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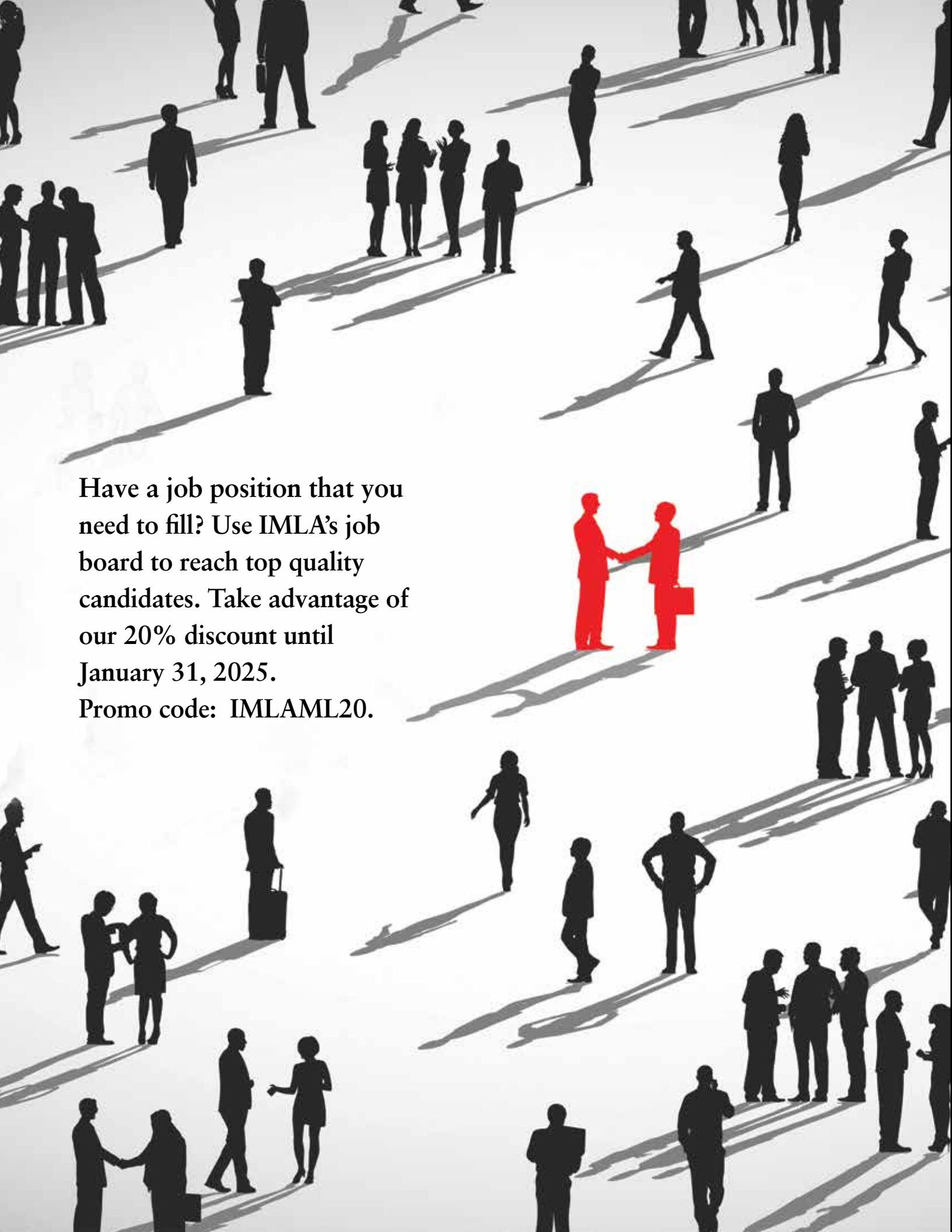
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Regulating Short-term Rentals: A Federal Circuit Roundup



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EDITOR'S NOTE



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

An American Innovation, A Global Impact

The November-December issue of *Municipal Lawyer* traditionally brings to you, in addition to our regular offering of legal articles, other information and messaging. True to form, in *President's Letter*, we print the inaugural note from our newly-installed IMLA President, Jeff Dana, City Solicitor of Providence, Rhode Island. As is customary, we honor the outstanding recipients of our *IMLA Awards* and congratulate our new and re-certifying *IMLA Fellows* on their professional acumen, providing a few glimpses of our *Annual Conference* where these honors are announced (Orlando, Florida in late September 2024). And this year, we offer a look at our *IMLA International Comparative Law Conference*, which recently convened during four days on the shores of extraordinary Lake Como.

In a few instances, these extracurricular elements have served as the backdrop for our November-December articles. Hurricane *Helene* roared by to our West as our Conference sessions took place--a juxtaposition which became the starting point for Brad Cunnigham's *Listserv* about disaster recovery.

And it turns out that Italy, while not only offering a remarkable venue in which to compare notes about Italian local government law with that in Canada and the United States, is actually a highly germane segue to our feature article by Katie Hodgdon—a review of short-term rental litigation across America's circuit courts. It should come as no surprise that the cuisine, architecture, style, history, art, natural beauty, and other ingredients that made our trip to Como so rewarding have for years placed Italy among the top tourist destinations on the globe. Revenues from international visitors have no doubt bolstered the national economy, and deservedly so. But not without a cost that will sound familiar to many North American local government lawyers: Airbnb and similar apps are converting long-term residences into short-stay lodging, undermining stability and community, eliminating housing, and driving prices to unheard-of levels.

Today, Italy ranks third, behind the US and France, in the number of short-term rentals offered within its shores. Much public outcry has followed; nationwide STR measures are gradually being proposed, but seemingly no regulation of major consequence has yet become law. A national proposal to prohibit one-night rentals in high-tourism cities has been floated. In October 2023, Forza Italia, the nation's co-leading political party, announced legislation to collect more than € 1 billion from Airbnb hosts who were flaunting their obligations to pay taxes of 21 percent on STR revenue. And effective June 2024, Italy's STR operators were required to register with a national database of short-term rentals, and to display a national identification certificate.

At least one Italian municipality has taken more tangible steps: one year ago, the city of Florence imposed a complete ban on new Airbnb-type listings in its historic center and offered short-term landlords three years of tax incentives to revert to traditional long-term leasing. The ban was overdue: citing from a *Reuters* article on the subject, the number of STRs in Florence grew from fewer than 6,000 in 2016 to nearly 14,400 by 2023, and rents increased by more than 42 percent in that time, including a jump of 15 percent in 2023 alone. Against that backdrop, it seems likely that the STR cost/benefit debate will accelerate in Italy; if so, we may take a look at their new measures in a future *ML*.

In the meantime, back to our North America focus. As noted earlier, our lead article in this issue discusses STR litigation in the US. We also hear from repeat contributor Monica Ciriello, summarizing recent cases of interest in *Inside Canada*; Katie Leininger elucidates the fine points of administrative search warrants in *Code Enforcement*; in *Day in the Life* Avery Morris introduces us to Wendy Walberg, City Solicitor of Toronto; and in *Amicus,* your editor provides an update on IMLA's legal advocacy activities, both past and future-looking.

We trust you will find the above articles interesting and relevant. Please let me know if you are interested in submitting an original work of authorship. And while we did not publish any articles discussing election law, we acknowledge the pivotal role that local elections officials and volunteers from the community play in assuring a transparent and trustworthy process, and thank them for their service. Happy Election Day.

Best regards-

Erich Eiselt

PRESIDENT'S LETTER



BY: **JEFF DANA**
City Solicitor, Providence, Rhode Island and IMLA President

Appreciation of Our Good Fortune

IMLA held its 89th Annual Conference in Orlando, Florida at the end of September, and it was a magnificent event. We all owe a hearty thank you to the hard-working IMLA staff who make the whole IMLA experience possible.

It is my honor to serve this incredible organization and its members. We are very fortunate to be in a profession for which service to others is paramount. We serve our clients, and we often serve folks with limited resources through pro bono work. We serve both the legal system and fellow attorneys through our efforts to work with each other in a collegial manner, and to engage in professional development and maintain high standards of ethics and professionalism. We, the members of IMLA, are even more fortunate than most attorneys as we have the privilege of serving our local governments. Our clients impact the daily lives of every member of our local communities. It is an awesome responsibility we have to help guide our clients through the myriad challenging decisions that they must make every day.

As municipal attorneys, we are fortunate to have all the services that IMLA provides. In addition to the learning opportunities that IMLA offers its members via its substantial volume of CLE sessions, both in-person and online, it also stimulates a strong professional support network. We represent large cities and small towns, we are from every region of North America, and we have a wide range of personal, professional, and academic backgrounds. We all have in common the unique joys and challenges of practicing local government law. I urge everyone to take full advantage of what IMLA has to offer: attend a conference, sign up for a webinar, follow and assist with our various amicus efforts, write an article, join one of the exceedingly useful listservs.

Among the very few drawbacks of being a local government attorney, the one I find truly frustrating is when any one of us has our integrity, or our continued employment, questioned for merely performing our duty to provide sound legal counsel and representation. In addition to availing yourself of the numerous benefits of IMLA membership mentioned above, I urge you to lean into the professional support network aspect of IMLA. Let's be present and available for each other – to help answer legal questions and discuss the finer points of drafting memoranda, but also to provide guidance, counsel, and moral support as we collectively navigate the challenges of our profession. On that note, I also urge participation in IMLA's mentorship program. I am fortunate enough to have had wonderful mentors throughout my career, and I am forever indebted to them for so many lessons learned. I am sure I am not alone in that, and I encourage engagement in the two-way street of learning and growth that occurs between mentors and mentees. Please get involved, enjoy what IMLA has to offer, and "pay it forward" to each other as we appreciate the good fortune we have to be in jobs that present opportunities for fulfillment, as well as membership in an organization that offers support through the kindness and sincerity of our colleagues. ML

Regulating Short-term Rentals: A Federal Circuit Roundup

By: KATIE HODGDON, *Association Counsel,*
Association of Towns of the State of New York, Albany, New York



INTRODUCTION

While short-term rentals are not a new concept – home-sharing platforms like Airbnb have been around since 2008, and property owners have been renting out their properties on a short-term basis for decades – their increasing popularity has resulted in local governments putting forth regulatory frameworks that seek to balance the needs of the municipality with the rights of property owners. This article analyzes recent cases in each federal circuit that have addressed local regulations of short-term rentals. In conducting this analysis, it became apparent that while there are a multitude of ways in which property owners can assert a constitutional violation when their property rights are hindered by a local regulation, the courts will generally defer to the municipality if the regulation is rational and furthers a governmental interest.

First Circuit (Procedural and Substantive Due Process): *Thayre v. Town of Brookline*, no. 120-cv-10910 (D. Mass. 2021) 2021 WL 66042 – The property owner sued the town asserting procedural and substantive due process violations, upon the town's finding that short-term rentals were not a permitted use in the town code.

Procedural Due Process: in order to establish a due process claim, the plaintiff had to identify a protectible property interest. Here, the property owner was not deprived of property or the ability to rent her property generally but rather of the ability to rent the property for 30 days or less. The locality possessed the authority to enact local regulations and registration and licensing requirements for short-term rentals (*see id*. at 4, citing Mass. Gen. L. c. 64G, section 14). Inasmuch as the town did not authorize short-term rentals, the property owner did not have a protected property interest in using her property in that manner.

Takeaway for localities in the First Circuit: *A property owner is not deprived of a procedural due process property interest simply because they are prohibited from using their property in a manner they desire, such as a short-term rental. Instead, the property owner must demonstrate that the protected property interest has been recognized by a state statute or legal contract – express or implied – between the state (locality) and the individual.*

Substantive Due Process: The property owner asserted that the locality violated her substantive due process rights by interpreting its code in a manner beyond the scope of its authority. The court found that the conduct of the government must "shock the conscience" or infringe upon rights "implicit in the concept of ordered liberty" (*see id*. at 6, citing *Commonwealth v. Wilbur W.*, 479 Mass 397, 403 (2018)). The court noted that the First Circuit routinely rejects substantive due process claims in zoning and land use contexts, although relief may be provided in "truly horrendous situations" (*see id*., citing *Brockton Power LLC v. City of Brockton*, 948 F. Supp. 2d 48, 69 (D. Mass 2013)). The court found that the town properly used its authority to interpret its own zoning bylaws, and that any review of the interpretation must be deferential to the legal conclusion reached by the board. Even if the board interpreted its zoning code improperly, such an interpretation does not violate substantive due process rights (*see id*. at 7). The court also concluded that the interpretation of a zoning code does not rise to the "shocks the conscience" standard required in the First Circuit.

Takeaway for localities in the First Circuit: *Property owners have a heavy burden to overcome by demonstrating that a locality's interpretation of its code shocks the conscience. Even improper zoning code interpretations do not rise to the level of shocking the conscience, nor do they violate substantive due process rights.*

Second Circuit (Fair Housing Act, NYS Town Law, Due Process, Fourth Amendment): *Weisenberg v. Town Board of Shelter Island*, 404 F. Supp. 3d 720 (E.D.N.Y. 2019) - Shelter Is-

land adopted a short-term rental law in 2017 that imposed licensing and advertising requirements on certain vacation rentals, prohibited rentals more than once in a 14-day period, imposed civil penalties for violations, and authorized the town board to review any issues associated with the short-term rental law. Short-term rentals predating the law could apply for a waiver to authorize more than one stay in the 14-day timeframe through the end of 2017, after which no waivers were allowed. The law applied only to vacation rentals, which were explicitly distinguished from owner-occupied rental properties. Various property owners filed suit, alleging, among other things, that the local law violated the Fair Housing Act (FHA), New York State Town Law and the United States Constitution.

Fair Housing Act: The court found that the law did not violate the FHA, which makes it unlawful to discriminate against any person in the sale or rental of a "dwelling," given that the short-term rental law excludes properties rented for more than 14 days at a time, it does not apply to dwellings for FHA purposes.

Takeaway for localities: *Short-term rental regulations will not violate the FHA, which applies to "dwellings," and a short-term rental cannot be considered a dwelling when the use is transient.*

Local Zoning Authority: The property owners also alleged that the local law violates New York's Town Law § 261, which authorizes towns to regulate and restrict "the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes." The court noted that the authority granted by Town Law § 261 is not a general police power but instead a power to regulate land use, rather than regulating the individual that owns or occupies it. Here, the short-term rental law addressed the use of the land; that is, the number of days the property is rented at a certain time, as opposed to the identity of the owners or renters.

Takeaway for localities: *Regulating the length of stays in short-term rentals is a proper exercise of zoning authority, as durational requirements regulate the use of the land and not owners or users. Accordingly, localities can feel confident imposing durational restrictions using their zoning authority in a short-term rental local law.*

Due Process: The plaintiffs asserted that they were denied Due Process because they had a fundamental right to rent out their homes under New York law. The court found that under New York law, a property owner has no vested right to the existing zoning status of their property unless they made substantial expenditures in reliance on the zoning status. As the property owners could not demonstrate any substantial expenditures, their Due Process claim failed.

Takeaway for localities: *This case suggests that if property owners can demonstrate that they made substantial expenditures on their properties they may have a due process claim if a short-term rental local law changes the status of the property that deprives them of the ability to use the property as intended. This appears to be a tenuous link, but the local government attorney should consider the case law as it relates to vested rights when drafting and implementing a short-term rental local law.*

Fourth Amendment: Lastly, the property owners asserted that the record-keeping and search requirements violated their right to privacy under both the Fourth Amendment and Article I, § 12 of the NYS Constitution. Specifically, the local law required short-term rental owners to maintain rental registries for the town to examine at any point, subject to automatic fines and license forfeiture for non-compliance. While the law allowed owners to demonstrate compliance before any license revocation, fines were automatically issued. The court allowed these claims to proceed; the town amended its law to comply with the Fourth Amendment, and both parties agreed to discontinue the action.

Takeaway for localities: *When drafting a local law, ensure that property owners are afforded the ability to comply with requests for records and respond before fines are issued. Any requests for records should be reasonable, and a monthly reporting requirement has been construed as excessive and an unlawful search and seizure violation of the Fourth Amendment.*

Third Circuit (Takings, Contract and Due Process Clauses): *Nekrilov v. City of Jersey City*, 45 F.4th 662 (3d Cir. 2022) –The property owners asserted that the city ordinance limiting short-term rentals violated their rights under the Takings, Contract, and Due Process

Continued on page 8



Katie Hodgdon serves as Association Counsel to the Association of Towns of the State of New York. In that role, she provides legal assistance and training to town officials on a variety of municipal issues, negotiates contracts on behalf of the Association and administers the Association's Continuing Legal Education program, among other things. Prior to joining the Association of Towns, she acted as counsel for the New York State Conference of Mayors. She also also completed a clerkship as an Appellate Court Attorney for the New York State Supreme Court, Appellate Division, Third Judicial Department in Albany, New York.
Katie is admitted to practice in New York and is a member of the New York State Bar Association, where she serves as co-chair of the Taxation, Finance and Economic Development Committee and the Code Drafting Committee of the Local and State Government Law section, as well as on the section's Executive Committee. In 2023, she was appointed to serve on the New York State Bar Association's Task Force on the Ethics of Public Sector Lawyering, as well as to her second five-year term on the Third Judicial District's Committee on Character and Fitness.

clauses of the United States Constitution. The plaintiffs operated short-term rentals using online home-sharing platforms. After previously adopting an ordinance authorizing short-term rentals and requiring permits for owners with more than five short-term rentals, Jersey City adopted a more restrictive ordinance essentially limiting short-term rentals to owner-occupied units if the owner wanted to rent the properties more than 60 nights per year (*see id.* at 667). In the timeframe from the initial ordinance (2015) through the adoption of the more restrictive measure (2019), the plaintiffs purchased several properties and entered into long-term leases on other properties with the intention of subleasing on a short-term basis. They filed suit upon the adoption of the more restrictive ordinance.

Takings Clause: The plaintiffs first asserted that the city violated the Takings Clause by limiting their ability to engage in a future short-term rental business. As the city did not physically take any property, the plaintiffs had to demonstrate a regulatory taking by showing that either: 1) the city engaged in a total taking by denying all economically beneficial productive use of the property; or 2) the regulation constituted a partial taking that, while not rendering the property completely economically unviable, would require compensation under the *Penn Central* test (*see id.* at 669, citing *Lucas v. South Carolina Coastal Council*, 505 US 1003 (1992), *Penn Central Transportation Co. v. City of New York*, 438 US 104 (1978)).

The plaintiffs argued that the city's regulation deprived them of a forward-looking right to pursue their short-term rental businesses. The court disagreed, finding that the Constitution does not create property interests, and zoning regulations are classic examples of permissible governmental regulations that do not require compensation even where they restrict or prohibit the property's most beneficial use. A property owner is not vested with a cognizable property right simply because a municipality legalized a business activity that the property owner seeks to undertake (*see id.* at 669).

While the forward-looking right to pursue short-term rentals was not a valid Takings Clause claim, the court also examined whether the regulation constituted a taking of: 1) the use and enjoyment of the purchased properties; 2) their long-term leases; and 3) their short-term rental contracts. The court found that despite the fact that the plaintiffs cannot use their properties as short-term rentals, they have not been rendered economically idle and can be used to generate income in other manners, including living at the properties, entering into long-term leases, or selling the properties (*see id.* at 672). For a total taking, the question is not "whether the regulation allows operation of the property as 'a profitable enterprise' for the owners, but whether others 'might be interested in purchasing all or part of the land' for permitted uses" (*see id.*, citing *Park Ave Tower Associates v. City of New York*, 746 F. 2d 135, 139 (2d Cir. 1984), quoting *Pompa Construction. Corp v. City of Saratoga Springs*, 706 F. 2d 418, 424 (2d Cir. 1983)). Because other uses of the property remained, there was no taking.

Takeaway for localities: *Prohibiting short-term rentals does not constitute a taking under the Constitution even if it deprives the owner of the property's most beneficial or income-generating use, so long as other uses are available.*

As for the takings claim, the court again found that other uses were available, including occupying the premises or entering into a sublease. For short-term rental contracts existing at the time the more restrictive ordinance was adopted, the court found that the ordinance did not outright ban short-term rentals, authorized up to 60 nights per year, and excepted short-term rental contracts that were in place at the time of adoption. Accordingly, the plaintiffs' total takings claims failed on all accounts.

Assessing the plaintiffs' partial takings claim, the court looked to the three-factor analysis elucidated by *Penn Central* and found that the ordinance did not constitute a partial taking. *Penn Central* partial takings claims require the court to look to: 1) the economic impact of the regulation on the claimant; 2) the extent to which the regulation interfered with distinct investment-backed expectations; and 3) the character of the governmental action (*see id.* at 672). Even though the plaintiffs may have lost over half of their potential revenue due to the short-term rental ordinance, they did not account for the other ways they could generate income from their properties. Moreover, the economic impacts of regulations are typically measured in the effect on the property value; here, the properties did not decrease in value but instead, the plaintiffs argued they were denied the ability to profit from and receive a reasonable return on their investment (*see id.* at 673). The court found that lost profits are not an appropriate measure of economic impact for a takings claim, and that the only loss in "value" was speculative lost revenue.

Takeaway for localities: *Property owners are unlikely to prevail on a takings claim in the event they cannot operate a short-term rental due to legislative action unless they can demonstrate that their property value was drastically reduced as a result.*

Regarding interference with the plaintiffs' distinct, investment-backed expectations, the court found that while the city had initially encouraged short-term rentals with its first ordinance, the revised ordinance still did not rise to a taking because the city had the authority to regulate residential housing in the public interest. While the city initially promoted itself as friendly to short-term rentals, that did not mean that short-term rental owners could run their

businesses indefinitely and without any future restrictions (*see id*. at 675).

Takeaway for localities: *In the event that a locality initially encourages short-term rentals, it still retains the authority to amend the regulation in furtherance of the public interest.*

As to the character of the governmental action, the court found that the ordinance was a general zoning regulation that restricted the permissible uses of residential housing in order to protect the residential housing market and promoted public safety by reducing nuisance behaviors associated with short-term rentals, and as such, did not rise to a taking.

Takeaway for localities: *Promoting housing affordability and reducing nuisance behaviors are valid reasons to restrict short-term rentals, although the locality should be prepared to demonstrate evidence of how the regulation achieves its stated goals.*

Contract Clause: The plaintiffs argued that the ordinance interfered with their existing short-term rental contracts and potential uture contracts. The court found that while the Contract Clause of the Constitution prohibits the state from passing any laws that impair the obligations of contracts, it does not disrupt the state's ability to exercise its police power to serve the public interest – even if it impacts existing contracts (*see id*. at 678). To this end, the regulation will be upheld if it: 1) has a significant and legitimate public purpose, and 2) is drawn in an appropriate and reasonable way to advance the legitimate public purpose. Noting that the Contract Clause applies to municipal ordinances, the court found that it generally defers to the locality's legislative authority, and that the plaintiffs failed to demonstrate that the city did not have a substantial public purpose in limiting short-term rentals and, additionally, such ordinance was drawn in an appropriate and reasonable manner.

Takeaway for localities: *If a short-term rental regulation impacts existing contracts, the locality should ensure that the regulation promotes a public purpose and is drawn as narrowly as possible to avoid any constitutional scrutiny.*

Substantive Due Process: Legislative due process claims are subject to rational basis review, and the city had to demonstrate in adopting the short-term rental regulation, there was: 1) a legitimate state interest, that 2) could be rationally furthered by the statute (*see id*. at 680). As amendments to zoning laws are legislative in character, the court afound that the city easily satisfied rational basis review with legislation that protected the long-term housing supply, reducing deleterious effects of short-term rentals, and protecting the residential character and density of neighborhoods; accordingly, it dismissed plaintiffs' substantive due process claims.

Takeaway for localities: *When adopting short-term rental regulations, it is important to elucidate the reason for any restrictions, and such restrictions should actually accomplish the stated goals.*

Fourth Circuit (Equal Protection): *Lowe v. City of Charleston*, 597 F.Supp. 3d. 855 (4th Cir. 2022) – Owners of the only residentially zoned property in the surrounding area – none of which had been rezoned since 1978 – commenced suit against the city upon its denial of their request to rezone their property to a limited business classification, which would enable them to apply for a commercial short-term rental permit under the code. They asserted that the city violated the Fourteenth Amendment's Equal Protection Clause because it treated their property differently from similarly situated properties, without a rational basis. In response, the city argued that there were no similarly situated parcels in the surrounding area and that there was a rational basis for denying the application.

The court noted that when a party has not alleged that it was deprived of a fundamental right or subjected to discrimination based on a suspect classification, a regulation will be upheld if it was rationally related to a legitimate state interest (*see id*. at 859). In this instance, denial of a rezoning--rendering a property owner unable to obtain a commercial short-term rental permit--is not a denial of a fundamental right or discrimination based on a suspect classification, so the city's action must merely be rationally related to a legitimate state interest. Irrespective of the applicable standard, the court found that the Equal Protection Clause was not implicated because the property owners failed to identify any similarly situated properties that applied for a rezoning and were granted the application. Even assuming that the property owners were treated differently, the court found that the city's denial of the rezoning had a rational basis, and that it was not the function of the judiciary to sit as "a super-legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines," quoting *Smith Setzer & Sons, Inc v. South Carolina Procurement Review Panel*, 20 F.3d 1311, 1323 (4th Cir. 1994)). Accordingly, the court dismissed the claims and found for the city.

Takeaway for localities: *If the local regulation distinguishes among classes of property or zoning status – e.g., commercial properties receive a different number of short-term rental permits than residential properties– ensure that similarly situated properties are treated the same to avoid any Equal Protection implications and confirm that regulations are rationally related to a legitimate state purpose.*

Fifth Circuit (Durational Requirements, Equal Protection, Due Process, Commerce Clause): *Hignell v. City of New Orleans*, no. 19 cv. 13773 (E.D.

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Short-term Rentals *cont'd from page 9*

La. 2024) (2024 WL 838217) – this case was remanded back to District Court after the *Hignell-Stark* (46 F.4th 317 (5th Cir. 2022) decision. In that case, the Fifth Circuit found that while owners of short-term rentals did not have a vested interest in short-term rental permits that were proffered by the city as a privilege and not a right, the city's short-term rental law violated the dormant Commerce Clause by requiring short-term rentals to be owner-occupied, thereby discriminating against out-of-state property owners. After the decision, the city revised its short-term rental ordinances by removing the owner-occupancy requirement and instead imposed an operator requirement, whereby an adult operator is required to be on the premises, and limited the number of short-term rental permits. The plaintiffs amended their complaint to challenge the city's authority to regulate the duration of short-term stays and the validity of the operator requirement under the Commerce Clause and asserted, among other things, that the ordinance violated both Due Process and Equal Protection.

Duration: The court found that local governments in Louisiana are authorized to adopt, implement, review, and enforce standards for land use, zoning, and historic preservation and, similar to the *Weisenberg* decision, encompassed within this scope is the authority to impose durational limits on short-term rentals.

Takeaway for localities: *Imposing durational limits on short-term rentals is a valid exercise of a locality's land use and zoning authority.*

Commerce Clause: The plaintiffs argued that the operator requirement violated the dormant Commerce Clause by prohibiting out-of-state corporate entities from operating residential short-term rentals and requiring the operator to reside in the short-term rental (*see Hignell* at 8). The court disagreed, holding that the operators are only required to be temporary residents of the short-term rental while rented, and that the ban on corporate entities acting as operators in residential zones impacted out-of-state and in-state businesses alike (*see id.*).

Equal Protection: The plaintiffs also asserted that the city's ordinances violated the Equal Protection Clause by their unequal treatment of similarly situated homeowners regarding short-term rental permits and regulations. The court disagreed with the plaintiffs' assertion that "all persons who wish to rent their residences for less than thirty days are similarly situated" (*see id.* at 18), finding instead, that the ordinance, which banned corporate entities from short-term rental permits in residential neighborhoods (via the operator requirement) was rational and furthered the city's legitimate aims of limiting commercial impacts in residential areas and reducing the overconcentration of short-term rentals in particular neighborhoods (*see id.* at 20).

Due Process: Finally, the plaintiffs argued that they were denied the "fundamental right to lease" their residential property for whatever length of time they chose (*see id.* at 22). The court disagreed, finding that both federal and Louisiana jurisprudence say otherwise and, further, that short-term rentals are not comparable to a traditional residential lease.

Takeaway for localities: *Imposing an operator requirement is much more likely to withstand constitutional scrutiny over an owner-occupancy requirement, as it does not implicate the dormant Commerce Clause by requiring an owner to stay on site and accomplishes the often-stated goals of ensuring timely responses to any issues that may arise during short-term rental stays and promoting safety on the premises by having a "responsible adult" on site.*

Sixth Circuit (Zoning Authority, Dormant Commerce Clause, Takings Clause): *Purple Munky Property Co. LLC v. Walnut Township*, no. 23-cv-853 (S.D. Ohio 2023) 2023 WL 3069752 –The plaintiffs were renting their properties as short-term rentals when they received notice from the town to cease operations, as the properties were in residential districts not zoned for tourist home use. The plaintiffs filed suit, arguing that the zoning code was silent on short-term rentals, thereby allowing the use and, further, that prohibiting them from using their property as a short-term rental violated both the dormant Commerce Clause and the Takings Clause.

Zoning Authority: The plaintiffs asserted that their properties could be used as short-term rentals because the town's zoning code did not explicitly prohibit the use. The court disagreed, finding the silence does not equate to permission, as the code provided that "any unlisted use shall be prohibited" (*see id.* at 2).

Takeaway for localities: *if the local code is silent on short-term rentals, that does not mean the use is authorized. To ensure this is the case, the code should explicitly indicate that any use not listed is prohibited.*

Dormant Commerce Clause: The court struck the plaintiffs' argument that the town's zoning code violated the dormant Commerce Clause, as: 1) the plaintiffs were in-state; and 2) the zoning resolution was not discriminatory on its face and did not purposefully discriminate against out-of-state interests – that is, it did not authorize in-state property owners to operate short-term rentals in residential zones while prohibiting out-of-state property owners from operating.

Takeaway for localities: *A dormant Commerce Clause argument is unlikely to succeed if the regulation does not distinguish between in-state and out-of-state property owners.*

Takings Clause: The court distin-

guished between actual, physical takings of property and regulatory takings. As the properties in question were not physically taken, the court looked to whether the government went "too far" in restricting land use (*see id*. at 5, quoting *Lingle v. Chevron USA Inc*. 544 US 528 (2005)). Applying the *Penn Central* test, the court found that the plaintiffs had not exhausted their remedies at the local level in applying for the permit and, thus, their claim was unripe. Additionally, they failed to demonstrate that they had any reasonable investment-backed expectations that were disrupted by the township, as they purchased their properties under the current zoning structure, where neither short-term rentals nor tourist homes were permitted.

Takeaway for localities: *this opinion suggests that if the plaintiffs had reasonable investment-backed expectations – like the plaintiffs in the Third Circuit Nekrilov case – they may have had a claim under the Takings Clause. It is important to examine the case law in the jurisdiction when drafting a local short-term rental law.*

Seventh Circuit (Fourth Amendment Unreasonable Search and Seizure, Equal Protection): *Murphy v. Walworth County*, 383 F.Supp. 3d. 843 (7th Cir. 2019) - In 2017, Wisconsin – a home rule state – adopted Act 59, which prohibited local governments from outlawing short-term rentals within their jurisdiction but gave them the authority to regulate short-term rentals through zoning and licenses (*see id*. at 846). Walworth County adopted licensing and zoning regulations regarding short-term rentals, including requiring a guest registry, requiring adequate sanitation facilities, and limiting occupancy, applicable to all short-term rentals. The plaintiff, who was not prohibited from operating a short-term rental, sued on the basis that the ordinance violated the Fourth Amendment by requiring an unreasonable search of the guest book, and violated the Equal Protection Clause of the Fourteenth Amendment because it treated single-family homes that rent out for less than 30 days differently from properties with long-term leases or owned single-family homes.

Fourth Amendment: The county asserted that the plaintiff lacked standing, since he did not yet comply with the ordinance by obtaining a license, nor had the county enforced the ordinance against him, but the court found that the plaintiff did have standing to pursue a pre-enforcement challenge, since the county would eventually enforce the ordinance. Regardless, the county had repealed the section of the ordinance that addressed the guest registry and accordingly, the Fourth Amendment claims were dismissed as moot.

Takeaway for localities: *As previously discussed in the Weisenberg case, to avoid Fourth Amendment issues, ensure that property owners have time to comply with requests for records, and that such requests are reasonable.*

Equal Protection: The court noted that local laws generally withstand an Equal Protection challenge if the classification drawn is rationally related to a legitimate state interest (*see id*. at 850, quoting *City of Cleburne v. Clerburne Living Center*, 473 US 432 (1985)). To succeed on an Equal Protection claim, plaintiffs have to demonstrate that: 1) they were intentionally treated differently from others similarly situated; 2) they were treated differently because of the class in which they belonged; and 3) the difference in treatment was not rationally related to a legitimate state interest (*see id*. at 850, quoting *Smith v. City of Chicago*, 457 F3d. 643 (7th Cir. 2006)). The court noted that single-family homes used for short-term rentals are not similarly situated to single-family homes used for long-term use, as there is a different rate of electricity, plumbing, and gas usage, as well as a variable number of automobiles on short-term rental properties. Even assuming, *arguendo*, that the properties were similarly situated, the ordinance would survive rational basis review, as protecting the health, safety and general welfare of the public from seasonal over-occupancy is "an obvious and rational justification" for the requirements (*id*. at 852). The court found for the county and dismissed the property owner's case.

Eighth Circuit (Legal Non-conforming Use, Takings Clause, Dormant Commerce Clause, Contract Clause, Procedural and Substantive Due Process): *MDKC, LLC v. City of Kansas City*, no. 23 cv 00395 (W.D. Mo. 2023) 2023 WL6406403 –In 2018 Kansas City adopted an ordinance authorizing short-term rentals in residentially zoned areas, so long as the applicant submitted required documentation that included signatures from 55% of the surrounding neighbors and, additionally, allowed short-term rentals as a matter of right in business zones so long as the applicant paid the permit fee (*see id*. at 1). Thereafter, the city conducted a survey of its residents regarding the impact of short-term rentals and, after a public hearing and meeting in 2023, adopted new ordinances overriding the former short-term rental ordinance. The 2023 ordinances distinguished between resident short-term rentals and non-resident short-term rentals. Resident short-term rentals were authorized in residential and non-residential zones, while non-resident short-term rentals were prohibited in residential zones and subject to density restrictions in non-residential zones. The city allowed pre-existing short-term rental permittees to continue their operations, even if they did not meet the new requirements.

Based on the 2023 ordinances, the city denied the plaintiffs' pending short-term rental permit applications. They sued, alleging that their properties were legal non-conforming uses and that the 2023 ordinances violated the Takings Clause, the dormant Commerce Clause,

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the Contract Clause, as well as substantive and procedural Due Process.

Legal non-conforming use: The court dismissed the plaintiffs' claim that their short-term rentals were legal non-conforming uses under Missouri law, as they had not exhausted their administrative remedies before seeking relief in court.

Takeaway for localities: *Property owners that fail to exhaust administrative remedies at the local level will likely not prevail when challenging short-term rental regulations.*

Takings Clause: The plaintiffs also asserted that the 2023 ordinances resulted in an unconstitutional taking by: 1) depriving them of all economically viable use of their property, 2) depriving them of vested property rights acquired before the 2023 ordinances were enacted; 3) depriving them of vested property rights in investment properties that were made in reliance on the 2018 ordinance; and 4) depriving them of vested property rights because the city delayed processing their short-term rental applications. As three of the four claims required the plaintiff to exhaust administrative remedies, the court only examined whether the ordinances deprived the plaintiffs of all viable economic uses of their property. Predictably, this claim failed, as plaintiffs had other ways to generate economically beneficial uses of the property, including leasing the properties on a long-term basis, living on the premises, or selling the property (*see id*. at 6, citing *Nekrilov*, *supra*).

Takeaway for localities: *As the Third Circuit indicated, to succeed with a Takings Clause claim the property owner has the burden of demonstrating that all economically beneficial uses of their property have been extinguished by a regulatory action.*

Dormant Commerce Clause: The court noted that if a state law discriminates against interstate commerce, it has to withstand strict scrutiny and be drawn as narrowly as possible to advance a legitimate local interest. But the court found that the 2023 ordinances did not discriminate against interstate commerce, as the primary resident in the residential short-term rental did not have to be the owner, as discussed in *Hignell*, *supra*, and *Rosenblatt*, *infra*. Indeed, nothing prevented an out-of-state property owner from leasing a portion of their property to a long-term tenant and leasing the remainder as a short-term rental, among other things. Even if the ordinance did discriminate against interstate commerce, the court found that the burden on interstate commerce was not significant enough to outweigh valid government interests.(*see id*. at 8).

Takeaway for localities in the Eighth Circuit: *Unlike the Hignell-Stark Fifth Circuit decision in 2022, this court appeared to find the locality's justifications in enacting the short-term rental restrictions for the benefit of the community far outweighed the minimal impact on interstate commerce. (The court also deemed the plaintiffs' brief conclusory and without evidence to support their assertions, which may have had an impact).*

Contract Clause: The court disagreed with the argument that the 2023 ordinances prevented plaintiffs from fulfilling contracts for future guest reservations, to the tune of $200,000. While the Contract Clause prohibits states from interfering with contractual obligations, the plaintiffs could not rely on the Contract Clause to protect contracts not yet entered into on properties that had never obtained a valid short-term rental permit. Again referring to *Nekrilov, supra*, the court found that it is unreasonable to conclude that one could rely upon an earlier, less restrictive ordinance indefinitely without additional restrictions (*see id*. at 9). Additionally, the city provided legitimate purposes for the 2023 ordinance and the court would not second guess the reasonableness of a zoning ordinance enacted to promote the public health and interest (*see id*.).

Procedural and Substantive Due Process: The plaintiffs' procedural due process claim was dismissed as they failed to make supporting arguments. In terms of substantive due process, the court looked to the "shocks the conscience" standard referenced in the First Circuit in *Thayre*, *supra*, and found that the 2023 ordinances did not shock the conscience. On the contrary, the city identified legitimate reasons in enacting the changes, including protecting the residential character of the neighborhood and reducing nuisance activity associated with short-term rental (*see id.* at 11).

Takeaway for localities: *When invoking substantive due process violations, land use regulations have to be truly irrational and egregious before they "shock the conscience." When drafting short-term rental regulations, rely upon legitimate reasons for enacting any restrictions.*

Ninth Circuit (Dormant Commerce Clause): *Rosenblatt v. City of Santa Monica*, 940 F.3d 439 (9th Cir. 2019) –A property owner filed suit against the city, alleging that its short-term rental ordinance requiring primary residents to remain in the dwelling unit in order to operate a short-term rental violated the dormant Commerce Clause and discriminated against interstate commerce. The ordinance prohibited short-term rentals of 30 days or less, but excepted home sharing from this requirement, or those properties where a primary resident (as opposed to owner) remained in the dwelling (*see id*. at 442). In adopting the ordinance, the city indicated that it sought to preserve available housing stock and the local

character and charm that result from its resident population (*see id.*). The plaintiff, who had previously rented her property on a short-term basis, commenced an action alleging that the ordinance violated the dormant Commerce Clause and was not enacted to preserve local housing stock and character of the community but instead, to drive tourists back to hotels to increase the declining revenue from the transient occupancy tax – which hotels paid and short-term rentals did not.

Dormant Commerce Clause: At the outset, the court noted that under California law, it must presume that the local legislative body did not intend to violate the Constitution when enacting ordinances. Following this principle, the court further indicated that the dormant Commerce Clause required a two-tiered approach: 1) when the regulation directly regulates or discriminates against interstate commerce, or when the regulation favors in-state economic interests over out-of-state interests, the court will strike down the regulation without further review; and 2) if the regulation is evenhanded and only indirectly impacts interstate commerce, the court will look to whether the regulator's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits (*see id.* at 444, citing *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 US 573 (1986)).

Applying this analysis, the court found that while vacation rentals generally implicate interstate commerce, the ordinance itself did not directly regulate the interstate aspect of the vacation rental business, as it only penalized conduct in the city, regardless of whether the visitors were from in-state or out-of -state and, additionally, the law was applied evenhandedly (*see id.* at 445, 446).

Takeaway for localities: *a local regulation will be struck down if it directly regulates or discriminates against interstate commerce. A local law is much more likely to withstand constitutional scrutiny if the interstate commerce components are incidental to regulating pursuant to municipality's police power or land use authority.*

As to whether the city's interest was legitimate and whether the burden on interstate commerce exceeded the local benefits, the court found that the ordinance did not discriminate against interstate commerce for a number of reasons. Importantly, the court held that the primary resident on-site requirement did not violate the dormant Commerce Clause because, in contrast to the 2022 *Hignell-Stark* decision from the Fifth Circuit, the city's policy did not require an owner to reside on premises but rather, a primary resident. That is, the dwelling could have an out-of-state owner yet a primary resident that is not the out-of-state owner on the premises, thereby complying with the city's policy.

Takeaway for localities: *in the event that the jurisdiction wants to ensure responsible adult supervision of short-term rental dwellings, it is constitutionally acceptable to require a "primary resident" to remain on premises, as this does not implicate the dormant Commerce Clause, given that out-of-state owners do not have to be the primary resident in question and still own the property.*

The court concluded that land use ordinances are inherently local and not a significant burden on interstate commerce merely because they disappoint out-of- state visitors (*see id.* at 452, citing *Spoklie v. Montana*, 411 F.3d 1051, 1059 (9th Cir. 2005)).

Tenth Circuit (Substantive Due Process, Equal Protection, Dormant Commerce Clause): *Colorado Property Owners for Property Rights v. Town of Breckenridge,* no. 23-cv-03171 (D. Colo. 2024) 2024 WL 3345230 –Breckenridge, Colorado adopted short-term rental regulations capping short-term rental licenses to 2,200 non-exempt units. Exempt units – for which there were no caps – included properties that provided certain twenty-four-hour services, including a staffed front desk and private security, while non-exempt units did not provide these services. The town indicated that exempt units required substantially less time to monitor and regulate than non-exempt units (*see id.* at 1). The plaintiffs sued asserting, among other things, that the ordinances violated substantive due process, equal protection, and the dormant Commerce Clause.

Equal Protection: Consistent with other circuits, the court found that the proper standard of review is the rational basis test, as the ordinance did not characterize based on suspect classifications or implicate fundamental rights (*see id.* at 4). Applying rational basis, the court found that the property owners failed to demonstrate that there was no plausible basis to support the ordinances. Given that the ordinances enjoyed a strong presumption of validity and that the restrictions in limiting the number of permits could advance the stated purposes of reducing noise, parking, and waste disposal issues, the court denied the plaintiff's equal protection claims.

Takeaway for localities: *the court included the quote that "federal courts have concluded uniformly that the right to dispose of one's property is not fundamental for equal protection purposes" (see id. at 4, quoting 211 Eighth, LLC* v. *Town of Carbondale, 922 F. Supp. 2d 1174 (D. Colo. 2013)). To this end, property owners are likely to be unsuccessful in any equal protection claims that arise out of property rights associated with short-term rentals unless the locality treats similarly situated classes differently.*

Substantive Due Process: The plaintiffs did not separately argue

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INSIDE CANADA

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

Irresponsible Downspouts, Fee Awards to Losing Parties, Non-Vicious Dogs, and More.

Bonus Years: Per *Class Proceedings Act*, Plaintiff's Amended Claim is not Statute-Barred
Pinon v. Ottawa (City), 2024 ONSC 5833 https://canlii.ca/t/k7dhf
In 2019, a City of Ottawa ("City") bus driver drove a double-decker bus into the Westboro transit station killing three passengers and injuring a dozen others. The Plaintiff, a passenger on the bus, brought an action as a proposed class proceeding that same year. The proposed class proceeding, which focused on the City's systemic negligence, was denied in 2021. The Plaintiff appealed and the leave to appeal was denied in 2023. In 2024, the Plaintiff sought to amend the claim to pursue an individual claim and four new actions. The City argued that the new actions are statute-barred under the *Limitations Act, 2002,* S.O. 2002, c. 24, Sched. B.

HELD: Motion to amend granted.

DISCUSSION: The central issue in this case revolves around whether the Plaintiff's individual claims are based on new causes of action or stem from the facts initially pleaded in the previously proposed class action. The law is clear that if a party amends the statement of claim to add causes of action that are based on the facts not pleaded, they will be treated as new pleadings and subject to the two-year *Limitation Act*. The Court held that the limitation period under the *Class Proceedings Act,* 1992, SO 1992, c. 6 suspended the running of the Plaintiff's limitation period from 2019 until 2023 while the class certification was being pursued. Therefore, the Plaintiff's claim is not statute-barred under the *Limitations Act*. After making that determination, the Court held that despite the refusal of certification, the original claim filed by the Plaintiff contained sufficient material facts to support claims of negligence against the City, including both vicarious and direct negligence related to the bus driver and broader systemic failures including road design, bus station design, vehicle design and road repair. The Court granted the motion to allow the individual claim and four new actions.

A Property Owner's Plans goes Down the Spout
Downes & White v Calgary (City), 2024 ABLCSAB 17 https://canlii.ca/t/k7csl
The Appellants received an order from the City of Calgary ("City") under the Stormwater Bylaw and the Parks and Pathways Bylaw requiring them to remedy a downspout on Appellants' property that was directing water onto a public pathway. They appealed.

HELD: Order upheld; date of compliance extended.

DISCUSSION: A citizen complaint prompted the City to investigate, and upon inspection a municipal officer confirmed that the downspout extended beyond the Appellants' property line and discharged water onto the public pathway. The Appellants acknowledged that the downspout directed water onto the public pathway but argued this had been permitted under a 1984 encroachment agreement with the City. Furthermore, the Appellants argued that the water from the downspout caused no damage or water accumulation on the pathway.

In response, the City argued that the encroachment agreement was void, as the Appellants replaced their fence in 2020, thereby nullifying the agreement. The City relied on the Stormwater Bylaw which states that, unless approved by the Director of Water Services, downspouts may not terminate onto a Surface Drainage Facility, which includes a pathway. Furthermore, the Parks and Pathways Bylaw provides that homeowners may not redirect water from a private parcel to a pathway.

The City provided photographic evidence to demonstrate the violation of both the Stormwater Bylaw and Parks and Pathways Bylaw. The Licence and Commu-

nity Standards Appeal Board was satisfied that the City's evidence demonstrated a violation of both the Stormwater Bylaw and the Parks and Pathways Bylaw. Furthermore, the encroachment agreement, while previously in place, was voided and the Board held that the Appellants could not rely on this agreement to justify the drainage configuration.

The Board upheld the City's order requiring the Appellants to modify the downspouts to prevent drainage onto the public pathway, but allowed for additional time for the Appellants to achieve compliance.

Awarding Costs Against the Successful Party is the Price of Unjust Bans

Polischuk v. The City of Winnipeg, 2024 MBKB 156 https://canlii.ca/t/k7dhw

In 2017 the Plaintiff, a contractor with the City of Winnipeg ("City") was banned from performing any City work based on unfounded allegations that he was attempting to steal City materials. The Plaintiff was first banned from doing work on behalf of the Water Department and then ultimately received a complete ban from all City Departments. The Plaintiff filed a claim against the City claiming loss of income, based on malfeasance of public office, causing loss by unlawful means, and breach of a common-law duty of procedural fairness or natural justice. The Court found that the Plaintiff failed to establish the legal elements of his claim and dismissed the case. The City sought costs of approximately $144,000. The Plaintiff also sought costs as the losing party. The Plaintiff argued that although he did not prove legal liability, he did establish that the City's actions were neither fair nor justified. The sole issue before the Court was the proper award of costs.

HELD: Plaintiff awarded $100,000.

DISCUSSION: The Court noted the exceptional nature of awarding costs against the successful party. Relying on *Kalo v. Winnipeg (City of)*, 2019 MBCA 46, which states that the Court has broad discretion in awarding costs, even against a prevailing party, in exceptional cases. The Court considered several factors, including the City's unreasonable and unjustified bans, the City's lack of response to the Plaintiff's demand letters, and the City's refusal to acknowledge the unsubstantial nature of the allegations against the Plaintiff. The Court highlighted that while the City successfully defended against legal liability, it failed to vindicate its actions on facts. The Court found that this aligned with the principles in *Schut v. Poll Venture Investments Inc.,* [1991] O.J. No. 2425, where costs were awarded against a successful party for creating an atmosphere that had compelled the other party to litigate. The Court focused on the City's misconduct in maintaining unfounded allegations that the Plaintiff was a liar and thief, and the City's failure to respond to the Plaintiff's attempts for resolution creating the condition where the Plaintiffs only option was to sue. The Court concluded that there was sufficient justification for the costs award to the Plaintiff, viewing it as a means to address the City's misconduct and restore some semblance of justice. The Court awarded the Plaintiff costs in the amount of $100,000 for his solicitor-client costs.

Municipal Authority to Designate Vicious Dog after Bite

Nykoliuk v Calgary (City), 2024 ABLCSAB 16 https://canlii.ca/t/k7bcr

The City of Calgary ("City") designated the Appellant's dog as a Vicious Animal under the City's Responsible Pet Ownership Bylaw ("Bylaw"). The designation was made following an incident in which the dog was alleged to have bit a victim, causing injuries. The Appellant contested this particular dog's involvement, submitting that the aggressive behaviour was actually caused by another dog in her care. The Appellant also raised procedural issues, such as a lack of evidence confirming the Appellant's direct involvement and the delay in the City's designation decision.

HELD: Designation removed.

DISCUSSION: The Board evaluated whether the dog's injuries met the criteria outlined in section 51 of the Bylaw, which allows for a vicious animal designation by the City if an animal causes "severe injury" to a person or animal, or poses an ongoing public safety risk. As for severe injury, the Board determined that the City failed to substantiate that the dog's alleged bite qualified as a "severe injury" under the Bylaw, which requires serious medial intervention. The City provided no medical reports to confirm that the victim's injury met this threshold. The Board also noted that while the witness's statement mentioned a future medical procedure, the City presented no evidence to the Board to support this claim. Furthermore, the City led insufficient evidence that the dog posed a risk to health and safety. The Board was not persuaded in City's evidence that the dog was found outside of the Appellant's

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DAY IN THE LIFE

WENDY WALBERG,
City Solicitor, Toronto, Canada
Interview by Avery Morris, IMLA Editorial Staff

Hi Wendy-thanks for giving IMLA the opportunity to learn a bit more about you, beyond serving on the IMLA Board of Directors and your current role as City Solicitor of Toronto. Why don't we start with where you were born and raised?



I'm from Thunder Bay, in Northwestern Ontario, which is quite far away from Toronto, actually. Toronto is southern and central, about 900 miles away from where I grew up.

And how did you end up in Toronto?

I first went to school in Ottawa for journalism for a couple of years. Then I decided that I wanted to become a lawyer, so I applied and came here to Toronto for law school at Osgoode Hall. I didn't necessarily plan to stay, but here I am!

Well, Toronto is a tremendous city, so it's easy to imagine why you'd want to make it your home. But what was your path to working for rhe city?

After being called to the bar I took a job as a judge's law clerk. It's a short-term new lawyer job; you can do it for one or two years. As that was wrapping up, I looked for jobs in litigation because I was working in the courts and was interested in being a litigator. Working for the judges was a great experience. You sit with them and talk over their cases, do the research and write briefs for them. It gave me lots of exposure to the court system. There was an ad for a lawyer doing general litigation for the regional government in the Toronto area, so I applied for that position and ended up doing general litigation for a while. That included some appeal and judicial review work, employment law work, human rights work, a little bit of everything.

At one point, there was an assignment for a lawyer to work on the Regional Official Plan, and I was asked to take that on. That was a full-time commitment, and I found that I really liked land use planning. The assignment got me exposure to the land use planning documents in all of the regions of Toronto. Toronto is an amalgamated city, so there were many smaller municipalities prior to that, and they each had their own zoning regulations and official plans. I got to meet lawyers who worked on those files and became familiar with those documents. After amalgamation, I became an employee of the City of Toronto. I moved into one of the general municipal jobs, where I was doing a wide range of solicitor's work. For many years, I gave advice on municipal elections, which I really enjoyed. I also really enjoyed working with the City Manager's Office and lawyers from the provincial government on the City of Toronto Act. That was another full-time assignment. I worked on that for a year and a half coordinating all of the legal advice. It touches on everything the city does, so I had to be a bit of a generalist to do that. I always tell people I'm a master of nothing, but I know a little bit about everything. After working as a legal team lead for quite a few years, I applied for the City Solicitor's position—and have served in that role for almost eight years now.

That's quite a time span. How have your responsibilities changed over the eight years?

They certainly changed during the pandemic. My job was very focused on providing advice on managing that situation. I was on the Strategic Command Team for the city. At first, there were several meetings every day to address the crisis. Then we whittled it down to one meeting a day, but that was still a very big change in my job for a couple of years. I've also now become part of the senior leadership team of the city. So I really wear two hats; first, I'm the head of the legal department, but second, as a member of the senior leadership team, I do bring my legal knowledge and my legal lens to the conversations, but I'm also asked to weigh in with my opinion as a member of the senior leadership team, taking my lawyer hat off. That change happened a couple of years ago, and I really enjoy it.

Do you want to tell us a bit about your law department? How is it organized, and how do you divide responsibilities within it?

Sure! We have six practice groups, each with a number of lawyers, law clerks, paralegals, and legal assistants, and then there's my office. My office includes administration, budget, my executive assistant, my assistant, HR, our IT group, all of that.

Each practice group has directors, and each director will have a team of lawyers reporting to them. There's also a deputy city solicitor for each group. There's a litigation group, an employment law group, a land use planning group, a general municipal law group, a real estate group, and a prosecution group. The prosecution group is a little different from the others in that they have many paralegals who handle a lot of the prosecutions, and a smaller number of lawyers who handle the more complex prosecutions.

Do you feel that there are unique characteristics of municipal legal activity in Toronto?

With three million people, Toronto is a really large city. That means there are some legal issues that we have that maybe other places don't. There's a surprising overlap, though, between municipalities in the legal issues they deal with, big and small. I always find that when I go to IMLA or the Municipal Law Departments Association of Ontario.

That being said, in Toronto we probably deal with the provincial government more. Provincial government has an interest in some of our transit projects and development projects in the city. We have large events; we're going to be one of the hosts of the FIFA World Cup, we have large concerts, we have large sporting events, and that brings with it various issues. The city owns various agencies that operate theaters, a soccer stadium, a zoo, transit--that sort of thing. We also have very large elections. Toronto is often consulted when the province is considering amending legislation.

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AMICUS

By: ERICH EISELT,
IMLA Deputy General Counsel and Director of Legal Advocacy

Where We've Been, and Where We Are Headed.

As the new 2024-2025 Supreme Court Term, now a month old, swings into full activity, it seemed appropriate to provide *ML* readers with information recently reported to our Board of Directors about IMLA's amicus activity for the prior six months, and to flag new cases where IMLA is filing as an amicus.

Mission: As the data below indicates, our Legal Advocacy program serves IMLA members across the country, filing not only in major cases before the US Supreme Court, in federal circuits and state supreme courts, but also in lower courts where appropriate. All requests for IMLA amicus support are given serious consideration, and where they are consistent with IMLA's purposes are sent to our Legal Advocacy Committee for a vote and subsequent action. IMLA's amicus filings over the prior six month period have supported some of America's largest cities as well as localities with fewer than 15,000 residents.

The LGLC: IMLA's leadership in local government advocacy has been strengthened with our formation of the Local Government Legal Center (LGLC), a collaboration of the National League of Cities (NLC-representing 2,700+ American cities), the National Association of Counties (NACo-serving nearly 40,000 elected county officials nationwide), the Government Finance Officers Association (GFOA-serving more than 20,000 federal, state/provincial, and local finance officers in the US and Canada), and most recently the International City/County Management Association (ICMA - representing 13,000+ local government managers). An LGLC amicus brief thus represents a substantial proportion of America's local governments, and we believe commands serious attention by the Court.

Other filings: IMLA also files in many lower courts without LGLC participation, aligning with state advocacy groups and other interested entities, as indicated below.

Pro-bono authors: The credibility and success of IMLA's Legal Advocacy program is heightened by our ability to obtain pro-bono participation by highly talented legal authors, many of whom operate at the highest levels of appellate practice, and who we honor at our Annual Mid-Year Seminar in Washington DC.

Highlights: Below are some highlights of IMLA's Legal Advocacy activities during the six months from April to September 2024:

Cases in which IMLA filed: thirty cases.

States where cases originated: Seventeen states – WA, OR, CA, NV, UT, NM, TX, ID, Al, GA, FL, VA, MD, PA, OH, MO, TN

US Supreme Court cases in which IMLA filed: sixteen cases - nine have been decided: *Grants Pass*, *Muldrow*, *Sheetz*, *Gonzalez*, *Chiaverini*, *Rahimi*, *Culley*, *Murthy*, *Vullo*; five cases yet to be decided: *SF/EPA*, *Lackey*, *Vanderstok*, *EMD*, and *Stanley;* two petitions which sought cert: *Nelson*, *Tekoh*. IMLA was joined by the other members of the LGLC in ten of the sixteen Supreme Court cases.

Originating Federal Circuits: Six Circuits – Fourth, Fifth, Sixth, Eighth, Ninth, Eleventh

Amendments at issue: Six Amendments – First, Second, Fourth, Fifth, Eighth, Fourteenth

Federal statutes at issue: more than seven – ADA, FLSA, Title VII, 18 USC §922(g)(8), Clean Water Act, §1988, Gun Control Act, etc.

Originating State Supreme Courts: three states - ID, UT, PA

Recap of Results: Our assessment is that, of the cases in which IMLA participated, outcomes were positive or avoided damaging precedent in many (US Supreme Court cases unless otherwise noted):

Grants Pass – prohibitions against camping on public property do not violate Eighth Amendment.

Rahimi-Second Amendment does not invalidate federal law criminalizing gun possession by individuals subject to domestic violence restraining orders.

Culley-Fourteenth Amendment does not require separate hearing before civil forfeiture hearing.

Murthy-plaintiffs have no standing—but result avoids challenge to government speech.

Sheetz-no outright requirement for individualized nexus/proportionality assessment in permit fees.

Muldrow-in Title VII discrimination actaion, plaintiff must show "some harm" resulting from change in employment term or condition- more than plaintiffs' "no harm" proposed rule, but less than "significant harm" rule proposed by IMLA.

Vullo-no erosion of government speech generally, although governmental advisory backed by implicit regulatory sanctions crosses line into coercion.

Slaybaugh-property damage during legitimate police activity is not Fifth Amendment taking.

Sacramento Homeless Union (E.D. Cal. to 9th Cir.)-dismissal of plaintiffs' appeal seeking injunction against movement of homeless encampment during high temperatures as moot.

US News and World Report (E.D. Cal. to 9th Cir.)-San Francisco's administrative subpoena is not violation of First Amendment.

Van Wandruzska (Idaho Dist. Ct. to Idaho Sup. Ct.)-Municipalities may hold landlords liable for tenants' unpaid utility bills.

In the period following our report to the Board, IMLA has already filed or agreed to file amicus briefs in another six cases:

NHL et al v. City of Pittsburgh (Pennsylvania Commonwealth Court to Pennsylvania Supreme Court-merits amicus brief in support of Respondent City of Pittsburgh): Whether new 3% Facilities Fee on non-resident athletes/performers who use City's stadiums violates Pennsylvania Uniformity Clause because all 3% goes to the General Fund, whereas of the 3% paid by resident athletes or performers, 2% goes to School Districts.

City of Seattle v. Kia/Hyundai (Central District of California to Ninth Circuit-merits amicus brief in support of Plaintiff/Appellee City of Seattle): Appeal by Hyundai/Kia of denial of motions to dismiss (municipal cost recovery, preemption, no duty) in public nuisance case for failure to install anti-lock devices.

Sheetz v. County of El Dorado (US Supreme Court remand to California Court of Appeals – merits amicus brief in support of Respondent County of El Dorado) – whether El Dorado's Traffic Impact Mitigation fee satisfies Nolan/Dollan nexus and proportionality tests, or is an individualized determination required.

Perttu v. Richards (Sixth Circuit to US Supreme Court – merits amicus brief in support of Petitioner Perttu) - whether, in cases subject to the Prison Litigation Reform Act, prisoners have a right to a jury trial concerning their exhaustion of administrative remedies where disputed facts regarding exhaustion are intertwined with the underlying merits of their claim.

McGlaughlin Chiropractic Associates Inc. v. McKesson Corp. (Ninth Circuit to US Supreme Court – merits amicus brief in support of Petitioner McGlaughlin Chiropractic Associates Inc.) - whether the Hobbs Act requires the district court to accept the Federal Communication Commission's interpretation of the Telephone Consumer Protection Act.

Ames v. Ohio Department of Youth Services (Sixth Circuit to US Supreme Court – merits amicus brief in support of Respondent Ohio Department of Youth Services) - Whether, in addition to pleading the other elements of an employment discrimination claim under Title VII, a majority-group plaintiff must show "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority.

Day in the Life *cont'd from page 17*

Why don't you walk us through a typical day in your life?

I don't know if I have a typical day! I would say there are elements that are part of every day, but they might not happen in the same order. Every day I walk my dog. Every day I get some exercise, whether it's biking or a bit of yoga or an exercise video. In the winterI try to do some cross-country skiing on the weekend, that kind of thing. Every day I drink too much coffee. [Laughs]. Every day I read fiction to relax. I've been in the same book club for 30 years. I have three adult daughters, and I spend lots of time with my family. I have a cottage, so I spend lots of time there. I also bake every weekend.

At work, I touch base with the deputy city solicitors often. I will talk to at least a couple of them about an emergent issue every day. I have senior leadership team meetings twice a week, so I prepare for those. I'm on a couple of steering committees and advisory committees at the city. I enjoy that work; I work with other division heads on those steering committees or other members of the senior leadership team. I'm called upon to unstick issues; if there's a problem and it is escalated to me, it's usually because it's somehow stuck. I have to have a general knowledge of the law so that I can get briefed by my staff on whatever the legal issue is, but then take a look at the bigger picture, try to understand the client problem, why it's stuck, and talk to the right people to help resolve it. I do a lot of that. Through all of this, the most important thing, I think, is to have a positive attitude and to be calm. As lawyers, we tend to deal with conflict, we tend to deal with crises, we deal with problems and we're problem solvers, as all senior leaders are. You're only helpful if you can be calm. I have a positive attitude because we can fix anything, really. My department provides advice to all of the departments in the city and many of the city's agencies, such as the parks department, the finance department, public health, the police board, and the library board.

And then, of course, I have to run my own department. I have a budget, I plan training for lawyers, I meet with my management team regularly, and I also try to stay connected with the legal community. I hosted a Municipal Law Departments Association meeting in the spring, we hosted the IMLA in Canada in the spring, and I'm going to a talk at the University this week. I'm a mentor with the women's network, and I'm doing mentoring for the Canadian Corporate Counsel Association. I try to do those things too, but I have to say much of my time is spent dealing with the issue of the day for the city and trying to work through some of these problems.

A lot of my time is also spent at City Council, which meets for 2-3 days a month. I'm the point person at the meeting, so I have to spend quite a lot of time preparing for that: reading the materials, speaking to the lawyers, reading briefing notes from them--and then I attend the briefing for the Mayor. Then I sit with the City Manager and the Chief Financial Officer and the deputy city managers as well. I'm there for the counselors to talk to if they want to talk on the side about an issue or if they want to ask me a question on the floor, where I have a microphone. That's actually a very big part of my job, too.

Is there any one achievement that you're most proud of, either throughout your career or personal life?

In my personal life I am very proud of my three daughters. In my career, I'm really proud of the City of Toronto Act. I was the lead lawyer coordinating the legal advice on that and meeting regularly with the province. I think it's been good for the city. I'm very proud of some of the changes I've made in the legal department; they might seem small to others, but I think they've been beneficial to the team, and I really care about the team and the workplace environment in the legal department of the city.

Tell us more about the book club you're a part of!

As I mentioned, I've been in I've been in the same book club for all those years. It's funny how it's evolved; at first, we talked about the book a lot, and now–my goodness–we've seen each other through so many things over 30 years. We still read the book every month, we still talk about it, but we've also become good friends.

Do you have any books to recommend to us?

For a nonfiction recommendation, *Being Mortal* by Atul Gawande is an excellent book that I would recommend to everyone. It's brilliant.

Another book I really liked was *Demon Copperhead* by Barbara Kingsolver and *Tom Lake* by Ann Patchett were my favorites last year. *Cutting for Stone* by Abraham Verghese is a favourite. I really like Kent Haruf. I haven't read his books in a long time, but I really like them. His books are about life in a small town and community.

I suppose it's no surprise that I ended up working for a municipality. When I think about the workplace, the workplace community is really important. I think we find community in many places. We might find community in our neighborhood, we might find it at our workplace, and there are lots of other ways to find community, but I but I believe that engagement in a community is fulfilling; it's really important.

Well, that belief in community is evident in your work and your career. Thanks, Wendy, for giving us some book recommendations, and for a glimpse into your world.

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CODE ENFORCEMENT

By: KATIE LEININGER,
Assistant City Attorney,
City of Pearland, Texas

Protecting Health and Safety: Administrative Search Warrants for Beginners

INTRODUCTION

As we all hopefully learned in law school, a search warrant is a court order authorizing agents of a governmental body to search one or more persons and/or places and potentially confiscate evidence of a criminal act from the person or place. Federal and state laws authorize the use of search warrants by specified agents of the government in certain circumstances. The Fourth Amendment to the United States Constitution states in part "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[1] In similar ways, the states' individual constitutions and statutes also outline the general expectations and specific requirements for a valid criminal search warrant.[2]

What is an Administrative Search Warrant? An Administrative Search Warrant (ASW) is a specific type of search warrant authorizing government employees responsible for enforcement of health and safety statutes and ordinances to inspect properties thought to harbor health and safety violations, rather than authorizing searches based on suspected violations of criminal laws. ASWs typically permit non-peace officers to conduct warrant searches. Although probable cause is still required to obtain an ASW, the facts permitted in an affidavit supporting an ASW are often much broader than in a traditional criminal search warrant. For example, in the ASW context the Texas Code of Criminal Procedure allows the magistrate to consider an affiant's specific knowledge of the property as well as (1) the age and general condition of the premises; (2) previous violations or hazards found present in the premises; (3) the type of premises; (4) the purposes for which the premises are used; and (5) the presences of hazards or violations in and the general condition of premises near the premises sought to be inspected.[3] As with criminal warrants issued pursuant to the Fourth Amendment, there is extensive case law outlining when and in what circumstances the ASW may or must be obtained prior to conducting an administrative search to determine whether health and safety violations exist at a specific location. ASWs are required for most administrative health and safety type searches.[4]

The federal case law requiring an ASW in most health and safety searches originates with *Camara v. Municipal Court*, a 1967 Supreme Court decision arising from a San Francisco city ordinance authorizing city building inspectors to enter any building at a reasonable time in furtherance of their code enforcement duties.[5] In *Camara*, the Court extended the same Fourth Amendment protections to administrative searches it previously granted to searches by government officials seeking "evidence of criminal action."[6] The Supreme Court clarified *Camara* in *New York v. Burger* by creating a three-part test to articulate when "closely regulated" industries have a reduced expectation of privacy and therefore, may be subject to warrantless searches by government inspectors despite *Camara*'s general Fourth Amendment protections.[7] Under the *Burger* test, a warrantless inspection will be found reasonable only if a "substantial" government interest exists, the warrantless inspections are necessary to further the regulatory scheme, and the inspection program provides a constitutionally adequate substitute for a warrant.[8] The Supreme Court then reminded cities in *City of Los Angeles v. Patel* that the Fourth Amendment exceptions to the ASW requirement outlined in case law are intentionally narrow: "the closely regulated industry…is the exception," not a rule extending to broader groups such as Patel's hotel or the hospitality industry as a whole.[9] The practical version of case law in this area: get the ASW before you conduct your search.

The job titles of personnel authorized to seek the ASW may vary from one state to another. Texas specifically permits fire marshals, health officers, and code enforcement officers to obtain an ASW to conduct an inspection of residential or commercial private property if they can show "probable cause to believe that a fire or health hazard or violation or unsafe building condition is present" at the specified premises.[10] For whomever among your city staff is au-

thorized by law to obtain one, the ASW makes it possible for city staff with a background in ICC codes and/or health and safety ordinances to gain access to properties whose owners are uncooperative, noncompliant, or actively creating or permitting unsafe conditions that endanger themselves or the larger community. Once access is granted, staff observations from an administrative search may be used as basis for a variety of further enforcement actions, including filing civil or criminal cases, seeking injunctions, and so on.

Drafting an Administrative Search Warrant

The ASW is composed of three parts: the affidavit, the warrant, and the warrant return. The longest section of the ASW is usually the affidavit, which contains the factual basis for why city staff are requesting permission to search the property. The warrant and the return are usually much shorter, often a single page each, and tend to look very similar from one ASW to the next.

Pro tip: legal review of the warrant affidavit, before presentation to the magistrate, is worth your time.

The affidavit underlying the request for an ASW should be drafted by someone familiar with the current conditions at the nuisance property as well as supporting information, including the property/owner's criminal or civil case history, other nearby properties with similar problems, number or frequency of complainants, relevant statutes and/or ordinances, etc. The affidavit must contain the "substantial facts" (factual basis) to explain why the affiant wishes to search the named property.[11] Depending on what your statutes permit, the affidavit underlying an ASW may summarize facts from months or years of complaints about and/or documented problems at the nuisance property. In practice, an affidavit accompanying a request for an ASW may include information gathered by multiple staff members over an extended time period. Ultimately, however, it is a single affiant who signs the affidavit before a magistrate 1) to certify s/he has statutory authority to search the property; and 2) to certify th e contents of the affidavit are true and correct.[12]

The warrant itself must contain certain information, usually specified in state law; a failure to include all required elements in the warrant may mean the magistrate denies your warrant request, or a court later decides you did not have valid authority to conduct the search.[13] Check your state's requirements, but when drafting a Texas ASW, the warrant must be properly titled pursuant to state law; it must sufficiently identify what is to be seized (if anything) and the name or description of the person, place, or thing to be searched; and it must command the authorized individuals to search forthwith the person, place, or thing.[14] A Texas ASW must also be dated and signed by the magistrate, with the magistrate's name appearing in clearly legible handwriting or typewritten and paired with the magistrate's signature.[15] The date and hour of issuance must be listed on the Texas ASW and the document must affirm the person signing the affidavit has statutory authority to search and s/he has established probable cause.[16]

Pro tip: make sure the person drafting the affidavit actually knows facts and history of the property they wish to search.

The warrant return is a document provided to the court after a warrant search is complete; it informs the magistrate when and in what manner the issued warrant was executed.[17] If any property is seized during the warrant search, an inventory of such much be provided to the court. Seizure of items is relatively unusual in the ASW context. Anecdotally, seizures tend to be either neglected animals or items associated with criminal activity left in plain view at the time of the search. Although administrative warrant searches sometimes uncover criminal activity, staff should be familiar enough with the property to know in advance whether the warrant search of a particular property is likely to lead to a seizure of any property. If staff think execution of an ASW may reveal evidence of criminal activity, they should consult with the City's legal advisor and/or law enforcement to prepare for such an eventuality before executing the search warrant.

Pro tip: if you think it might also be a drug house, prepare for your search as if it's a drug house.

Once all three parts of the document have been drafted, the affiant presents the ASW to an authorized magistrate for approval. Check your state laws to determine which magistrates may issue a warrant. In Texas the list includes municipal court and county court judges who are licensed attorneys in Texas, statutory county court judges, district court judges, judges of the Court of Criminal Appeals, justices of the Supreme Court of Texas, and other magistrates with jurisdiction over criminal cases serving a district court.[18] The affidavit should be signed by the affiant in front of the magistrate. Once the magistrate reviews, approves, and signs the warrant, the affiant, and other staff as appropriate, n authorized to execute the warrant at the property listed on the ASW. If you conduct a property search without following the proper procedural steps, you may not be able to use the information obtained during your warrant search in later criminal or civil cases, and you may become the subject of a § 1983 claim or other civil lawsuit.

Continued on page 22



Katie Leininger has served as an Assistant City Attorney for the City of Pearland, Texas, since 2011. She received her BA from Trinity University and her JD from the University of Houston Law Center. After starting her career as a felony prosecutor in west Texas, Katie spent four years as a prosecutor in the Pearland Municipal Court. She now handles employment law, nuisance abatement, public information requests, drafting and amending ordinances, and a variety of other matters for the City.

Execution of the Administrative Search Warrant

Before getting a magistrate's signature, know how long your state laws allow for an ASW to be executed (also commonly described as "served") after the warrant is signed by the magistrate. In Texas the affiant has three *calendar* days after the warrant is signed to visit the property and inspect it for violations. As much as possible, staff should plan ahead to ensure all relevant departments are aware of an anticipated ASW search, so relevant departments/staff are able to participate in execution of the ASW. The affiant who requested the ASW should execute the ASW, but be aware, the group of people whose subject-matter expertise is needed during execution of the warrant can rapidly grow to include staff from multiple other departments, depending on the nature of the complaints and conditions at the property subject to search. At a minimum, consider whether one or more peace officers should be present to clear structures and ensure staff safety. Although surprises can and do happen, thorough planning usually leads to a more efficient, effective search of a nuisance property.

Pro tip: confirm you will have a magistrate available to sign your ASW before gathering staff to execute the ASW.

If the execution of an ASW leads to plain view observation of criminal activity, such as narcotics packaged for sale, abused animals, illegal weapons, etc., staff should immediately pause their administrative search. If your search team does not include peace officers and/or legal counsel, staff should immediately contact law enforcement and/or their city's legal counsel because it may be appropriate to seek a criminal search warrant based on staff members' plain view observations. The Texas appellate court in *Cardoso v. State* decided searches based on ASWs may lead to valid criminal charges even if the ASW itself lacks specific dates or times, because complaint history listed in an affidavit for an ASW can indicate a course of conduct.[19] Other states may have similar helpful case law to support later prosecutions based on staff observations during the execution of an ASW.

If a criminal search warrant is sought by law enforcement, when possible, staff should hold the property based on their ASW authority (to avoid destruction of evidence, etc.) but take no additional actions to continue the administrative search. The administrative search authorized by the ASW should resume only after the criminal warrant execution has been completed and any people or items seized pursuant to the criminal warrant. Staff who were originally executing the ASW should release the property back to the owner or occupant only after all warrant search activities, administrative and, where applicable, criminal, have been completed. When in doubt at any point in this process, staff should seek guidance from their legal counsel to prevent problems in later civil or criminal cases.

Pro tip: bring bug spray and hand sanitizer to your warrant search; take your own pictures. Warrant return

Before executing the ASW, know when the return must be provided to the magistrate who issued the warrant.[20] For our ASWs, this notice includes informing the magistrate of the date, time, and the location of the search within three days after the search is completed. If any property is seized, the warrant return generally must include an inventory of what property was seized, by which person, and based on what authority. When circumstances allow, it is helpful to plan the execution of a search warrant at a time and on a day that will not make warrant return difficult for your affiant. For example, if the ASW is issued on Thursday afternoon and not executed until Friday afternoon, staff may be statutorily required to submit the return to the magistrate before they (and possibly your magistrate) are back at work the following week.

After the inspection – civil and criminal enforcement

Once the property inspection has been completed and the warrant return has been provided to the court along with any inventory of property seized, staff should work with legal counsel to determine next steps. Each property is different, with its own combination of violations and concerns. Depending on state laws, type of city, and what ordinances your governing body has enacted, you may have multiple options to seek abatement of nuisance conditions. Thoughtful drafting of ordinances and adoption of international codes can give a city powerful tools to eliminate nuisance structures if staff (and elected officials) can be patient and allow the enforcement process to take place.

Seeking voluntary abatement by a property owner, lienholder, tenant, or other person with authority over the property (collectively, "owner") should often be the first option you consider. Voluntary agreements for a timeline of what abatement work will be completed and on what timeline can be successful in some circumstances. Alternately, if the owner would like to correct the nuisance conditions, but is physically or financially unable to do so, the city may consider creating a written agreement with the owner wherein the city agrees to pay costs to complete the work necessary to abate the nuisance conditions. Such an agreement might include a payment plan for the owner to reimburse the city or acknowledge the city's inten-

tion to place a lien on the property and obtain reimbursement later, when the property is sold.

Pro tip: you probably want your city to draft the agreement; document and verify the property owner understands the agreement.

If, however, the owner does not agree with city staff on how best to abate the nuisance conditions, or the owner is absent, deceased, or otherwise unavailable, filing a civil lawsuit and/or criminal charges may be an appropriate next step to abate the nuisance conditions at the property. Multiple Texas statutes authorize municipalities to bring a civil action to enforce various types of health and safety ordinances.[21] Your state may have similar laws and, if you're lucky, your city may also have adopted ordinances creating a process for civil nuisance abatement lawsuits to be filed in your municipal court. Filing a civil nuisance abatement case in municipal court, if the option is available to your city, can simplify filing the case, scheduling a hearing, and arranging for staff to appear as witnesses at a court setting.

If your state authorizes municipalities to adopt ordinances to require vacation, relocation of occupants, securing, repair, removal, or demolition of a building that is dilapidated, substandard, or unfit for human habitation and a hazard to public health, safety, and welfare, such ordinances are another useful abatement tool.[22] Certain requirements must be met for such an ordinance to be valid and then serve as the basis for a civil suit in Texas. If a lawsuit is filed and an owner is ordered to secure a building or to repair, remove, or demolish a building, failure to comply with the court-ordered timeline may result in the city being authorized to abate nuisance conditions including a dilapidated, substandard, or hazardous structure. Cities often have some flexibility to define (based on "community standards") what conditions may lead a property to be found dilapidated, substandard, or unfit for human habitation.

Depending on state laws, criminal charges filed after the ASW search may be based on your city's adopted ordinances, any international codes your city has adopted, or state laws. Many civil or misdemeanor violations are easily documented with photography during an ASW search. Filing some health-and-safety-type criminal charges will require taking samples of soil or water to test for pollutants, such as in cases of illegal dumping of oil or other substances. These situations may also lead to criminal charges, a civil nuisance abatement, or civil seizure proceedings as outlined in the Texas Health and Safety Code or other similar statutes.[23]

Pro tip: be aware of overlapping regulations and enforcement authority in state laws, ordinances, and adopted international codes.

If your city is receiving complaints about certain types of ongoing criminal activity at a particular location, you may want to check whether your state laws provide a cause of action to abate a common nuisance. In Texas a "suit to enjoin and abate a common nuisance described by Section 125.0015(a) or (b) may be brought by an individual…or by a district, county, or city attorney."[1] The list of nuisance activities that may fit within the scope of this cause of action includes but is not limited to drug sales, gambling, prostitution, graffiti, criminal mischief, and illegal massage services.[2] These suits may be brought against an owner, a party to the use, or even an action *in rem* against the property itself.[3] Some general enforcement authority is also granted to cities in Texas Health and Safety Code Chapter 121, the "Local Public Health Reorganization Act."[4] This chapter outlines the authority of local public health authorities, which for many cities would be your county, but it also helpfully creates processes for a city to work with its county health department to enforce and abate nuisance conditions. Partnering with other governmental bodies may be another option to achieve permanent abatement of nuisance conditions. Familiarizing yourself with which circumstances allow for such partnerships may, in the right circumstances, save your city substantial time and money.//

Cities may also have limited authority to proactively abate certain specific nuisance conditions, but guidance from legal counsel should be sought before taking action to abate nuisance conditions without first obtaining a court order. Depending on circumstances, your city may be able to proactively abate common nuisance conditions including weeds and high grass,[5] mosquito issues,[6] junked vehicles,[7] or other problems endemic to your state, based on authority granted in state law.

CONCLUSION

Requesting and executing an ASW can be an important step in evaluating nuisance properties to determine what, if any, civil or criminal enforcement actions should be taken. The information obtained during a warrant inspection of a property can provide a factual basis for filing one or more cases leading to successful nuisance abatement even if, or after, other methods of enforcement have been unsuccessful. City staff who are so authorized should become familiar with the requirements for obtaining an ASW and the limitations on authority granted by an ASW. ML

LISTSERV

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

Unexpected Visitors on Main Street

Well, we are only one month past the 2024 IMLA Annual Conference in Orlando, Florida and kudos to IMLA for yet another outstanding event! It was well attended and well run, and again offered first rate CLE opportunities which were applicable to virtually everyone's practice.

We had a guest from Australia this time, Mr. Dan Best who relayed the housing situation in Australia to us. We are hoping to use this opportunity to build a communication bridge to our counterparts in Australia and ultimately someday arrange through the International Committee to visit "Down Under."

But we also had another guest at this conference, one of the unwanted variety. No last name… She only went by *Helene*, and her presence dominated the talks at the conference forcing alternative event plans, alternative travel plans and even alternative plans back home. It was hurricane time again.

Hurricanes can have a dramatic and lasting effect on operations of local governments. Years ago largely through the listserve, we formed an ad hoc Disaster Preparedness Committee. One main goal was to establish a "library" of resources for municipal governments to review to help prepare and respond to natural disasters such as this one. You may find the Disaster Preparedness materials in the Resource Library tab on the IMLA Website, www.imla.org.

Often in hurricanes, the bulk of the attention goes toward the beach municipalities and surrounding areas. This time, however, effects spread quite far inland. As a beach bum myself, I remember folks evacuating as far inland as Asheville, North Carolina--which everyone knows absolutely got hammered this time around by rains from *Milton*. I am told that many of the hundreds of electrical "line employees" we saw stationed at our Conference hotel preparing to assist in Florida ended up traveling to North Carolina to help out instead. Florida got its share of devastating weather, but what happened in North Carolina was unprecedented for that area.

As many of you know, I profess to be a beach bum and still hold to that claim. However, my childhood years were mostly spent in the lovely hamlet of Hendersonville, North Carolina, just south of Asheville. The reports I received from relatives and friends in the area were awful. One elderly aunt, recently widowed, had no power, water, or cellular phone service and the drive from her home was blocked by fallen trees. We did manage to connect on the phone after about two days, as she had discovered a very small spot in her driveway where a cell phone signal popped up. She had discovered it after walking around the yard for several minutes surveying the carnage.

For days I could not reach many relatives or friends. Finally, as cell service sporadically became available, pictures and stories were sent. The water level was over the roof of the hamburger restaurant I frequented as a teenager. The small town of Chimney Rock, one of our playgrounds growing up, was literally swept downhill and deposited into Lake Lure. And Lake Lure? Well, it was turned into a menagerie of scrap wood, metal and other debris. If you didn't know there was a lake there, the pictures would lead you to believe you were looking at the county landfill.

These pictures of my childhood home were hard to look at in many cases. The Caro-Mi Restaurant, a favorite of my family and many others for four generations was completely knocked off its foundation. The website reflects a "Permanently Closed" banner if you visit there now.

These are only memories for me, but the really difficult stories can be heard from the permanent residents. Some, like my aunt, still at least had a roof over their heads. Others had partially damaged homes and some simply lost everything. One family in a remote area of Western North Carolina sought refuge in the general store they operate because it is uphill from their nearby residence. A heartbreaking video shows them speechless and stunned as they look out the store window and watch literally their entire house and belongings float down the river--everything they owned but the store and the shirts on their backs.

There were plenty of folks who were not given a timetable for return of municipal services such as power, water, and/or gas. As of a month after the storm, many of them still have no idea when these "luxuries" of life will be returned. I am now fully in touch with all of my family members and friends, and they have begun the rebuilding and restarting efforts to their properties and their lives.

Here in the Midlands of South Carolina, we did not escape the storm. We

had widespread power outages due to downed trees and minor flooding, but all things considered we did very well. At the office and at home, we may have been out of power for about 12 to 15 hours. My city's crews were out early in the morning clearing roads and raising power lines, but we were really lucky. It could have been much worse.

All of this brought me back to my days as a beach bum. I have been threatened with the loss of everything on several occasions. The closest call of them all was in 1989 when Hurricane *Hugo* threatened by hometown of North Myrtle Beach. I wander back to that time.

I was working for a golf course in Myrtle Beach and given the ORDER to evacuate my home. It was a Thursday morning. We were excused from work. I left to go inland and stay with a friend. The first problem arose that morning when the friend was ORDERED to evacuate too. This storm had drawn a bead on my hometown and almost everyone was told to evacuate.

I drove to Columbia figuring I would stay the night there and go to the ballgame the next day. I thought surely this was far enough inland. This was not good enough according to the authorities. Although not ordered to evacuate (Columbia is 140 miles inland), these residents were given all other hurricane preparedness cautions. I also could not find a place to stay. Being on Interstate 20, I then decided I would ride all the way to Atlanta and stay with my girlfriend's family. I was safe there as it didn't even rain.

Although I was safe from the weather, the worry was consuming. Mind you, this was before the internet and cell phones. I could only get what news was on TV. As usual, the television crews broadcast from the worst spot they could find. They described devastation, torrential flooding, and worse. There were several tornadoes and rising waters inland. I spent three days in Atlanta with no news, wondering if I had a home left to go to.

I returned on Sunday and the drive back was very worrisome. As soon as I got to the east side of Columbia - remember its about 140 miles inland – I began to see damage. There were trees down across the interstate which I had to navigate around about a dozen times. I saw a mobile home completely obliterated. It was obvious there was no power. Discovering that I was one of the few cars on the road, there was doubt in my mind as to whether I should even be trying this.

Time marched on and after dodging a few more trees I reached a point where I would go off interstate. I thought I would seize the chance to get gas before I did this. But not so fast! There was no power in the area and no way to pump gas. I tried every sta-

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William I. Thornton, Jr. IMLA Faculty Award
ALAN BOJORQUEZ
Managing Attorney – Texas Municipal Lawyers, Austin, TX

Outstanding State League Counsel Award
KRAIG CONN
General Counsel - Florida League of VCities, Inc., Tallahassee, FL

Brad D. Bailey Assistant City/County Attorney Award
JENNIFER MARIE AVENDAÑO
Deputy City Attorney - Brownsville, TX

DANIEL CANTÚ-HERTZLER
Senior Attorney - Philadelphia, PA

Burk E. (Buck) Delventhal Legal Advocacy Award
GERARD LAVERY LEDERER
Partner - Best Best & Krieger LLP, Washington, DC

J. SCOTT MOEDE
Chief Deputy City Attorney - Portland, OR

Diversity, Equity and Inclusion Award
ZACHARY STRASSBURGER
Deputy City Solicitor - Philadelphia, PA

SAN JOSE CITY ATTORNEY'S DIVERSITY & INCLUSION COMMITTEE
San Jose, CA

Outstanding Associate Member Award
DARREN SHULMAN
City Attorney – Upper Arlington, OH

Outstanding State/Provincial Chair Award
ANDRE MONETTE
Partner – Best Best & Krieger LLP, Washington, DC






IN THE WORDS OF OUR RHYNE AWARD WINNER…

IMLA was pleased to honor our many outstanding members with awards at our recent Annual Conference in Orlando, as various of our accompanying photos indicate. Our highest such recognition is expressed in the Charles S. Rhyne Lifetime Achievement in Municipal Law Award, which IMLA was pleased to present to Valerie M. Robinson, Chair of the Corporate and Tax Group at the Philadelphia Law Department.

Valerie briefly addressed our Conference attendees, and we thought IMLA members would appreciate her sentiments. So, in her own words, an acceptance message from Valerie Robinson:

As an overthinker, I fretted over how to use the one to two minutes I was given to speak. How could I come up with something reflective and impactful yet not so reflective that it caused me to become emotional and ugly-cry? I called upon my lifetime of watching the ESPYs, the Emmys, the Grammys, the Kennedy Center Honors, the BET Awards, the Oscars, the Golden Globes, the Tonys, and the People's Choice Awards reflecting on what worked and what didn't work in the world of acceptance speeches and thinking about how I could ensure that I did not become a meme the way Salley Field did, before memes were a thing, when she made her iconic "you like me" speech.

After much reflection, I decided to keep it simple and use the two words that most of us were taught in kindergarten, if not pre-school. Those simple yet profoundly powerful words are "thank you." Thank you to IMLA for this humbling recognition; thank you to my colleagues on the City of Philadelphia Executive team, many of whom are here today and others who were supposed to have been here; thank you to my amazing team who show up each and every day; thank you to my clients who have been on this journey with me, and thank you to my family who accepts that I am a work in progress as it relates to work-life balance -- as well as perhaps a few other things.

From a papal blessing, to lunch with Oprah, to the RNC; from overseeing the legal operations of the City's COVID 19 response, to getting jiggy with Will Smith in a private concert, to going to ground zero of Occupy; from standing in arrivals hall at Philadelphia International Airport greeting people fleeing Afghanistan, to being to lauded by Jay Z, to the NFL Draft; from batting my eyes at Denzel Washington on the set of the movie Philadelphia, to mentoring generations of summer interns, I am honored to receive this award recognizing that which has been an amazingly magical, gratifying and unexpected journey. I am truly thankful and appreciative.





Continuing our IMLA international program, some 40 members made the trip to spectacular Lake Como from October 16 to 20, 2024, for a 4-day comparative law conference with more than 50 Italian municipal lawyers. Held in Villa Gallia, a centuries-old architectural masterpiece facing the lake, the meeting was an excellent opportunity to share observations about local government law.





Code Enforcement *cont'd from page 27*

NOTES

1. U.S. Const. amend. IV.
2. Alaska R. Crim. P. 37; Georgia Const. art. I, § 1, Para. XIII; 21 OK Stat §1266.8 (2023); Tex. Const. art. I, § 9; Tex. Code of Crim. Proc. Ch. 18.
3. Tex. Code of Crim. Proc. § 18.05.
4. Camara v. Municipal Court, 387 U.S. 523 (1967).
5. *Id.*
6. *Id.* at 530.
7. New York v. Burger, 482 U.S. 691 (1987).
8. *Id.* at 702.
9. City of Los Angeles v. Patel, 576 U.S. 409 (2015).
10. Tex. Code of Crim. Proc. § 18.05(b).
11. Tex. Code of Crim. Proc. § 18.01(c).
12. Tex. Code of Crim. Proc. § 18.05.
13. *Camara, supra* note 4, *Patel, supra* note 9.
14. Tex. Code of Crim. Proc. § 18.04(1), (2), and (3).
15. Tex. Code of Crim. Proc. § 18.04(4) and (5).
16. Tex. Code of Crim. Proc. § 18.04, 18.05, and 18.07(b).
17. Tex. Code of Crim. Proc. § 18.10; see also 18.06(a) and 18.07(a)(3).
18. Tex. Code of Crim. Proc. § 18.01(c), (d), (i), and (j).
19. Cardoso v. State, 438 S.W.3d 815 (Tex. App.—San Antonio 2014).
20. Tex. Code of Crim. Proc. § 18.10.
21. Tex. Local Gov't Code § 54.012; Tex. Local Gov't Code § 214.001; Civ. Prac. & Rem. Code §125.002.
22. Tex. Local Gov't Code § 214.001.
23. Tex. Health & Safety Code § 821.022 and 821.023.
24. Tex. Civ. Prac. & Rem. Code § 125.002(a).
25. Tex. Civ. Prac. & Rem. Code § 125.0015(a).
26. Tex. Civ. Prac. & Rem. Code § 125.002(b).
27. Tex. Health & Safety Code § 121.003.
28. Tex. Health & Safety Code § 342.008.
29. Tex. Health & Safety Code § 341.019.
30. Tex. Transp. Code Ch. 683, Abandoned Motor Vehicles, Subch. E Junked Vehicles: Public Nuisance; Abatement.

Inside Canada *cont'd from page 15*

care and control at the time of the incident, and the Board noted that a dog running at-large is an issue that is separate and apart from a designation and did not support a claim of aggressive behaviour. Lastly, the Board found the City's delay in pursuing the designation of the dog problematic, noting that there was a year-long gap between the incident and the designation decision. Based on these factors, the Board removed the vicious animal designation from the Appellant's dog, finding that neither the severity of the injury nor the demonstrated risk to public safety justified a designation under the City's Bylaw. Designation removed.

Slap on the Wrist or a Keen Demonstration of Proportionality?

Toronto (City) v. Adamson Barbecue Ltd., 2024 ONCJ 525 https://canlii.ca/t/k7br3

The Defendant was charged by the City of Toronto ("City") for operating a food service business without a licence. The Court found that the Defendant was aware of the City's licensing requirements, yet continued to operate his business despite receiving multiple warnings. The Defendant was found guilty of 17 counts of operating without a licence. This matter concerned the sentencing of the Defendant, and the City sought $1,500 per conviction, totaling $25,500.

HELD: $1,500 fine imposed on 10 counts.

DISCUSSION: The Defendant's contraventions were governed by the City of Toronto Municipal Code Chapter 545, Sections 2A (33) and 2A (34), mandating licenses for refreshment places and refreshment vehicles within the City. Penalties are set to allow for fines up to $25,000 per infraction. The City proposed a $1,500 fine per conviction, while the Defendant requested a reduced penalty without specifying an amount. The Court highlighted that sentencing for regulatory offences prioritizes deterrence, emphasizing compliance with municipal licensing to uphold public safety and health standards in business. While emphasizing the importance of public safety and deterrence, the Court also carefully considered the principles of proportionality and totality to ensure a fair and just outcome.

For proportionality, the Court must ensure that the sentence is proportionate to the offence. In this case, while there was no evidence of actual harm, the potential harm to the public from an unlicensed restaurant is significant. The Court found that the Defendant's non-compliance undermines these core protections, when it continued to operate unlicensed for over 10 months despite being aware of the violations and failing to remedy them. The Court was satisfied that the Defendant knew the responsibility and failed to obtain a licence. The principle of totality applies where a Defendant is convicted of multiple offences. In this case, the Defendant was charged and convicted of a total of 17 offences. The Court relied on *R v. Parry*, 2012 ONCA 171, finding that the total sum of all penalties should not exceed the overall gravity of the offence. The Court demonstrated a balanced approach to sentencing in regulatory offences, imposing a fine of $1,500 on 10 of the 17 convictions for a total fine of $15,000. The Court suspended the sentenced for the other counts due to the sheer number of charges laid against the Defendant. ML

any substantive due process claims and instead asserted that the court should simply overturn the ordinances. Finding that, as with an equal protection claim, absent the presence of a fundamental constitutional right, legislation that bears a rational relationship to a legitimate governmental interest will survive a due process challenge (*see id.* at 6, quoting *People v. Zinn*, 843 P.2d 1351 (Colo. 1993)), the court dismissed the substantive due process claims.

Dormant Commerce Clause: The court found that the plaintiffs failed to demonstrate how the ordinances treated in-state and out-of-state interests differently. While there was no cap on exempt properties, there was nothing that prohibited out-of-state owners from owning a short-term rental that provided 24-hour services that would render their property exempt.

Eleventh Circuit (Equal Protection, Due Process, Takings Clause, First Amendment, Contracts Clause, Dormant Commerce Clause): *Short-term Rental Owners Association of Georgia, Inc. v. Cooper*, 515 F.Supp. 3d 1331 (11th Cir. 2021) –The county modified its short-term rental regulations by prohibiting rentals in most residential zones for less than 30 days, although the regulations allowed short-term rentals that were in existence prior to the enactment of the regulations to continue, so long as the rental was no less than a week (*see id.* at 1337). Plaintiffs filed suit asserting that the ordinance violated the Fourteenth Amendment, the Takings Clause, the Free Speech Clause, the dormant Commerce Clause and the Contracts Clause.

Initially, the court opined that inasmuch as the initial short-term rental regulation did not authorize short-term rentals for less than a week, the plaintiffs did not have a vested interest in continuing to rent their properties for less than a week.

Takeaway for localities: *if a property owner's use of their property is not lawful in the first instance, they will have a heavy burden to overcome when trying to assert a vested interest in a non-conforming use.*

Equal Protection: Applying rational basis, the court found that the ordinance limiting short-term rentals was rationally related to the legitimate government purpose of mitigating the adverse impacts on the quality of life on neighboring residents and increasing affordable housing. Inasmuch as the federal circuit courts have previously held that short-term rental regulations are justified, given that municipalities have legitimate interests in ensuring permanent housing stock and maintaining the character of neighborhoods (*see Ewing v. City of Carmel-By-The-Sea*, 234 Cal. App. 3d 1579 (Ct. App. 6th Dist. 1991)), the court dismissed the Equal Protection claim.

Due Process: The court found that while the Eleventh Circuit has recognized a tailored substantive due process right of property owners to not have their property restricted by land use controls that have no substantial relation to the public health, safety, morals, or general welfare (see *Short-term Rental Owners Association* at 1348, citing *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369 [11th Cir. 1993]), this right could not be invoked in this case because the county had demonstrated a relationship between the regulations and the general welfare of the community.

Takings Clause: The court found that the property owners failed to demonstrate that the short-term rental regulation deprived them of all economically beneficial or productive uses of their property. Additionally, the court confirmed that a mere diminution in property value is insufficient to demonstrate a taking requiring just compensation (*see id* at 1349, citing *Lucas*, 505 US 1003 (1992)).

Takeaway for localities*- a property owner is unlikely to prevail on a regulatory takings claim that results from short-term rental prohibitions if other means to derive economic use out of their property exist, including long-term rentals, selling the property, or residing on the property.*

Free Speech: The plaintiffs argued that the regulation violated First Amendment free speech rights by discouraging persons seeking to rent their property to advertise or communicate the availability of the short-term rental (*see id.* at 1349). The court dismissed, saying that any impact on speech is incidental to the regulation of commerce or commercial conduct.

Takeaway for localities: *Property owners will be unsuccessful in challenging short-term rental regulations on the basis of free speech when the regulations govern commerce or commercial conduct.*

Contract Clause: Inasmuch as the plaintiffs failed to even allege the existence of a specific contract impacted by the ordinance, the court dismissed this claim. Indeed, the Contracts Clause does not provide a right to enter contracts in the future but rather protects the impairment of existing contracts. Even if the plaintiffs had existing contracts, the court deferred to the county's judgment as to the necessary and reasonableness of the ordinance (*see id.* at 1350, citing *Energy Re-*

serves Group, Inc v. Kansas Power and Light Co, 459 US 400 (1983)).

Takeaway for localities: *Property owners are unlikely to prevail when asserting a contracts claim if such claim is based on future contracts and, even if contracts exist, the court will likely uphold the municipality's regulation so long as it is necessary and reasonable.*

Dormant Commerce Clause: The court dismissed this claim, finding that the impact on out-of- state and in-state renters was the same and, further, that any burden on interstate commerce was incidental and "not clearly excessive in relation to the local benefits of enhancing and maintaining the residential character of a community" (*id. at* 1351).

Conclusion

As the local government practitioner can see, regulating short-term rentals can leave the municipality ripe for constitutional challenges, be it an assertion of engaging in unreasonable search and seizures under the Fourth Amendment through inspection requirements, discriminating against interstate commerce through the dormant Commerce Clause, engaging in a regulatory taking through the Takings Clause, inhibiting contracts through the Contracts Clause, and violating Due Process and Equal Protection, among other potential challenges. However, despite the plethora of pleadings and challenges, each case in this federal circuit roundup ultimately found for the local government, as the localities took steps to demonstrate the rational and non-discriminatory bases for enacting their short-term rental regulations. Local government practitioners should feel confident in adopting short-term rental regulations that further demonstrate governmental interests in a rational manner. ML

Listserv *cont'd from page 27*

tion I could find, eight in all, until I ran across a small country store with two gas pumps. I saw a man outside and yelled out the window. "Do you have power?" He responded that he did. "Can I buy gas?" He nodded affirmatively…. Hooray! After a 10-100 and a snack and filling my gas tank, I hit the road again feeling a little better but still wondering what I would find ahead.

I found much carnage and many surprises. the first of which was when I got within radio distance of my hometown. I tuned in and found there was an 8 p.m. curfew. You are not to be on the road at all after 8 p.m. Great! Here I am in my vehicle with a stereo, microwave, and various electronics items, but without any proof I own them, and I will be out during a period which virtually was Martial Law. Nerves and blood pressure hiked up, and so did my speedometer as I figured the police had a lot more important things to do than issue a two-point speeding ticket.

I did not even stop the car for the final 90 miles of the trip. No traffic lights were working and there were virtually no vehicles going in my direction. Fearful and worried about what I might find, I finally turned the sand-covered corner down the road from my house and proceeded nervously toward the driveway, reaching it at 7:57 p.m. (Three minutes to spare)

What I found to my astonishment was my roommate's car in the driveway. All the lights were on and he was sitting on the deck drinking a beer. "Ready to watch the ballgame?" He cracked a nervous smile. "Looks like we survived!"

In fact, I had power, water, and cable TV. A survey of the area the next morning revealed some slight damage in the area, and a pretty good bit at the ocean front. I got stuck in the sand on Ocean Boulevard, but was able to free myself. All in all, it could have been worse. At the last hour, the storm had wobbled back to the West and slammed into our state just above Charleston.

I found that the damage I surveyed on the way home was much worse than it actually was at the beach. The hurricane had spawned multiple tornadoes and had traveled much farther inland than one would expect. As far inland as Charlotte, North Carolina, they had fared a lot worse than we did at the beach.

Circle back to our conference in Orlando. Everyone was calling me to see how I was doing in Florida, but then a few days later I was calling them to see how they were doing in the Carolinas. The point here is that all the attention is on a few areas that are closer to the water, but we cannot ignore the inland areas that are prone to tornadoes and flooding from swollen rivers. They can be equally affected, or even worse. So, if your city is inland, do not ignore the emergency preparedness measures for a hurricane. The preparations may be different than at the coast, but they are no less important.

The last lesson I learned from all this is to investigate claims of destruction and catastrophe beyond what you hear on the news. Here I was ready to go to work on the morning of September 26, but folks from out of town were coming into the shop stating "We didn't expect anything to be open. We were told the entire town was flattened. We just came down here to gawk."

I couldn't help but wonder why they ventured my way if they thought everything was closed. However, I remained civil and replied "No sir. We are alive and well and please tell that to everyone when you go back home. We need the business."

Well, hurricane season officially ends December 1. Let's hope we can all avoid a recurrence of this tragedy.

The prosecution rests, your honor… ML

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