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Saving the World: How Municipal Lawyers Can Help in the Fight Against Climate Change



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CONTENTS

JANUARY / FEBRUARY 2023



SAVING THE WORLD: HOW MUNICIPAL LAWYERS CAN HELP IN THE FIGHT AGAINST CLIMATE CHANGE
By: Roger Horner, Senior Legal Editor, Thomson Reuters Practical Law, Government Practice Service, Nashville, Tennessee
The accelerating consequences of climate change are affecting localities worldwide, requiring rapid action. Government at every level has a significant role to play. As advisors to thousands of localities across America and Canada, local government attorneys can make a major contribution towards the creation and codification of measures to fight back. The author describes the crisis and provides a compendium of resources.
PAGE 6

CONFLICTS OF INTEREST IN POLICE MISCONDUCT LITIGATION AND WHAT TO DO ABOUT THEM
By: Lawrence Rosenthal, Professor of Law, Chapman University Dale E. Fowler School of Law, Orange, California
It might seem intuitively obvious that Section 1983 actions against individual police officers would stimulate improvements in departmental training, programs, and disciplinary policies. But the empirical evidence is that Section 1983 litigation results in few such enhancements. Among the primary reasons are the ethical duties owed by counsel to the officer; even if provided by, and compensated by, the department, that advisor cannot reveal information which might promote change.
PAGE 10

DEPARTMENTS

16 INSIDE CANADA
Mooted COVID Challenges, Intermunicipal Libraries, Roadway Hazards, and More
By: Monica Ciriello, Director of Municipal Law and Licensing Compliance, City of Hamilton, Ontario
Recent cases of interest.

18 AMICUS
Litigation Trends Surrounding Homelessness
By: Amanda Karras, IMLA Executive Director and General Counsel
Increasing challenges in the wake of *Martin v. City of Boise*.

20 LISTSERV
Hey – Where Did Our Team Go?
By: Brad Cunningham, Municipal Attorney, Lexington, South Carolina
On the value—fiscal and psychological—of a team to call your own.

27 CONFERENCE UPDATE
IMLA in Portland
We welcome a new President, hear from domain experts, honor outstanding members, and have some fun.

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Saving the World: How Municipal Lawyers Can Help in the Fight Against Climate Change

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INTRODUCTION

Around the world, signs of climate change have been abundant in recent years. Extreme rainfalls, record heatwaves, devastating droughts, and widespread wildfires fill the news with alarming regularity. International efforts to slow down the effects of harmful greenhouse gases have been insufficient. However, the frequency and intensity of climate-related disasters have led to a call to action in both the public and private sectors.

In the United States, new federal legislation funding broad initiatives to reduce greenhouse gas emissions has passed. At the state and local level, some governments have adopted climate action plans and net zero emissions targets. Yet there remains much to do. Municipal lawyers who care about the environment and worry about climate change may think they have little or no ability to make a difference. However, they are in a key position to influence local government response to the climate crisis. Incorporating language into agreements and regulations governing procurement, project management, and land use can dramatically improve a municipality's environmental impact. This article provides information about the climate crisis and its potential local consequences for communities in the US. It also looks at ways local government attorneys can help carry out environmental goals and develop contracts and regulations that address climate.

I. What the Facts Show

While concerns about climate change have existed for decades, recent statistics and news accounts indicate that its effects are accelerating.

For example:

A. The ocean is warming. Since the mid-1990s, the heat content of the world's oceans has consistently exceeded the average levels for the preceding four decades.[1] Such a dramatic increase has ominous implications; once heat energy is absorbed in the ocean, it can continue warming the earth for decades.[2] (*See Fig.1 on next page.*)

B. Glaciers and ice sheets are melting. Eleven people died in July 2022 when a glacier collapsed in the Italian Alps due to a lack of winter snow and abnormally high summer temperatures, which combined to create unstable conditions. Himalayan glaciers have also shrunk dramatically; in Pakistan, accelerated glacial melt combined with monsoon rains in 2022 to create flooding that killed more than 1,300 people and left hundreds of thousands homeless. At the same time, losses from the world's largest ice sheet in Antarctica have doubled previous estimates over the past 25 years.[3]

C. Sea levels are rising. Higher sea levels create greater damage from storm surges, high tide flooding, coastal erosion, and wetland loss. Between 2000 and 2020, the frequency of coastal flooding more than doubled in places such as New York City; Norfolk, Virginia; Miami, Florida; and Charleston, South Carolina.[4] And rising sea levels are threatening the future in other parts of the world: the Maldives in the Indian Ocean, and cities such as Lagos, Nigeria; Dhaka, Bangladesh; Rotterdam, Netherlands; and Alexandria, Egypt.[5]

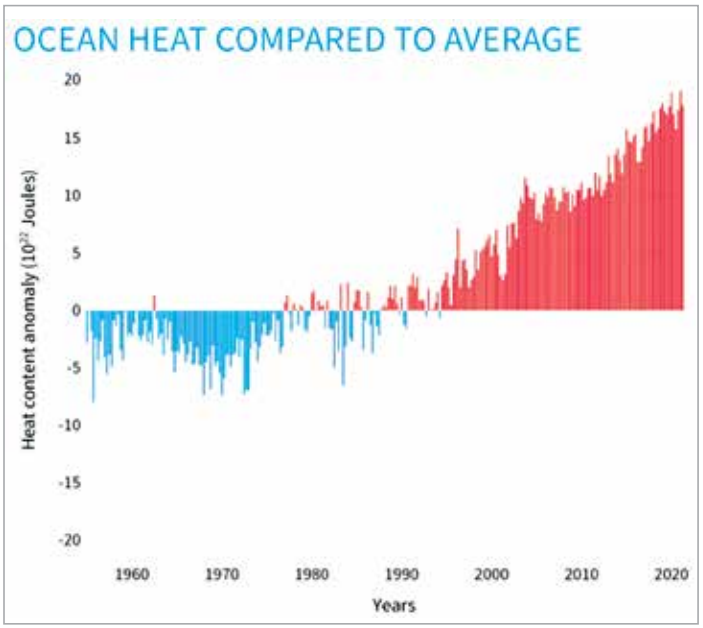


FIG.1

D. Temperatures are setting records. In 2022, new high temperature records were set in cities in:

- Australia in January;
- India in March;
- France, Norway, and Japan in June and the United Kingdom in July;
- China in July and August; and
- The US in June, July, and September.

The ten warmest Junes on record have all occurred since 2010, with June 2022 being the sixth warmest. [6]

E. Recent signs of climate change in the US.

1. Billion-Dollar Disasters.

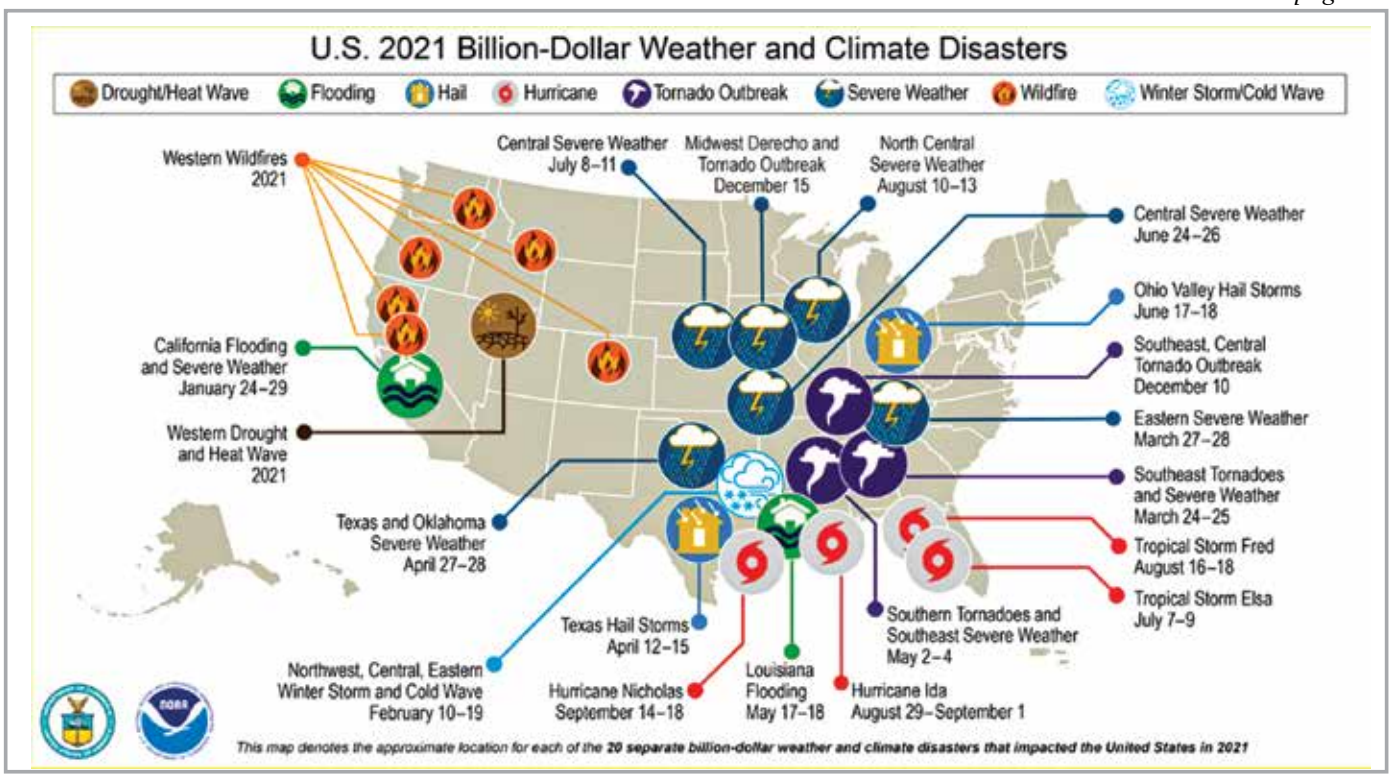
According to the National Oceanic and Atmospheric Administration (NOAA), 20 separate weather and climate disasters hit the US in 2021, at a cost of $145 billion (see NOAA map below). The number of billion-dollar disasters in 2021 was second only to 2020, when 22 separate events occurred:[7]

2. Continuing Pattern in 2022.

Massive weather and climate disasters continued to hit the US in 2022, including events such as:

- A Nor'easter leaving more than two feet of snow in Boston in January.
- Flooding in June that closed Yellowstone National Park for the first time in 34 years.
- Massive wildfires in California in July.
- A drought covering more than 93% of Texas, causing water shortages and widespread loss of pastures, crops, and cattle.
- A thousand-year flooding event in Kentucky in late July and early August, resulting in 39 deaths, followed by flooding in August that shut down the municipal water system in Jackson, Mississippi.
- Back-to-back hurricanes in September, with Hurricane Fiona hitting Puerto Rico and Hurricane Ian flooding much of Florida before moving up the East Coast.

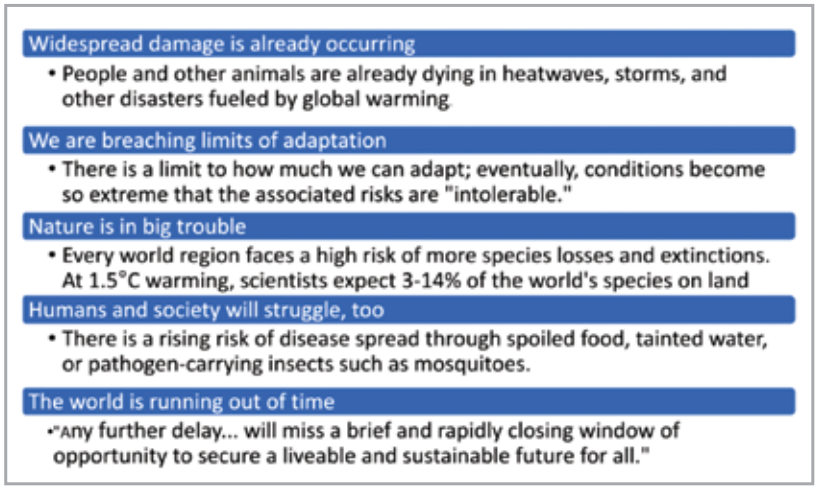
Continued on page 8



Climate *cont'd from page 7*

II. What the Future Holds

The Intergovernmental Panel on Climate Change of the United Nations (IPCC) issued its Sixth Assessment Report in 2022, calling for drastic action to ward off the increasingly dangerous impacts of climate change. Reuters News reported on key takeaways from the report, as shown below:[8]



A. The Paris Agreement and the Significance of 1.5° Celsius. In November 2016, the international treaty known as the Paris Agreement went into effect after it was ratified by 55 countries, including the US, that produce at least 55 percent of the world's greenhouse gas (GHG) emissions. The US withdrew from the Paris Agreement during the Trump Administration but re-entered it in 2021. Nearly 200 nations are now part of the Paris Agreement. Participants must periodically submit plans for curbing their emissions and report on their progress. Additionally, developed nations agree to help developing nations meet goals. Many municipal governments and hundreds of private companies across the world have also pledged to reduce their GHG emissions in furtherance of the Paris Agreement's goals.

The overall goal of the Paris Agreement is to:

- Limit global warming well below 2 degrees Celsius (3.6 degrees Fahrenheit) above pre-industrial levels
- Pursue efforts to limit the increase to 1.5 degrees Celsius (2.7 degrees Fahrenheit).

The planet is currently at 1.1 degrees Celsius above pre-industrial levels and scientists warn that the window is closing to reach the Paris Agreement's 1.5-degree goal. Given the frequency of climate disasters under current conditions, even an increase of 1.5 degrees will have major environmental and socioeconomic impacts. More concerning, the IPCC warns that if temperatures are allowed to increase by 2 degrees, the consequences will be extremely severe. For example:[9]

- 99 percent of the world's coral reefs will disappear, devastating the marine food chain.
- The West Antarctic ice sheet will be lost.
- Sea level rise will submerge large portions of coastal cities around the world.

B. The Effects on State and Local Governments. Mitigating climate change is difficult and costly. However, failing to take adequate steps will result in an economic, environmental, and human toll that far outweighs mitigation costs. State and local governments must be prepared to deal with problems such as:

- Rapid increases in sea levels. On average, NOAA predicts that sea levels along US coastlines will rise 10 to 12 inches.[10]
- High tide flooding. High tide flooding (HTF) occurs when ocean water at high tide covers low-lying areas. With rising sea levels, a full moon or changes in prevailing winds or currents can produce flooding that once only occurred during storms. HTF typically results in water spilling into streets and bubbling up from storm drains, requiring municipal response and remediation efforts. NOAA projects that the number of HTF days will increase dramatically in places such as those shown below:[11]

Location	High Tide Flood Days 2021	Projected 2050
Boston, MA	7	50-70
Baltimore, MD	8	65-105
St. Petersburg, FL	0	70-110
Corpus Christi, TX	4	110-150
San Francisco, CA	0	6-20

- **The disproportionate impact of weather disasters on minorities and lower-income populations.** While weather catastrophes can affect people of all races and income levels, where people live has a significant effect on their vulnerability. For example:[12]

  - Hurricanes threaten more counties with large African-American populations than any other community type.
  - Droughts disproportionately affect Hispanic populations in more rural areas.
  - Extreme rainfall events happen more frequently in largely African-American counties, working class counties, and blue-collar suburbs.

C. Climate Migration. As climate change and weather disasters make some areas increasingly dangerous, large segments of the population may shift to safer locations. In some cases in the US, hurricanes and wildfires have caused some residents to relocate to new areas, sometimes in another part of the country but sometimes relatively close. However, the likelihood, timing, and impact of mass migrations is difficult to estimate because:

- Migration may happen gradually in response to some climate issues and rapidly in response to others. Rising temperatures and droughts may result in a slow but steady pattern of population shifts, while more immediate catastrophes that result in widespread losses of life and property may cause a mass exodus.
- Even in areas threatened by adverse climate and weather events, many people are willing to accept the risks. For example, many coastal areas are still seeing significant growth and development, even as hurricanes happen with regularity and coastlines are retreating.

However, in planning for the future, communities may need to acknowledge the potential for:

- **Permanent migration away from the area.** Some parts of the world that are heavily populated may eventually become undesirable or even uninhabitable due to factors such as extreme temperatures or disappearing coastlines.
- **Temporary migrations and fluctuations.** Disasters that disrupt life and destroy homes may force residents to relocate. However, some may choose to return or the availability of affordable housing in a rebuilt community may attract new residents. For example, after a 2018 wildfire destroyed most of the town of Paradise, California, many of its residents had no choice but to move away. More recently, however, the town has seen a real estate boom, with both former residents and newcomers moving into new homes there.
- **Incoming migration.** People leaving areas due to climate-related causes may seek out places that will be relatively unscathed by climate change. A study published by ProPublica found that six of the ten counties with the least risks from climate change are in Vermont, while three are in Maine and one is in New York.[13] However, other factors can also influence individual decisions on where to relocate, including economic opportunities, healthcare availability, and proximity to family. In any event, some communities the US should expect to see population growth as a result of climate change.

D. Combining Manmade Hazards with Natural Hazards. In addition to understanding the ramifications of climate change, municipalities should consider how other hazards in or near the area can make adverse climate events even worse. For example, a natural hazard may trigger an accidental release of chemicals from a facility that makes, uses, handles, or stores hazardous substances. Out of 11,000 EPA-regulated facilities with extremely hazardous chemicals, 31% are in areas at risk for climate-related disasters:[14]

Facilities in Areas at Risk for Flooding, Storm Surge, Wildfire, or Sea Level Rise



E. Green Gentrification. Many cities have seen efforts to reclaim polluted areas for new development or provide climate-friendly features in urban residential areas. New green spaces, waterfront restorations, and other environmentally focused features can provide community benefits and enhance sustainability. However, they can also drive up property values and push lower income residents away. Even practical efforts such as elevating buildings and erecting seawalls to prevent losses from storm surges can attract residents with more money.

In east Boston, a carbon-neutral project provided a rehabilitated shoreline, stabilized seawalls, and waterfront apartments. However, the new development displaced former residents of the area and demand for residential units drove their prices above $1 million.[15] To avoid limiting green enclaves to wealthier occupants, new urban development will need to include a sufficient proportion of affordable housing units to address community needs.

III. Signs of Progress

A. New Climate Bill. In August 2022, the US Congress passed the Inflation Reduction Act (HR 5376), which includes almost

Continued on page 14

Climate *cont'd from page 9*

$375 billion in funding for tackling the climate crisis. Large portions of this funding will go toward renewable energy production and tax breaks that encourage consumers to buy new or used electric vehicles. Estimates show that by 2030, the legislation will help reduce the nation's GHG emissions by 42 percent from their peak levels in 2005. The White House's goal is to reduce emissions by at least 50 percent by 2030.

1. **Help for State, Local, and Tribal Governments.** The new climate legislation includes provisions that support state, local, and tribal efforts to reduce GHG emissions, such as:

- Funding for the first national "green bank," which can also be distributed to state and regional green banks. Sixty percent of this funding must support projects such as community solar and environmental justice programs for disadvantaged communities.
- Grant programs for:
  - urban forests and parks; and
  - water supply in places without reliable domestic water sources.
- Support for air pollution reduction efforts at ports, such as climate action plans, zero-emission technology, and new equipment.
- A clean heavy-duty vehicle program to offset costs of zero-emission transit buses, garbage trucks, and school buses.
- State rebate programs for homeowners achieving demonstrated energy savings, including those in affordable housing.

(See "Governing: What Does the Inflation Reduction Act Do for State and Local Government?"[16] For more information on the new act and how it benefits cities, see "Columbia Law School: Cities & The Inflation Reduction Act."[17])

B. State and Local Government Initiatives. Some state and local governments have taken their own measures to move toward net zero goals. In some cases, these actions came in response to the Trump administration's walk-back of environmental protections, while other initiatives have come more recently. Examples of these state and local actions include the following:

- Cities and counties have adopted climate action plans setting targets for GHG emission reductions, along with steps for achieving their targets.
- Fairfax County, Virginia's plan includes:[18]
  - green building commitments for new buildings;
  - retrofitting at least 100,000 housing units with energy efficiency measures by 2030;
  - increasing transit and non-motorized commuting to 30% (including teleworking) by 2030;
  - increasing zero-emission vehicles to at least 15% of all light-duty vehicle registrations by 2030;
  - expanding tree canopies to 60%, with a minimum of 40% tree canopy coverage in every census block by 2030; and
  - diverting at least 90% of waste from landfills and incineration.
- Phoenix, Arizona has taken actions such as:
  - prioritizing a "cool corridor" program that aims to create "tree equity" and add much-needed shade in disadvantaged neighborhoods; and
  - piloting the use of "cool pavement" that reflects sunlight rather than absorbing it (*see" City of Phoenix: Cool Pavement Program."*)[19]
- The California Air Resources Board (CARB) has adopted a rule requiring all new cars and light trucks sold in the state to be zero-emission vehicles (including plug-in electric vehicles) by 2035. Eleven percent of the nation's light-duty vehicle sales occur in California. There are 17 other states that have followed California's lead on other vehicle rules. If these states follow suit on California's zero-emission vehicles, the requirement will apply to 40 percent of US light-duty vehicle sales. (*For more information on California's action, see "CARB: California moves to accelerate to 100% new zero-emission vehicle sales by 2035."*[20])

The Rocky Mountain Institute (RMI), a nonprofit focused on improving America's energy practices, provides State Climate Scorecards that evaluate the efforts of states toward reducing GHG emissions. In addition to California, the scorecards show Colorado, Illinois, New Jersey, New York, and Washington to be the farthest along with their policies. RMI identifies these policies as the best options for putting states on net zero pathways:[21]

- Investing in clean electricity infrastructure, such as wind and solar.
- Replacing air conditioners, furnaces, and water heaters with heat pumps.
- Prioritizing the use of electric vehicles.
- Shifting industrial activity from burning fossil fuels to electricity.
- Capturing methane and fixing leaks from fossil fuel infrastructure, including oil and gas sites, and landfills.

C. Sources of Help. City attorneys and other municipal officials may find pertinent resources and educational opportunities through government agencies and professional organizations such as IMLA. Additionally, nonprofits supporting local government efforts to fight climate change include:

- **C40 Cities**, a network of mayors from across the world, collaborating to halve the emissions of its member cities within a decade.
- **Climate Mayors**, a bipartisan network of US mayors committed to climate leadership.
- **Resilient Cities Network**, with members from around the

world working to protect communities from climate change and other urban challenges.
- **Local Governments for Sustainability**, a global network of local governments devoted to sustainability challenges.

1. The Chancery Lane Project.
The Chancery Lane Project (TCLP), based in the United Kingdom, is a pro bono initiative that brings legal professionals across the world together to collaborate, rewrite contracts, and create legal standards to tackle the climate crisis.[22] TCLP has developed a broad range of climate clauses. Although most of TCLP's current clauses are for use in the United Kingdom, many have potential applicability in the US, and efforts are ongoing to increase the number of TCLP's US-specific clauses.

In addition to drawing from its clauses, US attorneys can help further TCLP's work by contributing new climate clauses or joining the effort to adapt UK-focused clauses for use in the US. Pro bono opportunities are available for attorneys with diverse professional backgrounds and experience levels.[23]

2. Legal Pathways to Deep Decarbonization Project.
The Legal Pathways to Deep Decarbonization (LPDD) website[24] provides resources for legislators and advocates at the federal, state, and local level, including:
- More than 50 model laws focused on reducing GHG emissions, drafted by pro bono attorneys and peer reviewed by experts.
- Over 2,000 other laws adopted or proposed by state and local governments to reduce GHG emissions.

(*For information on drafting or peer reviewing model laws for the LPDD Project, or to receive monthly updates, see "LPDD: Get Involved").*

3. Sabin Center for Climate Change Law.
The Sabin Center develops legal techniques to fight climate change and provides up-to-date resources on key topics in climate change law and regulation. Its Cities Climate Law Initiative works with local government attorneys, sustainability staff, and others to provide guidance on the legal aspects of local carbon mitigation policies. The Sabin Center's work includes legal research and memorandums, policy drafting, amicus briefs, and webinars for policymakers. (*For a report identifying legal considerations for local climate policies across the buildings, transportation, waste, and energy sectors, see "Sabin Center: Cities Climate Law: A Legal Framework for Local Action in the U.S."*)[25]

IV. City Attorneys as Climate Change Fighters
Local government lawyers can help municipalities in the fight against climate change by:

- Recognizing an ethical obligation to provide advice on environmental policies that considers moral, economic, social, and political factors (*see "The Ethics of Fighting Climate Change," below*).
- Knowing how to talk about the fundamentals of climate change (*see "Becoming Conversant in Climate Change Terminology," below*).
- Acknowledging the risks climate change poses to segments of the community and the potential benefits of mitigation measures (*see "Recognizing Potential Impacts and Solutions in Your Community," below*).
- Identifying and advising on proposed measures in local government climate action plans (*see "Developing Climate Action Plans," below*).
- Putting goals to work in local government regulations and contracts (*see "Incorporating Climate Goals into Regulations and Contracts," below*).

A. The Ethics of Fighting Climate Change. City attorneys are subject to the same rules of ethics that apply to private sector lawyers but must learn how to apply those rules to the practice of municipal law. Rule 2.1 of the American Bar Association's Model Rules of Professional Conduct includes this guidance:

> In rendering advice, a lawyer may refer not only to law **but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.** (Emphasis added.)

This rule recognizes that there is frequently more than just a legal issue involved when clients need their attorneys' advice. This may be especially true in municipal law, where local government actions can affect long-term quality of life issues for neighborhoods and residents. Preparing for and mitigating climate change in your community can involve many moral, economic, social, and political factors, in addition to legal considerations. (All of the states have adopted the ABA rules except for California, which has its own version of ABA Rule 2.1.)

B. Becoming Conversant in Climate Change Terminology.
There is no need for municipal lawyers to become climate scientists to understand climate change threats and the measures that can abate them. However, a basic understanding of commonly used terms and concepts is useful in advising on local government climate change policies.

1. Net Zero.
Policies and goals related to climate change mitigation often refer to the concept of "net zero." This refers to a balance between GHG produced and GHG removed from the atmosphere. Many governments and businesses have set goals to reach net zero by 2050, with incremental GHG reduction goals in the interim (*see "Developing Climate Action Plans," below*). While the White House has set emissions reduction goals for the nation as a whole, local governments can identify measures that are specifically tailored to their communities.

Continued on page 22

Climate *cont'd from page 15*

The best pathway to net zero is to reduce GHG emissions overall. However, local governments must rely on available technologies. Until these technologies are more developed, short-term success in reaching local government goals is likely to rely on offsetting GHG emissions with measures that remove GHG from the atmosphere.

2. Other Essential Terms.
Other terms that lawyers should know when drafting or reviewing climate-related contract clauses and regulations include: greenhouse gases, carbon footprint, carbon offset and carbon capture and sequestration. (*For definitions of these and other helpful terms, see Practical Law's "Glossary of Decarbonization Terms."*)

3. Recognizing Potential Impacts and Solutions in Your Community.
Municipal lawyers should know about the potential local impacts of various climate scenarios and be involved in the local government's plans for addressing those impacts. The municipality should consider the effects of:

- Regional phenomena, such as sea level rise and high tide flooding, along with increasing frequency of heatwaves, wildfires, storms, and extreme rainfalls.
- Specific local impacts on sections of the community, including low-lying areas, neighborhoods with basement apartments, and low-income neighborhoods.
- The potential for residents and businesses to leave or come into the community due to climate migration.

4. Taking the Right Actions.
There is no one-size-fits-all solution for local governments to address climate change. Municipalities should identify both short- and long-term measures that will improve their ability to withstand adverse climate events. These measures will depend on geographic location and many other factors, but may include steps such as:

- Improving public transportation and making communities more bike- and pedestrian-friendly.
- Using electric vehicles throughout the city's fleet and installing charging infrastructure at convenient locations for motorists who live and work in the city.
- Replacing surface asphalt parking with other options.
- Planting trees throughout areas that lack shade.
- Building seawalls and upgrading drainage systems.
- Tax abatements that encourage private sector businesses and property owners to take measures of their own.

5. Planning, Budgetary, and Legal Effects.
Efforts to counteract the impacts of climate change should be an element of the local government's comprehensive plan, zoning ordinance, and capital budget. From a legal standpoint, these efforts may require the city attorney's assistance with:

- Acquiring property and using eminent domain powers.
- Intergovernmental agreements.
- Grant funding from federal and state government sources
- Addressing affordable housing and other issues related to environmental justice.
- Assisting with drafting and enforcing zoning regulations and building codes.

C. Developing Climate Action Plans. Local government actions to fight climate change will be most effective if they are part of a coordinated approach, rather than scattershot efforts. Communities can be more assured that their actions are meaningful if they are part of a well-prepared climate action plan (CAP). At least 35 of the 50 largest cities in the US by population have adopted CAPs.[26] Local CAPs adopted or updated most recently include these:

Adopting CAPs is not just for large cities. Examples of smaller US cities with their own plans include:

- Grand Marais, Minnesota (2020 population, 1,426).[33]
- Aspen, Colorado (2020 population: 7,721).[34]
- Greenville, South Carolina (2020 population: 69,648).[35]
- Bloomington, Indiana (2020 population: 84,691).[36]
- Beaverton, Oregon (2020 population: 98,567).[37]
- Richmond, California (2020 population: 110,051).[38]

City/Name of Plan	Goal
Austin Climate Equity Plan [27]	Net zero GHG emissions by 2040
Columbus Climate Action Plan [28]	45% GHG reduction by 2030 (from 2013); carbon neutral by 2050
Memphis Area Climate Action Plan [29]	51% GHG reduction by 2035 (from 2016): 71% by 2050
Miami Forever Carbon Neutral [30]	60% GHG reduction by 2035 (from 2018); net zero by 2050
Raleigh Community Climate Action Plan [31]	80% GHG reduction by 2050 (from 2007)
San Francisco's Climate Action Plan 2021 [32]	61% GHG reduction by 2030 (from 1990); net zero by 2040

1. **Getting Started.**
Developing and following a CAP can be a daunting prospect. To ensure that the end result provides a meaningful but realistic pathway, local governments should:

- Consider joining with other nearby local governments to adopt joint plans or use the same consultants.
- Select and negotiate a contract with a qualified consultant. Reviewing CAPs adopted by other cities and inquiring about their experiences with the experts they used can be helpful in forming a list of potential consultants.
- Adopt a scope of work that describes the government's approach to building the CAP. For example, see the scope of work issued by Asheville, North Carolina.[39]
- Acknowledge the specific issues the local government will face (see Recognizing Potential Impacts and Solutions in Your Community) and scale the CAP to the community's size and abilities.
- Build buy-in from the community early on and engage stakeholders, including:
  - departments and agencies that are part of the government entity; and
  - members of the community or representatives of those served by the entity.
- Determine if funding for developing the CAP is available through grants, foundations, public utilities, or public-private partnerships.

2. Goals and Strategies.
To show that goals for reducing GHG emissions are not merely idealistic, a CAP must describe the government's strategies for achieving its goals. For example, to achieve the goal of reducing GHG emissions by 40% by 2030, 75% by 2040, and 100% by 2050, the City of Houston[40] developed strategies related to:

- Transportation.
- Energy transition.
- Building optimization.
- Materials management.

The local government may also want to hire a third party, separate from the consultant used to develop the CAP, to validate that the plan's goals and strategies are robust and realistic.

3. The Attorney's Role in Climate Action Plans.
While municipal attorneys may not play a central role in creating CAPs, they may need to:

- Assist in drafting or reviewing requests for proposals and contract documents for outside consultants and other necessary parties.
- Review agreements for grant funding used to develop the plan.
- Advise on the scope of the municipality's authority to carry out proposed climate-related initiatives, along with any preemptions of the municipality's authority under state law.
- Determine the legal implications of fulfilling the CAP and how implementation will involve the city attorney's office.

D. Incorporating Climate Goals into Contracts and Regulations. The municipal attorney must be mindful of the local government's climate-related goals when drafting and reviewing proposed contracts and regulations. Integrating climate clauses into legal documents and laws can be a critical part of implementing a city's climate action plan. However, even if the municipality has not yet adopted a CAP, contract terms and regulatory provisions can focus on environmental impacts and pave the way to a healthier future.

1. Using a Net Zero Mindset.
City attorneys can be instrumental in working toward local government net zero targets by incorporating provisions in contracts and regulations specifically aimed at furthering progress toward the targets. To ensure that potential contractors are like-minded about wanting to minimize their environmental impact, government entities can:

- Include their own net zero targets in bid invitations, requests for proposals, requests for qualifications, or other bid and procurement documents.
- Pre-qualify contractors to limit the pool of bidders to those demonstrating a commitment to green construction, manufacturing, or service delivery practices. Pre-qualification procedures can include asking each potential bidder to:
  - describe any net zero targets they have adopted; and
  - explain the measures they are taking and plan to take to achieve their net zero targets or to otherwise reduce their carbon footprint.

While net zero targets refer to a party's ultimate long-term goal for reducing GHG emissions, contract documents may also define:

- Net zero objectives, representing project-specific goals for the contract. These objectives are meant to move the parties closer to their ultimate targets.
- Net zero benchmarks, setting specific measures a contractor must reach to fulfill the net zero objectives.

2. Climate Goals in Construction Contracts.
Building construction, materials, and operations account for 39% of global carbon dioxide emissions (*see* "*World Green Building Council: Bringing embodied carbon upfront.*")[41] However, the traditional standards of care found in construction contracts do not explicitly require contractors

Continued on page 24

Climate *cont'd from page 23*

to incorporate climate change mitigation or adaptation measures. As a result, government entities and their contractors often build facilities without climate-related risks or decarbonization in mind.

The local government should engage with the project team early on to determine how the project design, specifications, contract terms, and budget can address the government's climate-related expectations. Examples of clauses municipalities can include in contracts for construction of public projects include:

- Requiring the contractor to meet defined net zero objectives, including reaching net zero benchmarks at various stages of the project.
- Rewarding the contractor for meeting net zero objectives, instead of penalizing the contractor for failing to meet them. (*Practical Law subscribers can find sample language online – see "Contract Clauses for Government: Net Zero Incentives."*)[42]
- Prescribing practices for management of construction waste associated with the project, which in turn helps:
  - reduce landfill waste and associated greenhouse gas emissions; and
  - avoid pollution to waterways and other environmentally sensitive areas.

3. Climate Goals in Procurement Contracts.
To ensure that its purchases are environmentally responsible, municipalities should consider procuring equipment, supplies, and materials from sources that:

- Require less transportation.
- Use materials or components that are recycled or otherwise responsibly sourced.
- Reflect the supplier's or manufacturer's commitment to sustainability.

One option for purchasers to evaluate a vendor's corporate responsibility is to look into environmental, social, and government (ESG) ratings. Services like Sustainalytics provide ESG ratings for many industries (see "*Sustainalytics: Company ESG Risk Ratings*").[43] (*Practical Law subscribers can find more on ESG reporting and ratings online – see "Practice Note, ESG Disclosure & Sustainability Reporting Frameworks: ESG Data and Ratings Providers."*)[44]

4. Climate Goals in Other Local Government Contracts.
Local governments sometimes operate facilities with high energy usage or environmental impact, such as landfills, schools, jails, or convention centers. Attorneys may be involved in drafting stand-alone contracts or clauses that are part of broader contracts to address matters such as:

- Retrofitting facilities with energy-efficient appliances, systems, and lighting.
- Reducing single use plastics by vendors in cafeterias and other dining facilities.
- Landfill management practices that reduce GHG emissions and other adverse climate impacts.

In addition to seeking assistance from other cities with the same issues, US attorneys may be able to use some of the clauses developed by The Chancery Lane Project, discussed above. (*For TCLP's clause requiring suppliers to use fewer single use plastics, see "TCLP: Reduction of CO2 from Single Use Plastic."*)[45]

5. Climate Goals in Planning and Zoning.
Many cities already include climate-friendly features in their planning and zoning, without necessarily having a coordinated approach to climate change mitigation. For example, municipal plans and zoning regulations often provide for:

- Preserving open spaces and setting aside land for parks.
- Planting new trees and protecting existing trees.
- Incorporating bike lanes, sidewalks, and other pedestrian-oriented features into street infrastructure.

Beyond these measures, some cities anticipate and encourage higher usage of electric vehicles with incentives such as:

- Free parking on streets and in public garages (*see "LPDD Model Law: Municipal Ordinance for Alternative Fuel Vehicle Parking Benefits."*).[46]
- Designated parking spaces with charging stations at privately owned parking facilities (*see "LPDD Model Law: Designation of Parking Spaces for Electric Vehicles and Installation of Electric Charging Devices*).[47]

With the serious threats presented by rapid climate change, most cities will need to step up their efforts and be more intentional in using planning and zoning to focus on climate issues. For example, some cities have recognized that single-family zoning with large lot sizes contributes to both regional GHG emissions and the affordable housing crisis. In some cases, state laws or local zoning amendments now allow more than one home on lots previously limited to single-family residences.

Cities that have adopted climate action plans can use them as support for overhauling comprehensive plans and zoning ordinances. Municipal attorneys will need to assist in drafting and reviewing new zoning language to confirm that it is within the city's authority, is enforce-

Climate *cont'd from page 24*

able, and carries out the city's intentions.

6. Climate Goals in Building Codes.
To assure that buildings within the municipality are resilient and energy-efficient, the city attorney can assist in efforts like drafting and adopting:

- New building and property maintenance codes that emphasize energy-saving construction and operational practices. For example:
  - some communities have adopted "stretch codes" that go beyond the standards included in other building codes to emphasize higher energy savings. (*For more on stretch codes, see "New Buildings Institute: Stretch Codes.")* [48]
  - codes can require new residential dwellings to include *charging infrastructure for electric vehicles (see "LPDD Model Law: EV Ready Building Code for One- and Two-Family Homes.")*[49]
- Ordinances setting requirements for recycling of construction and demolition waste. (*For example, see "Austin, Texas: Construction and Recycling Ordinance.")*[50]
- Landscaping standards that rely on trees and other plantings that, once established, will provide shade but will not require extensive irrigation.

V. Selling Local Government Climate Policies
Climate policies at any level of government can be a hot-button issue. However, many communities have already adopted regulations, contract provisions, and policies that address climate concerns without necessarily pointing it out. Local government attorneys and officials can get around the political controversy that sometimes accompanies climate-related measures by:

- De-emphasizing terms and references that trigger negative reactions.
- Stressing that climate-related actions will result in:
  - long-term economic benefits to property owners, residents, and the community as a whole;
  - a healthier and safer living environment; and
  - preservation of the community's natural resources and scenic beauty for future generations.

Conclusion.
The federal government and large states can act on climate change in ways that have widespread influence. Municipalities have little or no control over matters such as whether fossil fuels continue to be drawn from their sources. However, since the US is composed of thousands of communities, actions on a smaller scale by each community play an important role in fighting climate change. Municipal attorneys must be prepared to lend their skills and expertise to the fight.

Notes.
1. *See* NOAA: Climate Change: Ocean Heat Content-https://www.climate.gov/news-features/understanding-climate/climate-change-ocean-heat-content
2. *Id*.
3. *See* Reuters: Glaciers vanishing at record rate in Alps; Satellite imagery shows Antarctic ice shelf crumbling faster than thought; and Pakistan looks 'like a sea' after floods, PM says.
4. *See* NOAA: 2022 Sea Level Rise Technical Report.
5. *See* World Economic Forum: These 11 sinking cities could disappear by 2100.
6. *See* NOAA: June 2022 was Earth's 6th-warmest on record.
7. https://www.climate.gov/news-features/blogs/beyond-data/2021-us-billion-dollar-weather-and-climate-disasters-historical
8. *See* Reuters: Key takeaways from the IPCC report on climate impacts and adaptation and IPCC: Climate Change 2022.
9. *See* KQED: Straight Talk on Temperature: Here's What 1.5 Degrees C Means.
To view impacts of different scenarios for coastal areas in the US, *see* NOAA: Sea Level Rise Viewer.
11. *See* NOAA: Tides and Currents.
12. *See* American Communities Project: Mapping Climate Risks by County and Community.
13. *See* ProPublica: New Climate Maps Show a Transformed United States.
14. *See* US Government Accountability Office: Chemical Accident Prevention: EPA Should EnsureRegulated Facilities Consider Risks from Climate Change.
15. *See* PBS NewsHour: How 'green gentrification' is pricing out longtime east boston residents; https:// www.pbs.org/newshour/show/how-green-gentrification-is-pricing-out-longtime-east-boston-residents.
16. https://www.governing.com/now/what-does-the-inflation-reduction-act-do-for-state-and-local-government
17. https://blogs.law.columbia.edu/climatechange/2022/08/22/cities-the-inflation-reduction-act/
18. *See* Fairfax County: Community-Wide Energy and Climate Action Plan, https://www.fairfaxcounty.gov/environment-energy-coordination/climate-planning-action.

Continued on page 26

Climate *cont'd from page 25*

19. https://www.phoenix.gov/streets/coolpavement
20. https://ww2.arb.ca.gov/news/california-moves-accelerate-100-new-zero-emission-vehicle-sales-2035
21. *See* RMI: Sprinting Ahead: Just Five Policies Get States About Two-Thirds of the Way to Key Climate Goals.
22. https://chancerylaneproject.org
23. https://chancerylaneproject.org/get-involved/#sign-up
24. https://lpdd.org/pathways/
25. https://climate.law.columbia.edu
26. *See* Ballotpedia: Climate action plans in the 50 largest cities, https://ballotpedia.org/Climate_action_plans_in_the_50_largest_cities
27. https://www.austintexas.gov/sites/default/files/files/Sustainability/Climate%20Equity%20Plan/Climate
28. https://www.columbus.gov/sustainable/cap/
29. https://shelbycountytn.gov/DocumentCenter/View/37431/Memphis-Area-Climate-Action-Plan-2019-FINAL_4_JANUARY-2020
30. https://www.miamigov.com/files/4e5f26f7-2622-4c90834a- eaaa6aa3321e/Miami-Forever-Carbon-Neutral-FULL.pdf
31. https://cityofraleigh0drupal.blob.core.usgovcloudapi.net/drupal-prod/COR27/RaleighCCAP.pdf
32. https://sfplanning.org/project/san-francisco-climate-action-plan
33. CAP_Final.pdf (grand-marais.mn.us
34. https://www.aspen.gov/DocumentCenter/View/4506/Aspens-Climate-Action-Plan-
35. https://www.greenvillesc.gov/DocumentCenter/View/20686/Sustainability-Plan-PDF?bidId=
36. https://bloomington.in.gov/sites/default/files/2021-04/Bloomington%20Climate%20Action%20Plan%20040521%20Reduced.pdf
37. https://content.civicplus.com/api/assets/5b3ef548-2a25-47b4-afb5-10e0fa862109
38. https://www.ci.richmond.ca.us/DocumentCenter/View/40636/CAP-combined
39. https://drive.google.com/file/d/1cLnxIfmHmuPyKtcS2t-fRuzgZOqK1u-hT/view
40. For more on Houston's goals, *see* "City of Houston: Houston Climate Action Plan," at 20-21.
41. https://worldgbc.org/advancing-net-zero/embodied-carbon/
42. https://content.next.westlaw.com/practical-law/document/Ic6b67c01ab6011ec9f24ec7b211d8087/Contract-Clauses-for-Government-Net-Zero-Objectives?viewType
43. https://www.sustainalytics.com/esg-ratings
44. https://lpdd.org/resources/lpdd-model-law-municipal-ordinance-for-alternative-fuel-vehicle-parking-benefit https://lpdd.org/resources/lpdd-model-law-municipal-ordinance-for-alternative-fuel-vehicle-parking-benefit
45. https://chancerylaneproject.org/climate-clauses/reduction-of-co2-from-single-use-plastic/
46. https://lpdd.org/resources/lpdd-model-law-municipal-ordinance-for-alternative-fuel-vehicle-parking-benefits/
47. https://lpdd.org/resources/lpdd-model-law-designation-of-parking-spaces-for-electric-vehicles-and-installation-of-electric-charging-devices/
48. https://newbuildings.org/code_policy/utility-programs-stretch-codes/stretch-codes/48 of-electric-charging-devices/
49. https://lpdd.org/resources/lpdd-model-law-ev-ready-building-code-for-one-and-two-family-homes/
50. https://www.austintexas.gov/cd



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