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THE SUM OF THE PARTS: MUNICIPALITIES TAKE AIM AT GHOST GUNS

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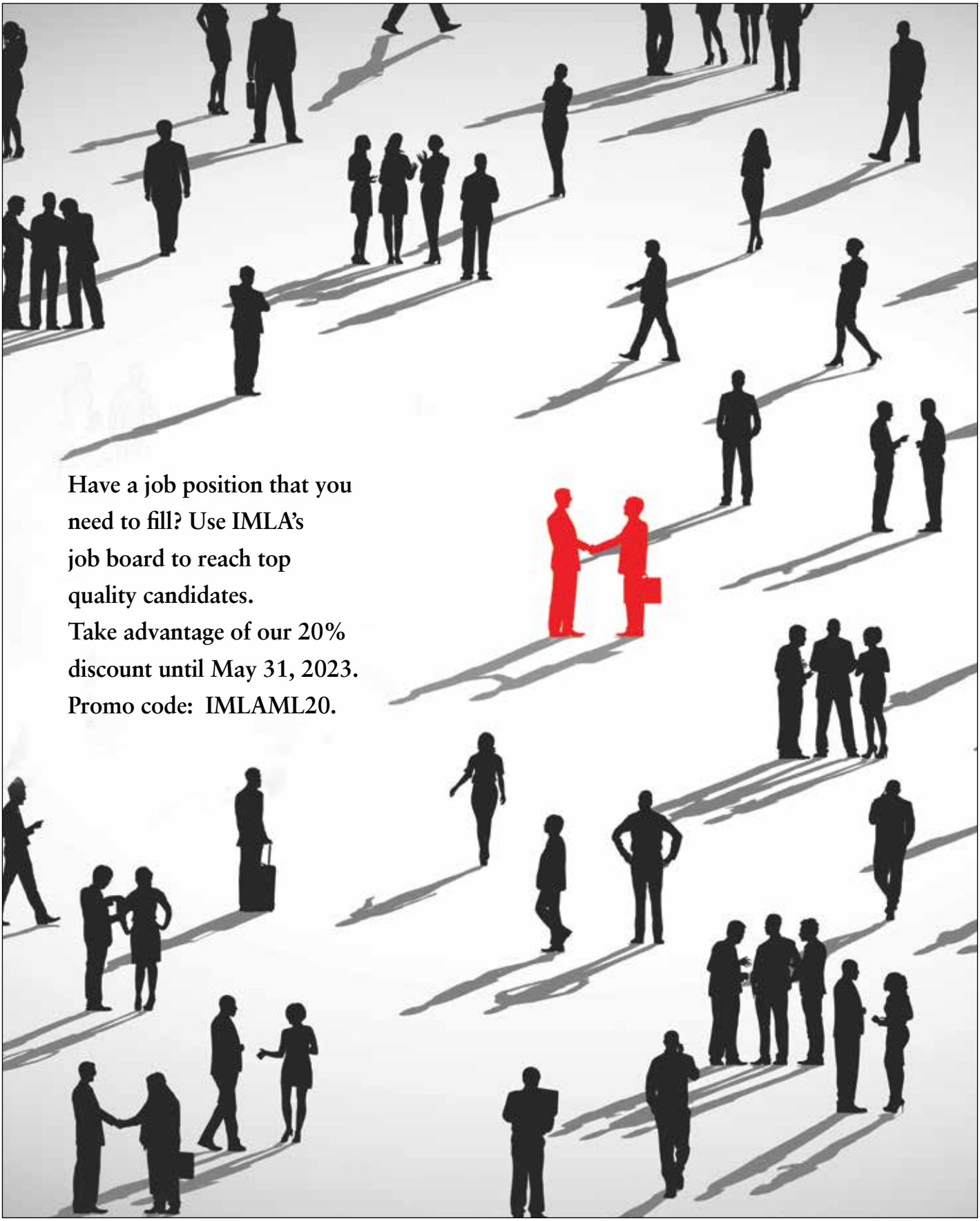
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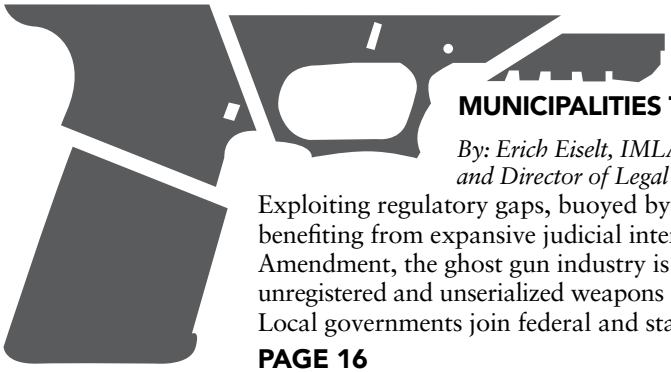

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BY: **ERICH EISELT**
IMLA Assistant General Counsel and Director of Legal Advocacy

A Study in Contrasts

In early February, I traveled to Japan, joining my law school housemate and his wife for a ten-day adventure. Half that time was devoted to a guided trek along the Nakasendo trail, an ancient route linking Kyoto and Tokyo traversed centuries ago by the shogunate class and their retinue. The hike took us up and over snow-blanketed mountain passes, along pristine rivers and through tiny villages that have scarcely changed in a hundred years. Each night, we enjoyed the hospitality of traditional ryokan inns, wearing yukata robes to sumptuous dinners, and sleeping on tatami mat floors in sparse rooms, sometimes only separated by sliding shoji paper doors.

The trek was bookended by Japan at its most modern—stays in spectacular lodgings in Tokyo and Kyoto. We travelled by immaculate shinkansen trains at 200 miles per hour, shopped in glittering city centers, and marveled at the national obsession with cleanliness. For me, who spent six early years in Tokyo and Kobe as the son of an American diplomat, it was a chance to use language skills and reconnect to a country important in my childhood.

One thing immediately evident to all of us was the harmony and mutual sense of respect shared by virtually everyone we observed. In ten days, we rarely heard a horn sound, or an elevated voice. The few sirens were merely ambulances, not police cars rushing to crime scenes. People entering stores on a rainy day obediently sheathed their damp umbrellas in plastic wraps, and subway platforms were routinely vacuumed and swept. All vehicles, whether dump trucks, taxis, or personal cars, seemed spotless and devoid of barely a scratch. Everyone wore masks, outside and in—helping to explain why Japan, with one-third the population of the US, has suffered 36,000 COVID deaths versus more than 1.1 million in our country. And virtually no poverty was visible—as economists will confirm, despite its current financial malaise, wealth in Japan is more evenly distributed than in most countries.

A quasi-utopia? In some ways, perhaps. But Japan's remarkable sense of national consensus and common purpose no doubt arises from factors not present in the US—and in reality diametrically opposite to many of America's most cherished characteristics. Take the foundational principle enshrined on our basic medium of exchange--*e pluribus unum*. Almost all of us trace our origins to lands and cultures far away, and we celebrate our success as a composite, regardless how difficult that task may sometimes be. Racially, the US is a mosaic, with 57 percent of respondents identifying as White, 19 percent as Hispanic, 14 percent as Black, 6 percent as Asian, and just over 1 percent as American Indian and Alaskan Native. Japan is much more specific: 98.1 percent Japanese, with another 1 percent Chinese and Korean. While almost 25 percent of America's residents are foreign-born, in Japan the number is barely over 2 percent. Virtually everyone in Japan speaks the same language, understands the common cultural norms, and avoids actions that will cause conflict.

As this *ML's* cover story suggests, other fundamental principles separate our two nations, beginning with the Second Amendment. Japan prohibits private ownership of pistols, and only allows purchase of rifles by those who have passed mental health tests, taken lengthy firearm safely training, and have undergone thorough background checks. Their nation of 127 million people possesses about 315,000 firearms—roughly ¼ gun per 100 people. (The great irony is that last July, former Prime Minister Shinzo Abe was assassinated by a man who had cobbled together a homemade rifle--one of fewer than 20 firearm deaths in Japan for the year). In the US, where we celebrate the right to bear arms, the total is more than 400 million firearms—about 125 weapons per 100 people, and more than 20,000 gun homicides per year.

Our federalism is also a stark distinction; while Japan's 47 prefectures have locally-elected governments, they in no way wield the autonomy that has been enshrined to the several states since the founding of our nation. And while Japan guarantees freedom of speech and protects a free press, the level of conflicting discourse and diversity of opinion does not begin to approach our American cacophony.

All that said, it's good to be home. If we can somehow approach the more harmonious, mutually-trusting, respectful society that occupies a remarkable island nation in the Pacific, that's a worthy goal. But equally important will be maintaining our unique identity as the United States—the ongoing laboratory of diversity and democratic ideals, continually evolving. Even in homogeneous Japan, America's influence, whether as a global leader or in music, sport, food, and dozens of other interesting cultural nuances, was often evident.

As we end our celebration of Black History Month, best wishes to all our IMLA local government colleagues who help animate that great American experiment. See you in Washington DC in late April.

Best regards,
Erich Eiselt

PRESIDENT'S LETTER

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

Dear Esteemed IMLA Colleagues-

The IMLA Mid-Year Seminar is fast approaching, and I hope that you have already registered or are considering joining us in Washington D.C.! One of the highlights of this program is the specialized track provided for those of us who represent local governments in cases brought pursuant to 42 U.S.C. Section 1983. Since not all of you have the pleasure, there is also a more general education track for local government attorneys-and you can't beat springtime in Washington D.C.

I personally welcome all the tips and practice tools gleaned from the expert presenters at the Mid-Year Seminar, knowing our area of practice is not for the faint of heart in today's world. As local government attorneys and stewards of public funds, it is our obligation to offer the very best defense of our communities and public servants, even when it's not popular. This was really brought home to me in a recent conversation with my daughter, who is a first-year law student. She was initially required to represent a fictional police department in an advocacy competition, and expressed grave concerns with the assignment. Although she grew up spending a great deal of time around police officers who have been neighbors and colleagues and friends of mine for years, she found this a very challenging assignment. She later reported that she was able to "channel her Mother," and prevailed in her argument, but I don't think she is unique. Local government law is a difficult practice, and sometimes it is beneficial to hear from others who face similar issues and conundrums, or have successfully navigated a topic. Because of the current widespread criticism of public actors, and governmental and qualified immunity, it is even more critical that we are attuned to recent developments in the Circuits, as well as cases pending at the Supreme Court. Perhaps we can even pick up some tidbits on successful communication to detractors, and clarify that qualified immunity does not protect criminals or those who are grossly negligent, but instead is only extended to those reasonable actors who, in retrospect and in dangerous situations, made a mistake. The IMLA Mid-Year Conference provides us with numerous opportunities to improve our own practices and communities.

In addition to offering top-notch continuing legal education and fabulous networking opportunities, IMLA has also continued its leadership in advocacy. Although this is nothing new, our Executive Director Amanda Karras and her wonderful team have recently demonstrated unparalleled initiative in founding a new coalition. With the unexpected dissolution of the State and Local Legal center in August 2022, Amanda recognized the need for quick action, culminating in a new partnership with the National League of Cities, National Association of Counties, the Government Finance Officers Association, and IMLA, providing a platform for state and local government voices. To that end, there have been some promotions within the IMLA staff, with Erich Eiselt being appointed the Director of Legal Advocacy, while Jennifer Ruhe is named Deputy Executive Director and Deanna Shahnami becomes an Assistant General Counsel. IMLA also hired a new attorney, Ravinder Arneja, as an Associate General Counsel to take on IMLA's distance learning. The IMLA team will now have the opportunity to demonstrate their professionalism, passion, and expertise on behalf of current and any future partners in the coalition. The IMLA staff is well qualified to author amicus briefs in many areas, but they are also able to secure other knowledgeable, persuasive and reputable authors when appropriate. Although the creation of this new coalition required some minor tweaks, the long-standing IMLA structure allowed for an easy transition. There is a skilled and diverse IMLA Legal Advocacy Committee, which will continue to be instrumental in vetting prospective amicus cases. This is another benefit of your IMLA membership, which provides all of us with a direct line to request amicus assistance in our cases that raise important state and local government issues, as well as tracking important cases, and keeping all municipal organizations and officials up to date on recent developments. The dissemination of important case information will be through presentations, webinars, and blog posts, and this additional IMLA exposure will be beneficial.

The Mid-Year Conference also provides us with the opportunity to congratulate, thank and honor the attorneys who have provided amicus briefing on behalf of local and state governments. IMLA is very fortunate to have so many great contributors willing to share their time and talents with us.

I hope that you consider attending the Mid-Year Conference and/or the Annual Conference in La Quinta California in September. I also hope that you get active in IMLA to receive some of these great benefits. ML

Homelessness in the Big City: A Case Study in Finding Legal and Practical Solutions for a Community

MARC SMITH,
Deputy City Attorney, City of Colorado Springs, Colorado

INTRODUCTION

It was the winter of 2012 and things were not going well with the homeless situation in Colorado Springs, Colorado. It had been estimated in June 2008 that there were over 500 "homeless camps" on the City's public lands, and it was clear that this number had not decreased by 2012.[1] Citizen complaints were rife regarding camping and panhandling, and elected officials felt the need to do something.

On November 20, 2012, the City Council took a drastic step and enacted an anti-solicitation ordinance targeting the downtown area.[2] While the City had for many years utilized an "aggressive solicitation" ordinance targeting solicitation near businesses and automatic teller machines,[3] this was something different. Instead, this ordinance would restrict *all solicitation* within a geographic area known as a "downtown no solicitation zone." The stated purpose of the ordinance was "to preserve and protect the beauty and economic viability of the downtown area. All solicitation in the Downtown No Solicitation Zone is disturbing and disruptive to residents and businesses and impacts social harmony and economic viability of the City as a whole."[4] The Downtown No Solicitation Zone consisted of a twelve-block area in the heart of the commercial area of downtown Colorado Springs.[5]

Predictably, the ordinance was quickly challenged by attorneys from the American Civil Liberties Union ("ACLU").[6] In an action to enjoin enforcement of the ordinance, the ACLU argued that the complete ban on solicitation violated the First Amendment of the U.S. Constitution.[7] The U.S. District Court for the District of Colorado found that the plaintiffs met all four elements for a preliminary injunction,[8] stating:

> [O]ne, that they will suffer immediate and irreparable injury unless the injunction issues; two, that the threatened injury outweighs whatever damage the injunction will cause to the other party; three, that the injunction if issued will not be adverse to the public's interest; and, four, that the plaintiff has a substantial likelihood of success on the merits.[9]

The court noted that the Supreme Court has many times determined that solicitation is protected speech under the First Amendment.[10] For this type of restriction to be valid, the ordinance must be narrowly tailored to serve a significant governmental interest, be content neutral, and must leave open ample alternative channels of communication.[11]

The parties stipulated that promotion of safety for people in the public rights-of-way, free flow of traffic, and protection of businesses were "significant, important governmental interests." However, there was a lack of testimony that these interests were being addressed by the legislation.[12] Instead, the court referenced testimony that "residents and visitors explain[ed] that they felt uncomfortable about the presence of many homeless people, people who may appear bedraggled or mentally ill . . . regardless of whether these people are actually engaging in solicitation."[13] The court did, however, find that the City had a significant governmental interest in protecting businesses within the Downtown No Solicitation Zone.[14] The court then determined that the ordinance was not narrowly tailored but instead "reaches a broad range of protected speech that does not present the harms, intrusion on the convenience and comfort of pedestrians that the ordinance seeks to prevent."[15] In light of these findings, the court enjoined the City from enforcing the ordinance.[16] The City entered into a stipulation with the plaintiffs, including a monetary settlement[17] and ultimately repealed the ordinance.[18]

II. Setting the Stage

Despite this inauspicious beginning in its response to the homelessness issues facing

the City, Colorado Springs has subsequently made substantial progress in its efforts to address its residents' and visitors' concerns while also providing necessary services to individuals who are experiencing homelessness. But first, some background: According to the U.S. Census Bureau, Colorado Springs' estimated population as of July 1, 2021 was 483,956 residents.[19] This was an increase of over 4,000 residents from the year before, and more than 67,500 residents greater than the 2010 population of 416,427.[20] With this increase in population, there had been extreme pressure on housing stock and affordability.[21] It was estimated that Colorado Springs had a housing shortage of 12,135 units.[22]

The United States Interagency Council on Homelessness, a council comprised of members of 19 wide-ranging federal agencies[23] has found that when housing costs are more affordable and housing opportunities are more readily available, there is a lower likelihood of households becoming homeless, and households who do become homeless can exit homelessness more quickly and with greater likelihood of sustaining that housing long-term.[24] Simply put, in Colorado Springs the population had boomed, housing demand increased, and prices rose substantially—and all these factors continue to escalate year after year and put sustained pressure on issues related to persons experiencing homelessness.

While these factors might lead to the conclusion that the local situation is trending in the wrong direction, the numbers suggest the opposite is true. In 2012, it was estimated in the City's Point in Time ("PIT") count that there were 257 chronically homeless people in the City.[25] That number rose to a high of 387 in 2016.[26] By 2021, following massive efforts by the City and the non-profit community which will be discussed below, the number of chronically homeless people in Colorado Springs was down to 182—the lowest PIT count number since 2011.[27]

III. Legal Landscape

The legal landscape surrounding issues related to people experiencing homelessness in Colorado has evolved significantly since the U.S. Supreme Court issued its 2015 opinion in *Reed v. Town of Gilbert*.[28] While localities across the nation, including Colorado Springs, immediately saw impacts to their land use and sign codes because of *Reed*, the impact of that decision went far beyond signs.[29] *Reed* stands for the proposition that any content-based restriction will be reviewed by the courts under a strict scrutiny analysis.[30] This means any content-based restriction must "'require[] the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.'"[31]

Following that Supreme Court decision, a Colorado-specific panhandling case was decided based on the principles set forth in *Reed*.[32] In *Browne v. City of Grand Junction*, the U.S. District Court for Colorado struck down Grand Junction's anti-panhandling and solicitation ordinances, finding that they were "over-inclusive because they prohibit speech that poses no threat to public safety."[33] Grand Junction's ordinances were similar to Colorado Springs' in that they restricted panhandling and solicitation in specific areas at specific times.[34] In terms of legislation regarding panhandling and solicitation, the trend in Colorado following the cases in both Colorado Springs and Grand Junction suggest a high level of scrutiny by the federal courts.

While the *Browne* case certainly caused impacts across Colorado, a Ninth Circuit case from Boise, Idaho also had a profound impact on legal efforts in Colorado Springs regarding persons experiencing homelessness. In *Martin v. City of Boise*, the Ninth Circuit Court of Appeals held that "an ordinance violates the Eighth Amendment insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them."[35] The court, quoting a vacated opinion in an earlier Ninth Circuit case stated:

> [W]e in no way dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets . . . at any time and at any place . . .
> [w]e hold only that 'so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters],' the jurisdiction cannot prosecute homeless individuals for 'involuntarily sitting, lying, and sleeping in public.'[36]

While Colorado is in the Tenth Circuit, *Boise* raised the attention of the City of Colorado Springs and helped bring to the forefront a more holistic approach to solving legal issues associated with people experiencing homelessness.

IV. A Services-Based Model

An important step to ensuring that a city can adopt and enforce ordinances that contribute to the reduction of homelessness is to create a services-based model within a community. As *Martin v. Boise* illustrated, in a city with a large population of people experiencing homelessness it is necessary

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Marc Smith has been with the Office of the City Attorney in Colorado Springs, Colorado since 2004. After beginning with the City as an intern between his second and third years of law school, he is now a Deputy City Attorney and oversees corporate, legislative and utilities legal affairs.
In his 18 years with the office, Marc has represented nearly all City operational departments and was Legislative Counsel to the City Council. In 2022 he was designated an IMLA Local Government Fellow. Marc is a graduate of the University of Colorado at Colorado Springs, has a Master of Sports Administration degree from Ohio University, and earned a Juris Doctorate from the University of Mississippi School of Law, better known as Ole Miss.

Homelessness *cont'd from page 7*

to provide services, including shelter beds, to ensure that any ordinances that a city adopts can withstand challenge. One of the most impactful steps the City of Colorado Springs took was to hire a "Homelessness Prevention and Response Coordinator."

In 2017, the City hired a social worker whose sole job is to coordinate and provide services for the homeless population, in concert with the City's Police and Fire Departments, Community Development Division, and many local entities that specialize in homeless-related issues.[37] The Homeless Prevention and Response Coordinator developed the 2019 Colorado Springs Homeless Initiative to guide the City's efforts in reducing homelessness in the community.[38] In addition to coordination with other departments of the City, the Community Development Division, in which the Homeless Prevention and Response Coordinator is located, is tasked with obtaining and administering federal Emergency Solutions Grant ("ESG") funding and Community Development Block Grant ("CDBG") funding to help provide housing and services to people experiencing homelessness.[39]

The City has further expanded the services and programs to ameliorate homeless issues substantially over the years. In addition to the Homelessness Prevention and Response Coordinator position, the City's Police Department established a Homeless Outreach Team ("HOT Team") that focuses on issues related to people experiencing homelessness.[40] The HOT Team consists of six officers[41] tasked with making direct contact with people experiencing homelessness and directing them to services to assist them with resources to address financial, substance abuse, and sheltering issues. Part of these duties includes helping people find shelter beds in the case of winter weather.[42] These efforts have undoubtedly saved countless lives.

In addition to the HOT Team, the Police Department has also established the Downtown Area Response Team ("DART"). Consisting of 14 officers,[43] DART is tasked with enforcing ordinances in the downtown area that, in addition to its general policing efforts, specifically address issues related to homelessness. The Colorado Springs Fire Department has created a Homeless Outreach Program through its Community and Public Health Division that provides access to services during medical calls with individuals experiencing homelessness.[44] Finally, the City created a Homeless Outreach Court docket in its Municipal Court for homeless individuals who have been cited with municipal ordinance violations.[45] The Municipal Court focuses on referring individuals to local services to facilitate positive outcomes for those seeking help.

The City's Homeless Prevention and Response Coordinator and the Community Development Division Director also coordinates with the Pikes Peak Continuum of Care ("PPCoC"). The PPCoC consists of government officials and non-profit service providers,[46] operating under a three-year strategic plan and coordinating on homeless issues throughout the City and El Paso County.[47] The stated mission of the PPCoC is "to end homelessness in the Pikes Peak Region."[48] PPCoC also administers the local Homeless Management Information System ("HMIS"). HMIS is required by the U.S. Department of Housing and Urban Development ("HUD") to obtain federal funding.[49] All of these efforts are necessary to generate an effective community response to provide services to individuals experiencing homelessness.

V. The Necessity of Shelter Beds

The single most important element for cities wishing to enforce their public camping prohibitions is the availability of shelter beds. As illustrated in *Martin v. Boise*, under the Eight Amendment courts are wary of allowing enforcement of municipal ordinances targeting camping on public grounds without the availability of alternative shelter arrangements.[50] To further illustrate this point in Colorado, the City and County of Denver had an urban camping ban declared unconstitutional by a county court judge, citing the *Martin* case. However, this was overturned by the district court following acknowledgement that the defendant in the case had, in fact, been offered a shelter bed and refused prior to being cited under the prohibition on camping in public places.[51] A petition for a *writ of certiorari* was denied by the Colorado Supreme Court,[52] leading to the conclusion that the availability of shelter beds can protect a city's enforcement of restrictions on public camping in Colorado.

In light of these concepts and to ensure enforceability of its camping ordinances, the City of Colorado Springs currently maintains more than 750 shelter beds, and hundreds are normally left unfilled per night.[53] To facilitate the enforcement of the ordinances, in 2018 the City provided $500,000 for the expansion of low barrier shelter capacity for the Salvation Army[54] and at the "Springs Rescue Mission Campus" in the southwest portion of downtown Colorado Springs.[55] The Springs Rescue Mission Campus is within walking distance of the area that was part of the Downtown No Solicitation Zone that was the subject of the 2012 litigation.[56] The Springs Rescue Mission provides shelter beds and coordinates on-site with the Veterans Administration, the Department of Human Services and Adult Protective Services, the Pikes Peak Library District, the Pikes Peak Workforce Center, and many private non-profit service providers.[57] There is a daily posting online displaying the number of available shelter beds at the five main shelters within the City.[58] If

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Charles Thompson Jr. Local Government Law Scholarships – 2023 Recipients

In the summer of 2022, IMLA announced the inaugural Charles Thompson Jr. Local Government Law Scholarships—competitive awards intended to recognize rising 2Ls and 3Ls with demonstrated interest and accomplishment in the study of municipal law. All candidates submitted written expressions of interest, law school transcripts, and letters of recommendation. In addition, those seeking the larger $5,000 scholarship were required to submit an original work relating to local government law.

We were fortunate to receive a significant number of outstanding applications from law students in the US and Canada who evidence a clear interest in serving their communities as local government lawyers. The IMLA Scholarship Committee, consisting of Kimberly Rehberg, City Attorney, Durham North Carolina; Doug Hoffer, Deputy City Attorney, Eau Claire, Wisconsin; Victoria Huynh, Deputy City Attorney, Plano, Texas; Robert Widner, partner and co-founder, Widner Juran LLP, Centennial, Colorado; and Erich Eiselt, IMLA Assistant General Counsel and Director of Legal Advocacy, Rockville, MD, has now completed the challenging task of rating each candidate's submissions and selecting the recipients.

IMLA is pleased to announce the winners of the 2023 IMLA Charles Thompson Jr. Local Government Law Scholarships:

$5,000 award—
Riley Zoch, Class of 2024,
Baylor University School of Law,
Waco, TX

$2,500 award—
McKaia Dykema,
Class of 2024,
Mitchell-Hamline College
of Law, St. Paul, MN

$2,500 award—
Stephen Raitz, Class of 2024,
University of
Alberta Law Faculty,
Edmonton, AB

The Follow-Through Matters: Contracts with Governmental Entities Must be "Properly Executed" Now to Waive Immunity Later

RILEY ZOCH, *Class of 2024, Baylor University School of Law*

Editor's Note: Contracting with the government raises different legal issues from those found in private contracts for similar goods, services and projects. The question of authority to contract, which may be implied or apparent in the private context, usually does not apply in government contracts where actual authority must exist. While this article deals with another aspect of government contracting that differs from the private sector – immunity, its discussion of authority extends to jurisdictions across the country. Some states, such as Texas, retain the concept of immunity in contract, others do not. Regardless of the status of immunity in a state, local government attorneys from around the country can benefit from learning how the Texas courts have addressed the question of immunity and the question of authority discussed in this article and from the helpful suggestions of the author, our 2023 $5,000 IMLA Local Government Law Scholarship recipient.

I. An Introduction to Contracting with Governmental Entities in Texas.

Businesses do not simply enter into contracts with governmental entities that are sufficient to waive immunity in later suits—waiving immunity takes deliberate action.[1] To waive governmental immunity in Texas, contracts must satisfy general contract requirements and the waiver of immunity provision in Tex. Loc. Gov't Code § 271.152.[2]

The waiver of immunity provision calls for contracts to comply with the five elements found in Tex. Loc. Gov't Code § 271.151. Under § 271.151, a contract must (1) be in writing, (2) state the essential terms of the agreement, (3) provide for goods or services (4) to the local government entity, and (5) be properly executed on behalf of the local governmental entity. If the contract does not comply with these elements, governmental immunity is not waived.

As such, contracts with governmental entities can be unenforceable for all sorts of reasons that do not apply to contracts between non-governmental entities. For example, contracts with governmental entities are unenforceable when they are not contracts for "goods or services" or when the contract does not "state the essential terms of the agreement."[3]

This paper focuses on the fifth element of § 271.151—"properly executed on behalf of the local governmental entity." Generally, "properly executed" is all about the follow-through once there is deal in place. It is about whether the contract has to be signed or approved by a particular person. Parts II – V discuss four important cases where Texas courts have interpreted this phrase. Part VI then synthesizes a rule for these holdings and provides a list of extra holdings that attorneys should keep in mind when contracting on behalf of governmental entities.

II. The Contract in *City of Houston v. Williams* was "Properly Executed."

The Texas Supreme Court first analyzed the phrase "properly executed on behalf of the local governmental entity" in *City of Houston v. Williams*.[4] There, 540 former Houston firefighters alleged wrongful underpayment of lump sums due upon termination of their employment.[5] The

firefighters argued that certain Houston ordinances constituted a written employment contract between the City and the firefighters for which immunity was waived under section 271.152.[6]

The City did not deny that the ordinances were duly "enacted," but challenged whether they were "executed."[7] When analyzing whether the ordinances were "executed," the Court pointed out that: "Section 271.151(2) does not define 'executed.'"[8]

The Court, however, noted that "execute" means to "finish" or to "complete" and stated that it is not necessary to sign an instrument in order to execute it, unless the parties agree that a signature is required.[9] Then the Court explained that no agreement between the City and the Firefighters had established that a signature was required, so the Court held that the ordinances, when duly enacted by the City with the intent to be bound, were "executed" under § 271.151(2).[10]

In this case, the phrase "properly executed on behalf of the local governmental entity" did not necessarily require a signature for a contract—here, an ordinance—to be executed but required the contract to be duly enacted by the governmental entity with the intent to be binding on the parties.

III. The Contract in *City of Dallas v. Arredondo* was "Properly Executed."

Following *Williams*, the Dallas Court of Appeals addressed a similar situation in *City of Dallas v. Arredondo*, where former police officers, firefighters, and rescue officers (Officers) alleged that the City breached its contract with them regarding pay.[11] There, the City passed an ordinance raising salaries,[2] but years later the Officers accused the City of failing to pay as required by the ordinance.[13] The Officers sued.[14] The City filed pleas to the jurisdiction asserting that it had governmental immunity.[15] Eventually, the Dallas Court of Appeals addressed whether the Officers had pleaded jurisdictional facts sufficient to waive governmental immunity under § 271.152.[16]

The City contended that it had not "properly execute[d]" the contract because none of the documents were signed or approved by the appropriate people.[17] Unlike the ordinances in *Williams*, the Dallas charter did require public contracts to be signed by city manager and approved by city attorney.[18]

Nevertheless, the court disagreed with the City for two reasons.[19] First, it stated that in adopting the ordinance, the City had stated it was "valid and binding," which was sufficient to evidence its intent to act in a specified way.[20] Second, requiring the city manager's signature on the ordinance to make its terms valid and binding would have rendered the charter and the ordinance meaningless because the charter stated that when the electors vote in favor of a proposed ordinance, the ordinance becomes "a valid and binding ordinance of the city, and . . . cannot be repealed or amended except by a vote of the people."[21]

The court concluded that the Officers' contract had satisfied the waiver of immunity requirements for its breach of contract claims.[22]

Thus, the court's interpretation of the phrase "properly executed" aligned with the Texas Supreme Court's decision in *Williams*—the contract must be duly enacted by the governmental entity with the intent to be binding. Though the City's public contracts required the city manager's signature and the city attorney's approval, the City's ordinances were valid and binding regardless of signature or approval.

In sum, the ordinances could constitute a contract sufficient to waive immunity so long as the ordinance was duly enacted with intent to be binding.

IV. The Contract in *Amex Props., LLC* was Not "Properly Executed."

Nine years after analyzing the phrase "properly executed" in *Williams*, the Texas Supreme Court readdressed it in *El Paso Educ. Initiative, Inc. v. Amex Props., LLC*.[23]

There, Amex Properties, LLC, through one its owners, signed a contract to lease space to the Charter School District.[24] The president and superintendent of the District signed on behalf of "The El Paso Education Initiative, Inc.," and a notary attested that the president had "executed the instrument on behalf of the El Paso Education Initiative, Inc."[25] The final paragraph of the contract even stated that each signatory "represents and warrants" that they have the authority to execute the lease and that it is "binding upon the entity."[26]

Despite these representations, Amex understood that the District's board still had to approve the lease in order to finalize it.[27] However, the District's president did not present the lease to the District's board for its approval.[28] At a May 28 board meeting, the president reported that the Amex negotiations had been "unsuccessful."[29] Even though the board had not approved the contract, Amex secured a construction contract and its builder commenced construction.[30] The District repudi-

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ated the contract and Amex ultimately had to lease the property to another tenant at a lower rate.[31]

Amex sued the District for anticipatory breach of the lease.[32] The District filed multiple pleas to the jurisdiction, asserting that it was immune from this suit on the grounds that the lease was not "properly executed" because the District's governing board had never approved the lease as required by TEA regulations, nor had the board delegated its authority through an amendment to the school's charter approved by the Commissioner of Education.[33]

The Court noted that the adjective "properly" limited the verb "executed" so that "not all executed contracts qualify for Chapter 271's waiver."[34] It held, in effect, that a contract is only properly executed when it was "executed in accord with the statutes and regulations prescribing that authority."[35]

The Court pointed out that the statute did not require the contract to be executed "by" the governmental entity, but rather required the contract be executed on the entity's "behalf," which was notable because it acknowledged that contracts with governmental entities are "not typically signed by all members of the entity's governing authority."[36] But in the same way that a government official cannot bind the government to a contract based on apparent authority, an agent acting on behalf of a charter-holder cannot bind it in a way that exceeds its statutory grant of authority to enter into contracts."[37]

The Court agreed with the District, holding that "[a]bsent board approval or a charter amendment delegating the board's authority to [its President], the lease was not 'properly executed on behalf of' the district because the board did not approve it."[38] The Court explained that the President acted as the board's authorized negotiator, but she lacked the power to "properly execute" the lease "on behalf of" the board without board approval.[39]

Put another way, a governmental entity's agent cannot bind the governmental entity where the contract requires approval. In those instances, the contract will not be duly enacted because the agent will have exceeded its statutory grant of authority to enter contracts. As a result, the contract would not be properly executed on behalf of the governmental entity.

In contrast to *Houston* and *Arredondo*, this case did not involve ordinances enacted by the entity—*Amex* involved traditional contracts negotiated and signed by an agent without authority to do so.

V. The Contract in *City of Port Isabel v. Meza* was "Properly Executed."

Recently, the Corpus Christi Court of Appeals examined whether a severance agreement between the City and its former city manager, Edward Meza, had been properly executed sufficient to waive immunity after Meza sued for breach of contract when the City rescinded Meza's severance agreement.[40]

There, the court held that Meza raised a fact question as to whether the severance agreement was properly executed, and thus the trial court was correct in denying the City's plea to the jurisdiction.[41]

In stating the rule for "properly executed" under § 271.151, the court followed the Texas Supreme Court's language in *Amex* nearly verbatim.[42]

The City argued that Meza's severance agreement, though the city commission approved it, was not "properly executed" because it was never brought before the city commission for final approval, or in the alternative, it was rescinded during the meeting on May 26, 2015.[43] Meza countered by stating that the severance agreement was "properly executed" because it was approved by the city commission in July 2010 and signed by the mayor.[44]

The court examined the minutes from July 2010, which showed that the commission discussed a "severance package" for Meza in closed session and subsequently approved certain requirements in an open session.[45] The court also found that the severance agreement contained the mayor's signature, which under the city charter gave the mayor the authority to sign all ordinances and resolutions.[46] The court held that the trial court correctly denied the City's plea to the jurisdiction because Meza raised a fact question as to whether the severance package was "properly executed."[47]

In contrast to *Amex*, where the signing party did not have the authority to bind the governmental entity, the mayor in *Meza* did have the authority to sign a contract and bind the parties.

VI. Conclusion

Together, these holdings show that the phrase "properly executed on behalf of a governmental entity" is all about the follow-through by the governing entity. In other words, does the contract have to signed or approved by a particular person other than the agent?

First, these cases show that a contract does not necessarily require a signature to be properly executed. As such, municipal attorneys should be cognizant of whether or not a governmental entity's charter or constitution requires contracts to be signed by one of its officials (e.g., the mayor, city manager, or another member). Suppose a municipal attorney mistakenly believes a contract is not enforceable unless signed. In that case, it may result in an enforceable contract before the governmental entity is ready to be bound

because the contract or ordinance only need be duly enacted by the governmental entity with the intent to be binding on the parties. For similar reasons, a municipal attorney should be cognizant of whether the governmental entity's charter or constitution requires its contracts to be approved in some capacity by the city attorney, the board, or the council.

Second, these cases show that a contract negotiated and signed by an agent cannot bind the governmental entity if the agent exceeds its statutory grant of authority. For governmental entities, an agent may only have authority if the board or council gives the agent authority. As such, municipal attorneys should understand how a particular agent receives authority, whether simply under common law or by a specific statute. If a municipal attorney mistakenly believes an agent does not have full authority to bind the governmental entity during negotiations, it may result in an enforceable contract before it is ready to be bound.

Though not exhaustive, other court rulings to keep in mind when contracting on behalf of a governmental entity are listed below:

- It is the duty of the successful bidder to verify that all of the requirements of the statute are met before work commences. Any contractor who starts work without a purchase order does so at its own peril.[48]
- A city or county may contract only upon the express authorization of the city council or commissioners court by a vote of that body reflected in the minutes.[49]

But compare this latter holding with the following holding:

- A governmental entity may be estopped to deny the validity of a contract which it had authority to make, but which was executed by an officer without authority, was entered into without the required formalities, and even where the records of the city do not show that such a contract was ever entered into, if the governmental entity accepts performance from the other party and enjoys the benefits accruing to it.[50]

In sum, even though it does take a significant effort to enter into binding contracts that are sufficient to waive immunity in future lawsuits, the lesson is that municipal attorneys should be aware that the requirements for properly executing a contract are not one-size-fits-all. ML

Notes

1. In a podcast hosted by Lloyd Gosselink, attorneys Stefanie Albright and James Parker talk about the different aspects of immunity issues that might arise in contracts with governmental entities. James Parker notes that governmental contracts "require more than just a regular lawyer who writes contracts because these are a special type of contract, and it is full of pitfalls for the unwary." Listen In With Lloyd Gosselink, *Episode Five – Governmental Immunity and Contract Provisions*, at 25:01–25:15 (May 26, 2021, 8:00 AM) (accessed using Apple Podcasts). *See also* Bradford E. Bullock, *2022 Advanced Government Law CLE: Tips for Drafting Government Contracts and Documents*, 2022 TXCLE-AGL 7 POWERPOINT, 2022 WL 3142791 ("There are a variety of pitfalls the unwary practitioner can trip over when shepherding government contracts through the drafting and approval process.").
2. USAA Tex. Lloyds Co. v. Menchaca, 545 S.W.3d 479, 501 n.21 (Tex. 2018) (stating that a plaintiff must prove the existence of a valid contract by establishing that (1) an offer was made; (2) the other party accepted in strict compliance with the terms of the offer; (3) the parties had a meeting of the minds on the essential terms of the contract (mutual assent); (4) each party consented to those terms; and (5) the parties executed and delivered the contract with the intent that it be mutual and binding). Tex. Loc. Gov't Code § 271.151.
3. *See e.g.*, Big Blue Props. WF, LLC v. Workforce Res., Inc., No. 02-21-00135-CV, 2022 Tex. App. LEXIS 3740, at *1 (Tex. App.—Fort Worth June 2, 2022, pet. denied) (concluding that the contract did not meet the requirements of § 271.152 to waive its immunity because it was not an agreement for the provision of goods or services to the governmental entity); W. Travis Cty. Pub. Util. Agency v. Travis Cty. Mun. Util. Dist. No. 12, 537 S.W.3d 549, 557 (Tex. App.—Austin 2017, pet. denied) (holding that by failing to state terms for price and time of performance, the contract did not "state the essential terms" of an agreement by MUD 12 to provide services to the Agency and thus did not waive immunity under § 271.152).
4. *See* 353 S.W.3d 128 (Tex. 2011).
5. *Id.* at 131.
6. *See id.* at 131, 135.
7. *Id.* at 139.
8. *Id.*
9. *Id.*
10. *Id.*
11. 415 S.W.3d 327, 339 (Tex. App.—Dallas 2013, pet. denied).
12. *Id.*
13. *Id.* at 339–40.
14. *Id.* at 340.
15. *Id.*
16. *See id.*
17. *Id.* at 349.
18. *See* id. (*citing* Dallas, Tex., Charter, ch. XXII, § 1 (2006)).
19. *Id.* at 349.
20. *Id.*

Governmental Entities *cont'd from page 13*

21. *Id.*
22. *Id.* at 350.
23. 602 S.W.3d 521 (Tex. 2020).
24. *Id.* at 524–25.
25. *Id.* at 525.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 525–26.
32. *Id.* at 526.
33. *Id.* at 526, 531. The Court cites 19 Tex. Admin. Code §§ 100.1033(a)-(b), .1101(b)-(c) for a Charter School's delegation of powers and duties.
34. *Id.* at 532.
35. *Id.*
36. *Id.* at 533.
37. *Id.*
38. *Id.*
39. *Id.*
40. *See* City of Port Isabel v. Meza, No. 13-19-00070-CV, 2020 Tex. App. LEXIS 5031, at *3–4, *7–8 (Tex. App.—Corpus Christi July 2, 2020, pet. denied).
41. *See id.* at *3–4, *12–13.
42. *See id.* at *8–9.
43. *Id.* at *7–8.
44. *Id.*
45. *Id.* at *12.
46. *Id.*
47. *Id.* at 12–13.
48. Richmond Printing v. Port of Hous. Auth., 996 S.W.2d 220, 224 (Tex. App.—Houston [14th Dist.] 1999, no pet.).
49. City of Bonham v. Sw. Sanitation, 871 S.W.2d 765, 767 (Tex. App.—Texarkana 1994, writ denied).
50. Panhandle Const. Co. v. Spearman, 89 S.W.2d 1053, 1055 (Tex. App.—Amarillo 1935, no writ).

Homelessness *cont'd from page 8*

there are shelter beds available, the City will enforce its camping ordinances.

VI. Legislative Tools

In addition to providing numerous services, it is important to have local ordinances regulating criminal behavior that sometimes occurs during interactions with people experiencing homelessness. These quality-of-life ordinances are necessary to assist the community and the municipal government find solutions. In Colorado, municipal ordinance violations are misdemeanor offenses with penalties capped at not more than $2,500, imprisonment of not more than 189 days, probation, or a combination thereof.[59] In 2010, the City Council passed an ordinance making it "unlawful for any person to camp on any public property, except as may be specifically authorized by the appropriate governmental authority."[60] A similar ordinance is also in effect regarding camping on City parks property, including parking and camping in a house trailer or camper trailer after the parks' closing time.[61] These ordinances are enforced when low barrier shelter bed capacity is available.

One of the more significant recent ordinances adopted by Colorado Springs is titled "Camping and Waste Deposit Within Public Stream/Public Stream Riparian Zone Prohibited."[62] In 2018, following water quality sampling conducted by the U.S. Geological Survey, the Colorado Department of Public Health and the Environment's Water Quality Control Commission determined that Fountain Creek, which traverses the length of the City, contained undesirable levels of *e. coli.* In response, the City Council adopted an ordinance making it illegal to camp within a stream, streambank, or within 100 feet from the edge of a streambank.[63] Additionally, there is specific language regarding dumping of waste within the riparian zone.[64] This ordinance was drafted and adopted to address the water quality concerns brought to the City's attention by the State and after citizens and City staff witnessed individuals urinating, defecating, and bathing within the City's streams. Mayor John Suthers stated, "[t]hat is truly a health, safety and wellness measure, trying to make sure we aren't polluting our waters."[65] Another concern is frequent flash flooding that has occurred and led to injuries and deaths through drowning.[66]

Also in 2018, the City extended its prohibition on extended parking of recreational vehicles in residential areas to all public rights-of-way.[67] The City Code makes illegal "[a]ny recreational vehicle parked on . . . a public right-of-way for a period of time greater than that necessary for the expeditious loading and unloading of passengers or property."[68] This ordinance was passed following an observation that many recreational vehicles were congregating on City streets just outside of residential areas in the downtown part of the City. Violation of this ordinance is not a criminal offense—instead, it results in a parking ticket with escalating fines up to, and including, potential impoundment of the recreational vehicle after multiple offenses.

Another traffic safety ordinance that the City of Colorado Springs has adopted relates to the use of medians on certain roadways in the City. Solicitation from medians was a dangerous safety concern throughout the mid-2010s in Colorado Springs. It was not uncommon to see people on medians soliciting for money at very crowded intersections with fast-moving vehicles. In 2017, the City Council passed an ordinance at the request of the City Traffic Engineer that made it unlawful to, "access, use, occupy, congregate or assemble on or about any median that has been posted with a sign pursuant to this section prohibiting such access, use or occupancy."[69] To ensure this code provision was narrowly tailored to

meet a compelling government interest, mainly traffic and pedestrian safety, the City limited the number of medians in which the restriction applies. The prohibition covers only medians that have been posted with a sign restricting access,[70] are located on any roadway with a posted speed of 30 miles per hour or greater and are classified as a freeway, expressway, parkway, principal arterial, or minor arterial, are less than four feet in diameter, and do not have a flat grade of eight percent or less.[71]

This measure has effectively limited the number of medians from which people can solicit; however, any community wishing to implement this type of ordinance must take extreme care to demonstrate specific evidence with a strong link to pedestrian safety to support the restrictions. Additionally, the regulation must be narrowly tailored based on this evidence regarding a specific type(s) of median instead of a wholesale prohibition on occupying all or most medians in the community.[72]

The final major piece of legislation that the City has adopted is known as the "Pedestrian Access Act."[73] This ordinance prohibits individuals from sitting, kneeling, reclining or lying down in the Downtown Commercial District and the Old Colorado City Commercial District between the hours of 7:00 A.M. and 10:00 P.M. and until 3:00 A.M. on Friday and Saturday nights.[74] It was adopted in 2016[75] in response to the downtown public rights-of-way being overrun by individuals sitting and lying in the path traveled by business owners, visitors, and residents. The Downtown Commercial District was recently expanded to include areas that have developed over the last few years, including the U.S. Olympic & Paralympic Museum, Colorado College's new NCAA Division I hockey arena, and a new minor league soccer stadium.[76] The sole purpose of the legislation is to allow access through public rights-of-way in highly crowded areas that contain facilities and services of high civic value. There have been increasing police calls for services related to the prohibited behaviors within the area, although the ordinance does contain affirmative defenses for medical emergencies, mobility devices, areas subject to City-issued permits, for people seated on objects intended for sitting furnished by the City, and those awaiting public transportation.[77]

VII. The Effectiveness of a Holistic Approach

It takes efforts on several fronts to achieve success in dealing with issues related people experiencing homelessness. Colorado Springs has enacted tough municipal ordinances to combat undesirable behaviors; however, the only way it has been able to enforce these ordinances effectively is through providing ample services and partnering with dedicated non-profit organizations committed to helping people find transitional and permanent housing. Colorado Governor Jared Polis remarked:

> I think Colorado Springs has had a more successful approach to reducing homelessness than Denver and other cities, having someone familiar with best practices . . . It has a long way to go, but it hasn't gotten any worse, and we want other cities to emulate that.[78]

Conclusion

Colorado Springs will never completely eliminate homelessness. But a multi-faceted approach has proven that the number of people experiencing homelessness can be successfully reduced. This is even during a time of great population increase, inflationary pricing, and high demand for any housing, let alone affordable housing. While there is still much work to be done, a commitment to these principles can lead to a successful regulatory regime, buy in from residents, and a program that helps people get off the streets permanently.

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The Sum of the Parts: Municipalities Take Aim at Ghost Guns

ERICH EISELT, *IMLA Assistant General Counsel and Director of Legal Advocacy*

INTRODUCTION

Local government lawyers are acutely aware of the Second Amendment battles being waged in courts across the nation. The spectrum of argument is broad: limits, if any, on possession outside the home after *Bruen*; restrictions on purchase; red flag laws; conditions on open and/or concealed carry; restrictions on magazine size; bans on assault weapons and devices that add machine gun-like capabilities; preemption of local gun laws; and more—the proper balancing of individual prerogatives versus communal safety continues to be fiercely contested. But within that debate, one element has generally been constant: the object of the litigation is a firearm.

Enter an innovation designed to skirt that issue altogether—the "ghost gun." Appearing on America's streets at an alarming pace, ghost guns avoid regulation and defy traditional policing mechanisms. Until recently, federal efforts to quell this growing threat have lagged, leaving state and local governments to take the lead.

1. Lethality, Piece by Piece-What is a "Ghost Gun?"

As their nickname implies, "ghost guns" are somewhat invisible incarnations of their namesake articles. Two primary characteristics allow them to remain in the shadowy outskirts of law enforcement: first, they are not offered fully assembled, and second, they do not bear serial numbers.

Components only: The moniker of the leading ghost gun manufacturer, Nevada-based "Polymer80," leaves little to the imagination. Its most popular offerings are kits containing unassembled polymer parts, often comprising the lower 80% of a firearm—the frame. Avoiding regulatory scrutiny, the polymer pieces do not yet comprise a functional weapon, requiring supplementary parts, machining, and assembly by the purchaser. The kits include instructions on how to mill, drill and assemble the components into a working firearm, by affixing additional metal constituents (the barrel, trigger, and firing mechanism, also offered by Polymer80) to the frame. On the company's website, shoppers can purchase unfinished lower receivers for rifles or unfinished handgun frames, along with other materials necessary to complete the assembly of a fully functional weapon, including the now-infamous AR-15, a .308 semi-automatic rifle, and seven or more types of handguns.[1] As will be discussed below, this piece-by-piece sales methodology has largely enabled Polymer80's products to avoid oversight by the federal agency charged with gun regulation—the United States Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). Polymer80 has openly promoted this extraterritoriality, portraying itself as an oasis of patriotic freedom against ever-encroaching government overreach with company swag like its "AFT" ("Assemble For Thyself") line of tees and patches.[2]

One purveyor of Polymer80 products, 3CR Tactical, provides this description of the kit and components:

> *What is a Polymer 80 Percent Build Kit?*
> A polymer 80% build kit provides everything you need to complete a Glock-style pistol from the comfort of your own home workshop.
>
> However, there are a few things you must consider when choosing a Polymer80 build kit, such as what parts you need and what size frame you want.
> You'll also need to decide if you want a complete kit with all the parts needed to build your Glock-style sidearm, or just a frame kit.

Are Polymer80 Kits Still Legal?
Yes, Polymer80 kits are still legal in the United States as of October 2022. There has been some confusion on this topic due to the fact that some states have banned "ghost guns," which are unfinished firearms that can be easily assembled at home.

However, Polymer80 kits are not considered ghost guns because they require some machining and finishing work before they can be assembled into a functioning firearm.[3]

No serial numbers: The second and even more problematic feature of ghost guns is their absence of serial numbers. For more than 50 years, all guns manufactured in the United States, and those imported from abroad, are legally required to bear serial numbers.[4] Typically located on the back of the frame, the numbers provide data about where a gun was manufactured and link the firearm to a registered owner. But until recently, the government has held that unfinished frames (for handguns) or receivers (for long guns) do not qualify as firearms because they cannot fire a projectile. Again, Polymer80 and others in the ghost gun industry have exploited this regulatory void, selling thousands of soon-to-be-weapons which bear no serial numbers.

Overlap with law enforcement: Ironically, although increasingly used by criminals, mostly-polymer guns also confer an important benefit for legitimate consumers: they are significantly lighter than all-metal weapons. That feature is an advantage to those who must carry firearms all day, such as law enforcement and security personnel, many of whom are avid users of polymer weapons. Unsurprisingly, this explains why the top ten pistols sold on guns.com in 2020—all of which were polymer based—included the Glock 17 and Glock 19 models used by many police departments.[5] It also explains why virtually all regulations prohibiting ghost guns make a clear exception for sales to law enforcement and members of the military (all of whose polymer guns will obviously be imprinted with serial numbers before use).

Sidebar--3D guns: It should be understood that firearms manufactured on 3D printers–true "3D guns"-- are not the leading antagonists in the ghost gun crisis. Made almost entirely of plastic, and virtually invisible to magnetometers, 3D guns are "ghost guns" in that they do not bear serial numbers. But 3D guns diverge from the general population of ghost guns in some respects: first, anecdotal evidence is that law enforcement has been finding few 3D guns in the hands of criminals because they have not proved sturdy enough to handle the stress of repeated firings. Second, true 3D guns have long been prohibited under the United States Undetectable Firearms Act of 1988 (Undetectable Firearms Act) which makes it illegal to manufacture, import, sell, ship, deliver, possess, transfer, or receive (1) any firearm which is less detectable by walk-through metal detection than a "Security Exemplar" (which contains a minimum of 3.7 oz (105 g) of steel), or (2) any firearm with major components that do not generate an accurate image when viewed by standard airport imaging technology.[6]

While the Undetectable Firearms Act addresses "firearms," it does not prevent the proliferation of self-manufactured 3D gun components, whether polymer or otherwise. The name "Defense Distributed" may sound familiar to some; it attempted for more than a decade to upload 3D firearm design files to the web for public use. Defense Distributed describes itself as "the first private defense contractor in service of the general public," and asserts that "Since 2012's Wiki Weapon project, DD has defined the state of the art in small scale, digital, personal gunsmithing technology."[7] The company's initial uploading efforts were quickly stopped by the Obama Administration. At that time, 3D gun components were deemed by the Department of State (DOS) to be included within "defense articles" under the International Traffic in Arms Regulations (ITAR), meaning the codes constituted a national defense asset and could not be disseminated. In 2016, Defense Distributed brought suit, asserting a First Amendment right to place 3D firearm design files on the web. The Trump Administration DOS subsequently moved to settle that litigation, de-designating 3D components from ITAR.[8] While a collective of Attorneys General from 22 states and the District of Columbia temporarily enjoined the de-designation via an order from the federal court for the Western District of Washington,[9] in late 2021 a panel of the Ninth Circuit vacated the district court's order.[10] Within days, Defense Distributed had uploaded to the web numerous program codes for 3D gun component production, offered for use by the public, at no charge.[11] The codes remain on the web today, accessible by anyone, creating another source of ghost components.

A page on a site linked to the Defense Distributed website expressly promotes the opportunity to use the code on CNC (computer numerical control) machines to create serial-free guns:

> **No Prior CNC Experience Required**
> With simple tools and point and click software, GG3 is the perfect platform to learn and program a CNC, regardless of application. No prior CNC skill is required to interact with community gunsmithing files. GG3 is the most popular way of finishing unserialized rifles and pistols in the comfort and privacy of home.[12]

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Ghost Guns *cont'd from page 17*

2. The Federal Framework-Missing the Mark

As suggested above, federal efforts to combat ghost guns have been largely ineffective, a victim of diminishing Congressional appetite to curb firearms generally. That hesitancy has not always existed. Two far-reaching gun control measures were signed into law by President Roosevelt in the 1930's to combat organized crime, each obtaining the approval of the National Rifle Association (NRA).[13] The NRA also endorsed a 1967 California law reversing open carry signed by Governor Reagan after armed Black Panthers began patrolling Oakland neighborhoods.[14]

But that ironic gesture would arguably be the high-water mark of NRA support for gun control, as evidenced the following year. When the Gun Control Act of 1968 (Gun Control Act)[15] was signed into law by Lyndon Johnson following a succession of devastating assassinations (John F. Kennedy, Robert Kennedy, and Martin Luther King, Jr.), the NRA exerted its growing influence to limit the measure. Although the Gun Control Act's mission was "to support Federal, State, and local law enforcement officials in their fight against crime and violence," the NRA blocked the law's major provisions, which included a national gun registry and a requirement for licenses by all gun owners.[16] In 1986, the NRA succeeded in rolling back even more of the Gun Control Act.[17] And after a sweeping anti-crime measure was signed in 1994 which included a ten-year prohibition on the manufacture, ownership or transfer of 19 semiautomatic weapons including the AR-15, and limited magazine capacity to ten bullets, the NRA's "Stop the Gun Ban" campaign helped ensure that the assault weapons ban would not be renewed when the measure was considered for reinstatement a decade later.[18]

A Short counteroffensive: With Congress and many statehouses unable to rally the majorities needed to overcome NRA-spawned indifference, a few local governments took action to stall the infestation of firearms swarming their streets. Cincinnati confronted the gun industry directly. In 2002, it notched a triumphal but brief victory, successfully arguing at the Ohio Supreme court that indiscriminate promotion and sale of weapons by Beretta and other gun makers and dealers was causing a flow of lethality to the city, creating a compensable public nuisance under Ohio law.[19] But that win was ephemeral. When Chicago took a similar tack, the NRA and industry forces rapidly coalesced, obtaining a decisive holding by the Illinois Supreme Court that the city could not apply Illinois public nuisance principles to hold gun makers and sellers liable for the flood of weapons into the municipality.[20]

Closing the door-PLCAA: The next major piece of Congressional legislation regarding firearms would reflect a 180-degree reversal of sentiment from prior federal measures. On the heels of the litigation by Cincinnati, Chicago and others, lawmakers bought into the NRA's Second Amendment urgings that they insulate the gun industry from challenge. The Protection of Lawful Commerce in Arms Act (PLCAA) passed by a wide Congressional margin in 2005. Captioned as "an act to prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers or importers of firearms or ammunition for damages, injunctive or other relief resulting from the misuse of their products by others,"[21] PLCAA has effectively muted would-be claimants, municipal and otherwise. With the exception of a relatively recent and exceedingly rare settlement by the industry in favor of Sandy Hook plaintiffs,[22] virtually no plaintiff has succeeded in circumventing the law's expansive immunities. True, some efforts have been floated in Congress to rebuff the weapons makers and dealers: in July 2021, for example, two bills reached a vote on the House floor: the *Equal Access to Justice for Victims of Gun Violence Act,*[23] and the *Assault Weapons Ban of 2021*.[24] Neither advanced.

3. Back to Ghost Guns-Too Little, Too Late

Paralleling its inability to rein in firearms generally, the federal response to ghost guns has largely been an exercise in futility. As referenced earlier, ATF regulations historically classed gun components—even if they could be assembled into a working weapon—as outside its definition of "firearm," meaning that they did not fall within the ambit of laws mandating the placement of serial numbers on guns.[25]

One small federal step: A growing chorus of concern about ghost guns eventually generated federal action. Last year, the Biden administration ATF announced new rules (Final Rule) that placed kits used to build homemade "ghost guns" in the same legal category as traditional firearms. The Final Rule prohibits the sale of gun components – the frames and receivers - without a serial number and requires that purchasers submit to background checks.[26] The measure was unsuccessfully challenged by a group of attorneys general, and by the NRA and other gun groups.[27] In the 120-day period between announcement of Final Rule and its effective date, ghost gun sales soared as retailers rushed to clear their inventories of the soon-to-be-illegal components.[28]

The loopholes persist: While well-intentioned, the Final Rule arguably suffers from a continuing federal myopia, as evidenced by the reactions to the measure by the State of California and one eminent gun control group-the Gifford Foundation.[29] They had initially sued the government due to

a lack of action on ghost guns, only to stay their proceedings as the Final Rule was announced. But upon closer review of the text, they again returned to court, citing material shortcomings and seeking injunctive relief:

> In April 2022, the administration issued new rulemaking that seemed intended to combat the proliferation of ghost guns. But ATF's new rule, which took effect in August 2022, is contrary to the text of the GCA in one critical aspect.. . . Though the Final Rule takes important steps to eliminate ghost gun-making "kits"—meaning where 80 percent receivers or frames are sold together with other essential firearm parts, such as the magazine to store ammunition, and the jigs to assemble the firearm—the Rule still permits the selling of unserialized "80 percent" receivers and frames as standalone items without any background checks or serialization. For example, Juggernaut Tactical sells both 80 percent lower receivers and jigs and tool kits on their website. These items are sold completely unregulated—as long as a buyer purchases each in a separate transaction.[30]

4. State and Local Governments Take Up Arms

As with other aspects of gun regulation, the inadequacy of federal action on ghost guns has spurred states and local governments to fill the vacuum. The following will illustrate some encouraging results, but will also reveal that hurdles lie ahead.

No in Nevada: Does the Second Amendment guarantee an individual right to manufacture firearms? The ferocity of pro-gun activists is evident in a recent decision in Nevada. There, gun control advocates passed AB 286, which was approved on straight party line votes in the state's Senate and Assembly. AB 286 prohibits a person from

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NEW LAWYERS

TODD SHEERAN,
City Attorney,
Herriman, Utah and
BLAKE PENNINGTON,
Assistant City Attorney,
Fayetteville, Arkansas

Balancing Work and Personal Life... Right

We recently asked the IMLA new lawyer group what topics they would like to discuss in our bimonthly meeting. One reoccurring sentiment was for a discussion on the notorious battle balancing personal life with work life. While we have some thoughts on how we balance our personal and work lives, we wanted to get a broader understanding of how other municipal lawyers perform this constant-and-always-changing balancing act.

To get some contrasting opinions, we emailed the IMLA new lawyers listserv and IMLA's Board of Directors with the following question: How do you balance your personal and work life? The response was incredible. In fact, after we cut and pasted each response into a word document, the document was seven pages long! After reviewing the responses, we found some common themes and great tips.[1]

But before we get into the responses, we need to express that the work-life balance is unique to everyone, and some of us have really struggled with this concept. Several members stated things like: "The 'balance' of personal and work life is always hard," and "our family calendar was chaotic. I rarely felt balanced." Even a young lawyer didn't initially respond "because I haven't found balance yet." And an experienced member said, "older lawyers do not know how and have never encountered a balance … until recent years."

Why is the work-life balance so hard? In two words: workaholic expectations. A member gave an example, "My senior partner at my second law firm worked seven days a week… [H]e did not wear a suit on Saturdays and would not come to the office until after church on Sundays (otherwise, you could set your watch by his arrival at 7:30 am and departure at 6:30 pm)."

This is an all-too-common theme in our profession, and many of you said you feel like you're always on the run. "You sleep when and where you can. You pay the bills on the run. You paint the kitchen on the run. … It's impossible. It's exhausting. Even panic-inducing." But, if you do it right, "it's worth it. And, that all too soon, it ends. And you will wish for those days again every now and again."

We wish we could paste all the fantastic responses we received but we have a word limit. Accordingly, we will attempt to summarize the responses into a few key takeaways, with the understanding that "perfection is not attainable." Thus, whatever stage in life you are in, here are some suggestions for better balancing your personal and work life.

Food. Surprised that this was the most common theme? We were. The food discussion is multifaceted, though. First, "keep a regular meal schedule as much as possible." This will help you "be alert during meetings" and "is good for your overall health and reduces stress." As one member put it, mealtime is "sacred." Second, eat with loved ones. Out-of-work relationships are essential for your mental health. The sharing of food has brought people together since the beginning of time. To build those relationships, one member has occasional lunch gatherings with friends. Another member "makes it a point to eat dinner with her family on nights she does not have board meetings." Whether you eat with family, friends, or current/former coworkers, nourishing those relationships is as important as nourishing your body.

Exercise and personal care. Many of you emphasized the importance of exercise and personal care. This is because "[o]ver time, I've learned that self-care must come first. I can't give to my partner, to my kids, to the City, to my clients, if I haven't made critical investments in myself first." Often this "helps to manage stress and keep things in perspective." The exercise and personal care comments were mainly specific to the members' needs - some get a monthly massage, some go to yoga, and others participate in exercise classes. But we gathered that whether you run, walk, bike, or hike, or do it before, during, or after work, the most important thing is to make time to take care of yourself.

Another important aspect of personal care is sleep. "I've learned that sleep is critical. I always feel more connected at both work and in my personal life when I'm rested. If I'm mentally and physically exhausted, I feel like everything is falling apart." Unfortunately, getting the recommended eight hours of sleep at night

can be a pipe dream with all of the things going on in our lives. Sometimes an afternoon power nap is the solution. One member told us, "I… keep a camping pad, pillow, and blanket in my office for the occasional 20-30 minute nap in the afternoon. It does wonders for my attitude and focus."

Leave work at work. In an article Todd wrote a couple of months ago for the *Municipal Lawyer* titled "Five Reasons to Become a Municipal Lawyer," Todd stated that he left family law (i.e., divorces) because that increased his struggle with "leaving work at work." What Todd didn't say in that article, however, was that the more responsibility he's been given as a municipal lawyer, the more challenging it is to disconnect from work. As one member wisely stated, "I have found that the work never stops flowing and that taking time to unplug or rest is okay …. I try to keep a balance by unplugging when I am not in the office or I am off." Another member wisely stated: when you are off work (especially during vacations and events), don't work! "Do whatever planning you have to do ahead of time to make sure you don't put yourself in the position of answering emails, editing a document, or attending a virtual meeting."

If you work from home--something that became almost universal thanks to the pandemic-- it becomes even more important to maintain that separation. A member said: "When I work from home I do so in a space that I use only for that purpose. Not everyone has the space to do this, but I think that putting laptop and papers away and out of sight at the end of the day is almost as effective."

Be careful about dumping work issues on your family and friends. "I try not to talk, in depth, about work when I am home or with friends. Sure, I'll say 'Oh it was a busy day, week, month… or tons of court appearances lately…' but rehashing a particularly difficult or complicated matter usually doesn't benefit anyone and doesn't provide the different atmosphere needed when one is separated from work. It is hard to do sometimes, but it is a worthwhile effort!"

Actively manage your work day. Several members agreed that time management at work is a crucial aspect of work-life balance. One said, "I try to start work early, stay focused during the work day, and then leave at my designated quitting time. I do this so I can get home, and then finish my daily exercise and have family/relaxation time."

Another member said, "at work, meetings are the bane of my existence" because she is often invited to "function as eye candy or cover, neither of which are productive uses of my time." I'm sure we can all remember walking out of a meeting thinking, "this could have been an email." Set boundaries for yourself, which could include blocking off time around important family events, allowing only a select few to add appointments to your calendar, or making sure every meeting has a clearly stated purpose before accepting the calendar invitation.

Rare will be the times when you absolutely must work through lunch, at night, or on weekends. A member said, "You wouldn't expect any of your departments' staff to work nights and weekends if it's not truly time sensitive, so stop expecting it from yourself. Without work-free nights and weekends, you're going to burn out and start hating the job you love. You deserve to have a job you love."

Plan and make goals. Limit wasted time or productivity. One member found journaling to be helpful in setting and tracking personal and professional goals each month. "The personal goals help me focus my free time so I can be intentional about working on them. That way they stay a priority and I feel like work is not all consuming because I am spending time on the things that matter to me."

Take time to reflect and meditate. Meditation and mindfulness practices can help you center yourself in times of stress. Kerrie Liles Lauck, a licensed attorney in Arkansas and now an internationally certified mindfulness teacher, recognizes how mindfulness has helped in her own life and how it can help others. Kerrie said, "in 2009, as an attorney and new mother, I found mindfulness as a way to help me cope with and better manage my life and work. The practices quickly became indispensable life skills for me, as well as keys to collaborative teamwork and leadership." This became so important to her that she retired from lawyering and, in 2021, established KLauckwork, a mindfulness training center in Little Rock, Arkansas, to share the practice of mindfulness with others. Kerrie's clients include the Arkansas Municipal League, attorneys and law firms, small and large corporations, school districts, and medical professionals.

Blake recently attended a mindfulness session Kerrie led for attorneys at the Arkansas Municipal League's annual conference. After sharing some of the science behind mindfulness, she led the group through a guided breathing exercise. Everyone in the room agreed that, after just a few minutes of breath work, their minds had calmed and they could feel a difference in their stress levels.

A mindfulness practice doesn't have to take an hour out of your day. Just a few minutes doing breath work, intentional movement, focused attention, body awareness, or visualization can positively impact your stress levels. This is not an overnight fix, but peer reviewed studies have shown that even a few weeks of regular practice can lead to increased focus; lower levels of stress hormones, blood pressure and heart rate; increased immune function; and protection against cognitive decline.[2,3,4]

The next time you feel overwhelmed, Kerrie suggests that you try the 7-11 breath exercise: count to 7 on your in-breath and count to 11 on your out-breath. Do this for several minutes. It can quickly and effectively bring relief by engaging the part of the brain that regulates our sense of safety and stability.[5]

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New Lawyers *cont'd from page 21*

Get a hobby. Many members find balance in their hobbies. Whether that involves throwing pottery, sitting down to read, doing crossword puzzles, or spending time in the great outdoors, these activities "contribute to a healthy lifestyle for the long term."

Give yourself grace. Life will not always be a walk in the park, and it's important to set reasonable expectations for ourselves. One member acknowledges that "perfection is not attainable, and therefore it's really important that we forgive ourselves if we are trying our best but still fall short." Another member said, "I now know that there are going to be periods when personal and family commitments intercede more and other times when I have seemingly endless time and energy to devote to my work. And that's okay. Giving myself grace and having a forgiving perspective has eventually brought everything into equilibrium." ML

Notes

1. In this article, we will quote several responses anonymously. And to ensure flow, it is safe to assume that anytime we're quoting something, it came from a member who submitted a response, without our specifying each time that it came from a member.
2. Yi-Yuan Tang, et al., *The neuroscience of mindfulness meditation*, Nature Reviews Neuroscience, April 2015 at 213-225
3. Shian-Ling Keng, et al., *Effects of mindfulness on psychological health: A review of empirical studies*, Clinical Psychology Review, Volume 31, Issue 6, 2011 at 1041-1056
4. Philippe R. Goldin, et al., *Effects of Mindfulness-Based Stress Reduction (MBSR) on Emotion Regulation in Social Anxiety Disorder*, Emotion, February 2010 at 83-91
5. Visit http://www.klauckwork.com for more information about practicing mindfulness including other tips and exercises.

Homelessness *cont'd from page 15*

1. *See* https://coloradosprings.gov/police-department/page/homeless-outreach-team.
2. Colorado Springs, Colo., Ordinance 12-100 (Nov. 20, 2012).
3. Code of the City of Colorado Springs 2001, as amended ("City Code") § 9.2.111.
4. Ordinance 12-100 was codified in City Code § 9.2.111.
5. City Code § 9.2.111 (B)(repealed).
6. Pikes Peak Justice & Peace Commission v. City of Colorado Springs, 12-cv-03095-MSK (U.S. Dist. Colo. 2012).
7. *Id.* at p .4.
8. Fed. R. Civ. P. 65.
9. *Pikes Peak Justice & Peace Commission, supra* note 6 at p. 10. The Court drew the elements of the preliminary injunction analysis from *Schrier v. University of Colorado,* 427 F.3d 1235 (10th Cir. 2005).
10. *Id.* at p. 13 *citing* Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981); and United States v. Kokinda, 497 U.S. 720 (1990).
11. *Id.* at p. 13.
12. *Id.* at p. 14.
13. *Id.* at p. 15.
14. *Id.* at pp. 18-19.
15. *Id.* at p. 22.
16. *Id.* at p. 32.
17. As part of the overall settlement of the case the City agreed to pay $110,000 to the ACLU.
18. Colorado Springs, Colo., Ordinance 13-22 (Apr. 11, 2013).
19. United States Census Bureau, "Quick Facts", https://www.census.gov/quickfacts/coloradospringscitycolorado.
20. *Id.*
21. Breeanna Jent, *Nearly All El Paso County Renters, Half of Homeowners Concerned About Housing Affordability*, Colorado Springs Gazette (Jun. 8, 2022), https://gazette.com/premium/nearly-all-el-paso-county-renters-half-of-homeowners-concerned-about-housing-affordability-poll/article_97404cb4-e6a2-11ec-b1c8-9f36e6a9351c.html.
22. Tom Cronin and Bob Loevy, *The Affordable Housing Crisis in Colorado: U.S. Government Has to Help*, Colorado Springs Gazette (May 7, 2022), https://gazette.com/premium/the-affordable-housing-crisis-in-colo-u-s-government-has-to-help-cronin-and-loevy/article_621f06ea-cc87-11ec-bd36-effdfc2e94fa.html#:~:text=The %2020 2020%20Census%20set%20the,-Colorado%20Springs%20at%20 12%2C135%20units.
23. *See* https://www.usich.gov/about-usich/council/.
24. U.S. Interagency Council on Homelessness, The Importance of Housing Affordability and Stability for Preventing and Ending Homelessness (2019), https://www.usich.gov/resources/uploads/asset_library/Housing-Affordability-and-Stablility-Brief.pdf.
25. City of Colorado Springs, "Number of People Experiencing Homelessness", https:// coloradosprings.gov/homeless-prevention-and-response-0/page/number-people-experiencing?m-lid=34021.
26. *Id.*
27. *Id.*
28. Reed v. Town of Gilbert, 576 U.S. 155 (2015).
29. *See* Genevieve Lakier, *Reed v. Town of Gilbert, Arizona, and the Rise of the Anticlassificatory First Amendment*, Supreme Court Review, 233 (2017), *located at* https://www.journals.uchicago.edu/doi/full/10.1086/691625.
30. *Reed*, 576 U.S. at 165.
3. *Id.* at 171, *citing* Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 131 S.Ct. 2806, 2817 (2011), *quoting* Citizens United v. Federal Election Commission, 558 U.S. 310, 340 (2010).
32. Browne v. City of Grand Junction, 136 F.Supp. 3d 1276, 1287-88 (D. Colo. 2015).
33. *Id.* at 1292.
34. *Id.*
35. Martin v. City of Boise, 920 F.3d 584, 604 (9th Cir. 2019).
36. *Id.* at 617 quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1136 (9th Cir. 2006), *appeal dismissed per stip-*

ulation and vacated as moot, 505 F.3d 1006 (9th Cir. 2007).
37. Debbie Kelley, *Colorado Springs' First Homelessness Prevention Specialist Heading for Similar Post in Governor's Office*, Colorado Springs Gazette (May 29, 2022), https://gazette.com/premium/colorado-springs-first-homelessness-prevention-specialist-heading-for-similar-post-in-governors-office/article_e31b504e-ddc3-11ec-abbf-9b1cf3b5edf3.html.
38. City of Colorado Springs, "2019 Colorado Springs Homelessness Initiative", *available at* https:// coloradosprings.gov/sites/default/files/inline-images/homelessness_initiative_20190212_0.pdf.
39. *See* https://coloradosprings.gov/ESG?mlid=30911.
40. *See* https://coloradosprings.gov/police-department/page/homeless-outreach-team.
41. Sydnee Scofield, *Colorado Springs Police Homeless Outreach Team to Focus on Safety Over Citations Amid Incoming Winter Storm*, KRDO (February 1, 2022), https://krdo.com/news/2022/02/01/colorado-springs-police-homeless-outreach-team-to-focus-on-safety-over-citations-amid-incoming-winter-storm/.
42. *Id.*
43. *See* https://coloradosprings.gov/police-department/page/gold-hill-division.
44. Debbie Kelley, *Colorado Springs Fire Department's Homeless Outreach Results in Less Street Crime*, Colorado Springs Gazette (Aug. 1, 2021), https://gazette.com/premium/colorado-springs-fire-departments-outreach-to-homeless-shows-decrease-in-crime-increase-in-assistance-for/article_de8b9052-f138-11eb-af17-430424685cea. html?fbclid=IwAR3X-wFuXcY-VTo92r-e5eJTJQd0N5Gzjzyh-DAcYGA1YzNWKtWzc3qSB_gdw.
45. 2019 Colorado Springs Homelessness Initiative at p. 10-11.
46. *See* https://www.ppchp.org/homelessness/about-coc/.
47. *See* "2021 PPCoC 3-Year Strategic Plan", *available at* https://www.ppchp.org/wp-content/ uploads/ 2021/11/Pikes-Peak-Continuum-of-Care-3-Year-Strategic-Plan.pdf.
48. *See* https://www.ppchp.org/homelessness/about-coc/.
49. *See* https://www.ppchp.org/homelessness/homeless-management-information-system-hmis/.
50. *See* Martin v. City of Boise, 920 F.3d 584 (9th Cir. 2019).
51. Tony Flesor, *Denver Finds Camping Ban Constitutional*, Law Week Colorado (Sept. 14, 2020), https://www.lawweekcolorado.com/article/denver-camping-ban-upheld/.
52. Burton v. City and County of Denver, (Colo. 2021) (No. 20SC821), 2021 WL 1951174.
53. Debbie Kelley, *Hundreds Persist in Living on the Streets in Colorado Springs Even With a Surplus of Shelter Beds*, Colorado Springs Gazette (Sept.12, 2020), https://gazette.com/homeless/hundreds-persist-in-living-on-the-streets-in-colorado-springs-even-with-a-surplus-of/article8011b0ba-f454-11ea-8eb9-a3d77f43f25b.html#:~:text=A%20concerted%20effort%20to%20provide,homelessness%20prevention%20and%20response%20coordinator.
54. Colorado Springs, Colo., Ordinance 18-105 (Oct. 23, 2018).
55. *Id.* and *see* https://coloradosprings.gov/springs-rescue-mission-campus-expansion?mlid=41286.
56. *See* https://coloradosprings.gov/springs-rescue-mission-campus-expansion?mlid=41286.
57. *Id.*
58. *See* "Available Shelter Beds Colorado Springs" *available at*: https://docs.google.com/spreadsheets/d/1eirJr-I3x-0ZXbJBXlDjt-a8JxMUj-YEtX43ON-fLlC_E/edit?mlid= 44751#gid=0.
59. City Code §§ 1.1.201 (B) and 10.1.101 (B).
60. *Id.* at § 9.6.110.
61. City Code § 9.9.404.
62. *Id.* at § 9.6.111.
63. *Id.* at § 9.6.111 (B).
64. *Id.* at § 9.6.111 (D).
65. Krystal Story, *Colorado Springs Mayor 'Confident' Homeless Camping Laws Could Stand Up* in Court, KRDO (December 31, 2019), https://krdo.com/news/2019/12/31/colorado-springs-mayor-confident-homeless-camping-laws-could-stand-up-in-court/.
66. Paola Farer, *Officials Identify Two Boys Found Dead After Colorado Springs Storm,* 9 News (Jun. 22, 2005), https://www.9news.com/article/news/local/officials-identify-two-boys-found-dead-after-colorado-springs-storm/73-344729639.
67. City Code § 10.25.101 (U).
68. *Id.*
69. City Code § 10.18.112 (A).
70. *Id.*
71. City Code § 10.18.112 (C).
72. *See* McCraw v. City of Oklahoma City, 973 F.3d 1057 (10th Cir. 2020), *cert. denied*, 141 S. Ct. 1738 (2021).
73. City Code § 9.2.122.
74. *Id.* at § 9.2.112 (A).
75. Colorado Springs, Colo., Ordinance 16-13 (Feb.9, 2016).
76. Colorado Springs, Colo., Ordinance 22-07 (Feb. 8, 2022).
77. City Code § 9.2.112 (C).
78. Debbie Kelley, *Colorado Springs' First Homelessness Prevention Specialist Heading for Similar Post in Governor's Office,* Colorado Springs Gazette (May 29, 2022), https://gazette.com/premium/colorado-springs-first-homelessness-prevention-specialist-heading-for-similar-post-in-governors-office/article_e31b504e-ddc3-11ec-abbf-9b1cf3b5edf3.html.

LISTSERV

BRAD CUNNINGHAM,
Municipal Attorney, Lexington, South Carolina

Oh No! Another Election!

The resignation this past month of a long-time Councilman has brought the issue of municipal elections to the forefront of the legal department. Due to the timing of the resignation, under state law a Special Election is required to fill the vacancy. I realize that state laws vary, so please understand at the onset I am writing from a South Carolina point of view--others may or may not have similar situations.

The first challenge is to figure out when and how to advertise the election. This is governed by S.C. Code, and it takes a calculator to figure it out: §7-13-35 states:

> "**Notice of general, municipal, special, and primary elections**… The authority charged by law with conducting an election must publish two notices of general, municipal, special, and primary elections held in the county in a newspaper of general circulation in the county or municipality, as appropriate. Included in each notice must be a reminder of the last day persons may register to be eligible to vote in the election for which notice is given, notification of the date, time, and location of the hearing on ballots challenged in the election, a list of the precincts involved in the election, the location of the polling places in each of the precincts, and notification that the process of examining the return-addressed envelopes containing absentee ballots may begin at 7:00 a.m. on the second day immediately preceding election day at a place designated in the notice by the authority charged with conducting the election. The first notice must appear not later than sixty days before the election and the second notice must appear not later than two weeks after the first notice." …

This is quite a balancing act, especially when you are required to place the ad with enough advance notice to meet newspaper ad deadlines.

The second challenge is to calculate when filing by candidates for the Special Election will open, followed by the calculation of when the election will actually be conducted. The Town of Lexington has non-partisan elections, so the calculation of the date is governed by S.C. Code §7-13-190(C):

> If the office is not one for which there are partisan elections, then the filing must be opened at noon on the third Friday after the vacancy occurs for a period to close ten days later at noon. The filing must be made to the same entity to which the nonpartisan officeholders would normally file for office in a general election year. The election must be set for the thirteenth Tuesday after the vacancy occurs. Both the filing date and the election date are subject to the provisions in subsection (B) of this section regarding holidays.

Let that sink in a minute… Filing by noon…Third Friday…For ten days…

Finally, as stated, the third challenge is to figure out the date for the actual election, which requires another exercise in mathematics. Fortunately, it is governed by the same statute as above. And must be "set for the thirteenth Tuesday after the vacancy occurs."

One wonders where all these numbers came from? And no wonder the Municipal Clerk has a calendar on her desk! There are notes *all over* our Clerk's desk calendar. And batteries for her calculator, which wears out quickly.

In our specific case, a quick trip on the calculator ended up revealing the timing in the Town of Lexington Special Election would have resulted in an election being conducted on Tuesday after Memorial Day weekend. The Election Commission balked at this. But whose fault is it? What can we do now? Nobody wants to have an election the day after a Federal Holiday!

Fortunately, an amicable Coun-

cilmember "adjusted" his date of resignation to fix this catastrophe, and the election will be conducted accordingly. Everyone knows it is hard enough to get folks out to vote for a General Election, much less a Special Election. And, in our case, a Special Election on the day after a federal holiday which also happens to be the traditional "opening weekend" of beach season in South Carolina. The over and under on the percentage of turnout on that one would probably be about 5%!

OK, after successfully figuring out a series of calculations that would thrill Miss Pledger, my high school Algebra teacher, we actually get to conduct the election! This brings to the forefront some more adventures.

There are the complaints of "This candidate is too close to the polls on Election Day! He's on the wrong side of the sidewalk! Her sign blocks mine!" Some of my personal favorites: "No, I don't live there but John is a friend of mine and I want to vote for him." … "This is important. Can I vote there even though I don't live there?" … "The Mayor is doing well. Why do we have to have an election to keep him in office? Can't he just stay?"

My mind continues to wander onto other adventures like actually counting the votes. My first election as a City Attorney dealt with three guys and a clerk all jammed in a small room with five candidate representatives as well as several curious citizens standing outside with their ears pressed to the door. My favorites were the write-in votes, which are not allowed everywhere but they are in South Carolina. (Except for President but that is a story for another day).

"What is this name? Let me see… Kind of hard to read… S-P-O-N-G-E…B-O-B… "Sponge Bob?" chimed in a second commissioner? "Who the **** is Sponge Bob responded the Election Chairman?" Nervous laughter ensued. Then there were the proverbial votes for "None of the Above", Winnie the Pooh, Mickey Mouse and "Your Mother." We also had a candidate declare as an official write-in candidate, but that candidate came in last, even losing to Winnie the Pooh. I suppose some folks just don't take these things seriously enough.

In that first election, around midnight the results were finally announced out loud and on a giant screen at the conference center in Town Hall. At last, a long and tedious process capped by an exceptionally long day was over! And we had an answer! (Note I did not even cover the process of recruiting poll managers and workers, setting up polls, transporting machines and manning the phones for voter questions and many other challenges)

My mind rolls back around to 2023 and reminds me: "And Guess what? We get to do this all over again in a couple of months for the General Election!" I promise if you ever volunteer to work during an election, you may never look at them the same way again.

***

There are many election oddities that come from my beloved home state, some of which I will share, but I am sure we are not alone. There was the retired and then blind doctor who was elected as Chief Medical Examiner/Coroner in one of our rural counties. I am certainly an advocate for those with disabilities, but a lot of folks seriously questioned the ability of this person to perform an autopsy and many concerns were voiced.

Then there was the case of the former candidate caught up in an infamous scam who got reelected anyway. One voter in an exit poll proclaimed "Yeah, I know he might be a crook but he's the best (in that office) we've ever had."

There was also the small-town Mayor who registered as a candidate but did not solicit votes, did not campaign at all, had no signs, no ads, nothing…. He was just "messing with them" and won!

Lastly there was a crowded County Council race here in my county with seven announced candidates filing for the same seat. However, due to a new change in the law, only one of the seven had actually filed for office properly (a lawyer who had read the rules), so the other six were disqualified and the sole survivor was elected.

Oh well, such is life in the state that brought the whole country the Murdaugh saga!

***

Unfortunately, I had to attend the funeral of my Uncle David a couple of weeks ago. In discussion with friends and relatives, I relayed the story about Uncle David getting a ticket for a fishing violation many years ago. I have often used it in situations or discussions about how far the small-town legal system has developed over the many years since this incident.

Back in the late 70's, it seems David and a couple buddies were fishing and while wading up a stream, they accidentally wandered onto the Cherokee Reservation. A game warden found them and asked for their license to fish on the reservation, and they did not have one. The warden insisted on making them appear before the area Magistrate. This was on a Sunday.

The Magistrate was furious with the game warden for making him come down to the office on Sunday for a fishing violation. Reluctantly, he proceeded. "Alright, tell me what happened," he barked. David replied that they had been fishing in an area that was poorly marked and accidentally wandered onto

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AMICUS

AMANDA KARRAS,
IMLA Executive Director and General Counsel

What would a Changed "Undue Hardship" Test Under Title VII Mean for Local Governments?

Title VII of the Civil Rights Act makes it unlawful for an employer to discriminate against an employee because of the employee's religion.[1] The term "religion" in the statute is defined as including "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that [it] is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[2] "Undue hardship" is not defined in the statute. In 1977, the Supreme Court articulated a definition for what constitutes an "undue hardship" in seeking to balance an employee's religious accommodation request and the employer's workforce obligations. The Court held in *Trans World Airlines, Inc. v. Hardison* that TWA was not required to accommodate the employee's request for Saturdays off to observe the Sabbath, as doing so would require TWA to "bear more than a de minimis cost," which the Court held, would constitute an undue hardship.[3]

The "more than a de minimis cost" standard articulated in *Hardison* has been the subject of criticism.[4] In fact, three sitting Justices have gone on record arguing that the test is a mistake.[3] The Court has now granted certiorari in *Groff v. DeJoy*, which presents the question as to whether the Court should overrule *Hardison* or at the very least, reject the "more than de minimis cost" test articulated in the case.

Gerald Groff was hired by the United States Postal Service (USPS) as a Rural Carrier Associate (RCA), which is a non-career employee who provides coverage for absent employees. Because the nature of the RCA job is "as needed," the job requires flexibility. RCAs do not accrue leave and any absences are unpaid. During Groff's employment, there was a shortage of RCAs in his region. Also, during this time, USPS contracted with Amazon to deliver packages, including on Sundays. USPS indicated that the success of the Amazon Sunday delivery was critical to its operations.

Groff's sincere religious beliefs dictate that Sunday is a day of worship and rest. He therefore informed USPS that he was unable to work on Sundays. USPS told him that during peak season (November – January) he would have to work Sundays or find another job. But they offered other accommodations, including that he could start later on Sunday after attending services. USPS also offered to find employees to swap shifts with him. USPS was able to find other employees to cover his Sunday shifts for some of the time, but one of the RCAs who had been covering for him got injured, which left just one other RCA and the Postmaster to cover Sunday shifts. There were at least 20 Sundays where no co-workers could swap, and Groff did not work. Groff was disciplined for failing to work on those days and ultimately left USPS.

Groff sued alleging violations of Title VII for failing to accommodate his religion. To establish a prima facie case of religious discrimination, Groff must show he: 1) has a sincere religious belief that would prohibit work on Sunday; 2) informed his employer of the conflict; and 3) was disciplined for failing to comply with the conflicting job requirement.[4] The burden then shifts to the employer to demonstrate either that "it made a good-faith effort to reasonably accommodate the religious belief, or such accommodation would work an undue hardship upon the employer and its business."[5]

The first issue under the Title VII analysis is whether the employer offered a reasonable accommodation. If the employer did, the statutory inquiry ends.[6] In the Third Circuit, to demonstrate a legally sufficient accommodation, it must "eliminate[] the conflict between the employment requirements and religious practices."[7] The Third Circuit concluded that "even though shift swapping can be a reasonable means of accommodating a conflicting religious practice, here it did not constitute an 'accommodation' as contemplated by Title VII because it did not successfully eliminate the conflict."[8]

If the good faith attempts to accommodate the religious practice are unsuccessful, the next step in the analysis is whether providing the accommodation would work an undue hard-

ship on the employer, which as noted above, is an accommodation that requires "more than a de minimis cost to the employer."[9] In the Third Circuit, courts can consider both economic and non-economic costs associated with the requested accommodation in assessing whether it is an undue hardship.[10] USPS provided evidence that Groff's absences created more work for the Postmaster, including requiring him to deliver mail some Sundays; created burdens for Groff's co-workers who had to do extra work; and created a "tense atmosphere" amongst other employees and hostility toward management.[11] The Third Circuit concluded that Groff's requested accommodation to be exempt from working Sundays caused "more than a de minimis cost on USPS because it actually imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale…"[12]

The Supreme Court granted certiorari on the following issues: (1) Whether the court should disapprove the more-than-de-minimis-cost test for refusing religious accommodations under Title VII of the Civil Rights Act of 1964 stated in *Trans World Airlines, Inc. v. Hardison*; and (2) whether an employer may demonstrate "undue hardship on the conduct of the employer's business" under Title VII merely by showing that the requested accommodation burdens the employee's coworkers rather than the business itself. The Court will hear oral argument on the case in April and will issue a decision before the end of June.

Religious accommodation requests can come in the form of schedule changes, break time modifications, dress policy exceptions, and exceptions to vaccination requirements, among others. IMLA supports laws and policies that eliminate discrimination in the workplace, and which require employers to provide reasonable accommodations so that people can participate equally in the workplace regardless of their protected characteristics. Employers should always attempt to accommodate reasonable requests by their employees to practice their sincerely held religious beliefs if doing so does not create an undue hardship. But of course, what constitutes an undue hardship is ultimately the question in these cases.

Local governments are collectively one of the largest employers in the country and any significant change to the undue hardship test will increase costs and liability for local governments while also negatively impacting operations. And questions remain about what test would replace it if the Court does overrule *Hardison*. How much must an employer be willing to pay to accommodate the religious accommodation requests of its employees? Is paying another employee overtime to accommodate the requesting employee's religious beliefs an undue hardship? What if a large employer has hundreds of requests for particular days off based on those employees' religions, requiring significant overtime payments? While there is an argument that the de minimis standard is too difficult for employees to meet to demonstrate liability under Title VII, employers should be concerned about what may replace it, lest the pendulum swing too far the other way.

Another nuance in this case for local governments is that any change in this rule will impact all public employees, including those in public safety positions. An example of how this could negatively impact local governments can be illustrated by *Rodriguez v. City of Chicago*. In *Rodriguez*, a police officer who was an observant Roman Catholic informed his supervisor that he opposed an assignment to help guard an abortion clinic during protests outside the clinic due to his religious beliefs.[13] His captain informed him that he would try not to assign him to the clinic, but that he could not give him a formal exemption given department policy (though Rodriguez could have transferred to another precinct that did not have to guard abortion clinics).[14] Over the course of many months, there was one incident in which Rodriguez was assigned to duty at the clinic, which he did under protest and he sued thereafter, asserting a failure to accommodate his religious beliefs.[15]

The Seventh Circuit affirmed the district court's finding that the City had satisfied its duty to accommodate Rodriguez as he could have sought (and would have obtained) a transfer to a district that was comparable that did not have any job duties associated with abortion clinics but failed to do so.[16] The court therefore did not reach the issue of undue hardship.

The case is nevertheless instructive because one can easily imagine a scenario in which under a more rigorous definition of undue hardship, employees in safety sensitive positions may seek exemptions from assignments based on their religious beliefs. Given the pluralistic nature of our society, police departments could easily be overrun with requests for exemptions from particular jobs, making it virtually impossible to meet critical public safety needs. Moreover, the nature of police and fire agencies lend themselves even less to employees refusing assignments because of their religious beliefs. It is one thing for an employee to request a schedule change to observe a religious holiday or Sabbath, but an entirely different issue arises if police officers and firefighters can claim exemptions from serving and protecting certain segments of society based on their religious beliefs.

Indeed, Judge Posner made exactly this point in his concurrence in *Rodriguez* when he explained that in his view "police officers and firefighters have no right under Title VII of the Civil Rights Act of 1964 to recuse themselves from having to protect persons of whose activities they disapprove for religious (or any other) reasons."[17] As an example, Judge Posner notes "a firefighter is [not] entitled to demand that he be entitled to refuse to fight fires in the places of worship of religious sects that he regards as Satanic."[18] The risk, should we

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Amicus *cont'd from page 27*

allow such exemptions for public safety personnel is "the loss of public confidence in governmental protective services if the public knows that its protectors are at liberty to pick and choose whom to protect."[19]

It is worth noting that the Court is also considering whether employee morale may be factored into the undue hardship analysis. If the Court holds that employers cannot demonstrate an undue hardship with evidence of the impact on coworkers, local governments' business operations will be negatively impacted. The reality is that employee morale is an important aspect of any workplace, and if employers are required to accommodate an individual's religious beliefs at the expense of other coworkers and workplace morale, workplaces will suffer.

Finally, issues surrounding *stare decisis* and the separation of powers are at play in this case as well. The *Hardison* decision should stand on the firmest *stare decisis* grounds, given that it is a case interpreting a Congressional statute. Congress has had nearly 50 years to pass a law defining undue hardship under Title VII in a way that is contrary to *Hardison* if it believes that the Supreme Court's interpretation of that language is erroneous. And yet, it has declined to do so even though it has amended the statute for other purposes since that time. That silence speaks volumes. If employees and other interest groups believe *Hardison's* de minimis standard is erroneous, the proper way to rectify the error is by petitioning Congress to define the term in the statute, as the legislature is better suited in the first place to define statutory terms. ML

Notes

1. Section 703(a)(1) of the Civil Rights Act of 1964, Title VII, 78 Stat. 255, 42 U.S.C. s 2000e-2(a)(1).
2. *Id.* at (j)
3.Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977). The costs associated with the requested accommodation included breaching a collective bargaining agreement's seniority system or paying overtime to employees to swap shifts. *Id.* at 68-69.
4. *See* Josh Blackman, *Did Justice Thomas Cover for Justice Barret's Vote to Deny Cert To Reconsider TWA v. Hardison?* The Volokh Conspiracy, , Apr 6, 2021 (available at https://reason.com/volokh/2021/04/06/did-justice-thomas-cover-for-justice-barretts-vote-to-deny-cert-to-reconsider-twa-v-hardison/).
5. *See* Small v. Memphis Light, Gas & Water, 141 S. Ct. 1227, 1228 (2021). In *Small*, Justice Gorsuch, joined by Justice Alito, dissented from the denial of certiorari in a case involving the undue hardship test under Title VII. In lamenting the Court's failure to grant certiorari, Justice Gorsuch refers to the de minimis test as undoing Title VII's undue hardship test and indicates the "only mistake here is of the Court's own making – and it's past time for the Court to correct it." *Id.* at 1229. In *Patterson v. Walgreens, Co.*, the Supreme Court denied certiorari in the identical issue. 140 S.Ct. 685 (2020). This time, Justice Alito wrote for himself and Justices Thomas and Gorsuch to indicate that the Court should revisit *Hardison's* undue hardship test, which Justice Alito noted did "not represent the most likely interpretation of the statutory term." *Id.* at 686.
6. Groff v. Dejoy, 35 F.4th 162, 168 (3d Cir. 2022).
7. *Id.* at 169.
8. *Id.*
9. *Id.*
10. *Id.* at 174.
11. *Id.*
12. *Id.*
13. *Id.* at 175-76.
14. *Id.* at 175.
15. Rodriguez v. City of Chicago, 156 F.3d 771, 773 (7th Cir. 1998).
16. *Id.*
17. *Id.* at 774-75.
18. *Id.* at 775.
19. Rodriguez v. City of Chicago, 156 F.3d 771, 779 (7th Cir. 1998) (Posner, J., concurring).
20. *Id.*
21. *Id.*

NACo, NLC, IMLA, and GFOA Announce New Local Government Legal Center

WASHINGTON, D.C. — The National Association of Counties (NACo), the National League of Cities (NLC), the International Municipal Lawyers Association (IMLA) and Government Finance Officers (GFOA) are pleased to announce the formation of a new coalition known as the Local Government Legal Center (LGLC). NACo, NLC, and IMLA are founding members of the LGLC and GFOA is an associate member of the LGLC.

The LGLC will provide a strong and unified local government voice before the U.S. Supreme Court and lower courts in cases that are of consequence to municipal operations. The LGLC will also serve as a resource for local governments regarding the Supreme Court, providing education to local governments regarding the Supreme Court and its impact on local governments and local officials.

Matt Chase, NACo's Executive Director, explained: "As the national voice of America's county governments, the National Association of Counties is proud to partner with NLC and IMLA to ensure the priorities and viewpoints of local officials are represented before our nation's highest court. As the U.S. Supreme Court addresses some of the most complex public policy issues of the day, it is essential that our county officials are aware of the Supreme Court's docket and offer our perspectives on the practical, frontline realities on county-related legal issues."

"The National League of Cities places a strong value in our legal advocacy program, recognizing the voice of local leaders in the courts presents a sound and persuasive legal argument on principles and issues important to good municipal government," said Clarence E. Anthony, NLC CEO and Executive Director. "By entering into a partnership with the International Municipal Lawyers Association in collaboration with the National Association of Counties we are excited to continue to advance our legal goals and ensure needs of cities, towns and villages are considered as the Supreme Court and lower courts rule on cases of consequence to our communities."

"GFOA is pleased to support The Local Government Legal Center as an associate member," said Chris Morrill, GFOA's Executive Director. "Supreme Court cases can impact local government finances, hindering the ability to serve their citizens. Therefore, it is critical to our members that skilled legal minds monitor Supreme Court cases and, when necessary, provide strong advocacy for local governments. We are fortunate that IMLA has this expertise and experience and has stepped forward to lead these efforts."

Amanda Karras, IMLA's Executive Director, stated the following regarding the importance of the LGLC: "Local government attorneys know as well as anyone how important persuasive advocacy is and how a lack of a voice in an important case at the Supreme Court could be devastating for local governments. IMLA is therefore pleased to be a part of the LGLC to help continue our long history of advocacy on behalf of local governments and to help elevate advocacy efforts of local governments at the Supreme Court. We believe that by joining together with the other members of the LGLC, local governments will be well served before the Supreme Court."

For more information about the LGLC, please visit: https://imla.org/local-government-legal-center/

Ghost Guns *cont'd from page 19*

"possessing, purchasing, transporting or receiving any unfinished frame or receiver of a firearm, or assembling any firearm not imprinted with a serial number."[31] Violations are a gross misdemeanor; however, repeat offenses can constitute a felony. The law does provide for various commonsense exceptions, including for a licensed firearms importer or manufacturer, or a member of law enforcement agency or where the unfinished frame or receiver already bears a serial number. The measure was signed into law by Nevada governor Steve Sisolak in June 2022; however, three days later the Firearms Policy Coalition (FPC) joined Nevada manufacturer Polymer80 to file suit. They assert that, in order for law-abiding individuals to exercise their Second Amendment rights, they must have the ability to possess firearms—including those they assemble themselves.

Federal district court Judge Miranda Du held that AB 286 did not violate the Second Amendment because individual gun owners can still purchase and use fully finished firearms – as well as assembly kits, provided they come with a serial number: therefore, the law "does not severely burden Second Amendment protected conduct, but merely regulates it."[32] Judge Du also rejected the assertion that AB 286 was a "taking" barred by the Fifth Amendment, holding that the law "does not deny all economically beneficial or productive use of unserialized firearms" because it only affects the sale or production of those products inside state lines.[33]

The decision resulted in a stampede to sell ghost gun parts before AB 286 took effect.[34]

FPC and Polymer80 launched a more productive attack in state court. In December 2021, Judge John Schlegelmilch of Nevada's Third Judicial District struck down the measure as unconstitutionally vague. He found, for example, that the phrase "intended to be used" was unclear: "by whom was it intended to be used as a gun--the manufacturer, the retailer, the purchaser?" Judge Schlegelmilch objected that "It would put an ordinary Nevada citizen at risk of discriminatory enforcement by anybody who just decides 'yeah, that looks like a gun.'" The legislature had not provided sufficient definitional guidance:

> Unlike the federal regulatory process to determine whether a frame or lower receiver is considered a firearm under the Gun Control Act, Nevada has established no authority at all to determine when an 'unfinished frame or receiver' actually comes into existence. . . . The most any court can glean from the definition is that it is something less than a firearm and more than a block of raw material."[35]

DC wins *Heller*, round two? Washington DC fared better. In February 2020, the city's Mayor, Muriel Bowser, sent to City Council proposed legislation entitled "Ghost Guns Prohibition Emergency/Temporary Amendment Act of 2020." The proposed bill amended DC code to include definitions of a ghost gun – meaning a gun that is undetectable, untraceable, or both. The measure was responding to a growing crisis: in 2017, the Metropolitan Police Department had recovered three ghost guns; by 2018 the number was 25; in 2019, 116; in 2020 306, and 327 through the first nine months of 2021.[36]

The bill rapidly passed in City Council, prohibiting the sale or transfer of an "unfinished frame or receiver," defined as "a frame or receiver of a firearm, rifle or shotgun which is not yet a component part of a firearm, but which may without the expenditure of substantial time and effort be readily made into an operable frame or receiver through milling, drilling, or other means."[37]

The DC law caught the attention of a longtime adversary of gun control in the District—Dick Heller, better known for the milestone Supreme Court decision bearing his name.[38] (Heller and other gun rights activists have won a number of more recent victories over the District, including overturning a ban on weapons with a capacity of 12 or more rounds, a ban on carrying a weapon outside the home, a ban on possession of ammunition without gun registration, and a ban on non-residents possessing a gun in the city.)[39]

Heller challenged the new ghost gun law, as well as DC's longtime ban on manufacturing weapons.[40] D.C. Attorney General Karl Racine declined to answer questions about the lawsuit, but said his office "will continue to do everything in our power to combat gun violence and improve public safety, including defending the District's common-sense gun laws in court. We are proud the District has strong laws on the books to protect residents from gun violence."

Heller's lawsuit acknowledged that the District has "a legitimate governmental concern" in prohibiting untraceable firearms. But he sought to enjoin the law on various grounds including unconstitutional vagueness. He also challenged a D.C. law that has been on the books since 1976: "No person or organization shall manufacture any firearm, destructive device or parts thereof, or ammunition, within the District." Heller's attorney wrote, "We know of no other jurisdiction in the United States that has purported to ban the manufacture of firearms." In an affidavit, Heller said that "for some time I have desired to build my own firearm," which he was willing to register and serialize. So he ordered a kit to make a Glock-style 9mm handgun from a North Carolina purveyor, and had it shipped to one of the District's two federal firearm licensees cleared by ATF to sell guns. The licensee consulted the D.C. police and was told to send the kit back, which it did. Thus, Heller was damaged "by being deprived of his parts kit."

Heller also argued that the new DC ghost-gun law was incompatible with the Undetectable Firearms Act, which as described above requires that, after removing the weapon's handle and magazine, it still must have 3.7 ounces of detectable metal. The DC law, said Heller, required the 3.7 ounces of metal *after* removing the gun's barrel, trigger and slide, leaving only

the polymer frame, which by definition isn't made of metal. "The District has apparently unwittingly made ... existing polymer frame handguns illegal."

These challenges did not prevent the DC law from surviving, withstanding even the heightened scrutiny applied by the Supreme Court in *Bruen*.[41] That victory yielded immediate results: The Polymer80 website rapidly noted, "On August 10, 2022, the Superior Court for the District of Columbia ruled that Polymer80 handgun frames, lower receivers, Buy, Build, Shoot kits and any comparable products are illegal to purchase and possess in the District of Columbia under District of Columbia law."[42] The ghost gun maker followed that announcement with a now-removed alert about possible illegality elsewhere and shifted responsibility for compliance to the purchaser:

> Please be advised that different states, localities, and jurisdictions have different laws regarding the types of products sold by Polymer80, and such products may be unlawful in certain places. By using this website, or using or purchasing a Polymer80 product, you affirm that you have verified that you may possess, purchase, and use Polymer80 products under all applicable federal, state, and local laws.[43]

Ghosts in Los Angels: "In September 2020, in Compton, a man with a felony conviction, armed with a weapon bearing no serial number, ambushed and repeatedly shot in the face and head two Los Angeles County Sheriff Deputies sitting in their patrol car."[44] So begins the complaint filed by Los Angeles City Attorney Mike Feuer against Polymer80 in 2019.[39] The action seeks injunctive relief, civil penalties, and abatement for public nuisance and violations of California's unfair competition law.[45] Los Angeles explains why Polymer80 is in its sights:

> The People bring this lawsuit against Polymer80 because Polymer80 is by far the largest seller and manufacturer of ghost gun kits and components. Of approximately 1,475 ghost guns seized in 2019 and entered into the ATF's database of ballistic images, over 86% (1,278) of these weapons were assembled from Polymer80 components. This holds true in Los Angeles, where an increasing percentage of firearms recovered by the LAPD in criminal investigations are ghost guns, and where of those ghost guns, Polymer80 is the most common component manufacturer.[46]

Trial in the Los Angeles case is set to begin in April 2023 in Superior Court, Los Angeles County.

Baltimore takes aim. In May 2022, the Mayor and City Council of Baltimore sued Polymer80 and Hanover Armory LLC, a gun distributor.[47] As the City's complaint complaint puts it, "by manufacturing and selling ghost guns, these defendants have predictably, if not intentionally, caused violence destruction and death in Baltimore City." Baltimore describes the means by which Polymer80 attempts to avoid applicable laws and undermines law enforcement: "With minimal work and without a background check or interaction with a federal firearms licensee (FFL), any buyer can assemble a fully functioning, untraceable firearm that lacks a serial number."[48]

As with Los Angeles, Baltimore's statistics paint a grim picture: the Baltimore Police Department retrieved 9 ghost guns in 2018, 29 such weapons in 2019, and 126 in 2020. In 2021, 324 ghost guns were recovered, constituting more than one seventh of the total. And by April 2022, the number had risen to 131 ghost guns, more than double the pace of the prior year.

As Baltimore describes, Polymer80's business model enables a robust secondary criminal firearms market: assemblers purchase Polymer80 products and sell fully functioning firearms. In June 2021, for example, the Baltimore Police Department uncovered a facility that built dozens of Polymer80 guns, confiscating 40 pistol frames, jigs, a drill press, and other tools used for assembly. The Baltimore complaint also details various of the illicit marketing techniques used by Polymer 80. As recently as June 2020, Polymer 80's home page included the question "Is it legal?" and responded unequivocally, yes!" (In fact, a Maryland resident cannot manufacture or sell handguns not approved by the state's Handgun Roster Board).

Baltimore points to a sleight of hand that Polymer80 employed widely: the company referenced an "ATF determination letter" implying that the ATF concluded that Polymer 80's weapons were not firearms. That representation was unequivocally false, given that the ATF determination in question related only to a small number of unfinished lower frames and receivers, and not to any assembled Polymer 80 product.

Baltimore asserts three causes of action: First, public nuisance, in that the defendants flooded Baltimore with untraceable and easily trafficked lethal weapons, requiring abatement for a host of costs imposed on the city. Second, negligence, given that the defendants had a duty to take reasonable measures to prevent injury to the public, failed in that duty, and are proximately liable for the resulting mayhem. Third, violation of the Maryland Consumer Protection Act (MCPA), which prohibits "unfair abusive, or misleading statements."[49] The MCPA also prohibits "knowing concealment, suppression or omission of any material fact with the intent that a consumer rely on the same."[50] In addition to damages and costs of litigation, Baltimore seeks an injunction against further illegal activity by the defendants.

The city continues to press its claims. On December 20, 2022, it defeated the defendant's motion to dismiss. Baltimore obtained an order finding that the City had "more than adequately pled facts supporting its claims" and denying the defendants' motion to dismiss.

Baltimore's ghost gun litigation has paralleled an awakening at the state

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legislature. Maryland Code Public Safety Section 5-703 has prohibited the sale or transfer of unfinished frames or receivers since June 1, 2022:

> Sale or transfer of unfinished frame or receiver to be imprinted with serial number: (a)(1) A person may not purchase, receive, sell, offer to sell, or transfer an unfinished frame or receiver unless it is . . . has been, imprinted with a serial number by a federally licensed firearms manufacturer or federally licensed firearms importer in compliance with all federal laws . . . .[51]

The law goes further, prohibiting even the possession of an unserialized firearm beginning March 1, 2023:

> (2) On or after March 1, 2023, a person may not possess a firearm unless:
> (i) the firearm is required by federal law to be, and has been, imprinted . . . with a serial number in compliance with all federal laws . . . or
> (ii) the firearm:
> 1. has been imprinted . . . with:
> A. the zip code of the current owner or person that made, completed, or initially assembled the firearm;
> B. the initials of the current owner or person that made, completed, or initially assembled the firearm; and
> C. a number that does not match a number used by the current owner on another firearm . . . and
> 2. has been registered with the Secretary.[52]

Signs of Progress

The concerted federal, state, and local efforts are finally evidencing results. The Biden Final Rule, despite being challenged by State of California and Gifford Foundation, did change the behavior of Polymer80. A blog on the company's website reported that Ploymer80 would comply with the "unconstitutional regulations:"

> Last week ATF final rule 2021R-05F, Definition of "Frame or Receiver" and Identification of Firearms, went into effect. Polymer80, Inc., the company that designs and develops innovative firearms and after-market accessories that provide ways for customers to participate in the build process while expressing their right to bear arms, is a direct target of this new rule. Polymer80 wholeheartedly disagrees with the ATF final rule, however, in an effort to maintain a legal business, will comply with the unconstitutional regulations.
>
> In accordance with the new ATF final rule, Polymer80 will no longer offer their popular 80% kits in the same configuration in which customers have grown accustom. Instead, Polymer80 has released three new options for consumers interested in building their own legal firearm:
>
> • OPTION 1 is an unserialized 80% frame with rear rail, locking block rail system and pins. No jig or tools are included with this product.
>
> • OPTION 2 is a serialized frame that does include a jig, tooling, rear rail and locking block rail system. This option is the same as the prior 80% kit offered by Polymer80, but with a serialized frame.
>
> • OPTION 3 is the "Build Back Better" kit, which includes everything listed in option 2 plus a slide assembly. This kit contains everything you need to build a complete, serialized firearm.
>
> Option 1, the unserialized 80% blank, is currently available for purchase at http://www.polymer80.com/"www.polymer80.com. Please note that shipment is not available to all states.
> For those interested in assembling without drilling, Polymer80 will continue to offer their AFT "Assemble for Thyself" kit, which includes all the necessary components to build a complete firearm, no drilling required. Polymer80 will also continue to offer their line of complete pistols, including the popular PFC9 compact pistol and PFS9 full-size pistol, as well as parts and accessories.[52]

During the writing of this article in January and February 2023, the Polymer80 website also appears to have changed dramatically. While the company still features "AFT" swag, promotes the Second Amendment, and encourages building firearms at home, the first page viewed by a visitor to the site is now an image of "Serialized Pistols" in various hues.[52]

Conclusion

The current headwinds against gun control measures in America, no matter how well-intentioned and seemingly respectful of Second Amendment rights, are not helpful in the campaign to outlaw ghost guns. But incremental progress is being made as regulations begin to eliminate loopholes previously exploited by the ghost gun industry. In the interim, local governments can play a major role in holding accountable the entities who have profited by sending thousands of unserialized firearms onto America's streets. **ML**

Notes

1. https://www.Polymer80.com; the company describes its mission as follows: "Polymer80, Inc. designs and develops innovative firearms and after-market accessories that provide ways for our customer to participate in the build process, while expressing their right to bear arms. This provides a fun learning experience and a greater sense of pride in their completed firearm, strengthening our brand loyalty. We summarize this with our motto of 'Engage Your Freedom.'"
2. Apparel & Swag (https://www.polymer80.com/apparel (last accessed Feb. 27, 2023).)

3. Polymer80 Build Kits | 3CR https://3crtactical.com/product-category/polymer80/polymer80-build-kits/ {last accessed Feb. 27, 2023).
4. Originally introduced in 1963 following the assassination of President Kennedy, the Gun Control Act (Pub. L. 90-618) was ultimately passed in 1968.
5. Police Sidearms: The Handguns of America's 10 Largest Departments; https://www.tactical-life.com/handguns/largest-departments-police-sidearms/ (last accessed Feb. 27; https://www.guns.com/news/2019/09/06/most-popular-duty-guns-for-law-enforcement, 2023) (last accessed Feb. 27, 2023).
6. Undetectable Firearms Act of 1988, 18 U.S.C. § 922 (p)).)
7. Defense Distributed (https://defdist.org).
8. On May 24, 2018, DOS proposed a rule removing all "non-automatic and semi-automatic firearms to caliber .50 . . . and all of the parts, components, accessories, and attachments specifically designed for those articles" from the Munitions List under ITAR.
9. Washington v. United States Dep't of State, 443 F. Supp. 3d 1245 (W.D. Wash. 2020).
10. Washington v. United States Dep't of State, no. 20-39351 (9th Cir. Apr. 27, 2021).
11. Dan Zimmerman, *Defense Distributed Releases All 3D Gun Files to the Public Following Ninth Circuit Decision,* The Truth About Guns, Apr. 29, 2021, https://www.thetruthaboutguns.com/defense-distributed-releases-all-3d-gun-files-to-the-public-following-ninth-circuit-decision/ (last accessed Feb. 25, 2023).
12. https://ghostgunner.net (last accessed Feb. 27, 2023).
13. The National Firearms Act of 1934 (Pub. L. 73-474) focused particularly on firearms and devices used by Prohibition-era gangs, including machine guns, sawed-off shotguns and silencers, requiring registration, notice of transfer, and payment of a $200 excise tax on those weapons. The Federal Firearms Act of 1938 (Pub. L. 75-785) imposed a federal license requirement on gun manufacturers, importers, and retailers and prohibited gun sales to certain categories of "prohibited persons."
14. Mulford Act, CA. Penal Code §§ 25850 and 171(c).
15. Gun Control Act of 1968, Pub. L. 90-618 (1968).
16. *Id.*
17. Firearms Owners Protection Act, Pub. L. 99-308 (1986).
18. Ann Gerhart and Chris Antara, How the NRA transformed from marksmen to lobbyists, Washington Post, May 29, 2018 https://www.washingtonpost.com/graphics/2018/national/gun-control-1968/#:~:text=The%20National%20Rifle%20Association%2C%20founded%20in% (last accessed Feb. 2, 2023).
19. City of Cincinnati v. Beretta U.S.A. Corp., 95 Ohio St.3d 416, 768 N.E.2d 1136 (Ohio 2002).
20. City of Chicago v. Beretta U.S.A. Corp, 13 Ill.2d 351, 821 N.E.2d 1099 (Ill. 2005). Among other holdings, the Illinois Supreme Court found that gun manufacturers and distributors did not owe a duty to the public at large, and there was insufficient causal nexus between retailers' sale of weapons in neighboring communities and gunfire on Chicago street, and the claim was barred by the municipal cost recovery rule. (IMLA joined the National League of Cities and others in an amicus brief in support of the City).
21. Pub. L. No. 109-92, 119 Stat. 2095 (2005), codified at 15 U.S.C. §§ 7901 through 7903 (2012).
22. Jenny Jarvie, Richard Winton, and Molly Hennessy-Fiske, *Sandy Hook $73-million settlement with Remington is not just about money,* Los Angeles Times, Feb. 15, 2022. The settlement was novel not only for its financial component—it required Remington to disclose thousands of pages of internal AR-15 marketing documents.
23. H.R. 2814 would have repealed PLCAA.
24. H.R. 1808 would have reintroduced a ban on assault weapons.
25. Are "80%" or "unfinished" receivers illegal? | Bureau of Alcohol, Tobacco, Firearms and Explosives (https://www.atf.gov/firearms/qa/are-"80"-or-"unfinished"-receivers-illegal). (Generally, no—until updated Final Rule passed in April 2022).
26. Definition of "Frame or Receiver" and Identification of Firearms | Bureau of Alcohol, Tobacco, Firearms and Explosives (https://www.federalregister.gov/documents/2021/05/21/2021-10058/definition-of-frame-or-receiver-and-identification-of-firearms)
27. Stephan Sykes, '*Ghost gun' regulations go into effect after judges reject challenges,* cnbc.com, Aug, 24, 2022 (https://www.cnbc.com/2022/08/24/federal-ghost-gun-regulations-go-into-effect-after-judges-reject-challenges.html)
28. Stephan Sykes, *What are 'ghost guns'? A federal crackdown is coming on untraceable firearms, and dealers are rushing to sell them*, cnbc.com, Aug. 19, 2022 (https://www.cnbc.com/2022/08/19/ what-are-ghost-guns-dealers-rush-to-sell-untraceable-firearms-as-crackdown-nears)
29. State of California v. Bureau of Alcohol, Tobacco, Firearms, and Explosives, no. 3:20-cv-06761 (N.D. Ca. Oct. 20, 2022).
30. *Id.*
31. https://www.leg.state.nv.us/App/NELIS/REL/81st2021/Bill/7778/Overview
32. Palmer v. Sisolak, no. 3:21-cv-00268 (D. Nev. Aug. 16, 2021).
33. *Id.*
34. Riley Snyder, *Federal judge*

Continued on page 38

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Listserv *cont'd from page 25*

the reservation where they were found by the game warden.

The Magistrate responded "You mean there were three of you and only one officer? Why didn't you just beat the **** out of him? This is a waste of everyone's time. Case dismissed. I got some potatoes to dig up."

Yes, the legal system has come a long way over the years…

***

Kudos to the continued good work of our friends at IMLA! Hopefully you are planning to attend the IMLA Mid-Year Seminar. A fantastic program is planned again, including presentations on the Fourth Amendment, Sovereign Citizens, Regulating Short Term Rentals, Small Cell Litigation, Supreme Court Case update, ADA and Law Enforcement, CBD and Delta Eight, Fair Housing and Ethical Obligations of a Municipal Attorney When a Councilmember is Sued Personally, as well as several other valuable topics.

If you have never been to an IMLA Annual Conference or Mid-Year Seminar, give it a try. Worried about not knowing anyone? That won't last long! This is the friendliest group with which I have ever been affiliated, and there are plenty of ways to get involved and stay involved. I was new once, and I had those thoughts. Now, some 19 years later I'm still attending as a veteran and loving it all.

Outside of the outstanding program, there have been plenty of adventures over the years. I was caught up in the Freddie Gray riots in Baltimore years ago and got locked inside the stadium with Greenville (SC) City Attorney Mike Pitts. I was also "ghosted" by my fishing guide in Alaska and had to climb a tree to get a cell signal to call him. Once a group of us had a bus driver bail out early in an unfortunate location and left us there to wait on a relief driver. We also had sleet at the ball game one year in DC.

Good things have happened too, of course. I've made some of the best friends I've ever had through this group. As an IMLA Board Member, I welcome you to contact me if you have any questions about joining or participating. I have never regretted it. ML

The prosecution rests, your honor…

INSIDE CANADA

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

Implied Contracts, Injurious Affection, Unowned Property and More.

City Contracted with Parent, Despite Using Third Party
WC v. City of Richmond,
2023 BCCRT 148 https://canlii.ca/t/jvl8m
The applicant, a parent of a child who attended a day camp, submitted that the City of Richmond (City) breached its contract by failing to enforce its Code of Conduct when the child was bullied or otherwise exposed to an unsafe environment. The City argued that it did not have a contract with the applicant as the day camp was offered by a third party.

HELD: Application dismissed.

DISCUSSION: The core question before the Court was whether the applicant had a contract with the City, and if so, did the City breach that contract. The City provided evidence that it had an agreement with CCCA, a third party listed as an independent contractor with its own staff to deliver recreational services, including day camps. The applicant did not challenge the validity of the agreement between the City and CCCA, but rather took the position that the City was responsible for the day camp as he booked the day camp through the City website, he received confirming emails from the City, and received receipts of payment from the City, without any reference to CCCA. The Court was satisfied that it would be clear to a reasonable person that the City and the applicant intended to enter into a contract with one another.

The applicant submitted that the Code of Conduct breached by the City was not a part of the original contract. However, the Court was satisfied that the Code of Conduct was a contractual amendment to the original contract, and that fresh consideration was not required to enforce the amendment.

The Court reviewed the language of the Code of Conduct and the evidence of the applicant which claimed a breach. The applicant relied on the evidence of his child to support the City's alleged breach, while the City submitted notes and statements of day camp leaders. In conclusion, the Court held that although it may be upsetting for parents to hear from their children about negative interactions with other children, there was no evidence before it that the incidents claimed created an unsafe environment. Specifically, there was no evidence the child was bullied, physically or mentally injured, or unable to participate in day camp activities. The Court held that, notwithstanding the existence of a contract, the applicant failed to demonstrate breach by the City. Application dismissed.

City Expropriates Land, Unsuccessfully Challenges Finding of Injurious Affection
Winnipeg (City of) v Barcoga Holdings Inc,
2023 MBCA 19 https://canlii.ca/t/jvq4p

The City of Winnipeg (City) expropriated a strip of land alongside property owned by Barcoga Holdings Inc. (owner) for the purpose of road improvements. Both parties agreed to the market value of the expropriated land, but did not agree on injurious affection of the remainder of the land as contemplated under the *Expropriation Act,* CCSM c. E190 (*Act*). The City's expert appraiser opined that there was no injurious affection, while the Land Value Appraisal Commission (LVAC) found that there was a utilization of the "before and after" comparison methodology of the owner's appraiser. The City appealed the amount certified, submitting that the LVAC erred in award any damages for injurious affection.

HELD: Appeal dismissed.

DISCUSSION: Case law provides that reasons are adequate if, when read in the context of the record on which the hearing focused, they disclose an intelligible basis for the decision, *R v. REM,* 2008 SCC 51. While undertaking a meaningful review of the evidence, the Court held that there was no mystery as to how LVAC arrived at its decision; the reasons submitted were adequate in explaining what the LVAC decided and why. The LVAC clearly determined the market value of the property both before and after expropriation by the City, and it was able to determine a global award

for damages in accordance with its methodology. The Court was satisfied that the LVAC did not make any palpable or overriding error in arriving at its finding of injurious affection: the before and after methodology utilized was specifically contemplated in section 27(3) of the *Act*. Appeal dismissed.

Inadequate Link between Applicant's Disability and Long Delay in Human Rights Application.
Khurana v. City of Toronto,
2023 HRTO 74 https://canlii.ca/t/jvbhc

The applicant filed a *Human Rights Code*, R.S.O. 1990, c. H.19 (*Code*) against his former employer, the City of Toronto (City) alleging discrimination in respect to employment on the basis of sex when he was terminated, contrary to the *Code*. The City responded to the applicant's allegations of sexual harassment; the applicant alleges that the investigation by the City was erroneous and biased as the City only accepted the complainant's testimony because of "white female privilege", and bias against men and discounted his testimony. The applicant submits that his 2017 termination was discriminatory. The City submitted that the application was untimely and beyond the one-year limitation period.

HELD: Application dismissed.

DISCUSSION: To proceed under the Human Rights Tribunal (Tribunal), an application must fall within its jurisdiction. As found in *Groblicki v. Watts Water*, 2021 HRTO 461 an adjudicative body either has jurisdiction or it does not. Section 34(1) of the *Code* provides that the Tribunal does not have jurisdiction to hear a matter that has occurred more than one year prior to filing the application, absent the delay was incurred in good faith. The applicant submits that the last day of discrimination by the City was his termination date of April 13, 2017, and although he concedes that the application was untimely, he argues that the delay was in good faith.

There is a high onus placed on the applicant to make a good faith argument for delay, *African Canadian Legal Clinic v. Legal Aid Ontario,* 2010 HRTO 1255. The applicant submits that his mental health during the relevant time period justifies the delay, submitting 3 separate medical notes to support his argument. In response, the City relied on *Paul James v. York University and Ontario Human Rights Tribunal (James)*, 2015 ONSC 2234, which provided that a disability was not enough to meet the good faith requirement. The evidence must establish a link between the disability and the inability to file an application within the one-year time period. Furthermore, the City provided evidence that between the applicant's termination date of April 13, 2017 and the filing of this application on October 29, 2018, the applicant took other steps to advance his rights, including filing a grievance with the union, attending meetings with his manager, attending an investigation report, requesting an arbitration, participating in the arbitration, and commencing a civil claim. The question for the Tribunal was whether the applicant was unable to file an application to this Tribunal as a result of his disability. The Tribunal was not satisfied, given that the applicant participated in a variety of legal proceedings; it was difficult for the applicant to establish good faith when he was able to undertake other legal proceedings. Application dismissed.

No Standing to Bring Claim Against City for Unowned Property
Ottosen v. City of Victoria,
2023 BCCRT 149 https://canlii.ca/t/jvl8k

The applicant, a community advocate, collected donation items including cots, blankets, and sleeping bags, for the purpose of establishing a respite tent for homeless individuals in City of Victoria (City) parks. City bylaw officers impounded the items. The applicant filed a claim that the City failed to return the items in the same condition, and in some cases did not return the items at all. The City submitted that the bylaw officers were authorized to impound the donated items under the City's bylaw and the applicant had no standing as she did not own the items.

HELD: Claim dismissed.

DISCUSSION: The onus was on the applicant to prove her claim of negligence and tort of conversion on a balance of probabilities. To be successful the applicant must establish that she had a property interest in the donated items that allegedly went missing while in the City's possession, and only at that point would the City owe the applicant a duty to take reasonable care of the items. The evidence before the Court submitted by the applicant was that she collected the donated items and brought them to the City park; she did not purchase them. The Court determined that the applicant only had the items in her possession for the purpose of delivering them to the City park, and at no point did the items ever belong to her; therefore, the applicant did not have standing to bring a claim against the City. Claim dismissed.

Property Owner Leave to Appeal Ontario Land Tribunal Decision Denied
***North Elgin Centre Inc. v. City of Richmond Hill*,**
2023 ONSC 1123 https://canlii.ca/t/jvkkc

The North Elgin Centre (NEC), a property owner in the City of Richmond Hill (City), sought leave to appeal to a full panel of the Divisional Court from a decision of the Ontario Land Tribunal (Tribunal). NEC submitted that the

Continued on page 38

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Tribunal breached its duty of procedural fairness when it approved the City's Secondary Plan and Zoning Provisions that were to be applied to several pieces of land owned by NEC.

HELD: Leave to appeal denied.

DISCUSSION: Referencing *Westhaver Boutique Residences Inc. v. Toronto,* 2020 ONSC 3949, the motion judge provided that it was at its discretion to give reasons on motions for leave to appeal, and that discretion should be exercised sparingly. The motion judge was compelled to do so in this matter.

Section 24(1) of the *Ontario Land Tribunal Act, 2021,* S.O. 2021, c. 4 Sched. 6 permits appeal of an order or decision of the Tribunal to the Divisional Court, but only if: first, the proposed appeal raises one or more questions of law; second, there is a reason to doubt the correctness of the Tribunal decision with respect to the question of law; and third, the question of law is of sufficient general or public importance. The motion judge provided that the failure to satisfy any of these results in a proper refusal, *CAMPP Windsor Essex Residents Association v. Windsor (City),* 2020 ONSC 4612. The motion judge held that the NEC's proposed appeal failed the test for leave to appeal as the issues raised were only issues of importance to the NEC and present no legal issues of broader importance. Furthermore, the motion judge held that the NEC failed on its attempt to characterize the procedural issues as issues that have greater importance to the overall conduct of proceedings before administrative tribunals. Rather, the means by which the NEC proceeded before the Tribunal was unreasonable, resulting in many of the procedural fairness issues raised by the NEC to fall squarely within the Tribunal's authority and discretion of procedural matters before it. The motion judge held that the motion for leave to appeal was dismissed. ML

Ghost Guns *cont'd from page 33*

rejects effort to block 'ghost gun' ban filed by pro-firearms group, The Nevada Independent, Jul. 26, 2022 (https://thenevadaindependent.com/article/federal-judge-rejects-effort-to-block-ghost-gun-ban-filed-by-pro-firearms-group).
35. Polymer80 v. Sisolak 21-cv-00690 (3d Jud. Dist. Lyon Cty. Nev., Dec. 10, 2021) at p.16.
36. Tom Jackman, *District sues Polymer80, manufacturer of 'ghost guns,' alleging illegal sales, false ads,* The Washington Post, June 24, 2020 (https://www.washingtonpost.com/crime-law/2020/06/24/district-sues-polymer80-manufacturer-ghost-guns-alleging-illegal-sales-false-ads/).
37. D.C. Law 23-125. Ghost Guns Prohibition Temporary Amendment Act of 2020 (https://code.dccouncil.gov/us/dc/council/laws/23-125).
38. Heller v. District of Columbia, no. 2376 (D. D.C. Sept. 8, 2021); Tom Jackman, *Dick Heller challenges DC ghost gun law after winning landmark Second Amendment case,* The Washington Post, Oct. 9, 2021.
39. In 2021, a federal judge ordered the District to pay damages to six people who were arrested under gun laws that were later found unconstitutional. Spenser Hsu, *U.S. judge: Nation's capital liable for wrongful arrests under struck-down gun ban,* The Washington Post, Sept. 29, 2021.
40. *Heller, supra* note 38.
41. *Id.*
42. https://www.polymer80.com/-BK45-BLK#:~:text=On%20August%2010%2C%202022%2C%20the%20Superior%20Court%20for,District%20of%20Columbia%20under%20District%20of%20Columbia%20law. (last accessed Feb. 25, 2023).
43. *Id.*
44. People of California v. Polymer80, 21-cv-06257 (Sup. Ct. Los Angeles Cty., Feb. 17, 2021).
45. Cal. Bus. & Prof. Code §§ 17200 et seq.
46. People of California, *supra* note 44.
47. Mayor and City Council of Baltimore v. Polymer80 LLC, no. 24-C-22-002482 (Cir. Ct. Balt. City).
48. *Id.*
49. Md. Code Ann. Comm. Law
50. *Id.*
51. Md. Pub. Safety Code § 507.
52. *Id.*
53. https://www.polymer80.com/blog.
54. https://www.polymer80.com (last accessed Feb. 27, 2023).

MARCHWEBINARS

March 2 @ 1:00 pm - 2:00 pm Eastern

Preemption Webinar - Curricular Preemption

Free Live For IMLA Members. CLE available to Kitchen Sink Subscribers and in some cases to others but fees may apply.

This session examines state preemption of local school boards with regard to the content of curricula and educational materials. Divisive concepts in schools have been raised targeting the 1619 Project (a *New York Times Magazine* series reframing American history in the context of slavery and structural racism) and Critical Race Theory. This curricular preemption swept the nation and now the strategy has been expanded to preempt discussion of LGBTQ+ issues as well. This session will examine the trend of curricular preemption, from its origins to current iterations.

Speaker: **Steven Nelson**,
Corinne Green & **Marissa Roy**

March 23 @ 1:00 pm - 2:00 pm Eastern

Telecommunications Webinar - Square PEG in a Round Hole: Limits on Municipal Use of Public, Education, and Government Fees

This presentation will discuss the federal restrictions on local governments' use of public, education, and government ("PEG") fees paid by cable operators to support local government PEG channels, pursuant to the federal Cable Communications Policy Act of 1984. Unlike some types of municipal revenue and funding sources, which carry no restrictions regarding how they may be spent and which are designated for the general fund to be used anywhere needed, the use of PEG fees is limited. Although trying to fit PEG fees into a local government's budget may be challenging at times, Federal Communications Commission orders and court cases provide guidance on the purposes for which local governments may and may not use PEG fees. This presentation will also cover a series of PEG "FAQs" to assist municipal lawyers in advising local government clients, relative to the limited purposes for the use of PEG fees.

Speaker: **David Johnson**

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