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## ZONING DISPUTE — AND APPELLATE PRACTICE POINT “Selective Enforcement” Charge Against Town Is Not Sustained; Important Point on “Weight of Evidence” Standard Made

Substantively, the bottom line in [\*Rocky Point Drive-In, L.P. v. Town of Brookhaven\*](#), 2013 WL 6008899 (Nov. 14, 2013), is on the “selective enforcement” issue. Of longer range influence, however, is an incidental point made about the “weight of the evidence” standard of judicial review. We’ll do it up as a separate topic, below.

First, the selective enforcement issue.

Plaintiff wanted to build a Lowe’s Home Improvement Center on its property in Brookhaven, but there was an issue of whether it could do so under applicable zoning rules. The landowner sought review under “a former, more favorable, zoning provision”, but the appellate division denied the application. Finding “no basis to overturn” the appellate division, the Court affirms it.

The substantive issue revolves around a charge of “selective enforcement” – the charge that the town was holding the plaintiff strictly to the applicable zoning requirements while “intentionally failing” to impose them on other “similarly situated applicants”. Plaintiff charged as well that action on its application was delayed in ways that these others’ applications weren’t, a particularly significant factor because of different zoning standards applicable at different times.

At a nonjury trial, the court upheld the plaintiff’s contentions and concluded that its case presented “special facts” that took the case out from under what it called “the general time of decision rule”, which is that “a case must be decided upon the law as it exists at the time of the decision”. In an opinion by Judge Rivera, the Court says that in land use cases the general rule means that the law at the time of decision governs “regardless of any intervening amendments to the zoning law”.

Plaintiff argued that its application fell within what it claimed to be a “special facts” exception to the general rule. The trial court agreed and held that the plaintiff was therefore entitled to have its case governed by a “previous ... zoning classification”. The appellate division reversed, holding that the trial court’s determinations “were not supported by the evidence”. In the Court of Appeals, that turned the key issue into one of appellate review.

The Court of Appeals sees this as an appellate division overturning of the trial court’s decision on the ground that it’s contrary to “the weight of the evidence”. But now, when the case is before the Court of Appeals – in this instance pursuant to its grant of leave to appeal – what is the appropriate review standard for the Court of Appeals to follow? The Court here affirms the appellate division, but on what basis? That’s the interesting appellate point that we now turn to.

**What Scale Does the Court Use When Both Lower Courts Have Based Their Holdings on the “Weight of the Evidence” But Reached Different Conclusions?**

Assume that there have been no errors of “law” in the case; just an issue of whether the decision is supported by the “weight of the evidence”.

Those who have regularly observed the appellate scene in New York would guess that the Court’s only duty in such a case is to determine whether there is “factual support in the record” for the appellate division decision – never mind the trial court – and to affirm the appellate division if there is.

That’s not so, however. The interesting element in this case is that the “weight of the evidence” was in effect the same issue before the appellate division as it was before the trial court. The trial court had analyzed the record in a similar way but concluded that the town had “intentionally and in bad faith delayed processing” the plaintiff’s application and “selectively enforced the prohibition against commercial centers” in the district. And so the trial court held.

The appellate division rejected this, “based”, in the words of the Court of Appeals, “on a lack of factual support in the record”. The Court equates that with “weight of the evidence” and so perceives before it two different “weight of the evidence” conclusions: one by the trial court finding the weight to support the plaintiff and one by the appellate division finding it to support the town.

One’s tentative conclusion would be that the Court of Appeals must consider only whether the appellate division decision has support in the record. That would be the rule if the Court were reviewing the issue as one of law. But, says the Court, when the appellate division

decides that a factual finding is against the weight of the evidence, that is itself a new finding of fact ... [and in] such case, our review of the ... decision is limited; we review the record to determine which factual findings “more nearly comport with the weight of the evidence” [quoting its decision last year in *State v. Daniel F.*, 19 N.Y.3d 1086, 955 N.Y.S.2d 547].

This connects up better if the reader remembers that the rule applicable in the Court of Appeals in civil actions is that the Court reviews only issues of law, with one exception, and that’s where the appellate division has reversed or modified a judgment and in doing so has found new facts and ordered a final judgment based on them. (This recognizes that the New York policy is to offer one appellate review of the facts and that the Court of Appeals is the only court positioned to conduct that review when the appellate division is the first fact-finder. See Siegel, *New York Practice* 5th Ed. § 529.)

Hence, here in [Rocky](#), where the appellate division rejection of the trial court decision as being contrary to the weight of the evidence constituted a new finding of fact, the Court of Appeals is allowed to review it as such. It does so here by in essence looking at both lower court records and choosing for itself which it thinks better comports with the “weight of the evidence”. It holds that the appellate division decision does.

One more matter. A wee one. The Court describes its review powers on this scene as being more “limited” than when it’s reviewing only an issue of law. But isn’t the opposite the case? Aren’t its review powers *expanded* when it’s able to review issues of fact as well as law?

Chief Judge Wachtler would have had the answer to that. “Picky, picky, picky.”

## OTHER DECISIONS

### MUNICIPAL INDEMNITY OBLIGATION

#### **Village May Withdraw Defense of Its Co-Defendant Employees When Village Settles with Plaintiff and Employees Refuse to Go Along**

O is the landowner. O’s failure to pay its real property taxes after a “business decision” to withhold them produced counter steps by the village and a lawsuit by O against the village and several of its officers. It’s not clear from the recitations in [Lancaster v. Incorporated Village of Freeport](#), 2013 WL 6062148 (Nov.

19, 2013; 6-1 decision), just where the equities lay, but there must have been a big bundle of equities in O's favor because the village agreed to pay \$3,500,000 to get O to settle the case and discontinue the action.

The dispute concerned the refusal of the individual village employees, co-defendants of the village and later petitioners in their own connected proceedings, to accept the terms O insisted on before discontinuing the action as against them. The petitioners objected to the inclusion in those terms of a "nondisparagement" clause, whereby the petitioners would agree "not to ... challenge or criticize" the settlement.

The petitioners called this – among other things – an infringement of their right of free speech, a First Amendment issue.

The difficulty is that there was more to this case than just that. While the village had an obligation to supply both defense and indemnification to the petitioners for any liability arising out of the performance of their municipal duties, the applicable statute conditioned this municipal duty on the petitioners' "full cooperation" in the village's own defense.

The ultimate holding here is that the petitioners breached that obligation, and that the village was thus justified in withdrawing its defense of them. In these circumstances, the Court of Appeals finds no right of free speech compromised. The petitioners were free to criticize the settlement to the skies, but they could not at the same time insist on the village's obligation to continue to supply them a defense and indemnification.

They did insist on it, however, to which end they brought their own proceedings seeking to compel the defense. They lose there at all three levels.

In an opinion by Chief Judge Lippman, the Court of Appeals makes the important point that there is nothing in the record to suggest that the village induced O "to include the nondisparagement clause in the settlement". And as for the village's threat to withdraw funding for the petitioners' defense, the reason for that, stresses the Court, "was to end the litigation and save public funds, not to suppress speech".

The gist of the case as the Court sees it is that the village "simply declined to fund petitioners' defense after they unreasonably refused to settle." (A peek behind the scenes reveals political elements, too, including a change of village regimes. And the Court sees O's insistence on the inclusion of the nondisparagement clause as understandable, citing the public remarks of at least one of the petitioners, who had accused O of "extorting the citizens of Freeport".)

Judge Pigott is the dissenter. He does see a compromise of free speech in this case. He goes further, citing the threat of perjury some of the petitioners might face for reciting – as asked to do – that they have "no objections" to the village's stipulation "even though the public record shows otherwise".

"A settlement of this size", says the dissent, "should invite vigorous debate, not suppress it."

### RECOVERING LOST ART

#### **Laches Rejected as Defense to German Museum's Claim to Lost Art**

The piece of art in this case is the by now well-publicized 3000-year-old gold tablet dating back to the 1243-1207 BCE reign of the Assyrian King Tukulti-Ninurta I. (His friends called him Tukee.) The museum got it in 1926 and it's catalogued in the museum's records. Hidden during World War II, the tablet turned up as part of the estate of D, a Nassau County resident.

Hannah was D's daughter and executor. In her final accounting in surrogate's court, she included something called a "coin collection". Her brother Israel objected to the accounting, claiming the value of

the item was understated. Israel notified the museum, which then appeared in the surrogate's proceedings. (Was brother Israel a man of great integrity, or did he just want the museum's aid in establishing the value of the tablet?)

The museum said the tablet had been missing since the end of World War II, and sought its return. The surrogate held that the museum met its prima facie burden of proof of ownership, but that its claim was barred by laches for the museum's failure to list it on any international stolen art registry.

The appellate division reversed and awarded the tablet to the museum; it held that the estate, whose burden it apparently was to show that the museum "failed to exercise reasonable diligence to locate the tablet", did not make such a showing. Hence its holding for the museum.

The Court of Appeals affirms in a memorandum opinion in [Matter of Flamenbaum](#), 2013 WL 6008911 (Nov. 14, 2013). It cites as virtually dispositive here its 1991 decision in *Solomon R. Guggenheim Foundation v. Lubell* (Digest 380), which involved analogous claims under the statute of limitations. The appellate division said in *Solomon* that

[t]o place a burden of locating stolen artwork on the true owner and to foreclose the rights of that owner to recover its property if the burden is not met would ... encourage illicit trafficking in stolen art.

The Court is influenced by the fact that at least one member of the decedent's family knew that the tablet belonged to the museum, a datum that reflects – and tends to reject – the estate's argument of prejudice, which is always part of a successful laches showing.

An interesting "spoils of war" theory was also tendered by the estate, which argued that Russia, when it invaded Germany, got title to the museum's property as a "spoil" and then transferred it to the decedent. The court rejects the argument. It points by way of analogy to U.S. official policy, which is to allow as booty only captured military equipment; "[o]ther movable property ... must be respected".

[W]e decline to adopt any doctrine that would establish good title based upon the looting and removal of cultural objects during wartime.

The Court accepts the museum's explanation that it didn't list the tablet as stolen art because "it would have been difficult to report each individual object that was missing after the war".

If it was essentially only a matter of submitting a list of missing items – numerous as they may be – to appropriate organizations, and considering that the museum had apparently catalogued all its treasures, what made the reporting so "difficult"?

### RESTRICTIVE LEASE TERMS

#### **Pursuant to Lease, Landlord's Acceptance of \$10 Million Termination Fee from Tenant Bars Its Claim of Damages for Deteriorated Condition of Property**

What's "plain" and what's not "plain"; that is the question in [JFK Holding Co. LLC v. City of New York](#), 2013 WL 6008902 (Nov. 14, 2013).

P leased a building to the Salvation Army (SA), which pursuant to an agreement with New York City (NYC) operated it as a homeless shelter. When the lease was terminated, the property that was returned to P was allegedly in "bad condition" and P brought this suit seeking damages from SA.

The Court of Appeals dismisses the action as "barred by the plain language of the lease".

The language apparently wasn't so plain to a divided appellate division, which held the other way and sustained the contract action. If we may use a rustic analogy here, it seems that what's plain for the goose is not necessarily plain for the gander, or vice-versa.

As the Court reads the lease on the point at issue, P had a choice when the property was returned to it. P could either sue for damages or accept in place of it a termination fee of \$10 million. For whatever reason – most likely because a bird in the hand is worth two in the bush – P accepted the termination fee. By so doing, rules the Court in an opinion by Judge Smith, P has “no further remedy under the lease”.

There was a clause in the lease requiring SA to “use commercially reasonable efforts” to enforce its rights against the city. It's not entirely clear what rights against the city this refers to. The Court cites a statement in the appellate division dissent, that the “reasonable efforts” clause “does not apply here because [the SA] did not have any right to recover posttermination restoration costs” from the city. Given the fact that this is a reversal by the Court of Appeals, we assume the Court concurs in that statement from the appellate division dissent.

The Court also speaks directly to the “commercially reasonable efforts” clause. Towards the end of its opinion, it finds that P had not “sufficiently alleged” that SA breached the clause, which, in the Court's view, left the limitation of liability provision as the governing point. And on that, as noted, P's acceptance of the termination fee barred the damages claim.

P complained that this subjected it to “hardship”, to which the Court responds that even if that is so,

[P] could have rejected [SA's] termination of the lease and continued collecting rent until the building was restored to its original condition – but that would have required [P] to reject the proffered \$10 million dollar termination fee. Having chosen to take the money, plaintiffs have no further remedy under the Lease.

That's the “plain language” of the lease. We would have been more comfortable if the Court had at least left the “plain” out.

### PHYSICIANS AND MEDICAID

#### **Inspector General Can Remove MD from Medicaid Program Based Solely on Consent Order MD Signed with Different Bureau, and Without Independent Investigation, But Must Explain**

Here's an imbroglio that involves two agencies and their respective powers.

Both are under the umbrella of the Department of Health and both have powers over physicians involved in the Medicaid program. One is BPMC, the Bureau of Professional Medical Conduct. The other is OMIG, the Office of the Medicaid Inspector General.

Dr. P got into some trouble and the BPMC got after him. He signed a consent order with BPMC pleading no contest to charges of professional misconduct and agreeing to 36 months suspension. BPMC did not terminate him. OMIG did, however.

OMIG's determination was then overturned by the courts and P was reinstated, at least for the time being. The appellate division's rationale was that it was arbitrary and capricious for OMIG to bar P from treating Medicaid patients after BPMC had allowed him to. The court said that OMIG was required to conduct an independent investigation; that it couldn't just rely on the BPMC action.

The whole Court agrees that OMIG had the power to terminate Dr. P, but disputes the propriety of its doing so on this record. A majority of four, in an opinion by Judge Read, finds the OMIG determination arbitrary and capricious based on OMIG's failure to explain itself – to “explain why the BPMC consent

order ... caused it to exercise its discretion pursuant to 18 NYCRR 515.7(e) to exclude [P] from the Medicaid program”.

Rule 515.7, operative in the health field, is entitled “Immediate sanctions”. It provides in subdivision (e) that on receiving notice of a charge against an individual by another agency, which “would constitute ... professional misconduct,” the recipient agency “may immediately sanction” the person involved. That’s what OMIG did, but the Court finds that it didn’t do it right. [Koch v. Sheehan](#), 21 N.Y.3d 697, ... N.Y.S.2d .... (Oct. 22, 2013).

A trio of concurers in the Court of Appeals, in an opinion by Judge Smith, so finds as well, but disagrees with the majority conclusion and would hold that OMIG was required to conduct an independent investigation, and that it was therefore arbitrary and capricious to exclude P based solely on the BPMC consent order.

The result is unanimous agreement of all judges – in both courts – that Dr. P must, at least for the present, be reinstated.

Perhaps an alternative route to understanding the *Koch* result is to analogize it to internal court proceedings. If a lower court is found to have needed an investigation to support its holding, the higher court would just order the investigation, remanding the case for that purpose; if the lower court might have been right in its disposition but the higher court can’t tell from the state of the record, the higher court would remand the case for clarification.

Whether viewed through the majority opinion or the concurrence, that seems to be what both sides have done here: ultimately directed the matter back for further proceedings, albeit not to a court in this case, but to an administrative agency.

### MITCHELL-LAMA HOUSING

#### **Closely Divided Court Finds Tenant Entitled to Succeed to His Mother’s Right to Apartment Despite Her Filing Omission**

As the tenant of record, she was required to file an annual income affidavit with the state Division of Housing and Community Renewal (DHCR), listing all occupants. For one of the two years preceding her vacating of the apartment, she did not make that filing.

Mitchell-Lama Housing is subsidized in several ways, producing lower rents and so of course making apartments in it all the more desirable. The filing requirement enables the agency to examine the total income of all occupants, so as to assess the tenants’ continued entitlement to occupancy.

P was the petitioner here, the son of the tenant of record; he had concededly lived in the apartment since he was one month old. He was 19 when his parents vacated the apartment in 2000, and he continued in occupancy afterwards. In 2004 he filed this succession application, which the landlord rejected. The DHCR upheld the landlord. P then brought this Article 78 proceeding to overturn the DHCR, and he prevails – at all levels, including this 4-3 squeaker in the Court of Appeals. [Murphy v. New York State Division of Housing and Community Renewal](#), 21 N.Y.3d 649, ... N.Y.S.2d .... (Oct. 17, 2013).

Chief Judge Lippman, writing for the majority, finds the key issue to be whether P was actually a resident all this while and finds that he was, stressing that no one disputes it. The majority obviously sees that as the salient point.

To the dissenters, in an opinion by Judge Read, there’s much more to the case. They end up finding the agency to have acted well within its powers, and they cite the other factors that they feel the majority just glossed over – factors that the agency was entitled to consider and which doubtless influenced its decision against P’s succession application.

The dissent sees a bright-line rule here, absolutely mandating the filing of the annual statement. The dissent may appear to justify the agency's action here based solely on the tenant/mother's failure to file for one of the years prior to her vacating the premises, but it goes beyond that, stressing the purpose of Mitchell-Lama housing to aid low income families and citing several factors that could support the DHCR determination in this case. It points out, for example, that this was a two-bedroom apartment, reserved for multiple occupancy, while when P sought the occupancy for himself he was just an unmarried individual.

By allowing the apartment to him, the dissent continues, the Court disregards the long waiting list of other eligible families. Under certain circumstances an exception might be made to enable P to "displace the next qualified" person, but no such circumstances were demonstrated in this case. "Fair assignment of subsidized housing is supposed to be a central component of the Mitchell-Lama program", the dissent says, towards which end the rule of admission "must be strictly enforced to insure the program's integrity".

The dissent also traces the history of the Mitchell-Lama program through amendments to the regulations, observing that the DHCR

explicitly considered and rejected the proposition – now adopted by the majority – that an applicant for succession should be allowed to demonstrate residency "through other evidence and not only via the annual certification".

To the majority there is such evidence – overwhelming evidence that P was always an occupant of the apartment. But, as noted, the dissent finds that by itself insufficient.