IMLA

Municipal Lawyer

THE JOURNAL OF LOCAL GOVERNMENT LAW

MAR APR 2020
VOL.61 NO.02

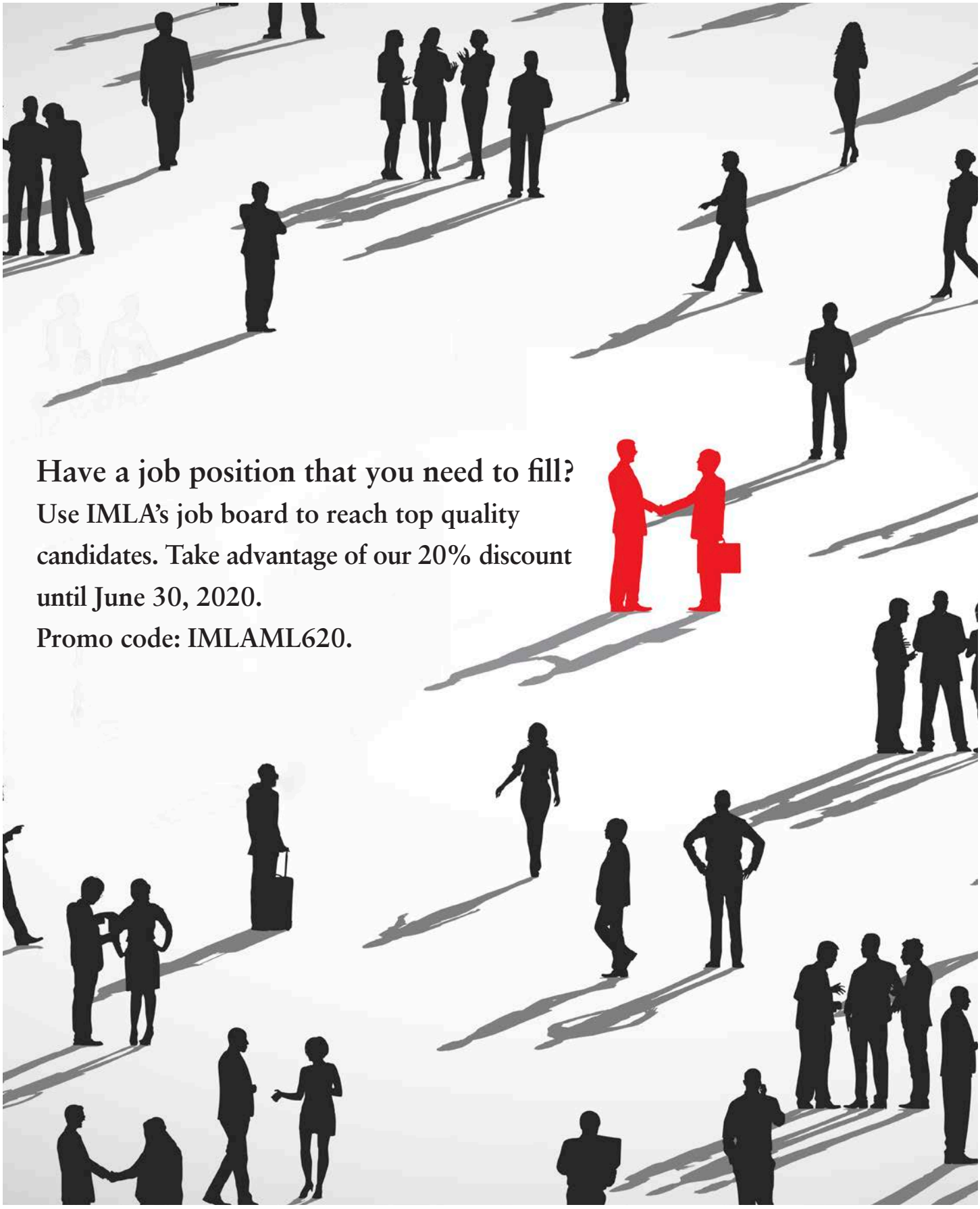
Spotlighting the IMLA Fellows

Mitigating Municipal Liability: Building Consensus and Improving City Operations

Ethical Issues For Municipal Lawyers In Evolving Organizations

The Elephant In The Room: Drug Testing Job Applicants After *Chandler v. Miller*




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

MARCH-APRIL 2020

SPOTLIGHTING THE IMLA FELLOWS

THE ELEPHANT IN THE ROOM: DRUG TESTING JOB APPLICANTS AFTER *CHANDLER V. MILLER*

By: Julia M. Vasquez, First Assistant City Attorney, Wichita Falls, Texas

Public employers must be increasingly cautious about suspicionless drug testing-and may want to and may want to consider radically downsizing such policies.

PAGE 6

ETHICAL ISSUES FOR MUNICIPAL LAWYERS IN EVOLVING ORGANIZATIONS

By: Lisa Glover, Senior Assistant Town Attorney, Cary, North Carolina

As local governments adapt to constantly-changing societal needs, so too must municipal lawyers continually evolve, becoming competent in emerging technologies and embracing new paradymes.

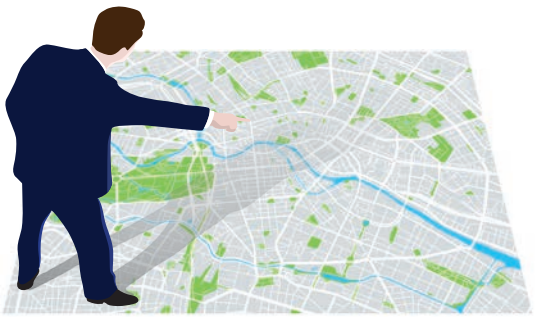
PAGE 12

MITIGATING MUNICIPAL LIABILITY: BUILDING CONSENSUS AND IMPROVING CITY OPERATIONS

By: Joseph G. Lauber, Managing Member, Lauber Municipal Law, LLC, Lee's Summit, Missouri

Deeper familiarity with the municipality's operations, finances, demographics and infrastructure can result in better legal advice, fewer miscues and less litigation.

PAGE 18



COVER AND FEATURE ILLUSTRATIONS BY:TRUJILLO DESIGN

DEPARTMENTS

26 AMICUS CORNER

Vehicles Put Municipalities on the Docket

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

Two cases involving autos and public safety.

28 FEDERAL

The FHA and Multifamily Development: When Suburbs Get Dense

By: Michelle D'Andrea, Deputy City Attorney for Development Services, Plano, Texas

Legal constraints on selective crowding.

30 INSIDE CANADA

Risky Skateboarding, Plastic Bans, and Uncooperative Officers

By: Monica Ciriello, Ontario 2015

Recent cases of interest.

32 LISTSERV

Lawyers – Hardly One-Dimensional

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

The diverse paths taken by IMLA members

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

Spotlighting the IMLA Fellows

Over the past 20 years, IMLA's membership has comprised many thousands of dedicated and accomplished local government attorneys. But only 105 of our members, roughly five per year on average, have achieved the distinction of being recognized as an IMLA Fellow. The IMLA Local Government Fellows program, established in 1999, recognizes attorneys who demonstrate exceptional competence in the field of local government law. These are IMLA members who have devoted the time and energy—while fulfilling their existing responsibilities to their clients and communities—to accumulate additional CLE credits, complete a two-part IMLA exam, and produce a scholarly paper elucidating an aspect of government legal practice. They contribute greatly to the profession and to IMLA.

In this March-April 2020 issue of *Municipal Lawyer*, we recognize the accomplishments of that small fraction of our members who take on the challenge to be certified as IMLA Fellows. This *ML* publishes four 2019 Fellows' submissions: Julia Vasquez, First Assistant City Attorney, Wichita Falls, Texas, cautions about the legal pitfalls involved in drug testing public employees, particularly as states increasingly legalize marijuana. Joseph Lauber, Managing Member of Lauber Municipal Law, Lee's Summit, Missouri, illustrates how municipal lawyers can become even more effective by developing an in-depth understanding--financial, logistical, and more--of their communities. Lisa Glover, Senior Assistant Town Attorney, Cary, North Carolina, revisits a topic which cannot be studied too frequently—the continuing ethical obligations of government lawyers as technology evolves, and Michelle D'Andrea, Deputy City Attorney, Plano, Texas, outlines the increasing federal scrutiny of potential discrimination as suburbs try to limit population density.

These March-April 2020 articles follow upon the two Fellows' contributions in our January-February 2020 *ML*, and are but a portion of the excellent submissions we receive each year from the group.

As IMLA President Patrick Baker notes, the 2019 Fellows class numbered eleven—the largest in the history of the program. And under the leadership of IMLA Board members Doug Haney and Shauna Billingsley, we look to continue on that trajectory, welcoming a new class of IMLA Local Government Fellows during our upcoming Annual Conference in September of this year.

Congratulations to the IMLA Fellows, all 105 of you, and here's to many more. ML

Best regards,

Erich Eiselt

PRESIDENT'S LETTER



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

Legacy Leadership Through Succession Planning (And How IMLA Can Help)

Since August of 2004, I have held positions in Durham and Charlotte municipal governments that have included the awesome responsibility of directly identifying, developing, recruiting, hiring, promoting and managing talent for the organization. I recently had a conversation with one such individual who I promoted to the position of Parks and Recreation Director back in my City Manager days in 2007. After serving the community for 13 years with distinction and much accomplishment, she is retiring next week. In our conversation we began to reminisce about our time working together. She thanked me for the one millionth time for providing her with the opportunity and support to serve in her dream job. She also mentioned that she was part of my "legacy of leadership" in Durham. Legacy?? Only old people who have been around forever have a legacy. But then I remembered that I am 52 with almost 23 years in municipal government experience. I have certainly been around long enough and involved with enough projects and people to have developed an identifiable legacy.

The typical dictionary definition of the word legacy speaks to something transmitted by or received from an ancestor or predecessor or from the past. From a connotative perspective, we often associate the word legacy with an assessment of the quality of a body of work over a period of time. For example, many sports pundits are currently discussing the legacy of the recently deceased Kobe Bryant. Is his legacy defined by his five NBA Championships? How about his "Mamba Mentality," that single-minded focus on preparation and unquenchable will to win. On the flip side, the legacy of the 2017 Houston Astros is certainly a hot topic of debate on sports talk radio. What was just a few weeks ago considered a legacy of excellence and hard work has been severely undermined with their acknowledgment of blatant cheating in their effort to with the World Series. In these cases, one's legacy speaks to how you or your accomplishments are viewed or remembered by others.

So, if we build off of these examples of legacy, we can start to consider the term "legacy of leadership." This is less about the assessment of the quality of tangible accomplishments and more about the quality of the leaders empowered to carry on a particular mission or vision. The development of these leaders is at the heart of quality succession planning. At its core, succession planning is the process by which an organization develops future leaders to replace current leaders when the current leaders depart an organization. While it is important to have competent talent ready to take vvover when departures occur in your organization, it is also critical that the leadership engage in what has been referred to as effective talent pool management. This entails the creation of an office atmosphere of excellence where high performing employees at all positions of the organization are identified, developed, appreciated and if all of the preceding goes well, retained. As transitions occur, the overall level of excellence is maintained.

As you consider your own legacy of leadership, pay close attention to the development of your entire staff in addition to the person most likely to replace you when you depart. For those of you with multiple attorneys in your office, you know that is takes all of you performing at a high level to deliver the high quality services your clients expect. Make sure they are all actively engaged in the mission of the office and have an active role in the creation of a positive office atmosphere. I would also encourage you to consider access to IMLA resources and events as an important component in your developmental toolbox for your attorneys. Encouraging your attorneys to attend IMLA seminars and conferences as well as the numerous CLE programs is an excellent way for them to increase their municipal law knowledge while networking with their colleagues from across the country and Canada. Participation in the numerous working groups, sections and committees also provides opportunities to develop their leadership skills.

I would also like to highlight the IMLA Local Government Fellows Program. Established in 1999, this prestigious program was established to recognize attorneys as legal specialists in the field of local government law and to encourage attorney proficiency and competency in the local government legal field. The program offers local governments a reliable benchmark for determining experienced and knowledgeable practitioners. The 2019 class of local government fellows, some of whose papers are featured in this issue of *Municipal Lawyer,* was the largest class to date and we hope to exceed that number in 2020. This Fellows distinction is a valuable asset in developing the talent in your office and is another way that IMLA can assist you to build your own legacy of leadership. ML

The Elephant in the Room: Drug Testing Job Applicants After *Chandler v. Miller*

BY: JULIA M. VASQUEZ
First Assistant City Attorney, Wichita Falls, Texas



I. INTRODUCTION

In many municipal governments, a drug test is just part and parcel of the application process. Once an applicant receives a conditional offer of hire, he or she is whisked away to the Human Resources department for "in processing," as we used to call it in the military. Typically, as part of this process, the prospective employee is handed myriad important documents to read, acknowledge and sign. Usually, these documents include various employment policies which the governmental entity believes are critical for an applicant to be familiar with, and documents describing pre-hire procedures such as Federal Credit Reporting Act credit checks and criminal background checks. Tucked away in that stack of papers will invariably be several "consent and release of liability" forms purporting to release the governmental entity from any liability associated with the hiring process.

One of those documents will likely be a form notifying the applicant that he or she will be scheduled for a pre-employment physical and a drug test. The applicant will be signing quite a few forms that day: forms to authorize direct deposit, tax withholding, internet access, and facilities access; forms acknowledging receipt and understanding of policies; forms directing the governmental entity to keep personal information confidential; forms for benefits and insurance; and a form acknowledging he or she will be required to undergo and pass a physical with a drug testing component. Usually, either this acknowledgement form or one provided by the testing facility will inform the employee what drugs will be tested for and request the applicant to disclose any medications which could affect the drug test. It is understood that these physicals and drug tests are mandatory and refusal to submit would be grounds for revoking the offer of hire. The pre-employment drug tests are conducted after an applicant has received a conditional offer of employment. The Americans with Disabilities Act treats pre-employment drug tests as "medical examinations" under the statute, and they cannot be administered until after an applicant has received a conditional offer of employment.[1] However, adherence to the ADA requirements doesn't legitimize an exam which is not legal in the first place.

There is no question that it would be a violation of the applicant's Fourth Amendment rights if the Human Resources Director called the police chief to "pat down" a male applicant or required a female applicant to empty the contents of her purse as a part of the application process. We would definitely be objecting to what we perceived as an unreasonable search. Yet, most applicants produce a urine sample for testing and think nothing of it. While some municipalities limit pre-employment testing to applicants for "safety sensitive" positions, numerous municipalities include all applicants in pre-employment drug testing.

The state of the law with respect to drug testing in the employment context is still evolving. And while private sector employers have the freedom to drug test under practically any circumstances, government employers are constrained by the Fourth Amendment to the United States Constitution and applicable

In In *Skinner* and *Von Raab*, the Court held that the government is allowed to conduct drug tests without individualized suspicion when there is a "special need" that outweighs the individual's privacy interest.

state constitutions and laws. With that being said, several states which have legalized marijuana to some extent have recently enacted legislation limiting even private sector employers with respect to how drug test results can be utilized in the hiring context. To understand the current state of the law regarding public sector drug testing, a brief summary of the applicable Supreme Court cases and regulatory changes is helpful at this juncture.

II. *SKINNER* AND *VON RAAB*.

The current law applicable to public employee drug testing began with the Supreme Court's companion decisions in *Skinner v. Railway Labor Executives' Assn.*,[2] and *National Treasury Employees v. Von Raab*.[3] In *Skinner* and *Von Raab*, the Court held that the government is allowed to conduct drug tests without individualized suspicion when there is a "special need" that outweighs the individual's privacy interest. In *Skinner*, a number of railroad labor groups protested the Federal Railroad Administration's ("FRA") requirement that employees be subjected to blood or urine tests after being involved in major train accidents or after having violated particular safety rules.[4] The FRA used statistics to show that 42 fatalities and 61 injuries between 1972 and 1983 were attributable to employees who had been under the influence of alcohol or drugs.[5] These statistics indicated that substance abuse was an identifiable problem in the railroad industry. In 1985, the FRA, in response to these statistics, implemented a program that required any employee involved in a major train accident which caused either a fatality, the release of hazardous material, or railroad property damage in excess of $500,000, to provide blood and urine samples for testing.[6] The Railway Labor Executives' Association brought suit to prevent such samples from being taken.

In *Skinner*, the Court found that public safety was such a "special need" justifying drug and alcohol testing of employees involved in railroad accidents. The Court balanced the special characteristics of the railroad industry, where on-the-job intoxication was a significant problem, and the serious risks to public safety. The Court determined that covered employees' expectations of privacy were diminished by reason of their participation in an industry that is heavily regulated to ensure safety.[7] Balancing the privacy rights of the individual with the compelling interest of the government, the Court held that the special needs exception applied because the intrusions created by drug testing were minimal compared to the safety concerns underlying the FRA's drug testing policy.[8] The Court thus deemed the drug testing policy constitutionally valid and, in doing so, tentatively established a framework for deciding drug testing cases. This is the case which led to labeling employees in hazardous jobs "safety-sensitive."

In *Von Raab*, the Court found a special need in relation to customs agents who carry firearms or are directly involved in drug interdiction. The public employees involved in *Von Raab* were employees of the United States Customs Service, an agency administered by the Department of Treasury. The Customs Service has a several responsibilities, but the activity in question in *Von Raab* was the interception of contraband that included, but was not limited to, illegal drugs.[9] In May 1986, Customs Service Commissioner William Von Raab implemented a drug testing program for all employees who were to be promoted or hired to serve in positions that involved drug interdiction, the carrying of firearms, or the handling of classified material. The National Treasury Employees Union brought suit to prevent the program from taking effect.

The Court began its analysis by identifying the government's special needs with regard to the first two categories.[10] The rationale given by the Treasury Department was that Customs employees responsible for drug interdiction were "exposed to the criminal element and to the controlled substances it sought to smuggle into the country." The Customs Service was concerned not only about employees' "physical safety," but also the risk of bribery or corruption.[11] The Supreme Court found that in these circumstances, "the Government had a compelling interest in ensuring that interdiction personnel who dealt directly with drug dealers and smugglers were physically fit, and had unimpeachable integrity and judgment."[12] Similarly, the Court applied the same analysis to those who carried firearms. "Employees who may use deadly force to plainly discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences."[13] Both *Skinner* and *Von Raab* provided a framework for suspicionless drug testing as applied to employees

Continued on page 8

working in safety-sensitive positions and those working in sensitive law enforcement positions who carry firearms who are not accessible to their employers on a day-to-day basis.

Based on similar *Skinner*-type considerations of "safety-sensitive" positions, the Federal Omnibus Transportation Employee Testing Act of 1991 was passed. Under this Act, certain employees in the motor carrier, railroad, mass transit industry and in aviation must be tested. Under the Act, any municipal employee with a Commercial Driver's License is subject to drug testing, including pre-employment drug testing.[14] This Act basically codified suspicionless testing, including pre-employment testing, for certain applicants and employees in safety-sensitive positions.

III. THE FIRST "PRE-EMPLOYMENT" TESTING CASE

The Supreme Court has yet to take a case that directly addresses the constitutionality of pre-employment drug testing of applicants. The Court decided a case in 1997, however, that provides the analytical framework for determining the constitutionality of "across-the-board" testing of applicants. In 1997, the Supreme Court decided the case of *Chandler v. Miller.*[15] The Court examined a Georgia statute that required candidates for state offices to certify they had a negative drug test 30 days prior to qualifying for nomination or election to office. The Court's analysis in *Chandler* began with the "uncontested point" that Georgia Statute § 21-2-140,[16] which required candidates for state office to submit to and pass a drug test, "effects a search within the meaning of the Fourth and Fourteenth Amendments." The only point of contention was whether the test, in the absence of individualized suspicion, was reasonable under a Fourth Amendment analysis.[17]

Speaking for an overwhelming majority (8-1), Justice Ginsburg indicated that the State presented no realistic evidence of a drug problem among State officeholders. In fact, the counsel for the State of Georgia admitted that there was no evidence of such a problem. Georgia attempted to justify its drug-testing requirement by pointing out that "the use of illegal drugs draws into question an official's judgment and integrity; jeopardizes the discharge of public functions, including antidrug law enforcement efforts; and undermines public confidence and trust in elected officials."[18]

In distinguishing this case from *Von Raab,* Ginsburg noted:

> Respondents overlook a significant difference between *Von Raab* and Georgia's candidate drug-testing program. In *Von Raab* it was 'not feasible to subject employees [required to carry firearms or concerned with interdiction of controlled substances] and their work product to the kind of day-to-day scrutiny that is the norm in more traditional office environments.' Candidates for public office, in contrast, are subject to relentless scrutiny—by their peers, the public, and the press. Their day-to-day conduct attracts attention notably beyond the norm in ordinary work environments.[19]

As a result, Ginsburg reasoned, the legislation was "symbolic" and did not overcome the presumption of individualized suspicion required for searches embodied in the Fourth Amendment.[20] The Georgia statute was not in response to any previous drug problems, and the officials covered under the law typically did not perform high-risk, safety-sensitive tasks. Rather, it was simply meant to be a statement that Georgia did not condone drug abuse, and a symbolic statement was found to be insufficient justification for suspicionless testing.

While not technically "applicants" within the employment context, the elected state officials had not taken the oath of office which was contingent on them passing a medical examination and a drug test. So, in that respect, they are very much like job applicants who are subjected to suspicionless drug tests.

Since *Chandler*, there have been several cases where pre-employment drug testing has been upheld as constitutionally reasonable when the applicants are filling safety sensitive positions.[21] However, there is a dearth of cases which actually address pre-employment drug testing as applied to all applicants, regardless of position, for employment. Two pre-*Chandler* cases which are often cited to support the notion that drug testing of all applicants is constitutionally permissible, are *Loder v. City of Glendale*[22] and *Willner v. Thornburgh*.[23]

Willner v. Thornburgh, a 1991 case, involved drug testing of Department of Justice attorney applicants. In *Willner*, the D.C. Circuit reasoned that because these applicants are subjected to a rigorous background investigation including drug testing, they have very little expectation of privacy. In other words, because every aspect of these applicants' lives was open for government inspection, a drug test would constitute a minor intrusion considering all of the other private information of an applicant subject to intense scrutiny.[24] While still technically "good law" because it hasn't been overturned, *Willner* is very fact-specific in that it is dealing with DOJ applicants subjected to extremely rigorous, intrusive background investigations. It stretches credulity to justify widespread suspicionless drug testing based on a case where the applicants are applying for very specialized and sensitive legal positions.[25]

Public employers should review their drug testing policies to ensure that they are constitutionally permissible. If medical and recreational marijuana use is allowed in states where your employees work, it's time to examine the core motivation behind your drug testing policy.

As with *Willlner, Loder* was decided before the Supreme Court's *Chandler* case. *Loder* was a suit brought by California taxpayers against the City of Glendale for its across-the-board testing of applicants and employees offered promotions. The California Supreme Court found that the City's drug testing program as applied to current employees was unconstitutional, but was constitutional as applied to applicants.[26] In making this finding the court held that "when…the drug screening program is administered in a reasonable fashion as part of a lawful pre-employment medical examination that is required of each job applicant, drug testing of all job applicants is constitutionally permissible under the Fourth Amendment…"[27] The court distinguished *Skinner* and *Von Raab* by differentiating between individuals required to give a urine sample for "medical reasons" as part of a pre-employment physical as opposed to those required to give a sample on demand.[28]

Contrary to the Supreme Court's later decision in *Chandler,* California high court in *Loder* discerned a generalized "public interest" justification for suspicionless drug testing of applicants, determining that

> [B}ecause of the significant problems—absenteeism, increased safety concerns, tardiness, reduced productivity, and increased risk of turnover—typically posed by an employee who abuses drugs or alcohol, an employer has a legitimate and substantial interest in determining whether or not an applicant currently is engaging in such conduct before the employer finalizes any hiring decision."[29] *Loder* has very little precedential value considering it was decided before *Chandler* and, because in 2008, the Ninth Circuit Court of Appeals issued a ruling in a case directly contrary to *Loder.*[30]

Both *Loder* and *Willner* were decided during the decade after the Drug Free Workplace Act was enacted in 1988,[31] implemented as part of the war on drugs under President Ronald Reagan's administration. According to the Substance Abuse and Mental Health Services Administration, this law made creating a drug-free workplace a requirement for any organization receiving a contract or grant from a federal government agency. Part of the law required implementing a drug-free awareness program for employees, disciplining employees with workplace drug convictions and maintaining "a drug-free workplace through an ongoing, good faith effort," which includes drug testing.

During the years following, governmental employers at all levels implemented drug testing policies mirroring the federal law. The culture during this time period could be best described by First Lady Nancy Reagan's signature "just say no" project. It was a culture of zero tolerance and belief that drug testing was the primary deterrent in maintaining a drug free workplace. The Drug-Free Workplace Act still maintains "zero tolerance" policies in all federal grant recipients as well as federal contractors. However, the United States Department of Labor ended the Drug-Free Workplace Program in 2010. The dismantling of the government program was possibly due to several states looking into the legalization of medical marijuana use.

IV. *CHANDLER* RE-EXAMINED.

Other than cases dealing with suspicionless testing in the educational setting, originally there were few significant cases dealing with pre-employment drug testing except those that defined the contours of what constituted a "safety-sensitive" position subject to suspicionless testing. In 2008, however, a woman named Janet Lanier applied for a library-page position with the City of Woodburn, Oregon, and filed suit after her offer of employment was withdrawn because she refused to take a pre-employment drug test. In a very straightforward opinion, the United States Court of Appeals for the Ninth Circuit ruled that the City's reliance on merely having a drug-free workplace or economic efficiency was insufficient to outweigh the burden upon individual privacy.[32]

Continued on page 10



Julia Vasquez is the First Assistant City Attorney for the City of Wichita Falls. She joined the City in September 2001 and was promoted to the First Assistant position in December 2005. She is responsible for federal litigation involving claims under 42 U.S.C. § 1983, Title VII, and other employment statutes, and state litigation involving breach of contract claims, condemnation actions, and claims brought pursuant to the Texas Tort Claims Act. She advises City management on all employment and Civil Service related matters. Julia is the legal liaison to the Human Resources Department, Police and Fire Departments, and the Civil Service Director. Julia began her legal career as an Assistant Staff Judge Advocate in the United States Air Force, and represented the Air Force in several special and general courts-martial. Prior to joining the City, Julia was an associate in the Labor and Employment Section of Haynes and Boone in Fort Worth and later a partner in the firm Karger, Key, Barnes and Springer. She produced this article for her 2019 IMLA Fellows certification process.

The Circuit went on the say that to pass constitutional muster, the City must satisfy a special needs test for such testing. This could be accomplished by the City in positions involving safety-sensitive tasks or positions that include the carrying of firearms or drug interdiction in the scope of work.[33] The City was unable to justify the testing for any reasons other than the desire to have a drug- free workplace.[34] Woodburn asserted "that it has a substantial and important interest in screening library pages for three reasons: drug abuse is one of the most serious problems confronting society today, drug use has an adverse impact on job performance, and children must be protected from those who use drugs or could influence children to use them."[35] The Circuit disagreed: "No doubt these problems are worthy of concern, but there is scant, if any, indication that on account of them, the City has 'special needs' of sufficient weight to justify an exception to the Fourth Amendment's requirement of individualized suspicion."[36]

On the opposite coast from Oregon in Key West, Florida, Karen Voss applied for the position of Solid Waste Coordinator in 2012.[37] In connection with her application for employment, Voss provided the City with her driver's license, educational history, employment history, references, answered questions about convictions and was subjected to a criminal history search. On January 28, 2012, Voss was offered the Solid Waste Coordinator position. On February 5, 2012, she reported to Human Resources for the "post-offer" stage of the application process, at which Voss: was provided with a copy of the City's "Drug Free Work Policy;" signed both a drug-testing identification form and an Employee Acknowledgement Agreement, acknowledging receipt of the Policy; and was asked to report to the City's drug-testing specimen collection site within one hour to give a urine specimen for urinalysis. The Employee Acknowledgement Agreement states that, "As a job applicant, I freely and voluntarily agree to a urinalysis drug screen as part of my application for employment. I understand that a refusal to test ... will disqualify me from employment."[38]

Voss subsequently refused to submit to the pre-employment drug test. Her job offer was withdrawn. The City asserted two important governmental interests in an effort to justify the suspicionless testing of job applicants. First, the City argued that it had an important interest in the "safe, effective, and efficient delivery of public services." Second, the City argued that the position was "safety-sensitive" because the coordinator must occasionally supervise the transfer station and give presentations to school-aged children." The district court, relying upon the Supreme Court's decision in *Chandler v Miller*, rejected the City's argument regarding the safe and effective delivery of services as being merely a "symbolic" interest and therefore insufficient to justify the search. The court indicated that there was no record evidence of a serious problem with drug abuse amongst job applicants or city employees, which might serve to justify the suspicionless testing regimen.[40]

The court was not swayed by the City's assertion that the Solid Waste Coordinator position was "safety-sensitive," justifying suspicionless testing. The court analyzed the essential job functions of the job and concluded that the coordinator was not engaged in safety-related duties. The court also distinguished this case from *Skinner* which found that certain "surpassing safety interests" would justify suspicionless drug testing. In *Skinner*, the Court had been presented with evidence that on-the-job intoxication resulted in multiple fatalities and other injuries over a ten-year period. In *Voss*, the City was unable to produce any such similar history of accidents or injuries in the solid waste department resulting from intoxication.[41]

Finally, the court rejected the City's argument seeking to draw a distinction between current employees and applicants for employment. The City, relying primarily upon the prior decision in *Willner v. Thornburgh*, had argued that suspicionless testing of job applicants was reasonable under the Fourth Amendment because applicants can refrain from applying for positions that require pre-employment drug testing. The district court disagreed, stating in pertinent part as follows:

> [T]there is no precedent in this Circuit which holds that the government can violate a person's rights under the Fourth Amendment so long as prior notice of the impending violation is given. Accordingly, the Court finds no reasons to adopt the distinction between applicants and employees that the City has suggested.[42]

V. CONCLUSION AND RECOMMENDATIONS.

Based on the analysis of the *Woodburn* and *Voss* cases, and based on the existing jurisprudence related to drug testing of public employees, it is more than reasonable to assume that the Supreme Court, if given the chance, would find across-the-board pre-employment testing of all applicants unconstitutional. Notwithstanding the legal prohibitions of suspicionless drug testing, laws regarding drug use, especially marijuana, are rapidly changing. On June 5, 2019, Nevada became the first state to make it unlawful for employers to reject job applicants who test positive for cannabis. The new law

went into effect January1, 2020.[43] The law does not protect positions funded with federal money since cannabis is still illegal under federal law. It also does not apply to safety-sensitive positions like firefighters, police officers, and EMTs, or employees required to operate a motor vehicle.

This legislation follows on the heels of New York City's April 9, 2019 enactment of a ban on pre-employment marijuana testing. The law will take effect May 10, 2020. Pre-employment marijuana testing will continue to be permissible for: police officers or other law enforcement jobs, certain construction and maintenance jobs, positions requiring a commercial driver's license, positions requiring supervision of children, medical patients, or certain individuals with physical and cognitive disabilities, and any position with the potential to significantly impact the health or safety of employees or members of the public. It will also be permissible if required by contract, state or federal law or provisions of any collective bargaining agreement.[44] Other states are considering or have already passed bills to provide employment protection for medicinal and/or recreational marijuana use.[45] Senator Cory Booker has introduced legislation in the Senate which would legalize marijuana and provide certain employment protections.[46]

Thirty-three states plus the District of Columbia, have legalized marijuana to some degree. The District of Columbia and 11 states -- Alaska, California, Colorado, Illinois, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont and Washington -- have adopted the most expansive laws legalizing marijuana for recreational use. Most recently, Illinois became the second most-populous state to legalize recreational marijuana.[47]

This rapidly evolving legal landscape presents new challenges for employers, particularly governmental employers who have to be mindful of constitutional protections. Government employers must balance complying with often divergent federal and state laws, maintaining a safe work environment, and protecting employees' rights considering the job duties, the need for testing and safety concerns. Public employers should review their drug testing policies to ensure that they are constitutionally permissible. If medical and recreational marijuana use is allowed in states where your employees work, it's time to examine the core motivation behind your drug testing policy. Most governmental entities will continue to test those employees hired for or currently holding safety sensitive positions such as DOT covered employees, firefighters and police officers. The issue will be which types of drug tests should continue to be given.

Employers that wish to drug test should include a drug-testing policy in their employment handbook that sets out the specific triggering events for post-accident and reasonable suspicion drug testing. If random testing is included, public employers should audit each position to ensure they are security or safety-sensitive positions. Most importantly, public employers with policies that prescribe mandatory drug testing for all applicants across-the-board should, with haste, revise those policies to apply only to those applicants seeking safety sensitive positions. By doing so, public employers will increase the chance that their policies will withstand legal challenges. **M**

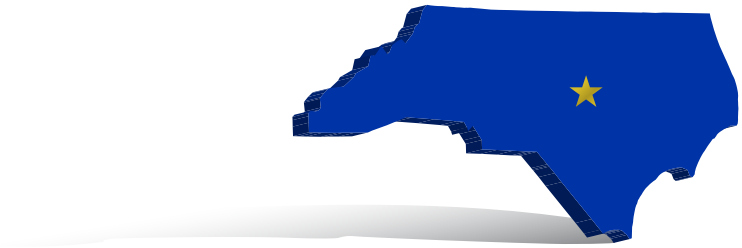
Notes

1. 42 U.S.C. § 12112(d)(3).
2. Skinner v. Railway Labor Executives' Assn.; 489 U.S. 602, 109 S.Ct. 1402, 103 L. Ed. 2d 639 (1989).
3. Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 667–68, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989).
4. *See Skinner*, 489 U.S. at 602.
5. *See Id.* at 607.
6. *See Id.* at 609-10.
7. *See Id.* at 627.
8. *See Id.* at 628.
9. *See Id.* at 659-60 (citing United States Customs Service, Customs U.S.A., Fiscal Year 1985, p.4).
10. *Von Raab*, 489 U.S. at 668.
11. *See Id.* at 669.
12. *Id.* at 670.
13. *Id.*
14. 49 U.S.C. §§ 31301 and 31306; 49 C.F.R. Part 382.101, et seq; 49 C.F.R. § 383.5; 61 Fed. Reg. 9546 (Mar. 8 1996) and 61 Fed. Reg. 14, 667 (April 3, 1996); 65 Fed. Reg. 79462 (Dec. 19, 2000)).
15. 520 U.S. 305, 117 S. Ct. 1295, 137 L. Ed. 2d 513 (1997).
16. Georgia Code Ann. § 21-2-140(a)(4).
17. *Id.* at 305.
18. *Id.* at 321.
19. *Id.*
20. "…the candidate drug test Georgia as devised diminishes personal privacy for a symbol's sake. The Fourth Amendment shields society against that state action." Chandler v. Miller, 520 U.S. 305, 322, 117 S. Ct. 1295, 1305, 137 L. Ed. 2d 513 (1997).
21. Am. Fed'n of State, Cty. & Mun. Employees Council 79 v. Scott, 717 F.3d 851, 869 (11th Cir. 2013); Bluestein v. Skinner, 908 F.2d 451, 457 (9th Cir. 1990); Nat'l Fed'n of Fed. Employees v. Cheney, 884 F.2d 603, 610–11 (D.C. Cir. 1989). Another category—a natural extension of the Supreme Court's holding in *Von Raab*—encompasses police officers, *see* Carroll v. City of Westminster, 233 F.3d 208, 213 (4th Cir. 2000), correctional officers who interact with parolees or inmates in a prison, see Int'l Union v. Winters, 385 F.3d 1003, 1013 (6th Cir. 2004), and firefighters, see Hatley v. Dep't of the Navy, 164 F.3d 602, 604 (Fed. Cir. 1998).
22. Loder v. City of Glendale, 14 Cal. 4th 846, 927 P.2d 1200 (Ca. 1997).
23. Willner v. Thornburgh, 928 F.2d 1185 (D.C. Cir. 1991).
24. *Id.* at 1191 (Thus, as a general matter, applicants for Justice Department positions cannot reasonably expect to—and in fact do not—shield their private lives from

Continued on page 17

Ethical Issues for Municipal Lawyers in Evolving Organizations

BY: LISA GLOVER
Senior Assistant Town Attorney, Cary, North Carolina



The Town of Cary, North Carolina grew from 8000 residents in 1970[1] to over 160,000 residents in 2019.[2] It's known as one of the safest cities in the United States; was rated by Money Magazine as one of the "Best Small Cities in America;" and maintains the highest bond ratings from Moody's, Fitch, and Standard & Poor's.[3] Growth and development over the years have led to increased property tax revenues, allowing Cary to cover the expenses of delivering additional services and maintaining existing infrastructure.[4] However, less than 16% of the land in Cary's planning jurisdiction remains available for new development; the population is aging; and the cost of providing services and maintaining aging infrastructure is expected to increase, eventually surpassing increases in revenue with current tax rates.[5]

Cary, which has a city manager form of government,[6] hired Sean R. Steagall as its Town Manager in August 2016. Steagall recognized that this accelerating pace of change and the new fiscal reality would require a change in the way Cary operated, and a change in mindset of Cary staff. Staff at all levels of the organization, including the legal department, have been introduced to and encouraged to implement tenets of "Adaptive Leadership" as outlined in books by Ronald Heifetz and Marty Linsky of Harvard University's Kennedy School of Government,[7] and to experiment with new and innovative ways to provide services to citizens, including use of new technology.

Other cities are experimenting in different ways with organizational, process change, or technological change. Employees in San Jose are using "Scrum,"[8] which has been described as an "agile project management framework" that is "most frequently used by software development teams."[9] Boston has had an "innovation team" since 2010, and many other cities, including Memphis and Durham, also have them.[10] Many localities are striving to become "smart cities," which one publication has defined as a city that uses "sensors and technology to connect components across a city to derive data and improve the lives of citizens and visitors."[11] Even if your city is not using any of these buzzwords, your city manager has probably talked about "breaking down silos to help people collaborate across boundaries," and is finding it just as difficult to do as it is in the private sector.[12, 13]

While your local government may not be undergoing the level or type of change that's happening in Cary, odds are modes of operation are changing in your organization in some way to meet the challenges of reduced revenue sources, aging infrastructure, disruptive technology innovations (electric scooters, autonomous vehicles), alterations in local weather patterns (too much

City attorneys are required to be generalists who can provide advice on topics from animal control law to zoning. In today's world, where drones are everywhere and autonomous vehicles may soon proliferate, we must do the "necessary study" so we can "provide adequate representation in a wholly novel field."

rain, not enough rain, increased frequency of storm events), the needs of a younger workforce, increasing divisiveness in local politics, or some combination of all of these.

It doesn't take much searching to find articles touting "The Agility That Governments Need for the Digital Age"[14] and "Retooling our Organizational Culture."[15]

As noted by one professor at the Harvard Business School, "organizations everywhere are struggling to keep up with the accelerating pace of change – let alone get ahead of it."[16]

If your organization is adopting the latest and greatest technology, or working to become more adaptive, flexible, collaborative, or entrepreneurial in spirit, you will likely be asked to do the same. What ethical challenges does this present for a municipal lawyer? This article uses the framework of the American Bar Association's Model Rules of Professional Conduct (hereinafter, "Rules") to start the discussion.[17]

Preamble: A Lawyer's Responsibilities

> As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.[18]

In a traditional local government setting, the City Attorney may be looked at as simply the person who tells the Manager or the City Council whether a given course of action is legal (the advisor), and who defends the city in court when the city is sued (the advocate). Lawyers have long been negotiators and evaluators as well, but these skills may be overlooked and underutilized in a siloed organization. Contracts may be negotiated solely by technical staff, who bring the lawyers in only to memorialize a deal. And there may be no one "getting off the dance floor and going to the balcony" to gain "perspective on the bigger picture" of how actions affect the City as whole. [19] The Preamble to the Rules makes clear that lawyers may perform all these roles, and in fact, should be expected to perform all these roles. The Rules thus support and encourage a larger role for attorneys in evolving organizations.

Rule 1.1: Competence

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.[20]

The very first Rule requires lawyers to provide competent representation to their clients. This may well be the biggest challenge in an evolving organization, or just in any organization today, given the pace of change in society and technology. City attorneys are required to be generalists who can provide advice on topics from animal control law to zoning. In today's world, where drones are everywhere and autonomous vehicles may soon proliferate, we must do the "necessary study" so we can "provide adequate representation in a wholly novel field."[21] One commentator has suggested that we "focus on learning skills that the [organization] needs both in the near term and as you look out five years into the future" in order to satisfy the requirement for competence.[22] And of course, we must continue to associate or consult with outside counsel[23] to provide guidance on legal topics that we do not feel competent to handle or that we know we will not have time to properly

Continued on page 14



Lisa C. Glover is the Senior Assistant Town Attorney for Cary, North Carolina. She advises Cary on all aspects of municipal law, with an emphasis on land use law. Previously, she served as an Assistant Attorney General for the North Carolina Department of Justice, representing the North Carolina Department of Transportation in environmental law matters. She began her legal career as a clerk at the North Carolina Court of Appeals. Ms. Glover earned her B.S. degree in Biology from the University of North Carolina at Chapel Hill, and Juris Doctorate and Masters of Environmental Management degrees from Duke University. She was certified as an IMLA Fellow in 2019.

handle, such as complex personnel matters, protracted litigation, or intellectual property law.

Legal subject-matter competence is not enough, however. Comment [8] to Rule 1.1 specifically admonishes lawyers to "keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."[24] Just as in the rest of society, lawyers run the gamut from technology-obsessed to technology-adverse. But unlike the rest of society, we have an ethical duty of competence when representing our clients that extends to technology.[25]

We tend to hear about this most often in the context of e-discovery, and mistakes made by lawyers resulting in release of confidential information,[26] but our duty of technological competence embraces much more than e-discovery. Is your organization transitioning to Microsoft OneDrive, Box, or other "cloud" document storage services?[27] Are city employees using Slack, Google Apps for Business, or other messaging and collaboration tools?[28] Do you understand how they work? Can you competently advise your clients on the public records implications: retaining records properly, segregating confidential or protected records, thoroughly searching for records in response to requests, disposing of records when their retention period ends? Perhaps more importantly, are you taking proper steps to preserve client confidentiality (Rule 1.6) and safekeeping of client property (Rule 1.15) with your own files? Ethics opinions in your state may address steps you need to take when using the cloud or "software as a service."[29]

Rule 1.3: Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

A close corollary of competence is diligence. We must not only understand technology and new developments in the law, we must follow through with that knowledge. One commentator has suggested that "diligence" may require lawyers to not only "have a basic understanding or familiarity with social media," but also to use it "to screen a client or opponent's social media posts to gather relevant information."[30] This raises an interesting question – should you "follow" the Mayor, council members, the manager, or other employees on social media? Do you have a duty to do so? In certain situations, the answer may be yes. Both the New Hampshire and the North Carolina State Bars have recognized that a lawyer must "be competent to obtain [social media] information directly or through an agent, and to know how to make effective use of that information in litigation."[31]

The aspect of diligence that keeps me up at night, however, is that captured in comment 2 to Rule 1.3: "A lawyer's workload must be controlled so that each matter can be handled competently."[32] In an evolving organization, new ideas and experimentation are encouraged.[33] One of the benefits of this approach is said to be that if a new idea "misses the mark, you do not feel compelled to defend it" because you know you are trying things out to "see what happens, and make changes accordingly."[34] Unfortunately, if a new idea misses the mark, the City Attorney may be called on to defend it! When new ideas are introduced, we have a duty to vet them and provide competent advice.

I'm sure all lawyers have concerns with workload, but in private practice I would posit there is (generally) more flexibility to associate with other counsel, hire new associates, or otherwise spread work around or decline new matters. City attorneys must be mindful of limited outside counsel budgets that are typically adjusted only once per year, hiring freezes, and the pressure to "do more with less" that all governments face. And we can't "decline" to represent our client – our only client – without quitting our job.

Rule 1.13: Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

The guiding ethical precept for local government attorneys is that your client is the organization – not the mayor, not any individual council member, and not the city manager. Municipal attorneys typically interact with the governing board, city manager, and department heads. In a new, collaborative environment, where silos are breaking down, lower level staff may be approaching you more often with new ideas for programs or approaches to existing work. It's therefore more important than ever to make sure everyone you work with understands that your first duty is to the organization as a whole.

The wider the circle of people you interact with, the greater the chance that someone will want to tell you something "in confidence" – perhaps they are even concerned with the direction the organization is taking, or want to commiserate with you over some perceived shared grievance. One of the tenets of adaptive leadership and evolving organizations is that there will be change, and that affected employees experience a sense of loss with

> Just as in the rest of society, lawyers run the gamut from technology-obsessed to technology-adverse. But unlike the rest of society, we have an ethical duty of competence when representing our clients that extends to technology.

this change.[35] They may view you as a trusted person they can air concerns to, or they may think what they say to you is protected by attorney-client privilege.

Rule 1.13 requires that we "explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."[36] We know we must warn employees that we do not represent them when we are conducting internal investigations into misconduct; but what about those more mundane, water cooler situations? Can we ever participate in employee discussions about the state of the organization, or the changes it may be undergoing? Does this answer differ if you are "The City Attorney" or an assistant attorney? Does it differ if the discussion is amongst management staff only or includes lower level employees? Management staff, and lower level employees that you interact with frequently, should be reminded about the limits of attorney-client privilege and public records laws. In North Carolina, for example, written communications from the attorney are protected only if (1) made to the governing board; (2) within the scope of the attorney-client relationship; (3) concerning a "claim against or on behalf of" the city or judicial or administrative actions; and are only protected for three years from date of receipt by the board.[37] Emails, Slack messages, or other forms of electronic messaging to the attorney from staff, or from the attorney to staff, are not protected from disclosure.

The most conservative approach, then, would be to stay disengaged, but that leaves you at risk of being judged aloof and not a "team player." It also may not serve the organization – your client – well. Being able to take the pulse of the organization as it deals with change is crucial. Experimenting with new and different ways to do business may result in required legal processes being overlooked. Disaffected employees may turn into litigious ex-employees. You must be aware enough to know if an employee "is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization."[38] If that occurs, you must escalate the matter to the city manager or the city council, as appropriate.[39]

Rule 2.1: Advisor

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

When an organization is undergoing cultural change, there is pressure on all employees to get on board with the new culture. If your council has just hired a new manager, they may expect everyone – including the city attorney – to back her new approach to leading the organization. Attorneys should support the culture and management of their organization, so long as there is no conflict with the lawyer's ethical responsibilities.[40] However, the lawyer must be prepared to give "unpalatable" advice in the face of "unpleasant facts and alternatives that a client may be disinclined to confront,"[41] and must be prepared to give advice, even when not asked, if the "client proposes a course of action that is likely to result in substantial adverse legal consequences."[42]

While a lawyer has no duty to give advice the client has not asked for, comment 5 to Rule 2.1 notes that "a lawyer may initiate advice to a client when doing so appears to be in the client's interest." In a truly adaptive organization, the leadership will actually welcome this candid advice. "In a highly adaptive organization, no issue is too sensitive to be raised . . . and no questions are off-limits. . . . It is not only all right to challenge [management]; it is expected" at all levels of the organization.[43] Even dissenters and skeptics – which lawyers are often accused of being – are recognized as having "the uncanny capacity for asking the really tough key question" that may lead to the unearthing of "a wide range of perspectives that would otherwise be unspoken."[44] Leaders in evolving, adaptive organizations should welcome the critical eye their attorney brings to the table. We should still be sensitive to how we deliver advice, however.

Continued on page 24



"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

2020 Event Bundle – Registration for the 2020 Mid-Year Seminar & 85th Annual Conference
Please email info@imla.org for more information.

LegalEdge SOFTWARE

LegalEdge Software offers the ONLY Browser Based Case/Matter Management Software made just for City and County Attorneys.

- Claims, Litigation, Contracts
- General for FOIA, Legislative Review, Opinions, etc.
- Criminal Prosecution
  - Interfaces to Police/Courts/Jails
- Specialty Cases – Child Abuse/Dependency, Mental Health, Contempt
- Outlook Interface
- Access from any device, anytime, anywhere

LegalEdge Software

Case/Matter Management Software for Municipal Attorneys

Contact Us Now!

610-975-5888

www.LegalEdge.com



Elephant in the Room *cont'd from page 11*

government scrutiny during the hiring process. The background investigation is an extraordinarily intrusive process designed to uncover a vast array of information about those applying for jobs in the Department of Justice. As the Supreme Court stated in *Von Raab*, 109 S.Ct. at 1397, this "especially" "may be expected to diminish their expectations of privacy in respect of a urinalysis test.").

25. *Id.* at 1192 ("The Department of Justice, of course, is not just any employer. It has a legitimate interest in maintaining public confidence and trust. Drug use among its employees would undermine the Department's credibility as the nation's leading law enforcement agency.")

26. *Loder*, 927 P.2d at 1203.

27. *Id.* at 1203.

28. *Id.* at 1232.

29. *Id.* at 1233.

30. *Lanier v. City of Woodburn,* 518 F.3d 1147 (9th Cir. 2008).

31. 42 U.S.C § 8102.

32. *Lanier,* 518 F.3d at 1151-52.

33. *Chandler* makes clear that the need for suspicionless testing must be far more specific and substantial than the generalized existence of a societal problem of the sort that Woodburn has posited. In *Chandler*, the State of Georgia sought to subject candidates for public office to suspicionless testing to show its commitment to the war against drugs. Like Woodburn, Georgia asserted no evidence of a drug problem among the targeted population, and the officials who were required to pass a drug test were neither involved in interdiction, nor did they typically perform "high-risk, safety-sensitive tasks." *Chandler,* 520 U.S. at 321–22, 520 U.S. at 321-22. It follows here, as in *Chandler*, that "[t] he need revealed, in short, is symbolic, not 'special,' as that term draws meaning from our case law." *Id.* at 322.

34. *Lanier*, 518 F.3d at 1150.

35. *Id.*

36. *Id.*

37. *Voss v. City of Key* West., 24 F. Supp. 3d 1219, 1222 (S.D. Fla. 2014).

38. *Id.* at 1222.

39. *Id.* at 1224-26.

40. *Id.* at 1224-25.

41. *Id.* at 1226.

42. *Id.* at 1126-28.

43. Nevada Assembly Bill 132, (80th Leg. Sess. 2019).

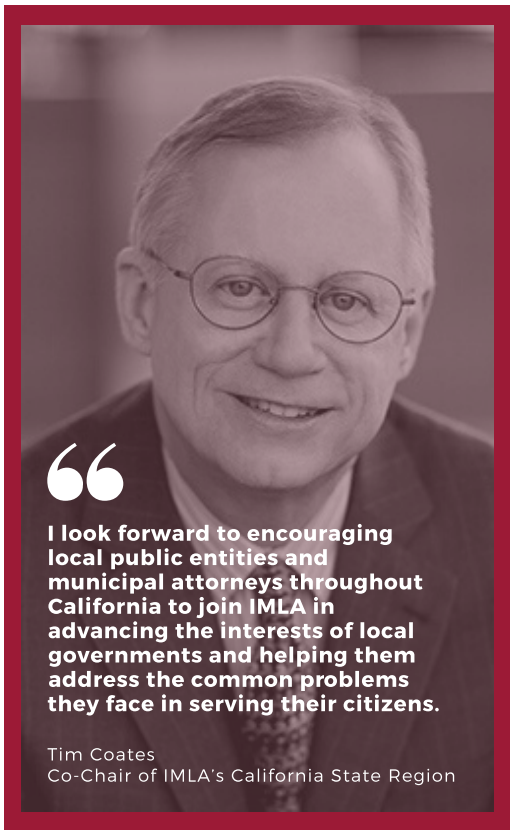
44. Int. No. 1445-A (2019) (amending Section 8-107 of title 8 of the Administrative Code of the City of New York).

45. Passed: Oklahoma, New Mexico, Maine. Considering: California, Iowa, Vermont (not an all-inclusive list).

46. Marijuana Justice Act of 2019, S.597 (116th Congress 2019).

47. Governing: The State and Localities, State Marijuana Laws in 2019 Map, https://www.governing.com/gov-data/safety-justice/state-marijuana-laws-map-medical-recreational.html.

ML



GMSR
APPELLATE LAWYERS
GREINES, MARTIN, STEIN & RICHLAND LLP

Winning On Appeal.

Tim Coates, Managing Partner at the appellate law firm of Greines, Martin, Stein & Richland LLP, headquartered in Los Angeles, was appointed Co-Chair of the International Municipal Lawyers Association's California State Region.

Tim was honored to accept the appointment, stating: "My work over the past several years with IMLA staff and members has been personally and professionally rewarding."

Tim has represented municipalities in appellate courts across the United States, including six victories in the United States Supreme Court.

Phone: (310) 859-7811
Website: www.gmsr.com
Fax: (323) 330-1070

Mitigating Municipal Liability: A City Attorney's Practical Guide to Building Consensus and Improving the City's Operation

BY: JOSEPH G. LAUBER
Managing Member, Lauber Municipal Law, LLC, Lee's Summit, Missouri



Occasionally, city attorneys may be told directly, or certainly may suspect by inference, that they are known around city hall as the "no" person. For those who serve as outside counsel, this phenomenon may be amplified. If left unchecked, especially in unfavorable political contexts, these sentiments can devolve into a virtually adversarial relationship. However, with our broad knowledge of city operations and understanding of the legal consequences of each decision to be made, city attorneys are in a constructive position to assist elected officials and high-level staff to operate at the most proficient and productive levels. This article is designed to establish a practical plan to build consensus and add value to the municipal attorney-client relationship beyond citations and legal memoranda—with the added benefit that cities that are run well may very likely be exposed to less legal liability.

Several years ago I found myself in a small city's board of aldermen meeting where the city clerk (who serves as the de facto finance director, city administrator, and chief cook and bottle-washer) was summarizing the city's proposed budget for the upcoming fiscal year. She was pointing out that revenues had fallen off significantly and that the city had done all it could to eliminate costs. They were down to just two employees, had contracted out for police services, and no one had seen a pay increase for several years. Despite this, she explained, for the third year in a row the city would be forced to cash in a certificate of deposit to make ends meet—this was the last CD they had, and for the most part reflected their entire reserve fund. I was surprised that the Board did not have any questions when prompted by the clerk after receiving this news, so when the mayor began to entertain a motion to accept the budget I asked if I could interrupt to say a few words.

Within the past few months before this scene there had been a city in a nearby county that had undergone the statutory process to disincorporate. Thankfully, I have never been asked to "put a city down" in this manner, but it occurred to me in that moment this city might be only a few miles down the trail from where the nearby city met its demise. I asked the Board members if they understood the ramifications of continuing this path of emptying the city's reserves and cutting costs (and services) to the bone. They did, but what this group of handymen, farmers, and retired schoolteachers did not know was how they could do anything about it. You see, 15 or so years earlier the main highway through town was bypassed around them; businesses were closing up, and kids were leaving to find work in other places and returning home only for an occasional weekend visit, if at all. I told the Board in that moment that they had a choice to make. I could help them put the city down (disincorporate) when the time was right—but in the not too distant future. Or, I could help them do some things that might turn around their

fortunes. To their credit, the Board's unanimous decision was to fight for the life of their city.

What follows is a summary of the things we did to "build a better city" in that instance. Looking back on our experience it is clear that whether your city finds itself at the brink of financial disaster or not, the things we did are things we should have been doing all along, and are applicable to cities of every size and financial status.

1. Setting Priorities and Goals

No matter whether you still prefer the crinkle of a paper map, or you'd rather have the robotic voice of your GPS direct you, every journey needs a good map. The map of a city's success must be drawn against the backdrop of the goals and priorities the city sets. Most cities have been in existence longer than its current city staff, and our hope is that they will continue to thrive long after we are gone. An initial question city leaders should ask themselves is "what will be my legacy?" What will people remember about you or your administration once you are gone?

If you do some internet research, you will find that there are probably about a million different goal setting programs, and I feel certain that each is just effective as the next. I like one in particular because of the clever mnemonic: always set "SMART" goals.[1] For ultimate effectiveness, goals should be specific (clear and well-defined, not vague or generalized), measurable (precise outcomes), attainable (realistically possible to achieve), relevant (focused on the direction in which you wish to go), and time-bound (have a deadline).[2] For example, if your city goes into a four-hour goal setting session and comes out with the goal of "increasing revenues" for the city, have you really made progress at all? On the other hand, if your resultant goal is to increase sales tax revenues by $50,000 in the next fiscal year by putting a question on the ballot to approve a tax for an untapped tax revenue source, now you have a workable plan.

Beyond making the plan, it is important to write it down, make it "official," and stick with it. City staff and elected officials should conduct a simple survey of the goals and aspirations of the citizens and elected officials and employees, which should be reduced to a policy or resolution approved by the governing body. In fact, I recommend that you print out a copy of that resolution on parchment paper with fancy calligraphy font, frame it and it hang it in a prominent place in city hall. Additionally, you should refer to the resolution on a regular basis to ensure that you are getting those goals accomplished.

2. Internal Resources Analyses

Once you have a good plan for where you are headed, it is a best practice to check out the vehicle that will get you there. The next phase of this process is to look at how the business of the city is running from the inside. Mayors and board or councilmembers should remember that essentially they are the CEO and board of directors of a municipal corporation. While the municipal corporation is not focused on profits and shareholder dividends, we are similarly concerned about the stewardship of public funds, level of service, and constituents. Your internal analysis should consider, at a minimum, the following areas: finances and revenues; infrastructure; staffing and personnel issues; and policies and procedures.

<u>Finances and Revenues:</u>

The business of running a municipal corporation is different from the private corporate world, but there are similarities. Cities, for the most part, are not manufacturing widgets; although in some circumstances we are bringing a good to market. Instead, as a group, we are primarily a service industry—the provision of wastewater and storm water sewerage service, police and fire services, and potable water delivery services to name a few. An initial step in your financial analysis of the business you are operating should be to determine whether you are bringing in enough revenue to cover the costs of the services you are providing to your customers.

Is the revenue you have coming in for your operations sufficient to cover the costs of operating that business, including setting aside funds for proper long-term upkeep and maintenance? Or are you borrowing against time in actual debt or, just as costly, in the form of deferred maintenance? Oftentimes the answer when things get financially tight is to "wait until next year." Unfortunately, those deferred costs (A) rarely get cheaper, and (B) never go away. A city's staff and elected officials should always have a working knowledge of the city's debt level. One must be wary, however, that municipalities are usually subject to debt-limitation provisions, which may come from constitutional, statutory, or city charter provisions.[3] For example, in Missouri, unless a city has received voter approval for a higher amount, it is subject to a debt ceiling of

Continued on page 20



Joe Lauber founded Lauber Municipal Law, LLC, in 2010 and practices in the areas of general municipal law, public facility/infrastructure construction and financing, economic development law, public works contracts, annexation, land use planning and zoning, and appellate law. He oversees the operations of the firm's two offices which serve 38 cities as city attorney and dozens of other cities as special counsel. Joe personally serves as the city attorney of 8 cities. Throughout his 16-year career, Joe has dedicated his practice exclusively to the representation of governmental entities. His prior experience includes work at the region's busiest municipal bond law firm and in the public law/public finance division at one of Kansas City's largest law firms. Joe was recognized in 2019 as a Local Government Fellow by IMLA. He resides in Lee's Summit, Missouri with his wife Sheri and their two children.

5% of the total assessed value within the city's jurisdictional boundaries.[4] Do you know your "credit card" limit in case of an emergency?

Another consideration is to understand how your revenue is generated, and more importantly, whether your city is utilizing all of the available revenue sources your community will support. Property taxes are an important source of revenue, but place the burden of revenue generation squarely on your constituents. Sales taxes, while applicable to your constituents when buying "in town," are also paid by non-residents who benefit from visiting your community for school, to work, or to shop. These non-residents consume your resources; and therefore should share in the costs of making municipal services available as well. Administrative fees, which are the charges placed on constituents only when they partake of a particular service, are another effective revenue source. Pool fees, shelter house rentals, dog licenses, business licenses, and building permits are all examples of administrative fees. Are the costs of administering these services being sufficiently offset by the fees charged? Finally, grants can be excellent sources of revenue from federal and state sources; but beware of "strings" that may be attached—sometimes the cost of participating in the grant program is significant.

It is important for every city to look at each of these sources and understand how they fit into the "big picture" of the city's financial condition. In order to survive difficult times it is important to have diversified and stable funding sources. To aid in this process, a city attorney should provide the city staff and elected officials with a summary of your state's laws authorizing the city to raise revenues, and the limitations of each source. Of course, this analysis should include a discussion of limitations of revenue generation authority. These might include a constitutional[5] or statutory[6] voter approval requirement or a lid on tax rates.

Last, if your city is operating a business enterprise (water utility, power utility, trash collection service, etc.) be sure this enterprise is covering its costs. If private companies cannot stay in the widget painting business because it costs more to operate the business and maintain the equipment than the business can bring in, why should your city's water utility be any different? Subsidizing these enterprises from the general fund is not necessarily a bad thing; however, not knowing what the level of subsidy is being provided, or worse yet, not thinking about the issue at all should be a major concern. And keep in mind that while the general fund may be used to subsidize restricted funds, the reverse is rarely true.[7] Be careful to ensure that tax revenue raised for a specific purpose (e.g., transportation or police protection) must be used only for those purposes.[8]

Infrastructure:

Once you have an understanding of how revenues are generated, it is logical to review how these funds go out in the form of costs of operations. Sanitary sewer infrastructure is a great place to start—if those systems are not running properly you can literally find yourself in deep crap! If your city does not have an inventory (map) of your sewer infrastructure, start one. Now. Your inventory should address where your lines are located, how deep, how old they are, and where your major problem areas are located. All of these things can help to save major costs in the future, especially by reducing line breaks due to construction, repairing worn out lines before they break, and even training new personnel. The costs of treating inflow and infiltration ("INI") at your sewer plant or lagoon are real and they add to your bottom line—what is your goal to reduce these costs in the next six months? Other major costs that can hit your sewer infrastructure include fines from regulatory agencies, the fact that repeated back-ups could lead to inverse condemnation claims, and as was mentioned before, deferred maintenance is a real cost. Staying in front of these issues can help to mitigate significant fines and other liability from state and federal environmental protection agencies.

Likewise, you should map your other infrastructure and prioritize its condition. You still have to pay for water that enters your system but leaks out via worn lines and meters. Meters that are not calibrated properly may allow product to flow to customers at no charge or create bad will among your citizens. Dangerous conditions in parks and on sidewalks and other pedestrian ways could lead to legal liability for personal injury claims. Non-existent or unreliable utility services might cause prospective employers to pass you by or cause younger generations to move away to a more technologically savvy community. Another benefit of this infrastructure mapping is that it can aid the city's planning efforts, and more importantly could be used to reduce the city's liability for a Religious Land Use and Institutionalized Persons Act ("RLUIPA")[9] equal terms violation. Courts have suggested that so long as requirements for exactions in the development process are applied equally, such conditions are more likely to survive RLUIPA challenges[10]—a firm understanding of the city's infrastructure needs is beneficial in establishing an exactions program that is equally administered.

Staffing and Personnel:

An internal review of your staffing and personnel resources is a must for service-oriented industries like ours. Over the years, I have seen numerous examples of a candidate running for office so they can "clean up City Hall." Most of the time, if these folks are actually elected, they realize once they are "on the inside" that city staff is generally a

> Once you have completed your internal review, it is time to look beyond the walls of city hall. . . [T]his how the outside world sees and perceives your city, whether they really know anything about it or not. And more importantly, these are some of the things every city can work on to improve the factors that drive those perceptions.

hard-working bunch, striving to do the best they can with limited budgets. It is important to look at whether the level of staffing is appropriate when gauging whether or not someone is doing a "good job." If you skimp on staff and make people do the jobs of two or three persons, you will burn them out and they will go elsewhere at their earliest opportunity. You will also end up with more costly physical injuries and bad interactions with citizens when morale deteriorates. A city that is optimally staffed may reduce its liability for worker's compensation claims.

Do the things that are needed to reduce turnover. Turnover costs money; it is expensive to constantly rebuild experience, training, and institutional knowledge when you are unable to keep employees on a long-term basis. This is in addition to the intangible cost of loss of goodwill in your community when your employees never know what they are doing because they are always new. It is also important that your city is offering competitive salary and benefits. If you are not sure about this, do a survey—call around to other cities or ask your state's municipal league for help. You should also invest in your staff's knowledge by offering training opportunities. Proper training can reduce job injuries and also reduce instances of harassment in the workplace, thus reducing liability to the city.

Also, be sure to develop strong employment policies and procedures and, more importantly, enforce them–your employees need to know what the rules are and that if others will not abide by them, that you will take the necessary action to replace them. Not doing this can lead to a pervasive "lowest common denominator" attitude. Finally, always expect and provide great customer service. This service may be external, i.e., that which is provided to your citizens, or internal, i.e., that which is provided among your staff, interdepartmentally and person-to-person. Unhappy employees are likely to become unhappy ex-employees and may increase the city's liability for hostile work environment and other employment claims.

Policies and Procedures:
A final consideration for internal resources analysis deals with the importance of developing, following, reviewing-and amending, when necessary, policies and procedures that espouse good business practices. You might have noticed all of the words in present continuous tense in the last sentence. That is because a city's policies and procedures should be living documents, constantly updated for new understanding or practical applications that were not considered at the time they were developed. Policies and procedures should not be simply kept on a shelf—these are the trails blazed by pioneers who have gone before us to save us from extra work today. We should leave them better than we find them.

Examples of policies each city should have in place are: reserve fund (how much "cushion" do you need for operations?); purchasing (are you making the best use of public funds? Do you have an adequate balance between efficiency in getting work completed and primary accountability for purchasing decisions? Are you adequately protected from conflicts of interest?); investment[11] (if you have idle funds are they earning you the most money possible?); economic development (are you proactive or reactive when a developer requests incentives? Do you know what you want or need?). The answer to all of these issues, and many more, can be guided effectively by a good policy and logical and practical procedures.

3. External Resources Analyses
Once you have completed your internal review, it is time to look beyond the walls of city hall and out through your community to your city limits. This is what I refer to as the external resources analysis. In a nutshell, this how the outside world sees and perceives your city, whether they really know anything about it or not. And more importantly, these are some of the things every city can work on to improve the factors that drive those perceptions.

Jurisdictional Boundaries:
The first external review topic I recommend you to address is literally "where you are"—or better yet, where you are not! Increasing the size and shape of your community's boundaries has a direct effect on your ability to collect sales tax, franchise, utility, administrative fee and fine revenues– but will also cause additional need for services. You should also think about whether your city's boundaries have been extended in the most strategic manner possible. To get at this issue some questions are appropriate: How do people come into contact with your community (are they driving to or through or passing by?) Do you have a historically strong source of potential customers flowing through your town (highway, airport, river)? Have you been bypassed, and if so, do you need to work to bring the new highway back into your

Continued on page 22

community's limits? What are nearby resources (businesses, tourist attractions, major employers)? Is it feasible to bring them into your boundaries?

If boundary adjustments are needed, your city should look for and understand strategic opportunities that are presented. Your governing body may need to discuss policy decisions including whether the city is willing to pursue voter-approved (involuntary) annexation to expand, or if it will be willing to consider only petition-initiated (voluntary) annexations.[12] You will want to have conversations with possible strategic partners to develop opportunities to collaborate. It may be necessary to work with owners of desirable property by assisting with potential sale/lease of property– even economic incentives. You also may need to work with neighboring communities to establish ground rules for targeted areas. It is important to note, however, that whatever arrangement is met may only work as a "moral obligation" because a governing body may not bind their successors in office, especially where doing so would constitute a limitation on legislative discretion.[13]

Community Business Review: An analysis of your community's businesses is another important consideration. Just as with your city's infrastructure, it is a good idea to take an inventory of the businesses operating within your jurisdictional boundaries. Every city should have a good understanding of all types of businesses, not just large industrial employers, but also the small businesses and even home occupations. Ask if there are ways to incubate these smaller businesses into larger, more successful enterprises. Are there ways to connect these businesses to create a better draw to your community?

Another consideration is whether your community's critical needs are being met. Some smaller cities are feeling the pinch that comes after losing businesses like a pharmacy or grocery store. A market study is a great tool for a city to understand both to where its sales tax dollars are leaking when residents drive out of town to conduct business, and also from where others travel to your community to shop. A market study can also help you identify the types of businesses that are best suited to your demographics. These studies can be immensely useful when developing an economic development policy as was discussed above. With the information provided in a market study your community has the best information to determine where gaps exist and what types of businesses you should be recruiting to your city.

Finally, a business inventory can also assist you in developing crucial relationships with the business leaders in your community. You need these entities to thrive to keep your employment base stable. Additionally, keeping tabs on business activity can be beneficial if problems develop that tax your city's ability to provide services. Understanding these connections can help to reduce the likelihood that businesses will over-exert your services and infrastructure, or be damaging to your systems; specifically, the city's sanitary or storm water sewers or water infrastructure.

Economic Development Status: An external analysis should also include a review of your city's economic development status. Our elected officials and city staff members should take a good, honest look at the community to determine in which direction it is heading. Is it growing? Stagnating? Constricting? Is this what you and your constituents want for the community? How does the city compare to its closest "competition" or similar-sized cities in the area?

Another thing to think about is your approach to economic development. Is the city proactively marketing the community to attract a good mix of manufacturers, service providers and retailers? Or are you sitting on the sidelines just hoping that someone will find you? Are you reactive in your approach—meaning that developers come to you with their ideas (usually seeking public money to assist their efforts), or are you proactive—meaning that your city knows what it needs and can make good business decisions about the types of businesses for which it will consider incentives. This is exactly where a well thought out economic development policy can be employed.

It is also important to ensure that your economic development efforts are well-balanced. So many times a community gets caught up in the new, shiny retailer to be the savior to the extent that they neglect the core of businesses that formed the backbone of the community for generations. It is critical that when you grow, you also maintain the existing businesses in your community. If you are putting new businesses on the outskirts, you should also consider how you can entice the traffic flow visiting those establishments back to your downtown area.

Earlier in this segment of the article I used the term "competition." The reason for my use of the quotations is that although your jurisdictional neighbors may be your rival on the football field or basketball court, they do not necessarily need to be your rival on economic development terms. Sometimes the whole can be greater than the sum of its parts… if your community is

"too small" on its own to attract tourists or employers or whatever it is you desire, perhaps you should band together with nearby communities to market your cumulative resources. When viewed in the aggregate, the communities may be able to achieve demographic benchmarks; and the drive times among the component areas may not be any longer than would be found in a typical metropolitan area.

Building Stock Inventory:
The final consideration for external analysis I suggest is that of your community's building stock. This issue gets to the heart of the message your community sends to the outside world based on its appearance. As the saying goes—you only have one chance to make a first impression. So you should ask yourself, when a plant manager or building site selector drives through your town for the first time, does it look like a place in which they could be excited about making an investment? Is this a place they can tell their workers that they need to live and raise their families?

It is important to have building and property maintenance regulations in place, and even more important for you to enforce them. Your community should have policies in place that support pride in ownership and investment in property maintenance. If you are not doing this, it is very easy for the lowest common denominator effect to take root. Over time it becomes more difficult for citizens to "do the right thing" if their neighbor or the house on the corner always looks terrible. Subdivision, planning, and zoning regulations should also be in place and be enforced. Subdivision regulations help to ensure that as land is developed, it is done so in a way and at a pace that makes sense from the standpoint of providing governmental services. Zoning regulations allow a potential property investor to buy with confidence that an adverse use will not pop up next door– these regulations are an important consideration of businesses looking to locate in your community. Ensuring that these regulations are being consistently and fairly enforced should lead to more effective results and may reduce litigation.

Just as was the case with your infrastructure and building stock, it is important to have an inventory of the structures in your community. What percentage of the structures are industrial? Commercial? Residential? In what condition are those properties? Are they owner-occupied or leased? What is available for sale or lease[14]…would you know if a potential investor asked you today? If you are working with the property owners in your community and they know they should communicate with you when space comes available, you will be better suited to inform the development community of these opportunities. If it is applicable to your community, do something to improve its self-image. Do not allow a self-fulfilling prophecy of "we can't do it" to take hold. Make changing the expectations of how your community appears a priority.

4. Encourage Community Involvement
I will close this discussion with the topic of encouraging community involvement. I credit my state's municipal league and a fantastic keynote address given by Peter Kageyama several years ago at the league's annual conference for my passion about this subject. In his book "For the Love of Cities,"[15] Mr. Kageyama challenges communities to do things to elicit the emotion of love for those communities. As community leaders, it is important for each of us to ask whether our communities are places that people truly want to be? Do they love where they are?

This is not a question about which you should speculate; instead ask everyone you can at every opportunity possible. Do this in person and do this in surveys. It seems sometimes that our constituents are most vocal when something is going wrong. And while it is important to address those problems, it is just as important to know what is going right, and to trumpet those successes. The stronger people feel about their community, the more likely they will be willing to invest their time in it.

If you create a place that people love, you will add to your sustainability. If they love where they grew up, young people won't be straining to get out and will even look to home to raise their own family. So you need to know what you have that will keep them coming back especially during those first formative years on their own. When you have a place that people love, it will be easier to attract business and employers, which in turn provides you with more to offer your constituents– success begets success! Be sure to celebrate your successes. It's easy to complain and pile on, but don't let the negatives define you. Provide positive reinforcement to those who are working hard in your community and encourage others to do the same. Have a yard of the month award, recognize a citizen or business of the month or year. Do resolutions to show gratitude for service or good citizenship.

Finally, provide as many opportunities as you can for your citizens to gather together and celebrate your community. Have funky parades on Halloween or Groundhog Day. Project a movie on the side of a building on your downtown square. Hold tricycle races or host

Continued on page 24

Building Consensus *cont'd from page 23*

the local band in your community gazebo. In the past when speaking on this topic I tell the very sincere story of how I picked the community in which I live to be the place at which I "settled down." In the end, it is a story of how I fell in love with my community. I close with a challenge to you in the form of a question: what are you doing that will make someone fall in love with your community today?

You might be wondering about the community about which I spoke at the beginning of this article. I am happy to report that they are doing very well and achieving their goals on a regular basis. Since our discussion nearly five years ago they have annexed land to bring the bypassed highway back within city limits, they obtained voter approval for a fire protection sales tax to offset costs that were previously being covered out of the general fund, they hold regular live music events, they have adopted their first ever zoning code, a new restaurant has opened in town, and the local convenience store and gas station has decided to relocate and expand. Their financial reserves are growing again and things are really looking up!

Conclusion

Municipal attorneys are in a unique position to understand the legal implications of their city's diverse activities. They can and should use this knowledge in assisting city officials to avoid potential liabilities and enable their communities to flourish.

Notes

1. Adapted from Mindtools.com, *Golden Rules of Goal Setting- Five Rules to Set Yourself Up for Success*, (http://www.mindtools.com/pages/article/newHTE_90.htm; last visited June 27. 2019).
2. *Id.*
3. *See* McQuillin, Eugene, 15 McQuillin Mun. Corp. § 41:2 (3d ed.).
4. *See* Mo. Const. art. VI, § 26(b).
5. *See, e.g.*, Cal. Const. art. XIII C, § 2(requiring local government general taxes to be put to majority vote, while special taxes require 2/3 majority voter approval); Mo. Const. X, § 22(a) (requiring majority vote of qualified voters before creating a new tax, or increasing the current levy).
6. *See, e.g.,* Kan. Stat. Ann. § 79-2925c (placing a tax lid on city or county property taxes in excess of the five rolling year CPI, unless approved by a majority of qualified voters).
7. Note that transfer of funds is not always permitted. *See* McQuillin, Eugene, 15 McQuillin Mun. Corp. § 39:63 (3d ed.); *but see* Town of Thornton v. Winterhoff, 406 Ill. 113, 92 N.E. 2d 163 (1950) (holding that borrowing from one fund into another is not by itself illegal, provided that funds are returned in time to be available when a demand for such funds is made).
8. *Id.*
9. 42 U.S.C. §§ 2000cc- 200cc-5 (2000).
10. *See, e.g.*, River of Life Kingdom Ministries v. Village of Hazelcrest, 611 F.3d 367, 372 (7th Cir. 2010).
11. Authority for municipal investment of idle funds varies, and if available is often restricted by constitutional or statutory provisions. *See, e.g.,* McQuillin, Eugene, 15 McQuillin Mun. Corp. § 39:19 (3d ed.).
12. Annexation authority and procedures vary widely from state to state. *See, e.g.,* McQuillin, Eugene, 2 McQuillin Mun. Corp. § 7:15 (3d ed.).
13. *See, e.g.,* Tunica County v. Town of Tunica, 227 So. 3d 1007 (Miss. 2017).
14. Including an inventory of surplus land available for religious uses to assist applicants with researching available locations before they invest in land acquisition or design activities may also be beneficial in mitigating risk for RLUIPA claims. *See,* Seeman, Evan J. and Peloso, John, *Avoiding and Defending Against RLUIPA Claims*, Resource ID w-002-9215 (Thompson Reuters 2017).
15. Peter Kageyama, For The Love Of Cities (2011). **M.**

Ethical Issues *cont'd from page 15*

Comment 1 to Rule 2.1 guides us to "sustain the client's morale" and message the advice "in as acceptable a form as honesty permits."[45]

Attorneys should not limit their counsel to "[p]urely technical legal advice," "especially where practical considerations, such as cost or effects on other people, are predominant."[46] However, attorneys should be sure to explain when their caution or hesitancy about a new idea is based on legal concerns or other considerations. If you think a decision is a bad policy decision, but is otherwise legal, you may share your concerns, but should ensure it is clear that you are not challenging the legality of a decision and will accept it.[47]

Conclusion

Working in an evolving, adaptive organization is exciting and challenging. I have seen first-hand how empowering employees to experiment and tackle emerging issues can yield positive outcomes for the organization and its employees. I am also fortunate to work for an organization that values all voices, including those that may advise caution. Helping your local government use the tools it needs to succeed in the 21st Century, while at the same time abiding by your ethical duty to the organization, can be very rewarding if you can find the right balance.

Notes

1. Town of Cary, *The Cary 2040 Community Plan* 2 (Jan. 24, 2017).
2. *About Cary*, Town of Cary, https://www.townofcary.org/recreation-enjoyment/about-cary (last visited Feb. 7, 2020).
3. *Cary Superlatives*, Town of Cary, https://www.townofcary.org/recreation-enjoyment/about-cary/cary-superlatives (last visited Feb. 7, 2020).
4. Town of Cary, *supra* note 1, at 8.
5. *Id*. at 6, 8.
6. Some of the challenges discussed here may not be applicable to attorneys who operate under other forms of government; however, many of the challenges are faced by the legal profession as a whole.
7. *See*, Ronald Heifetz & Marty Linsky, *Leadership on the Line* (2017); Ronald Heifetz, Alexander Grashow, & Marty Linsky, *The Practice of Adaptive Leadership* (2009).
8. Hana Schank & Sara Hudson, *Getting the Work Done: What Government Innovation Really Looks Like*, New America, 21 (Oct. 2018), https://www.newamerica.org/public-interest-technology/reports/problem-solving-government/.
9. *Scrum*, Atlassian, https://www.atlassian.com/agile/scrum (last visited Feb. 7, 2020).
10. Schank & Hudson, supra note 8, at 25, 26.
11. Teena Maddox, *Smart Cities: A Cheat Sheet*, Techrepublic, July 16, 2018 https://www.techrepublic.com/article/smart-cities-the-smart-persons-guide/.
12. Tiziana Casciaro, Amy C. Edmondson, & Sujin Jang, *Cross-Silo Leadership*, Harvard Business Review, May-June 2019 issue, https://hbr.org/2019/05/cross-silo-leadership.
13. Scott D. Pattison, *Eliminating Silos in Government*, Governing (Apr. 5, 2006), https://www.governing.com/columns/mgmt-insights/Eliminating-Silos-in-Government.html.
14. Russ Linden, *The Agility that Governments Needs for a Disruptive Age*, Governing (June 7, 2017), https://www.governing.com/columns/smart-mgmt/col-agility-governments-need-disruptive-age.html.
15. Dan Singer, Retooling Our Organizational Culture, ICMA (Oct. 3, 2017), https://icma.org/blog-posts/retooling-our-organizational-culture.
16. John P. Kotter, *Accelerate* 1 (2014).
17. Please consult your local state bar's ethics rules for guidance specific to your state.
18. Preamble cmt. [2].
19. Heifetz & Linsky, *supra* note 6, at 51, 53.
20. Rule 1.1.
21. Rule 1.1 cmt. [2].
22. Sterling Miller, *Ten Things: Common Ethics Issues for In-House Counsel*, Ten Things You Need to Know as In-House Counsel (Aug. 18, 2015), https://sterlingmiller2014.wordpress.com/2015/08/18/ten-things-common-ethics-issues-for-in-house-counsel/.
23. Rule 1.1 cmt. [1].
24. Rule 1.1 cmt. [8] (emphasis added).
25. *Id*.
26. Debra Cassens Weiss, *Lawyer's E-Discovery Error Led to Release of Confidential Info on Thousands of Wells Fargo Clients*, ABA Law Journal (Jul. 27, 2017), http://www.abajournal.com/news/article/lawyers_e_discovery_error_led_to_release_of_confidential_wells_fargo_client.
27. Michael Muchmore & Jill Duffy, *The Best Cloud Storage and File Sharing Services for 2020*, PC Magazine (June 14, 2019), https://www.pcmag.com/picks/the-best-cloud-storage-and-file-sharing-services.
28. Pritam Tamang & Prodyut Borah, *5 Best Slack Alternatives for Collaboration Software*, Capterra (Aug. 4, 2019), https://blog.capterra.com/the-top-13-slack-alternatives/.
29. *See, e.g.,* N.C. State Bar, 2011 Formal Ethics Opinion 6 ("Subscribing to Software As a Service While Fulfilling the Duties of Confidentiality and Preservation of Client Property").
30. Judge Herbert B. Dixon, Jr., *Yes, Judges Should Know About Recurring Ethical Issues Involving the Use of Social Media by Lawyer*, The Judges' Journal, Vol. 57 No. 2 Spring 2018, at 37, 38.
31 N.C. State Bar, 2014 Formal Ethics Opinion 5 ("Advising a Civil Litigation Client About Social Media") (citing N. H. Bar Ass'n Op. 2012-13/05).
32. Well, that and procrastination (Rule 2.1 cmt. [3])!
33. *See* Heifetz & Linsky, *supra* note 6, at 36-37.
34. *Id*. at 36.
35. *See id*. at 92-95.
36. Rule 1.13(f).
37. N.C. Gen. Stat. § 132-1.1 (2017).
38. Rule 1.13(b).
39. *See id*.
40. *See* Rule 1.3 cmt [1] ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.")
41. Rule 2.1 and cmt. [1].
42. Rule 2.1 cmt. [5].
43. Heifetz, Grashow, & Linsky, *supra* note 6, at 102.
44. *Id*. at 145-146.
45. *Id*.
46. Rule 2.1 cmt. [2].
47. *See* Rule 1.2(a) ("a lawyer shall abide by a client's decisions"). ML

AMICUS

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

Vehicles Put Municipalities on the 2019 Supreme Court Docket

The Supreme Court has now filled out its 2019 term docket and has added a number of new cases that are relevant to local governments, including *City of Chicago v. Fulton* and *Torres v. Madrid*. Both of these cases involve public safety issues, albeit in very different contexts.

IMLA filed an amicus brief at the certiorari stage in *City of Chicago*, and in prior articles, I have highlighted the importance of getting amicus support at the petition stage when seeking Supreme Court certiorari. That is because the Supreme Court receives approximately 8,000 petitions a year, while granting only 70-80 cases a year. Therefore, anything you can do as a petitioner to stand out and express the importance of the issue in your case to the Court helps increase your odds of having certiorari granted. Getting amici to do this for you can pay off.

City of Chicago v. Fulton

The issue in this case is whether a creditor violates the bankruptcy code by holding a debtor's vehicle that the creditor already had in its possession prior to the debtor's filing for bankruptcy. IMLA's amicus brief explained how the issue extended well beyond the City of Chicago and also highlighted the public safety concerns with the Seventh Circuit's ruling. We were pleased that the Court agreed and granted certiorari given the broad impacts of the issue to local governments.

The case involves four bankruptcy petitions that were consolidated on appeal to the Seventh Circuit. In each, the City of Chicago impounded the debtor's vehicles based on significant accumulated unpaid fines and penalties for parking tickets, moving violations, and driving with suspended licenses. The City has an ordinance which provides that the City may impound vehicles of individuals with three or more unpaid violations for the "purpose of enforcing" its traffic regulations until the owner pays the outstanding fines and penalties.[1] The Chicago Municipal Code further provides that "[a]ny vehicle impounded by the City or its designee shall be subject to a possessory lien in favor of the City in the amount required to obtain release of the vehicle."[2]

In each of the four cases at issue, after the City had impounded the owner's vehicles, each owner filed for bankruptcy. The Bankruptcy Code's automatic stay provision provides that a petition for bankruptcy operates as a stay of "*any act to obtain possession of property* of the estate or of property from the estate or to exercise control over property of the estate."[3] The City did not release the debtor's vehicles back to the trustee of the bankruptcy estate. Each bankruptcy court held that the City violated the stay by "exercising control" over property of the bankruptcy estate and ordered the City to turn over the vehicles immediately.

The City of Chicago argued that holding a vehicle that was impounded *before* the debtors filed their bankruptcy petitions did not violate the Bankruptcy Code's automatic stay provision. Further, the City argued that the Bankruptcy Code provides a mechanism for a debtor to seek the turnover of property being held by a creditor under a possessory lien through an adversary proceeding and the court should therefore find an exception for the City's retention of the vehicles from the automatic stay under 11 U.S.C. § 362(b)(3). The City also argued that Code subsection (b)(4) which provides that the stay authorized by the Act does not extend to:

> . . . the commencement or continuation of an action or proceeding by a governmental unit . . ., to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.[4]

This police power exception often arises in bankruptcy proceedings where a debtor seeks to avoid local regulations affecting its business.

The Seventh Circuit rejected these arguments and held in favor of the debtors. By way of background, the Seventh Circuit had previously addressed this issue in *Thomson v. General Motors Acceptance Corp.*, which had held in a case where a creditor had repossessed a vehicle prior to the filing of the bankruptcy petition

that a "creditor must comply with the automatic stay and return a debtor's vehicle upon her filing of a bankruptcy petition."[5] The City requested the Seventh Circuit overrule *Thomson,* which the court declined to do.[6] The Seventh Circuit explained that the "[t]he primary goal of reorganization bankruptcy is to group all of the debtor's property together in his estate such that he may rehabilitate his credit and pay off his debts; this necessarily extends to all property, even property lawfully seized pre-petition."[7]

In its petition for certiorari, Chicago highlighted the entrenched Circuit split on the question presented (which is the single most persuasive argument for getting the Court to grant certiorari).[8] Chicago also explained why the Seventh Circuit's decision was incorrect based on the text, purpose, history, and structure of the bankruptcy code.[9]

IMLA's amicus brief focused on the prevalence of vehicle impoundments around the country, as well as the policy reasons behind those impoundments and the fact that they are done not just to raise revenue, but also to maintain the safety and welfare of local governments' residents. For example, as our amicus brief points out, "[a]ccording to the Centers for Disease Control and Prevention (CDC), many states and local governments also authorize vehicle impoundment in situations where police encounter a driver under the influence of alcohol or drugs."[10] It is important to note that, under the Seventh Circuit's rule "these vehicles are returned to the debtor not just in the case of unpaid fines, but also in cases where the vehicle was impounded because the driver did not have insurance, or a license, or another public safety reason" such as driving under the influence of alcohol.[11] Thus, the Seventh Circuit's rule creates significant public safety risks.

IMLA's brief points out that the alternative rule, which was endorsed by the Tenth and D.C. Circuits, does not leave debtors without recourse to obtain their vehicles. Under 11 U.S.C. § 542(a), the debtor can bring an adversary possession proceeding to seek to release the vehicle, at which point the creditor has a chance to seek adequate protection of its interest in the property.[12]

As of this writing, the Court has not set the date for oral argument, but it will likely be in the end of April and if so, a decision will issue before the end of June.

Torres v. Madrid

The Supreme Court also recently granted certiorari in another case that arises in the public safety context, this time involving a question under the Fourth Amendment. In *Torres v. Madrid,* the question presented is whether an unsuccessful attempt to detain a suspect by use of physical force is a "seizure" within the meaning of the Fourth Amendment.

The facts in *Torres* fall into the category of "you can't make this stuff up." In this case, two police officers went to an apartment building to arrest a woman subject to a warrant. They noticed two people standing in front of her apartment next to a Toyota Land Cruiser and decided to talk to them, as they believed one may have been the woman the officers were seeking to arrest. The officers were wearing tactical vests with police markings and were thus readily identifiable as police. One of the people, Roxanne Torres, got into the car. She claims she was "tripping out" from methamphetamine. One of the officers told Torres several times to show her hands.

The officers attempted to open the car door, and when Torres heard the flicker of the door handle, she started to drive thinking she was being carjacked. Torres drove at one of the officers who fired at Torres through the windshield. The other officer shot at Torres as well to avoid being crushed between two cars and to stop Torres from hitting the other officer.

Despite being shot twice, Torres drove some distance away. She then hit another car, got out of the Land Cruiser, and tried to "surrender" to the "car jackers." She asked a bystander to call the police but then left the scene as she had an outstanding warrant. She thereafter stole a car, drove 75 miles, and checked into a hospital. She was arrested the next day.

Torres sued under Section 1983, claiming the officers used excessive force when they shot her. The Tenth Circuit held that Torres was not seized under the Fourth Amendment because the police officers "failed to 'control her ability to evade capture or control.'"[13] There was therefore no excessive force in this case, because without a seizure there can be no excessive force. The Tenth Circuit relied on its own precedent in *Brooks v. Gaenzle,* 614 F.3d 1213, 1223-24 (10th Cir. 2010), which explained that "a seizure requires restraint of one's freedom of movement." Thus, according to the Tenth Circuit, an officer's intentional shooting of a suspect does not effectuate a seizure unless the "gunshot . . . terminate[s] [the suspect's] movement or otherwise cause[s] the government to have physical control over him."[14]

While it seems unlikely that the officers in this case would be held liable for excessive force, given the fact that the plaintiff was driving her car at them when they shot her, police officers and local governments will often have factual disputes in these types of cases that make obtaining summary judgment challenging for them. A rule that definitively states that a suspect is not "seized" within the meaning of the Fourth Amendment unless his or her motion is terminated and the officers restrain the person's movements would provide a bright line for litigants that would make it easier for local governments to get summary judgment in these cases (as opposed to arguing about reasonableness of use of force).

Continued on page 36

FEDERAL

BY: MICHELLE D'ANDREA
Deputy City Attorney for Development Services, Plano, Texas

The Fair Housing Act and Multifamily Development: When Suburbs Get Dense

Congress adopted the Fair Housing Act ("FHA" or "Act") over 50 years ago, in 1968, shortly after the assassination of Martin Luther King Jr., to prohibit discrimination in housing, including the practice of redlining[1]. Originally, the Act covered race, color, religion and national origin. Sex was added in 1974.[2] And, in 1988, disability and familial status were added.[3]

The term "redlining" comes from the practice of withholding mortgages from minority communities. Before the Act, banks, realtors and even federal agencies used maps drafted by the Home Owners' Loan Corporation that described communities on the basis of perceived desirability and risk. According to the maps, the best neighborhoods were colored green, blue communities were still desirable, yellow were definitely declining, and the hazardous were lined in red.

The redlined communities were generally those in older urban areas and those with racial minorities. Lenders would not provide loans, so the areas fell into decline. Today 74% of Home Owners' Loan Corporation-redlined communities remain low-to-moderate income, according to a 2018 National Community Reinvestment Coalition study.[4]

After slowly increasing for about 35 years following enactment of the Act, the black homeownership rate reached nearly 50 percent in 2004, but went down significantly after 2007. In early 2019, 43 percent of black households owned their homes, essentially equal to the 42 percent recorded by the 1970 Census.[5]

Republicans and Democrats have drawn different conclusions from these numbers, with the GOP believing federal intervention is ineffective, and the Democrats saying that more intervention is needed.[6]

Recently the Trump Administration, through Secretary Carson at the Department of Housing and Urban Development ("HUD"), suspended the requirement of affirmatively furthering fair housing ("AFFH") and decided to rewrite the disparate impact rule. Both AFFH and the disparate impact rule have been used in previous administrations to further the goals of the Act.

GOP members of the House of Representatives said HUD policies should do more to push federal funding recipients to remove local zoning policies that can block the development of affordable, multi-family housing.[7] In a recent House hearing, Salim Furth of the Mercatus Center, the Republican minority's witness, defended HUD's decision to revisit the AFFH rule, but on the grounds that the 2015 rule lacked teeth. "It helped jurisdictions that wanted to be inclusive," said Furth.[8] "But if you look at communities that didn't want to be inclusive, it didn't force them to be so."[9] "Current land use regulations — one way to think about it — is that they reinforce redlining over time," Skylar Olsen, director of economic research at the Zillow Group, said in response to a question from ranking member Patrick T. McHenry, R-N.C.[10]

Meanwhile, suburban residents continue to fight multifamily housing projects. [11]

This article will discuss the impact of the Fair Housing Act on local land-use regulation, in particular regulatory limitations on multifamily housing, considering HUD guidance and caselaw. It will also provide practical tips for planning and zoning commissions and other decision-makers for complying with the Act when considering often-controversial developer requests for increased housing density in suburban areas.

In 2016, HUD and the U.S. Department of Justice released a Joint Statement with guidance about the relationship between the Act and local land-use law.[12] The Statement provides the following examples of land-use laws that control housing density in violation of the Act:

- Prohibiting or restricting the development of housing based on the belief that the residents will be members of a particular protected class, such as race, disability, or familial status, by, for example, placing a moratorium on the development of multifamily housing because of concerns that the residents will include members of a particular protected class.

- Imposing restrictions on housing because of alleged public safety concerns that are based on stereotypes about the residents' or anticipated residents' membership in a protected class, by, for example, requiring a proposed development to provide additional security measures based on a belief that persons of a particular protected class are more likely to engage in criminal activity.

The Act prohibits both intentional discrimination (with discriminatory intent) and discrimination lacking discriminatory intent but having a disparate impact on a protected group.[13] Disparate impact claims are based on a showing that the defendant's actions perpetuate segregation or disproportionality impact a minority group. Examples of violations of the Act due to disparate impact include:

- Adopting minimum floor space or lot size requirements that increase the size and cost of housing if such an increase has the effect of excluding persons from a locality or neighborhood because of their membership in a protected class, without a legally sufficient justification.
- Prohibiting low-income or multifamily housing may have a discriminatory effect on persons because of their membership in a protected class and, if so, would violate the Act absent a legally sufficient justification.[14]

Disparate-impact claims, which the US Supreme Court permits in FHA cases,[15] are analyzed in three steps. The first step requires the plaintiff to establish a prima facie case of disparate impact, which means showing at least three elements: (1) that the defendant used a policy in making housing-related decisions; (2) that a class of persons protected by the Act was harmed by this policy more than others; and (3) that this disparity was actually caused by the defendant's policy.[16]

A few cases in the last decade discuss the application of the FHA to local land-use regulations or development decisions regarding increased housing density. Reviewing the facts considered by the courts in their evaluations of these cases helps develop an understanding of how to prepare local decision-makers when they face unpopular requests for dense housing.

After Hurricane Katrina, a suburb of New Orleans placed a moratorium on multi-family housing --resulting in a challenge from a developer under the FHA. St. Bernard Parish in the Greater New Orleans area was undergoing substantial reconstruction. The Parish was also operating under a consent order with a civil rights organization to resolve previous civil rights violations. While the City of New Orleans worked on updated zoning, they adopted a twelve-month moratorium on multifamily construction. That moratorium prevented a developer from constructing mixed-income housing. Following is a portion of some of the expert testimony:

> First, the moratorium has a disparate impact on African–Americans by reducing the amount of available housing structures with 5 or more units. 17.61 % of African–American households in the New Orleans metropolitan area live in structures with 5 or more units, compared to only 9.54% of Caucasian households. African–American households are 85% more likely to live in structures with more than 5 units than Caucasian households.
>
> Second, African–Americans are disproportionately affected because the moratorium reduces the supply of rental properties. Over 90% of structures with more than 5 units are rental structures. 51.7% of African–American households in the New Orleans metropolitan area live in rental units, compared to just over 25% of Caucasian households. African–American households are twice as likely as Caucasians to live in rental housing…[17]

Considering the information from the 2018 National Community Reinvestment Coalition study and the old redlining practices, this same type of data may also apply to your city or town. It may not be difficult for a plaintiff to show that decisions against multifamily housing have a disparate impact on minorities in your community. You may even have studies prepared on behalf of your city that analyze this type of information.

After considering disparate impact, the court also looked for discriminatory intent by the Parish, using the formula established by the Fifth Circuit. In particular, they reviewed: (1) the historical background of the decision, (2) the specific sequence of events leading up to the decision, (3) departures from the normal procedural sequence, (4) substantive departures, and (5) legislative history, especially where there are contemporaneous statements by members of the decision-making body.[18]

This editorial appeared on the front-page of *The St. Bernard Voice*, the official newspaper of St. Bernard Parish:

> Should St. Bernard residents be concerned? Ours was a crime free community of homeown-

Continued on page 38

INSIDE CANADA

BY: MONICA CIRIELLO
Niagara 2015

Risky Skateboarding, Plastic Bans, Uncooperative Officers and More

Amending a Statement of Claim
Oak Lake Four Seasons Island Resort Ltd. v. The Rural Municipality of Sifton and The Government of Manitoba, 2019 MBQB 188 http://canlii.ca/t/j4h5l
Oak Lake

Four Seasons Island Resort Ltd. ("Plaintiff") owns property in the Rural Municipality of Sifton ("Municipality"), situated near a body of water and a provincial highway. The Plaintiff advised the Government of Manitoba ("Manitoba") that the highway was stopping the natural flow of water, causing severe causing severe flood damage and economic loss. The Plaintiff filed an action against the Municipality in 2013, and then sought to amend the statement of claim to reflect Manitoba's negligence. The lower court dismissed and the Plaintiff appealed.

HELD: Appeal granted.

DISCUSSION: The question on appeal was whether the amendments sought by the Plaintiff raised a new cause of action merely provided a clarification on the existing claim. The Supreme Court of Canada defines a new cause of action as "a set of facts that provides the basis for an action in court" *Markevich v. Canada,* 2003 SCC 9. The Plaintiff argued that the amendments elaborated on particulars already in the existing statement of claim. Manitoba argued that they introduced new facts or in the alterative failed to disclose a reasonable cause of action. The Court held that two amendments were unrelated to the allegations in the statement of claim. Relying on *Maxwell v. Dhalla et al.*, 2006 MBCA 33, the Court determined even if Manitoba was successful in defending the current statement of claim, it might still be found liable based on the two proposed amendments, meaning created a new cause of action. However, the Court was satisfied that five of the proposed amendments were furthering particulars and were not allegations arising to an independent action; as such the Court granted the Plaintiffs motion to amend the statement of claim.

***"Cooperate Fully"* - Compliance with Civilian Investigatory Agencies**
Independent Investigations Office of British Columbia v. Vancouver (City) Police Department, 2020 BCCA 4 http://canlii.ca/t/j4c9b

A shooting fatality in the City of Vancouver caused police officers in the City's Police Department ("VPD") to appear before the Independent Investigations Office ("IIO") as witnesses. The IIO, governed under the *Police Act,* RSBC 1996, c. 367 ("*Act*") is a civilian led agency who investigates officer actions when there is a death or serious bodily harm. The IIO began an investigation, scheduling compulsory "witness officer" interviews for all police officers ("Appellants") who were present at the fatality. The Appellants requested disclosure prior to the interview, the IIO refused; whereupon the Appellants declined to be interviewed. The IIO successfully filed an application before the Supreme Court of British Columbia and compelled the Appellants to attend the interview. The Appellants filed an appeal arguing the Court erred by declaring the duty of a witness officer to *cooperate fully* with the IIO included the duty to attend interviews. (emphasis added)

HELD: Appeal dismissed.

DISCUSSION: Section 38.101(1) of the *Act* requires an officer to fully cooperate with an IIO investigator's exercise of powers or performance of duties under the *Act*.

> 38.101 An officer must cooperate fully with
> (a) the chief civilian director in the chief civilian director's exercise of powers or performance of duties under this Act, and
> (b) an IIO investigator in the IIO investigator's exercise of powers or performance of duties under this Act.

The issue was which party may define what it means to fully cooperate. The IIO argued that witness officers do not have discretion to determine terms of their cooperation, while the Appellants argued that s the IIO does not have unilateral authority to impose interview terms, particularly lack of disclosure to officer witnesses. The Court reviewed the legislation to ensure that the plain language interpretation was consistent with and furthered the purpose of the *Act*. It found that the plain language imposed a duty to cooperate on police officers, and nothing in the *Act* supported an inference that the legislature intended that "fully cooperate" required a discussion among the parties.

Paper or Plastic: Which Law Governs?
Canadian Plastic Bag Association v. Victoria (City), 2019 BCCA 254 http://canlii.ca/t/j1dng

The City of Vancouver ("City") was approached by an environmental non-profit organization dedicated to the "pro-

tection and enjoyment of the world's oceans, waves, and beaches through a powerful activist network" with the goal of eliminating all single use plastic check out bags. Following extensive consultation, City Council approved the "Checkout Bag Regulation Bylaw" ("Bylaw") which prohibited businesses in the City from providing or selling plastic single use plastic bags to customers at checkout and required fees to be charged for paper or other reusable bags. The Canadian Plastic Bag Association ("Association") filed for judicial review of the Bylaw. The Association submitted that any Bylaw passed by the City for the protection of the natural environment must be approved by the Ministry of the Environment ("MOE"), and without such approval the City lacked jurisdiction to prohibit single use bags. The Association sought a declaration that the Bylaw was *ultra vires* to the City's authority and sought to quash it The Chamber Judge agreed that the City did not have the approval of the MOE but held that it was not required because the Bylaw fell within the City's authority to regulate businesses under the *Community Charter*, S.B.C. 2003, c. 26 ("*Charter*") and did not seek to protect the natural environment. The Association appealed.

HELD: Appeal allowed, and Bylaw quashed.

DISCUSSION: The Association argued that the Chamber Judge erred in his findings because the "dominant characteristic" of the Bylaw was to protect the natural environment which required MOE approval, and without it, the Bylaw was *ultra vires* to the City's authority. The Court had to determine between two sources of authority within the *Charter*, one to regulate business under s.8.(6) and one to protect the natural environment under s.(8)(3)(j) and 9(1)(b) applied to this Bylaw. The City argued that the Bylaw only regulated the actions of the business, not the customer. The Court disagreed, stating that the inverse is true as customers would be the ones that were most impacted by the Bylaw. Furthermore, the Court examined the stated measure for success outlined in the Bylaw which was to reduce the amount of plastics in the oceans. The Court determined that this was clearly a natural environment objective, not a business or consumer protection measure. The Bylaw was for the protection of the natural environment and therefore required that the approval of the MOE. Appealed granted and Bylaw quashed.

Skateboarding at Night on Recreational Trail: *Caveat Emptor*?
Karpouzis v. Toronto (City of), 2020 ONSC 143 (CanLII) http://canlii.ca/t/j4j6d>

The Plaintiff suffered a severe brain injury on a recreational trail in the City of Toronto ("City") while skateboarding alone at 2:00 am with no protective gear or flashlight. He brought an action for negligence and public nuisance, arguing that the City acted with reckless disregard as there was a lack of lighting on the trail and no signs prohibiting use of the trail at night. The City agreed that the trail was dark and lacked signage but argued that the darkness would have been visible from the entrance of the trail. The City sought summary judgement to dismiss the Plaintiff's action.

HELD: Summary judgement granted.

DISCUSSION: The Court may grant a summary judgment under Rule 20 of the *Rules of Civil Procedure* RRO 1990, Reg. 194 if it is satisfied that there is no genuine issue before it that requires a trial. The Plaintiff's claim for negligence is under the *Occupiers' Liability Act* RSO 1990, c. O.2 ("*Act*"). Neither party disputed that the City is the occupier of the recreational trail. Section 3 of the *Act* outlines the standard duty of care for occupiers, which requires reasonable precautions to be taken to guard against known risks. The Supreme Court of Canada in *Waldick v. Malcolm,* [1991] 2 S.C.R. 456, stated "After all, the statutory duty on occupiers is framed quite generally, as indeed it must be. That duty is to take reasonable care in the circumstances to make the premises safe." However, section 4 of the *Act* indicates that the statutory duty is lowered when a person enters a premise for recreational activity, and as such the occupier is under no duty to take reasonable care of the premises mentioned in *Waldick v. Malcolm*. Under the lowered standard, the occupier's duty is not to create a danger and not to act with reckless disregard. It was not disputed by either party that the Plaintiff entered the trail for a recreational activity, as such the Court held that section 4 governed the Plaintiff's claim. Therefore, the Court held that the City did not create a danger, but rather the Plaintiff willingly accepted the risk of skateboarding at night without protective equipment or a flashlight.

The question before the Court was whether the City acted with reckless disregard for the Plaintiff using the trail at night. To constitute reckless disregard, the City must have known or should have known that an injury was likely to happen on the trail. The Plaintiff argued that the City failed to post warning signs about using the trail at night, did not provide lights on the trail, and failed to close the park. The Court held that anyone entering the trail at night would be able to observe the potential risk of entering a wooded area, and the Plaintiff did not need to be warned about these obvious conditions. Furthermore, the Court was satisfied with the City's evidence of regular inspections, maintenance and enforcement of the trail, which demonstrated that the City did not recklessly disregard the safety of trail users. The City was successful in showing that there were no genuine issues requiring a trial. The Court granted summary judgement. ML

LISTSERV

BY: BRAD CUNNINGHAM
Municipal Attorney, Lexington, South Carolina

Lawyers-Hardly One Dimensional

In a past column, we discussed the varied talents and diverse career paths of those of us who frequent the IMLA Listserve. We learned that we are indeed a multi-faceted group with a broad span of backgrounds. We are from virtually all fifty states and a handful of foreign countries or territories. We range in age from our 20's to, uh, well a little bit more than that.

As to past occupations, we have bankers, sales professionals, medical professionals, media professionals, teachers, athletes, and even a self-professed beach bum, among other occupations. Then there are the hobbies and avocations which include triathlons, biking, fishing, hunting, baking, running, traveling, writing, woodwork and many others.

In college, our undergraduate majors include Education, Finance, Marketing, Engineering, Art, History, Journalism, Foreign Language, Communications, Religion, Political Science, Government and International Studies, Criminal Justice, Interdisciplinary Studies, Nursing, Medicine, and others; virtually anything is fair game.

Suffice it to say lawyers have a variety of attributes and abilities, far and above quoting statute, case law and saying "No, you can't do that because of the potential liability." A while back I ran across an article about attorneys who engaged in other professions. There are some surprising names on the list, which support the above assertion that lawyers are multifaceted. Just who are these lawyers? Ok, let's take a look. The following people either practiced law or attended law school:

Nelson Mandela – the well-known anti-apartheid leader was a partner in the first black law partnership in South Africa. The site of his former law firm is now becoming a museum in Johannesburg.

Mahatma Gandhi – The leader of the Independence Movement attended University College in London, and after studying he went back to his home country of India. He tried practicing law but was never comfortable cross-examining witnesses. He eventually took a position with a firm in South Africa but spent most of his time pursuing development of his political ideology. He felt the true cause of a lawyer was to unite those with differences.

Washington Irving – who was Ambassador to Spain under Martin van Buren, studied in Europe and passed the New York bar. He was, of course, better known for writing *Rip Van Winkle* and *The Legend of Sleepy Hollow*.

John Grisham – another author who went on to try law school, is famous for his series of legal thrillers. Grisham decided to try his hand at law school after a series of other professions. Originally intending to become a tax practitioner, Grisham instead sought out a career as a trial lawyer. One of his more famous novels, *A Time to Kill*, was inspired by Grisham's real-life observation of a rape trial.

Jerry Springer – the former Mayor of Cincinnati attended Northwestern University School of Law but is more famously known for his television talk show. He was also a campaign aide to Robert Kennedy and practiced law in Ohio before getting involved in radio and television.

Ben Stein – the television personality graduated at the top of his class in Yale Law School. He started his professional life as a lawyer, but reportedly his popularity and personality led to an eventual career in television.

Ozzie Nelson – the *Ozzie and Harriet* star was a graduate of Yale Law School. He reportedly used his skills to negotiate his own agreement with ABC which apparently resulted in a ten-year guaranteed contract, which was unique in the industry at the time.

John Cleese – the English comedy genius earned his law degree from Cambridge. However, he never practiced law. He co-formed the comedy group *Monty Python* with a friend he met in law school and never got into the legal business.

Geraldo Riviera – was one of the top five students in his class at Brooklyn Law School. During his ensuing career as an activist, he was discovered by a news network executive and his career in journalism was born.

Josh Saviano – earned an undergraduate degree from Yale and fol-

lowed that with a law degree from the Benjamin N. Cardozo School of Law. He now practices law in New York. In case you don't recognize the name, he gained television fame as the character Paul Pfeiffer who was Kevin's sidekick in the popular series *The Wonder Years*. Further note – he is not Marilyn Manson as the popular rumor goes.

Nina and Tim Zagat – This husband and wife team met during their attendance at Yale Law School. They started The Zagat Survey after tiring of complaints about the reliability of newspaper restaurant reviews.

Elizabeth Holloway Marston – Marston and her husband are credited with creation of the iconic superhero *Wonder Woman*. She earned an L.L.B from Boston University, and passed the Massachusetts Bar Exam. Her wish was to attend Harvard, but females were not admitted there at the time. Her husband attended Harvard, and she boasts of finishing the bar exam before him.

Fidel Castro – The Cuban leader studied at the University of Havana, was admitted to practice in 1950, and worked for a law firm in Cuba for a time before going on to his more well-known pursuits as the leader of Cuba.

Henri Matisse – the famous French artist studied law in Paris. At the onset of his legal career, he became ill and dabbled in oil painting during his recovery. He reportedly knew from the first moment he held a palette that he had discovered his true calling.

Howard Cosell – the famous TV sports personality entered law school at the urging of his parents. He studied at the NYU School of Law and initially practiced in Manhattan. One of his early clients was baseball great Willie Mays. He started a radio program to promote youth baseball and proved to be a natural at interviewing. He stopped practicing in 1956 to pursue his famous sportscasting career.

Steve Young – the former San Francisco 49ers quarterback holds the unique distinction of earning a law degree and winning a Super Bowl Championship in the same year. He retired from football in 1999 but has yet to put his J.D. to a career use.

Dick Button – the famous figure skater won Olympic gold medals in 1948 and 1952. He later attended Harvard Law School and began a legal career. He continued skating professionally on breaks and after law school.

Will Shortz-The puzzlemaster got his JD from Virginia in 1977, but passed up the bar to get the world's only degree in enigmatology instead. "Law is great training for the mind for almost any career. It was good for me because the thinking skills you get from law school are important in puzzle-solving and puzzle-making."

Francis Scott Key – the author of the *Star-Spangled Banner* was a lawyer when he penned the national anthem in 1814. He served as the District Attorney of the United States and famously represented Sam Houston in an assault trial in 1832.

Julio Iglesias – the famous singer was studying law in Spain in 1963 when he was paralyzed in a car accident. He learned to play the guitar during his lengthy recovery and discovered he was truly a musician. Although he is obviously more well-known for his musical talents, he still completed his law degree in 2001.

David Stern – the former commissioner of the National Basketball Association attended Columbia University Law School and was admitted to practice in New York in 1966. His firm represented the NBA, and he later signed on as the General Counsel for the NBA. And, as is well known, he eventually became the NBA Commissioner. (Sources – *Thirty Famous People with Law Degrees*, by Stacy Conradt, and *Famous People You Didn't Know Were Lawyers,* courtesy of The Droid Lawyer.com.)

Some folks say the life of a municipal lawyer is indeed full of variety but sometimes just isn't all that exciting as far as legal careers go. However, every once in a while, events (good and bad) occur which add a little "spice" to our day to day operations. Such was the case a couple of weeks ago when a defendant allegedly threatened an unnamed colleague with "death and the raping and killing of his wife and children." All of this arose over a Municipal Court charge. This particular defendant now appears to have elevated his petty charge to a serious felony. Why? As I have said before many times in this column, it is for the sole reason that he couldn't control himself and learn to keep his mouth shut.

This is worse than the woman who was in court locally and was charged with disorderly conduct following an altercation at a fast food restaurant because her order was prepared incorrectly. With child in tow, she picked a fight over the sandwich, and ended up spending Christmas in jail over a simple error and her inability to control her temper and her mouth.

Some of you know that I am not that fond of lawyer jokes. I worked very hard to get here, and after a while it gets old being the only one of my profession in the building and constantly being the butt of jokes--and taking the blame for "slowing down the process or making things more difficult than they have to be." This week I actually heard a "lawyer joke" that was funny and supportive at the same time.

It seems this man found a bottle on the beach, and a genie popped out when he picked it up. "For freeing me, I will grant you three wishes," said the genie. "Oh boy," exclaimed the lucky man. He thought for a moment. "For my first wish, I wish for a world without lawyers." Upon blinking, the genie proclaimed "Your wish is granted. There are now no more lawyers." The man was happy, but then the genie said "I will now leave. My work is done here."

"Wait," cried the man. "What is going on? You promised me three wishes." To this, the genie simply replied, "Sue me."

The prosecution rests, your honor… ML

SUPREME COURT

BY: ABBY FELTER
2020 Graduate,
George Washington University
School of Law

Espinoza v. Montana Dep't of Revenue: The Need to Preserve the "Play in the Joints" in the Religion Clauses

The intersection of the Establishment Clause and the Free Exercise Clause has produced vexing issues of constitutional law. To what extent is the government permitted to fund religion under the Establishment Clause? To what extent is the government required to fund religion under the Free Exercise Clause? And to what extent may state constitutions impose additional prohibitions on funding religion that exceed the limitations established under the Establishment Clause before running into Free Exercise issues? This delicate balance between "freedom of religion" and "freedom from religion" is one the United States Supreme Court has sought to preserve over time.

The Supreme Court, in this current term, has the opportunity to address the confluence of these issues when it takes up *Espinoza v. Montana Dep't of Revenue*. In June 2019, the Court agreed to decide whether it violates the religion clauses or the Equal Protection Clause of the United States Constitution to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools.[1] The determination could potentially have widespread impact on school-choice programs throughout the country.[2] Currently, there are 23 school-choice programs in 18 states that are similar to the Montana school-choice program in *Espinoza*, and there are 65 school-choice programs nationwide.[3] Additionally, the outcome could have sweeping implications for defining the parameters between the two religion clauses and for the constitutionality of No-Aid provisions in state constitutions.

In 2015, the Montana legislature created a school-choice program that provides a dollar-for-dollar tax credit of up to $150 for individuals and businesses who donate to nonprofit "student scholarship organizations" ("SSOs").[4] The money donated under this program is used to create scholarships for students to attend private schools.[5] The fact that most private schools in Montana are religious created a foreseeable problem—that is, the program would likely conflict with the "No-Aid Clause" in the Montana Constitution. The No-Aid Clause expressly prohibits "direct or indirect" aid to sectarian schools.[6] However, unlike other No-Aid Clauses, Montana has shown that its constitutional amendment does not arise from either anti-Catholic bigotry or non-specific antagonism towards religion in general.[7]

In recognition of the likely conflict between the school-choice program and the No-Aid Clause, the Montana legislature required the state's Department of Revenue to administer the tax credit in a manner that complied with the Montana Constitution.[8] In response, the Montana Department of Revenue promulgated "Rule 1" which prohibits the tax credit from being used to fund religious schools, thereby making the tax credit program compliant with the State's No-Aid Clause.[9]

Kendra Espinoza, a mother whose children received scholarships through an SSO to attend a Christian School, successfully sought an injunction against Rule 1 in 2015.[10] However, the Montana Supreme Court reversed and held that the tax-credit program "indirectly [paid] tuition at private, religious-affiliated schools" in violation of the No-Aid Clause.[11] In a sweeping move, rather than upholding Rule 1, the Montana Court struck down the entire tax-credit program.[12]

The Montana Department of Revenue petitioned the Supreme Court, contending that the state's highest court acted unconstitutionally in striking down the statute as a whole.[13] Instead, they claim that the U.S. Constitution prohibits applying a state constitutional provision in a way that would bar religious options from an otherwise neutral and generally available student-choice program.[14]

The Supreme Court's jurisprudence delineating the restrictions on government funding of religious schools under the Establishment Clause and the permissible exclusion of religion under the Free Exercise Clause has a complex and multivariate history. The issues in such cases are highly complex and do not easily yield uniform responses. To fully appreciate the gravity of *Espinoza*, a review of the jurisprudence leading up to this point is useful:

In a trailblazing decision, *Everson v. Board of Education*, the Supreme Court not only incorporated the Establishment Clause against the states for the first time, but acknowledged that the Estab-

lishment Clause does not necessitate an absolute prohibition on providing aid to religious schools. In *Everson*, the justices confronted the issue of a local board of education's decision to reimburse parents of children for bus fares necessary to attend Roman Catholic schools, as well as public high schools, outside the township.[15] The board of education's reimbursement program found its legal footing in a New Jersey state law that required the equal treatment of children in public and private non-profit schools.[16] Writing for the majority, Justice Hugo Black upheld the state law as applied to the reimbursement program because, in his view, the Constitution prohibits governments from excluding individuals from receiving the benefits of public welfare legislation "because of their faith or lack of it."[17] Thus, because the legislation at issue "does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools," the program does not violate non-establishment clause principles.[18]

What may seem like a win for proponents of school-choice programs was tempered by the Court's ostensibly rigid representation of the Establishment Clause. The majority noted that the nature of the aid "approaches the verge of [constitutional] power."[19] Thus, early on the Court suggested that any substantial or direct funding of religious schools is likely incompatible with the Establishment Clause.[20] Nonetheless, recent developments in Establishment Clause jurisprudence signal a move away from strict separationism in the Court's evaluation of indirect aid programs.[21]

In the years following *Everson*, the nature of the aid—whether direct or indirect—and its connection to education became increasingly important in the constitutional inquiry.[22] In a series of cases, the Court upheld the constitutionality of state programs that were wholly neutral in offering indirect educational assistance to a class defined without reference to religion.[23] These programs also shared a key feature that aided the Court in reconciling the expenditures with the Establishment Clause—that is "genuine," "independent," and "individual" choice.[24] The decisions in this line of cases reflected the underlying assumption that the government was protected from any perceived endorsement of religion when the aid passed through the choices of individual beneficiaries at the outset before benefiting a religious entity.[25] Thus, while there is a constitutional limit on the type of aid a state may provide to a religious school, so long as families are provided a genuine, independent, and individual choice, religious schools may be included in general student-choice programs without being invalid under the Establishment Clause.[26]

Nevertheless, opponents of school-choice programs have relied on state constitutional provisions that provide additional limitations on the state's ability to provide aid to religious schools. The origins of these constitutional amendments, commonly referred to as "No-Aid" provisions or "Blaine Amendments," go back to a failed attempt to amend the Constitution of the United States in 1875 and are deeply tainted with anti-Catholic bigotry.[27] The proposed amendment, introduced in the House by Representative James G. Blaine, would have prohibited the government from funding any religious school.[28] While the Amendment ultimately failed to pass the Senate, 37 states have since incorporated similar "No-Aid" provisions into their constitutions.[29] Some of the No-Aid provisions have been construed narrowly, and are understood as providing minimal restrictions on aid to religious entities,[30] while others reflect a separationist construction that demands a rigid interpretation.[31]

At the other end of the intersection between the Establishment Clause and the Free Exercise Clause is a parallel question: to what extent if any, is the government *required* to fund religious entities? The Court has recognized that there is some "play in the joints" between the two religion clauses, and offered guidance on the matter in *Locke v. Davey*.[32] The issue before the Court was whether the state of Washington, acting pursuant to its own constitution, could exclude students who were pursuing degrees in devotional theology from a college scholarship program created by the state's legislature, without violating the Free Exercise Clause.[33] The Court rejected the student's challenge and stated, "we. . . cannot conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect."[34] *Locke* also illustrates the Court's willingness to respect state constitutional amendments that provide more stringent limitations than that drawn by the Establishment Clause.[35]

After the decision in *Locke* a circuit split developed on whether state governments, relying on No-Aid provisions, may bar religious options from student-choice programs.[36] The circuits that have read *Locke* broadly have inferred a wholesale exclusion of religious schools from student-aid programs.[37] On the other hand, some courts have relied on a narrow reading of *Locke* to invalidate attempts to exclude religious schools from student-choice programs.[38]

In 2017 the Court had another opportunity to address the effectiveness of No-Aid provisions within the context of a grant to a religious organization in *Trinity Lutheran Church of Columbia, Inc. v. Comer*.[39] Writing for a 7-2 majority, Chief Justice John Roberts explained that a Missouri policy that expressly excluded churches from a grant program to resurface playgrounds violated the Free Exercise Clause because it denied an otherwise available public benefit on account of an applicant's religious status.[40] Although a broad reading of the opinion may suggest that the Free Exercise Clause prohibits general aid programs from discriminating against religious institutions, four of the seven justices in the majority tempered the holding

Continued on page 36

Amicus *cont'd from page 27*

Such a rule would therefore be in the fiscal interest of local governments as it would allow them to dispose of these cases earlier, cutting down not only on litigation costs, but also the employee time and distractions that come with civil rights litigation.

Oral argument in the *Torres* case is set for the end of March, and the Supreme Court will issue a decision before the end of June.

Notes

As noted at the outset, amicus support at the petition stage can make a huge difference in getting your petition for certiorari granted by the Supreme Court. If you would like IMLA's help with an amicus brief, please reach out to me at: akellar@imla.org or 202-466-5424 x 7116. The earlier in your case that you reach out, the more likely we would be able to help.

1. Municipal Code of Chicago, Ill. § 9-100-120(a).
2. *Id.* § 9-92-080(f).
3. 11 U.S.C. § 362(a)(3) (emphasis added).
4. 11 U.S.C. § 362(b)(4)
5. *In re* Fulton, 926 F.3d 916, 920 (7th Cir. 2019), *citing* Thompson v. GMAC, LLC, 566 F.3d 699, 700 (7th Cir. 2009)
6. *Id.*
7. *Id.* at 923.
8. *See* City of Chicago v. Fulton, Petition for Writ of Certiorari, p. 15-19.
9. *Id.* at 19-26.
10. City of Chicago v. Fulton, Brief of Amicus Curiae International Municipal Lawyers' Association In Support of Petition (hereinafter, "IMLA Amicus Brief"), p. 8.
11. IMLA Amicus Brief, p. 11.
12. *Id.* at 11-12.
13. Torres v. Madrid, 769 F. App'x 654, 657 (10th Cir. 2019)
14. *Id.* ML

Supreme Court *cont'd from page 35*

in a footnote.[41] Those justices emphasized that their decision was limited to the facts before them and did "not address religious uses of funding."[42] *Trinity Lutheran* also represents a sudden and unacknowledged move towards principles of nondiscrimination that were not present in past cases.[43]

This cursory review of the Court's religious clause jurisprudence reveals the importance of *Espinosa v. Montana Dep't of Revenue*. The crux of *Espinosa*, like many other Free Exercise cases, comes down to whether the government may treat religious activities differently than secular ones. *Locke* suggests that there should be some "play in the joints" that allows states to exclude funding for religious education. Governments are afforded significant discretion in their ability to accommodate and respond to the religious impulses of society that are not mandated by the Free Exercise Clause.[44] Accordingly, *Locke* aptly affirms that there is an analogous discretion in a state's choice to limit aid to religious organizations. To extend *Locke* to the *Espinosa* would be in line with the Court's historical interest in not funding religious education.

When evaluating government treatment of religion, it is important to acknowledge the Constitutional duality between not discriminating against religion while not promoting it.[45] Critics of *Locke* emphasize principles of nondiscrimination and substantive neutrality.[46] In their view, the Constitution requires the government to minimize the extent to which it either encourages or discourages religious belief, which can only be accomplished if nondiscrimination principles prevail.[47] However, the *Locke* Court rejected a similar argument made by the student that the exclusion of theology majors is presumptively unconstitutional because it is not facially neutral. Ironically, supporters of nondiscrimination and neutrality neglect specific instances where the government may treat religion differently in order to protect freedom of religion.[48] If principles of nondiscrimination and neutrality are strictly adhered to in all religious cases, the government would not be able to provide religious exemptions for burdensome regulation. Instead, the Constitution allows, and in some instances requires, laws to recognize the seminal role religion plays in our society.[49]

The plaintiff in *Espinoza* relies heavily on the Court's decision in *Trinity Lutheran*, but that argument is not without fallibility. In reaching its decision in *Locke*, the Court assumed that the playground was not being used for any religious activities, and specifically stated the case did not apply to "religious uses of funding."[50] For the Court to extend *Trinity Lutheran* to *Espinoza*, the justices will have to confront the fact that Montana's tax-credit program would subsidize not only religious activities but religious instruction, training, and indoctrination on a daily basis. While the Establishment Clause may not prohibit such school-choice programs so long as there is an independent, genuine, individual choice, Montana should have the same type of discretion that the state of Washington was afforded in *Locke* to not fund such religious education.

If the Court rules in favor of Espinoza, No-Aid provisions throughout the country could be effectively meaningless, at least within the context of school-choice programs. The potential breadth of such a holding could be detrimental to No-Aid provisions as a whole. It is hard to distill a meaningful difference between an indirect school-choice program and other forms of indirect aid to religious organizations that could withstand a similar constitutional challenge. Even if the justices side with Espinoza via a narrow disposition, such a holding would open the doors to additional challenges to No-Aid provisions. On the other hand, if the Court sides with the state, the decision would simply reaffirm that there is "room for play in the joints" and that states have discretion when it comes to

funding religious education.

The Court's decision to hear *Espinoza v. Montana Dep't of Revenue* offers an exceptional opportunity to extrapolate future markers pertaining to religion-related funding cases ahead. Whether the Court will allow the continuation of the "play in the joints" remains to be seen.

Notes

1. *See* Espinoza v. Montana Dep't of Revenue, 393 Mont. 446 Mont. 446 (Mont. 2018), *cert. granted*, 139 S. Ct. 2777 (Jun. 28, 2019) (No. DA 17-0492).
2. *See* EdChoice Amicus Curiae, Espinoza v. Montana Dep't of Revenue, 139 S. Ct. 2777 (2019) (No. DA 17-0492).
3. *Id.* at 3.
4. *See* Mont. Code Ann. §§ 15-30-3101 *et seq.*
5. *Id.* § 15-30-3102(7).
6. Mont. Const. art. X, § 6.
7. *See* Brief for Respondent at 14-15, Espinoza v. Montana Dep't of Revenue, 139 S. Ct. 2777 (2019) (No. DA 17-0492).
8. *See id.* § 15-30-3101.
9. *See* Admin. R. Mont. § 42.4.802(1)(a).
10. *See* Espinoza v. Montana Dept. of Revenue 2017 WL 11317587 (Mont. Dist. 2017).
11. *See* Espinoza v. Montana Dept. of Revenue, 393 Mont. 446 (Mont. 2018).
12. *Id.* at 468-69.
13. *See* Petition Cert., Espinoza v. Montana Dep't of Revenue, 139 S. Ct. 2777 (2019) (No. DA 17-0492).
14. *Id.* at 3.
15. *Everson v. Board of Education*, 330 U.S. 1 (1947).
16. *Id.* at 62.
17. *Id.* at 16.
18. *Id.*
19. *Id.*
20. Ira C. Lupu & Robert W. Tuttle, Secular Government, Religious People 87 (2014).
21. Ira C. Lupu & Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 Notre Dame L. Rev. 917, 2 (2002).
22. Secular Government Religious People, *supra* note 20 at 93.
23. *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (upholding Ohio's Pilot Project Scholarship Program that provided tuition aid in the form of vouchers for certain students to attend participating public or private schools of their parents choosing); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (holding that the Establishment Clause did not prohibit the school district from providing a sign-language interpreter to a student attending a Catholic high school); Witters v. Washington Dep't of Servs. for the Blind (holding that extending aid granted through Washington's vocational rehabilitation program to assist a blind student in becoming a pastor did not violate the Establishment Clause); *but cf.* Comm. for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (invalidating New York State's program of tuition grants and tax credits for low and middle income parents whose children attended private elementary and secondary schools because the program was a nonneutral attempt to saving religious schools from financial distress).
24. *See Zelman's Future*, *supra* note 21 at 2.
25. Secular Government Religious People, *supra* note 20 at 96-99.
26. *See, e.g.* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986); Muller v. Allen, 463 U.S. 388 (1983).
27. *See* Philip Hamburger, The Separation of Church and State, chaps. III-IV (2002).
28. George Kurian, Encyclopedia of Religion in American Politics, 26 (1998).
29. https://ij.org/issues/school-choice/blaine-amendments/answers-frequently-asked-questions-blaine-amendments/
30. *See* Kotterman v. Killian, 972 P.2d 606, 624 (Ariz. 1999) (construing no-aid provision narrowly because of religious bigotry behind the amendment).
31. *See Zelman's Future*, *supra* note 21 at 57.
32. Locke v. Davey, 540 U.S. 712, 718 (2004).
33. *Id.* at 719.
34. *Id.* at 725.
35. *See id.* at 723-24.
36. The Sixth, Seventh, Eight, and Tenth Circuits hold that government may not prohibit religious options in student-aid programs. The First and Ninth Circuits hold that it may. *See* Brief for Petitioner at 15-16, Espinoza v. Montana Dep't of Revenue, 139 S. Ct. 2777 (2019) (No. DA 17-0492).
37. *See, e.g.,* Eulitt ex rel. Eulitt v. Me. Dep't of Educ., 386 F.3d 344, 355 (1st Cir. 2004).
38. *See, e.g.,* Colorado Christian Univ. v. Weaver, 534 F.3d 1245 (10th Cir. 2008).
39. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S.Ct. 2012 (2017).
40. *See id.*
41. *See id.* at 2024 n. 3.
42. *Id.*
43. *See* Ira C. Lupu & Robert W. Tuttle, *Trinity Lutheran Church v. Comer: Paradigm Lost?* 1-2 (2017) (unpublished manuscript) *available at* https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2554&context=faculty_publications.
44. *See generally* Secular Government, Religious People, *supra* note 20 at 211-248.
45. *See Trinity Lutheran Church v. Comer: Paradigm Lost?*, *supra* note 43 at 1-2.
46. *See e.g.,* Thomas C. Berg and Douglas Laycok, *The Mistakes in Locke v. Davey and the Future of State Payments for Services Provided by Religious Institutions*, 40 Tulsa L. Rev. 227 (2004).
47. *See id.* at 232.
48. *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 338 (1987).
49. *See Trinity Lutheran Church v. Comer: Paradigm Lost?*, *supra* note 43 at 1-3.
50. *See id.* at 2024 n. 3.

ML

Federal *cont'd from page 29*

> ers with a deep appreciation for shared values ... Is that now threatened?
> The local newspaper had three entries in its legal notices this past week. All three relate to the use of private and public money to construct a total of 216 apartments in three selected sites in the parish ...
> ... The fact that each development mentions that it will provide "supportive services in a community facility including ... after school programs on a voluntary basis, adult basic education, and personal finance" may provide some insights into the background of the intended occupants ...
> Less we forget, Village Square started out as a middle class housing development that catered to teachers, other professionals, and their families. It was a wonderful place to live ... when first opened.
> After a number of years, ownership changed, maintenance diminished, and the quality of renter fell to a much lower social/economic class. Result: Village Square became what can only be described as a ghetto with drugs, crime, vandalism, and violence.
> That is generally the case with high density housing. It was just because such problems persist in that type of environment that HUD demolished the concentrated lifestyles of the "New Orleans Projects." Is St. Bernard about to buck the trend and construct them here in St. Bernard? What guarantees have the residents of St. Bernard that their tax money is not going to be used to create the kind of blight New Orleans recently destroyed?
> But the fact remains that residents know little about what is going on, [and] are not impressed when they hear the term "mixed income development" mentioned in the project description ..."

The references to "ghetto," "crime," "blight," and "shared values," according to the court, were nothing more than "camouflaged racial expressions."[19]

The court found the publication of the editorial, and the outcry from citizens about the development project after the editorial, led to the adoption of the moratorium. This suburb's moratorium on multifamily housing had a disparate effect on African Americans in violation of the FHA.[20]

Let's look at one more case. In Yuma, Arizona, a community close to the Mexican border, the City denied a zoning application requesting a change to allow 6000 square foot lots, down from 8000 square foot lots.[21] The developer's reputation was for building Hispanic neighborhoods, based on its development of several affordable housing projects in Yuma in which the majority of the homes were sold to Hispanics.[22]

According to the developer, the City's refusal to rezone land to permit higher-density development stemmed from disparate treatment of Hispanics and created disparate impact in violation of the Fair Housing Act.

Yuma's general plan supported 6,000 square foot lots.[23] The City's Analysis of Impediments indicated the Hispanic population in Yuma was concentrated in the northern, western and central parts of the City and that substantially all of the available low to moderate income housing was in those areas, and that more than 75% of the households in that area were Hispanic.[24] By contrast, whites were concentrated in the northwest and southeast parts of Yuma where they comprised more than 75% of the population. The property the developer wanted to construct upon was on the western boundary of the white majority area in the Southeast portion of Yuma.[25]

The Ninth Circuit court held that: 1) the developer's allegations that Yuma's decision was driven by animus was plausibly alleged; and 2) the existence of similarly-priced and similarly modeled housing available elsewhere in Yuma did not necessarily preclude the disparate impact claim. "We reject the district court's view that other similarly-priced and similarly-modelled housing available elsewhere necessarily precluded a finding that there was a disparate impact."[26]

One primary factor in the court's finding was that the city council denied the developer's request despite the advice of its own experts to the contrary.[27] Another was the context of racially-charged opposition by Yuma residents.[28] Also cited against Yuma was the fact that the City had approved all requests for rezoning in the last three years except for this one.[29]

A Few Practical Tips:

1. Take language seriously and make findings. Your general plan, special area plans, and other adopted documents and policies determine how to analyze a request for a zoning change.
   a. Talk to your planning staff about making reports specific to help the decision-makers make appropriate findings. Make sure the reports produced by staff quote policy language that both supports and opposes the staff recommendations, to help the decision-makers understand the proper criteria for evaluating decisions, not just the sentiment of the public.
   b. Remind your planning staff that documents prepared by other

departments, including those prepared for affordable housing or demographic purposes will be considered by those bringing Fair Housing claims against your city.

c. Train the decision-makers to prepare for hearings on applications for zoning amendments by carefully highlighting language in staff's report that supports or does not support a particular application, so that they are prepared when they make their decision to cite specific language.

d. Remind the decision-makers that they are bound to their adopted plans, at least until they take legislative action to amend those plans.

2. Create appropriate distance between public comments and considerations of the commissioners.

a. Teach your decision-makers about disparate impact and give examples.

b. Talk to the chair about monitoring residents' comments and responding when necessary to create a clear record.[30]

c. Be aware of the need to distance decision-makers from press and social media while on the record in proceedings.

Notes

1. 42 U.S.C.A. § 3601-19 (West). (President Lyndon Johnson signed the Civil Rights Act of 1968 on April 11, 1968. Title VIII of the Civil Rights Act is also known as the Fair Housing Act.)
2. PL 93–383 (S 3066), PL 93–383, August 22, 1974, 88 Stat 633. (At this time the Act established the requirement that communities receiving Community Block Grants affirmatively further fair housing.)
3. PL 100–430 (HR 1158), PL 100–430, September 13, 1988, 102 Stat 1619. (The act added handicap and familial status to the classes protected under Title VIII of the Fair Housing Act, via the Fair Housing Amendments Act.)
4. Bruce Mitchell, Phd. and Juan Franco, *HOLC "redlining" maps: The persistent structure of segregation and economic inequality* (NCRC 2018).
5. Troy McMullen, *The 'heartbreaking' decrease in black homeownership. Racism and rollbacks in government policies are taking their toll*, The Washington Post, Feb. 28, 2019.
6. House panel shifts to fair housing issues, including redlining, bias, 2019 WL 1450294.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. Steve Brown, *If DFW suburbs won't allow apartments, where will hundreds of thousands of new residents live?* Dallas Morning News, May 2018; Rachel M. Cohen, *When a Suburb tries to densify, forget Minnesota Nice*, Citylab, June 21,2018; Jon Kamp, *Boston Doesn't Have Enough Housing. Can it get the Suburbs to Help*? Wall Street Journal, Dec. 8, 2018.
12. Joint Statement of the Department of Housing and Urban Development and the Department of Justice, State and Local Land Use Laws and Practices and the Application of the Fair Housing Act, Nov. 10, 2016.
13. §3604(a) Fair Housing Act; Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 192 L. Ed. 2d 514 (2015).
14. Joint Statement at Question 4.
15. *Texas Dept. of Housing*, 135 S. Ct. 2507 at 2525.
16. Reyes v. Waples Mobile Home Park Ltd. P'ship, 903 F.3d 415, 424 (4th Cir. 2018), cert. denied sub nom. Waples Mobile Home Park Ltd. P'ship v. de Reyes, No. 18-1217, 2019 WL 1280527 (U.S. May 13, 2019). (This case has a robust notation in footnote 4 about the origins of the three-part analysis.)
17. Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Par., 641 F. Supp. 2d 563, 567–68 (E.D. La. 2009).
18. *Id.* at 568–69.
19. *Id.* at 571.
20. *Id.* at 578.
21. Ave. 6E Investments, LLC v. City of Yuma, Ariz., 818 F.3d 493, 500 (9th Cir. 2016).
22. *Id.* at 498.
23. *Id.* at 498–99. (The City's General Plan designates the Property for use as "Low Density Residential." This designation encompasses two permissible zoning designations: "R– *499 1–6" zoning, which allows development of a residential subdivision of houses placed on 6,000 square foot lots, and "R–1–8" zoning, which requires the use of at least 8,000 square foot lots.)
24. *Id.* at 498.
25. *Id.*
26. *Id.* at 497.
27. *Id.* at 504.
28. *Id.* (The presence of community animus can support a finding of discriminatory motives by government officials, even if the officials do not personally hold such views.)
29. *Id.* at 507. (Drawing all reasonable inferences in Developers' favor, the City's singling out of their zoning request for denial supports Developers' contention that the City had a discriminatory intent.)
30. Joint Statement at Question 5. 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