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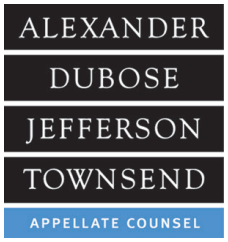

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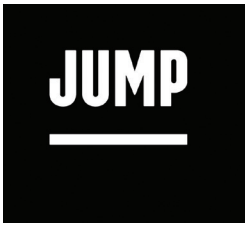

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LEAD STORY

The Content Challenge: A Practitioner's Guide to Sign Ordinances After *Reed*

By: DeWitt McCarley and Catherine Clodfelter, Parker Poe, Charlotte, North Carolina

The implications of *Reed v. Town* of *Gilbert* continue to pose challenges for municipalities as they attempt to regulate signage—and other communication—without reference to the messaging itself.

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Takings and Improved Traffic Flow: New Intersection Designs Can Reduce Property Value

By: Nicholas Papleacos, Chamberlain-Hrdlicka, Atlanta, Georgia

Roadway improvements satisfy residents' demands for better traffic flow, but often come with a cost: nearby businesses and property owners see a decline in value. Takings challenges ensue, with municipalities footing the bill.

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The SEC Raises the Stakes: How the Recent Amendments to Rule 15c2-12 Will Affect Municipal Bond Issuers

By: Randall S. Kulat, Saul Ewing Arnstein & Lehr, Chicago, Illinois and Robert Doty, AGFS, Annapolis, Maryland

The SEC's scrutiny of local government bond issuers has steadily increased over the past decade, with elected officials and even municipal lawyers facing civil and criminal penalties.The requirements for "continuing disclosure" just became more stringent.

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Law Enforcement and Religious Freedom: A Proposal to Amend the NYPD Photo Booking Policy

By: Mariam Arbabi, 2018 Graduate, George Washington University School of Law

For Muslim women, removal of a hijab in front of unrelated males violates religious precepts. Police photo booking policies which require such removal implicate the First Amendment.

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DEPARTMENTS

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Beyond 435 plus 35.

Tomorrow, November 6, 2018, we head to the polls. A relentless press corps—and many candidates themselves--characterize "the Midterms" as the most significant elections in a lifetime. With a total of 470 Congressional votes at stake—those of every Representative and 35 Senators—not to mention the selection of three dozen governors and 40 attorneys general, the stakes are apparently so high that our lives will be immutably changed in a single day.

While the outcome on Capitol Hill and in statehouses around the country will no doubt be hugely significant, experience suggests that the earth will continue to spin on its axis whether Joe survives in West Virginia, Ted keeps the Alamo or Stacey takes the keys to the Governor's Mansion. Less trumpeted but arguably more impactful for IMLA members will be the elections much closer to home—the contests to determine who will populate positions of leadership in tens of thousands of smaller governments across our nation. Battles over healthcare and women's choice may preoccupy the national psyche, but Main Street will decide the contours of local real estate development, funding for community centers and social programs, the tenor of municipal courts and how neighborhood children are educated.

It is tempting to become fixated on the ferocious, heavily financed Congressional and statewide skirmishes playing out endlessly on national media. The platforms and messaging in municipal races can easily be overlooked. Luckily, we are not without resources that provide easy access to information about local candidates, their positions and voting records. In other words, there is no need—and scant justification—for voters not to know why they are selecting a given councilman, school board president or judge. Particularly at the local level, we will get the government we deserve.

The impact on municipal life of our local "electeds" is amply depicted in the November-December ML. Our lead feature examines, again, the nuances of local sign ordinances—a subject which has garnered a massive amount of commentary post-*Reed*. We include a proposal to re-write the New York City Police Department's photo-booking policy, look at the effects of street configuring on adjacent property values, discuss a more rigorous SEC standard for municipal bond issuers, analyze the ramifications of the ADA in police arrest scenarios, chronicle the recent hurricane experience in a local community and summarize a case challenging the adequacy of local schooling.

Here's to free, fair and informed elections tomorrow—both at the national and local level.

Best regards-
Erich Eiselt

PRESIDENT'S LETTER

Andrew J. Whalen, City Attorney, Griffin, Georgia

It is a privilege to address the membership of IMLA as your new President. My congratulations to Immediate Past President Arthur Pertile for his leadership over the past year, and to the Houston Host Committee for an outstanding IMLA annual conference. Art and his fellow Texans have raised the bar high, both for my administration and for the upcoming 2019 Annual Conference in Atlanta.

I was first appointed City Attorney for the City of Griffin, Georgia in 1982. I soon came to know the late Ed Sumner, then General Counsel of the Georgia Municipal Association. In 1984, Ed made sure I attended my first IMLA Conference and I don't believe I've missed but one since...the year I was in a jury trial while the rest of you were in New Orleans. IMLA is where you go to learn about "cutting edge" municipal law and where you can compare what is happening in your jurisdiction with issues across the U.S. and Canada. It's rare to confront an issue in practice that I didn't first learn about at an IMLA Conference or Seminar. Also important is the networking opportunities one gains through IMLA. Don't tell your elected officials, but City and County Attorneys are the under-recognized officers that make most local governments look good. When we need advice and counsel, we can turn to each other, as many do daily through the Municode-IMLA Listserv.

In addressing the business session at the Conference, I outlined three goals I hope to see accomplished this year. First is MEMBERSHIP. No organization will succeed without its membership; IMLA is no exception. During my tenure as Secretary/Treasurer it became quite evident that IMLA's financial survival comes not from registration fees, but from membership dues. We have to be ever vigilant to keep our members active and their dues paid. Staff can send out reminders to delinquent jurisdictions, but it takes a prod from the local attorney to keep their local government aware of the many benefits IMLA offers. IMLA has a membership committee, ably chaired by Doug Haney of Indiana and Arthur Gutekunst of New York. If they call on you, please help them. I'd like to challenge each of you to contact a colleague in a nearby city or county and tell them about IMLA. If you'll do that, you'll help this organization immensely.

Next, IMLA's outreach must be diverse. The Small and Rural Communities Committee seeks to appeal to a segment of the municipal law community that currently is not well represented in IMLA. In Georgia, we have over 500 cities; 75% of them have a population of less than 5,000 and 83% are under 10,000. Most are located outside of urban areas. Through the generosity of the Georgia Municipal Association paying their dues, these smaller cities have the opportunity to participate in the IMLA Lite program. IMLA's active membership historically consists mostly of large to medium jurisdictions; I believe IMLA has a lot to offer attorneys in smaller jurisdictions and we need them to become active members. Since it was first organized about three years ago, the Small and Rural Committee has been very engaged and has provided programming at our last two conferences. Houston was the first time the committee hosted a separate reception for its members.

Third, we are INTERNATIONAL and Ben Griffith chairs our International Committee. Let me say I owe Ben an apology... I've never been able to travel with this Committee to a foreign land, although I almost made it to Cuba. I wish I could have gone on this year's trip to Israel and Palestine. Next year, the Committee will be traveling to Germany, and I definitely plan to join the group in 2020 that is going to Ireland. These are not vacations by any means; they are comparative law studies in which our members can share their experiences with local government attorneys around the world. The real beneficiaries, however, are the members of IMLA that elect to participate. I would encourage each of you to get involved with this committee and foster the goals of IMLA as envisioned by our founder, Charles Rhyne.

Before I close, I want thank our Executive Director Chuck Thompson and his staff at IMLA. Never have I seen an organization that gets so much out of so few. Jennifer Ruhe hit the ground running to fill the shoes of her mentor, Veronica Kleffner. Amanda Kellar does an amazing job leading the Legal Advocacy program and managing the writing and filing of amicus briefs. Erich Eiselt, Editor of this magazine, is recognized for his expertise with the Opioid Epidemic. Trina Shropshire is outstanding. Other, newer staff members are working hard to make this organization great. I urge you to get to know your IMLA staff.

In closing, let me say I'm looking forward to this being a great year for IMLA. I invite each of you to start making your plans now to be in Washington this Spring and in Atlanta next September. By working together we can make IMLA better. Please don't hesitate to reach out to me with your thoughts and suggestions. ML

The Content Challenge: A Practitioner's Guide to Sign Ordinances after *Reed*

By: DeWitt McCarley and Catherine Clodfelter, Parker Poe, Charlotte, North Carolina

Municipalities across the country have been struggling to find the right response to the U.S. Supreme Court's ruling on sign ordinances in *Reed v. Town of Gilbert*.[1] Three justices concurring with the majority in *Reed* predicted this outcome, writing that the Court's ruling would cast doubt on the ordinances of "thousands of towns," many of which were "entirely reasonable" to begin with.[2]

Municipalities had a sign ordinance on the books before the ruling for a reason: they regulate issues that make a difference in the lives of their residents. Sign ordinances impact public safety, the local economy, politics, and a place's look and feel. As a result, when a municipality acts to change its ordinance or fails to conform established ordinances with First Amendment jurisprudence, passions run high.

But there are effective ways for municipalities to comply with *Reed* while accomplishing their public policy goals. We have been partnering with municipalities to do that over the past few years and have learned valuable lessons about what works and what does not. If you have not revised your jurisdiction's sign ordinance yet – or if you have and are looking for additional analysis – this article is for you.

The Starting Point: *Reed v. Town of Gilbert*

Before launching into a rewrite of a sign ordinance, it is important to have a thorough understanding of the *Reed* decision. In *Reed*, the Town of Gilbert, Arizona had a sign code prohibiting the display of outdoor signs anywhere without a permit but exempting 23 categories of signs.[3] The code provided more or fewer restrictions on signs based on the *type* of message the sign was conveying. Ideological signs, political signs and temporary directional signs all had different applicable time, place or manner regulations. For example, ideological signs could be much larger than other types and could be placed in all districts without time limits; but temporary directional signs could be no bigger than six square feet, were limited to specific locations and could be out no more than twelve hours before an event.[4]

There was no evidence in *Reed* that the town was regulating the signs differently based on any disagreement with the messages conveyed.

Before *Reed*, many courts determined whether a sign ordinance was content-based by first examining whether the government adopted the sign ordinance because of disagreement with the message the sign was conveying.[5] In a 9-0 decision, the Supreme Court repudiated the approach of relying principally on the government's motivation in regulating speech.[6] Writing for the majority, Justice Clarence Thomas held the inquiry must *start* with whether a regulation, on its face, draws distinctions between speech depending on the message of the sign.[7] If the regulation distinguishes between speech based on the message, the regulation is content-based. In other words, the Court found a regulation to be content-based that other courts had been finding to be content-neutral; it applied the content-based inquiry regardless of the municipality's intent in enacting the ordinance. (The Court also confirmed that an evaluation of the motivation behind a regulation may be a necessary second determination if regulations do not distinguish between speech based on the message of the sign).

Gilbert's ordinance was content-based as it was regulating signs based on their type of speech: ideological, political or directional. From that determination, the Court applied strict scrutiny to the ordinance and concluded Gilbert's approach was unconstitutional under the First Amendment.[8]

Reed tells us that municipalities (and where applicable, courts) must closely examine sign ordinances to make sure the ordinance does not impose different regulations on signs based on the content of the sign's message. If an ordinance does distinguish between signs based on what the sign says, the regulation must be narrowly tailored to meet a compelling government interest.[9] In First Amendment jurisprudence, when a municipality imposes a content-based restriction on speech, the municipality bears the heavy burden of proving that it has a compelling reason for prohibiting or regulating that speech.[10] The municipality also must show that it prohibited the least amount of speech possible to protect its interest. Only a small number of the municipality's interests would be considered compelling, and itis extremely difficult to meet this standard.

Justice Elena Kagan, joined by Justices Stephen Breyer and Ruth Bader Ginsburg, observed in a concurring opinion that the practical reality of the holding in *Reed* meant municipalities "will have to either repeal the exemptions that allow for helpful signs on streets and sidewalks, or else lift their sign restrictions altogether and resign themselves to the resulting clutter."[11] Justice Breyer, also writing a concurring opinion, highlighted that the majority opinion has the potential to decrease a municipality's ability to be practical and directly address certain problems – even beyond sign ordinances. "Virtually all government

activities involve speech, many of which involve the regulation of speech,"[12] Breyer wrote. "Regulatory programs almost always require content discrimination. And to hold that such content discrimination triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity."[13] Indeed, some of the evolving case law deals not with how this new ruling affects signs but how broadly the rule may be applied to other types of ordinances.[14]

Justice Samuel Alito, on the other hand, joined by Justices Anthony Kennedy and Sonia Sotomayor, provided additional guidance on how counties can "enact and enforce reasonable sign regulations."[15] Justice Alito set out a non-exhaustive but helpful list of those regulations that would still be deemed content-neutral, and therefore easier to defend. Some of those suggestions, detailed more fully in the concurring opinion, include regulating the size of signs based on any content-neutral criteria and regulating the locations in which signs may be placed if the sign is free-standing or attached to a building.[16]

In addition, the majority opinion in *Reed* noted that the ruling *should not* prevent cities from using certain signs for public safety. "A sign ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers—such as warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses—well might survive strict scrutiny,"[17] Justice Thomas wrote. Because the signs at issue in Reed were "far removed from these purposes," the Court easily found the ordinance did not meet strict scrutiny.

Though the suggestions seem straightforward, the difficult part for any municipality will be aligning the need for regulation with the type of regulation allowed. Practically, it is simple to use content-based regulations because it is clear what the ordinance is seeking to regulate and why. But First Amendment principles do not bend to accommodate practicality. Thus, municipalities must re-evaluate the necessity for a regulation that distinguishes between signs based on message. If the regulation is still necessary, the municipality should seek to revise the manner in which those public policy needs are met.

Revising Your Ordinance

The Process

Before revising your municipality's ordinance in compliance with *Reed*, you will need an agreement from elected officials that an evaluation and revision of a sign ordinance is necessary. Signs are a politically sensitive subject and are likely to bring out many competing stakeholders and interest groups. It would be reasonable to expect sign companies, real estate firms, developers, fast food franchisees, car dealers, billboard companies, the Sierra Club and others to have an intense interest in this issue. And even though it is rarely said out loud, elected officials themselves have a vested interest in the regulations as they apply to campaign signs (which are sometimes the worst offenders). A lawsuit in a nearby community, in your state, or against your local government will help get their attention, but do not expect elected officials to be excited about taking on this controversial topic.

If there is a guiding philosophy to the average sign ordinance, it may be as simple as allowing new advertising innovation while minimally regulating to protect roadway safety and keep sign clutter to a tolerable level. It is at least worth considering whether to use the rewrite forced by *Reed* as an opportunity to consciously adopt a guiding policy to drive sign regulations.

The manager, planning director and city attorney also must agree that the ordinance needs to be brought into compliance with current case law so that each party is willing to carry their share of the load to accomplish the goal. The manager can help guide elected officials through the policy decisions required and help manage industry and constituent reactions. The planning director can catalog and analyze problems particular to the municipality, as well as issue spot for "real life" situations that have been overlooked or do not fit into any new proposed language. The city attorney must master the case law and translate the old content-based regulations into new content-neutral time, place and manner provisions, wherever possible.

Outlining the Issues

A threshold question is whether to use this forced rewrite of the sign regulations as an opportunity to alter the guiding philosophy behind the existing regulations.

A fair criticism of many sign ordinances is that they are merely a collection of *ad hoc* regulations developed over time as each new sign product made its debut in the community. When flashing signs arrived in the 1980's, many communities enacted a regulation prohibiting flashing signs in the right of way in an effort to prevent distracted drivers. When car dealers started flying American flags the size of a football field, planning directors asked for limits on the number and size of flags on commercial properties. When digital billboards with changeable copy came on the scene there was a rush to regulate the length of time the message could or should be displayed. The point is that many sign ordinances are nothing more than a historical collection of one-off fixes for discrete issues.

If there is a guiding philosophy to the average sign ordinance, it may be as simple as allowing new advertising innovation while minimally regulating to protect roadway safety and keep sign clutter to a tolerable level. It is at least worth considering whether to use the rewrite forced by *Reed* as an opportunity to consciously adopt a guiding policy to drive sign regulations.

Regardless of whether the project aims to blaze a new path, some policy decisions simply must be addressed in the process. Two obvious questions are:

1. Whether the rewrite is simply designed to

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Catherine Clodfelter is an associate at the firm's Raleigh office. She focuses her practice on creditors' rights and financial restructuring. She has experience with individual and corporate bankruptcies pursuant to Chapters 7, 11, and 13 of the Bankruptcy Code. Catherine previously clerked for two judges in the U.S. Bankruptcy Court for the Middle District of North Carolina, and also worked with the North Carolina Coordinated Campaign as regional director of voter protection in Mecklenburg County.

allow a rough continuation of what exists, or whether some "clean up" is desired. period.

2. Whether to take on the proliferation of temporary signs in the right of way.

If some "clean up" is desired, be prepared for the existing merchant community to cry foul, that their signage is likely to be made non-conforming and that they will have to spend money at some point to come into compliance. From our experience, the sign companies will be fine with most changes as long as the new regulations are not overly restrictive. The sign companies figure out pretty quickly that some number of businesses will need new signs and that their business may actually increase, or at least won't suffer.

The second issue that needs to be addressed is how to treat the proliferation of temporary signs in the right of way. (Warning: this is the part where elected officials will realize the new regulations are going to apply to them and their campaign signs). If your jurisdiction is experiencing a clutter of temporary signs in the right of way (such as directional signs to the newest subdivisions, a declaration that "we buy ugly houses," signs informing the public that they can sell their used cell phones for cash – now! – campaign signs, or, in some parts of the country, simply "Thank You Jesus"), the rewrite may be an opportunity to reset how the community regulates the use of the public right of way.

Speaking a New Language

Moving from content-based regulations to content-neutral regulations requires a realization on our part that simply saying "time, place and manner" won't mean much to non-lawyers trying to understand why a rewrite is necessary in the first place. It does not take much explanation for a lay audience to understand exactly what is required by a sign ordinance provision regulating menu boards at drive-in restaurants. But when the city attorney explains that now we can only regulate menu boards by describing signage that can be at a drive-in restaurant in a permitted zone, in particular locations on the site, but not based on what the sign says, you can expect some confusion.

The path to success requires using language and examples that make sense to a lay audience. Early in the discussion, it helps to simplify the *Reed* decision down to an easily understood phrase:

"If you have to read the sign to know how to regulate it, the regulation is content-based, and we can't regulate signs that way anymore."

We sincerely apologize to any attorney who is offended by such a gross over simplification of a complex First Amendment issue. Really, we are sorry. However, if we want our clients to understand the concept that we can now only regulate signage by time, place and manner, we have to speak in plain English. "Time" translates to permanent versus temporary. "Place" translates to land use zones or locations of permitted uses. And "manner" translates to construction materials, internal or external lighting versus no lighting, size, ground mounted versus pole mounted, and other physical features of the sign.

Examples of What Works

By way of illustration, here is how some "old, content-based" sign ordinance provisions could be translated into "new, content-neutral" sign ordinance provisions. (These examples do not address whether a particular municipality could pass intermediate scrutiny.)

1. **Tenant signs in a strip shopping center.** Old version would allow one tenant identification sign per business. Revised version allows one sign per entrance on a building that houses one or more non-residential uses. No reference to content.
2. **Flags.** Old version would allow flags of the United States, the state, a local government or other enumerated entities. Revised version would allow up to a limited number of flags on poles no higher than a specified height. No reference to what the flag depicts. Here, it is important to scrutinize the definition of flag to make sure the definition also does not contain a content-based qualification.
3. **Business entrance signs.** Old version would allow specified signs such as "entrance," "exit," "parking," "no trespassing" and "no soliciting." Revised version would allow a specified number of signs at entrances or exits. No reference to content.
4. **Construction announcement, grand opening and going out of business signs.** Old version would allow these temporary signs with stated size, placement and period of time they could be displayed. Revised version will allow a temporary sign of stated size and period of time it may be displayed, but with no reference to content.
5. **Political signs, real estate signs, subdivision entrance signs, fuel island canopy signs, time and temperature signs, and any other sign defined by what the copy on the sign says.** Old version would allow these signs with specific regulations for each type of sign. Revised version would allow signs at various places, with defined physical characteristics (including size and height) and specify how long or when a temporary sign may be displayed, but with no reference to what the signs may say.

In explaining this change to elected officials and planning-board members, someone will inevitably ask whether this means that, for example, the local gas station could put "Stop the War" on their fuel island canopy instead of the brand name of the gasoline they sell. The city attorney will answer, "Yes, that's exactly what it means." In response to the puzzled or incredulous looks the city attorney receives, the best reply is that this is what the U.S. Supreme Court now requires, and that we should rely on common sense and people's self-interests to believe that most businesses will use their allowed signage to advertise the goods and services that they are in business to provide.

Examples of What Does Not Work

1. **Doing nothing.** It is highly likely that if you haven't updated your ordinance since *Reed*, it would not hold up in court. For that reason, it is only a matter of time before a constituency group brings a lawsuit, which would either force you to begin the process of compliance or pay the legal costs of fighting it. Though, if elected officials are not on board with engaging in the process of revisions, doing nothing might be the only thing you can do.
2. **Holding onto one or two "old" provisions.** Resist the temptation to retain provisions with a unique local history and that were enacted to handle one particular sign or situation. This only makes the new ordinance vulnerable to challenge.
3. **Copying content-neutral regulations from another municipality** without **tailoring to your needs**. Remember, content-neutral regulations must be narrowly tailored as well. What has worked for other municipalities can be a good starting point, but only if you then tailor it to the exact needs of your community.
4. **Make everything "commercial."** It might be tempting to exploit the fact that commercial vs. noncommercial regulation appears to remain intact (see discussion below). Stating that a regulation only applies where the activity is "commercial," though, might not achieve any of your needs and goals as it relates to signs.

Additional Issues to Consider From the Evolving Case Law

1. **What if it's commercial speech?** The distinction between commercial versus noncommer-

cial regulations might remain intact.[18] This might seem counterintuitive based on the simple message learned from *Reed* – how else do you determine a sign is for a commercial versus a noncommercial purpose other than by reading it? However, the majority in *Reed* dealt only with noncommercial speech, and courts interpreting its reach have not applied it any farther. But, be careful that simply calling something "commercial" or "noncommercial" does not give you the all-clear to create other distinctions. As a federal district court found in a case after *Reed*, an Indiana city and county's sign ordinance "clearly subjected noncommercial opinion signs to restrictions different from other sign types that also received exemptions from the [...] requirement, including, inter alia, 'real estate signs' and 'temporary signs for grand openings and city-recognized special events,' all of which were also defined by their content."[19]

2. **Can my ordinance be grandfathered in?** Courts applying *Reed* have found provisions grandfathering in old signs to be content-neutral.[20] However, *Reed* made the point that even terms which grandfather in old signs must be reviewed to make sure the speakers grandfathered in are not being favored over new speakers simply based on the content of the regulated speech.[21]
3. **How much evidence is required in court?** Many local governments hesitate to initiate a process that requires showing regulations meet the needs of specific interests. Unless your municipality does seek to regulate based on the content of the message, the burden of tailoring ordinances that are content-neutral is not insurmountable and can be based in large part on what other municipalities are doing or common sense. As a district court in Missouri put it, "A municipality may rely upon any evidence that is reasonably believed to be relevant for demonstrating a connection between speech and a substantial, independent government interest, which may simply include common sense."[22] And a Minnesota court noted its post-*Reed* jurisprudence has "permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even ... to justify restrictions based solely on history, consensus, and simple common sense." (internal quotation marks and citation omitted).[23] This all depends, of course, on the provisions and rationale being relevant in your municipality.
4. **What about overbroad applications?** *Reed* is powerful because its holding is simple. However, as with most rules in constitutional law, simplicity leads to a potentially overbroad application. The most difficult issue courts appear to deal with post-*Reed* is whether its holding should be applied in the same manner to other regulated acts. It is easy to come up with a list of ways to distinguish between signs based simply on their appearance, size, type of lighting or location – and not based on their content. But the simplicity that applies to physical signs does not carry over to other types of ordinances, such as panhandling and aggressive solicitation ordinances.

It is easy to come up with a list of ways to distinguish between signs based simply on their appearance, size, type of lighting or location – and not based on their content. But the simplicity that applies to physical signs does not carry over to other types of ordinances, such as panhandling and aggressive solicitation ordinances.

Use of Outside Counsel

A growing number of law firms and planners now offer sign ordinance revision as a service. One reason to consider outside assistance is that the firms who offer this service have probably already done several rewrites for other communities and have drafted language that covers most of the common sign regulation issues, and they have learned some lessons about how to present this issue to elected officials and the community so that it's understandable. Sign ordinance revision is a relatively straightforward project when the drafter has already done a few previously, but it requires significant research and a steep learning curve for a first-time drafter.

Some bidders charge by the hour for this work while others are willing to quote a flat fee. An issue to watch out for in a flat-fee proposal is limits on particular line items of service. For example, the bidder may limit the number of on-site meetings or hearings that are covered by the fee or may limit the number of drafts/rewrites that can be done without incurring hourly charges for additional work. These are reasonable protections for outside counsel to request, and it is incumbent upon the city attorney to know their planners, elected officials and business community well enough to predict whether a flat-fee proposal will work.

NOTES

1. 135 S. Ct. 2218 (2015).
2. *Id., 135 S. Ct.at 2239, 192 L. Ed. 2d 236 (Kagan concurrning).*
3. *Id., 135 S. Ct. at 2224-25.*
4. *Id.*
5. *See e.g.*, Hensel v. City of Little Falls, 992 F. Supp. 2d 916, 923 (D. Minn. 2014) (*citing* Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S. Ct. 2746, 2754, 105 L. Ed. 2d 661 (1989)).
6. *Reed, 135 S. Ct. at 2227.*
7. *Id.*
8. *Id., 135 S. Ct. at 2231-2232.*
9. *Id.*
10. *Id.*
11. *Id. at 2237 (Kagan, concurring).*
12. *Id. at 2234.*
13. *Id.*
14. Panhandling and aggressive solicitation ordinances are two examples. Most, if not all, courts that have analyzed panhandling ordinances enacted before *Reed* have found them to be unconstitutional in its aftermath. Although we do not have room here to detail compliance tips for these potentially thorny *topics, it* is worth noting that the same First Amendment analysis that requires a complete reexamination of sign ordinances also requires a reexamination of panhandling and aggressive solicitation ordinances. This is another area where it can be valuable to consult with outside counsel, especially because panhandling ordinances are controversial due to their inextricable link to issues of homelessness.
15. *Reed, at 2233.*
16. *Id.*
17. *Reed, at 2232, 192 L. Ed. 2d 236 (2015); ArchitectureArt, LLC v. City of San Diego, 231 F. Supp. 3d 828, 840 (S.D. Cal. 2017), reconsideration denied, No. 15-CV-01592-BAS-NLS, 2017 WL 1346899 (S.D. Cal. Apr. 4, 2017)*
18. *See Citizens for Free Speech, LLC v. Cty. of Alameda, 114 F. Supp. 3d 952, 969 (N.D. Cal. 2015).*
19. *See Geft Outdoor LLC v. Consol. City of Indianapolis & Cty. of Marion, 187 F. Supp. 3d 1002, 1014 (S.D. Ind. 2016), appeal dismissed sub nom. Geft Outdoors, LLC v. Consolidated City of Indianapolis (June 17, 2016).*
20. *Citizens for Free Speech, supra note 18, at 968.*
21. *Reed, at 2231.*
22. *See Willson v. City of Bel-Nor, 298 F. Supp. 3d 1213, 1220 (E.D. Mo. 2018).*
23. *Hensel, supra* note 5, at 927; City of Los Angeles v. Alameda Books, Inc., *535 U.S. 425, 438–39, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002).*

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Takings and Improved Traffic Flow: New Intersection Designs Can Reduce Property Value

By Nicholas Papleacos, Chamberlain-Hrdlicka, Atlanta, Georgia

Introduction

As our population increases and the number of vehicles on existing roads goes up, state and local departments of transportation are facing the challenge of moving more vehicles along the same number of roads. Traffic engineers are searching for creative solutions to meet the demands of the increased flow of traffic, which can include the utilization of alternative intersections.

Alternative intersections may create the need for additional land adjoining the existing roadway or change the accessibility to the roads from adjoining property. These changes can impact the value of the land based upon detrimental impacts to the characteristics of the property. Government may need to acquire property from adjoining landowners, or landowners may file claims for inverse condemnation based upon perceived takings of property interests. When evaluating alternative intersection designs, government and city officials should consider the impact these configurations may have on adjacent property and the potential costly claims that could arise from affected property owners, including proximity damages and access damages.

Location, location, location

The mantra about what makes a piece of property desirable has not changed. The value of commercial property is dependent upon several characteristics, and location and accessibility are often key factors. Zoning ordinances dictate the general uses of property in the commercial arena, including different levels and intensity of use of property. There are vast differences between retail uses and office uses, although both generally fall into the category of "commercial property's." Other characteristics include the size, topography and available utilities.

However, location and access are intertwined. An advantageous location for a business owner will likely include convenient access to the property.

A real estate appraiser may distinguish commercial properties as being either a "destination" location or a "convenience" location. A destination location is one which people are aware of in advance such as a doctor's office. Generally, people traveling to a doctor have obtained directions or an address before they get into a car.

A convenience location, on the other hand, is a business which largely attracts its customers from people driving by, becoming aware of a particular product or service and desiring quick access and departure. Convenience locations include fast food restaurants and "convenience" stores, such as standalone small stores or gas stations with a store which sells food and beverage items, among other products generally associated with motor vehicles. Any change in the design of the roadway may affect access to adjoining properties and businesses, regardless of whether any land is taken for the road project.

Types of intersections

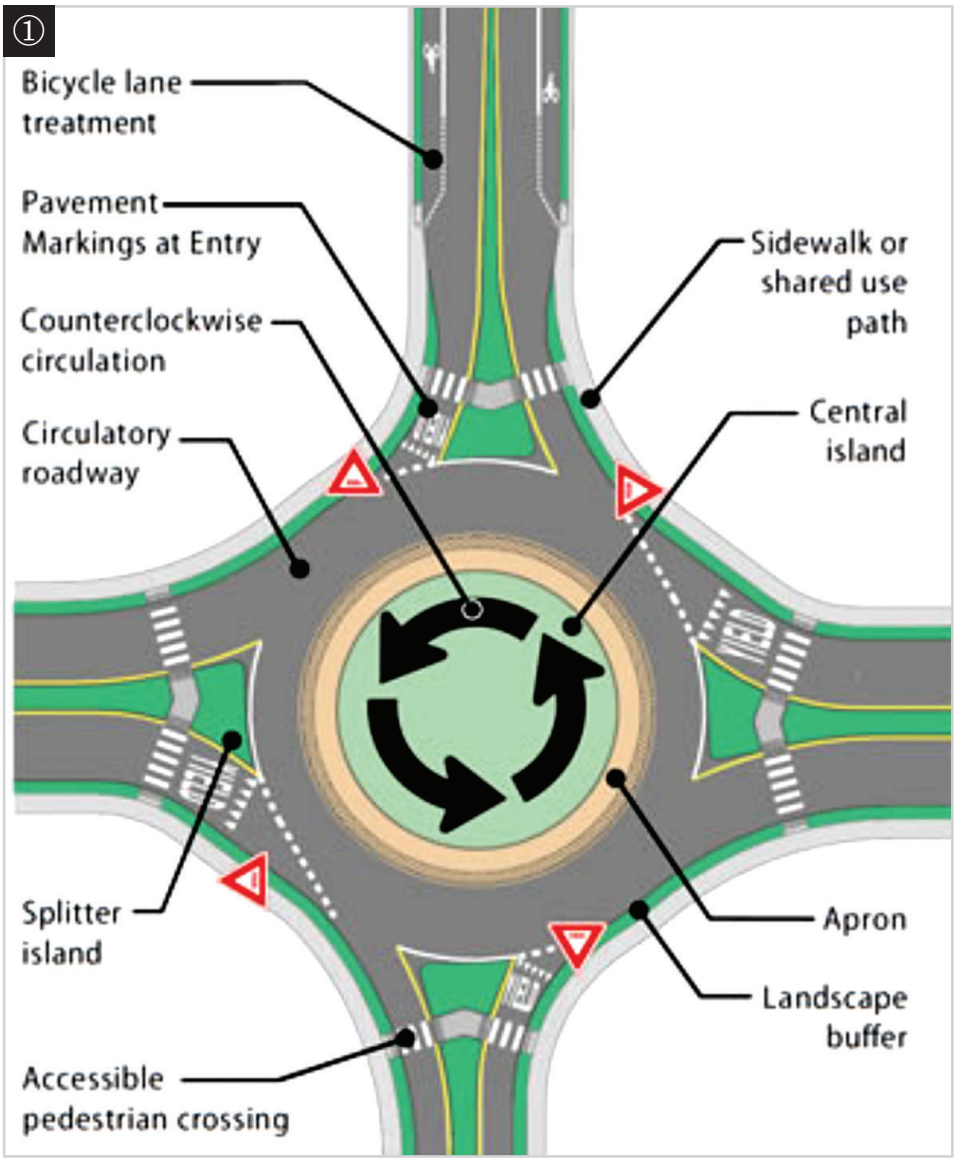
Two types of intersections generally may have an impact on adjoining properties: a roundabout and a displaced left turn intersection.

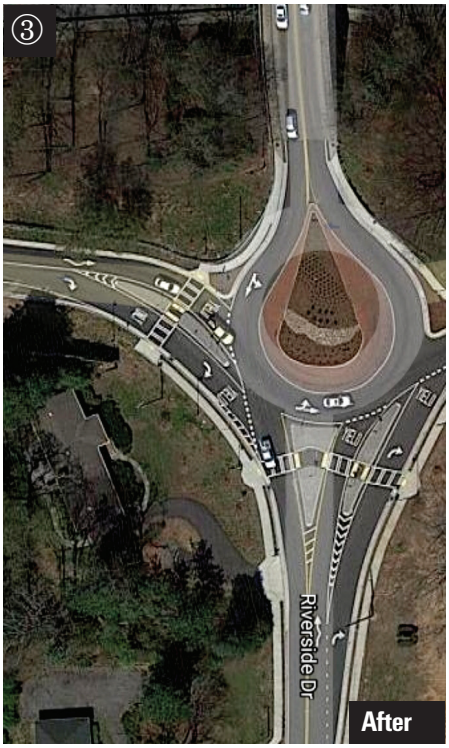
While roundabouts are popular in New England, they are relatively novel in other parts of the U.S. A roundabout simply exchanges a four-way intersection with a form of concrete or solid round structure in the middle of the intersection. Cars enter the circle under a yield guideline for cars already in the circle, and travel around the circle to the road intended. The advantage of the roundabout is that there are no lights; traffic can theoretically move continuously through the intersection. Typically, a roundabout is used at intersections on two-lane roads and requires some additional land on all four corners of the intersection to accommodate the size of the circle and traffic lanes. A governing authority will negotiate with adjoining landowners to purchase the property or take the property through eminent domain.

A displaced left turn intersection (DLT) is also used at a four-way intersection, but best used at larger intersections with at least two lanes in each direction on at least one of the two roads at the intersection.

The DLT differs from a standard four-way intersection because on at least

The roundabout is a relatively simple design. A general diagram is shown below.





one road, the left turn lane shifts from the center of the roadway, alongside the main artery, to the far left of the intersection, starting from a point before the actual intersection. In essence, a DLT siphons off left turn traffic into another lane that travels up to the intersection and moves according to signals at the intersection.

The movement of left turn traffic requires signals before the intersection because the left turn traffic crosses over traffic headed in the opposite direction. Studies have claimed that this is a more efficient movement of traffic as well as a safer option due to minimizing the number of crash points at the intersection.

As can be seen in diagram ① there are no impediments to car movement other than other traffic in the intersection. The diagram shows the potential need for additional property, depending upon how much existing right-of-way already is present in the intersection. Typically, the creation of a roundabout will be affecting the closest corner of adjoining property owners.

Adjoining property owners could experience several different impacts from a roundabout. Separate from the loss of land needed for the actual construction, the roundabout will bring traffic closer to buildings or structures situated on the property. For commercial property, this could impact the number of parking spaces. For residential property, the home could be situated closer to traffic.

Parking spaces are usually compensable in one form or another in a condemnation. For a residential owner, closer traffic may give rise to what appraisers call proximity damages. Proximity damages reflect the loss of fair market value of the remaining property arising from closer traffic.

In diagram ② and ③, the property owner lost his driveway because it was within the curve of the roundabout. The designer moved the driveway onto adjoining property away from the roundabout for safety reasons.

Nonetheless, the property owner was given additional compensation for the loss of a dedicated driveway by the

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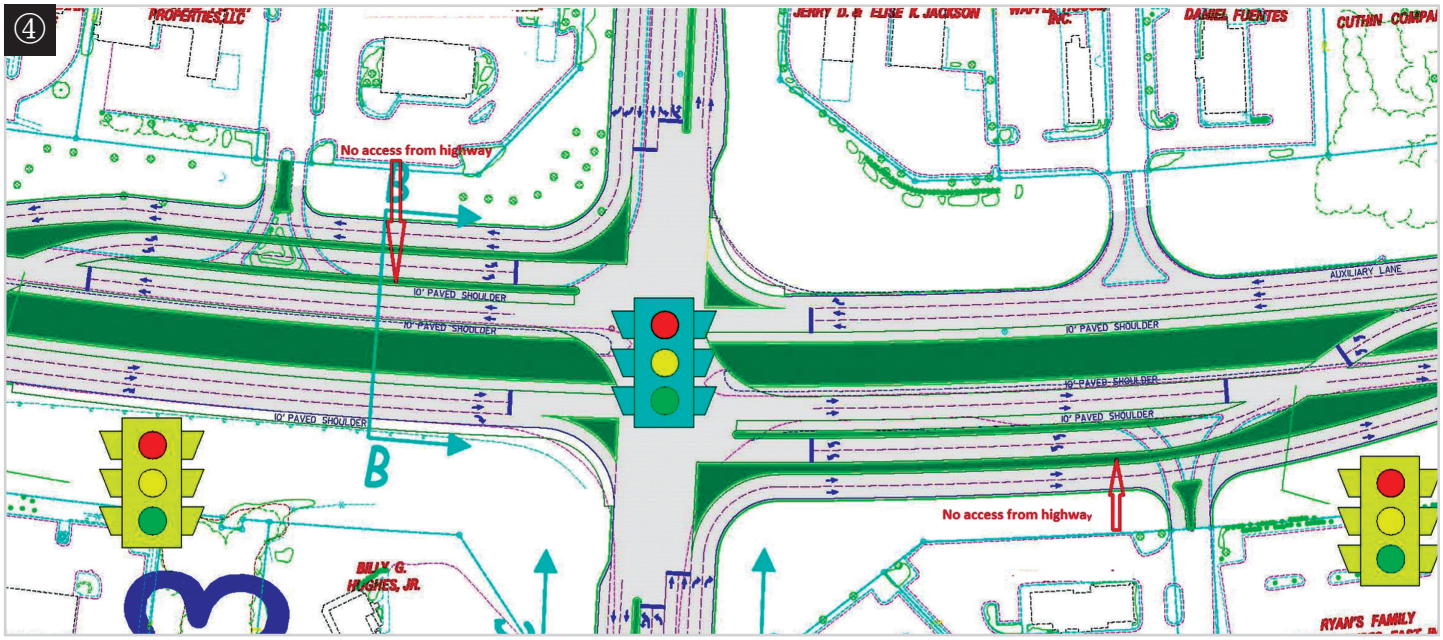
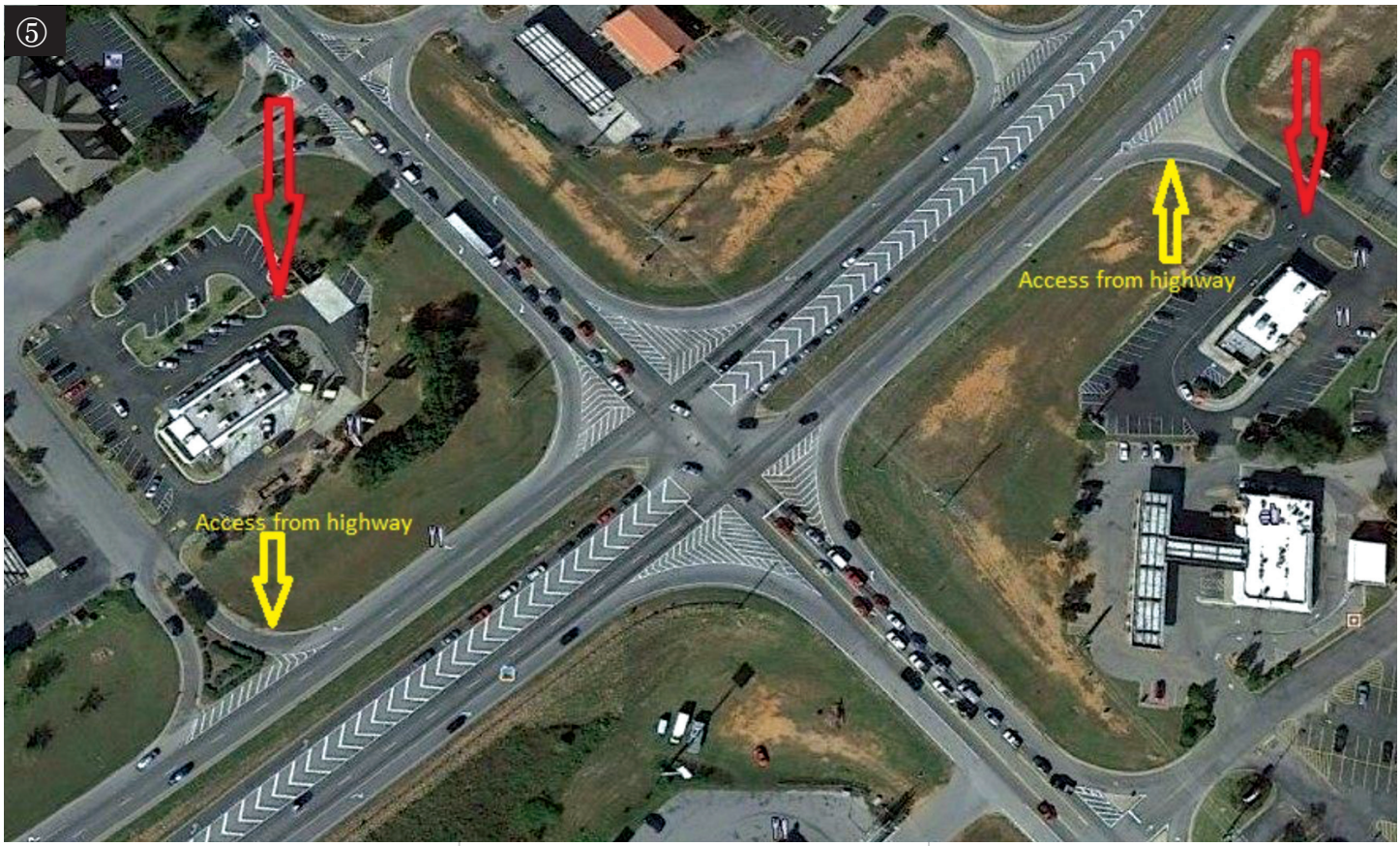




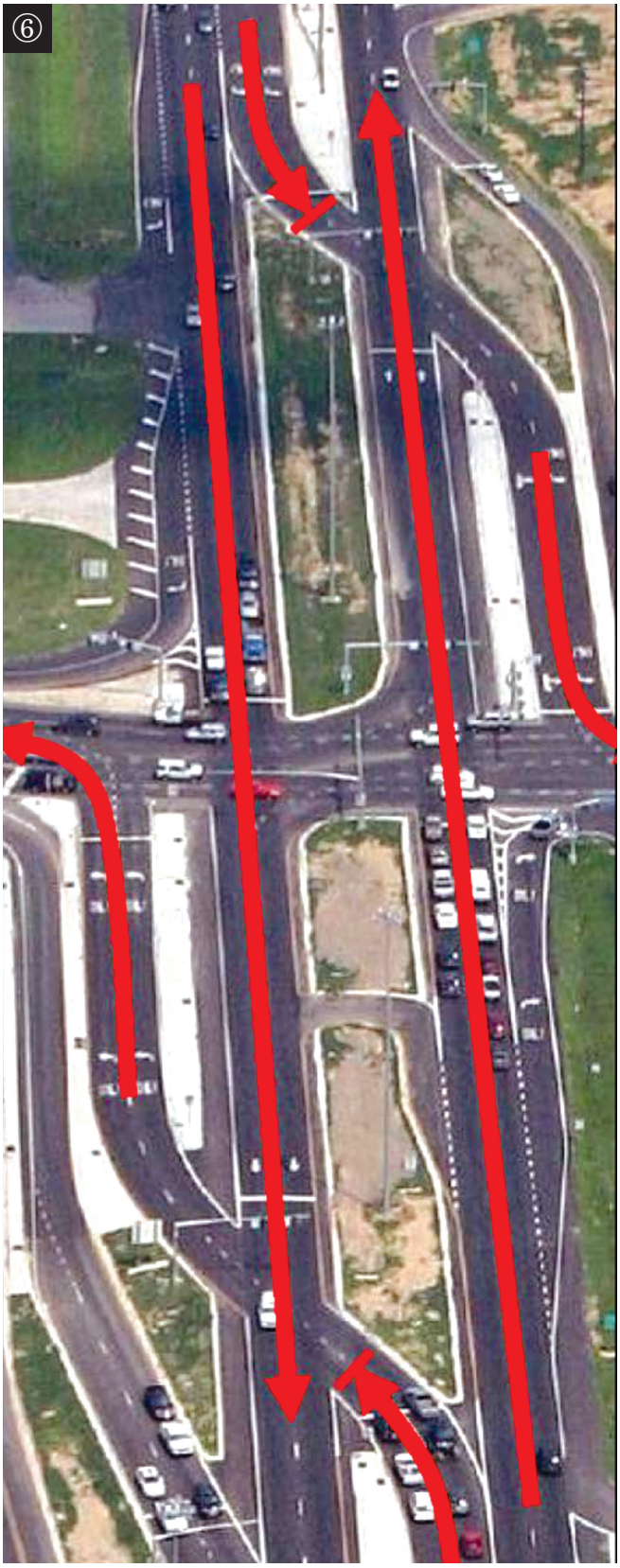
DOT's appraiser. The concept of a shared driveway was viewed by the appraiser as being less advantageous than a dedicated driveway.

The design of the roundabout may also impact actual access from adjoining property onto the roadway. In another case, the design of the roundabout provided for a thru lane and a right turn lane for traffic that simply made a right turn. In the plat below, the right turn lane was in the same area as the homeowner's driveway. Given traffic on a busy road and additional street markings, the homeowner was being relegated to a right turn only onto an entrance ramp to an interstate highway.

The homeowner in that case was not only compensated for the land he lost, but substantial damages were paid in a settlement for the impacts to his driveway and access. The DLT is best explained in diagram ④.

This diagram shows a two-way displaced left turn on the main roadway. Drivers approaching the intersection intending to make a left turn are funneled off the main roadway and moved to the other side of oncoming traffic through an at-grade crossover. They then stack up in a lane or lanes at the intersection until the lights change to permit vehicles on the main roadway to travel forward and the left turn stacking lanes to empty into the side road.

The DLT design impacts properties sit-



uated on the corner of the intersection, where the stacking lanes for vehicles turning left are created. Corner properties no longer have immediate access to the main roadway from both directions. The dedicated right turn lane causes those properties to lose the ingress from the main road. Apart from being a taking of access, a DLT may also change the nature and use of the property at the corner. Typically, corner properties are advantageous to convenience businesses. However, as alternative fuel vehicles increase in popularity, new gas stations no longer depend on gas sales for profit. Instead, gas stations instead aim to entice customers to go inside to purchase food and drinks. The markups on products at convenience stores are normally higher than those made in a grocery store, but customers are paying for the convenient ease of entry and departure from the site. As can be seen by the diagram, a driver would have a more difficult time anticipating access to the location or getting back to the location after having passed it on the main road. In diagram ⑤ two fast food restaurants on opposite corners of an intersection have made claims asserting an inverse condemnation of access rights caused by the construction of a DLT. Before the original condemnation, the intersection was a four-lane highway intersection with a two-lane state road. The photo below shows the original condition.

After construction was completed, diagram ⑥ both restaurants no longer had access into their properties from the highway.

Departure to the state highway was maintained by an adjoining road; however, it was the result of installing a dedicated right turn from the two-lane state road that gave the access. The new displaced left turn lane interferes with ingress from the highway to the restaurants. The latest aerial photo shows the intersection during the late stages of construction, while the diagram below shows how the roads will be marked after completion.

Entitlement to Compensation Arising from a New Intersection

An owner's right to compensation for impacts to property arises in both the U.S. Constitution and state constitutions. Generally, interests in real property cannot be taken without payment of just and adequate compensation. All of the elements and characteristics of real property that give it value are protected against government interference.

There are two elements of damages when a government exercises its power of eminent domain. First, there is the value of the land taken. Generally determined by the fair market value of property, the owner is entitled to that compensation.

The property owner may also be entitled to consequential damages for the impacts to the value of the remaining property. Where the property taken impacts the utility or other attributes of the remaining property, the owner may recover for the diminution of the fair market value. For example, if the taking of a strip in the front of the property also takes access, the remaining property will have a diminished value because it is landlocked.

Access is a key element of value. Depending on how much land is taken for the project, the remaining property may no longer be useful for a commercial purpose and can add significant costs to roadwork projects. While there are no reported cases in my state regarding compensation for impacts arising from these intersections, it is inevitable that the issue of compensation will be litigated. The legal principles that will apply are long-standing. It is their application to the specific facts that has not yet occurred in the appellate courts. The impacts are real to the property owners. ML

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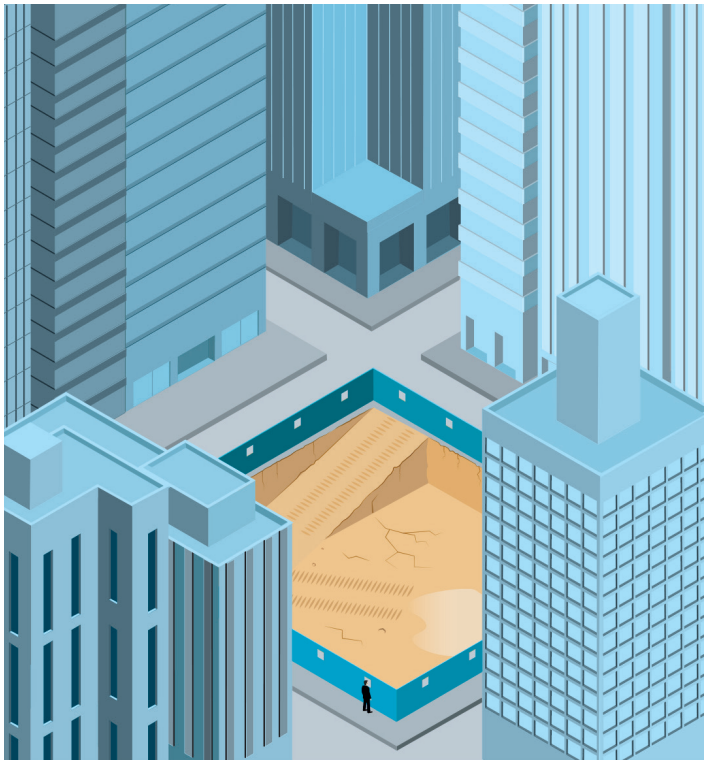
The SEC Raises the Stakes: How the Recent Amendments to Rule 15c2-12 Will Affect Municipal Bond Issuers

By: Randall S. Kulat, Saul Ewing Arnstein & Lehr, Chicago, Illinois and Robert Doty, AGFS, Annapolis, Maryland



Starting early next year, municipal bond issuers and other "obligated persons"[1] will become obligated to publicly disclose certain information regarding their bank loans, municipal leases, direct purchases or private placements of bond issues, derivatives and other types of non-publicly offered financial obligations. The Securities and Exchange Commission ("SEC"), wishing to "add transparency to the municipal securities market by increasing the amount of information that is publicly disclosed about material financial obligations incurred by issuers"[2], recently adopted two amendments to Rule 15c2-12[3] (the "Rule") under the Securities Exchange Act of 1934. These amendments add two new "events" to the list of events required by the Rule to be included in continuing disclosure undertakings and posted on the Electronic Municipal Market Access ("EMMA") website of the Municipal Securities Rulemaking Board ("MSRB").[4]

The two new events added by the SEC will, by its own admission, likely result in municipal bond issuers and underwriters incurring additional time and expense[5] in order to comply with the Rule – both before and after these amendments to the Rule take effect on February 27, 2019 (the "Compliance Date"). In order to lessen the impact of the two new event disclosure requirements, issuers, underwriters, municipal advisors and others involved in public finance, including municipal attorneys representing issuers, should become familiar with the changes to the Rule well before the Compliance Date.

New Disclosure Events Added to the Rule

The Rule prohibits an underwriter from buying or selling municipal bonds unless it has reasonably determined that the issuer, or other obligated person, has agreed in a written continuing disclosure undertaking or agreement to provide specific information on EMMA.[6] The Rule currently lists fourteen specific events for which notice is to be posted on EMMA within ten business days after occurrence.[7] On August 20, 2018, the SEC announced that it is adding two new events requiring issuers and obligated persons in municipal bond offerings to agree in writing to provide notice of:

- The incurrence of a financial obligation of the obligated person, if material,[8] or agreement to covenants, events of default, remedies, priority rights, or other similar terms of a financial obligation of the obligated person, any of which affect security holders, if material (new "Event Numbered 15"); and
- a default, event of acceleration, termination event, modification of terms, or other similar events under the terms of a financial obligation of the obligated person, any of which reflect financial difficulties (new "Event Numbered 16").[9]

The amendments to the Rule will only affect continuing disclosure agreements entered into by an issuer or obligated person on or after the Compliance Date. An issuer's existing continuing disclosure undertakings will be unaffected by the amendments to the Rule.

It may be noted that, in primary offerings, material information must be disclosed pursuant to the antifraud provisions of the federal securities laws[10] and, as applicable, state securities law and common law. Those disclosure mandates would apply to the information content of Event Numbered 15 and Event Numbered 16, as well as to other information that the SEC may have considered, but did not include in this regulatory action.

Financial Obligations under New Event Numbered 15

The amendments to the Rule define a "financial obligation" as a (i) debt obligation; (ii) derivative instrument entered into in connection with, or pledged as security or a source of payment for, an existing or planned debt obligation; or (iii) guarantee of (i) or (ii). In implementing these amendments, the SEC said that the definition of "financial obligation" does not include ordinary financial and operating liabilities incurred in the normal course of an issuer's or obligated person's business, but only an issuer's or obligated person's debt, debt-like, and debt-related obligations. By distinguishing debt, debt-like, and debt-related obligations from obligations incurred in an issuer's or obligated person's normal course of operations, the amendments to the Rule focus on the types of obligations that could impact an issuer's or obligated person's liquidity, overall creditworthiness, or an existing security holder's rights.[11] It should be noted that the SEC has specifically excluded municipal securities as to which a final official statement has been provided to the MSRB consistent with Rule from the definition of financial obligation.[12]

Debt Obligation. Under the Rule, a "debt obligation" is any short-term or long-term debt obligation of an issuer or obligated person under the terms of an indenture, loan agreement or similar contract, regardless of the length of the debt obligation's repayment period, such as a direct purchase of municipal bonds or a direct loan by a bank, whether long-term or short-term.[13]

A lease is not a debt obligation, except when the lease is debt or debt-like. If a lease operates as a vehicle to borrow money, such as an equipment financing lease or a facilities lease-purchase agreement, it is a debt obligation, but an operating lease is not included in the definition.[15] The SEC noted that, since the Government Accounting Standards Board has discontinued the use of the terms "capital lease" and "operating lease" in government accounting, it is appropriate to focus not on whether the lease is a capital lease or an operating lease, but on whether a lease operates as a vehicle to borrow money. A lease entered into as a vehicle to borrow money could, in the SEC's view, represent competing debt of an issuer; therefore, an obligation to repay borrowed money over time under the terms of a lease is "functionally equivalent" to a similar obligation incurred under the terms of a loan agreement or similar agreement.[16]

Derivative Instrument. The definition of financial obligation includes a "derivative instrument" such as a swap, a security-based swap, a futures contract, a forward contract, an option or similar instrument (or combination) or any similar instrument to which an issuer or obligated person is a counterparty, provided that such instruments are related to an existing or planned debt obligation. The SEC includes derivative instruments in the definition of financial obligation because, it believes, such instruments could adversely impact an issuer's or obligated person's liquidity and overall creditworthiness, or adversely affect security holders.[17]

Guarantee. A "guarantee" is also a financial obligation, as defined in the Rule. A guarantee includes any guarantee provided by an obligated person (as a guarantor) for the benefit of itself or a third party, which guarantees payment of a financial obligation, guarantee of a debt obligation or a derivative instrument entered into in connection with, or pledged as security or a source of payment for, an existing or planned debt obligation.[18] The SEC notes that a guarantee of a debt obligation or a derivative instrument entered into in connection with, or pledged as security or a source of payment for, an existing or planned debt obligation could raise two disclosures under the amended Rule – one for the guarantor and one for the beneficiary of the guarantee. Specifically, if an issuer or obligated person incurs a material guarantee, such guarantee would be subject to disclosure under the Rule, as amended. For an issuer or obligated person that is the beneficiary of a guarantee provided in connection with a debt obligation or a derivative instrument entered into in connection with, or pledged as security or a source of payment for, an existing or planned debt obligation, the SEC suggests that such beneficiary issuer or obligated person should assess whether such guarantee is a material term of the underlying debt obligation or derivative instrument and, if so (and if the underlying debt obligation or derivative instrument is material), disclose the existence of such guarantee under the Rule.

Materiality under New Event Numbered 15

Because materiality is a "core principle" that guides the SEC's approach to securities regulation, only "material" financial obligations or agreements to terms of financial obligations need to be disclosed on EMMA within ten business days after its occurrence under the new Event Numbered 15.[19] The SEC stated that not every incurrence of a financial obligation or agreement to terms is material, but it has offered no hard and fast rules as to what exactly constitutes materiality. Instead, the SEC wants issuers and obligated persons to assess their disclosure obligations in the context of the specific facts and circumstances, and based on whether the information regarding their financial obligations would be important to the "total mix of information made available to the reasonable investor."[20] An issuer or obligated person will need to consider whether a financial obligation or the terms of a financial obligation, if they affect security holders, would be important to a reasonable investor when making an investment decision. The SEC recommends that issuers and obligated persons should consider not only the source of security pledged for repayment of a financial obligation, but also the rights associated with such a pledge (such as senior debt versus subordinate debt), par amount, covenants, events of default, remedies, or other similar terms that affect security holders to which the issuer or obligated person agreed at the time of incurrence, when determining its materiality.

What to Report, and When, under New Event Numbered 15

If, on or after the Compliance Date, an issuer or obligated person determines that it has incurred a material financial obligation, it must disclose such information on EMMA within ten business days after such occurrence. A financial obligation is considered to be incurred when it is enforceable against an issuer or obligated person.[21] A financial obligation incurred before the Compliance Date is not required to be disclosed under new Event Numbered 15, but, as discussed below, a default or other event under such financial obligation may have to be disclosed under new Event Numbered 16.

A disclosure on EMMA under new Event Numbered 15 must include a description of the material terms of the financial obligation, such as the date of incurrence, principal amount, maturity and amortization, interest rate, if fixed, or method of computation, if variable (and any default rates). The SEC has indicated that obligated persons can submit to EMMA either a description of the material terms of the financial obligation, or alternatively, or in addition, submit related materials, such as transaction documents, term sheets prepared in connection with the financial obligation, or continuing covenant agreements or financial covenant reports, as long as such related materials include the material terms of the financial obligation. The amendments do not require disclosure of confidential information such as contact information, account numbers or other personally identifiable information, all of which may be redacted.[22]

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Law Enforcement and Religious Freedom: A Proposal to Amend the NYPD Photo Booking Policy

By: Mariam Arbabi, 2018 Graduate, George Washington University School of Law

I. Introduction

In the aftermath of the terrorist attacks of September 11, 2001 Muslim men and women, especially those who could be readily identified by their dress or practices,[1] faced increased discrimination. The FBI reported that "anti-Muslim hate crimes are approximately five times more frequent than they were before 2001" and "Muslims are consistently portrayed as somehow un-American because of their faith."[2] Although both Muslim men and women are victims of discrimination, Muslim women who choose to wear a headscarf face unique forms of discrimination and are adversely impacted in ways that Muslim men are not.[3]

Muslim women have struggled to express their religious freedom and identities in numerous contexts. In the workplace, Muslim women have been denied the right to wear a headscarf (hijab) and have been fired for their refusal to remove their hijab; at school, Muslim girls have experienced public humiliation and have been prevented from participating in extracurricular activities; in the criminal justice system, they have been denied the right to wear a hijab while in courthouse, jails, and in correctional institutions.[4] They have also been mistreated by police officers, both when being arrested and when seeking police assistance.[5]

Because of their visibility, Muslim women who choose to wear a hijab experience discrimination and racism that is committed either consciously or subconsciously due to a widespread bias against Muslims. In New York City (City), the lack of religious accommodations and tolerance for Muslim women arrestees being processed by the New York Police Department (NYPD) has caught media attention after several incidents of police misconduct were reported. Within the past five years, the City and NYPD have been the subject of three separate lawsuits by Muslim women who were victims of police harassment and were forced to remove their headscarves for booking photographs (i.e. mugshots).[6] Although these women settled with the City and NYPD, similar incidents are still occurring, as evidenced by the most recent civil rights class action lawsuit filed in March of this year, urging a change in NYPD's photo booking policy.[7] The NYPD's treatment of Muslim women has generated great fear within this community, especially for Muslim women and girls who are victims of domestic violence and feel too terrified to seek help.[8]

This article examines the tension between NYPD's photo booking policy and the First Amendment right of Muslim American women to wear the hijab. First, I will discuss the significance of the hijab for Muslim-American women and the laws protecting one's right to religious expression. Second, I will examine how NYPD's current policy mandating the removal of the hijab is in violation of the First Amendment. Finally, I propose changes to the current Photo Booking policy that reflects sensitivities not only to the customs of the Muslim community but to all residents of the City whose religious beliefs and customs may be undermined by this policy.

II. Background

a. What is a hijab?

The prevailing custom during the time of the Prophet Mohammad was for a woman to wear the hijab covering her head and neck in front of all "non-mahram" males; she was only permitted to remove her head covering in front her "mahram" males.[9] A "mahram" male is defined as a male who has a close familial relationship and is an individual that the woman can never marry, such as her father, brother, son, uncle, nephew, and husband's father.[10] Within the Muslim community there are various types of coverings for women, ranging from merely covering a woman's head and neck, such as the hijab, or one that conceals a woman's entire body including her face, such as a burka or niqab.[11] As with each of these religious coverings, a rationale behind the hijab is, in fact, to protect Muslim women from the immorality and objectification by the opposite sex.[12] Therefore, the conscious decision of Muslim women to wear a hijab reflects an expression of empowerment, and a policy that prohibits or forces her to remove her hijab violates her religious autonomy.[13]

This article will focus on NYPD's arrest and photo booking policy regarding women who wear a hijab, which leaves a woman's face visible and recognizable. (I make this distinction because there are different policy concerns, such as that of identification, that can justify the partial removal of a full burqa or niqab versus a head covering). Although the prevailing perception of the hijab in America is one of oppression, it is important to note that in the United States Muslim women do not face the same societal pressures to wear the head scarves as their counterparts in other countries. In fact, many Muslim American women make a deliberate decision to dress according to their religious beliefs and customs, and thus it is a deeply personal choice.[14] To these women, wearing a hijab is fundamental to their understanding and adherence to their faith and to their own identity.[15]

b. Religious protections under the U.S. and New York Constitutions.

The practice of religious freedom with regards to religious dress extends far beyond Muslim women; for instance, forms of religious dress can also be found in Catholicism, in Mormonism, in Sikhism, and in Orthodox Judaism.[16] Accordingly, the Free Exercise clause of the First Amendment has implications for all such religious expression. While the right to religious expression has not always been fully honored in federal case law, the First Amendment does provide a fundamental right to protection from governmental regulation that substantially burdens this right. The Supreme Court has held that laws that "substantially burden" the free exercise of religion can survive scrutiny if the government can present a "compelling interest" for passing such regulation.[17] In 1990, the Court in *Department of Human Resources v. Smith* held that Oregon's law prohibiting the use of hallucinogenic drugs (peyote) for sacramental purposes was constitutional.[18] The Court explained that the state law was facially neutral because it did not aim to promote or restrict a certain religious belief but rather only incidentally affected the plaintiffs and therefore the Free Exercise clause was inapplicable.[19] The *Smith* decision was significant because it was generally seen as abandoning strict scrutiny for claims alleging religious freedom violations under the First Amendment.[20]

As a response, Congress enacted the Religious Freedom Restoration Act (RFRA) of 1993[21] which aimed to restrict government action that would intrude on sincerely held religious beliefs.[22] It further provided that the government--federal or state--cannot "substantially burden" religious conduct even by "a rule of general applicability" unless the government can demonstrate that it took the least restrictive means in furthering its compelling governmental interest.[23] However, in *City of Boerne v. Flores,* the Supreme Court struck down RFRA's application to state laws, holding that it violated the separation of powers between the federal and state government.[24] Nevertheless, RFRA still applied federally—and many states have since interpreted their own constitutions to legitimize statewide statutes that provide heightened protection for religious expression.[25] Therefore, despite the decisions in *Flores and Smith,* a general consensus remains among the states that freedom of religious beliefs cannot be regulated without a compelling state interest.

The practice of religious freedom with regards to religious dress extends far beyond Muslim women; for instance, forms of religious dress can also be found in Catholicism, in Mormonism, in Sikhism, and in Orthodox Judaism. Accordingly, the Free Exercise clause of the First Amendment has implications for all such religious expression.

New York is one such jurisdiction. Its State Constitution establishes that "the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind."[26] In language more robust than that of the First Amendment, it emphasizes the importance of religious liberty, a fundamental right that can only be overridden in limited circumstances.[27] In *Catholic Charities of the Diocese of Albay v. Serio,* the New York Court of Appeals had the opportunity to apply *Smith* after a faith-based organization alleged that certain provisions in the Women's Health and Wellness Act[28] that required employer health insurance policies to provide coverage for prescriptions drugs and contraception, violated the Free Exercise Clauses of the New York and U.S. Constitutions.[28] Although the court did not apply strict scrutiny in *Serio* and found, applying *Smith*, that the First Amendment had not been offended, this opinion was significant because it demonstrated a willingness to adhere by New York's Constitution and only limit the free exercise of religion by a compelling governmental interest in maintaining public peace, safety, or the prevention of licentiousness.[30] This is aptly summarized in Justice Kaye's concurrence; "'the court has been cognizant that where the Supreme Court has changed course and diluted constitutional principles, the Court of Appeals has the responsibility to support the State Constitution when [it] examines whether [it] should follow along as a matter of State law.'"[31] The Court of Appeals in Serio thereby acknowledged that New York State's Free Exercise protection under its Constitution is broader and more robust than the current protections granted under the U.S. Constitution.[32]

III. NYPD's Photo Booking Restrictions on Religious Head Coverings

The first civil rights lawsuit that the City and NYPD encountered regarding its photo booking procedures occured in 2012 when a young high school student was forced to remove her hijab and she was denied the opportunity to have her official photograph taken by a female officer.[33] In 2012, NYPD's patrol guide had not implemented an official policy as to whether religious head coverings in official post-arrest photographs would be allowed.[34] Due to the lack of guidance, central booking facilities throughout the City handled this issue differently. Some would allow individuals to wear religious head coverings for photographs and others would not, making the policy discretionary.[35] Practicing Muslim-American women throughout the City had varying experiences in their interactions with law enforcement, with no certainty or guarantee of their constitutional rights.

In 2015, another lawsuit ensued alleging a similar complaint against the NYPD. A Muslim-American woman claimed that she was forced to remove her hijab in the presence of male officers and prisoners while her photograph was being taken.[36] In reaction to these civil rights lawsuits NYPD passed and implemented Interim Order 29 in March 2015, which attempted to establish certain protocols for taking pictures of arrestees who

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refused to remove religious headwear.[37] Interim Order 29 amended Patrol Guide 208-03, "Arrests-General Processing," and established the following governing policy:

> In order to accommodate arrestees who refuse to remove their religious head covering for an official department photograph, the Department has authorized the Mass Arrest Processing Center ("MAPC") at One Police Plaza be available so that an arrestee can remove their religious head covering and have their photograph taken in private. . . the Department requires that an official photograph be taken of an arrestee with an unobstructed view of the arrestee's head, ears, and face.[38]

This amendment is aimed at accomodating those with religious apparel by instructing both Desk Officers and Borough Court Section Supervisors the as follows: (1) Notify Manhattan Court Section to ensure that someone of the same gender is available to take the picture of the arrestee; (2) Once at the processing center, have an officer of the same gender take an official Department picture without the religious head covering; and (3) Transport the arrestee to the Mass Arresting Processing Center ("MAPC") and return the arrestee back to the respective Borough Court Section upon completion.[39] Since the passing of Interim Order 29, there have been no further changes to NYPD's Patrol Guide regarding the procedures for official NYPD photographs of arrestees, and it continues to be the current protocol.

Despite the implementation of this policy, mistreatment of individuals with religious requirements continued. An incident in 2016 led to another lawsuit by a Muslim-American woman who alleged various violations of her religious rights when a male officer forcefully removed her hijab for a photograph, and never gave her the option of being escorted to MAPC to have her picture taken in private by a female officer.[40] As evidenced in these cases, in practice, the police department was inconsistent in the application of the order and continued to use their discretion on the treatment of Muslim-American arrestees. Muslim American women are vulnerable to these inconsistencies–which can result in severe mental and emotional distress, as that experienced by the three woman who filed suits against the City and NYPD.[41] They each expressed that they felt exposed, distraught, and violated when they were forced to remove their religious head covering, especially since their own experience was in front of "non-mahram" males.[42] The City recognized their significant constitutional interests and harm that the NYPD's protocol may have caused and agreed to pay $60,000 in damages to each woman.[43]

Interim Order 29 was a laudable attempt to accommodate religious customs, but the current policy continues to be problematic because it mandates the removal of all religious head coverings.[44] The policy as it stands today substantially burdens Muslim-American womens' ability to practice their sincerely held beliefs.[45] As such, NYPD's photo booking procedure violates Muslim womens' rights under the First Amendment and Article I section 3 of the New York State Constitution.

The NYPD, like other federal and state agencies that impose specific requirements for official photographs, has an interest in capturing pictures that accurately portray the identity of the individual in order to facilitate their identification by the public, victims, and other officers. However, the ban on wearing a hijab in photographs does not serve any overriding governmental interest because a hijab leaves the woman's face completely visible and unobstructed.. Further,

A blanket ban on religious head coverings is not the least restrictive means by which the NYPD can achieve its stated interest. For instance, if the hijab casts a shadow on a woman's face obstructing a clear view of distinctive features, an officer can easily ask her to adjust the hijab in order to facilitate the identification process; this would mimic a similar existing policy within the United States Citizenship and Immigration Services.[46] To oblige a woman to completely remove her hijab is insensitive towards her personal religious practices–and ultimately disrespects the customs of all religions requiring a religious dress.

This NYPD policy remains in place, and continues to harm many more Muslim-American women who are residents of City. In March 2018, two Muslim-American women came forward with their traumatizing experience and filed a federal class-action lawsuit against the City. Both women endured hostile comments and mistreatment as they were forced to remove their hijabs for official Department photographs in spite of their tearful objections.[47] These women are urging City-wide reform to the existing NYPD policy to ensure that no individual is deprived of their fundamental right to exercise their religion and forced to undress against their will.[48]

IV. Proposed Changes to NYPD's Post-Arrest Photo Booking Policy

a. Authority to amend NYPD's Patrol Guide 208-03

NYPD's photo-booking policy squarely falls within the arena of local government. The New York State Constitution grants local government home rule power to enact laws relating to "property, affairs, or government" and to revise their city charters in accordance with the State Constitution.[49] Furthermore, the Municipal Home Rule Law broadens that power to include the "protection, order, conduct, safety, health, and wellbeing of persons or property" of its local citizens.[50] With this authority to self-govern, the Charter of New York City (Charter) delegates its authority among its elected legislative body, the New York City Council and its' agencies.[51] Specifically, the legislative body is equipped with the power to "adopt local laws [. . .] for the order, protection and government of persons and property; for the preservation of the public health, comfort, peace and prosperity of the city and its inhabitants."[52]

The Charter has also created agencies to provide certain services, which the City Council is also responsible for overseeing by holding regularly scheduled hearings to ensure that each agency is working to fulfill its purpose with the appropriate procedures.[53] One service provided to the citizens by the Charter is police protection; Chapter 18 of the New York City Charter establishes the City's police department and bestows upon it the duty to:

> [P]reserve the public peace, prevent crime, detect and arrest offenders, suppress riots, mobs and insurrections, disperse unlawful or dangerous assemblages. . .protect the rights of persons and property, guard the public health, preserve order at elections and all public meetings and assemblages. . .enforce and prevent the violation of all laws and ordinances in force in the city; and for these purposes to arrest all persons guilty of violating any law or ordinance for the suppression or punishment of crimes or offenses.[54]

Consequently, law enforcement is the most visible, accessible, and direct representation of the local government's policies, making it imperative that police officers uphold law and order, and promote public safety without abusing their power. NYPD's post-arrest photo booking policy is a matter that needs to be addressed by both the City Council and NYPD to create consistent practices that will not trigger constitutional violations.

b. Nationwide progress regarding hijabs in booking photographs.

NYPD is not the only law enforcement agency to have aroused tensions when interacting with arrestees who refuse to remove religious head coverings for purposes of official photographs. Dearborn Heights, Michigan; Long Beach, California; Portland, Maine; and Minneapolis, Minnesota have all faced similar situations. However, unlike NYPD, all of these cities' police departments implemented reforms and adopted policies that provided for religious accommodations for arrestees wearing religious garb.[55] For example, after the Long Beach City Council approved a settlement between a woman who was required to remove her hijab for a post-arrest photograph, the Long Beach Police Department amended its post-arrest photograph policies to allow women to wear their head coverings while in custody and for photographs.[56] In Dearborn Heights, Michigan the police changed their booking procedures in response to a lawsuit filed by a Muslim-American woman who was forced to remove her hijab while taking an official photo.[57] The new policy permits Muslim women to be searched by female officers without the presence of male officers and allows for women to wear their head scarves for official photographs.[58] These are just a few examples where law enforcement officials across the country have acknowledged the need for religious accommodations within their internal post-arrest photo booking policies. Most importantly it demonstrates a growing national consensus that Muslim-American women have a right to wear a hijab during official government photographs.

Other Federal and state entities have already taken additional steps to accommodate individuals wearing religious apparel. For official US passport photographs, the United States Department of State permits individuals to wear hats or head coverings that must be customarily worn in public due to their religious beliefs.[59] As referenced above, the United States Citizenship and Immigration Services issued a policy memorandum stating that the department will accommodate individuals who wear religious headwear and will not mandate the removal of such head coverings for official photographs.[60] At the state level, New York's Department of Motor Vehicles regulations regarding official photographs for driver licenses, permit individuals to wear religious head coverings.[61] The progress made at the federal, state, and local levels across the nation to address matters of law enforcement and arrestees' religious rights, should serve as a model policy for other communities faced with such issues.

c. How should NYPD amend its Photo-Booking Policy?

In light of the many lawsuits that the City and NYPD have faced regarding headscarves worn in booking photos, it is in the City's and NYPD's best interest to amend NYPD's Patrol Guide 208-03, "Arrests – General Processing." I would respectfully propose an updated policy that provides direction to police officers to accommodate religious beliefs when requiring an individual to pose for official photographs. In particular**,** *the City should amend the Patrol Guide to eliminate the wholesale removal of all religious head coverings, following in the footsteps of other police departments who have recognized the rights of citizens to wear a religious head covering, such as a hijab.*

As mentioned above, the City and NYPD have the authority and power to amend NYPD's photo booking policy. It is imperative that the City take the required steps to modify or adopt policies and practices that accommodate religious customs. Thereby, an updated NYPD policy on post-arrest photographs would be consistent with Federal regulations regarding official passport photographs, and state regulations regarding driver licenses; ensuring that individual's right to Free Exercise of religious freedom is subject to the same standards throughout all three levels of government.

Moreover, viewed through the prism of the Free Exercise clauses of the New York and U.S. Constitutions, NYPD's photo-booking policy would not withstand strict scrutiny. Clear identification of a person is a compelling interest, but the NYPD's discriminatory treatment of the Muslim community by requiring removal of a hijab or any religious head covering is not narrowly tailored to this interest. It is far from clear how the removal of a head scarf that leaves a woman's face completely uncovered and visible for pictures furthers the NYPD's intended goal of keeping an accurate photographic record of an individual. To require women to involuntarily remove their religious attire infringes upon their rights to freely exercise their religious beliefs without the interference of substantially burdensome government conduct. In addition to burdening Muslim-American women's rights, having police officers transport these arrestees to and from the Mass Arresting Processing Center to have their pictures taken by an officer of the same gender, when there is no guarantee that one will be available, places a burden on law enforcement's time and efficiency.

This proposed amendment would not only accommodate individual's right to free exercise of religion, but it would also be the least restrictive means in furthering law enforcements' interests. It would also have wider implications for individuals of various religions beyond the Muslim community, who may also require certain religious dress or coverings.

Conclusion

The right to wear religious apparel such as a hijab is protected under the First Amendment of the United States Constitution and the majority of State Constitutions. Merely because Muslim womens' religious practices require an overt expression of faith does not mean that they should be treated differently or marginalized for their sincerely held beliefs. Local government regulations, such as the NYPD's photograph booking policies that mandates the removal of a woman's headscarf violates the First Amendment and Article 1, section 3, of New York State's Constitution. Considering that other federal and state policies do not require the removal of a woman's hijab for purposes of official photographs such as passports and licenses, the City is hard pressed to justify such removal for a photograph serving a similar interest in identification. The various hijab-related suits initiated against the City and its police department make it all the more evident that it would be in the City's best interest to amend the NYPD Patrol Guide 208-03 "Arrests- General Proccessing." Modifying the existing policy would ensure that all individuals are being treated equally when it comes to religious freedom and allow them to comply with arrest policies without the humiliation and violation of their strongly held religious beliefs.

Notes

1. Sahar F. Aziz, *From the Oppressed to the Terrorist: Muslim American Women in the Crosshairs of intersectionality, In the post-9/11 era, Muslim women donning a headscarf in America find themselves trapped at the intersection of bias against Islam, the racialized Muslim, and women...., 9* Hastings Race & Poverty L.J. 191, 191 (2012).

2. Aliyah Frumin and Amanda Sakuma, *Hope and Despair: Being Muslim in America After 9/11,* NBC NEWS, March 28, 2018, https://www.nbcnews.com/storyline/9-11-anniversary/hope-despair-being-muslim-america-after-9-11-n64545.

3. Aziz, *supra* note 1 at 192. Due to Muslim women's overt expression and display of their religious identity they become both "visible targets and silent victims" of discrimination and hate-crimes. State and local laws have failed to either protect their constitutional rights or have limited their religious constitutional freedom.

4. *Discrimination Against Muslim Women -*

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Amicus

The Intersection of the ADA and Arrests: More Questions than Answers

By: Amanda Kellar, IMLA Director of Legal Advocacy and Associate General Counsel

Title II of the Americans with Disabilities Act (ADA) provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U. S. C. §12132. It is an open question whether Title II of the ADA applies to arrests and if so, whether reasonable accommodations must be provided for dangerous or violent suspects.

***City and County of San Francisco v. Sheehan* and the Resulting Split in Authority**

In 2015, the Supreme Court heard oral argument in *City and County of San Francisco v. Sheehan*, which presented the question of whether Title II of the ADA requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody. *See City and County of San Francisco v. Sheehan,* 135 S.Ct. 1765, 1772 (2015). Unfortunately, the Court did not answer the question, and the only thing that was clear after the Court's decision is that there are more questions than answers in this area of the law. The Court dismissed the question presented as improvidently granted, based on the fact that it believed the City had pivoted away from the main arguments it had pressed below in the Ninth Circuit.

The Court complained in its opinion that San Francisco, Sheehan, and the United States all agreed that § 12132 applies to arrests. *Id.* at 1773. San Francisco conceded that Title II applies to arrests, but that Sheehan was not a qualified individual because she presented a "direct threat" to the officers, as that term is defined under the ADA. *Id.* The Court appeared to want someone to argue that Title II simply does not apply to arrests, period, and without an adversarial brief on that issue, the Court dismissed the question presented. The Court also noted that the related question of "whether a public entity can be liable for damages under Title II for an arrest made by police officers" was also unaddressed by the parties in the case. Again, all the parties agreed that "an entity could be vicariously liable for money damages for the purposeful or deliberately indifferent conduct of its employees," but the Court explained that it had "never decided whether that is correct..." *Id.* at 1774-75.

Thus, after the *Sheehan* decision, many open questions remain. Does Title II of the ADA apply to arrests? If so, does it apply to arrests involving a violent and dangerous mentally ill suspect? How does the ADA's "direct threat" analysis come into play? If the ADA does apply, does vicarious liability apply to the entity for an officer's violation of the ADA?

To further complicate matters, the Circuits are split as to how to apply the reasonable accommodation analysis in these cases and offer varying approaches. As the parties explained in *Sheehan,* the lower courts all seem to agree that Title II applies to an arrest (though as noted, the Supreme Court has not decided that question), but there is a division "over whether Title II of the ADA applies at all to encounters with violent, mentally ill individuals." *See Adle v. Me. State Police Dep't,* 279 F. Supp. 3d 337, 363-64 (D. Me. 2017) (detailing circuit split and collecting cases). There are more or less three camps within this divide: (1) those that say Title II does not apply; (2) those that say it does apply, but that courts should take into account exigent circumstances in determining whether any accommodation was reasonable (or even possible); and (3) those that say it does apply, and that there is no added exigent circumstances analysis.

On one side of the split, the Fifth Circuit has firmly held that "Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life." *See Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000). The Fifth Circuit noted that to hold otherwise would "pose an unnecessary risk to innocents." *Id.*

The Fourth and Sixth Circuits meanwhile, appear to allow for the possibility that Title II of the ADA may apply to arrests of violent individuals, however they provide for an "exigent circumstances" analysis, which will often render accommodations of the mentally ill unreasonable under the ADA, depending on what those exigent circumstances are. *See e.g., Roell v. Hamilton Cty.,* 870 F.3d 471, 489 (6th Cir. 2017) (noting that neither the Supreme Court nor the Sixth Circuit "has squarely addressed whether Title II of the ADA applies in the context of an arrest," but that if it does, on the facts of the case, the accommodations proposed by the arrestee were not reasonable given the "exigent circumstances" that required them "to make a series or quick, on-the-spot judgments in a continuously evolving environment."); *Seremeth v. Bd. of Cty. Comm'rs,* 673 F.3d 333, 338 (4th Cir. 2012) (concluding that Title II of the ADA applies to police investigations, but that exigent circumstances in the case involving suspected domestic violence rendered the accommodations provided, which were not considered

"best practices," reasonable); *Waller ex rel. Estate of Hunt v. Danville, Va.*, 556 F.3d 171, 177 (4th Cir. 2009) (assuming "for the purposes of argument that a duty of reasonable accommodation existed" in the context of standoff with an armed and dangerous mentally ill individual and noting that an exigency is one factor in the totality of the circumstances that bears on the reasonableness of an accommodation under the ADA). Meanwhile, in the Third Circuit, the court seems to have concluded that the ADA does apply to arrests, but has held the question of "exigent circumstances" for another day. *Haberle v. Troxell*, 885 F.3d 171, 178, 181 n.11 (3d Cir. 2018) (noting that it is "debatable" as to whether the ADA applies to arrests, but that the "answer is generally yes" and further concluding that in a future case, the court may need to consider whether reasonable accommodations are necessary in exigent circumstances).

The Ninth Circuit, on the other side of the split, more firmly recognizes that Title II of the ADA applies to arrests and does not seem to take into account exigent circumstances. *See Sheehan v. City & Cty. of S.F.*, 743 F.3d 1211, 1231 (9th Cir. 2014); *Vos v. City of Newport Beach*, 892 F.3d 1024, 1036 (9th Cir. 2018) (discussed more fully below).

Against this legal backdrop, IMLA is filing two amicus briefs involving the ADA and police encounters. *City of Newport Beach v. Vos* is a petition stage Supreme Court case and will present the Supreme Court with an opportunity to revisit the issues presented in *Sheehan* and provide much needed clarity in this area of the law. *Gray v. Cummings* is a First Circuit case, where the issue of whether the ADA applies to arrests of violent and dangerous mentally ill individuals is an open question.

City of Newport Beach v. Vos

In *Vos,* Newport Beach City Police responded to a call that an individual later identified as Vos was behaving erratically with a pair of scissors at a 7-Eleven, including cutting an employee's hand who tried to disarm him. *Vos v. City of Newport Beach*, 892 F.3d 1024, 1028-29 (9th Cir. 2018). Over the course of approximately 20 minutes while Vos was alone inside of the store, the eight officers at the scene discussed non-lethal options for resolving the situation. *Id.* During this time a K-9 unit arrived, and one of the officers armed himself with a 40-millimeter less-lethal device. *Id.* at 1029. Also, during this time, the officers became aware that Vos was simulating having a gun, appeared angry and agitated, yelled "shoot me." *Id.* The officers did not know whether Vos was mentally unstable or under the influence of drugs, though one officer notified those at the scene that he believed Vos was under the influence of narcotics. *Id.*

Before the officers could cement their plan to apprehend Vos using less-lethal force, Vos charged the doorway with a metal object raised over his head. *Id.* The officers twice yelled over their bullhorn for Vos to drop the weapon, but he did not drop it and continued to charge the officers. *Id.* When one officer shouted, "shoot him," the officer with the 40-millimeter less-lethal device fired non-lethal rounds, and two officers fired lethal gun shots, causing his death. *Id.* at 1029-30.

According to an expert report submitted by the City, based on his rate of speed Vos would have traveled the 41.1 feet from the back of the store to the police officers' positions in 3.4 seconds. *Id.* at 1039-40 (Bea, J. dissenting). The video shows that the officers had approximately two seconds to decide to shoot Vos after having warned him to drop his weapon. *Id.*

Vos's parents brought suit against the City and three officers on twelve causes of action, including excessive force in violation of the Fourth Amendment and violation Title II of the ADA, based on Vos's schizophrenia. The district court granted summary judgment on all claims in favor of the City.

In a 2-1 decision, the Ninth Circuit found that summary judgment on the Fourth Amendment claim was not proper because the *Graham* factors did not weigh in favor of deadly force. *Vos,* 892 F.3d at 1031-34. The court also found that other factors beyond those identified in *Graham,* including "the availability of less intrusive force, whether proper warnings were given, and whether it should have been apparent to the officers that the subject of the force was mentally disturbed," diminished their interest in using deadly force. *Id.* at 1033-34. However, the court went on to find that the officers were entitled to qualified immunity because it was not "beyond debate" that the officers had acted unreasonably, particularly given another Ninth Circuit decision, *Lal v. California*, which had similar facts and where no Fourth Amendment violation was found. *Id.* at 1034-36.

Finally, on the ADA claim, the Ninth Circuit found that summary judgment was improper because the facts arguably show the officers could have provided further accommodation of Vos's disability. Specifically, the court held that the fact that the officers' actions were not reasonable under the Fourth Amendment undercuts the argument that "because Vos posed an immediate threat he was not entitled to accommodation." *Id.* at 1037. The court acknowledged that the officers did nothing to provoke Vos's behavior, but found that an officer's duty to accommodate is not limited to situations in which the officer provokes the individual's behavior; here, the officers arguably could have provided further accommodations to Vos like de-escalation, communication or specialized help. *Id.*

Judge Bea dissented, finding that the majority misapplied the *Graham* factors and ignored the undisputed fact that "the police were presented with a mere two seconds in which to decide to deploy deadly force." *Id.* at 1041. The dissent also found "the case should not turn on Vos's mental illness" because officers have no obligation "to put themselves in danger so long as the threatening person is mentally ill." *Id.* at 1042. Finally, the dissent found that the majority has in essence "create[d] two tracks of excessive force analysis, one for the mentally ill and one for serious criminals." *Id.*

Gray v. Cummings

In 2013, Judith Gray, who suffered from bipolar disorder and manic depression, suffered a manic episode and called the Athol, Massachussetts Police Department. The police brought Gray to the hospital, where she was civilly committed under Mass. Gen. Laws c. 123 §12 ("Section 12"). Under Section 12, a medical professional who "has reason to believe that failure to hospitalize such person would *create a likelihood of serious harm* by reason of mental illness may restrain or authorize the restraint of such person and apply for the hospitalization of such person for a 3-day period..." (emphasis added).

Later that morning, the hospital called

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the police department requesting the return of Gray, who had left the hospital despite the involuntary commitment. The hospital informed the police that Gray was a "Section 12 patient," which Officer Thomas Cummings later testified he understood to mean "the person is a danger to either themselves or others."

Officer Cummings located Gray and as soon as he stepped out of his cruiser, Gray began yelling obscenities at him. Cummings radioed for backup and told Gray that she needed to return to the hospital. Cummings continued to plead with Gray to talk to him and return to the hospital and Gray responded with more obscenities. Gray then abruptly stopped and turned to face Cummings approximately five feet away from him, with her fists, teeth, and body clenched. She shouted an expletive at Cummings and suddenly began to quickly approach him. Cummings assumed a defensive position and as Gray pushed closer to him, Cummings took Gray to the ground to gain control of the situation.

Once on the ground, Gray tucked her arms under her chest and flexed tightly. Officer Cummings ordered Gray to stop resisting and to place her hands behind her back. Gray responded by cursing at Cummings. Cummings gave another command to place her hands behind her back, which Gray ignored. At this point, Cummings warned Gray he would tase her if she did not place her hands behind her back. Gray responded by saying "f*cking do it!" After one more command to put her hands behind her back and Gray's continued refusal, officer Cummings placed his taser in drive stun mode and tased Gray for approximately five seconds, at which point she released her arms and placed them behind her back. Officer Cummings secured Gray in handcuffs and Gray was then taken back to the hospital in an ambulance.

Gray filed suit alleging excessive use of force and failure to train under 42 U.S.C. § 1983, violation of the ADA, and various state law claims based on Officer Cummings' use of the taser. The district court concluded that Officer Cummings did not violate Gray's Fourth Amendment rights under *Graham*. The court found that even if the Fourth Amendment had been violated, the officer was entitled to qualified immunity as the law was not clearly established that a single application of a taser constituted excessive force against a person who has assaulted a police officer and was actively resisted lawful arrest.

Regarding the ADA claim, the court noted that the First Circuit has not ruled on whether an officer may be liable under the ADA for failing to accommodate a person with disabilities in the process of an arrest or in the officer's use of force, but that nevertheless, even if such a claim could be brought, the plaintiff could not succeed on this theory of liability.

Gray filed an appeal to the First Circuit arguing the district court's grant of qualified immunity was erroneous, and that the ADA protects encounters between the police and those with disabilities, therefore the district court's dismissal of her ADA claim was erroneous. On the ADA claim, Gray argues that a reasonable jury could find that the officer violated the ADA by failing to accommodate Gray's disability by tasing her, and when Officer Cummings interpreted Gray's symptoms of her mental disorder as crimes.

Conclusion

Local governments need to carefully consider requirements under the ADA to avoid unintentional barriers for people with disabilities, but these considerations are best met at the policy and training level, while taking into account differing budgetary constraints and resources. Both the *Gray* and *Vos* cases underscore the challenges that police officers face in their encounters with the mentally ill where force is necessary to effectuate an arrest or to ensure the safety of the police officers or the public. The fact that the Circuits are split, and the Supreme Court has yet to weigh in on the numerous legal issues surrounding the application of the ADA to police arrests makes these situations even more challenging for police officers and local governments. Unless and until the Court takes up these issues, police officers will be left to wonder if their split-second decisions in tense and dangerous situations involving the mentally ill will be subject to liability under the ADA, potentially ensnaring them in litigation for years. As judge Bea pointed out in his dissent in *Vos*, "the danger to the officer is not lessened with the realization that the person who is trying to kill him is mentally ill." *Vos*, 892 F.3d at 1043. ML

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18. *Employment Division, Department of Human Resources v. Smith, 494 U.S. 872, 873 (1970).*
19. *Id. at 878.* (holding "It is a permissible reading of the text, in the one case as in the other, to say that if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.")
20. Houchin, *supra note 17 at 872.*
21. 42 U.S.C. § 2000 bb-4 (1994).
42 U.S.C. 2000bb to 2000bb-4 (1994).
22. Abdo, *supra* note 9 at 452.
23. *Id.; see generally* 42 U.S.C. §2000bb.
24. *Id.*
25. *Houchin, supra note 17 at 872.*
26. N.Y. Const. art. I, § 3 "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind; and no person shall be rendered incompetent to be a witness on account of his or her opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state."
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33. *Christine Hauser, Women Forced to Remove Hijabs for Mug Shots Settle with New York City,* The New York Times, March 25, 2018, https://www.nytimes.com/2018/02/28/nyregion/muslim-hijab-nypd.html.
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49. *Id. at 122; see generally N.Y. Mun. Home Rule Law § 10.*
50. Fine and Caras, *supra* note 48 at 123.
51. N.Y.C. Charter Chapter 2 § 28 (2018).
52. *Fine and Caras, supra note 48 at 125.*
53. N.Y.C. Charter Chapter 18 § 435 (2018).
54. *Id.*
55. *Compl. at 11, Clark v. City of New York, supra* note7.
56. Catherine Trautwein, *Long Beach Settles Lawsuit after Police Forcibly Remove Woman's Hijab* April 3, 2018, http://time.com/4897803/long-beach-kirsty-powell-police-hijab/; *See also, Compl. at 11, Jamilla Clark & Arwa Aziz v. City of New York* ("In amending its policy, Long Beach joined neighboring jurisdictions of San Bernardino County and Orange County, which both adopted policies protecting religious headwear in detention following similar lawsuits that settled in 2008 and 2013").
57. *CBS Detroit, Dearborn Heights Police Update Policy on Dealing with Women in Hijabs, April 2, 2018 http://detroit.cbslocal.com/2015/07/10/dearborn-heights-police-update-policy-on-dealing-with-women-in-hijabs/.*
58. *Id.*
59. Photo Requirements, U.S. Department of State Bureau of Consular Affairs, April 2, 2018, https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/photos.html. ("Do not wear a hat or head covering that obscures the hair or hairline, unless worn daily for a religious purpose. Your full face must be visible, and the head covering must not cast any shadows on your face.").
60. USCIS Policy Mem. supra note 46. ("Religious headwear can be worn if a reasonable likeness can be obtained from an individual, the full face is visible, and the religious headwear does not cast a shadow on the face. Therefore, USCIS will ask an individual to remove or adjust portions of religious headwear that covers all or part of the individual's face. . . An individual's ears should be exposed, but religious headwear is allowed to cover the ears if USCIS can still identify the individual.").
61. 15 RR-NY 3.8 (b)(2) ("Presents evidence satisfactory to the commissioner that the taking of the applicant's photograph would violate the applicants sincerely held religious belief forbidding the making of photo images.").



HOUSTON CONFERENCE 2018









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HOUSTON CONFERENCE AWARDS

The SEC Raises the Stakes Cont'd from page 15

Disclosure of Defaults under New Event Numbered 16

As previously noted, new Event Numbered 15 under the Rule is prospective in that it will require an issuer to provide notice on EMMA, pursuant to a continuing disclosure undertaking executed on or after the Compliance Date, if it enters into certain financial obligations thereafter. New Event Numbered 16, however, is retroactive, in that it will require issuers of municipal securities offered on or after the Compliance Date to enter into continuing disclosure undertakings mandating the disclosure on EMMA of any default or other similar event under any applicable financial obligation, regardless of whether such financial obligation was entered into before or after the Compliance Date.

New Event Numbered 16 requires obligated persons offering municipal bonds on or after the Compliance Date to agree to disclose on EMMA any defaults, accelerations, terminations, modifications and other such events under both new and existing financial obligations, if the event "reflects financial difficulties" of the obligated person. A "default" under the Rule may not necessarily be an "event of default" under a financial obligation. The SEC stated that defaults may reflect financial difficulties even if they do not qualify as "events of defaults" under transaction documents, but may still constitute important information related to an issuer's or obligated person's material financial obligations that could impact an issuer's or obligated person's liquidity, overall creditworthiness, or an existing security holder's rights. Similarly, a modification of terms of a financial obligation would have to be reported under a continuing disclosure agreement if the modification "reflects financial difficulties of the issuer or obligated person."[23]

The key is whether any default, modification, waiver or similar event reflects "financial difficulties," but the SEC does not provide much guidance as to what constitutes a financial difficulty. Its notice of the amendments to the Rule states that the financial difficulties standard is intended to "target the disclosure of information relevant to investors in making an assessment of the current financial condition of the issuer or obligated person."[24] Without further explanation from the SEC, issuers and obligated persons will be on their own to determine whether a default, modification of terms or other like event concerning a financial obligation reflects financial difficulties, thereby requiring disclosure on EMMA. However, as the SEC has pointed out, the "reflecting financial difficulties" standard is already a part of the Rule, in reportable events numbered 3 and 4.[25]

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Robert Doty participated for more than 45 years in the corporate and municipal securities markets as bond, underwriter and issuer counsel, underwriter, financial advisor to securities issuers, and special consultant to underwriters and issuers. He worked in billions of dollars of successful corporate and municipal bond transactions in approximately two dozen states. Through his litigation consulting firm, AGFS in Annapolis, Maryland, Mr. Doty continues to serve as consultant to, and municipal bond expert witness on municipal finance in consultation with, legal counsel to municipal securities issuers, underwriters, bond counsel, investors and other parties. Mr. Doty has written numerous books and articles on municipal finance and served as an active member of drafting committees for authoritative market guidance published by the Government Finance Officers Association, the National Federation of Municipal Analysts and the National Association of Bond Lawyers. Mr. Doty graduated from Harvard Law School.

Saul Ewing Arnstein & Lehr LLP is a full-service law firm that offers clients the national reach and sophisticated experience of a large firm and the local connections and value of a boutique firm. With 17 offices in Delaware, the District of Columbia, Florida, Illinois, Maryland, Massachusetts, New Jersey, New York and Pennsylvania, Saul Ewing Arnstein & Lehr serves businesses throughout the United States and internationally, representing recognizable names in corporate America, exciting start-ups and an array of closely held and privately held companies, as well as nonprofits, governmental and educational entities."

Timing of Compliance

The amendments to the Rule will impact only those continuing disclosure agreements entered into in connection with primary offerings of municipal bonds that occur on or after the Compliance Date. The SEC considers an offering to occur on the date the continuing disclosure agreement is executed.[26] However, if a preliminary official statement is posted or distributed before the Compliance Date, with an expectation that the offering will close on or after the Compliance Date, the preliminary official statement should contain a description of, or attach a form of, a continuing disclosure agreement that reflects these amendments to the Rule.

As noted earlier, the new amendments to the Rule do not affect an obligated person's responsibilities under continuing disclosure agreements entered into before the Compliance Date. Issuers will not need to disclose new loans, or defaults under any financial obligation, under any continuing disclosure agreement entered into prior to the Compliance Date. However, if it issues bonds on or after the Compliance Date, an issuer will have to sign a continuing disclosure agreement mandating it to provide the notices required by the recent amendments to the Rule.

Not all publicly offered bond issuances are subject to the Rule, however, so the new amendments to the Rule will not affect certain exempted bond issues, even if issued after the Compliance Date. The Rule does not apply to primary offerings of municipal securities in authorized denominations of $100,000 or more and sold to no more than 35 sophisticated investors who are not purchasing such securities with a view to distributing the securities.[27] Issuers issuing such exempt bonds are not required by the Rule to enter into a continuing disclosure agreement for such issuance.

What to do next

The SEC has given the public finance community until the Compliance Date to

implement new policies, practices and procedures for complying with the amendments to the Rule. Issuers and their dissemination agents, municipal advisors and legal counsel will need to quickly find ways to determine whether a financial obligation is material, or if a default, termination or modification relating to a new or existing financial obligation reflects financial difficulties of the issuer. Existing financial obligations and continuing disclosure agreements may have to be identified and reviewed in order to determine if the new amendments have any impact on existing documents. Existing leases will need to be examined to determine if they could be considered financial obligations under the amendments to the Rule. Municipalities and other bond issuers will need to train their internal disclosure personnel on the effects of the new amendments to the Rule, and how to comply. Existing disclosure procedures and policies will need to be updated. Larger issuers may need to prepare spreadsheets listing all their financial obligations and the material terms thereof.

Underwriters will need to make their own determinations regarding an issuer's financial obligations, and may need to upgrade their due diligence procedures in order to ferret out any undisclosed financial obligations of the issuer. Underwriters will need to review an issuer's financial obligations,[28] and then determine which are deemed financial obligations under the Rule, which are material and which terms might be considered material to investors. Underwriters will need to judge for themselves whether a default, termination or modification relating to a new or existing financial obligation of an issuer reflects financial difficulties of the issuer.[29]

This won't be easy for anyone. The SEC already anticipates that issuers and underwriters will have to devote considerable time and expense to implement the amendments to the Rule, and it acknowledges that issuers and underwriters may need to retain outside counsel to help sort it all out.[30]

The authors wish to acknowledge the assistance of George Magnatta and Josh Pasker of Saul Ewing Arnstein & Lehr's Philadelphia office in the preparation of this article.

Endotes

1. The term "obligated person" means any person, including an issuer of municipal securities, who is either generally or through an enterprise fund, or account of such person committed by contract or other arrangements to support payment of all, or part of the obligations of the municipal securities to be sold in an offering of municipal securities (other than providers of municipal bond insurance, letters of credit, or other liquidity facilities). *See* 17 CFR 240.15c2-12(f)(10).
2. 17 CFR Part 240 [Release No. 34-83885 (Aug. 20, 2018; File No. S7-01-17], RIN 3235-AL97, 83 FR 44700 (Aug. 31, 2018), Amendments to Municipal Securities Disclosure (the "*Adopting Release*"), page 1.
3. *See* 17 CFR 240.15c2-12(a), (b)(5)(i), (b)(5)(i)(C).
4. The internet website for EMMA is available at http://emma.msrb.org/. The Municipal Securities Rulemaking Board was established by the United States Congress in 1975 and is charged with a mandate to protect municipal securities investors, municipal entities and the public interest. It is a self-regulatory organization governed by a Board of Directors that consists of 21 members with expertise in municipal securities markets, including 11 representatives of the public and 10 representatives of regulated entities.
5. The SEC anticipates that issuers and obligated persons will incur an annual total cost of $4,928,000 in the preparation of additional event notices and that issuers and obligated persons will incur an additional estimated annual cost of $819,000 in fees for designated agents to assist in the submission of event notices. *See Adopting Release*, pages 135-142 for the SEC's discussion of anticipated costs to issuers and obligated persons.
6. The SEC lacks the statutory authority to regulate issuers directly, but it can require underwriters to determine, prior to buying or selling municipal bond, that the issuer or other obligated person has agreed in a written continuing disclosure undertaking to provide certain information on EMMA.
7. Under the Rule prior to these amendments, the following fourteen events require notice in a timely manner not in excess of ten business days after the occurrence of the event: (1) principal and interest payment delinquencies; (2) non-payment related defaults, if material; (3) unscheduled draws on debt service reserves reflecting financial difficulties; (4) unscheduled draws on credit enhancements reflecting financial difficulties; (5) substitution of credit or liquidity providers, or their failure to perform; (6) adverse tax opinions, the issuance by the Internal Revenue Service of proposed or final determinations of taxability, Notices of Proposed Issue (IRS Form 5701-TEB) or other material notices or determinations with respect to the tax status of the security, or other material events affecting the tax status of the security; (7) modifications to rights of security holders, if material; (8) bond calls, if material, and tender offers; (9) defeasances; (10) release, substitution, or sale of property securing repayment of the securities, if material; (11) rating changes; (12) bankruptcy, insolvency, receivership or similar event of the obligated person; (13) the consummation of a merger, consolidation, or acquisition involving an obligated person or the sale of all or substantially all of the assets of the obligated person, other than in the ordinary course of business, the entry into a definitive agreement to undertake such an action or the termination of a definitive agreement relating to any such actions, other than pursuant to its terms, if material; and (14) appointment of a successor or additional trustee or the change of name of a trustee, if material. *See* 17 CFR 240.15c2-12(b)(5)(i)(C).
8. Information regarding the financial obligations of issuers and other obligated persons long has been considered in the municipal securities market to be information that should be disclosed to investors.
9. For example, the Government Finance Officers Association recommended in its *Disclosure Guidelines for State and Local Government Securities (4th ed. 1991)* ("*GFOA Disclosure Guidelines*"), widely-accepted market guidance, recommended at 35-39 a lengthy set of information regarding debt obligations and terms of the obligations, stating at 35:

> Sufficient information should be provided by the issuer or governmental enterprise so that an investor

will be able to evaluate tax and other revenue sources in relation to the obligations or commitments of the issuer or governmental enterprise.

GFOA added at 36:

> The information furnished should also include a separate description of other commitments, such as long-term leases, lease-purchase obligations, installment purchase obligations, joint ventures, guaranteed debt, "moral obligation" indebtedness, output or supply contracts, take or pay or similar contracts and other forms of contingency indebtedness and indebtedness that does not appear on the issuer's balance sheet.

GFOA also recommended that the same information that GFOA recommended for disclosure in primary offerings be disclosed on a continuing basis, including "prompt release" of information regarding event occurrences. GFOA Disclosure Guidelines at 65 *et seq*, 70.

9. The GFOA Disclosure Guidelines provide at 38-39:

> If any securities of the issuer have been in default as to principal or interest payments or in any other relevant respect, or any agreements or legal proceedings of the issuer relating to securities have been declared invalid or unenforceable, at any time in the past 25 years, state the circumstances giving rise to the default or declaration, describe the relevant provisions of the securities and authorizing and governing instruments, and any such agreements or proceedings, and state the amounts involved. State whether the default or declaration has been terminated or waived, and if so, the manner of such termination or waiver.

10. The federal antifraud provisions are SEC Rule 10b-5, 17 C.F.R. § 240.10b-5—promulgated pursuant to Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b)—and Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q.

11. *See Adopting Release*, page 39.

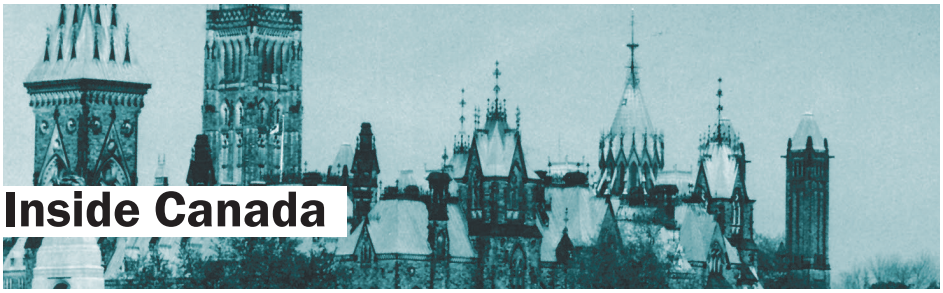
12. *See Adopting Release*, page 58.
13. For the SEC's discussion of what constitutes a debt obligation, see *Adopting Release*, beginning at page 40.
14. For example, lease-purchase agreements may be used in certificate of participation (COP) and appropriation-based financing structures.
15. For the SEC's discussion of whether a lease constitutes a debt obligation, *see Adopting Release*, beginning at page 42.
16. See footnote 141, *Adopting Release*, page 46, in which the SEC states that "the types of leases that could be debt obligations include, but are not limited to, lease-revenue transactions and certificates of participation transactions".
17. For the SEC's discussion of what constitutes a derivative instrument, *see Adopting Release*, beginning at page 48.
18. For the SEC's discussion of what constitutes a guarantee of debt obligation or a derivative, *see Adopting Release*, beginning at page 53.
19. *Adopting Release*, page 22.
20. *Adopting Release*, page 24.
21. *See Adopting Release*, page 32.
22. For the SEC's discussion of the form of an event notice, see *Adopting Release*, pages 33-35.
23. *See Adopting Release*, page 61.
24. See *Adopting Release*, page 64.
25. *Seend* note 7, *supra*.
26. *See Adopting Release*, page 67.
27. Rule 15c2-12(d) provides other full and limited exemptions from the requirements of the Rule. *See* 17 CFR 240.15c2-12(d)(1).
28. In *Disclosure Roles of Counsel in State and Local Government Securities Offerings* (3rd ed. 2009) ("*Disclosure Roles of Counsel*"), the National Association of Bond Lawyers and a Section and Committee of the American Bar Association stated the following at 144 regarding limitations on assistance provided by counsel and the primary responsibilities of underwriters for due diligence relating to financial information:

> In conducting a due diligence investigation, there are (1) certain tasks that the underwriter must conduct itself; (2) certain matters as to which counsel is, in effect, rendering legal advice; and (3) certain tasks that may be delegated to underwriter's counsel as agent of the underwriter, but that do not amount to legal advice. Those matters that are financial — *e.g.*, revenue projections, interest earnings assumptions, debt service coverage ratios-should be reviewed by the underwriter and, because they fall within the province of the underwriter's expertise, should not be delegated to others (although an underwriter may satisfy a portion of its due diligence obligations by, *e.g.*, requesting accountants to review and report on financial statements).

29. Even regarding matters as to which underwriters may have assistance of counsel, Disclosure Roles of Counsel states at 145:

> The underwriter is responsible for all due diligence, whether performed by itself or on its behalf by agents such as underwriter's counsel, and can be held responsible not only for its own actions or inactions, but also for those of its attorneys and other agents. Many bankers, even experienced ones, believe that it is the responsibility of underwriter's counsel to lead and manage the due diligence process, and that the underwriter can confine its role to assessing the credit, coordinating with rating agencies and insurers, and marketing the bonds. That view is misplaced.

30. It should be noted that underwriters counsel do not have contracts with or responsibilities to advise issuers or other obligated persons. Issuers needing assistance of counsel should consult their bond counsel or issuer disclosure counsel pursuant to contractual arrangements. **ML**



Inside Canada

Transgender Advertisements, Roadway Controversies, and Non-Impecunious Taxpayers

By: Monica Ciriello, Assistant Barrister and Solicitor, Middlesex County, Ontario

City Error: Removal of Advertisements Questioning Transgender Rights Violates Charter of Rights and Freedoms
CHP v. City of Hamilton
2018 ONSC 3690 http://canlii.ca/t/hvdf4

The City of Hamilton (City) had developed a City-wide "transgender protocol". The Christian Heritage Party of Canada (CHP), a federal political party which engages on various topics including transgender issues, CHP contracted with the City to place advertisements in bus shelters. The advertisements showed an individual from the back with short hair entering a room labelled "ladies showers" and slogan read "competing human rights." After the advertisements began appearing, the Canadian Broadcasting Company (CBC) contacted the City to inquire about them. Within two hours after receiving the CBC inquiry, the City's Communications Director determined that the advertisements were offensive~ despite not having obtained any material as to how they contravened any law, act or code~and requested that all such advertisements be removed.

The City confirmed that CHP was not consulted during this timeframe, and that it did not balance CHP's rights to political expression. Following the City's decision, it received a formal complaint, which lead City Council to pass a motion that all offensive advertisements be removed, and that a transgender pride flag be raised at City Hall. The City claimed that it removed the advertisements on grounds that they were offensive and discriminated against the transgender community. The CHP argued that it was attempting to engage in a political discussion and convey its position on a politically sensitive topic. It sought judicial review of the City's decision, which had been taken without considering the CHP's rights under the *Charter of Rights and Freedoms* (the *Charter*).

HELD: City's decision and motion quashed.

DISCUSSION: In evaluating whether CHP was deprived of natural justice, the Court balanced CHP's rights to political expression as opposed to the City's right to remove advertising that it considered offensive. The Court examined the freedom of expression clause under the *Charter* and concluded that free speech is paramount and must be protected; without free speech society would be a dictatorship. In drawing its conclusion, the Court cited *Bracken v. Fort Erie*, 2017 ONCA 668 which highlighted the right to free political speech and held that speech is not "violence" merely because people may find it offensive.

In oral submissions, the City claimed that the right to political speech was a lesser right than other rights guaranteed by the *Charter.* The Court disagreed as there was nothing in the law to support such a conclusion. The Court held that the City deprived CHP of natural justice by removing the advertisements without permitting CHP the ability to provide input into the decision. Furthermore, the City's actions were based on an inquiry by CBC and its decision to remove the advertisement was already made before it received a complaint. The Court acknowledged that while in some situations this may be acceptable and/or justified, this was not one. By all accounts, the City failed to demonstrate that the process it adopted was reasonable; it denied CHP of their fundamental right to natural justice. City Council's motion to adopt the decision made by the City was not legislating, it was merely ratifying the City's decision. The Court quashed both the City's decision and Council's motion.

Expropriation: Damages for Trespass Prior to Expropriation can be Triggered by Expropriation
City of Owen Sound (Corporation of the) v. Naidal Incorporated, 2018
2018 ONSC 6207 http://canlii.ca/t/hvl9d

While completing road construction, the City of Owen Sound (City) mistakenly trespassed on the property of Naidal Incorporated (Respondent). When the City was made aware it did not own that property, it obtained permission from the Respondent to complete the construction. When the road was complete, the City obtained an appraisal to expropriate the property and provided the Respondent with a statutory offer under s.25 of the *Expropriations Act*, which was accepted. The following year, the Respondent served the City with a notice of arbitration claiming additional funds for the expropriated lands, injurious affection and disturbance damages. City responded that the Respondent had been fully compensated and any claim for damages of trespass were frivolous as the Respondent had provided consent and furthermore, the claim should be statute-barred. The Ontario Municipal Board (OMB, now known as the Local Appeal Planning Tribunal (LPAT)) awarded the Respondent more than $50,000 plus interest and costs. The City appealed.

HELD: Appeal is dismissed.

DISCUSSION: The Court referenced s. 18 of the *Expropriations Act*, which states: "the expropriating authority shall pay to an owner other than a tenant, in respect of disturbance, such reasonable costs as are natural and reasonable consequences of the expropriation." The City argued that it did pay the Respondent all reasonable costs associated with the expropriation. Furthermore, the City submitted that it trespassed mistakenly during road construction years prior to the expropriation, and as a result the trespass was not a natural or reasonable consequence of the expropriation. In reviewing the matter before it Board had relied on the Supreme Court of Canada

decision, *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 S. C.R. 32 which held among other things that, "it is not uncommon that damages which occurred before the expropriation can in fact be caused by that very expropriation". The Court held that the Board correctly found that the damages arising out of the trespass were a natural and reasonable consequence of expropriation and dismissed the City's appeal.

Property Taxes: No Refund Based on Poverty for Applicant with Two Million Dollar Net Worth
F.E.J.B. v Mississauga (City), 2018 CanLII 96173 (ON ARB) http://canlii.ca/t/hvk23

Each year the City of Mississauga (City), like all municipalities across the province, requires its residents to pay property taxes. The Applicant, a resident in the City filed an application to have her property taxes refunded pursuant to s.357(1)(d.1) of the *Municipal Act, 2001* S.O., c. 25 as a result of sickness or extreme poverty.

HELD: Application dismissed.

DISCUSSION: Section 357(1)(d.1) of the *Municipal Act, 2001* states:

357.(1) Upon application to the treasurer of a local municipality made in accordance with this section, the local municipality may cancel, reduce or refund all or part of taxes levied on land in the year in respect of which the application is made if,

...

(d.1) the applicant is unable to pay taxes because of sickness or extreme poverty;

To determine if an Applicant qualifies for a property tax refund, the Board must apply two-part test. First, the Board must determine if sickness or extreme poverty exists. If either exists, then the second part of the test places the onus on the Applicant to prove an inability to pay all or part of the taxes. To meet the first prong, the Applicant submitted medical records that demonstrated that she no longer worked, for medical reasons. The Board was not required to, but also reviewed the Applicant's evidence to demonstrate extreme poverty. The evidence the Applicant provided demonstrated that she lived in a four-bedroom custom home, with an approximate worth exceeding one million dollars. Furthermore, the financial and bank statements provided by the applicant demonstrated that she had a net worth of just under one million dollars. Despite this latter information, the evidence of sickness was not disputed by the City; thus the Applicant had satisfied the first prong. As a result, the onus was on her to demonstrate an inability to pay property taxes. Although there is no legal test, the Board looks to determine if applicants are using every last resource to pay some or all of their property taxes in order to provide a remedy under s. 357(1). Based on the evidence provided by the Applicant, her home was found to be mortgage-free and assessed at over one million dollars, and her bank records demonstrated that she had spent over five thousand dollars the previous year on pet food and supplies. The Board held that the Applicant application does not qualify for relief under the *Municipal Act*.

Roadways: Despite Faded Stop Line, Intersection Did Not Pose Unreasonable Risk
Chiocchio v. Hamilton (City), 2018 ONCA 762 (CanLII) http://canlii.ca/t/hv56g

The City of Hamilton (City) is seeking leave to appeal a trial judge decision that held the City negligent and partly responsible for a motor vehicle accident that caused Mr. Chicocchio to become a quadriplegic. In addition to the driver of the car that hit Mr. Chicocchio, the trial judge found that the City, by failing to repaint a faded stop line, breached its duty to keep its roadway in a reasonable state of repair. After hearing the evidence before the court, the trial judge held that had the driver stopped at the faded stop line the accident never would have occurred.

HELD: Appeal is allowed.

DISCUSSION: A municipality is required under the *Municipal Act*, 2001 S.O., c. 25 to keep roadways in its jurisdiction in a reasonable state of repair. Furthermore "a municipality is required to prevent or remedy conditions on its roads that create an unreasonable risk of harm for ordinary drivers exercising reasonable care" *Fordam v. Dutton-Dunwich (Municipality),* 2014 ONCA 891. The trial judge concluded that absent a proper stop line, a reasonable driver would not know where to stop, and would be required to exercise personal subjective judgement as to where to stop. As a result, the City created unreasonable risk by failing to keep its roads in a reasonable state of repair.

The Court found that the trial judge was focused on the wrong question. The question should have been whether in the absence of a stop line, did the intersection pose an unreasonable risk of harm for ordinary drivers even if they were exercising reasonable care. In addressing the wrong question, the trial judge failed to consider that drivers that stopped at the stop line would have a view of traffic one way, but their view the other way would be obscured by a house. A reasonable driver would not stop their cars twice. A driver would likely come closer to the intersection to see in both directions and proceed into the intersection when it was safe to do so. All evidence presented before the trial judge did not demonstrate that the intersection posed an unreasonable risk to ordinary drivers. The Court granted the appeal and set aside the trial judge's finding that the City failed to keep the roadway in a reasonable state of repair.

Standard of Proof: Decision Based on Preference of One Party's Testimony is Error in Law
Mississauga (City) v. Ahmad, 2018 ONCJ 671 http://canlii.ca/t/hvbxx

The Appellant was charged and convicted of using a hand-held device while operating a motor vehicle in the City of Mississauga (City) contrary to s.78.1(1) of the *Highway Traffic Act,* R.S.O. The police officer testified that he witnessed the contravention and was confident it was a cellphone. The Appellant testified that he was not holding a cellphone but confirmed that he did own one. Following the oral evidence of both parties, the Justice of the Peace (JP) rendered a decision in favour of the police officer without any reference to the legal standard to be met. The Appellant appealed the conviction and argued that the JP erred in law for failing to consider whether the Appellant's evidence raised a reasonable doubt.

HELD: Appeal allowed.

DISCUSSION: In reviewing the concise reasons issued by the JP to convict the Appellant, the Court noted that it was assumed that the JP knew the law and as a result, the legal governing standard to convict a party. However, the governing standard-- beyond a reasonable doubt--was not applied in the JP's reasoning. Rather, the JP registered a conviction based on the preference of one oral testimony over another. The Court held that even if a court or a JP believes or prefers one set of evidence over another, a court is required to consider if it has reasonable doubt after being presented with all evidence, *R v. W. (D.),* 1991 CanLII 93 (SCC). As a result, the JP's failure to consider the legal governing standard was an error in law, and a new trial was required to consider if the Appellant's evidence gives rise to a reasonable doubt. ML

Cases

The Battle for Literacy in the Federal Courts

By: Negheen Sanjar, IMLA Associate Counsel

Our courts have approached the issue of access to education on numerous occasions, most famously in the iconic *Brown v. Board* decision. Recently, lawyers seeking to establish a fundamental right to education have renewed their efforts to challenge the quality of education in both federal and state courts. These challenges range from allegations of poor quality education due to racial segregation resulting in lower test scores, to arguing that students have been denied access to literacy.

One such challenge was brought in the Eastern District of Michigan and is now on appeal to the Sixth Circuit. *Gary B. v. Snyder* is a section 1983 class action brought by seven Detroit public school students asserting that education is a basic right under the Due Process and Equal Protection clauses of the Fourteenth Amendment--a right they have been denied because their public schools failed to provide them with the tools necessary for literacy, on account of their race. The suit was brought against the state of Michigan, which moved to dismiss for failure to state a claim, arguing sovereign immunity. Although the court found that the class of students had standing to sue and that Michigan did not have immunity, it granted the defendants' motion to dismiss, agreeing that there is no constitutional right to an education.

The district court found that plaintiffs demonstrated injury in fact by alleging Fourteenth Amendment violations. The complaint was further particularized because the plaintiffs alleged that their school buildings, unlike those of other Michigan students, were in a condition such that it was nearly impossible for them to learn; they provided specific photographic evidence to support this claim. They further argued that they lacked both the teachers and books necessary to attain literacy. The traceability requirement was met because plaintiffs connected each named defendant with their position and demonstrated how that position related to the operation of Detroit schools. Causality was also shown because of the state's appointment of budget managers and other efforts which made the state responsible for Detroit schools. Therefore, the state could be held liable for denial of access to literacy, particularly actionable if such access was a fundamental right or if such denial was based on race. Finally, the district court found the redressability requirement was met because the plaintiffs merely sought access to literacy, not literacy per se; their request included remedial education for those who no longer attended the schools named in the complaint.

The district court also addressed the defendant's claims that the State and its officials have immunity under the Eleventh Amendment. According to the court, Michigan officials do not have Eleventh Amendment immunity because the suit challenges the constitutionality of the officials' actions, not the actions of the State itself. In addition, the relief sought by plaintiffs was prospective and injunctive in nature, further avoiding Eleventh Amendment immunity. Plaintiffs merely asked the court for a declaratory injunction and for the opportunity for students to obtain literacy, phrasing that was sufficient to avoid immunity under Eleventh Amendment jurisprudence.

Turning to the merits, the district court held that there is no constitutional right of access to literacy. The court pointed out that access to literacy is different from the issues in other education precedents, which concerned the right to education itself or the right to equally-funded education. The court further found that based on the complaint and relief sought, plaintiffs' access to literacy would be a positive right. The complaint focused on a failure to provide the basic environment for teaching and learning, noting that schooling is compulsory in Michigan, and the relief sought by the plaintiffs was "exclusively positive in nature" because the plaintiffs asked for evidence-based literacy instruction and intervention programs, screening for literacy problems, and creating a system of accountability.

Having determined that access to literacy as sought by plaintiffs was a positive right, the district court went on to say that while literacy is a life necessity to vote, find a job, and obtain government aid among other things, access to literacy a not fundamental right because, according to Supreme Court precedent, the mere importance of a service or good does not determine whether it is constitutes a fundamental right. Plaintiffs challenged that the right to literacy is different because it is the gateway to meaningful participation in society, and the lack of literacy means economic and social instability. The district court's response was that this could be said of many other injustices such as living in unsanitary conditions or being forced to live in an abusive home, and this does not a fundamental right make. Moreover,

although history points to education as an American commitment, it does not support the notion of state-provided education. Even *Brown v. Board of Education* implicitly concludes that education is not a fundamental right.

Finally, on the equal protection claim, the district court held that the plaintiffs' claim failed because the state had not burdened a fundamental right, the complaint failed to show the state targeted a suspect class, and it is unclear that the way the state treats Detroit schools lacks a rational basis. The district court also held that appropriate comparison was not between Detroit schools and schools throughout the state of Michigan, but instead should be between individual Detroit schools because these schools are similarly situated, since no other schools in the state have required the level of state intervention that Detroit schools have.

1. Alia Wong, *Students in Detroit Are Suing the State Because They Weren't Taught to Read*, The Atlantic, Jul. 6, 2018, https://www.theatlantic.com/education/archive/2018/07/no-right-become-literate/564545/
2. *See Gary B. v. Snyder*, No. 2:16-cv-13292, 2018 WL 3609491, at *1, *6 (E.D. Mich. 2018)
3. *See Id. at *1*
4. *See Gary B. v. Snyder*, No. 2:16-cv-13292, 2018 WL 3609491 (E.D. Mich. 2018)
5. *See Id. *6-*7*
6. *See Id. at *7*
7. *See Id.*
8. *See Id. at *8*
9. *See Id.*
10. *See Id.*
11. *See Id. at *8-*9*
12. *See Id.*8*
13. *See Id. at *9*
14. *See Id.*
15. *See Id.*
16. *See Id. at *13*
17. *See Id. at *15*
18. *See Id.*
19. *See Id. at *16*
20. *See Id.*
21. *See Id.*
22. *See Id. at *16-*17*
23. *See Id. at *18-*19*
24. *See Id at *17-*19*

Listserv

Hello from the Land of Hurricanes

By: Brad Cunningham, City Attorney, Lexington, South Carolina

As fall rolled into place here in the Carolinas, two seasons made their annual appearance on the radar. First and foremost, on the minds of most of us was the beginning in earnest of the 2018 college football season. After all, there are priorities aren't there?

And, while college football is touched upon on the listserve slightly, it is usually discussed more upon the IMLA Water Cooler. The other season that has crept upon us was discussed much more on the listserve. If you haven't realized by now, I'm talking about hurricane season. It starts June 1, but peaks in September. Our reward in 2018 was a visit from Hurricane Florence.

Having lived in the Carolinas my entire life, and being an old beach bum at heart, I likely qualify as a hurricane veteran. I have seen them come and go and witnessed the first-hand effect they have on cities and their residents.

And right off the top, let me answer the first question everyone usually asks me? How can you live there with the threat of hurricanes? The initial and simple answer for this old beach bum is "It's worth it." Besides, unlike some natural disasters, you at least have a sporting chance with a hurricane. It sends a telegram ahead of time and says "Hey – I might be dropping in at your place in a few days, so you might want to start to prepare." Not so with tornadoes, earthquakes or even severe thunderstorms. With those, you have little or even no advance notice at all. But, even with advance notice, evacuation is not a fun chore. But, hey, we are old pros at it.

The media coverage of Hurricane Florence was incredible. About a week ahead of time, our Governors Cooper (North Carolina) and McMaster (South Carolina) declared states of emergency. The national guard was activated, schools were closed, emergency supplies were made available and interstate lanes were reversed. This was a needed step and was taken well ahead of time. It stirred raids on the gas stations, grocery stores and hardware stores. Residents grabbed all the batteries, bottled water, tape, bread and other necessaries they could find.

At my daughter's college, classes were canceled for an entire week. Sandbags and portable toilets were brought in by the truckload. Yes, portable toilets... stacked in a line of 24 out in front of the dorm for two weeks. Little did we know at the time, but these proved to be perfectly useless. Students were also given the option to go home. But, living in the international community, my daughter's dorm was full of foreign students who had never experienced a hurricane.

Once all the emergency preparations were made, the most difficult portion of the process took place. Waiting... and waiting... and waiting some more. As she neared the coast, Florence was moving at speeds between 3 to 5 miles per hour. The first four days of the "emergency" were gorgeous weather-wise. Students spent their severe weather days swimming and laying in the sun, swimming in their pools, and binge watching I Carly reruns. Local pizza delivery places were inundated with orders.

Here in Lexington, by Friday a slight "mist" moved in and it stayed wet all day even though it did not rain hard enough for an umbrella most of the time. "Zero Hour" was expected to be Saturday morning... then adjusted to Saturday afternoon... then Saturday evening...then Sunday morning... After making landfall just above Wrightsville Beach, NC, Florence began creeping toward us at the startling pace of 2 miles per hour. A friend in Myrtle Beach correctly pointed out that he could have evacuated on foot and stayed ahead of the storm. Truly, that is how slow it was moving.

We waited and waited and finally Saturday evening came the announcement – our Hurricane and Tropical Storm Warnings were dropped. No watches were even in place. Florence had simply lost her steam once she moved this far inland because she was moving too slowly. Yes, here in Lexington we were very fortunate.

Such was not the case for folks in Southeastern North Carolina and Northeastern South Carolina. Rain came and kept coming. Record amounts of rainfall fell in many locations. Municipal resources were taxed in helping flood victims. Worse yet, for those in some places, they had as much as two weeks until the rivers in their area "crested." So, while they "dodged" the hurricane, they certainly did not stay free from its effects. It may have "hit" further north, but flooding lasted for quite some time as the waters made their way in a southerly direction toward the coast. So, we learned it is not "over" once the hurricane moves on. Indeed, the danger can last for quite some time afterward.

Schools in most areas have finally returned to session this week. This was an amazing storm. It served as a great reminder for many of us as to what resources were taxed by municipalities. Here in Lexington, like other places, our police were on extra duty. This caused overtime pay. Such was also the case in our Utilities Department, Transportation Department and Parks Department. (trees were damaged). Overtime and the effect on the payroll was one often

overlooked cost of hurricane experience. How can you budget for this accurately?

Other things we learned: Gas lines formed way ahead of time. Laws are not the same in every state, and I had a report from a friend in Georgia that his local station was selling regular unleaded gas for nearly six dollars a gallon. And this was in a place that never received a Storm Warning!

Hotels were booked as folks fled inland. Many found there to be no room at the inn. Those who found rooms were disappointed at the number of rooms that refused to take pets. Another lesson... Hotels, shelters and evacuation centers most of the time do not accept pets. This led several folks, like my Aunt Cyndi and Uncle Fred, to stay home in Coastal North Carolina when they might have been better served to evacuate. But, with no place to take several pets they decided to hunker down with their dogs. (No, they are not Georgia fans)

Evacuation of hospitals and nursing homes proved to be quite a challenge for some hard-hit areas. My thoughts were with my childhood friend Dr. Chris Cosgrove, who lives near ground zero in Wilmington, NC. "Where do his patients go? I guess he can't leave if he has critical patients in the hospital. Wow, what a situation to be in," I thought. Unfortunately, I heard a few patients died of heart attacks or other complications during the process.

I digress to the news coverage of this tragic event. It was constant and widespread. My daughter received a text from her friend in Germany. It contained a picture of the front page of her local (small town) newspaper. Florence was the lead story. I received phone calls, text messages and emails from places including but not limited to Montana, California, Washington, Kansas, Missouri, Texas, Arizona, Japan, Germany, France and even our IMLA buddy Dan Best in Australia. This thing was publicized all over the world! I heard from people I hadn't talked to in twenty years.

Yet another lesson learned was to pay attention to the ACTUAL track of the storm as well as the FORECAST track... With the TV on in the clerk's office all week, I noticed weather stations sticking to the forecast track. Being the hurricane veteran, I am, I was plotting the coordinates manually myself for quite some time. When the forecast track took a turn to the south, the media outlets and folks in South Carolina began to get more nervous. But, I noticed in the actual track that it had indeed not turned south but had turned in a more northerly direction.

The broadcast of the "turn south" continued long enough to where I emailed the National Weather Service which was fielding questions. My question was this: "For a whole day days now we have been hearing about this turn to the south. But the coordinates show it has gone in direction from moving "W" to "WNW" to now NW. How is that a turn to the south?" They professed that the storm was not doing what it was predicted to do.

Wow, I thought. Wouldn't it be better if they reported what it was *doing* instead of what they thought it was going to do? Certainly they need to look at the forecast, but we need both don't we? That was another lesson – both the actual track and the forecast track are important, but make sure you know which one you are hearing.

Folks, yes, these hurricanes are serious business. The overarching concern is take it seriously, and keep informed. Pay attention to local authorities, and stay clear of high water and danger areas. Also, please watch the news, but remember to take it for what it is.

I'm in no way trying to diminish the seriousness of the issues here. Please understand that. But, sometimes the news doesn't get the whole story or leads you to make conclusions that may not be so dependable. A cousin in Wilmington reports that a news outlet was using a sprinkler to make fake rain during a newscast.

Another news outlet showed a weather reporter struggling to stand while young folks walked with little difficulty in the background. Countless times I have seen a weather reporter standing with some difficulty while folks strolled the beach in the background like they didn't have a care in the world.

Sure, the weather reporters are providing a valuable service by bringing us the news ahead of time so we can prepare. No question about that. But, be honest here, does exaggeration help anyone? I'm concerned about the "crying wolf" effect, and that the more this happens the more people may find the news sources not credible. And, then this could cause them to stay behind next time when it might otherwise not be a good idea. Isn't honesty best?

I close by saying I really feel for those in the floodwaters of Florence and its aftermath. Mosquito borne diseases have become a concern, and resources have been taxed. A giant hug and pat on the back would be welcome form the rest of the country. Thanks for sending the resources, and we will be glad to repay you someday. Let's hope we don't have to, but we will if needed.

A small bit of humor related to the hurricane saga. It is generally well known that the Weather Channel sends Jim Cantore to where ground zero is expected to be for bad weather. He does a great job. But, check that channel and Internet for commercials and videos publicizing this in a humorous way.

Poor Jim is seen taking his family on a vacation. He plops down his beach chair and lays back. Seeing him, the rest of the folks flee in panic expecting a storm to come. This leaves Jim alone on the beach. In another video, he tries to check into a hotel but can't because all the employees vanish when he shows up there. Comical, and a much-needed relief at this time.

The prosecution rests, your honor...

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