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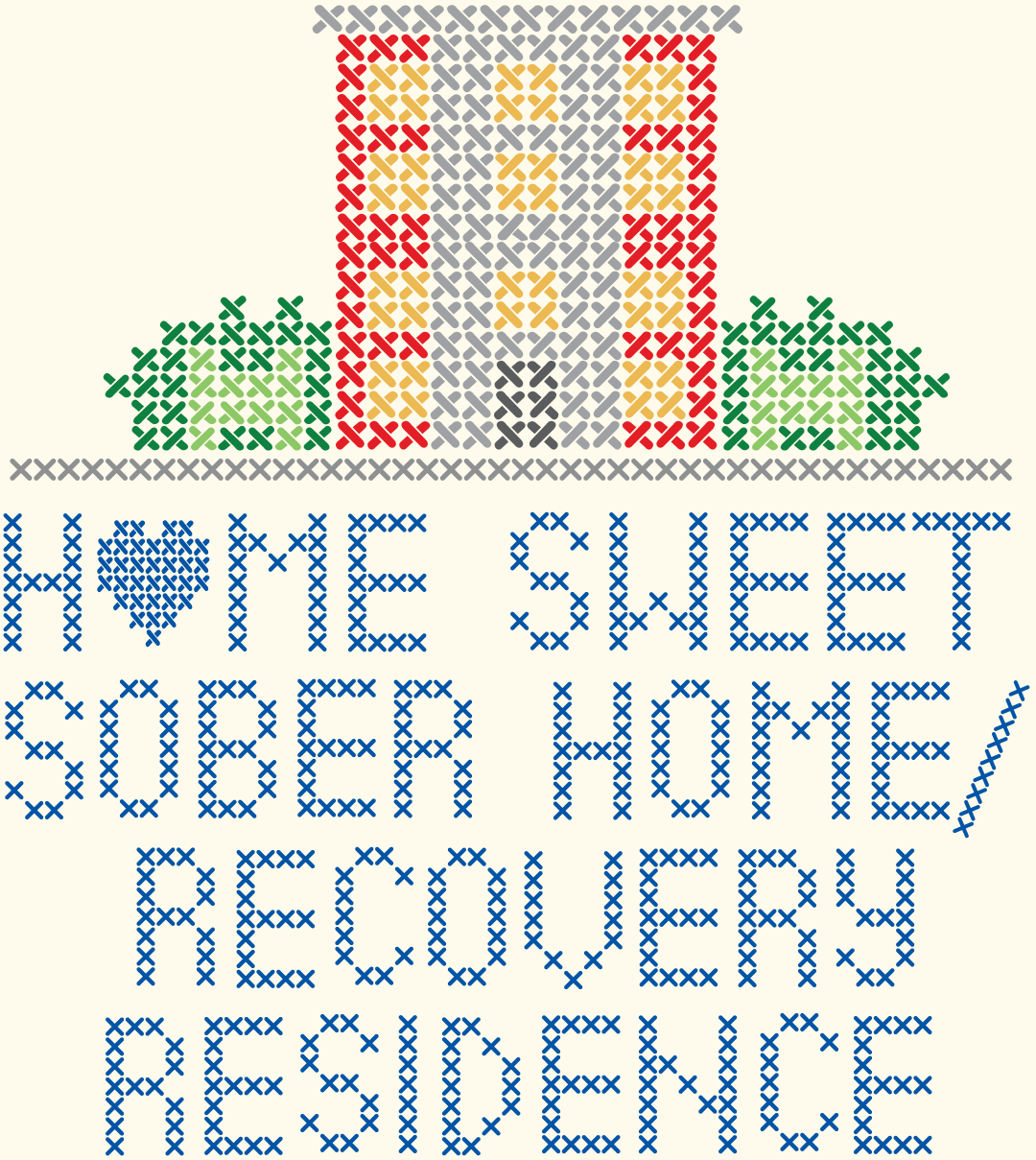

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EDITOR'S NOTE

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

Life Beyond Service

Our just-concluded Mid-Year Seminar in Washington DC was, by all accounts, a great success. We thank our presenters, moderators, sponsors, and all the IMLA members who made four days so productive and enjoyable. I had the pleasure of conversing with numerous attendees, many of whom now seem like long-time friends. Among those chats were several discussions about changes members have made in their professional lives, what they do in addition to serving as municipal lawyers, or what they intend to do when they leave the profession.

Those conversations resonated, given a book I'm currently reading: *Life After Power* by Jared Cohen. He examines the search for purpose by seven American presidents after they left the trappings and eminence of the White House—among them Thomas Jefferson, Jimmy Carter, Herbert Hoover, William Howard Taft, George H.W. Bush, and Grover Cleveland. They travelled varying paths following the presidency, each worthy of study.

One of the more interesting personages profiled by Cohen is John Quincy Adams, who gained the presidency in 1824. Andrew Jackson had received 40,000 more popular votes than Adams (out of 366,000 cast among four candidates), but not an electoral majority. Ultimately, the House of Representatives narrowly elected Adams over Jackson—a result sullied by Adams' subsequent selection of of House Speaker Henry Clay to be Secretary of State, allegedly in exchange for Clay's vote. Many of Adams' ambitious proposals for the nation were defeated in Congress. And in 1828, Jackson evened the score, winning overwhelmingly with more than double Adams' electoral vote count, 178 to 83.

As Cohen tells it, Adams left Washington DC resignedly, returning to his home in Massachusetts. But he would soon heed a call to represent his district in Congress. He served in this less prestigious role—the only former president ever to do so—with distinction, and is particularly remembered for his Congressional advocacy against slavery. In 1841, at the age of 73, Adams would further devote his energies to that cause before the Supreme Court, representing slaves who had ended in American custody on the notorious Spanish ship *Amistad*. Arguing for nine hours, Adams ultimately succeeded in securing their freedom for return to Sierra Leone, defeating claims by the United States and Spanish governments.

In some ways, the post-White House accomplishments of former American presidents may have little to do with life after service as a local government lawyer. But the analogies are there. The aspirations expressed by various of our members at the Mid-Year, to transition to a more productive municipal role, or simply to better serve their communities, seems worthy of painting with a similar brush. The relationships forged, the skills learned, the ability to connect with constituents, and many other incidents of local government law practice are valuable assets when put to other societal purposes. So, at the risk of exaggerating similarity with profiles in a *New York Times* best seller, here's to next steps, or parallel steps, that complement a career in local government law.

Returning to our current responsibilities, this May-June *Municipal Lawyer* endeavors to advance professional acumen. Two articles provide practice pointers: in their *Sober Homes* feature, Terrill Pyburn and Norman Dupont offer insights towards compliance with laws governing addiction recovery facilities; and in *Amicus*, Amanda Karras distills the take-aways from a recent Supreme Court decision about public officials' use of personal social media pages to disseminate government information. A *First Amendment* feature by Roger Horner and Ian Williams delivers an extensive overview of governmental deference to our most fundamental of rights. In *Day in the Life*, Avery Morris interviews Lisa Glover, who leads the law department in thriving Cary, North Carolina. Our Hamilton, Ontario colleague Monica Ciriello summarizes a cross-section of recent cases in *Inside Canada*. We also take time, in *Amicus Awards*, to recognize the many authors who contribute their talents to IMLA's vigorous legal advocacy program, and include a few photos from the Mid-Year—many more of which are posted on IMLA's website.

Thank you again for your support of our organization. It was great to see those who joined us in Washington DC, and we'll look forward to connecting with more of you, in person or virtually, at an upcoming IMLA conference, work group call, webinar, or otherwise. And if you'd like to submit an article, please feel free to contact me at eeiselt@imla.org.

Best regards,

Erich Eiselt

PRESIDENT'S LETTER

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

Looking Towards Future Growth

During springtime there is always a ton of clean-up from winter to get things prepared for the incoming season. The garden poses many challenges at this time. Perennials are checked to make sure they are ready to reappear from their planting several years ago. New seeds are planted along with some new annuals to add excitement to the usual landscape. The hedges, shrubs and trees need pruning and trimming so that they are not growing in an unmanageable fashion. Fertilizer and bloom booster pellets are needed to feed the garden and replenish the resources.

These thoughts on spring clean-up and planting coincide with the efforts of IMLA's "Spring Planning." As members know, and the calendar of Events demonstrates, the organization is busy during each and every season of the year. As we just closed a fantastic Mid-Year Seminar in Washington, DC, the IMLA Executive Committee and Executive Director Amanda Karras now turn to activities for the upcoming spring and summer. These include recapping the Seminar experience, planning the IMLA in Canada event as well as the Italy meeting in early fall, ongoing Webinars, various working group conference calls, Top 50 conference, amicus briefs, *Municipal Lawyer*, and so on. As well, their duties include assembling the members of the Nominating Committee to provide for tomorrow's leadership of the organization.

Just as a gardener tends to a plot so that it can continue to provide reappearing natural beauty each year, IMLA staff tend to these planning duties to assure their quality, utility, and annual re-appearance on our calendars. Actually, planning occurs for years in advance but come springtime each year IMLA staff is tying up the spring Seminar looking ahead to the fall Conference. After that seasonal change, the staff continues to work on the following year's events. The IMLA staff look out at their landscape to plan, well in advance, what is envisioned for future programming, much like a gardener's selection and placement of flowering plants and foliage.

Planning Staff, the IMLA Board of Directors, and others are in ongoing discussions with our members as to areas of interest to explore. This year, with conversations initiated by Board member Alan Bojorquez, I spoke to Amanda and Alan on an interest in ethics for Municipal Lawyers which has morphed into a discussion group. This idea and others are seeds we plant today for the future of IMLA in the many seasons to follow. Each springtime there are new plants that come to the market--perhaps hybrids or heirlooms--that burst onto the gardeners' list of potential new choices to complement the existing landscape. Similarly, any thoughts, comments, or concerns members may have are welcome; some, such as Alan's, may be a new idea planted this season for possible growth in IMLA offerings to its membership in a future season.

Acknowledging that this is a recurring theme in my letters, I nevertheless reiterate that the IMLA staff perform the "heavy lifting," accomplishing the necessary planning well in advance of any IMLA function. Without that diligence each and every year, the IMLA garden would be seriously out of control, much like my wisteria this spring! Absent knowledgeable attention and maintenance, season after season, programs and organizations, like plants, will inevitably decline. You have previously heard me say that IMLA is focused on a path not merely to survive but to thrive, and we have certainly done so. Planting seeds today for the future of this organization helps to assure its continuing dedication to excellence in local government law, year after year.

IMAl has not persevered and thrived for almost 90 years without change and integration of new ideas. Like an attentive gardener, the organization ensures continuing focus on growth, promoting excellent education in municipal law that one can count on, like a reliable perennial or reblooming tree or bush in a garden. IMLA is always open to new and exciting programs springing forth from perhaps just a seed of thought. So, with that perspective I may walk into my garden this weekend and look at that crazy wisteria. Even though at this time it is gorgeous, I ponder why it doesn't want to be trained to the trellis, so that next spring it may not need quite so much springtime pruning!

IMLA treasures legacy knowledge as well as welcoming new thoughts. As to the latter, our members may well reveal seeds to nurture our ongoing commitment to excellence in municipal law. HAPPY SPRING!

Regulating Sober Living Homes-A Bicoastal Perspective

By: TERRILL C. PYBURN, *City Attorney, Coconut Creek, Florida,*
and NORMAN A. DUPONT, *Partner, Ring Bender LLP, Newport Beach, California*

Introduction:
More Americans have died from drug overdose in recent years than died in the Iraq, Afghanistan, and Viet Nam Wars combined.[1] In 2023 alone, more than 112,000 people lost their lives due to drug overdose in the United States according to the Centers for Disease Control and Prevention.[2] Given this sobering statistic, it is clear that for those struggling to recover from substance use disorder, participation in rehabilitative programs can be instrumental. Sober homes/recovery residences, where recovering residents live with others on a similar journey, provide a beneficial environment to help people recover instead of becoming another statistic, but can also present concerns for occupants of the homes as well as for surrounding communities. Advising our clients on how to protect the health, safety, and welfare of *all* residents is of the utmost importance. This article provides a brief examination of federal and state regulations governing sober homes/recovery residences and the legal issues involved.

I. Basic Federal Protections. Persons in recovery from substance use disorder are protected under the Fair Housing Amendments Act (FHA) and Americans with Disabilities Act (ADA); therefore, they may locate in all residential zoning districts in accordance with federal law.

A. Fair Housing Amendments Act (FHA).
1. Under the Fair Housing Amendments Act, the term "handicap" means, with respect to a person, a "physical or mental impairment which substantially limits one or more of such person's major life activities, a record of having such an impairment, or being regarded as having such an impairment." 42 U.S.C. § 3602(h). The term "physical or mental impairment" includes "alcoholism" and "drug addiction" (other than addiction caused by current, illegal use of a controlled substance). 24 C.F.R. 100.201.
2. Under the FHA, it is unlawful to discriminate against or otherwise make unavailable or deny a dwelling to any buyer or renter because of a handicap of that buyer, renter, or person residing in or intending to reside in, that dwelling after it is sold, rented, or made available. 42 U.S.C. § 3604(f) (1).

B. Americans With Disabilities Act Amendments Act (ADA).
1. Under the ADA, the term "disability" means a physical or mental impairment which substantially limits one or more major life activities; a record of having such an impairment; or being regarded as having such an impairment. 42 U.S.C. § 12102(2), 29 U.S.C. § 705(20).
2. "Alcoholism" and "drug addiction" are considered "impairments" under the definitions of disability set forth in the ADA.[3]

II. Federal Case Law. Many jurisdictions have grappled with the issue of regulating sober homes/recovery residences within the confines of the law. Some jurisdictions have successfully addressed issues such as overcrowding, safety, length of stay, distance, and parking, while others have not. Here is a summary of federal case law related to regulations of group homes for persons with disabilities applicable to sober homes and/or recovery residences:

A. Sober Homes/Recovery Residences Are Not a Business.
1. A sober home/recovery residence is not a business, or at least it is no more of a business than renting out a house to a tenant or tenants.
2. Sober living homes/recovery residences can constitute "dwelling[s]" within the meaning of the Fair Housing Act.[4]

B. Defining "Family" to Limit the Number of Unrelated Persons Permitted in a Dwelling Unit. The case law runs the gamut. A limit seems to be acceptable as long as the definition of "Family" is applied to everyone and as long as there is a reasonable accommodation process to *except* sober homes/recovery residences from the regulation.

1. In ***City of Edmonds v. Oxford House, Inc.***, the Supreme Court stated, "It remains for lower courts to decide

whether *Edmonds*' actions (in applying ordinance, which defined a family as no more than five (5) unrelated individuals to the *Oxford House* in an attempt to limit its occupants to no more than five (5) individuals) against *Oxford House* violates the Fair Housing Amendments Act's prohibitions."[5]

2. The Eighth Circuit in ***Oxford House–C v. City of St. Louis*** upheld an ordinance allowing no more than eight (8) unrelated persons in a group home and three (3) in a single-family dwelling.[6]

3. The Eastern District of New York in ***Human Resource Research and Management Group, Inc. v. County of Suffolk,*** held that a limitation of six (6) occupants in a substance abuse recovery home is invalid.[7]

4. The Western District of Washington held in ***Children's Alliance v. City of Bellevue*** that a city ordinance limiting homes to six (6) residents, two (2) caretakers and minor children was invalid.[8]

5. In ***Jeffrey O. v. City of Boca Raton,*** the Southern District of Florida stated, "I do not think the Fair Housing Act is violated merely by having a cap on the number of unrelated individuals who can live in a single-family dwelling. Furthermore, I find nothing wrong with the number three (3) that the City has chosen. A city must draw a line somewhere… while I find no legal problem with the cap of three (3) unrelated individuals per se, the limitation without any exception for handicapped individuals or an established reasonable accommodation procedure violates the Fair Housing Act." [9]

C. Limiting the Change in Occupancy of a Dwelling Unit by Limiting the Allowed Rate of Turnover of Properties. This appears to be acceptable as long as it is applied to all similarly situated properties (short-term rentals) and only if an accommodation procedure is in place to *except* sober houses from the regulation. (Beware of possible state preemption laws on vacation rentals).

1. In ***Schwarz v. City of Treasure Island,***[10] the Eleventh Circuit upheld a limitation that only permitted a change in occupancy no more often than two (2) times per year in the City's RU-75 (single-family) zoning district in order to uphold the City's intent to "create pockets of stable, single-family neighborhoods" but it further stated that a reasonable accommodation should be granted to the City's turnover rule within the RM-15 (multi-family) zoning district (the City prohibited a change in occupancy more often than six (6) times) and remanded the case to be decided by the District Court.[11] The District Court reheard the matter and in February 2010, a jury returned a verdict finding the City liable for failing to provide a reasonable accommodation to Plaintiffs.[12]

D. Distance Requirements between Facilities. The case law is varied. Some districts have allowed them, but the majority have not; however, with a detailed study, it may be possible to impose distance requirements if it is shown that there is a need for them due to overconcentration or saturation in a particular city or town and so long as relief is available via conditional use/special exception.

1. In accordance with the Joint Statement of the Department of Housing and Urban Development (HUD) and the Department of Justice,[13] local governments may take into account concerns about overconcentration and proximity of group homes (including "sober homes") one to another if they can prove actual overconcentration taking into account all group homes for persons with disabilities (typically through a detailed study).

2. In ***Familystyle of St. Paul, Inc. v. City of St. Paul,*** the Eighth Circuit held that a distance requirement of a quarter mile from an existing group home did not conflict with the language and purpose of the Fair Housing Act by limiting the housing choices of persons with mental illness.[14]

3. The Sixth Circuit held in ***Larkin v. State of Mich. Dept. of Social Services*** that a fifteen hundred foot (1500') distance requirement between residential facilities for disabled persons was in violation of and preempted by the Fair Housing Amendments Act and the court further held that while deinstitutionalization was a legitimate goal, the state did not show how the statutory restrictions advanced that goal.[15]

4. In ***Harding v. City of Toledo,*** the Northern District of Ohio held that a five hundred foot (500') distance requirement between "adult family homes" was reasonable and served the public interest of controlling the concen-

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Terrill C. Pyburn is board certified in City, County, and Local Government Law. She has served as the City Attorney for Coconut Creek, Florida for over nine years, prior to which she was employed by the City of Delray Beach where she assisted with drafting state legislation regarding recovery residences. Terrill was awarded the 2013 Florida League of Cities' Hometown Home Rule Hero Award and continues to serve as Special Counsel to Delray Beach regarding recovery residences. She has presented on recovery residences, zoning, and the ADA/FHA to various county and state municipal leagues, bar associations, and professional organizations nationwide, and has helped draft local and state laws, testified in grand jury proceedings and at city, county, and state legislative hearings, and has presented to Members of U.S. Congress regarding recovery residences.

Norman (Norm) Dupont advises clients in complex litigation, environmental and municipal law matters. He has tried environmental, antitrust, contract, labor, tort, and other cases and has argued environmental and municipal law appeals. Norm is active in the ABA and local bar organizations, was named "Lawyer of the Year" for Environmental Law-Orange County for 2023, and serves as an advisor on constitutional law matters to ABA's Section of Environment, Energy & Resources. He served from 2019-2022 on the ABA Standing Committee on Publications Oversight. Norm actively participates in his community, and serves on the Board of Directors for Women Against Gun Violence, a Los Angeles based group which supports sensible gun regulation.

tration of such homes.[16]
5. One legal treatise provides that clustering community residences-especially recovery residences-on a block and neighborhood reduces their efficiency by obstructing their ability to foster normalization and community integration. For residents of those homes to achieve long-term sobriety, it is critical to establish regulations and procedures that assure a proper family-like living environment, free of drugs and alcohol that weed out incompetent and unethical operators, and protect this vulnerable population from abuse, mistreatment, exploitation, enslavement, and theft.[17]
6. Recently, the Eleventh Circuit upheld a distance limitation of one thousand feet (1000') between community residences in the case of ***Sailboat Bend Sober Living, LLC v. City of Fort Lauderdale*** because it permitted certified and/or licensed community residences to house up to ten (10) residents as of right (exceeding the City's definition of family that provided for no more than three (3) unrelated persons).[18]
7. The United States District Court for the Central District of California stated in ***SoCal Recovery, LLC v. Costa Mesa,***[19] "Because SoCal has presented evidence to suggest that the 650-foot separation requirement substantially impacted only disabled persons in Group Homes rather than nondisabled persons in boarding houses, it has made a prima facie case of disparate impact discrimination;" however this issue is currently being considered by the Ninth Circuit in ***The Ohio House, LLC v. City of Costa Mesa and Brandon Stump,***[20] so we will have to wait and see what happens.

E. Reasonable Accommodations. The government must make reasonable accommodations in rules, policies, practices or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling. 42 U.S.C. § 3604 (f)(3)(B).

1. Are cities required to have such procedures? Yes.[21]
2. Reasonable Accommodation Requests are not automatically granted. The government must be given an opportunity to make a final decision with respect to the request, which necessarily includes the ability to conduct a meaningful review of the requested accommodation to determine if such an accommodation is required by law.[22]
3. An accommodation is not reasonable if it imposes undue financial and administrative burdens on the government or requires a fundamental alteration in the zoning scheme[23].
(a) Requiring a municipality to waive a zoning rule ordinarily would cause a "fundamental alteration" of its zoning scheme if the proposed use was incompatible with surrounding land uses. If the proposed use is quite similar to surrounding uses expressly permitted by the zoning code, it will be more difficult to show that a waiver of the rule would cause a "fundamental alteration" of the zoning scheme.[24]

4. Local Governments may require annual re-certification of ongoing need for reasonable accommodations once granted. People move; things change. A Ninth Circuit case held that a policy that required disabled participants to provide updated medical information every three years recertifying that they are disabled did not discriminate against the participant on the basis of his disability. [25]

F. Governments Can Pass Housing Rstrictions on Sober Homes/Recovery Residences That Are Narrowly Tailored to Serve a Legitimate State Interest. The Fair Housing Act provides justification for regulatory schemes that federal courts have narrowly construed. A governmental entity may act on the basis of protecting the public health and safety of other individuals. These restrictions seem to be upheld without any exceptions or accommodations required as long as there is an actual benefit to the disabled residents and not just a pretext to cover a discriminatory motive. In contrast, regulatory schemes that do not provide an actual benefit to the disabled residents have been stricken.
1. In *Bangarter v. Orem City Corp.*, the Tenth Circuit stated, "the Fair Housing Amendments Act should not be interpreted to preclude special restrictions upon the disabled that are really beneficial to, rather than discriminatory against, the handicapped."[26]
2. In ***Familystyle of St. Paul, Inc. v. City of St. Paul,*** the Eighth Circuit held that the relevant question is whether legislation is rationally related to a government purpose.[27]
3. In ***Human Resource Research and Management Group, Inc. v. County of Suffolk,*** a County ordinance that was intended to avoid overcrowding, ensure proper supervision and avoid excess debris which imposed location requirements and occupancy limitations on Oxford House was held to be discriminatory because it was not rationally related to the proffered reasons for the ordinance where there was no proof of excess debris, overcrowding or need for 24/7 supervision.[28]
4. In ***Tsombanidis v. West Haven Fire Department,*** fire safety regulations were held not to have a discriminatory impact, but failure to treat Oxford Home as a one-family dwelling under fire regulations did have a discriminatory impact.[29]

G. Policy Statements. Federal and state authorities have issued guidance to recovery residence operators.
1. Joint Statement of HUD and DOJ. In a Joint Statement of the Department of the Department of Housing and Urban Development (HUD) and the Department of Justice (DOJ), the agencies charged with enforcing the Fair Housing Act, the agencies stated:

> Operators of group homes for persons with disabilities are subject to applicable state and local regulations addressing health and safety concerns unless those regulations are inconsistent with the Fair Housing Act or other federal law. Licensing and

other regulatory requirements that may apply to some group homes must also be consistent with the Fair Housing Act. Such regulations must not be based on stereotypes about persons with disabilities or specific types of disabilities.[30]

2. Palm Beach County, Florida Grand Jury Report. The failure to comply with minimal standards was a focus of a grand jury that the Palm Beach County State Attorney's Office convened to investigate fraud and abuse in the addiction treatment industry. The grand jury report states:

> The Grand Jury received evidence from a number of sources that recovery residences operating under nationally recognized standards, such as those created by the National Alliance for Recovery Residences (NARR), are proven to be highly beneficial to recovery. The Florida Association of Recovery Residences (FARR) adopts NARR standards. One owner who has been operating a recovery residence under these standards for over 20 years has reported a 70% success rate in outcomes. The Grand Jury finds that recovery residences operating under these nationally approved standards benefit those in recovery and, in turn, the communities in which they exist.[31]
>
> In contrast, the Grand Jury has seen evidence of horrendous abuses that occur in recovery residences that operate with no standards. For example, some residents were given drugs so that they go back into detox, some were sexually abused, and others were forced to work in labor pools. There is currently no oversight on these businesses that house this vulnerable class. Even community housing that is part of a DCF [Department of Children and Families] license has no oversight other than fire code compliance. This has proven to be extremely harmful to patients.[32]

H. Fire Sprinklers. The case law seems to provide that sober homes/recovery residences are to be treated the same as single- family residences in relation to fire-sprinkler requirements.

1. In ***Nevada Fair Housing Center, Inc. v. Clark County,*** the District Court held that the state statute that required group homes of four or more to register in order to provide information to police, fire-fighting, rescue, or emergency medical services was facially discriminatory because it treated handicapped individuals different than everyone else and there was no evidence of any legitimate safety concerns to justify the statute.[33]

2. In ***Tsombanidis v. West Haven Fire Dep't,*** the owner and residents of a group home for recovering alcoholics and drug addicts brought an action against the City and the City Fire District for alleged violations of the FHA and Title II of the ADA. The Court determined that the fire code had a disparate impact on residents, determined that the City had engaged in intentional discrimination by failing to classify an Oxford House as a single-family residence, created disparate impact, and failed to reasonably accommodate residents' handicap, and awarded damages and attorney's fees.[34]

3. In ***Oxford House, Inc., et. al. v. H. "Butch" Browning, State Fire Marshal,*** the Court held that the residents of an Oxford home were entitled to a reasonable accommodation from the fire safety features that the state Fire Marshal was demanding in order to afford the residents of the home an "equal opportunity" to "use and enjoy: their home. Further, the Court stated that, "without the requested accommodation the Oxford House West Hale residents' recovery from alcoholism and drug addiction and perhaps even their lives would be in danger. The requested accommodation- that the Fire Marshal interpret the term "family" in a manner that would capture the type of relationship shared among the residents of Oxford House West Hale however, would not increase the potential danger to the residents that is presented by the risk of fires, and therefore Plaintiffs are entitled to their requested accommodation."[35]

III. Additional Federal and State Legislation. Legislatures are starting to provide clarification to cities and towns where the courts have failed (although some states have provided better guidance than others).

A. Federal Legislation.

1. H.R. 6, "Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act or the Support for Patients and Communities Act" passed into law on October 24, 2018 and provided, in the context of housing, a requirement for the Substance Abuse and Mental Health Services Administration (SAMHSA) to develop best practices for operating recovery housing.[36]

2. SAMHSA issued "Best Practices for Recovery Housing" on September 1, 2023.[37] Importantly, SAMHSA recommended that recovery housing entities be certified stating, "Certification is one noted remedy to address unethical and illegal practices in recovery housing. The National Alliance for Recovery Residences (NARR) has developed the most widely referenced national standards to ensure well-operated, ethical, and supportive recovery housing."[38]

B. State Laws/Legislation. As indicated below, states are diversified in their approaches to sober homes/recovery residences. Fourteen states provide for voluntary certification of sober homes/recovery residences (Colorado, Delaware, Florida, Indiana, Maine, Maryland, Massachusetts, Missouri, New Hampshire, New Jersey, Ohio, Rhode Island, Texas, and West Virginia). Four have created licensing requirements for at least some types of sober homes/recovery residences (Arizona, California, Louisiana, and Pennsylvania). Two require compliance with state law without requiring any licensing or certification (Minnesota and Utah).

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Sober Homes *cont'd from page 9*

One requires that sober homes/recovery residences alert the next of kin when a client is evicted for relapsing (New Jersey). Two require that sober homes/recovery residences notify cities and counties before they open in their jurisdiction (Arizona and Tennessee). Two are studying the issue of sober homes/recovery residences (Illinois and Massachusetts). Five require registration with the state simply for notice purposes with no apparent certification or licensing requirements (Connecticut, Hawaii, Illinois, Montana, and Wisconsin). Four address patient brokering and deceptive marketing practices in sober homes/recovery residences (Connecticut, Florida, Georgia, and Tennessee), and two passed legislation to provide that sober homes/recovery residences are prohibited as a home-based business (Kansas and Oklahoma). The remaining states appear to have nothing in their codes addressing sober homes/recovery residences (Alabama, Alaska, Arkansas, Idaho, Iowa, Kentucky, Michigan, Mississippi, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oregon, South Carolina, Vermont, and Wyoming).[39]

1. Arizona

ARIZ. REV. STAT. § 36-2062 passed in 2018 requiring mandatory licensure of all sober living homes by an approved national organization that will contract with the Department. SB 1361/HB 2317 (2024) is currently pending and would provide for verification from local jurisdictions regarding compliance with all zoning, building, fire, and licensing ordinances.

2. California

California has licensing requirements for recovery residences (CAL. Health and Safety Code §§ 11834.01 – 11834.18), but the State of California ties the license to state funding for the houses. California is also attempting to pass legislation this year (AB 2574 (2024) to provide that a sober living home in a neighborhood zoned for residential use need not be considered a residential use of property when evidence demonstrates that the sober living home is an integral part of a licensed drug treatment facility located elsewhere, and AB 1438 (2024) to provide that the use of drugs or alcohol, without other lease violations is not reason for eviction.

3. Colorado

Colorado has certification requirements contained in COLO. REV. STAT. § 27-80-129, which provides that effective January 1, 2020, a person shall not operate a recovery residence or sober living home unless the facility is certified, the home is an Oxford House, the home has been operating for more than 30 years, or it is a community-based organization that provides reentry services as described in COLO. REV. STAT. §17-33-101(7). Colorado is currently attempting to pass legislation (SB 24-048 (2024) that provides that recovery residences, sober living facilities, and sober homes are residential uses of land for zoning purposes.

4. Connecticut

Connecticut requires each certified recovery residence to:
(1) register with the State's Department of Mental Health and Addiction Services and (2) maintain a supply of opioid antagonists on the premises and train all residents on how to administer the medication if even one resident is diagnosed with opioid use disorder. Further, it provides penalties for falsely advertising certification status. (CONN. GEN. STAT. § 179-716.

5. Delaware

The state recently passed a law (HS 1 for HB 114 as amended by SA 1 (2023) that provides for voluntary certification of recovery residences and treats certified recovery residences the same as single-family residences for zoning purposes.

6. Florida

In 2015, HB 21 passed, which defined "recovery residence" and provided for voluntary certification of recovery residences, but mandated that referrals from state licensed treatment providers could only be to recovery residences certified by the Florida Association of Recovery Residences (FARR). In 2016, the Legislature passed HB 823, which created the Substance Abuse and Recovery Fraudulent Business Practices Pilot Program, which funded a task force led by Palm Beach County State Attorney, Dave Aronberg, to study the issue of sober living homes. In 2017, HB 807 passed, which provided that referrals from recovery residences to licensed treatment centers had to be made by certified recovery residences only, and provided penalties for deceptive marketing, and clarified the law regarding patient brokering in the context of recovery residences. In addition, in 2021, legislation passed clarifying fire and building inspection requirements providing that a single or two-family dwelling that is a certified recovery residence or Oxford House under the Florida Fire Protection Code and does not have a change in occupancy under the Florida Building Code may not be reclassified solely due to such use. In 2023, the Legislature passed Proviso #1901 to provide funding for a statewide study to be completed to support a zoning template for local governments in Florida. The study is ongoing, but it is expected to be completed in June 2024 and we expect for the zoning template to be filed as draft legislation for the 2025 legislative session. CS/HB 1065 and CS/SB 1180 (2024) recently passed to provide that a local ordinance or regulation may not further regulate the duration of a resident's stay in a certified recovery residence within a multifamily zoning district after June 30, 2024. Said provision is set to expire July 1, 2026.

7. Georgia

GA. CODE §26-5-80 prohibits patient brokering and kickbacks.

8. Hawaii

In 2014, the Hawaii Legislature passed a law that required the Department of

Health to establish a voluntary "clean and sober homes registry" to assist individuals recovering from substance abuse to find an environment that supports their recovery. The law prohibits homes from advertising as registered "clean and sober homes" unless they are registered and in good standing with the Health Department as stated in HAW. REV. STAT. §321-193.7. Currently, there is legislation pending (SB 2642/HB 2750 (2024)) that will provide for mandatory registration including the requirement that a public information meeting be held before locating clean and sober homes in counties with a population of 500,000 as well as proof of compliance with local zoning.

9. Illinois

ILL. COMP. STAT. § 55-40 defines "recovery residence" and provides for state registration for listing in an online database and encourages national accreditation from an entity that has developed uniform national standards for recovery residences. Currently, there is pending legislation (HB 2962 (2024)) to provide for 1 year for the Department to establish minimum standards and requirements for the licensure of recovery residence and impose penalties for failure to meet those standards.

10. Indiana

IND. CODE § 12-7-2-158.2 and IC -12-21-2-3 as amended by P.L. 35-2016, Section 56 together define "recovery residences" and require recovery residences to be certified and meet standards established by the Division of Mental Health and Addiction through Administrative Rules.

11. Kansas

HB 2704 (2024) is currently before the legislature and provides that a no-impact home-based business shall not be used to operate a structured sober living home.

12. Kentucky

HB 462 (2024) is pending before the Senate, which will provide for mandatory certification of recovery residences.

13. Louisiana

LA. REV. STAT. § 40: 2159.1 provides for residential substance use disorder facilities to be licensed and provides for onsite access to one form of FDA approved opioid agonist treatment.

14. Maine

Recovery residences must be certified to receive contracts and housing assistance in accordance with ME. REV. STAT. tit. 5 §20057.

15. Maryland

HB 1411 (2016)/SB 1094 (2016) approved a credentialing entity to develop and administer a certification process for recovery residences with certification required for any recovery residence that receives state funds, operates as a "certified" recovery residence or is advertised as "certified."

16. Massachusetts

HB 2004 (2024) is pending, which provides for the establishment of a special task force to investigate best practices for housing and HB 2014 (2024), which provides for the establishment of a Bureau of Substance Addiction Services to determine the regional need for recovery housing throughout the commonwealth including locations, number of occupants, and municipal zoning. Additionally, MASS. GEN. LAWS Ch.123 § 18A provides for voluntary training and an accreditation program for operators of alcohol and drug free housing.

17. Minnesota

MINN. STAT. § 254B.181, provides that all sober homes must comply with applicable state laws and regulations and local ordinances related to maximum occupancy, fire safety, and sanitation. Additionally, SF 3973 and HF 3954 (2024) are currently pending and propose to amend the statute to allow sober home residents to allow legally prescribed medication as directed by a licensed prescriber.

18. Missouri

MO. REV. STAT. 9 § 30-3.310 requires certification for every recovery support organization to maintain a contract with the department, to serve Medicaid individuals, and to serve individuals whose referral sources require the provider to be certified by the department.

19. Montana

SB 94 was passed last year (2023) and provides, among other things, that a recovery residence must register with the Department of Public Health and Human Services and must meet state and municipal standards related to a residence's dwelling size and occupancy, including, but not limited to, safety requirements, building codes, zoning regulations, and local ordinance requirements. It also provides that the Department of Health and Human Services must indicate which recovery residences are certified on its website.

20. Nebraska

LB 208 (2023) was filed last year and reintroduced this year and it provides that, a county may adopt or enforce an ordinance that prohibits operating a short-term rental only if the law prohibits the use of a short-term rental for the purpose of operating a structured sober living home.

21. New Hampshire

N.H. REV. STAT. § 172-B:2 provides for voluntary certification. Further N.H. Rev. Stat. § 153:10-d provides that an owner or operator of a recovery house which is in compliance with rules adopted by the Commissioner of Health and Human Services may apply to the State Fire Marshal and may be granted an exemption under N.H. REV. STAT. § 153:5, IV from certain requirements of the state fire code provided that certain minimum requirements are in place.

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22. New Jersey

A3977 (2024) is pending, which provides for a definition of "Cooperative sober living residence" and requires the Commissioner of the Department of Community Affairs to publish on the department's website a list of each licensed cooperative sober living residence in the state. A3978 (2024) is also pending and provides for the establishment of a "Substance Use Disorder and Addiction Treatment Best Practices Task Force" to study and present a report of its findings and recommendations to the Governor no later than 2 years after the organization of the task force.

Next A3929 (2024) would provide for preliminary approval of cooperative sober living residences by a municipality before the issuance of a license. Then S252 (2024) provides for the requirement that cooperative sober living residences must obtain approvals from zoning, fire, health, and building authorities before a license can be approved by the state. Also, A2198 (2024) provides that the Department of Human Services has the authority to regulate sober living homes and requires background checks and other protections for residents. A3230 (2024) requires the Department of Community Affairs to approve the credentialing entity to develop and administer a certification program. While A3974 (2024) prohibits the use of deceptive marketing practices by substance use disorder treatment providers.

Currently, N.J. REV. STAT. § 26:2G-25 provides that no sober living home can deny a resident the ability to use prescription medicine and requires the homes to provide notice to a patient's next of kin whenever the patient voluntarily withdraws or is involuntarily evicted from such facility.

23. New York

SO3349 (2024) proposes to create a certified recovery residences task force to establish best practice guidelines for certified recovery living residences that illustrated the most appropriate and effective environment for persons recovering from a chemical dependency. SO6094 (2024) would define certified recovery residences and then then require the Chief Executive Officer of a Municipality be notified in writing as to the address, number of residents, type of community residence, and community support requirements of the program. Further, A5547 (2024) provides for the definition of "Sober living homes" and provides for certification of Sober living homes.

24. Ohio

H.B. 227 and S.B. 105 (2024) provides that the Ohio Department of Mental Health and Addiction Services shall monitor the operation of recovery housing in this state by doing either of the following: (1) certifying recovery residences through a process established by the department or accepting accreditation or its equivalent from the Ohio affiliate of the National Alliance for Recovery Residences; Oxford House, Inc., or any other organization that is designated by the department. Further, it provides for mandatory certification or accreditation after January 1, 2025.

Also, H.B. 33 (2023) passed last year and provides that beginning January 1, 2025 no person or government entity shall advertise or represent any residence or other building to be a recovery residence unless the residence is registered and regulated by the Department of Rehabilitation and Correction under 2967.14 of the Revised Code (pertaining to Halfway Houses or Community Residential Centers).

25. Oklahoma

SB 46 (2024) is currently pending, which would provide that a home-based business for the purpose of operating a structured sober living home is prohibited. Also, 43A OKLA. STAT. tit. 43A § 3-417.1 prohibits any transitional living center or halfway house from being located within 1,000 feet of any public or private elementary or secondary school.

26. Oregon

ORS 90.243 defines qualifications for drug and alcohol free housing.

27. Pennsylvania

Pennsylvania approved SB 446 (2017-2018)/HB 119 (2017- 2018) to require either state licensure or certification in order to be eligible for state funding. The Bill became effective on December 19, 2017. Then in 2021, 28A PA. CONS. STAT. Ch. 717 was approved for mandatory licensure of "drug and alcohol recovery houses" to avoid confusion between certification of residences versus licensure for treatment facilities and to provide stricter required standards for drug and alcohol recovery houses.

28. Rhode Island

The Rhode Island legislature approved SB 2225 (2018)/HB 8212 (2018), in 2018, to require the Department of Behavioral Healthcare, Developmental Disabilities, and Hospitals to establish and promulgate the overall Plans, Policies, Objectives, and Priorities for state Substance-abuse Education, Prevention and Treatment and to voluntarily certify recovery housing directly, or through a contracted entity, as defined by department guidelines, which includes adherence to using National Alliance for Recovery Residences (NARR) standards. Certification is required to receive referrals and/or state funds.

29. South Carolina

SB 445 (2024) is currently pending and will provide for the creation of a voluntary certification program for recovery housing based upon nationally recognized standards, such as those established by the National Alliance for Recovery Residences (NARR) and Oxford House.

30. Tennessee

TENN. CODE § 6-54-145 provides a definition for "Sober living home" and further provides that a municipality may adopt an ordinance encouraging Sober living homes to be chartered (Oxford Home) or become a not-for-profit that

prescreens new affiliates and requires them to adhere to a code of ethics. Further, TENN. CODE § 33-2-1402 provides that the Department of Mental Health and Substance Abuse Services shall establish and maintain on its website a list of certified organizations and those that are not certified are required to post an 11"x17" sign providing they are not certified. It also prohibits deceptive marketing.

31. Texas
HB 4431 (2023) recently passed providing for voluntary accreditation of recovery housing. The Health and Human Services Commission shall adopt minimum standards for accreditation as a recovery house that are consistent with the quality standards established by the National Alliance for Recovery Residences and the Oxford House Incorporated. It also prohibits patient brokering and deceptive marketing. This bill became effective on September 1, 2023. Further, a recovery house that is not accredited in accordance with this bill will be ineligible for state funding effective September 1, 2025. Additionally, TEX. REV. CIV. STAT. § 229.151 defines "structured sober living homes" and TEX. REV. CIV. STAT. § 229.152 provides that a municipality may adopt standards for structured sober living homes that comply with state and federal Fair Housing laws and the Americans with Disabilities Act of 1990.

32. Utah
UTAH ADMIN. CODE r. 501-18 provides basic health and safety standards for recovery residences and minimum administration requirements.

33. Virginia
VA. CODE § 37.2 – 431.1 defines "recovery residence" and provides for mandatory certification by the Department of Behavioral Health and Development Services according to the standards set forth by the National Alliance for Recovery Residences (NARR) and Oxford House and minimum square footage requirements to be met.

36. Washington
WASH. REV. CODE § 41.05.760 provides that the Washington State Healthcare Authority shall establish and maintain a registry of approved recovery residences and that the Authority may contract with a nationally recognized recovery residence certification organization based in Washington to maintain the registry.

35. West Virginia
SB 301 (2024) is currently pending and provides that tenancy for eviction purposes under the landlord and tenant laws include those persons residing in a sober living home. HB 4943 and SB 541 (2024) provide that a municipality may limit or prohibit the use of a home-based business for the purpose of operating or maintaining a structured sober living home. SB 491 (2024) expands the definition of "recovery residence" and references the West Virginia Alliance for Recovery Residences in the context of referencing the entities the Department of Health can contract with to have them provide for voluntary certification of recovery residences through a contract with the Department of Health based upon the standards determined by the National Alliance for Recovery Residences (NARR). In addition, it provides that a municipality or county may require verification of compliance with local building, maximum occupancy, fire safety, and sanitation codes applicable to single-family housing.

36. Wisconsin.
WIS. STAT. § 46.234 defines "recovery residence" and provides that the Department of Human Services shall establish and maintain a registry of approved recovery residences. Registration is required for all referrals and state funding.

C. Oxford Houses. States and local go ernments cannot impose certification requirements on "Oxford Houses." An Oxford House Charter gives a group of six or more recovering individuals the right to call itself an Oxford House and to use the Oxford House system of operations set forth in the Oxford House Manual, forms and other publications. There is no charge for the charter, but it has three conditions: (1) the group must be democratically self-run following the procedures of the Oxford House Manual, (2) the group must be financially self-supporting and pay all its own bills, and (3) the group must immediately expel any resident who returns to using alcohol or illicit drugs.[40] Courts have generally stricken regulations imposed on Oxford Houses.

IV. Best Practices. Regardless of whether a state already has implemented sober home/recovery residence legislation or is yet to do so, there are resources which provide best practices to guide them.

A. National Alliance for Recovery Residences. NARR has affiliates in 30 states and emerging affiliates in nine more states.[41] Those with NARR Affiliates can refer to the standards adopted by those affiliates and require that they be followed as best practices to protect the residents of the homes.

B. State Model. If your state does not have a NARR Affiliate, not to worry, you can require that recovery residences in your jurisdiction follow best practices by implementing standards similar to the following:

1. FLA. STAT. § 397.487, which was established by HB 21 in 2015, requires, among other things that applicants to operate recovery residences must submit a policy and procedures manual containing:

a) Job descriptions for all staff positions.
b) Drug-testing procedures and requirements.
c) A prohibition on the premises against alcohol, illegal drugs, and the use of prescribed medications by an individual other than the

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Sober Homes *cont'd from page 13*

individual for whom the medication is prescribed.
d) Policies to support a resident's recovery efforts.
e) A good neighbor policy to address neighborhood complaints and concerns.
f) Rules for residents.
g) Copies of all forms provided to residents.
h) Intake procedures.
i) Sexual predator and sexual offender registry compliance policy.
j) Relapse policy.
k) Fee schedule.
l) Refund policy.
m) Eviction procedures and policy Code of ethics.
n) Proof of insurance.
o) Proof of background screening
p) Proof of satisfactory fire, safety and health inspections.

C. Legal standards. It is clear that the requirements under FLA. STAT. § 397.487, are designed to benefit the protected class by protecting residents of recovery residences against fraud, misrepresentation, exploitation and abuse. This is an example of narrowly tailored legislation that furthers the legitimate government interest of providing consumer protection laws for residents of commercial recovery residences who are purchasing a housing service while they are participating in treatment off site. The government interest/intent is to provide the residents of these homes with due process rights afforded to every single residential tenant, to prevent homelessness, to provide the residents with a safe place to live, and to help prevent addiction relapse.

V. Final Thoughts as to What You Can Do at the Local Level. Local government lawyers can assist their jurisdictions with sober home/recovery residence issues as follows

- Educate residents and elected officials as to applicable Federal and State Law.
- Create a definition of "family," if you don't have one already.
- Create a Reasonable Accommodation process, if you don't have one already and require annual recertification of the need for the reasonable accommodation.

- If you believe your city has issues with overconcentration of sober homes/ recovery residences, then we encourage you to get a professional study completed before creating any regulations imposing distance requirements and that study and any resulting ordinances must take into account *all types of group homes for people with disabilities, not just homes for people recovering from substance use disorder*.

- Create best practices similar to those listed above as advised by NARR and/or those in FLA. STAT. § 397.487, and require that sober homes/recovery residences follow those standards if seeking to house more than the allotted number of people in a home per your city's definition of family.

- Keep in mind that any regulations imposing certification requirements on sober homes/ recovery residences must address health and safety concerns and *benefit* the disabled residents and Oxford Houses, must be excluded from any certification requirement.

CONCLUSION:

In summary, sober homes and recovery residences are protected against exclusion and limitation by a spectrum of federal regulations, guidance, and case law, and in many states the operators of those facilities are subject to some modicum of oversight and increasing certification requirements. These restrictions are generally oriented towards the laudable societal goal of protecting members of the community that are in recovery from substance use disorder. Local government attorneys need to be aware of the relevant legal parameters as they play a role in that process.

NOTES

1. https://.dcas.dmdc.osd.mil/dcas/app/conflictCasualties (last viewed April 15, 2024).
2. https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm (last viewed on April 15, 2024).
3. Buckley v. Consolidated Edison Co. of New York, Inc., 155 F.3d 150, 154 (2d Cir. 1998) (en banc) (recovering drug addicts may be considered to have a "disability" under the ADA).
4. Caron Foundation of Florida, Inc. v. City of Delray Beach, 879 F. Supp.2d 1353 (S.D. Fla. 2012).
5. City of Edmonds v. Oxford House, Inc., 514 U.S. 725 (1995).
6. Oxford House–C v. City of St. Louis, 77 F.3d 249, 252 (8th Cir. 1996).
7. Human Resource Research and Management Group, Inc. v. County of Suffolk, 687 F.Supp.2d 237, 265-266 (E.D.N.Y. 2010).
8. Children's Alliance v. City of Bellevue, 950 F. Supp. 1491, 1499 (W.D. Wash. 1997).
9. Jeffrey O. v. City of Boca Raton, 511 F. Supp.2d 1339, 1358-1359 (S.D. Fla. 2007).
10. Schwarz v. City of Treasure Island, 544 F.3d 1201 (11th Cir. 2008).
11. *Id*.
12. Schwarz v. City of Treasure Island, 2010 WL 2869473 (M.D. Fla. 2010).
13. Joint Statement of the Department of Housing and Urban Development and the Department of Justice, State and Local Land Use Laws and Practices and the Application of the Fair Housing Act at 12 (November 10, 2016).

14. Familystyle of St. Paul, Inc. v. City of St. Paul, 923 F.2d 91, 92 (8th Cir. 1991), reh'g denied (Feb 15, 1991).
15. Larkin v. State of Mich. Dept. of Social Services, 89 F.3d 285, 290-291 (6th Cir.1996).
16. Harding v. City of Toledo, 433 F. Supp. 2d 867, 873-874 (N.D. Ohio 2006).
17. Daniel Lauber, *Principles to Guide Zoning for Community Residences for People with Disabilities in Delray Beach, Florida*, 3d Ed. at 5, (River Forest IL. Planning/Communications, August 2017).
18. Sailboat Bend Sober Living, LLC v. City of Fort Lauderdale, 46 F.4th 1265 (11th Cir. 2022).
19. SoCal Recovery, LLC v. City of Costa Mesa, 2023 WL 8263377, at 10 (C.D. Cal. 2023).
20. The Ohio House, LLC v. City of Costa Mesa and Brandon Stump, no. 22-56181 (9th Cir. 2023).
21. *Jeffrey O., supra* note 9.
22. *Schwarz, supra* note 8 at 1219.
23. School Bd. of Nassau County v. Arline, 480 US 273, 288 n.17, 107 S.Ct.1123, 94 L.Ed.2d 307 (1987), *Schwarz, supra* note 10 at 1220.
24. Bryant Woods Inn, Inc. v. Howard County, 124 F.3d 597 (4th Cir. 1997).
25. Weinreich v. Los Angeles County Metropolitan Transp. Authority, 114 F.3d 976 (9th Cir. 1997), cert. denied, Weinreich v. Los Angeles County Metropolitan Transp. Authority, 522 U.S. 971 (1997).
26. Bangarter v. Orem City Corp., 46 F.3d 1491, 1504 (10th Cir. 1995).
27. *Familystyle, supra* note 14.
28. Human Resource Research and Management Group, Inc. v. County of Suffolk, 687 F. Supp. 2d 237 (E.D.N.Y. 2010).
29. Tsombanidis v. West Haven Fire Department, 352 F.3d 565 (2d Cir. 2003) (superseded by regulation as stated in Perricone-Bernovich v Tohill, 843 Fed.Appx. 419 (2d Cir. 2021)).
30. *Joint Statement*, *supra* note 11.
31. Report on the Proliferation of Fraud and Abuse in Florida's Addiction Treatment Industry, The Palm Beach Grand Jury in the Circuit Court of the 15th Judicial Circuit In and For Palm Beach County, Florida, (Dec. 8, 2016).
32. *Id.*
33. Nevada Fair Housing Center, Inc. v. Clark County, 565 F. Supp. 2d 1178 (D. Nev. 2008).
34. Tsombanidis, *supra* note 29.
35. Oxford House, Inc.. v. H. "Butch" Browning, State Fire Marshal, No. 3:15-cv-00282-BAJ-EWD (M.D. La. 2017).
36. Public Law No. 115-271 (10/24/2018) Congress.gov/bill/115th-congress/house-bill/6 (last visited on March 3, 2024).
37. Store.samhsa.gov/sites/default/files/pep23-10-00-002.pdf (last visited on March 3, 2024.)
38. *Id.* at 10.
39. Please note that this list represents only a snapshot at a point in time, is not comprehensive, and should not be taken to constitute legal advice or guidance. The authors of this document searched each state's legislative page for pending legislative information and searched the internet using common search terms for statutes/legislation, but may have missed statutes/legislation and/or there may be legislation that has been filed since the date that this document was prepared.
40. http://www.oxfordhouse.orgq-uestions_and_answers.#q3 (last viewed March 3, 2024).
41. http://www/info@narronline.org (last viewed March 3, 2024).

What Every Municipal Attorney Should Know About the First Amendment

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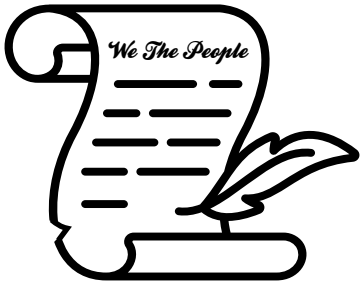

INTRODUCTION:

Local governments must honor the rights granted to all persons by the First Amendment of the United States Constitution. The text of the First Amendment says:

> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances (U.S. Const. amend. I).*

While the text refers only to the United States Congress, First Amendment rights are enforceable against state and local governments under the Fourteenth Amendment. Engaging with citizens, enforcing government regulations, and managing government workplaces requires balancing First Amendment rights with the need to operate the government efficiently. Local government attorneys must draft and apply regulations, policies, and procedures that withstand constitutional challenges. Applying constitutional law to real world situations can involve complex analyses, and the law continuously evolves through court decisions.

This article provides an overview of First Amendment issues local governments face. It discusses the rights guaranteed by the First Amendment and how they intersect with local government operations. And it offers basic guidance on applying the First Amendment in public meetings, government regulations, and employment matters.[1]

1. The Rights Guaranteed by the First Amendment

The First Amendment guarantees certain fundamental rights to all persons, including:

- **Freedom of speech and freedom of the press,** protecting:
  - the right to express individual opinions and beliefs, even if they are offensive to others; and
  - the right of the press to publish without government censorship.
- Freedom of religion, under:
  - the Establishment Clause, which prohibits the government from establishing a national religion or favoring one religion over another; and
  - the Free Exercise Clause, which protects the rights of individuals to practice their religion freely or to refrain from practicing any religion.
- **Freedom of assembly,** protecting individual rights to gather peacefully with others.
- **The right to petition the government,** protecting individual rights to interact with the government to express concerns and seek amends for grievances.

Additionally, the Supreme Court has recognized an implicit guarantee of **freedom of association** for the purpose of engaging in the activities the First Amendment explicitly protects (*Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984)). This freedom includes the right to associate with or refrain from associating with specific groups or belief systems.

2. Fundamentals of Free Speech Limitations

Each of the First Amendment's clauses has implications for local government, but the Free Speech Clause may have the greatest impact on how local governments operate. The Free Speech Clause protects:

- All speech except for a few narrow categories.
- Not only verbal speech, but also printed words and expressive conduct.

- The speech of:
  - individuals, regardless of citizenship; and
  - corporations and other organizations.

a. The Importance of Content Neutrality

In a legal challenge to government regulations that affect speech, the outcome often depends on whether the regulations are content based or content neutral.

Content-Based Regulations

A regulation is content based if it either:

- Indicates disagreement with a viewpoint (*Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)), or
- Applies to an entire topic of speech, regardless of the speaker's viewpoint. For example, a sign code provision that singles out specific subject matter for differential treatment is a content-based speech regulation (*Reed v. Town of Gilbert*, 576 U.S. 155, 169 (2015); *see* Sign Regulations, below).
- It is typically difficult to defend content-based regulations because courts generally analyze them under a strict scrutiny standard. Under strict scrutiny, speech regulations must:
  - Be based on a compelling governmental interest.
  - Be narrowly tailored to serve that interest.
  - Be the least restrictive means to accomplish the government's objective.

Content-Neutral Regulations

A speech regulation is content neutral if it focuses only on the speaker's manner or method, rather than the message or viewpoint. Content-neutral regulations are easier to defend because courts use intermediate scrutiny to review them. Under this standard, speech regulations must:

- Be based on a significant governmental interest, which is easier to show than a compelling governmental interest.
- Be narrowly tailored to serve that interest.
- Leave open ample alternatives for communication.

b. Public Forum Categories

Courts recognize four types of public forums for determining how much protection speech and expression on public property should receive. When a speaker uses local government property to express an idea or opinion, the government entity should determine whether the location is:

- A **traditional public forum**, such as a street, sidewalk, park, or public square. Regulations affecting speech in these places should be content-neutral time, place, and manner restrictions.
- A **designated public forum** at a location not normally open for First Amendment activities but at which the government has chosen to allow them. Speech limitations in a designated public forum are treated the same as those in traditional public forums.
- A **limited public forum**, only open for use by certain groups or dedicated solely to the discussion of certain subjects. In these forums, a government entity may limit speech to only certain subjects and impose blanket restrictions on others. Although limitations do not have to be content neutral, they must still be viewpoint neutral and reasonable.
- A **non-public forum**, not traditionally used or designated for expressive activity.

3. The First Amendment in Government Meetings and Events

a. Public Participation in Meetings

Local government legislative bodies, boards, and committees must observe First Amendment rights in the way they conduct their meetings. The First Amendment does not guarantee members of the public the right to speak at a meeting of a local governing body or advisory board. However, many local government meetings include public comment periods, either because of state law requirements or in observance of local policy or tradition.

When the public is allowed to speak, counsel should understand the type of forum the government has created and the corresponding limitations on speech regulations. Depending on the way comment periods are conducted, courts generally view them as either a designated public forum or a limited public forum. If a comment period is a limited public forum, the government has more leeway to limit comment periods to the discussion of certain subjects. However, the limits must be viewpoint neutral. If the government has created a designated public forum, it should avoid both content-based and viewpoint-based restrictions on citizen comments.

b. Public Prayer

Legislative Prayer

Local government bodies that begin their public meetings with a prayer should have measures in place to ensure that the prayer meets constitutional standards. Under the Establishment Clause, legislative prayer is government speech rather than individual speech. Courts determine the constitutionality of ceremonial prayer at government events under two tests:

- A **historical test** that analyzes whether the practice is consistent with long-standing tradition. The Supreme Court has recognized that the opening of legislative sessions with prayer is deeply embedded in US history and tradition (*Marsh v. Chambers*, 463 U.S. 783, 786 (1983)).

  Legislative prayers need not be nonsectarian and may reflect the prayer-giver's religious beliefs or tradition (*Town of Greece v. Galloway*, 572 U.S. 565, 578 (2014)).

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- A **coercion test** that investigates whether the government is coercing anyone to support or participate in religion or its exercise (*Lee v. Weisman*, 505 U.S. 577, 587 (1992)). This inquiry is fact-sensitive and considers both the setting in which the prayer is given and its audience (*Town of Greece*, 572 U.S. at 587).

Boards can mitigate concerns about public meeting prayers if they have policies and procedures that:
- Forbid discrimination on the basis of religion.
- Create an organized procedure for choosing prayer-givers.

Courts may find prayers less acceptable at school board meetings where children may be audience members and active participants (*Freedom From Religion Found. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 896 F.3d 1132 (9th Cir. 2018)).

Prayer and Religious Exercise at Other Public Events

The constitutionality of prayer at public events other than board or committee meetings may depend on whether the prayer is government or private speech, as determined by:

- The central purpose of the program in which the speech occurs.
- The degree of editorial control exercised by the government or private entities over the speech's content.
- The identity of the speaker.
- Whether ultimate responsibility for the speech's content falls on the government or a private entity. (*Turner v. City Council of Fredericksburg*, 534 F.3d 352, 354 (4th Cir. 2008.)) A government employee's prayer in view of the public at a public event is not necessarily government speech (*Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 529 (2022)).

If a prayer is given at a government-sponsored event:
- The prayer must meet the requirements of the Establishment Clause if it is government speech.
- The government must honor the rights of the prayer-giver under the Free Exercise and Free Speech Clauses if the prayer is private speech (*Kennedy*, 597 U.S. at 532-33).

The same analysis applies to other forms of religious expression, such as readings or proselytizing.

4. The First Amendment in Regulations and Policies

a. Sign Regulations

Local government lawyers should be able to determine whether local sign regulations are content neutral. Sign restrictions that make distinctions based on a sign's message are content based, even if the intent is innocuous. A sign regulation is content based if it includes restrictions aimed at either certain viewpoints or an entire topic of speech. As a result, imposing different size, location, and durational requirements by topic categories, such as directional, political, or ideological signs, impermissibly regulates the signs' content. (*Reed*, 576 U.S. at 164.)

To prevent constitutional challenges, sign regulations should:

- Avoid prohibiting, allowing, or making exceptions for signs based on their message.
- Focus on the physical characteristics, location, and number of signs.

In 2022, the Supreme Court clarified its decision in *Reed* by holding that sign regulations may distinguish between on-premises and off-premises signs without triggering strict scrutiny (*City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61 (2022)). Courts have also generally given local governments latitude to distinguish between commercial and noncommercial signs. Although *City of Austin* does not directly involve commercial speech regulation, it references the Court's previous decisions allowing commercial speech distinctions and implicitly leaves them intact (*City of Austin*, 596 U.S. at 73).

b. Panhandling and Soliciting

Panhandling and soliciting involve speech protected by the First Amendment. Courts have invalidated many panhandling and solicitation restrictions as content based because they targeted specific subject matter. It did not matter that the regulations were not an attempt to squelch certain ideas or viewpoints. (For example, see *Norton v. City of Springfield*, 806 F.3d 411 (7th Cir. 2015).)

However, in *City of Austin*, the Supreme Court discusses its decisions involving solicitation regulations and observes that:

- The First Amendment allows the government to regulate the time, place, and manner of solicitation.
- Restrictions on solicitation are not content based if they do not discriminate based on topic, subject matter, or viewpoint.

(*City of Austin*, 596 U.S. at 72-73.)

Panhandling restrictions are more likely to survive a challenge if they focus on conduct that threatens public safety as opposed to the content of a panhandler's speech. Cities have been less successful prohibiting panhandling from persons waiting in line or within a designated buffer zone surrounding a bank, ATM, or outdoor dining area. Courts generally find provisions like these are not narrowly tailored to the government's interests.

Street Solicitation

Solicitation ordinances sometimes specifically target interactions between solicitors and persons in vehicles on public streets. Some cities have been successful in defending against challenges to regulations emphasizing vehicular and pedestrian safety. However, courts have found that other cities' street solicitation regulations were content neutral but

were not narrowly tailored to serve the government's safety interests (for example, see *Cutting v. City of Portland*, 802 F.3d 79 (1st Cir. 2015), invalidating regulations that prohibited pedestrians from occupying any median strip except while crossing the street).

Door-to-Door Solicitation

Local governments often find it difficult to regulate door-to-door solicitors in a way that both satisfies property owners and protects free speech rights. Government regulators should treat door-to-door solicitation as a form of expression that warrants the same constitutional protections as other types of speech. After *Reed*, some courts struck down ordinances that more heavily regulated commercial solicitation. However, the Supreme Court's *City of Austin* decision indicates that distinguishing between commercial and noncommercial may still be permissible (*City of Austin*, 596 U.S. 61at 73). Counsel drafting or reviewing door-to-door solicitation regulations should keep in mind that:

- Regulations must still be narrowly tailored to serve a substantial government interest even if they:
  - are content neutral; or
  - affect only commercial speech and are held to a lower level of scrutiny.
- Regulating the conduct of solicitors rather than the content of their speech is generally easier to justify.

c. Holiday Displays on Public Property

Holiday displays on public property can generate difficult questions involving both the Free Speech and the Establishment Clauses. Local governments often use public property for their own displays celebrating various holidays and sometimes allow private parties to have displays on government property. In advising local governments about holiday displays, counsel should keep in mind that:

- The government's own holiday displays on public property are government speech and the Establishment Clause applies in evaluating their constitutionality. Even a private party's display may be government speech if the government:
  - selects the components to be included;
  - maintains final authority over every aspect of the approval process; or
  - gives the display preferential access to property that is not available to all on equal terms.

  (*Pleasant Grove City v. Summum*, 555 U.S. 460, 470-71 (2009).)
- Although a symbol may come from religious holiday traditions, courts may still treat it as secular in nature. For example, a Christmas tree on public property does not typically raise Establishment Clause concerns. Additionally, including both religious and secular symbols can provide context and acknowledge the religious aspects of a holiday without violating the Establishment Clause.
- Displays of standalone religious symbols may be more problematic. In a legal challenge, courts are likely to look at:
  - the context of the display, its historical significance, and the extent to which it has become part of the community's identity; and
  - how the display fits in with a tradition of similar displays in other parts of the country.

  (*Am. Legion v. Am. Humanist Ass'n*, 139 S.Ct. 2067, 2082-85 (2019).)
- Establishment Clause jurisprudence is in flux. The Supreme Court holds that the Establishment Clause must be interpreted by reference to historical practices and understandings (*Kennedy*, 597 U.S. at 535-36). However, the Court has not yet provided definitive guidance on how its history and tradition framework applies to religious displays on public property. Counsel should continue to monitor case law developments in this area.
- The Free Speech Clause applies when:
  - a private holiday display on public property is not government speech; or
  - the government denies a request to locate a private display on public property.
- Regulations governing private holiday displays must be viewpoint neutral.
- The line between the government's own displays and the creation of a public forum for private displays is not always clear. In attempting to comply with the Establishment Clause, the government may end up violating a private party's free speech or free exercise rights. (*Shurtleff v. City of Boston*, 596 U.S. 243, 247-48 (2022).)

A well-drafted written policy can be helpful in avoiding challenges involving

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Roger Horner joined the Government Practice team of Thomson Reuters Practical Law after more than three decades in local government. Previously, he was the City Attorney for Brentwood, Tennessee, where he advised the City Manager, City Commission, and all City boards and departments. Prior to that, he served as Brentwood's wood's Finance Director and was a financial analyst for the Tennessee Public Service Commission. Roger is a past president of the Tennessee Municipal Attorneys Association (TMAA) and received TMAA's Distinguished Municipal Attorney Award in 2018. He is a former member of the IMLA Board of Directors and a Fellow of the Tennessee Bar Foundation.

Ian Williams joined Practical Law from the County Attorney's Office of Volusia County, Florida, where he was an Assistant County Attorney. His practice focused on a variety of local government matters, including land use, environmental compliance, transportation, utilities, and litigating Section 1983 and inverse condemnation claims. Previously, he clerked for Florida's Fifth Judicial Circuit and was president of the Florida Trial Court Staff Attorneys Association. Ian has government experience with the Massachusetts Port Authority and the U.S. Department of State's Bureau of Arms Control in Washington, D.C. and Geneva, Switzerland. He is licensed as a lawyer in Florida and Ontario.

AMICUS

By: AMANDA KARRAS,
IMLA Executive Director and General Counsel

When Can Public Officials Block Someone on Social Media?

Supreme Court Justice Elana Kagan recently quipped during oral argument: "You know, these are not like the nine greatest experts on the internet" referring to herself and her colleagues on the bench.[1] Despite that confession, the Supreme Court has not shied away from tackling several significant cases involving social media and the internet this Term.[2] But perhaps because of that self-awareness, the Court was fairly temperate in its ruling in *Lindke v. Freed*, which involved the question of when a public official's social media account constitutes "state action" such that it is subject to the First Amendment. The unanimous decision clocked in at only 15 pages and produced no additional writings (either concurrences or dissents), which for such a complicated and important issue, is somewhat surprising.[3]

The Local Government Legal Center filed an amicus brief (joined by IMLA, NACo, and NLC) advocating for a clear and easy to apply state action test focused on authority.[4] The brief also highlighted the unworkable nature of the subjectively-driven "appearance" test advanced in various lower court cases and urged the Court to reject that model. And the brief argued that public officials have their own First Amendment rights, which could be squelched if the Court adopts too broad of a test.

The Court's ruling adopted many of the LGLC's positions and provides some clarity for local governments and their officials, though it also leaves open several unanswered questions. Because local governments can in some circumstances be liable for their employees' or officials' use of social media if a court finds that the use constitutes "state action," it is imperative that local government attorneys familiarize themselves with the decision and train their employees and officials on how to avoid liability. This article will discuss the decision as well as IMLA's 2019 *Model Social Media Policy* and the practice pointers for local government attorneys in this area of the law.

Lindke v. Freed

In this case, Mr. Freed operated a Facebook page, which he started in college in 2008. In 2014, he was appointed the city manager of Port Huron, Michigan and he added that information to his Facebook page. He listed his contact information as Port Huron's, including linking to the city website, city email, and so on.

Mr. Freed posted primarily about personal matters including pictures of his family, his dog, and the food he likes to eat. However, he also posted information about his job, including the City's COVID-19 policies and articles on public-health measures as the pandemic continued. According to Mr. Freed, he would only repost on his social media account things about COVID-19 that had already been posted elsewhere – i.e., none of the information posted was available solely via Mr. Freed's account.

Mr. Lindke was a citizen of Port Huron and unhappy with the City's COVID policies. Mr. Lindke would post negative comments on Mr. Freed's Facebook page and Mr. Freed initially deleted those comments, but then eventually blocked Mr. Lindke from the page.

Mr. Lindke sued, claiming blocking him from the Facebook page was "state action" for the purposes of a Section 1983 claim and that Mr. Freed had violated his First Amendment rights in doing so. Mr. Freed argued his account was strictly personal and not subject to the constraints of the First Amendment. The Sixth Circuit found in favor of Mr. Freed, concluding the proper test to determine if the government official is engaging in state action is to ask whether he was "performing an actual or apparent duty of his office or if he could not have behaved as he did without the authority of his office."[5] The lower courts were split on the proper test and the Ninth Circuit in a separate case involving the same question held that state action applies to public officials' social media accounts based on the "appearance and content" of the pages.[6]

The Supreme Court took the case to resolve the split and provide the test to determine when the First Amendment applies to a government official's social media account. In a unanimous decision authored by Justice Barrett, the Court rejected the Ninth Circuit's subjective "appearance and content" test and concluded that a government official's social media posts are "attrib-

utable to the State only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media."[7] The Court noted that the "appearance and function of the social-media activity are relevant at the second step, but they cannot make up for a lack of state authority at the first."[8] The authority must be "real, not a mirage" because "to misuse power… one must possess it in the first place."[9] The analysis will hinge on substance and not the mere label of public official and the Court explained, it will require a fact-intensive inquiry.[10]

The test is derived from the text of Section 1983, which provides a cause of action where "[e]very person who, *under color of any statute, ordinance, regulation, custom, or usage, of any State* deprives someone of a federal constitutional or statutory right."[11] Thus, a public official has the authority to speak on behalf of the government if based on a written law, regulation, or ordinance which authorizes that person to make official announcements or if there is a well-established custom such that the "power to do so has become permanent and well settled."[12] (internal quotations omitted).

The Court noted that in situations where an account belongs to the government or is passed down to the occupier of the particular office, those would be government accounts subject to the First Amendment.[13] But in many circumstances, the Court acknowledged that the line can be "difficult to draw."[14] The difficulty is magnified because the nature of some public officials' work can make it seem like "they are always on the clock."[15] But the Court emphasized that public officials have their own First Amendment rights, including rights to speak about their employment, that they do not relinquish simply by becoming public officials.[16]

The burden is on the plaintiff to show the official is "purporting to exercise state authority in specific posts."[17] Additional factors, such as the use of governmental staff and resources may help demonstrate the use of that authority.[18] The Court admonished lower courts not to rely on "excessively broad job descriptions" to conclude that authority to speak on behalf of the government exists.[19] Instead, the question should be "whether making official announcements is actually part of the job that the State entrusted the official to do."[20]

The Court provided hypotheticals to help illuminate its test. It explained that in cases where someone has the authority to communicate with their residents, for state action to exist and First Amendment liability to attach, "there must be a tie between the official's authority and the gravamen of the plaintiff's complaint." For example, if Mr. Freed had no authority over public health and he was posting about local restaurants with health-code violations and deleted unwanted comments on those posts, he would not be acting with any state authority and would not violate the First Amendment. The Court offered another example and additional guidance:

> Take a mayor who makes the following announcement exclusively on his Facebook page: "Pursuant to Municipal Ordinance 22.1, I am temporarily suspending enforcement of alternate-side parking rules." The post's express invocation of state authority, its immediate legal effect, and the fact that the order is not available elsewhere make clear that the mayor is purporting to discharge an official duty.[21]

On the other hand, the Court explained that if the mayor in the hypothetical is merely sharing information that is otherwise publicly available, it is far less likely to be state action.[22]

Finally, the Court also offered that public officials may use labels and disclaimers on their social media pages such as "this is the personal page" of the individual or "the views expressed are strictly my own" which, would entitle the official to "a heavy (though not irrebuttable) presumption that all of the posts on his page were personal."[23] However, the Court noted such a disclaimer cannot provide cover to conduct government business on a so-called personal page such as by making the only avenue to view a live stream a council meeting on a so-called "personal" page.[24]

Because Mr. Freed's page did not have a disclaimer and he posted about both private matters and those related to his job, the Court remanded to the Sixth Circuit to re-examine the case. The Court also noted that lower courts will need to examine both activities that he engaged in on the social media account: deleting and blocking.[25] The Court cautioned that because blocking is a blunt instrument, when an official is using social media in a mixed way, as Mr. Freed did, there is a greater potential to expose themselves to liability as the court must analyze the entire social media page.[26] Deleting on the other hand, is more precise and the only relevant inquiry for First Amendment purposes pertains to those posts for which the comments were deleted.[27]

While the decision offers some guidance, there are also unanswered questions. First, since the test is based on authority, can a member of an elected body ever be liable under the test if acting alone on a social media account since technically that elected official would have no sole authority over government matters. (While we do not want to train these elected officials to think they may never be liable, certainly advocates will want to make this argument if a case ever arises). Second, how specifically must authority be defined to create potential liability? Third, how will mayors and other executives limit liability and not be seen as "always on the clock" given their significant unilateral authority (which may vary by charter and state law). Fourth, under what circumstances will courts find that

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AMICUS AWARDS 2024

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(Supreme Court Merits Stage)

Whether criminal asset forfeiture requires preliminary probable cause hearing; does "speedy trial" standard suffice for Due Process.

GILBERT C. DICKEY
Consovoy McCarthy PLLC
Partner

C'ZAR D. BERNSTEIN
Consovoy McCarthy PLLC
Associate

Groff v. Dejoy
(Supreme Court Merits Stage)

Religious accommodation Title VII-substantial burden. Must employer demonstrate more than de minimis cost/inconvenience to other employees?

F. ANDREW HESSICK
University of North Carolina School of Law
Judge John J. Parker Distinguished Professor of Law/Associate Dean – Strategy

RICHARD A. SIMPSON
Wiley Rein, LLP
Partner

Lindke v. Freed
(Supreme Court Merits Stage)

Whether public officials use of personal web pages is state action for First Amendment purposes/can they block members of the public from those personal web pages.

O'Connor-Ratcliff v. Garnier
(Supreme Court Merits Stage)

Whether public officials' use of personal web pages is state action for First Amendment purposes/can they block members of the public or delete the public's postings from those personal web pages.

CAROLINE MACKIE
Poyner Spruill LLP
Partner

ROBERT HAGEMANN
Poyner Spruill LLP
Partner

Murthy v. Missouri
(Supreme Court Merits Stage)

Whether government's request that social media delete posting is coercive and violates First Amendment rights of posting party.

NRA v. Vullo
(Supreme Court Merits Stage)

Can government regulator threaten adverse regulatory actions if regulated entities do business with a controversial speaker, due to (a) government's own hostility to the speaker's viewpoint or (b) a perceived "general backlash" against the speaker's advocacy?

MEAGHAN VERGOW
O'Melveny
Partner

DANIEL LAUTZENHEISER
O'Melveny
Associate

NINA OAT
O'Melveny
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Sheetz v. El Dorado County
(Supreme Court Merits Stage)
Whether conditioning building permit on payment of impact fee is impermissible Taking under Nollan/ Dolan exaction analysis.

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San Francisco City Attorney's Office
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KRISTEN A. JENSEN
San Francisco City Attorney's Office
Deputy City Attorney

Tyler v. Hennepin County
(Supreme Court Merits Stage)
Retention of excess funds on state real property tax forfeiture and sale. Taking/ Excessive Fine.

JOHN M. BAKER
Greene Espel
Attorney

KATHERINE M. SWENSON
Greene Espel
Attorney

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(Supreme Court Merits Stage)
Whether federal statute violates Second Amendment by criminalizing possession of a firearm after restraining order due to domestic violence.

LAWRENCE ROSENTHAL
Chapman University
Professor of Law

City of Grants Pass v. Johnson
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BRANDON RAIN
Seattle City Attorney's Office
Legal Project Counsel

County of Tulare v. Murguia
(Supreme Court Certiorari Stage)
Whether allowing mentally ill mother to take children to new premises is "state created danger."

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Best Best & Krieger LLP
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GREGG W. KETTLES
Best Best & Krieger LLP
Partner

Duarte v. City of Stockton
(Supreme Court Certiorari Stage)
Whether nolo plea admitting guilt and completion of diversion program is adequate "conviction" or "sentence" for Heck purposes.

NADIA SARKIS
Miller Barondess, LLP
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Indiana Municipal Power Agency v. United States (Supreme Court Certiorari Stage)
Whether interest refunds to issuers of Build America Better bonds can be sequestered as "direct payments" or must be continued as "appropriations Act" or contractual obligations.

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Los Angeles County v. Ray
(Supreme Court Certiorari Stage)
Whether County is joint employer with state for purposes of Fair Labor Standards Act, and responsible for overtime payments to domestic workers under state In Home Supportive Services program. Circuit split.

DEREK COLE
Cole Huber LLP
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J. PATRICK TAVES
Pandack and Taves PLLC
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SHARON PANDAK
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Castanares v. City of Chula Vista
(Appellate 4th Division)
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CALVIN HOUSE
Gutierrez, Preciado & House, LLP
Partner

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RAHI AZIZI
Deputy City Attorney
Los Angeles City Attorney's Office

RUTH M. BOND
Atkinson, Andelson, Loya, Ruud & Romo
Partner

District of Columbia v. Exxon Mobil Corp
(D.C. Circuit)
Climate change litigation involving questions under state / D.C. public nuisance law and attendant preemption and federal officer removal questions.

ROBERT S. PECK
Center for Constitutional Litigation, PC
Founder/President

SATHYA S. GOSSELIN
Hausfeld
Partner

Sacramento Homeless Union v. County of Sacramento (Ninth Circuit)
Whether enforcing encampment clean up policies during high heat is "state created danger".

ELLEN VAN RIPER
Gresham, Oregon
City Attorney

Scott v. Baltimore County (Fourth Circuit)
Whether prisoners working at offsite recycling facility are "employees" entitled to minimum wages under the FLSA.

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STEVEN M. KLEPPER
Kramon & Graham, P.A.
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SUMMER HUGHES NIAZY
Kramon & Graham, P.A.
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KELSEY CHANDRASOMA
MEAGHAN VERGOW
MIKE DUNDAS
Los Angeles City Attorney's Office
Senior Assistant City Attorney

Trumbull County v. Purdue Pharma (Sixth Circuit)
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J. CARL CECERE
Cecere PC
Owner

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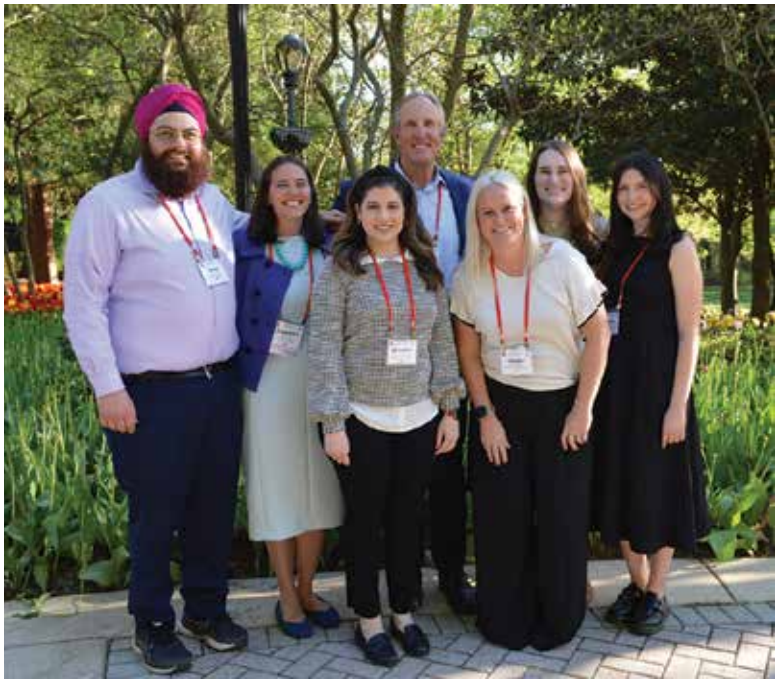
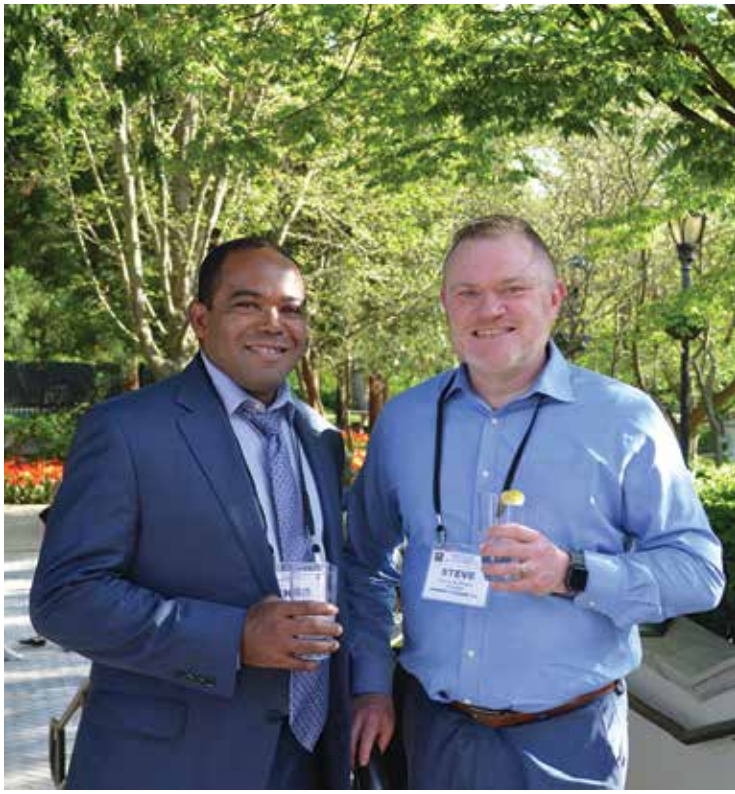
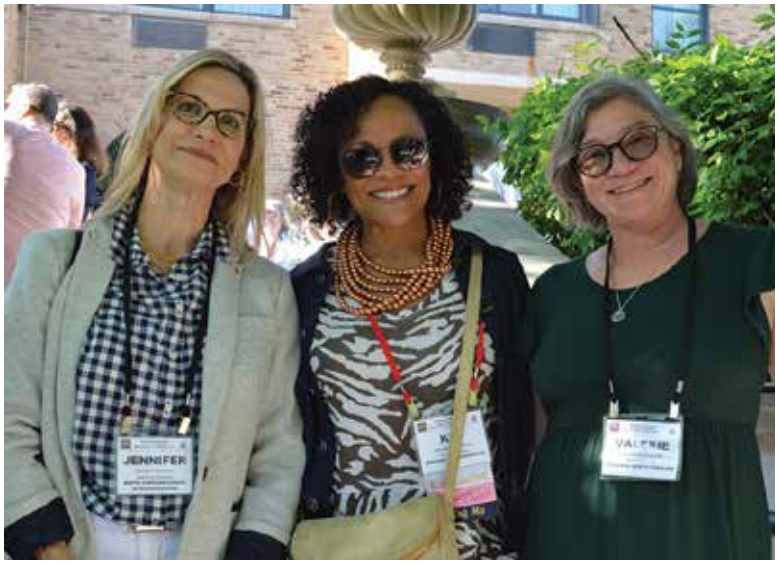
Van Ness Feldman LLP
Of Counsel

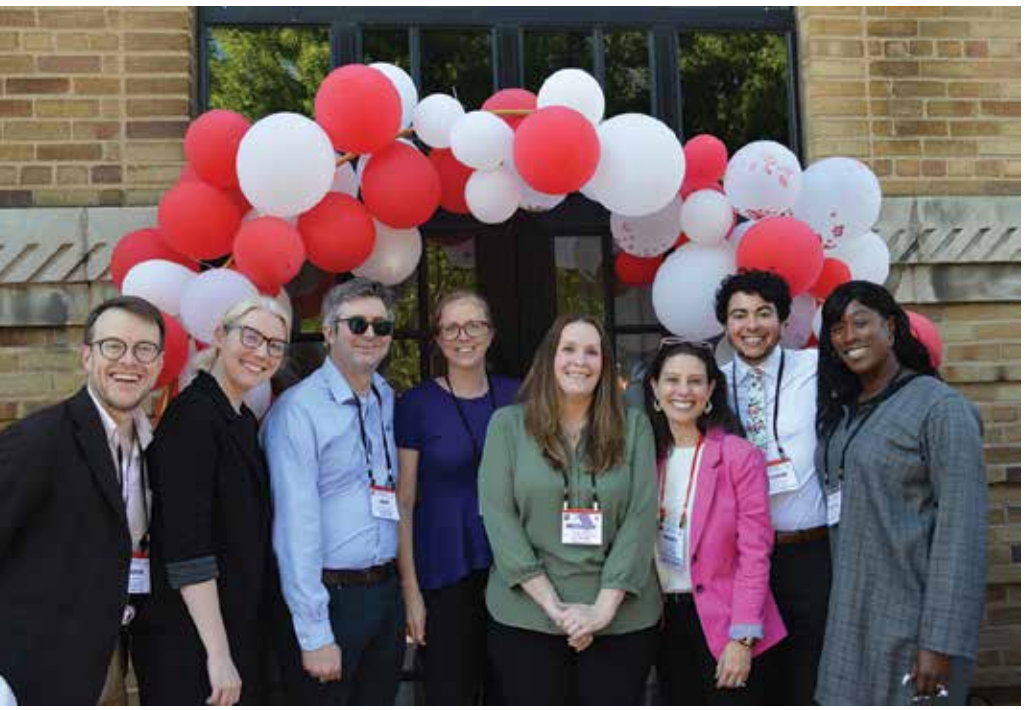
IMLA
Mid-Year Seminar
April 18-21, 2024
Washington DC

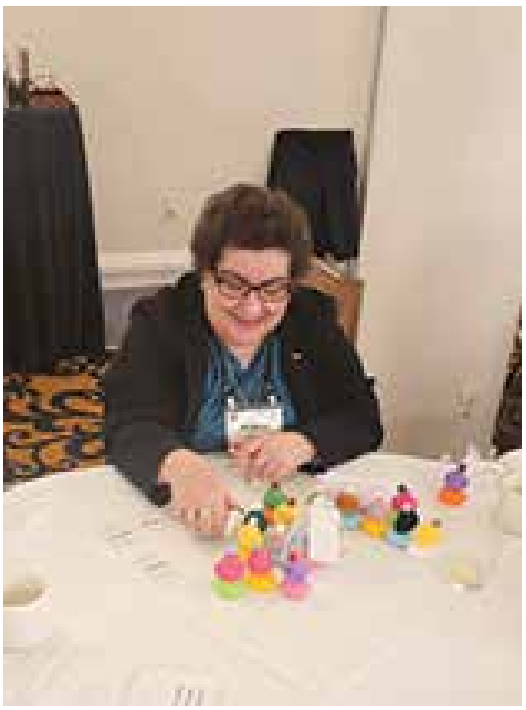


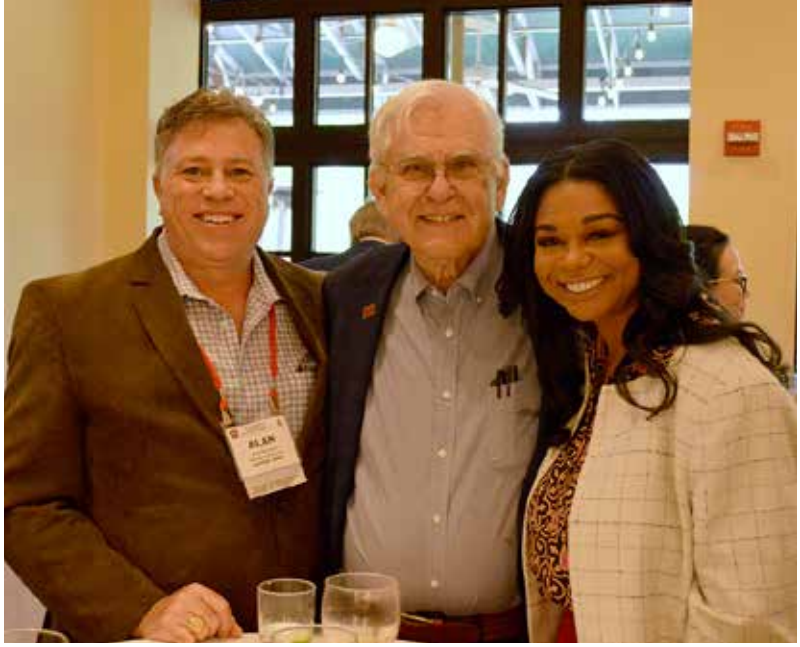


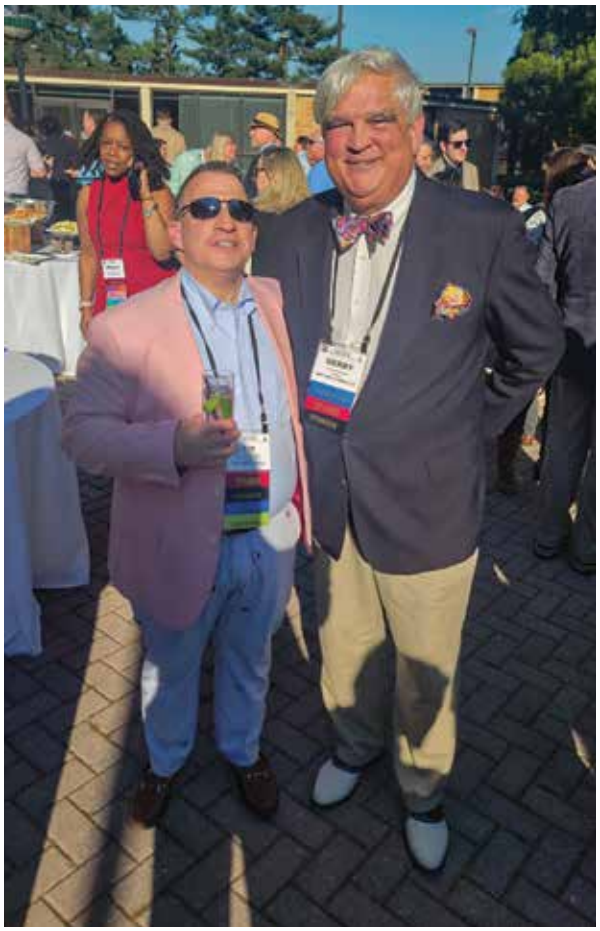


Once again, IMLA members--in record numbers this year--convened at the venerable Omni Hotel in Washington DC for our annual Mid-Year Seminar. Thanks for attending, and for contributing to a great opportunity to learn and connect.







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DAY IN THE LIFE

LISA GLOVER,
Town Attorney of Cary, North Carolina

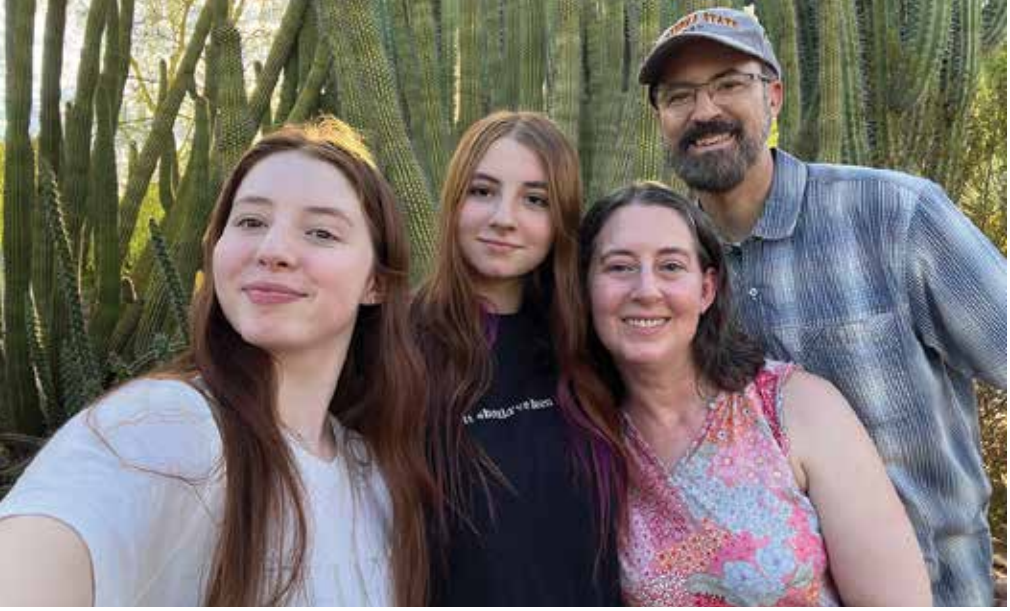
Playing a Part in Well-Run Government

Hello, Lisa! Where were you born and raised?
I was born in Richmond, Virginia, but grew up in Suffolk, Virginia, and I stayed there through high school. I came down to Chapel Hill to go to UNC for undergrad, and I've been in North Carolina ever since.

After UNC, what did your journey from law school to becoming the Town Attorney of Cary look like?
After UNC, I went to Duke for law school so that I could get a master's degree in environmental management at the same time. I had planned to be an environmental lawyer and work in that sector. It took four years to get the joint degree, so I had several summers to work. One of those summers, I worked for the UNC School of Government, which is the largest university-based local government training, advisory, and research organization in the United States. That was my first time hearing about local government as an option for lawyers. After law school, I clerked for a year at the North Carolina Court of Appeals and then moved into a job with the North Carolina Attorney General's Office. There, I represented the North Carolina Department of Transportation on environmental law issues. I was doing what I had wanted to do, which was environmental law, but I kept my eyes open for opportunities in local government because of that summer at the School of Government. After about eight years with the Department of Transportation, the Town of Cary had an opening for an Assistant Town Attorney. I didn't know if I'd be at all qualified for it, or if I would even like it, but I decided to put my hat in the ring. That was 15 years ago! When I was hired, there were just two attorneys in the office–the town attorney and myself. In 2015, we added a third attorney to the office, so I became the Senior Assistant Attorney, and then the Deputy Attorney. At the end of 2020, our Town Attorney retired after 20 years, and I was named to that position a few months later. I've now been the Town Attorney for Cary for three years.

How are responsibilities divided between the three attorneys in your department?
Because there's only three of us, we're all kind of generalists in everything. Matt Pentz is our Senior Assistant Town Attorney, and he took over handling a lot of our planning and zoning issues, which is what I had specialized in until I became Town Attorney. He represents the planning and zoning board, works with our quasi-judicial boards, and does a lot of contract review work. He's also our technology guru and is becoming our AI expert. He's really diving into that at the legal level and staff level, which is helping our office figure out how and why to use AI. Nick Yates is our Deputy Town Attorney. He has a litigation background, so he interfaces with all of our outside counsel on litigation. He also has experience in the District Attorney's office, so he works very closely with our police and fire departments. Nick has also become our solar energy expert as we work to incorporate solar into new facilities and retrofit existing facilities. Besides day-to-day council activity, I'm involved in the legal aspects of large development projects in Cary.

What are some unique characteristics of municipal legal activity in Cary, maybe compared to larger cities?
Well, Cary has over 180,000 people, so it's the seventh largest city in North Carolina. Fun fact: we're actually the second largest "town" in the country behind Gilbert, Arizona. I would say that there's a couple of things that make us unique. We have a town council that is very experienced. Our Mayor has served for 16 years, so he's the longest-serving Mayor in Cary history. He was just reelected. We have a council member who has been on the council for more than 30 years, since 1989. There's also two other long-serving councilmembers, and three that are relatively new. The level of experience



and knowledge on our council is really amazing and unmatched. It makes a great environment for all staff, including the attorneys, because they know how the town works, they know how local government works, and they're just really good partners on everything that we do. I think that experience level of the council makes us unique and more like a small city. Our neighbors and bigger cities have had more turnover on their councils and are relatively young in terms of experienced council members. Cary's newest council members all came in eager to learn and grow and have been very supportive of staff. We have a very healthy mixture of veterans and newcomers with "fresh eyes." Our council approaches decision-making in a non-partisan way as well, which I think is very helpful. Their focus is always Cary and its citizens.

What do you enjoy most about being Town Attorney of Cary, and what about municipal law appeals to you?
I have a two-part answer for that. What I really love about Cary, specifically, is the people. I told you about the council and how great the town council is, but the staff is just amazing from top to bottom. From my first day in the office 15 years ago, I was impressed by their level of commitment to Cary, their knowledge, and how much they've been able to accomplish. The staff just keeps getting better and better as the years go by. We have a manager who has been here about seven years now. He brought a new mindset to the staff and really reinvigorated everybody. On top of that, I really love that municipal law brings something different every day. The three of us in the legal department work with every single department, from A to Z–animal control to zoning–and everything in between, so on a given day I might be talking to someone in the solid waste department, or someone in parks, or someone in police. There are certainly folks that we talk to more than others, such as the planning department. Cary is growing, developing, and redeveloping, so planning is probably the department that I work with most. But unlike the Attorney General's office, where I used to work, every day is different here. Every *year* is different because the legislature in North Carolina makes a lot of changes that affect local government, so there's also an intellectual challenge of figuring out how to adapt to those changes.

How do you feel that your job responsibilities have changed over the past few years?
When I first started in the assistant role, I was just learning about local government and how it really works, so the bulk of my responsibilities before I became Town Attorney were working with the planning department, contract review, and so on. . In Cary we use terms from a a book called *Leadership on the Line* by Marty Linsky and Ronald Heifetz. We use terminology called the "dance floor" and the "balcony". The "dance floor" consists of the technical work, making sure things are running day-to-day. The "balcony" is taking a higher- level view, making sure all of the moving parts fit together and create a whole. Starting out, Iwas doing work on the "dance floor," making sure things were running and answering the technical legal questions that came up. Now, as Town Attorney, I get to take more of that high-level balcony view and really think about how all of the departments of Cary are working together, how what one department does affects another. I also have to think at a high level about the council and their ideas, thoughts, pressures, and motivations, and work with the Manager's office on that level, too. So it's more strategic and adaptive thinking, less day-to-day technical work.

What does a typical day for you look like inside and outside of work?
At work, it's generally a lot of meetings with staff, running from one to the next, working with staff at all levels in all departments. Twice a month we have our council meetings, so preparing for and attending those meetings and work sessions takes up a lot of time. The real deep-thinking work that needs to

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INSIDE CANADA

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

Unstable Trees, Indecisive Officials, Questionable Applicants, and More

If a Tree Falls, Is a City Liable for Damages?
Camarda v. City of Abbotsford, 2024 BCCRT 284 https://canlii.ca/t/k3jrv
A City of Abbotsford ("City") tree fell on the Applicant's property, knocking down his fence and destroying a trampoline. The Applicant sought damages. It was uncontested by both parties that the City owns the wooded area and that the tree damaged the Applicant's private property.

HELD: Application dismissed.

DISCUSSION: To prove negligence, the onus was on the Applicant to demonstrate that the City owed a duty of care. The Applicant argued that the City should have inspected the trees regularly to prevent damage or injury. The City submitted that it did not owe the Applicant a duty of care as it was following a core policy decision and was thereby not negligent. The Supreme Court of Canada in *Nelson (City) v. Marchi*, 2021 SCC 41 outlined four factors to consider when determining a "core policy decision:" first, the decision-maker's level and responsibility; second, the decision-making process; third, the nature and extent of any budgetary constraints; and fourth, the extent to which the decision was based on objective criteria. The City submitted that its corporate tree management policy ("policy") outlined a reactive approach to assess the health of thousands of City trees, which is based on resident complaints or past incidents. The City provided evidence that there were no complaints about the tree that fell on Applicant's property and as a result the tree was not inspected prior. The Court was satisfied that the City's decision to have a reactive policy towards trees satisfied the four factors as a core policy decision; therefore the City did not owe the Applicant a duty of care. The Court also contemplated nuisance laws, which protect a person's right to use and enjoy their land without unreasonable interference. To prove nuisance, the Applicant had to prove that the City knew or ought to have known that the tree was a hazard or at risk of falling, and once aware was required to take reasonable steps to address it. The Applicant argued that the City's policy was inadequate and failed to identify the tree as a potential hazard. The Court found that due to a lack of resident complaints, the City would not have known that the tree was at risk of falling onto the Applicant's property. Therefore, the City was not liable for nuisance. Application dismissed.

Duty to Act or a Duty to Decide?
Bos v City of Vernon, 2024 BCSC 495 https://canlii.ca/t/k3nv1
The Petitioner owned two neighbouring commercial properties in the City of Vernon ("City"). At the request of the City, the Petitioner filed two separate applications for the proposed use of an outdoor storage facility on both properties. The City granted the proposed use and a corresponding business licence to operate on one of the properties but made no decision about the other property. The Petitioner sought judicial review, pursuant to section 2(2) of the *Judicial Review Procedure Act*, RSBC 1996 c. 241 to review the City's failure to issue one of the business licences and sought an order of *mandamus* to require the City to issue the permit.

HELD: Petition granted, in part.

DISCUSSION: The City submitted that the pleadings were deficient as it had issued business licenses for both applications submitted by the Petitioner. The Court found the City's submissions without merit, as the evidence revealed that no decision had been made with respect to one of the applications. The Court agreed with the Petitioner, that he was entitled to know whether or not an outdoor storage facility was permitted, and that the City had an obligation to make a decision and provide an explanation. The Court of Appeal in *Paldi Khalsa Diwan Society v. Cowichan Valley (Regional District)* 2013 BCSC 1773 provides guidance on an order of *mandamus*: there must be a public legal duty to act, the duty must be owed to the applicant, there is a clear right to performance of that duty, where the duty sought to be enforced is discretionary, no other adequate remedy is available to the applicant, the order sought will be of some practical value or effect, the Court in the exercise of its discretion finds no equitable bar to the relief sought, and on a balance of convenience an order in the nature of mandamus should be issued. In this case, the Court held that there was no prejudice to the City being mandated to perform its obligation, rather the prejudice lay with Petitioner. However, the Court noted that the order as sought by the Petitioner would compel the City to issue the licence, which was not appropriate. Rather, the Court issued an order of *mandamus* compelling the City to render

its decision on the Petitioner's application for a licence within 14 days of the order.

Appropriate Parties to Determine Top Cop Shop.
City of Surrey v British Columbia Ministry of Public Safety and Solicitor General, 2024 BCSC 506 https://canlii.ca/t/k3pjd
The City of Surrey ("City") sought an order in the nature of *certiorari* quashing a 2023 decision by the British Columbia Minister of Public Safety and Solicitor General ("Minister") directing the City to transition its police jurisdiction from the Royal Canadian Mounted Police ("RCMP") to the Surrey Police Service ("SPS"). The Minister opposed the order. In this application, the Surrey Police Union ("SPU") sought to be added to the proceeding as a respondent, or in the alternative, as an intervenor.

HELD: Application dismissed.

DISCUSSION: The RCMP is the national police service in Canada and serves cities within the province of British Columbia that do not have their own municipal service, including Surrey. The City Council passed a motion to develop the SPS that would replace the RCMP. The motion was approved by the Minister. The SPU relied on Rule 6-2(7)(b) and (c) of the Supreme Court Civil Rules to be joined as a Respondent. Rule 6-2(7)(b) and (c) provides that at any stage of the proceeding, the Court on an application by any person may be added as a party if the person ought to have been joined or the person's participation in the proceeding is necessary and if there is a question or issue relating to any relief claimed or the subject matter. The Court provided that the Rule is to be given narrow interpretation, as it is meant to remedy defects in the proceeding. SPU argued that its participation was necessary because of the potential effect on the City's submissions, on public safety in the City, and the potential occupational health and safety of the police officers providing services. The Court disagreed, not being satisfied that SPU had any direct interest in the outcome of the proceeding, or that its participation was necessary to ensure that all matters of the proceeding were effectively adjudicated. SPU's application to be added as a respondent was dismissed. In the alternative, SPU sought intervenor status.

The onus was on SPU to demonstrate that it had a direct interest in the outcome of the proceeding or that it represented a public interest in a public law issue to which it could bring a different and useful perspective, *EGALE Canada Inc. v. Canada (Attorney General),* 2002 BCCA 396. The Court had already determined that the SPU did not have a direct interest in the outcome of the proceeding, and found that the application to intervene failed on two grounds. First, the proposed intervenor must have a different and useful perspective with respect to the issues before the Court; SPU did not specify what its perspective was in respect to the legal issues and as such did not establish that it would bring a different perspective. Second, SPU raised occupational health and safety concerns that were not raised by the parties to this proceeding. SPU would need to offer evidence on these issues if it were permitted to intervene. SPUs application for intervenor status was dismissed.

Can Business Licenses Be Denied to Individuals Charged but Not Convicted?
Mr. Emperor Group of Businesses Inc. v Calgary (City), 2024 ABLCSAB 8 https://canlii.ca/t/k3ktz
The City of Calgary ("City") refused the Appellant's business licence application to operate. Upon intake and in accordance with its Business Licensing Bylaw and policies the City completed a security check with the Calgary Police Service ("CPS"). CPS did not recommend the issuance of a business licence to the Appellant as the owner had active criminal charges related to fraud. The City relied on this information to deny the Appellant's business licence application. The decision was appealed.

HELD: Appeal dismissed.

DISCUSSION: The Appellant argued that he was not aware of the particulars of the criminal charges against him, and further since the charges were still before the Court, he was not guilty of fraud. The City submitted that the Appellant was the sole director on the corporate ownership for the business licence application, and it had an obligation to consumer protection and the community when issuing a business licence. To fulfil that obligation, the City relies on its authority under the Bylaw. The City may deny a business licence application following consult with internal departments, and the results of a security clearance check from CPS. The City argued that it relied on the information by the CPS and did not issue a licence due to the outstanding criminal charges against the Appellant. The Board was satisfied that the Appellant was charged under 380(1)(b) of the *Criminal Code*, for Fraud under $5,000 and 374(b) of the *Criminal Code* to Draw Document Without Authority, and that these matters are still before the Court. Furthermore, the Board was satisfied that the City had the authority under its Bylaw to consult with CPS as part of its review process to determine whether the issuance of a business licence would be appropriate. Appeal dismissed.

Costs Imposed by the City is Not a Human Rights Discrimination
Pan v Village of Standard, *2024 AHRC* 35 https://canlii.ca/t/k3czb
The Complainant is a resident and owner of a hotel property in the Village of Standard ("Village"). The Complainant alleges that the Village discriminated against him by pursuing an outstanding tax amount due to his Chinese ancestry contrary to the *Alberta Human Rights Act* ("*Act*"). The human rights complaint was dismissed, and the Complainant appealed.

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Amicus *cont'd from page 21*

there is a "well-established custom" of government authority? These cases will require intensive factual development around the government employee's authority, and we will learn more as lower courts issue decisions in this area.

Local government attorneys should review the decision and their social media policies to ensure compliance with the decision. Just as importantly, training for local government officials and employees will be imperative to avoid liability in this area. IMLA developed a model social media policy in 2019 that primarily focuses on a local government's own use of social media, but also contains guidance regarding use of social media by employees and elected officials.. Much of that guidance in the policy is consistent with the Court's decision and the policy can be obtained from IMLA's resource library. While the law will continue to evolve in this area and attorneys would be wise to follow developments in their jurisdiction, the below practice pointers can be discerned from the Court's decision.

Practice Pointer #1:
The easiest and safest way to avoid liability is for employees and officials to have separate accounts for their private matters from any account related to their work at the City/County. However, as the Court explained, the First Amendment does not require that result. Moreover, because many aspects of a local government employee's job may be of general interest to that person and the community in general, it may be difficult or unrealistic for them to refrain from posting about their job.

Take Mr. Freed and COVID-19 as an example. At the time he was posting about the City's COVID-19 policies and other matters related to public health, the entire world was focused on those matters. To say that Mr. Freed could not post about COVID-19 on (what he considered) his private social media account or post about the City's policies would treat public employees as second-class citizens when it comes to the First Amendment, something the Constitution does not require.

Thus, it may be easier for some employees to maintain this wall of separation than for others. But the Constitution does not require the separation, nor can we, as local governments, dictate to employees that they are prohibited from posting about publicly available matters pertaining to work as such a directive from the local government could in and of itself run afoul of the First Amendment. Thus, while maintaining separate accounts is the gold standard, local governments should not mandate separate accounts. But they should certainly try to steer their employees and officials in this direction.

Practice Pointer #2:
Employer policies should prohibit employees from including the City/County's logo, email, and websites on their personal social media accounts. Policies should also clearly prohibit the use of City/County staff and resources to run the social media account. And employer policies should discourage

employees from identifying themselves as City/County employees when engaging in social media within their private capacity. However, as noted above, employers may not be in a position under the First Amendment to prohibit their employees from identifying themselves as a City/County employee. In that case, we move to Practice Pointer #3.

Practice Pointer #3:
If an employee chooses to identify themself as an employee of the City/County in a private social media account (after being discouraged from doing so), employer policy should require the use of disclaimers by the employee. As Justice Barrett notes in the decision, a disclaimer may provide a "heavy (though not irrebuttable) presumption" that the post made by the employee is personal. Something as simple as "These are my own opinions and do not necessarily represent those of the City/County." Employers should ensure their policies require these disclaimers.

Practice Pointer #4:
Employees should never post something to a personal social media account related to City/County business if the "personal" account is the only place that information is available. Justice Barrett made this point in the decision and employers should ensure their policies reflect this requirement.

Practice Pointer #5:
After employees have implemented the above on their social media accounts and policies have been updated, in conducting training, remind employees to be extremely careful about blocking an individual versus deleting their comments on any personal pages. If an official blocks someone from their so-called personal account, then their entire page will be under judicial scrutiny. If by contrast, the employee deletes a comment on a post about their dog, the review will be limited to the particular posts where the comments were deleted, not the whole page. The likelihood of liability greatly increases with blocking versus deleting.

Practice Pointer #6
As alluded to in some of the above practice pointers, in crafting your social media policy do not forget about your employees' First Amendment rights. That said, those rights are not unlimited in the public employment context. Employees must protect confidential information, adhere to the rules of ethics, public records laws, open meeting law requirements, and may be admonished not to attribute personal statements or opinions to that of the City/County. Further, their off duty conduct on social media can adversely affect the workplace and they should be reminded in employer social media policies not to create hostile work environments or violate other federal, state, or local laws.

Practice Pointer #7
IMLA's social media policy notes that localities should consider whether they should allow indemnification for employees and officials who violate

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either the government's own displays or private displays on public property.

d. Protests, Demonstrations, and Parades

The First Amendment supports participation in protests, demonstrations, rallies, parades, and similar events in many public places. To prepare for these events, government entities should:

- Be aware of the places that may be the site of First Amendment events.
- Have clear policies for handling the events.
- Adopt procedures for issuing permits in advance for events exceeding a designated size or in specified locations. Permitting procedures should allow for timely decisions and should accommodate spontaneous demonstrations that occur in response to recent occurrences.
- Promote an understanding of the government's obligations and its policies within the organization and in the community.

Government officials must accept that traditional public forums are open for free speech activities. However, governments can address health, safety, and welfare concerns. Some locations that fall within the definition of traditional public forum work better for protests and demonstrations than others. It may be necessary to reroute or relocate a proposed event from one traditional public forum to another for safety reasons.

Policies and practices can impose reasonable controls over the use of public property, preserve public safety, and prevent First Amendment violations by:

- Avoiding unconstitutional prior restraints.
- Limiting restrictions to reasonable, content-neutral time, place, and manner regulations. For example, regulations for these events sometimes set restrictions on the time of day when they may occur or limit sound amplification to a reasonable level.
- Ensuring that provisions for separating protesters from counter-protesters and others are no more burdensome than necessary (see Buffer Zones, below).
- Distinguishing between speech that is not protected, such as fighting words, from speech that is merely offensive to many (see *Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 246 (6th Cir. 2015)).
- Avoiding the heckler's veto, which results in silencing the speech of one party out of fear of a hostile reaction from others (see *Bible Believers*, 805 F.3d at 252).
- Preparing law enforcement officers to handle interactions with participants.

e. Buffer Zones

Regulations sometimes establish buffer zones limiting activities that normally get First Amendment protection, such as protesting or leafletting. In some cases, government entities have successfully used legislation or policies to create buffer zones that:

- Require pro-life advocates to keep their distance from clinics that provide abortions or from persons entering the clinics.
- Separate protesters and counter-protesters at rallies and demonstrations.

Counsel assisting in drafting regulations implementing buffer zones should feel comfortable the regulations are content neutral and can survive intermediate scrutiny. A buffer zone that is too big or overly intrusive improperly diminishes the communication potential of those required to stay outside the zone (see *Sisters for Life, Inc. v. Louisville-Jefferson Cnty.*, 56 F.4th 400 (6th Cir. 2022)).

f. Sexually Oriented Businesses

Many of the activities that take place in establishments known as adult businesses or sexually oriented businesses fall under the First Amendment's free speech protections. However, many local government leaders and citizens believe these businesses are detrimental and pose risks to their communities. Local governments must clearly define what sexually oriented businesses are before they attempt to regulate them. Without a precise definition:

- Code enforcers may struggle to determine whether a business is a sexually oriented business.
- Some officials may push for an overly wide view and attempt to regulate businesses that do not justify regulation as a sexually oriented business.

Some US Supreme Court cases have allowed local governments to target sexually oriented businesses for differential treatment. The Court has:

- Recognized that adult business regulations have an impact on the content of speech. However, society's interest in protecting sexually explicit expression is "of a wholly different, and lesser, magnitude" than other protected classes of speech (*Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976)). Even though adult business regulations single out a specific type of expression, courts often treat the regulations as they treat content-neutral regulations.
- Applied a lower level of scrutiny to the regulations when their intent is to address the businesses' secondary effects, such as crime and effects on property values. If the primary purpose is to address secondary effects associated with sexually oriented businesses, courts apply intermediate scrutiny review. The Supreme Court views ordinances that focus on the secondary effects of adult businesses and that do not completely ban the businesses as content-neutral time, place, and manner regulations. (*City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).) However, the emphasis on secondary effects should not rely

on merely speculative findings, but on evidence that fairly supports the government's rationale (*City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002)).

Local governments typically regulate adult businesses through a combination of approaches, which can include:

- Limiting the potential locations for sexually oriented businesses through zoning.
- Requiring sexually oriented businesses to apply for and maintain special licenses.
- Setting standards to regulate structural and operational aspects of the businesses.

Even if a local government justifies regulating adult businesses, its regulations must not be unconstitutionally overbroad or vague.

The Supreme Court has not addressed the impact of *Reed* on adult business regulations, but the US Courts of Appeals have had divergent views on its impact. The secondary effects doctrine still applies unless the Supreme Court or a court with jurisdiction over the local government entity determine otherwise. Local government counsel should continue to monitor case law developments for trends in the way courts treat the use of secondary effects to justify regulations.

g. Other Regulations Implicating the First Amendment

Regulations Targeting Religion or Religious Practices

Local governments should avoid adopting or enforcing regulations that control or prohibit religious conduct or conduct motivated by sincere religious belief (*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993)). For example, courts have ruled against government entities that:

- Suppressed a religious exercise by prohibiting the ritual slaughter of animals (*Church of the Lukumi*, 508 U.S. at 539-40).
- Discriminated against a religious group by prosecuting a Jehovah's Witnesses minister for violating an ordinance prohibiting persons from addressing religious gatherings when other groups were allowed to hold church services (*Fowler v. State of R.I.*, 345 U.S. 67 (1953)).
- Allowed secular groups to use school property for meetings after the school day but prohibited religious uses (*Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001)).

To satisfy the Free Exercise Clause, a regulation must be neutral and generally applicable. If the law is neutral and generally applicable, the government must provide a rational basis for the law. If the law is not neutral nor generally applicable, the government must survive strict scrutiny analysis. Even if a law appears neutral on its face, it is not neutral if its effect is to discriminate against religiously motivated conduct. (*Church of the Lukumi*, 508 U.S. at 531.) Additionally, governmental bodies themselves must be neutral decisionmakers and give full and fair consideration to religious objections (*Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 638-39 (2018)).

In addition to the Free Exercise Clause, federal law creates other causes of action for persons whose religious rights have been violated. The Religious Land Use and Institutionalized Persons Act (RLUIPA) prohibits local governments from implementing zoning and other land use regulations that infringe on religious exercise.

Noise Regulations

Laws that restrict loud or disruptive noises are content neutral if they make no reference to the communicative content of speech. Even when noise is expressive conduct, a noise restriction can be content neutral:

- If it targets the effects of the noise itself with no reference to content (*Ward*, 491 U.S. at 791-92; see also Porter *v. Martinez*, 68 F.4th 429, 441-42 (9th Cir. 2023), *cert. denied*, 2024 WL 759806 (Feb. 26, 2024) (upholding a prohibition on horn honking as applied to a motorist at a protest rally)).
- Even if it focuses on the noisemaker's function or purpose, such as interfering with the delivery of health services (see *March v. Mills*, 867 F.3d 46 (1st Cir. 2017)).

Flags

Regulating the types of flags an individual or private entity can display may invite a First Amendment challenge. Cities should use caution in attempting to distinguish between the types of flags that parties may display when:

- Sign ordinances or other regulations set standards for flags on private property. A regulation is content based if it exempts governmental flags from regulation while restricting flags with other messages.
- Private groups are allowed to display flags on public property. For example, the Supreme Court found that Boston exercised impermissible viewpoint discrimination when it refused to allow a Christian flag in a public plaza where it allowed other private flags (*Shurtleff*, 596 U.S. at 258).

5. The First Amendment in the Government Workplace

The First Amendment affects not only the way local governments interact with citizens, but also how they handle internal matters. Local government attorneys should understand the protections the First Amendment provides to government employees and applicants for employment.

a. Employee Protected Speech

The First Amendment protects a government employee's right to speak as a citizen on matters of public concern.

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First Amendment *cont'd from page 35*

When a government employer restricts employee speech, the restrictions must fall within constitutional limits. The outcome of a free speech challenge by a government employee generally depends on whether:

- The employee was speaking as a citizen rather than as an employee. An employee's speech made as part of official job duties is speech made as an employee and not as a citizen.
- The employee's speech was about a matter of public concern. Courts examine the context, form, and content of speech to determine whether it is a matter of public concern. Workplace concerns, such as duty assignments and office morale, are matters of personal interest that are not protected by the First Amendment.
- The employer has an adequate justification for regulating the employee's speech that outweighs the employee's interest in speaking on a matter of public concern. Courts balance the employee's interest with the government employer's legitimate interests in effectively performing its mission. The government may only restrict employee speech to the extent that the speech harms government operational interests, such as by interfering with proper discipline.
(*Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); see also *Connick v. Meyers*, 461 U.S. 138, 148-49 (1983).)

b. Freedom of Association in the Workplace

In public sector employment, freedom of association:

- Protects employees' rights to join a union or association and advocate for its interests (*Smith v. Ark. State Highway Emps. Loc. 1315*, 441 U.S. 463, 464-65 (1976)).
- Prevents public sector employers from allowing employee unions to require non-union members to pay dues or fees (*Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018);).
- Protects employees' rights to independent political affiliation and belief. Political patronage requirements satisfy First Amendment concerns only in limited situations, usually in positions involving policymaking or confidential relationships with a superior (see *Hall v. Babb*, 389 F.3d 758, 762 (7th Cir. 2004)).

c. Freedom of Religion in the Workplace

To accommodate the exercise of religion, government employers:
May not discriminate against employees or applicants on the basis of religion.

- Must reasonably accommodate their employees' religious practices unless an accommodation would create an undue hardship for the government. Examples of reasonable accommodations can include measures such as:modifying schedules to permit employees to engage in or observe religious practices;
- permitting religious expression in the workplace, such as allowing employees to display religious symbols at their workstations or proselytize, unless it is harassing to other employees; and
- making exceptions to a dress code policy to permit employees to wear religious attire or symbols.

Employment claims involving the Free Exercise Clause typically also allege violations of Title VII of the Civil Rights Act of 1964. Title VII applies to most public and private employers with 15 or more employees. Individuals may enforce their rights under Title VII by filing a claim with the Equal Employment Opportunity Commission (EEOC). The EEOC may also file a lawsuit to enforce Title VII on behalf of an individual or individuals.

6. Consequences of Violating the First Amendment

Under 42 U.S.C. Section 1983, local governments and their officials and employees are subject to civil liability if they deprive individuals of their constitutional rights. A successful plaintiff in a Section 1983 action may obtain one or more of the following:

- Prospective relief (typically, an injunction or declaratory judgment).
- Compensatory judgment.
- Punitive damages.
- Attorneys' fees.
- Costs.

CONCLUSION:

First Amendment freedoms are fundamental to our national character and are rightfully guarded with vigor. American governments at every level have a duty to protect those rights. This article has been an effort to provide a brief but expansive overview of the principles and precedents which can assist local government lawyers as they craft, enforce, and interpret regulations which assure that the First Amendment continues to thrive in their communities.

EDITOR'S NOTE: This article is adapted from a Practice Note published by Practical Law, titled First Amendment Issues for Local Government: Overview.

NOTES

1. Local government attorneys should also be familiar with rights granted under state constitutions that complement or add to the rights granted by the First Amendment.

Amicus *cont'd from page 33*

the social media policy. For example, if the policy indicates that officials and employees must have disclaimers on private accounts noting that the views expressed on that account are private and not that of the City/County and the employee/official fails to provide such a disclaimer and the account is later found to be subject to the First Amendment, should the employer indemnify that employee for the ensuing lawsuit? If the failure to provide a disclaimer created liability and violated policy, employers should consider whether indemnification is appropriate in these circumstances.

NOTES

1. Gonzalez v. Google, No. 21-1333, Oral Argument Trans., p. 45:25 – 46:3.
2. In addition to Lindke v. Freed, the Court also heard argument in Moody v. NetChoice, LLC, No. 22-277 and NetChoice, LLC v. Paxton, No. 22-55, which pertain to state laws regulating content moderation decisions on certain websites, including social media websites and Murthy v. Missouri, No. 23-411 which involves issues of government speech and coercion as between the federal government and social media companies.
3. The brevity of the decision was even more surprising given that the Court granted certiorari in two cases involving this issue. O'Connor-Ratcliff v. Garnier resulted in a per curiam short decision vacating the Ninth Circuit's judgment and remanding the case to consider in light of the new test adopted by the Court in Lindke. The Court did not shed light on how the test it adopted might apply to the different facts in Garnier, including to elected officials and members of a body.
4. The amicus brief was authored by Caroline Mackie & Robert Hagemann of Poyner Spruill and can be viewed here: https://www.supremecourt.gov/DocketPDF/22/22-611/270245/20230630170439817_22-611%20Amicus%20BOM%20IMLA.pdf.
5. Lindke v. Freed, 37 F.4th 1199, 1203 (6th Cir. 2022).
6. Garnier v. O'Connor-Ratcliff, 41 F.4th 1158, 1170 (9th Cir. 2022).
7. Lindke v. Freed, 144 S. Ct. 756, 762 (2024).
8. *Id*. at 766-767.
9. *Id*. at 767.
10. *Id*. at 766.
11. *Id*. at 764 (emphasis in the original) (internal quotations omitted).
12. *Id*. at 768.
13. *Id*. at 769.
14. *Id*. at 765.
15. *Id*. at 766.
16. *Id*.
17. *Id*. at 770.
18. *Id*. President Trump was subject to a similar lawsuit that was ultimately dismissed as moot after he was no longer in office. One of the factors the Second Circuit looked at in determining that Mr. Trump had engaged in official governmental action was his use of governmental resources in running the account. *See* Knight First Amend. Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 235 (2d Cir. 2019), cert. granted, judgment vacated sub nom. Biden v. Knight First Amend. Inst. atz Columbia Univ., 141 S. Ct. 1220, 209 L. Ed. 2d 519 (2021), and abrogated by Lindke v. Freed, 144 S. Ct. 756 (2024).
19. *Id*. at 768.
20. *Id*.
21. *Id*. at 769-770.
22. *Id*. at 770.
23. *Id*. at 769.
24. *Id*. at 769, n. 2.
25. *Id*. at 770.
26. *Id*.
27. *Id*.

Inside Canada *cont'd from page 31*

HELD: Application dismissed.

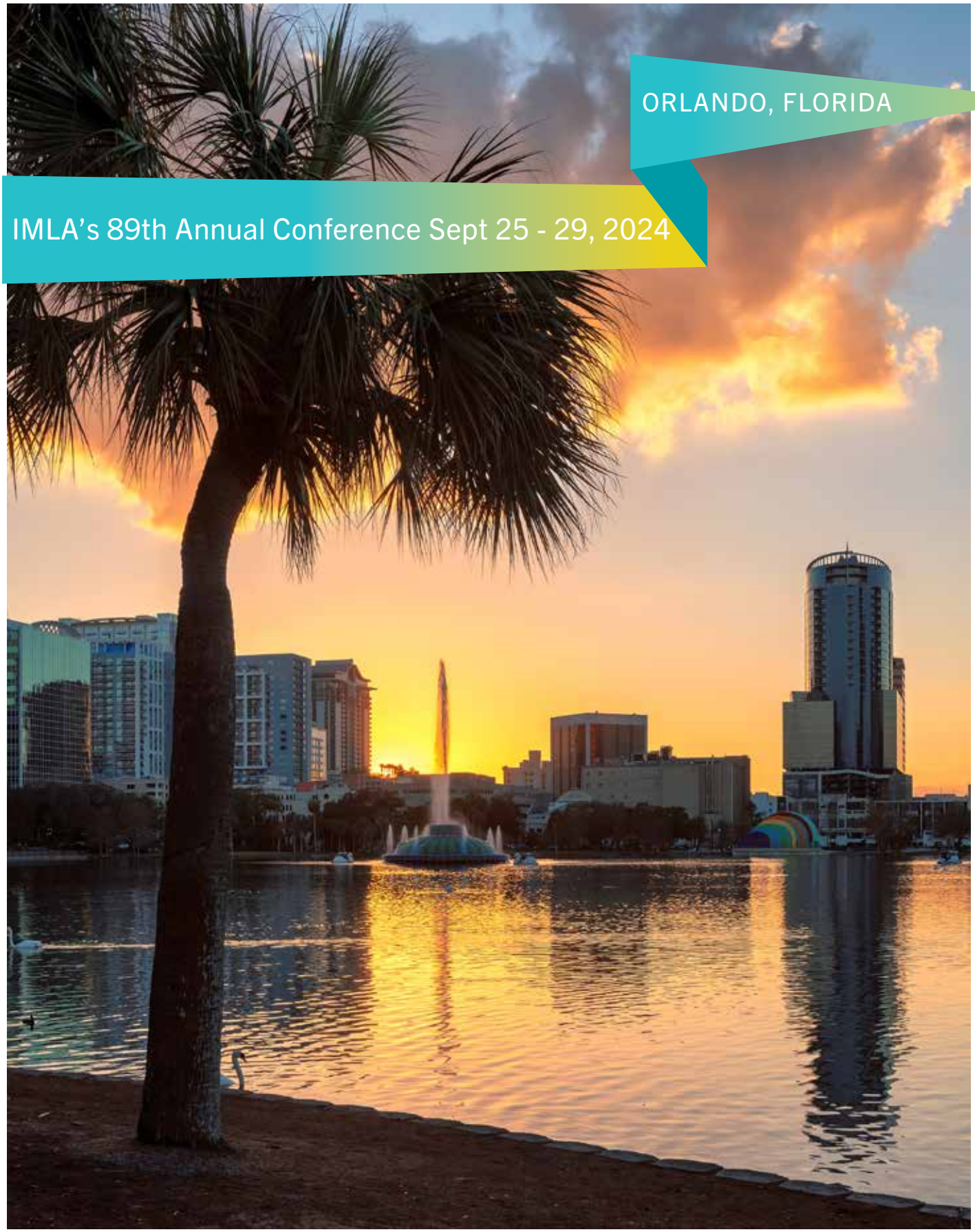
DISCUSSION: The Complainant alleged he received an outstanding tax bill in the amount of $29,000 accompanied by a threatening letter from the Village to auction his hotel if the arrears remained unpaid. The Village submitted evidence that the Complainant did not have an outstanding tax bill, but rather had been incurring fines for the removal of an illegal mobile home that was towed from his property and had remained impounded in a lot that charged a daily fee since 2016. Furthermore, the Village provided correspondence between staff and the Complainant that advised him the mobile home was illegal on his property and would be seized if not removed. The Complainant submitted that the Village's actions were solely based on race, as he and his family are the only Chinese family living in the Village. The complaint was dismissed by the Director of the Human Rights Commission ("Director"). The Director held that simply being part of a particular race, without evidence to support alleged discrimination, was not sufficient to establish that the Village's treatment occurred because of a protected ground. Upon review of the decision to dismiss, the Adjudicator agreed with the Director. The Adjudicator acknowledged that the Complainant was a member of a protected class under the *Act*, and that he suffered negative consequences when the mobile home was seized from his property and daily charges were incurred. However, the Adjudicator was satisfied that the Village provided a reasonable non-discriminatory explanation for the seizure of the mobile home and the costs incurred. Therefore, the Board concluded the Complainant was not discriminated against on the basis or race or colour, ancestry, and place of origin under the *Act*. The Director's decision to dismiss the complaint was upheld. Application dismissed. ML

Day in the Life *cont'd from page 29*

happen sometimes has to wait until nighttime or the weekends. I try not to interfere with that time too much, but that's when things finally quiet down and you get to focus. I balance all of that around two kids and their activities; I have one who's a freshman in college, and one who's still in high school.. Another perk of local government work, in general, and in Cary in particular, is the flexibility to be able to do what I need to do during the day for my kids and for myself, and not be stuck at my desk. I'm flexible to work from home sometimes or leave early. I always know that the work is going to get done and the timing around when it gets done is not as important as it getting finished. Local government doesn't have the pressure of billable hours; a normal 40-hour week is what we expect. Sometimes we have to work more than that, but we try not to exceed that too often.

What are some of your hobbies or ways you like to spend your time outside of work/with your kids?
I love reading, so reading anything–fiction, non-fiction–I've been trying to do more of that in the past year or two; increasing my number of books read per year has been pretty exciting. We also have season tickets to the Carolina Ballet, which is the professional ballet company in Raleigh. I love to exercise–jazzercise is my exercise of choice. I did want to say–because I just think this is interesting–I work for Cary, but I do not live in Cary. I live in Apex, which is a neighboring municipality. Obviously, living in Cary is not a requirement to be the Town Attorney. My predecessor didn't live here either. I'm always curious about this for other attorneys. For me, it's nice to have that separation between work and home life.

I'll have to add that to my list of interview questions! To wrap things up, do you mind giving us a few book recommendations?
For work purposes, *Leadership on the Line* is the book I mentioned earlier. Our manager, Sean Stegall, brought that book to us when he came to Cary, and it's become our staff's vocabulary. For recreational reading, I'll give you two. I was recently introduced to the author Ross Gay. His newest book is called *The Book of (More) Delights: Essays*. It's a short collection of essays about things that are delightful, and things that have made him think. It's very poetic and elevates my mood when I read one of his essays. There's also a popular book that I just finished and really liked called *Tomorrow, and Tomorrow, and Tomorrow* by Gabrielle Zevin. It spans several decades of time from the 1980s onward and was hard to put down.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