

Local Government Law News

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IMMIGRATION-RELATED ORDINANCES

Results of the 2000 census indicated that there were between 8 million and 11 million illegal aliens then living in the United States. A 1997 study by the National Research Council¹ estimated the lifetime fiscal drain at the state and local level from all immigrants (legal and illegal) was a negative \$25,000. That is, an immigrant would cost state and local governments \$25,000 more in services than the immigrant would pay in taxes in the course of a lifetime. Data that are more recent suggest that illegal immigration cumulatively costs state and local government some \$4 billion per year for health care and \$12 billion per year for education.² Local governments are responding in very different ways to these pressures.

One approach, exemplified by Hazelton, Penn., is to pass ordinances aimed at illegal aliens. Hazelton is a small city in the foothills of the Pocono Mountains a couple of hours' drive from Philadelphia and New York. According to the 2000 census, it had a population of about 23,000. Subsequently, it experienced a sharp increase in population attributable in large part to an influx of people moving away from New York and New Jersey after the attacks of September 11, 2001. Most of those moving to Hazelton were Latino and included United States citizens, lawful permanent residents, and undocumented aliens.³

In the summer of 2006, the city enacted a series of ordinances aimed at combating what the city regarded as the problems arising from the presence of illegal aliens. One ordinance, dubbed the Illegal Immigration Relief Act, prohibited the harboring and employment of undocumented aliens.⁴ Another, a tenant registration ordinance, required apartment dwellers to obtain an occupancy permit, for which a person had to prove citizenship or lawful residency.

A group of individuals and associations filed suit in federal district court challenging the validity of the Hazelton ordinances.⁵ This past July, in *Lozano v. City of Hazelton*, the judge rendered a lengthy decision permanently enjoining enforcement of the ordinances for several reasons.⁶

The court first ruled that federal law expressly preempted the employment provisions in the ordinances. The Immigration Reform and Control Act of 1986, noted the court, is a comprehensive scheme that prohibits the employment of unauthorized workers in the United States. The law prohibits the employment of aliens who are not lawfully present in the United States and not lawfully authorized to work here. It requires employers to verify the identity and eligibility of workers and prohibits employing an alien who is unable to present proper documentation.⁷ Most important for the purpose of the court's analysis, the act contains a provision that expressly preempts state or local laws dealing with the employment of unauthorized aliens.⁸

Hazelton argued that its ordinance nevertheless survived express preemption. It did not impose criminal or civil sanctions, but instead merely suspended an offending employer's business license, thus falling within a savings provision. The court rejected this interpretation. Said the court, "It would not make sense for Congress in limiting the state's authority to allow states and municipalities the opportunity to provide the ultimate sanction [of forcing the employer out of business], but no lesser penalty. Such an interpretation renders the express preemption clause nearly meaningless."⁹ Moreover, said the court, such an interpretation is contrary to legislative history. Viewed in light of the legislative history, the statute's reference to revoking a local license allows revocation for a violation of the federal act, not for a violation of local laws.

In addition, the court held that federal law impliedly preempted Hazelton's ordinances for two reasons. First, the pervasiveness of federal regulation of immigration precludes supplementation by the states. Since federal regulation first appeared at the end of the nineteenth century, "an intricate and complex bureaucracy" had evolved to restrict who can immigrate and under what terms.¹⁰ That bureaucracy administers a "complete and thorough" body of law with respect to the employment of unauthorized aliens, and that body of law occupies the field.

Further, held the court, federal law preempts the ordinance because the two conflict.¹¹ Although the ordinance and the federal act have similar goals, they adopt different means to attain those goals. As a result, the ordinance and federal law each strike "a different balance between the rights of businesses and workers and the goal of preventing illegal employment."¹² In the court's opinion, that different balance has implications for the nation's foreign policy. Thus, the responsibility for striking the proper balance must rest with Congress and the president.

Turning from the employment to the tenancy provisions in the ordinances, the court held them preempted as well. Opponents argued that two assumptions underlying the ordinances were faulty – the assumption that the federal gov-

Continued on page 3

articles in this issue

Director's Desk	page 2
Decisions of Note.....	page 5
Opinions of the Attorney General	page 13

DIRECTOR'S DESK

Vision 2015, the region-wide strategic planning process for Northern Kentucky, in its 2006 report invited citizens to imagine living in a booming regional economy whose businesses had generated 50,000 new high-wage jobs. President James Votruba of Northern Kentucky University, in his 2007 State of the University Address, observed that if the region is to attain that goal NKU will have to more than double its degree output.

More generally, in 1997 Kentucky set for itself the goal that it would be by 2020 “a society with a standard of living and quality of life that meets or exceeds the national average.” In its recent report *Double the Numbers*, the Kentucky Council on Postsecondary Education says that to reach that goal the whole state must double the number of Kentuckians empowered by a bachelor’s degree. According to the report, at the state’s current rate of progress Kentucky would not reach the national average in per capita income for another 154 years.

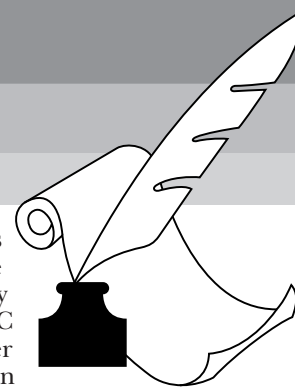
To attain its goal Kentucky must increase the number of home-grown college graduates, but that will not be enough. It must also recruit 80,000 more college-educated workers to Kentucky. Both strategies are dependent on the same asset – good elementary and secondary schools. If Kentucky is to raise high school graduation rates and increase the number of Kentuckians going to and completing college, the need for high-performing elementary and secondary schools is self-evident.

Further, as Dr. Votruba explains in *The Talent Imperative!*, “Talented people choose where to live based on two considerations: professional opportunity and quality of life as measured by a combination of physical, social, and cultural assets. Regions that hope to compete for talent must offer high-value jobs, but they must also offer great schools, great parks and cultural venues, safe and attractive neighborhoods, a strong urban core, and an attitude of openness that welcomes diversity and sees strength in human differences.”

A recent policy note from the Kentucky Long-Term Policy Research Center takes stock of the state’s progress since the Kentucky Education Reform Act of 1990 and the Postsecondary Education Improvement Act of 1997. According to that assessment, Kentucky has improved its national educational ranking from 43rd in 1992 to 34th in 2005. However, it cautions, knowing that Kentucky has improved nine places does not reveal how much distance remains between it and those states competing for the talent it produces or competes to attract. “Comparing Kentucky to the top-10 states in 2005,” it says, “reveals that the commonwealth still has far to go in almost every facet of educational attainment and achievement.” *A Compendium of State Education Rankings*, a recent publication by the Legislative Research Commission, gives readers a sense of just how far that is.

Arguments for greater educational achievement commonly focus on the attendant economic benefits. CPE notes that Ken-

tuckians with bachelor’s degrees typically earn over \$16,000 more per year than do those with only a high school diploma. KLTPRC projects that doubling the number of degree holders could yield an additional \$139.5 billion in personal income and \$9.0 billion in general fund revenue in 2020. Not surprisingly, enhanced worker productivity associated with greater educational attainment translates into higher output and incomes for the economy.



Is there value to government in this beyond simply improved revenue streams? Yes. Social and behavioral statistics suggest that higher educational attainment is associated with greater civic participation. Last year the National Conference on Citizenship, a nonprofit organization created by Congress, reported a large and growing civic divide between those with a college education and those without one. This year the group described the fact that Americans with more years of education are more likely to participate in politics and civil society as the “best documented finding in American political behavior research.”

Better-educated Americans are more likely to vote, to trust government, and to do volunteer work. An article in the Winter 2007 edition of this newsletter noted city and county governments’ increasing dependence on volunteers. College graduates volunteer for community organizations at more than twice the rate for high school graduates. In a similar vein, analyses of the 2004 presidential election revealed that 76 percent of college graduates reported voting compared to 49 percent of high school graduates and 31 percent of high school dropouts.

While the numbers are telling, focusing on the numbers risks missing an important point. Neil Postman, in his book *The End of Education: Redefining the Value of School*, asserts that in America “public education does not serve a public. It creates a public.” Calls for a better-educated public must coincide with a discussion of what kind of education that ought to be.

The current “standards” movement exemplified by the No Child Left Behind Act of 2001 embraces an approach to education designed to teach students to behave like patriotic citizens and disciplined workers. It teaches them how to be ruled. However, our nation’s founders made the choice to rule in a republic rather than be ruled in a monarchy. Benjamin Franklin’s oft-quoted remark, “a republic, if you can keep it,” should remind us that an educated populace is a priority for a republic. The founders envisioned an education designed to prepare youth to participate in citizenship by allowing them the freedom to create the thinking, processing, and communication skills necessary to lead rather than to follow. That would be the real value to government of doubling the numbers.

ernment seeks the removal of all aliens who lack legal status and the assumption that one can determine an individual's right to remain in the United States without a formal removal hearing. The court agreed.¹³ Federal officials have discretion to permit persons who are removable to stay here and to work. Even aliens deemed removable after formal proceedings can sometimes stay and work. Because the Hazelton ordinances would deny these persons the ability to reside in the city, they conflicted with federal law.¹⁴

Beyond the preemption arguments, opponents also persuaded the court that the ordinances violated the Due Process Clause of the U.S. Constitution. That clause prohibits a deprivation of life, liberty, or property without due process of law. These protections apply to all persons in the United States including aliens here lawfully or unlawfully, temporarily or permanently.¹⁵ The court found that the employment aspects of the ordinances impinged business owners' liberty and property interests in running their businesses and individuals' liberty interests in pursuing their livelihoods. In the court's opinion, the local procedures provided inadequate notice and opportunity to be heard. Further, the resort to the courts provided under the ordinances failed because state courts do not have authority to decide an alien's immigration status.¹⁶ For similar reasons the tenancy aspects impinged the property rights of landlords and tenants.¹⁷

Hazelton's approach served as a model for other local governments. Not surprisingly, similar suits have been filed against Valley Park, Mo.; Escondido, Calif.; Cherokee County, Ga.; Farmers Branch, Tex.; and Riverside, N. J.¹⁸ No local government yet has had success defending its immigration-related ordinances.¹⁹

For example, in *Villas at Parkside Partners v. City of Farmers Branch*, another federal court ruled that federal law preempts an ordinance providing that before entering into a residential lease a property owner must require a tenant to submit evidence of citizenship or eligible immigration status.²⁰ The court said this was a regulation of immigration, a power reserved to the federal government. In the court's opinion, the city's reliance on HUD regulations and documents demonstrated that the city was doing more than simply adopting federal immigration requirements. It was using the HUD regulations to define which non-citizens could rent in the city, an approach inconsistent with the federal immigration standards.

As did the court in *Lozano*, the *Farmer's Branch* court focused on the fact that state agents are unqualified and unauthorized to make an independent determination of a person's immigration status. In doing so, the court acknowledged that the failure of Congress to address immigration reform puts local governments in an untenable situation.

The court recognizes that illegal immigration is a major problem in this country, and one who asserts otherwise ignores reality. The court also fully understands the frustration of cities attempting to address a national problem that the federal government should handle; however, such frustration, no matter how great, cannot serve as a basis to pass an ordinance that conflicts with federal law.²¹

A report done for Congress in 2006 foreshadowed the results in the courts.²² Its discussion of state involvement in the enforcement of immigration law begins, "Setting the rules on the entry and removal of aliens is unquestionably an ex-

clusive federal power, and some would argue that uniformity in enforcing those rules is critical to the exercise of sovereign authority (i.e., it should *not* be enforced by states)."²³ The report notes that this was also the position of the Department of Justice until 2002 when then-Attorney General John Ashcroft confirmed the existence of a memorandum prepared by the department's Office of Legal Counsel asserting that states and local governments have the "inherent authority" to enforce federal immigration law.

The about-face brought a torrent of criticism from local governments across the country.²⁴ To compound the problem, the Department of Justice refused to release the memorandum until 2005 when the U.S. Court of Appeals for the Second Circuit ruled in a Freedom of Information Act suit and directed its release.²⁵ Once released, critics described the opinion as "deeply flawed" and unsupported by legislative history or judicial precedent.²⁶

A particular flaw in the memorandum's "inherent authority" theory is that it fails to accord sufficient weight to the fact that local police draw their powers from state constitutions and laws. In Kentucky, for example, KRS 95.019 reflects this: "The chief of police and all members of the police force in cities of the first through fifth classes shall possess all of the *common law and statutory powers* of constables and sheriffs." (Emphasis added.)

No Kentucky case addresses the inherent authority of police to enforce federal immigration law. The case that comes closest involves the authority of local police to arrest members of the armed forces absent from duty without leave. In *Martin v. Commonwealth*, the court said, "At common law civil officers could not arrest upon probable cause for offenses punishable only by court-martial. ... We hold that civil officers have no authority to arrest members of the armed forces who are merely unauthorized absentees."²⁷ Since being present illegally in the United States is not itself a crime, the holding in *Martin* suggests that local police in Kentucky lack inherent authority to arrest persons for civil violations of federal immigration law.

At the other end of the spectrum, local governments are adopting policies that some claim also conflict with federal law. These are the so-called "sanctuary cities." These communities are neutral toward, if not supportive of, undocumented aliens.²⁸ To varying degrees, they decline to cooperate in the enforcement of federal immigration law.²⁹

Proponents of sanctuary policies argue that, because enforcement of immigration laws is the responsibility of federal authorities, state and local resources should not be used for federal purposes. Further, they point out that federal laws do not require local officials to ask about immigration status and that federal power over immigration is not transferable to the states or their local governments.³⁰ The position statement of the Major Cities Chiefs Association reflects the concerns underlying these sanctuary policies.

Local police agencies must balance any decision to enforce federal immigration laws with their daily mission of protecting and serving diverse communities, while taking into account: limited resources; the complexity of immigration laws; limitations on authority to enforce; risk of civil liability for immigration enforcement activities and the clear need to foster the trust and cooperation from the public including members of immigrant communities.³¹

Critics respond that sanctuary policies conflict with section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and section 434 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (the Welfare Reform Act).³² These statutes provide that states and local governments may not inhibit the maintenance, transmission, or exchange of information regarding a person's immigration status.³³ New York City, which had a sanctuary policy in place at the time, unsuccessfully challenged those laws in *City of New York v. United States*.³⁴ The court held that sections 434 and 642 do not require city officials to provide information; they merely prevent the city from interfering with a voluntary exchange of information. The laws and a sanctuary policy can therefore coexist.

Despite the criticism, sanctuary policies persist. This prompted Congress, in the Violence Against Women and Department of Justice Reauthorization Act of 2005, to direct the inspector general of the Department of Justice to conduct a study of cities and localities with sanctuary policies and provide the Congress with a list of such areas. The audit report, issued in January 2007, found that the effects of sanctuary policies were "inconclusive."³⁵

Between the poles of sanctuary policies and anti-illegal immigrant ordinances is the "287(g)" program. Section 287(g) of the Immigration and Nationality Act provides that U.S. Immigration and Customs Enforcement may enter into a memorandum of agreement with a state or locality enabling qualified state or local law enforcement agents to carry out certain functions relating to immigration enforcement, including investigation, apprehension, or detention of aliens in the United States.³⁶ According to a fact sheet, "State and local patrol officers, detectives, investigators and correctional officers working in conjunction with ICE gain: necessary resources and authority to pursue investigations relating to violent crimes, human smuggling, gang/organized crime activity, sexual-related offenses, narcotics smuggling and money laundering; and support in more remote geographical locations."³⁷ Although authorized in 1996, only about two dozen memoranda of agreement are currently in place.³⁸ While Immigration and Customs Enforcement touts several successes under the program,³⁹ many local governments remain wary for the reasons expressed above by the Major Cities Chiefs of Police.

The federal disarray over immigration policy leaves local governments in something of a Catch-22. Prof. Peter H. Shuck of Yale Law School suggests a partial way out of the impasse. He recently made a case for a more robust role for state and local government in certain areas of immigration policy.

As a matter of sound policy, however, Congress should allow the states, which have in some respects an even greater stake in the effective administration and enforcement of immigration law than the federal government does, to play a discrete, carefully tailored role without jeopardizing legitimate federal interests, properly understood. My analysis suggests that the states, working under federal standards, could make important contributions to the advancement of federal immigration policy in at least three areas: employment-based admissions, state and local enforcement, and employer sanctions. There may well be others. It is time to take the possibilities of immigration federalism more seriously.⁴⁰

Endnotes

1. National Research Council, *The New Americans: Economic, Demographic, and Fiscal Effects of Immigration* (James P. Smith and Barry Edmonston, editors) (1997).
2. Steven A. Camarota, Director of Research, Center for Immigration Studies, *Testimony Prepared for the House Judiciary Committee Subcommittee on Immigration and Claims*, August 24, 2006, available at <http://www.cis.org/articles/2006/sactestimony082406.html>. The Center for Immigration Studies, an offshoot of the Federation for American Immigration Reform, describes itself as "the nation's only think tank devoted exclusively to research and policy analysis of the economic, social, demographic, fiscal, and other impacts of immigration on the United States."
3. *Lozano v. City of Hazelton*, No. 3:06cv1586, slip op. at 4-5 (M.D.Pa. July 26, 2007).
4. Two later ordinances replaced the original Illegal Immigration Relief Act and two others further amended it.
5. *Lozano*, slip op. at 6-8.
6. *Lozano v. City of Hazelton*, 496 F.Supp.2d 477 (M.D.Pa. 2007).
7. *Lozano*, slip op. at 93-95.
8. *Id.* at 95. "The provisions of this section preempt any state or local law imposing civil or criminal sanctions (other than through licensing and similar law) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2).
9. *Lozano*, slip op. at 96.
10. *Id.* at 101.
11. Kentucky readers will be familiar with this concept in the context of municipal home rule. "A power or function is in conflict with a statute if it is expressly prohibited by a statute or there is a comprehensive scheme of legislation on the same general subject...." Ky. Rev. Stat. 82.082(2).
12. *Lozano*, slip op. at 117.
13. *Id.* at 125.
14. *Id.* at 125-30.
15. *Id.* at 134 citing *Kamara v. Attorney General*, 420 F.3d 202, 216 (3rd Cir. 2005) and *Plyler v. Doe*, 457 U.S. 202 (1982).
16. *Lozano*, slip op. at 139-41.
17. *Id.* at 141-46.
18. The Civil Rights Litigation Clearinghouse, <http://clearinghouse.wustl.edu/index.php>. Documents including the contested ordinances, pleadings, briefs, and decisions are collected at the site.
19. Some local governments may have abandoned the defense of their ordinances due to the costs involved. See Annabelle Garay, *Cities Spend Big Money Defending Immigration-Related Ordinances*, Associated Press, May 6, 2007. See also, The Pitch, *Kobach Cashes In*, http://blogs.pitch.com/plog/2007/08/kobach_cashes_in.php.
20. *Villas at Parkside Partners v. City of Farmers Branch*, 496 F.Supp.2d 757 (N.D. Tex. 2007).
21. *Villas at Parkside Partners v. City of Farmers Branch*, 2007 WL 1498763 at *10 (granting temporary restraining order).
22. Congressional Research Service, *Enforcing Immigration Law: The Role of State and Local Law Enforcement*, (updated August 14, 2006), available at <http://www.ilw.com/immigdaily/news/2005,1026-crs.pdf>. See also, Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 University of Chicago Legal Forum 27.
23. *Id.* at 6.
24. National Immigration Forum, *Background: Immigration Law Enforcement by State and Local Police*, <http://immigrationforum.org/DesktopDefault.aspx?tabid=572>.
25. *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350 (2nd Cir. 2005).
26. See *Secret Immigration Enforcement Memo Exposed*, <http://www.aclu.org/immigrants/gen/19984prs20050907.html> (containing links to the memorandum and to a detailed refutation of its findings). But see Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 60 Albany L. Rev. 179 (2005-2006). Now at the University of Missouri – Kansas City School of Law, Prof. Kobach was an

DECISIONS OF NOTE



UNITED STATES SUPREME COURT

Prisoner Suits – Administrative Exhaustion

State prison inmates brought separate § 1983 actions against corrections officials. The district courts for the eastern and western districts of Michigan dismissed the actions for failure to satisfy procedural rules adopted by the Sixth Circuit Court of Appeals to implement the administrative exhaustion requirements of the Prison Litigation Reform Act of 1995. The Sixth Circuit affirmed the dismissals, but the U.S. Supreme Court reversed holding that the PLRA does not require the rules. A prisoner need not allege exhaustion of remedies in the complaint; failure to exhaust is an affirmative defense. Where the complaint contains a mix of exhausted and unexhausted claims, the court should entertain the exhausted claims rather than dismiss the entire action. *Jones v. Bock*, ___ U.S. ___, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007).

Greenhouse Gases – EPA Regulations

The Environmental Protection Agency denied a petition to regulate greenhouse gases reasoning that the Clean Air Act did not authorize it to address global climate change and, even if it had the authority, regulation would be unwise because there was no unequivocal link between greenhouse gases and a rise in surface temperature. Petitioners appealed, and state and local governments intervened. The Supreme Court held that states, local governments, and others had standing to sue EPA with respect to global warming. The harms associated with climate change are serious and well recognized, and the EPA's failure to regulate emissions of greenhouse gases contributes to the injuries suffered. The agency's argument that it lacks authority to regulate fails because greenhouse gases fit well within the Clean Air Act's definition of air pollutant. Its alternative rationale for its failure to act fell short of a reasoned scientific judgment for why it cannot promulgate regulations. "A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere" and "[r]espected scientists believe the two trends are related." *Massachusetts v. Environmental Protection Agency*, ___ U.S. ___, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007).

School Aid Equalization – Federal Impact Aid Program

The Federal Impact Aid Program provides financial assistance to local school districts where a federal presence adversely affects the district's ability to finance public school education. Ordinarily, a state may not offset this federal aid by reducing state aid to a local school district. However, an exception permits a state to reduce its own local funding because of the federal aid where the secretary of education finds that the state program "equalizes expenditures" among local school districts. The statute instructs the secretary, when making the determination, to "disregard" school districts "with per-pupil expenditures above the 95th percentile or below the 5th percentile of such expenditures." Department of Education officials ranked New Mexico's 89 local school districts in order of per-pupil spending for fiscal year 2000, excluding 17 schools at the top because they contained less than 5% of the student population as did an additional six districts at the bot-

tom. The remaining 66 districts accounted for approximately 90% of the state's student population. Because the disparity between the highest and lowest of these districts was less than 25%, the state's program is one that "equalizes expenditures," thus allowing the state to offset federal impact aid by reducing state aid to individual districts. Two public school districts challenged the department's action, but lost. In identifying which districts to disregard, the secretary of education could look to the number of a district's pupils as well as to the size of per-pupil expenditures. *Zuni Public School District v. Department of Education*, ___ U.S. ___, 127 S.Ct. 1534, 167 L.Ed.2d 449 (2007).

High-Speed Chase – Use of Excessive Force

To end a high-speed chase, a deputy sheriff used his car to push the rear of a vehicle, causing it to leave the road and crash. The driver, rendered a quadriplegic, brought a § 1983 action alleging use of excessive force in violation of his Fourth Amendment rights. The deputy moved to dismiss on grounds of qualified immunity, but the district court denied the motion and the Eleventh Circuit affirmed. The Supreme Court had to decide whether law enforcement officials could, consistent with the Fourth Amendment, take actions that place a fleeing motorist at risk of serious injury or death in order to stop the motorist's flight from endangering the lives of innocent bystanders. Holding that it was quite clear that the deputy did not violate the Fourth Amendment, the Supreme Court held that the deputy's actions were objectively reasonable when considering the risk of bodily harm to the driver compared to the threat to the public's safety that the deputy was trying to eliminate. "[W]e are loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive so recklessly that they put other people's lives in danger." *Scott v. Harris*, ___ U.S. ___, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007).

Flow Control Ordinances – Dormant Commerce Clause

Counties enacted ordinances requiring all private waste haulers to collect solid waste and deliver it to sites controlled by a waste management authority. A trade association and individual haulers challenged the ordinances as a violation of the Commerce Clause by discriminating against interstate commerce. They submitted evidence showing that they could dispose of the waste at out-of-state facilities for far less than they paid in tipping fees to the authority. Interpreting *C & A Carbone, Inc. v. Clarkstown* to hold that the commerce clause barred such ordinances, the district court found in favor of the haulers. The Second Circuit reversed, finding that the case allowed for a distinction between laws benefiting public, as opposed to private, facilities. The Supreme Court affirmed, finding this difference to be "constitutionally significant." "[T]reating public and private entities the same under the dormant Commerce Clause would lead to unprecedented and unbounded interference by the courts with state and local government." *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*, ___ U.S. ___, 127 S.Ct. 1786, 167 L.Ed.2d 655 (2007).

Schools – Individuals with Disabilities Education Act

Parents of a child with autism spectrum disorder sought review related to the child's individualized education program under the IDEA. After the administrative review process, the parents filed a federal court complaint, proceeding without

the aid of counsel. The court of appeals ordered the matter dismissed unless the parents obtained an attorney, reasoning that the IDEA does not abrogate the common law rule prohibiting nonlawyer parents from representing minor children. On further appeal, the Supreme Court turned to the provisions of IDEA to determine if it accords parents rights of their own that can be vindicated in court proceedings or, alternatively, if IDEA allows them in their status as parents to represent their child in court proceedings. The court held that the text of IDEA grants parents independent, enforceable rights at the administrative stage and that it would be inconsistent with the statute to bar them from continuing to assert these rights in federal court. *Winkelman v. Parma City School District*, ___ U.S. ___, 127 S.Ct. 1994, 167 L.Ed.2d 904 (2007).

Agency-Shop Fees – Election-Related Expenditures

The state of Washington prohibited labor unions from using the agency-shop fees of nonmembers for election-related purposes unless the nonmember affirmatively gave consent. Agency-shop fees are fees paid to a union by nonmembers to ensure that non-union workers, who benefit from the union's bargaining efforts, contribute toward those efforts. However, agency-shop arrangements in the public sector raise First Amendment concerns because they force individuals to contribute money to unions as a condition of their employment. Public sector unions are constitutionally prohibited from using the fees of objecting nonmembers for purposes that are not germane to the union's collective bargaining duties. However, prior cases have not mandated affirmative consent before public sector unions could spend a nonmember's agency fees. Placing a condition on the union by prohibiting expenditure of a nonmember's agency fees for election-related purposes unless the nonmember consents does not violate the unions' First Amendment rights. The restriction does not tell the union how it can spend "its" money; it is a condition placed upon the union's extraordinary state entitlement to acquire and spend "other people's" money. *Davenport v. Washington Education Association*, ___ U.S. ___, 127 S.Ct. 2372, 168 L.Ed.2d 71 (2007).

School Sports – League Member's Rights

The Tennessee Secondary School Athletic Association (TSSAA) prohibited its members from using "undue influence" in recruiting middle school students for their athletic programs. The association sanctioned a member school that violated the rule, and the member school sued claiming a violation of its rights of free speech and due process. Enforcing the rule did not violate the member school's First Amendment rights. The school made a voluntary decision to join, and an athletic league's interest in enforcing its rules may warrant curtailing the speech of its voluntary participants. The court finds the rule obviously necessary to managing an efficient and effective state-sponsored high school athletic league. In addition, there was no violation of due process rights. An investigation, several meetings, correspondence, the TSSAA executive director's adverse written determination, a hearing before the director and an advisory panel, and a review by the entire TSSAA board preceded the decision. The member school had notice of all the charges against it, the representation of counsel, and the opportunity to produce evidence. The court held any other claimed due process violations to be harmless beyond a reasonable doubt. *Tennessee Secondary School Athletic Association v. Brentwood Academy*, ___ U.S. ___, 127 S.Ct. 2489, 168 L.Ed.2d 166 (2007).

Schools – Student Speech

Several high school students at an off-campus, school-approved activity held up a banner that read "Bong Hits 4 Jesus." When the principal saw the banner, which she regarded as promoting illegal drug use and a violation of an established school policy prohibiting such messages at school events, she asked the students to take down the banner. One student refused and received a suspension. He challenged the suspension as a violation of his right to free speech. Reversing the circuit court that held in the student's favor, the Supreme Court held that the student's First Amendment rights were not violated. Schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use. The fact that students were off campus did not change the result. The event was held during normal school hours and was sanctioned by the principal as an approved social event at which the district's student conduct rules expressly applied. *Morse v. Frederick*, ___ U.S. ___, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007).

School Assignments – Voluntary Diversity Plans

Schools in Louisville and Seattle voluntarily adopted student assignment plans that relied upon race to determine which public schools certain children could attend. Parents of students denied assignment to particular schools under these plans solely because of their race challenged the plans as violating the Fourteenth Amendment guarantee of equal protection. Holding for the parents, the Supreme Court applied the strict scrutiny standard to conclude that the government's interest in diversity could not justify the districts' use of racial classification in student assignment plans. *Parents Involved in Community Schools v. Seattle School District No. 1*. ___ U.S. ___, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007).

KENTUCKY SUPREME COURT



District Fire Chiefs – Overtime Pay

District chiefs in a city fire department filed a claim with the Kentucky Labor Cabinet seeking reimbursement for time-and-a-half overtime pay they claimed the city unlawfully withheld. The cabinet held for the city and the circuit court affirmed. The court of appeals reversed. However, on further appeal the Supreme Court held that the district chiefs were not entitled to overtime pay under KRS 337.285, Kentucky's analog to the federal Fair Labor Standards Act. At issue was whether for purposes of the statute the district chiefs were compensated "on a salary basis." The court concluded that they were. Looking for guidance to federal cases interpreting the FLSA, the court adopted the salary basis test of *Auer v. Robbins*, 519 U.S. 452 (1997). Applying that standard to the city's actual practices concerning absences, work schedule, time sheets, vacation and compensatory time, and shift trading, the court found substantial evidence to support the cabinet's conclusion that district chiefs were paid on a salary basis within the meaning of Kentucky law. *City of Louisville v. Fire Service Managers Association*, 212 S.W.3d 89 (Ky. 2006).

Sexually Oriented Business Ordinance – Justification

The owner of an adult cabaret, cited for violating a county's ordinance restricting hours of operation, fully nude dancers, and contact with patrons, sought to declare the ordinance unconstitutional. Although the lower courts upheld the ordi-

nance, the court of appeals found that the owner cast sufficient doubt on the county's pre-enactment justification to require a remand and a trial. The Supreme Court reversed. The court reviewed at length the history and development of First Amendment jurisprudence as it relates to sexually oriented businesses before concluding that the court of appeals erred as a matter of law. The court found the ordinance to be content neutral and thus subject to the *O'Brien* standard for evaluating restrictions on symbolic speech. As to the particular question whether the ordinance furthered a substantial government interest – the issue that the court of appeals said required a trial – the Supreme Court held that it did. A city may rely on any reasonable evidence believed to be relevant to demonstrate the secondary effects it seeks to regulate; it need not prove the local secondary effects. *Commonwealth v. Jameson*, 215 S.W.3d 9 (Ky. 2006).

Police Cruiser – Negligent Operation

A motorist died in a collision with a police cruiser operated at the time by a handcuffed prisoner. The estate sued the city and the police officer who left the cruiser with the engine running and the keys in the ignition. The lower courts granted summary judgment to the city and the officer, but a split Supreme Court reversed. First, said the court, the officer's operation of his cruiser was a ministerial act. Whether he was negligent under the circumstances is a question for the jury, and summary judgment was inappropriate. Further, the city can be liable for the acts or omissions of its employees in the discharge of their ministerial duties. Statute requires operators of motor vehicles to stop the engine, lock the ignition, and remove the key when leaving the vehicle unattended. This statute exists for the benefit and safety of the general public, including the deceased motorist. Statute further provides that injured persons can recover for violations of this statutory duty. Finally, the court held that the actions of the prisoner were not a superseding cause relieving the city and officer of liability because those actions were not of independent origin nor unassociated with the officer's act of leaving the car running. *Pile v. City of Brandenburg*, 215 S.W.3d 36 (Ky. 2006).

KENTUCKY COURT OF APPEALS



Conflict of Interest – Interest in Contract

A master electrician in the employ of a state university subcontracted with another firm when off the clock at his regular employment. That firm had a contract with the university to install voice and data lines, and the university employee performed some of this work as a paid subcontractor. The university interpreted this as an interest in a contract prohibited by KRS 164.390. When so informed, the employee severed ties with the firm and sought a declaratory judgment that his employment as a subcontractor did not violate the statute. The court of appeals held that as a subcontractor the employee had a pecuniary interest in the contract between the firm and the university. The employee's proposed alternative constructions of the statute disregarded its plain meaning. *Witt v. Eastern Kentucky University*, 205 S.W.3d 263 (Ky. Ct. App. 2006).

Zoning – Compliance with Comprehensive Plan

In separate ordinances, a city rezoned two tracts of property from agricultural to industrial in connection with the development of a regional industrial park. A group of citizens opposed

to the industrial park project thereafter sought judicial review of the ordinances. The trial court held that the citizens group had standing to seek review, but held for the city on the merits. Both sides appealed. The city argued that residency was essential to standing, but the appeals court disagreed. In the court's opinion, the size and scope of the proposed development, as well as its public nature, meant that it directly affected parties well beyond the city limits. On the merits, the court rejected the citizens' argument that the rezoning was inconsistent with the focal point system of the county comprehensive plan. The court said that when viewed in the context of the entire plan, the methodology for granting map amendments satisfied KRS Chapter 100. In addition, the court found that the amendments were supported by substantial evidence saying, "a comprehensive plan is intended to be a guide for development, not a straight-jacket. A zoning agency is not bound to follow every detail of a land use plan." *Warren County Citizens for Managed Growth, Inc. v. Board of Commissioners*, 207 S.W.3d 7 (Ky. Ct. App. 2006).

Highways – Prescriptive Easements

The purchasers of property closed off a dirt road leading from a state highway to the waters of a creek. Hunters and anglers had used the road for as long as 52 years to gain access to the creek. A member of the public sued claiming that, as a result, he and the general public acquired a prescriptive easement over the property. The trial court found sufficient evidence of adverse use and entered an order granting the prescriptive easement. On appeal, the court of appeals reversed. The property owners first argued that KRS 411.190 applied. It prohibits an action to establish a prescriptive easement based on use solely for recreational purposes. The bill was a direct response to the instant action, but the court of appeals refused to apply it because it did not expressly provide for its retroactive application. The court also rejected the owners' argument that a prescriptive easement required the presence of a dominant tenement. However, the court accepted the owners' argument that there was no uninterrupted period of use of sufficient length to establish the prescriptive easement. "The mere use by a few individuals, from time to time, as distinguished from the public generally, does not constitute such use as creates title in the public by prescription." *Allen v. Thomas*, 209 S.W.3d 475 (Ky. Ct. App. 2006).

Kentucky Civil Rights Act – Scope of Coverage

A city employee sued the city claiming that her discharge violated the Kentucky Civil Rights Act's prohibition on sex discrimination. The city moved to dismiss the case contending that the act did not apply because the city did not have the requisite eight employees. The former employee argued that, for purposes of the act, the elected mayor and members of the city commission should count as employees and, therefore, the act applied. The court of appeals agreed. The court noted that while the KCRA tracks federal civil rights law in many respects, it does not track the federal language omitting elected officials. The court took this to be intentional on the part of the General Assembly. The court reasoned that anyone who draws a salary from a municipality must be either an employer or an employee. Since under Kentucky law the elected officials were not employers, they must be employees. Further, said the court, the KCRA must be interpreted broadly. Treating the elected officials as employees for this purpose helps to further the objectives of the act. *Kearney v. City of Simpsonville*, 209 S.W.3d 483 (Ky. Ct. App. 2006).

Zoning Amendment – Claim of Injury

After a county approved an application for a rezoning of a large parcel from agricultural to residential, a preservation organization challenged the change. The lower court dismissed for lack of standing. On appeal, the court of appeals reframed the issue as “whether it is mandatory under KRS 100.347(3) for a party to allege in its complaint on appeal to the circuit court that the party has been injured or aggrieved by the final action of the legislative body....” An appeal from an administrative decision such as a zoning decision is a matter of legislative grace, not of right. Therefore, failure to follow strictly the statutory guidelines for the appeal is fatal. Under KRS 100.347(3) a person must claim in the complaint to be injured or aggrieved and allege facts supporting such a claim. The failure to do so here required dismissal of the case. *Spencer County Preservation, Inc. v. Beacon Hill*, 214 S.W.3d 327 (Ky. Ct. App. 2007).

Occupational License Fee – Special Legislation

A 2005 amendment to KRS 68.197, which authorizes an occupational license fee, eliminated a credit against city occupational license fees in two counties. The legislation provided that the amendment would apply retroactively. Affected taxpayers sued, claiming that the statute violated the constitutional provision against special legislation and that its retroactive application violated the constitution’s due process and separation of powers provisions. The court rejected the special legislation claim because the two counties were a “distinct and natural” class owing to the manner in which they adopted their occupational license fees. The court rejected the due process claim because the taxpayer had only an expectation of a refund. It agreed with the U.S. Supreme Court that, since no citizen enjoys immunity from the burden of taxation, its retroactive imposition does not necessarily infringe due process. Finally, the court rejected the separation of powers claim. The retroactive amendment of the statute did not encroach upon the power of the judiciary. *King v. Campbell County*, 217 S.W.3d 862 (Ky. Ct. App. 2006).

Occupational License Fee – Fixed Fee Alternative

A county occupational license fee ordinance allowed business licensees, in lieu of a net profit based fee, to pay a “fixed amount license fee” according to a schedule in the ordinance. The ordinance did not extend the option to wage-earning licensees because it imposed the tax on earned wages, not on net profits. Subject licensees asserted that extending the flat-fee option to one class of taxpayers but not the other was inconsistent with the statutory and constitutional provisions governing the occupational license fee. The court agreed. The flat-fee option exists to reduce the burden of administrative cost and paperwork involved in complying with the ordinance. Here, however, the county’s stated purpose in extending the option was to promote economic development, a purpose the court found was not consonant with the legislature’s purpose. The legislature intended to treat wage earners and business owners alike under the statute, but the ordinance treats them “selectively and differently.” *Hardwick v. Boyd County Fiscal Court*, 219 S.W.3d 198 (Ky. Ct. App. 2007).

Employee Discipline – Refusal to Answer Questions

In the course of an investigation into allegations of impropriety, an agency of an urban county government directed one of its employees to appear at a lawyer’s office to answer questions about his employment. Despite warnings that he was required to cooperate and would be subject to disciplinary action if he refused, the employee invoked his right against self-incrimina-

tion and refused to answer questions. As a result, the agency charged the employee with insubordination and suspended him for three days without pay. The employee appealed to the civil service commission, which upheld the suspension as did the circuit court on further appeal. In the court of appeals, the employee argued that the agency wrongly suspended him for the exercise of his constitutional rights. Citing the decision of the U.S. Supreme Court in *Lefkowitz v. Cunningham* and numerous cases in other states, the court of appeals affirmed that public employees could be discharged for refusing to answer potentially incriminating questions concerning their official duties. The employee also asserted a right to a pre-deprivation hearing, but the court found that the post-suspension hearing before the civil service commission afforded sufficient due process. *Barrow v. Lexington-Fayette Urban County Civil Service Commission*, 222 S.W.3d 237 (Ky. Ct. App. 2006).

County Administrative Code – Proposal and Adoption

KRS 67.710 directs the county judge/executive to prepare and submit to the fiscal court an administrative code for the county, and KRS 68.005 charges the fiscal court to adopt an administrative code. After many years of operating without an administrative code, the fiscal court adopted one not formally proposed by the judge/executive. The judge/executive refused to sign it or publish it, acts necessary to enactment of the code. Thereafter, on behalf of the fiscal court, the county attorney asked the circuit court to recognize the code as legally binding and directing the judge/executive to take the steps necessary officially to enact it. Subsequently, the judge/executive moved to disqualify the county attorney, arguing that it was a conflict of interest for the county attorney to represent the fiscal court against him. The circuit court denied the motion. On appeal, the court held that in these circumstances KRS 69.210(1) obliged the county attorney to follow the directives of the fiscal court. Thus, there was no conflict of interest. On the merits, the judge/executive argued that he had the sole authority to prepare and submit a code and that the fiscal court had no authority to formulate its own. The court agreed, citing earlier opinions of the attorney general. Thus, the code adopted by the fiscal court was invalid. In light of the delay in proposing a code, the fiscal court should have sought a writ of mandamus to compel the judge/executive to propose a code. *Knight v. Spurlin*, 226 S.W.3d 844 (Ky. Ct. App. 2007).

Conditional Use Permit – Arbitrariness

A zoning board of adjustment granted an application for a conditional use permit to allow a tourist home on property zoned agricultural. Opponents sued, arguing that the board acted arbitrarily when, in the absence of a definition of tourist home in the zoning ordinance, the board employed a definition submitted by the zoning compliance officer found in a standard reference work. After dismissing the appeal as untimely, the court nevertheless addressed the merits. The court found the conduct of the board was proper and within the authority conferred by KRS 100.237. *Allen v. Woodford County Board of Adjustments*, 228 S.W.3d 573 (Ky. Ct. App. 2007).

Subdivision Regulations – Traffic Flow

In the face of opposition from neighbors, a county zoning and planning commission refused to allow a proposed subdivision. The owner appealed. Finding that evidence received at the commission’s hearing was sufficient to establish that the proposed subdivision did not meet the standards in the subdivision regulations concerning traffic flow, the court of appeals agreed with the circuit court that the commission’s

action was reasonable. *Oldham Farms Development, LLC v. Oldham County Planning and Zoning Commission*, 233 S.W.3d 195 (Ky. Ct. App. 2007).

UNITED STATES COURT OF APPEALS



Kentucky

Disabled Student – Compensatory Education

The guardian of a student with ADHD, unhappy with the timing of the student's referral for special education and with the development of the student's individualized education plan, requested a due process hearing under the Individuals with Disabilities Education Act. The hearing officer concluded that the school district's failure to refer the student for evaluation earlier resulted in the denial of a free appropriate public education in the previous two years and prescribed certain remedies. The school district appealed to the state appeals board, which upheld the factual findings but altered the remedy. Still unhappy, the district filed suit in federal district court and the student's guardian counterclaimed. The district court affirmed the appeals board decision, and the student and guardian appealed further, seeking hour-for-hour compensation for the loss of a free appropriate public education. The court found that this "would border on punishment to the school district rather than an equitable remedy for a child in need." However, because the IEP team includes representatives of the local education agency, it is inappropriate to delegate to it, as the appeals board did, any part of the hearing officer's function regarding an award of compensatory education. *Board of Education of Fayette County v. L.M.*, 478 F.3d 307 (6th Cir. 2007).

Deadly Force – Police Officer's Immunity

In the course of a drug sting, a detective struggled with a suspect. When the suspect broke free and fled, the detective fired at the suspect striking him three times. Though it turned out the suspect actually was carrying a firearm in his waistband, the detective did not know this when he fired. The suspect later died from the wounds, and his estate sued alleging use of excessive force. The trial court denied the officer's motion for summary judgment on grounds of qualified immunity and state-law immunity. On the interlocutory appeal, "we need only ask whether an officer who employs deadly force against a fleeing suspect without reason to believe that the suspect is armed or otherwise poses a serious risk of physical harm is entitled to either qualified immunity or immunity under the law of Kentucky. We hold that he is entitled to neither." *Bougness v. Mattingly*, 482 F.3d 886 (6th Cir. 2007).

Teacher Discharge – Disqualifying Conduct

A physical education teacher sustained a closed head injury while bicycling. She returned to teaching, but a later automobile accident aggravated the injury. Thereafter, the board of education created an individualized accommodation plan for the workplace. Some four years later, the teacher was involved in an incident at school in which she lectured some unsupervised students and allegedly threatened to kill them, resulting in criminal charges against her and a conviction. The school board terminated her. Her criminal appeal, her appeals to civil rights agencies, and her appeals to the state education authorities were all unsuccessful. She then sued in federal court alleging violations of the Americans with Disabilities

Act and state law. The court granted summary judgment to the school board, and here the Court of Appeals affirms. An employer may legitimately fire an employee for conduct, even conduct that occurs because of a disability, if that conduct disqualifies the employee from his or her job. The board offered a legitimate, nondiscriminatory reason for its action, and the employee presented no evidence from which a jury could infer that the reason was pretextual. *Macy v. Hopkins County School Board of Education*, 484 F.3d 357 (6th Cir. 2007).

Civil Rights Claims – Statute of Limitations

An IRS special agent boarded a plane in Louisville for a flight to Chicago. He was carrying a weapon for which he completed the necessary paperwork and security screening. On boarding and attempting to stow his luggage in the carry-on bin, he got into a verbal exchange with another passenger, telling her to "f— off." The crew removed him from the plane and advised security. While the agent was in the gate area, an officer in the employ of the airport authority approached. The IRS agent refused to talk with him. As a crowd began to gather, the officer decided to remove the agent from the area. When the officer took the agent's arm, the agent stiffened and reached for his right side where he carried his gun. Arrested on misdemeanor charges of disorderly conduct and resisting arrest, the agent was taken to jail and later released. After the state criminal trial ended in a directed verdict in the agent's favor, he filed an action against the officer and the airport authority alleging that the officer arrested him without probable cause and used excessive force. The district court ruled that some claims were time-barred and the Court of Appeals affirmed. Kentucky's one-year statute of limitations for personal injury applies (KRS 413.140(1)). The other claims fail under the rule of the U.S. Supreme Court's recent decision in *Wallace v. Kato*. In any event, the warrantless arrest was reasonable, and it was not actionable to take the agent to the ground when he reached toward his gun. *Fox v. DeSoto*, 489 F.3d 227 (6th Cir. 2007).

Michigan

Excessive Force – Choke Hold

Because her son was acting strangely, a mother went to a police station for advice about having him hospitalized. When the police discovered an outstanding traffic warrant, an officer offered to have him arrested so he could then be evaluated. The mother agreed to the arrangement. After the police arrived at the home the mother and son shared, a struggle ensued at the end of which the son lay handcuffed face down on the ground in distress. Once the officers realized the fact, it was too late to resuscitate the son. An autopsy revealed the cause of death to be asphyxia associated with physical restraint. The estate sued, alleging use of excessive force. The district court granted summary judgment in favor of the police officers, but the court of appeals reversed. Issues of fact exist as to whether the officers' use of force was reasonable. Since the victim allegedly posed no threat, it followed that the use of the neck restraint violated a clearly established right to be free from gratuitous violence during arrest "and is obviously inconsistent with a general prohibition on excessive force." *Griffith v. Coburn*, 473 F.3d 650 (6th Cir. 2007).

Police Snipers – Use of Deadly Force

Two men growing marijuana in the basement of their residence set fire to the outbuildings and barricaded themselves in the residence rather than show up for court. One was killed after firing on a news helicopter; the other agreed

to surrender. Instead, he set fire to the house and ran to the woods, rifle in hand. As a light armored vehicle approached, its occupants partially exposed to maintain radio contact, the suspect pointed his rifle at the police and was killed by a sniper. The estate sued, alleging that police used excessive force, but the court holds that the sniper's actions were reasonable in the circumstances. From the officer's perspective, he fired at the suspect engaged in violent behavior to prevent the suspect from firing at another officer. Claims that the commanding officer was reckless in setting up the snipers also fail. *Livermore v. Lubelan*, 476 F.3d 397 (6th Cir. 2007).

Public Meeting – Use of Profanity

During the "Citizen Time" portion of a board meeting, a citizen responded to an official's comment saying, "That's why you're in a God damn lawsuit...." For that he was arrested and charged with disorderly conduct and obscenity. After the citation was voided and dismissed, he sued the arresting officer for violating his First and Fourth Amendment rights. The federal district court dismissed the Fourth Amendment claim, holding that state laws criminalizing swearing, using indecent language in the presence of women and children, and disturbing a meeting supported the arrest. The district court also no found basis for the First Amendment claim despite a dispute and lawsuit between the township and the arrestee's wife. On appeal, the court of appeals reversed. "[I]t cannot be seriously contended," said the court, "that any reasonable peace officer, or citizen, for that matter, would believe that mild profanity while peacefully advocating a political position could constitute a criminal act. ... We therefore hold that no reasonable officer would find that probable cause exists to arrest a recognized speaker at a chaired public assembly based solely on the content of his speech (albeit vigorous or blasphemous) unless and until the speaker is determined to be out of order by the individual chairing the assembly." *Leonard v. Robinson*, 477 F.3d 347 (6th Cir. 2007).

Driving while Intoxicated – Failure to Enforce

Minutes before a speeding, intoxicated driver ran a red light and killed another motorist, police confronted the offending driver making a scene at the house of her ex-boyfriend. The officers ordered the offender to leave without citing her for expired license plates, conducting an investigation into her driving record, or conducting a sobriety test. The victim's estate sought to hold the police secondarily liable for the death by allowing the intoxicated driver to operate a motor vehicle, but failed. By directing the woman to leave, the police did not increase the danger to the deceased motorist. The deceased was exposed to a risk that affected the public at large, and the police created no "special danger" to a discrete group that included the deceased. *Koultta v. Merciez*, 477 F.3d 442 (6th Cir. 2007).

Shoplifting – Probable Cause to Arrest

Having discovered at checkout that the drill he was purchasing cost only \$5, the shopper told the cashier he would like to buy another, paid for it, went back to the shelf to get it, put it in his bag at the checkout, and was waived on out by the cashier. The store's security guards, however, thought he was shoplifting and called the police who went to the shopper's home. When the shopper could not produce the receipt, the police put him in their patrol car and took him back to the store where they discovered the guards' error. The shopper later sued the police for false arrest, but his suit fails. The

officers had first-hand information from the guards and had no reason to doubt their veracity. They are not liable for the store's error. *Boykin v. Van Buren Township*, 479 F.3d 444 (6th Cir. 2007).

Antitrust – Access to Real Estate Records

Four title insurance companies, who compiled real estate records into a "tract index" for their use and for the use of other companies, sought relevant documents and information from county officials (registers of deeds) responsible for the records. Five registers refused to provide the information unless the companies agreed to a no-resale condition. The companies challenged the condition as an anticompetitive practice that violated the Sherman Antitrust Act. The trial court held that the registers qualified for state-action immunity from Sherman Act liability. The court of appeals held that they do not. To receive immunity, the challenged practices must reflect "clearly articulated and affirmatively expressed" state policy. None of the statutory provisions invoked by the registers addresses their authority to regulate or restrict private parties' resale of record copies or their sale of unofficial copies of those record copies. However, one register who flatly refused to make records available in non-paper form or to sell them at less than the dollar-a-page maximum rate, and who did not restrict resales, is entitled to immunity. It was reasonably foreseeable under state law "that a register accorded the discretion to provide paper copies at such a hefty per-page fee would choose to reap the revenues . . . rather than forgo them." *First American Title Company v. Devaugh*, 480 F.3d 438 (6th Cir. 2007).

Hazmat Decontamination – Invasion of Privacy

When university employees received a suspicious looking envelope, they called the city fire department. Concerned for the possibility of an anthrax contamination, the fire department set up a wet-decontamination process in a hallway of the building. Although informed that the contents of the envelope were not anthrax, the fire department nevertheless proceeded with the decontamination. The employees (all women) were disrobed, scrubbed, and rinsed at different stations by men in hazmat suits. In the court's view, the women's privacy concerns went largely ignored. After a trial of their invasion of privacy claim, a jury found in their favor. A procedural error by the city at the close of the trial means the jury verdict stands. *Allison v. City of East Lansing*, 484 F.3d 874 (6th Cir. 2007).

Ohio

Takings Claim – Operation of City Water Wells

A city purchased property near another city on which to drill three wells to serve its water needs. By 1980, the wells were producing between 500,000 and 750,000 gallons of water per day. In 1994, residents in the second city filed a complaint in state court seeking damages and injunctive relief because the new wells lowered the aquifer and caused them to suffer water shortages and poor water quality. The state courts held that sovereign immunity barred the action. In 2000, the residents filed suit in federal court alleging that the city's actions constituted a taking of their property without just compensation. The federal district court concluded that the takings claim was not timely. The court of appeals agreed, but distinguished past violations of the owners' property rights from continuing violations of those rights. Before the federal courts can consider the latter, the owners must seek their state court remedies. *McNamara v. City of Rittman*, 473 F.3d 633 (6th Cir. 2007).

Police Officers – Duty to Aid

Police officers responded to a 911 call for a suspected cardiac arrest. When they arrived they found a woman dead on the floor and a man lying on a couch in the same room. They secured the apartment as a crime scene, but left the man on the couch asleep, unconscious, or passed out. No one treated the man or transported him to a medical facility. At some point, he died on the couch. The estate later sued, claiming that the police and EMTs present should have known that the woman overdosed on drugs and that the man was in imminent danger because he, too, had overdosed. The court of appeals noted that the officers were under no general duty to aid the man on the couch. An exception to the rule exists for persons in custody, but here “[t]he mere fact that the police exercise control over an environment is alone insufficient to demonstrate that a person is seized.” Neither did the act of closing off the apartment to conduct an investigation increase the risk of harm to the deceased or give rise to a state-created danger. The officers were entitled to qualified immunity. *Carver v. City of Cincinnati*, 474 F.3d 283 (6th Cir. 2007).

Employee Free Speech – Official Duties

A city police officer, a handler in the canine unit, sent a memo to the police chief complaining about the chief’s cost-containment measures that reduced the amount of and compensation for training. When later the officer refused to report for work, the chief relieved him of his duties as a canine handler. Subsequently, the chief placed the officer on administrative leave and ordered the officer to submit to a psychological evaluation. The officer refused to do so without first consulting with an attorney. In turn, the officer filed a grievance claiming that the chief had no cause to remove him from his handler duties or to require him to submit to an evaluation. Ultimately, the city terminated the officer’s employment. He sued, asserting a violation of Ohio’s whistleblower statute and a claim for retaliatory discharge based on his exercise of his First Amendment rights. The trial court granted summary judgment for the chief and the city on the whistleblower claims, but denied summary judgment on the First Amendment claim. On appeal, the court of appeals finds that the officer’s memo was speech pursuant to his official duties. The speech was, therefore, unprotected under the rule of *Garcetti v. Ceballos*. [See “Supreme Court Narrows Speech Protection for Government Workers,” Local Government Law News, Fall 2006.] *Haynes v. City of Circleville*, 474 F.3d 357 (6th Cir. 2007).

Traffic Stop – Chilling Effect

Members of a pro-life advocacy group wearing body armor and helmets drove trucks with graphic images of aborted fetuses around on area streets. Accompanying them were escort vehicles equipped with dashboard cameras, cages behind the driver’s seat, a shotgun rack, amber lights in the back, and antennae on the roof and trunk. Concerned about domestic terrorism targeting abortion doctors and clinics, local police contacted the FBI. A prolonged investigation ensued during which the police and FBI detained the group’s members. Subsequently, the group filed a civil rights action against the municipalities, the local officers, and the federal agents alleging violations of their constitutional rights as well as conspiracy to violate rights. The trial court entered summary judgment for the defendants, but the court of appeals reversed in part. The officers do not receive qualified immunity. It finds that a reasonable officer when faced with the circumstances of this

case would have known that detaining persons because of their speech would violate their rights. Further, the two-and-one-half hour detention absent probable cause, accompanied by a search of the vehicles and personal belongings, would undoubtedly deter an average law-abiding citizen from similarly expressing controversial views on the streets. *Center for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807 (6th Cir. 2007).

Traffic Stop – Unreasonable Seizure

An officer in a helicopter alerted officers conducting a roadblock that he had in sight a PT Cruiser heading in their direction driven by a suspect with a gun. To the surprise of the driver, officers approached the car with guns drawn, ordered him out, patted him down, and started to handcuff him. Within five minutes the police realized their mistake and released the driver. The driver later asserted that the officers subjected him to an unlawful seizure and excessive use of force. The trial court denied qualified immunity to the officers, but a divided court of appeals reversed. The court acknowledged that the driver’s ordeal resulted from individual mistakes of different officers, each “committed in good faith while performing their job in a potentially dangerous situation.” Where the constitutional violations are based on the collective knowledge of a number of police officers, an individual officer is still entitled to qualified immunity if an objectively reasonable officer in the same position could have reasonably believed that he or she was acting lawfully. *Humphrey v. Mabry*, 482 F.3d 840 (6th Cir. 2007).

Tennessee

Age Discrimination – Jury Verdict

An older clerical employee dismissed from her position filed suit in federal court alleging claims under the Age Discrimination in Employment Act. After a trial, the jury awarded her \$199,200 in damages. The city moved for judgment as a matter of law; the judge granted the motion and dismissed the case with prejudice. On appeal, the court of appeals reversed the lower court and ordered the verdict reinstated. The employee offered sufficient evidence that a non-protected employee received treatment that was more favorable, that the employer’s proffered reasons for its actions were pretext for age discrimination, and that the employer threatened her with demotion after she filed a complaint with the Equal Employment Opportunity Commission. *Tuttle v. Metropolitan Government of Nashville and Davidson County*, 474 F.3d 307 (6th Cir. 2007).

Protective Orders – Failure to Enforce

A woman obtained three protective orders against the father of her child. She called the police several times over a period of two years to complain about violations of the orders, but the police took no action. Ultimately, the father broke into her home, killed the woman and two of her friends, and then committed suicide. In the son’s subsequent suit against the police department and several of its officers, the trial court denied qualified immunity to the officers on the ground that their actions were not discretionary, and they appealed. Relying on the 2005 decision of the U.S. Supreme Court in *Town of Castle Rock v. Gonzales*, the court of appeals holds that statutes seemingly mandatory for state purposes are discretionary for federal purposes where they do not specify the precise action an officer must take when enforcing a protective order. Qualified immunity is thus available, and here the officers are entitled to it. The protective order does not create a special

relationship between police officers and the individual who petitioned for that order. Neither does the order create a property interest protected by the Due Process Clause of the Fourteenth Amendment. *Hudson v. Hudson*, 475 F.3d 741 (6th Cir. 2007).

Annexation – Purchase of Utility Property

When a Tennessee municipality that owns and operates its own electric system annexes territory in which an electric cooperative is providing electric service, the municipality may either grant a franchise to serve the annexed area or “offer to purchase any electric distribution properties and service rights within the annexed area owned by any electric cooperative.” The city chose the latter, but the utility would not voluntarily sell and forced the city into a condemnation proceeding. The district court awarded reintegration costs of \$5.285 million for a new substation and distribution loop, and the court of appeals affirmed. *City of Cookeville v. Upper Cumberland Electric Membership Corporation*, 484 F.3d 380 (6th Cir. 2007).

Billboard Ordinance – Standing to Challenge

A billboard company challenged a city’s sign ordinance. The court of appeals earlier upheld the ordinance’s height and size requirements and remanded the case to the district court for consideration of the company’s remaining claims. The district court dismissed those claims holding that the company had no standing to sue because it suffered no injury in fact. Having received a decision on that portion of its complaint that directly affected it, the company cannot pursue a challenge against other provisions of the ordinance that do not affect it. *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343 (6th Cir. 2007).

Paramedics – Improper Treatment of Patient

Firefighters, paramedics, and EMTs responded to a 911 call requesting aid for a man having an epileptic seizure. The responders restrained the man, using their bodies to apply weight and pressure and tying his hands and ankles behind his back. While restrained, the man died. His estate sued the responders, alleging that they acted with deliberate indifference to the victim, used excessive force, and failed adequately to protect him. The district court denied the responders’ motion for qualified immunity, and they appealed. The Court of Appeals reversed, finding no case authority holding that paramedics answering a 911 emergency request for help engage in a Fourth Amendment seizure of the person when restraining the person while trying to render aid. Improper

medical treatment by a government employee, standing alone, does not violate the Fourth or Fourteenth Amendment. *Peete v. Metropolitan Government of Nashville and Davidson County*, 486 F.3d 217 (6th Cir. 2007). [See “No Constitutional Right to Competent Rescue Services,” *Local Government Law News*, Winter 2003.]

Police Informant – Use of Officer’s Personal Car

A police officer loaned his personal car to an informant who, while driving the car, ran into a pedestrian and killed him. The city knew of and permitted the practice of police officers loaning their personal vehicles to informants in exchange for information. Parents of the boy killed by the informant asserted that the city was therefore partially liable for the boy’s death. The trial court dismissed the complaint for failure to state a claim on which relief could be granted, and the court of appeals affirmed. Characterizing the practice as a “strange policy,” the court decided that its mere existence is not enough to state a claim. It did not intentionally or recklessly place individuals in danger, nor could the court infer that the city acted with intentional or reckless indifference to the safety of the public. *Mitchell v. McNeil*, 487 F.3d 374 (6th Cir. 2007).

Writ of Execution – Participation of Deputy Sheriff

A woman who obtained a money judgment against her former employer obtained writs of execution against the employer and his property. A deputy sheriff was present when the writs were served at the employer’s residence, and he supervised the private contractors who seized the property. The deputy also ordered the employer to leave the premises and inquired about any cash the employer was carrying on his person. The employer sued the persons involved in executing the writs, alleging that the search and seizure violated his constitutional rights. The Court of Appeals held that evicting the property owner without post-judgment notice and opportunity to be heard when only a monetary obligation was at issue was a violation of due process. However, the deputy has qualified immunity given the phrasing of the writs, his prior consultation with county attorney, and the absence of clearly established federal case law governing the post-judgment deprivation of real property. *Revis v. Meldrum*, 489 F.3d 273 (6th Cir. 2007).

Debra Suckow, a student at Salmon P. Chase College of Law, contributed to this article.

Immigration-Related Ordinances *continued from page 4*

- author of the 2002 memorandum and was lead counsel for the city of Hazelton in the *Lozano* case (<http://www.law.umkc.edu/faculty/kobach.htm>).
27. *Martin v. Commonwealth*, 592 S.W.2d 134 (Ky. 1979).
 28. See Matthew Parlow, *A Localist’s Case for Decentralizing Immigration Policy*, 84 *Denv. U. L. Rev.* 1061, 1062 (2007).
 29. See Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 *U. Cin. L. Rev.* 1373, 1387-91 (2006) (describing five forms of non-cooperation laws).
 30. See Congressional Research Service, *Enforcing Immigration Law: The Role of State and Local Law Enforcement* 29-31 (2006), available at <http://www.mnllp.com/CRSenforce11mar04.pdf>.
 31. M.C.C. Immigration Committee, *Recommendations for Enforcement of Immigration Laws by Local Police Agencies* 5 (June 2006), available

- at http://www.houstontx.gov/police/pdfs/mcc_position.pdf.
32. Criticism of sanctuary policies is not limited to the statutory argument. See Douglas R. Sahmel, *How Maryland’s Sanctuary Policies Isolate Federal Law and the Constitution While Undermining Criminal Justice*, 36 *U. Balt. L.F.* 149, 152-53 (2006) (“Sanctuary laws are invalid for three reasons: first, sanctuary supporters’ Tenth Amendment claim turns federalism on its head while violating federal and Constitutional law. Second, the IIRIRA and PRWORA provisions are legitimate federal enactments that preempt contrary local law under the Supremacy Clause. Third, by brazenly violating statutory and Constitutional law and defying Congress’s will, sanctuary policies are incongruous with both our general governmental framework, and with the deference traditionally given to the federal immigration power.”) Prominent critics include Bill O’Reilly of Fox News, <http://www>.

Continued on page 15

OPINIONS OF THE ATTORNEY GENERAL

SUMMARIES OF SELECTED OPEN MEETINGS

DECISIONS

Open to the Public – KRS 61.810

Members of a board of education appeared at a meeting of the state school board to argue for a waiver of state regulations. In the car on the return trip, a quorum of the board discussed the ramifications of the state's refusal to grant the waiver. A citizen complained that this violated the Open Meetings Act, and the attorney general agreed. The discussion of alternatives open to the board of education contravened KRS 61.810(1). The fact that the board of education did not take action based on the discussions until a subsequent public meeting does not change the fact that it violated the act. 07-OMD-100.

Appointment, Discipline, or Dismissal – KRS 61.810(1)(f)

A citizen objected that a city commission went into closed session for a discussion "regarding personnel." The city attorney responded that the motion properly reflected that the closed session was "for discussions or hearings which might lead to the appointment, discipline, or dismissal of an individual employee." The minutes, however, reflected that the commission went "into executive session based on KRS 61.810(1) regarding personnel." The attorney general observed that the minutes do not reflect strict compliance with the Open Meetings Act, giving rise to a violation. If, as the city claims, it followed the proper procedure for going into closed session, then it violated KRS 61.815(1)(a), which requires that the minutes of action taken at every meeting set forth an accurate record of votes and actions at the meeting. 07-OMD-059.

Serial Meetings – KRS 61.810(2)

A city council retained its own attorney in contemplation of taking action against the mayor. A citizen complained that the attorney met individually with enough members of the city council collectively to constitute a quorum, a violation of the Open Meetings Act. The attorney denied such meetings, but the attorney general reasoned that the public could reasonably infer from the actions of the attorney and the council that information may have been gathered and discussed in a series of less-than-quorum meetings. If that was the case, there may have been a violation of the act. 07-OMD-041.

Notice of Closed Session – KRS 61.815(1)(a)

On two occasions a fiscal court went into executive session following adoption of motions that recited only the statutory language in the Open Meetings Act. A citizen complained that the fiscal court violated the act because it did not also disclose the general nature of the business to be discussed in closed

session. The attorney general agreed. Merely parroting the language of the statutory provision, said the attorney general, does not satisfy the standard of "specific and complete notification" required by *Floyd County Board of Education v. Ratliff*. Neither does it give a sufficiently specific description of the business to be discussed. Elaborating on the discussion after the fiscal court returned to open session did not cure the defect in giving notice of the closed session. 07-OMD-029.

Notice of Special Meetings – KRS 61.823(3), (4)

A fiscal court called a special meeting intending to go into closed session to discuss pending litigation. The proposed agenda reflected only that the fiscal court would hold an executive session. A citizen complained that this notice was inadequate, and the attorney general agreed. Citing an earlier opinion, the attorney general admonished, "the practice of including open-ended agenda items like old and new business, or open to counsel and floor, is inconsistent with the natural and harmonious reading of KRS 61.823(2), as well as the statement of legislative policy codified at KRS 61.800, and the goal of maximizing notice to the public." 07-OMD-099.

Conditions for Attendance – KRS 61.840

Several city residents arrived at a meeting of the city council to discover that there was inadequate seating for those who wanted to attend. The residents complained that this violated the Open Meetings Act. The attorney general opined that KRS 61.840 does not expressly require enough chairs for everyone who attends a public meeting to have a seat. Thus, there was no violation under the circumstances. However, said the attorney general, "this office does believe that such a reasonable accommodation should be made whenever feasible." 07-OMD-127.

SUMMARIES OF SELECTED OPEN RECORDS DECISIONS

Public Record Defined – KRS 61.870(2)

A newspaper reporter asked a county judge/executive for a copy of a letter sent to him by a county magistrate. The judge/executive initially denied the request on the ground that it was personal correspondence. Subsequently, the judge/executive reconsidered his position and released the letter after redacting those parts reflecting the magistrate's personal thoughts and comments. On appeal, the attorney general explained that a public record includes any record that is "prepared, owned, used, in the possession of, or retained" by the judge/executive. A letter from one public official to another relating to public business and the discharge of official duties is such a record. The privacy exception in

the Open Records Act pertains only to matters unrelated to public business. The letter at issue related to fiscal court business. 07-ORD-040.

A board of education denied a reporter's request for a copy of a settlement agreement in a lawsuit against it. The court ordered the record sealed and directed the board to adhere strictly to the confidentiality provisions in the agreement. On appeal, the attorney general stated that unless the agreement was protected from disclosure by one of the statutory exceptions, the agreement was a nonexempt public record. However, said the attorney general, the question whether the document is subject to public inspection must be raised in the judicial system. The presumption is that the record is disclosable, and the burden is on the agency to show that it is exempt. 07-ORD-110.

Records Management – KRS 61.8715

Having received no response from a county detention center for requested records, the requester initiated an appeal. On appeal, the county attorney explained that the records sought were generated by a prior administration and that the prior office holder was the custodian of the records to whom to address the request. This, said the attorney general, "reflects a fundamental misunderstanding of KRS 61.8715 and the 'essential relationship' between proper records management... and agency accountability through records access..." A public record made by a public officer belongs to the office, not to the officer personally. An outgoing county official must deliver to his successor all books, papers, records, and property held by virtue of office. There is no support in law for the proposition that the prior office holder is the proper custodian of the records. 07-ORD-020.

Written Application – KRS 61.872(2)

A citizen sent a fax to a housing authority informing it that he would be in the next day to inspect certain records. The housing authority replied that it would require a written application and would thereafter make the records available for inspection within three days. The citizen appealed, claiming that the actions of the housing authority violated the Open Records Act. The attorney general found no fault with the housing authority's actions. Statute allows a records custodian to require a written application, which serves the interests of the agency, the requester, and the attorney general when deciding the appeal. 07-ORD-048.

Receiving Copies – KRS 61.872(3)(b)

A sheriff received a request for records related to three individuals. After searching his indexed records, he informed the requester that there were no responsive records. On appeal, the attorney general concluded that the sheriff discharged his duty under the Open Records Act and was not obligated to search his unindexed records because the request was not "definite, specific, and unequivocal." The attorney general opined that the act places this greater burden on persons who wish to receive copies by mail to describe the records they desire to see. 07-ORD-086.

Fees, Commercial – KRS 61.874(4)

In response to separate requests from the same individual, a county sheriff charged the requester a fee of \$0.25 per copy on the assumption that the requests were for commercial use in the requester's business. The requester objected to the fee and appealed. The attorney general had no evidence other

than the sheriff's assertion that the purpose was commercial, but gave the sheriff the benefit of the doubt. The attorney general then concluded that the sheriff "amply substantiated the reasonableness of the fee." Had the requester sought the records for a noncommercial purpose, the fee charged would subvert the intent of the Open Records Act. 07-ORD-015.

Information of a Personal Nature – KRS 61.878(1)(a)

An employee organization asked a municipal utility for records pertaining to employees from whose paychecks the utility deducted association dues. The utility asserted that the payroll records were information of a personal nature exempt from disclosure and denied the request. On appeal, the attorney general agreed with the utility. Affirming the position taken in OAG 82-233, the attorney general reiterated that sums withheld for taxes, insurance, retirement, credit unions, charitable contributions, and annuities come under this exemption. The employee association has no greater right of access to information about withheld dues than does a member of the public. "[T]he exemption should be invoked according to the nature of the record and not according to the person who is requesting the inspection or the stated or suspected purposes of the inspection." 07-ORD-056.

A reporter requested copies of records pertaining to the discipline and termination of a middle school principal. The school superintendent responded by providing a copy of a final administrative order in the matter that placed the settlement under seal and by asserting that disclosure of the remaining records sought would constitute an unwarranted invasion of personal privacy. The reporter appealed. As to the personnel records, the attorney general opined that a personnel file is open to inspection. Where the file contains both excepted and non-excepted material, the agency must redact any excepted material and make the rest available for inspection. As to the settlement agreement, the attorney general held that it was accessible. An earlier Kentucky Supreme Court decision held that a confidentiality clause in such an agreement is not entitled to protection. 07-ORD-064.

Examination Data – KRS 61.878(1)(g)

A school district denied a request for the selection rating forms for applicants to the Governor's Scholars Program. The school asserted that the information was exempt under the provisions applicable to examinations, preliminary materials, and matters made confidential by law. The attorney general concluded that there could be little doubt that records such as the completed rating form fell within the scope of an education record exempt from disclosure. As to the guidelines used by the evaluators in determining the scores on the rating forms, the attorney general said that they, too, were exempt because disclosure would give an unfair advantage to applicants. 07-ORD-107.

Confidential by Law – KRS 61.878(1)(k), (l)

A television reporter asked a school district for a copy of a videotape recorded by a camera in a bus involved in a serious accident. The district denied the request on the ground that its release would constitute an unwarranted invasion of personal privacy. The reporter appealed, asserting that there was no protected privacy interest aboard the school bus. In response, the district claimed that the Family Education Rights and Privacy Act prohibited disclosure, making it confidential by law. The attorney general agreed with the district. Videotapes used for monitoring student activities and revealing the

identities of students are education records the disclosure of which is prohibited by federal law. 07-ORD-037.

Records Related to Employee – KRS 61.878(3)

A member of AmeriCorps*VISTA requested from the agency with which he was placed access to email pertaining to him. The agency denied the request claiming that the email was exempt as preliminary drafts, notes, and correspondence. The member appealed asserting that the relationship with AmeriCorps*VISTA gave him the status and broader rights of access of a public agency employee. The attorney general reviewed the memorandum of understanding governing the member's placement and concluded that he was not an employee. Further, the member's early termination of his placement was the action of the Corporation for National and Community Services, not that of the agency. The materials at issue lose their preliminary character only when the agency adopts them as part of its action. Here the agency had no authority to take final action. 07-ORD-117.

Denial of Inspection – KRS 61.880

A city provided copies of recent real property tax ordinances, but did not provide the requested proofs of publication for some of the ordinances. The requester appealed this partial denial of his request, and on appeal the city failed to provide an explanation for the missing documents. In doing so the city did not satisfy its statutory burden. Records retention schedules regard proofs of publication as permanent records that a city must retain in its offices. The failure of the city to explain why it did not have these records and what efforts it made to locate them did not conform to the Open Records Act. 07-ORD-011.

A fiscal court refused to provide requested records because it viewed the tone of the request as "degrading and demeaning." On appeal, it asked that the request "be rendered null and void." The attorney general found the fiscal court in violation of the Open Records Act saying, "We find no legal basis in the language of the Act for the position that the requester's disrespectful tone relieves the agency of its statutory obligations under the Act." 07-ORD-069.

Subversion – KRS 61.880(4)

A citizen requested from a city a copy or transcript of a particular 911 call she placed. The citizen received no records

in response to her request for over a year and appealed. On appeal, the city argued that it honored the request, but the attorney general found that the facts supported the citizen's account of events. The attorney general characterized the city's conduct as a "continuing violation" that was "egregious" and without mitigating factors. In light of the city's conduct that was the subject of an earlier appeal, the attorney general concluded that the "evidence is indicative of an obvious disregard for the Open Records Act resulting in its ultimate subversion" and referred the matter to the Department for Libraries and Archives for further investigation. 07-ORD-009.

A citizen requested records related to a board of education's decision to consolidate two elementary schools. The board responded to the request by producing 47 boxes of records it said were responsive to the scope of her request. On appeal, the attorney general said that the board subverted the intent of the Open Records Act "by commingling non-responsive records with responsive records so as to create unnecessary impediments to effective review and by asserting that it had no duty to produce only responsive records." The attorney general opined that the act requires an agency to produce records responsive to an open records request, to identify, segregate, and disclose the responsive records; to exclude non-responsive records; and, where possible, to produce existing records that aggregate the information sought. 07-ORD-105.

Under KRS 61.846 and 61.880, the Office of the Attorney General reviews complaints alleging violations of the Open Meetings Act and Open Records Act respectively and issues written decisions stating whether an agency violated the act. If no party timely appeals, the decision has the force and effect of law. Copies of the decisions summarized here are available online at <http://ag.ky.gov/civil/oromlist.htm>.

Under KRS 65.055(1), 160.395(1), and 164.465(1), certain public officers have a continuing duty to distribute written information prepared by the Office of the Attorney General pursuant to KRS 15.257 that explains the procedural and substantive provisions of the Open Meetings Act and the Open Records Act. See <http://ag.ky.gov/civil/alert.htm>. In addition, those officers must distribute information prepared by the Department for Libraries and Archives pursuant to KRS 171.223 concerning proper retention and management of public records.

Immigration-Related Ordinances *continued from page 12*

billoreilly.com/blog?action=viewBlog&blogID=362056141532353188, and presidential candidate Fred Thompson, http://www.townhall.com/columnists/FredThompson/2007/08/14/sanctuary_cities.

33. Section 642(a) provides that, "[n]otwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual." 8 U.S.C. 1373(a). Section 434 provides that "[n]otwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States."

34. *City of New York v. United States*, 971 F.Supp. 789 (S.D.N.Y. 1997).

35. A redacted version of the report is available at <http://www.usdoj.gov/oig/reports/OJP/a0707/index.htm>.

36. 8 U.S.C. § 1357(g) (1996).

37. U.S. Immigration and Customs Enforcement, Section 287(g), *Immigration and Nationality Act; Delegation of Immigration Authority*, <http://www.ice.gov/pi/news/factsheets/070622factsheet287gprogover.htm>.

38. U.S. Immigration and Customs Enforcement, Section 287(g), *Immigration and Nationality Act; Delegation of Immigration Authority*, http://www.ice.gov/partners/287g/Section287_g.htm.

39. Fact Sheet, *supra* note 36.

40. Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 University of Chicago Legal Forum 57, 92.

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