FALL 2017

GOV-LAW CONNECTION

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Navigating Facebook and the First Amendment

IF YOU HAVE a problem with someone "trolling" your city Facebook page, can you ban the commenter or delete their posts or comments? Perhaps surprisingly, the answer is likely no. A federal judge in Virginia has ruled that in most instances, public officials cannot ban the public from interacting with the government's social media accounts.

In *Davison v. Loudon County Board of Supervisors*, 2017 WL 3158389 (E.D. Va. July 25, 2017), Brian Davison filed suit against Phyllis Randall, the Chair of the Loudon County Board of Supervisors, after she banned him from her Facebook page and deleted a post she made, along with critical comments he made in response. She restored his posting and commenting access 12 hours later, but according to the court, the damage was done.

To arrive at the conclusion that Davison's First Amendment rights had been violated, the court first had to determine whether Randall was acting in her official capacity when moderating comments on the Facebook page, because "to state a constitutional claim, one must trace the challenged conduct to the government." To make this determination, the court focused on Title 18, U.S.C., Section 242, which addresses the deprivation of rights under color of law. The Department of Justice has summarized that acts committed under color of law include those perpetuated not only by federal, state, or local officials within the their lawful authority, but also acts committed beyond the bounds of that official's lawful authority, if the acts take place while the official is purporting to or pretending to act in the performance of his/her official duties.

Here, even though Randall was not administering a government-sanctioned Facebook page, the court concluded that Randall's actions "arose out of public, not personal, circumstances" and as such, her actions related to the Facebook page in question were made under the color of law. As explained by the court, the impetus for the creation of the page was Randall's election to office and her desire to communicate with her constituents in back and forth discussions about matters related to her elected office. Furthermore, Randall used county resources to support her Facebook page and links to the page appeared in official county newsletters hosted on the county's web site. Based on these facts, the court found that even

IN THIS ISSUE:

PARTNER'S MUSINGS

from Chad's desk…

"No government should be without critics. If its intentions are good then it has nothing to fear from criticism."

—Thomas Jefferson

I spent this summer listening to several biographies of our founding fathers and other historical books related to the beginning of our country. For a self-confessed government geek, these stories kept me on the edge of my seat just as well as, if not better than, any spy or mystery novel. Reading (okay, hearing) about the sacrifices made by so many while fighting and dying for the freedoms we enjoy today was truly inspiring. There is no doubt in my mind that "we the people" of today's United States can still learn much from these heroic men and women.

One common tale throughout many of these stories was the vitriolic nature of public communications targeted at government leaders during the early years of our republic. Scandalous accusations and outright lies that even the National Enquirer would likely reject seemed common-place even during the many life-and-death situations the founding fathers faced.

though the Facebook page was not an "official" county page, Randall's actions were still taken under "color of law" and therefore subject to constitutional restrictions.

This means that First Amendment issues apply not merely to the official Facebook pages of a local government, but also to those pages maintained by local government officials—as long as they represent themselves as such and appear to be acting as such. The fact that local government officials maintain such pages in their free time will not necessarily insulate them from a constitutional claim—especially when such pages are created for the purposes of assisting local government officials with their official duties.

That is not the end of the analysis, however. In order to conclude a First Amendment violation occurred, the court then had to determine whether the speech in question was protected. It is well established in case law that speech criticizing the government and official conduct is soundly and indisputably protected speech. Speech may not be disavowed by the government simply because it offends. As explained by the court, "criticism of . . . official conduct is not just protected speech, but lies at the very heart of the First Amendment."

Because Randall opened up her page to comments on any matter related to her official duties, she created a forum for the public to express their opinions about all matters related to the county. By blocking Davison because he posted critical comments about the county, Randall engaged in viewpoint discrimination, which is almost always a violation of the First Amendment.

The court went out of its way, however, to make it clear that not every act of moderating comments under the color of law on a government-related Facebook page is a First Amendment violation. Rather, the court stated "a degree of moderation is necessary to preserve social media websites as useful forums for the exchange of ideas." The court went on to explain that neutral and comprehensive social media policies can provide vital guidance in navigating First Amendment concerns. This is especially true in states, such as Oregon, where a state constitution provides even broader free speech protections than the First Amendment.

Even though this case has no binding effect on courts here in the Pacific Northwest, it is still instructive to our local governments.

First and foremost, this case reminds us that local governments and their elected officials must be extremely cautious and use considerate care before blocking members of the public from their social media sites—especially when such actions are taken based on viewpoint discrimination. It is always best to contact an attorney before deleting comments or banning posters from a social media site—no matter how offensive the comment might be.

Second, just because a social media site is maintained by an elected official separate and apart from their local government does not make the site "private" and free from regulation. Rather, when such sites are related to official business, they very well may be subject to free speech issues.

Next, this case reminds us that the internet is a powerful platform for two-way communication with constituents. In other words, the internet is not something that can be treated as less "real" than offline, or so-called "real life" activities. Simply put, unconstitutional suppression of criticism is just as real when it is performed via social media (like Facebook or Twitter).

Finally, it is wise to have a well-crafted policy in place to provide guidance, not only to the local government and/or its elected officials but to users of the site as well. We here at BEH can assist you with such a policy if you do not have one in place already.

Kristen Ketchel-Bain and Chad Jacobs

All of these attacks eventually led the Federalist dominated government to pass the Alien and Sedition Acts of 1798. These four laws, passed during a time of "quasi-war" with France, were enacted with the supposed purpose of strengthening national security. Critics of the laws, however, pointed out that they were really a means to suppress opposition to the then ruling Federalist Party, which controlled both Congress and the Presidency.

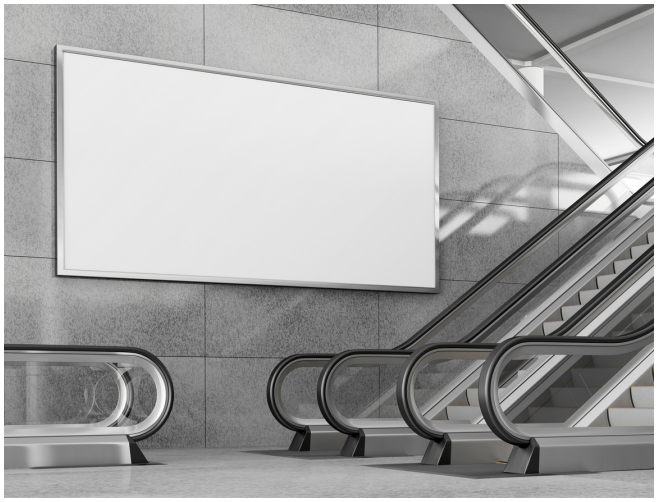
The first three laws of the Alien and Sedition Acts sought to deny certain rights to immigrants, and were, for the most part, never utilized by then President Adams. The fourth law, the Sedition Act, was used to prosecute and imprison government dissenters. The Sedition Act prohibited individuals from voicing or printing what the government deemed to be malicious remarks about the president or the government of the United States. Most historical reports seem to suggest that up to 14 individuals were prosecuted and even imprisoned for speaking out against or publishing material critical of the federal government.

Now I try to give our founding fathers the benefit of the doubt here. In 1798, our country was still in its infancy. Foreign countries were outwardly attempting to disrupt the fragile alliance

Court Revisits Government Speech

IN JUNE, the Oregon Court of Appeals issued a decision in *Oregon Natural Resources Council Fund v. Port of Portland* addressing limits on government regulations that restrict the advertising in public buildings under the Oregon Constitution.

The case involves regulations adopted by the Port of Portland that govern advertising placards on the walls at Portland International Airport. First, Port of Portland Ordinance 423-R delegates authority to the Port Director to adopt rules for running the airport. The Director then adopted rules that, among other things, allow commercial advertising at Portland airport but prohibit religious or political advertising. The Oregon Natural Resources Council Fund (ONRC) sought to purchase advertising space but was rejected because the Port determined the advertising was political. ONRC sued, arguing the regulation violates Article I, section 8, of the Oregon Constitution which provides: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever."



Relying on its earlier decision in *Karuk Tribes v. Tri-Met*, the Court of Appeals agreed with ONRC. In *Karuk Tribes*, the Court held that a similar Tri-Met rule that prohibited political advertising on busses violated Article I, section 8. The Court of Appeals decision in *Karuk* was affirmed by an evenly divided Oregon Supreme Court. Because the Port's arguments in this case were similar to Tri-Met's arguments in *Karuk Tribe*, the Court of Appeals followed its precedent to conclude that the Port's rule violates Article I, section 8. However, the Court also addressed two additional arguments that were not raised in *Karuk Tribes*.

First, the Court found that the administrative rules adopted by the Director are "law" that was "passed" for purposes of Article I, section 8. ("No law shall be passed . . .") Second, the Court found that the political/proprietary distinction, to the extent it exists, does not provide an exception to the free speech protections of Article I, section 20.

With respect to the first issue, the Court found that an administrative policy adopted by the chief executive is a "law" that is "passed" and therefore subject to Article I, section 8. The Court reasoned that a law is a permanent rule of general application, whereas administrative actions are temporary and restricted. Because the rules adopted by the Director are permanent and apply generally, they are a "law" for purposes of Article I, section 8.

"To the extent that the distinction [between a law and an administrative act] is relevant to the meaning of Article I, section 8, it is consistent with the understanding of 'passing' a 'law' that we described above. That is, the distinction is drawn primarily between acts that, on the one hand, establish general rules of conduct or a 'rule of action' by the citizens or the city (legislation), and acts that, on the other hand, are temporary and restrictive in their operation and effect. We therefore are not convinced that the framers, even if aware of that distinction, intended to depart, in the case of municipal corporations, from what we understand to have been included within the ordinary meaning of 'passing' a 'law' at the time that Article I, section 8, was adopted—that is, the enactment of a rule, particularly an established or permanent rule, prescribed by the government, for regulating the actions of its subjects."

then formed between the states. Animosity was growing between different factions who argued about everything from the formation of a national bank to taxation to slavery. The northern and southern states were already at odds, and believe it or not, there was talk of secession by northern states interested in rejoining the rule and protection of England. It was, to say the least, a fragile time for our federal government. Nonetheless, when Thomas Jefferson and his Democratic-Republican Party gained control of the federal government, they quickly repealed the Sedition Act.

Most modern-day observers recognize that the Sedition Act clearly violated the guarantees of free speech found in the First Amendment. Based on today's free speech jurisprudence, it would take most government attorneys about two seconds to advise against the enactment of such a law. In 1798, however, this jurisprudence did not exist, and arguably the Federalist Party was doing what it thought it needed to do in order to protect the continuation of our fledgling country.

Today's world, although drastically different than that of the late 1790's, can present similar challenges for government officials. One of the articles discussed in this

With respect to whether there is a historical exception for when government acts in a proprietary capacity versus a general law restricting speech, the Court concluded:

"We agree with the circuit court's conclusion that the Port did not establish that its content-based restriction was 'wholly confined within some historical exception.' Robertson, *293 Or at 412;* State v. Moyer, *348 Or 220, 233, 230 P3d 7 (2010) (explaining that the question of historical exception 'requires the following inquiries: (1) was the restriction well established when the early American guarantees of freedom of expression were adopted, and (2) was Article I, section 8, intended to eliminate that restriction'). As we explained previously, none of the principles in the 'government as proprietor' case law naturally extend to the context of governmental interference with free expression, let alone demonstrate a 'well established' exception for the type of speech restriction at issue in this case."*

There was a concurring opinion by Judge Armstrong in which he agreed with the outcome because the Court is bound by its decision in *Karuk Tribes*, but went on to argue that *Karuk Tribes* was wrongly decided and that the Supreme Court should reverse it. Armstrong claims the case that allows DMV to regulate speech on license plates should control. (*Higgins v. DMV*, 170 Or App 542, 13 P3d 531 (2000) (en banc), aff'd, 335 Or 481, 72 P3d 628 (2003)). According to Armstrong, when government creates the forum that allows the speech in the first place, regulations that limit speech within that forum are not subject to Article I, section 8:

"I believe, however, that we failed in Karuk Tribe to recognize the broader principle embodied in Higgins. The broader principle is that there are circumstances in which the government can choose to create opportunities for people to communicate without making Article I, section 8, applicable to the government's decision to control the content of the communication."

Not surprisingly, the decision in *ONRC v. Port of Portland* was appealed to the Oregon Supreme Court, so stay tuned.

Paul Elsner

IS YOUR ORGANIZATION SUBJECT TO THE ADEA?

UNDER A NEW 9th Circuit ruling (*Guido v. Mount Lemon Fire District* (859 F 3d 1168, 9th Cir 2017)), the Age Discrimination in Employment Act (ADEA) applies to all political subdivisions of the state regardless of how many employees the subdivision employs. Two former firefighters filed charges with the Equal Employment Opportunity Commission (EEOC) which found reasonable cause to believe the Fire District had violated the ADEA. The former employees subsequently filed suit in federal district court which did not find in their favor. The district court in granting summary judgment held that that the Fire District was not an "employer" as that term is defined in the ADEA. The 9th Circuit disagreed. It held that the meaning of the term "employer" was not ambiguous and that there was no reason to depart from the statute's plain meaning. The Court found that the term "employer" included three distinct groups: (1) persons engaged in industry affecting commerce with 20 or more employees; 2) an agent of such person; and 3) state and political subdivisions. Under the plain meaning of the statute the Court found that there was no requirement for a state or political subdivision to employ 20 or more employees for the ADEA to apply. This case is instructive in that any political subdivision of the state—no matter how many employees it has—will be subject to the ADEA.

Heather Martin

issue of our newsletter talks about the perilous nature of monitoring posts on social media sites related to local governments. Certainly not as clear cut of a legal analysis as the Sedition Act, this burgeoning area of free speech jurisprudence is sure to garner much attention for years to come.

This newsletter also focuses on other common issues our clients confront. Updates on employment and labor issues, including the Oregon Supreme Court's recent decision on veterans' preferences, how an amended statute is altering the way land use decisions are made, and changes in state law from the last legislative session round out what we hope is informative (and possibly entertaining) reading. Please do not hesitate to contact any of us here at BEH if you desire additional information on any of these topics, and as always, thank you for allowing us to assist you in making your community thrive.

Devising & Applying Veterans' Preference Policies

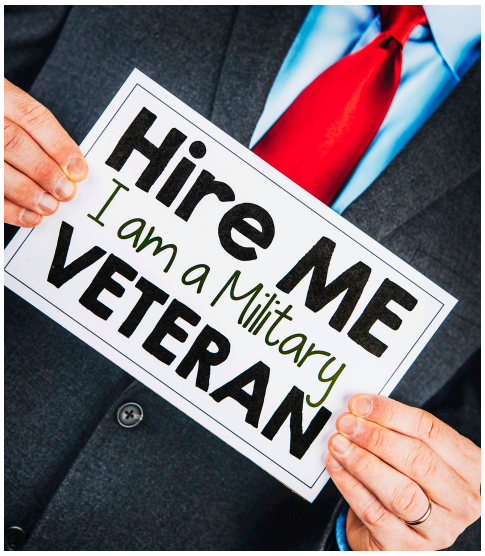
ON AUGUST 10, 2017, the Oregon Supreme Court handed down the final decision in *Multnomah County Sheriff's Office v. Edwards*, the dispute between a disabled veteran and Multnomah County ("County") regarding how public employers should apply veterans' preference. This decision found the County failed to provide the disabled veteran, Edwards, with his statutory right to preferential treatment in a promotion. The decision is the culmination of much frustration for public employers regarding how to apply Oregon's veterans' preference statutes.

COUNTY'S APPLICATION PROCESS

In 2012, the County held an internal recruitment for an open lieutenant position for which it received three applications, one of which was from Edwards. The County's application process included the following steps: candidates submitted a letter of interest and resume; the County then conducted a 360 degree review of the applicants; and finally the applicant had a command interview. At every step in this process Edwards was ranked third of three; the County ultimately offered the position to another candidate.

After he was not selected for the position, Edwards requested a written explanation from the County. The County responded by explaining that due to his status as a disabled veteran, Edwards was "at the top of the list of three potential candidates for promotion."

Edwards then filed a complaint with the Oregon Bureau of Labor and Industry (BOLI) alleging that the County had committed an unlawful employment practice by failing to give him the preferential treatment that Oregon law requires.



WHAT DOES THE LAW REQUIRE?

State law provides three different ways that public employers must grant preference for veterans and disabled veteran applicants; the method of preference depends on the type of selection process the public employer uses. First, for any initial application screening that is used to develop a list of applicants to interview, the employer must add a specified number of points to the veteran's or disabled veteran's score. ORS 408.230(2)(a). Second, for an examination that is given after the initial application screening and that results in a score, the employer must again "add preference points to the total combined examination score." ORS 408.230(2)(b). Third, if the employer uses any other method of ranking that does not result in a score, the employer must "devise and apply methods by which the employer gives special consideration in the employer's hiring decision to veterans and disabled veterans." ORS 408.230(2)(c).

In addition, BOLI requires that at "each stage of the application process, a public employer will grant a preference to a veteran or disabled veteran . . . ." OAR 839-006-0450(2).

WHAT HAPPENED WITH EDWARDS?

Because Multnomah County's process does did not result in a "score," the County had to "devise and apply" methods to give the preference pursuant to ORS 408.230(2)(c).

Although Multnomah County argued that it did apply the preference by placing Edwards at the top of the applicant pool, it unfortunately did not have a written policy describing the method it used. The

Let us know about any interesting projects happening in or planned for your community! We'd love to feature you in our next Client Corner segment.

only evidence came from testimonies from those involved in the process. Ultimately, BOLI found that because these explanations were "confusing and inconsistent" as to how individuals involved in the process applied the preference, the County had failed to devise any method of giving preference to disabled veterans in Edwards' situation.

The County appealed BOLI's decision, arguing that its process satisfied the statute because it did give Edwards preference, regardless of whether or not it has devised a particular method for doing so. The County explained that the veterans' preferences laws were designed to provide employers with flexibility in determining how to apply the preference in situations where the employer was not giving candidates a numeric score. As such, it contended "no single, uniform method is required."

The Oregon Court of Appeals, and now the Oregon Supreme Court, rejected the County's argument. The recent decision provides that because the County's witnesses "could not agree on what granting a disabled veteran's preference meant, who would apply it, or when it would be applied," it failed to "devise and apply methods" for giving preference.

Interestingly, the Oregon Supreme Court did not make any findings on the County's argument that BOLI's rule requiring that the preference be applied at each stage of the process went above and beyond what the statute required, which leaves the question still open.

WHAT SHOULD PUBLIC EMPLOYERS DO?

Have a plan and write it down prior to any recruitment.

The Oregon Supreme Court took pains to point out that the law does allow flexibility in exactly how the employer applies the preference, and that the application of the preference does not have to be uniform across all positions and all employers. The only requirements are that the employer has to have a plan and apply that plan in a way that gives veterans and disabled veterans preference.

Ashley Driscoll

OREGON ADDRESSES RACIAL PROFILING WITH ADDED RESPONSIBILITIES FOR LAW ENFORCEMENT AGENCIES

THE OREGON LEGISLATURE'S efforts to reduce police profiling gained traction with the passage of House Bill (HB) 2355. HB 2355 has a number of new requirements for local law enforcement agencies including:

1. PROFILING DATA. It requires local law enforcement agencies to record and track certain data from pedestrian and traffic stops, including the date and time, location, race, ethnicity, age, and sex of the pedestrian or motor vehicle driver, the nature of the citation or other alleged violation that prompted the stop, and the final disposition.

2. PROFILING COMPLAINTS. The Bill also requires agencies to submit profiling complaint forms each year. The data will be used by the Oregon Criminal Justice Commission to identify patterns and practices of profiling which is defined as police targeting of individuals because of a protected class status, including but not limited to race, ethnicity, and national origin. In the event patterns are identified, the Department of Public Safety Standards and Training (DPSST) will provide assistance and advice to the impacted law enforcement agency.

3. TIMEFRAME FOR COMPLAINT. Previously, law enforcement agencies could set deadlines for when a profiling complaint must be filed (between 90-180 days of the alleged incident). The new law requires that law

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enforcement agencies must accept for investigation any complaints filed within 180 days of the complaint and they must respond within a "reasonable" time.

4. TRAINING. HB 2355 also requires training for law enforcement officers aimed at reducing profiling, which training must occur at all levels (basic, advanced, leadership, and continuing). This training is to be developed and implemented by DPSST.

Depending upon the size of the agency, local law enforcement agencies need to begin recording data July 1, 2018 (100 or more officers), Jul 1, 2019 (between 25-99 officers), or July 1, 2020 (between one and 24 officers) with the additional requirement that they begin reporting their data a year later (i.e. the following July 1 after they begin recording).

The Oregon Criminal Justice Commission, along with the Department of State Police and Department of Justice, will develop and implement a standardized method of recording the required data that will be implemented no later than July 1, 2018.

In addition to reducing police profiling, HB 2355 also reclassifies possession of small amounts of certain drugs (including heroin, cocaine and methamphetamines) from felonies to misdemeanors for first time offenders.

Heather Martin

IMPACTS OF ORS 197.522 ON THE LAND USE PROCESS

THE OREGON LEGISLATURE revised ORS 197.522 in 2015 and it became effective January 1, 2016. It is an important statute in that it changes the way local governments are accustomed to making land use decisions. This statute pertains only to residential developments, and was likely proposed by the Legislature as another way of addressing the housing crisis in Oregon.

ORS 197.522(3) states, "If an application is inconsistent with the comprehensive plan and applicable land use regulations, the local government, *prior to making a final decision* on the application, *shall* allow the applicant to offer *an* amendment or to propose conditions of approval that would make the application consistent with the plan and applicable regulations." If an applicant seeks to amend the application or propose conditions of approval, the statute permits a city or county to extend the 120/150 day clock to a time of their choosing in order to consider the amendment or proposed conditions. ORS 197.522(a) and (b).

This means that if a decision-making body (e.g. a board of commissioners, a planning commission, a planning director, a hearings officer, etc.) determines that an application is not going to meet approval criteria for whatever reason, it is now required by statute to give the applicant one opportunity to present an amendment or conditions of approval that would allow the application to be approved.

While the statute does not say the decision maker must expressly put an applicant on notice of its right to offer an amendment or propose conditions, we believe the best practice is for cities and counties to state at the beginning of a quasi-judicial hearing that the applicant may offer an amendment or propose conditions prior to a final decision. This statement could be included in the "script" that advises participants of other rights and obligations they have in quasi-judicial land use hearings. If a decision will be made without a hearing, jurisdictions should put that statement in the initial notice of the proposed housing development and ensure that the applicant gets a copy of the notice.

Of course, if the applicant avails itself of that opportunity, other parties to the proceeding must be allowed an opportunity to respond. The decision maker takes control of the 120/150-day clock, and can extend it at its discretion to accommodate what is essentially a statutorily-granted, extra open record period.

If you have any questions about how ORS 197.522 might affect you as a decision maker or as a governing body, please reach out to your city attorney for further information and clarification.

David Doughman

Legislative Review

THE FOLLOWING LIST contains bills signed by the Governor in the 2017 legislative session, which will affect cities and counties throughout the state.

- **HB 2005** – Pay equity act – provides definitions relating to comparable work for purposes of pay equity provisions.
- **SB 481** – Defines "business day" for purposes of public records and requires acknowledgement of public records requests within 5 days of receipt.
- **SB 327** – Provides recreational immunity to holder of any legal or equitable interest in the land.
- **HB 3253** – Requires state agencies, departments and political subdivisions to grant to persons who are blind priority to establish and operate vending facilities in public buildings and preference to operate cafeterias in public buildings and vending facilities in community colleges.
- **HB 3464** – Prohibits public body from disclosing specified personal information unless required by state or federal law.
- **SB 1051** – Requires city with population greater than 5,000 or county with population greater than 25,000 to review and decide on applications for certain affordable housing developments within 100 days.
- **SB 754** – Creates offense of selling tobacco products or inhalant delivery systems to persons under 21 years of age.
- **HB 2873** – When municipal corporation places local option tax measure or general obligation bond measure on ballot, requires chief elections officer of city, governing body of county or district elections authority to file all materials relating to measure with appropriate county elections officer.
- **HB 2316** – Requires city with population of less than 25,000 to determine estimated housing need for 20-year period, inventory buildable land and adopt measures as part of periodic or legislative review of comprehensive plan.
- **SB 865** – Requires county or city to submit notice of tentative plan to certain special districts for district approval prior to approval by county or city.
- **SB 319** – Authorizes local governments to allow medical marijuana dispensaries and marijuana retailers licensed by Oregon Liquor Control Commission to be located within certain distance of schools.
- **SB 310** – Authorizes city or county to designate area as vertical housing development zone.
- **HB 2409** – Permits city to issue speeding citation using red light camera in conjunction with other technology that is capable of measuring speed.
- **SB 360** – Directs counties to establish community service exchange program for persons who have served sentence with Department of Corrections and who are serving active period of parole or post-prison supervision.
- **HB 2377** – Authorizes city or county to adopt ordinance or resolution granting exemption for newly rehabilitated or constructed multi-unit rental housing.
- **HB 3245** – Permits city to authorize planning commission or hearings officer to conduct hearings and make final decisions on applications for amendments to city comprehensive plan map.
- **SB 299** – Allows employers to limit number of hours of sick time that employees may accrue

per year.

- **SB 890** – Defines "legally protected material" to mean information and records of city that are protected by attorney-client privilege held by city and attorney work product prepared in course of providing legal services to city.
- **HB 3203** – Requires contracting agency to perform analysis to determine whether constructing public improvement with contracting agency's own equipment and personnel will result in least cost to contracting agency.
- **HB 2611** – Requires law enforcement unit that hires police or corrections officer originally hired by another law enforcement unit, to reimburse original employing law enforcement unit for certain expenses.
- **HB 3012** – Permits county to allow owner of lot or parcel of at least two acres zoned for rural residential uses to construct new single-family dwelling on lot or parcel if owner converts existing historic home to accessory dwelling unit.
- **HB 2002** – Expands laws regarding preservation of participating properties that are publicly supported housing.
- **SB 311** – Authorizes city or county to adopt ordinance or resolution providing time-limited property tax exemption to certain commercial and residential buildings that will be seismically retrofitted.
- **SB 418** – Requires Director of Department of Land Conservation and Development, at city's request, to approve or remand sequential phases of work tasks related to potential amendment of urban growth boundary.

If you have questions about any of these bills and the impact on your entity, contact us and we would be happy to help.

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