ABA Section of State and Local Government Law

Vol. 34, No. 3, Spring 2011

STATE & LOCAL LAW NEWS

The Section serves as a collegial forum for its members, the profession, and the public to provide leadership and educational resources in urban, state, and local government law and policy.

State of Public Sector Bargaining: What a Difference an Election Year Makes

By Ronald J. Kramer

Last year, Congress appeared poised to pass the Public Safety Employer-Employee Cooperation Act, a bill that would have imposed minimum collective bargaining standards for state and local government law enforcement, firefighters, and emergency medical personnel. Given that over two dozen states have no collective bargaining laws for any of these employees, and many others have bargaining laws that likely did not comply with the proposed Act, this bill, if passed, would have had a significant effect on public sector labor relations.

Today, the bill is dead (at least for this Congress). Instead, some states and local governments in the midst of economic crises are looking to cut costs by modifying their public bargaining statutes. Already forgotten, New Jersey and Montgomery County were on the forefront of this movement. Wisconsin and Ohio have now joined the fray, proposing much more aggressive reforms.

New Jersey

On December 21, 2010, New Jersey Governor Chris Christie signed into law a cap on "base salary" increases for police and fire interest arbitration awards involving collective bargaining agreements that expire between January 1, 2011, and April 1, 2014, to 2% per year over the life of the contract. This limitation applies to longevity, length of service, salary increments, cost of living increases, and other items included in the base salary as understood by the parties in their previous contract.

The cap is on base salary increases only and does not apply to nonsalary economic items such as pension and health insurance costs. Thus, an employer's overall annual contract cost increases after taking into account that health insurance and pension costs may exceed 2%. Notably, however, an arbitrator is prohibited from awarding "base salary items and non-salary economic issues which were not included in the prior collective negotiations agreement."

The change was a compromise agreed to between the Governor and the Democratic Legislature as part of a larger strategy to address budget deficits. The 2% cap parallels earlier legislation that limited local property tax increases to 2% per year. This legislation gives employers newly facing tax caps the luxury of knowing there

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Ron Kramer is a partner at Seyfarth Shaw LLP's Chicago office, where he practices labor and employment law, including public sector labor law. He is currently the chair of the Section's Government Operations Committee.

In This Issue

SECTION NEWS

ABA House Approves Section's Resolution 114

By Benjamin E. Griffith

Mitigation benefits and challenges weigh heavily on economically challenged states and localities across the nation at a time of unprecedented hurricanes, flooding, tornados, and other disasters. There is a paramount need to advance our country's resilience and protection from such hazards, to develop a national mitigation strategy, and to set the stage for future policy and program recommendations. R114 addresses these needs and concerns. Approval of R114 by the ABA House of Delegates on February 14, 2011, assures that the ABA will participate in the development of a national mitigation strategy.

The ABA now endorses the Recommendation for an Effective National Mitigation Effort prepared by the Association of Directors of Emergency Management of the U.S. States and Territories and D.C.

The Section of State and Local Government Law made the case that the ABA's endorsement of the White Paper on Hazard Mitigation (available on our Section's website) would make the ABA a nationally recognized stakeholder in further deliberations in support of its adopted policies. Passage of R114 also would enable the ABA to have a voice at the table and play a vital role in developing and steering the National Hazard Mitigation Collaborative Alliance in a direction that will support ABA policy.

A significant amount of work went on behind the scenes, of course. At the time of the 2010 Annual Meeting in San Francisco, the predecessor to R114 was withdrawn because of objections over endorsing a recommendation from a non-ABA entity. Between then and the 2011 Midyear Meeting in Atlanta, R114 was carefully revised to urge ABA lawyers and the legal profession to (1) support hazard mitigation through disaster preparedness planning, (2) recognize the important roles that states and local governments have in this area, and (3) give due regard to the interests of property owners.

Benjamin E. Griffith is a partner in the Cleveland, Mississippi, firm of Griffith & Griffith, a Section Delegate to the ABA House of Delegates, and a Past Chair of the Section.

The additional time and work on the resolution's wording paid off.

Thanks to the effective collaboration of our Section's R114 working group, consisting of Lai Sun Yee, Ernest Abbott, Edward Thomas, and our two delegates, Patricia Salkin and myself, Section leaders were able to garner support from other entities in preparing and presenting the final revised version of this resolution as it sailed through the House of Delegates, with visible support from the Section of Real Property, Trust and Estate Law, the Special Committee on Disaster Response and Preparedness, the Tort Trial & Insurance Practice Section, and the Section of Administrative Law and Regulatory Practice.

STATE & LOCAL LAW NEWS

Public Law Produces Public Benefit

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State & Local Law News provides information concerning current developments in the law of interest to state and local government lawyers, news about the activities of the Section, and other information of professional interest to Section members.

Any member of the ABA may join the Section by paying its annual dues of $45. Subscriptions to *State & Local Law News* are available to nonlawyers for $44.95 a year ($49.95 for foreign subscribers).

The views expressed herein are not necessarily those of the American Bar Association or its Section of State and Local Government Law.

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Address corrections should be sent to the American Bar Association Service Center.

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CHAIR'S MESSAGE

Dwight H. Merriam is a partner in the Hartford, Connecticut, office of Robinson & Cole and the Chair of the Section.

Our Lucky Days

Thomas Jefferson said: "I am a great believer in luck, and I find the harder I work, the more I have of it." Our Section has experienced some recent good luck, and all of it is attributable to the hard work of many.

First, we are in a solid position financially. When Donna Pugh was Chair, she cut where she could and enhanced revenue at every turn. We have added nondues revenue from increased attendance at meetings and the remarkable efforts of the Publications Oversight Board and the hardworking authors, editors, and ABA publications staff. Generous sponsors have supported our meetings. In the process we have served our members well with expanded educational opportunities and content.

Second, and hold on to your socks, we have just learned that during the last year, when the going has been the toughest, we increased our membership by almost 13%. How can that be, when overall ABA membership decreased by 2.2% and all but five sections reported net losses?

The answer can be found in the hard work of the Membership Committee, led by Lora Lucero and Ellen Rosenblum, and Section staff, Tamara Askew and Marsha Boone. Many, many people at all levels were totally focused on holding fast to what we had and building on it. All the substantive committees showed increased strength and participation. That constant drive added momentum and carried us through. Only the Forum Committee on Air and Space Law outpaced us and, as someone quipped when they saw the numbers: "Heck, they probably promised a ride in space. Why, we could offer a muni-bond, a labor contract for teachers, advice on a Superfund site, a three-lot subdivision, and a Votomatic chad investigation." Still, hats off to Air and Space. We'll beat them this year. It's our Sputnik moment.

We are now 12,485 members strong.

Not only did our Fall Meeting in Providence have a large turnout, but we were also able to capture the outstanding content on video through a do-it-yourself effort. The production values may be about the same as *The Blair Witch Project,* but we have it all and we will be making it available at the least cost possible to those of you who couldn't make it to the meeting. Maybe Netflix will want to be our next big Section sponsor.

The Midyear Meeting in Atlanta was a great success with a Diversity Law Hot Topics session at Georgia State University School of Law. Thank you, Professor Julian Juergensmeyer, for helping make that possible. The session was co-sponsored by the Georgia Asian Pacific American Bar Association (GAPABA), the Georgia Association for Women Lawyers (GAWL), the Georgia Hispanic Bar Association (GHBA), the South Asian Bar Association of Georgia (SABAGA), the Georgia African American Attorneys Association (GAAAA), and the Stonewall (GLBT) Bar Association. It was simulcast as a teleconference and will be available for purchase online. Thank you, Larry Hoyt, chair of the Diversity Law Committee, for making this happen and to Margaret Rowell Good for moderating the session.

The Spring Meeting in Portland, Oregon, I absolutely guarantee will be nonpareil. Please go to the Section's website for details. I hope to see you there.

Finally, although spring is in the air as my photo suggests (taken with my youngest, Lucy) and we are crawling out of the deep recession, state and local governments continue to suffer. The lower-than-expected quarterly growth report for the fourth quarter of 2010 (2.8% vs. 3.2% annual) is attributed in part to a downturn in state and local government spending, which decreased 2.4%. Government lagged behind the private economy going into the recession and will be the last sector out. There's a lot of work to be done, and our Section can help you as we all continue to struggle over the next year or two. Together, we can make our own good luck.

Calling All Friends of the Section!

Connect with the Section on Facebook.

www.facebook.com/pages/Chicago-IL/ABA-Section-of-State-and-Local-Government-Law/151505107412

For more information, contact Keith Hirokawa, chair of the Electronic Communications Committee.

ABA SECTION OF STATE AND LOCAL GOVERNMENT LAW

2011 Spring Meeting

May 12-15, 2011

The Westin Portland • Portland, Oregon

Money-Back Guaranty

I am so certain you will find great value in our Spring meeting in Portland that I personally guaranty it. If this is your first time attending a Section Spring or Fall Meeting and you are not completely satisfied that you received full value, I will personally (not Section funds) reimburse you the full amount of your registration fee. All I ask in return is that you tell me how we can make it better.

Dwight Merriam, Section Chair

Thursday, May 12, 2011

11:00 a.m.–12:00 p.m.

Executive Committee Meeting

Garvey Schubert Barer, 121 S.W. Morrison Street, 11th Floor

Recent Developments in State and Local Government Law

Total CLE Credits for Thursday Session—3.50

Portland State University, 506 S.W. Mill Street, Room 710

12:30 p.m.–2:00 p.m.

Sex, Drugs and Government?

Sponsors: Land Use, Planning and Zoning Committee, Public Finance Committee, and ABA Section of Criminal Justice

Speaker: Bill E. Kyriagis, Otten Johnson Robinson Neff & Ragonetti PC, Denver, Colorado

As 2010 ended, so did state and local government Stimulus Act funds. Would state and local governments consider regulating activities beyond tobacco, alcohol, and gambling to include drugs and prostitution to fund government? This panel will explore the issues involved in drafting statutes around these very controversial proposals.

2:10 p.m.–3:10 p.m.

Green Building

Sponsor: Environmental Committee

Moderator: Scott I. Steady, Williams Schifino Mangione & Steady P.A., Tampa, Florida

Speakers: Ann Essko, Assistant Attorney General, Olympia, Washington

Timothy M. Harris, Goodstein Law Group PLLC, Tacoma, Washington

Shari Shapiro, Obermayer Rebmann Maxwell & Hippel LLP, Philadelphia, Pennsylvania

This panel will discuss the issues of Green Building Ordinances, ongoing cases involving the preemption of local green building codes under federal law, and other challenges and pitfalls with Green Building Ordinance initiatives.

3:20 p.m.–4:20 p.m.

Cyberbullying

Sponsor: Public Education Committee and ABA Section of Criminal Justice

Speakers: James C. Hanks, Ahlers Law Firm, Des Moines, Iowa

Judge Patricia A. Lynch, Reno Justice Court, Reno, Nevada

With new technology, bullying at school has expanded to include cyberbullying. This program will explore the challenges the Internet brings to protecting students from harassment while respecting the constitutional rights of free speech, due process, and personal privacy.

4:30 p.m.–5:30 p.m.

Ethics of Social Networking

Sponsor: Ethics Committee and ABA Section of Criminal Justice

Moderator: Preston Pugh, Pugh, Jones, Johnson & Quandt, P.C., Chicago, Illinois

Speakers: David Silverman, Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C., Chicago, Illinois

Julie A. Tappendorf, Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C., Chicago, Illinois

This panel will discuss the impact of social networking and the resulting ethics issues it presents for municipalities, elected officials, and government lawyers.

5:30 p.m.–6:30 p.m.

Networking Reception, *506 S.W. Mill Street, Room 212*

Dr. Rachelle Alterman will make a brief presentation on her book, *Takings International*, published by the Section.

Friday, May 13, 2011

Total CLE Credits for Friday Session—3.00

All Meetings for this day will be held at Metro Headquarters, 600 N.E. Grand

8:30 a.m.–9:30 a.m.

Judicial Review of Local Land Use Decisions—Two Views CLE

Sponsor: Government Operations Committee and National Conference of State Trial Judges

Moderator: Donna Frazier, Shreveport, Louisiana

Speakers: Judge Peter Buchsbaum, New Jersey Superior Court

Judge Timothy J. Sercombe, Oregon Court of Appeals

Hear two thoughtful judges, one from a trial court and another from an appellate court, discuss how they approach their review duties. How, if at all, do such principles as due process, separation of powers, and the scope of review, among others, affect their approach to this task? Or are land use cases simply matters of administrative law, governed by statute?

9:45 a.m.–11:45 a.m.
Regionalism CLE
Sponsor: Land Use, Planning and Zoning Committee
Moderator: Nadia Costa, Miller Starr Regalia, Walnut Creek, California
Speakers: Andy Cotugno, Metro Council Office, Portland, Oregon
Janice C. Griffith, Ashburton Place, Boston, Massachusetts
Tom Hughes, Metro Council Office, Portland, Oregon
Nikelle S Meade, Brown McCarroll LLP, Austin, Texas
Mark M. Murakami, Damon Key Leong Kupchak Hastert, Honolulu, Hawaii

A panel of lawyers and planners from Portland's Metro and other regional government entities will share their expertise on the challenges, successes, and failures of regional efforts around the country.

12:00 p.m.–1:00 p.m.
Land Use Hot Topics with Lunch

1:30 p.m.–4:00 p.m.
Mobile Workshop—Bus & Walking Tour begins at the Metro Regional HQ at N.E. Grand Avenue. This three hour tour provides an introduction to the "Rose Quarter," "Brewery Blocks," "Pearl District," and "South Waterfront" areas.

Saturday, May 14, 2011

All Meetings for Saturday and Sunday will be held at The Westin Portland Hotel

7:00 a.m.–5:00 p.m.
Section Registration & Hospitality

7:30 a.m.–8:30 a.m.
***Urban Lawyer* Advisory Board**

8:30 a.m.–10:00 a.m.
Content Advisory Board

10:00 a.m.–11:00 a.m.
Diversity Outreach Committee

10:00 a.m.–11:00 a.m.
Publications Oversight Board

11:00 a.m.–12:00 p.m.
Land Use Committee

12:00 p.m.–1:00 p.m.
Substantive Committee Business Meetings: Condemnation, Public Finance, Government Operations, Environmental, Ethics, Public Education, Emergency Management, Diversity Law

1:00 p.m.–2:00 p.m.
Membership Committee

2:00 p.m.–3:00 p.m.
Revenue Enhancement Committee

2:00 p.m.–3:00 p.m.
Electronic Communications Committee

4:00 p.m.–6:00 p.m.
Cutting Edge Green Walking Tour—Experience Portland the green and eco-friendly way. The tour takes approximately two hours and will cover a little over one mile of physical distance. This is a ticketed event, not included in the general registration fee. The cost is $20 per person.

6:00 p.m.–10:00 p.m.
Dinner—Bridgeport Brewpub, *1313 N.W. Marshall Street*
This is a ticketed event, not included in the general registration fee. The cost is $60 per person.

Sunday, May 15, 2011

Meeting will be held at The Westin Portland Hotel

8:30 a.m.–11:00 a.m.
Council Breakfast Meeting

REGISTRATION

Register online through the Section website at **http://new.abanet.org/calendar/state-and-local-government-law-2011-spring-meeting/Pages/default.aspx** (credit card only)
Or Send via Fax to 312/988-5121 (credit card only)
Or Mail to Marsha Boone, ABA Section of State and Local Government Law, 321 N. Clark Street Chicago, IL 60654-7598

HOTEL INFORMATION

The Westin Portland Hotel is located in the center of downtown. A block of rooms has been reserved on a **priority basis for program registrants.** Room rates at the Westin Portland are $129, single/double. This rate is available three days prior and three days following the Section's *listed meeting dates.*

Reserve your accommodations by calling the hotel directly at 800/937-8461, or online at *www.westinportland.com*. Refer to the **ABA Section of State & Local Government Law's Spring 2011 Meeting,** and guarantee your reservation by credit card or deposit check. Rooms will be available for check-in no later than 3:00 p.m. with check-out time of 12:00 p.m. **Individuals with guaranteed reservations must cancel their reservations 24 hours prior to the scheduled day of arrival to avoid a one-night cancellation charge.** The hotel will release our room block on Thursday, April 21, 2011, at 5:00 p.m. (CST).

CANCELLATION POLICY

Refund requests must be made in writing (via email or U.S. mail) and received in the Section of State and Local Government Law's office **on or before April 21, 2011.** All refunds will be reduced by a $25 administrative fee. Substitutions may be made at any time.

NO refunds will be made after April 21, 2011.

To register for the State and Local Government Law Section Spring Meeting in Portland, Oregon, visit **http://new.abanet.org/calendar/state-and-local-government-law-2011-spring-meeting/Pages/default.aspx.**

Nominating Committee Appointed

Section Chair Dwight H. Merriam, on consultation with the Council, named the following Section members to the Nominating Committee:

Edwin P. Voss, Jr., *Chair*
Brown & Hofmeister
740 E. Campbell Rd., Ste. 800
Richardson, TX 75081
214/747-6100
evoss@bhlaw.net

David L. Callies
University of Hawaii
dcallies@hawaii.edu

Nadia Lynn Costa
Miller Starr Regalia
nadia.costa@msrlegal.com

Scott I. Steady
Williams Schifinol
ssteady@williamsschifino.com

Lai Sun Yee
lmyee1@gmail.com

At the Annual Meeting in August, the Nominating Committee will submit the names of nominees for Section Officers and Council for the 2011–12 Association year. Section members who would like to suggest potential nominees should contact Edwin P. Voss, Jr., *Chair,* Brown & Hofmeister, 740 E. Campbell Road., Suite 800, Richardson, TX 75081, 214/747-6100, *evoss@bhlaw.net,* or any other member of the Nominating Committee by May 1, 2011.

JOIN A COMMITTEE!

One way to ensure that you maximize the value of your Section membership is to sign up for a Section committee. Even if you do not want to be an active member, please sign up for the committees that deal with the areas of law in which you are interested.

- ❑ Condemnation Law
- ❑ Diversity Law
- ❑ Environmental Law
- ❑ Emergency Management/ Homeland Security
- ❑ Ethics
- ❑ Government Operations and Liability
- ❑ Land Use, Planning & Zoning
- ❑ Public Education
- ❑ Public Finance

Committee membership is free. For information on the Section's committees, to join a committee, or to contact a committee chair or vice-chair, please visit **www.abanet.org/statelocal**. This page lists the links to each of the Section's committee web pages, where you will find details specific to each entity's work. From there, you can also e-mail a chair or vice-chair directly if you are interested in contributing to the work of the committee, as well as sign up for one of the committee listservs.

Send your committee enrollment information to Marsha Boone, administrative assistant, 321 N. Clark St., Chicago, IL 60654-7598, 312/988-5649, fax 312/9885121, statelocal@abanet.org.

Committee(s): _____

Your Name: _____

Address: _____

E-mail: _____

Telephone: _____ Fax: _____

MAY 19, 2011

Recent Developments in State and Local Government Law

Live Webinar and Teleconference Series (From the 2011 Spring Meeting)

If You Missed the Spring Meeting in Portland . . .

The Section of State and Local Government Law invites you to attend its annual three-program Live Webinar and Teleconference Series featuring customized curriculum designed for both new and experienced attorneys. This three-program Live Webinar and Teleconference Series is the most prudent and economical way to gain up to 3.5 hours of CLE credit in one day.

Thursday, May 19, 2011

11:00 a.m.–12:30 p.m. Eastern
Sex, Drugs and Government?

1:00 p.m.–2:00 p.m. Eastern
Cyberbullying

2:30 p.m.–3:30 p.m. Eastern
Ethics of Social Networking *Up to 3.5 hours of CLE*

Cost: $225 Section of State and Local Government Law, Criminal Justice Section and Law Practice Management Section Members | $300 ABA Members |$205 ABA Young Lawyers Division | $360 General Public | $205 Government Lawyers/Employees, Family Law

Sponsored by the American Bar Association Sections of State and Local Government Law, Criminal Justice, and Law Practice Management, and the ABA Center for Continuing Legal Education

Register by phone at 800/285.2221, Monday–Friday, 8:30 a.m.–6:00 p.m. Eastern,

Event Code: cet1rdg

Or visit **http://apps.americanbar.org/cle/programs/t11rdg1.html.**

SECTION OF STATE AND LOCAL GOVERNMENT LAW

2011 ABA Annual Meeting

August 4–7, 2011 ✳ DELTA CHELSEA HOTEL ✳ TORONTO, ONTARIO, CANADA

THURSDAY, AUGUST 4, 2011

7:00 a.m.–5:00 p.m.
Section Office
Baker, 2nd Floor, Delta Chelsea

3:00 p.m.–4:30 p.m.
Executive Committee Meeting

5:30 p.m.–7:00 p.m.
Networking Reception
Please RSVP—Contact Marsha Boone, at 312/988-5649 or Marsha.Boone@americanbar.org.

FRIDAY, AUGUST 5, 2011

Delta Chelsea Hotel, 33 Gerrard Street W.

7:00 a.m.–5:00 p.m.
Section Office
Baker, 2nd Floor, Delta Chelsea

7:30 a.m.–8:30 a.m.
Publications Oversight Board
Seymour Room, 2nd Floor, Delta Chelsea

8:30 a.m.–9:30 a.m.
***Urban Lawyer* Advisory Board**
Stevenson Room, 2nd Floor, Delta Chelsea

9:30 a.m.–11:00 a.m.
Council Meeting
Churchill Ballroom B, 2nd Floor, Delta Chelsea

11:00 a.m.–12:00 p.m.
Diversity Outreach Committee
Stevenson Room, 2nd Floor, Delta Chelsea

12:00 p.m.–2:00 p.m.
Jefferson B. Fordham Award Luncheon
Bb33 Bistro & Brasserie at the Delta Chelsea Hotel
This is a ticketed event, not included in the general registration fee. The cost is $50 per person.

2:15 p.m.–3:15 p.m.
Substantive Committees Business Meetings
Seymour Room, 2nd Floor, Delta Chelsea

3:15 p.m.–4:15 p.m.
Land Use Committee
Stevenson Room, 2nd Floor, Delta Chelsea

4:15 p.m.–5:15 p.m.
Revenue Enhancement Committee
Stevenson Room, 2nd Floor, Delta Chelsea

6:00 p.m. to 8:00 p.m.
Chair Elect's Reception
c5 Lounge, 100 Queen's Park
Please RSVP—Contact Marsha Boone, at 312/988-5649 or Marsha.Boone@americanbar.org.

SATURDAY, AUGUST 6, 2011

7:00 a.m.–5:00 p.m.
Section Office
Baker, 2nd Floor, Delta Chelsea

8:30 a.m.–10:00 a.m.
Protecting Heirs Property: Uniform Laws and Social Justice
CLE Centre, Metro Toronto Convention Centro, 225 Front Street W.
Moderator: Steven J. Eagle
Speakers: Carolyn Gaines-Varner, David Dietrich, Thomas Mitchell, Kieran Marion.
Extended families (largely in the rural South) have lost their homes through partition sales by investors acquiring small fractional interests. A new Uniform Act targets abuses while protecting traditional property rights.

10:30 a.m.–12:00 p.m.
The Bully at School Goes High Tech: Protecting Students in the Internet Age
CLE Centre, Metro Toronto Convention Centro, 225 Front Street W.
Moderator: James C. Hanks
Speakers: Grant Bowers, Dr. Jeff Gardere, Jody Westby
Changes in technology have created new ways for students to bully one another and new legal challenges for schools and society. The program will (1) address legal/constitutional issues regarding the regulation of bullying, (2) review case histories, and (3) provide best practice guidance for policies and procedures.

12:30 p.m.–1:30 p.m.
Lunch on Your Own

1:30 p.m.–2:30 p.m.
Membership Committee Meeting
Stevenson Room, 2nd Floor, Delta Chelsea

2:30 p.m.–3:30 p.m.
Electronic Communications Committee
Stevenson Room, 2nd Floor, Delta Chelsea

3:30 p.m.–4:30 p.m.
Content Advisory Board
Stevenson Room, 2nd Floor, Delta Chelsea

SUNDAY, AUGUST 7, 2011

Delta Chelsea Hotel, 33 Gerrard Street W.

7:00 a.m.–12:00 p.m.
Section Office
Baker, 2nd Floor, Delta Chelsea

8:30 a.m.–10:30 a.m.
Council Meeting and Nominating Committee Report
Churchill Ballroom B, 2nd Floor, Delta Chelsea

Climate Change and Emergency Management: Adaptation Planning

By Edward A. Thomas and Terri Turner

"*climate change*" generally elicits an emotional reaction in even the most mild-mannered audience. Insurance companies and respected journals, such as the *New York Times*, report increasing concerns about the damages that will occur if those who believe in climate change are later proven to have been prescient. *See, e.g.,* Elisabeth Rosenthal, *Huff and Puff and Blow Your House Down,* N.Y. Times, Week in Review, Feb. 12, 2011, at 2. Many believe that climate change is part of a vast left-wing conspiracy to take away property rights and fund the current political agenda. Sea level rise is well-documented, however, and temperatures are setting records all over the planet. Regardless of the debate, a fundamental principle of emergency management provides a basis for action: "Hope for the best and plan for the worst."

"Natural" Disasters

To begin, consider whether "natural disasters" are really natural. Can we throw the blame at Mother Nature when humans build improperly in areas subject to natural hazards? The late Dr. Gilbert F. White, often known as the Father of Modern Floodplain Management, often said, "Floods are acts of nature, but flood losses are largely acts of man."

Those occurrences we call "natural" disasters are usually quite unnatural. Predictably, Mother Nature will do what she does with earthquakes, wildfires, floods, high winds, and other natural phenomena. Unfortunately, many people and cities build poorly designed structures in inappropriate locations where natural phenomena are likely to occur. Rather than blame Mother Nature for "natural disasters," we should acknowledge Pogo's words of wisdom: "We have met the enemy, and he is us."

Edward A. Thomas is the president of the Natural Hazard Mitigation Association, www.nhma.info, and a floodplain manager and disaster response and recovery specialist.

Terri Turner, AICP, CFM, is the deputy executive director of the Natural Hazard Mitigation Association, the assistant zoning and development administrator for the Augusta-Richmond County Planning Commission in Augusta, Georgia, and the Region 4 director of the Association of State Floodplain Managers (ASFPM).

This commentary summarizes and expands on a presentation Mr. Thomas made at the Section Fall Meeting in Providence, Rhode Island, in October 2010. Mr. Thomas may be reached at ethomas@mbakercorp.com. *Ms. Turner may be reached at* tturner@augustaga.gov.

There is no question that wind and flood disasters are increasing at a dramatic pace around the world. Dr. Roger Pielke has researched what would happen if actual historic floods took place in today's highly developed floodplains. He determined, for example, that a repetition of the 1926 Miami hurricane would cause approximately $160 billion dollars in damages and untold misery to the vulnerable population in that area. A repetition of the 1900 Galveston hurricane would cause damage totaling about $100 billion dollars. Other researchers estimate that a repetition of the historic 19th century New York City hurricane would cause between $500 billion to $1 trillion in damages.

Irresponsible land use patterns and building practices are significant contributing factors to increased damages. Think of Miami today and compare it to the city in 1926, the last time it was hit directly by a significant hurricane. The difference is palpable. Millions of people are in harm's way, and they will suffer horribly when Mother Nature does what Mother Nature is most surely going to do, someday.

Hurricane Katrina, hopefully, taught an important lesson: there is no possibility of a sustainable economy, or for that matter, any economy at all, unless we plan and prepare for natural disasters. Improper or unsafe development in inappropriate locations is not inevitable, but the result of very deliberate actions and decision making. Developers and engineers that design, and the local governments that approve, such development must wise up.

Demographic trends along our coasts and in other vulnerable areas indicate greater challenges in the future because of sea level rise and the more frequent occurrence and greater intensity of storms. Poorly designed development in the wrong location can exacerbate the effects of Mother Nature's fury. Paul Farmer, APA executive director, recommends that "we need to take a look at both where we build and how we build. We can't just build in bad locations. We must build safely and properly." Farmer urges local government officials to "just say no to building on barrier islands or in wildfire prone areas."

Risk

Risk is calculated by multiplying the probability of the flood times the consequences. Think of Sacramento, California. A major levee is located on the Sacramento River. On one side is farmland and on the other is the

capital of California. How can the flood risk be changed here? On the one hand, if a flood takes place on the farmland, the farmers will have a horrible, miserable event in their lives. Their land may be rendered permanently unable to grow crops because of the volume of sand that will flow out of the levee. On the other, if Sacramento is almost entirely underwater, it becomes a very different situation with incredible misery and devastation, which may also include loss of life.

The Army Corp of Engineers in California has pioneered efforts to buy down flood risk through programs of warning and evacuation, insurance, improved building codes, resilience, improved levees, continued stewardship plans, and outreach—recognizing that significant risk still remains. Unfortunately, what is really going on around the nation is the opposite—we are increasing risk because insufficient attention to building codes, warning and evacuation programs, insurance, and other risk reduction efforts.

Damages are going to increase even if the current minimum standards of the National Flood Insurance Program (NFIP) are perfectly implemented. Although the NFIP has succeeded in significantly reducing our nation's exposure to flood losses, nevertheless our appetite for development and our proclivity to develop larger and higher value structures, especially in hazardous locations like floodplains and in areas subject to wildfires, has resulted in mounting losses. Good engineering science enables us to calculate the likely effects of development on flood heights and velocities, as well as how to design to resist reasonably foreseeable wind loads, earthquakes, and wildfires. These calculations can be made before development and used to help design safe, sustainable developments, or they can be made following a flood, earthquake, or wildfire to assist in litigation. Making the calculations before a disaster is much more cost effective and reduces the probability of many kinds of misery, including litigation.

Even if the climate stabilizes, millions of people are still at risk and that risk is still growing because natural hazards continue to be ignored when development decisions are made.

Regulating Development

So, why aren't we doing more to safely and properly regulate development?

The National Oceanic and Atmospheric Administration (NOAA) commissioned a report based on interviews with community development officials around the nation. The conclusions of the report reveal that there are basically two reasons we are not doing more to lessen the severity of disasters. The primary reason is economics. Development near the water is more valuable, and local governments covet these high-value properties. Yet, taxpayers pick up the costs post disaster, while the benefits go to the developers, local governments, mortgage companies, and engineering firms. The second reason local governments are not doing more to properly regulate development is fear of regulatory takings challenges. It is important to point out here, however, that research Jon Kusler, Ed Thomas, and others have done for the Association of State Floodplain Managers (ASFPM) found that communities are most apt to pay when developments they permit cause damages, not when the community denies a permit. That damage is easily predictable given current technology and better computer models. Further, Mr. Kusler was able to find only a few cases in which the landowner prevailed in a regulatory takings suit against a municipality's denial of use, when the proposed use would have had substantial offsite effects or threatened public safety. In fact, courts have broadly and consistently upheld performance-oriented floodplain regulations, including those that exceed minimum FEMA standards. Regulations that require additional freeboard, impose tighter floodway restrictions, or very tightly regulate high risk areas, have consistently been upheld by the courts.

Regulations based solely on considerations of climate change may be a different matter. Even very conservative legal scholars, such as those at the Cato Institute, agree that if a regulation prohibits wrongful uses, then no compensation is required. But what is a wrongful use? Will the courts accept the theory of climate change as a basis for severe restrictions on development?

Other considerations beyond concerns about climate change, especially in coastal areas, may well be more persuasive to a court, however. For example, in developing property in floodplain areas, flood elevations present many uncertainties. Generally, when an engineer makes a critical calculation, he or she strives to reach a confidence interval of 90%–95% that the calculation is correct. For flood elevations on the FEMA Flood Insurance Rate Maps, a 50% confidence interval is the norm. A 50% confidence interval may be appropriate for a map designed for the purpose of rating an insurance policy, but it is not good enough for public safety. It is possible to adapt to the very real uncertainties in future flood heights by designing buildings and other infrastructure located in floodplains to take such events into account. Other considerations such as warning/evacuation time, life safety, and concerns about debris from coastal property destroyed by a storm causing harm to property that otherwise would not have been harmed, may also be quite appropriate for consideration in reviewing the worth of a coastal development.

Joining the Call

Many organizations are joining the call for improved consideration of how we develop, particularly in areas prone to predictable natural events such as floods, wildfires, and earthquakes. The American Bar Association has adopted a series of resolutions addressing hazard mitigation. The Federal Emergency Management Agency has started looking at how to reform the National Flood Insurance Program, to make the program even better and more effective. The Army Corps of Engineers is moving away from the concept of "flood control" to the much more practical

(continued on page 15)

Recipe for a Housing Boom: Market + Senior Demographics = Stand Back!

By Valerie Lafferty

One Part Grim Stuff

Mortgage delinquencies continue to rise. Despite the small, well-published bright spots in the economy, fundamental negative forces remain at work. Whether chicken or egg, employment remains stubbornly high and housing values are off an arguable one-third[1] since their peak five years ago. The Census Bureau reports the housing industry is in the most severe downturn since tracking new construction began shortly after WWII.[2]

Therefore it should not be surprising that foreclosures in 2011 are likely to exceed the record set in 2010, which was 14% more than 2009. According to RealtyTrac,[3] which started reporting foreclosures in 2005, banks seized the highest number of homes in 2010—1 million. About 3 million have been repossessed since the housing boom ended in 2006, and that "number could balloon to about 6 million by 2013, when the housing market may absorb the bulk of distressed properties. . . ."[4] Plus some banks will remove their moratoriums on foreclosures (because of questionable paperwork/procedures) so any way you look at it 2011 promises to be trouble still.

One Part Demographics

Close to one-fifth of all homebuyers are 55+.[5] The enormous ripple effect of the baby boomers pushing through the economy is staggering. For instance, the leading edge of this age group is now Medicare ready (meaning age 65) with projections of 10,000 boomers added per day to the federal health-care plan over the next 18 years.

Mix-in 2009 American Housing Survey[6]

The National Association of Home Builders (NAHB) and MetLife Mature Market Institute published a report on Housing Trends for the 55+ Community based on a HUD and U.S. Census Bureau survey measuring trends in housing from 2001 to 2009. In comparing trends from 2001 to 2009, the following may be instructive on where things are headed:

- Proximity to family has been the strongest reason for seniors to relocate in recent years. In fact the desire to be near family and friends is the overwhelming motivation of the over 55 crowd.
- Down payments used to come from the proceeds of prior home sales, but now they come increasingly from savings: 55% (2009), 92% (2007), and 100% (2005).
- There is gradual and sustained growth in age restricted or 55+ neighborhoods.
- Seniors recognize and make choices based on quality.
- In more affluent retirement communities, prices have held up well.
- In 2009, 10% of the 55–64 age group moves were job related.
- In 2009, 15% of seniors worked from home vs. 8.4% in 2003—a 44% increase in six years.
- Proximity to work grew in importance: 12% in 2009 vs. 2% in 2001.
- NAHB indicates a steady rise in reverse mortgages, generally used by lower income women who have spent a long time in their homes.
- The median value of homes (whether with a reverse mortgage or with no mortgage) is roughly $225,000.

Add Heat

As we all know from the media, seniors are living longer, working longer, and medical advances portend increasing quality of life advances, if not lifespan as well.

Stand Back?

For a small bright spot, Fannie Mae (largest buyer of U.S. mortgages) says home values may rise 0.6% in 2011,[7] the first annual increase since 2006. But more importantly, sometime soon the balance of divergent economic forces finally must shift enough to cause a chain reaction of buying and selling. One person's buy is another's sell. If the activity reaches a critical mass threshold, why wouldn't it be of chain-reaction proportions? People have been putting their lives on hold "until the market gets better" for too many years.

When these ingredients come together, the effect on the real estate market will surely to be explosive—senior housing included!

Valerie Lafferty practices in elder law and real estate and is a part-time attorney at Elder Law Michigan, a nonprofit serving seniors 60 and over in Michigan.

Endnotes

1. S&P/Case-Shiller Index of 20 cities.
2. Philip Moeller, *The Graying of American Housing Continues*, U.S. News & World Rep., Jan. 12, 2011, *http://money.usnews.com/money/blogs/the-best-life/2011/01/12/the-graying-of-american-housing-continues.html*.
3. RealtyTrac, *www.realtytrac.com/home*.
4. Don Miller, *Housing Crisis Could Peak in 2011 as Foreclosures Rise to Record*, Money Morning, Jan. 13, 2011, http://moneymorning.com/2011/01/13/housing-crisis-could-peak-2011-foreclosures-rise-to-record.
5. Moeller, *supra* note 2.
6. *See www.nabb.org.*
7. Miller, *supra* note 4.

SUPREME COURT WATCH

By Sophia M. Stadnyk

Getting Personal: Public Employees, Workplace Grievances, and Petition Clause Rights

If this Court adopts the Third Circuit's view, it will open the door for state and local government employees to make "a federal case" out of every garden variety employment dispute. . . . [1]

On March 22, the U.S. Supreme Court heard arguments in a First Amendment case to determine whether a local government employee is protected from retaliation under the First Amendment's Petition Clause[2] when he complains to the government on matters of purely personal, not public, concern.

The Facts

The case, *Borough of Duryea v. Guarnieri*,[3] is grounded in an acrimonious working relationship between Charles J. Guarnieri, the chief of police of Duryea, Pennsylvania, and the Duryea Borough Council. A collective bargaining agreement between the municipality and its police officers stipulated that a member of the force could be discharged only for "just cause" and established a binding arbitration process for grievances. After the seven-member Council fired Guarnieri in 2003,[4] he filed a grievance, which led to arbitration and his ultimate reinstatement in 2005. On his first day back at work, the Council presented him with a list of eleven "directives" that began:

> 1. Your daily shift consists of eight hours. You are not to work more than eight hours per day or more than forty hours per week unless you receive express permission from Borough Council. You are to go home at the end of your eight hour shift.
>
> 2. You are not to attend council meetings as the chief of police and will not be paid for attending council meetings. You may only attend as a citizen. . . .[5]

Guarnieri responded by filing another grievance, which resulted in a direction that the Council change or remove some of its directives because, among other things, they were vague or violated the collective bargaining agreement. Guarnieri also filed a 42 U.S.C. § 1983 lawsuit against the Borough and the Council members, claiming that the directives amounted to retaliation against him for having filed (and won) his 2003 grievance. While that federal lawsuit was pending, the Council refused Guarnieri's request for overtime pay.[6] The federal Department of Labor investigated and determined that withholding the overtime compensation violated the Fair Labor Standards Act. Guarnieri amended his suit to add a new claim of retaliation based on his filing a lawsuit. (Incidentally, the Borough allegedly never paid Guarnieri this money, as it conditioned payment of the overtime it owed on Guarnieri signing a waiver that would have compromised his other legal claims.[7])

The Decisions

The jury hearing the federal suit returned a verdict in Guarnieri's favor, finding the defendants had retaliated against him by issuing the directives and withholding overtime pay, and awarded him approximately $45,000 in compensatory damages and $52,000 in punitive damages.[8] The defendants moved for a new trial and for judgment as a matter of law, arguing, among other things, that Guarnieri's filing of his 2003 grievance and lawsuit did not address a matter of public concern and that the Third Circuit's precedent on the issue, *San Filippo v. Bongiovanni*[9] (that a public employee was protected under the First Amendment's Petition Clause against retaliation for having filed a good faith petition in the nature of a lawsuit or grievance, even if it addressed matters of purely private concern), contravened the law of numerous other circuit courts.

The district court dismissed, finding that Guarnieri's actions were protected without regard to whether or not they addressed a matter of public concern:

> At this time, the Supreme Court has yet to decide the split in authority between the Third Circuit and other Courts of Appeals. Therefore, the law of *San Filippo* remains good law in this circuit. As a good faith grievance pursuant to a collective bargaining agreement has specifically been protected within the meaning of the Petition Clause by the Third Circuit Court of Appeals in *San Filippo,* Defendants' motion for judgment as a matter of law will be denied.[10]

That court rejected the defendants' argument that the principle in *Garcetti v. Ceballos,* 547 U.S. 410, 422 (2006), applied to First Amendment retaliation claims based on a public employee's petitioning activities, as it did to employee speech. In any event, the filing of both Guarnieri's grievance and his lawsuit were not actions taken under his "official duties" as the chief of police.[11] The district court also held that there was sufficient evidence of causation. Although the 2003 grievance occurred approximately two years before the alleged retaliatory actions, a reasonable jury could still find temporal proximity,[12] and there was a sufficient basis on which a reasonable juror could find that the

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directives would deter a person of ordinary firmness from exercising his First Amendment rights.[13] Because the law as to the First Amendment was clearly established, the defendants were not entitled to qualified immunity.[14]

On appeal, in a nonprecedential ruling, the U.S. Court of Appeals for the Third Circuit affirmed on the First Amendment issue, finding that, although circuit precedent conflicted with that of other circuits, "we are bound by our prior holding."[15] *San Filippo* was "clearly established, controlling law," and the defendants were not entitled to qualified immunity.[16] Liability attached to the municipality because of the "ample evidence" that its Council both made Borough policy and was responsible for the retaliatory acts.[17] But, although the issuance of the directives and the withholding of overtime pay were retaliatory, as well as "petty and careless," acts, none of the defendants' actions demonstrated malice or the "reckless or callous indifference to the federally protected rights of others" needed to support the grant of punitive damages.[18]

The decision ran counter to decisions by all 10 other federal circuits and four state supreme courts that had ruled on the issue and set the stage for the Supreme Court's involvement.[19]

The Issue

The backdrop to this case is the Court's earlier First Amendment decisions in *Connick v. Myers,* 461 U.S. 138, 147 (1983), and *McDonald v. Smith,* 472 U.S. 479, 485 (1985). In *Connick,* the Court held that the First Amendment's Free Speech Clause did not protect a public employee from an adverse employment action taken because of her speech, because the speech there was not on a matter of public concern and addressed internal or personal interest issues.[20] A federal court, it noted, was not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. The Court subsequently affirmed this approach in *Garcetti v. Ceballos,* 547 U.S. 410, 422 (2006), restricting the protection further: when public employees speak in the course of carrying out their routine and required employment obligations, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their speech from employer discipline.

In *McDonald,* the petitioner, McDonald, wrote letters to President Reagan and others containing "false, slanderous, libelous, inflammatory and derogatory statements" about Smith, a candidate for public office. When sued in a libel action by Smith, McDonald relied on the Petition Clause as a shield, claiming it provided absolute immunity from liability. The Supreme Court disagreed, finding the petitioner's argument sought to "elevate the Petition Clause to special First Amendment status."[21] The Petition Clause, however, was "inspired by the same ideals" as the other "inseparable" First Amendment rights, the freedoms to speak, publish, and assemble, and there was "no sound basis for granting greater constitutional protection to statements made in a petition . . . than other First Amendment expressions."[22]

The question for the Supreme Court in *Borough of Duryea v. Guarnieri* is the extent to which local government employees are protected by the First Amendment's Petition Clause for petitioning the government on purely private concerns. At its most basic, the dispute is one of style versus substance.

The respondent employee argues that the "core purpose of the petition clause is to enable petitioners to seek redress, not to facilitate any expression"[23]—that the clause protects the *process.* "When the petition clause was adopted, the common understanding of Americans was that the right to petition included efforts to obtain redress for private problems."[24] Given the facts, neither *Connick* nor *McDonald* is the controlling precedent, and the legal issue in this case is "essentially the opposite of the issue in *McDonald*."[25] There, Smith did not challenge McDonald's Petition Clause right to oppose his appointment to public office; the gravamen of his action was that the statements McDonald made in doing so were false, damaging, and likely cost him the position. In contrast, the municipal defendants here did not take the allegedly retaliatory actions because of Guarnieri's statements, or seek to justify their actions against him because his grievances or the lawsuit were false, defamatory, disruptive, insubordinate, or in any other way objectionable. Rather, "they contend . . . that Guarnieri's very act of petitioning is not protected by the Constitution."[26] The particular retaliatory intent alleged by Guarnieri, and accepted by the lower courts, was limited to the *acts* of filing the grievance and lawsuit.

For their part, the petitioners, the municipal actors, seek to draw a parallel between the employee free speech rulings and the less common cases relying on the Petition Clause, based on *Connick* and *McDonald.* They argue that, by ignoring the "matter of public concern" requirement, the Third Circuit's decision puts employees relying on the Petition Clause in a better position than those raising their free speech rights. This, they say, "violates fundamental principles of parity between speech and petitions," as the right to petition and the right to free speech, while separate guarantees, "are related and generally subject to the same constitutional analysis."[27] Accordingly, if petition claims concerning private matters were actionable but speech claims were not,

> public employees could (and will) easily sidestep *Connick* by characterizing their claims as arising under the Petition Clause. Such easy evasion of *Connick* would encourage an onslaught of burdensome litigation and costly settlements and judgments. Government employers would face increased complexity and uncertainty in addressing employee complaints, creating an obvious risk that public employers will retain unproductive or disruptive employees simply to avoid crippling defense costs and judgments.[28]

This, they (and amici in support) argue, would bring government to a standstill, as government offices could not function if every disputed employment decision became a constitutional matter.[29] In addition, one of the potential difficulties would be that an employee could be "petition-

ing" the same government that was employing him. "By forcing public officials to make employment decisions based on a guess as to whether a disgruntled employee is 'petitioning' or just 'speaking,' the Third Circuit has exposed officials to the very legal uncertainty" that the Supreme Court "consistently has sought to minimize."[30]

Will the Court prioritize petitions, or grant petition parity, or choose a third way that balances the interests at stake? Is there a distinction between employee petitions and speech in this context, or is any distinction essentially arbitrary and contrary to the best interest of public employers? The answers will surely be of interest.

Endnotes

1. Brief of Amicus Curiae, The State and Local Legal Center, in Support of Petitioner, 2010 WL 5125438, at *2 (U.S. Dec. 13, 2010).
2. U.S. Const. amend. I, cl. 6. This reads, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."
3. 364 Fed. Appx. 749 (3d Cir. 2010), *cert. granted,* 131 S. Ct. 456 (2010) (No. 09-1476).
4. The reason for the firing is not stated in the decisions. But the Brief for the Petitioners, 2010 WL 5014179, at *6 (U.S. Dec. 6, 2010), states it was for misconduct and disciplinary reasons. The respondents alleged it was prompted, in part, because Guarnieri rejected a request from the Council Chair that he lobby the mayor to sign a proposed ordinance that was unrelated to the Police Department. Brief for the Respondent, 2011 WL 175871, at *2 (U.S. Jan. 18, 2011).
5. Guarnieri v. Borough, No. 3:05-CV-01422, 2008 WL 4132035, at *13, 14 (M.D. Pa. Sept. 2, 2008). The entire list of directives is included in this decision.
6. 364 Fed. Appx. at 752. In another dispute, Guarnieri was allegedly refused health insurance coverage for his wife because the Borough Secretary did not believe he was married, despite Guarnieri providing a marriage license signed by Duryea's mayor. *Id.* at 752 n.1. The jury rejected this retaliation claim. Brief for the Petitioners, 2010 WL 5014179, at *10, n.5.
7. Brief for the Respondent, 2011 WL 175871, at *5 (U.S. Jan. 18, 2011).
8. Guarnieri v. Borough, 2008 WL 4132035, at *1. This included $3,000 against each individual defendant respecting the issuance of the directives, and $3,500 against each individual defendant for the denial of overtime pay.
9. 30 F.3d 424, 439 (3d Cir.1994).
10. Guarnieri v. Borough, 2008 WL 4132035, at *5.
11. *Id.* at *6.
12. *Id.* at *12. It held, however, that same temporal proximity did not exist between the filing of Guarnieri's lawsuit and the denial of overtime pay.
13. *Id.* at *14.
14. *Id.* at *8, *10.
15. 364 Fed. Appx. at 753.
16. *Id.*
17. *Id.* at 754.
18. *Id.*
19. For a list of these other decisions, see Brief for the Petitioners, 2010 WL 5014179, at *4, *5 (U.S. Dec. 06, 2010).
20. 461 U.S. 138, 147 (1983).
21. 472 U.S. at 485.
22. *Id.*
23. Brief for the Respondent, 2011 WL 175871, at *8.
24. *Id.* at *7.
25. *Id.* at *6.
26. *Id.* at *7.
27. Brief for the Petitioners, 2010 WL 5014179, at *14.
28. *Id.* at *13.
29. For example, the Amicus Curiae Brief of the Pennsylvania State Association of Boroughs in Support of Petitioners, 2010 WL 2709840 (U.S. July 6, 2010), notes that as

> a result of constitutionalizing public employer-employee disputes, small borough governments, which have limited revenue resources and budgets, will be easily overburdened merely by the threat of employee litigation. . . . The dedication of volunteer public elected service will evaporate as more elected officials are besieged with individual labor issues because of the elevated protection afforded by the Petition Clause.

Id. at * 11.
30. Brief of amicus curiae, The State and Local Legal Center, in Support of Petitioner, 2010 WL 5125438, at *5 (U.S. Dec. 13, 2010).

Public Sector Bargaining

(continued from page 1)

is a similar outside cap to any interest arbitration award regarding base salary.

Montgomery County, Maryland

In December, Montgomery County, Maryland, modified its County Code's interest arbitration procedures to beef up and require consideration of County economics. The new procedure provides that the interest arbitrator must first evaluate and give "the highest priority" to the ability of the County to pay for additional short-term and long-term expenditures by considering: (1) limits on the County's ability to raise taxes under state law and its charter; (2) the added burden on County taxpayers resulting from increases in revenues needed to fund a final offer; and (3) the County's ability to continue to provide the current standard for all public services. Only after an interest arbitrator evaluates the ability of the County to pay may the interest arbitrator consider the numerous other criteria set forth in the County Code.

The new Code provision gives the County some comfort in knowing that any interest arbitrator will give the highest priority in his determination to whether the County is able to pay for what its unions are seeking without reducing its current level of services.

Wisconsin

Wisconsin Senate Bill 11, introduced on Valentine's Day, addresses numerous spending issues, including altering cost sharing on certain public employee pension and health insurance coverage. The public standoff, however, has been over the changes to the state's collective bargaining statutes as to "general employees"—notably, police officers and firefighters are exempted from the bargaining changes.

While New Jersey put a cap on wage negotiations and banned negotiating over new economic benefits, the Wisconsin bill limits general employee bargaining to base wages only. Unless residents by referendum authorize a greater increase, any wage increase negotiated can be no greater than the percentage change in the consumer price index. Contracts would be limited to one-year terms, and wages would be frozen until a new contract is ratified.

There are other changes as well. University of Wisconsin (UW) System employees, UW Hospitals and Clinics Authority employees, and certain home-care and child-care providers no longer would be permitted to organize. General employee bargaining units would have to hold a certification election each year to determine whether employees still wished to be represented. Employers would be prohibited from deducting dues from general employee paychecks, and general employees could not be required to pay dues—that is, no fair share provisions.

Wisconsin Governor Walker has reported that S.B. 11 is designed to permit state and local governments to make the difficult cuts necessary to offset losses of state revenues

as a result of pending budget cuts. The press largely discounts this, but public employers that engage in collective bargaining will attest that bargaining and contract administration in and of itself costs money. Moreover, contract provisions on such issues as staffing, scheduling limitations, overtime, and layoff restrictions—as well as generous health insurance, pension, and time off provisions—can be expensive, limit flexibility to cut costs, and can be very difficult to obtain concessions over in bargaining.

Ohio

Ohio Senate Bill No. 5, as currently amended before its passage by the Ohio Senate on March 2, is in many respects a complete re-write of Ohio's public bargaining laws and is reportedly designed to correct a current imbalance in bargaining power. Unlike Wisconsin, however, employees will be able to bargain over far more than just wages. Those interested in reading the entire bill or the summary bill analyses are encouraged to do so. *See www.legislature.state.oh.us/bills.cfm?ID†129_SB_5_RS.*

The public attention on S.B. 5 has been focused on the limitations placed on collective bargaining and impasse resolution. Numerous issues would be inappropriate for bargaining and banned from any agreement: (1) employer-paid employee contributions to any state public employee retirement system, (2) requiring the employer to pay more than 85% of the cost of health care benefits, (3) prohibitions on privatization and contracting out, and (4) staffing and hiring minimums. Existing contract provisions that do not concern wages, hours, or terms and conditions of employment would not be considered mandatory subjects of bargaining for future negotiations.

S.B. 5 also eliminates step pay systems and, instead, requires merit-based pay for most public employees, and performance-based pay for teachers and educational employees. In addition, no contract could (1) provide for the payment of overtime beyond the minimum required under the Fair Labor Standards Act, (2) provide for sick leave accrual, sick leave buyback, and vacation accrual beyond certain levels, (3) contain certain provisions regarding the deferred retirement option plan, (4) use seniority as the only factor in layoffs, (5) prohibit an employer in a state of "fiscal emergency" or "fiscal watch" from renegotiating its agreement, (6) require an employer to continue practices or benefits not expressly set forth in the contract, or (7) set maximum class sizes.

Currently, most Ohio nonpublic safety employees have the right to strike, and those employees that do not ultimately can engage in a binding interest arbitration process, mandatory conciliation, to determine the final terms of the contract. Under S.B. 5, no public employee can strike. Moreover, in lieu of mandatory conciliation, there would only be a nonbinding fact-finding process. Ultimately, in the event of no agreement the public employer's legislative body (the city council, for example) would, after a hearing, determine which parties' final offer to accept.

S.B. 5 is projected to save state and local governments more than $1 billion annually, savings that the Governor reports are needed to help offset budget deficits.

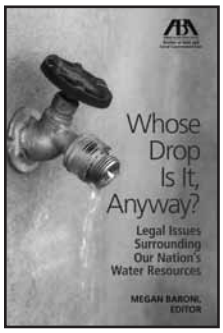
Trend or Fad? Right or Wrong?

What is happening is as unprecedented as the economic tsunami facing many state and local governments. Given that in many states public sector employees have limited or no bargaining rights, the scaling back of rights for those employees that have them is not as radical as some might claim. After all, no state at issue has repealed bargaining rights completely. There even was a time when then President Franklin Roosevelt called the idea of public sector unions "unthinkable and intolerable," and then AFL-CIO President George Meany declared that it was "impossible to bargain collectively with the government." *See www.huffingtonpost.com/social/HistoryGuru/scott-walker-prank-call_n_827370_78472859.html.*

Few can dispute that state and local governments are facing difficult economic times. Some public employers have had serious difficulties negotiating concessions to avoid layoffs and service reductions, and some interest arbitrators have been unwilling to impose concessions. These bills and laws will make it easier for state and local governments to limit and/or reduce employment costs. Who is to blame for the economic crises, the true extent of the savings achieved by these laws, whether public employees even should have the right to bargain, whether reform instead of harder bargaining is necessary to achieve savings, and whether other actions might be taken that would better preserve employee bargaining rights are all issues clearly open to debate.

It is too early to tell whether this will become a trend, but other states are keeping an eye on what is happening in Ohio and Wisconsin. Even if states do not propose changes as broad as those two states, it would not be surprising to see proposals to prohibit bargaining over certain subjects (for example, privatization, contracting, layoffs), to place negotiating caps or guidelines on certain economic issues (insurance, pensions, wages), or to require interest arbitrators to give greater consideration to an employer's financial situation and its desire to maintain service levels. At a minimum, public sector unions may want to think twice before taking a hard line against concessionary bargaining—for they may risk losing the right to bargain all together.

The Book Corner



Whose Drop Is It Anyway? Legal Issues Surrounding Our Water Resources

Megan Baroni, Editor

$99.95 list price
$79.95 member price

"Whiskey is for drinking, water is for fighting over."
—attributed to Mark Twain

If push comes to shove, most agree that mankind could transition away from fossil fuels, could live and travel more efficiently, could learn new "old" farming techniques, and could build a new economy to replace the faltering one. Water, though, that's a different story.

Water is undeniably indispensable.

> "Water is fluid. More than just a bad pun, this statement conveys the pervasiveness of water issues on the American and global legal landscape. Quite simply, it gets into everything. As scarcity issues become more common and threats like global climate change loom with uncertainty over our water resources, water only stands to become more persuasive in the future." (Introduction—Megan Baroni)

In *Whose Drop Is It Anyway?*, editor and attorney Megan Baroni has bitten off a very big conundrum that continues to stump state engineers, federal court judges, and everyone else interested in who gets how much of this precious resource.

Baroni decides to tackle this challenge by first posing the question to experts involved in the different legal and regulatory regimes. The history and current trends in prior appropriation (Sarah Bates) and riparianism (Benjamin Griffith) highlight the east-west divide. Regulation of water diversions, water transfers, and groundwater withdrawals is addressed from the Florida perspective by the General Counsel of the Tampa Bay Water Authority (Rick Lotspeich). The perplexing intersection between federal and state regulation of water resources is adeptly handled by David Cassuto and Steven Reed.

Not one to shy away from a provocative topic, A. Dan Tarlock addresses the growing impact of climate change on the nation's water resources, providing some thoughtful policy strategies for legislators and water resource managers to consider. The pervasive disconnects between water, growth, and land management is the focus of Lora Lucero's chapter.

Will we see water wars in our future? Baroni hopes not. The final chapters focus on allocation solutions, including litigation (Donald Blankenau), interstate/intrastate agreements (David Naftzger), and potential market-based solutions (Megan Baroni). If you think turning on the tap will always bring you water, this book is a must-read.

Climate Change

(continued from page 9)

and nuanced approach of "flood risk management."

The American Planning Association's (APA) Paul Farmer has written extensively on the subject of flooding and APA's Jim Schwab has authored a new APA publication, *Hazard Mitigation: Integrating Best Practices into Planning*, PAS No. 560.

There is now a National Hazard Mitigation Collaborative Alliance, borne out of the NEMA white paper and charged with providing "*Recommendations for an Effective National Mitigation Effort Building Stronger Partnerships, Increased Resilience, and Disaster Resistance for a Safer Nation*" and a Natural Hazard Mitigation Association (*www.nhma.info/index.html*) that hopes to bring the same education and outreach for all hazards that the Association of State Floodplain Managers (ASFPM) has done for floods.

Successfully Confronting Disasters

The United States has a track record of successfully confronting disasters—airplane crashes and wildfires are two examples. Airline disasters have been reduced at the same time that the number of flights has increased phenomenally. Although wildfires are still a challenge, the incidence of urban wildfires has been reduced tremendously through zoning, building code standards, and communities striving to improve fire protection to secure better insurance rates for all of their citizens.

Following a flood, if we take a serious look at the disaster, and accept that it is not a natural disaster but an unnatural disaster, we can begin to think about how zoning and building codes can prevent misery and devastation. We may find a solution to the mounting toll of floods and other natural disasters. Such thinking has reduced the incidence of plane crashes and urban fires.

We can do better; we have to do better. Already millions of Americans live in areas subject to harm from a mere repetition of actual historic floods, earthquakes, and wildfires. Many more people are expected to move into these areas in the near future. While the debate about climate change rages on, flood heights are increasing, levees are overtopping, catastrophic flood events are occurring, and documentation of sea level rise continues. Development in at-risk areas, especially in high-risk coastal areas and in highly sought after locations "near the water," continues at an alarming rate. If communities continue to encourage at-risk development and ignore their effects on others, can we accept the consequences . . . and, are we willing to pay for them?

In our opinion, the loss of even one life is much too high a price to pay!

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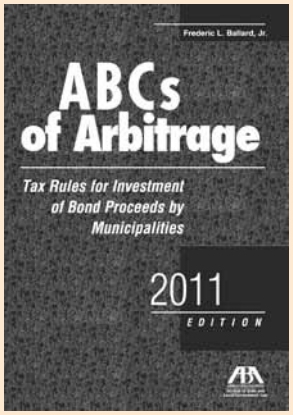

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