

# RISK REVIEW

VOLUME 24, ISSUE 3

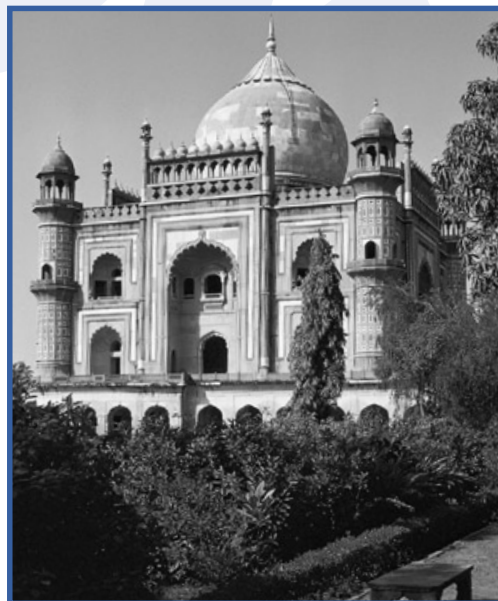
AUGUST 2010

## Church, synagogue or mosque could be built almost anywhere

By William J. Sims III • Moyes, Sellers & Sims

The recent controversy in Lower Manhattan involving a mosque brings to mind new legislation here in Arizona. Based on newly adopted legislation, a church, synagogue, mosque or other house of worship could be built almost anywhere and your city or town would have little to say about it.

In 2007, the City of Yuma denied a conditional use permit for a church to be located on Main Street in Yuma's historic downtown district. The persons desiring to operate the church bought the property fully aware that a conditional use permit ("CUP") would be required in order to operate a church on the property and decided to purchase the property before applying for the CUP. The City denied the CUP, in part, because a church on Main Street would not implement Yuma's "Old Town District" zoning ordinance that was intended to promote "a mixture of commercial, cultural, governmental, and residential uses that will help to ensure a lively pedestrian-oriented district." A church, in the City's view, did not conform with the City's downtown redevelopment plan and was in conflict with the City's goal of making Main Street a cultural, retail, recreation and entertainment hub.



City staff noted that a church on Main Street would limit additional bars on Main Street due to the State requirement (A.R.S. § 4-207) that restricts most liquor licenses (particularly bars) for establishments located within 300 feet of a church. City staff also pointed out that granting the CUP could harm property values and lead to a loss of retail and entertainment.

The owners of the church property filed a suit against the City in *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 615 F.Supp.2d 980 (D. Ariz. 2009) and argued that the CUP denial violated the Religious Land Use and Institutionalized Persons Act, violated their First and Fourteenth Amendments and the Arizona Religious Freedom Restoration Act. The United States District Court for the District of Arizona disagreed and held that the City (i) had not imposed a substantial burden on the exercise of religion, (ii) had not adopted a zoning code that treats religious assemblies on less equal terms than nonreligious assemblies and (iii) had a justified basis for denying the CUP because the denial bore a rational relationship to the City's goals of redeveloping the City's downtown district as a tourism, entertainment and retail

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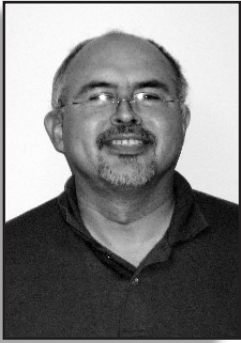
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**Rudy Rodriguez**  
AMRRP President

## LETTER FROM THE PRESIDENT

Dear AMRRP Members:

One of the priorities of the AMRRP and its Board is to remain responsive to the needs of our Members when considering how best to reduce their liability exposures. Although our responsiveness frequently comes in the form of providing excellent underwriting, loss control and claim services, the Board, on occasion, has relied on the Pool's legislative influence and judicial resources in order to reduce or eliminate liability exposures to our Members.

Over the past few years, our Board had become increasingly aware that many of our Members were exploring innovative ways to retain long-term employees who were eligible for retirement from their government positions, but whose knowledge and experience would be a huge loss to the cities and towns that had employed them for as many as 20 years or more. One of the more popular solutions is for a municipality to rehire a retired worker as a leased employee via an agreement with a private personnel leasing company. This allowed the municipality to continue to benefit from the former employee's skills and experience without jeopardizing their retirement benefits. It also allowed top quality employees to enjoy a financial incentive – receiving both retirement benefits and additional wages – while continuing service to their cities and towns. Unfortunately, since these leased employees weren't actually on the payrolls of the municipalities for which they worked, a city or town that was sued as a result of the alleged negligence of a leased worker wasn't protected by the same governmental immunities that were otherwise available for employees who worked for a municipality directly. Because leased workers compromised the legal immunities that would normally protect municipalities, the AMRRP coverage agreement did not previously extend to leased employees.

Due to the growing number of AMRRP Members wanting to re-employ retired workers on a leased basis, the AMRRP Board requested assistance from the League of Arizona Cities and Towns in order to address this issue during the last legislative session. With League sponsorship, HB 2477 was passed to add leased employees to the list of public employees who, under A.R.S. §12-820.02, would meet the criteria for qualified immunity. Following the passage of HB 2477, the AMRRP Board modified the Pool's general liability coverage agreement at our July 16th meeting so that leased employees are now covered.

More recently, with the passage of SB 1070, the Board became aware of the potential liability exposures that could arise from that portion of the legislation which modified ARS § 11-1051(B) to read: "Any person who is arrested shall have the person's immigration status determined before the person is released." Although the AMRRP Board took no position on SB 1070's constitutionality or on whether it was pre-empted by federal law, there was concern about civil rights lawsuits that might arise if a Member's police officer detained an un-charged individual for an extended period of time pending verification of citizenship. Similarly, there was concern that an officer's failure to detain an individual until citizenship was verified could result in citizen lawsuits due to an AMRRP Member's failure to enforce the new statute. In either scenario, the Member could be exposed to liability.

Consequently, the Board authorized the AMRRP Executive Committee to retain counsel to file an amicus ("friend of the court") brief that attached to the pending federal lawsuit against the State of Arizona. In that brief, the AMRRP asked that enforcement of the single sentence of SB 1070 referenced above be preliminarily enjoined, pending a final ruling on the merits of the U.S. Government's lawsuit. On July 28th, among the other portions of her ruling, U.S. Federal District Judge Susan Bolton did, in fact, stay the implementation of the portion of the bill that was of concern to the AMRRP.

Our Board is proud of the AMRRP's long history of providing excellent coverage, loss control and claim handling to its Members. Complementing those traditional insurance services however, is the Pool's commitment to finding innovative and proactive ways to control our Members' liabilities through legislative and judicial efforts when necessary.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Rodriguez". The signature is fluid and cursive.

Rudy Rodriguez  
President, AMRRP Board of Trustees

## Member Profile: *The City of Safford*

The City of Safford is a farming community that has been chosen as a prime spot for hosting observatories. It is located in the Upper Gila Valley in southeastern Arizona about 165 miles southeast of Phoenix.

Safford was founded by Joshua Eaton Bailey, Hiram Kennedy and Edward Tuttle, who came from Gila Bend, in southwestern Maricopa County. They had moved far upstream from Gila Bend in the winter of 1873-74 after their work on canals and dams had been destroyed by high water in the Gila River during the previous summer. Upon arriving early in 1874, the founders laid out the townsite and constructed a few crude buildings.

They named their community after Arizona Territorial Governor Anson P.K. Safford, who served from July 1869 to April 1877. Safford is best remembered for his work to create a public education system, getting Lt. Col. George Crook assigned to the territory to handle the volatile Apache situation and persuading the Territorial Legislature to pass a bill granting him a divorce. The first public school opened during March 1872 in Tucson. It was a one-room adobe structure with a single teacher, but, at its peak, 138 students were enrolled. Crook used various methods to persuade the Apaches to go onto reservations and earned a promotion to brigadier general. He returned in the 1880s to deal with the quarrelsome Geronimo. Safford's marriage to Jenny L. Tracy of Tucson had become acrimonious. Safford signed the bill granting the divorce in January 1873, and his ex-wife remarried in February.

The Town of Safford was incorporated October 10, 1901, and changed to City of Safford in 1955.

Safford's street lights are low-output to improve the quality of the images taken by the observatories atop Mount Graham, which is just a few miles southwest of the city and rises to a height of 10,720 feet. The Mount Graham International Observatory complex is operated by the University of Arizona,

and the complex is home to the Mount Graham International Observatory (MGIO) and Large Binocular Telescope, or LBT. The mountain also is home to the Vatican Advanced Technology Telescope (VATT) and the Heinrich Hertz Submillimeter Telescope (SMT).

The idea for a visitor's center for the MGIO began in the 1980s. Plans for the center quickly expanded and eventually became known as Discovery Park, an education and entertainment retreat, emphasizing the science and culture of the Gila Valley, from mining and agriculture to space exploration. The University of Arizona donated a research-grade 20-inch reflector telescope and dome for the park's observatory, and the Vatican Observatory donated a radio telescope. A full-motion simulator takes guests on a ride past Mount Graham to tour the solar system. As the park grew, Nature's Hideaway was added as a riparian habitat just south of the observatory, and a replica of a 1860s steam locomotive delivers guests to the Circle D ranch past the wildlife habitat. In the summer of 2006, the park came under the control of Eastern Arizona College's Governing Board. Eastern Arizona College is located in neighboring Thatcher.

Safford is the principal city of the Safford Micropolitan Statistical Area, which covers Graham and Greenlee counties. Micropolitan Statistical Areas ( $\mu$ SA, where the initial Greek letter mu represents "Micro") are defined by the Census Bureau and the Office of Management and Budget as urban areas in the United States based around a core city or town with a population of 10,000 to 49,999. The micropolitan area designation was created in 2003. The term was created by author G. Scott Thomas in 1989 and gained currency in the 1990s to describe growing population centers in the United States that are removed from larger cities. Arizona has four other  $\mu$ SAs – Gila County, Cochise County, Santa Cruz County and Mohave County. ❁

## Board approves 'leased employees' endorsement change

The AMRRP Board of Trustees has voted to approve a "leased employees" endorsement change in the AMRRP Municipal Liability Form as a result of the Legislature adding "leased employees" to the list of public employees whose actions are protected by governmental immunities in case of a lawsuit.

The board vote was taken July 16, and the addition of "leased employees" to A.R.S. §12-820 became effective July 29 along with most other bills passed by the Legislature during its regular spring session.

The addition was contained in House **Bill (HB) 2477**, which was introduced by Rep. Bill Konopnicki, a Republican from Safford. The legislation was sponsored by the League of Arizona Cities and Towns at the request of the AMRRP Board. It passed in both the House and Senate without a dissenting vote.

HB 2477 defines leased employee as "a person providing services to a public entity under a lease agreement and is not an independent contractor or temporary employee."

A.R.S. §12-820 outlines actions against public entities or public employees and includes definitions. According to the statute, employee "includes an officer, director, employee or servant, whether or not compensated or part time, who is authorized to perform any act or service, except that employee does not include an independent contractor. Employee includes non-compensated members of advisory boards appointed as provided by law," and now includes "leased employees."

A.R.S. §12-820.04 states, "Neither a public entity nor a public employee acting within the scope of his employment is liable for punitive or exemplary damages."

A.R.S. §12-820.01 provides absolute immunity for a public entity for acts and omissions of its employees constituting either the exercise of a judicial or legislative function or the exercise of an administrative function involving the determination of fundamental governmental policy. According to the statute, "The determination of a fundamental governmental policy involves the exercise of discretion and shall include, but is not limited to:

1. A determination of whether to seek or whether to provide the resources necessary for any of the following:
  - (a) The purchase of equipment.
  - (b) The construction or maintenance of facilities.
  - (c) The hiring of personnel.
  - (d) The provision of governmental services.
2. A determination of whether and how to spend existing resources, including those allocated for equipment, facilities and personnel.
3. The licensing and regulation of any profession or occupation.
4. The establishment, implementation and enforcement of minimum safety standards for light rail transit systems."



## Widows of officers killed in line of duty to receive funds for health insurance premiums

The spouse of a law enforcement officer who is killed in the line of duty can receive payments from the officer's employer for health insurance premiums for one year after the death of the officer under a bill passed by the Arizona Legislature during its regular session in the spring.

**House Bill (HB) 2296** was an emergency measure and contained a retroactive effective date of Jan. 1. Statutes in effect before HB 2296 prohibited the use of public funds to pay health insurance premiums.

Provisions of HB 2296 establish that the spouse is entitled to continue participating in the employer's health insurance plan and clarifies that the provisions apply to the spouse's

dependents if they were enrolled in the health insurance at the time of the officer's death.

HB 2296 requires the payments to the surviving spouse come from the officer's retirement plan.

Other bills passed by the Legislature and signed by Gov. Jan Brewer became effective July 29. Legislation of interest now effective includes the following:

**HB 2209** extends online posting of public meeting requirements to governing bodies of charter schools and public bodies of counties and school districts and allows special taxing districts to post public meetings online.

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## Personnel Perspectives

Featuring legal issues from the AMRRP Personnel Assistance Lifeline (PAL)

### AMRRP Personnel Assistance (PAL) Lifeline Q&A

By Justin Pierce, Jackson Lewis, LLP

**Question:** One of our HR employees recently came to me and said that she has done some investigation on social networking sites regarding some applicants for a position with the City. She suggested that we reject one of the candidates because his MySpace page shows that he is a member of the Young Americans for Freedom, a group which is believed to have ties to white supremacist groups. Can we reject this candidate on this basis?

**Answer:** This question implicates the First Amendment freedom of speech and freedom of association clauses to the United States Constitution. As a general matter, employers enter a dangerous area when they begin investigating employees or potential employees on the internet, and the danger increases in the public employment arena. Sometimes this information is inaccurate, sometimes information is posted by someone other than the person who appears to be involved, and sometimes this information can give you a discriminatory basis on which to make employment decisions. In this particular case, if the applicant's membership in this organization is a substantial motivating factor in the decision not to hire, you could face a viable First Amendment lawsuit. ❁

## CHURCH, SYNAGOGUE OR MOSQUE

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area. The court observed that to accept the argument proposed by the owners of the church property would "provide a growing religious organization with a de facto exemption from the zoning laws." *Id.* at 991. The court affirmed the actions of the City in denying the CUP. The case is now before the 9th Circuit Court of Appeals.

Meanwhile, the actions in Yuma County did not go unnoticed by the Arizona Legislature where HB 2596 was adopted and is now in effect. HB 2596 prohibits a city or town from imposing or implementing a land-use regulation, *regardless of a compelling governmental interest*, that imposes an unreasonable burden on a person's exercise of religion, unless the city or town can demonstrate: (i) that religious activities at a location would violate "religion-neutral zoning standards" – a term that would prohibit a city or town from justifying a land-use regulation based on redevelopment or tax revenue goals; (ii) that the exercise of religion at a particular location would be hazardous due to toxic uses in adjacent properties; or (iii) the existence of a suitable alternative property that could be used for the exercise of religion. These exemptions significantly limit a city or town's ability to do what Yuma did when it denied the CUP for a church.

HB 2596 also prohibits a city or town from unreasonably limiting religious assemblies, institutions or structures within the city or town, regardless of a compelling governmental interest. Again, Yuma probably would not have been able to deny the CUP had HB 2596 been in effect.

There are limited exceptions to HB 2596 concerning one of the factors that the court evaluated when it affirmed Yuma's denial of the CUP: restrictions on the sale of alcohol within 300 feet of a church. Under HB 2596, a city or town may grant an exception, but it must first approve an entertainment district, an area limited to no more than one square mile that contains a "significant number of entertainment, artistic and cultural venues, including music halls, concert facilities, theaters, arenas, stadiums, museums, studios, galleries, restaurants, bars and other related facilities." Were a person to propose to build a church in downtown Gila Bend, for example, I am not certain that the Town's Council would be able to do what Yuma did and deny a CUP, and I doubt that Gila Bend, which is significantly smaller in size, would be able to create an entertainment district in order to authorize liquor licenses within 300 feet of the church.

If someone comes to your city or town and wants to build a church, under HB 2596 there is not much you can do. The problem from a land-use perspective is compounded when you consider the various ancillary activities now conducted by churches such as recreational activity and charitable activity, including feeding the homeless. About all you can do is try to fall within one of the exceptions to HB 2596. But what do you when (after you issue the CUP and let the church be built) the neighbor files a Proposition 207 complaint because you devalued his property because he can no longer operate that liquor store that he always wanted to operate? Stay tuned. ❁

## Local governments facing 500,000 job losses

Local government job losses in the current and next fiscal years will approach 500,000, with public safety, public works, public health, social services and parks and recreation hardest hit by the cutbacks, according to a recent survey conducted by the National League of Cities (NLC), National Association of Counties (NACo), and the U.S. Conference of Mayors (USCM).

“Local governments are being forced to make significant cuts that will eliminate jobs, curtail essential services, and increase the number of people in need of those services,” says the report on the survey, *Unemployment in America is a National Crisis*. “Unfortunately, just as families are increasingly turning to local governments for support, local governments are facing their own fiscal crisis. The effects of the Great Recession on local budgets will be felt most deeply from 2010 to 2012.”

Ron Loveridge, NLC president who is mayor of Riverside, Calif., commented: “For local governments, unemployment and foreclosures resulting from the Great Recession translate into too few revenues making it increasingly difficult to fund or satisfactorily maintain many basic services – not only parks, libraries, and public works projects but also public safety, police and fire services. Cities are the backbone of their regional economies, where investments in infrastructure and services provide a platform for private sector investment and growth.”

NLC, NACo and USCM conducted the survey in May and June for the purpose of gauging the extent of job losses. The survey was sent via e-mail and fax to all cities over 25,000 in population and to all counties over 100,000 in population. The survey results are based on 270 responses, 214 from cities and 56 from counties. Arizona local governments responding were the cities of Phoenix, Tucson, Avondale, Bullhead City and Lake Havasu City and Navajo County.

The surveyed local governments reported cutting 8.6 percent of total full-time equivalent (FTE) positions over the previous fiscal year to the next fiscal year (roughly 2009-2011). “If applied to total local government employment nationwide, an 8.6 percent cut in the workforce would mean that 481,000 local government workers were, or will be, laid off over the

two-year period,” says the report. “Projected cuts for the next fiscal year will likely increase as many of the nation’s local governments draft new budgets, deliberate about how to balance shortfalls and adopt new budgets.”

Other survey findings include:

- Local government job losses are being most heavily felt in public safety, public works, public health, social services, and parks and recreation. “Local governments typically seek to shield direct services to residents from cuts during economic downturns and the cuts occurring in these services are indicative of the depth of the recession’s impact on cities and counties,” says the report.
- Sixty-three percent of the cities and 39 percent of the counties reported cuts in public safety personnel. “For some communities this means fire and police stations that are closed and the potential for reduced capacity to respond to emergencies,” says the report.
- A majority of the surveyed cities – 60 percent – and counties – 68 percent – report making personnel cuts in public works. “Public works services are highly visible to local residents – such as highway and road construction and maintenance and solid waste (garbage and recycling) disposal,” says the report. “Cuts in public works are common responses to economic downturns, but the range of local governments making these cuts in response to the current downturn is considerably higher than previously. For example, in response to the 2001 recession, a survey conducted by NACo revealed that 26 percent of counties were delaying highway and road construction and 23 percent reported delaying highway and road maintenance. Cuts in public works go beyond public jobs, with many of these services provided via contracts with private sector businesses.”
- Approximately half of the surveyed counties report personnel cuts in social services and public health. “These services are critical to local residents in need. Counties, and some cities, deliver significant services in these arenas,

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## LOCAL GOVERNMENTS

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in many cases as extensions of state government programs,” says the report. “For example, many counties are the primary delivery agents for child welfare services, cash assistance payments to individuals and families in need and public health and medical services. Confronted with their own significant budget shortfalls, many states are cutting these programs. Yet, demand for these services tends to increase during periods of economic downturn. Personnel and other budget cuts will increase the already expanding pressures on caseloads and the remaining personnel.”

- Approximately half of cities and counties reported personnel cuts in parks and recreation services. “Park maintenance and programs for youth, such as after-school

educational and recreational activities, and seniors, such as meal delivery services, are also highly visible local services that often serve as the primary point of interaction for many residents with local governments,” says the report.

- Many local governments are also making personnel cuts in library services, resulting in closures, reduced hours and cuts in programs. “Libraries often serve as centers for job searches for residents without access to computers and the Internet, or provide after-school programs,” says the report.
- City- and county-run schools and school districts are also facing significant cutbacks. ❁

## WIDOWS OF OFFICERS

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Currently, only public bodies of cities and towns that have a website are required to post public meeting notices online. HB 2209 gives cities and towns the option of posting on their own website or posting on an association of cities and towns website.

Other public bodies were previously required to file a statement with either the Secretary of State (SOS), city or town clerk or the county clerk. The statement had to indicate where all public notices of the public meeting would be posted. HB 2209 eliminates the filing requirement and instead requires the statements to be posted on the public body’s website.

**HB 2166** prohibits the use of evidence in an appeals hearing of a law enforcement or probation officer if the officer is denied a representative during the investigative interview.

Existing law sets down the requirements for the employer in an investigation which may result in disciplinary action. In an interview where the employer believes a disciplinary action may occur, such as dismissal, demotion, or suspension, the employer is required to:

- Permit the officer a representative who will serve as an observer.

- Permit the officer reasonable breaks of limited duration for telephonic or in-person consultation with others, including an attorney.
- Not discipline, retaliate against or threaten to retaliate against either the officer or the officer’s representative.

**Senate Bill (SB) 1091** sets down new requirements for the Arizona Department of Economic Security/Child Protective Services (CPS) to receive and investigate reports of child abuse and neglect in licensed behavioral health residential settings.

In order to comply with these requirements, CPS has established requirements for law enforcement officers to cross-report incidents in these facilities to the Child Abuse Hotline so that CPS can investigate. If the report contains an allegation of criminal conduct, CPS will jointly investigate the allegation with law enforcement pursuant to County Joint Investigation Protocols. Previously, law enforcement officers were not required to report allegations involving employees or volunteers of licensed centers or agencies. ❁

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## RISK REVIEW

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The AMRRP is a non-profit corporation created in 1987. Its primary purpose is to provide property and casualty coverages to incorporated cities and towns in Arizona. AMRRP is sponsored by the League of Arizona Cities and Towns. AMRRP is governed by a nine member board elected by representatives of participating cities and towns.

*Risk Review* is published by AMRRP in a continuous effort to inform and educate its member cities and towns. Suggestions for article topics are welcome. Contact AMRRP at the above address and phone number.