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Overcoming Human-Nature Dualism In The Texas Hill Country: Local Governments And Urban Spaces





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In reversing four decades of what had been settled *Chevron* deference, the Supreme Court's recent *Loper Bright Enterprises* decision promises to radically restrict federal agency authority and replace it with judicial oversight. But that transformation may not be as sweeping at the state and local level.

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By: AJ Urteaga, Assistant City Attorney, Land Use & Real Estate Division, Austin, Texas

A common perception is that biodiversity has little to do with heavily populated urban areas. But the reality is that cityscapes can be home to a wider array of plant and animal life than most of us would suspect—it just takes a broader awareness of the possibilities and a shift in focus.

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EDITOR'S NOTE



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

On the Continuity of Change

Dear IMLA Colleagues-

As we deliver this September-October *Municipal Lawyer*, it's official--summer 2024 is all but over. Our boisterous beaches and teeming national parks are gradually going quiet, throngs replaced by solitude. Closer to home, there is more irrefutable evidence: sunlight diminishing minute by minute each day, almost imperceptibly at first but obvious as weeks pass. Before month-end, the sun will have crossed from our planet's Northern Hemisphere to the Southern, replicating an eons-old pattern that will eventually bring winter for the vast majority of earth dwellers--90 percent in fact--who live above the equator.

For most of us in the municipal law ecosphere, autumnal change will be more than celestial. Labor Day, installed nationally during Grover Cleveland's second term to celebrate America's workers, now signals the retreat of languorous dog days and the renewed ascendancy of occupational responsibilities. At the local government level, front and center among these duties may be education, as more than 13,000 school districts nationwide welcome back 50 million young learners, building the skills and capabilities of a new generation to carry us into the future. A shorter-term focus will absorb many local leadership teams, law departments included, who will be expending significant hours compiling budgets that reflect expectations and estimates for the upcoming year. And even more immediate will be our local preparations for elections—not merely the transformative national and statewide contests on November 5, but also on a much more granular level: the general election in Bethany Beach, Delaware; Boise's special election to fill a School District at-large seat; Blenheim, South Carolina's mayoral special election; recall elections in Cottonwood and Navaho Nation, Arizona; and the Ward 2 special election in Jackson City, Mississippi, to identify a few, with hundreds more. Whether pivotal nationwide contests or small-town races, local governments will be tasked with huge responsibilities to ensure the transparency and fairness central to our democracy, from voter registration to ballot design, poll worker recruitment and training, early voting and absentee balloting, election day operations, vote counting and tabulation, and certification of results.

On a more modest level, the autumnal equinox also marks an inflection point for IMLA. This fall, we say farewell to outgoing IMLA President Rosemary Humway-Warmuth (City Solicitor, Wheeling, West Virginia) and welcome Jeff Dana (City Solicitor, Providence, Rhode Island) to lead us until September 2025. Our Annual Conference begins IMLA's programming season, and as Rosemary writes in her final President's Letter, this year's event promises to be outstanding, both in terms of education and interaction. Among the always topical Conference sessions (ILGL basics, Section 1983, Code Enforcement, Affirmative Litigation, and many more) this year's menu includes one sitting devoted to the above-referenced local government function of crucial consequence for 2024: elections. Beyond the Conference, other IMLA activities gain renewed momentum as autumn arrives. Work groups gather participants, webinar schedules come together, and legal advocacy takes on growing vitality with the start of the Supreme Court's October Term.

Among IMLA's attributes noted by Rosemary in her outgoing missive are the breadth, commitment, and contributions of our members—characteristics that are evident in this issue of *ML*. For starters, our cover article on urban biodiversity is by McCarley Scholarship winner AJ Urteaga, a very recent addition to the ranks of government lawyers, serving as Assistant City Attorney in the City of Austin's Land Use & Real Estate Division. To that we add submissions by three IMLA Fellows: Ben Mount, Senior Assistant General Counsel, North Carolina League of Municipalities (the nuances of eminent domain); Chris Towle, City Attorney, Newton, Kansas (advice on employment testing); and Julian Grant, Deputy City Attorney, San Marcos, Texas (recertifying his Fellows status with an update on legislative prayer). Two longstanding contributors provide further insights —IMLA General Counsel and Executive Director Amanda Karras (significant upcoming Supreme Court cases) and Hamilton, Ontario Director of Municipal Law and Licensing Compliance Monica Ciriello (recent decisions of interest). And we receive an analysis of the local implications of *Chevron's* demise from Norman Dupont, of counsel to Aleshire & Wynder, California, who has been practicing local government law for more than four decades.

To echo Rosemary's thoughts, I encourage you to take advantage of all the services and opportunities offered by IMLA. Thank you for your responses to our Listserv questions, your work group participation, your interest and attendance at our webinars, your *ML* articles, your amicus inquiries, and many other contributions that enable our small team to succeed. And we look forward to joining you in Orlando as fall approaches.

Best regards-

Erich Eiselt

PRESIDENT'S LETTER



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

Playing Your Part in Continuity and Excellence

Dear IMLA Colleagues-
As we approach our highly anticipated 2024 IMLA Annual Conference in Orlando, Florida, I am filled with both pride and excitement. This year marks the 89th anniversary of our association's outstanding tradition of gathering together to share knowledge, foster relationships, and plan for the future. Our Annual Conference (September 25-29 this year) is more than just a convocation; it is a cornerstone event that upholds our values, strengthens our community, and ensures our continued success. This year's venue--Signa Hilton Bonnet Creek and the adjacent Waldorf Astoria property in Orlando--will provide a wonderful setting for our educational sessions and social activities!

The upcoming Conference is particularly special for me, as I will be passing the gavel to our next IMLA President, Jeffrey Dana. It has been a sincere honor to serve you all as IMLA's President over the past year, which has flown by. I am grateful for the opportunity to get to know more of you during my term, and for the unwavering support and dedication of our members. And I know you will continue your commitment and passion for our organization as our incoming President leads IMLA forward.

Why Attend?
Beyond welcoming a new slate of leadership to our organization, there are so many reasons to attend our Conference:

1. Networking and Collaboration: Our Annual Conference provides an unparalleled opportunity to connect with fellow members, industry leaders, and peers. The relationships forged and the ideas exchanged during these gatherings often lead to lifelong partnerships and innovative collaborations.

2. **Knowledge and Growth:** With a range of sessions, workshops, and keynote speeches, attendees will gain valuable insights into the latest trends, research, and best practices in our field. This knowledge is crucial for personal and professional growth.

3. **Family-Friendly Venue:** We are delighted to host this year's meeting at the beautiful Bonnet Creek Resort in Orlando, a venue that welcomes families. We have scheduled free time for attendees to relax and engage in a variety of fun activities with their loved ones. This is a perfect opportunity to blend professional development with family bonding.

The Importance of Serving on the Board of Directors.
Serving on IMLA's Board of Directors is an integral way to contribute to our organization's strength and direction. Board members, working with IMLA's Executive Director and Staff, dedicate many hours to ensure that we remain strategically focused on our goals and mission. Their commitment helps us navigate challenges and seize opportunities, securing a bright future for our association.

Your Role in Our Success.
Every member plays a vital role in keeping our association strong. Whether you are a long-standing member or new to our community, your participation and engagement are crucial. By attending the Annual Conference, volunteering for committees, taking on speaker/presenter opportunities, becoming an IMLA Fellow, providing articles for *Municipal Lawyer*, or simply sharing your insights on our Listservs and via our Work Groups, you help IMLA thrive and grow.

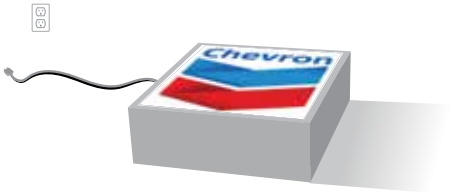
I encourage each of you to consider the value you can bring by getting involved, whether through Board service or active participation in our events and initiatives. Join a Work Group, attend a webinar, submit an article, respond to a query on the Listserv. Together, we can achieve remarkable things!

In closing, I urge you to attend our Annual Conference, not just for your professional benefit, but for the opportunity to be part of a community that cares deeply about its members and their families. Don't hesitate to reach out to me, or any member of the IMLA Board or Staff because our association is, and always will be, the most comprehensive resource for education, collaboration, and advocacy on behalf of local government lawyers.

Let's come together to celebrate our achievements, thank the IMLA team, share our visions for the future, and build lasting memories. Thank you for your continued support and dedication to IMLA. I look forward to seeing you and your families at the 89th Annual Conference.

"It ain't necessarily so"— The Supreme Court's Narrow Ruling in *Loper Bright Enterprises* Means Little to the Municipal Lawyer

By: NORMAN A. DUPONT
Counsel to Aleshire & Wynder LLP, Westlake Village. California



The Supreme Court in June of this year announced what many termed a "blockbuster" bomb of a decision. In *Loper Bright Enterprises*, *Inc.* v. *Raimondo*[1] the Court decisively destroyed the 40-year old *Chevron*[2] doctrine of judicial deference to federal administrative agencies, at least in cases of an ambiguous statutory text. It left behind a ruined foundation of federal court interaction with future federal administrative agencies, a foundation pockmarked by references to "perhaps" an 80-year old doctrine of deference (sometimes) known as the *Skidmore* doctrine.[3]

The Court in *Loper Bright* did not overrule the hundreds, nay thousands, of prior lower court decisions premised on the previously accepted *Chevron* doctrine. In a curious bow of deference to the doctrine of stare decisis that was otherwise knocked about by the majority (with a special 30-page concurrence by Justice Gorsuch), the Chief Justice's somewhat inconsistent opinion ends by stating that: "[W]e do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory stare decisis despite our change in interpretative methodology." A cynic might observe that this invocation of stare decisis, but only in part, resembles the famous observation of the Red Queen (actually Humpty Dumpty—"A word means what I want it to mean, nothing more, nothing less."[4] Cynicism aside, in terms of federal administrative law, the Court's June decision is truly significant by any measure—it destroyed a doctrine used by thousands of lower courts and invoked even outside of a litigation forum in countless citations by federal agencies seeking to justify their positions.

"It ain't necessarily so" is the probing song of Sportin' Life, the complex *Porgy and Bess* character who questions whether some of the stories allegedly based on Biblical lore are in fact literally true. In a jocular fashion, 'Sportin' Life questions whether "little Jonah" really lived in a whale's abdomen, or whether you could call a 900-year old Methuselah "living" when no women would "give in to no man what is 900 years."[5]

So too, the municipal lawyer must question whether the Supreme Court's decision in *Loper Bright* has any "necessary" impact to her or his practice. The practice of many municipal lawyers revolves around not federal but state-based agencies which issue their own rules and regulations. To be sure, some state regulations in environmental areas (and various others) have federal analogues—most states have "Clean Air" statutes that to some degree mirror the federal Clean Air Act. Many states have environmental laws protective of state waters that also mirror federal statutory provisions. Most states have state emergency action agencies akin to the Federal Emergency Management Agency (FEMA). It is, however, not necessarily the case that the state agencies charged with implementing these laws are given the same level of deference as federal agencies are (or at least were until this June).

This article examines the limits of the Supreme Court's holding in *Loper Bright* and then briefly examines judicial deference to administrative agencies in three states—California, New York, and Iowa. The net result shows that deference by judges to determinations in those states is alive and well, notwithstanding *Loper Bright*.

Loper Bright's Holding—*Chevron* style deference is wrong, but it is not unconstitutional

The municipal advocate whose practice with agencies is primarily in state court must first understand the limits of the holding in *Loper Bright*. It was not founded on constitutional prin-

ciples of separation of powers—i.e., that the judicial power to determine the meaning of laws was a "separate" power not subject to administrative agency override. While the majority opinion starts off with some constitutional-sounding observations based on the Federalist papers and citation to the Court's early cases in the 1800s, it then takes a distinct left turn to discuss the expanded federal regulatory world during the New Deal of the 1930s and 1940s. [6] The Chief Justice then appraises judicial review of New Deal agency decisions by suggesting that those cases stand for the proposition that: "as new agencies with new powers proliferated, the Court continued to adhere to the traditional understanding that questions of law were for courts to decide. . ." [7]

The Chief Justice's historical narrative omits one telling period of the Court in the early 1930s in which a coalition of conservative justices rejected a number of agencies and agency positions based on the purported restrictions of the commerce clause and "personal liberties," an assertion of raw judicial authority that lead to a "court-packing plan" to expand the number of Supreme Court justices.[8] Given today's scrutiny of the Court, it is perhaps inevitable that the Chief Justice simply omitted earlier examples of judicial overreach that triggered Presidential efforts to rein in the Court.

The Chief Justice's historical narrative, which attempts to shape history to his theme that "judges always decided the law" ran into two cases that arguably went the other way—*Gray* v. *Powell* and *NLRB* v. *Hearst Publications, Inc.* [9] The Chief Justice essentially treats these two cases as anomalies in the greater river of uniform assertion of judicial rights and finally cites a legal treatise and a law review article for the proposition that the deference shown in those two cases was not uniformly applied. [10]

After slogging through the historical swamp of somewhat inconsistent precedents, the majority opinion then takes another sharp left turn. It is not that *Chevron* style-deference defies what the Chief Justice describes as prior (pre-1994) precedent, it is rather that *Chevron* violates a statute—the federal Administrative Procedures Act (APA). The Chief Justice cites to section 706 of the APA as providing that "the reviewing court shall decide all relevant questions of law. . ." [11] He then concludes that this text, combined with legislative history, supports and confirms the "traditional" understanding of a supreme judiciary and that the 1994 decision in *Chevron* cannot be squared with the language of the federal APA. [12]

After dealing with the nettlesome doctrine of stare decisis for a case that had 40 years of support in courts, treatises, and even law review articles, the majority opinion concludes that: "under the APA [courts] may not defer to an agency interpretation of the law simply because a statute is ambiguous." [13]

The alternative path to overturning *Chevron* would have been to reach even further and hold that as a matter of the U.S. Constitution no one, not even Congress in amending the APA, could limit judicial power.

Only one Justice, Justice Thomas, espoused this Constitutional separation of powers argument, citing to many of his own prior dissenting or concurring opinions. Justice Thomas' concurring opinion was a singular one, with no other Justice joining him on those grounds. [14]

The critical take-away for the municipal lawyer is that the Supreme Court's holding was limited to its reading of the federal APA. A number of States have enacted their own "State Administrative Procedures Act[s]", but these statutes may vary significantly in their form and content from the federal APA. [15]

The critical take-away for the municipal lawyer is that the Supreme Court's holding was limited to its reading of the federal APA. A number of States have enacted their own "State Administrative Procedures Act[s]", but these statutes may vary significantly in their form and content from the federal APA.

State Court Deference to Administrative Agencies—A few examples

1. *California-Deference for "Quasi-Legislative" Rules.* A key case in California discussing the scope of deference to administrative agencies in that state arises from an "only in California" context of a seller of musical instruments (Yamaha guitars) who purchased them outside the state, stored them within the state, and then gave them away as promotional items. The California taxing authority, going by the curious name of the State "Board of Equalization," imposed use taxes and cited as authority for doing so one of its own

Continued on page 8



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.

Loper Bright *cont'd from page 7*

"annotations" to a guidance called Business Taxes Law Guide. There is no evidence that this (or other) annotations were promulgated as formal rules pursuant to California's state administrative procedures act.[16] The California Supreme Court distinguished between two types of agency actions—the quasi-legislative and the "interpretative of a statute." As to the former category, which the California Supreme Court described as "regulations adopted by an agency to which the Legislature has confided the power to 'make law,' those actions "*if* authorized by the enabling legislation, bind this and other courts as firmly as statutes themselves."[17] As to other agency determinations that purport to interpret the legal effect of a statute, those are subject to a more searching degree of judicial scrutiny in California, one the Court in *Yamaha* described in vague terms—"Its power to persuade is both circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation."

This standard of review sounds much like the standard suggested by the U.S. Supreme Court in *Loper Bright*; as the California Supreme Court put it: "'The standard for judicial review of agency interpretation of law is the independent judgment of the court, giving deference to the determination of the agency appropriate to the circumstances of the agency action.'"[18] In an almost foretelling of the decision in *Loper Bright*, the California Supreme Court quoted and cited as a "valuable judicial account" the 1944 decision in *Skidmore*, *supra*. The California Supreme Court in *Yamaha* held that the lower courts gave too much weight to the taxing authority's annotation. Then, in an utterly unhelpful conclusion the Court punted on the ultimate issue, stating that it was remanding without expressing an opinion on the merits of the underlying question of the imposition of a use tax on Yamaha's products.[19]

2. Iowa—Deference if the Issue has been "Clearly Delegated" by the Legislature to the Agency.

Iowa is a vastly different state than California, so much so that it one might say in Iowa City: "Dorothy, you're not in Hollywood anymore!" But in the area of judicial review of administrative agencies Iowa is actually quite similar to California. In 2012 the Iowa Supreme Court reviewed the determination of a Workers' Compensation Commissioner as to the meaning of "suitable [alternative] work" because the injured employee's residence was some 380 miles away from the proffered alternative. The Iowa Supreme Court also reviewed the Commissioner's determination of the extent of the disability suffered by Mr. Neal.[20]

As to the first issue of whether the Commissioner had properly assessed the meaning of the phrase "suitable work" as defined by the Iowan Code, the Supreme Court stated a deferential standard as to an agency decision within the scope of its legislatively granted domain as to factual determinations. Such factual determinations are "binding" if supported by substantial evidence.[21] As to the ultimate question of the ultimate meaning of the legislative term "suitable work," however, the Iowa Supreme Court drew a different standard of deference, finding that the legislature did not clearly vest interpretative authority to the Worker's Compensation Commissioner and that: "we accord no deference to the interpretation of the commissioners and will substitute our own judgment if we conclude the commissioner made an error of law."[22] To explain the scope of the Court's own judgment, the Supreme Court then explored the exact statutory text, adjacent words that might modify or give context to the term "suitable work," and also explored the precedents in Iowa and other states considering geographic proximity to be a relevant factor in a variety of employment settings. Only after its own independent analysis did the Court conclude that the Commissioner's interpretation of this phrase was not legal error, and therefore that his conclusion that offering an injured employee a possible job some 380 miles away from his home was not "suitable work."[23]

The Iowa Supreme Court's standard of review of agency determinations, at least as articulated in *Neal*, is a flexible one depending on whether it is a review of fact (more deferential) or issues of law (less deferential). Nonetheless, in much of the discussion of the ultimate role of the judiciary this opinion mirrors portions of the discussion by the California Supreme Court in *Yamaha*.

3. Recent Standard of Deference in the New York Court of Appeal.

The New York Court of Appeal addressed that state's standard of judicial deference to agency decisions in the case of a doctor who rendered possibly deficient medical services at the informal request (but not an express request) by the Department of Corrections was entitled to a statutory indemnity.[24] The agency in question, the New York Attorney General's office, rejected the doctor's request for indemnification against a subsequent medical malpractice suit, finding that he was not covered as an employee of the Department but rather more of an independent contractor. The Court of Appeal considered this ruling and the appropriate degree of deference to be accorded in this context. It stated the general rule that in New York deference is accorded to an agency's interpretation of law when it involves "specialized competence of expertise the agency has developed in administering the statute." On the other hand, where the question "is one of pure statutory reading and analysis. . .the judiciary need not accord any deference to the agency's determination."[25]

In this case, the Court of Appeal determined that whether a service was performed "at the request of" the Department of Corrections did not involve "specialized knowledge or expertise" of the Attorney General. Accordingly, it went on to its own independent statutory interpretation and concluded that the Attorney General

reached the correct conclusion, albeit based on the Court's review of statutory text and history.[26] No doubt the New York Attorney General appreciated the result, despite the subtle inference that her office had no "special expertise" in interpreting New York statutes in general.

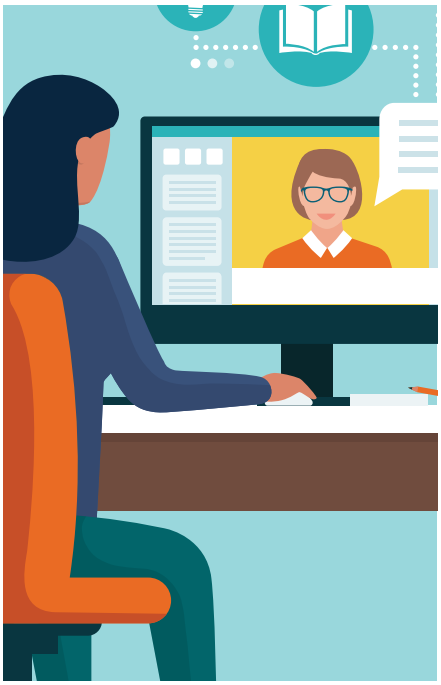
4. It ain't necessarily so. . .

Loper Bright received much publicity as a blockbuster or landmark decision in both the legal and popular press. What it did not do was to reach its decision based on Constitutional grounds. This leaves the City Attorney, or the municipal lawyer advising a City, with the unenviable task of pouring through the judicial decisions of her or his particular state jurisdiction as to judicial deference given in that state. Many municipal matters involve administrative proceedings (zoning decisions, environmental review processes, or the like) as to which the attorney defending the city might well seek to invoke the cloak of judicial deference to fend off attacks by gadflies. For these matters, the core inquiry remains as to the specific expertise that the deciding body had and invoked to resolve a particular issue.

Finally, the municipal lawyer should be alert to changes in precedent as to deference accorded to an administrative agency. Conventional wisdom suggests that *Loper Bright* eradicated judicial deference to agency interpretation in every venue across the nation, but"it ain't necessarily so," and local government attorneys will still need to keep aware of the dimensions of *Chevron*-style deference in their own.

Notes

1. ___ U.S. ___; ___ S. Ct. ____ (June 23, 2024).
2. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).
3. Skidmore v. Swift & Co., 323 U.S. 134 (1944). Chief Justice Robert's opinion for the 6-3 majority described Skidmore as "most notably along those lines" (of the majority's preferred style of judicial deference) in his opinion but does not directly hold that lower courts must now follow that standard of deference in lieu of *Chevron*.
4. Lewis. Carroll, *Through the Looking Glass and What Alice Found There (*1871).
5. George Gershwin, *Porgy & Bess* (1935).
6. *Loper Bright, supra*, 603 U.S. ___, ___ S. Ct. ___ (slip op. at 7-9).
7. *Id.*at 9.
8. *See* U.S. Supreme Court Historical Society, "FDR & the Court Packing Controversy: Full Script" available at: https://supremecourthistory.org/films/fdr-courtpacking-controversy-full-script/
9. *Loper Bright, supra*, (slip op. at 10-11).
10. *Id*. at 12.
11. *Id*. at 13-14 (citing 5 U.S.C. Sec. 706)
12. *Id*. at 18.
13. *Id*. at 18.
14. *Id*.(Thomas, J., concurring at 2) .
15. *See, e.g.,* Colorado State Administrative Procedure Act (Title 24, Chap. 4); New York "State Administrative Procedure Act" found in N.Y.Con.Law, Administrative Proc. Sec. 100, et. seq.; Cal. Gov. Code Section 11340 et. seq.
16. Yamaha Corporation of America v. State Board of Equalization, 19 Cal. 4th 1, 5-6, 79 Cal. Rptr. 2d 1 (1998).
17. *Id*. at 7.
18. *Id*. at 8.
19. *Id*. at 15.
20. Neal v. Annett Holdings, Inc., 814 N.W.2d 512 (2012).
21. *Id*. at 518.
22. *Id*. at 519.
23. *Id*. at 519-525.
24. Wang v. James, 40 N.Y.3d 497 (2023).
25. *Id*. at 501-502.
26. *Id*. at 502-503.



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Fit for Duty: A Municipal Law Practitioner's Guide to Implementing an Effective and Defensible Physical Abilities Test

By: CHRISTOPHER TOWLE,
City Attorney, Newton, Kansas



Introduction

Employers have a legitimate interest in evaluating employment candidates to determine whether they are capable of successfully performing the requisite job duties and functions. To perform competitively in the employment market, cities need to select the right person for the position in an effectively and efficiently manner. A thorough evaluation of employment candidates will extend beyond employment applications and interviews as employers utilize physical ability testing to identify the best candidate for the position using objective metrics. One challenge for city attorneys tasked with drafting or reviewing these physical ability testing policies will be to develop measures appropriate for a diverse group of jobs spread throughout various city departments.

While cities need to establish testing programs suitable for individualized positions that are effective in identifying the appropriate candidates, they need to do so in a way that does not illegally discriminate. Apart from the moral desire to implement a hiring process that promotes a diverse workforce and is fair to all that apply, city employers must consider the financial impact of either failing to properly evaluate candidates or implementing a testing program that has a discriminatory impact.

Failing to screen out an employee during the selection process can have an economic impact on cities with the cost of a single employee turnover being estimated to range from tens of thousands of dollars to one and a half to two times annual salary.[1] Additionally, cities should consider the costs of litigation and potential judgments as a consequence of implementing an illegal physical ability testing program. Apart from the costs and resources associated with defending these claims, the penalties can be significant when a physical abilities testing program is deemed to be improper.

In 2020, the EEOC and Walmart entered into a consent decree that required Walmart to end a physical ability testing program utilized for the hiring of order fillers at their grocery distribution center.[2,3] In their action against Walmart, the EEOC alleged that the physical ability testing program used for certain distribution center employees discriminated against against women.[4] It was further alleged that the Walmart physical abilities test was not related for the position in question and was not consistent with a business necessity.[5] The decree included a requirement that Walmart pay $20 million into a settlement fund.[6,7]

In 2019 the EEOC filed suit against Stan Koch & Sons Trucking for sex discrimination based on a pre-employment strength test.[8] In that suit, the EEOC alleged that the test disproportionately disqualified female truck drivers.[9] The case was resolved through a consent decree with Stan Koch & Sons agreeing to discontinue the test and to pay $500,000.[10]

The EEOC filed a similar suit against Schuster Company, another trucking company that utilized a physical abilities test comparable to the one implemented by by Koch & Sons.[11,12] As in the Koch & Sons matter, the EEOC alleged that the strength test used by the company discriminated against female truck drivers. The case was settled with Schuster Company agreeing to discontinue the test, pay damages, and to offer employment to a class of women whose jobs were impacted by the test.[13]

Charges of discrimination can also be brought by employees themselves. Twelve female police officers sued the City of Colorado Springs challenging a physical abilities test implemented by the City's Police Department.[14] This test was not limited to the pre-employment hiring process, but was required to be performed by all officers on an

annual basis.[15] The test evaluated the number of push-ups and sit-ups that officers could do in a timed period and also included two running tests.[16] The City ultimately entered into a settlement agreement paying $2,471,350 to the plaintiffs in a case that cost more than $960,000 to defend.[17]

Applicable Federal Laws

While physical abilities testing in the employment context is generally permissible, liability can attach in certain instances when the testing results in a discriminatory impact.[18] Aside from conforming with applicable state law, a city's physical abilities testing programs-both pre-employment and ongoing or annual testing-must comport with Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Pregnancy Discrimination Act, the Pregnant Workers Fairness Act, and the Age Discrimination in Employment Act of 1967.

Title VII

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits discrimination based on race, color, religion, sex, or national origin.[19] Pre-employment physical tests are permitted under Title VII unless deemed discriminatory.[20] It is a lawful employment practice for an employer to give and act upon the results of any professionally developed ability test provided that such test, its administration, or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.[21] Title VII prohibits both intentional discrimination[22] (disparate treatment) and unintentional discrimination (disparate impact).[23] As stated in *Griggs v. Duke Power Co*. "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[24]

Burden of Proof in Title VII Disparate Impact Cases

In a disparate impact Title VII employment discrimination claim, the court will adjudicate a motion for summary judgment utilizing the burden-shifting framework from *McDonnell Douglas Corp. v. Green*.[25] In order to shift the burden to the employer, the employee must establish that 1) the employee is a member of a protected class, 2) the employee was qualified for the position, 3) the employee was rejected for the position, and 4) the position remained open, and the employer continued to seek applicants.[26] Once these requirements are met, the employer must show a legitimate and non-discriminatory justification for the adverse action.[27]

Americans with Disabilities Act

Another federal employment law for municipal practitioners to consider is the Americans with Disabilities Act (ADA). The ADA prohibits covered entities from discriminating against employment candidates based upon a disability or perceived disability.[28] Local government employers are covered entities under the ADA, so any employment candidate submitting an application to the local government would be entitled to ADA protection, which can include accommodations in certain scenarios. In February of 2024 the EEOC entered into a consent decree with Hospital Housekeeping Systems, LLC which required a settlement payment of $520,000.[29] The EEOC alleged that Hospital Housekeeping Systems terminated certain employees after failing an essential functions test because of their disabilities, despite the fact that they were able to perform their job.[30]

Pregnancy Discrimination Act

The Pregnancy Discrimination Act (PDA) prohibits discrimination on the basis of pregnancy, childbirth, or pregnancy related medical conditions.[31]

Pregnant Workers Fairness Act

The Pregnant Workers Fairness Act (PWFA) requires certain employers to provide reasonable accommodations to qualified employees or applicants affected by pregnancy or childbirth unless the accommodation will cause an undue hardship.[32]

Age Discrimination in Employment Act

The Age Discrimination in Employment Act (ADEA) prohibits employment discrimination against persons 40 years old or older.[33]

Validation

When a physical ability test is challenged based on disparate impact, a significant issue will be the statistical data specific to the protected group. See the U.S. Department of Labor Guide related to testing and assessment which discusses the validation of such testing.[34,35] The Uniform Guidelines set forth three types of validation applicable to physical ability testing: [36]

1) **Criterion-related validation.** This This requires a statistical relationship between test performance and job performance. Criterion-related

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validation consists of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance.[37] "Criterion validity compares responses to future performance or to those obtained from other, more well-established surveys."[38]

2) **Content-related validation.** This requires a demonstration that the content of the test represents important job-related behaviors. "Content validity is the degree to which elements of an assessment instrument are relevant to a representative of the targeted construct for a particular assessment purpose."

3) **Construct-related validation.** This validation requires a demonstration that the test measures the construct or characteristic it claims to measure, and that the characteristic is important to the successful performance. "Construct validity represents the most complex and comprehensive form of validation."[39]

Erdman v. City of Madison

In *Erdman v. City of Madison*,[40] the Seventh Circuit considered a case involving Catherine Erdman, a female applicant for the Madison, Wisconsin Fire Department. Erdman was a veteran firefighter who had been promoted several times over the course of her career with a different fire department.[41]

At the time that Erdman applied for the position, the Madison Fire Department hiring process included an application with minimum requirements, a written test, a physical abilities test, an oral examination before a panel, and an interview with the chief.[42] After not being chosen for the position, Erdman filed an action against the City, alleging that the department's physical abilities test caused the City to discriminate against her on the basis of sex. The court referred to this physical abilities test as the "Madison Test" which was unique to the City of Madison and consisted of seven events designed to assess multiple physical demands that firefighters face on the job.

The court's analysis included an alternative candidate physical ability test established by the International Association of Fire Fighters (the IAFF Test).[43] The IAFF Test is a comparable physical abilities test and has many similarities to the Madison Test. However, there are differences between the two. Three of those differences outlined by the court included the method of timing each test, the number of attempts allowed, and the specific implementation of the pike pole event. The pike pole component was what ultimately disqualified Erdman from consideration. For the timing of the tests, the IAFF test establishes a maximum combined time to complete all events, whereas the Madison Test sets forth a time requirement for each component.[44] In terms of attempts, the IAFF Test provides each candidate with up to three attempts to pass, whereas the Madison Test limits each candidate to a single attempt. Both tests include a "pike pole" component which involves the candidate using a long pole with a hook on the end to simulate the action of reaching up to breach and pull down a ceiling to check for fire. However, the Court made a distinction between the two tests. Under the IAFF Test, the candidate can stand directly under the breached portion of the ceiling, whereas under the Madison Test the candidate can stand directly under the hook to push up, but they must move 18 inches back when completing the pull portion of the test.[45]

The court followed a three-step burden shifting framework to evaluate Erdman's claims against the City. First, the court considered whether the Madison Fire Department "uses a particular employment practice that causes a disparate impact" on an impermissible basis.[46, 47] The City challenged the the District Court's decision that Erdman had proved her *prima facie* case of disparate impact. Here, the court analyzed whether the scope of the review should include the entire test, or should focus only on the component that eliminated Erdman from consideration. Ultimately the Circuit Court agreed with the District Court in concluding that the entire Madison Test should be considered, not just the modified pike pole test.[48] Further, the court found that Erdman proved her *prima facie* case that the test had an improper disparate impact on women.

The second step was resolved through Erdman's conceding the Madison Test is "job related for the position and consistent with business necessity."[49]

The third step was ultimately resolved by the Circuit affirming the findings of the lower court in that the IAFF test was not an "available alternative employment practice that has less disparate impact while serving the needs of the Madison Fire Department.[50] Notwithstanding, given the procedural history of the case, the burden on the third step was on Erdman.[51] Given the nature of this case, even a slight deviation to the facts could have created a different result.

Practical Guidance

1) **Any physical abilities testing program should be designed to coincide with the specific job functions of the particular employment position.** Any physical abilities test offered by an employer should have a direct connection to the actual tasks to be performed. This would include not only the job responsibilities included in the job description but should also match the actual tasks performed in the field. Clearly, cities should avoid taking a "one size fits all" approach when implementing a testing program. When evaluating the physical abilities test in *Erdman*, the court pointed out that the Madison Test "focuses on job simulation activ-

ities, rather than traditional exercise-based activities."[52] The Colorado Springs suit referenced above represents the converse approach, which evaluated the number of push-ups and sit-ups officers could do in a timed period. Clearly, an employer will be better served to evaluate actual job performance as opposed to general fitness ability.

2) **Cities should track all available data related to the test.**
Any challenge to a physical abilities test based on a claim of disparate impact will involve a review of the data associated with the testing. Employers should consider the success rate of all applicants as well as those included in a protected class that may be subject to a discriminatory framework. This analysis should include comparable data for any available alternative test.

3) **Cities should determine whether the testing being offered is a physical abilities test or a medical examination.**
Under the ADA, pre-employment medical tests are prohibited.[53] Only after a conditional job offer is extended may an employer conduct medical examinations.[54] The EEOC defines a medical examination as "a procedure or test that seeks information about an individual's physical or mental impairments or health."[55] Generally, physical abilities testing is suitable in the pre-offer stage, but a physical ability test can be considered a medical exam if the test measures a physiological response such as heart rate or blood pressure. [56]

Conclusion

A detailed comprehensive physical ability testing program can undoubtedly provide city employers with a significant edge in the hiring process. However, a testing program that fails to accurately identify successful candidates or imposes a prejudicial effect can be determinantal to a city. Any testing framework that fails on either front will prove to be a liability.
City Attorneys should consider the current legal guidance and confirm that their client city utilizes a physical ability testing program that accurately measures the actual physical tasks of each employment position subject to testing. Further, the city should regularly review the data associated with its testing program to identify potential disparate impact and make the client organization aware that a discriminatory testing program can incur significant costs and resources in litigation.

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Overcoming Human-Nature Dualism in the Texas Hill Country: the Role of Local Governments and Urban Spaces

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INTRODUCTION

The Texas Hill Country is an iconic landscape known for its unique beauty and rich biodiversity. Located above the Edwards Aquifer at the southeastern edge of the Edwards Plateau, the region's rolling hills, karst geography, and crystal-clear springs support a number of plant and animal species found nowhere else in the world. However, rapid population growth and sprawling development continue to transform the area, threatening several endangered species. Habitat destruction making way for housing and other urban development is the leading cause of species decline in the Hill County, yet prior conservation efforts have largely ignored the potential of these newly urbanized areas to help promote biodiversity.

Traditional conservationist thinking has tended to equate the environment as belonging only to "rural" or "wild" places; places wholly separate and that need to be protected from the encroachment of urban society.[1] As a result, much of the biodiversity governance at the local level has focused on the designation and intensive management of protected areas.[2] While important, this urban vs. nature dualistic view overlooks the ways nature inhabits a city, the way cities rely on nature, and the potential benefits that forms of biodiversity can bring to urban areas.

Cities and other local governments are key jurisdictions in a world of multi-level governance and will play an important role in addressing the loss of nature. Though cities are often thought of as species- deserts and as themselves drivers of biodiversity loss, there is an increasing recognition of the role that urban green spaces, waterways, and wetlands serve in conservation, and their larger contributions to human health and well-being as whole.[3] Whether intended or unintended, cities provide a diverse array of unconventional habitats for a number of plant and animal species. These spaces provide opportunities for people in urban and suburban communities to connect with nature and instill values necessary for broader support of environmental solutions.

Challenges in Local Biodiversity Governance

Located in the south-central portion of the state, at the convergence of several distinct ecoregions, the Texas Hill Country supports a diversity of life including several species found nowhere else in the world. The region is situated at a biodiversity crossroads, home to species representative of the desert to the west, grasslands to the north, forest to the east, and tropics to the south. Today, however, the Hill Country and its abundance the very resources that have drawn and supported humans here for generations are under threat due to sprawling development, changing hydrologic conditions, and a unique set of regulatory challenges and competing political considerations that impact biodiversity governance and ecosystem services at the local level. The Texas Hill Country is experiencing rapid growth and is among the fastest-growing regions in the United States. With the population that has increased by 50% in just the last 20 years,[4] the area faces significant challenges in balancing urban expansion with habitat conservation.

The primary causes of biodiversity loss in the Texas Hill Country are habitat destruction, degradation, and fragmentation due to increased impervious development, particularly along the I-35 Corridor and in unincorporated areas, or areas outside of city limits. For example, over the just the last twenty years, the population in unincorporated areas of Hays and Comal County have grown by 195% and 176%, respectively.[5] Despite the 19 municipal governments within the two counties, more than 40% of the population now live in unincorporated areas.[6] Across the entire region, the unincorporated population has more than doubled since 1990, not accounting for second homes or short-term rentals.[7] This pattern of development creates regulatory and spatial challenges with respect to land conservation and habitat protection at the local level.

Texas is unique in that city and county governments differ wildly with respect to their ability to regulate land use and set development standards within their jurisdictional boundaries. Pursuant the Texas Constitution, most cities in the Hill Country with a population greater than 5,000 have adopted a "home- rule" charter, which establishes their city government structure and gives it the full power of local self- governance, subject only to explicit state and federal statutory limitations.[8] This gives cities more autonomy and flexibility to manage growth, as they are authorized to adopt a comprehensive plan that permits zoning regulations to incentivize or prohibit certain uses altogether in areas within their jurisdiction.[9]

A county, by contrast, has neither a charter nor home-rule authority to adopt a comprehensive plan; a county government has no authority except that expressly granted to it by the Texas Constitution or a state statute.[10] Thus, unlike most cities, no county in Texas has general ordinance-making authority to address biodiversity challenges, and their ability to plan for growth and minimize its impact is severely limited to by statute.[11] For example, though both cities and counties have nondiscretionary authority over platting in Texas, cities can set more stringent standards for density, lot size,[12] impervious cover, water, and wastewater system performance without action from the Legislature, and require additional fees to offset the impacts of development, subject to express limitations.[13] A county, however, is required to approve developments that satisfy the requirements prescribed in the State and Local Government Code, which must be amended by the Legislature and does not allow for the collection impact fees. This narrow view of state-delegated authority is known as "Dillion's Rule," and has been replaced by a broader interpretation of county regulatory authority in almost every other state.[14] The inability of Hill Country counties to employ these traditional land use controls has resulted in unregulated sprawl in these areas, with unsustainable impacts on the region's biodiversity and natural resources.

Texas is unique in that city and county governments differ wildly with respect to their ability to regulate land use and set development standards within their jurisdictional boundaries

Today, only 10-percent of the total land area of the Hill Country has been incorporated by a municipality,[15] leaving the other 90% unincorporated and, like most of Texas, predominately privately- owned. The inability of county governments to set stricter regulations on or collect impact fees from development, along with lower land prices, lower property taxes, and the desire of many to experience the natural landscape of the region, have only incentivized further growth away from cities and into these areas. Urbanization of these areas has a number of direct impacts on biodiversity, including habitat loss and degradation, altered disturbance and modified soil regimes, and the loss of endemic species due to the introduction of invasives.[16] However, the effects of this urban growth are compounded given this lack of regulatory authority to set stricter standards necessary to limit the spatial footprint of new development.

Without the ability to comprehensively plan, the process of selecting suitable land (and what to build on it) is often left to developers, and typically determined based on the availability, affordability, and marketability of land, without consideration of ecosystem services.[17] Consequently, new developments are rarely connected or adjacent, resulting in significant fragmentation of the natural habitat and the compounding edge effect at the boundaries of this new development. Additionally, because much of this growth in these areas has been accommodated by large residential subdivisions, it has come at a net-fiscal drain on county resources. Given the distance of these subdivisions from other areas of the human environment, this pattern of growth is often referred to as "sprawl," characterized by low density, auto-dependent development occurring on the outskirts of urban centers, with significant indirect impacts on the human and natural environment.[18]

Beyond the effects of increased traffic congestion, pollution, and land consumption, this pattern of development comes at an economic cost to local communities. A "Cost of Community Services" analysis for Hays

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Urban Spaces *cont'd from page 17*

County conducted by the American Farmland Trust observed that for every dollar generated in taxes from residential property, $1.26 was spent on providing services to those areas.[19] Because counties cannot charge impact fees to offset the costs of capital improvements and infrastructure expansion necessitated by these new developments, counties must offset these losses by increasing taxes and service fees across the entire tax base, or generating it from new commercial, industrial, and agricultural properties, which provide a net gain to local governments.[20] Though without zoning authority, they cannot plan out where best to locate those potentially high-impact uses.

Recent legislative changes have further complicated the landscape for local governance. Senate Bill 6, passed in 2017, limits cities' ability to annex properties within their extraterritorial jurisdiction (ETJ) unilaterally.[21] More recently, Senate Bill 2038, passed in November of 2023, allows property owners in a city's ETJ to unilaterally remove themselves from city regulations and place themselves under county jurisdiction.[22] This change has lead to less stringent development oversight in areas crucial for biodiversity conservation.

Even with the tools necessary for effective biodiversity governance, local governments must balance competing economic, infrastructural, and social considerations that too impact the human and natural environment. Despite cities more expansive authority to regulate development, growth management policies that confine development to limited areas often have the effect of making housing more costly, discriminating against moderate- to low-income households and pushing development further into unincorporated areas.[23] Additionally, programs to buy and conserve open space in and beyond urban areas are often funded obligation bonds, which have the effect of increasing property taxes across the entire tax base and around the project once complete. Due to this potential displacement effect, efforts to bring parks and green space into existing urban areas, despite the ecological and community benefits, are often criticized for their failure to consider the impact to the human environment and their worst, have been termed "green-gentrification."[24] Overcoming these perceptions while considering impacts to interconnected the human environment will be important for successful biodiversity governance.

However, managing growth in the Hill Country and ensuring affordable housing are not exclusive, and local governments will play an active role in the provision of both.

Role of Local Govts: Overcoming Human-Nature Dualism

Though urbanization is largely responsible for biodiversity loss in the Hill Country, these newly urban areas also have the tremendous potential to aid in greater conservation efforts and provide a number of ecosystem services to local communities. In this era of rapid suburban and exurban sprawl, the continued loss of natural resources and important habitat for biodiversity has led to a movement to preserve open space and rural communities. As developers search to find new sites to house the growing population in this region, environmentalists and conservations have been at work to preserve habitat and open spaces from disappearing under this new development.[25] The challenge, of course, is that acquisition of these properties expensive and dependent on market availability. As a result, these efforts have culminated in the permanent protection of a fragmented 546,301 acres, or only 5% of the total land area in the Texas Hill Country.[26] The bulk of this conserved lands are in Travis, Hays, Bexar, Uvalde, and Medina counties and are largely the result of obligation bonds funded by the significant tax bases of municipalities in these areas.[27] The exception to this is San Antonio, who have largely funded conservation efforts above the Edwards Aquifer Recharge Zone through an eighth-of-a-cent sales tax on every taxable dollar spent in the city.[28] This funding strategy has work well for the city and has been consistently reapproved by voters; however, because state law institutes a two percent cap for combined municipal and county sales tax, it is not available to most jurisdictions who have already allocated their maximum.[29] Thus, even with support from voters, local government land acquisition plans are severely limited by funding.

The primary goal of conservation is to prevent the further loss and degradation of natural ecosystems, and the primary preference has been given to conserve large, highly connected areas.[30] While these lands held in permanent protection are instrumental in preserving biodiversity and other critical ecosystem services in the region, merely designating reserves is not sufficient to protect the nature and biodiversity within them, as the direct and indirect impacts are felt beyond the footprint of new development. Additionally, a strategy focused exclusively on the conservation of these "natural" places fails to generate the broad future support needed to make biodiversity governance effective over the long term.[31] Long-term protection of biodiversity can only come with the recognition of the interconnectedness of nature and urban society, which requires an approach that considers both the conservation of natural areas and the integration of nature into urban planning and design. However, the traditional conservationist view of nature as a place that needs to be protected from the encroachment of urban society, has overlooked the ways nature inhabits urban areas, their reliance on nature, and the potential benefits that forms of biodiversity can

bring to urban society.

Urban green spaces are ecosystems that provide key services for urban communities and are essential for the long-term protection of biodiversity. While true that the lack of effective planning, even within incorporated areas of the region, have resulted in urban reserve and park systems that are often small, fragmented, disconnected, and generally located on leftover or undevelopable land, these areas nonetheless have been shown to make important contributions to conservation. Inseparable from these ecosystems are the services they provided, including soil production, erosion prevention, flood control, and groundwater recharge.[32] Urban green spaces have also been shown to provide a number of economic benefits to local areas, such as low-carbon stormwater management and, whether intended or unintended, provide a diverse array of unconventional habitats for a number of plant and animal species.

Perhaps most importantly, however, these spaces provide opportunities for people in urban and suburban communities to connect with nature, realize our place within it, and instill values necessary for broader support of environmental solutions. Though economics provide some justification, an affection for nature, with an accompanying sense that nature provides benefits to our lives, can help motivate us to make sacrifices necessary for sustainability.[33] Providing communities access to natural areas, however small, has the potential to foster this relationship with nature and instill values necessary for broad support of biodiversity governance.

Role of Local Governments: Highlighting New and Existing Socio-Ecological Solutions

Beyond the designation and intensive management of protected areas, minimizing habitat and biodiversity loss while limiting the degradation

Urban green spaces are ecosystems that provide key services for urban communities and are essential for the long-term protection of biodiversity.

of related ecosystems services will require local governments to incorporate conservation efforts into their traditional land use controls. To encourage smarter growth in urban areas, it is clear that an expansion county authority over land use is required to manage growth in increasingly urbanizing unincorporated areas. While this would require action from the state, the Legislature has often passed statutes that give zoning authority to only certain counties, depending on the specific circumstances or needs present there.[34] For example, the Legislature determined that due to significant recreational use of certain parts of the Padre Island area, the commissioners' courts of Cameron County and Willacy County should have zoning authority "for the orderly development and use" of the area designate.[35] Given the tremendous growth and unique challenges facing the 19 counties in the Hill Country, a case could be made that limited zoning and comprehensive planning authority is needed in this area as well.

Yet, until the Legislature can be state's fastest-growing counties require the type of land use controls that exist in almost every other state, city and county governments in Texas must focus on maximizing their current authority over land use and continue to invest in urban open space. Parkland dedication ordinances and the evolving concept of "conservation development" are existing, though underutilized, tools for local governments to aid in larger biodiversity and conservation efforts.

A. Parkland Dedication Ordinances

Parkland dedication ordinances have emerged as a powerful tool for communities to address issues related to preserving open space in newly developing areas. In accordance with the authority of both cities and counties in Texas over platting,[36] a process required of every developer wishing to subdivide land into lots, local authorities can require developers to dedicate a portion of their land for use as a public park, or pay a "fee-in-lieu" of such dedication of an equivalent value, and charge a development fee to develop that land into a useable public park.[37] These regulations have been touted as a win-win for both conservation and urban development.

For conservationists, these ordinances have proven tremendously successful in preserving open space providing benefits for growing communities and biodiversity alike. For cities and ultimately its citizens at large, these ordinances place the burden of providing the space to the developer and are ultimately absorbed by the homeowner, the primary recipient of these community benefits. Compared to conventional revenue raising tools which increase

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LAND USE

By: BEN MOUNT
JD, MPA, *Senior Assistant General Counsel, North Carolina League of Municipalities*

A Brief Look at Land Condemnation

Public infrastructure projects often require municipalities to acquire real property interests from private property owners. If a municipality cannot acquire the necessary real property interests through a negotiated agreement with the property owners, then the municipality may exercise the power of eminent domain through a condemnation action, subject to certain procedures and legal limitations, including those set forth in the Fifth Amendment's Takings Clause. This article summarizes key concepts, definitions, and approaches to land condemnation litigation in the context of municipal infrastructure projects that require the physical appropriation of property.[1]

A. **Constitutional Limitations.** Eminent domain is the government's inherent right to take private property for public use or benefit without the owner's consent.[2] Condemnation is the government's formal exercise of eminent domain.[3] [4] The government's power of eminent domain is limited by the Fifth Amendment to the United States Constitution, which states, "nor shall private property be taken for public use, without just compensation."[5] The fundamental right to just compensation is incorporated by states through the Fourteenth Amendment, which provides that "[n]o State shall . . . deprive any person of . . . property, without due process of law."[6]

1. There must be a "public use." Whether a proposed infrastructure project meets the legal definition of "public use" is a question that is often left for the courts to determine. In the landmark case of *Kelo v. City of New London*, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005), the United States Supreme Court, by a 5-4 majority, held that the condemnation of unblighted property to support an economic development plan constituted a valid public use under the Takings Clause. Many state legislatures responded to *Kelo* by passing laws to clarify the scope of "public use" in the government's exercise of eminent domain.[7] Therefore, it is important that you understand how your state defines the phrase "public use" in considering the types of infrastructure projects that will require using eminent domain.

For example, North Carolina courts have held that a condemnation action must satisfy both the "public use" and the "public benefit" test.[8] Under the "public use" test, the courts ask whether the public has a right to a definite use of the condemned property.[9] It is the public's right to use, not the public's actual use, that is the key factor in making the public use determination.[10] Under the "public benefit" test, the courts ask whether some benefit accrues to the public as a result of the desired condemnation.[11] Not just any benefit to the general public will suffice, however. The taking must furnish the public with some "necessity or convenience which cannot readily be furnished without the aid of some governmental power."[12]

2. The owner of private property is entitled to "just compensation." It is well settled law that an owner of private property taken by power of eminent domain is entitled to just compensation.[13] To competently represent your municipal client in a condemnation action[14], you must understand how the law defines and determines the amount of just compensation owed to property owners whose land has been taken by eminent domain. The most common measure of just compensation is the fair market value of the land taken.[15] Though state law definitions will vary, for purposes of this discussion, *Nichols on Eminent Domain* provides the following definition of fair market value:

"Fair market value," for the purpose of evaluating land and improvements taken under the power of eminent domain, is the amount of money which, as of the date of valuation, an informed and knowledgeable purchaser willing, but not obligated, to buy property would pay to an informed and knowledgeable owner willing, but not obligated, to sell it. Consideration must be given to the following:

- all uses for which the land is suited and might be applied, including, but not limited to, present use or highest and best available use;
- the existing zoning or other restric-

tions on use, and the reasonable probability of a change in those restrictions;
- the period of time within which the sale could reasonably be effectuated.[16]

If there is a dispute over the issue of just compensation owed to the property owner, then you are likely going to be dealing with valuation witnesses, including certified appraisers. Whether you are negotiating the settlement of a condemnation lawsuit or preparing for a condemnation trial, you will need to be very familiar with appraisal methodologies[17] and valuation standards utilized by valuation witnesses, such as the *Uniform Standards of Professional Appraisal Practice*.[18] In addition to on-the-job training, there are online and in-person courses that can help you develop subject matter expertise in property valuation methodologies.[19] Educating yourself about valuation methodologies and concepts such as "highest and best use" is a critical aspect of providing competent legal representation on behalf of municipalities in land condemnation litigation.

B. Procedural Considerations.
There are many procedures to follow in a typical condemnation lawsuit. Ihave selected three procedural areas, discussed below, that warrant special consideration.

1. Initiating a Condemnation Action.
Municipal attorneys handling condemnation litigation should be familiar with applicable statutory procedures, including those required to initiate a condemnation action. State laws typically govern which procedures you will need to follow, though the federal process for initiating a condemnation action is instructive. For example, most federal condemnation cases are initiated by filing a Declaration of Taking pursuant to the Declaration of Taking Act, 40 U.S.C. § 3114, in the U.S. District Court for the district in which the property is located.[20] The Declaration of Taking must contain:
(1) a statement of the authority under which, and the public use for which, the land is taken;
(2) a description of the land taken that is sufficient to identify the land;
(3) a statement of the estate or interest in the land taken for public use;
(4) a plan showing the land taken; and
(5) a statement of the amount of money estimated by the acquiring authority to be just compensation for the land taken.[21]

The statutory process in North Carolina is very similar to the federal process described above.[22] For your typical public infrastructure project, meeting requirements like those described above is a pretty straightforward process, though condemnation attorneys should verify the accuracy of information presented in the declaration of taking.[23] Furthermore, it is important to research the property that is the subject of the taking, commonly referred to as the "subject property," to ensure that there aren't any title issues or other issues that may inform your litigation strategy. For example, if the subject property is encumbered by a lien or encumbrance, then other third parties who have an interest in the subject property may need to be named as parties to the condemnation lawsuit.[24] Similarly, it is important to understand the infrastructure project giving rise to the condemnation action. In some cases, there may be opportunities to mitigate damages based on decisions that are tied to the project's design, including the project's physical alignment.

2. Measure of Damages.
The general rule in most states is that the value of the property taken by eminent domain is fixed at the time that the property is actually appropriated by the government, often referred to as the "date of taking."[25] The amount of just compensation owed, sometimes referred to as the "measure of damages," depends on the nature of the property interest being acquired. If the taking requires acquisition of the entire property in fee simple, then the typical measure of damages is the market value of the entire property as of the date of taking.[26] In my experience, most municipal infrastructure projects require taking something "less than" a fee simple title of the entire subject property; rather, these projects require easements over a portion of the subject property. This requires an understanding of easement law[27] and how your applicable laws approach the valuation of "partial" takings.

For partial takings, there are two generally accepted approaches for determining just compensation: the "before and after" rule and the severance damage rule.[28] The before and after rule compares the fair market value of the entire tract of land before the taking with the fair market value of the land remaining after the taking.[29] The mathematical difference between the "before" value and the "after" value constitutes the just compensation owed for the taking. The severance damages rule is a variation of the "before and after" rule.[30] Under this approach, the value of the portion of property

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Land Use *cont'd from page 21*

that is physically taken is calculated first and then a separate "severance damage" calculation is added to account for the diminution in value, if any, to the property with which the landowner is left."[31] The issue of severance damages, also known as damages to the remainder, is among the most common issues in dispute in land condemnation lawsuits that involve partial takings. Attorneys representing property owners are keenly aware of this reality. A careful study of applicable statutory requirements and case law will help you navigate severance damages claims arising from public infrastructure projects.

3. Inverse Condemnation.
An in-depth discussion about inverse condemnation is outside the scope of this article, but it is worth noting some basic concepts as they might apply to public infrastructure projects. In *San Diego Gas and Electric Co. v. San Diego*, 450 U.S. 621, 101 S. Ct. 1287 (1981), Justice Brennan in his dissent described the remedy of inverse condemnation as follows:

> The phrase "inverse condemnation" generally describes a cause of action against a government defendant in which a landowner may recover just compensation for a "taking" of his property under the Fifth Amendment, even though formal condemnation proceedings in exercise of the sovereign's power of eminent domain have not been instituted by the governmental entity.[32]

In the context of municipal infrastructure projects, the key is to understand, and perhaps anticipate, what types of scenarios might give rise to an inverse condemnation claim. A common scenario that gives rise to an inverse condemnation claim is where the condemnor's contractor exceeds the physical limits of an easement area.[33] The government does not have to physically enter one's property, however, to give rise to an inverse condemnation claim. Interferences or intrusions caused by the government's "nuisance-like" activities may be substantial enough to constitute a compensable taking. Depending on your jurisdiction, examples of such takings may include:

- Odors from an adjacent sewage disposal plant.[34]
- Rock blasting incidental to the construction of city sewer line.[35]
- Discharge of foul matter from sewage disposal plant onto private property.[36]
- Discharge of improperly treated sewage into stream.[37]
- Cutting trees on private property.[38]
- Pollution caused by City's maintenance of filthy drain on adjoining lot.[39]
- Impoundment of stormwater caused by grade of road maintained by the City.[40]
- Air pollution from tunnel ventilator that discharged smoke on private property.[41]
- Foreseeable increase in propensity for flooding on private property.[42]
- Elimination of direct access to property.[43]

There are many reasons to avoid inverse condemnation claims. In North Carolina, for example, property owners are entitled to recover their costs (including reasonable attorney, appraiser, and engineering fees) where they obtain a judgment in their favor from an inverse condemnation claim.[44] While cost recovery provisions can assist property owners in obtaining compensation for the trouble of having to pursue an inverse condemnation action against a condemnor, they are often used by attorneys representing property owners as a tool for negotiating settlement of claims, including
"regular" condemnation claims that are linked to a counterclaim for inverse condemnation.

Conclusion

It is important to understand the constitutional limitations of eminent domain and the applicable procedural requirements that must be followed in condemning property for public infrastructure projects. Fortunately, there are many resources available to develop your knowledge in land condemnation and, therefore, provide your municipal client with competent representation.

1. Regulatory takings under the Fifth Amendment's Takings Clause are outside of the scope of this article, though I do provide a brief overview of inverse condemnation actions arising out of "nuisance-like" activities that are tied to public projects.
2. Nichols on Eminent Domain, Ch.1, §1.11 (Matthew Bender, 3rd ed., 2024); Black's Law Dictionary 562 (8th ed. 2004); *See also* N.C. Gen. Stat. §40A-2(3)(2024) (defining "eminent domain" as "the power to divest right, title or interest from the owner of property and vest it in the possessor of the power against the will of the owner upon the payment of just compensation for the right, title or interest divested"); State v. Core Banks Club Properties, Inc., 275
N.C. 328, 334, 167 S.E.2d 385, 388 (1969) ("The right to take private property for public use, the power of eminent domain, is one of the prerogatives of a sovereign state. The right is inherent in sovereignty; it is not conferred by constitutions. Its exercise, however, is limited by the constitutional requirements of due process and payment of just

compensation for property condemned.").
3. Black's Law Dictionary 310 (8th ed. 2004).
4. In condemnation litigation, the governmental unit exercising the power of eminent domain is considered the "condemnor". The property owner whose land has been taken is the "condemnee."
5. U.S. CONST Amend. V.
6. U.S. CONST Amend. XIV, sec.1; *see* Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984); Chicago, Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 17 S.Ct. 581 (1897).
7. Nichols on Eminent Domain ®, Special Alert Responses to *Kelo* – Eminent Domain Reform Legislation and Selected Cases §AS.01 (Matthew Bender, 3rd ed., 2024).
8. Carolina Tel. & Tel. Co. v. McLeod, 321 N.C. 426, 430, 364 S.E.2d 399, 401 (1988).
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 432, 364 S.E.2d at 401 (1988).
13. *See* R&J Holding Co. v. Redevelopment Auth., 670 F.3d 420, 425 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2792, 183
L. Ed. 2d 653 (2012); United States v. 103. 38 Acres of Land, 660 F.2d 208 (6th Cir. 1981); Kohl Indus. Park Co. v. County of Rockland, 710 F.2d 895 (2d Cir. 1983); United States v. 91. 90 Acres of Land, 586 F.2d 79 (8th Cir. 1978); United States v. Sowards, 370 F.2d 87 (10th Cir. 1966); Almota Farmers Elev. W. Co. v. United States, 409 U.S. 470, 93 S. Ct. 791 (1973); United States v. 71. 29 Acres of Land, 376 F. Supp. 1221 (W.D. La. 1974).
14. *See* Rule 1.1 of the American Bar Association's Model Rules of Professional Conduct ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."). Please consult your local state bar's ethics rules for guidance specific to your state.
15. Nichols on Eminent Domain, Ch.4, §12.02 (Matthew Bender, 3d ed., 2024).
16. *Id.*
17. *See* Bly v. Story, 241 P.3d 529, 536 (Colo. 2010) (fact finder may consider evidence of market value based on three established real estate appraisal methods: (1) the comparable sales method, which considers recent sales of comparable properties; (2) the cost of construction method, which estimates value based on the cost of reproducing or replacing a particular improvement; and (3) the income method, which considers the property's earning power).
18. The Appraisal Foundation, *Uniform Standards of Professional Appraisal Practice,* https://www.appraisalfoundation.org (last visited March 10, 2024).
19. I recommend starting with the "Basic Appraisal Procedures" course offered by the Appraisal Institute.
20. U.S. Department of Justice, Environmental and Natural Resources Division, Condemnation, https://www.justice.gov/enrd/condemnation (last visited March 10, 2024).
21. 40 U.S.C. §3114 (2023).
22. *See* N.C. Gen. Stat. §40A-41 (2023).
22. *See* N.C. Gen. Stat. §40A-43 (2023)("The condemnor, at the time of the filing of the complaint containing the declaration of taking and deposit of estimated compensation, shall record a memorandum of action with the register of deeds in all counties in which the land involved is located and said memorandum shall be recorded among the land records of said county.").
24. *See* N.C. Gen. Stat. §§40A-41(7) (2023)(The condemnor's complaint shall include a "statement as to such liens or other encumbrances as the condemnor is informed and believes are encumbrances upon the property and can by reasonable diligence be ascertained.).
25. *See* United States: Tenn. Gas Pipeline Co., LLC v. Permanent Easement for 7.053 Acres, 931 F.3d 237, 244 (3d Cir. 2019) (under the Fifth Amendment, just compensation generally means "the fair market value of the property on the date it is appropriated" and nothing more); United States v. 269 Acres, 995 F.3d 152, 163 (4th Cir. 2021) (relevant "value" is "fair market value" of property, which is what willing buyer would pay in cash to willing seller at time of taking).
26. Nichols on Eminent Domain ®, Ch.4, §14.01 (Matthew Bender, 3d ed., 2024); *see also* N.C. Gen. Stat. §40A-64 (2024)(measure of compensation for a partial taking is the greater of either (i) the amount by which the fair market value of the entire tract immediately before the taking exceeds the fair market value of the remainder immediately after the taking; or (ii) the fair market value of the property taken).
27. Common factors at issue include the scope of easements and whether easements taken are permanent or temporary in nature.
28. Nichols on Eminent Domain ®, Ch.4A, §14.02 (Matthew Bender, 3rd ed., 2024).
29. *Id.*
30. *Id.*
31. *Id.*
32. 450 U.S. at 638 n.2, 101 S. Ct. at 1297 n.2, 67 L. Ed. 2d at 554 n.2 (dissenting opinion of Justice Brennan, with Justices Stewart, Marshall, and Powell joining). *See also* United States v. Clarke, 445 U.S. 253, 255–258, 100 S. Ct. 1127, 1129–1130, 63 L. Ed. 2d 373, 376–378 (1980) (inverse condem-

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FIRST AMENDMENT

By: JULIAN GRANT,
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Prayer at Council Meetings: Who Prays and How is that Decided?

Introduction

On my first day of work as a Deputy City Attorney, many years ago, my boss joked with me that the only surefire way to lose your job in Texas as a municipal attorney was to be asked if prayer was allowed before City Council meetings. Either way you answered, you were in great peril. You could be accused of being a religious fanatic from the *Handmaid's Tale* by some, or you might be categorized as a socialist and atheist by others.

Of course, the best advice as this paper will try and show is that it's hard to give a clear answer. However, management and public officials may not like that particular answer.

Nature and Purpose of Prayers.
The first questions involve the nature and purpose of prayers/invocations/spiritual chats, or any talk authorized by the council itself as a religious or spiritual reflection.

The usual answer given on the **nature** or character of this type of talk is that it is government speech. This is not the same type of speech that a citizen not affiliated with the city or not authorized by it to speak on its behalf might have, governed by the Free Speech clause of the First Amendment. More likely, there will be Establishment Clause issues, centered on the fear the government is imposing a state religion on its employees and citizens. Government speech is often defined as that having editorial control exercised by the government, by a member of the government or someone authorized by the government, where the ultimate responsibility lies with the government for the speech›s content. *Turner v. City Council of Fredericksburg*, 534 F.3d 352, 354 (4th Cir. 2008).

As for the **purpose** of such reflection, cases frequently state that it is assumed that the speech is for the benefit of the council or other board that arranges the prayer at its meeting, solemnizing and lending gravity to the proceedings the members will shortly undertake for the public's best interests. They can consider shared values before voting on divisive matters.

Supreme Court Cases.
The Supreme Court has used **historical analysis** to uphold the general idea of legislative prayer. This was first done in 1983 in a case involving the Nebraska Legislature's hiring of a chaplain for its daily meetings. The Court held that as Congress passed the First Amendment for ratification by the states, it would make no sense to find the Amendment's Establishment Clause would be violated by the prayers of a chaplain, as the House and Senate of that first Congress had hired such prayer-givers themselves (*Marsh v. Chambers*, 463 U.S. 783, 786 (1983)). Accordingly, the use of legislative prayer in general was supported by "unambiguous and unbroken history of more than 200 years" (463 U.S. at 792). In the different context of prayer by public employees at sporting events, such as a football coach with his team, the Court has also signaled its reliance on "original meaning and history…historical practices" (*Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 536 (2022)).

Ten years ago, the Supreme Court revisited legislative prayer, this time involving local government meetings. Surprisingly to some observers, as lower courts had mostly rejected this idea, it explicitly allowed "sectarian" prayers as passing constitutional muster on their face; that is, the invocations could invoke the Muslim, Jewish, Christian, or Hindu god or the faith values that the prayer-giver honored (*Town of Greece v. Galloway*, 572 U.S. 565, 571-72 (2014); *Freedom of Religion Foundation Inc. v. Mack*, 49 F.4th 941, 950 (5th Cir. 2022)).

The Temple Comes A-Knockin'.
With only two Supreme Court decisions to look at, there are many real-life situations that fall at the margins where no definitive answers for the legal counsel to give their officials are going to be found easily. The City of San Marcos had such a situation occur recently where its staff and officials learned a few business days before its upcoming council meeting that a representative of the Satanic Temple was signed up under the loose system of speaker rotation to give the opening invocation. As with many cities who retain a moment devoted to a religious

observance to solemnize the meeting for its councilmembers, our city did not have an elaborate procedure or vetting official for requests from members of the public to deliver this moment. It did have a bare-bones statement of policy it had adopted, arising from a back-and-forth discussion with a group devoted to the separation of church and state almost 15 years ago, at least. This policy:

–Reminds the public that the invocation is for the benefit of the council, to solemnize its conduct during the meeting, not for the direct benefit of the attending and viewing citizens.

–Concludes that the invocation is government speech, not private speech.

–Bases the invocation on a rotating basis that can include any faith tradition.

–Reminds speakers they should not disparage others, proselytize, or advance one religious tradition.

–States a moment of silence should be observed if no prayer-giver is available.

The Satanic Temple often seeks to be the group that challenges the typical notion of who gives the moment of spiritual solemnity. Its imagery and reputation conjure up wild thoughts and notions, of course. It describes itself, however, as more secular humanist than devil-worshipping, though. One representative serving as a witness in one of its many legal challenges stated she does not believe in a literal God or Satan. She testified that Satanism encompasses all the values she holds dear: justice, the pursuit of knowledge, bodily autonomy, and person sovereignty. She testified that her beliefs include seven tenets that encompass compassion, nobility of character, justice, and the pursuit of knowledge. *Satanic Temple v. City of Scottsdale*, 2020 WL 587882 (D. AZ).

Legally, either the feared image or the reality of the Temple's beliefs should not matter, nor the content of its speech before the Council. As the Supreme Court reminded, judges should normally not be concerned or involved with prayer or speech content, as with most First Amendment analysis if not falling within an exception. *See Galloway*, 572 U.S. at 581. An exception, or at least an area of heightened scrutiny, occurs when prayers denigrate or threaten damnation for those outside the prayer-giver's faith group or ask for conversion of these outsiders into that faith. *Id.* at 583.

Process of Exclusion Found Wanting. There are certainly instances where the courts have found councilors or commissioners went too far in their hostility towards potential speakers. In *Williamson v. Brevard County*, 928 F.3d 1296, 1299 (2019)), the court added factors of **identity** of the speaker and the **process** of speaker selection to the nature of the invocation. The process itself gave the court pause, as the commissioners rotated among themselves in inviting whomever they wished, "with no consistent standards or expectations of inclusiveness." *Id.* As for the speaker identity, ultimate success went to the chosen few aligned with mainstream beliefs of the elected officials. "Secular humanists are far from the only group viewed with disfavor. Thus, for example, some of the Commissioners and former Commissioners have testified unambiguously that they would not allow deists, Wiccans, Rastafarians, or, for that matter, polytheists to deliver prayers, and that they would have to think long and hard before inviting a Hindu, a Sikh, or a follower of a Native American religion." *Id.*

As with any controversy, putting unspoken thoughts into written form caused the County many problems with the Circuit Court. "The Resolution that the Commission passed in response to the plaintiffs' requests to offer invocations only confirms our understanding that Brevard County's process of selecting invocation speakers is unconstitutional. As the Resolution notes, 'individual Board members have predominantly selected clerics from monotheistic religions and denominations -- including Christian, Jewish and Muslim -- to present the invocation.' But it does not stop there. The Resolution adds that the Board 'in recognition of the traditional positive role faith-based monotheistic religions have historically played in the community,' typically offers the cleric an opportunity to share upcoming events or other information about their religious group before the invocation." *Id.* Elsewhere, the court noted the resolution barred secular speeches promoting reason, science, the environment, nature, and even ethics. *Id.* at 1312. The commissioners would allow those rejected from the invocation slot to speak at citizen comment, but this discriminatory treatment was actually a factor counted against them by the courts.

This same court, which had upheld most challenges to invocation practices, including those where almost all prayers were Christian, had once ruled for a challenger when there was direct evidence of discriminatory intent, a phone book used to choose prayer givers with a "long and continuous line" cross-

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Prayer *cont'd from page 25*

ing out several subcategories, under Churches, such as Muslim, Jewish, Latter-Day Saints, and Jehovah's Witnesses institutions (*Pelphrey v. Cobb County*, 547 F.3d 1263, 1282 (11th Cir. 2008)).

Just as this direct evidence of discrimination made it difficult to defend the boards' invocation selection practices, it is easier to see harm when tangible adverse results happen to those falling outside the "mainstream" of the commissioners' beliefs. For example, an applicant's zoning change request is denied moments after she is chastised for not standing for a prayer; or someone is denied appointment on a citizen volunteer board after they criticize the prayer selection process (*Bormuth v. County of Jackson*, 870 F.3d 494, 499 (6th Cir. 2017)); or when the security officer in the legislative chamber asks the audience to stand and remove their hats during the invocation (*Fields v. Speaker of the Pennsylvania House of Representatives*, 251 F.Supp.3d 772, 776 (M.D. Penn 2017), *aff'd*, 936 F.3d 142 (3d Cir. 2019). These acts may be seen as coercion by the government to have citizens join the "mainstream" faith or commit acts in furtherance of that established religion. (The **Coercion** test is the second type of test mentioned by many courts, after the historical test.)

Counterarguments for Requiring Religious Prayers.

Some might object that if the prayers for the governing body are considered government speech, the governing board should be able to speak or have spoken what they prefer to hear, for their own benefit. Is it really establishing a religion by arranging for a ceremonial time when most people may sleep through? Hasn't the Supreme Court allowed Ten Commandments monuments and giant Christian crosses on government property as ceremonial window dressing? These are not bad arguments. Some courts have agreed, at least to the extent where you can envision the judges barring Satanists from signing up for the prayer rotation.

The Court of Appeals for the D.C. Circuit ruled that the Chaplain of the U.S. House of Representatives was not obligated to provide a self-professed atheist the opportunity to deliver a "nonreligious prayer" because, regardless of whether he was denied the opportunity on account of being an atheist or because he was going to deliver a nonreligious prayer, "the House permissibly limits the opening prayer to religious prayer" and the atheist's prayer would not have qualified by these terms. *Barker v. Conroy*, 921 F.3d 1118, 1132 (D.C. Cir. 2019). *Fields v. Speaker of Pennsylvania House of Representatives* had a similar holding for a state legislative body limiting prayers to theistic types (936 F.3d 142 (3d Cir. 2019)). This court also found that one security guard asking a few visitors to stand did not rise to the level of government coercion, under the Establishment Clause test.

These two lines of cases do not seem either directly in conflict with each other, but the governing "spirit" of each do not seem similar. The latter cases, for example, state "modern, evolving standards are not our lodestar when evaluating a practice like this; instead past is prologue for our inquiry. And history tells us that only theistic invocations can achieve all the purposes of legislative prayer" (*Fields*, 936 F.3d at 152).

Temple Challenges.

Some of the recent cases involving the Satanic Temple illustrate the uncertainty that permeates litigation on council-directed prayer at this historic point in time.

One challenge had some intriguing findings. First, a federal district court in Arizona discussed how the Temple's secular humanist beliefs qualified as a religion despite not possessing "a system of belief and worship of a superhuman controlling power," but curiously it mentioned this in reference to Satanism being a religion protected by the Establishment Clause! (*Satanic Temple v. City of Scottsdale*, 2020 WL 587882 (D. AZ)).

Does the court mean that an outside organization can use this Clause to demand access to participation in an official religion, or a ceremonial, constitutionally allowed historical religious process? This holding appears better suited involving the Free Exercise Clause, but that should not apply to government speech. The answer may lie in the fact this holding involved the issue of plaintiff standing, always a land mine region in the federal courts.

This case also held in favor of the City of Scottsdale based upon the "outsider status" of the Temple. In other words, the city's policy of requiring a substantial connection to its City to give the opening invocation was sufficient to exclude the "Tucsonians," who also happened to be Satanists. This holding does appear to give cities a lifeline when a controversial prayer applicant has no local presence or provable ties. Adopting a policy such as ours, with the addition of that local connection requirement, is a good start to have something to rely on, should you face such a difficult situation. Another recent case has a detailed discussion of the issue of whether invocations by "outsiders" are government or private speech. Suggesting that recent decisions have made it a tougher call whether the Free Exercise clause is involved as the government regulating private speech, the court nonetheless ended

up rejecting the Temple's attempt to argue this (*Satanic Temple Inc. v. City of Chicago*, 2024 WL 1376440 (N.D. Ill.)).

The case contains an excellent analysis of a possible circuit split, being in essence the two lines mentioned above. Interestingly, it cites *Mack* as putting the Fifth Circuit in line with the Eleventh and Seventh Circuits as rejecting a "theistic" basis for excluding secularists and atheists from praying for the government officials' well-being. The Seventh Circuit case has a good discussion of a further nuance how "adherents to Buddhism, Jainism, Shinto, and some forms of Daoism" are religious even if "gods" are absent from many versions of these faiths (*Center for Inquiry, Inc. v. Marion Cir. Ct. Clerk*, 758 F.3d 869, 874 (7th Cir. 2014) (allowing secular humanists to marry persons in Indiana). The court ended up denying the city's motion to dismiss the Temple's Establishment Clause claims.

Additionally, the Temple lost a case where the ad hoc process of councilmembers choosing prayer-givers, in rotation, reduced the amount of actual evidence that discrimination against the Temple had occurred, rather than political glad-handling of spots to donors and supporters (*Satanic Temple v. City of Boston*, 2023 WL 4868944 (D. Mass)). The Court helpfully gave five general factors to consider when evaluating broad challenges to a legislative prayer practice: (1) the identity of the speaker; (2) whether the speaker is paid to give a prayer; (3) the government's review of the speaker's chosen prayer content; (4) whether the nature of the prayer proselytizes or denigrates other religions; and (5) the selection process.

Tips

The City of San Marcos prayer policy is one place to start should you decide to have the courage to discuss adding a policy with your council. One possible added feature could be the adoption of a public statement explaining the whys of the policy:

"Welcome to the meeting of the city of ____, Texas. As many of you are aware, we customarily begin these meetings with an invocation. This prayer is intended for the benefit of the council members and should be directed to them and not the audience. Those who deliver the invocation may reference their own religious faith as you might refer to yours when offering a prayer. We wish to emphasize, however, that members of all religious faiths are welcome not only in these meetings, but in our community as well. The participation of all our citizens in the process of self-government will help our fine country best serve the good people who live here. Employees and members of the audience are welcome to pray or not pray."

This message could be placed on the council website page for further dissemination.

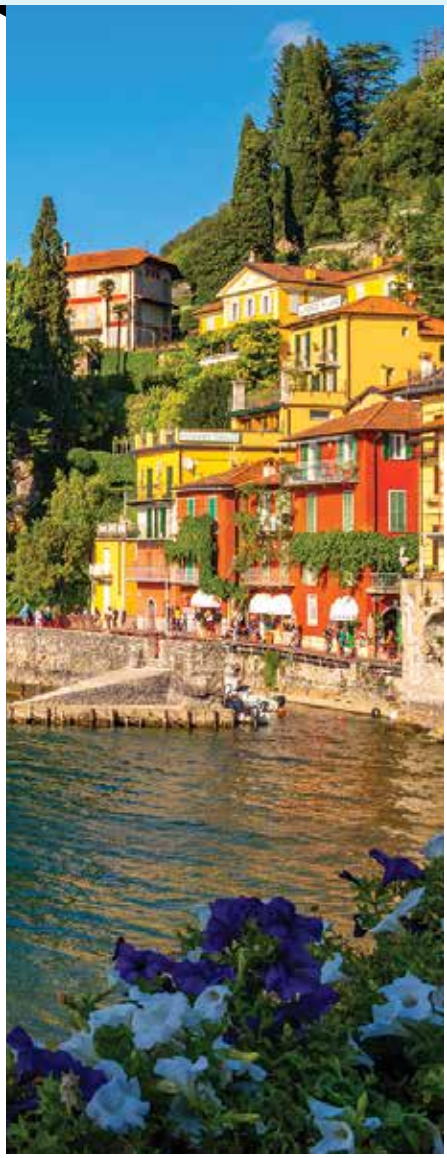
Final Thoughts.

The circuits that have addressed the issue have split on the legality of board members saying the prayer themselves. *See Lund v. Rowan Cnty.*, 863 F.3d 268 (4th Cir. 2017) (not allowed); *Bormuth v. Cnty. Of Jackson*, 870 F.3d 494 (6th Cir. 2017) (allowed). So no Texas or Fifth circuit cases address this particular question that would truly put counsel in their bosses' crosshairs.

The trend with the Supreme Court has been to allow more and more religion in government buildings, meetings, and spaces, as long as bright red lines are not crossed. No one can deny that the question I mentioned up front remains one you may wish never to hear. But this paper is a starting point if that dreaded time indeed arrives.

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INSIDE CANADA

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

Blocked Drainage, Illegal Tempos, Arson Allegations, and More

Appellant Circles the Drain on Appeal Attempts

Katelnikoff v Irricana (Town), 2024 ABCA 205 https://canlii.ca/t/k58v1

The Appellant experienced ongoing flooding on her property in the Town of Irricana ("Town") due to a blocked drainage pipe connected to a concrete swale managed by the Town. The buried drainage pipe was originally installed as part of an easement agreement for storm water management. The Appellant filed an application and sought a mandatory permanent injunction and order that the Town remove the drainage pipe from the property. The application was dismissed by the chambers judge; the Appellant appealed on four grounds.

HELD: Appeal dismissed.

DISCUSSION: In reviewing the appeal, the Court of Appeal considered whether the chambers judge had erred when issuing its decision related to the scope of evidence considered, the test for an interim injunction instead of a permanent injunction, nuisance caused by flooding, and other errors of fact. The Appellant argued that the drainage pipe was not a permitted use by the easement on title, claiming that the overland drainage could not include buried pipes, and the chambers judge erred when he interpreted the buried drainage pipe as permitted within the easement. The Court of Appeal disagreed, finding that the drainage pipe was within the easement's scope, affirming that the judge's interpretation of the easement was consistent with its terms and intentions. The Appellant also claimed that the chambers judge incorrectly used the test for an interim injunction instead of the test for a permanent injunction, relying on *Plains Midstream Canada ULC v Keyera Partnership* 2021 ABQB 871. The Court of Appeal disagreed, finding that the chambers judge had applied the correct higher standard for permanent injunctions, focusing on whether the Appellant demonstrated an enforceable right. The judge concluded that the Appellant failed to establish this right, which meant a permanent injunction could not be granted. The Appellant further argued that the chambers judge erred in concluding there was only one incident of nuisance, and further evidence was ignored. The Court of Appeal disagreed, finding that there was no error in the determination based on the evidence that was presented. The Court of Appeal also dismissed the Appellant's claim that there were other errors of fact, finding that the Appellant did not point to any palpable or overriding error by the chambers judge in regard to those fact findings. Appeal dismissed.

Moral Licensing 101: The Case of the Tempo

Town of Dollard-des-Ormeaux c. Gibson, 2024 QCCM 11 https://canlii.ca/t/k36mh

The defendant, a resident in the Ville de Dollard-des-Ormeaux ("Town"), was charged with violating a municipal by-law that prohibits "temporary shelters". The by-law did not specifically define the term "temporary shelter" however, and it was interpreted by the Town to include tent like structures used in the winter to provide a roof over vehicles in a driveway for the purpose of keeping ice and snow from the vehicle, commonly known as "tempos." The charge is a strict liability offense.

HELD: Defendant guilty.

DISCUSSION: Since the charge is a strict liability offence, the Town did not have to establish the defendant's intent to commit the offence. The defendant argued that the tempo was required due to her role as a foster parent. The defendant provided evidence that the agreement with the clinical support service required a controlled area in the home to leave items that may pose a risk to minors. The defendant used their garage as this area, which required the vehicle to be parked on the driveway under the tempo. The defendant argued the defense of impossibility and claimed that it was impossible for her to comply with the Town by-law because the garage was used as a controlled area as required by the foster support service. To be successful in this defense, a defendant has to demonstrate that the impossibility is beyond the defendant's control. The defense failed because the defendant was unable to provide evidence that compliance with the Town's by-law were beyond her control. The Court noted that there were alternative potential solutions available other than

using the garage, including using one of the household bedrooms for storage or reducing the number of foster children in the home. The Court stated that while admirable, the defendant chose to foster a high number of youth and had failed to make reasonable attempts to comply with the Town by-law. The Court held that non-compliance with the Town's by-law was not justified by the defendant's personal circumstances or the perceived fairness of the by-law's enforcement. The defendant was found guilty.

When To Seek Leave vs Appeal as of Right?

Tabet v Winnipeg (City of), 2024 MBCA 60 https://canlii.ca/t/k66v4

The Plaintiffs brought a legal action against the City of Winnipeg ("City") claiming trespass and nuisance due to the City's drainage system causing flooding onto their properties. The City argued that it had a prescriptive easement over the Plaintiffs' properties and therefore a right to enter. The City further submitted that it had used the properties continuously and openly for more than twenty years. The motion judge partially granted the City's summary judgment motion, recognizing the prescriptive easement, but denied the Plaintiff's request to dismiss the City's defense. The plaintiffs sought leave to appeal the motion judge's order and questioned whether it required leave or if it could be appealed as of right.

HELD: Order may be appealed as of right.

DISCUSSION: The issue before the Court of Appeal was to determine whether the motion judge's order constituted a final or interlocutory order. The Court assessed whether the order definitively resolved a substantive issue or whether it only addressed the procedural matters. The Court relied on the principles set out in *Nguyen v Winnipeg (City of)*, 2022 MBCA 33 and *Kinnarath v People's Party of Canada*, 2024 MBCA 2, to determine whether the motion order definitively resolved a substantive issue or whether it only addressed procedural matters. Additionally, the Court cited *Johnson v Ontario*, 2021 ONCA 650, which held that an order which definitively addresses a substantial defense, like a prescriptive easement, is considered final if it impacts the overall outcome of the case. The Court concluded that the motion judge's order to recognize the City's prescriptive easement and dismiss the Plaintiffs' motion was final because it resolved the City's crucial defense that could potentially determine the Plaintiffs' claims of trespass and nuisance. Therefore, the order was eligible for appeal as of right, bypassing the need for leave.

The Burden of Proof for Negligence on City Roadway Maintenance

Fadler v Milton (Town), 2024 CanLII 71124 https://canlii.ca/t/k62r3

A motorcyclist lost control while riding on a municipal roadway in the Town of Milton ("Town") resulting in catastrophic injuries and leaving him in a vegetative state. The motorcyclist's family members ("Plaintiffs") brought a claim against the Town for negligence alleging that roadway conditions caused the accident and ultimately the injuries. The Town sought summary judgement, arguing that there was no genuine issue requiring a trial as the roadway was in reasonable condition and that the Plaintiffs had not sufficiently demonstrated a pothole played a role in the accident. The Plaintiffs responded that the Town's motion was premature, as the evidence raised a triable issue.

HELD: Summary judgment granted.

DISCUSSION: At the core the Court's decision rested on the inadequacy of the Plaintiffs' evidence. A summary judgment is appropriate if there is no genuine issue requiring a trial. The Plaintiffs argued that the motion for a summary judgment was premature due to incomplete discoveries. The Court disagreed, finding that the Plaintiffs had ample opportunity to conduct discovery but did not pursue them. The Court found that the Plaintiffs' failure to seek necessary discoveries suggested that they were prepared to argue the merits based on the existing record. The Court concluded that the Town's motion was not premature. The Court also found that the Plaintiffs submitted insufficient evidence, including hearsay evidence provided by their lawyer who relayed an expert opinion from an engineering firm; that evidence was dismissed as it was not an expert report. Lastly, the Plaintiffs did not provide evidence to prove that the Town failed to keep the roadway in a reasonable state of repair. Section 44 of the *Municipal Act*, 2001 ("*Act*") provides that municipalities must keep roads in a reasonable state of repair, and the onus was on the Plaintiffs to show that the Town failed in its duty. The evidence before the Court was that of the Town's expert witness, who attributed the accident to the motorcyclist's high speed rather than the roadway conditions. The Court was not persuaded by the Plaintiffs' attempt to challenge the findings of the expert witness. The Court noted that although it was sympathetic to the Plaintiffs' situation, it awarded summary judgment and costs in favour of the Town.

Feeling the Burn on Filing Frivolous Actions

Gallos v. Toronto (City), 2024 ONSC 4183 https://canlii.ca/t/k60tv

The Plaintiff filed an action against the City of Toronto ("City") and several other named defendants, including a former City Councillor and various City Staff. The action alleged various serious offences by the City officers, including wrongful shutdown and arson of the Plaintiff's restaurant. The Plaintiff sought $250,000 in damages and an order compelling the City to issue a building permit to rebuild his restaurant at a size more than double that permitted within the City. The

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AMICUS

By: AMANDA KARRAS,
IMLA Executive Director and General Counsel

Supreme Court: On to the Next Term

The Justices wrapped up another Term on July 1st, issuing consequential decisions involving public camping laws,[1] public officials' use of social media,[2] standards for discriminatory employee transfers,[3] and the Second Amendment,[4] among others. These decisions will shape local governments in more significant ways than whether Presidents are immune from criminal suit, though they don't garner quite as much attention. As we review the local government scorecard on how cities, counties, and towns fared this Term, some areas are clearer than others. In the win column, local governments in the Ninth Circuit will be afforded more autonomy and control over decisions surrounding homeless encampments and see a reprieve from lawsuits involving Eighth Amendment challenges under the Cruel and Unusual Punishment Clause to public camping laws.[5] And around the country, local government officials have more guidance about how to avoid First Amendment liability on their social media accounts.[6]

At the same time, the impacts of one of the bigger decisions this term – the Court's overruling *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) – remains to be seen.[7] A smaller administrative state may benefit some local governments more than others and whether less agency deference helps local governments will depend on the issue and the locality. It may take years to fully understand the scope of the decision and its impacts.[8]

As the Justices wrap up their summer recess, it is time to look forward to the next Term, which begins in October. Every Term lately has had the descriptor "blockbuster" affixed to it. Looking ahead, the Court has granted 28 cases for argument, which approximates nearly 50% of its docket. Whether the upcoming Term will warrant being called a "blockbuster" remains to be seen. However, there are already several significant cases on the Court's docket that local government attorneys should be aware of. In the spirit of offering something for everyone, these cases include issues involving post-retirement employee health benefits,[9] the burden of proof to demonstrate a Fair Labor Standards Act exemption to overtime or minimum wage,[10] requirements for National Pollutant Discharge Elimination System permits under the Clean Water Act,[11] attorney's fees for preliminary injunctions under Section 1983, and ghost guns. While all of these present interesting and important issues for local governments, this article focuses on the last two.

***Garland v. VanderStok* - Ghost Guns**

More than 50 years ago, Congress enacted The Gun Control Act of 1968 (GCA), which imposes requirements involving licensing, background checks, recordkeeping, and serialization on firearm manufacturers and dealers.[12] "Firearm" is defined under the GCA to include "any weapon … which will or is designed to or may readily be converted to expel a projectile by the action of an explosive," as well as "the frame or receiver of any such weapon."[13] The GCA directed that the Attorney General has the authority to issue "such rules and regulations as are necessary to carry out" the Act.[14]

Although there is a history in this country of individuals building their own firearms, technology has allowed companies to manufacture and sell "firearm parts kits" that have rapidly accelerated the use and ease with which firearms can be put together by individual purchasers. In fact, the manufacturers market their products to allow anyone to "quickly and easily" assemble the kits, often in just minutes.[15] These firearm part kits are known as ghost guns, and a number of the manufacturers claimed they are not "firearms" under the GCA and that they therefore did not have to comply with the requirements of the GCA. As a result, these easy to assemble kits are sold without background checks or records of sale, and the assembled firearms lack serial numbers.

To close the loophole, in 2022, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) issued a regulation to clarify that the definition of "firearm" under the GCA includes products and kits that can "readily be converted" into an operational firearm or a functional frame or receiver.[16] The regulation also explained that the statutory term "frame or receiver" includes "a partially complete, disassem-

bled, or nonfunctional frame or receiver, including a frame or receiver parts kit, that is designed to or may readily be completed, assembled, restored, or otherwise converted to function as a frame or receiver."[17]

The Solicitor General explained the regulation did not burden Second Amendment rights, but instead, meant to impose the same requirements on ghost gun manufacturers as those on companies that manufacture fully assembled firearms:

> The Rule's interpretation of the Act does not prohibit the manufacture of any firearm or the sale of a firearm to any individual lawfully entitled to possess one. Nor does it prohibit such a person from making a firearm at home. Instead, the Rule simply clarifies that the Act requires commercial manufacturers and sellers of covered weapon parts kits and partially complete frames or receivers to obtain licenses, mark their products with serial numbers, conduct background checks, and keep transfer records. Those are the same "conditions and qualifications on the commercial sale of arms," that around 80,000 manufacturers and distributors of firearms comply with in millions of transactions each year.[18]

The ghost gun manufacturers challenged the ATF's rule. The Fifth Circuit held the rule was inconsistent with the statutory text of the GCA and exceeded the agency's authority, thereby violating the Administrative Procedure Act.

The Supreme Court granted certiorari on the following issues:

1. Whether "a weapon parts kit that is designed to or may readily be completed, assembled, restored, or otherwise converted to expel a projectile by the action of an explosive," 27 C.F.R. 478.11, is a "firearm" regulated by the Act.
2. Whether "a partially complete, disassembled, or nonfunctional frame or receiver" that is "designed to or may readily be completed, assembled, restored, or otherwise converted to function as a frame or receiver," 27 C.F.R. 478.12(c), is a "frame or receiver" regulated by the Act.

IMLA filed an amicus brief in this case authored by John Korzen, the Director of Appellate Advocacy at Wake Forest Law School. One point we make is that ghost guns present significant public safety concerns for local communities. While there is no way to know how many ghost guns are in circulation, law enforcement has seen a significant boom in ghost gun recoveries in the last several years. In 2022, the Department of Justice recovered nearly 26,000 ghost guns nationwide, which was 7,000 more than 2021, which in turn was already a 1000% increase from the year 2016.[20] These national increases are mirrored in local statistics. In Philadelphia for example, police recovered 575 unserialized guns while conducting criminal investigations in 2022. [21]

One of the public safety concerns related to ghost guns is the lack of background checks. Ghost gun kits are available online and allow minors and felons, including individuals convicted of violent crimes, that are otherwise prohibited from purchasing firearms under federal law to obtain them. IMLA's amicus brief highlighted several chilling examples of minors purchasing ghost guns and using them to kill or harm others, including but not limited to:

- A 16-year-old in Santa Clarita, California killed two students and injured three others with a ghost gun purchased online.
- In Darby, Pennsylvania, a, a fifteen-year-old with a ghost gun killed one teen and wounded another.
- In Milwaukee, Wisconsin, a fifteen-year-old shot and killed two other fifteen-year-olds with a ghost gun.[22]

Similarly, a separate brief filed by a group of large cities and counties in the case points out that ghost guns allow individuals convicted of violent crimes who are otherwise barred by federal and state law from possessing firearms to circumvent those laws, often with tragic consequences.[23] For example:

- "In April 2023, a Staten Island man with 'multiple violent felonies' that prohibited him from owning a firearm shot his neighbor with a ghost gun…
- In April 2021, a man with a criminal record for unlawfully carrying a concealed weapon used a ghost gun to shoot five people, killing one, in San Diego….
- In November 2020, a Baltimore man with a prior felony conviction was sentenced to 21 years in federal prison for a string of armed robberies committed using a ghost gun that had been assembled from a gun-building kit."[24]

Not only do ghost guns allow individuals prohibited under federal and state law from purchasing firearms to do so, their lack of serial numbers hinders law enforcements' efforts to solve crimes. The inability to determine the lawful owner of the firearm, or the absence of any history of ownership, has impeded law enforcement's apprehension of violent individuals, undermining public safety.

If the Supreme Court holds that the ATF regulation violates the APA, that will allow ghost guns to continue to proliferate in communities. Importantly, however, the case was not brought under the Second Amendment; it is a statutory and definitional debate. Therefore, if the ATF regulation is invalid, presumably Congress, states, and local governments may still work to regulate ghost guns.

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Land Use *cont'd from page 23*

nation is "a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." 445 U.S. at 257, 100 S. Ct. at 1130, 63 L. Ed. 2d at 377–378); St. Bernard Par. Gov't v. United States, 887 F.3d 1354, 1359 (Fed. Cir. 2018) (in a physical takings case, explaining inverse condemnation as the means by which landowner may recover just compensation under the Fifth Amendment for taking of his property when condemnation proceedings have not been instituted).

33. Your municipality's contract with the contractor should include indemnification language that protects the municipality in this type of scenario.

34. Gray v. City of High Point, 203 N.C. 756, 166 S.E. 911 (1932).

35. Guilford Realty & Insurance Co. v. Blythe Brothers Co., 260 N.C. 69, 131 S.E.2d 900 (1963). *See also* Nichols on Eminent Domain ®, Ch.4A, §9.03 (Matthew Bender, 3rd ed., 2024) (taking land for a highway projects sometimes includes the compensated right to blast and throw debris on adjacent property).

36. Clinard v. Town of Kernersville, 215 N.C. 745, 3 S.E.2d 267 (1939); *see* Glace v. Town of Pilot Mountain, 265 N.C. 181, 143 S.E.2d 78 (1965); Eller v. Board of Education, 242 N.C. 584, 89 S.E.2d 144 (1955).

37. Moser v. Burlington, 162 N.C. 141, 78 S.E. 74 (1913). *See also* Stoddard v. Western Carolina Regional Sewer Auth. 784 F.2d 1200, 1206 (4th Cir. 1986) (holding that foul odors, human sewage, dead fish, algae growth, and other conditions created by discharges from respondent's sewage treatment plant amounted to a taking of a landowner's riparian rights).

38. Rhyne v. Town of Mt. Holly, 251 N.C. 521, 112 S.E.2d 40 (1960); *but see* State Highway Comm'n v. Batts, 265 N.C. 346, 144 S.E.2d 126 (1965). *See also* N.C. Gen. Stat. §§ 40A-11 and 136-120 (2023)(granting condemnor right of entry prior to condemnation to make surveys, borings, or examinations).

39. Downs v. City of High Point, 115 N.C. 182, 20 S.E. 385 (1894).

40. Midgett v. State Highway Comm'n, 265 N.C. 373, 144 S.E.2d 121 (1965).

41. Richard v. Washington Terminal Co., 233 U.S. 546 (1914).

42. Lea Co. v. North Carolina Board of Transp., 308 N.C. 603, 304 S.E.2d 164 (1983).

43. Dep't of Transp. v. Harkey, 308 N.C. 148, 152, 301 S.E.2d 64, 67 (1983); State Highway Comm'n v. Raleigh Farmers Mkt., Inc., 263 N.C. 622, 139 S.E.2d 904 *adhered to*, 264 N.C. 139, 141 S.E.2d 10 (1965); *see also* N.C. Gen. Stat. §§ 136-89.53 and 136-89.52 (2023)(governing compensability of damages caused by 'controlled access facilities' imposed on existing highways or on new locations).

44. *See* N.C. Gen. Stat. §§136-119 and 40A-8 (2023).

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POINTED DISCOVERY

Urban Spaces *cont'd from page 19*

property taxes across the entire tax base, parkland dedication ordinances are much more politically favorable for existing residents with the added advantage of being "hidden" to new homebuyers.[38] Despite these benefits, several Texas municipalities and many counties have yet to adopt similar subdivision ordinances, and many that are failing to maximize this conservation tool's full potential.

The failure of most local governments in the Hill Country to optimize the financial potential of parkland dedications is surprising given their legal validation. In the early days of parkland dedication ordinances, there were several challenges to their legality in Texas. However, in 1984 the Texas Supreme Court concluded that requiring parkland dedication or fees-in-lieu was a valid exercise city authority because such ordinances are substantially related to the "health, safety, and general welfare of the people," as required by the Texas Constitution.[39] The amount a local government can require, however, must be "roughly proportional" to the proposed development, a burden that must be shown by the government entity.[40] This requires cities and counties to make "individualized determinations" that every parkland dedication effects a roughly proportional response to the demand generated by a development, a burden which may contribute to their lack of widespread adoption and failure of many localities to maximize their use. However, if a locality enacts a dedication using a quantitative method, the burden shifts to the developer to show that the exaction is inappropriate.[41] The challenge, however, is the method of calculation used by almost all Texas cities which have adopted such ordinances is arbitrary rather than empirically derived, and those that are empirical are far from uniform.[42]

The variability and lack of uniform adoption of these parkland dedication ordinances provides an opportunity for growing cities and counties alike. A 2022 audit done by the Texas A&M AgriLife Extension titled "Parkland Dedication: Optimizing an Underutilized Resource," identified a number of deficiencies in existing parkland ordinances causing local governments to charge only a fraction of what could legally be required under the "rough proportionality" requirement.[43] Among the deficiencies included the limited application of these ordinances to residential development, and minimal adoption of the additional development fee requirement in addition to the dedication or fee-in-lieu.[44] Additionally, only two Texas cities (Temple and Austin) have addressed affordability concerns, exempting certified affordable housing projects approved by the city.[45] Given the legal validation and economic, social, and ecological benefits provided by parkland dedication ordinances, there is little reason for both cities and counties not to maximize their

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Amicus *cont'd from page 31*

***Lackey v. Stinnie* – Section 1988 Attorney's Fees**

Another case that should be on local government attorneys' radar is *Lackie v. Stinnie,* which involves the important question of whether a plaintiff who successfully obtains a preliminary injunction can obtain attorney's fees under Section 1988 if the defendant thereafter voluntarily changes its conduct and there is never a permanent injunction or full ruling on the merits. Because Section 1988 provides for attorney's fees in Section 1983 actions and those fees can sometimes outstrip the dollar value of the verdicts themselves, this is an important case for local governments.

In this case, five named plaintiffs brought a class action lawsuit against the Virginia Department of Motor Vehicles to challenge the constitutionality of a (now repealed) law, Section 46.2-395 of the Virginia Code. This law required courts to automatically suspend a convicted criminal's driver's license if they failed to pay certain court fines and fees. The plaintiffs alleged the law was unconstitutional by violating their procedural and substantive due process rights as well as other claims. They sought preliminary and permanent relief to prevent enforcement of the statute and sought reinstatement of the licenses for the Virginians' whose licenses had been suspended.

The district court granted a preliminary injunction, finding the plaintiffs were likely to succeed on the merits as to their procedural due process claims (one of the five claims brought). The court set the case for a bench trial, but before the trial, the Virginia General Assembly passed a Budget Amendment that suspended the enforcement of the law for one year. The court then stayed the case pending the next legislative session, which the Commissioner represented to the court was likely to result in a full repeal of the law. That subsequent repeal took place, and the court then dismissed the action as moot. The court therefore never issued a permanent injunction or declared the law unconstitutional (it was only ever found to be "likely" unconstitutional under the preliminary injunction standard).

After the case was dismissed, the plaintiffs sought attorney's fees under Section 1988. The appellate fees alone were over $767,000.

Under 42 U.S.C. § 1988(b), in certain civil rights cases, "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee." In *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Hum. Res,* the Supreme Court held for a party to "prevail" under Section 1988 for the purposes of attorney's fee awards, the relief must be "judicially sanctioned."[25]

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potential.

Recent legislation has added another layer of complexity to this issue. House Bill 1526, passed in November 2023, standardized municipal parkland dedication ordinances for cities with populations over 800,000.[46] While the bill aims to create uniformity, it effectively caps the amount of parkland large cities can require from developers in comparison to then adopted parkland ordinances. This change further highlights the ongoing tension between local control and state preemption in Texas, particularly in matters of land use and development regulation.

Despite these challenges, there's significant room for improvement in the use of parkland dedication ordinances for counties and smaller cities. For local governments, maximizing this underutilized tool will be important to offset the impacts of development and provide substantial funding for open space needed to build a greater affection for nature and biodiversity in urban areas.

B. Conservation Development

The importance of small areas of fragmented urban nature for biodiversity conservation also suggests that addressing biodiversity goals requires multiple sites and actors not directly engaged in the formal land-use planning or regulatory process. Because counties' limited land use authority, biodiversity governance in much of the Hill Country will largely fall on developers. However, given the growing conservation ethic and initiatives being taken by developers today, there is some room for hope.

For example, conservation development is a type of planned unit development (PUD) that aims to balance land conservation and development goals.[47] The process involves designing and managing development projects in a way that preserves natural resources, protects biodiversity, and provides ecosystem services, while still accommodating the specific needs of a developer. Typically during the platting stage of subdivision development, a developer will first grid out its streets, then add lot lines based on existing regulatory requirements and their desired number of units.[48] Instead, conservation development, like golf course development, begins with the green space in mind and seeks to incorporate that space into the design from the outset. This may involve identifying and protecting important sensitive areas, or connecting existing green spaces to improve habitat connectivity.

Like parkland ordinances, conservation development is a tool that can help strike an important balance between biodiversity protection and accommodating growth in this region. Cities and counties that have adopted PUD or specific conservation development ordinances are able to meet with developers early in the design stage to learn their desired number of units to be built, modify existing zoning and subdivision ordinances to allow for smaller lots and higher density, and permanently protect the remainder of the site as open space.[49] Aside from the ecological and community benefits, like golf course developers, conservation developers also get the benefit of increased lot values that overlook the preserved spaces, as well as reduced infrastructure costs and a potential density bonus offered by municipalities in the region.[50] A prerequisite to siting these developments, however, is to inventory high priority biodiversity areas.

While conservation design can be done on a development-by-development basis, its impact is much greater when done in conjunction with a comprehensive inventory of important habitat on a regional scale. For example, many states and several non-Texas counties have used their zoning power to create "priority conservation areas," which limit development altogether in areas most important for the provision of ecosystem services.[51] Additionally, maps of "secondary conservation areas" have been adopted, providing notice to developers that underlying land will be subject to conservation development ordinances.[52] This provides consistency and predictability for developers prior to acquisition of the property and can avoid unnecessary conflicts and delays throughout the platting process. Along with these priority conservation areas, "priority development areas" can also be adopted, encouraging denser and affordable developments near existing public transportation infrastructure.

For biodiversity, regional planning at scale can provide for the cohesion of these newly created greenspaces, remedying issues of habitat fragmentation caused by current patterns of development.

Conservation development goes beyond preserving the inherently unbuildable areas, such as steep slopes, flood plains, and wetlands, and encourages additional preservation.[53] It aspires to help developers and local governments recognize that additional features are worthy of preservation as well, including woodlands, meadows, scenic views, and historic or cultural features, which is needed by the community at large to aid in larger conservation efforts.

Conclusions

Given local governments' authority over land use regulation, coupled with challenges posed by sprawling growth and development, cities and counties will play an important role in protecting biodiversity in the Texas Hill Country. The unique topography, geology, and hydrologic features of the Hill Country provide ecosystem services and support several threatened and endangered species found nowhere else in the world. While most efforts to protect biodiversity in the region have involved the acquisition and intensive management of protected habitat areas, acquisition of these lands for a number of economic, regulatory, and political reasons has been unable to keep up with population growth. Additionally, there is an increasing recognition that the impacts of this growth, including habitat destruction, fragmen-

tation, water quality impairment, and reduced aquifer recharge, stretch far beyond the physical footprint of the developments onto managed lands. Regulatory challenges and the resulting patterns of growth in this area and have only amplified these concerns, though these newly urbanized areas are often overlooked for their conservation potential. Traditional conservationist thinking has tended to equate the environment as belonging only to "natural places," areas wholly separate and that need to be protected from urban society. As a result, the focus has been to preserve large, contiguous tracts of land while ignoring the smaller spaces close to home.

Urban green spaces hold considerable potential to aid in conservation efforts and will play a critical role in preserving Earth's biodiversity. Aside from the traditional regulating and provisional services relied on by urban society, open space in urban areas provides spaces for people to experience nature in their everyday lives. By fostering this relationship in urban areas, people are better able to recognize the interconnectedness of humans with natural environment, and develop a connection and affection for nature necessary for support of broader socio-ecological solutions for the protection of biodiversity.

Local tools such as parkland dedication ordinances and conservation development have tremendous potential to aid in the provision of these spaces, yet, their lack of widespread adoption, and the limited authority of county governments to comprehensively plan and set more stringent regulations on development, has limited their effectiveness. As the population of this region projects to increase by an additional two million people over the next two decades,[54] planning for their growth while maintaining sufficient open space will be critical to maintaining biodiversity and interconnected ecosystem services in this region.

Notes

1. Ingrid J. Visseren-Hamakers, and Marcel T.J. Kok, (eds.) Transforming Biodiversity Governance. Cambridge University Press, 2022 at 293.
2. *Id.*
3. *Id.* at 296.
4. Texas Hill Country Conservation Network, *The State of the Hill Country: Eight Conservation and Growth Metrics for a Region at a Crossroads*, Feb. 2022, at 13, https://hillcountryalliance.org/wp-content/uploads/State_of_the_Hill_Country-Network_REPORT_2022.pdf.
5. *Id.*
6. *Id.* at 15.
7. *Id.*
8. Tex. Const. Art. XI, § 5.
9. Cities have broad zoning and other land use regulatory authority within their corporate limits. Extraterritorial powers, however, must be authorized by statutes. *See* Tex. Att'y Gen. Op. LO-97-055 (1997); Town of Lakewood Vill. v. Bizios, 493 S.W.3d 527, 531 (Tex. 2016).
10. Tex. Const. Art. V, § 18(b); *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 28 (Tex. 2003).
11. Tex. H.R. Housing Research Organization Focus Rep No. 77-26, at 2 (2002).
12. *Integrity Group, Inc. v. Medina County. Com'rs Court*, No. 04-03-00413-CV, 2004 WL 2346620, *1 (Tex. App.—San Antonio Oct. 20, 2004, pet. denied). In *Medina County*, the court explained that county's platting powers were limited to those allowed by the platting statute in Chapter 232 of the Local Government Code, and therefore they could not deny a reject an application for a proposed development over the Edward's Aquifer based on lot size.
13. Tex. Loc. Gov't Code Ann. § 232.101.
14. John R. Nolon, *State and Local Jurisdiction: Local Land Use Solutions*, Pace University School of Law Land Use Law Center, Oct. 2019, https://law.pace.edu/sites/default/files/LULC/State%20and%20Local%20Jurisdiction.pdf.
15. Texas Hill Country Alliance, *A Look at the Texas Hill Country*, Sept. 2008 at 7, https://hillcountryalliance.org/ uploads/HCA/Growth-Scenario2.pdf
16. Thomas Elmqvist et. al, *Urbanization, habitat loss, biodiversity decline: solution pathways to break the cycle*. In, Karen Seta et. al (eds.), *Routledge Handbook of Urbanization and Global Environmental Change*, Ch. 10: 139-151, 2016 at 139, https://www.srs.fs.usda.gov/pubs/ja/2016/ja_2016_zipperer_001.pdf.
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18. Rachel Jeffers, *Development Sprawl in Texas*, Texas State University, Fall 2003 at 1, https://digital.library.txstate. edu/handle/10877/3463.
19. Julia Freegood, *Cost of Community Services: making the case for conservation*, American Farmland Trust, 2002 at 58, https://s30428.pcdn.co/wp-content/uploads/sites/2/2019/09/AFT_COCS_Making_the_Case_Final.pdf.
20. Texas Hill Country Conservation Network, *The State of the Hill Country: Eight Conservation and Growth Metrics for a Region at a Crossroads*, Feb. 2022, at 16, https://hillcountryalliance.org/wp-content/uploads/State_of_the_Hill_Country-Network_RE-

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PORT_2022.pdf.
21. *See* Tex. Local Gov't Code Chapter 43, Subchapters C-4 and C-5.
22. *See* Tex. Local Gov't Code Chapter 42, Subchapters D and E.
23. Anthony Downs (ed.), *Growth Management and Affordable: Do They Conflict*?, Brookings Institution Press, 2004 at 20.
24. Carly, Fordyce, *Analysis of Gentrification and Green Spaces in East Austin, Texas*, University of Arkansas, Fayetteville, May 2022 at 17, https://scholarworks.uark.edu/etd/4481.
25. Meghan J. McCarthy, *Smart Sprawl: An Examination of Sucessful Conservation Development Ordinances and Practices and Recommendations for Central Texas*, The University of Texas at Austin, May 2008 at 2, https://repositories.lib.utexas.edu/bitstream/handle/2152/22309/McCarthy-2008.pdf?sequence=2&isAllowed=y.
26. Texas Hill Country Conservation Network, *The State of the Hill Country: Eight Conservation and Growth Metrics for a Region at a Crossroads*, Feb. 2022, at 22, https://hillcountryalliance.org/wp-content/uploads/State_of_the_Hill_Country-Network_REPORT_2022.pdf.
27. *Id*. (Notably, missing from the list is Comal County, an area located in large part over the Edwards Aquifer Recharge Zone and home to the fast growing cities of New Braunfels, Bulverde, and Garden Ridge.)
28. *Id*. at 45-46, 50 (describing the Edwards Aquifer Protection Program protected lands).
29. *Id* at 46
30. Ingrid J. Visseren-Hamakers, and Marcel T.J. Kok, (eds.) *Transforming Biodiversity Governance*. Cambridge University Press, 2022 at 296.
31. Holly Doremus, *The Special Importance of Ordinary Spaces*, Environs, Vol. 23, No. 2:3, Spring 2000 at 13, https://environs.law.ucdavis.edu/volumes/23/2/essay/doremus.pdf.
32. Zhao et. al, *Biodiversity in Urban Green Space: A Bibliometric Review on the Current Research Field and Its Prospects*, Oct. 19, 2022, https://doi.org/10.3390%2Fijerph191912544.
33. Holly Doremus, *The Special Importance of Ordinary Spaces*, Environs, Vol. 23, No. 2:3, Spring 2000 at 14, https://environs.law.ucdavis.edu/volumes/23/2/essay/doremus.pdf.
34 Stool, 2019 (p.1)- pdf, Authority of TX Counties over Land Use
35 *See* Tex. Local Gov't Code §231.11 - .023.
36 *See* Chapters 231 and 232 of the Tex. Local Gov't Code.
37 John L. Crompton, *Parkland Dedication: Optimizing an Underutilized Resource*, Texas A&M AgriLife Extension, Feb. 2022 at 5, https://cdn-de.agrilife.org/extension/departments/repk/repk-pu-009/files/parkland-dedication-optimizing-an- underutilized-resource.pdf.
38. *Id*. at 8.
39. *City of Coll. Station v. Turtle Rock Corp*., 680 S.W.2d 802, 805 (Tex. 1984).
40. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).
41. John L. Crompton, *Parkland Dedication: Optimizing an Underutilized Resource*, Texas A&M AgriLife Extension, Feb. 2022 at 35, https://cdn-de.agrilife.org/extension/departments/repk/repk-pu-009/files/parkland-dedication-optimizing-an- underutilized-resource.pdf.
42. John L. Crompton, *Parkland Dedication Ordinances in Texas: A Missed Opportunity?*, Texas A&M AgriLife Extension, Oct. 2010 at 50, https://college.agrilife.org/rptsweb/wp-content/uploads/sites/21/2015/05/Parkland-Dedication-Ordinances-in- Texas-A-Missed-Opportunity.pdf.
43. John L. Crompton, *Parkland Dedication: Optimizing an Underutilized Resource*, Texas A&M AgriLife Extension, Feb. 2022 at 1, https://cdn-de.agrilife.org/extension/departments/repk/repk-pu-009/files/parkland-dedication-optimizing-an- underutilized-resource.pdf.
44. *Id*.
45. *Id*. at 64.
46. Tex. Gov't Code § 212.202.
47. Meghan J. McCarthy, *Smart Sprawl: An Examination of Sucessful Conservation Development Ordinances and Practices and Recommendations for Central Texas*, The University of Texas at Austin, May 2008 at 64, https://repositories.lib.utexas.edu/bitstream/handle/2152/22309/McCarthy-2008.pdf?sequence=2&isAllowed=y.
48. Randall Arendt, *Conservation Subdivisions*, Hays County Livestream, Oct 6, 2020, https://hillcountryalliance.org/ our-work/communities/planning-and-development/low-impact-and-sustainable-development/.
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50. *Id*. at 22.
51. *See Id*. at 21.
52. *See Id*. at 15.
53. *Id*. at 64.

Amicus *cont'd from page 33*

In other words, "[a] defendant›s voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change" to have prevailed under the statute.[26] Then, in *Sole v. Wyner,* the Supreme Court held that a party has not "prevailed" under Section 1988 through the award of a preliminary injunction if that injunction is later reversed by a final decision in the case.[27]

The district court denied the attorney's fees, following the Fourth Circuit's case law at the time which had a bright line rule indicating that preliminary injunction awardees are not entitled to attorney's fees as they are not prevailing parties under the statute. The Fourth Circuit, bound by its case law, initially affirmed. The Fourth Circuit then reheard the case en banc and reversed, creating a new rule for when a party may obtain attorney's fees after the award of a preliminary injunction.[31] That rule states:

> When a preliminary injunction provides the plaintiff concrete, irreversible relief on the merits of her claim and becomes moot before final judgment because no further court-ordered assistance proves necessary, the subsequent mootness of the case does not preclude an award of attorney's fees.[33]

The court then explained that "all preliminary injunctions" are "solidly merits-based" and will satisfy the "judicial imprimatur" necessary under *Buckhannon*.[32] (Though the court did leave open the possibility that not all preliminary injunction awardees will be entitled to attorney's fees, but the result is that most will be). The court found in this case there was "little question that [the] preliminary injunction's 'alternation of the legal relationship of the parties'" satisfied the necessary standard as it provided precisely the relief the plaintiffs sought – the reinstatement of their licenses.[33]

The issues in *Lackey v. Stinnie* were left open by prior Supreme Court decisions. On appeal, the questions presented are: (1) whether a party must obtain a ruling that conclusively decides the merits in its favor, as opposed to merely predicting a likelihood of later success, to prevail on the merits under 42 U.S.C. § 1988; and (2) whether a party must obtain an enduring change in the parties' legal relationship from a judicial act, as opposed to a non-judicial event that moots the case, to prevail under Section 1988. IMLA filed an amicus brief in this case authored by Josh Skinner, Benjamin Gibbs, and Alexander Lindvall, with the City of Arlington, Texas. Attorney's fee awards directly impact the public fisc and the amounts can be as high, or even higher than the underlying liability—particularly in civil rights litigation. IMLA's amicus brief provided several examples of high attorney's fees awards local governments were forced to shoulder as a result of preliminary injunction victories.

Additionally, as the Court noted in *Buckhannon,* allowing attorney's fees awards in these scenarios can have a deterrent effect for governments to voluntarily alter their behavior. Governments may have already planned to change legislation or a policy or they may have done an assessment and decided the risks of continued litigation outweighed changing course. But in either scenario, the government may decide it is better served to continue litigating if it will be on the hook for attorney's fees no matter what. IMLA's amicus brief pointed out that this is particularly problematic in the context of preliminary injunctions which by their nature involve incomplete records and evidence and underdeveloped legal arguments. A limitation in fees under this scenario would represent a significant financial victory for local governments.

Notes

1. City of Grants Pass, Oregon v. Johnson, 144 S. Ct. 2202, 2216 (2024) (holding the Eighth Amendment's Cruel and Unusual Punishment Clause does not prohibit local governments from enforcing public camping bans).
2. Lindke v. Freed, 601 U.S. 187, 188 (2024) (setting forth new test to determine when a public employee's use of social media constitutes "state action" for the purposes of the First Amendment).
3. Muldrow v. City of St. Louis, Missouri, 144 S. Ct. 967, 972 (2024) (holding employee must demonstrate "some harm" in Title VII action based on forced transfer).
4. United States v. Rahimi, 144 S. Ct. 1889, 1891 (2024) (concluding that a federal statute that disarms certain individuals subject to domestic violence retraining orders is not facially unconstitutional under the Second Amendment as it fits within the Nation's regulatory tradition).
5. For example, in *Coal. on Homelessness v. City & Cnty. of San Francisco*, the Ninth Circuit vacated the district court's preliminary injunction related to the plaintiffs' cruel and unusual punishment claims. No. 23-15087, 2024 WL 3325655, at *1 (9th Cir. July 8, 2024).
6. Lindke v. Freed, 601 U.S. 187, 188 (2024).
7. Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024).
8. That said, in just over a month since it was decided, there were already 49 lower court decisions that cited to *Loper Bright*. For example, the Fifth Circuit recently reversed a district court decision relying on *Chevron* that involved the Department of Labor's rule related to ERISA and whether a fiduciary may consider "the economic effects of climate change and other environmental, social, or governance factors." *See* Utah v. Su, No. 23-11097, 2024 WL 3451820, at *1 (5th Cir. July 18, 2024). Another court in

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Texas recently granted Texas' motion for a preliminary injunction related to the DOL rule that raises the minimum salary for administrative, executive and professional employees to be exempt from overtime under the FLSA, noting *Chevron* no longer applies. Texas v. United States Dep't of Lab., No. 4:24-CV-499-SDJ, 2024 WL 3240618, at *7 (E.D. Tex. June 28, 2024).

9. Stanley v. City of Sanford, No. 23-997. The issue in this case is whether a former employee can sue under Title I of the Americans with Disabilities Act for alleged discrimination in post-employment distribution of fringe benefits.

10. E.M.D. Sales, Inc. v. Carrera, No. 23-217. The issue in this case is whether the burden of proof that employers must satisfy to demonstrate the applicability of a Fair Labor Standards Act exemption is a mere preponderance of the evidence or clear and convincing evidence.

11. City & County of San Francisco v. Environmental Protection Agency, No. 23-753. The issue in this case is whether the Clean Water Act allows EPA (or an authorized state) to impose generic prohibitions in NPDES permits that subject permitholders to enforcement for exceedances of water quality standards without identifying specific limits to which their discharges must conform.

12. 18 U.S.C. 921 et seq.

13. 18 U.S.C. 921(a)(3)(A) and (B).

14. 18 U.S.C. 926(a). The Attorney General in turn has delegated authority under the Act to the ATF) which is a part of the Department of Justice under the Attorney General's purview.

15. *See* Brief of Untied States, p. 7, available at: https://www.supremecourt.gov/DocketPDF /23/23- 852 /315742/20240625172334020_23-852%20VanDerStok.pdf.

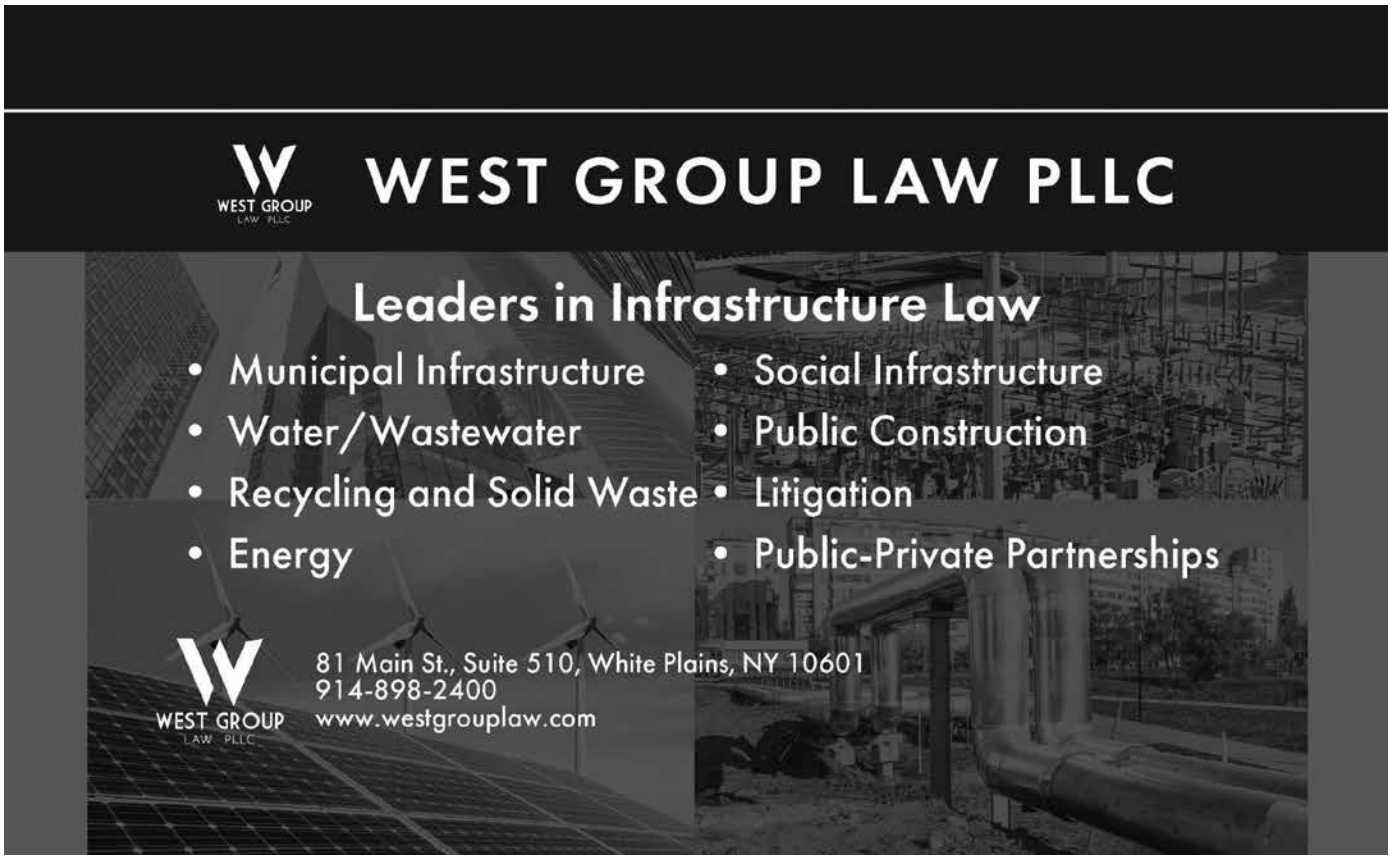
16. *See* 87 Fed. Reg. 24,652 (Apr. 26, 2022) (codified in relevant part at 27 C.F.R. 478.11, 478.12(c)).

17. 27 C.F.R. 478.12(c).

18. *See* Brief of Untied States in support of petition for certiorari, p. 8, available at: https://www.supremecourt.gov/DocketPDF/ 23/23-852/299970/20240207114349501_VanDerStok%20Petition%20v.2.6%201%20pm.pdf

19. *Id.* at p. I.

20. *See* Department of Justice, *Fact Sheet: Update on Justice Department's Ongoing Efforts to Tackle Gun Violence,* June 14, 2023, available at: https://www.justice.gov/opa/pr/fact-sheet-update-justice-department-s-ongoing-efforts-tackle-gun-violence (providing ghost gun figures for 2022); Department of Justice, *Justice Department Announces New Rule to Modernize Firearm Definitions,* April 11, 2022, available at: https://www.justice.gov/opa/pr/justice-department-announces-new-rule-modernize-firearm-definitions#:~:text=To%20help%20re-



duce%20the%20number,firearms%20they%20take%20into%20inventory (providing ghost gun figures from 2016- 2021).
21. CBS News, *Philadelphia reaches settlement in case against 2 large suppliers of ghost guns,* April 12, 2024, available at: https://www.cbsnews.com/philadelphia/news/ghost-guns-settlement-polymer80-jsd-supply-philadelphia/
22. *See* Brief of the Local Government Legal Center, p. 20-21, available at: https://www.supremecourt.gov/DocketPDF /23/23-852/316175/20240702104637030_23-852%20FINAL%20Ami%20Brief%20as%20filed%20PDFA.pdf
23. Brief of 20 Major Cities, et. al., p. 13-15, available at: https://www.supremecourt.gov/DocketPDF/ 23/23-852/316235/20240702145232136_23-852%20PDF%20A%20Amicus%20Brief%20of%2020%20Major%20Cities%20et%20al..pdf
24. *Id.*
25. Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Hum. Res., 532 U.S. 598 (2001).
26. *Id.* at 605.
27. Sole v. Wyner, 551 U.S. 74, 83, (2007).
28. Stinnie v. Holcomb, No. 3:16-CV-00044, 2021 WL 2292807, at *4 (W.D. Va. June 4, 2021), *aff'd*, 37 F.4t h 977 (4th Cir. 2022), *on reh'g en banc*, 77 F.4th 200 (4th Cir. 2023), and *vacated and remanded*, 77 F.4th 200 (4th Cir. 2023).
29. Stinnie v. Holcomb, 37 F.4th 977, 981 (4th Cir. 2022), *reh'g en banc granted*, No. 21-1756, 2022 WL 3210714 (4th Cir. Aug. 9, 2022), and *on reh'g en banc*, 77 F.4th 200 (4th Cir. 2023), *cert. granted sub nom. Lackey v. Stinnie*, 144 S. Ct. 1390 (2024).
30. Stinnie v. Holcomb, 77 F.4th 200, 210 (4th Cir. 2023).
31. *Id.*
32. *Id.* at 213.
33. *Id.* at 211.

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Court directed the registrar to provide notice to the Plaintiff that in review of his statement of claim, the Court was considering the action as frivolous or vexatious or an abuse of the court's process.

HELD: Action dismissed.

DISCUSSION: The Ontario Rules of Civil Procedure provides a mechanism for addressing occasions where a litigant advances a claim that is frivolous, vexatious or otherwise an abuse of process. Pursuant to Rule 2.1.01, the Court may on its own initiative stay or dismiss a proceeding if the proceeding appears on its face to be frivolous or vexatious or otherwise an abuse of process of the court, *Gao v. Ontario (Workplace Safety and Insurance Board),* 2014 ONSC 6100. The Court identified several issues with the Plaintiff's statement of claim: First, the allegations lacked material facts, particularly concerning three of the named City Staff defendants, who were not substantively connected to the claims. Second, the action was time-barred, as it was brought well beyond the two-year limitation period specified in the *Limitations Act,* 2002 S.O. 2002, c. 24, with no submissions as to why the actions should not be barred by the *Act*. Third, the claims were based on serious allegations without supporting material facts, rendering them vexatious. Lastly, the Court noted that the Plaintiff had a history of unsuccessful litigation on similar matters against the City, reinforcing the conclusion that this case was an abuse of the judicial process. The Court's decision emphasizes the importance of ensuring that legal proceedings are based on substantive and timely claims to prevent misuse of judicial resources. The action was dismissed for being frivolous, vexatious or otherwise an abuse of process.



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