IMLA

Municipal Lawyer

THE JOURNAL OF LOCAL GOVERNMENT LAW

NOV DEC 2023
VOL.64
NO.06

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CONTENTS

NOVEMBER / DECEMBER 2023

EXTERN! EXTERN! READ ALL ABOUT THEM!
By: Matthew Pentz, Senior Assistant Town Attorney, Cary, North Carolina
Externs--Law schools want to place them, law students seek the opportunity, and local government law offices can benefit. While the proposition may at first seem complicated and time-consuming, our author illuminates the process and reveals just how rewarding an externship program can be for everyone involved, nurturing new municipal lawyers along the way.
PAGE 6

DEMOLITIONS AND DUE PROCESS: GALVESTON'S HOUSING ABATEMENT PROGRAM
By: Donna M. Fairweather, Senior Assistant City Attorney, Galveston, Texas
Dilapidated and unsound homes have a detrimental impact on the surrounding neighborhood, inviting crime and detracting from property values. It is within the city's police powers to remove these structures, but care must be taken to avoid Takings challenges through proper notice, hearing, and other mechanisms.
PAGE 10



DEPARTMENTS

14 PRACTICE TIPS
Councilmembers Gone Wild!
By: Patrick Baker, City Attorney, Charlotte, North Carolina and Kim Rehberg, City Attorney, Durham, North Carolina
Tips on dealing with challenging councilmembers.

16 AMICUS
SCOTUS to Decide: What's Materiality Got to Do with It?
By: Amanda Karras, IMLA Executive Director and General Counsel
A battle over Title VII's anti-discrimination injury element.

18 ANNUAL CONFERENCE
A look back at IMLA's highly successful gathering in La Quinta, and a note to congratulate our 2023 IMLA Award winners.

23 LISTSERV
There Are Fifty Unique FOIA Statutes in This Great Country of Ours
By: Brad Cunningham, Municipal Attorney, Lexington, South Carolina
Accommodating public access to government-held information.

24 INFRASTRUCTURE
Canadian Municipal Infrastructure – A Construction Law Perspective
By: Rahul Ranade, P.Eng., Associate Counsel, Lidstone & Company, Vancouver, British Columbia
Local government and the fine points of procurement, contracting, and construction.

26 SUPREME COURT
From the Campus to Main Street: the Broader Impact of *Students for Fair Admissions*
By: Deanna Shahnami, IMLA Associate Counsel and Director of DEI
The expanding reach of a case about college admissions.

28 INSIDE CANADA
Demolitions, Political Signage, Underpaid Welders, and More
By: Monica Ciriello, Director of Municipal Law and Licensing Compliance, City of Hamilton, Ontario
Recent cases of interest.

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EDITOR'S NOTE



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

Amicus Advocacy for Local Governments

In November 2021, the Eastern District of Texas held that McKinney, Texas must pay a homeowner $60,000 to compensate for damage to her residence caused by McKinney law enforcement as they sought to dislodge a hostage taker. Weaving together fragments of Supreme Court decisions and a 1980 Texas precedent, the court concluded that police activity, even if properly conducted to capture an armed criminal, was a taking of private property for public use, violating the Fifth Amendment. That decision, in *Baker v. City of McKinney*, was reversed two weeks ago at the Fifth Circuit, but *en banc* rehearing has already been sought. And in the interim, a homeowner in Smyrna, Tennessee filed a similar claim, unsuccessfully arguing that residential damage during police activity violates the Takings Clause and requires compensation. That case, *Slaybaugh v. Town of Smyrna*, was resolved against the plaintiff, and is now on appeal to the Sixth Circuit.

These law enforcement damage actions are a fraction of the Fifth Amendment Takings complaints being lodged against local governments. The cases, and others, bear the imprint of interest groups seeking to reach the Supreme Court in a quest to dramatically enlarge the scope of property interests compensable by government. In opposition to these efforts, IMLA filed an amicus brief in *McKinney*, will do so in *Smyrna*, and is already lining up its sources and authorities in *Sheetz v. County of El Dorado*, a Supreme Court case to be heard later this Term challenging local impact fees as a Taking. A fuller discussion of Fifth Amendment Takings litigation will be featured in the next issue of *ML*.

This is only a minor segment of the cases--more than forty over the past year—in which IMLA has provided amicus assistance to our members. Some of the briefs are signed by the Local Government Legal Center (LGLC), a collaboration between IMLA, the National League of Cities, the National Association of Counties, and the Government Finance Officers Association; others are filed by IMLA alone or with a subset of LGLC members. On October 30, we were pleased to hear Justice Barrett reference our brief during oral argument in *Culley v. Marshall*, a case discussing due process rights in civil forfeitures. As this note is being written on October 31, the Court is hearing a duo of cases construing how and when social media use by public officials becomes state action, in *Freed v. Lindke* and *O'Connor-Ratcliffe v. Garnier*—also cases where IMLA filed an amicus brief, seeking clarity. Next week, the Court will hear *United States v. Rahimi*, assessing a federal law that criminalizes a domestic abuser's continued possession of a firearm while subject to a restraining order prohibiting such possession, again a case in which IMLA has filed. And later in the Term, the degree of injury which must be demonstrated in Title VII sexual discrimination actions will be considered in *Muldrow v. City of St. Louis*, a police lateral transfer case discussed below in this issue; there, IMLA legal staff wrote our amicus brief. We are appreciative of IMLA's Legal Advocacy Committee for their input as we consider cases for amicus activity, a service which complements the other benefits we are pleased to provide our members.

Returning to the matter at hand, we lead this November-December 2023 issue with a feature article by Matt Pentz, extolling the virtues of externs in your local government law department. A second feature by Donna Fairweather touches on the just-discussed Takings Clause, reminding readers of the processes and documentation required to abate dilapidated nuisance housing in your community while comporting with the Fifth Amendment. We present two Canadian offerings: in *Infrastructure*, a discussion of Canada's municipal infrastructure legal parameters by Rahul Ranade and our recurring *Inside Canada* look at Canada caselaw from Monica Ciriello. We also offer two Supreme Court-sourced articles: an assessment of the Court's recent affirmative action decision by Deanna Shahnami in *Supreme Court* and in *Amicus,* an explanation of the issues underlying an upcoming employment discrimination case by Amanda Karras. Brad Cunningham contributes his regular *Listserv* column, this time discussing the ins and outs of responding to FOIA requests. And *Practice Tips* delivers some commonsense advice for productive dealings with councilmembers, courtesy of Patrick Baker and Kim Rehberg.

Finally, our center spread recounts some of the great experiences IMLA members shared at our recent Annual Conference in La Quinta. To those who joined us, thank you for making this one of IMLA's most successful events in recent memory.

Best regards-

Erich Eiselt

PRESIDENT'S LETTER



BY: **ROSE HUMWAY-WARMUTH,**
City Solicitor, Wheeling, West Virginia and IMLA President

The Road Better Traveled

IMLA's 88th Annual Conference held in La Quinta, California was a fantastic event organized by IMLA staff over several years. It was great to see so many old friends and make new ones, while experiencing an enriching learning environment and social networking activities. When arriving in Palm Springs I thought of the great opportunity to also rejuvenate mind and body in an area historically known for such transformation. Seeking harmony between our job performance as attorneys and our personal lives can be difficult, if not daunting.

The role of an attorney is often adversarial and stressful. The American Bar Association reports that lawyers spend an average of 50 hours a week at work. Our profession requires a large amount of intellectual energy, and there always seems to be more work to be done. Seldom is this a stereotypical 9 a.m. to 5 p.m. commitment for attorneys who must deal with and attend to "urgent" and last-minute client requests. Irregular work hours are the norm, as depicted in a 2022 article for *Legal Trends Report* by a legal technology provider Clio. They found that 86% of attorneys work outside of a 9 a.m. to 6 p.m. framework and of the attorneys surveyed who were 55 years of age and older, 82% said that they work irregular hours.

In drafting this letter, I started thinking about the difficulties in maintaining a work/life balance as an attorney and the potential negative consequences to poor balance. These can include higher stress, damaging personal life choices, less time with family and friends, physical/mental exhaustion or decline, and the burn out that comes when one is consumed with work 24/7..." Well now, I thought, that's a pretty disheartening path..." But do take heart, as that is not the path that we municipal attorneys have taken!

As I looked at the professional advice to assist attorneys in achieving a good work/life balance, it became clear that choosing to be a local government lawyer provides one with the best possible path to such balance: for example, defining work hours as close as possible to legitimate "regular" workdays and weeks without jeopardizing work product quality and timeliness. Yes, there's always some stress or extremely time sensitive deadlines, but those, hopefully and generally, are few and far between.

As municipal lawyers, we have more time management control than other attorneys. We generally are more able to allocate time to participate in things that feed one's soul, whether it be spending quality time with family and friends, investing hours in a hobby, simply taking a walk in a park or, goodness dare I say, taking a full week's vacation while rarely looking at emails. (I say "rarely" because I know that leaving a cell phone or laptop at home while on vacation is nearly impossible and would probably produce the opposite effect of what we attempt to achieve).

As a municipal attorney I believe we have chosen a career path that allows us to have a great work/life balance and truly the best of both worlds. We are all aware that such a choice is not going to be as lucrative, monetarily speaking, as other facets of the legal profession. However, how does that old adage go..." money can't buy everything." Can it truly buy job satisfaction? Look around at your fellow members of the bar. How many can say they assist the community as a client? But that is what we do and who we serve as municipal attorneys.

There are many wonderful benefits to being a municipal/governmental attorney that others in the profession may not be so fortunate to claim. These include taking advantage of a 40-hour work week even if you must labor longer on occasion, sick leave, vacation benefits, usually paid local, state, and federal holidays, pensions or employee retirement savings programs, and as a full-time employee of a local government, you are likely not concerned with "billable hours" and time keeping requirements.

Take a moment to think about some of the areas where you as a municipal/governmental lawyer have had a hand in the issues facing your governing bodies and their constituents, including but not limited to: police, fire, safety forces, economic development and financing, streets, services, land use, social and cultural concerns such as LBGTQ legislation, homelessness, etc., the list goes on and on. Our work as municipal attorneys can be transformational for the local governments we serve and that, my friend, leads to a great sense of job satisfaction. Take a moment to embrace that fact for the betterment of your efforts each day--in the practice of municipal law and the practice of personal wellbeing.

So, what began as a letter addressing negative forces at play in the legal profession for those trying to achieve a good work/life balance morphed into a realization that the choice to be a local government lawyer is a perfect fit. In retrospect, the time spent at the 2023 IMLA Conference in an adobe cottage in La Quinta, as well as 25-plus years being a member of this fine organization, leads me to believe as Frank Capra contemplated "It's a Wonderful Life." ML

Extern! Extern! Read All About Them!

By: MATTHEW PENTZ,
Senior Assistant Town Attorney, Cary, North Carolina



Hello fellow local government legal practitioner! Do you like the thought of being able to provide tangible experience and guidance to future lawyers? What about the idea of advancing the interests of our local government practice area and the legal profession as a whole? What about making progress on that one project you just never seem to have time to work on? What if I told you that you can do all of these things at the same time! "Well of course, please tell me more!" is certainly the phrase you just uttered in your head, and I, of course, will be delighted to do so. You, for the low price of exactly $0.00, can accomplish all of the above by doing one thing: have your organization establish an externship placement program!

That's right! We're talking about externs! What are they? Why should your organization consider being a placement site for them? What are things to keep in mind when serving as such a placement site? I'm going to speak to you about all of these things and more with the intent of convincing those of you whose organizations currently don't host externs to start doing so.

What are "externs" (and how do they differ from "interns")?
This is an excellent question, both because externs are the subject of this article and because this WILL be the question practically every non-attorney employee of your organization will ask when you first introduce your externs to them.[1] The trusty dictionary is of little help in answering this question, as various ones all define an "extern" as some variant of "a person connected with an institution but not residing in it, as a doctor or medical student at a hospital."[2] This is, unfortunately, not a particularly helpful definition for us legal practitioners.

Luckily, and far more pertinent for our purposes, the American Bar Association ("ABA") has its own definition of the term: "Externships are non-compensated positions in settings outside a law school, for which students receive academic credit."[3] This definition is a bit closer to the mark and is the one that has been accepted into the legal profession's vernacular. The receipt of academic credit seems to be the core aspect of what makes an extern an extern, so that is the aspect that appears to be their defining feature and what sets them apart from traditional interns.

I've heard this arrangement as sometimes being described as externs being "paid in experience," which is as apt a description as any. It also makes for some fun wordplay, as it allows for the oh so clever conversion of the "ex" prefix from it's original "out of, outside"[4] meaning to, instead, reference the experience said externs are receiving. That is the answer I normally give people who ask me the million-dollar question: "An extern is an intern that is paid in experience," and is an answer that usually results in knowing nods, hints of smiles, and sets the perfect mood for the actual introduction of the extern. While we are on the subject of definitions, I want to clarify the meanings of the terms "externship program" and "externship placement program" as I use these them. "Externship programs" are the programs through which law schools offer law students the opportunity to be externs and offer the academic credit externs receive. "Externship placement programs" are the programs organizations set up to host externs within their organizations, which includes the program I administer for my organization and the one that I hope you will establish for yours!

Who are you and how do you know anything about externs?
This is another excellent question! I'm currently the Senior Assistant Town Attorney for the Town of Cary, North Carolina, a municipality with around 1,200 fulltime employees and a citizen population of approximately 180,000 people located in central North Carolina (just outside of Raleigh). I attended the University of North Carolina at Chapel Hill School of Law, during which I externed at the North Carolina Court of Appeals, and began my legal career at a general practice law firm in Statesville, North Carolina. I then joined Cary's Legal Department and will have been part of Cary's four-person legal team (three attorneys and a legal assistant) eight years this September.

Prior to my coming to Cary, the Legal Department had a fledgling placement program that had hosted one or two externs over several years. My superiors thought my arrival to be a perfect

opportunity to ramp up the program, so becoming Cary's "Extern Program Coordinator" became one of my duties and has remained one to this day. Over that period, Cary has hosted over 25 externs from multiple law schools (including one from out of state!), several of whom have gone on to become local government attorneys or to practice local government law in some capacity. I've found my experience as Cary's Extern Program Coordinator to be fulfilling on multiple levels due to the benefits it has provided to the externs we host, my organization, and my own professional development. My intent with this article is to outline those benefits and methods by which to achieve them in the hope that other individuals and organizations can learn from my experience and benefit in a similar fashion.

Prior to discussing those benefits, however, I want to address the thought that is probably at the forefront of your mind…

What if I'm too busy to manage a placement program?
You might be, but I'm willing to bet this isn't true. As much as I would like to say (and for my superiors to hear) that my role as Cary's Extern Program Coordinator is demanding and requires the utmost attention and focus, that simply isn't the case. There is work involved, and it is important work that does sometimes require me to prioritize it over other things, but the actual amount is minimal compared to the benefits the program and externs provide. I acknowledge that my continued talk of "structuring" a placement program could make it sound like some kind of substantial endeavor involving a curriculum somehow separate from the day-to-day work of your office. However, as you'll see in my recommendations on how to structure a program, there is a way run things where the impact on your day-to-day work will be minimal because the curriculum of the program IS the day-to-day work you do.

What are the benefits of having a placement program?
I keep extolling the benefits of having a program, so I suppose it's time to outline what I believe those benefits to be. I've found that having a placement program provides distinct benefits in five areas: 1) to the externs being hosted, 2) to the practice area of local government law, 3) to the legal profession as a whole, 4) to the organization doing the hosting, and 5) to the professional development of the persons managing and working with the externs.

Getting any kind of real-world experience practicing any kind of law is beneficial to law students at all stages of their education, and local government practice involves working in various practice areas that will benefit all externs no matter what career path they end up taking, so providing a placement program will provide that benefit to every extern an organization hosts.

1. **Benefits to externs:**
I don't think it's controversial to say that providing experiential learning is one of the best, if not the best, method by which students of any trade can learn that trade. Local government externship placement programs offer law students accessible opportunities to get real-word experience working for organizations that often cannot offer traditional internships due to budgetary constraints. Getting any kind of real-world experience practicing any kind of law is beneficial to law students at all stages of their education, and local government practice involves working in various practice areas that will benefit all externs no matter what career path they end up taking, so providing a placement program will provide that benefit to every extern an organization hosts. More importantly, however, local government externships may be the ONLY chance most externs have to dip their toes into local government practice prior to graduating. Gaining such experience can be of immense help to externs who have a potential interest in local government law or who may not be aware such a career is possible, providing these students with otherwise unobtainable information that can help them shape the rest of their professional lives.

2. Benefits to local government practice as a practice area:
The strength of any practice area is predicated on the quality and number of attorneys practicing in it. Those attorneys are the ones who pay attention and influence legislation applicable to the area, run the trade groups that support area practitioners (like IMLA!), and provide the wells of knowledge individual practitioners can turn to when in need of help. The more competent local government practitioners we have practicing alongside us, the wider the resource pool is to support all of these endeavors. Placement programs are one of the best chances we have to show law students just how great a gig being a local govern attorney can be by strengthening the resolve of those students already interested in the area, introducing the area to those who had not thought about it, or convincing some that it is not a path they wish to travel. All of these are worthwhile goals as each result in the potential for the community of local government practitioners to grow and improve to the benefit of all its current and future members.

3. Benefits to the legal profession as a whole:
These benefits are similar to those I list in the prior section and boil down to the fundamental concept that the more competent, informed, and experienced lawyers we have as part of our ranks, the higher the quality of our work and the opinion of the profession in the eyes of society at large. Hosting externs provides us with the ability to pass on some of

Continued on page 8



Matt Pentz is the Senior Assistant Town Attorney for Cary, North Carolina and has been affiliated with Cary since 2015. He earned his undergraduate degree from the University of Notre Dame and his law degree from the University of North Carolina at Chapel Hill School of Law. In addition to managing Cary's externship placement program, he is a member of a three-attorney team that advises the Cary Town Council, Town Boards, Town Manager, and departments on the various aspects of municipal law.

our own experience and provide models by which these soon-to-be attorneys can look to when embarking on their own practice. Also, the work we do as local government attorneys touches on so many practice areas beyond local government specific topics, giving us a somewhat unique opportunity to provide externs with exposure to more practice areas than many other placement sites. Such exposure gives externs experience in those areas and helps them decide which areas they can see themselves working in for the rest of their careers (or which ones they want to desperately avoid). I personally find the quality of my work to, at least partially, equate to my enthusiasm for the same, so I believe any contribution to guiding externs into practice areas they will enjoy, no matter how small, to be worth the effort. Hosting externs gives us the ability to provide such experience.

4. Benefits to the hosting organization.
This benefit is a very practical one: externs can work on those projects you want to do but never have time for due to having to put out the numerous fires that crop up each day. If you are anything like me, you routinely come across issues or questions – an obscure concept you've always wanted to know the history of, a recent state appeals or supreme court case that involves a local government issue but not one that is pressing in your jurisdiction, that back-burner project you never seem to have time to plug away at - that you would love to take the time to dig deeper into but can't justify spending that time when there are other, more pressing matters that need to be attended to. All of these are perfect extern projects where the externs can perform the research, brief the case, or work on the project, gaining experience and providing you with current, useful work that makes your job easier.

5. Benefits to professional development.
Being Cary's Extern Program Coordinator has assisted in my professional development in substantial ways. It has provided me with experience in supervision and project management. More importantly, it has offered me the opportunity to teach about various aspects of local government law and the inner workings of my organization at levels deeper than what I normally do when speaking with Cary staff. I've found

The more competent, informed, and experienced lawyers we have as part of our ranks, the higher the quality of our work and the opinion of the profession in the eyes of society at large. Hosting externs provides us with the ability to pass on some of our own experience and provide models by which these soon-to-be attorneys can look to when embarking on their own practice.

that being in this position of pseudo-law school professor shifts my perspective on the topics being taught, requiring me to distil often complex topics into teachable concepts appropriate for law students. This exercise betters my own understanding of those topics and reveals gaps in that understanding that I can then correct. Teaching these topics has also increased my confidence in my own abilities, as it has made me realize that I do actually know a thing or two about local government law. My involvement with Cary's placement program has provided me with tangible benefits to my own development and is helping to make me a better at my job.

How would I structure an extern placement program?
I mentioned previously that there is a way to structure a placement program so that its content is the day-to-day work you do. Here at Cary, me and my colleagues' workdays consist mostly of attending meetings, putting out fires, and using whatever time remains in between to work on the numerous assignments or projects we're involved in.

Our placement program is structured so that the experience of our externs mirrors this day-to-day work we do as municipal attorneys, meaning it's barely "structured" at all because our own days lack any kind of consistent structure. We include our externs in every meeting we can, leverage their help in putting our fires when possible, and give them assignments to work on in the time they are not at those meetings or helping us put out fires. Also, a consequence of including our externs in much of or daily activities is that it creates pockets of time – walking to meetings, meetings ending early, short gaps between meetings – where we can talk with the externs about their assignments, questions they may have about things they've heard at meetings, local government law, the legal profession in general, and or any other topic that may come up.

That's our program structure, and it's resulted in an externship experience that has consistently received high ratings from the students who have externed with us. Common reviews are that the externs appreciate the breadth of issues they are exposed to, the ability to be involved in pertinent and topical matters, the ability to frequently observe our attorneys interacting with staff and outside parties, and the amount of time they get to spend with us.

You'll also notice that this "structure" and the externs' presence alters me and my colleagues' days barely at all, as we would be doing all of these things whether we had externs are not. This is what I mean when I say the content of your program can be your day-to-day work. I'm again willing to bet that your workdays are at least similar to mine. If that's the case, you already have your program structure in place. All you need now is to add some externs into the mix!

It can't be that simple, what are you not telling me?
There is a *little* extra work required, but it is minimal. The law schools your externs come from will have certain requirements in place as part of their externship programs that will require some input from you. This normally takes the form of completing certain introductory forms at the outset of the externship and completing evaluation forms at the midpoint and conclusion of the externship. In my experience, the law schools understand the imposition these forms impose and have endeavored to make them as painless possible (and they mostly succeed - the forms I fill out are, at absolute most, two or three pages long).

The bigger task is reviewing and providing feedback on the assignments you have your externs complete but, again, I would argue this is no great imposition. This is because, if you provide topical assignments, you *want* to look at them when they come in because they may hold the answer to an

issue you're currently working on. Once you're looking at the document, it's easy to make edits and comments and meet with the extern to discuss needed edits or additional research that needs to be done, as all that effort goes towards a finished product you can then put to immediate use.

Also, you'll have to remember the Rule of Professional Conduct. We as lawyers should be keeping them the rules in mind in all things we do, but there are a few rules that could come into prominence when working with externs:

1. Rule 1.6: Confidentiality of Information[5]
You will need to make sure you speak with your externs about this rule and how it applies to the work your organization does. This discussion should include who the client actually is, the types of information that will need to be kept confidential and, perhaps most importantly in a local government context, the types of information that can't be kept confidential. For example, here in Cary, we make it a point to educate our externs on the nuances of our Town Council being the client we represent and how that client designation does not include individual Council Members or any Town employees. We also discuss how, because Town employees are not our clients, our communications with them are not confidential and what that means in light of our applicable public records law.

2. **Rule 5.3: Responsibilities Regarding Nonlawyer Assistance**[6]
Externs are not yet lawyers and, as such, will be nonlawyers "employed or retained by or associated"[7] with you, the lawyer, when externing at your placement site. That means you will be responsible for making "reasonable efforts to ensure that" your externs' "conduct is compatible with the professional obligations of the lawyer" and you will be held responsible for any of your externs' violations of these obligations if you knowingly ratify the conduct involved or fail to take "reasonable remedial action" related to the conduct.[8]

How would I find externs who want to be placed my organization?
As I mentioned previously, law schools are incentivized to assist you in the administration of your placement program and have established extern programs of their own. They will often have preexisting application processes in place through which they will list your placement site as being available, collect application materials from prospective externs, and provide those materials to you for your review. The schools Cary works with allow us to specify what materials we want to receive from prospective externs (we ask for a cover letter, resume, and writing sample), collect those from interested applicants, and then provide them to us several months prior to the beginning of the respective externship semester. This allows us time to review the materials, schedule interviews, and make selections well before the start of the semester.

In addition to their established processes, your organization will become known to the law schools' externship program administrators and they may reach out to you directly if they have a student who is specifically seeking local government experience or who they think might be a good fit. This has happened in Cary on numerous occasions and Cary has never had difficulty finding interested externs.

While on the subject of law schools, it's worth quickly mentioning that some also provide site supervisor handbooks or similar resources that provide guidance on how to prepare for and interact with externs along with other resources that can help you run a program. I've also found them to be fully cognizant of the perceived burden of hosting externs, consistently asking for and implementing feedback on how they can make their programs work better for Cary as a placement site. This is much appreciated and shows their willingness to support Cary's placement program. I would be very surprised if your nearby law schools would not be similarly inclined to support yours.

What if no externs want to be placed with my organization?
The American Bar Association ("ABA") mandates that all accredited law schools require students to take at least some "experiential courses"[9] as part of their legal education. Standard 302 of the *ABA Standards for the Approval of Law Schools* requires law schools to offer a curriculum that requires each student to, among other things, complete "one or more experiential course(s) totaling at least six credit hours. An experiential course must be a simulation course, a law clinic, or a field placement, as defined in Standard 304."[10] Standard 303 of the ABA Standards requires law schools to "provide substantial opportunities to students for "…field placement(s)."[11]

The ABA maintains a list of "Responding Schools" that have provided it with information on their respective externship programs.[12] This list contains over 175 ABA-accredited law schools from across the country and includes almost all of the 2023-2024 Best Law Schools as listed by the U.S. News & World Report.[13] The above shows that law students are required to take experiential courses, there are a large number of law schools actively looking for externship placement sites, and an even larger pool of law students interested in being placed.

How many externs should I consider hosting?
As I mentioned earlier, Cary's Legal Department is a four-person office with three attorneys working for a municipality with 1,200 fulltime employees and a citizen population of approximately 180,000 people. We, on average, host two externs during each academic semester (often from different law schools), meaning we host about six a year. This has been completely manageable from an administrative perspective, and we have never lacked assignments to doll out. In fact, we've discussed the possibility of increasing the number of externs we host but have not done so because we currently have space limitations and can't physically accommodate more.

I'm providing this information as a data point for you to compare to your own organization to provide an idea of how many externs you might be able to handle. More externs mean more administrative work for you, but it also means more externs will benefit from the externship experience and increases the amount of work those externs produce.

The most I personally have supervised at one time has been three, and that was done at the height of the Covid-19 lockdown in an effort to help provide externship experiences to more students due to the lockdown limiting the number of placement sites available that academic year. That was the first time I felt the amount of administrative work required bordered on burdensome for me, but we were fully remote at that time and that was certainly an added challenge. However, even with three externs, we were never short on assignments to provide and it was nice to have willing hands to help with much of the time-sensitive and novel work we were having to do at the time, so I will again maintain that the benefits provided by the externs far outweighed the burden they imposed.

Continued on page 32

Demolitions and Due Process: Galveston's Housing Abatement Program

By: DONNA M. FAIRWEATHER,
Senior Assistant City Attorney, Galveston, Texas



INTRODUCTION

I cannot think of any city that does not have at least one house or property that is dangerous, unsanitary, deteriorated, run down, and unsightly. Whatever the issue, the city wants it repaired or gone. Galveston is no exception. In 2008, our city was devasted by Hurricane Ike. The number of vacant, dilapidated, substandard, and dangerous properties increased. Some owners repaired, demolished or rebuilt their properties; however, there were many that did not. Absentee ownership and abandonment of properties exacerbated the city's problems, which resulted in many areas of blight.

A solution: After Hurricane Ike, the task was how best to address the issues of the large number of properties that remained damaged, destroyed, vacant, or otherwise substandard. Many properties were badly deteriorated, dangerous, unsanitary, or were attractive nuisances. They posed substantial threats to the health and safety of the city and its population. Demolition of these properties became a necessary evil when owners were not able to repair or abate them, or refused to do so. A formal city demolition program was necessary before the city took the reins to destroy a person's property that was timely, effective and constitutionally sound. The City of Galveston's Housing Abatement Program was specifically developed to handle these problem properties.

Constitutional considerations: While a city has to deal with the myriad problems resulting from derelict properties, and demolition seems like a quick fix, the constitutional rights of property owners cannot be overlooked.

Section 1983 (42 U.S.C. § 1983) provides the right of an individual to sue persons "acting under color of state law" for civil rights violations. The necessary elements of a Section 1983 claim are:

1. The conduct complained of was committed by a person acting under the color of state law; and
2. The conduct deprived the plaintiff of rights, privileges or immunities secured by the Constitution or the laws of the United States.

Likely Section 1983 claims that result from the demolition of a person's property are alleged violations of:

- The Fourth Amendment protections against unreasonable search and seizure and of substantive due process. "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized;[1]
- The Fifth Amendment protection against unlawful takings. "No person shall…be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation;"[2] and
- The Fourteenth Amendment protections of due process and the equal protection of the laws. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[3]

The Texas Constitution similarly provides these protections, and reads in part:

- Takings - "[n]o person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation."[4]
- Due Process - "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disenfranchised, except by the due course of the law of the land."[5]

Due Process safeguards: Texas courts, including the Fifth Circuit have articulated fundamental mechanisms for cities to prevent violations of Section 1983 rights, and how to ensure successful outcomes when a city is

accused of those violations.

Procedural due process requires notice and an opportunity to be heard. Due Process requirements of the Fourth and Fourteenth Amendments require notice and an opportunity to be heard at a meaningful time and in a meaningful manner.[6] The Supreme Court has held that deprivations of property rights do not violate the Due Process Clause if adequate and meaningful opportunity to be heard has been provided.

Substantive due process bars certain government actions deemed arbitrary or conscience shocking.[7] In order to withstand such claims, a city must ensure that its ordinances or laws governing demolition of nuisance property provide safeguards not only against procedural shortcomings but also against substantive violations.

Notice: A principal safeguard to ensure due process is by providing appropriate and accurate notice. Proper notice must:

- be to the owner, lien holder, or mortgagee of the property,
- provide for a public hearing to determine whether the property complies with the regulations set out in the city's ordinance, and
- include a statement that the owner is required to submit proof of the scope of work and a reasonable timeframe to comply with the city ordinance.[8]
- be personally delivered, sent by certified mail with return receipt requested, or delivered by U.S postal service.[9]
- contain an identification and location of the subject property, a description of the violation(s), at the property, and a statement the city will "vacate, secure, remove, or demolish"[10] the property if action is not taken in a reasonable time.[11]

It is not mandatory that a property owner receive actual notice before demolition of the property,[12] provided that the city can establish that it has made a diligent effort to discover each mortgagee, lienholder, or owner before the public hearing proceeds. Alternatively, by filing notice of the public hearing in the Official Public Records of Real Property in the appropriate county, the notice requirements are met.[13]

Cities often physically post violation notices on the subject property as well. The physical posting of the notice on the subject property constitutes service.[14] Additionally, in emergency situations, courts have recognized that the protection of the health and safety of the public is a paramount governmental interest which takes precedence over notice and hearing requirements.[15] Such emergency demolitions are usually grounded in the city's police powers.

International Code Council: Along with the above requirements, cities have another mechanism to effectuate proper service. Texas has adopted codes promulgated by the International Code Council (ICC) as standard codes for cities. The ICC "I-Codes" are the most widely accepted, comprehensive set of model codes used in the United States. These "I-Codes" are found in state statutes but are adopted at the local level. Cities can make local amendments to a respective I- Code that better fits their purposes. The City of Galveston adopted the International Property Maintenance Code (IPMC) as a part of their 'dangerous and substandard buildings' ordinance. The IPMC provides notice requirements for code officials to follow when issuing violations against a property. The IPMC also establishes minimum requirements for the maintenance of existing buildings through model code regulations that contain clear and specific property maintenance and property improvement provisions.[16]

Substantive Due Process: Cities may satisfy procedural due process requirements but nevertheless continue to face substantive due process claims. "Substantive due process 'bars certain arbitrary wrongful government actions regardless of the fairness of the procedures used to implement them."[17] To succeed, the claimant must prove that a state actor unreasonably deprived them of their property. As stated previously, in order for a substantive due process claim to prevail, the claimant must show the city's actions were arbitrary or conscience shocking, in a constitutional sense.[18] Substantive due process claims therefore face a significant burden when a city employs well-crafted ordinances or laws governing demolition of a nuisance property.

Equal Protection: The Fourteenth Amendment's equal protection clause protects against violations by a "state actor" intentionally discriminating against a claimant because of membership in a protected class. There must be a showing that the claimant was "intentionally treated differently from others similarly situated, and moreover, that there is no rational basis for the difference in the treatment."[19] In my experience, it is difficult for a plaintiff to succeed in an equal protection claim regarding demolition of property by a city. Texas courts have held that under a rational basis analysis, as long as a classification is rationally related to a legitimate government objective, it will survive an equal protection challenge.[20] Abatement, which includes demolition of danger-

Continued on page 12



Donna Fairweather is the Senior Assistant City Attorney for the City of Galveston, Texas, where she has served since 2010. She advises City officials, Boards and Commissions, and prepares legal documents on a wide range of municipal law areas, currently concentrating on land use issues and code review for the City. She also serves as a Municipal Court Prosecutor in the city's Municipal Court of Record. Prior to relocating to Texas, Donna practiced as an Assistant State's Attorney and Special Assistant City Solicitor for the Department of Housing and Community Development for the City of Baltimore, Maryland, and as a Supervising Attorney in the Child Advocacy Unit for Baltimore's Legal Aid Bureau.

Donna is the proud recipient of the 2017 Susan Rocha award for recognition of outstanding accomplishment in the field of municipal law and is a certified IMLA Fellow. She received her law degree from the University of Maryland School of Law and is licensed to practice in Maryland and Texas and in the U.S. District Court for Southern District of Texas. She is a Board Member on the 'National Adoption Day' organization in Galveston County, Texas, and continues to assist in the adoptions of children placed in adoptive families at minimal or no cost to the family. Donna is a proud mama of an Eagle Scout and she is very thankful to be a "Survivor Thriver." She continues to do her best to make a difference to others in her daily life and likes to bring humor and positivity to her work.

ous property by a city, is a legitimate government objective; a city's health and safety ordinance in accord with due process requirements will generally withstand challenge.

Likewise, a Fourth Amendment allegation of illegal search and seizure will have difficulty surviving court scrutiny if the evidence shows the city has complied with the due process procedures of its applicable health and safety ordinances.

Takings: The Fifth Circuit has been the site of numerous Takings claims in the context of demolition, which by its very nature is the destruction of a person's property. Courts recognize two types of takings: Regulatory Takings and Physical Takings. The Fifth Amendment "requires payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is a result of a condemnation proceeding or a physical appropriation."[21] An analysis of a physical takings claim relies upon whether the city breached its duty to justly compensate the property owner. Commonly known as eminent domain, Texas statutes outline the procedures by which municipalities may acquire private property for public purposes.[22] If the municipality takes private property without following the required procedures, the property owner is free to file an inverse condemnation proceeding against the municipality in state court. However, in a city demolition of dangerous property, the goal of the city is not to acquire property, but to abate a dangerous situation.

In a regulatory taking claim, a court must focus not only on whether the governmental entity failed to justly compensate a property owner after taking their property, but also on whether the regulation advances a substantial governmental interest and/or deprives the property owner of all economically valuable use of their land.[23] The test in a regulatory takings claim is whether the legislation at issue unreasonably interferes with a landowner's right to use and enjoy property. Clearly, it could be argued that the demolition of one's property is a physical taking; based upon the elements of the city regulation, demolition could also amount to a regulatory taking. However, a city's demolition of a dangerous and substandard structure is not an acquisition of the underlying land the property sits on. The city does not gain legal rights to the owner's fee simple or other ownership right to the land. The dangerous structure is removed, but all interests in the land remain with the owner.

In Texas, courts have held that if the property was in fact a nuisance, a takings analysis does not apply.[24] Instead, cities can lawfully rely on their police powers to demolish a structure. Through their police powers, municipalities have the ability to abate public nuisances: "regulation of nuisance properties is at the heart of the municipal police power. It is eminently reasonable for a city to prescribe minimum property maintenance standards to protect the public and to maintain adjacent land values."[25] This authority does not give a city carte blanche to do what it likes, when it likes: police powers are typically engaged based upon an emergent situation or circumstance, nevertheless a city may not arbitrarily enter abatement orders or declare the existence of nuisances with no underlying standards.[26] Cities may regulate property use in a way that assures the prevention and abatement of dangerous conditions so long as due process rights are honored.[27] Therefore, even in situations of emergency, it will benefit the city to provide post-demolition notice and due process remedies for its own protection and that of the owner.

Municipal Prosecution: City Of Galveston Housing Abatement Program – Why It Works.

The city of Galveston is a Home Rule municipality which operates under its own established City Charter. Home Rule cities derive their power from their state Constitution and look to their state legislature only as a limit on their authority, i.e. preemption. A simpler view is that a home rule municipality may do anything that is not specifically prohibited by its state law.

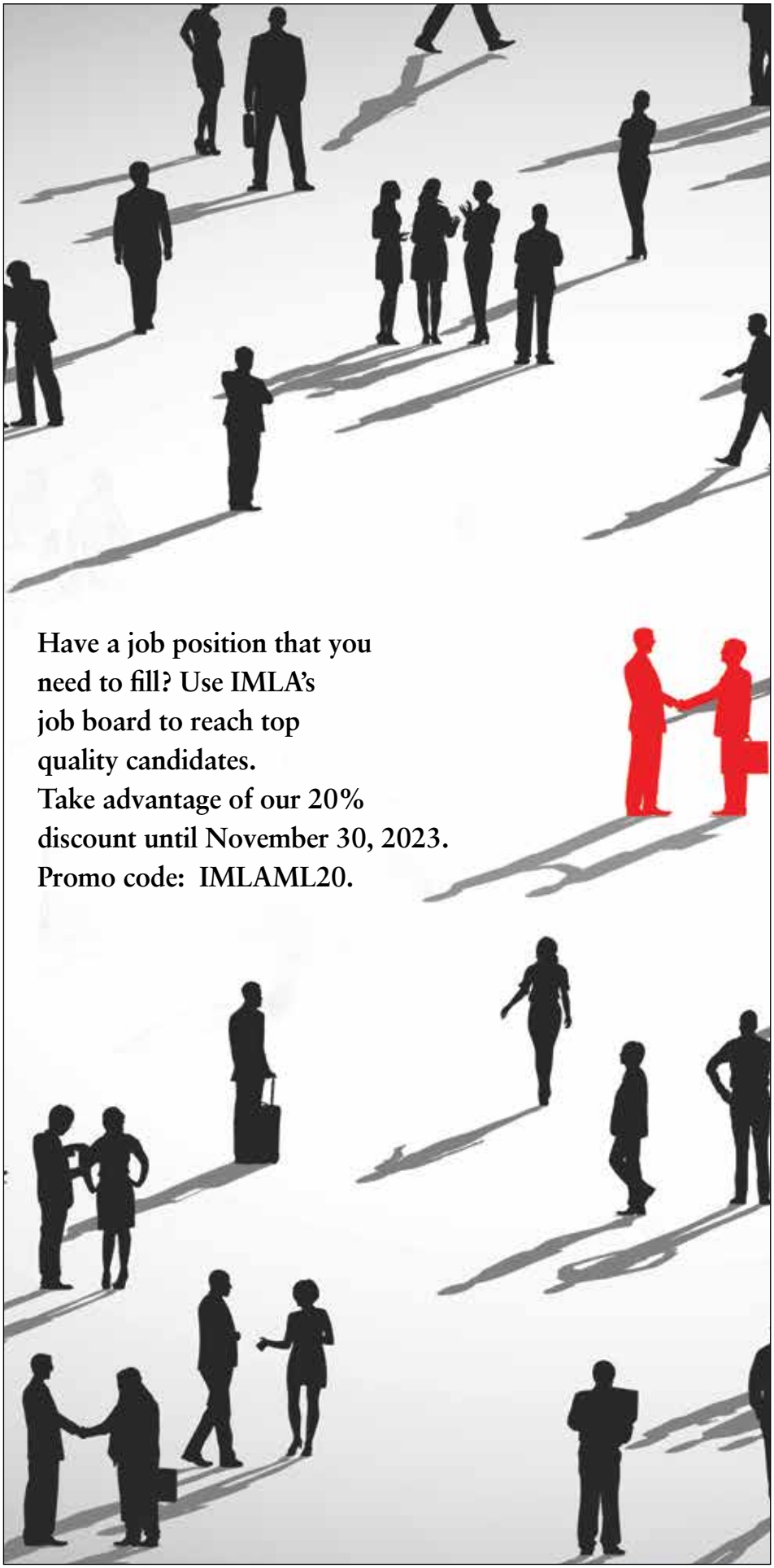
The city has been able to enforce its health and safety regulations more effectively in its municipal court of record through its *housing abatement program*. Distinguishing elements of the housing abatement program and its management are:

1. The housing abatement docket strictly handles properties that the city, according to applicable codes, has determined are substandard and dangerous such that demolition may be warranted;
2. The Assistant City Attorneys solely prosecute these cases in the municipal court;
3. The City Marshal's Code Enforcement personnel bring these properties to the Assistant City Attorneys for enforcement;
4. The cases are heard before a Judge who is a licensed attorney in the state;
5. All cases are heard in a public hearing;
6. All documents are filed in the municipal court of record, as well as in the real property records of Galveston County;
7. Original Petitions are published in the general local paper;
8. All documents are physically posted on the property along with the other notice requirements of mailings, etc.

Prior to the filing of any case in the municipal court of record, the attorney reviews each notice to make sure that the elements of the violations are met to classify a property as substandard and dangerous, as well as ensuring that proper notice has been made. The housing abatement process will then proceed.

Success: The housing abatement program has been extremely effective for the city. There has been increased compliance by owners who choose to repair their properties (and/or demolish them), which has decreased areas of blight. Development has increased, as well as the city's housing stock. While demolition itself is not always the goal in a housing abatement case, it can be a valuable tool. Storms will come and storms will go. The City of Galveston is still a work in progress; however, the decrease in substandard and dangerous properties has made substantial positive impacts on the city, creating a more vibrant, healthy and safe community. ML

1. U.S. Const. Amend. IV. Art. 6.
2. U.S. Const. Amend. V. Art. 7.
3. U.S. Const. Amend XIV. §1.
4. Tex. Const. Art. 1. §17(a).
5. Tex. Const. Art. 1. §19.
6. Rhone v. City of Texas City, 2022 WL 3453351 at 9, (*citing* Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).
7. Reynolds v. City of Commerce, 2020 U.S. Dist. Lexis 68330,*10; 2020 WL 1915713.
8. Tex. Loc. Gov't Code § 214.001(b)(2); §214.001 (b)(3); §214.001(c).
9. Tex. Loc. Gov't Code § 214.001(d).
10. *Id*.
11. *Author's note*: For the purposes of this paper, my focus is on property that is unoccupied.
12. Amaya v. City of San Antonio, 2014 U.S. Dist. Lexis 176572,*11-12. 2014 WL 7339077.
13. Tex. Loc. Gov't Code § 214.001(e).
14. International Property Maintenance Code (IPMC) (2021).
15. International Property Maintenance Code (IPMC) §114 (2021).
16. *Amaya, supra* note 12, at *12.
17. Reynolds v. City of Commerce, 2020 U.S. Dist. Lexis 68330,*11; 2020 WL 1915713; (*citing* Marco Outdoor Adver., Inc. v. Reg'l Transit Auth., 489 F.3d 669, 672 n.3 (5th Cir. 2007) (*quoting* Zinermon v. Burch, 494 U.S. 113, 125, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990)).
18. *Reynolds*, *supra* note 18, at *11.
19. *Reynolds*, *supra* note 18, at *11 (*citing* Village of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000).
20. Korndorffer v. City of Galveston, 2002 U.S. Dist. Lexis 28116 *27, (*citing* Vulcan Materials Co. v. City of Tehuacana, 238 F. 3d 382, 389 (5th Cir. 2001).
21. *Korndorffer*, *supra* note 20, at *15 (*citing* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 122 S. Ct. 1465, 1478, 152 L.Ed. 2d 517 (2002).
22. Tex. Prop. Code §§21.001 et seq., Tex. Loc. Gov't Code §§251.001-02.
23. *Korndorffer*, *supra* note 20, at *3.
24. Rhone v. City of Texas City, *5-6, 2022 WL 3453351 (*citing* City of Dallas v. Stewart, 361. S.W.3d 562, 575 (Tex. 2012).
25. Freeman v. City of Dallas, 242 F.3d 642, 652 (5th Cir. 2001), *cert. denied*, 534 U.S. 817 (2001).
26. *Id*.
27. Rhone v. City of Texas City, *6, 2022 WL 3453351 (*citing* Freeman v. City of Dallas, 242 F.3d 642, 652 (5th Cir. 2001).



PRACTICE TIPS

By: PATRICK BAKER, *City Attorney, Charlotte, North Carolina and* KIM REHBERG, *City Attorney, Durham, North Carolina*

Councilmembers Gone Wild! Tips on Dealing with Challenging Councilmembers

Tip #1 | There can be only one City Attorney: dealing with lawyers not on the City payroll.

Welcome legal input from any attorney—elected or otherwise—who is willing to share their opinion.

Encourage councilmembers to forward outside legal opinions to to the City Attorney's Office (CAO) for analysis and follow-up.

Do not simply accept or concur with an outside legal opinion for political expediency.

DO follow up (highlighting your experience and CAO resources that have been relied upon to produce your legal opinion).

Tip #2 | There is only one client: the City.

The City Attorney (CA) owes legal and ethcal obligations to the City rather than any individual councilmember.

Confidential information shared with the CA cannot be kept from other councilmembers. Council direction ultimately comes from will of the majority on Council.

When the Council is divided on a matter of policy, the CA's duty is to provide fair and balanced legal advice to all sides.

Councilmembers should respect the legal advice of the CA and not expect the CA to advocate for their particular policy position.

Tip #3 | Inserting the City Attorney into policy debates is not good for anybody.

Do NOT fall for Council attempts to get you to render legal advice that supports a particular policy objective.

Do NOT succumb to Council maneuvers to elicit a creative legal interpretation that more favorably supports a particular policy objective.

If you engage Councilmembers seeking to do either of the above, you will compromise the ultimate decision and authority of the City Council.

Do NOT voluntarily insert yourself into a policy debate by giving biased or slanted legal advice.

If you do ANY of the above, you will compromise the legitimacy and objectivity of YOUR legal advice and the work of the CAO, which is the worst damage of all.

Tip #4 | Councilmembers should consult the City Attorney at the earliest opportunity.

The sooner the CAO is consulted on a matter, the sooner attorneys can begin to understand the goals and objectives of the client AND begin to research and map out a legal strategy to accomplish the stated goals.

Conversely, the legal research that will be conducted may lead to the conclusion that the goals or objectives cannot be legally accomplished.

Bottom line: It is far better to know your legal options sooner rather than later.

Tip #5 | The Council meeting is NOT the time for your Council to start asking for legal advice.

Seeking the CAO's advice on sensitive or critical issues for the first time in open meeting will likely not result in the best outcomes.

Tip #6 | Convey to your Council that the City Attorney needs adequate time to research issues and answer questions.

Many elected officials are lay people and may be largely unfamiliar with the tenets of municipal law (and municipal administration, for that matter).

Take the time to share with them that seemingly "simple" and "easy" questions can turn out to be quite complex and multi-faceted.

Learn to "dance"—Help your elected officials understand the process of the CA "questioning the questioner" to draw out important background facts that will ensure a more accurate and complete answer is given by the CAO.

Emphasize that we don't want to delay, but research conducted in haste isn't in anyone's best interest, either. Sometimes it takes time to do sophisticated research and get the advice right.

Tip #7 | Be a great partner. Let the Client know that letting their partner (the) in on all important facts will yield better results.

The more information CAO receives, the more likely they are to provide an accurate, timely, and thorough response.

Do YOUR part—always be good for the accurate, timely, and thorough response.

Tip #8 | Help Councilmembers understand that concrete answers sometimes aren't possible when the law is not clear cut.

Sometimes as City Attorneys we're shooting at a moving target in trying to render advice.

Laws are interpreted and reinterpreted by trial and appellate courts all the time.

Some state legislatures are quite active in changing the landscape for local governments.

Sometimes we're wading into unknown territory. COVID (remote meetings, federal funds passthrough), gCARES Act, ARPA; non-discrimination ordinances, etc.

Tip #9 | Legal risk tolerance is ultimately within the purview of the Council.

When the legal authority to support a particular policy directive is unclear, the CA will conduct a legal risk analysis in order to provide the Council with the CA's best educated guess as to whether the policy could successfully withstand a legal challenge.

The CA should have a relationship with councilmembers in which the CA is free to share with them the relevant information they need to know rather than just what they want to hear.

Legal risk tolerance is a subjective balancing act between a desired policy objective and the potential negative impact of a successful legal challenge against the policy.

The CA's duty is to provide the necessary and relevant legal advice. The Council majority ultimately determines whether or not to proceed in light of the identified risk.

Tip #10 | Just because the Council doesn't like your advice doesn't make it bad advice.

We can't always be the bearers of good news.

Don't tell them what they want to hear.Tell them what they NEED to hear.

Our ethical obligation as attorneys sometimes necessitates that we provide counsel or advice that the client does not want to hear.

When competing policy decisions or objectives hinge on your legal advice…

Always follow the law.

Provide your best reasoned legal advice based on an objective reading of the law.

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AMICUS

By: AMANDA KARRAS,
IMLA Executive Director and General Counsel

SCOTUS to Decide: What's Materiality Got to Do with It?

The Supreme Court will hear an important Title VII employment discrimination suit this term that could have significant impacts for all local governments as employers. If the Court sides with the employee, the case could create increased costs and liability for local governments while also diverting resources away from the critical missions that they serve. The case could also have serious implications for public safety, as explained more fully below.

In the case, Jatonya Muldrow, a Sergeant with the St. Louis Police Department was laterally transferred from a position as a patrol detective with the Intelligence Division, where she worked on public corruption and human trafficking cases, to the Fifth District in the City where she retained her rank, pay, supervisory role, and duties investigating violent crimes, including homicides, robberies, and assaults. The transfer was a part of several personnel changes in the police department that included transferring seventeen men and five women from various positions to new lateral assignments. Sgt. Muldrow sued, claiming the transfer was based on her sex in violation of Title VII of the Civil Rights Act.

Section 703(a) of Title VII states:

> It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

Sgt. Muldrow was not fired or demoted, so at issue in this case is construing the terms in the statute "discriminate against" and "terms, conditions, or privileges of employment." Sgt. Muldrow's original position with the Intelligence Division involved a 9:00 am – 5:00 pm or 8:00 am – 4:00 pm Monday – Friday schedule. She also worked as a liaison to the FBI field office and in this capacity, had the same privileges as an FBI agent, including working in plain clothes and access to an FBI vehicle. When she was transferred, she was required to work a rotating schedule, which included some weekends, and she was required to wear a police uniform.

In order to establish an employment discrimination claim under Title VII, a plaintiff must first demonstrate a *prima facie* case of discrimination by showing: (1) that she belongs to a protected class; 2) that she was qualified for the job; 3) that despite those qualifications, she suffered an adverse employment action; and 4) the circumstances surrounding the employment action allow for an inference of discrimination.[1] The burden then shifts to the employer to "articulate some legitimate, nondiscriminatory reason" for the action.[2] After the employer meets its burden, the burden then shifts back to the plaintiff to show that the employer's reasons are pretext for discrimination.[3]

The Eighth Circuit found in favor of the City, concluding that the lateral transfer was not an adverse employment action and Sgt, Muldrow therefore failed to establish a prima facie case of discrimination.[4] The Eighth Circuit explained:

> [a]n adverse employment action is a tangible change in working conditions that produces a material employment disadvantage... A transfer involving only minor changes in working conditions and no reduction in pay or benefits will not constitute an adverse employment action, '[o]therwise every trivial personnel action that an irritable ... employee did not like would form the basis of a discrimination suit.'[5]

The court reasoned that Sgt. Muldrow retained her pay and rank as well as her supervisory role and her responsibilities to investigate violent crimes and she therefore suffered no significant change to her working conditions which would rise to the level of an adverse employment action under Title VII.[6] Other courts have found that a change to a shift, from day to night for example, would constitute a material "term of employment" under the statute.[7] On this point, the Sixth Circuit recently noted the question of whether a shift change was a material term of employment was so "easy" that "[i]t's not even clear that we need dictionaries to confirm what fluent speakers of English know."[8]

The Supreme Court granted certiorari to resolve the question of whether an adverse employment action under Title VII must cause "significant disadvantage" or put another way, must have a materiality requirement to it. Nearly every circuit court to address the question has found that materiality is required to demonstrate an adverse action.[9] This has been the rule in most courts for decades.

Under the Petitioner's (employee's)

theory, *any* change to an employee's working conditions would constitute an adverse action under Title VII, regardless of how trivial the change. The Petitioner argues that in a purely textualist sense, the word "discriminate" means "any differential treatment" and there is no requirement for "heightened harm" or materiality.[10] Adopting this rule, which is also advocated by the federal government, would be a sea change under Title VII in the vast majority of circuits.

Even if the Court were to adopt the Petitioner's theory of liability, employees would still need to prove that the change in working conditions was due to the employee's protected status. In other words, the analysis does not stop at materiality, which provides some comfort to employers if the Court sides with the employee. However, one of the biggest problems with the Petitioner's proposed rule is that whether the change to the employee's job was due to the employee's race or sex (or other protected status) will often be a jury question. Employees, who after all would not be suing if they did not think so, will claim that the transfer or employment action was because of their protected status and employers (unless they settle) will claim that it was not because of the employee's protected status. These suits are already expensive and time consuming to litigate, but if most of the issues that are now being resolved at summary judgment due to a lack of materiality become jury questions, employers will be forced to settle more lawsuits or go to trial, spending even more money to defend these already expensive suits.

And while every employer, both public and private, will feel a drain on their resources with the addition of new Title VII liability, public employers have an added concern in this case regarding public safety. That is because lateral transfers of paramilitary employees – i.e., those in police and fire departments - are common and necessary. Most local governments provide their police and fire chiefs (as well as their designees) with the authority to assign personnel within their departments as they see fit. Transfers may be necessary due to budgetary limitations, staffing shortages, ADA and religious accommodations, familiarizing employees with other units of a department, filling vacancies, preventing burnout, and avoiding ongoing harassment.

One of the most important reasons a chief may need to transfer an employee is to satisfy staffing demands. Police departments across the country are facing significant personnel shortages caused by a spike in retirement, resignations, and insufficient recruitments. The deficits are significant. For example, Baltimore is short 532 police officers, Portland, Oregon is down 100 officers, Dallas is facing a 550-officer shortage, and Washington D.C. is 800 officers below full strength.[11] Public safety requires the proper personnel in the proper places. Chiefs may need to disband specialized units, move personnel from the day shift to the night shift, or move officers to different units to address staffing shortages and ensure proper emergency response. All of these reassignments are necessary for public safety, and they would all be potentially actionable under Petitioner's theory. Of course, the employees would still need to demonstrate that the transfers were due to the person's protected status, but right now, if a transfer like this is not considered a material adverse action, most courts can address the claim at earlier stages of litigation, saving time, money, and resources for public employers.

In deciding the question presented, this Court will determine who should be responsible for allocating scarce personnel resources to address public safety. Adopting the Petitioner's definition of Title VII's threshold will turn federal courts into the overseers of minute employment decisions routinely made by local governments, which is particularly problematic for paramilitary employers. IMLA believes that these decisions should be made by the leadership of the police or fire department, not a federal court with no public safety experience.

IMLA drafted an amicus brief in support of the City of St. Louis in this case, arguing many of these points.[12] The case will be argued on December 6, 2023, and we can expect a decision before the end of June 2024.

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Notes

1. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
2. *Id.* at 802.
3. *Id.* at 804.
4. Muldrow v. City of St. Louis Missouri, 30 F.4th 680, 687 (8th Cir. 2022), *cert. granted in part,* 143 S. Ct. 2686 (2023).
5. *Id.* at 688.
6. *Id.* at 688-89.
7. Threat v. City of Cleveland, Ohio, 6 F.4th 672, 677 (6th Cir. 2021).
8. *Id.*
9. *See* Hamilton v. Dallas Cnty., 79 F.4th 494, 504 (5th Cir. 2023) (noting "nearly every circuit seems to have adopted" a materiality requirement and collecting cases); *But see* Chambers v. D.C., 35 F.4th 870, 872 (D.C. Cir. 2022). The court in *Hamilton* rejected the circuit's previous requirement that the adverse action be an "ultimate employment decision", but the court did not decide what level of materiality was necessary to plead a Title VII violation.
10. *See* Petitioner's Brief, p, 16, available at: https://www.supremecourt.gov/DocketPDF/22/22- 193/278337/20230828212608509_Petitioner%20opening%20merits%20brief%20-%208.28.2023.pdf.
11. Ryan Young, *et al.*, '*We Need Them Desperately': US Police Departments Struggle with Critical Staffing Shortages*, Cable News Network (July 20, 2022), https://www.cnn.com/2022/07/19/us/police-staffing-shortages-recruitment/index.html; Rebecca Pryor, *Baltimore Police Turn to 'Drastic Measures' Amid Severe Staffing Shortages*, WPBN FCC (Aug. 2, 2023) (hereinafter "*Baltimore Police")*, https://upnorthlive.com/news/nation-world/baltimore-police-turn-to-drastic-measures-amid-severe-staffing-shortages-high-crime-rates-patrol-officers-baltimore-city-police-department-understaffed-districts-gun-violence-juvenile-crime; Megan Cloherty, *DC's Police Chief Says Recruiting Officers is Harder Due to New Laws*, WBFF Staff (Feb. 24, 2023), https://wtop.com/dc/2023/02/dc-police-chief-blames-recruiting-struggles-on-new-laws/#:~:text=Standing%20at%203%2C400%20officers%2C%20D.C.,policies%20that%20increase%20officer%20accountability.
12. IMLA's amicus brief is available here: https://www.supremecourt.gov/Docket PDF/22/22-193/285432/20231018151003442_Muldrow%20Amicus%20Brief%20Final%20for%2010.18.23.pdf.

IMLA IN LA QUINTA CALIFORNIA














Meredith Everhart














IMLA























IMLA 2023 AWARDS

At our recently-concluded Annual Conference in La Quinta, IMLA took the opportunity to recognize some of our outstanding members—those who have contributed many years to the betterment of their communities and the practice of municipal law, as well as more recent local government lawyers who exhibit the dedication and service which will enhance our profession.

Please join us in congratulating—and thanking – our 2023 IMLA Award winners!

Charles S. Rhyne Lifetime Achievement in Municipal Law Award

THOMAS ACQUINAS CARR
County Counsel (ret.) - Washington County, Oregon

LINDA S. KINGSLEY
Corporation Counsel - Rochester, New York

HENRY C. LUTHIN
Corporation Counsel (ret.) - Boston, Massachusetts

James H. Epps III Award for Longevity of Service to a Community Award

HONEY A. LEWIS
Civil Liability Unit - Los Angeles, California

WILLIAM W. MANLOVE
Senior Deputy City Attorney - Portland, Oregon

SCHAUNDRA DAVENPORT OLIVER
Divisional Deputy City Solicitor - Philadelphia, Pennsylvania

Daniel J. Curtin Young Public Lawyer Award

DESJENEE DAVIS
Assistant City Solicitor - Philadelphia, Pennsylvania

Brown, Mulligan, Rocha Distinguished Public Service Award

RONDA G. CURTIS
Chief Corporate Counsel - Cleveland, Ohio

Bruce A. Noble Distinguished Canadian Municipal Lawyer Award

DEMETRIUS KACHAFANAS, K.C.
Regional Solicitor - Cape Breton Regional Municipality, Nova Scotia

William I. Thornton, Jr. IMLA Faculty Award

BYRON WERRY
City Solicitor (ret.) - Regina, Saskatchewan

Outstanding State League Counsel Award

LORELEI A. LEIN
General Counsel - Alabama League of Municipalities

Brad D. Bailey Assistant City/County Attorney Award

CINDY J. CROSBY
Division Chief, Municipal Operations Division - Austin, Texas

Burk E. (Buck) Delventhal Legal Advocacy Award

VERNETTE DORIS DOW
Divisional Deputy City Solicitor - Philadelphia, Pennsylvania

PETER A. LETZMANN
Peter Letzmann Associates, Grand Rapids, Michigan

Diversity, Equity and Inclusion Award

NEAL FALGOUST
Division Chief, Open Government, Ethics, & Compliance Division - Austin, Texas

CITY OF MADISON DEPARTMENT OF CIVIL RIGHTS
Madison, Wisconsin

Outstanding Associate Member Award

ROBERTA "ROBIN" CROSS
Senior Attorney – Messer, Fort, McDonald, Frisco, Texas

Outstanding State/Provincial Chair Award

THOMAS E. POWERS III
Senior Assistant City Attorney, Lead – Charlotte, North Carolina

LISTSERV

By: BRAD CUNNINGHAM,
Municipal Attorney, Lexington, South Carolina

There Are Fifty Unique FOIA Statutes in This Great Country of Ours

One of the more recent listserve discussions regarding the Freedom of Information Act and its relationship to Discovery in litigation brought to light the many differences in FOIA among our fifty wonderful states. The original question posted was "Why Use a FOIA request instead of Discovery?" There was quite an array of answers. One state effectively allows the use of FOIA to skirt Discovery rules. One contributor said it could even be used to circumvent a Scheduling Order in litigation in their state.

Others felt Discovery and/or Subpoena fetched more information than a FOIA request because of their state's exemptions in FOIA. Timetables were different for answering and a violation in one place was common practice in another. The conclusion was there are unique items in each state FOIA rules that make for interesting discussion.

Here at home in South Carolina we are no exception to that conclusion. One of our unique provisions in the South Carolina State Code provides a mechanism for challenging overly burdensome requests:

> **SECTION 304110.** Hearings regarding disclosure; appropriate relief; civil fine for violation.
>
> (A)A public body may file a reques for hearing with the circuit court to seek relief from unduly burdensome, overly broad, vague, repetitive, or otherwise improper requests, or where it has received a request but it is unable to make a good faith determination as to whether the information is exempt from disclosure.

We have not had to file such an action, and I am presently unable to find a case where such an action was instituted. I find two reasons for this. First, many Councils are reluctant to "file action" against a member of the public for making a FOIA request. Never mind that it is a Declaratory Judgment action and there are no punitive measures sought. The public will see it as "legal action against a citizen who made a FOIA request."

Second, the South Carolina Code allows fees to be charged for costs of research and copying in response to a FOIA request. If the City deems a request overly burdensome as suggested in the Code, another way to potentially avoid litigation is to respond with a fee schedule. If the request is truly overbroad and overly burdensome, there is a good chance the cost for research and copying will follow suit. Some requestors then choose not to pursue their request because of the costs. The South Carolina Code provides as follows:

> "**SECTION 30430.** Right to inspect or copy public records; fees; notification as to public availability of records; presumption upon failure to give notice; records to be available when requestor appears in person….
>
> (B)The public body may establish and collect fees as provided for in this section. The public body may establish and collect reasonable fees not to exceed the actual cost of the search, retrieval, and redaction of records. The public body shall develop a fee schedule to be posted online. The fee for the search, retrieval, or redaction of records shall not exceed the prorated hourly salary of the lowest paid employee who, in the reasonable discretion of the custodian of the records, has the necessary skill and training to perform the request. Fees charged by a public body must be uniform for copies of the same record or document and may not exceed the prevailing commercial rate for the producing of copies. Copy charges may not apply to records that are transmitted in an electronic format. If records are not in electronic format and the public body agrees to produce them in electronic format, the public body may charge for the staff time required to transfer the documents to electronic format…. However, members of the General Assembly may receive copies of records or documents at no charge from public bodies when their request relates to their legislative duties. The records must be furnished at the lowest possible cost to the person requesting the records. Records must be provided in a form that is both convenient and practical for use by the person requesting copies of the records concerned, if it is equally convenient for the public body to provide the records in this form. Documents may be furnished when appropriate without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public. Fees may not be charged for examination and review to determine if the documents are subject to disclosure. A deposit not to exceed twentyfive percent of the total reasonably anticipated cost for reproduction of the records may be required prior to the public body searching for or making copies of records."

Continued on page 34

INFRASTRUCTURE

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Canadian Municipal Infrastructure – A Construction Law Perspective

One of the many hats Canadian municipalities wear is that of a builder. Statistics Canada reports that in 2022, municipalities nationwide were collectively responsible for 56% of public investments in infrastructure construction. Provincial governments, collectively, follow at a distant second place with 40% of the investments. In other words, when a Canadian uses any piece of public physical infrastructure – whether a park, highway or water system – there is a greater chance than not that it was built by a municipality.

As Canada's most prolific builders of public infrastructure, municipalities frequently have to contend with legal issues and disputes about construction projects. These legal issues are what this article is about, but Canadian construction law is expansive and attempting a general overview would be meaningless. Instead, this article attempts to provide a selective, "by the slice" flavour of the subject by discussing certain construction law considerations unique to municipalities or Canadian law.

The discussion below is divided into three parts, following the significant phases of a typical infrastructure project – procurement, contracting, and construction.

I. Procurement

Procurement is an area of law where Canadian municipalities are subject to a legal regime significantly different than that in the United States. Municipalities are subject to various domestic and international trade agreements that Canada and its provinces have entered into, e.g., the Canadian Free Trade Agreement (CFTA), a domestic trade agreement that aims to reduce barriers to trade within Canada.

Obligations under trade agreements kick in early in the life of an infrastructure project when the decision to procure construction services is made. Under the obligation to provide "open, transparent, and non-discriminatory access" to procurement (Article 502(1) of the CFTA), municipalities must select their suppliers through an open procurement process when the value is above a certain threshold (for construction, the threshold amount is $302,900 as of 2023 under the CFTA).

Sometimes, a municipality may wish to purchase construction-related services an existing relationship with a builder known to perform good work at a reasonable price. "Sole-sourcing" such work to the said builder is clearly a no-go under the trade agreements. Instead, the municipality must first assess if the estimated purchase amount exceeds the applicable threshold amounts set out in the trade agreements. If yes, and provided no exception applies, the municipality must follow an open procurement process in which the favoured provider may or may not succeed.

While violations of trade agreements are intended to be challenged through special dispute resolution mechanisms outside Canada's system of constitutional courts, bidders have creatively leveraged the trade agreements to obtain remedies through constitutional courts too. This was recently illustrated in *Thales DIS Canada Inc. v. Ontario*, 2022 ONSC 3166, in which an unsuccessful bidder alleged that the selection criteria established by a public purchaser breached national and international trade agreements. Exercising its jurisdiction under administrative law principles, the Ontario Supreme Court quashed the procurement decision and awarded costs to the challenger after concluding that the purchaser's decision was unreasonable.

However, trade agreements are not all that the Canadian municipal purchaser (or their lawyer) must worry about during the procurement stage. Once bids or proposals are received in response to a market call, the purchaser must contend with certain obligations concerning evaluation and selection arising from the landmark Supreme Court of Canada decision in *The Queen (Ont.) v. Ron Engineering*, 1981 CanLII 17.

The central teaching of *Ron Engineering* is that once a purchaser receives a valid bid, the purchaser owes a quasi-contractual duty to the bidder to act fairly. Particularly, a purchaser is prohibited from disqualifying a valid bid or evaluating a bid based on undisclosed criteria. Further, once a bidder is ranked the highest based on published criteria (price-based or otherwise), the purchaser must award the contract to that bidder.

This duty to award the contract to the highest-ranked bidder was at issue in *2708266 Ontario Inc. v The City of Toronto, 2022 ONSC 6315*. After receiving bids in response to a request for tenders (RFT) for sewer construction, the municipality disqualified the lowest bidder based on its opinion that the bidder did not meet minimum experience requirements. The bidder challenged the decision. The Court found that the

municipality's interpretation of the experience requirement in the RFT was unreasonable and, accordingly, the municipality had breached its duty under *Ron Engineering* to enter into a contract with this bidder.

Ron Engineering is now more than 50 years old, but the trade agreements are of much recent vintage, so the law governing municipal procurement in Canada is still actively evolving.

II. Contracting

In the days of *Ron Engineering*, most municipal construction in Canada was being performed using the traditional, lowest-price tendering process. While this process has limitations, an advantage is that the contracting that follows selection is straightforward because the contract terms are outlined in the call for tenders and are non-negotiable. However, recent decades have seen a marked expansion in the range of tendering, contracting and delivery methods used by Canadian municipalities. The traditional approach to lowest-price tendering has been replaced to a great extent by qualifications-based selection, and the traditional design-bid-build approach to execution now shares ground with approaches such as design-build and integrated project delivery (IPD).

This wider range of options makes selecting contract provisions a relatively daunting task for municipal project owners. Drafting project-specific contract terms is generally uneconomical or burdensome except for large or complex projects, so municipalities tend to use one of the several form contracts prevalent in the construction industry. The most common set of form contracts in Canadian construction are those published by the Canadian Construction Documents Committee (CCDC). Similar to the form contracts provided by the American Institute of Architects or the Engineers Joint Contract Documents Committee in the United States, CCDC has published a range of forms for different construction contract types; for example, CCDC-2 for stipulated price contracts and CCDC-14 for design-build agreements.

A common refrain among municipal buyers is that CCDC contracts are biased in favour of contractors, which this author agrees is the case. Accordingly, from the municipal perspective, CCDC form contracts nearly always require modifications through supplementary conditions. For example, municipalities typically prefer having firm and enforceable completion dates associated with their construction contracts, but the CCDC-2 form contract contains no liquidated damages provisions.

Thus, despite standard form contracts being widely adopted in Canada, municipal purchasers approach these forms cautiously, as using them without modification could cause prejudice to the owner-municipality. This risk was recently underscored in *Seagate v. Halifax Regional Municipality*, 2023 NSSC 176, which pertained to a facility for which the municipality and contractor entered into a CCDC-2 standard form agreement. The municipality expected the contractor to be responsible for code compliance of the facility and, when provincial regulators shut the project down for non-compliance, refused to pay a portion of the contract price to the contractor who sued. The court found in favour of the contractor, primarily relying on provisions within the CCDC-2 form contract that lessened the contractor's liability for design issues.

III. Issues during construction

The construction phase is undoubtedly where most legal disputes arise on municipal infrastructure projects. The discussion below will selectively focus on three legal concerns unique to municipalities or the Canadian context during construction – builders' liens, payment issues and independence of the payment certifier.

Under Canadian law, municipal property (with narrow exceptions) is lienable if the head contractor is not paid for work performed on the property or the head contractor fails to pay its subcontractors. This is different than some states in the United States, where courts have found that, without express statutory intent otherwise, liens cannot be filed against property owned by municipalities under principles of sovereign immunity.

Contractors' and subcontractors' rights to file liens arise under builders' lien legislation, which each province in Canada has adopted in some form. Municipalities, which typically own the land on which public infrastructure is built, thus face the risk of such liens being placed on their property. Interestingly, the most significant risk to municipalities arises from procedural requirements in lien legislation rather than substantive aspects. Regardless of the merits of the claim, an owner can be prejudiced by not strictly following the formal requirements of the lien process.

This was illustrated in *Loedel v. Swanky*, 1992 CanLII 1504 (BCSC), which pertained to a lien on lands owned by the City of Prince George in British Columbia. The City could have, under the applicable lien legislation, limited its liability by posting a written notice on the lands but failed to do so. This failure resulted in the court refusing to relieve the City of its lien-related liability. The author's anecdotal experience is that such procedural liability often arises because contract administrators or project managers for municipalities are well-qualified in building-related trades but do not have a comparable understanding or experience with lien and associated legal procedures.

The second source of legal risk during the construction phase arises from payment-related issues. Under typical construction contracts, municipalities make payments to contractors in the form of progress payments; i.e., as the work progresses, the municipality periodically pays the contractor for work *after* the work has been performed. However, in rare situations, the municipality may be requested to make an advance payment to the

Continued on page 35



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SUPREME COURT

By: DEANNA SHAHNAMI,
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From the Campus to Main Street: the Broader Impact of *Students for Fair Admissions*

In 2003, former Supreme Court Justice Sandra Day O'Connor wrote a majority opinion preserving affirmative action in college admissions, finding that the University of Michigan Law School's consideration of applicants' race furthered a compelling interest and was narrowly tailored.[1] She envisioned a future where such criteria would be superfluous: "The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[2]

Justice O'Connor's prophecy would be tested much sooner. On June 29, 2023, the Supreme Court issued its much-anticipated decisions[3] in a duo of cases challenging the consideration of race by college admissions officers at Harvard and the University of North Carolin: *Students for Fair Admissions, Inc. v. Pres. and Fellows of Harvard College*[4] and *Students for Fair Admissions, Inc. v. University of North Carolina*[28] (collectively, *Students for Fair Admissions*).

Affirmative Action Eliminated in College Admissions.

In *Students for Fair Admissions*, the Court held that Harvard's and UNC's admissions programs—which considered race as one of many factors in the application process—violate the Equal Protection Clause of the Fourteenth Amendment, which bars racial discrimination by governmental entities.[6] Eliminating affirmative action for college admissions, Chief Justice John Roberts, writing for the majority, explained that UNC and Harvard's race-based admissions programs "lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points."[7]

The decision does not stop at college admissions. Knowing this, local governments across the United States are reviewing their race-conscious programs, i.e., double-checking their disparity studies for Minority- and Women-Owned Business Enterprise (MWBE) Programs. Cities from St. Petersburg, Florida, to Chicago, Illinois, rely on *City of Richmond v. J.A. Croson Co.*, which held that the city of Richmond failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race.[8] In *Croson*, the Court determined that government actors could use racial classifications only if the classifications survived strict scrutiny.[9] In *Students for Fair Admissions*, the court affirmed that "[a]ny exception to the Constitution's demand for equal protection must survive a dauting two-step examination known in our cases as 'strict.'"[10]

Strict Scrutiny, defined.

Strict scrutiny analysis is comprised of two prongs. First, the government must establish its "compelling interest" in remediating race discrimination with a "strong basis in evidence" of the persistence of discrimination.[11] Such evidence may consist of the entity's "passive participation" in a system of racial exclusion.[12] Second, any remedies adopted must be "narrowly tailored to remedy prior discrimination"; the program must be directed at the relevant market and types of discrimination identified.[13]

To satisfy the compelling government interest prong, the Supreme Court has held that the government has a compelling interest in "remediating specific, identified instances of past discrimination that violated the Constitution or a statute."[14] Additionally, the government must present goals that are "sufficiently coherent for purposes of strict scrutiny."[15] To determine whether the government's use of a racial classification is narrowly tailored, the Court examines several factors, including the necessity for the race-based relief, the efficacy of alternative remedies, the flexibility and duration of the relief, the relationship of the numerical goals to the relevant labor market, and the impact of the relief on the rights of third parties.[16]

Strict Scrutiny Applied to SBA 8(a) Business Development program.

Less than a month after Students for Fair Admissions was issued,—in *Ultima Services Corp. v. U.S. Dep't of Agriculture*.—the U.S. District Court for the Eastern District of Tennessee enjoined the Small Business Administration (SBA) from applying a rebuttable presumption of social disadvantage to individuals of certain racial groups applying to the 8(a) Business Development program.[17] The issue in the case was whether, under the Fifth Amendment of equal protection, Defendants the United States' Department of Agriculture (USDA) and SBA may use a "rebuttable presumption" of social disadvantage for certain minority groups to qualify them for inclusion in a federal program that awards government contracts on a preferred basis to businesses owned by individuals in those minority groups.[18] The court held they cannot.

Plaintiff, Ultima, is a small business that provides administrative and technical support services.[19] Ultima competed for federal services contracts with USDA, earning approximately $37 million since 2015.[20] In 2017, Ultima won four regional Indefinite Delivery Indefinite Quantity (IDIQ) contracts to provide its services to different NRCS offices in four

regions of the country.[21] In 2018, USDA decided not to exercise any more options under all four IDIQ contracts.[22] USDA also declined to exercise any further options on pending task orders under the IDIQ contracts or issue new task orders.[23] To continue providing services to NRCS offices, Defendant USDA, in some instances, awarded sole source contracts with companies participating in the 8(a) Business Development Program (8(a) program) outlined in 13 C.F.R. § 124.1.[24] Ultima was not a participant in the 8(a) program; therefore, USDA could not consider it in awarding those sole source contracts.[25] Ultima experienced a decline in revenue following USDA's decision to set aside contracts for the 8(a) program.[26]

The Tennessee court acknowledged that *Students for Fair Admissions* concerned college admissions programs, but stated that the reasoning in that case is not limited to academic admissions.[27]

Applying strict scrutiny, the Tennessee court found that defendants' rebuttable presumption of social disadvantage must (1) satisfy a compelling interest and (2) be narrowly tailored to promote that compelling interest. To satisfy the compelling-interest prong, the government must both identify a compelling interest and provide evidentiary support concerning the need for the proposed remedial action.[28] To determine whether the government's use of a racial classification is narrowly tailored, the Court examines several factors, see *supra* note 13.

The court said examples provided by the defendants did not show that the federal government allowed discrimination to occur in the industries relevant to Ultima. Going further, the court found that the defendants had not examined whether any racial group is underrepresented in a particular industry relevant to a specific contract in the 8(a) program.[29] This approach is more rigorous than the industry within a market area analysis presented in *Croson*.[30] Accordingly, the court determined that defendants failed to show a compelling interest justifying their use of the rebuttable presumption as applied to Ultima. The court went on to say that even if defendants could establish a compelling interest, the rebuttable presumption of social disadvantage is not narrowly tailored to serve the asserted interest.[31] The court also noted the Supreme Court's instruction to examine whether (1) the governmental entity considered race-neutral alternatives prior to adopting a program that uses racial classifications; (2) the program does not presume discrimination against certain minority groups; and (3) if the program involves a set-aside plan, the plan is based on the number of qualified minorities in the area capable of performing the scope of work identified.[32] The court did not find any relevant evidence specific enough to Ultima's contracts under these considerations.

Immediate Action by SBA.

On the heels of the Tennessee court decision, the U.S. Small Business Administration (SBA) updated its website to reflect Ultima and a new environment for all 8(a) participants: the "SBA has temporarily suspended new 8(a) application submissions to comply with the Court's decision."[33] To comply with the Court's order, SBA is requiring that all 8(a) participants whose program eligibility is based upon one or more individuals who relied upon the presumption of social disadvantage to establish their individual social disadvantage must complete a social disadvantage narrative.[34] Under the Small Business Act, Congress explained that "economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged."[35]

To receive new 8(a) contracts, an individually owned 8(a) participant that previously relied on the presumption of social disadvantage to support its eligibility will need to submit information to SBA, through the Certify.sba.gov system, that will allow SBA to determine whether the individual upon whom eligibility is based has established personal social disadvantage.[36]

What to Consider and What to Look Forward to.

Here are some of the takeaways from the *Ultima* decision: (1) Ultima only challenged the SBA's use of the rebuttable presumption of social disadvantage for the 8(a) program, not the entire 8(a) program itself; (2) to comply with the *Ultima* court's decision, SBA responded accordingly and updated it website, interim guidance, and temporarily suspended new 8(a) application submissions; and (3) the decision will likely open the door to future challenges to SBA's authority, the 8(a) program itself, and other race-based programs that are outside of the 8(a) program.

That issue is already being tested in a Houston case. *Landscape Consultants of Texas, Inc. v. City of Houston,* (S.D. Tex. Sept. 19, 2023). The City has adopted a policy to "stimulate the growth of local minority, women, and small business enterprises by encouraging the full participation of these business enterprises in various phases of city contracting."[37] The plaintiff, a contractor providing more than $1.3 million annually in landscaping services to Houston, argues that it should not have to subcontract eleven percent of its revenue from the City to minority-owned business enterprises: "Although most of Landscape Consultants' and Metropolitan's employees are racial minorities, the owners are not. These businesses are thus placed at a disadvantage just because their owners are not from a preferred race. Picking winners and losers based on race violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution."[38]

One area of concern for local governments will be their use of disparity studies in supporting minority-owned, women-owned, and small business enterprises (MWSBEs). An example is Chicago.

The City of Chicago's latest disparity study for construction contracts was in 2021. Following Croson, which states that a state or local government may only remedy discrimination within its own contracting market area, the Chicago study has "long established economic principles to empirically establish the City's geographic and product market area to ensure that any program based on the study satisfies strict scrutiny."[39]

One thing for local governments to think about, for race-based initiatives or policies, is the Ultima court's meaning of specific contract.[40] How will evidence before the contract is awarded differ from evidence gathered at trial? How specific does the evidence have to be to survive strict scrutiny? Croson is dicta for many jurisdictions, but only time will tell if Ultima will make its way to the Supreme Court to solve the plurality opinions that govern the topic.[41] ML

Continued on page 29

INSIDE CANADA

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Demolitions, Political Signage, Underpaid Welders, and More

Ambiguous Sign By-law Results in Charter Challenge
Kaps v Surrey (City),
2023 BCSC 1844 https://canlii.ca/t/k0q8j
The City of Surrey (City) broadened the definition of "political sign" in its Sign By-law, which ultimately covered political issues, as opposed to city, provincial and federal election signs. The petitioners, residents of the City, challenged the constitutionality of the amendments, arguing that the provisions infringed section 2(b) of the *Canadian Charter of Rights and Freedoms (Charter)*, that guarantees constitutional protection of political expression. The Court held that the amendments gave rise to an ambiguity that arguably prohibited posting signage including "Get Vaccinated" or "Save the Whales" on private property except during specified periods of time. The Court agreed that the ambiguity caused a constitutional restriction that violated the *Charter* but did not declare the Sign By-law invalid on constitutional grounds. The Court granted interim relief and directed the City to amend the Sign By-law to eliminate the ambiguity but did not grant special costs.

HELD: Application for special costs dismissed.

DISCUSSION: The petitioners relied on ***Carter v. Canada (Attorney General),*** 2015 SCC 5, submitting a public interest rationale for awarding special costs. They argued that this is a truly exceptional public interest case that warranted special costs as residents had been compelled to defend themselves against the unconstitutional actions of the local government. Further, the petitioners submitted that the City's actions had far-reaching implications, including the potential to negatively impact varying grassroots organizations that are fundamental to a democracy. The City submitted that it was the successful party as the Court had rightfully refused to grant the relief sought by the petitioners, namely a declaration of invalidity on constitutional grounds; as such, no costs were warranted. In the alternative, the City submitted that the petitioners were not entitled to costs as the City never intended for the amendments to limit freedom of expression. The Court clarified that the City was not the successful party to the proceeding, but rather that the petitioners appropriately sought judicial review of the Sign By-law amendments and had obtained a remedy. That remedy was not costs, but rather an order to have the City amend the Sign By-law to remove the ambiguity that triggered the petitioners' constitutional concerns. The Court was satisfied that this was the appropriate remedy and was not persuaded that the *Carter* public interest rule applied as this was not a truly exceptional matter of public interest. The petitioner's application for special costs was dismissed.

City Fair Wage Action Did not Deprive Employer of Procedural Fairness
1460973 Ontario Ltd. v. City of Toronto,
2023 ONSC 5213 https://canlii.ca/t/k07w5
The Applicant has a construction contract with the City of Toronto (City), and a condition of the contract is that it is required to pay its employees a minimum hourly wage in compliance with the City's Fair Wage Policy (Policy). The City's Fair Wage Office (Office) received and investigated a complaint that the Applicant did not pay a welding employee in compliance with the Policy. The Office found that the Applicant violated the Policy, prompting the Applicant to file an application that it was denied procedural fairness.

HELD: Application dismissed.

DISCUSSION: The Applicant submitted it was deprived procedural fairness because it was not given fair notice and adequate disclosure from the Office. The Court disagreed. The evidence between the Office and the Applicant demonstrated ongoing dialogue including notice of the investigation and the scope, namely whether the employee's work qualified him as a welder under the Policy. The Applicant undertook several opportunities to provide verbal and written submissions on the issue, suggesting that the employee was a "stud welder" which not the same as a journeyman skilled welder. The Office considered this in its decision and noted that the Policy did not distinguish or define different types of welders or skilled vs. unskilled work; rather the Policy applied if the employee worked as a welder. The Policy does not require that a worker be certified as a welder to be entitled to the rate of pay guaranteed to welders under the category. The Court was not persuaded by the Applicant's arguments that it was deprived procedural fairness and found that the decision rendered by the Office was reasonable. Application dismissed.

Housing Shortage is No Excuse for Violating City's Building By-laws
Surrey (City) v Sidhu,
2023 BCSC 1837 https://canlii.ca/t/k0rws
The City brought a petition to seek demolition of the Respondents' laneway home and an extension to their

main home, collectively referred to as the "Structures." The Structures were constructed in violation of the City's Building By-law with no building permits or inspections, resulting in square footage that exceeded the permitted size and violated setback requirements. The Respondents acknowledge that the Structures violate the City's Building By-law but submit that given the housing crisis, the City's demolition order is wasteful and drastic.

HELD: Demolition order granted.

DISCUSSION: The City relied on its authority under the Building By-law to regulate construction, alteration, repair or demolition of buildings, as well as the Zoning By-law to regulate the location, use, and height of buildings on land in the City. The City submitted that the Structures must be demolished as they violate a number of By-laws and were constructed without any of the required permits or inspections. The Respondent accepted that it violated City By-laws but argued first, that given the housing shortage it is wasteful to destroy the Structures which are perfectly good rental units. In support of its argument the Respondent relied on the *Build More Houses and Rental Units Policy* issued by the British Columbia Provincial Government. The Court was not persuaded that the Provincial Government wanted to encourage the unlawful construction of dwellings or rental units as a part of its housing policy. Second, the Respondent submitted that it is willing to work with the City to retroactively bring the Structures into compliance with all City By-laws. The Court disagreed that this was appropriate.

The Court held that based on the evidence, there was a clear and ongoing flagrant breach of City By-laws: the Structures were built without permits and inspections, exceeded square footage and setback regulations--all of this despite the City's ongoing correspondence with the Respondent during construction. The Court found that the Respondents gambled that they could expand the Structures on their property, create rental units without obtaining permits and not be caught by the City; the Respondents

Supreme Court *cont'd from page 27*

1. Grutter v. Bollinger, 539 U.S. 306 (2003).
2. *Id.* at 343.
3. Collectively, the two *Students for Fair Admissions* cases drew more than 170 amicus briefs between the Supreme Court's petition and merits stages.
4. Students for Fair Admissions, Inc. v. Pres. and Fellows of Harvard College, no. 20-1199 (U.S. June 29, 2023), on appeal from the First Circuit (Justice Jackson recused herself from this case due to her prior membership on Harvard University's Board of Regents).
5. Students for Fair Admissions, Inc. v. University of North Carolina, no. 21-707 (U.S. June 29, 2023)., on appeal from the U.S. District Court for the Middle District of North Carolina.
6. Students for Fair Admissions, Inc. v. Pres. and Fellows of Harvard College, 143 S. Ct. 2141 (2023).
7.*Id.* at 2175.
8. 488 U.S. 469 (plurality opinion). *See* City of Chicago Disparity Study for Construction Contracts (2021), https://www.chicago.gov/content/dam/city/depts/dps/Outreach/City%20of%20Chicago%20Disparity%20Study%20for%20Construction%20Contracts%202021.pdf; *see also* City of St. Petersburg Disparity Study ("The standard for measuring evidence of disparity in public contracting is set forth in the 1989 United States Supreme Court decision of *City of Richmond v. J.A. Croson Co.*."), https://cms5.revize.com/revize/stpete/Business/Economic%20Development/docs/City%20of%20St.%20Petersburg%20Disparity%20Study%20Report.pdf.
9. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).
10.*Students for Fair Admissions,* 143 S. Ct. 2141 at 2162.
11. *Croson*, supra n. 9, at 500 (*citing* Wygant v. Jackson Board of Education, 476 U.S. 267, 277 (1986)(plurality opinion)).
12. *Croson, supra* n.9, at 492.
13. *Id.* at 471.
15. Ultima Servs. Corp. v. U.S. Dep't of Agric., No. 220CV00041DCLCCRW, 2023 WL 4633481, at *24 (E.D. Tenn. July 19, 2023)(citing *Students for Fair Admissions*., 143 S. Ct. at 2162, 2166).
16. *Ultima*, 2023 WL 4633481, at *31.
17. *Id.* at *18.
18. *Id.* at *1.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at *15 n.8; *see* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 215 (1995)(applying the reasoning in *Bolling*, 347 U.S. at 497, which discussed school desegregation, to a federal program designed to provide highway contracts to disadvantaged business enterprises).
28. See *Croson*, 488 U.S. at 498–504.
29. *Id.* (emphasis added).
30. *Croson,* 488 U.S. at 470.
31. *Ultima*, 2023 WL 4633481, at *14.
32. *Id. See Croson*, 488 U.S. at 507–08.
33. SBA, *8(a) application submissions temporarily suspended*, https://www.sba.gov/federal-contracting/contracting-assistance-programs/8a-business-development-program (last visited Sept. 25, 2023).
34. *Id. See* Guide for Writing a Social Disadvantage Narrative, https://sbaone.atlassian.net/wiki/spaces/CKB/pages/2768076819/Guide+for+Writing+a+Social+Disadvantage+Narrative(Owned by Fazila Sunbal, Last updated: Sept. 5, 2023).
35. 15 U.S.C. §§ 631, 637(a)(6)(A).
36. *Id.* (emphasis added)(https://www.sba.gov/federal-contracting/contracting-assistance-programs/8a-business-development-program).
37. Houston Code § 15-81(a).
38. Complaint at 2, Landscape Consultants of Texas, Inc. v. City of Houston, (S.D. Tex. Sept. 19, 2023)(No. 23-3516).
39. City of Chicago Disparity Study for Construction Contracts (2021), https://www.chicago.gov/content/dam/city/depts/dps/Outreach/City%20of%20Chicago%20Disparity%20Study%20for%20Construction%20Contracts%202021.pdf
40. *See supra* n. 25.
41. *See Croson, supra* n. 9; *see also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986)(plurality opinion); *Adarand, supra* n. 27 (plurality holding that racial classifications are subject to strict scrutiny).

lost that bet, and the Court would not condone unlawful activity. The Court held that the Respondents shall apply for a demolition permit from the City and carry out the demolition within 60 days after receiving the permit.

Insufficient Evidence--Property not Eligible for Multi-Residential Occupation
Joubarne v. The Corporation of the City of Belleville et al., 2023 ONSC 5308 https://canlii.ca/t/k09p6
The Plaintiff purchased a property in the City of Belleville (City) with the intention of renovating it into four rental residential units. The City did not grant the approval for construction submitting that the property was constructed as a single residential dwelling and is not eligible for multi-residential occupation. The Plaintiff sought a declaration from the Court that the property was originally constructed as two semi-detached living units, or in the alternative a declaration that four rental residential units are permitted on the basis of a legal non-conforming use.

HELD: Declarations dismissed.

DISCUSSION: Neither party was able to provide the Court any building records as to how the original property was constructed in 1906. The Plaintiff relied on the expert evidence of a structural engineer who opined that there was a common wall between the units with no internal access, eliminating the possibility of internal access between the two semi-detached living units. The City relied on the expert evidence of an engineer and architect, who opined that the original property had the layout of a single-family dwelling, including a bathroom, kitchen and living area, allowing someone to move through the dwelling without limitations. The experts further provided the Court with records of occupancy of the residents from the time of the construction until the latest sale.

The Court preferred the evidence of the City's experts, finding that not only did they both have superior qualifications, but also significant experience with historical constructions. The Court was satisfied that the property was constructed as a single-family dwelling and did not have the layout, characteristics, or necessary elements to suggest that it was constructed as two semi-detached living units. As for the legal non-conforming use, the Plaintiff submitted that the property was occupied as four residential units at the time the City's Zoning By-law was passed in 1977. The Court disagreed, finding that the Plaintiff did not have evidence to support that the property ever comprised of four self-contained residential units prior to 1977 or that such use continued until her purchase of the property. The Plaintiff's declarations were dismissed.

Town Restrains Interference in Demolition of Unlawful Building
Fort Smith (Town) v Berton, 2023 NWTSC 27 https://canlii.ca/t/k0c57
The Town of Fort Smith (Town) was granted an order restraining the Applicants from interfering with the Town's enforcement measures to demolish an unsafe building. The Applicants sought to have the Court set aside the order, submitting that it was granted to the Town without notice, under section 141 of the *Cities Towns and Villages Act,* SNWT 2003 c. 22 (*Act*).

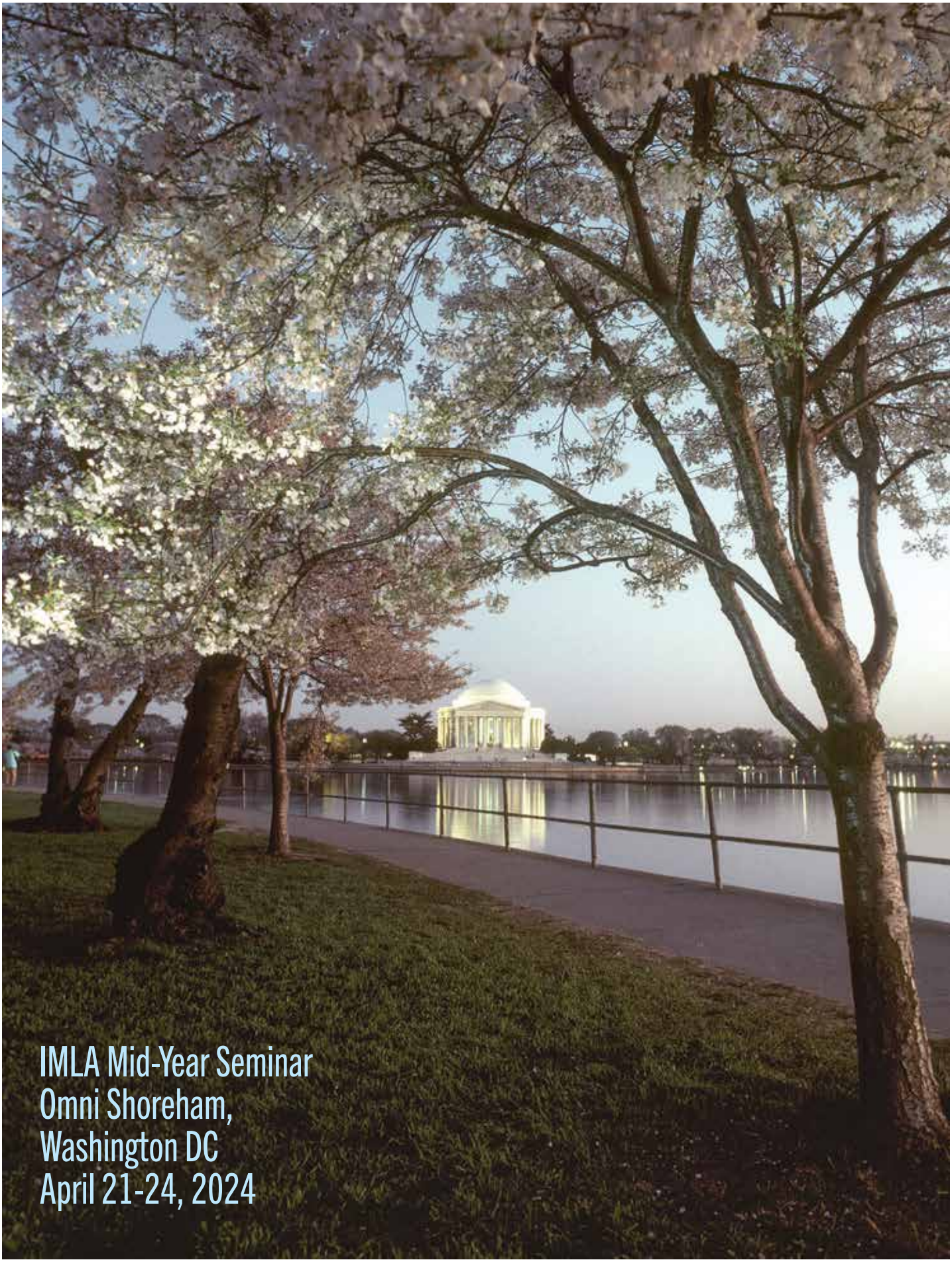
HELD: Application dismissed.

DISCUSSION: Following the Applicants purchase of a mobile building, the Applicants unsuccessfully filed multiple applications with the Town for a development permit to move the building to another property. The Town denied the applications as they did not comply with the Town's Zoning By-law. In a separate action, the owner of the property where the Applicants' building remained sought an order from the Court requiring the Applicants to remove the building or it would be destroyed. The separate action prompted the Applicants to remove the building without a Town permit to put it on another property.

During transit, the vehicle hauling the building ended up in the ditch, blocking traffic on the public street. The Town's By-law Officer responded to the scene, and to remove the hazard advised the Applicants to move the building to the closest property to which it had access. That property was not zoned for the building, prompting the Town after 30 days to issue a notice of contravention to the Applicants, advising that the building had to be moved or it would be demolished. Upon expiration of the notice, the Town proceeded to begin demolition of the building, but while underway the Applicant parked his vehicle in front of the building to prevent it from being demolished. Based on the public health and safety of an exposed half-demolished building, the Town applied to the Court without notice to the Applicants for an order restraining the Applicants from interfering with the Town's enforcement measures. The order was granted, and the Town completed the demolition.

The Applicant sought to have the restraining order set aside, submitting that the Town breached its notice obligation and failed to advise the Court of all the facts, mainly the reason the building was unsafe was because the Town had begun to demolish it illegally. The Town submitted that this was a moot application as the building had been demolished; in addition it submitted that it had provided the Court with appropriate evidence that demonstrated the Applicant's interference with enforcement. The Court was satisfied that the question for consideration on the order was whether the building posed a risk when the Town applied for a restraining order. The Court held that none of the Applicants' arguments would have changed the Court's finding on the condition of the building when the Town's application was heard. Accordingly, the Applicants' application was dismissed.

ML


IMLA Mid-Year Seminar
Omni Shoreham,
Washington DC
April 21-24, 2024

You mentioned having space limitations – what if we don't have a space to host externs?

Your externs will need a space to work, but that space does not need to be a fully kitted office. Here at Cary, our externs bring their own computers and set up shop in our Legal Department conference room. This is rarely inconvenient, as they are invited to most of the meetings that occur in that room, and it has proven to be an adequate space for as long as I've been with Cary.

That being said, our extern accommodations are an area I would like to improve and I would love to provide future externs with a more legitimate workspace, but the point I'm attempting to convey is that there are multiple ways to accommodate externs and lack of traditional office space is not necessarily a deal breaker. In fact, that leads me to my next point: remote work!

Thanks to Covid-19, all of our organizations can accommodate, at least partially, remote work. In Cary, the shift to remote work had some unexpected benefits to our externship program (it allowed us to host an out-of-state extern) and we continue to allow our externs to work remotely in a hybrid manner. This decision to allow current externs to partially work remotely is a facet of our program that many have positively commented on. We much prefer our externs to be on-site whenever possible, as that allows us to more easily include them in short-notice meetings and elicit their help in putting out fires, but allowing at least some remote work can alleviate space concerns and make your placement site more attractive to prospective externs.

What kind of assignments should I give externs?

Here in Cary, we endeavor to assign projects that are topical and related to the work the attorneys in the office are currently doing. As an example, I'm writing this during the summer semester of 2023 and we currently have two externs working with us. One extern recently completed a memo on a question related to the dedication of easements that resulted from a zoning question that came from our Planning Department while the other extern is researching and gathering artificial intelligence use policies to assist us in advising Cary on how to approach that emerging technology. We also often ask externs to brief new North Carolina Supreme and Appeals Court cases that may have local government implications as they come down or other legal cases we hear about via other channels.

One thing to keep in mind, however, is that externs are law students, coming to you with zero or very little experience in some of the practice areas they may be asked to work in, so that needs to be taken into consideration when deciding what types of tasks to assign. Also, the actual hours the externs will be working should be considered. The law schools Cary works with offer externships during all academic semesters – fall, spring, and summer. The fall and spring externs work for Cary while also taking their law school classes for that semester, meaning that their externships last the length of that academic semester (January to May in the spring and August to November in the fall) and they work between seven to ten hours a week depending on the amount of academic credit they seek to receive. Summer externs work for a shorter period (June to late July/early August) but they work far more hours in that time frame (upwards of twenty to thirty hours a week). I keep these schedules in mind when deciding the kinds of assignments I give to our externs, as I've found spring and fall externs are better equipped to handle smaller projects and shorter research assignments due to their intermittent presence and other time demands while summer externs can be given larger and more complicated assignments due to their increased presence and available focus. This has resulted in better work product and ensures that spring and fall externs get exposed to a variety of matters and issues.

Beyond these potential limitations, feel free to give assignments based on whatever comes in the door! That's how we get our work, so why shouldn't it be the same way the externs get theirs?

Having an externship placement program does sound like a worthwhile endeavor, doesn't it?

I obviously think so, and I'm glad you agree! In all seriousness, managing Cary's externship placement program has been a highlight of my time with Cary and I firmly believe it produces the numerous benefits I have discussed with you today. My hope is that you will strongly consider establishing your own program so that you can contribute to and begin reaping these benefits for yourself and your organization. ML

Notes

1. If I had a dollar for every time I have been asked this question, I would be writing this article while relaxing on my own private island.
2. Extern, Dictionary.com (June 16, 2023), https://www.dictionary.com/browse/extern. *See also* Extern, Meriam-webster.com (June 16, 2023), https://www.merriam- webster.com/dictionary/extern ("a person connected with an institution but not living or boarding in it: specifically : a nonresident doctor or medical student at a hospital"). *See also* Extern, Oxfordlearnersdictionaries.com (June 16, 2023), https://www.oxfordlearnersdictionaries.com/us/definition/english/extern_1?q=extern ("a person who works in an institution but does not live there, especially a doctor or other worker in a hospital.").
3. Public Interest Externships & Internships, Americanbar.org (June 16, 2023) https://www.americanbar.org/groups/center-pro- bono/resources/directory_of_law_school_public_interest_pro_bono_programs/definitions/pi_externships_internships/.
4. Ex, Meriam-webster.com (June 21, 2023) https://www.merriam-webster.com/dictionary/ex.
5. Model Rules Of Prof'l Conduct R. 1.6 (Am. Bar Ass'n 1983).
6. Model Rules Of Prof'l Conduct R 5.3 (Am. Bar Ass'n 1983).
7. *Id.*
8. *Id.*
9. Aba Standards And Rules Of Procedure For Approval Of Law Schools 2022-2023 Standard 303(a)(3) (Am. Bar Ass'n 2023).
10. Aba Standards And Rules Of Procedure For Approval Of Law Schools 2022-2023 Standard 303(a)(3) (Am. Bar Ass'n 2023).
11. *Id.* at Standard 303(b)(1).
12. *Public Interest Externships, supra note 3.*
13. 2023-2024 Best Law Schools, USNews.com (June 16, 2023 3:24 PM), https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings.

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Listserv *cont'd from page 23*

We once received what (in our judgment) was an overly burdensome request. The conservative cost of responding was over $13,000 using the above guidelines. A note was sent to the requestor in accordance with the statute, and the requestor was given the choice of submitting the payment or submitting a revised request. The requestor chose neither.

Another subject discussed on the listserve FOIA thread was the use of FOIA in litigation. Some states use it routinely. Others, like South Carolina, do not. In fact, such a practice is not permitted according to state law. The pertinent Code section portions include:

> **"SECTION 30440.** Matters exempt from disclosure.
> (3) Records, video or audio recordings, or other information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information:
>
> (A) would interfere with a prospective law enforcement proceeding;
> (B) would deprive a person of a right to a fair trial or an impartial adjudication;
> (C) would constitute an unreasonable invasion of personal privacy;

A State Court of Appeals decision (*Pope v. Wilson*, Appellate Case No. 2016-001708 Opinion No. Op. 5657) has interpreted this statute:

The court noted the holdings of the United States Supreme Court in *John Doe Agency v. John Doe Corp.* , 493 U.S. 146, 110 S.Ct. 471, 107 L.Ed.2d 462 (1989) and *NLRB v. Robbins Tire and Rubber Co.* , 437 U.S. 214, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978) : "In construing the federal FOIA, the United States Supreme Court has held that the FOIA does not supplement or displace the *applicable* rules of discovery." *Robinson* , 305 S.C. at 476, 409 S.E.2d at 409 (*emphasis added*). The court cited *Robbins Tire* regarding the federal FOIA exemption for certain law enforcement records: "An exemption to disclosure based on 'interference with enforcement proceedings' has been construed to exempt disclosure of any information that would give a party litigant greater access to the government›s opposing case." *Id.* at 476, 409 S.E.2d at 409."

A third unique provision in the South Carolina FOIA deals with employment searches, such as one recently conducted in a nearby municipality looking for a new City Manager. The local city attorney there essentially concluded the State FOIA law "decreed how you will conduct your search." A pertinent code section provides:

> **"SECTION 30440.** Matters exempt from disclosure.
> (a) A public body may but is not required to exempt from disclosure the following information:
>
> (13) All materials, regardless of form, gathered by a public body during a search to fill an employment position, except that materials relating to not fewer than the final three applicants under consideration for a position must be made available for public inspection and copying. In addition to making available for public inspection and copying the materials described in this item, the public body must disclose, upon request, the number of applicants considered for a position. For the purpose of this item "materials relating to not fewer than the final three applicants" do not include an applicant's income tax returns, medical records, social security number, or information otherwise exempt from disclosure by this section."

My colleague essentially concluded that the FOIA required his city to trim the list to a final three, and then choose from that group. There are those who suggested the choice be made from a larger group, say five for example, to get around that provision. However, this is a "no-no" according to the South Carolina Supreme Court which has ruled that if the candidate is selected from a final list of five, then the appliable materials must be released for **all five** candidates. My colleague took note of this, and the city took his advice in narrowing the list to three candidates before making a selection.

One can argue about the "good or bad" nature of these rules, or the fact that candidates for a public job need to be aware of such rules if they are to contend for such a position. But many find these "directions" intrusive into their local job searches.

While I have discussed here only three, there are other unique "wrinkles" in our state FOIA, as I am sure there are everywhere. The topic could fill a bookshelf, with the differences making for good discussion around the Water Cooler.

***

I cannot end without congratulating the IMLA Staff for another successful conference after my recent return from the Annual Conference in LaQuinta, California. Once again, I found the seminars I attended to be first rate and informative. This one was not in the middle of a big city as is typical, but it was out in the desert at the beautiful LaQuinta Resort. I found the area very beautiful, but it also reminded me how different things can be when one travels.

I put gas in the car at home the night before I left. It cost a whopping $3.09 per gallon, totaling about $43 to fill up my Ford Escape. Fast forward to California where I was given a Dodge Ram pickup instead of the compact car I reserved. After a few trips here and there, and a wonderful trip to Joshua Tree State Park with Randy and Debra VanVleck, Lori Lein and Amanda Stanly, I went to fill the truck before returning it. Wow was I in for a surprise!

My debit card has a hold limit of $150 for gasoline purchases. It has never been a problem. However, I wondered if it would be when I pulled up to the pump in LaQuinta and found the price to be $6.29 per gallon! Sure enough it wasn't, as the pump stopped at $150 without a complete fill-up. I couldn't help but think "and their potholes are just as big as ours!" (Sarcasm font deploted). However, what a beautiful state I was reminded I was in when visiting California. This old country boy wasn't used to it, but sure enjoyed it. I was able to pick limes right off the tree outside my window!

***

A colleague tells the story of a man who tried to get out of paying his bill at a restaurant because he had been drinking, which altered his dimished mental capacity. He claimed his mental capacity negated his capacity to enter into a binding contract when presented with his credit card receipt for signature. Sometimes fact is stranger than fiction.

The prosecution rests, your honor… ML

Infrastructure *cont'd from page 25*

contractor.

Such situations are highly risk-prone for the municipality, and such advance payments are best avoided. Yet, occasionally, the reasons to make such advances are compelling; for example, the contractor is short of operating capital, threatening to delay project execution. The principal risks arising from advance payments are (a) potential loss of coverage under performance bonds and (b) increased liability under builder's lien legislation.

Legal risk related to performance bonds arises out of a legal quirk involving sureties: If advances are made to a contractor contrary to the terms of the construction contract, courts have found that the surety is relieved from its obligations. This situation was seen in *Town of Mulgrave v. Simcoe and Erie General Insurance Co.*, 1977 CanLII 1813 (NSCA), where the Town entered into a contract for a contractor to construct a water system. At some point, money was advanced to the contractor by the Town. When the contractor later defaulted and the Town invoked the performance bond, the surety refused to perform on the grounds that the advance payment by the Town released the surety from its obligation. The court agreed, and dismissed the Town's claim.

Advance payments sometimes result in lien-related liability when municipalities advance such payments without retaining the statutory holdback. If a lien is subsequently filed, the municipality risks having to pay this amount out of pocket to release the lien. This risk was illustrated in *Iberdrola Energy Projects Canada Corporation v Factory Sales & Engineering Inc. d.b.a. FSE Energy*, 2017 BCSC 1776, rev'd in part 2018 BCCA 272. In *Iberdrola*, the contractor encountered financial difficulties and, to complete the project, the owner agreed to make advance payments to subcontractors. The owner failed to retain holdback on these advance payments. Ultimately, the contractor abandoned the project, and in action between the owner and subcontractors, the advance paid by the owner came into issue. The court found that, under lien legislation, the advances were still payments made under the contract and, thus, the owner should have retained holdback on the advances. By not retaining holdback, the owner faced higher liabilities than it would have otherwise.

Finally, let us look at another source of liability for municipal owners arising from a common law principle unique to Canada – the duty of independence of the payment certifier. (The term 'payment certifier' is used here to generally mean the person or entity who verifies, on behalf of the owner, what progress payment is owed to a contractor; other prevalent terms for this person or entity are 'consultant' (see CCDC-2) or simply 'engineer' or 'architect'.) In addition to the payment-certifying function, payment certifiers are typically also required to render a decision when a dispute arises between the owner and contractor about a contract term. Because the payment certifier is paid by the owner (and is sometimes an employee of the owner), there is an inherent conflict of interest when the payment certifier acts in the role of judging a contract dispute.

This conflict of interest has been subject to treatment by a line of cases in Canada that have adopted the decision in the English case of *Hickman & Co. v Roberts* (1913) AC 229. In *Hickman*, the payment certifier failed to issue a certificate of payment for work adequately completed by the contractor because the owner (i.e., the payment certifier's client) would not allow it. The House of Lords held that the payment certifier had a duty of independence and had improperly allowed the owners to influence him.

The principle from *Hickman* and its Canadian progeny is essentially that a payment certifier, though otherwise loyal to the owner, is obligated to act objectively when providing an opinion on a contractual dispute between owner and contractor; their decision must be based on relevant facts and not influenced by extraneous factors (see, e.g., *Welcon (1976) Limited v. South River (Town)*, 2009 NLCA 59, leave to appeal denied 2010 CanLII 17169 (SCC)).

The other side of the *Hickman* rule is that if a payment certifier properly approves an invoice, the owner is obligated to pay the contractor, and failure to do so could result in liability. In *JCR Construction Ltd. v. Colwood (City)*, [1991] B.C.J. No. 3218, the municipality (i.e., the project owner) refused to make a progress payment that had been certified by the architect. The court found that the contract was clear that payment became due once payment was certified, and the municipality had breached its contractual obligation to pay.

To conclude, Canadian municipalities must continuously deal with construction-related legal risks because building and upkeeping infrastructure is an inalienable part of what municipalities do. To some extent, municipalities must contend with the same legal considerations that any other project owner – public or private – must contend with, whether in Canada or elsewhere. However, some legal considerations apply especially to municipalities in Canada because of their municipal status or because of rules unique to Canadian law. Examples are the duty of open procurement that arises under trade agreements and the payment certifier's duty of independence. ML

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