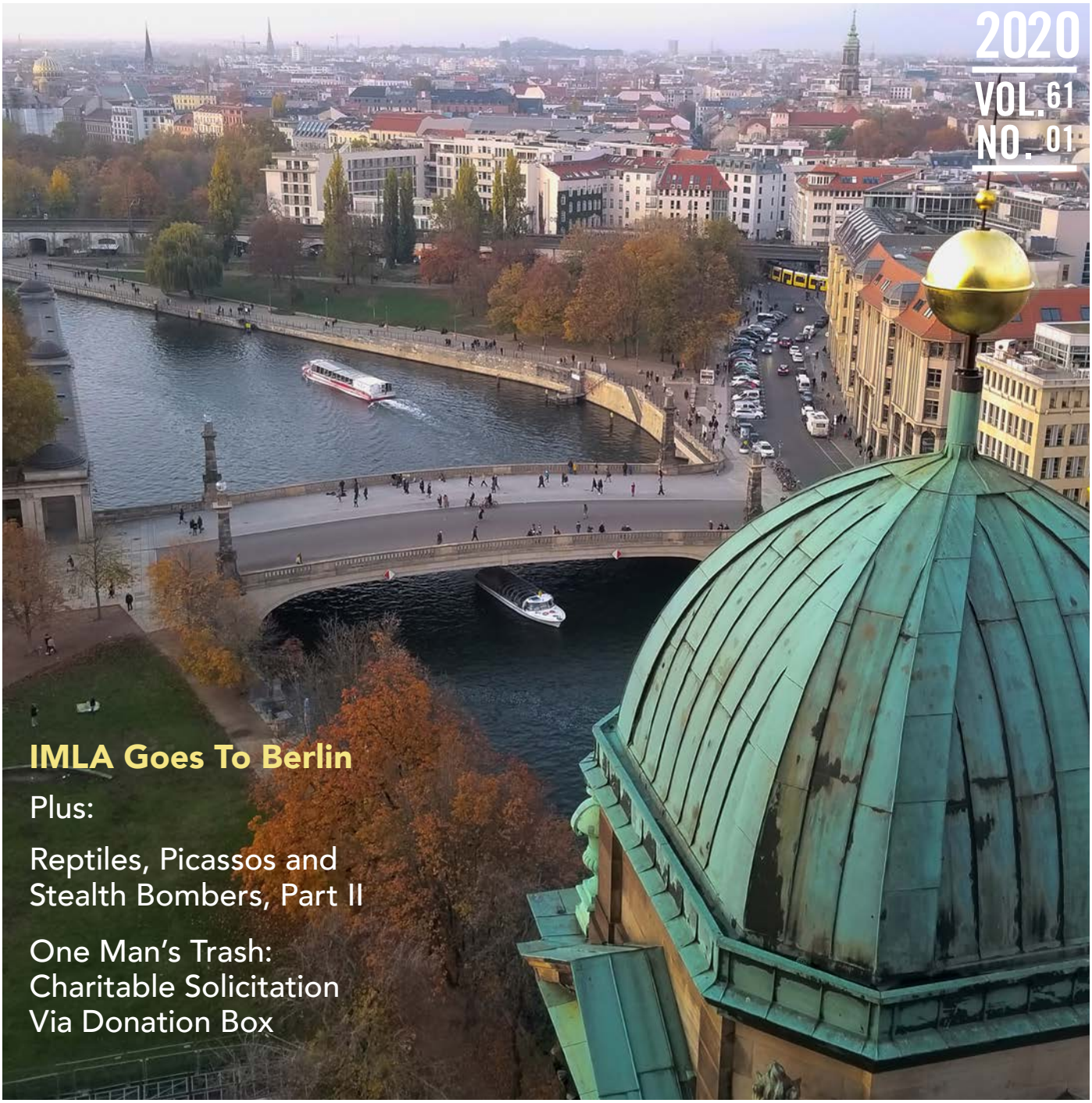
IMLA

Municipal Lawyer

THE JOURNAL OF LOCAL GOVERNMENT LAW

JAN FEB 2020

VOL. 61 NO. 01



IMLA Goes To Berlin

Plus:

Reptiles, Picassos and Stealth Bombers, Part II

One Man's Trash: Charitable Solicitation Via Donation Box


Have a job position that you need to fill?
Use IMLA's job board to reach top quality candidates. Take advantage of our 20% discount until June 30, 2020.
Promo code: IMLAML620.

OFFICERS
President
Patrick Baker
City Attorney
Charlotte, North Carolina

President-Elect
Tyrone E. Cooper
City Attorney
Beaumont, Texas

Immediate Past President
Andrew J. Whalen, III
City Attorney
Griffin, Georgia

Treasurer
Barbara Adams
Village Attorney
Kenilworth, Illinois

General Counsel And Executive Director
Charles W. Thompson, Jr.
IMLA
Rockville, Maryland

BOARD OF DIRECTORS
Christopher Balch
City Attorney
Brookhaven, Georgia

Shauna Billingsley
City Attorney
Franklin, Tennessee

Lori Grigg Bluhm
City Attorney
Troy, Michigan

Alan Bojorquez
Borjorquez Law Firm PLLC
Austin, Texas

Beth Anne Childs
Prosecutor
Owassa, Oklahoma

Jeffrey Dana
City Solicitor
Providence, Rhode Island

Arthur Gutekunst
Sr. Assistant Corporation Counsel
White Plains, New York

Douglas Haney
Corporation Counsel
Carmel, Indiana

Nina R. Hickson
City Attorney
Atlanta, Georgia

Joy Hulton
Regional Solicitor
Newmarket, Ontario

Rose Humway-Warmuth
City Solicitor
Wheeling, West Virginia

Wynetta Massey
City Attorney
Colorado Springs, Colorado

Marcel S. Pratt
City Solicitor
Philadelphia, Pennsylvania

Gregory Priamos
County Counsel
Riverside County, California

Kelly Pridgen
ACCG
Atlanta, Georgia

Tracy Reeve
City Attorney
Portland, Oregon

Jennie Granahan Tarr
Chief Assistant County Attorney
Hillsborough County, Florida

Nancy Thompson
City Counselor
Columbia, Missouri

Randall Van Vleck
New Mexico Municipal League
Santa Fe, New Mexico

Byron Werry
City Solicitor
Regina, Saskatchewan

Susana Alcala Wood
City Attorney
Sacramento, California

CONTENTS

JANUARY-FEBRUARY 2020



IMLA GOES TO BERLIN: CELEBRATING THE FALL
By: Erich Eiselt, IMLA Assistant General Counsel
IMLA members spend a week in Germany's capital as the West celebrates the 30th anniversary of the Berlin Wall's demise.
PAGE 22

REPTILES, PICASSOS, AND STEALTH BOMBERS: COMBATING INFLATED NON-ECONOMIC TORT DAMAGES (part II)
By: Edward (Ted) L. Xanders and Nadia A. Sarkis, Greines, Martin, Stein, & Richland LLP, Los Angeles, California
Plaintiffs' lawyers play to the jury's own "reptilian" survival instincts, urging them to value losses as works of art and counseling them to "teach a lesson." Part II of the authors' defensive strategies.
PAGE 6

ONE MAN'S TRASH IS ANOTHER MAN'S TREASURE: CHARITABLE SOLICITATION VIA DONATION BOX
By: Galen Gatten Jr., Senior Assistant City Attorney, Arlington, Texas
Charitable donation boxes generate vital contributions for nonprofits. Regulating them generates constitutional challenges for municipalities.
PAGE 14

DEPARTMENTS

28 ZONING
Tiny Homes: A Practitioner's Guide
By: James McKechnie, Senior Assistant City Attorney, Wichita Falls, Texas
The legal implications of mini-residences in your town.

32 AMICUS CORNER
A Unique Take on the Takings Clause
By: Amanda Kellar, IMLA Deputy General Counsel and Director of Legal Advocacy
Police pursuit, residential damage, and the Fifth Amendment.

35 LISTSERV
Homelessness Hits Main Street
By: Brad Cunningham, Municipal Attorney, Lexington, South Carolina
One small step towards solving a much larger crisis.

38 INSIDE CANADA
Contested Thoroughfares, Off-Premises Signs, Hidden Sprinklers and More
By: Monica Ciriello, Ontario 2015
Recent cases of interest.

STAFF

EXECUTIVE EDITOR
Charles W. Thompson, Jr.

EDITOR
Erich R. Eiselt

EDITORIAL STAFF
Negheen Sanjar

ART DIRECTION AND PRODUCTION
Trujillo Design

MARKETING
Caroline Storer

Views appearing in Municipal Lawyer are those of the author. Publication of articles in this magazine does not reflect a direct or implied endorsement of an author's views. © Copyright 2020 by the International Municipal Lawyers Association (IMLA). All rights reserved. IMLA is a non-profit professional association of municipal lawyers from across the United States and Canada. It offers its members continuing legal education courses, research services, litigation assistance on amicus briefs and an information-sharing network in the field of municipal law. Municipal Lawyer is IMLA's membership magazine. It is published bi-monthly. Views expressed by authors and contributors are not necessarily the views of IMLA. For membership information contact: IMLA, 51 Monroe Street, Suite 404, Rockville, Maryland 20850, phone: (202) 466-5424, or e-mail: info@imla.org. Contributions of articles are welcome. Municipal Lawyer reserves the right to refuse or edit manuscripts submitted for publication.

EDITOR'S NOTE



BY ERICH EISELT
IMLA Assistant General Counsel

2020 Vision

As this January-February 2020 issue of *Municipal Lawyer* reaches your desk we mark the end of another decade. Time is flying; the century is already one-fifth over. In the short interval since we welcomed (or dreaded) Y2K, the world's population has grown by 1.5 billon people, new global tensions have flared, and technology has immutably granted humankind unfettered power to communicate and influence, without regard to reality. The truth is increasingly hard to discern.

In the midst of this accelerating complexity, we can give thanks for being engaged in a profession which, however influenced by external developments, remains steadfastly grounded in unshakable basic principles. And when those legal precepts can be applied to support, preserve, and enhance communities, the journey is eminently fulfilling, as IMLA President Patrick Baker describes in his letter to members.

The cover story in this issue touches on the most profound of those ethics: the freedom and dignity of all people. Remnants of the Berlin Wall and an internment site in a nearby town bear witness to a failed campaign to reverse what is just and humane. Such images should be particularly compelling to North American municipal lawyers, because they represent the complete abrogation of everything local government attorneys strive to achieve.

ML's other features are more specifically focused on professional acumen. Our authors complete their advisory on countering inapposite damages arguments by plaintiffs' counsel and explore the free speech implications of a common sight in our communities—the charitable donation box. In our ListServ and Zoning departments, respectively, we provide an account of homelessness in a smaller town and discuss the regulation of one potential solution to the problem—the tiny home. Amicus keeps with the housing theme, examining the takings arguments arising from law enforcement's damage of a residence. And Inside Canada presents a sampling of recent local government litigation.

Once again, IMLA thanks you for your membership. We reiterate our commitment to provide you with timely and actionable information, to continue our advocacy efforts, and to join you in our common quest to discern fact from fiction.

Best wishes as our new decade begins.

Erich Eiselt

PRESIDENT'S LETTER



BY **PATRICK BAKER**
City Attorney, Charlotte, North Carolina and IMLA President

Shakespeare and the Unsung Virtues of Municipal Lawyering

"The first thing we do, let's kill all the lawyers" - Dick the Butcher: Henry VI

You have heard this line before. Shakespearean scholars (which I am definitely not) are somewhat divided as to the true meaning of the line. You see, at the time Dick uttered his famous quote, he was part of Cade's rebellion seeking to overthrow the government. He and his companions were engaged in illegal activity and naturally concerned that the rule of law would ultimately prevail against them. As the most critical defenders of the rule of law, the lawyers needed to be quickly neutralized for the rebels to carry out their nefarious intentions. From that perspective, the line could be considered a compliment to lawyers as the prime defenders of the rule of law. From Dick's perspective, the lawyers were the prime defenders of an oppressive and immoral application of the rule of law against the people and therefore it was right and just to do away with them first.

Regardless of perspective, it is clear that pop culture's appropriation of the line has not been complimentary to our profession. The line has often been referred as the patriarch of the seemingly endless supply of lawyer jokes. The cynics would say that rebellion or not, Dick was on to something. The theory goes that a lawyer-free society would be an ideal first step to real cultural improvement, in the same way that clearing the harbor of mines would be the first step to restoring maritime commerce to an area. In biblical times, it was the tax collecting business that society seemed to loathe universally. But the cynics have seized upon the line to create and then feast on pop culture's alleged disdain of lawyers by crediting Dick for his foresight in recognizing that purging our profession would be a necessary first step to make his (or any) country great again. (Hey, I will be spending the majority of 2020 preparing to host the Republican National Convention in Charlotte so I can make those MAGA jokes!!)

My guess is that Dick and the cynics never spent much time with a municipal lawyer. What so many of us love about what we do is the fact that our community literally is our client. Everyday, we devote our professional time and energy toward improving and enhancing the quality of life of our own community. It's hard to think of a better client to have than the place you and your family have already chosen to call home. As municipal lawyers, we have a very compelling story to tell, particularly to aspiring attorneys who want to earn a good living and make a substantial difference in their community of choice.

Most law schools have something equivalent to a public interest law organization that exposes its students to potential careers in public interest law fields. A colleague of mine here in Charlotte recently relayed an experience he had during a panel presentation of public interest lawyers at his law school alma mater. He was very surprised that the students (some in their third year) had very little knowledge of the wide range of opportunities available to municipal lawyers. I had a very similar experience on a couple of panel discussions at my own alma mater. My impression is that when most students think of public interest law, they tend to focus on criminal law fields such as district attorneys, public defenders and legal aid. This is where it becomes incumbent on us as local government attorneys instead of to tell our stories to the next generation of lawyers.

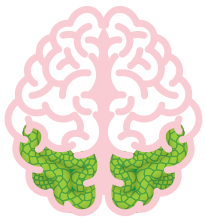
As we know, the legal needs of a municipal corporation are quite varied and substantial. From litigation to transactional work, criminal law, land use, business, constitutional law, employment law and intellectual property, just to name a few of the legal subjects our offices deal with on a weekly basis. Therefore, I would challenge all of the members of this esteemed organization to give thought to how you can help educate your community about the important work that municipal lawyers do on a daily basis. Reach out to your regional law schools to educate and mentor the next generation of lawyers on the multitude of opportunities available to them in the field of municipal law. Our story is compelling. Our service to our communities is indispensable. Had Dick the Butcher been properly educated on the subject, my guess is he would have started with the tax collectors!!

ML

PART II

Reptiles, Picassos, and Stealth Bombers: Combating Inflated Non-Economic Tort Damages

BY: EDWARD (TED) L. XANDERS AND NADIA A. SARKIS
Greines, Martin, Stein, & Richland LLP, Los Angeles, California



Editor's Note: this is the final segment of the authors' "Reptile Theory" article, continued from the November-December 2019 Municipal Lawyer.

IV. AGGRESSIVE CLOSING ARGUMENTS

A. What they look like

Aggressive closing arguments by plaintiff's counsel in personal-injury cases can take many shapes and forms. Some, such as Reptile Theory arguments, may need to be raised and explained to the court. Others are just flat out objectionable:

- Defendants and/or their counsel are lying or trying to deceive the jury. *See, e.g, Chin v. Caiaffa*, 42 So.3d 300, 309 (Fla. Dist. Ct. App. 2010) (new trial required because arguing that defense counsel was "'pulling a fast one,' 'hiding something,' and 'trying to pull something,' was tantamount to calling defense counsel liars and accusing them of perpetrating a fraud upon the court and jury," citation omitted).
- Improper credibility assertions: "You may think lawyers lie. Based on what you see on TV, that's what they do to win. But I have to tell you, I don't."
- Discussing counsel's (or opposing counsel's) personal background or impugning their character.
- "If you discount the damages the way the defendants are seeking, they will be high-fiving in the parking lot and champagne corks will be flying."
- The jury should punish the defendant or teach them a lesson.
- Golden Rule arguments.

More subtle Golden Rule arguments. Most plaintiffs' attorneys realize that saying "put yourself in the plaintiff's shoes" is a classic Golden Rule violation and will raise the court's immediate ire. But some attempt more subtle approaches that still run afoul of the Golden Rule. For example, saying "I'm not going to ask you to put yourself in plaintiff's shoes" is a Golden Rule violation because doing so has just that effect. *Loose v. Offshore Navigation, Inc.*, 670 F.2d 493, 496-97 (5th Cir. 1982); *Woods v. Burlington N. R.R. Co.*, 768 F.2d 1287, 1292 (11th Cir. 1985), rev'd, 480 U.S. 1 (1987). This is reminiscent of the classic experiment on thought suppression—when you instruct someone not to think of a white bear, that person will inevitably think of a white bear.

Also, any comments that implicitly invite the jury to "'become a personal partisan advocate for the injured party'" violate the Golden Rule. *Loth v. Truck-A-Way Corp.*, 70 Cal. Rptr. 2d at 576; *see also DeJesus v. Flick*, 7 P.3d 459, 464 (Nev. 2000) *overruled on other grounds* ("[T]he fact that [counsel] did not expressly remind the jury that [plaintiff] is 'people like you' does not save him from a violation of the golden rule. He clearly asked the jurors to 'allow such recovery as they would wish if in the same position.' Moreover, [counsel's] 'testimony' during his argument, that he personally would not want to trade ten million dollars for the use of his fingers, violated the golden rule. While making this argument, he asked the jurors, 'How do you put a value on not using your fingers?' He thus invited the jury to agree that neither would they make such a trade").

Classified ad arguments. Another familiar tactic is the "classified ad" argument. The plaintiff's attorney will ask the jury to imagine how much a newspaper classified ad would have to offer for someone to agree to endure plaintiff's injuries. That is a Golden Rule violation. *See Collins v. Union Pac. R.R. Co.*, 143 Cal. Rptr. 3d 849, 861 (Ct. App. 2012) (rejecting classified ad hypothetical as

ILLUSTRATION: TRUJILLO DESIGN

Another tactic to inflate damages is to ask the jury to assign specific dollar amounts to each descriptive item mentioned in the applicable non-economic damages jury instructions, even though the instruction does not ask for separate awards and the items are inherently duplicative and overlapping.

Golden Rule argument); *Lougon v. Era Aviation, Inc.*, 609 So. 2d 330, 345 (La. Ct. App. 1992) (closing argument inviting jury to consider a classified ad for a job with "no regular hours; you don't have to report for work . . . all you have to do is agree to go through a helicopter crash, just like Mr. Saunier did . . . . All you have to do is agree to have those injuries and suffer with them for the rest of your life;" held: argument was improper, but denying motion for mistrial); *Faught v. Washam,* 329 S.W.2d 588, 601-602 (Mo. 1959), *overruled on other grounds, Tune v. Synergy Gas Corp.*, 883 S.W.2d 10, 20-22 (Mo. 1994) (reversing judgment based where plaintiff argued in closing: "In considering what is an adequate sum for this young man, suppose I was to meet one of you ladies on the street and I say to you, 'I want to offer you a job . . . ; one peculiar thing, if you take it you have to keep it for the rest of your life, you work seven days a week, no vacations, work daytime and night . . . here is your job—your job is to suffer [plaintiff's] disability.")

Some attorneys will ask the jury to imagine the plaintiff reading the classified ad, and claim this does not violate the Golden Rule because the attorney never told the jurors to imagine themselves doing so. It is virtually impossible, however, for jurors not to imagine themselves reading the ad. Regardless, the argument is unfair because, if the plaintiff truly suffered severe injuries, no reasonable person (including the plaintiff) would ever answer such an ad even if the "job" offered compensation equal to winning the lottery. *See Seffert v. Los Angeles Transit Lines*, 364 P.2d 337, 345 (Cal. 1961) (Traynor, J., dissenting) ('"No rational being would change places with the injured man for an amount of gold that would fill the room of the court, yet no lawyer would contend that such is the legal measure of damages'"). The "classified ad" tactic is a patently unfair argument, yet it can have powerful impact on a jury and lead to inflated damages.

Asking the jury to assign damages amounts to each category of non-economic damages. Another tactic to inflate damages is to ask the jury to assign specific dollar amounts to *each* descriptive item mentioned in the applicable non-economic damages jury instructions, even though the instruction does not ask for separate awards and the items are inherently duplicative and overlapping. For example, the California instruction refers to plaintiff recovering for past and future "physical pain/mental suffering/loss of enjoyment of life/ disfigurement/physical impairment/ inconvenience/grief/anxiety/ humiliation/ emotional distress," Council of California Civil Jury Instructions 3905A. There is no genuine difference between "pain," "suffering," "emotional distress" and "grief," or between "love" and "affection," or between "care" and "assistance."

Nor is there any true difference in the Georgia instruction between "interference with normal living," "interference with enjoyment of life," and "the extent to which the plaintiff must limit activities"; or between "impairment of bodily health and vigor," "fear of extent of injury," "pain and suffering" and "mental anguish." *See* Georgia Suggested Pattern Jury Instructions Civil 66.501. The Connecticut instruction similarly refers to inherently overlapping items, such as "physical pain and suffering," "mental and emotional suffering," "loss of the ability to enjoy life's pleasures," and "permanent impairment or loss of function." Conn. Judicial Branch Civil Jury Instr. 3.4-1 (emphasis added); *see also* Colo. Jury Instr., Civil 6:1 ("physical and mental pain and suffering, inconvenience, emotional stress, impairment of the quality of life"); Del. P.J.I. Civ. § 22.1 (2000) ("In evaluating pain and suffering, you may consider its mental as well as its physical consequences. You may also consider such things as discomfort, anxiety, grief, or other mental or emotional distress that may accompany any deprivation of usual pleasurable activities and enjoyments").

Yet plaintiffs' attorneys in such jurisdictions will often inflate damages by breaking out each item referenced in the jury instruction into a separate category and then blackboarding to the jury separate suggested dollar values for each, and separately for past and future damages. When you start assigning $500,000 or $1-2 million to the various items and for both past and future, the overall suggested damage number inflates quickly. It is improper to request separate awards for inherently, duplicative overlapping categories. *See, e.g., Loth v. Truck A-Way Corp*, 70 Cal. Rptr. 2d at 579 ("Because loss of enjoyment of life is simply one component of pain and suffering damages, presenting the jury with a formula for separately calculating hedonic damages created a risk of double recovery for pain and suffering and loss of enjoyment of life"). Yet plaintiffs' attorneys do it all the time.

Logically suspect analogies to economic prices. Plaintiffs' attorneys also will frequently use emotionally-powerful—but logically suspect—analogies to economic prices when

Continued on page 8

asking for a large amount of non-economic damages. The most colorful approaches often appear in wrongful death cases in those jurisdictions that allow the plaintiffs to recover for their own personal non-economic losses caused by the decedent's absence. Here are some examples, all taken from the same closing argument, and all made while the jury was staring at large photos of a stealth bomber, a Picasso and Kobe Bryant on the courtroom screen.[9]

> <u>The Stealth Bomber</u>
> "I also want you to think, when you're thinking about valuing this loss: If we create the most expensive thing, a billion dollar B-2 bomber, as a society, even when we create the most expensive piece of machinery we possibly can, the most sophisticated, we still value human life over that $2 billion object. So if that plane is in trouble, we never say, 'Save the plane'; we say, 'Save the pilot.' Because human life is way more precious than any $2 billion object."
>
> <u>One-of-a-kind Picasso (or another painting or stamp)</u>
> "This is a Picasso painting. It sold for over a hundred million dollars. This is just paint and canvas and a talented artist. But when you think about Mr. Shanks as a human being and the testimony you heard about how kind he was, how giving he was, how loving he was, his smile, his joking, his cooking, his laugh, he was a Picasso times 10 to this family.
> So when you look at if someone loses a Picasso worth a hundred million dollars, no one would hesitate to say, 'Okay. Look. This is the harm you caused. You have to pay 100 million dollars.'
> When you are thinking about what's been taken from this family for the next 26 years, their Picasso has been taken from them, and the value of that loss is astronomical. We will all agree a billion dollars probably isn't enough to compensate for whatever's taken from this family. But you are going to have to come up with a number."
>
> <u>Salaries of famous athletes</u>
> "Kobe Bryant, he gets paid $10s, $20s, whatever. Professional players get $20, $30 million a year to dribble a ball and put it in a basket. And the team will say, 'He has that value to our team. He produces a value to our team. He's our superstar, and that's what he's worth.'
> Mr. Shanks was the Kobe Bryant to his family and to his community. You heard Mr. Wickham tell you, he strived to be half the man Mr. Shanks was. You heard how many people looked up to Mr. Shanks. You could see in the photographs how kind and loving and caring he was."

Variations of these same "value of a life" type arguments can be found in cases throughout the country.[10]

B. How to combat aggressive closing arguments.

1. Tactics before closing argument.

Use a pre-argument pocket brief to ask the court to bar the other sides' potential objectionable arguments, relying where possible on oral arguments or documented misconduct in other cases. A motion in limine is not the only mechanism to prevent a potentially objectionable argument by opposing counsel. Defense counsel can also file a pocket brief just before closing argument asking the court to bar or, at a minimum, be wary of and lookout for certain conduct. If you don't ask for and get a pre-argument ruling via your pocket brief, the only other option will be to object during plaintiff's argument the instant the issue arises. Even if the trial court defers giving an advance ruling on an issue, an objection during the opposing party's closing argument will be far simpler and more likely to be sustained if you've already educated the judge about the issue via prior motions in limine or a pre-argument pocket brief. For example, objecting that something is a Reptile argument or Golden Rule Argument is far more likely to succeed if you don't have to explain the legal and factual backdrop at that moment.

Hopefully, motions in limine will have set the stage for many pocket-brief issues, but often there will be additional issues to cover that may make little sense to raise in a motion in limine because they pertain to closing argument only (addressing Picasso painting arguments, etc.). Successful plaintiffs' attorneys often follow the same basic script from one case to the next. If a particular plaintiff's attorney presented an objectionable argument in a prior case, chances are that he or she will do so again. The same holds true for attorneys from the same law firm, as they usually have had the same training. As a result, obtain copies of closing arguments that the same attorney or same law firm has made in other personal-injury cases (defense bar organization are always a good source). Also, research and obtain copies of any trial court orders (such as new trial motions) or appellate opinions that document the same attorney's misconduct in other cases. Attach those materials to the pocket brief as basis for explaining to the court why you are concerned about certain objectionable arguments being made during the upcoming closing argument. Remind the court of any prior motion in limine rulings.

> If a particular plaintiff's attorney presented an objectionable argument in a prior case, chances are that he or she will do so again. The same holds true for attorneys from the same law firm, as they usually have had the same training. As a result, obtain copies of closing arguments that the same attorney or same law firm has made in other personal-injury cases

The pocket brief can target any problematic arguments you anticipate, including:

- No Reptile or other arguments invoking the "conscience of the community."
- No newspaper ad hypotheticals or Golden Rule arguments.
- Where there is no punitive damages claim, no "send a message," "teach a lesson" or "punish the wrongdoer" arguments that impermissibly invite punitive damages or awards based on sympathy for the plaintiff or prejudice against the defendant.
- No personal attacks on opposing parties or counsel.
- No recovery for the mental stress of having to litigate a lawsuit.
- No treating of inherently duplicative, overlapping harm formulations as separate elements requiring separate awards.
- No "value of a life" arguments or misleading references to the economic value of tangible objects, such as Picassos, Stealth bombers, or an athlete's salary.
- No saving of argument for rebuttal, thereby depriving the defendant of responding during its closing argument.

In seeking to support aggressive closing arguments, plaintiffs will cite to case law referencing a trial court's discretion to afford counsel broad latitude in closing argument. But that discretion is not unfettered. Case law prohibits certain arguments, so research the law of the applicable jurisdiction. Even if that jurisdiction's law is unclear and does not absolutely prohibit a particular argument, the scope of permissible argument will still fall within the trial court's discretion. *See, e.g., Cohen v. Yale-New Haven Hosp.,* No. 365908, 2000 WL 1337660, at *17–19 (Conn. Super. Ct., Aug. 31, 2000) (noting that "the court might well have exercised its discretion and sustained the defendant's objection to the plaintiff's [Picasso and sports salary] argument"). You won't get the court to exercise its discretion in a municipality's favor if you never ask the court to do so. Also, sometimes opposing counsel will agree not to pursue a certain argument once the issue is brought to the court's attention.

Examine the types of argument the opposing attorney has made in prior cases. Research the current case law regarding their use. If you know, for example, that a Picasso, Stealth bomber and athlete salary argument may be coming, do a search for current case law addressing the use and exclusion of such arguments. You will typically find cases on both sides of the issue.

There are cases supporting the exclusion of such arguments, in particular a line of Florida cases. *See, e.g., Fasani v. Kowalski*, 43 So.3d 805, 808-11 (Fla. Dist. Ct. App. 2010) (although defendant did not object to argument that the jury should compare plaintiff's brain to a Picasso painting, "such 'value of life' arguments are improper"); *Chin v. Caiaffa*, 42 So.3d 300, 309-10 (Fla. Dist. Ct. App. 2010) (argument "highly improper and grounds for reversal" where plaintiff asked "the jury to compare [plaintiff's] life to a Picasso painting valued at $10 million, and suggested that if this case had been about a $10 million painting, the jury 'would go back and in five minutes you would write out a $10 million check.'").[11]

You also should look for any case law from the particular jurisdiction that criticizes a plaintiff's use of economic figures to create a basis for non-economic awards, which is what the Stealth Bomber, Picasso and athlete-salary analogies are designed to do, albeit indirectly. *See, e,g., Loth v. Truck-A-Way Corp.*, 70 Cal. Rptr. at 576-77 [criticizing counsel's argument that the jury should "accept $2.3 million as the baseline value of life and to give [plaintiff] a percentage of that figure (adjusted for her age) as hedonic damages," because that figure "is based upon benchmark figures such as the amount society spends per capita on selected safety devices, or the amount employers pay to induce workers to perform high risk jobs. We perceive no meaningful relationship between those arbitrarily selected benchmark spending figures and the value of an individual person's life. Moreover, our Supreme Court has rejected the notion that pain and suffering damages may be computed by some mathematical formula."].)

Request helpful jury instructions (and use them in your subsequent argument). Although jury instructions vary among jurisdictions, most jurisdictions have model instructions that state in one form or another that:

- There is no standard or mathematical formula for determining non-economic damages.
- The arguments of the attorneys are not evidence, and the jury must base its findings only on evidence.

Continued on page 10

- If there is no punitive damages claim, the jury can only award damages to compensate the plaintiff's injuries and cannot award damages to punish the defendant for its conduct.
- The jury should not let bias, sympathy, prejudice or public opinion influence its decision.

Also, some jurisdictions have specific model jury instructions regarding a plaintiff's proposed per diem proposals, so review the local instructions carefully.[12]

If the local jurisdiction has no specific model instruction on the plaintiff proposing per diem calculations, request a special instruction relying on case law and sample instructions from other jurisdictions. As previously discussed, case law specifically acknowledges that the jury should be instructed that (a) per diem arguments by counsel are not evidence but are merely a method suggested by a party to calculate; (b) the jury is not bound by any particular calculation method in assessing pain and suffering damages; and (c) the amount of damages claimed by a plaintiff is not evidence, and the jury's only duty is to award reasonable compensation based on the jurors' independent judgment. *See, e.g., Giant Food Inc. v. Satterfield*, 603 A.2d at 881; *Beagle v. Vasold*, 417 P.2d at 681.

You need to request and rely on model and, if necessary, special jury instructions to facilitate an argument that the jurors can and should ignore opposing counsel's aggressive arguments. Do not farm out the preparation of jury instructions to a junior lawyer who does not know the nuances of the case.

2. Tactics during closing argument.

Plaintiff's closing argument and rebuttal. The main thing for defense counsel to remember when the plaintiff is arguing is to immediately object when improper arguments are made. That is true even if the trial court previously granted your motion in limine, or sustained a prior objection made by a pocket brief or during testimony. Don't assume prior orders will be followed. Be vigilant. If an objection is sustained, you typically need to request a curative admonition or request a mistrial to preserve an error argument on appeal.

The municipality's closing argument. Obviously, the scope of the municipality's closing argument about non-economic damages will depend on the court's prior motions in limine and pocket brief rulings. But here are some general considerations:

- Offer a counter-anchor to plaintiff's proposed non-economic damages numbers. Always give a number. Failing to do so is playing with fire.
- Use the jury instructions to explain that there is no formula, and yet plaintiff's counsel is providing mechanical formulas designed to generate huge numbers. The jury should apply common sense.
- Explain that opposing counsel is using gimmicks to plant inflated figures in the jurors' heads. Again, tell the jury to rely on common sense.
- Explain that counsel is floating such huge numbers so that if the jury gives a huge discount off that number, the resulting number still will be way too large. Tell the jury not to start with plaintiff's number and discount; instead, start from scratch or use defendant's proposal and then apply common sense.
- Personalize or humanize the municipality. You need to offset any attempt by the plaintiff to make the jurors angry and seek to punish the defendant. Plaintiffs suing a municipality are at a disadvantage compared to litigating against for-profit companies. Plaintiffs' attorneys always want to portray the defendant as a bad actor that only cares about making money. Municipalities do not fit that bill, as they are non-profit entities that provide valuable services to the community. Try to subtly remind the jurors through witness testimony and argument about all the good things the municipality does, and the numerous employees. Although you obviously cannot flag the juror's potential self-interest as taxpayers, jurors will likely realize without being told that an unreasonably large verdict could reduce community services or increase taxes. Make sure municipal employees attend the trial to show they care and are taking the lawsuit seriously. If the municipality has conceded liability, emphasize that the concession demonstrates the municipality's reasonableness and shows the municipality is taking responsibility for what happened.
- Do not shy away from attacking plaintiff's proposed numbers. If the plaintiff has blackboarded separate numbers for inherently duplicative or overlapping numbers, call them out on it. Emphasize to the jury that there is no difference between "pain," "suffering," and "emotional distress," or many of the other items identified by plaintiff. Do not leave this tactic unrebutted.
- If the plaintiff has used misleading economic analogies, such as Picasso, Stealth Bomber or famous athlete salaries, point out to the jury that they have nothing to do with the issues and plaintiff's counsel is just trying to throw around huge numbers. Don't ignore the arguments if it is a big dollar case. These types of analogies can have a bigger impact on jurors than a lawyer might think. Come up with a response that demonstrates plaintiff's counsel is playing games. For example, yes, society would want the pilot of a Stealth Bomber to bail out if there is a plane failure. But that's because it would be pointless to lose both the plane and the pilot. Society would equally want a pilot to bail out of a faulty $20,000 crop duster. But that doesn't mean the pilot is "worth" $20,000. The plane's value is irrelevant.

- Take the gloves off if necessary. The single biggest reason for the increased non-economic awards is that plaintiffs' attorneys are asking for bigger numbers and are being more aggressive.

NEW TRIAL MOTIONS AND APPEALS

Unless arguments exist as to other elements of the claim, such as liability or causation, there are only two potential avenues to reduce or reverse a runaway non-economic damages award—a post-verdict motion in the trial court or an appeal. Do not assume that an appeal can fix the problem. Your best shot at reducing or reversing the verdict, and often your only realistic chance, is a new trial motion in the trial court.

Appeals are problematic for several reasons. Appellate courts will frequently refuse to reverse a non-economic damages award based upon attorney misconduct or error either because no objection was made (and thus the issue is deemed waived) or because the error is harmless or non-prejudicial when the totality of the evidence is considered.[13]

If the verdict is huge, the municipality will almost always want to pursue a new trial motion:

- Many jurisdictions *require* a defendant to raise excessive damage arguments in post-judgment motions or else the arguments will be deemed waived on appeal.
- Even where a defendant failed to object at trial, many jurisdictions will still allow the defendant to raise the issue as grounds for new trial even if the failure to object would make the issue dead on arrival at the appellate level.
- The standard of review in the trial court on a new trial motion is generally more favorable than the standard on appeal. Jurisdictions impose heightened standards at the appellate level for reversing damage awards as excessive. A typical standard is that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury. In contrast, in many jurisdictions, the trial judge has far greater powers, including sitting as the equivalent of a thirteenth juror with the power to weigh evidence and witness credibility and the duty to reduce a verdict he/she finds excessive. *See, e.g., Seffert v. Los Angeles Transit Lines*, 364 P.2d at 342-343; *U.S. v. Landau,* 155 F.3d 93, 104 (2d Cir. 1998) ("trial judge considering a motion for new trial 'is free to weigh the evidence himself and need not view it in the light most favorable to the verdict winner'") (citation omitted); *Hardesty v. Serv. Merch. Co.,* 953 S.W.2d 678, 681 (Tenn. Ct. App. 1997) ("The trial court acts as thirteenth juror" and may set aside a judgment if it finds the verdict "to be either excessive or inadequate.")

In jurisdictions that let plaintiffs propose non-economic damages numbers to the jury, it is imperative that trial courts seriously exercise their duty to scrutinize non-economic damage awards and to reduce or reverse inflated awards. If your case is in a jurisdiction that gives plaintiffs broad authority to propose numbers, check the controlling Supreme Court precedent. Often it will expressly denote the important role that trial courts must play to prevent plaintiffs from using their opportunity to propose numbers to garner an inflated award.[15] Defense counsel should emphasize such language in their new trial motions. ML

Endnotes

9. The excerpts are all from a closing argument by Arash Homampour in Shanks v. Dep't of Transp., 215 Cal. Rptr. 3d 359 (Ct. App. 2017), a California case, which involved a $12.69 million jury award for a dangerous condition of property relating to a motorcyclist's death.

10. *See, e.g.,* Doe v. Doe, No. 307420, 2014 WL 6852750, at *14 (Mich. Ct. App., Dec. 4, 2014) (attorney noted a Picasso painting sold for $106.5 million, and then asked whether "[a] little girl who is made in God's image" was more valuable than a Picasso canvass [sic]"; counsel also argued that "we build bombs and we build bombers to deliver them that costs [sic] hundreds of millions of dollars to kill people. We have got inter-continental ballistic missiles that cost hundreds of millions of dollars to deliver nuclear weapons. And now I'm here in a court in America to talk about what our children are worth."); Cohen v. Yale-New Haven Hosp., No. 365908, 2000 WL 1337660, at *17–19 (Conn. Super. Ct., Aug. 31, 2000) ("I don't really want to give you a number because it's your job, but in assessing that and trying to figure out what's fair, just and reasonable, you have to look toward other things in our society, how we measure things. And I can only give you some suggestions of things you can look at, but it's totally up to you as to how you come to that number, but I'll remind you that, you know, we have Picassos hanging on walls for millions of dollars and we have ball players or baseball or football or basketball or whatever who make . . . ."); Fasani v. Kowalski, 43 So.3d 805, 808–11 (Fla. Dist. Ct. App. 2010) ("If that was a Picasso painting that was in the elevator and it got ripped, no one would argue with paying $80 million to replace it. Why is it any different when it's a man's brain?"); Edwards v. Sears, Roebuck & Co., 512 F.2d 276, 286 n.10 (5th Cir. 1976) (new trial warranted where counsel argued: "You will decide what is the dollar value of the loss of a husband and a father . . . I don't believe my sixteen year old would take three million dollars for me-that may sound selfish, but he knows the value of money, but I believe he'd rather have me" and "evoked the image of deceased's children crying at graveside forlornly awaiting the return of their father.")

11. *See also* Carnival Corp. v. Pajares, 972 So.2d 973, 979 (Fla. Dist. Ct. App. 2007) ("highly improper" to ask the jury to place a monetary value

Continued on page 12

on [plaintiff's] life by comparing a $20 million Van Gogh painting, 'created by one of the greatest artists in history,' to [plaintiff's] life, which 'was created by the greatest creator there is'"); Pub. Health Tr. of Dade Cty. v. Geter, 613 So.2d 126, 127 (Fla. Dist. Ct. App. 1993) (argument in wrongful death action that the jury "should place a monetary value on the life of the plaintiff's decedent, just as a monetary value is placed on an eighteen million dollar Boeing or an eight million dollar SCUD missile-was improper, highly inflammatory, and deprived the defendant ... of a fair trial on the issue of damages"); Goad v. Evans, 547 N.E.2d 690, 707-08 (Ill. App. Ct. 1989) (counsel's argument about the loss of expensive cars and earnings of race horses "was improper to the extent it suggested [the plaintiff's] losses were equivalent to the losses sustained by the owner of a destroyed car or were equivalent to the value of a race horse"; the jury should focus on plaintiff's losses "as a result of the death of her son ... rather than on the losses sustained by owners of destroyed automobiles or the worth of race horses."); Velocity Express Mid-Atlantic, Inc. v. Hugen, 585 S.E.2d 557, 563-65 (Va. 2003) (circuit ground erred in failing to grant mistrial where plaintiff's counsel argued that the jury should consider what wealthy persons, like Howard Hughes or Bill Gates, would spend for medical care if they suffered plaintiff's injuries); Colfer v. Ballantyne, 363 P.2d 588, 591-92 (Ariz. 1961) (affirming the grant of a motion for new trial in a personal injury action where plaintiff's counsel stated that "[a]s to the amount of damages, I sometimes think that we lose our sense of values," referencing that Marlene Dietrich "would walk across the stage in Las Vegas in a fishnet dress" and earn $5,000 as a "56 year old grandmother" and "we have got 32 race horses in the country in which the purse exceeds $100,000"; such references were "not relevant" to plaintiff's damages).

12. *See, e.g.*, HI R. Civ. Jury Instr. 8.8 (emphasis added) ("In presenting his/her argument to you on the amount, if any, which should be awarded to plaintiff(s) as damages, the attorney for plaintiff(s) has proposed to you figures which he/she arrived at by mathematical calculations (and has shown you those figures on a chart). After first suggesting that a dollar value per hour or day or month or year be given to an item such as pain, disability, emotional distress and so forth, he/she multiplied that dollar value by a certain number of hours or days or months or years and came up with a total figure as an amount of damages for such items. Neither the chart nor what the attorney has said as to the dollar values or figures for measuring such items of damages is evidence. *The law permits this kind of argument to be made, but you must remember argument is not evidence. The law gives you no way to mathematically calculate such items of damages and leaves them to be fixed by you as your common sense and good judgment dictate, based on the nature and extent of plaintiff's(s') injuries/damages under the evidence in this case.*") (emphasis added).

13. *See, e.g.,* Doe v. Doe, No. 307420, 2014 WL 6852750, at *14 (Picasso, bomber and similar arguments: "Although plaintiff's counsel's argument was somewhat hyperbolic, no objection was made at trial and a curative instruction would have alleviated any prejudice"); Cohen v. Yale-New Haven Hosp., No. 365908, 2000 WL 1337660, at *17–19 (plaintiff's Picasso and sport salary references "even if improper, do not warrant upsetting the verdict" because they "'were not the culmination of an improper theme developed throughout the trial" nor part of a pattern of misconduct); compare Fasani v. Kowalski, 43 So.3d at 808–11 (new trial required even though appellants never objected to counsel asking the jury to compare plaintiff's "brain to a Picasso painting," given counsel's additional misconduct, including describing plaintiff as "retarded' and "asking the jury to consider how much money a reasonable person would accept to be hit in the head with a baseball bat") with Carnival Corp. v. Pajares, 972 So.2d at 979 (argument about Van Gogh painting was "highly improper" but not "fundamental error," so failure to object precluded consideration on appeal).

14. *See, e.g.,* Seffert v. Los Angeles Transit Lines, 364 P.2d at 342 ("The amount of damages is a fact question, first committed to the discretion of the jury and next to the discretion of the trial judge on a motion for new trial. They see and hear the witnesses and frequently, as in this case, see the injury and the impairment that has resulted therefrom. As a result, all presumptions are in favor of the decision of the trial court.")

15. *See, e.g.,* Beagle v. Vasold, 417 P.2d at 679 ("Even if it can be established that larger verdicts result on occasions when the 'per diem' argument is employed, it does not necessarily follow that these awards are excessive under the circumstances of the particular cases since, as pointed out hereinafter, *both the trial and the appellate courts have the power and the duty to reduce verdicts which are unreasonably large*. As was stated in one case, 'if the evil feared is excessive verdicts, then the cure ought to be directed against the product, not the practice.'") (emphasis added); *id.* at 680 ("The 'per diem' argument is only a suggestion as to one method of reaching the goal of reasonableness, not a substitute for it. If the jury's award does not meet this test, *the trial court has the duty to reduce it*, and the appellate court has the authority to review the result") (emphasis added); Olsen v. Preferred Risk Mut. Ins. Co., 354 P.2d at 576 (absent a jury instruction that counsel's per diem formula was "but lawyer talk" "the practitioner runs the risk of a more piercing and less sympathetic review on appeal as to the argument's prejudicial aspect . . . .").

2020 Event Bundle –
Registration for the
2020 Mid-Year Seminar &
85th Annual Conference

Please email info@imla.org for more information.

"Attending the annual conference reminds me of why I enjoy government law and that there are many resources and contacts out there that can help me in representing clients"

April 24-27, 2020
Washington, D.C.
Omni Shoreham Hotel

September 23-27, 2020
La Quinta, California
La Quinta Resort
& Club



One Man's Trash is Another Man's Treasure: Charitable Solicitation via Donation Box

BY: GALEN GATTEN, JR.
Senior Assistant City Attorney, Arlington, Texas



They take many forms and are known by various names and acronyms. Donation box. Unattended charitable donation bin or UDCB.[1] Public donations receptacle.[2] Donation drop box.[3] Regardless of the nomenclature, these often-unassuming containers have become big business for the recycling companies that employ them to collect used goods for resale in the marketplace. Local and national charities and non-profits have utilized these boxes to collect donations from residents with excess personal goods that might otherwise go in the garbage. In the process, these organizations raise, either directly or indirectly, funds for operations and expenditures related to their goals. And cities benefit by seeing less personal property finding its way into municipal landfills.

But donation boxes are not without their own sets of problems. Commonly cited issues include dumping, illegally placed boxes, graffiti, and traffic-related hazards. Donation box operators come in many forms as well. While some are simple recyclers, attempting to divert clothing and other goods into their own resource stream, many donation box operators have contracted with charities, both large and small, to collect in their names. Contractual arrangements between charities and collectors often take the form of either flat fee or weight-based contingent on the number of tons of collected goods. While some will argue that such arrangements perpetuate fraud on the charitable-giving public, others will point to the positive symbiotic relationship enjoyed by many such charities and collectors. The low overhead associated with the business of collecting items through donation boxes is an inviting option for organizations looking to reduce solicitation costs to fund their objectives. Attempts by governmental entities to combat stated goals of reducing fraud have resulted in many of the same judicially struck-down efforts used to mandate specific requirements for in-person solicitation efforts. As this article will attempt to show, the Courts have not been reluctant to extend constitutional protections under the First Amendment to all forms of charitable solicitation, including unattended donation boxes. But as in the case of signs, recent case law interpreting the scope of such regulations impacting free speech rights has not resulted in cities being completely proscribed from regulating donation boxes.

I. The *Village of Schaumburg* trilogy

The concept of solicitation is not new. The notion of requesting assistance, either for money or tangible items, directly or indirectly, for oneself or for a collective, goes back as long as people have engaged in social discourse.[4] During the Twentieth Century, the United States Supreme Court has grappled with First Amendment infringement claims covering a spectrum of different types, methods, and parties. Most recent cases discussing donation boxes begin with a review of Justice White's opinion in *Village*

ILLUSTRATION: TRUJILLO DESIGN

As this article will attempt to show, the Courts have not been reluctant to extend constitutional protections under the First Amendment to all forms of charitable solicitation, including unattended donation boxes.

of Schaumburg v. Citizens for a Better Environment, as that case and its progeny established current controlling judicial precedent for First Amendment solicitation claim consideration.[5]

The Village of Schaumburg ("the Village") adopted an ordinance in 1974 with the intended desire to combat fraudulent representations by solicitors seeking funds either door-to-door on private property or by use of the public streets and right-of-ways.[6] The Village attempted to prohibit some solicitors from operating within the city by means of a permitting process and a contingent requirement that a solicitor must prove that not less than 75% of the proceeds of the applicant's solicitations would be used directly for the charitable purpose of the organization.[7] A not-for-profit corporation, Citizens for a Better Environment, filed suit alleging that the Village's ordinance and its subsequent denial of a permit under the ordinance, was unconstitutional and violated the First and Fourteenth Amendments of the United States Constitution.[8]

The issue considered by the Supreme Court was whether the Village had exercised its power to regulate solicitation in such a manner as to not unduly intrude upon the rights of free speech.[9] The Supreme Court found that the 75% threshold was a direct and substantial limitation on protected free speech activity.[10] Further, the Court held that the regulations could not be sustained unless they served a sufficiently strong, subordinating interest that the Village was entitled to protect.[11] Concluding that the solicitation was protected under the First Amendment and entitled to review under strict scrutiny, the Court held that while preventing fraud, protecting public safety, and preserving residential privacy were legitimate interests for the Village, there were less intrusive and more appropriate related regulations to address these concerns.[12]

Finding that the Village's ordinance was unconstitutionally overbroad, the Supreme Court quoted its earlier opinion in *Schneider v. State*.[13] The Court drew a distinction between punishing frauds and forbidding trespasses.[14] While a municipality might be tempted to adopt regulations that might be more efficient and convenient, such considerations do not empower a municipality to abridge freedom of speech and press.[15]

In *Secretary of Maryland v. Joseph H. Munson Co.*, the Supreme Court took up the discussion of a state statute enacted to address concerns of potential fraud.[16] There, the Court considered the State of Maryland's requirement that charitable organizations not pay professional fundraisers more than 25% of the total gross income raised by a fundraising activity. Unlike the municipal ordinance discussed in *Schaumburg*, the Maryland statute allowed a waiver to be granted by the state that would allow charitable organizations that would not otherwise be able to operate in Maryland.[18]

The question considered by the Supreme Court was whether the distinctions between the Schaumburg ordinance and the Maryland statute were sufficient to render the statute constitutionally acceptable.[19] After reviewing its analysis in *Village of Schaumburg*, the Court found that "While there no doubt are organizations that have high fundraising costs not due to protected First Amendment activity and that, therefore, should not be heard to complain that their activities are prohibited, this statute cannot distinguish those organizations from charities that have high costs due to protected First Amendment activities."[20] Additionally, the Court stated that the statute in all of its applications operated on a fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud.[21] One could argue, the Court stated, that the State's interest could just as easily be read as preventing mismanagement as well as fraud, but regardless the percentage limitation adopted by the statute was too imprecise to achieve either purpose.[22] Finding that the waiver provision only served to decrease the number of impermissible applications of the statute, the

Continued on page 16



Galen Gatten is a Senior Assistant City Attorney for the City of Arlington, Texas. He currently serves as the City's land use attorney and provides legal advice on planning, zoning, permitting, stormwater utilities and fair housing. Galen has been with the City of Arlington since May 2015. Previously, he was a land use attorney for the City of Fort Worth and the City of Midland and served six years on the Planning and Zoning Commission for the City of Midland. He received his law degree from Texas Tech University School of Law and his bachelor's degree in history from the University of North Texas in Denton.

Court held that the statute as a whole was fundamentally defective.[23]

In 1988, the United States Supreme Court considered the third of its "big three" solicitation cases for the decade. In *Riley v. National Federation of Blind*, the Court considered North Carolina's three-tiered state licensing schedule that was purportedly enacted to combat fraud by professional fundraisers soliciting charitable contributions on behalf of their clients.[24] Citing *Schaumburg* and *Munson*, the Court stated "Our prior cases teach that the solicitation of charitable contributions is protected speech, and that using percentages to decide the legality of the fundraiser's fee is not narrowly tailored to the State's interest in preventing fraud."[25]

When determining whether there was any meaningful distinction between charitable organizations soliciting on their own behalf or contracting a professional fundraiser to do so on their behalf, the Court found the result to be the same.[26] "Whether one views this restriction of the charities' ability to speak … or a restriction of the professional fundraisers' ability to speak … the restriction is undoubtedly one on speech, and cannot be countenanced here."[27] The Court restated its earlier quote from *Schaumburg*, but renders it here more concisely as: "[W]e reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency."[28]

The Court was unmoved by the State's argument that the speech of a professional fundraiser should be treated differently than that of a charitable organization. "But even assuming, without deciding, that such speech in the abstract is indeed merely 'commercial,' we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech."[30] Finding that the North Carolina Charitable Solicitations Act's licensing requirements, compelled disclosure of donors, and reasonable fee requirements were all subject to strict scrutiny, the Court held all three components of the statute to unconstitutionally infringe on the First Amendment.[31]

II. The *Metromedia* trilogy

One year after the Supreme Court's decision in *Schaumburg*, Justice White delivered an equally important opinion that impacts regulations related to donation boxes. Instead of in-person solicitation, the subject matter this time was off-site advertising (i.e. billboards). The specific issue in question was the validity of a City of San Diego ordinance prohibiting outdoor advertising displays.[31]

Metromedia, Inc. and its fellow appellants were companies engaged in the outdoor advertising business in San Diego. The appellants sued alleging that the ordinance would effectively eliminate their business.[33] As the case worked its way through the California court system, each level of appeal reversed the previous one until the California Supreme Court ultimately held that the two purposes of the ordinance were within the City's legitimate interests and that the ordinance was "a proper application of municipal authority over zoning and land use for the purpose of promoting the public safety and welfare."[34]

Addressing the subject of billboards and the First Amendment, the opinion quotes Justice Jackson, saying "Each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method."[35] The Court stated that because the billboard creates a unique set of problems for land-use planning and development, the government has legitimate interests in controlling the noncommunicative aspects of the medium.[36] The government's interests in regulating the noncommunicative aspects of signs, the Court found, must be balanced against the individual's right to expression of the communicative aspects of signs.[37]

The Court lists the four-part test for determining the validity of government restrictions on commercial speech (as distinguished from more fully protected speech).[38] This test was adopted in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), and states: (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial government interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.[39]

With little discussion given to three parts of the test, the Court focused on a single question: does the ordinance directly advance governmental interests in traffic safety and in the appearance of the city? The Court found that the City could reasonably conclude that a commercial enterprise – as well as the interested public – has a stronger interest in identifying its place of business and advertising the products or services available there than it has in using or leasing its available space for the purpose of advertising commercial enterprises elsewhere.[41] Finding

that the ordinance was not overly broad and that it did directly advance substantial government interests, the Court concluded that the ordinance passed the constitutional test laid out in *Central Hudson*.[42]

San Diego's billboard ordinance still implicated noncommercial messages and as a result the Court found that while San Diego could distinguish between the relative value of different categories of commercial speech, it did not possess the same latitude when it came to noncommercial speech.[43] As a result, under the First and Fourteenth Amendment, because some noncommercial messages may be conveyed by billboards, San Diego must similarly allow billboards conveying other noncommercial messages through the same commercial and industrial zones.[44] The Court concluded that since the San Diego ordinance reached too far into the realm of protected speech, it was unconstitutional on its face.[45]

The Supreme Court considered a much smaller sign in *City of Ladue v. Gilleo* in 1994.[46] The sign at issue was originally a 24 by 36-inch sign placed in Margaret Gilleo's front yard in 1990 that read "Say No to War in the Persian Gulf, Call Congress Now."[47] Ms. Gilleo was advised that her sign violated the City of Ladue sign ordinance. After being denied a requested variance to the ordinance, Ms. Gilleo sued the City of Ladue and alleged that the ordinance violated her right to free speech under the First Amendment.[49] After obtaining a preliminary injunction against enforcement of the ordinance, Ms. Gilleo posted a letter-sized sign in her second story window that read "For Peace in the Gulf."[50] Ms. Gilleo's signs expressed noncommercial messages to the public and were prohibited under city ordinance as they did not satisfy any of the list of exceptions the code allowed for a number of different types of signs, including "for sale or rent" signs for residential property.[51] The Supreme Court affirmed the Court of Appeals which held that the ordinance was invalid as a "content-based" regulation because the City treated commercial speech more favorably than noncommercial speech and some types of commercial speech more favorably than other types of commercial speech.[52] Finding that the City of Ladue had totally excluded political, religious, or personal messages from the medium, the Supreme Court held that the City of Ladue's ban on almost all residential signs violated the First Amendment.[53] On top of discussing the disparity between the sign code's treatment of commercial and noncommercial speech, the Court also discussed the role of the location (i.e. the residential yard of a neighbor) as a significant factor in considering the prohibition on residential signs.[54] With reference to Aristotle, the Court stated "[T]he identity of the speaker is an important component of many attempts to persuade."[55] As the location of a sign placed on one's residential property conveys to the reader the "identity" of the "speaker", the message conveyed may have more meaning than a similar sign with similar wording placed elsewhere.[56]

A content-based regulation was the subject of the Supreme Court's decision in *Reed v. Town of Gilbert*. The Town of Gilbert ("Town") had adopted a municipal sign code that classified different types of signs into different type of categories and enforced different requirements on each category.[57] One such category was "temporary directional signs" and the Town of Gilbert considered signs put out by the Good News Community Church and its pastor, Clyde Reed, to advertise the time and location of its services, to be such a sign.[58] The Town imposed strict time restrictions on such signs, restrictions that were not imposed on "ideological signs" and "political signs".[59] While an "ideological" sign could be up to 20 square feet in size and displayed for any length of time, a "temporary directional sign" was limited to 6 square feet in size and could not be displayed more than 12 hours before a qualifying event and 1 hour after.[60] The Supreme Court found that the Town's sign code was content-based on its face and applied strict scrutiny.[61] Finding that the Town's sign code was "hopelessly underinclusive", the Court held that the Town had not met its burden under strict scrutiny to prove that its sign code was narrowly tailored to further a compelling government interest.[62] Further, in her concurring opinion, Justice Kagan pointed that considering the *City of Ladue v. Gilleo* as a previous model, the Court could have resolved the issue without deciding the level-of-scrutiny question because "the law's breadth made it unconstitutional under any standard."[63] "[T]he law's distinctions between directional signs and others—does not pass strict scrutiny, or immediate scrutiny, or even the laugh test."[64]

III. The donation box trilogy: The Fifth, Sixth, and Ninth Circuits weigh in

With the foregoing cases in the background, the Fifth Circuit Court of Appeals heard the first of the three donation box-related cases that would be considered by the Fifth, Sixth, and Ninth Circuit Courts of Appeals.[65] The Fifth Circuit's case dealt with a familiar theme: the government's efforts

Continued on page 18

to combat fraud in the area of charitable solicitation.[66]

In *National Federation of the Blind of Texas, Inc. v. Abbott*, the Fifth Circuit Court of Appeals considered the claims of nonprofit organizations who retained professional resellers to operate public receptacles for the purpose of soliciting donations.[67] The claims were made against a 2009 Texas statute requiring disclosures to be included on said public receptables. The provisions challenged consisted of three components: (1) an "identification" requirement, (2) a "sold for profit" disclosure requirement, and (3) a "fee arrangement" disclosure requirement.[68]

While the State of Texas argued that the statute was regulating mere commercial speech, the Court of Appeals was not convinced.[69] It found that "[a]t a minimum, the donation boxes implicitly advocate for their charity's views, ideas, goals, causes, and values. It is clear that Texans have choices when choosing to dispose of unwanted clothing or household goods."[70] The Court went on and stated "[T]he public receptacles are not mere collection points for unwanted items, but are rather silent solicitors and advocates for particular charitable causes."[71]

Upon reviewing the *Schaumburg* trilogy of charitable solicitation cases, the Fifth Circuit quoted the requirements of *Munson* and *Schaumburg*, saying "The Act will therefore be sustained as constitutional under the Speech Clause if (1) it 'serves a sufficiently strong, subordinating interest that the [government] is entitled to protect' and (2) it is 'narrowly drawn … to serve the interest without unnecessarily interfering with First Amendment freedoms.'"[72] Finding that the State of Texas could not meet its burden under strict scrutiny, the Court determined that the "fee arrangement" disclosure requirements of the statute were unconstitutional. The Court held that said disclosures should be modified to remove the offending provision, namely, the requirement that if a professional solicitor collects for a charitable organization under a flat fee agreement, that said flat fee amount be disclosed to the potential donor on the face of the donation box.[73] The statutory requirements related to identifying the charitable organization and disclosing that the donated goods would be sold for profit were upheld, but the provision requiring the disclosure of how the proceeds would be allocated between the charity and the donation box operator was found to be an unconstitutional infringement of the First Amendment.[74] Once again, much like the results in *Munson* and *Riley*, a court found that combating fraud through a mandatory disclosure requirement was not a sufficiently strong interest for the government to claim to infringe on free speech.

The Sixth Court of Appeals discussed donation boxes in 2015 when a non-profit corporation named Planet Aid sued the City of St. Johns, Michigan, ("City") for prohibiting the placement and use of donation boxes within the city limits.[75] During the City's appeal of a preliminary injunction, Planet Aid argued that its speech regarding charitable giving was protected by the First Amendment and that the ordinance was a content-based restriction subject to strict scrutiny. The City conceded that the speech was eligible for First Amendment protection, but that the bins were analogous to outdoor advertising signs, and that the ordinance was therefore a content-neutral time, place, and manner restriction that passes constitutional muster.[77] The Court disagreed, instead agreeing with the Fifth Circuit that donation boxes were "silent solicitors and advocates for particular charitable causes."[78] The Court held that speech regarding charitable giving and solicitation was entitled to strong constitutional protection, and the fact that such speech may take the form of a donation bin does not reduce the level of its protection.[79]

Concluding that the City's ban on donation boxes was a content-based restriction on protected speech, the Court determined that in order for the ordinance to pass constitutional muster, the City bore the burden of establishing that the ordinance was narrowly tailored to promote a compelling government interest.[80] After assuming that the City's stated interests in preventing blight and aesthetics were compelling, the Court held that the ordinance was not narrowly tailored to promote those interests.[81] The Court found that the ordinance "preemptively and prophylactically prevents all charities from operating outdoor, unattended donation bins within the City in the interest of aesthetics and preventing blight."[82] As a result, the Court held that Planet Aid was likely to succeed on the merits of its First Amendment claim and affirmed the preliminary injunction granted by the District Court.[83]

The Ninth Circuit got an opportunity to discuss donation boxes in *Recycle for Change v. City of Oakland*. In 2015, the City of Oakland adopted a comprehensive licensing scheme governing the operation of donation boxes within the city limits.[84] Referring to donation boxes as unattended donation collection boxes ("UDCBs"), the Oakland ordinance required an annual permit and

established numerous restrictions on the placement, size, maintenance, and density of said boxes.[85]

The Court condensed the issue of whether the regulation implicated protected expression to the following question: does a law that requires an enforcing officer to decide whether a UDCB collects personal items for the purpose of distributing, reusing, or recycling those items – regardless of the purposes of such activity – discriminate on the basis of content?[86]After reviewing the difference between the restrictions in Oakland's ordinance and the ban in St. Johns' ordinance, the Court concluded that the Oakland ordinance did not discriminate on the basis of any message.[87] Rather, the Court held, the ordinance discriminates on the basis of non-expressive, non-communicative conduct.[88] By disregarding the charitable or business purpose of the collection of goods, and focusing only on the conduct (which is neither expressive, nor communicative), the Oakland ordinance simply restricts the boxes themselves, as collection devices for discarded material.[89] The Court held that by doing so, the ordinance was therefore content-neutral to the extent it regulates speech or expressive activity at all.[90]

After concluding that the Oakland ordinance regulating UDCBs was content-neutral, the Court determined whether the ordinance would survive the immediate scrutiny standard outlined in *United States v. O'Brien*, 391 U.S. 367 (1968).[91] The Court held that Oakland's ordinance satisfied that level of scrutiny.[92] Further, the Court held that the ordinance was narrowly tailored to achieve its goal, which was stated in this case as "combating blight, illegal dumping, and graffiti."[93]

IV. Conclusion

So, what have we learned from the caselaw surrounding solicitation and commercial versus noncommercial speech? And how will the courts treat ordinances regulating donation boxes in the context of this caselaw?

Even before *Reed*, the courts were reluctant to let the government label donation boxes as commercial speech. Also, much like burning draft cards, the courts struggled with the problem of intertwined protected speech and unprotected conduct. The courts had to determine whether commercial interests could "outweigh" the protected speech interests of charitable organizations; in order words, could the use of professional fundraisers change protected charitable solicitation into less protected commercial speech? What degree of involvement changed the result? And finally, could the mere involvement of a charitable organization "elevate" the protection of a solicitor?

The answer, post-Reed, was content-neutral regulation. And perhaps most importantly, not focusing on the "content" component of the speech at all, but rather focusing on the "conduct" component. Just as a sign may implicate different interests if it waves in the hand of a panhandler than if it is placed in the second-story window of a residential structure, or installed along a major thoroughfare on a third-party billboard, so can a regulation be struck down as a violation of the First Amendment if it focuses on the content of a sign, or the charitable or business purpose of soliciting used goods through donation boxes. A city wishing to regulate donation boxes should clearly limit all types of boxes collecting discarded goods and narrowly tailor its ordinance to address the direct concerns associated with illegal dumping, blight, and graffiti. Efforts to differentiate between charitable solicitors, professional solicitors working on behalf of charitable solicitors, and pure commercial recyclers are likely to be invalidated by the courts. Cities should learn from earlier cases that attempts to combat fraud through permits for solicitors or mandatory disclosures are not likely to survive an allegation that they are infringements of protected free speech. Cities would be wise to focus on the boxes themselves, rather than attempt to restrict or categorize the "speech" of these "silent solicitors." ML

Notes

1. Recycle for Change v. City of Oakland, 856 F.3d 666 (9th Cir. 2017). *See also*, Planet Aid v. City of St. Johns, 782 F. 3d 318 (6th Cir. 2015).
2. National Federation of the Blind of Texas, Inc. v. Abbott, 647 F. 3d 202 (5th Cir. 2011).
3. Linc-Drop, Inc. v. City of Lincoln, 996 F. Supp. 2d 845 (D. Neb., Feb. 18, 2014).
4. Judith Welch Wegner and Mathew Norchi, *Regulating Panhandling: Reed and Beyond*, 63 S.D. L. Rev. 579. 581-585 (2019) (discussion of begging in the context of American panhandling and rise of "quality of life" regulations).
5. Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 628-632 (1980) (provides a concise review of Supreme Court precedent beginning in the 1930s and through the 1970s on the topic of charitable solicitation and the difficulty of separating commercial intent from purely protected speech).
6. *Id.* at 622.
7. *Id.* at 624.

Continued on page 20

One Man's Trash *cont'd from page 19*

8. *Id.* at 625.
9. *Id.* at 633.
10. *Id.* at 636.
11. *Id.*
12. *Id.* at 637-638.
13. *Id.* at 639, quoting *Schneider v. State*, 308 U.S. 147 (1939).
14. *Id.* at 639.
15. *Id.* at 639.
16. Secretary of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984).
17. *Id.* at 950.
18. *Id.* at 953.
19. *Id.* at 959.
20. *Id.* at 966.
21. *Id.*
22. *Id.* (footnote 14).
23. *Id.* at 968.
24. Riley v. National Federation of Blind, 487 U.S. 781, 784 (1988).
25. *Id.* at 789.
26. *Id.* at 794.
27. *Id.*
28. *Id.* at 795, quoting *Schaumburg* at 639.
29. *Id.* at 796.
30. *Id.* at 803.
31. Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).
32. *Id.* at 496.
33. *Id.* at 497.
34. *Id.*
35. *Id.* at 501.
36. *Id.* at 502.
37. *Id.*
38. *Id.* at 507.
39. *Id.* quoting Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 563-566 (1980)
40. *Id.* at 508.
41. *Id.* at 512.
42. *Id.*
43. *Id.* at 514.
44. *Id.* at 515.
45. *Id.* at 521.
46. City of Ladue v. Gilleo, 512 U.S. 43 (1994).
47. *Id.* at 45.
48. *Id.*
49. *Id.*
50. *Id.* at 46.
51. *Id.* at 45-46.
52. *Id.* at 47.
53. *Id.* at 58.
54. *Id. at 56.*
55. *Id.*
56. *Id.*
57. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2223 (2015).
58. *Id.* at 2225.
59. *Id.* at 2224-2225.
60. *Id.*
61. *Id.* at 2231.
62. *Id.*
63. *Id. at 2239.*
64. *Id.*
65. Nat'l Fed'n of the Blind of Tex., Inc. v. Abbott, 647 F.3d 202 (5th Cir. 2011).
66. *Id.*
67. *Id.* at 207.
68. *Id.* at 206-207.
69. *Id.* at 213.
70. *Id.*
71. *Id.*
72. *Id.* quoting *Munson*, 467 U.S. at 960-61 (quoting *Schaumburg*, 444 U.S. at 636-37).
73. *Id.* at 215.
74. *Id.*
75. Planet Aid v. City of St. Johns, 782 F.3d 318 (6th Cir. 2015).
76. *Id.* at 322-323.
77. *Id.* at 323.
78. *Id.* at 325.
79. *Id.* at 326.
80. *Id.* at 330.
81. *Id.*
82. *Id.*at 331.
83. *Id.*
84. Recycle for Change v. City of Oakland, 856 F.3d 666, 668 (9th Cir. 2017).
85. *Id.* at 668-669.
86. *Id.* at 671.
87. *Id.* at 672.
88. *Id.*
89. *Id.* at 673.
90. *Id.*
91. *Id.* at 674.
92. *Id.*
93. *Id.* at 675.




IMLA
85
ANNUAL
CONFERENCE
LA QUINTA, CA
SEPTEMBER 23-27, 2020



IMLA GOES TO BERLIN: CELEBRATING THE FALL

BY: ERICH EISELT, *IMLA Assistant General Counsel*

In a culture seemingly blinded by minute-to-minute political vignettes, it is easy to lose sight of far more transformative historical events. One such epochal moment occurred 30 years ago, as the entire world order seemingly shifted overnight: the fall of the Berlin Wall on November 9, 1989.

Under the auspices of IMLA's International Committee, twenty-seven IMLA members and guests were privileged to travel to Germany's capital city in November for the week celebrating the 30th anniversary of "Mauerfall." Our consensus is that the experience was was overwhelmingly worthwhile. We spent many hours in the environs of Friedrichstrasse, where East Berliners first stormed past guards and through the totalitarian barrier. We touched on the Wall's antecedents--a madman's instigation of World War, and the rapid deterioration of a wartime alliance as Soviet socialism emerged. We toured Berlin's soaring capitol building at the heart of the European Union and the NATO alliance. And we received curated programming about issues relevant to American communities—cyber security, personal data protection, smart cities, immigration, human rights and more. All of this was interspersed with individual forays into Germany's culture, arts, gastronomy, and social fabric.

The History: The elements that would lead to a divided Berlin are relatively well-known: Hitler's rise—first as a duly elected minor official, then as a guileless political sorcerer—leading to genocide and a global conflict that would leave 70 million dead; Stalin's brutal determination to establish a subjugated communist bloc; the severing of 30 percent of German citizens from the free world; and finally the erection, in 1961, of a massive physical barrier to prevent further emigration of East Germans, the most notorious segment of which divided the people of Berlin by means of two impenetrable cement walls framing a 100-yard, landmine-filled "death strip" where hundreds of would-be escapees were gunned down over the years.

History tells us that the promised miracles of centrally- controlled economies did not materialize. A trip to Berlin's East German Museum amply illustrates that in the decades after World War II, life for the average citizen behind the Iron Curtain was a series of shortages and deprivations. Indoor sanitation was absent in many dwellings and consumer goods, abundantly available in Western markets, remained stubbornly beyond reach. As the 1980s came to a close, anti-communist, pro-democratic outbursts convulsed through Warsaw Pact countries including Czechoslovakia, Poland, Hungary, Bulgaria, and Romania. Mikhail Gorbachev's new policy of *perestroika* revealed Moscow's grudging concession to capitalist principles, and the German Democratic Republic was informed that it could no longer rely on the Soviet Union for fiscal solvency. East Germany was in economic and political crisis.



In October 1989, disenchanted East Germans marched by the tens of thousands through the streets of Leipzig. The next month, nearly a million massed in East Berlin, with the Wall squarely in focus.

The Mayor's Story: What may not be as familiar are the specific incidents leading to the breaching of the Wall on November 9, 1989. In an indelible gathering three days before the anniversary, IMLA members were treated to a private dinner with Walter Momper, who was Mayor of West Berlin at that fateful moment in history. As Mayor Momper described, late in the afternoon of November 9, Günter Schabowski, a senior official in the GDR's ruling Socialist Unity Party, held what appeared to be a routine press briefing. In an unscripted moment, he was asked about reports that East German leadership was considering acceding to citizens' demands for greater access to the West. The GDR official was able to confirm that this prospect was under consideration, but he had not attended the most recent governmental discussions on changing travel policies. When asked *when* such a change might become effective, he rapidly scanned a written policy statement he had been handed —and misread an announcement presumably intended for the next day, to be broadcast only after East German leaders had cleared the specifics with Moscow and alerted border guards. He mistakenly responded "immediately."

Stunned reporters rapidly passed the information to the masses. Hundreds of East Germans soon converged at Checkpoint Charlie, the most famous of several passages through the Wall. The swarm vociferously insisted to be let through and violence appeared imminent. The confused GDR border authorities, lacking clear instructions from superiors, apparently had only two choices—to shoot their countrymen *en masse*, or allow them passage. They chose the latter. Within hours, a trickle of crossings became a torrent as thousands of East Berliners streamed across the border, becoming reacquainted with relatives and friends and a world of abundance that had long been foreclosed. A few sections of Wall were rapidly felled at the iconic Brandenburg Gate as worldwide media looked on.

Although it would take two years for the despised barrier to be fully dismantled, the Berlin Wall was effectively obsolete on November 9, 1989—the most overt indication of a far more profound collapse of Soviet socialism. Less than a year later, Germany would be reunified, erasing more than four decades of forced separation.

Mayor Momper told his story from the perspective of an elected leader responsible for the safety and order in his municipality. While he had anticipated a large influx of East Berliners, he could not have imagined the throngs that would fill his city, creating immense logistical problems and straining virtually all city services. His personal anecdote, aided by actual footage of the infamous press briefing and delivered in a small private dining room only blocks from Checkpoint Charlie, was itself worth the trip.

Sachsenhausen: Two days before our inspiring dinner with the Mayor, the IMLA group experienced a far different chapter in Germany's past. A duo of spotless buses ferried us for a one-hour journey to Oranienburg, a small town located 25 miles north of Berlin. The burg's narrow roads passed trim houses and small garden plots before ending at a large parking

Continued on page 24

area adjoining another high wall. This was Sachsenhausen, a Nazi camp built in 1936 to hold a large spectrum of humanity deemed to be inconsistent with the maniacal aims of the Third Reich. Intellectuals, communists. homosexuals, immigrants, nonconformists—and Jews, by the thousands—were brought here, conveyed through the town from the train station in plain view of the residents. We walked into the massive facility through iron gates emblazoned with "Arbeit Macht Frei" and followed a knowledgeable docent for more than two hours as every aspect of the institution's unimaginable cruelty was revealed. While Sachsenhausen never operated on the scale of far more notorious remote death camps such as Auschwitz, tens of thousands were exterminated here, within a stone's throw of the town's day-to-day activities.

This excursion raised many unanswered questions, foremost among them being how such inhumanity could possibly have been supported—or at least ignored—by so many. The German government is determined to expose this history; the Memorial to the Murdered Jews of Europe, an arrangement of massive coffin-like stone rectangles, occupies several acres in the middle of Berlin near the Brandenburg Gate, and a trip to camps like Sachsenhausen is mandatory for all German schoolchildren, many of whom were there during our visit.





In Kennedy's Footsteps: Another morning saw the group taking a short ride on U-Bahn numbers 6 and 2 to Schöneberg, a picturesque residential borough outside Berlin's curent city center. There, we climbed stairs in the local Rathaus, which served as Berlin's City Hall prior to Soviet partition, a to a large room where we were warmly welcomed by the District Mayoress, Mrs. Angelika Schöttler. That building is a source of particular pride to Americans; from its portico in June 1963, shortly after the Wall had severed Berlin, John F. Kennedy delivered his "Ich bin ein Berliner" message to the enthusiastic support of thousands.

The Reichstag after Dark: Our activities were not confined to daylight hours. As the IMLA group awaited our 8pm entry slot before the security facility adjoining Berlin's Reichstag—the nation's capitol building that provides tours until 10 pm each weeknight—we noticed a collection of what appeared to be broken pieces of slate, standing vertically in a long row. Inspection revealed that these were actually thin steel plates bearing the names of 96 German legislators who died "unnaturally" between 1933 and 1945--a precursor to the larger history lesson to be rendered within. Upon entering the Reichstag, an enormous modern structure with soaring walls of glass immediately revealing the legislative chamber itself, we quickly learned from another excellent docent about the building's darker past. As Hitler's rise accelerated in the 1930's, a major obstacle stood in his way—the people's elected representatives. In 1933, a mysterious fire tore through the Reichstag, gutting it and paralyzing the legislature. The Nazi party falsely blamed a Communist for the arson, executed him, and began a crackdown on Communists and others considered inimical to Hitler's aspirations. The vertical plates we had seen outside were a tribute to the many public servants who were murdered in this campaign.

The Reichstag also evidences the struggle which ultimately righted the German ship of state. Portions of the building still bear the marks of bullets and shrapnel fired as the Nazis fought annihilation near the War's end, and the signatures and salutations of exultant Soviet soldiers remain scrawled on several concrete walls. Like the American flag raising over Mount Suribachi, the iconic image of the Soviets' hammer and sickle flying above the Reichstag in May 1945 heralded the allies' victory in Berlin. Today, the structure houses a vibrant democratic institution. It is architected to feel accessible and transparent, figuratively and literally--we walked directly past Angelica Merkel's office. The immense legislative chamber, a gradual bowl ending at a large dais under a massive metallic eagle sculpture, accommodates all 709 members of the current Bundestag, with room for several hundred spectators. And the building's signature piece—a glass covered globe rising high above the city, rewards visitors with a spectacular view from a spiraling walkway.

The Trabi Tour: On our last day, those of us who had elected to pay an extra 79 euros joined a "Trabi Safari." From 1957 to 1991, a plant in Zwickau, East Germany, produced slightly more than three million of the Trabant—a noisy, antiquated two-cylinder, two-stroke 500cc automobile. Constructed of "duroplast," a peculiar cotton fiber/resin plastic shell affixed to a steel frame, the Trabi's 25-horsepower engine was barely more muscular than today's riding lawnmowers. Although the

pride of East Germany, even into the 1980's the Trabant had no tachometer, no indicator for the headlights or turn signals and no rear seat belts—and drivers had to pour a mix of gasoline and oil into the vehicle. Because East Germans had to wait for up to 10 years to obtain a Trabant off the waiting list, used Trabis—available immediately from a private seller—were worth more than the purchase price for a new one.

A small group of intrepid IMLAers assembled at the Trabi Safari site near Checkpoint Charlie for an afternoon adventure. After a cursory self-guided educational encounter with wall-mounted models of the cars' unorthodox shifting mechanism, and the conspicuous absence of lengthy American-style waivers which would doubtless have consumed a dozen pages of exculpatory language, our caravan of gear-grinding anachronisms hit the busy streets of Berlin. What followed was two hours of guided tour. We wound past many of the city's tourist highlights:-immense cathedrals, infamous Nazi buildings, remaining portions of the Wall, now featuring murals from artists the world over, and bohemian neighborhoods such as Charlottenburg. At many points we were the subject of photographs as delighted tourists spied the passing vehicular icons. Less enthused were commuters and truck drivers with places to go, as our cars stalled repeatedly at red lights, turn signals flashing continuously





It was with a fair amount of relief that we finally inched the relics up the short ramp into the Safari's parking lot and rejoined its collection of more than 100 Trabis in various states of preservation. The exercise seemed a fitting end to our brief but absorbing look at East-West history.

The IMLA Sessions: IMLA's CLE-credited program interspersed between these events was relevant and informative throughout. Our first morning provided an update on the continent's General Data Protection Regulation (GDPR), which is already safeguarding European consumers and web users far beyond the modest measures afforded to Americans. Lawyer Maja Smoltczyk, Berlin's Data Protection Officer, described the numerous obligations imposed on web companies: abundant notice about the potential utilization of personal data, the requirement to obtain explicit consent thereto, and stringent limitations on the quantum and type of data obtained and stored. The impact of this different regime was immediately apparent upon use of our hotel's internet, which required numerous consents to proceed and in some instances refused access to ordinary-course American sites deemed to be noncompliant with GDPR mandates. While some of these principles are already being considered in the US and have been implemented on a modest basis in California, the European sanctions regime has yet to mimicked stateside. As Ms.Smoltczyk alluded, the GDPR's penalties can reach 4% of the violator's annual *revenues*. During our session, she referenced a major penalty about to be imposed, without mentioned any names. The next day she announced a fine of 40 million euros for violation of the GDPR.

Our look at German cyber security issues was presented by Dr. Dirk Behrendt of the Berlin Ministry of Justice and Dr. Ulf Beurymer, a jurist and expert in cyber issues. Like their American counterparts, German municipalities including Berlin are weathering a surge in hacking efforts by increasingly sophisticated criminals. Dr. Buerymer provided advice on the mechanics of minimizing governmental cyber attacks, ranging from basic policies requiring heightened password protections to particular technologies which are most resistant to intrusion. He also argued that at least partial responsibility for cyber attacks should be borne by the companies that design and implement the web applications, software and technology upon which municipalities and businesses rely.

Other sessions covered Smart Cities, delivered by Hilmar von Lojewsky, head of the Urban Development, Building, Housing, and Transport Department of the Deutscher Städtetag—the German League of Cities, an organization of 3,400 municipalities comprising more than 50 million people, and Immigration, by Mrs. Bilkay Kadem, Minister of Integration, Baden-Wurttemburg. Finally, we received an overview of Human Rights activities in Latin America by Eunice Gibson, formerly City Attorney in Madison, Wisconsin.

The IMLA International Facilitators: Our trip succeeded due to the efforts of IMLA International Committee head Ben Griffith, whose continuing push to enervate the "I" in IMLA has for many years added an extra-

Continued on page 26

territorial dimension to our US and Canada focus. His vision of a Wall Anniversary trip to Berlin was the impetus for what followed. Similar credit is due to Tyler Wallach, who contributed many hours to the Berlin planning process—and brought his family to experience the journey; this included Tyler's father, Hon. Michael Wallach of the Texas Court of Appeals, who presented a Proclamation from Governor Greg Abbott to our cyber security speaker.

Behind all of this was Sven Kohlmeier, our irrepressible Berlin colleague who opened doors and made introductions which would literally have been impossible without his efforts. Sven, known to many members for his various presentations on cyber security issues at IMLA conferences, is a Berlin legislator, representing the Kaulsdorf sector of the city—as well as a full-time practicing IT attorney. He was present for virtually every phase of our tour, ensuring that each element went off smoothly, including in particular our private dinner with former Berlin Mayor Momper. We owe sincere thanks to Sven and look forward to his presence at our future IMLA events as we follow European directives which may influence North American regulators.

In Conclusion: The opportunity for IMLA members to meet leading Berlin municipal thinkers and to compare some of Germany's legal, political, and cultural milieu to our own--while getting to know one another better--was unquestionably worth the journey. As plans coalesce for our next such venture, potentially to Ireland, which will offer a fascinating legal and political study regardless of the trajectory of Brexit, IMLA members should keep "International" in mind. ML
















CDU/CSU - Fraktion
Dr. Angela Merkel, MdB
Bundeskanzlerin
1 N 003
Anmeldung
Zimmer 1 N 002





ZONING

BY: JAMES McKECHNIE
Senior Assistant City Attorney, Wichita Falls, Texas

Tiny Homes: A Practitioner's Guide

The "American Dream" has been home ownership since the Hoover Presidency.[1] Almost every American president since 1930s has pushed the dream of homeownership.[2] However, that dream was severely stunted by the 2008 economic crash. Enter tiny homes, which were made popular by several home improvement shows on television but are not a new phenomenon.[3] This article will address the history of tiny homes, how building codes and zoning ordinances regulate tiny homes, and what legal practitioners can do to allow the natural growth of tiny homes without sacrificing neighborhood aesthetics.

Tiny Homes: A History Tiny homes are not a new invention by any means, but rather, sprang from "a social movement where people are downsizing the space they live in" in order to live with less financial burden.[4] This idea further provides for a new vision of the American Dream in which all people can obtain homeownership in the face of exponential costs of rising housing.

It is difficult to narrow down exactly what a tiny home is, as there is no single definition. The Micro Showcase defines a tiny home as "any residential structure, foundation built or on wheels, with full utilities (electric/ water/ sewer) and living facilities (kitchen/ bed/ bath/ commode) designed for full-time occupancy that accommodates occupants at less than 300 ft per person."[5] Meanwhile, the American Planning Association defines them as "living a sophisticated lifestyle with less than 500 square feet."[6] It is safe to say that a tiny home is a house that is under 750 square feet attached to a permanent foundation.

According to the United States Census Bureau for 2015, the average American home was 2,500 square feet, with those surveyed stating 4,800 square feet as being most desirable. How did we go from wanting an average of 2,500 square feet to less than 750 square feet? The answer lies in rising home costs and the economic downturn. The global financial crisis of 2008 and the Great Recession wrecked the booming housing market. The failure of the housing market was wrought with multiple issues – subprime mortgaging, high debt-to-income ratio lending, and mistaken beliefs that home prices would only continue to rise.[7] As a result, nearly four million homes were foreclosed on each year during the Great Recession, with individuals either unable or unwilling to pay their mortgages based on the costs versus the value of their homes.[8] As individuals began losing their homes and some of their jobs as a result of the 2008 financial crisis, they began to scale back. Between 2006 and 2014, the share of United States households who rented rose to 35.5%.[9] As renters were unable to save money for traditional down payments, they turned to tiny homes as an alternative.

Tiny homes are not a new element of the American landscape. In post-World War II, William Levitt introduced a new concept to American neighborhoods: the suburb. Taking advantage of the need for more housing due to returning servicemen, Levitt used assembly-line construction to assemble prefabricated sections and pour concrete foundations, resulting in 2,000 units for Levittown, Long Island.[10] The Cape Code style structures were 750-square-foot cottages with two bedrooms, a living room, bathroom and kitchen.[11]

For years, tiny home communities have been used to house the homeless. In Portland, Oregon, Dignity Village is one of the first projects in the nation to create transitional housing for the homeless population.[12] The project was one in which city-owned land was donated for the production of the tiny home village. The purpose was to not only provide housing to the homeless, but to allow the homeless population to eventually graduate out of the tiny home village and back into society.[13]

Similar projects have sprung up in other states. Quixote Village in Olympia, Washington began providing 144-square-foot tiny homes as temporary housing for the homeless.[14] Each home had a toilet, bed, sink, and a front porch facing a shared green space.[15] In 2018, the City of Wichita Falls, Texas, approved a planned unit development for a project called Base Camp Lindsey. The idea is to create a tiny home village for homeless veterans or those at risk of becoming homeless.[16] The proposal included the construction of 58 dwelling units up to 240 square feet with access to community gardens, an on-site training center, and on-site professional servicing.[17] While these are excellent ideas, the question is how to make them a reality in a world of zoning and

building codes. We need to analyze the authority of zoning and the building codes and evaluate the steps to alleviate those restrictions.

Zoning and Building Codes

Village of Euclid v. Ambler Realty Co. established the authority for municipalities to promulgate zoning.[18] *Euclid* recognized the general right to zoning through the creation of zones for development and determining the hierarchy of preferred zoning districts.[19] Since then, the single-family zoned district has become the most protected zone.[20] Modern-day zoning is reflective of protecting the health, safety, welfare, and morals of a community and attempting to maintain the character and makeup of each zoning district while still allowing for development and natural change to occur.

Zoning allows for municipalities to regulate uses within districts. As zoning districts are typically named, the uses can be self-evident; however, cities can and do limit those uses further by providing for specific uses and no more within the district. In single-family zoned districts, things such as spacing are typically regulated.[21] Further, zoning does allow for minimum lot size or minimum size restrictions for houses in different districts depending on the jurisdiction. In *Brian B. Brown Constr. Co. v. St. Tammany Parish*, the court upheld minimum lot sizes, explaining cities have the right to "control the orderly development of the community by regulating density."[22] In *Thompson v. City of Carrollton*, the court upheld an ordinance limiting homes to at least 900 square feet.[23] The landowner complained the regulation was not related to health, safety or morals. The court denied the landowner's appeal, citing the city had to a right to regulate based on the character of the neighborhood to promote the conservation of property values.[24] Further, in *N.A.A.C.P. v. City of Kyle*, the 5th Circuit upheld an ordinance requiring a home size of a minimum of 1,200 square feet.[25] In contrast, in *Senefsky v. Lawler*, the court rejected a similar argument where the city attempted to regulate homes under 1,300 square feet. The court was of the opinion the city could not maintain that the ordinance was related to health, safety or morals.[26] Depending on the jurisdiction, minimum square footage may be an option.

Building codes are another tool in the box to limit or to allow tiny homes. The International Building Code (IBC) applies in all 50 states.[27] In 49 states, the International Residential Code (IRC) also applies.[28] These codes help bring uniformity and consistency to the building process through a model code. Further, in some jurisdictions, the local government has control to adopt and amend the codes as they determine is fit for their city. For example, in Texas, the legislature has adopted the International Residential Code as it existed on May 1, 2001, but allows municipalities to adopt amendments made to the IRC after May 1, 2001.[29] The Texas legislature has made similar provisions for the IBC.[30]

Prior to 2015, the IRC had minimum square footage requirements for a dwelling unit. A dwelling unit is "a single unit providing complete independent living facilities for one or more person, including permanent provisions for living, sleeping, eating, cooking and sanitation."[31] The 2012 IRC had a minimum square footage requirement of not less than 120 square feet for every dwelling unit.[32] Beginning with the 2015 version of the IRC, the code committee reduced the minimum square footage requirements from 120 square feet to not less than 70 square feet.[33] The IRC committee made this change because they believed there was no technical, safety, or general welfare reason to require one room of at least 120 square feet.[34] This was a huge step in removing a hurdle for those who want to build tiny homes. However, for those cities that want to regulate tiny homes and that have been relying on the IRC for authority to do so, the amendment severely reduces their ability.

Progressive Steps to Allow Tiny Homes

While courts have been consistent in upholding minimum housing sizes, the changes to the IRC seem to show a trend toward allowing tiny homes to some degree. The question becomes how do municipalities regulate tiny homes while still maintaining the character and make-up of neighborhoods. One suggestion is to allow tiny home developments through the PUD process while requiring minimum square footage for in-fill development.

Planned Unit Development Solution

There are times when development does not fit neatly into the zoning districts of a city. A planned unit development or planned development district is designed to meet specific land use control issues. Specifically, a planned unit development is an option to allow development that may not quite fit into the traditional zoning districts. A planned unit development is a special district that deviates from normal *Euclidian* zoning by allowing a mix of residential, commercial, and even industrial uses on a specific parcel of land without the same normal districts of the underlying base zone.[35] This allows developers, with input from city planners, the ability to tailor their development to a specific project without regard to the traditional limitations that zoning can provide.

There are different ways in which a PUD can work. Some options retain the base zoning and create a floating zone on top, while others are an entire rezone from the underlying base zone to a new PUD zone. Within the new PUD, city planners are able to provide conditions better able to suit the development. For example, a reduction

Continued on page 30

in required parking, an increase in required green space, an increase in single-family housing density per lot, increased or decreased setbacks, additional screening, etc. might be potential conditions a PUD would be required to have. The idea is to create a zoned community in and of itself with its own special regulations tailored to that specific development.

How is this beneficial to tiny homes? For long-term large developments, it allows the city to guide the installation of a tiny home community to help minimize the perceived negative effects, such as tiny homes being considered "shanty towns" or the tiny home development being perceived as lowering the value of neighboring developments. Further, it allows for some unique development that may not be allowed under traditional zoning. As previously noted, Base Camp Lindsey in the City of Wichita Falls, Texas, is a tiny home community designed to house homeless veterans. The group wanted to have each home face green space and use walking paths to minimize vehicular traffic. The problem was the zoning ordinance required parking for single-family home uses.[36] The City was able to lessen the parking restrictions through the use of the PUD.[37] Further, minimum spacing requirements were added to maintain sanitary conditions and maintain the character of a neighborhood while providing for ample green space.[38] The overall response from the neighbors was positive due to the controlling features of the PUD.

While PUDs are an excellent tool for new large-term development, they do not necessarily provide a great framework for infill development. Infill development is the process of developing vacant or under-used parcels within existing urban areas that are already largely developed.[39] While minimum square footages are generally allowed, hard baselines per district may not be the best option moving forward. One option is to require minimum square footages per zoning district but allow for a conditional use permit or special use permit to deviate on a case-by-case basis below that minimum threshold. The conditional use process allows for tiny homes to come before the Zoning Board to request a permit to be built. It further allows the Zoning Board to maintain control and provide input over the in-fill development while still allowing for the city to continue down a path of being progressive and open to this new trend.

It is hard to say whether this is a trend that will eventually fizzle out or if this is the future of development due to rising home prices. While the market economy will continue to dictate the housing market, cities should be as proactive as possible when it comes to the tiny home phenomenon. Economically it might not make sense to place tiny homes on expensive in-fill lots, but it does not hurt for cities to provide a mechanism to make that a possibility. It is large scale tiny home developments where cities may see an uptick in want or need. That is where the PUD can provide significant oversight while still providing for a new, prospective development to occur.

Here are the quick takeaways:
--Check your municipality's adopted International Residential Code. Post-2015, the IRC was amended to reduce the required square footage from 120 to 70 for a dwelling unit thus removing the protection that some cities relied upon.
--Minimum housing square footage can be appropriate depending on the jurisdiction but allow for built-in relief via the conditional use permit or special use permit.
--The planned unit development or planned development district can produce a long-term solution to tiny home developments while still allowing a city to maintain character and aesthetics for neighboring developments.
--Market economy will always control. Cities can provide for all types of regulations but if the market is not there to support tiny home development, it will never get off the ground and thus never need regulation. Try to get a pulse on the home economy in your city.

Endnotes

1. Emily Keable, *Building on the Tiny House Movement: A Viable Solution to Meet Affordable Housing Needs*, 11 U. St. Thomas J.L. & Pub. Pol'y 111, 112 (2017).
2. *Id.* at 118; *see* Priya S. Gupta, *The American Dream, Deferred: Contextualizing Property After the Foreclosure Crisis*, 73 Md. L. Rev. 523, 535 (2014); *see also* President Barack Obama State of Union, https://millercenter.org/the-presidency/presidential-speeches/january-28-2014-2014-state-union-address (Jan. 28, 2014); President Bill Clinton, State of the Union, https://millercenter.org/the-presidency/presidential-speeches/january-19-1999-state-union-address (Jan. 19, 1999); President Ronald Reagan, State of the Union https://millercenter.org/the-presidency/presidential-speeches/january-25-1984-state-union-address (Jan. 25, 1984).
3. *Tiny House, Big Living* (DIY Network 2014); *Tiny Home Nation* (FYI 2014); *Tiny Home Builders* (HGTV 2018).
4. Katherine M. Vail, *Saving the American Dream: The Legalization of the Tiny House Movement*, 54

U. Louisville L. Rev. 357, 358 (2016); The Tiny Life, *What is the Tiny House Movement*, http://thetinylife.com/what-is-the-tiny-house-movement/ (last visited Jun. 18, 2019).
5. Micro Showcase An Overview, https://microshowcase.com/microdwell/microhousing-an-overview/ (last visited June 17, 2019).
6. Donald L. Elliot & Peter Sullivan, *Tiny Houses, and the Not-So-Tiny Questions They Raise*, Am. Planning Assoc. Zoning Prac. Guide, November 2015 at 2.
7. Robert Samuelson, *What Caused the Housing Bubble*, Real Clear Politics (Feb. 2, 2015), https://www.realclearpolitics.com/articles/2015/02/02/what_caused_the_housing_bubble_125463.html; John V. Duca, *Subprime Mortgage Crisis*, Federal Reserve History (Nov. 22, 2013) https://www.federalreservehistory.org/essays/subprime_mortgage_crisis.
8. Adam J. Levitin & Susan M. Wachter, *Explaining the Housing Bubble*, 100 Geo. L.J. 1177, 1181 (2012).
9. Professor Lisa T. Alexander, *Bringing Home the Right to Housing to Advance Urban Sustainability*, 4 Tex. A&M J. Prop. L. 67, 72 (2017); *see also* Ingrid Gould Ellen & Brian Karfunkel, *Renting in America's Largest Metropolitan Areas*, NYU Furman Center & Capital One 4 (Mar. 8, 2016), http://furmancenter.org/news/press-release/national-affordable-rental-housing-landscape-in-americas-largest-metro-area.
10. Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism*, Post-Modernism, Urban Planning, and Gentrification, 20 Fordham Urb. L.J. 699, 782 (1993).
11. Witold Rubczynshki, *The Pioneering "Levittowner,"*' Samuel Zell and Robert Lurie Real Estate Center , Wharton School, University of Pennsylvania http://realestate.wharton.upenn.edu/wp-content/uploads/2017/03/556.pdf (last visited June 17, 2019).
12. Professor Lisa T. Alexander, *Bringing Home the Right to Housing to Advance Urban Sustainability*, 4 Tex. A&M J. Prop. L. 67, 72 (2017); Andrew Heben, *Tent City Urbanism: From Self-Organized Camps to Tiny House Villages* 134-35 (2014).
13. Alexander, *supra* note 12 at 72.
14. *Id.* at 76.
15. *Id.*
16. Wichita Falls, Tex. Ordinance 20-2018 (May 1, 2018).
17. *Id.*
18. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926)
19. *Id.*
20. Farley v. Zoning Hearing Bd. of Lower Merion Tp., 161 Pa. Cmwlth. 229, 241, 636 A.2d 1232, 1238 (1994) ("preservation of the character and integrity of single-family neighborhoods, prevention of undue concentration of population, prevention of traffic congestion and maintenance of property values" are all legitimate purposes of zoning); City of Miramar v. Bain, 429 So. 2d 40, 42 (Fla. Dist. Ct. App. 1983) (city required the removal of front yard fence); Brevard County v. Woodham, 223 So. 2d 344, 349 (Fla. Dist. Ct. App. 1969) (rezone of single family district to commercial would constitute a spot zone).
21. Tex. Loc. Gov't Code Ann. § 211.003(a) (West, Westlaw through 2019 Sess.).
22. Brian B. Brown Const. Co. v. St. Tammany Par., 17 F. Supp. 2d 586, 590 (E.D. La. 1998*); citing* Clark v. County of Winnebago, 817 F.2d 407, 408 (7th Cir.1987).
23. Thompson v. City of Carrollton, 211 S.W.2d 970, 971 (Tex. Civ. App.—Texarkana 1948, no writ).
24. *Id.*
25. N.A.A.C.P. v. City of Kyle, Tex., 626 F.3d 233, 238 (5th Cir. 2010) (holding NAACP lacked standing to sue because they could not show a disparate impact on the minimum house size).
26. Senefsky v. Lawler, 307 Mich. 728, 742, 12 N.W.2d 387, 390 (1943).
27. *See* Code Adoption Map, Int'l Code Council (Feb. 7, 2017), https://cdn-web.iccsafe.org/wp-content/uploads/Code_Adoption_Maps.pdf.
28. *Id.*
29. Tex. Loc. Gov't Code Ann. § 214.212 (West, Westlaw through 2019 Sess.).
30. Tex. Loc. Gov't Code Ann. § 214.216 (West, Westlaw through 2019 Sess.).
31. International Residential Code § 202 (Int'l Code Council 2015).
32. International Residential Code § R304.1 (Int'l Code Council 2015).
33. International Residential Code § R304.1 (Int'l Code Council 2012).
34. Ciara Turner, *It Takes A Village: Designating "Tiny House" Villages As Transitional Housing Campgrounds*, 50 U. Mich. J.L. Reform 931, 944 (2017); citing Stephen A. Van Note & Sandra Hyde, *Significant Changes to the International Residential Code* 46-47 (2015).
35. Patricia E. Salkin, *Standards for planned development districts*, 3 Am. Law Zoning § 24:5 (5th ed.).
36. Wichita Falls, Tex. Ordinance 20-2018 (May 1, 2018).
37. *Id.*
38. *Id.*
39. *Infill development: An Overview*, Municipal Research and Services Center (June 22, 2018) http://mrsc.org/home/explore-topics/planning/development-types-and-land-uses/infill-development-completing-the-community-fabric.aspx.

AMICUS

BY: AMANDA KELLAR,
IMLA Deputy General Counsel and Director of Legal Advocacy

A Unique Take on the Takings Clause

The City of Greenwood Village, Colorado enjoyed a recent victory in a case in which IMLA supported the City as an amicus involving a somewhat unusual claim that the City had violated the Takings Clause of the Fifth Amendment when its police officers had significantly damaged a home where a suspect who had fired on the police had barricaded himself inside. This case presents an important legal issue that plaintiffs' lawyers may try to replicate elsewhere, but it also offers a case study in how the media can tell one side of a story and thereby create a public relations issue for local governments. Both the public relations aspect of the case and its legal implications are explored below.

The Facts v. The Media Spin

The plaintiffs in this case are homeowners whose residence was destroyed by Greenwood Village police as a part of a 19-hour standoff with an armed suspect who had unlawfully entered their home, barricaded himself inside and shot at the police on multiple occasions. The police followed applicable procedures and the result was that nobody was injured or killed. Notwithstanding their painstaking efforts to prevent loss of life, they are now being sued by the homeowners for a claim that the police violated the Takings Clause of the Fifth Amendment.

The Tenth Circuit describes the situation facing police officers at the time as follows: "City's police department responded to a burglar alarm at the Lechs' home and learned that Robert Seacat, an armed criminal suspect who was attempting to evade capture by the Aurora Police Department, was inside. Although the nine-year-old son of John Lech's girlfriend was present at the time of the break-in, he was able to exit the home safely."[1] Seacat fired at police officers from inside the home.[2] According to facts in the record,, the police tried to negotiate with Seacat for five hours and then employed "increasingly aggressive tactics," including gas munitions, sending in a robot with a phone to negotiate, and using explosives to create sight lines to see Seacat, which would aid in apprehending him safely.[3] The police then sent a tactical team in to apprehend Secat, but he fired on them again and they were forced to retreat.[4] When all of these tactics failed, police ultimately used a BearCat (an armored vehicle) to open multiple large holes into the home so that they could see Seacat from outside.[5] At this point, they were able to locate him and sent in a tactical unit to successfully apprehend him without the loss of life or injury to any officers or Seacat.[6] Unfortunately, the use of the BearCat caused significant damage to the Lech's home, rendering it "uninhabitable."[7]

These are the facts in the court's decision based on the evidence in the record and construing the facts in the light most favorable to the Lechs. After the Tenth Circuit ruled in favor of the City (more on that below), the Washington Post ran a story with the following headline: "Police blew up an innocent man's house in search of an armed shoplifter. Too bad, court rules."[8] The Post article opens with the following description of facts:

> When they were finished, it looked as though the Greenwood Village, Colo., police had blasted rockets through the house…[Lech] thought it looked like al-Qaeda leader Osama bin Laden's compound after the raid that killed him. . . .
>
> But now it was just a neighborhood crime scene, the suburban home where an armed Walmart shoplifting suspect randomly barricaded himself after fleeing the store on a June afternoon in 2015. For 19 hours, the suspect holed up in a bathroom as a SWAT team fired gas munition and 40-millimeter rounds through the windows, drove an armored vehicle through the doors, tossed flash-bang grenades inside and used explosives to blow out the walls.[9]

Note that at this introductory point, the article has indicated this was a shoplifting suspect and fails to mention the single most important fact from the perspective of the police, that this armed suspect had fired his gun at police officers on more than one occasion from inside the home. The article makes the police sound eminently unreasonable in destroying this home; after all, why would you need to drive an armored vehicle into a home simply to apprehend a shoplifting suspect?[10] The article does eventually get to the fact that Seacat fired at the officers, but only after describing the Tenth Circuit ruling and including a number of quotes from Lech like "It just goes to show that they can blow up your house, throw you out on the streets and say, 'See you later. Deal with it."[11] And later in describing the second time Seacat fired at the officers, the article says that the officers retreated "after believing they heard Seacat fire several rounds."[12] But the Tenth Circuit was clear on this fact, saying "… Seacat fired at the officers while they were inside,requiring them to leave."[13]

To be fair, the Washington Post article does also provide some context from the City, for example, explaining that the reason the City only offered $5,000 by way of settlement to the Lechs was due to the fact that the family had insurance for their home which covered the vast majority of the damage, and the Lechs' decision to build a larger home than the one destroyed was the reason why insurance did not fully cover the replacement cost. But context like that is overshadowed by the skew offered by the article toward the homeowners.

The Tenth Circuit Decision and State of the Law

After the police rendered the Lechs' home uninhabitable, the plaintiffs brought suit under Section 1983, claiming the police officers violated the Fifth Amendment by taking their property without just compensation. The Lechs argued, in part, that the purpose of the Takings Clause was to "bar government from forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole."[14] The Tenth Circuit rejected this argument, concluding that "as unfair as it may seem…when the state acts pursuant to its police power, rather than the power of eminent domain, its actions do not constitute a taking for the purpose of the Takings Clause."[15] The court went on to conclude that the police power / eminent domain distinction is dispositive in cases involving "direct physical appropriation or invasion of private property," like the Lechs' case.[16]

The Lechs next claimed that the police officers were not acting within their "police powers," which turns on the question of whether the government is using the property "for the public good" (police powers) versus "for the public use"(eminent domain).[17] Despite noting that the Lechs' position had "considerable appeal…as a matter of policy," the court agreed with a Federal Claims case and a Federal Circuit case and concluded that the damage to the Lechs' home was "not a taking for public use, but rather an exercise of the police power" as the home "had become instrumental to criminal activity…"[18]

The majority of the case law as cited by the Tenth Circuit appears to be on the side of the local governments and police in this area.[19] However, the Lechs pointed to two state supreme court cases, one from Minnesota and one from Texas, that they argued support their position. *Wegner v. Milwaukee Mut. Ins. Co.*, involved facts very similar to the Lechs' scenario, where police officers caused significant damage to an innocent third party's home when a suspect barricaded himself inside her residence.[20] The Minnesota supreme court held that the police officers had taken the property within the meaning of the Minnesota constitution.[21] However, the fact that the claim was brought under the Minnesota Constitution is a critical point as it provides in relevant part; "[p]rivate property shall not be taken, **destroyed or damaged** for public use without just compensation, first paid or secured."[22] The U.S. Constitution by contrast states "nor shall private property be taken for public use, without just compensation."[23] In concluding that the police had violated the Minnesota constitution, the court held that the property was "damaged" within the meaning of the state constitution, a term that is conspicuously absent from the U.S. Constitution.[24]

In *Steele v. Houston*, the Texas supreme court also concluded that the police had violated the Texas constitution on facts again similar to the Lechs', and noted that a government is not excused from its duty to pay for taking property "by labeling the taking as an exercise of police powers."[25] However, the court in *Steele*, like in *Wegner*, was interpreting its own state constitution, and not the U.S. Constitution. And the Texas constitution mirrors the Minnesota constitution by providing that "[n]o person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation…"[26] The court relied explicitly on the text of the Texas constitution in coming to its conclusion, noting "[t]he Constitution itself is the authorization for compensation for the destruction of property and is a waiver of governmental

Continued on page 34

Amicus *cont'd from page 33*

immunity for the taking, damaging or destruction of property for public use."[27]

Conclusion

The Lech case has garnered significant media attention and with renewed interest from pro bono counsel, it seems likely that the Lechs will seek Supreme Court certiorari (they are in the process of petitioning the Tenth Circuit for rehearing en banc). However, *Wegner* and *Steele* should not provide any real help to the Lechs in arguing there is a split in authority on this issue, which is the most important consideration for the Supreme Court in granting certiorari.

And while the Lechs present many policy-based arguments, it is worth noting that local governments also have policy concerns. For example, if a claim exists under the Fifth Amendment in this case, it would also seem to call into question the emergency exception, which has historically been applied to deny compensation where property is destroyed to avert a public emergency, such as a fire. As the Supreme Court has aptly noted:

> We find, indeed, a memorable instance of folly recorded in the 3 *Vol. of Clarendon's History*, where it is mentioned, that the *Lord Mayor* of *London*, in 1666, when that city was on fire, would not give directions for, or consent to, the pulling down forty wooden houses, or to the removing the furniture, &c. belonging to the Lawyers of the Temple, then on the Circuit, **for fear he should be answerable for a trespass; and in consequence of this conduct half that great city was burnt.**[28]

The example of London burning should be a cautionary tale for courts considering allowing takings claims to move forward where government actors are acting pursuant to their police powers, rather than eminent domain. Certainly, if the police had to factor in a takings claim into the calculus in this case, the neighboring homes would not have burnt down, but it's very possible that police officers or the suspect could have been gravely injured or killed. Fortunately, for all involved, that was not the case. ML

Notes

1. Lech v. Jackson, No. 18-1051, 2019 U.S. App. LEXIS 32393, at *3 (10th Cir. Oct. 29, 2019).
2. *Id.*
3. *Id.* at 3-4.
4. *Id.* at 4.
5. *Id.*
6. *Id.*
7. *Id.*
8. Meagan Flynn, *Police blew up an innocent man's house in search of an armed shoplifter. Too bad, court rules,* Washington Post (Oct. 30, 2019), available at: https://www.washingtonpost.com/nation/2019/10/30/police-blew-up-an-innocent-mans-house-search-an-armed-shoplifter-too-bad-court-rules/ (hereinafter "Washington Post Article").
9. *Id.*
10. The Washington Post was not the only news outlet to run stories on this case with a slant toward the Lechs. An article that ran in Forbes that was written by the attorney who now plans to represent the Lechs on appeal, the story states: "In apprehending a suspect wanted for a few dollars' worth of goods, the police did damage costing Lech $400,000." Andrew Wimer, *Innocent Property Owners Deserve Compensation When The Police Cause Destruction,* Forbes Media LLC (Dec. 3, 2019), available at: https://www.forbes.com/sites/instituteforjustice/2019/12/03/innocent-property-owners-deserve-compensation-when-the-police-cause-destruction/?fbclid=IwAR3PcbMYxlSrX6b8RCxy09Niu1XjYt7lRPxM4Gbs33Rg8Sn6mguapIV7lSg#101237515030 (hereinafter "Forbes Article").
11. *See supra* note 8, Washington Post Article. While the Washington Post Article does mention the suspect shooting at the police, the Forbes Article fails to even mention this crucial fact. *See* Forbes Article, *supra* note 10.
12. Washington Post Article, *supra* note 8 (emphasis added).
13. *Lech,* 2019 U.S. App. LEXIS 32393, at *4.
14. *Id.* at *12 (internal quotations omitted).
15. *Id.* at *13.
16. *Id.*
17. *Id.* at *13-14.
18. *Id.* at *14-17 citing Bachmann v. United States, 134 Fed. Cl. 694, 698 (Fed. Cl. 2017) and AmeriSource Corp. v. United States, 525 F.3d 1149 (Fed. Cir. 2008).
19. *See* Zitter v. Petruccelli, 744 F. App'x 90, 93, 96 (3d Cir. 2018) (unpublished); Johnson v. Manitowoc Cty., 635 F.3d 331, 333–34, 336 (7th Cir. 2011) AmeriSource Corp, 525 F.3d. at 1153-54; Bachmann v. United States, 134 Fed. Cl. 694, 696 (Fed. Cl. 2017).
20. Wegner v. Milwaukee Mut. Ins. Co., 479 N.W.2d 38, 40 (Minn. 1991).
21. *Id.* at 41-42.
22. Minn. Const. Art. I, section 13 (emphasis added).
23. U.S. Const. amend. V.
24. *Wegner* 479 N.W.2d at 41-42.
25. Steele v. Houston, 603 S.W.2d 786, 789 (Tex. 1980)
26. Tex. Const. Art. I, § 17
27. *Steele,* 603 S.W.2d at 791.
28. United States v. Caltex (Philippines), Inc., 344 U.S. 149, 155 n.7, 73 S. Ct. 200, 203 (1952) (internal quotations omitted) quoting Respublica v. Sparhawk, 1 U.S. 357 (1788) (emphasis added).

LISTSERV

BY: BRAD CUNNINGHAM
Municipal Attorney, Lexington, South Carolina

Homelessness Hits Main Street

Those of us on the ListServ work for cities of varying sizes. In many respects, however, we face similar issues. Police protection… Provision of utilities…. Planning and Zoning…. Sanitation… Parks… Personnel… and the list goes on… However, one issue that seems more pressing on our larger members is homelessness. Please understand that I realize homelessness exits virtually everywhere, and in larger cities it can become an overwhelming problem. But I know that smaller municipalities can have homeless issues too, as you will see in my story later.

According to an article titled "The U.S. Cities with the Most Homeless People" by lawyer and journalist Niall McCarthy in the infographic publisher Statista.com earlier this year, "over half a million Americans are facing the prospect of being homeless this holiday season." According to McCarthy, 17 out of every 10,000 people in the U.S. experienced homelessness on a single night in 2018, and as of September 2019, the number of homeless in the U.S. stood at roughly 553,000. Only two-thirds of that total live in sheltered accommodation.

Exactly where are these homeless people located? According to McCarthy's article, "half of all homeless people are in one of five states – California (129,972), New York (91,897), Florida (31,030), Texas (25,310), and Washington (22,304). It is primarily an urban issue, and more than half of the homeless population are scattered across the country's 59 biggest cities. Nearly a quarter of them live in just two cities – New York and Los Angeles." (Oddly, McCarthy points out that in New York 65% of homeless are given sheltered accommodation, while in Los Angeles more than 75% of the homeless stay on the street. Weather, maybe?)

The U.S. Cities with the highest homeless population, following New York and Los Angeles are: Seattle/King County, San Diego City/County, San Jose/Santa Clara City/County, District of Columbia, San Francisco, Phoenix/Maricopa County, Boston and Las Vegas/Clark County. (All data taken from McCarthy's article on Statista.com).

For most of my life, I have lived in what, according to IMLA standards, is a "small town. "Homelessness has never been as high on the radar for those cities as it has been for some other jurisdictions. When I did briefly live in a larger city, my experience with the homeless was limited to the guy who visited our tailgate party asking for money to buy food but refused when we offered food, the guy who jumped on my car hood and washed my windshield at a stop light, and the guy who was throwing up in the bushes outside when I visited City Hall. All true stories, mind you, but certainly not representative of the bigger picture.

During the IMLA Mid-Year Seminar many years ago in DC, my family took the trip along with me. My daughter was about seven years old at the time, and had lived in Lexington, SC, her whole life. While walking near the White House, she spied the first homeless person she had ever encountered. She asked, "Daddy, why is that man sleeping on the bench? Why doesn't he go home and sleep?" My reply was "I don't think he has a home, darling." You could see the wheels churning in her little mind processing the issue. She inquired further: "Does he have a mommy and daddy?" "I don't know. Maybe somewhere," I replied. She had never encountered this issue during her few years, and it puzzled her.

Now, as said before, I understand that the issue can exist in small towns too. When I was working in a restaurant the summer after graduating from high school, we used to slip food out back to a hungry little old man who came by each evening. He did so all summer, but I'm not sure what happened to him after we left for college.

Not nearly as long ago as the restaurant and the aforementioned DC trip, a man wandered into our church one cold rainy morning asking if he could stay inside for a while. We obliged and gave him some coffee and a snack. He sat in the back attending the service. He left after the proceedings without speaking but returned again the following Sunday and again attended services carrying his duffle bag, which contained virtually everything he owned.

Continued on page 36

ListServ *cont'd from page 35*

We were able to spend a little time talking to him on the second visit. I will call him "Rob." We were to learn that Rob had been homeless for about 25 years--he wasn't sure exactly, as time had come to have little meaning for him. He had just gotten into town after (I kid you not) *walking* all the way from a small town in Oklahoma. He had pitched a tent and made a camp in a hidden spot in the woods across the street from the church. Rob appeared weathered and unshaven and was wearing torn and tattered clothes. His long hair hid that fact that he was probably approaching 60 years in age. He also appeared somewhat malnourished.

I retrieved a hamburger from a nearby restaurant and gave it to him. He appreciatively took it and disappeared into the woods. For weeks after that, I slipped food to Rob at a meeting place behind a local pharmacy. He continued to attend our church and was given more clothes and food. He started to gain a little weight and had improved his appearance. The pastor and his wife bought him groceries from time to time and took them into the woods to leave them for him. He was beginning to trust us to a good extent.

One day he asked for help in getting federal disability benefits. He had no ID, except for an extremely tattered Oklahoma Birth Certificate. Rob was slightly mentally challenged and had a problem with his memory. A bit of research discovered that he had a Social Security Number. We were able to get his SS Card and a State Identification Card. He had started the process previously but abandoned it in a previous location. We helped him complete it, and after quite a bit of time, the Feds mailed an approval. Rob began collecting his checks.

The pastor opened a bank account for Rob, and had the checks directly deposited. A cheap apartment was found, and we convinced Rob to move into it. He was off the street for the first time in over 25 years! Occasionally, he would still slip away and spend the night in the woods. We found he did this to hide the fact that he was buying cigarettes and alcohol with the money he was getting. Eventually, he stopped doing this, but we never could convince him to go to a doctor.

Rob disappeared several times, and we even thought he had left town at one point. However, the authorities advised me that he had been in jail for thirty days in another jurisdiction for public drunkenness. He showed back up at church, as the pastor had continued paying his rent. Rob improved slowly but surely, and still attends the church to this day. A larger place was found for him later, and he has continued to improve. We hope this trend continues.

I learned from Rob that homelessness can be chronic or short-lived. It can be a result of tragedy, a poor family situation, pure economics, mental health and/or addiction. There will not be the same remedy for every situation, just as there is not the same reason for homelessness in the first place. This is a fight we are all going to have to continue. We're all in it together, big cities and small.

Fast forward to 2019, and this year at Thanksgiving my daughter and I volunteered at two events designed to feed the homeless and/or provide for the less fortunate. We took groceries to an event here in Lexington and dined with homeless/low income folks from around the area. We also took several food donations to a gathering in nearby Columbia where the issue exits on a larger scale. There is nothing like attending such an event to make you appreciate what you have and to stop complaining about your own circumstances.

Now back to a theme I've touched on before. Recently, in Municipal Court, I have encountered two more examples of folks looking at jail time for the simple reason that they could not keep their mouths shut. The first was a gentleman who was originally arrested for public drunkenness and being a danger to himself. He was found walking in and out of traffic on a busy highway. He was determined to be a threat to his safety. When the police arrived at his location, he came belligerent and threw out a few expletives. He further physically fought with police, and it took four of them to subdue him and put him in a car. Under normal circumstances, he might have spent a single night in jail. Instead he was charged with resisting arrest in addition to public drunkenness.

When he was brought to court, it was likely the parties were willing to give him a break. However, he soon proved drunkenness was not the cause for his behavior. He behaved the same way in court, becoming belligerent with the Judge, and eventually calling him a derogatory name. The Judge held him in Direct Contempt of Court and said he would spend thirty more days in jail. "**** You," he said to the Judge... Thirty more days... "**** you" again... Thirty more days... The jail time total began to resemble a taxi cab meter as the man cursed the Judge three more times on the way out of court despite being restrained. Although the Clerk was keeping up, we lost count on the number of days to which he was sentenced. From one night in jail to all this!

The other example was a young mother who went berserk at a fast food drive thru because the workers mistakenly put pickles on her kid's sandwich. The enraged young woman parked her car, got out and went inside. She engaged in a verbal assault on the restaurant workers,

and the manager came out and asked her to leave, telling her the police had been called. She picked a fight with the workers who were only defending themselves, and it was taken outside where the young woman suffered the worst of it.

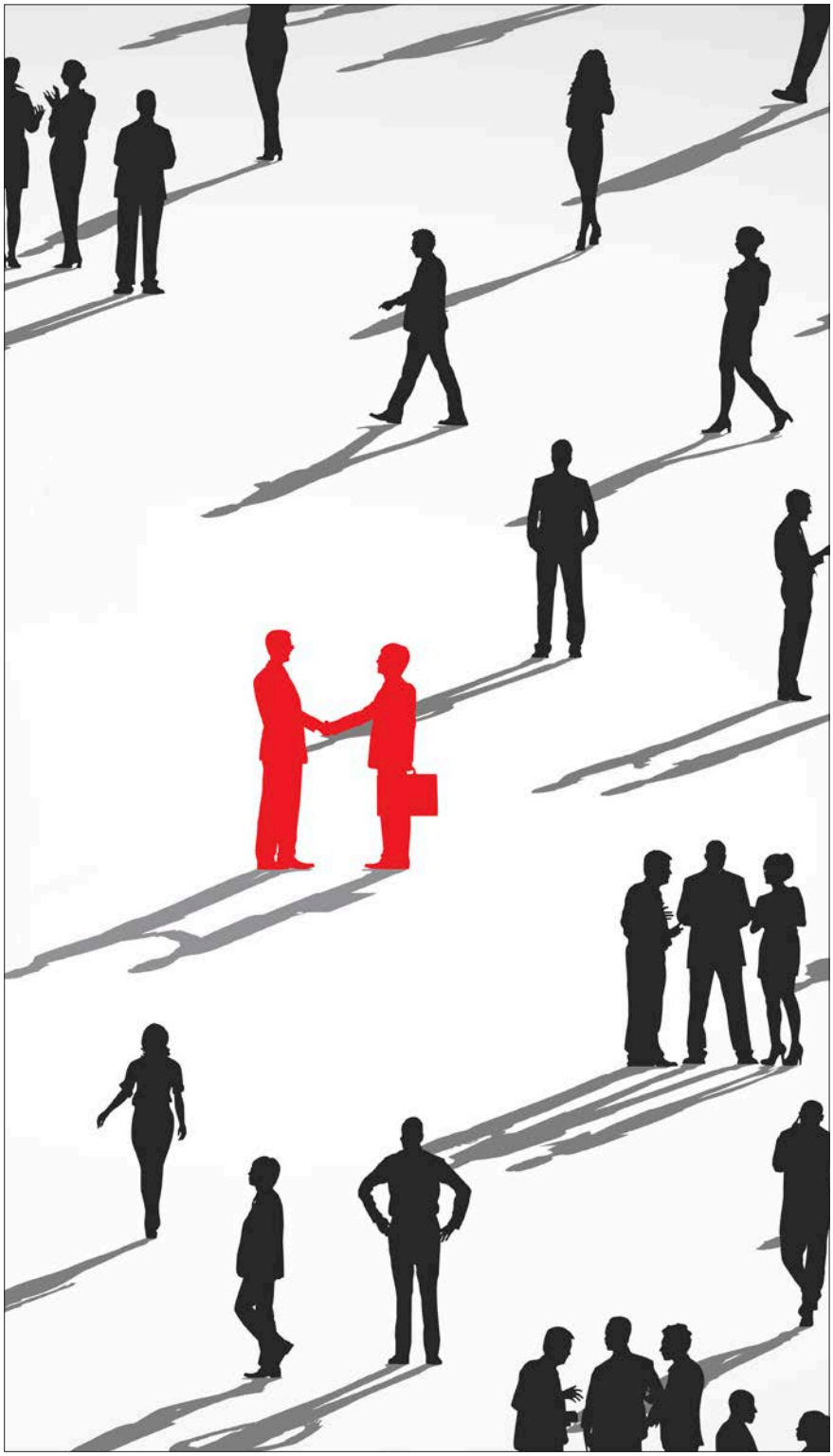
The police arrived and arrested her. A relative was summoned to retrieve the child. When the woman later came to court, she ended up in a verbal confrontation with the Judge after she repeatedly interrupted him and disrupted court. After he finally got her to stop, she requested a continuance to allow for time to hire an attorney. The Judge granted the continuance, and she headed toward the door. This would be the end of proceedings for most defendants. Not this young woman, however, as she exclaimed "I don't give a **** who you are" on the way out the door. As prosecutor, I heard this along with the court clerk who looked shock at the Judge. "What did she say?" the Judge asked. "She said she didn't give a **** who you are," exclaimed the clerk. I told the Judge I heard the same.

The Judge asked the bailiff to have her brought back into the courtroom. She was brought back before the Judge and told what the Clerk and I had just advised the Judge. "I did not say that," she emphatically exclaimed. The Judge then inquired whether anyone else in the court had heard what she said. Ninety percent of the room raised their hands. The Judge proceed to have about six people repeat what they heard, and it matched what we had relayed to the Judge verbatim in all six cases. The defendant claimed everyone in the room was lying. She was sentenced for Contempt of Court and taken out the door screaming the entire way… Thirty days in jail over a pickle on a sandwich, a situation which could have easily been cured. Even worse, we are all convinced she truly believes she did nothing wrong.

The Prosecution rests, your honor. ML

Have a job position that you need to fill?

Use IMLA's job board to reach top quality candidates. Take advantage of our 20% discount until June 30, 2020. Promo code: IMLAML620.



INSIDE CANADA

BY: MONICA CIRIELLO,
Ontario 2015

Contested Thoroughfares, Off-Premises Signs, Hidden Sprinklers and More

Eliminating Off-Premises Portable Third-Party Advertising Signs is Upheld

Belleville Sign Rentals Inc. et al. v. The Corporation of the City of Belleville, 2019 ONSC 6579 (CanLII) http://canlii.ca/t/j3cbd

The Applicants operate a business which leases third party advertising signs in the City of Belleville (the "City"). The City has a Sign Bylaw (the "bylaw") that regulates on-premises signs which advertise site-specific information for what is at that location and off-premises signs which are portable or third party advertising. After numerous resident complaints, the City determined that off-premises portable signs were causing visual clutter throughout the City and required significant staffing resources dedicated to removal. Following an external and internal consultation, an amendment to the bylaw was put forward and accepted by City Council to eliminate off-premises portable signs. After the amendment was passed, no renewal permits were issued for off-premises portable signs. The Applicants filed an application to seek declaratory relief.

HELD: Application dismissed.

DISCUSSION: The Court confirmed the City's authority under s. 10(2) of the *Municipal Act, 2001* S.O. 2001, c. 25 (the "*Act*") to pass bylaws regulating signs. The Applicants argued that the amendment was a violation of its right to free speech under s. 2(b) of the *Charter of Rights* and is not saved under s.1. The City agreed that the amendment infringed on s.2(b) but argued it was reasonably limited under s.1. Once an infringement was established, the onus was on the City to satisfy the four-prong criteria summarized in *Langenfeld v. Toronto Police Services Board,* 2019 ONCA 716:

1. The objective of the law must be sufficiently important to justify limiting a *Charter* right;
2. The law must be rationally connected to the objective of the law;
3. The law must impair the constitutional right no more than is necessary to accomplish the objective; and
4. The law must not have a disproportionately severe effect on the constitutional rights of the persons affected by it.

The Court determined that the amendments to eliminate off-premises portable signs were intended to address two main concerns; visual clutter, as the signs were often abandoned, and portable signs increased workload for City staff. The rationale for passing the amendments was clear and would assist the City to achieve outcomes for the two main concerns. The Court agreed with the City that the amendment would have minimal impact, as the bylaw still permitted many other types of signs throughout the City and furthermore the amendment was limited to the sign's structure and location, not the content on the sign. The amendment might limit freedom of speech but only to the most modest degree. The Court held that the City satisfied the four-prong test, and the amendment was a reasonable limit that was demonstrably justified under s. 1.

The Applicant unsuccessfully attempted to argue procedural fairness, specifically that the City had a duty to consult prior to enacting the amendments to the Bylaw. Despite there being no legal duty that required the City to consult with the Applicant prior to the amendments, the City did engage both internal and external stakeholders. The Court went further to point out that the City was within its authority to pass the amendments, and a bylaw can only be quashed if it was passed in bad faith or was deemed illegal. The onus is on the party bringing forth the argument to provide evidence of bad faith. The only evidence before the Court was that the City had the public interest in mind when it passed the amendments to the bylaw.

Laneway is "Street" due to Municipality's Continuous Use for Water Supply

St. Mary's (Municipality) v. Cook, 2019 NSSC 374 http://canlii.ca/t/j3xsd

A laneway within the jurisdiction of Village of Sherbrooke, Municipality of the District of St. Mary's (the "Municipality") connects the Municipality to the local lake to maintain water supply, however it is also used by residents who own property alongside the laneway, including the Respondents. A resident who owned land near the laneway conveyed title to the Respondents by way of a warranty deed--and via a Quit Claim deed, conveyed to Respondents whatever interest he may have had in the laneway. Under the Nova Scotia *Expropriation Act,* R.S.N.S. 1989, c. 156 the Municipality expropriated the laneway and filed an application under s. 17 of the *Expropriation Act* to have the Court determine who has the right and interest in the laneway.

HELD: Laneway vested with the Municipality

DISCUSSION: The Municipality's position is that the laneway is for the public and is free of private interests. The Respondents do not claim to own the laneway but are pursuing a claim for injurious affection following the expropriation as landowners who have acquired a private right of way over the laneway. To determine if the laneway was public, the Court began by reviewing the legislation governing municipal routes, *Municipal Government Act,* SNS 1998, c. 18 (the "*MGA*"). The *MGA* references "streets" which refers to "public street, highway, road, lane […]". All "streets" in the boundaries of a municipality are vested absolutely in the municipality, however there is a caveat for a "road" under s. 308(3) to become a "street". No "road" becomes a "street" until approved by council or it is vested in a municipality according to law. Both parties agreed that council did not approve the laneway.

A "road" may qualify as a "street" under s. 307 of the *MGA* if it is a transportation route with a public purpose operated by a municipality. The evidence put forth by the Municipality made it clear that the laneway had been used for years by the Municipality to access water supply infrastructure. Therefore, the Court found that despite having no identified owners on title, the laneway had been operating as a "street" as defined in the *MGA* since 1998, and under the *MGA* the laneway would have vested absolutely with the Municipality. As with any street, the Respondents are permitted to use the laneway as members of the public but have no private control over the laneway.

Watch Your Step: Individual Risks and the City's Duty of Care

Ellis v Lethbridge (City), 2019 ABPC 276 http://canlii.ca/t/j36l5

The Plaintiff stepped in a sprinkler hole covered with grass at a park owned and operated by the City of Lethbridge (the "City") and suffered a broken ankle. The City has dedicated staff to monitor irrigation in the park, which includes being on the lookout for hazards resulting from the over 2000 sprinkler heads. The City repairs a sprinkler head when staff come across an issue, but due to the large number, each is not checked individually. The City acknowledged that the sprinkler head the Plaintiff fell on could have been missed by City staff. The Plaintiff filed a claim for damages.

HELD: Claim dismissed.

DISCUSSION: Relying on s.7 of the *Occupiers' Liability Act*, RSA 2000, c. O-4 (the "OLA") the City argued that the Plaintiff willingly accepted the risk of injury by entering the park and the City was under no duty of care to a visitor. The Court disagreed, finding that with the evidence before it there was no way the Plaintiff was aware of, let alone accepted, the risk associated with entering the park. In the alternative, the City argued that it was exempt from liability under the OLA because the maintenance of the irrigation system at the park was based on a policy decision of the City, *Just v. British Columbia*, [1989] 2 SCR 1228. The City detailed that its policy decision to reduce the number of sprinkler inspections was reasonable and justified based on the limited availability of public funds. The Court disagreed and held that the policy exemption only applies to common law tort duty, and not statutory duty under the OLA. The Court made mention that there is not a consensus in the law on this point, but nonetheless determined that the common law policy exemption does not apply to the City.

However, s. 530 of the Municipal *Government Act*, RSA 2000, c. M-26 (the "Act") provides a very narrow statutory exemption against any tortious liability arising in the context of the section, which exempts governmental agencies like the City from any liability for damages with respect to inspection frequency, infrequency or even absence. Section 530 does not require a policy analysis and is *prima facie*. As such the Court concluded that s. 530 exempted the City from liability under the OLA for any breach of a duty of care that arose in conjunction with the City's inspection or maintenance of sprinkler heads. The Plaintiff's claim was dismissed. ML

International Municipal
Lawyers Association
51 Monroe Street, Suite 404,
Rockville, MD 20850

Nonprofit Organization
U.S. Postage
PAID
WEST

municode

CONNECTING YOU & YOUR COMMUNITY

Codification & Recodification

Legal Reviews

Self-Publishing Software

ADA Website Design



HELPING STRENGTHEN DEMOCRACY

We've helped attorneys across the nation for over 65 years and innovated every step of the way. That legacy helps us create best in-class software solutions for codification, government website design, and agenda management.

We're inviting our attorneys to join the MuniAtty Listserv. The listserv is a joint effort between Municode and IMLA that has grown into a professional community of over 900 municipal attorneys that share sage advice and sympathetic ears with their peers across the nation.

info@municode.com
800.262.2633