ba644f.
11. Baker v. City of McKinney, 4:21-CV-0176-ALM (E.D. Tex. June 22, 2022), 2022 WL 2298974. A jury ultimately found in favor of Ms. Baker, awarding her nearly $60,000 in damages.
12. It is worth noting that both the Lechs and Ms. Baker had homeowners' insurance that covered the vast majority of the damage caused by the police.
13. Lech v. Jackson, 791 F. App'x 711, 717 (10th Cir. 2019).
14. *Id*. at 718, quoting Bachmann v. United States, 134 Fed. Cl. 694, 698 (Fed. Cl. 2017).
15. United States v. Caltex, 344 U.S. 149, 154, 73 S. Ct. 200, 202, 97 L. Ed. 157 (1952).
16. *Id*.
17. *Id*. at 155 n.7 quoting Respublica v. Sparhawk, 1 U.S. 357, 363 (1788) (emphasis added).

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