NYSBA FALL 2015 | VOL. 29 | NO. 3

Municipal Lawyer

A publication of the Local and State Government Law Section
of the New York State Bar Association, produced in cooperation with Touro Law Center

Message from the Chair

As this is my inaugural column, I wish to state that I am deeply honored and humbled to begin to serve a term as your Section's Chair. I owe an extraordinary debt of gratitude to so many of the past Chairs throughout the years for their exemplary dedication, guidance and encouragement. The journey traveled to reach this position was long but worth every minute. I first joined the Municipal Law Section upon my graduation from Pace University School of Law in 1985 at the urging and guidance of Les Steinman, a then-future Chair of the Section, and the then-Director of the Michaelian Municipal Law Resource Center (MLRC) at Pace and a longtime editor of the *Municipal Lawyer* and its current editor *emeritus*. The *Municipal Lawyer* is particularly dear to my heart as I began writing articles for the publication when I was in law school and an intern at the MLRC. This publication, first issued in November 1978, was much shorter in length and had a smaller circulation in those days, since it was designed as a monthly digest for Westchester-area municipal attorneys, but, as always, served as a scholarly, pragmatic, timely and informative resource for municipal practitioners.

Just as the *Municipal Lawyer* has remarkably flourished, expanded and blossomed over the years into such a highly respected and widely circulated publication, so has the practice of municipal law. Having recently celebrated my thirtieth year as a local government attorney, having served nearly ten years for the County of Westchester, attaining the rank of Assistant Chief Deputy County Attorney, and presently serving over twenty years for the City of White Plains as Chief Deputy Corporation Counsel, I can honestly attest to that reality. The practice of municipal law has indeed grown and changed over the years but still remains an enigma in many respects. Municipal law is challenging, fluid and diverse, as it touches every field and aspect of law. A passion for the law is a prerequisite, as municipalities encounter a variety of intricate legal issues every day, including planning and zoning, land use, taxation, real estate, telecommunications, administrative law, labor and employment law, constitutional law, and legislation, for example. As such, the role of a municipal lawyer is both complicated and complex. There are times when it becomes difficult to even discern who your client is. The municipal attorney is a legal advisor, and it is his or her job to assist the governmental

Inside

entity to be aware of what the options are and what the benefits and disadvantages might be of proceeding in a given way. One golden rule to keep in mind that is sometimes difficult to follow but is of utmost importance—municipal attorneys are legal advisors, not policy makers.

As I begin my term as Chair, one of my first priorities and responsibilities is to continue to promote, diversify, broaden and enhance our Section's membership. Thanks to the tremendous efforts and devotion of Immediate Past Chair Mark Davies and Past Chair Patty Salkin, we have been presented with a unique and exciting opportunity to seize the moment by welcoming the former Committee on Attorneys in Public Service (CAPS) for inclusion into our Section. Expansion of our Section to include State attorneys, including those associated with CAPS, as well as in-house and outside counsel to municipalities and attorneys who appear before and against governmental entities, offers the Section many benefits, such as greater diversity, energy and an even greater pool for future leaders; assumption of CAPS' renowned *Government, Law and Policy Journal* as a forum for more articles concerning municipal, as well as State law, issues; bestowal of the revered annual Excellence in Public Service Award for outstanding government attorneys; the addition of CAPS' excellent blog to encompass municipal law issues; and integration of programs, reports, and articles on a vast array of topics of state and local government concern, including environmental, open government, ethics and green development, just to name a few. These benefits will be at no additional cost to our Section, as President David Miranda and the State Bar have promised to commit the resources necessary to fund the expansion, including the cost of a major outreach to State attorneys, both members and non-members of the NYSBA, and the current ongoing expenses of the *Government, Law and Policy Journal* and the Public Service Award. President Miranda has also enthusiastically stated that attracting State-employed attorneys to our Section is one of the key goals of his presidency.

The first and crucial step in the process of expanding our Section to include State attorneys required, *inter alia*, a revision to the bylaws of our Section. The amendments to the bylaws of our Section included the following changes: (1) renaming the Municipal Law Section to the Local and State Government Law Section (Article I); (2) updating the purpose and definitions to more accurately depict the mission of the Local and State Government Law Section (Article II); and (3) minor changes to Articles IV and V reflecting the name change of our Section. Other future actions, for instance, such as creating new committees and adding State attorneys as committee co-chairs to existing committees would not require approval of the State Bar.

The mission statement of our Section has been changed as follows:

> The purpose of the Local and State Government Law Section shall be to serve, educate and provide a common meeting ground and impartial forum for those attorneys, whether in the public or private sector, engaged in dealing in any capacity with issues in local or state government law.

The bylaws revision proposal was approved by the Executive Committee of our Section and presented to the Executive Committee of the NYSBA at its meeting in June in Cooperstown. On June 18, 2015, the Executive Committee of the NYSBA unanimously approved the bylaw changes subject to the approval of our Section at our Fall CLE meeting. The bylaws were unanimously approved by our members at the Fall Meeting on September 26, 2015. Our Section is now officially to be known as the Local and State Government Law Section.

At our Fall Meeting on September 25-27th in Saratoga Springs, which was jointly held with the Labor and Employment Law Section, our Section's program co-chairs, Michael Kenneally and Sharon N. Berlin, endeavored to create a very interesting program, featuring topics such as the implications of social media in the workplace and courtroom, recent developments in the Fair Labor Standards Act (FLSA), emergency equities in paying for municipal services, a 2015 Legislative Update, and an in-depth analysis of recent cases concerning environmental law, including taking a "harder look" at the State Environmental Quality Review Act (SEQRA). The program was well received by all attendees.

I wholeheartedly encourage you to attend the Local and State Government Law Section's Annual Meeting on January 28, 2016 at the New York Hilton Midtown in New York City. The program will showcase topics such as tax certiorari, *in rem* tax foreclosures, a land use case law update highlighting the U.S. Supreme Court case on sign ordinances in *Reed v. Town of Gilbert* and the New York Court of Appeals decision on parkland dedication in *Glick v. Harvey*, electronic surveillance in the workplace, and recent revisions to the New York State Lobbying Law and State and local government ethics laws. The co-chairs for the program are Les Steinman and Lisa Cobb.

(continued on page 4)

Letter from the Editors

With the broad lineup of articles in this issue, it seems only fitting that the Section has changed its name to the Local and State Government Law Section and welcomed a more diverse group of government law practitioners. As always, the articles in this issue will be of interest to municipal attorneys and also, we believe, to county and state attorneys, the private bar that practices against and with those attorneys and in front of local and state administrative bodies, students, and scholars of local and state government law.

In this issue, frequent contributor Karen Richards examines public employees' reasonable expectation of privacy in their places of work and the workplace exception to the Fourth Amendment warrant requirement. Although determining whether a public employee has a reasonable expectation of privacy and whether the workplace exception to the warrant requirement applies to a search are highly fact-specific endeavors, readers will benefit from Richards' thorough discussion of the case law, identification of common threads therein, and summary of practical tips for public employers.

Kenneth W. Bond provides a primer on local government financing. In his article, Bond discusses the emergence of local development corporations as a source of municipal financing as well as two important reports—one in 2011, the other in 2015—by the Office of the State Comptroller about this development. He sketches the relevant legal background for understanding local development corporations as well as a number of legal and policy questions raised by their use.

The *Municipal Lawyer's* newest research fellow, Michael Spinelli, examines *T-Mobile S., LLC v. City of Roswell, Ga.*, in which the Supreme Court decided how—and announced a new rule as to when—a locality denying a siting application for a cell phone tower must notify the applicant pursuant to the Telecommunications Act of 1996. As Spinelli explains, the Court held that the Act requires a locality to issue a written decision "supported by substantial evidence contained in a written record" when denying a request to site, construct, or modify a cell tower. Furthermore, localities must provide or make available the reasons supporting the decision. However, those reasons need not be stated in the notice or written denial letter but may be stated in another writing, if those reasons are "sufficiently clear and are provided or made accessible to the applicant essentially contemporaneously with the written denial letter or notice."

Dr. Robert Christopherson and James Coffey believe that New York State relies too heavily on property taxes. In their article, they provide data to support their views, explore why and how the State is in this position, and propose suggestions for New York to reduce its reliance on property taxes as a revenue source.

Finally, the issue wraps up with the Land Use Law Update. The Winter 2015 Land Use Law Update asked whether the Supreme Court's decision in *Reed v. Town of Gilbert* would require municipalities throughout the country to rewrite their sign codes. As Sarah Adams-Schoen explains in this installment of the update, the short answer is "yes." The long answer, of course, is more nuanced (we're lawyers after all), and includes a caution that extends beyond sign codes to all local and state laws that limit speech, such as, for example, prohibitions against panhandling.

We hope to see you all at the Local and State Government Law Section's Annual Meeting on January 28, 2016.

Sarah Adams-Schoen and Rodger Citron

Message from the Chair

(Continued from page 2)

I look forward to the challenges ahead and to working with a devoted and talented team of Executive Committee members and officers, including First Vice-Chair, E. Thomas Jones, Town Attorney of Amherst; Second Vice-Chair, Richard K. Zuckerman, and Secretary, Sharon N. Berlin, both of Lamb & Barnosky, LLP, as well as our Section's committees and their co-chairs, Beth Gould, our Section Liaison, and all of our membership. Since our members are the building blocks upon which our Section rises or falls, your comments and ideas are most welcome and appreciated. Your suggestions and input are crucial to helping us meet the ever-changing needs and expectations of our members. Please contact me at cvanscoyoc@whiteplainsny.gov with your suggestions and ideas for enhancing and improving the Section.

See you at our Annual Meeting!

Carol L. Van Scoyoc

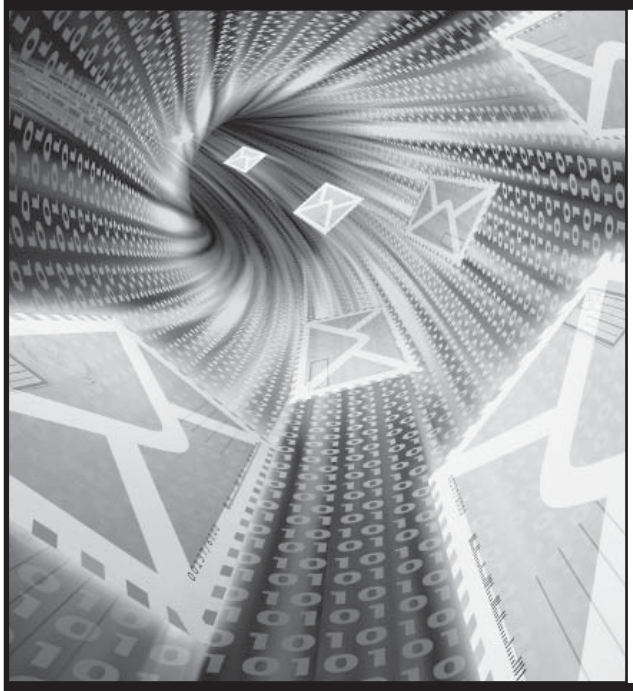
Government Ethics Quiz

Sponsored by the Section's Ethics and Professionalism Committee

Q A deputy county clerk is knowledgeable about real estate matters and agrees to act as the representative of an applicant seeking site plan approval from the County Planning Commission. The deputy clerk is confident that she will succeed in obtaining approval of the application. She agrees to forgo any compensation unless the application is approved and, in that case, to accept a fee equal to one percent of the property's appraised value. Is the deputy clerk's agreement with her client prohibited?

Answer and analysis on page 31

Request for Articles



If you have written an article you would like considered for publication, or have an idea for one, please contact one of the *Municipal Lawyer* Co-Editors:

Prof. Rodger D. Citron
Touro Law Center
225 Eastview Dr., Room 413D
Central Islip, NY 11722-4539
(631) 761-7102
rcitron@tourolaw.edu

Prof. Sarah Adams-Schoen
Touro Law Center
225 Eastview Dr., Room 411D
Central Islip, NY 11722-4539
(631) 761-7137
sadams@tourolaw.edu

Articles should be submitted in electronic document format (pdfs are NOT acceptable), and include biographical information.

www.nysba.org/MunicipalLawyer

Public Employees, Privacy, and Workplace Intrusions

By Karen M. Richards

Introduction

The Fourth Amendment to the United States Constitution guarantees a right of privacy, but not all intrusions upon personal privacy implicate the Fourth Amendment.[1] Rather, intrusions cross the constitutional line only if "the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate' expectation of privacy that has been invaded by government action."[2]

A privacy expectation under the Fourth Amendment must meet both subjective and objective criteria; a person must have an actual expectation of privacy and that expectation must be one which society recognizes as reasonable.[3] A subjective expectation of privacy requires only a straightforward inquiry into the employee's state of mind.[4]

An objectively reasonable expectation of privacy hinges upon "an expectation of privacy that society is prepared to consider reasonable."[5] This inquiry is fact-specific, as

> [There is] no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable. Instead, "the [United States Supreme] Court has given weight to such factors as the intention of the Framers of the Fourth Amendment, the uses to which the individual has put a location, and our societal understanding that certain areas deserve the most scrupulous protection from government invasion."[6]

While the Fourth Amendment does not expressly refer to workplaces, the United States Supreme Court recognizes that "[a]s with the expectation of privacy in one's home, such an expectation in one's place of work is 'based upon societal expectations that have deep roots in the history of the Amendment.'"[7]

> To hold otherwise would belie the origin of that Amendment… [T]he Fourth Amendment's commands grew in large measure out of the colonists' experience with the writs of assistance…[that] granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods. Against this background, it is untenable that the ban on warrantless searches was not intended to shield places of business as well as of residence.[8]

Thus, the Fourth Amendment "safeguards individuals not only against the government *qua* law enforcer but also *qua* employer,"[9] but, in general, a search conducted by the government without a warrant is *per se* unreasonable under the Fourth Amendment.[10] There are, however, "specifically established and well-delineated exceptions" to the Fourth Amendment warrant requirement.[11]

The genesis of one of those exceptions, the workplace exception, is traced to *O'Connor v. Ortega*, which is summarized in this article.[12] Also summarized in this article are a few cases where courts utilized the approach set forth in *O'Connor* to determine if a warrantless search by a public employer was reasonable.

I. The Workplace Exception to the Fourth Amendment: *O'Connor v. Ortega*

The "workplace exception" permits public employers to dispense with the Fourth Amendment's warrant requirements for work-related, non-investigatory intrusions or for investigations of workplace misconduct.[13] This exception was first articulated in the seminal case of *O'Connor v. Ortega*, decided by a four-Justice plurality in 1987.[14]

"Given the societal expectations of privacy in one's place of work" expressed in previous Court decisions, the plurality rejected the contention that public employees can never have a reasonable expectation of privacy in their place of work.[15] The *O'Connor* plurality cautioned that, while "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer,"[16] public employees' expectations may be diminished by "[t]he operational realities of the workplace," such as actual office practices, procedures, or regulations.[17]

> [I]t is the nature of government offices that others—such as fellow employees, supervisors, consensual visitors, and the general public—may have frequent access to an individual's office. We agree with Justice Scalia that "[c]onstitutional protection against *unreasonable* searches by the government does not disappear merely because the govern-

> ment has the right to make reasonable intrusions in its capacity as employer," but some government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable. Given the great variety of work environments in the public sector, the question of whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis.[18]

Finding that a public employee had a reasonable expectation of privacy, according to the plurality, "'is only to begin the inquiry into the standards governing [searches by public employers]…What is reasonable depends on the context within which a search takes place.'"[19] It requires balancing "the invasion of employees' legitimate expectation of privacy against the government's need for supervision, control, and the efficient operation of the workplace."[20]

The four Justices reasoned that requiring a public employer to obtain a warrant to enter the offices, desks, or file cabinets of employees for legitimate work-related reasons wholly unrelated to illegal conduct "would seriously disrupt the routine conduct of business and would be unduly burdensome,"[21] noting that "the governmental interest justifying work-related intrusions by public employers is the efficient and proper operation of the workplace."[22] Thus, they concluded that, "[t]o ensure the efficient and proper operation of [a government agency], …public employers must be given wide latitude to enter employee offices for work-related, non-investigatory reasons."[23]

The Justices applied similar reasoning to searches conducted pursuant to an investigation of work-related employee misconduct:

> Public employers have an interest in ensuring that their agencies operate in an effective and efficient manner, and the work of these agencies inevitably suffers from the inefficiency, incompetence, mismanagement, or other work-related misfeasance of its employees.… The delay in correcting the employee misconduct caused by the need for probable cause rather than reasonable suspicion will be translated into tangible and often irreparable damage to the agency's work, and ultimately to the public interest.[24]

The plurality thus concluded that the "special needs" of public employers "beyond the normal need for law enforcement make the…probable-cause requirement impracticable" for legitimate work-related, non-investigatory intrusions, as well as investigations of work-related misconduct.[25] The four Justices held that these searches should be judged by a standard of reasonableness under all the circumstances.[26] This involves "a twofold inquiry: first, one must consider 'whether the…action was justified at its inception'; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'"[27]

In general, a supervisor's search of an employee's office "'will be justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a non-investigatory work-related purpose such as to retrieve a needed file."[28] A search is permissible in scope when "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of…the nature of the misconduct."[29]

Dr. Ortega was on administrative leave from his position at a state hospital when hospital personnel, investigating misconduct charges, entered his office and removed personal items from his desk and file cabinets.[30] The plurality held that he had a reasonable expectation of privacy in his desk and file cabinets because the undisputed evidence demonstrated that Dr. Ortega did not share them with any other employees and the hospital did not have a policy discouraging employees from storing personal items in desks or file cabinets.[31] Five Justices of the Court concluded that Dr. Ortega also had a reasonable expectation of privacy in his office.[32] The plurality was unable to determine, however, whether the search of Dr. Ortega's office and the seizure of his personal belongings satisfied the reasonableness standard because the record did not reveal the extent to which hospital officials may have had work-related reasons to enter his office. The case was remanded for the district court to determine the justification for the search and seizure and to evaluate the reasonableness of both the inception of the search and its scope.[33]

II. Applying the Workplace Exception to Information Stored, Sent, and Received on an Employer-Owned Computer: *Levanthal v. Knapek*

O'Connor v. Ortega is "[t]he beginning point for any discussion of the law concerning public employer searches in government workplaces."[34] Numerous courts, including those in New York, have found *O'Connor* is the foundation for analyzing whether a public employee has a reasonable expectation of privacy in information stored, sent, and received on government-owned electronic devices, such as computers.

In *Levanthal v. Knapek*, the Court of Appeals, Second Circuit, found a search by the New York State Depart-

ment of Transportation ("DOT") of an employee's office computer was reasonable, even though the employee had an expectation of privacy in its contents.[35] The DOT began an investigation after receiving an anonymous letter alleging a grade 27 employee in the accounting bureau was neglecting his duties.[36]

Without the consent of Levanthal, the only grade 27 employee in the accounting bureau, investigators entered his office and searched his computer. Their search was limited to viewing and printing file names to determine whether Levanthal was misusing his office computer.[37] The list of file names indicated Levanthal had non-standard software on the computer, including a program suspected of containing tax preparation software. The DOT conducted three subsequent searches of Levanthal's office computer to determine with greater certainty whether the non-standard software discovered during the first search was indeed part of a tax preparation program.[38]

The Court of Appeals first determined whether "'the conduct…at issue…infringed an expectation of privacy that society is prepared to consider reasonable,'" since "[w]ithout a reasonable expectation of privacy, a workplace search by a public employer will not violate the Fourth Amendment regardless of the search's nature and scope."[39] Recognizing that workplace conditions can diminish an employee's expectation of privacy in certain areas, the court considered what access other employees or the public had to Levanthal's office.[40] Because he occupied a private office with a door, had exclusive use of the desk, filing cabinet, and computer in his office, did not share his computer with other employees, and there was no evidence that visitors or the public had access to his computer, Levanthal had a reasonable expectation of privacy in the contents of the computer.[41]

Applying the *O'Connor* twofold inquiry for determining the reasonableness of a workplace search, the Court of Appeals determined the searches were reasonable.[42] The initial search to identify whether Levanthal was using non-standard DOT software was reasonably related to the DOT's need to ascertain, based on the anonymous letter, whether Levanthal was engaged in workplace misconduct by misusing his computer.[43] The scope of the initial search was not excessively intrusive because the investigators did not run any programs or open any files; instead, they merely printed out a list of file names found on the computer.[44]

The three subsequent searches were also permissible because "[c]onsidering that the first search yielded evidence upon which it was reasonable to suspect that a more thorough search would turn up additional proof that Levanthal had misused his DOT office computer, the investigators were justified in returning to confirm the nature of the non-standard DOT software located on Levanthal's computer."[45] These searches also were not excessively intrusive, as the investigators did not open any computer files containing individual tax returns, but instead limited the searches to copying directories, printing out additional copies of file names, and opening a few files to examine their contents.[46]

III. Privileges Communicated Via a Government-Owned Computer May Be Waived if There Is No Objectively Reasonable Expectation of Privacy: *In Re Asia Global Crossing, Ltd.*

The case of *In re Asia Global Crossing Ltd*. established that an employee's use of an employer's e-mail systems to communicate with attorneys or spouses may result in a waiver of confidentiality, and by extension, the attorney-client privilege or the marital communication privilege.[47] Relying on *O'Connor*, *supra*, and other Fourth Amendment "reasonable expectation of privacy" cases, such as *Levanthal*, *supra,* the bankruptcy court in the Southern District of New York formulated a four-factor test for determining whether an employee has an objectively reasonable expectation of privacy in computer files and e-mail:[48]

(1) Does the corporation maintain a policy banning personal or other objectionable use?

(2) Does the company monitor the use of the employee's computer or e-mail?

(3) Do third parties have a right of access to the computer or e-mails?

(4) Did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?[49]

This four-factor waiver analysis has been "widely adopted" by other courts.[50] Although no one factor is dispositive,[51] some jurisdictions have taken the position that if the factors are evenly split, "hard cases should be resolved in favor of the privilege, not in favor of disclosure."[52] Moreover, because cases in this area tend to be fact-specific and the outcomes tend to hinge on the particular policy language adopted by the employer:

> [A]n employer's announced policies regarding the confidentiality and handling of email and other electronically stored information on company computers and servers are critically important in determining whether an employee has a reasonable expectation of privacy in such materials, the cases in this area tend to be highly fact-specific and the outcomes are largely determined by the particular policy language adopted by the employer.[53]

A. Does the Corporation Maintain a Policy Banning Personal or Other Objectionable Use?

Courts analyzing the first factor have focused on the nature and specificity of an employer's e-mail policy. Where a policy did not completely ban personal use of the employer's e-mail system, some courts found the first factor weighed in favor of the employee.[54]

Other courts came to an opposite conclusion if the employer's policy warned there was no expectation of privacy in using the company's systems.[55] *United States v. Finazzo* is a case on point.[56] In *Finazzo*, the company's policy allowed employees "limited and reasonable use of its systems," while also prohibiting certain types of personal use.[57] Importantly, the policy also warned there was no expectation of privacy in using the company's systems.[58] Although "an outright ban on personal use would likely end the privilege inquiry at the start, the fact that [the company] placed restrictions both limiting personal use generally and outright banning certain types of personal use lowers an employee's expectation of privacy in the system," and therefore, the District Court in the Eastern District of New York determined the first factor weighed against Finazzo.[59]

In *In re Reserve Fund Securities and Derivative Litigation*, the U.S. District Court for the Southern District of New York determined this factor weighed in favor of finding the employee did not have a reasonable expectation of privacy, where the employer's policy provided that employees "should" limit their use of e-mail resources to official business and should remove personal and transitory messages from personal inboxes on a regular basis.[60] While this language acknowledged the possibility that employees may receive personal e-mail from outsiders over the company's system, it did not undermine the mandatory nature of the language that they "should" limit their use of e-mail resources to official business.[61]

In *United States v. Hatfield*, "a fifth and ultimately deciding factor" was added by the District Court for the Eastern District of New York.[62] This fifth factor, which asks with respect to privilege issues how the company interprets its computer usage policy, was "seen as a clarification of the first factor."[63] After all, reasoned the court, "if a company chooses to reasonably interpret its own internal policies liberally, then those policies 'exist' only to the extent that they are actually interpreted and implemented, and do not extend as far as an outside party (such as the Government) might wish them to."[64] Because the company in *Hatfield* believed employees did not forfeit applicable privileges by maintaining personal legal documents on company computers, the court concluded that finding the employee waived the attorney-client privilege simply because he maintained certain documents on the company's hard drive would be "fundamentally unfair," as it essentially imposed a much harsher and more restrictive computer usage policy than the company ever intended.[65]

B. Does the Company Monitor the Use of the Employee's Computer or E-Mail?

The second factor involves the "extent to which the employer adheres to or enforces its policies and the employee's knowledge of or reliance on deviations from the policy."[66] Some jurisdictions found an employer's failure to actually monitor e-mail may suggest to employees that e-mail is confidential.[67]

Most courts, including those in New York, concluded an employer's reservation of the right to review e-mail destroys any reasonable expectation of privacy, regardless of whether e-mail was actually monitored.[68] For example, in *Finazzo*, *supra*, there was no evidence the company had a practice of actually monitoring e-mail, but still, the employee had no expectation of privacy where the employer's policies clearly reserved the right to access e-mail.[69] The district court stated:

> Although evidence of actual monitoring would make an expectation of privacy even less reasonable, communicating in a setting where a third party has reserved the right to review it is wholly inconsistent with the Second Circuit's requirement that the "person invoking the privilege must have taken steps to ensure that it was not waived" by "tak[ing] some affirmative action to preserve confidentiality."[70]

Similarly, in *Reserve Fund Securities*, *supra*, while the company's policy provided it would not routinely monitor employees' e-mail and would take reasonable precautions to protect the privacy of employees' e-mail, the policy also "reserv[ed] the right to access an employee's e-mail for legitimate business reason… or in conjunction with an approved investigation…"[71] Because the company reserved the right to access and monitor employees' e-mail, the second factor weighed against finding the employee had a reasonable expectation of privacy.[72]

C. Do Third Parties Have a Right of Access to the Computer or E-Mails?

Regarding the third factor, the *Asia Global* court noted, "[a]n employee may take precautions to limit access; offices can be locked, computers can be password-protected, and e-mails can be encrypted."[73] However, the court acknowledged that many jurisdictions found these precautions may not create an expectation of privacy, where the employer's policy notified employees they should have no expectation of privacy.[74]

In *Finazzo*, *supra*, the district court found the third factor did not weigh for or against Finazzo.[75] Although Finazzo did not allege his e-mail was protected, he maintained he deleted the e-mail in question immediately after he received it. However, Finazzo only deleted the e-mail after it had passed through the company's servers, and he did not establish that deletion prevented the company from accessing his e-mail, *i.e.*, that a copy no longer remained on the company's server. The court noted, "[c]ases that take into account an employee's deletion efforts usually require more to render any expectation of privacy reasonable."[76]

Deletions by a professor at Oklahoma State University of over 3,000 pornographic images of young boys downloaded through the university's monitored computer network were not sufficient to establish an objectively reasonable expectation of privacy.[77] In *United States v. Angevine*, the Court of Appeals, Tenth Circuit, noted that the university's policy clearly warned computer users that data was "fairly easy to access" by third parties, that network administrators actively audited network transmissions for misuse, and that system administrators kept file logs recording when and by whom files were deleted.[78]

Other courts have found that similar warnings weighed against an expectation of privacy. For example, in *Reserve Fund Securities, supra,* since the employer's policy explicitly warned employees that e-mail communications were automatically saved and were subject to review by the employer and may be disclosed to regulators and the courts, the employee's expectation of privacy was lessened.[79]

In *Scott v. Beth Israel Medical Center, Inc.*, the court found the third factor was not relevant, since, pursuant to CPLR 4548, the fact that such "persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication" does not destroy an attorney-client privilege.[80] Prior to Dr. Scott's departure from the Medical Center, no one else had access to his computers, which were located in his locked office.[81] After his departure, since the Medical Center deleted a departing employee's information from the computer hardware itself but not from the server, the only personnel with access to Dr. Scott's e-mail were the computer staff, which CPLR 4548 addressed.[82]

D. Did the Corporation Notify the Employee, or Was the Employee Aware, of the Use and Monitoring Policies?

If the employee had actual or constructive knowledge of the employer's policy, any subjective expectation of privacy the employee may have had is likely to be held unreasonable.[83] In *Finazzo*, *supra*, the fourth factor weighed heavily against Finazzo because not only did he admit awareness of the policy, but also he was required to acknowledge that he read the policy each year and affirm in representation letters to the company's senior officers that he was familiar with the policies each quarter.[84]

Courts often consider the employee's position in a company when analyzing whether the employee had actual or constructive knowledge of a policy.[85] For example, in *Scott, supra*, the court found Dr. Scott had actual notice of the Medical Center's policy, as the Medical Center disseminated its policy regarding its ownership of e-mail on its server to each employee, including Dr. Scott, and as an administrator, Dr. Scott had constructive knowledge of the policy.[86]

Similarly, the fourth factor weighed against two former employees in *Long v. Marubeni America Corporation*.[87] The District Court in the Southern District of New York decided the employees knew or should have known of the company's e-mail use policy due to their positions in the company; one of the employees was senior vice president and general manager of human resources and the other employee held the position of senior vice president and general manager.[88]

Screen notifications, which communicate to users that they have no expectation of privacy when using an employer's system, generally negate an expectation of privacy. By such notifications employees should have known they possessed no expectation of privacy.[89] *United States v. Etkin* is a case on point.[90]

Etkin, an investigator in the New York State Police ("NYSP"), moved to preclude introduction at trial of an e-mail communication exchange with his wife.[91] The government argued that a printed e-mail, seized when Etkin was arrested in a vehicle assigned to him by the NYSP, was not a confidential communication because it was sent from Etkin's work computer, which was owned by the NYSP, and because each time he logged onto the computer, a flash-screen notice warned:

> For authorized use only. The system and all data are the property of the New York State Police.… Any use of the NYSP computer systems constitutes express consent for the authorized personnel to monitor, intercept, record, read, copy, access and capture such information for use or disclosure without additional prior notice. Users have no legitimate expectation of privacy during any use of this system or in any data on this system. Your access may be logged at any time. By logging into this system, you are agreeing that you have read, and accepted the above terms and conditions.[92]

Etkin countered that he was never verbally advised that his use of the computer might be monitored and that there was no evidence that his e-mail was actually monitored by the NYSP.[93]

The District Court in the Southern District of New York was particularly persuaded by the rationale of cases in other jurisdictions "that employees do not have a reasonable expectation of privacy in the contents of their work computers when their employers communicate to them via a flash-screen warning a policy under which the employer may monitor or inspect the computers at any time."[94] Following this line of reasoning, the court found it did not matter whether the NYSP actually read Etkin's e-mail because the log-on notice, which appeared "every single time" Etkin logged onto his computer, sufficiently notified him that any e-mail sent from his work computer might be read by a third party.[95] Consequently, Etkin had no reasonable expectation of privacy, and the e-mail at issue was not subject to the marital communications privilege because it was not a confidential communication.[96]

IV. Applying the Workplace Exception to Text Messages Sent and Received Via a Government-owned Pager: *City of Ontario v. Quon*

In *City of Ontario v. Quon*, the defendants claimed they had a reasonable expectation of privacy in text messages sent and received by a third party on city-owned pagers assigned to police officers.[97] The text messages did not pass through city-owned computers but instead were sent through a wireless provider's computer network.[98] The city's contract with its service provider limited the number of characters each pager could send or receive, and any usage exceeding that number resulted in an additional fee.[99]

The city's computer policy reserved its right to monitor and log all network activity, including e-mail and internet use, with or without notice, and warned users they had no expectation of privacy or confidentiality when using these resources.[100] Although the policy did not expressly reference pagers, employees were told text messages would be treated the same as e-mail and could be audited.[101]

When monthly character limits continued to be exceeded, without obtaining a warrant the city obtained transcripts of text messages from its service provider to determine whether the existing character limit was too low for work-related messages or if the overages were for personal messages.[102] An audit of Officer Quon's pager revealed many of the messages were personal in nature.[103] For example, during one month, Quon sent or received 456 messages, of which no more than 57 were work related.[104] As a result of the audit, Quon was disciplined.[105]

Though the petitioners and respondents disagreed on whether Quon had a reasonable expectation of privacy, both agreed the reasonableness standard articulated by the *O'Connor* plurality controlled.[106] The Court declined, however, to decide whether Quon had a reasonable expectation of privacy, stating:

> It is not necessary to resolve whether that premise is correct. The case can be decided by determining that the search was reasonable even assuming Quon had a reasonable expectation of privacy. The two *O'Connor* approaches—the plurality's and Justice Scalia's—therefore lead to the same result here.[107]

The Court cautioned:

> The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear. Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations enjoyed by employees when using employer-provided communication devices.… Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior.… At present, it is uncertain how workplace norms, and the law's treatment of them, will evolve.… Even if the Court were certain that the *O'Connor* plurality's approach were the right one, the Court would have difficulty predicting how employees' privacy expectations will be shaped by those changes or the degree to which society will be prepared to recognize those expectations as reasonable.[108]

Because "[a] broad holding concerning employee's privacy expectations vis-à-vis employer-provided technological equipment might have implications for future cases that cannot be predicted," the Court found it was "preferable to dispose of this case on narrow grounds."[109] For argument's sake, the Court assumed, without deciding, a number of facts: Quon had a reasonable expectation of privacy in the text messages sent on the pager; the city's review of the transcripts constituted a search within the meaning of the Fourth Amendment; and the principles applicable to a government employer's search of an employee's physical office apply with at least the same force when the employer intrudes on the employee's privacy in the electronic sphere.[110]

Limiting its review to the reasonableness of the search, the Court held the audit "satisfied the standard of the *O'Connor* plurality and was reasonable under that approach."[111] The search was justified at its inception because there were reasonable grounds for suspecting the audit was necessary for a noninvestigatory work-related purpose, i.e. to determine whether the character limit was sufficient to meet the city's needs.[112] Also, the scope was reasonable because it was an "efficient and expedient" way to determine whether Quon's use was for work or personal text messages, and as it was limited a two-month period and all off-duty messages were redacted, the search was not excessively intrusive.[113]

V. Applying the Workplace Exception to the GPS Surveillance of a Public Employee's Personal Car: *Cunningham v. New York State Department of Labor*

In *Cunningham v. New York State Department of Labor*, the State of New York, suspecting that one of its employees was engaging in a pattern of taking unauthorized absences from duty and falsifying records to conceal those absences, attached a global positioning system ("GPS") device to the employee's car.[114] The New York Court of Appeals held the search was unreasonable, although it was within the *O'Connor* workplace exception.

Cunningham argued that the workplace exception was not applicable because the object of the search was his personal car and that the exception should be confined "to the workplace itself or workplace-issued property that can be seen as an extension of the workplace."[115] The Court of Appeals rejected Cunningham's arguments, "at least insofar as it would require a public employer to get a warrant for a search designed to find out the location of the automobile an employee is using when that employee is, or claims to be, working for the employer."[116] Since Cunningham "was required to report his arrival and departure times to his employer, this surely diminished any expectation he might have had that the location of his car during the hours he claimed to be at work was no one's concern but his."[117]

Applying the *O'Connor* twofold standard, New York's highest court found the search was justified at its inception, as Cunningham's employer had ample grounds to suspect him of misconduct, but the search was excessively intrusive.[118]

> [The GPS surveillance] examined much activity with which the State had no legitimate concern—i.e., it tracked [Cunningham] on all evenings, on all weekends, and on vacation. Perhaps it would be impossible, or unreasonably difficult, so to limit a GPS search of an employee's car as to eliminate all surveillance of private activity—especially when the employee chooses to go home in the middle of the day, and to conceal this from his employer. But surely it would have been possible to stop short of a seven-day, 24-hour surveillance for a full month. The State managed to remove a GPS device from [Cunningham's] car three times when it suited the State's convenience to do so—twice to replace with a new device, and a third time after the surveillance ended. Why could it not also have removed the device when, for example, [Cunningham] was about to start his annual vacation?[119]

All of the evidence gathered from the GPS surveillance was suppressed. While "[o]rdinarily, when a search has exceeded its permissible scope, the suppression of items found during the permissible portion of the search is not required,"[120] the Court of Appeals held this rule was inapplicable to GPS searches because of the device's "extraordinary capacity" for "'constant relentless tracking of anything.' Where an employer conducts a GPS search without making a reasonable effort to avoid tracking an employee outside of business hours, the search as a whole must be considered unreasonable."[121]

VI. Applying the Workplace Exception to Video Surveillance of Public Workplaces

In *Carter v. County of Los Angeles* and *Richards v. County of Los Angeles*, after the County's Department of Public Works ("DPW") received an anonymous complaint alleging possible misconduct by Dispatcher Richards, it installed a hidden camera in the dispatch room.[122] The California District Court concluded the plaintiffs had a reasonable belief that the dispatch room was private.[123] The dispatch room was a secure, non-public, and often solitary office separated from the rest of the building by restricted access doors.[124] Although it was occasionally entered by security and supervisors, this did not destroy a reasonable expectation of privacy, as "[p]rivacy does not require solitude."[125]

The court concluded:

> Because of the constant and non-discriminating nature of the surveillance [no attempt was made to restrict the hours or individuals covertly recorded[126]], and because it occurred in a semi-private area where employees had to perform non-work activities (like eating and taking breaks), under Justice Scalia's *O'Connor* test or

> the *O'Connor* plurality test, the video surveillance was unreasonable and in violation of the [plaintiffs'] Fourth Amendment rights.[127]

Noting that "[t]he status of being an employee does not carry with it the elimination of personal dignity,"[128] the court expressed serious doubts about the use of a covert video search:

> Employers have many traditional tools available in that regard. Covert video surveillance is not a traditional tool. We pride ourselves on our respect for individual privacy. Outside of a strip search or a body cavity search, a covert video search is the most intrusive method of investigation a government employer could select. Secret videotaping goes against the grain of our strong anti-Orwellian traditions. Secret videotaping should be reserved for those extreme and rare circumstances involving serious transgressions where it is highly improbable that less odious techniques will be effective.[129]

Thus, "[b]ecause of the constant and non-discriminating nature of the surveillance, and because it occurred in a semi-private area where employees had to perform non-work activities (like eating and taking breaks)," the court held that the video surveillance was unreasonable and in violation of the plaintiffs' Fourth Amendment rights under Justice Scalia's *O'Connor* test or the *O'Connor* plurality test and the plaintiffs were entitled to judgment as a matter of law.[130]

In *Brannen v. Kings Local School District Board of Education*, the employees did not have a reasonable expectation of privacy in the break room, which was "open all the time," giving others such as the principal and most of the teachers "unfettered access" and was more of an all-purpose utility room that contained a washing machine, clothes dryer, cleaning supplies, cleaning machines, lockers, a refrigerator, and a microwave oven.[131] By applying the *O'Connor* plurality twofold test to determine the reasonableness of a search, the court concluded that, even if the employees were able to establish a reasonableness expectation of privacy in the break room, the inception and scope of the search were both reasonable.[132] The school district was justified in installing the hidden video camera because the custodial supervisor suspected third-shift custodians were taking excessive, unauthorized breaks, while turning in time sheets indicating they had worked their full eight-hour shifts.[133] The scope was reasonable, since the camera was operational only between 10:00 p.m. and 6:00 a.m. for one week.[134] Further, the camera created only a visual record of activities in the break room and recorded only that which the custodial supervisor himself could have observed in person.[135] "[T]he mere fact that the observation is accomplished by a video camera rather than the naked eye, and recorded on film rather than in a supervisor's memory, does not transmogrify a constitutionally innocent act into a constitutionally forbidden one."[136]

In *Thompson v. Johnson Community College*, community college personnel claimed silent video surveillance of the locker area violated the Fourth Amendment.[137] The court noted that other jurisdictions, such as the Eighth and Ninth Circuits, found that "[d]omestic silent video surveillance is subject to Fourth Amendment prohibitions against unreasonable searches."[138] The court found the employees did not have a reasonable expectation of privacy in the security personnel locker area: it was not enclosed, but rather was part of a storage room that also housed the college's heating and air-conditioning equipment; activities could be viewed by anyone walking into or through the storage room/security personnel locker area; and the security personnel's locker area was not reserved for their exclusive use considering that other college employees, including maintenance and service personnel, had regular "unfettered" access to this locker area.[139]

The court also found that both the inception and the scope of the video surveillance was reasonable.[140] It was uncontroverted that the college's purpose for the video surveillance was work-related; it was investigating reports of employee misconduct in the locker area. Security personnel had complained to supervisors that items were stolen from their lockers and that some security officers were bringing weapons on campus. Further, the video surveillance was conducted only for a limited period of time to confirm or dismiss those allegations. Thus, the court concluded that the video surveillance of the security personnel locker area was reasonable and that, as a matter of law, summary judgment on this issue is appropriate.[141]

VII. A Public Employer's Dual Role When Investigating Workplace Misfeasance and Criminal Activity

As the *O'Connor* Court noted in declining to hold public employers to the probable cause standard when conducting a search pursuant to an investigation of work-related employee misconduct:

> while law enforcement officials are expected to "school themselves in the niceties of probable cause," no such expectation is generally applicable to public employers, at least when the search is not used to gather evidence of a criminal offense.[142]

However, "[a] public employer cannot cloak itself in its public employer robes in order to avoid the probable cause requirement when it is acquiring evidence for a criminal prosecution. While the burden of showing probable cause and obtaining a warrant may be "intolerable" for public employers, it is *de rigueur* for law enforcement officials."[143]

Courts, such as those in New York, have held that *O'Connor's* goal of ensuring an efficient workplace should not be frustrated simply because the workplace misconduct also happens to be illegal[144] or because a law enforcement officer is involved in investigating the workplace misconduct.[145] For example, in *United States v. Reilly*, the Department of Labor ("DOL") investigated possible workplace misconduct and criminal activity, after learning an individual using Reilly's e-mail address, as well as his social security number, credit card number, and home address, had purchased a password from a known provider of Internet child pornography.[146] A DOL agent remotely monitored internet access from the employee's government-issued laptop computer, and after reviewing the accessed sites, concluded it had been used in violation of DOL policy on proper use of workplace computers.[147] When the agent approached Reilly's cubicle, Reilly immediately reached for the computer, began to close the lid, and grabbed a diskette from his desk (a second diskette was found in the computer).[148]

An analysis of the diskettes revealed images of nude children and children engaging in sex acts.[149] Reilly was arrested and charged with receipt of child pornography.[150]

Reilly moved to suppress the diskettes, claiming their seizure violated his right to privacy in his workplace cubicle.[151] The District Court in the Southern District of New York found Reilly did not have a legitimate expectation of privacy, since other employees could see into his small, doorless cubicle and also since they routinely entered each other's cubicles for work-related purposes, even in the employee's absence.[152] As for the diskette, the court did not need to decide whether Reilly "had a legitimate expectation of privacy in the diskette as the government's seizure of the diskette falls into the exception carved out to the Fourth Amendment standard of a warrant and probable cause for the 'special needs' of the government in the efficient operation of a government workplace."[153]

The district court found the investigation and seizure fell within the *O'Connor* exception to the warrant requirement because it was carried out for the purpose of obtaining "'evidence of suspected work-related employee misfeasance.'"[154] It was reasonable in inception, since, as a result of monitoring the computer, it was clear that someone was using the computer to access unauthorized sites on the Internet in violation of DOL workplace policies, and perhaps in violation of the criminal law, and it was entirely reasonable to approach Reilly's cubicle in order to ascertain who was using the computer for prohibited purposes.[155] The search was also reasonable in scope, since it only included the two diskettes and did not include a search of Reilly's person, his bag, or the "mini-disks" that Reilly took from his desk.[156]

The agent's dual role as an investigator of workplace misfeasance and criminal activity did not invalidate the otherwise legitimate workplace search in *Reilly*.[157] If the dominant purpose of a warrantless search of an employee's workplace is to acquire evidence of criminal activity, the search nevertheless remains within the *O'Connor* exception to the warrant requirement because the government "'does not lose its special need for 'the efficient and proper operation of the workplace,' merely because the evidence obtained was evidence of a crime.'"[158] Simply put, an employer does not lose its capacity and interests as an employer merely because an employee's violation of its policy is also a violation of criminal law.

Conclusion

Determining whether a public employee had a reasonable expectation of privacy and whether the workplace exception applies to a search are highly fact-specific endeavors. Although few generalizations can be made regarding a public employee's right of privacy in the workplace, some general points may be gleaned from the cases cited in this article. First, case law demonstrates that, at a minimum, a policy should clearly and explicitly:

- notify employees that they have no explicit or implicit expectation of privacy on anything created, stored, sent, or received on the employer's systems and equipment, such as computer systems, telephone systems, voice mail systems, paging systems, e-mail systems, facsimile equipment, and the wire or wireless networks that connect them, or in their offices, desks, and file cabinets;
- notify employees that such systems and equipment are solely the property of the employer; and,
- warn that the employer reserves the right to review and access employees' use of such systems and equipment and that such systems and equipment are subject to review and access by third parties, including but not limited to, regulatory agencies or courts.

Second, an employer should take affirmative steps to notify employees of its policies. Two methods of notification, as seen from cases cited herein, are: (1) to include these policies in the employee handbook

and have employees sign a statement acknowledging receipt and understanding of the handbook, and (2) set up a system that does not allow employees to access computer files, e-mail, and programs without first acknowledging they understood that computer resources are solely owned by the employer and use of the computer is consent to be monitored and authorization to search the computer and anything created, stored, sent, or received on the computer. Best practices include monitoring and auditing systems and equipment and providing employees with periodic reminders of policies and practices.

Lastly, but importantly, the workplace exception does not grant a public employer unfettered power to conduct a warrantless search, as the intrusion is judged by a standard of reasonableness. Thus, a public employer must be able to point to a legitimate work-related noninvestigatory purpose or an investigation of work-related misconduct. In addition, the intrusion must be reasonably related in scope to the circumstances that justified the interference in the first place and must not be excessively intrusive.

Endnotes

1. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").
2. *In re Asia Global Crossing*, 322 B.R. 247, 256 (S.D.N.Y. 2005).
3. *Katz v. United States*, 389 U.S.347, 361 (1967).
4. *Vega-Rodriguez v. Puerto Rico Tel. Co*., 110 F.3d 174, 178 (1st Cir. 1997).
5. *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987) (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)).
6. *Id*. (quoting *Oliver*, 466 U.S. at 178); *see Vega-Rodriguez*, 110 F.3d at 178 (stating "the Court has not developed a routinized checklist that is capable of being applied across the board and each case therefore must be judged according to its own scenario").
7. *Oliver v. United States*, 466 U.S. 170, 178 n.8 (1984); *see Blake v. Wright*, 179 F.3d 1003, 1009 (6th Cir. 1999) (stating "Stated broadly, workplaces or commercial settings often are subject to less protection than dwellings."), *cert. denied by*, 528 U.S. 1136 (2000); *Vega-Rodriguez*, 110 F.3d at 178-178 ("Generally speaking, business premises invite lesser privacy expectations than do residences. Still, deeply rooted societal expectations foster some cognizable privacy interests in business premises.").
8. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311 (1978).
9. *Vega-Rodriguez*, 110 F.3d at 179.
10. *Marshall*, 436 U.S. at 312 (citing *Camara v. Mun. Court of City and Cnty. of San Francisco*, 387 U.S. 523, 528 (1967)).
11. *Katz v. United States*, 389 U.S. 347, 357 (1967) (citations omitted).
12. This article explores the topic of public employees' reasonable expectation of privacy in their places of work and the workplace exception to the Fourth Amendment warrant requirement by reviewing judicial decisions. The reader must keep in mind that these inquiries are highly fact-specific. In many of these cases, employees alleged numerous different claims, but this article is restricted to discussing public employees and their Fourth Amendment rights.
13. *Nat'l Treasury Emp. Union v. Von Raab*, 489 U.S. 656, 665 (1989).
14. *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987).
15. *Id*. at 717 (referencing *Mancusi v. DeForte*, 392 U.S. 364 (1968), and *Oliver v. United States*, 466 U.S. 170 (1984)).
16. *Id*.
17. *Id.* at 717-18 (citations omitted).
18. *Id.* (citations omitted). Justice Scalia criticized the plurality for adopting a case-by-case standard "so devoid of content that it produces rather than eliminates uncertainty in this field." *Id*. at 729-730 (concurring opinion). He disagreed "with the plurality's view that the reasonableness of the expectation of privacy (and thus the existence of the Fourth Amendment protection) changes 'when an intrusion is by a supervisor rather than a law enforcement official.' The identity of the searcher (police vs. employer) is relevant not to whether Fourth Amendment protections apply, but only to whether the search of a protected area is reasonable." *Id*. at 731. He would have held "that the offices of government employees, and *a fortiori* the drawers and files within those offices, are covered by Fourth Amendment protections as a general matter" and would have held "that government searches to retrieve work-related materials or to investigate violations of workplace rules—searches of the sort that are regarded as reasonable and normal in the private-employer context—do not violate the Fourth Amendment." *Id.* at 731-732. Justice Blackmun was "disturbed" by the plurality's suggestion that routine entries by visitors might completely remove an employee's expectation of privacy. *Id*. at 738 (dissenting opinion).

    An employee's expectation of privacy is not automatically destroyed merely because others may have access to the employee's office, desk, computer, or filing cabinet. *See, e.g., Caldarola v. County of Westchester*, 343 F.3d 570, 575 (2d Cir. 2003) ("However, a private space (such as a desk) within an otherwise public space (such as a government building) will justify an expectation of privacy."); *United States v. Taketa*, 923 F.2d 665, 673 (9th Cir. 1991) (finding where regular access to employee's office by three other employees did not defeat employee's expectation of privacy in his office and stating, "Privacy does not require solitude. As *O'Connor* recognized, even 'private' business offices are often subject to the legitimate visits of coworkers, supervisors, and the public, without defeating the expectation of privacy unless the office is 'so open to fellow employees or the public that no expectation of privacy is reasonable.'" (citing *O'Connor,* 480 U.S. at 717–18)); *United States v. Slanina*, 283 F.3d 670, 675 (5th Cir. 2002) (finding fire marshal had a reasonable expectation of privacy in his office even though other city employees had a grand master key and a select few coworkers had access to office but access by others was not routine), *remanded on other grounds by*, 537 U.S. 802 (2002); *but see Moore v. Constantine*, 191 A.D.2d 769, 771 (3d Dep't 1993) (holding trooper had no reasonable expectation of privacy in his locker from his superiors who routinely obtained access to locker's work-related contents, taking needed documents and evidentiary material and checking firearms left therein).
19. 480 U.S. at 718 (*quoting New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985).
20. *Id*. at 719-720.
21. *Id*. at 723.
22. *Id*.
23. *Id*.
24. *Id*. at 724-26.
25. *Id*. at 726 (citation omitted); *see Avila v. Valentin-Maldonado*, 2010 WL 936202 at *5 (D. Puerto Rico), *order clarified on reconsideration*

by, 2010 WL 1728434 (2010) (stating the *O'Connor* test "is a more relaxed reasonableness standard than the warrant and probable cause requirements that the Fourth Amendment imposes on searches conducted as part of criminal investigations").

26. *Id.* at 725-726.

27. *Id.* (citations omitted).

28. *Id*. at 727.

29. *Id*. at 726 (quoting *T.L.O.*, 469 U.S. at 342). Justice Scalia, concurring, offered a different approach:

> The government like any other employer, needs frequent and convenient access to its desks, offices, and file cabinets for work-related purposes. I would hold that government searches to retrieve work-related materials or to investigate violations of workplace rules—searches of the sort that are regarded as reasonable and normal in the private employer context—do not violate the Fourth Amendment. *Id*. at 732 (concurring opinion).

In *City of Ontario v. Quon*, *infra*, the Court had the opportunity to resolve the schism between the two approaches—the plurality's and Justice Scalia's—but tiptoed around it by stating that either approach would lead to the same result. 560 U.S. 746, 757. As Justice Stevens stated in *Quon*, "the Court has sensibly declined to resolve whether the plurality opinion in *O'Connor*…provides the correct approach to determining an employee's reasonable expectation of privacy." *Id*. at 766 (concurring opinion).

Courts have commented on this divide, and, in some cases, applied both approaches. *See, e.g.*, *Schowengert v. Gen. Dynamics Corp*., 823 F.2d 1328, 1334 (9th Cir.1987), *cert. denied by*, *Schowengert v. United States*, 503 U.S. 951 (1992) (noting "a majority of the *Ortega* Court did not reach consensus as to what determines whether an employee's expectation of privacy is reasonable"); *Looney v. Washington Cnty., Oregon*, 2011 WL 2712982 (D. Or. 2011) (where the court applied both the *O'Connor* plurality's analysis and Justice Scalia's analysis); *Carter v. County of Los Angeles, infra*, 770 F. Supp. 2d 1042, 1048 (C.D. Cal. 2011) ("Resolution of Plaintiffs' Fourth Amendment claim requires application of two multi-factor tests set forth by the Supreme Court's plurality opinion and Justice Scalia's concurring opinion in *O'Connor v. Ortega*… The court is sensitive to the fact that, at their core, these tests each involve an assessment of the reasonableness of the search in context.); *Richards v. Cnty. of Los Angeles*, *infra*, 775 F.Supp.2d 1176, 1186 (C.D. Cal. 2011) ("under either Justice Scalia's *O'Connor* test or the *O'Connor* plurality test, the video surveillance was unreasonable and in violation of the Carter Plaintiffs' and Richards Plaintiffs' Fourth Amendment rights"); *Laval v. Jersey City Housing Authority*, 2014 WL 683974, at *9 (D.N.J.) (stating "[the] Supreme Court has established two overlapping frameworks for analyzing Fourth Amendment claims against government employers" and discussing both frameworks); *Walker v. State*, 432 Md. 587, 608-609 n.15, 69 A.3d 1066, 1079 n.15 (Ct. Apps. Md. 2012) (stating "The mere fact that other employees or the public may enter an office does not automatically make one's expectation of privacy unreasonable; context matters and each situation must be analyzed on its facts" and noting that the Supreme Court "has declined to state whether the plurality's reasoning controls"), *aff'd*, 432 Md. 587 (2013).

30. *Id.* at 712-713.

31. *Id*. at 718-719 ("the absence of such a policy does not create an expectation of privacy where it would not otherwise exist").

32. *Id*. at 731-732 (Scalia, J., concurring in judgment; Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting).

33. *Id.* at 726-729. The parties were in dispute about the actual justification for the search and seizure, with the hospital claiming it initiated the search to secure property "as part of the established hospital policy to inventory property within offices of departing, terminated or separated employees" and Dr. Ortega contending that the intrusion was an investigatory search initiated for the sole purpose of discovering evidence to use in administrative proceedings. *Id*. at 727.

34. *Haynes v. Office of the Attorney Gen. Phill Kline*, 298 F. Supp. 2d 1154, 1160 (D. Kan. 2003) ("The beginning point for any discussion of the law concerning public employer searches in government workplaces must begin with the plurality opinion of the United States Supreme Court in *O'Connor v. Ortega*. This opinion provides the groundwork for analyzing these types of claims, although it does not involve a search of computer files.") (citation omitted).

35. *Levanthal v. Knapek*, 266 F.3d 64, 75 (2d Cir. 2001) (where the employee challenged the legality of the searches).

36. *Id*. at 68 (alleging grade 27 employee was late to work every day, spent the majority of time on non-DOT business related phone calls or talking to other personnel about personal computers, and was only in the office half the time).

37. *Id*.

38. *Id*. at 69.

39. *Id*. at 73 (quoting *O'Connor*, 480 U.S. at 715).

40. *Id*. (quoting *O'Connor*, 480 U.S. at 717-718).

41. *Id*. at 73-74 (stating that although technical personnel had access to all DOT computers for maintenance and occasionally obtained documents from an unattended computer, "[t]his type of infrequent and selective search for maintenance purposes or to retrieve a needed document, justified by reference to the 'special needs' of employers to pursue legitimate work-related objectives, does not destroy any underlying expectation of privacy that an employee could otherwise possess in the contents of an office computer").

While the Court of Appeals was aware that actual office practices and procedures or legitimate regulation can reduce an employee's expectation of privacy, it found the DOT did not have either a general practice of routinely conducting searches of office computers and did not place Levanthal on notice that he should have no expectation of privacy in the contents of his office computer. While the DOT did have an anti-theft policy that prohibited the "improper use of state equipment including conducting personal business on State time," it did not define "use" or "personal business." *Id*. at 74. However, the policy did not prohibit the storage of personal materials in office computers. The "acting director of the DOT's Office of Internal Audits and Investigations testified at Leventhal's disciplinary hearing that an employee would not violate state policies by keeping a personal checkbook in an office drawer, even though it would take up space there." *Id*. Under these circumstances and viewing the policy in the light most favorable to Leventhal, the Court of Appeals could not conclude that the anti-theft policy prohibited Leventhal from storing personal items in his office computer. *Id*.

42. *Id*. at 75.

43. *Id*. at 67.

44. *Id*. at 76.

45. *Id*. at 76-77.

46. *Id*.

47. *In re Asia Global, Ltd.*, 322 B.R. 247, 256-57 (Bankr. S.D.N.Y. 2005) (where the main question raised was whether an employee's use of company's e-mail system to communicate with his personal attorney destroyed the attorney-client, work product or joint defense privileges in e-mail and stating, "Although e-mail communication, like any other form of communication,

carries the risk of unauthorized disclosure, the prevailing view is that lawyers and clients may communicate confidential information through unencrypted e-mail with a reasonable expectation of confidentiality and privacy" and noting that New York CPLR 4548 (McKinney 1999) provides that "a privileged communication does not lose its privileged character for the sole reason that it was sent by e-mail or because persons may have access to its content") (citations omitted).

48. *Id*. Among the cases the *Asia Global* bankruptcy court cited were *United States v. Simons*, 206 F.3d 392, 398 n.8 (4th Cir. 2000) (where employer's official Internet usage policy provided that use of the Internet was for official government business only, accessing unlawful material was specifically prohibited, and employer would conduct electronic audits to ensure compliance); *Muick v. Glenayre Elec*., 280 F.3d 741, 743 (7th Cir. 2002) (where employee handbook provided employer could inspect laptops it owned and furnished to employees); *Thygeson v. U.S. Bankcorp*., 2004 WL 2066746 at *20 (D. Or.) (where employer had an explicit policy banning personal use of office computers and permitting monitoring); *Kelleher v. City of Reading*, 2002 WL 1067442, at *8 (E.D. Pa.) (where city's guidelines regarding expectation of privacy explicitly informed employees that there was no expectation of privacy); *Haynes*, 2005 WL 2704956, at *4 (where a flash-screen warning was displayed every time employee logged on).

49. *Id*. Applying the four factor test, the *Asia Global* judge found the evidence regarding the existence or notice of corporate policies banning certain uses or monitoring employees' e-mails was "equivocal." *Id*. at 259-260. Therefore, he was "unable to conclude as a matter of law that [the employees'] use of [their employer's] e-mail system to communicate with their personal attorney eliminated any otherwise existing attorney-client privilege." *Id*.

50. *See, e.g., In re the Reserve Fund Sec. and Derivative Litig*., 275 F.R.D. 154, 159-60 (S.D.N.Y. 2011) (stating the four factor test "regarding the 'reasonable expectation of privacy' determination in the context of email transmitted over and maintained on a company server" has been "widely adopted"); *United States v. Finazzo*, 2013 WL 619572, at *7 (E.D.N.Y. 2013) ("Although the test is only advisory, because it is 'widely adopted' by many courts, it is a good framework with which to conduct this highly fact-dependent analysis.").

51. *Id*.

52. *United States v. Mett*, 178 F.3d 1058, 1065 (9th Cir. 1999) (discussing attorney-client privilege), *cert. denied by*, 536 U.S. 961 (2002); *see also Harvey v. Standard Insurance Co*., 275 F.R.D. 629, 734-635 (N.D. Ala. 2011) (discussing attorney-client privilege and noting this was not a hard case).

53. *Reserve Fund Secs*., 275 F.R.D. at 160.

54. *See, e.g*., *United States v. Nagle*, 2010 WL 3896200, at *4 (M.D. Pa. 2010) (finding the first factor favored employee where the policy did not forbid use of company-owned computers for personal purposes but instead merely stated employees' Internet and e-mail activity was not private).

55. *See, e.g., Aventa Learning*, *Inc. v. K12, Inc*., 830 F. Supp. 2d 1083, 1109 (W.D. Wash. 2011) (finding no reasonable expectation of privacy where company "discouraged" personal use and advised its systems "should generally be used only for [company] business"); *Hanson v. First Nat. Bank*, 2011 WL 5201430, at *6 (S.D. W. Va. 2011) (finding no reasonable expectation of privacy despite policy allowing "[i]ncidental and occasional personal use" of its systems); *In re Info. Mgmt. Servs., Inc. v. Derivative Litig*., 81 A.3d 278, 289 (Del. Ch. 2013) (finding no reasonable expectation of privacy where company's policy provided employees "should assume files and Internet messages are open to access by [company] staff" and "[a]fter hours you may use [company] computers for personal use but if you want to keep the files private, please save them off line," and although policy was less detailed than other policies, it sufficiently put employee on notice that e-mail was not private).

56. *United States v. Finazzo*, 2013 WL 619572, at *8 (E.D.N.Y. 2013).

57. *Id.* (where company's policy stated specific instances of use that are always impermissible, such as "solicitations for commercial ventures; religious or political issues; or outside organizations" and banned the "distribution of chain letters or copyrighted or otherwise protected materials").

58. *Id*.

59. *Id*.; *see Thygeson*, 2004 WL 2066746, at *20 (finding no expectation of privacy where employer's policy explicitly banned personal use of office computers and permitted monitoring); *Kelleher*, 2002 WL 1067442, at *8 (finding no reasonable expectation of privacy where city's guidelines regarding expectation of privacy explicitly informed employees there was no expectation of privacy); *but see People v. Wilkinson*, 20 Misc. 3d 414, 421, 859 N.Y.S.2d 356, 361 (Onondaga Co. 2008) (finding officers charged with crimes had a legitimate and reasonable expectation of privacy where the police department's written policy permitted, if not encouraged, employees to utilize computers for "personal needs at minimal or no cost to the taxpayer").

60. *Reserve Fund Secs*., 275 F.R.D. 160, 161 (holding employee had no reasonable expectation of privacy in e-mail sent to wife using company e-mail system and thus communications were not protected by marital communications privilege).

61. *Id*.

62. *United States v. Hatfield*, 2009 WL 3806300, at *10 (E.D.N.Y.) (involving attorney-client privilege).

63. *Id*. at *10 n.14 (where company's policy provided employees were "expected" to use company equipment "solely for business purposes" and set forth several specific activities that were "strictly prohibited," but did not prohibit employees from using company computers to conduct legal matters, court found the first factor favored the employee).

64. *Id*.

65. *Id*. at *10 (concluding, after weighing all five factors, employee did not waive attorney-client privilege).

66. *Information Mgmt. Servs*., 81 A.3d at 289.

67. *See, e.g., Goldstein v. Colborne Acquisition Co., LLC*, 2012 WL 1969369, at *5 (N.D. Ill. 2012) (finding a mere policy rather than a practice of monitoring weighed in favor of finding no waiver); *Hatfield*, 2009 WL 3806300, at *9 (finding where employer reserved the right to review an employee's hard drive, but never actually did so, there could still be a reasonable expectation of privacy).

68. *United States v. Finazzo*, 2013 WL 619572, at *9 (E.D.N.Y. 2013) (involving marital communication privilege); *see, e.g., Long,* 2006 WL 2998671, at *3 (finding no expectation of privacy where employer's policy warned employees they had "no right of personal privacy" and employer reserved the right to monitor its systems); *Scott*, 17 Misc. 3d 934, 847 N.Y.S.2d at 442 (finding no expectation of privacy where "[a]lthough [employer] acknowledges that it did not monitor the [employee's] e-mail, it retain[ed] the right to do so."); *Hanson,* 2011 WL 5201430, at *6 (finding no expectation of privacy where employer reserved right to monitor, even though there was no evidence of actual monitoring, and stating "most Courts have not required evidence [that the employer actually monitored its employees' use of its computer system]. Rather, the employer's reservation of the right to do so sufficed as a basis for concluding the employees had no reasonable expectation of privacy."); *Reserve Fund Secs.*, 275 F.R.D. at 161–62 (rejecting the suggestion that court should ignore employer's policy about use of its e-mail system because it had "tacitly allowed employees to [breach its policy about personal use of

its systems] and did not intervene"); *see also Muick*, 280 F.3d at 743 (although Glenayre was not a public entity, the court recognized there can be a right of privacy enforceable under the Fourth Amendment if employer is a public entity and stated, "the abuse of access to workplace computers is so common (workers being prone to use them as media of gossip, titillation, and other entertainment and distraction) that reserving a right of inspection is so far from being unreasonable that the failure to do so might well be thought irresponsible").

69. *Id.*

70. *Id.* (citing *United States v. Mejia*, 655 F.3d 126, 134 (2d Cir. 2011)).

71. *Reserve Fund Secs.*, 275 F.R.D. at 163.

72. *Id.* at 164.

73. *Asia Global*, 322 B.R. at 257 n.7 (citing *Haynes,* 298 F. Supp. 2d at 1161-1162 (finding employee had reasonable expectation of privacy in private computer files, despite computer screen warning that there shall be no expectation of privacy in using employer's computer system, where employees were allowed to use computers for private communications, were advised that unauthorized access to user's e-mail was prohibited, employees were given passwords to prevent access by others and no evidence was offered to show employer ever monitored private files or employee e-mail); *Levanthal v. Knapek*, 266 F.3d 64 (2d Cir. 2001) (finding employee had reasonable expectation of privacy in contents of workplace computer where employee had a private office and exclusive use of his desk, filing cabinets and computers, and where employer did not have a general practice of routinely searching office computers, and had not "placed [the plaintiff] on notice that he should have no expectation of privacy in the contents of his office computer"); *United States v. Slanina,* 283 F.3d 670, 676–77 (5th Cir. 2002) (finding employee had reasonable expectation of privacy in computer and files where computer was maintained in a closed, locked office, employee installed passwords to limit access, and employer "did not disseminate any policy that prevented the storage of personal information on city computers and also did not inform employees that computer usage and internet access would be monitored"), *vacated on other grounds,* 537 U.S. 802 (2002).

74. *Asia Global*, 322 B.R. at 257-258 (citing *Garrity v. John Hancock Mut. Life Ins. Co.,* 2002 WL 974676, at *1–2 (D. Mass. 2002) (finding no reasonable expectation of privacy where, despite the fact that employee created a password to limit access, company periodically reminded employees that company e-mail policy prohibited certain uses, e-mail system belonged to company, and although company did not intentionally inspect e-mail usage, it might do so where there were business or legal reasons to do so, and plaintiff assumed her e-mails might be forwarded to others); *see Silverberg & Hunter, L.L.P. v. Futterman*, 2002 WL 34461954 (N.Y. Sup. 2002) (Trial Order) ("Protecting files with a password may not be used to bootstrap a privacy claim where (a) the recognized expectation is that none exists; and (b) the act purportedly used to create it is wrongful to begin with.").

75. *United States v. Finazzo*, 2013 WL 619572, at *10 (E.D.N.Y. 2013).

76. *Id.* (*citing Covertino v. United States Dept. of Justice*, 674 F. Supp. 2d 97, 108-110 (D.D.C. 2009) (finding reasonable expectation of privacy in e-mail sent by private attorney to his DOJ account where he "delete[d] the e-mails as they were coming into his account" and "was unaware that [the DOJ] would be regularly accessing and saving such e-mails"); *Curto v. Medical World Comms.*, 2006 WL 1318387, at *5-6 (E.D.N.Y.) (finding employee had reasonable expectation of privacy in company-provided laptops where she attempted to delete the confidential files before returning them and the "laptops were not connected to [employer's] computer server [and therefore employer] was not able to monitor [her] activity…or intercept her e-mails at any time")).

77. *United States v. Angevine*, 281 F.3d 1130 (10th Cir. 2002) (where police department executed a search warrant after being informed by Angevine's wife child pornography was on computer and where university posted a "splash screen" on its computers, and each time professor turned on the computer, a banner appeared that provided, among other things, that "all electronic mail messages are presumed to be public records and contain no right of privacy or confidentiality," and where university reserved the right to inspect electronic mail, warned of criminal penalties for misuse, and forbade downloading obscene material in violation of state and federal law), *cert. denied*, 537 U.S. 845 (2002).

78. *Id.* (stating the court had "never held the Fourth Amendment protects employees who slip obscene computer data past network administrators in violation of a public employer's reasonable office policy").

79. *In re Reserve Fund Secs.*, 275 F.R.D. at 164 (considering whether employee was on actual or constructive notice that e-mail could be read or otherwise monitored by third parties).

80. *Scott v. Beth Israel Med. Ctr., Inc.*, 17 Misc. 3d 934, 942, 847 N.Y.S.2d 436, 443 (Sup. Ct. N.Y. Co. 2007) (rejecting Dr. Scott's argument that this factor violated HIPAA, the federal statute that protects patient information, because the e-mail at issue was between Dr. Scott and his attorney and because a "hospital can certainly have access to its patients' information"); *see also Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, 363 F.3d 177, 184-185 (2004) (stating "Whatever reasonable expectations of privacy Shaul may have had in personal property maintained in his classroom while he was a teacher in good standing, that expectation ended when, after being suspended for professional misconduct and barred from his classroom, he surrendered all school keys, including a key to a locked file cabinet in his classroom, at the same time that he failed to avail himself of an opportunity to retrieve his personal belongings. To the extent Shaul complains that defendants did not give him enough time to remove all his belongings on a subsequent occasion, we hold that even if that were the case, by January 30th defendants had reasonable investigatory and non-investigatory grounds for searching the classroom and removing plaintiff's personal property so that a new teacher could complete the school year.").

81. *Id*.

82. *Id.*; *see Forward v. Foschi*, 27 Misc.3d 1224(A), 911 N.Y.S.2d 692 (Sup. Ct. Westchester Co. 2010) (discussing CPLR 4548), *reargument denied*, 31 Misc. 3d(A) (2010). Other jurisdictions, such as Delaware and New Jersey, have found the third factor is "most helpful when analyzing webmail or other electronic files that the employer has been able to intercept, recover, or otherwise obtain," *Information Mgmt. Servs.*, 81 A.3d at 290-291, and that employees have a lesser expectation of privacy when they communicate via a company e-mail system as compared to a web-based account. *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650, 662 (N.J. 2010). In *Information Management Services*, the New Jersey court stated, "In a work email case, this factor largely duplicates the first and second factors, because by definition the employer has the technical ability to access the employee's work email account." 81 A.3d at 290.

83. *See United States v. Finazzo*, 2013 WL 619572, at *10 (E.D.N.Y. 2013) (finding it was unreasonable for Finazzo to conclude company did not monitor e-mail system merely because CEO was never disciplined for violating company's rules about personal use of e-mail); *see also Long*, 2006 WL 2998671, at *3 (finding privilege waived where proponent "disregarded" the "clear and unambiguous" warning that company computer systems were not private and could be monitored); *but see Nagle*, 2010 WL 3896200, at * 5 (finding employee's belief that information on the hard drive would remain private was objectively reasonable where, even assuming the existence of a computer policy, employee was not aware of a policy and had never seen or signed a policy).

84. *Finazzo*, 2013 WL 619572, at *10.

85. *See, e.g., In re High-Tech Emp. Antitrust Litig.*, 2013 WL 772668, at *7 (N.D. Cal. 2013) (assuming constructive knowledge where employee was a high level executive and admitted familiarity with the company's policies); *Aventa Learning*, 830 F. Supp. 2d at 1107 (ascribing constructive knowledge of company's privacy policy to a "senior level manager" who was "expected to know of the contents of company policies"); *United States v. Bailey*, 272 F. Supp. 2d 822, 836 (D. Neb. 2003) (finding even though employee's computer was password-protected, his claim of a subjective expectation of privacy was not credible where, as a high school grad who became an automotive technician and passed licensing requirements to sell insurance, he was capable of reading and understanding the screen banner notifying him that computer could be searched); *Hatfield*, 2009 WL 3806300, at *9 (presuming employee, as Chairman and CEO, had knowledge of company's computer use policy).

86. *Scott v. Beth Israel Med. Ctr.*, 17 Misc. 3d 934, 942 (N.Y. Sup. Ct. 2007).

87. *Long v. Marubeni America Corp.*, 2006 WL 2998671, at *3 (S.D.N.Y. 2006) (where company's "Electronic Communications Policy" provided that: "(a) use of MAC's automated systems for personal purposes was prohibited; (b) MAC employees 'have no right of personal privacy in any matter stored in, created, or sent over the e-mail, voice mail, word processing, and/or internet systems provided by MAC; and (c) MAC had the right to monitor all data flowing through its automated systems.'").

88. *Id*.

89. *See, e.g., U.S. v. Bailey*, 272 F. Supp. 2d 822, 836 (D. Neb. 2003) (finding employee did not have a reasonable expectation of privacy where employee could not access his e-mail account, or any other computer file or program, without first acknowledging that he understood computer resources were solely owned by employer, and "use of this computer system [was] consent to be monitored and authorization to search" his computer, even though he claimed he did not routinely read the screen notification); *see also Angevine*, 281 F.3d at 1134 (finding no expectation of privacy where a "splash screen" warned of criminal penalties and employer's right to conduct inspections to protect business-related concerns); *Haynes*, 2005 WL 2704956, at *4 (finding employee clearly "on notice that he did not have an expectation of privacy in [his work] computer and its contents" where a flash-screen warning to that effect was displayed every time employee logged on his computer); *United States v. Sims*, 2001 WL 36498440 (D.N.M.) (finding no expectation of privacy where a "warning banner" notified employees that computer system was for authorized use only and "[u]sers (authorized or unauthorized) have no explicit or implicit expectation of privacy"), *aff'd*, 428 F.3d 945 (10th Cir. 2005).

90. *United States v. Etkin*, 2008 WL 482281, at *6 (S.D.N.Y.).

91. *Id*.

92. *Id*. at *3.

93. *Id*. at *4.

94. *Id*. (citations omitted).

95. *Id*. at *5.

96. *Id*. at *6.

97. *City of Ontario v. Quon*, 560 U.S. 746 (2010). The Supreme Court disagreed with the Ninth Circuit's suggestion that less intrusive means would have produced the same information. Such a suggestion "was inconsistent with controlling precedents," as the Court has repeatedly refused:

> to declare that only the "least intrusive" search practicable can be reasonable under the Fourth Amendment (citations omitted). That rationale 'could raise insuperable barriers to the exercise of virtually all search-and-seizure powers," (citations omitted) because 'judges engaged in *post hoc* evaluations of government conduct can almost always imagine some alternative means by which the objectives of the government might have been accomplished' (citation omitted). The analytic errors of the Court of Appeals in this case illustrate the necessity of this principle. Even assuming there were ways that OPD could have performed the search that would have been less intrusive, it does not follow that the search as conducted was unreasonable. *Id*. at 763-764.

98. *Id*. at 751.

99. *Id*. at 751-752, 897-898.

100. *Id.*

101. *Id*. at 751-752.

102. *Id.* at 897-98.

103. *Id.* at 889.

104. *Id.* at 752-53.

105. *Id.* at 746.

106. *Id.* at 751.

107. *Id*. at 757. *See* footnote 35 *supra* regarding the Court's reluctant to take a stance on whether the approach taken by the *O'Connor* plurality or Justice Scalia's approach was the correct approach. Justice Scalia, concurring, offered a different approach:

> The government like any other employer, needs frequent and convenient access to its desks, offices, and file cabinets for work-related purposes. I would hold that government searches to retrieve work-related materials or to investigate violations of workplace rules—searches of the sort that are regarded as reasonable and normal in the private employer context—do not violate the Fourth Amendment.

Id. at 732.

Justice Stevens, concurring, wrote:

> Although I join the Court's opinion in full, I write separately to highlight that the Court has sensibly declined to resolve whether the plurality opinion in *O'Connor v. Ortega* provides the correct approach to determining an employee's reasonable expectation of privacy. Justice Blackmun, writing for the four dissenting Justices in *O'Connor,* agreed with Justice SCALIA that an employee enjoys a reasonable expectation of privacy in his office. But he advocated a third approach to the reasonable expectation of privacy inquiry, separate from those proposed by the *O'Connor* plurality and by Justice SCALIA. Recognizing that it is particularly important to safeguard "a public employee's expectation of privacy in the workplace" in light of the "reality of work in modern time," which lacks "tidy distinctions" between workplace and private activities, Justice Blackmun argued that "the precise extent of an employee's expectation of privacy often turns on the nature of the search." And he emphasized that courts should determine this expectation in light of the specific facts of each particular search, rather than by announcing a categorical standard.

Id. at 765-766 (concurring opinion) (citations omitted).

108. *Id*. at 759-760 (citations omitted).

109. *Id*.

110. *Id*. at 760.

111. *Id.* at 761.

112. *Id.*

113. *Id.* at 762 (finding redacting off-duty messages was "a measure which reduced the intrusiveness of any further review of the transcripts"). The Court, still assuming that Quon had a reasonable expectation of privacy in the contents of his messages, stated that "the extent of an expectation is relevant to assessing whether the search was too intrusive." *Id*. Even if Quon could assume that some level of privacy would inhere in his messages, it was unreasonable for him to conclude that that his messages would not be reviewed when he had been advised that his messages were subject to auditing. *Id*. Although intimate details of his life, including some sexually explicit messages sent by the married Quon to his girlfriend, were revealed during the search, this did not make the search unreasonable, "for under the circumstances a reasonable employer would not expect that such a review would intrude on such matters." *Id*. at 763.

114. *Cunningham v. New York State Dep't of Labor*, 21 N.Y.3d 515 (2013).

115. *Id*. at 520-521.

116. *Id*. at 522.

117. *Id.* at 521.

118. *Id*. at 522.

119. *Id.* at 522-523.

120. *Id.* at 523 (citing *United States v. Martell*, 654 F.2d 1356, 1361 (9th Cir. 1981)).

121. *Id.* (quoting *People v. Weaver*, 12 N.Y.3d 433, 441 (2009)).

122. *Carter v. Cnty. of Los Angeles*, 770 F. Supp. 2d 1042 (C.D. Cal. 2011) (alleging, among other misconduct, Richards had engaged in sexual activity with a visitor in the dispatch room while she was on night duty); *Richards v. County of Los Angeles*, 775 F. Supp. 2d 1176 (C.D. Cal. 2011) (same); *see also Devittorio v. Hall*, 347 Fed. Appx. 650 (2d Cir. 2009) (finding video recorder did not infringe officers' expectation of privacy in workplace locker room).

123. 770 F. Supp. 2d at 1049; 775 F. Supp. 2d at 1182.

124. 770 F. Supp. 2d at 1050; 775 F. Supp. 2d at 1180 (where the space was used not just for work, but also for resting, eating, and napping and was furnished with objects, such as a television and good cooking items, reserved for a home, not work, setting, and the presence of such objects in the dispatch room office supported the plaintiffs' characterization of the room as a "second home" and private and noting plaintiffs performed acts normally reserved for private spaces and which further bolstered employees' belief that dispatch room was private, such as changing in or out of workout clothes, pumping breast milk, adjusting or undoing bras, applying deodorant, picking pimples, removing or adjusting sanitary napkins, and picking noses).

    The court found it important "to make clear that its determination that Plaintiffs' had a reasonable expectation of privacy in the dispatch room does not depend on the fact that the dispatch room had locked doors or that employees occasionally worked alone. Absent the aforementioned—and unusual—workplace scenario where a government's office is so open to others that no expectation of privacy would be reasonable, an employee has a Constitutionally protected right to privacy in the workplace. This right undeniably extends to shared offices." 770 F. Supp. 2d at 1050; 775 F. Supp. 2d at 1183-1184.

125. 770 F. Supp. 2d at 1050 (quoting *United States v. Taketa*, 923 F.2d 665, 673 n.1 (9th Cir. 1988)); 775 F. Supp. 2d at 1183 (same).

126. 770 F. Supp. 2d at 1046; 775 F. Supp. 2d at 1179.

127. 770 F. Supp. 2d at 1052 (citing Fed.R.Civ.P. 56(c)); 775 F. Supp. 2d at 1186 (same).

128. 770 F. Supp. 2d at 1051; 775 F. Supp. 2d at 1184.

129. 770 F. Supp. 2d at 1051; 775 F. Supp. 2d at 1184 (although court was mindful that an employer is not limited to employing the least intrusive search practicable, it noted that several alternatives existed, such as only video recording Richards when she worked alone).

130. 770 F. Supp. 2d at 1052 (*citing* Fed. R. Civ. P. 56(c)); 775 F. Supp. 2d at 1186 (same); *see Thompson v. Johnson Cnty. Cmty. Coll.*, 930 F. Supp. 501, 508 (D. Kansas 1996) ("[V]iewing the facts in a light most favorable to plaintiffs, the court finds that they did not have a reasonable expectation of privacy in the security personnel locker area. This area was not enclosed. Plaintiffs' activities could be viewed by anyone walking into or through the storage room/security personnel locker area. Additionally, plaintiffs cannot maintain that the security personnel locker area was reserved for their exclusive use considering that other college personnel also had regular access to this area. The court finds that both the inception and the scope of the video surveillance defendants conducted was reasonable. It is uncontroverted that defendants' purpose for the video surveillance was work-related; they were investigating reports of employee misconduct in the locker area. Security personnel complained to supervisors that items were stolen from their lockers and that some security officers were bringing weapons on campus. Defendants established the video surveillance for a limited period of time to confirm or dismiss those allegations. Thus, the court concludes that the video surveillance of the security personnel locker area was reasonable and that, as a matter of law, summary judgment on this issue is appropriate.").

131. *Brannen v.Kings Local Sch. Dist. Bd. of Educ.*, 144 Ohio App. 3d 620, 626 (Ct. App. Oh. 2001).

132. *Id*. at 631.

133. *Id*.

134. *Id*.

135. *Id*.

136. *Id*.

137. *Thompson v. Johnson Cnty. Cmty. Coll.*, 930 F. Supp. 501, 508 (D. Kansas 1996), *aff'd*, 108 F.3d 1388 (1997).

138. *Id*. at 507 (citing *United States v. Falls*, 34 F.3d 674, 678 (8th Cir. 1994); *United States v. Koyomejian*, 970 F.2d 536, 541 (9th Cir. 1992).

139. *Id.*

140. *Id.*

141. *Id.*

142. *O'Connor,* 480 U.S. at 724.

143. *United States v. Taketa*, 923 F.2d 665, 675 (9th Cir. 1991) (quoting *O'Connor*, 480 U.S. at 724).

144. *See, e.g.*, *United States v. Nasser*, 476 F.2d 1111, 1123 (9th Cir. 1973) (upholding as reasonable government employer's electronic surveillance that yielded evidence of criminal misconduct where surveillance was undertaken to determine whether employer's work was being properly performed by employee); *United States v. Linder*, 2012 WL 3264924, at *11 (N.D. Ill.) (stating, "A workplace search still falls within the *O'Connor* framework even if the purpose of the search is to discover evidence of criminal activity."), *recon. den'd*, 2013 WL 505214 (N.D. Ill.).

145. *See, e.g.*, *United States v. Slanina*, 283 F.3d 670, 679 (2002) (finding *O'Connor* exception extended to a situation in which criminal work-related misconduct was being investigated by employer who was also a law enforcement officer and stating that any evidence of criminal acts was also proof of work-related misconduct), *vacated on other grounds*, 537 U.S. 802 (2002); *Simons*, 206 F.3d at 400 (finding the search fell within the

O'Connor framework where primary purpose of warrantless search by the CIA of employee's office was to discover evidence of criminal wrongdoing because employer "did not lose its special need for the efficient and proper operation of the workplace merely because the evidence obtained was of a crime"); *Gossmeyer v. McDonald*, 128 F.3d 481, 492 (7th Cir. 1997) (finding a legitimate warrantless search looking for evidence of a workplace misconduct is not transformed into an illegitimate law enforcement search merely by virtue of the presence of law enforcement officers in the search team).

146. *United States v. Reilly*, 2002 WL 1163572 (S.D.N.Y.).
147. *Id*. at *1.
148. *Id*. at *2.
149. *Id*.
150. *Id*.
151. *Id*.
152. *Id*. at *4.
153. *Id*. (citing *O'Connor*, 480 U.S. at 725-726).
154. *Id*. (citing *O'Connor*, 480 U.S. at 723).
155. *Id*.
156. *Id*. at *5. Reilly argued that by preventing him from putting the diskette, which was on his desk, into his bag with his other personal possessions, the agent seized the diskette from his person. *Id*. at n.2. The Court rejected this argument, stating that "attempting to grab a diskette in plain view on a desktop cannot transform a search of his cubicle into a search of his person." *Id*.
157. *Id*.
158. *Id*. (quoting *Simons*, 206 F.3d at 400) (assuming dominant purpose of warrantless search of Simon's office was to acquire evidence of criminal activity, court found search remained within the *O'Connor* exception to the warrant requirement—employer did not lose its special need for "the efficient and proper operation of the work place" merely because the evidence obtained was evidence of a crime and stating, "Simons' violation of FBIS' Internet policy happened also to be a violation of criminal law; this does not mean that FBIS lost the capacity and interests of any employer"); *see also Cerrone v. Cahill*, 246 F.3d 194, 200 (2d Cir. 2001) ("The crucial question is not whether the investigation involves actions arising out of a police officer's duties, but whether the investigation's objective is to discipline the officers within the department or to seek criminal prosecution."); *United States v. Taketa*, 923 F.2d 665, 674 (9th Cir. 1991) (holding that a public employer "cannot cloak itself in its public employer robes in order to avoid the probable cause requirement when it is acquiring evidence for a criminal prosecution."); *United States v. Johnson*, 871 F. Supp. 2d 539, 550 (W.D. La. 2012) (finding the search of police officer's desk "was anything but 'non-investigatory'; it was part of an extensive investigation into criminal activity unrelated to his work… Indeed, the search was conducted by law enforcement officers…in their capacity as investigators, not employers.").

Karen M. Richards is an Associate Counsel with the Office of General Counsel, State University of New York. The views expressed are her own and do not necessarily represent the views of the State University of New York or any other institution with which she is or has been affiliated.

Local Development Corporations in the Eye of the Comptroller

By Kenneth W. Bond

Introduction

New York State (State) law severely restricts the power of local governments[1] to issue debt under the State Constitution (Constitution). All local government debt must be "full faith and credit" debt supported by a pledge of real property taxes. This legal restriction has continued unabated since the mid-19th century when the Constitution placed limits on the type,[2] source of repayment,[3] purpose,[4] and application of proceeds.[5] As the party responsible for the issuance of municipal bonds, local governments, together with their bond counsel and financial advisors, have universally shown respect for this restriction, save errant deals to finance municipal facilities through Industrial Development Agencies (IDAs).[6] The State monitors local government debt for compliance with the Constitution through the audit power of the State Comptroller (Comptroller or OSC). OSC, in its published audit reports, is not shy to blast local governments that step over the line.

Unlike many states, New York law does not empower local governments to finance public facilities with revenue bonds[7]—any bonds (whether paid from a discrete stream of project revenues or legislative appropriations) *not* supported by the "full faith and credit" pledge. In contrast, State public authorities[8] have been given a pass in compliance with the Constitution.[9] If a local government wants to issue revenue bonds, it has to obtain State-enabling legislation to establish a public authority to issue the bonds—an expensive, politically charged and tiresome process. However, over the past several years, local governments have inched toward a revenue bond regime of their own, largely by accident, without the benefit of State legislation and now with the tacit acquiescence of OSC. The story of how this happened follows.

Finding a Replacement for Civic Facility Bonds

In 2008, a popular form of conduit financing through IDAs, known as civic facilities bonds (CFBs), which permitted IDAs to finance non-profit healthcare and educational facilities through tax-exempt bonds expired—permanently. Giving up on its resurrection, finance professionals attempted to substitute CFBs issued through IDAs with bonds issued by local development corporations (LDCs).[10] Here is how that works: The governing body of a local municipality establishes an LDC with the purpose to "lessen the burdens of government and act in the public interest" as an "on behalf of" entity or "instrumentality" of the local government.[11] The LDC owns and/or finances a public purpose which the local government does not want to or legally cannot[12] finance under the Constitution or Local Finance Law (LFL). The LDC, operating with general corporate powers under the State Not-for-Profit Corporation Law (NFPCL), issues bonds paid from revenues of the facility or, if there is a revenue shortfall, from annual appropriations of the local government. To date, no suit has been brought that this arrangement, whereby a subsidiary entity of a local government issues debt for the benefit of the local government, is unconstitutional local government debt. Under this structure, without enacting or amending any State law, local governments through an LDC have instituted the use of revenue bond financing, a concept on its face strictly prohibited by the Constitution.[13]

LDCs were first engaged to acquire underperforming assets of local governments, namely, county nursing homes. Getting these facilities off the books of local governments improved budgets by eliminating deficits and placed the facility's procurement operations out of the reach of the Wicks Law,[14] prevailing wage requirements and Article VIII of the Constitution. Again, nobody sued. But the Comptroller put his foot down.

Finding Risk, Fraud and Abuse of Taxpayers

In an April 2011 report ("2011 Report"),[15] the Comptroller chastised the use of LDCs to do anything except act as an administrative arm of an IDA for economic development purposes as increasing the risk of "waste, fraud and abuse of taxpayer dollars." OSC introduced legislation to prevent the use of LDCs to finance local government purposes which can be (and should be, in the Comptroller's view) financed solely under the provisions of the Constitution and the LFL.[16] Although the Comptroller has no authority to audit LDCs (a source of understandable frustration),[17] LDC bond issues were inspected by OSC nonetheless where a "financial relationship" exists with a local government being audited. The 2011 Report found LDCs were engaged primarily to avoid the restrictions of the Constitution and the LFL on incurring local government debt—not good.

Chief among the offenses discussed in the 2011 Report in using LDCs is reliance on the statutory phrase in NFPCL §1411 "lessening the burdens of government and acting in the public interest" as the primary purpose of an LDC, rather than the purpose OSC believes was intended by the Legislature; promote economic development through administering intergovernmental grants funds. But since CFBs were gone for good after 2008, by growing custom and use without a lawsuit filed, LDCs became not only an administrative arm of IDAs, but a debt-issuing body for local governments as well. And what a relief it was to issue local government purpose debt under the broad corporate powers of a NFPCL,[18] and escape the strictures of the Constitution and the LFL. In an LDC financing, local governments might have the best of both worlds: (i) structural flexibility to finance public purposes with (ii) a corporate entity which is the *alter ego* of the local government.

As the sale of deficit-ridden nursing homes to LDCs gained favor among counties, the OSC report reminded officials that pubic assets cannot be sold unless obsolete, subject to a public hearing and at "fair value" (and sometimes sold at competitive sale to assure the best price). The 2011 Report also pointed out that LDCs were no longer just not-for-profit corporations. Under "authority reform legislation" enacted in 2005[19] and 2009[20] they were now local "public benefit corporations" subject to the same rules on reporting financial information to, and required ethics training for directors from, the Public Authorities Budget Office (PABO). Although the PABO compliance burden might give pause to engage an LDC just to circumvent the Constitution and the LFL, the PABO monitoring function had the salient effect of bringing into analysis whether local government LDC debt should be entitled to the same permissive jurisprudence by which the State Court of Appeals has permitted State "public benefit corporations" to pile up billions of dollars of state appropriation-backed debt[21] without voter approval.

The 2011 Report emphasizes that the sole purpose of LDCs is to provide economic development—not finance purposes which local governments finance under the LFL. It then provides unpleasant examples of instances where local governments have used LDCs when they should have financed under the LFL:[22] (i) Town of Watertown (2010)—the city gave money to an LDC which financed an ambulance service from which the city received no benefit from the service; (ii) Nyack Fire District (2009)—the fire district financed a new firehouse through an LDC and avoided a vote on the bond resolution and bypassed the Wicks Law; (iii) City of Yonkers (2006)—the city issued bonds to finance a library, gave the proceeds to the city school district, the school district formed an LDC[23] and loaned the library bond proceeds to the LDC to build a baseball stadium; (iv) Town of Cicero (2004)—the town formed an LDC and issued bonds guaranteed by the town to finance a park, the LDC bonds defaulted and the town bailed out the LDC debt and lost its credit rating.

There was more. Following the 2011 Report, further local government audits revealed more abuses: (i) Ramapo (2012)—after voters defeated a bond proposition to finance a baseball stadium, an LDC was formed to finance the stadium although stadium revenues were likely to be insufficient to pay debt service on LDC bonds; (ii) Monroe County (2012)—(a) county sold a coal plant to an LDC without an appraisal or soliciting bids and used the LDC bond proceeds to finance county budget deficits, (b) an LDC was formed to provide a county emergency technology/communications system, providers skimmed fees from the LDC and were indicted by the Monroe County district attorney for embezzlement and fraud. The 2011 Report underscores that just as local governments may not borrow to finance budget deficits[24] in the depths of the Great Recession, LDCs should not be given license to do so.

At bottom, the 2011 Report recommended that, among other things, (i) "lessening the burdens of government and acting in the public interest" should not be a stand-alone purpose for which an LDC may issue debt lest the Constitution and LFL be made impotent, (ii) local governments should not guarantee LDC debt, and (iii) OSC should have the power to audit LDCs independent of PABO and any financial arrangement with a local government. Ironically, OSC's proposed legislation in the Assembly to codify the recommendations of the 2011 Report died in the Senate, never to rise again.

LDCs in the Real World

Meanwhile, LDCs gained acceptance as quasi-revenue bond subsidiaries of local governments for both local government and economic development purposes. The revenue may be nothing more than an annual legislative budget appropriation, but the Court of Appeals on several occasions had long validated such appropriation-backed debt against complaints of State constitutional violations in the case of State public benefit corporations.[25] Why could not the same principles apply to LDCs established by local governments? The short answer was that LDCs are not created by the Legislature as Article 10, §5 of the Constitution requires.[26] The notion that an LDC could rise to the status of an entity like the Thruway Authority or the Dormitory Authority seemed ridiculous. But was it?

The 2005 and 2009 "authority reform" legislation, intended to tighten up administration and financial accountability of public benefit corporations, also introduced the concept of "local public authorities." The term reflects the Legislature's design to have increased long-arm regulatory jurisdiction not only over State

public authorities but also those formed to operate in a specific local government, namely, IDAs and LDCs. A primary mission of authority reform was to make it difficult from a State regulatory standpoint to operate IDAs and LDCs. Of central importance was creation of PABO,[27] directed to maintain fiscal oversight over "local public authorities" as well as the big State agencies. And what was a "local public authority?"—an LDC? Probably not because it was not formed by the Legislature and had no taxing power as Article X, §5 of the Constitution requires. But in *Griffiss LDC v. DiNapoli and PABO*[28] the Third Department said yes: an LDC is a local public authority because PABO has fiscal oversight jurisdiction over an LDC just as it does over State public authorities. That being the case, could an LDC issue debt for local government purposes such as a State public authority issues debt for State purposes? The question remains unanswered to this date. But in certain cases (not including the power to issue debt) New York adopts the rule of construction that characterizing an entity for one purpose implies it is imbued with all the powers and purposes of the entity.[29] Getting closer to finding LDCs may issue debt on behalf of a local government is the case of *Summers v. City of Rochester*[30] where the Fourth Department upheld an arrangement whereby the city guaranteed the debt of a limited liability company (of which the city was the sole member) which bought a ferry service across Lake Ontario that became bankrupt. In the city's picking up the LLC's debt,[31] the court said the city was not violating the gift or loan clause of Article VIII, §1 of the Constitution.[32] The court recognized the City as the sole member of the LLC, thereby making the LLC a ***de facto*** department or agency of the City. In much the same way, an LDC, as an on-behalf-of entity or instrumentality, acts as a department or agency of a local government. The LDC is not a private corporation to which the gift or loan prohibition is directed. *Griffiss LDC* and *Summers* point the way toward judicial loosening of the Constitutional strictures on local government debt paid for from a non-tax revenue issued by entities under their control which serve a public purpose. These entities issue revenue bonds, i.e., debt paid from a source other than real property taxes.[33]

The Comptroller Reconsiders the 2011 Report

In 2015 OSC again reported on the state of affairs of "local authorities" (the "2015 Report")[34] and again reminded us that LDCs operate without Constitutional constraints on incurring debt, making it difficult to assess their "efficiency" and leading to risk, fraud and taxpayer abuse. That premonition out of the way, OSC offered no proposed legislation except to ask again for the power to audit LDCs. Although the 2015 Report reiterated its position in the 2011 Report that the purposes of LDCs are solely economic development, it offered that LDCs may also be used to finance water systems, parking facilities and housing (sometimes through local authorities other than LDCs). In sum, OSC admitted that in light of the 2005 and 2009 authority reform legislation which placed LDCs under the regulatory umbrella of PABO, and, without saying so, in light of the holdings in *Griffiss LDC* and *Summers*, there are now "several types of public corporations that had not been universally regarded as public authorities before"[35] but now have pried open the door to the "public authority" club. This is OSC's tepid acknowledgement that LDCs have gained acceptability as revenue bond agencies of local governments. The 2015 Report's use of the term "public corporation" in describing an LDC is significant because it suggests that resort to the Legislature via Article X, §5 of the Constitution as the exclusive way to form a public authority is an outdated view. Perhaps a local public authority formed under a general law (i.e., the NFPCL) enjoys the power of borrowing on behalf of a local government just as a public authority established in the Public Authorities Law borrows on behalf of the State? Many states' statutes embrace this principle.[36]

Put another way, an LDC is not the "public corporation" which can only be established by the Legislature the Constitution had in mind. To the extent an LDC receives money from a local government, the money is an appropriated revenue, not taxes or assessments which the local government may pledge to levy under an agreement with the LDC. The local government's payment to the LDC is a "service fee" subject to annual appropriation. And in this respect, neither is the local government issuing invalid debt because its faith and credit are not pledged to the payment of an LDC's bonds as Article VIII of the Constitution requires for local government debt. LDC debt becomes "appropriation-backed" debt sanctioned by the Court of Appeals for the big State public agencies.[37] LDC bondholders take the risk that the local government may not appropriate the service fee in the future. But like "tax-exempt leasing" authorized under the General Municipal Law[38] (e.g., equipment, HAVC systems), the "essentiality" of the purpose financed (e.g., a water system, sewer system, etc.) implies that the likelihood of future non-appropriation is substantiality reduced. The essentiality factor (aren't these payments really local government debt?) versus the non-appropriation clause (no future legislature is bound to make a payment, so how can this be debt?) create an analytic tension which New York and other state supreme court cases have uniformly resolved to uphold appropriation-backed revenue bond financing.[39]

The 2015 Report indicates that OSC is aware of judicial resolution of this "analytic tension" and given that LDCs as "local authorities" are public authorities, save their formation under a general law rather than the Legislature, shows tolerance to LDC purposes other than economic development, stating "the ability

of local authorities to issue debt without some of the legal requirements to which counties, cities, towns and villages are subject can make such entities an attractive alternative source of financing projects in certain circumstances."[40] Those "certain circumstances" include, among others, local government purposes where LFL compliance would ruin the deal. An LDC as an "attractive alternative" is a long way from requiring LFL compliance "as the exclusive law" for local government financing recited in the 2011 Report. Yet OSC warns, somewhat tepidly, having relaxed the public corporation standard for LDCs "the relative freedom from restrictions [of the Constitution and LFL] means local authority debt may not come under the same public scrutiny as a local government's general obligation debt"[41]—i.e., no voter approval, no debt limits, and no competitive bidding.

The 2015 Report does not tell us why LDCs are an "attractive alternative" or why the "relative freedom from restrictions" is not likely to result in risk, fraud and taxpayer abuse. But developments in the municipal securities market, of which OSC is no doubt aware, give clues to the change in attitude between the 2011 Report and the 2015 Report. Two points stand out. First, private sector participants are now active in financing local government purposes as sources of capital rather than merely as contractors and vendors. For example, a community may need a new water or sewer plant and a developer may want water and sewer services brought to a new master plan tract in the community. Rather than just extend lines into the tract from an inadequate water or sewer plant, the developer may offer to "design, build, operate and finance" a new plant. This "public-private partnership" arrangement, for which no express statutory regime exists in New York[42] (as it does in 35 other states!) can be facilitated through LDC financing. LDC bondholders incur non-appropriation risk but both the community and developer are winners.

Second, although granting OSC audit power over LDCs would clearly be in the public interest, much of the State law "public scrutiny" imposed for general obligation debt, the avoidance of which OSC laments, is taken up today by Big Brother. To some extent, OSC can relax in unearthing shady deals because the U.S. Securities and Exchange Commission (SEC) is heavy on the back local government financing. The Wall Street reform legislation, known as Dodd-Frank,[43] among other things, requires the SEC to "protect investors" against securities fraud in the municipal bond market. 2013 saw stepped-up surveillance by the SEC looking for failure to continuously disclose throughout the life of local government bonds material facts an investor would take into account in buying or holding. In several "cease and desist" orders the SEC imposed financial penalties, suspension of underwriters from participating in municipal bond deals, and brought lawyers to the threshold of malpractice. In 2014 the SEC imposed a requirement on all municipal bond issuers and underwriters to disclose failures to report financial information and "material events" to the SEC reporting website in a timely fashion, throwing panic into hearts of issuers and underwriters, alike.[44] The point of the SEC's enforcement effort (its legality under the United States Constitution in doubt in this writer's view), is that no LDC bond issue is likely to be sold which is a sham transaction lest everyone involved risk paying large fines and going to jail. The days of the City of Troy IDA revenue bonds[45] are over. The feds have replaced traditional state law safeguards (i.e., Articles V [OSC audit powers], VII and VIII of the Constitution) not to protect taxpayers (who may be inadvertent third party beneficiaries of Dodd-Frank), but to protect the investing public. In this regard, the SEC has inured, in part, to the job of protecting the public reasonably sought by OSC in statutory audit authority over all LDCs. It is not that New York "public scrutiny" law should not be enforced in authorizing local government debt, but rather, if the financing itself develops a bad odor the SEC may sniff it out and investors (and, perhaps, taxpayers) warned of the risks.

Toward Revenue Bonds for Local Governments

The Comptroller concludes the 2015 Report with an exposition on "revenue debt" and "conduit debt." Other than to point out that most LDC debt is supported by annual appropriations of the local government, rather than revenues from the sale of municipal services of the facility financed by LDCs, the discussion serves mainly to inform us that OSC recognizes that at the local government level, there is a distinction between general obligation bonds—secured by a pledge of real property taxes without legislative discretion—and revenue bonds—secured by moneys other than real property taxes. And in making that distinction, OSC hints that perhaps revenue bonds are not *ipso facto* invalid unconstitutional debt, after all. Rather than assert that "lessening the burden of government in the public interest" is not a financeable purpose of an LDC, as in the 2011 Report, in the 2015 Report OSC leaves the door open that a well-conceived LDC financing that is more than an end run around the Constitution and the LFL may serve a valid public purpose.

OSC's expression of tolerance toward LDC financing in the 2015 Report is not the end of the story. It is only the beginning: the Legislature needs to craft a law that authorizes local government revenue bonds. With constitutional restraints on local government debt still firmly in place, operating in the LDC financing space is dangerous.[46] This is not a reliable legal basis for engaging in a municipal finance transaction. Extrapolating public purposes through custom and use can only go

so far before allegations of risk, fraud and taxpayer abuse are back on the table or the SEC is subpoenaing documents, or both. New York could benefit from looking across the Hudson at New Jersey "county improvement authorities" and "redevelopment area bonds,"[47] statutory regimes for local government revenue bonds which have been in place for decades and have operated efficiently.

We could also address the uncertainties of LDC financing by amending the Constitution. That opportunity arises again in 2017 when the voters will be asked to vote on holding a constitutional convention.[48] The Constitution is nearly 80 years old; its origins on local government finance law date back to the Civil War. It's time for an update. Until our finance laws are modernized, we practice local government finance law in the "wild west" with only the Comptroller and decisional law to guide us safely around antiquated constitutional and statutory law to the shores of bond closings.

Endnotes

1. N.Y. Local Fin. Law § 2.00(1) (McKinney) (defining the term "municipality" as a "county, city, town or village").
2. General obligations to which the faith and credit (i.e., real property tax levy) of the municipality is pledged.
3. Solely real property taxes plus the "first revenues" secured by the faith and credit pledge.
4. Only a facility or service for use of the general public and owned by the municipality.
5. Proceeds of borrowing strictly limited to paying vendors for facilities built and services provided.
6. In the early 1980s the City of Troy sold its City Hall to the Troy IDA to fund a cumulative deficit, a deal properly excoriated in a report of the State Comptroller (Comptroller or OSC), leading to an amendment, since repealed, to Article 18A of the General Municipal Law (GML), dealing with the industrial development agencies (IDAs), that IDAs may not finance municipal purposes which can be financed under the LFL.
7. MUNICIPALBONDS.COM (last visited Sept. 13, 2015, 4:36 PM), General Obligation vs. Revenue Bonds: A MunicipalBonds. Com Guide, June 24, 2015, http://www.municipalbonds.com/education/two-types-of-bonds-general-obligation-vs-revenue-bonds/ (states, cities and towns are the most common issuers of general obligation bonds; transportation systems, utilities, and other local authorities that "generate revenues from providing services to the public" are most commonly the issuers of revenue bonds).
8. N.Y. Pub. Auth. Law (McKinney).
9. Article VII of the Constitution requires State debt be approved by the voters. In the so-called *Wein* cases, 36 N.Y.2d 610, 370 N.Y.S.2d 550 (1975); 39 N.Y.2d 136, 383 N.Y.S.2d 225 (1976), from the 1970s and the *Schultz* cases, 198 A.D.2d 554, 603 N.Y.S.2d 207 (3d Dep't 1993); 84 N.Y.2d 231, 616 N.Y.S.2d 343 (1997), from the 1990s, the Court of Appeals made abundantly clear that State authority debt paid through legislative appropriations but not approved by the voters is not unconstitutional under the unique (to New York) theory, among others, that the Constitution does prohibit gifts from the state to and among its public authorities. *Comereski v. City of Elmira*, 308 N.Y. 248, 252, 125 N.E.2d 241, 242 (1955) (N.Y. Const. art. VIII, § 1 provision that "[n]o county, city, town, village or school district shall give or loan any money or property to or in aid of any individual, or private corporation or association, or private undertaking" does not prohibit monetary gifts from one local municipality to another public corporation for a public purpose).
10. LDCs are special purpose charitable not-for-profit corporations created under §1411(b) of N.Y. Not-for-Profit Corp. Law. On its face, and as the Comptroller has maintained, LDCs are tools for promoting economic development within a municipality. However, one of the enumerated powers in §1411(a) is "lessening the burdens of government and acting in the public interest." The paragraph ends with the statement: "in carrying out said purposes and in exercising the powers conferred by paragraph (b) such corporations will be performing an essential governmental function." *Id.* An LDC is not a municipality but is a "local public authority."
11. "On behalf of" and "instrumentality" of a political subdivision are terms used in the revenue rulings of the Internal Revenue Service to describe the factors required of municipal special purpose "subsidiary" entities, like an LDC, which issue debt for a local government purpose, the interest on which qualifies for exemption from federal income tax.
12. For example, Article 5L § 119-gg of the GML authorizes municipality to make "sustainable energy loans" but no authority to borrow or make loans under the Constitution or LFL. Similarly, municipalities have housing powers to raise funds.
13. Richard L. Sigal, *The Proposed Constitutional Amendments to the Local Finance Article: A Critical Analysis*, 8 Fordham Urb. L. J. 29; Kenneth W. Bond, *Toward Revenue Bonds for N.Y. Municipal Finance*, NEW YORK LAW JOURNAL, September 1983, Vol. 190, No. 63 (discussing New York's legal aversion to local government revenue bonds).
14. N.Y. Gen. Mun. Law § 101 (McKinney) (generally requiring separate specifications for certain public work).
15. N.Y. STATE OFFICE OF THE STATE COMPTROLLER, MUNICIPAL USE OF LOCAL DEVELOPMENT CORPORATIONS AND OTHER PRIVATE ENTITIES: BACKGROUND, ISSUES AND RECOMMENDATIONS (2011).
16. N.Y. Local Fin. Law § 176.00 (McKinney) (providing that LFL is the exclusive law for financing by municipalities).
17. *See*, *New York Charter Sch. Ass'n, Inc. v. DiNapoli*, 13 N.Y.3d 120, 886 N.Y.S.2d 74 (2009) (holding that the OSC is not authorized under Article V of the Constitution to audit private entities like charter schools, and by extension, LDCs); *see also*, N.Y. STATE OFFICE OF THE STATE COMPTROLLER, *supra* note 15 at 1 (OSC "currently does not have direct authority to audit LDC's or most other private entities.").
18. The authority to exercise powers of corporations, including not-for profit corporations, and municipalities, including the power to incur debt, are different. Corporations may do any lawful act described in their article of incorporation. Municipalities may not exercise any power unless expressly authorized by statute or necessarily implied from statute (i.e., Dillon's Rule).
19. Public Authorities Accountability Act of 2005, Ch 766, L 2005.
20. Public Authorities Reform Act of 2009, Ch 506, L 2009.
21. MUNICIPALBONDS.COM, *supra* note 7.
22. N.Y. STATE OFFICE OF THE STATE COMPTROLLER, *supra* note 15 at 6-7.
23. A school district is not a municipality and therefore may not create an LDC as its on-behalf-of entity or instrumentality.
24. *Hurd v. City of Buffalo*, 34 N.Y.2d 628, 629-30, 355 N.Y.S.2d 369 (1974) (explaining that a municipality may not borrow to finance an annual expense paid through real property taxes to avoid exceeding the constitutional tax limit).

25. *Comereski v. City of Elmira*, 308 N.Y. 248 (1955); *Wein v. City of New York*, 36 N.Y.2d 610 (1975); *Schultz v. State of New York*, 84 N.Y.2d 231 (1994); and *Schultz v. New York State Legislature*, 224 A.D.2d 126 (1998) (all standing for the proposition that funds appropriated by the state or a local government to a public benefit corporation are not unconstitutional debt of the state or local government but a mere gift excluded from the gift or loan prohibition of §1, Article VIII of the State Constitution). *See also*, *Local Gov't Assistance Corp. v. Sales Tax Asset Receivable Corp.*, 2 N.Y.3d 524, 535, 813 N.E.2d 587 (2004) (Chief Judge Kaye of the Court of Appeals, after reviewing the constitutionality of public benefit corporation debt funded by annual government appropriations found no unconstitutionality, observes that "At the outset, we again note that the wisdom of this refinancing plan is not a matter for this Court to evaluate.").

26. OSC and finance professionals have long held that a public authority (i.e., a public corporation—the phrase used in the Constitution) cannot exist outside its creation by the Legislature. The public corporation the Constitution addresses is one that both (i) levies taxes and assessments, and (ii) incurs debt, i.e., a municipality itself or a special purpose entity with the same debt/tax powers as a municipality. But an LDC, being a subsidiary finance arm of a municipality created by its governing board without the power to tax or assess directly, is not covered by Article X, §5.

27. Public Authorities Reform Act, *supra* note 20.

28. *Griffiss Local Dev. Corp. v. State of New York Auth. Budget Office*, 85 A.D.3d 1402 (3d Dep't 2011).

29. *Buffalo News, Inc. v. Buffalo Enterprise Development Corp.*, 84 N.Y.2d 488, 619 N.Y.S.2d 695 (1994) (holding that not-for-profit local corporation administering government loan programs was "agency" subject to Freedom of Information Law).

30. 60 A.D.3d 1271, 875 N.Y.S.2d 658 (4th Dep't 2009).

31. Limited liability companies share a quasi-government purpose with LDCs: NY Limit Liab Co § 202(n) (McKinney) ("a limited liability company may: transact any lawful business in aid of governmental policy.").

32. Article VIII, §1 of the Constitution provides: "No county, city, town, village or school district shall give or loan any money or property to or in aid of any individual, or private corporation or association, or private undertaking, or become directly or indirectly the owner of stock in, or bonds of, any private corporation or association."

33. MUNICIPALBONDS.COM , *supra* note 7.

34. N.Y. STATE OFFICE OF THE STATE COMPTROLLER, RESEARCH BRIEF: LOCAL AUTHORITIES IN NEW YORK STATE—AN OVERVIEW, at 1 (April 2015).

35. N.Y. STATE OFFICE OF THE STATE COMPTROLLER, *supra* note 34 at 2.

36. For example, in New Jersey County Improvement Authorities Law (P.L. 1960, c. 183, § 1, eff. Jan. 18, 1961; N.J.S.A. 40:37A-44 et seq.) and Redevelopment Area Bond Financing Law (N.J.S.A. 40A:12A-65 et seq.).

37. MUNICIPALBONDS.COM , *supra* note 7.

38. General Municipal Law, §109-b.

39. The dissent of Judge Jason in *Wein v. City of New York* still haunts us today: "The…Act violates the letter and the spirit of article VIII of the State Constitution. No amount of words can disguise the simple fact that while liability of the city is disavowed, it effectively commits its sources of revenue from the State to the discharge of the obligations of the…Corporation. It is, therefore, ***indistinguishable from a commitment of its credit***. The fact is that while the city's sources of revenue from the State are not committed by existing law ***but only by annual appropriations***, their continuance is economically and governmentally inevitable. The city has, therefore, committed its sources of revenue to the payment of these "debts"; ***that is tantamount to a commitment of credit economically, practically and, therefore, legally***. As a consequence, the act is unconstitutional." (emphasis added). 36 N.Y.2d 610, 621, 370 N.Y.S.2d 550 (1975) (Jason, J. dissenting).

40. N.Y. STATE OFFICE OF THE STATE COMPTROLLER, *supra* note 34 at 9.

41. *Id.*

42. *See*, New York Senate bill 5501, Two Hundred Thirty-Seventh Legislative Session, comprehensive P3 law, modeled after statutes enacted in Florida, Maryland, Texas and Virginia, introduced in the 2013 session of the Legislature (referred to the Finance Committee where it died; reintroduced on June 8, 2014 where it died again in committee).

43. Public Law 111-203 [H.R. 4173], July 21, 2010, 124 Stat 1376, codified at 12 U.S.C. §5301 *et seq.*—Dodd-Frank Wall Street Reform and Consumer Protection Act.

44. United States Securities and Exchange Commission, Press Release announcing Municipal Securities Continuing Disclosure Initiative, March 10, 2014, available at http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370541090828 (last visited Sept. 19, 2015, 7:25 p.m.).

45. City of Troy, *supra* note 6.

46. LDCs, as not-for-profit corporations, have no limits on their corporate powers save acts which are *ultra vires.*

47. New Jersey County Improvement Authorities Law, *supra* note 36.

48. Article XIX. §2 of the Constitution provides: "At the general election to be held in the year nineteen hundred fifty-seven, and every twentieth year thereafter, and also at such times as the legislature may by law provide, the question "Shall there be a convention to revise the constitution and amend the same?" shall be submitted to and decided by the electors of the state."

Kenneth W. Bond is a member of the New York bar; partner at Squire Patton Boggs (US) LLP; adjunct professor, Albany Law School; member of Council, section of State and Local Government Law, ABA; member of executive committee, Local and State Government Law Section, NYSBA; and, co-editor of *State and Local Government in a Federal System*, 8th ed., Mandelker et al. (Lexis/Nexis, 2014).

T-Mobile South, LLC v. City of Roswell, Ga.: A New Rule with Little Consequence

By Michael W. Spinelli

In January of this year, in *T-Mobile S., LLC v. City of Roswell, Ga.*, the Supreme Court decided how—and announced a new rule as to when—a locality that wished to deny a siting application for a cell phone tower must notify the applicant pursuant to the Telecommunications Act of 1996 (the "Act").[1] In so doing, the Court resolved a split in the Courts of Appeals, abrogating precedent in the First,[2] Sixth,[3] and Ninth Circuits.[4]

The Court held that the Act[5] requires a locality to issue a written decision "supported by substantial evidence contained in a written record" when denying a request to site, construct, or modify a cell tower.[6] A locality must provide or make available its reasons supporting the decision; however, those reasons need not be stated in the notice or written denial letter.[7] Instead, the locality may state its reason or reasons in another writing, if those reasons are "sufficiently clear and are provided or made accessible to the applicant essentially contemporaneously with the written denial letter or notice."[8]

I. Procedural History

In February 2010, Petitioner, telecommunications service provider T-Mobile, made application to the City of Roswell, Georgia, to construct a new "monopine" cell phone tower on residential property within the city limits.[9] Upon review of T-Mobile's application, the City's Planning and Zoning Division issued a memorandum to the City Council confirming that the application met all of the requirements of the city ordinances, including that the tower be "compatible with the natural setting and surrounding structures," and further recommended approval of the application to the City Council.[10] During a public hearing held in April 2010 to evaluate the merits of the application, the City Council heard testimony from the Planning and Zoning Division, a number of residents who expressed concern over the application, and representatives of the applicant, T-Mobile.[11] The Planning and Zoning Division testified to its recommendation to approve the application.[12] However, several residents testified that the cell tower lacked "aesthetic compatibility," that the technology was no longer necessary, and that the tower was too tall.[13] Representatives of T-Mobile responded to neighboring concerns and reiterated that it had complied with all of the ordinance requirements.[14] In addition, the company provided the expert testimony of a real estate appraiser who opined that the placement of a cell tower would not have a negative effect on property values.[15] T-Mobile had its own court reporter present at the time; thus, it would have access to a transcript of the hearing.[16]

After hearing all of this, the City Council discussed the application.[17] Generally, the Council discussed as its reasons for opposing the application that the tower was aesthetically incompatible with its surroundings, that it was too tall, and that the tower would reduce property values in the area.[18] Upon a motion duly made and seconded, the City Council voted unanimously to deny the application.[19]

Two days after the public hearing, the Planning and Zoning Division sent a letter to the applicant stating that its application for a cell tower had been denied and that the minutes of the public hearing would be available from the City Clerk.[20] The detailed minutes, however, were not approved and issued by the city until 26 days later.[21]

T-Mobile initiated the current litigation in the Federal District Court 3 days after the minutes were published, 29 days following the city's denial of the application, alleging that there was not substantial evidence in the record supporting the denial, and that the denial had the effect of prohibiting the provision of wireless services in violation of the Act.[22] The parties made cross motions for summary judgment.[23]

The district court granted T-Mobile's motion for summary judgment, finding that the city violated 47 U.S.C. § 332 (c)(7)(B)(iii) when it rejected the application in a short written denial letter that failed to state its reasons for the denial.[24] The district court believed the Act to require that sufficient evidence and reasoning be incorporated into the actual written denial or notice such that a reviewing court could evaluate those reasons against the written record.[25]

On appeal, the Eleventh Circuit reversed.[26] Having acknowledged a split in the Courts of Appeals on this issue, and that it departed from the majority rule, the Eleventh Circuit relied upon its own precedent from *T-Mobile S., LLC v. City of Milton*,[27] a case decided after the matter in the district court, when it held that "to the extent that the decision must contain grounds or

reasons or explanations, it is sufficient if those are contained in a different written document or documents that the applicant is given or has access to."[28] Applying the *City of Milton* rule to the instant action, the Eleventh Circuit held that the requirements of § 332 (c)(7)(B)(iii) were satisfied because the applicant had access to the transcript it had prepared of the hearing. Moreover, the city had directed the applicant petitioner T-Mobile to where a copy of the hearing minutes could be obtained.[29] The Eleventh Circuit never considered the timing of when the city made available its written reasons (here, the hearing minutes) to the petitioner.[30] The Supreme Court granted certiorari[31] and reversed the Eleventh Circuit.[32]

II. The Questions Presented

The Supreme Court answered two questions in its opinion. The first question addressed by the Court was whether the Act required a locality to provide its reasons when denying an application to construct a cell phone tower.[33] The second question addressed whether these reasons must be communicated in the same writing or notice that announced the denial.[34]

A. Must a Locality Provide Its Reasons When Denying a Cell Tower Application?

Answering the first question in the affirmative, the Court looked to the text of the Act[35] and found that while the Act "generally preserves the traditional authority of state and local government to regulate the location, construction, and modification" of cell phone towers, it also imposes "specific limitations" on that authority.[36, 37] One such limitation is that any "decision by a state or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by *substantial evidence* contained in a written record"[38] (emphasis added). Another limitation is that any person "adversely affected" by a locality's decision to deny an application for a cell phone tower may "commence an action in any court of competent jurisdiction" and that court "shall hear and decide such action on an expedited basis."[39] Reasoning that in order for a reviewing court to judge whether a decision to deny an application was based on substantial evidence, the Court held that a reviewing court must be able to identify the locality's reason(s) for the denial.[40] The Court also concluded that it would be far more difficult for a reviewing court to evaluate whether a locality had violated the substantive provisions of section 322 (c)(7)(B) of the Act were that locality not commanded by Congress to set forth its reasons for denial.[41]

In support of its conclusion, the Court examined the "substantial evidence" standard. Citing *Sec. & Exch. Comm'n v. Chenery Corp*., the Court recognized that reviewing courts "cannot exercise their duty of [substantial evidence] review unless they are advised of the considerations underlying the action under review."[42] Moreover, "the orderly functioning of the process of [substantial evidence] review requires that the grounds upon which the administrative agency acted be clearly disclosed."[43, 44]

The Court also provided some guidance concerning the depth of cognition required. While the Court made clear its interpretation of the Act that required a locality to provide its reasons for a denial, the Court stressed, however, "these reasons need not be elaborate or even sophisticated."[45] Instead, the reasons simply must be clear enough to facilitate judicial review.[46] The Court rejected the city's argument that having to provide a reason for its denial would divest the city of its local zoning authority.[47]

B. Must a Locality's Reasons for the Denial Be Contained within the Writing or Notice of Decision?

Answering the second question in the negative, the Court held the compulsory disclosure of their reasons discussed above need not appear in the same writing or notice that announced a locality's decision.[48] Once again, having looked to the text of the Act when it arrived at its conclusion, the Court found that while the text requires a locality to provide its reasons in writing, that same text imposes no such requirement that the writing be in any prescribed form.[49]

The Act imposes finite, enumerated limitations on localities. The saving clause of the Act provides that with the exception of the specific limitations proscribed, "nothing in this [Act] shall limit or affect the authority of a state or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities."[50] The Court reasoned that given the plain language of the text, in concert with the principles of "cooperative federalism," the enumerated limitations were an exclusive list.[51] Accordingly, while the Court arrived at the "inescapable" conclusion that localities had to render their decisions in writing, the Court found no such requirement—express or implied—that localities convey these reasons in a particular form of writing.[52]

C. The Court Imposes a New Rule as to the Timing of a Locality's Release of Its Reasons for Denial

In addition to the previous questions answered, the Court created a new rule regarding to the timing of a locality's publication of the reasons in support its decision. "[A] locality cannot stymie or burden the judicial review contemplated by the statute by delaying the release of its reasons for a substantial time after

it conveys its written denial."[53] The Act provides that "[a]ny person adversely affected by any final action… by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action…, commence an action in any court of competent jurisdiction."[54] Moreover, "the court shall hear and decide such action on an expedited basis."[55] The Court reasoned that because a denied applicant, one who is adversely affected by the decision or final action, may not be able to make a fully informed decision within the statutory time constraints, and because a reviewing court will be obstructed in its review of the denial absent the locality's reasons, a locality's written reasons must published or conveyed at "essentially the same time" as its denial is communicated.[56]

The Court found the new timing rule was not unduly burdensome. Because a locality has a reasonable period of time in which to act on an application to collocate a new antenna on an existing tower or to locate a new tower, the written reasons of a locality need not be released until such time as the decision is reached and provided.[57] As a result, the 30-day clock for the filing of a suit for judicial review does not begin to run until such time as the decision is issued.

III. The Court Reversed and Remanded for Further Proceedings

The matter was reversed and remanded for further proceedings. The Court held that the City of Roswell provided its reasons in writing, and those reasons were published in an acceptable form, however, the city did not issue its written reasons essentially contemporaneously with its decision to deny the application, and therefore the City did not comply with its obligations under the Act.[58] The Court did not reach the issue of harmless error, nor did it address how to provide a remedy. Instead, the Court left those matters for the Eleventh Circuit to decide on remand.[59]

Justice Alito wrote separately and concurred with the opinion of the Court. In his opinion, he addressed additional administrative law principles and provided guidance to the Eleventh Circuit on the principle of harmless error and the matter of a remedy. First, having found that a court must give effect to a decision with "less than ideal clarity" if the locality's logic "may be reasonably discerned,"[60] it was the opinion of Justice Alito that the city's simple statement that the cell tower was aesthetically incompatible with the surrounding area should satisfy the city's obligation.[61] Next, Justice Alito suggested that even had the city erred, based on T-Mobile's active participation in the decision making process, T-Mobile was not prejudiced, and the harmless error rule should apply.[62] Finally, Justice Alito did not believe that the opinion of the Court should be read to suggest that if the city had erred, the unavoidable remedy was approval of the application and construction of the cell tower.[63]

IV. The Dissent Largely Concurs with the Opinion of the Court

In an opinion that reads more like an arm's-length concurrence than an aggrieved dissent, Chief Justice Roberts asked whether the majority opinion was a "bad break" for the city, which was found by the majority to have violated the Act. The Chief Justice agreed with the majority on all but one issue, and concluded, as did Justice Alito in his concurring opinion, that no harm was done. The Chief Justice was joined by Justice Ginsburg, with whom Justice Thomas[64] joined as to Part I of the dissent.

The Chief Justice agreed with the majority that the City of Roswell complied with its obligations under the Act when it (1) provided its denial in writing, (2) assembled a written record, and (3) prepared a statement of reasons for that denial.[65] The Chief Justice departed from the majority on the issue of timing:[66] the written record—in this case the minutes of the public hearing—were issued 26 days after the denial, not essentially contemporaneously with the decision—a requirement the Chief Justice was able to locate nowhere in the text of the Act.[67]

The dissenting Justices did not find a reviewing court's ability to meaningfully adjudicate a matter thwarted simply because the court did not have before it the local municipality's contemporaneous disclosure. The Act provides that any party adversely affected by a decision of a locality may, within 30 days of a final decision or failure to act, commence an action, and a court must review such an action on an expedited basis.[68] First, the Chief Justice dismissed the majority's reasoning that an adverse party or a reviewing court would be "stymied" by having received the written record four weeks or four days before an action was commenced—or "four days *after*, for that matter."[69] Second, and in further support of his opinion, the Chief Justice echoed the sentiments of the Eleventh Circuit when it acknowledged that T-Mobile had its own transcript of the hearing, thus it was fully aware of the city's reasoning prior to the city providing those reasons in writing.[70] Finally, the Chief Justice rejected the notion that a telecommunications company, or as in this case a cell phone service provider, required essentially the full thirty days provided for in the statute in order to make an informed decision on whether to file suit.[71] According to the Chief Justice, cell service providers are sophisticated business entities—not "Mom and Pop" shops—who, as this case illustrates, participate fully in local governmental proceedings.[72] The Chief Justice saw no reason why T-Mobile would have to make "last-second, uninformed decisions" on whether to file suit.[73]

Along with Justice Alito's concurrence, the Chief Justice found no harm was done to T-Mobile. The Chief Justice quipped that T-Mobile "somehow managed" to overcome the 26-day wait for the statement of reasoning from the city when it decided to bring the instant action.[74]

Seemingly in complete agreement with the second point raised by Justice Alito in his concurring opinion,[75] the Chief Justice believed that any error construed by the court on remand should be excused as "harmless error."[76] In his summation, the Chief Justice attempted to calm the land use and telecommunication bars when he assured them that "the sky is [not] falling" as a result of this decision and the new rule that followed, while he also cautioned the unwary hamlet of the contemporaneous timing trap that may lie in wait.[77]

V. Conclusion

The Court held that the Act requires a locality to provide a statement of reasons when it denies a cell tower application. Those reasons may be published in a separate writing, which may include minutes of a meeting, and need not be included in the letter or notice of denial. A locality has satisfied its obligations when those reasons are reduced to writing, with sufficient clarity, and essentially contemporaneously with the denial. Here, because the city waited 26 days after it issued its notice of denial—just 4 days before Petitioner T-Mobile's time to seek judicial review had expired—the city violated its obligations under the Act.

While this new timing rule will essentially compel a locality to issue its statement of reasons along with its letter or notice of denial, it should have no detrimental or burdensome consequence on the ministerial publication of a decision. A locality may still exhaust the entire reasonable period of time provided for under the Act to prepare its statement of reasons, thus enabling both writings to be issued on a contemporaneous basis.

Endnotes

1. 135 S. Ct. 808, 190 L. Ed. 2d 679 (2015).
2. *Sw. Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51 (1st Cir. 2001).
3. *New Par v. City of Saginaw*, 301 F.3d 390 (6th Cir. 2002).
4. *MetroPCS, Inc. v. City & Cnty. of San Francisco*, 400 F.3d 715 (9th Cir. 2005).
5. PL 104–104, February 8, 1996, 110 Stat 56.
6. *Roswell*, 135 S. Ct. at 811; 47 U.S.C.A. § 332(c)(7)(B)(iii) (West).
7. *Roswell*, 135 S. Ct. at 811.
8. *Id.* at 812.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Roswell*, 135 S. Ct. at 812.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Roswell*, 135 S. Ct. at 812.
18. *Id.* at 813.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Roswell*, 135 S. Ct. at 813.
23. *Id.*
24. *Id.*
25. *Id.*
26. *T-Mobile S., LLC v. City of Roswell, Ga.*, 731 F.3d 1213, 1221 (11th Cir. 2013), *cert. granted*, 134 S. Ct. 2136, 188 L. Ed. 2d 1123 (2014) and *rev'd and remanded*, 135 S. Ct. 808, 190 L. Ed. 2d 679 (2015).
27. 728 F.3d 1274, 1285 (11th Cir. 2013).
28. *T-Mobile S., LLC v. City of Roswell, Ga.*, 731 F.3d 1213, 1219 (11th Cir. 2013) (citing *T-Mobile S., LLC v. City of Milton, Ga.*, 728 F.3d 1274, 1285 (11th Cir. 2013).
29. *Roswell*, 135 S. Ct. at 814 (citing 731 F.3d at 1221).
30. *Id.*
31. 134 S. Ct. 2136, 188 L. Ed.2d1123 (2014).
32. *Roswell*, 135 S. Ct. at 814.
33. *Id.*
34. *Id.* at 815.
35. *Id.* at 814.
36. *Id.* (internal quotations omitted) (citing *City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 115, 125 S. Ct. 1453, 1455, 161 L. Ed. 2d 316 (2005)).
37. 47 U.S.C. § 332 (c)(7)(A).
38. 47 U.S.C. § 332 (c)(7)(B)(iii).
39. 47 U.S.C. § 332 (c)(7)(B)(v).
40. *Roswell*, 135 S. Ct. at 814.
41. *Id.*
42. *Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 94, 63 S. Ct. 454, 462, 87 L. Ed. 626 (1943).
43. 318 U.S. 80, 94, 63 S. Ct. 454, 462, 87 L. Ed. 626 (1943).
44. The Court also relied upon *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 2866, 77 L. Ed. 2d 443 (1983) (finding that an agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made" (internal quotations omitted) and *Beaumont, S. L. & W. Ry. Co. v. United States*, 282 U.S. 74, 86, 51 S. Ct. 1, 6, 75 L. Ed. 221 (1930) ("Complete statements by the Commission showing the grounds upon which its determinations rest are quite as necessary as are opinions of lower courts setting forth the reasons on which they base their decisions.…").
45. *Roswell*, 135 S. Ct. at 815.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Roswell*, 135 S. Ct. at 815-16.
50. 47 U.S.C. § 332(c)(7)(A).

51. *Roswell*, 135 S. Ct. at 816.
52. *Id.*
53. *Id.*
54. § 332(c)(7)(B)(v).
55. *Id.*
56. *Roswell*, 135 S. Ct. at 815-16. The Court opined that this new rule should not impose any undue burden on local government as the Court provided for a wide range of options a locality may utilize to provide their reasons. 135 S. Ct. at 817. In addition, a locality need only issue its decision "within a reasonable period of time." § 322 (c)(7)(B)(ii).
57. A reasonable period of time has generally been interpreted as 90 days for a locality to act on applications for new antennas on existing towers, *Arlington v. FCC*, 133 S. Ct. 1863 (2013), and 150 days to act on other applications involving the siting of a new tower. *In re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(b)*, 24 FCC Rcd. 13994, 13995, ¶ 4 (2009).
58. *Roswell*, 135 S. Ct. at 818-19.
59. *Id.* at 819.
60. Citing *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286, 95 S. Ct. 438, 442, 42 L. Ed. 2d 447 (1974).
61. *Roswell*, 135 S. Ct. at 819.
62. *Id.* (citing *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 659-60, 127 S. Ct. 2518, 2530, 168 L. Ed. 2d 467 (2007) ("In administrative law, as in federal civil and criminal litigation, there is a harmless error rule").
63. *Roswell*, 135 S. Ct. at 819.
64. Justice Thomas joined the Chief Justice as to Part I of the dissent, opining that once the Court resolved the interpretative question in favor of the city, the case should have been resolved. 135 S. Ct. at 821. Justice Thomas wrote separately in dissent to reject the Courts "eagerness to reach beyond the bounds of the present dispute" to create a new timing rule that is supported nowhere in the Act.
65. *Roswell*, 135 S. Ct. at 819.
66. *Id.* at 820.
67. *Id.*
68. 47 U.S.C. § 322 (c)(7)(B)(v).
69. *Roswell*, 135 S. Ct. at 820 (emphasis in original).
70. *Id.* at 823.
71. *Id.* at 820.
72. *Id.*
73. *Id.*
74. *Id.* at 823.
75. *Id.* at 819.
76. *Id.* at 823.
77. *Id.*

Michael W. Spinelli is a registered architect licensed to practice in New York and Connecticut. He is a 3L part-time, evening student at the Touro Law Center and serves as a student editor of the *Municipal Lawyer*.

Answer to Government Ethics Quiz

(from page 4)

A Yes. The agreement is prohibited.

Analysis: One should first note that, absent a prohibition in the county ethics code, the deputy clerk may, for non-contingent compensation, work on the matter and even appear before the County Planning Commission. Gen. Mun. Law § 805-a(1)(c) prohibits a municipal officer, member, or employee from working for non-contingent compensation on a private matter only if the matter is before the member, officer, or employee's own agency or an agency over which he or she has jurisdiction or to which he or she has the power to appoint any member, officer, or employee. Since the deputy clerk's agency is separate from the Planning Commission and since she has no jurisdiction over the Planning Commission and also lacks any power to appoint any member, officer, or employee of the Planning Commission, she may work on the matter for non-contingent compensation.

Nonetheless, here the deputy clerk may not enter into the agreement because her compensation is dependent on the Planning Commission's approval of the application. Gen. Mun. Law § 805-a(1)(d) prohibits a contingent fee arrangement in relation to any matter before *any* agency of the municipality, not just before her own agency or one over which she has control. That said, section 805-a(1)(d) permits the deputy clerk to receive a fee based on the actual value of her services, again, unless such an arrangement is prohibited by the county code of ethics.

The Section's Government Ethics and Professionalism Committee invites comments from readers on this problem, especially by those who disagree with the Committee's analysis.

New York State's Overdependence on Property Taxes

Dr. Robert Christopherson and James J. Coffey

I. Introduction and Purpose

Dr. Robert Christopherson

In Robert A. Caro's *The Passage of Power*,[1] the multi-volume biography of Lyndon Johnson, Caro describes an encounter between an army general and Robert Kennedy. At the time Kennedy was the Attorney General and the brother of the President, John F. Kennedy. The general was explaining to Robert Kennedy why a particular request would be difficult to meet. Kennedy's response was, "Why would it be difficult, General?" A witness to the exchange stated that the general "learned that there are few experiences in the world quite like having Robert Kennedy push his unsmiling face towards yours and ask, 'Why?'"

Unfortunately, no one is asking Governor Andrew Cuomo or the New York State Legislature why the State overly relies on property taxes. If anyone did ask, the answer would be stunningly simple: the property tax is perceived as a "local" tax. It follows that "local" tax issues have their solution and political consequences on the local level. However, through unfunded mandates and funding to local governments, or lack thereof, New York State has a huge impact on property taxes. The property tax, although set at the local level, is influenced to a great extent by decisions made in Albany. A modest increase in the state income tax or sales tax rate could have a dramatic impact on reducing property taxes. This is not happening for a very good political reason—what Member of the Assembly or Senate wants to propose an increase in the state income tax?

Today's anti-tax climate has impacted the political decision-making process to a considerable extent, making any tax increase problematic. In addition, the connection between property taxes, the state income tax and the sales tax does not fit on a bumper sticker.

We have written this article to make municipal attorneys, as well as elected municipal representatives, aware of the damage inflicted by excessively high property taxes. We hope that this knowledge will result in changes to New York State's tax policies. Our specific concern in this article is with the county tax, not special district taxes. (Special district taxes are broken out separately which allows taxpayers to develop a sense of how much they are paying for a particular service such as water or sewer service and over which they may have some control.) The views expressed here are those of the authors and are based upon our knowledge and experience gained from teaching, researching and writing, working, and living in New York.

James J. Coffey

II. The Political Landscape

People run for political office for a variety of reasons, probably the most common being a desire to serve. However, you can't serve if you don't win, and you don't win by supporting tax increases. For good or bad, that is a political reality.

The New York State legislature and the governor have the power to decide how tax revenue is raised. New York State imposes an income tax, a sales tax and various other fees on its citizens, and uses the revenue to fund state expenditures, including funding to local governments. New York State has options available to it that local municipalities do not have. Unlike the Federal Government, New York State cannot print money, but it has the next best option with unfunded mandates.

Being at the bottom of the financial food chain, local governments and school districts raise revenue by simply increasing the taxes on real property in order to meet expenses. The idea that local governments and school districts determine the property tax rate is misleading. Municipalities and school districts pay the bills that have to be paid. If the state reduces funding or creates an unfunded mandate, property tax rates increase. Thus, to a large degree, it is the state that establishes the property tax rate.

The amount of property taxes per capita in New York State in 2012 was $2,435 and the amount of New York State income taxes during the same period were $2,431, almost identical amounts. However, there is a major difference and the difference is this: Real property taxes are levied without regard to income while the state income tax is progressive. In addition, expenditures for shelter are necessities. Even a modest increase in either the income or sales tax would bring about a dramatic relief to property owners and would be more efficient.[2]

Why does New York State refuse to shift more of the tax burden to the efficient and progressive state income tax as opposed to continuing to overly rely on the regressive and less efficient property tax? Because, we believe,

state politicians are fearful of being associated with any increase in the state income tax and fully understand the political liability of high property taxes residing at the local level.

III. The Problem

New York State overly relies on property taxes as a source of revenue. Several factors explain why property taxes are damaging to property owners and the economy in general, a few of which are:

A. First and Foremost, Real Property Taxes Are Regressive

There are few taxes more regressive than the real property tax. It is a tax that must be paid regardless of the taxpayer's income. Also there is very little homeowners or business owners can do to reduce the tax short of taking time off from work to grieve their assessment with their town assessor. The homeowner, in particular, has almost no flexibility. The only alternative to paying the tax is selling the home, which requires a considerable time and expense. Property owners may even experience a dramatic increase in their assessment, which will lead to a dramatic increase in their property taxes, simply because their neighbors were fortunate in selling their home for a very high price. Even if the value of an individual's home declines this is no guarantee that the property taxes will decline.

Municipalities require a certain amount of tax revenue to provide required services. Therefore, even if the assessed values of property in a municipality decline, an increase in the tax rate is very likely so the tax revenue does not decline.

Thus, for homeowners on a fixed income and business owners incurring a loss, increasing property taxes creates a financial challenge. Imagine if someone proposed levying a minimum income tax regardless of whether the taxpayer had income. The proposal would be dismissed for not being feasibile. Yet that is how the property tax works.

B. High Real Property Taxes Diminish the Value of Real Property

Real property has value in that it provides, in the case of a homeowner, needed shelter for the homeowner and his family. In the case of a business owner, real property provides the physical place from which the businessperson can generate income. As property taxes increase, the value of the home or business property decreases because it is making the cost of living in a particular location or operating a business in a particular location less profitable. A business owner is more likely to establish a business in an area that has low property taxes. That is why when a state or locality wishes to encourage businesses they often provide them with reduced property taxes as an incentive.

Conversely high property taxes reduce the profitability of the business and reduce the value of a home. As the property taxes associated with a house increases the amount of money a potential buyer would pay for the house decreases. For example, if a person is choosing between two homes that are exactly the same, the one he or she would choose to purchase is the one that has lower property taxes. Therefore as property taxes become excessive it causes a decline in the property's value. As the value of the home or business declines as a result of high property taxes, the likelihood that the value of the home or business will be exceeded by the amount owed on the home or business increases. In these cases homeowners or businesses are underwater and often walk away from their property.

C. Excessively High Real Property Taxes Incentivize Large Corporations to Challenge Their Assessments

As property taxes increase there is a very strong incentive for companies with numerous locations to contest their assessments. It is not unusual for a company with several locations in the state to hire a law firm that specializes in that type of work and challenge the assessments of all the locations. This forces the municipality to hire an attorney to respond to the challenge, which is both expensive and time consuming. The large corporation that is challenging its assessments often sees the challenge as another cost of doing business. This financial burden of fighting the challenge is coupled with the additional burden of setting aside enough money to pay refunds if necessary.

The refund issue creates an even larger burden for school districts. Ralph Napolitano, the superintendent of Yorktown Central School District in Westchester County, said, "Yorktown schools refunded $45,000 in the 2008-09 school year, $52,000 in 2009-10 and $934,000 in 2010-11. Already this year, the district has committed to $877,000 in refunds." Superintendent Dan McCann of the nearby Hendrick Hudson School District, in Montrose, said, "We had $300,000 in tax certs last year, and this year, we'll have $400,000. We don't have a reserve for it anymore. We have to borrow."[3]

D. High Property Taxes Endanger a Major Financial Lifeline

For political and economic reasons the home has been granted a special status in terms of taxability. If one borrows to purchase a home, or to improve a home, the interest is deductible, as are the real property taxes, which the homeowner pays. To some degree the logic behind this special treatment is that society benefits from people owning their own home and providing shelter for themselves and their family. In addition, there is a belief that with homeownership will come a desire to maintain and improve the property, which is a benefit to society.

In addition, homeowners can obtain a home equity loan, which allows them to, not only improve their homes but also send their children to college or pay for high medical expenses or unanticipated expenditures of any type. Elderly couples often obtain reverse mortgages, which allow them to continue to live in their home, by extracting from the home the equity they have built into it over the years, and not become a financial burden to their children. This financial lifeline may be imperiled by high property taxes.

E. High Property Taxes Contribute to Bank and Municipal Foreclosures

There are many reasons homes and businesses are subject to foreclosure. However, one major reason is increasing real property taxes. Homeowners fortunate enough to have a fixed mortgage payment must deal with rising monthly payments when real property taxes increase. Homeowners who have a variable interest rate mortgage and rising property taxes expose themselves to the risk of foreclosure. However, the catastrophe of foreclosure is not limited to the homeowner being foreclosed upon. Homes that are being foreclosed upon are often not maintained; this drags down the value of the surrounding homes. "A foreclosure can harm a whole neighborhood. When a borrower loses a house, the house loses a caretaker. The neighbors lose a neighbor. The community loses a member. All of the losses can have a variety of negative consequences even for people who were not themselves among the dispossessed."[4]

F. Real Property Taxes Are Insidious

One definition of insidious is as follows: "operating or proceeding in an inconspicuous or seemingly harmless way but actually with grave effect."[5] Ask homeowners how much they pay each year in property taxes and they will often respond that the bank pays the property taxes. Clearly this is not exactly the case. The bank does make the physical payment but it's the individual who pays the bank. Individuals who are careful about obtaining a fixed rate mortgage to avoid the disaster that can sometimes occur with an adjustable rate mortgage are often indifferent to the continual increase in real property taxes. Even though a combination of a homeowner's principal and interest payments remain the same, the mortgage payment continues to escalate because of rising real property taxes.

This escalation in many instances is modest and periodically homeowners receive a notice from their lending institution that their payment will be increasing as a result of real property taxes. As this payment continues to escalate the homeowners can only hope that their income sources continue to escalate along with the real property tax. If the individual is on a fixed income—and it should be noted that it is not only retired people who are on a fixed income—then this burden becomes even heavier and in some cases forces the property owner to sell his property. It should also be pointed out that property owners might be unaware of how much they are paying in real property taxes. However, they can rest assured any potential purchaser of the property and the realtor representing the potential purchaser will be very aware of the amount of the real property tax, and it will be a factor in determining whether to purchase the property and what price to offer.

IV. Property Taxes Are Often Misused to Subsidize Municipal Services That Should Be Self-Sustaining

Property taxes are a source of revenue municipalities use to subsidize expenses associated with numerous governmental activities. Often shortfalls in a particular service are covered through the property tax. For example, if a municipality provides trash collecting services and there is a shortfall, it is often more convenient to not annoy voters by increasing the cost of the trash collecting services. The more politically expedient way is to continue the very attractive trash collection service at a discounted price and make up the shortfall through the property tax. The same is true of many other services: dog licenses, recreational activities, etc. The problem with this approach is that people who are not using the trash collection services or do not have dogs or do not avail themselves of certain recreational programs subsidize those who do through the real property tax.

The tables below document New York State's property tax problem.

Table 1. Property Taxes on Owner-Occupied Housing Ranked by Total Taxes Paid, 2010

State	County	Median Property Taxes Paid on Homes	Rank in the U.S.
New York	Westchester	$9,945	1st
New York	Nassau	$9,289	2nd
New Jersey	Bergen	$9,081	3rd
New York	Rockland	$8,861	4th
New Jersey	Essex	$8,755	5th
New Jersey	Hunterdon	$8,431	6th
New Jersey	Passaic	$8,281	7th
New Jersey	Morris	$8,147	8th
New Jersey	Union	$8,041	9th
New Jersey	Somerset	$7,897	10th
New York	Putnam	$7,841	11th
New York	Suffolk	$7,768	12th

Source: taxfoundation.org available at http://taxfoundation.org/article_ns/median-effective-property-tax-rates-county-ranked-total-taxes-paid-1-year-average-2010.

As seen in Table 1 above, New York and New Jersey vie for the dubious distinction of having the highest property taxes in the nation, with New York holding the top two spots and five of the top twelve. In Table 2 below, property taxes are shown as a percent of home value, for the top eight counties in the United States. Here the picture for New York is even more distressing; New York holds the top six spots and seven of the top eight, with only a single county in Michigan joining New York's counties on this list.

Table 2. Median Effective Property Taxes Rates by County, Ranked by Taxes as a Percent of Home Value, 1-Year Average, 2010

State	County	Taxes as a Percentage of Home Value	Rank in the U.S.
New York	Wayne	3.02%	1st
New York	Monroe	3.00%	2nd
New York	Cattaraugus	2.90%	3rd
New York	Livingston	2.84%	4th
New York	Oswego	2.81%	5th
New York	Niagara	2.81%	6th
Michigan	Wayne	2.72%	7th
New York	Chautauqua	2.70%	8th

Source: taxfoundation.org available at http://taxfoundation.org/article_ns/median-effective-property-tax-rates-county-ranked-taxes-percentage-home-value-1-year-average-2010.

V. What Can New York State Do to Reduce This Overdependence on the Property Tax?

A. Allow Counties to Increase Their Sales Tax Rate!

Almost every county in New York State has raised its sales tax rate to 8% or beyond.[6] In fact, only seven of New York's 57 counties have a rate below 8%. There is a reason for that. It is not simply to collect needed tax revenue, which could have been done by increasing property taxes. The fact that almost every county has raised the sales tax to 8% (NYC and Yonkers have the highest sales tax rates at 8.785%) is evidence that sales tax is a convenient tax to collect and in many ways far less burdensome than the real property tax. The tax is paid in small amounts as consumers spend. Many necessities are exempt from the sales tax, so to some degree individuals have control over the amount of sales tax that they pay.

One major complaint regarding the sales tax is that it is regressive, which is true in certain cases but in general is far less regressive than the real property tax. It is true that people with high incomes who purchase a certain item pay the same amount of tax as a poor person who purchases the same item. The reality is that consumers with higher incomes spend more and thus pay much more in sales tax. For example, a family with a modest income that purchases a car for $10,000 is subject to an 8% tax on the $10,000. The wealthier person who purchases a $60,000 car will pay six times the amount of sales tax.

Of course, this depends on both income levels and expenditure levels for the two groups. However with the property tax, lower income families have to pay their property tax bill without any exemptions (except for the New York STAR program, which all homeowners receive), such as they might receive with sales tax on food expenditures. Further, higher income individuals can typically deduct mortgage interest payments on their federal taxes, while lower income families who do not own a home cannot.

To illustrate the power of the sales tax for Clinton County, if this tax were to increase from 8% to 10%, the additional amount collected would be more than enough to eliminate the Clinton County property tax. (We perform the calculation below.) This assumes, of course, that the State of New York would allow Clinton County to keep all of the additional sales tax revenue, see Table 3. We think most taxpayers would favor this arrangement because of its simplicity.

Table 3 illustrates the potential of the sales tax to reduce the property tax.

Table 3. Property, Sales and Use Taxes for NYS and Selected NY Counties, 2013

County	Real Property Taxes and Assessments	Sales and Use Taxes
Clinton	$22,171,545	$60,522,044
Essex	$14,929,411	$28,065,560
Franklin	$14,404,751	$20,818,007
St. Lawrence	$52,373,114	$44,540,435
Four County total	$103,878,821	$153,946,046
All NYS counties, excluding New York City	$5,054,843,282	$7,454,901,542

Source: www.osc.state.ny.us/localgov/datastat/findata/index_choice.htm (Once at the OSC website, select county data and the year 2013 in order to view or download the data.)

As indicated in Table 3, sales tax revenue collectively exceeds property tax revenue for counties in New York State as a whole, as well as for many individual counties. Clinton County is a bit of an anomaly given its proximity to the Canadian border. In Clinton County, the sales and use tax revenue exceeds property tax revenue by almost a 3:1 margin. In Essex County the margin is nearly 2:1, while in St. Lawrence, another border county, property tax revenue actually exceeds the sales and use tax revenue collected. For the 57 counties in NYS as a whole, excluding NYC, we see that sales and use tax revenue is about 50% higher than the amount raised from the property tax.

The sales tax rate for most New York State counties currently stands at eight percent, with New York State keeping four percent and the counties also receiving four percent. If Clinton County wished to eliminate its property tax and raise the same amount of total revenue simply using the sales tax, we estimate this could be accomplished by increasing its sales tax from 8% to 10%. That is, Clinton County currently brings in over $60 million on a 4% county sales tax rate, so increasing this rate to 6% should, theoretically, bring in an additional $30 million. Even if sales declined in the county due to the higher sales tax rate and only $23 million in additional sales tax revenue was garnered, this would be more than enough to eliminate the county tax.

B. Pledge That the Entire Proceeds from the Additional Sales Tax Will Be Used Exclusively to Reduce Real Property Taxes

A valid concern the public might have is that raising the sales tax will not result in a reduction in the property tax. Including language in the law that the increase in revenue from sales tax must be used exclusively to reduce property taxes would address this concern.

C. Acknowledge That New York State Has Considerable Responsibility for Local Taxes

Taking responsibility for increasing taxes is not something politicians like to do. However, when state officials are asked about why taxes are so high the response is often along the following lines. *You see people often make the mistake of lumping all taxes together. Taxes have increased but for the most part these increases have occurred at the local level, i.e., school and property taxes. To get these local taxes under control you should speak to your local supervisor or school superintendent to see what can be done*. This type of answer is misleading. Actions taken at the state level have an enormous impact on local taxes. Unfunded mandates and reductions in funding are two very big reasons why local property taxes increase. To pretend that state actions do not dramatically impact local taxes is a serious impediment to resolving New York State's high property taxes.

VI. What Can Local Municipalities Do to Reduce Property Taxes?

A. Embrace the Concept of Depreciation

Convenient as it may be to blame the financial problems of municipalities on the state, the reality is that municipalities contribute to many of their own problems. One of the major problems that municipalities face is their failure to take depreciation into consideration in their spending and taxation policies.

The goal of many municipalities is to pay their current bills while keeping taxes at the lowest possible level. Ironically and unfortunately, many politicians pride themselves in keeping taxes low in the face of a crumbling infrastructure and increasing debt, as though taxes and debt are unrelated. Ideally the municipality should calculate each year the amount the municipality's infrastructure has declined in value and require through local law that at a minimum that amount be reinvested in the infrastructure.

B. Eliminate Political Subsidies

To accomplish this objective, subsidies must be divided into two groups, political and social. Schools, for example, constitute a social subsidy. For many families the school taxes they pay only cover a fraction of what it costs to educate their children. This is a social subsidy and a sensible one because everyone benefits from a well-educated populace.

However, political subsidies should rarely be permitted. A political subsidy is a service provided by a municipality that is underpriced, with any financial shortfall being covered by homeowners through the property tax. A simple example of this is dog licenses. People who own animals, which are licensed, should pay the entire cost associated with licensing and regulating their behavior. There are numerous other examples such as building permits, site plan review, water and sewer charges, and fees for recreational activities. Covering costs for municipal services is not just a matter of covering direct costs; indirect costs such as medical coverage, retirement contributions, departmental overhead must all be built into the fees.

A common refrain of politicians is that *taxpayers can't afford that*, should not be confused with the taxpayer not receiving that. What the statement means is that the taxpayer will receive the service at a subsidized price with the shortfall being borne by all the property owners through the property tax. Wherever possible, fees and charges of every sort should be set so that the user of a particular municipal service pays the cost associated with that service.

C. Link Municipal Fees to the Consumer Price Index

Politicians are uneasy about increasing costs for services they provide to the public, and with good reason. In many instances even a moderate fee or tax increase makes headlines. To make matters worse, some elected officials seek to enhance their political viability by opposing any increase in taxes or fees regardless of logic. The result of this type of political maneuvering creates an unwanted contrast between the good guys opposing any increase in taxes or fees and the bad guys wanting to raise taxes. This type of conflict inevitably leads to long periods of no increase in fees or taxes followed by dramatic increases that both surprise and punish the taxpayer.

One of the best examples of this political mindset is the tuition the State University of New York (SUNY)

charges its students, see Table 4. In 2003 tuition increased by an absorbent 32%. Clearly costs had not risen 32% in one year. Presumably the increase was to make up for past years when costs were increasing but the legislature was unwilling to increase tuition at SUNY. The dramatic increase creates a terrible burden for students and their parents. Modest increases in tuition that match increases in costs are something everyone can live with. After increasing the tuition 32% you would think an effort would be made avoid this problem in the future, but students were hit with another 14.4% hike in tuition in 2009, again after several years of no tuition increases. See Table 4 below. There is some "good news" in that New York State has implemented a rational tuition policy for SUNY tuition for 2013-2016 and will increase tuition by $300.00 per year for the next few years.

Table 4. SUNY Undergraduate Tuition, NYS Resident, 2000-15

Year	Tuition ($)	Per Credit Hour	% Increase
2000	3400	137	--
2001	3400	137	0
2002	3400	137	0
2003	4350	181	32%
2004	4350	181	0
2005	4350	181	0
2006	4350	181	0
2007	4350	181	0
2008	4350	181	0
2009	4350	181	0
2010	4970	207	14.40%
2011	4970	207	0
2012	4970	207	0
2013	5570	232	12.10%
2014	5870	245	5.60%
2015	6170	257	4.90%

Sources: Publicly available SUNY Catalogs 2000-2015.

VII. What Can Property Owners Do to Reduce the Real Property Tax?

A. Review Their Tax Bill

Politicians are inordinately careful about not criticizing those who put them into office. As a result, voters often come to believe that they have no responsibility regarding the taxes that they are forced to pay. Politicians often serve as piñatas for the angry taxpayer and in many cases this is justified. It is also a fair statement that politicians often cater to what they believe their constituents want to hear as opposed to what their constituents need to hear. One thing everybody needs to hear is that it is extremely important to review your tax bill. Ask the average person how the highway tax in their town compares with the highway tax in a neighboring town; the response in nearly 100% of the cases will be that they don't know.

The taxpayer who is paying these enormous property taxes must shoulder some of the responsibility for these taxes getting out of control. Pearson's Law says that, "that which is measured improves. That which is measured and reported improves exponentially."[7] Unfortunately, many of the tax metrics are neither measured nor reported in a meaningful way and, as a result, cost and expenses tend to drift upward. It is only when there is continual analysis of costs that costs can be controlled.

B. Vote for Politicians Who Talk About Improving and Maintaining the Infrastructure as Opposed to Reducing Taxes

Roads wear out. Buildings wear out. Infrastructure wears out. The voter has to at least listen to those politicians who tell them that the municipality cannot be run on a cash budget (i.e. paying bills, not improving the infrastructure and leaving those costs to the next supervisor or legislator who is elected).

In 1977 Jim Gilmore was elected Governor of Virginia on the extremely popular mantra, "No Car Tax."[8] The car tax was clearly unpopular; however the real question that should have been asked was: How would the shortfall in revenue from the elimination of the car tax be replaced? These are questions that often go unanswered. In many instances popular tax reductions or subsidized programs are what generate our ever-increasing property taxes.

VIII. Conclusion

Detroit has been the poster child for fiscal neglect and as a result the citizens of Detroit, as well as the public servants of Detroit, are the ones who are paying the price as bondholders and pensioners battle over money.[9] When you look at the rows of abandoned homes you know that some families invested a considerable amount of money in these homes but that is money that they will never recoup. People often claim that this can all be avoided if people vote with their feet. The reality is not everybody can and as a result the governments at every level have an obligation to structure their tax policies in such a way that the most important asset most families have is not placed at risk.

Who to tax and how to tax are difficult issues. However, for all the reasons discussed above, we believe that it is clear that taxing real property excessively is a poor policy at every level. Taxing income at the level it should be taxed is perhaps the most efficient and equitable way to tax but unfortunately political considerations make this approach very unlikely. Thus, the sales tax is

the last best option. In fact, in a recently published book on the financial success of states, the authors conclude

> All taxes are bad for growth, but some are a lot worse than others. What a state should prefer is a low rate, broad-based flat tax, and a sales tax fits this concept to a T. That is why we observe high sales tax states outperforming low sales tax states. High sales tax states often have less of the more damaging taxes, and low sales tax states often have more of the more damaging taxes.[10]

We do not necessarily agree that all taxes are bad; however, the evidence is overwhelming that excessive real property taxes produce a crushing burden on the citizens of the state and its businesses.

Endnotes

1. Robert A. Caro, The Passage of Power: The Years of Lyndon Johnson 241 (2012).
2. The Facts on New York's Tax Climate, TaxFoundation.org, http://taxfoundation.org/state-tax-climate/new-york (last visited Oct. 26, 2015).
3. Jim Nash, *Property Tax Appeals Benefit Big Companies*, New York Times, April 4, 2012, available at http://www.nytimes.com/2012/04/04/realestate/commercial/commercial-owners-gain-in-property-tax-appeals.html?_r=0.
4. Isaac Martin & Christopher Niedt, Stanford Briefs: Foreclosed America 46 (2015).
5. Dictionary.com, *available at* http://dictionary.reference.com/browse/insidious?s=t.
6. New York State Department of Taxation and Finance, Publication 718, New York State Sales Tax and Use Tax Rates by Jurisdiction, Effective Sept. 1, 2015, *available at* http://www.tax.ny.gov/pdf/publications/sales/pub718.pdf.
7. Pearson's Law, *available at* http://english.stackexchange.com/questions/14952 (last visited Oct. 20, 2015).
8. *Where Does Virginia Get $10 Billion for Transportation?*, VirginiaPlaces.org, http://www.virginiaplaces.org/taxes/taxcar.html (last visited Oct. 20, 2015).
9. Mark Guarino, *Detroit bankruptcy: Pensioners clear plan, creditors erect new hurdle*, Christian Science Monitor, July 22, 2015, *available at* http://www.csmonitor.com/USA/2014/0722/Detroit-bankruptcy-Pensioners-clear-plan-creditors-erect-new-hurdle-video.
10. Arthur B. Laffer, Stephen Moore, Rex A. Sinquefeld and Travis H. Brown, An Inquiry into the Nature and Causes of the Wealth of States: How Taxes, Energy, and Worker Freedom Change Everything 88 (2014).

Dr. Robert Christopherson is Interim Associate Dean and Chair of the Economics and Finance Department at State University of New York in Plattsburgh. Dr. Christopherson has a PhD in Economics with a concentration in Public Finance. James J. Coffey and Dr. Christopherson have jointly published articles relating to issues concerning the taxation of real property.

James J. Coffey is a practicing attorney in Plattsburgh, New York and Professor at the School of Business and Economics at the State University of New York in Plattsburgh. He has represented municipalities since the late 70s and currently represents three municipalities in Clinton County, New York.

The views expressed in this article are those of the authors and not those of the New York State Bar Association or the Local and State Government Law Section.

Land Use Law Update: *Reed v. Town of Gilbert* Redux

By Sarah J. Adams-Schoen

The Winter 2015 Land Use Law Update asked whether the Supreme Court's decision in *Reed v. Town of Gilbert*[1] would require municipalities throughout the country to rewrite their sign codes.[2] The short answer is "yes."

At a minimum, following the Supreme Court's decision that the Town of Gilbert's temporary directional sign regulations violated petitioners Good News Community Church's and Pastor Clyde Reed's First Amendment rights, municipalities will want to act quickly to amend their sign codes if they regulate different categories of signs differently. A code that places fewer restrictions on political or ideological signs than on directional signs likely will not withstand judicial review. Whether codes that differentiate between commercial and noncommercial signs will withstand review is an open question, but application of the Court's content neutrality analysis would appear to require strict scrutiny of even commercial-noncommercial distinctions—and if the governmental justifications for the distinction are aesthetics and traffic safety, which they so often are, this distinction also likely will not withstand judicial review.

Introduction

To briefly summarize, the facts are as follows. The Town of Gilbert had a sign code that restricted the size, number, duration, and location of many types of signs, including temporary directional signs. The code generally required anyone who wished to post a sign to obtain a permit, with numerous exceptions for specific types of signs including "ideological signs," "political signs," and "temporary directional signs relating to a qualifying event." The code defined ideological signs as signs "communicating a message or ideas for noncommercial purposes" that do not fall into one of several more specific categories; political signs as signs that "support[] candidates for office or urge[] action on any other matter" on a national, state, or local ballot; and, temporary directional signs as "not permanently attached to the ground, a wall or a building, and not designed or intended for permanent display," and "intended to direct pedestrians, motorists, and other passersby" to "any assembly, gathering, activity, or meeting sponsored, arranged or promoted by a religious, charitable, community service, educational, or other similar non-profit organization."[3]

Like so many sign codes, the Town of Gilbert's code established a hierarchy of restrictions, with the fewest restrictions on ideological signs and the most restrictions on temporary directional signs. The only restriction on ideological signs was that they "be no greater than 20 square feet in area and 6 feet in height." Political signs could be up to 16 square feet (on residential property) or 32 square feet (on nonresidential property) in size; may be up to six feet in height; may remain in place for several days after the election, and were not generally limited in number. Temporary directional signs could be "no greater than 6 feet in height and 6 square feet in area"; no more than four such signs "may be displayed on a single property at any time"; and such signs could be displayed only "12 hours before, during, and 1 hour after" the event. They could not be displayed in "the public right-of-way" or on "fences, boulders, planters, other signs, vehicles, utility facilities, or any structure."[4]

The Church placed signs in the surrounding area announcing the time and location of services. Treating these signs as temporary directional signs, the Town issued code enforcement notices to the Church. The Church then sued the Town, claiming that the sign code violates the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment on its face and as applied to the Church. The district court denied the Church's motion for a preliminary injunction and the Ninth Circuit affirmed this ruling[5]; the district court then granted summary judgment for the Town,[6] which the Ninth Circuit also affirmed.[7]

The Court of Appeals concluded that the Town of Gilbert's sign ordinance was content neutral because the town did not adopt the code because it disagreed with the message conveyed and its interests in regulating the signs were unrelated to their content.[8] In its first opinion in the *Reed* matter, the Ninth Circuit affirmed the petitioners' motion for a preliminary injunction, despite recognizing that an enforcement officer would have to read the sign to determine what provisions of the sign code applied. The court explained that this "kind of cursory examination" for the purposes of determining function "was not akin to an officer synthesizing the expressive content of the sign."[9] On a later appeal of the district court's summary judgment for the petitioners, the court reasoned that the distinctions in the Town's code between temporary directional signs, ideological signs and political signs "are based on objective factors relevant to Gilbert's creation of the specific exemption from the permit requirement and do not otherwise consider the substance of the sign."[10]

The plaintiffs appealed to the Supreme Court and the Court granted certiorari[11]—presumably to resolve a circuit split regarding whether temporary sign regulations that differentiate between sign types based on the function of the sign are content-based and therefore subject to strict scrutiny review.[12] The National League of Cities, United States Conference of Mayors, National Association of Counties, International City/County Management Association, International Municipal Lawyers Association, American Planning Association, and Scenic America[13] filed a brief in support of the Town, warning "that adoption of the strict scrutiny test has the potential to invalidate nearly all sign codes in the country, and would thereby imperil the important traffic safety and aesthetic purposes underlying local government sign regulation."[14] The United States, numerous religious and civil liberties organizations, and nine states filed amicus briefs in support of the petitioners.[15]

On June 18, 2015, nine justices agreed with the petitioners that the Town's sign code was content-based on its face, that strict scrutiny therefore applied, and that the code did not pass constitutional muster.[16] But, the justices took such varying routes to this conclusion that attorneys may find it difficult to determine which categorical sign regulations are content based, and therefore likely unconstitutional under a strict scrutiny analysis.

The Thomas Majority: "A Very Wooden Distinction"

Six justices joined Justice Thomas's majority opinion, which took a literal (some say "wooden"[17]) approach to the question of content neutrality. Essentially, the Thomas majority opinion stands for the principle that, if distinctions in a sign code require reading the sign to determine if the distinction applies, the code is content based, any content neutral justifications for the distinctions are irrelevant to the determination of content neutrality and strict scrutiny applies. Moreover, a code justified by aesthetics and traffic safety will not survive strict scrutiny if it places more lenient restrictions on political or ideological signs than it places on temporary directional signs—because no difference exists between these categories of signs in terms of their impact on aesthetics and traffic safety.

In so holding, the Court rejected several theories the Ninth Circuit—as well as various amici including the United States—had relied upon to support the conclusion that the code was content neutral. First, the Court explained that the Ninth Circuit's and amici's reliance on *Ward*[18] was misplaced because the question of whether a regulation has a neutral justification is irrelevant when the regulation is content based on its face.[19] The Court characterized the question of whether a regulation "draws distinctions based on the message a speaker conveys"[20] as "the crucial first step in the content-neutrality analysis."[21] Only if the answer at the first step is "no" does the analysis move to the second step, which asks whether a facially content-neutral law is still content based as a result of its content-based justification or adoption by the government "because of disagreement with the message."[22] Thus, the Court resoundingly rejected the notion that "an innocuous justification" can transform a facially content-based sign code into one that is content neutral.[23]

Second, the Court rejected the Ninth Circuit's reasoning that the content neutrality analysis "should be applied flexibly with the goal of protecting viewpoints and ideas from government censorship or favoritism."[24] This reasoning, the Court explained, erroneously equates with speech regulation generally a particularly egregious subset of speech regulation—that is, regulation of speech based on "the specific motivating ideology or the opinion or perspective of the speaker."[25] In doing so, the Court admonished the Ninth Circuit's failure to recognize the well-established application of the First Amendment to speech regulation that targets a specific subject matter—such as political speech generally—as opposed to a specific perspective.[26]

Rejecting classification of codes that distinguish based on function alone as content neutral, the Court explained that "[s]ome facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose," but "[b]oth are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny."[27] Citing *Ward*, the Court explained that there are two categories of laws that are content based—those that are content based on their face including those that regulate speech by its function or purpose, and those that cannot be "'justified without reference to the content of the regulated speech' or that were adopted by the government 'because of disagreement with the message [the speech] conveys.'"[28] Content-based regulations of speech are subject to strict scrutiny, and, where the regulation is content-based on its face, the government's justifications or purposes for enacting the regulation are irrelevant to the determination of whether it is subject to strict scrutiny.

Finally, the Court rejected on factual and legal grounds the Ninth Circuit's characterization of the sign code's distinctions as "turning on the content-neutral elements of who is speaking through the sign and whether and when an event is occurring."[29] As a factual matter, the Court observed that the Town of Gilbert's distinctions were not speaker based, but rather categorized by message type—political, ideological or directional—and the applicable category depended on the content of the message, not the identity of the speaker. As a legal matter, the Court observed in dicta that "the

fact that a distinction is speaker based does not… automatically render the distinction content neutral." Rather, "[c]haracterizing a distinction as speaker based is only the beginning—not the end—of the inquiry." Indeed, "'speech restrictions based on the identity of the speaker are all too often simply a means to control content.'"[30]

The Court emphasized three guiding principles that compelled the result. First, a content-based restriction on speech is subject to strict scrutiny regardless of the government's motive and thus "an innocuous justification cannot transform a facially content-based law into one that is content neutral."[31] Second, "the First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic" and thus the mere fact that a law is viewpoint neutral does not insulate it from strict scrutiny.[32] Third, whether a law is speaker-based or event-based makes no difference for purposes of determining whether it is content-based.[33]

The Alito Concurrence: An Attempt to Stave Off the Sign Code Apocalypse

Justice Alito, joined by Justices Sotomayor and Kennedy, joined the majority opinion and wrote separately to "add a few words of further explanation."[34] In an apparent attempt to assuage fears that the Court's decision is a harbinger of the sign code apocalypse, the Alito concurrence explains that certain distinctions between signs are content neutral and provides a non-exhaustive list of sign regulations that would not trigger strict scrutiny, including: (1) regulations that distinguish between free-standing versus attached signs, (2) regulations of electronic signs with content that changes, and (3) regulations of the placement of signs on public versus private property or on- versus off-premises signs.

But, puzzlingly, the list of content-neutral examples also includes signs advertising a one-time event. As the Kagan concurrence discussed below points out, this example is in conflict with the majority opinion—an opinion that the Alito concurrence joined with respect to the result *and reasoning*. Under the majority's reasoning, regulations that target one-time event signs are content based. Indeed, how would one know that a particular sign was covered by the regulation without reading the sign—and this simple, literal test is the majority test for content-based.

Given that the Alito concurrence is inconsistent with the majority reasoning and does not bind the lower courts, its examples of content neutral regulations may provide cold comfort to municipal officials, attorneys and planners. At the very least, given the tensions between the majority opinion and Alito concurrence, it would seem that, to the extent municipalities intend to rely on the concurrence's list of examples of content-neutral sign categories, they should do so cautiously.

The Kagan Concurrence: Bad Facts Make Bad Law

Justices Ginsburg, Breyer, and Kagan rejected the notion that a content-based regulation must necessarily trigger strict scrutiny, and concurred only in the judgment. The Kagan concurrence agrees that the Town of Gilbert regulation was invalid, but warns that the majority approach will lead to either a watering down of strict scrutiny review or courts invalidating many democratically enacted laws. Echoing the warnings of amici the American Planning Association, the Kagan concurrence recognizes that as a result of the Court's decision many municipalities will have to repeal many sign regulations.

In contrast to the literal approach adopted by the majority and endorsed by the Alito concurrence, the Kagan concurrence takes a functional approach, observing that the purpose underlying First Amendment protection simply is not implicated by many categorical sign codes. Rather, the Kagan concurrence argues that regulation of signs by function, even when ascertaining a sign's function requires reading the sign, does not threaten the uninhibited marketplace of ideas. Under the majority's simple, literal test, warns Kagan, the Court will "find itself a veritable Supreme Board of Sign Review."[35] The Kagan concurrence also criticizes that majority for ignoring the last fifty years of sign code jurisprudence, and, indeed, the only sign code case cited by the majority opinion is *City of Ladue v. Gilleo*.[36]

But, bad facts can certainly make bad law, and according to the Kagan concurrence the Town of Gilbert sign ordinance "does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test."[37] Like many municipal codes, the Town's sign code banned outdoor signs without a permit and created exceptions for specific sign types. However, the range of those exceptions was, as conceded by the Town's counsel at oral argument, "silly."[38] Town of Gilbert's code created 23 exemptions to the outdoor sign ban for specific types of signs and placed varying restrictions on the signage depending on which exemption it fell into. For example, the law exempted "temporal directional signs relating to a qualifying event," but placed more severe restrictions on these signs than "ideological signs" or "political signs." Temporary directional signs were required to be "no larger than six square feet. They may be placed on private property or on a public right-of-way, but no more than four signs may be placed on a single property at any time. And, they may be displayed no more than 12 hours before the 'qualifying event' and no more than 1 hour afterward."

The Breyer Concurrence: A Regulatory Apocalypse All Round

In addition to joining the Kagan concurrence, Justice Breyer wrote a concurrence in which he warned not only of the invalidating effect of the Court's approach on municipal sign ordinances, but also on a host of other regulations that require reading to determine the applicability or enforcement of the regulation. According to Justice Breyer, the Court's all-or-nothing approach to content neutrality casts a net that will encompass a wide range of regulations including regulations of airplane warnings, drug warnings, securities regulations, energy conservation labeling, and—citing a New York example—signs at petting zoos.[39]

Conclusion

The key holding in *Reed* in terms of impact on municipal authority to regulate signs is the holding that categorical sign ordinances are content-based. It follows from *Reed* that sign ordinances that regulate signs based on their function—such as directional signs, event signs, and advertisements—like those on the books of many New York municipalities, are content-based and therefore subject to strict scrutiny. The case leaves open the question of whether speaker-based regulations—i.e., ordinances that distinguish between who is giving the message (e.g., signs for gas stations)—are subject to strict scrutiny. The case also leaves open how sign ordinance cases not cited in *Reed* will be applied in the future. Did the Court implicitly abrogate them, or, will lower courts attempt to synthesize *Reed* and the pre-*Reed* sign ordinance jurisprudence? Will much of *Reed* be treated as dicta such that the line of sign cases not cited remains good law with *Reed* being narrowly applied to codes that impose a laundry list of different requirements to different types of signs, as Town of Gilbert's code did.

The sweeping invalidation of legitimate municipal exercises of the police power that would follow from broad application of *Reed* suggests that lower courts are more likely to apply *Reed* narrowly, relegating to dicta those portions of the opinion that cannot be synthesized with prior sign ordinance cases that took a more functionalist approach. For example, two weeks after *Reed* was decided the Central District of California ruled in *California Outdoor Equity Partners v. City of Corona* that "*Reed* does not concern commercial speech, let alone bans on off-site billboards," observing that "[t]he fact that *Reed* has no bearing on this case is abundantly clear from the fact that *Reed* does not even cite *Central Hudson*, let alone apply it."[40] Similarly, in *Citizens for Free Speech v. County of Alameda*, the Northern District of California distinguished *Reed*, holding that a sign ordinance that applied to commercial speech only was content-neutral despite the fact that the determination of whether a sign is commercial requires reading the sign. Citing the court's duty to interpret zoning ordinances as constitutionally valid if fairly possible, the court held that "*Reed* has no applicability to the issues before the Court" because *Reed* was specifically concerned with a sign code's application of different restrictions—including temporal and geographic restrictions—to permitted signs based on their content" and the plaintiffs in *Citizens for Free Speech* had "not identified any distinct temporal or geographic restrictions on different categories of permitted signs [the code at issue] based on those signs' content."[41] In a later decision, the same court also concluded that "[b]ecause *Reed* does not abrogate prior case law holding that laws which distinguish between on-site and off-site commercial speech survive intermediate scrutiny, the Court holds that its prior analysis continues to control the fate of plaintiff's First Amendment claim."[42]

That said, many municipalities make functional distinctions between sign types that can only be applied by reference to the content of the signs, and, according to the two-step test laid out in the majority opinion, such sign ordinances are subject to strict scrutiny. Indeed, the sign ordinances in two other cases the Court vacated and remanded following *Reed* will probably appear familiar to many municipal attorneys and planners.[43] These cases involved a zoning ordinance that governs the placement and size of signs with various restrictions depending on whether a sign is categorized as a "temporary sign," "freestanding sign," or an "other than freestanding sign,"[44] and a sign ordinance that, in essence, allows more political lawn signs than non-political lawn signs in residential districts.[45] In each of these cases, the lower court had concluded that the regulation, although content-based on its face, was justified by subordinating valid governmental interests, and was therefore subject to intermediate scrutiny.[46] But, under the first step of the *Reed* analysis, a content-neutral justification is irrelevant and each of these ordinances is subject to strict scrutiny.

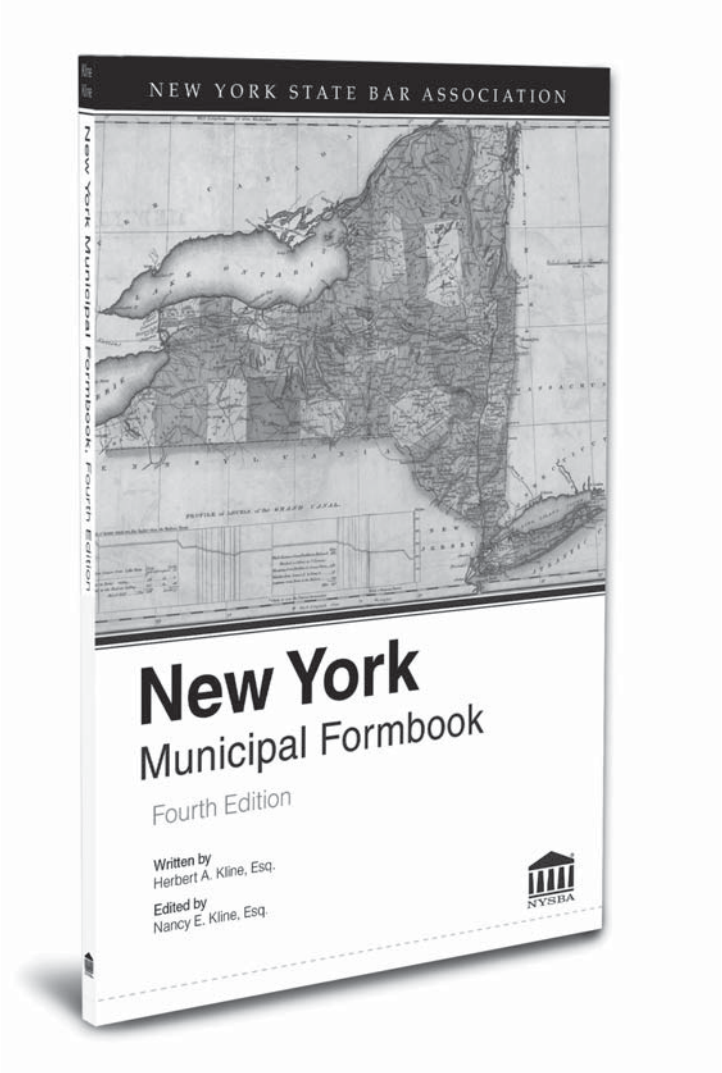
Moreover, regardless of whether New York courts ultimately apply *Reed* narrowly or broadly, uncertainty regarding the scope of *Reed* is likely to result in more claims that sign ordinances—as well as other government regulations that distinguish based on categories that can be discerned only by reading or listening—are subject to strict scrutiny. Indeed, the Seventh Circuit recently extended the holding of *Reed* to an ordinance that prohibited panhandling[47] and the Fourth Circuit recently applied *Reed* to an anti-robocall statute that carved out exemptions for debt collectors among others, concluding that the statute failed under *Reed's* first step "because it makes content distinctions on its face," and, as a result, strict scrutiny applied whether or not the government's justification for the statute was content-neutral.[48]

Endnotes

1. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).
2. *Will* Reed v. Town of Gilbert *Require Municipalities Throughout the Country to Rewrite Their Sign Codes?*, 29 MUNICIPAL LAWYER 16 (2015).
3. Gilbert Sign Code § 4.402.
4. *Id.*
5. 587 F.3d 966 (9th Cir. 2009).
6. The district court's unreported order is available at No. CV 07-522-PHX-SRB, 2011 WL 5924381 (D. Ariz. Feb. 11, 2011).
7. 707 F.3d 1057 (9th Cir. 2013).
8. *Id.* at 1071-72.
9. 587 F.3d 966, 978 (9th Cir. 2009).
10. 707 F.3d at 1069.
11. 134 S. Ct. 2900 (2014).
12. *See Solantic, LLC v. Neptune Beach*, 410 F.3d 1250, 1264–69 (11th Cir. 2005) (holding that sign categories similar to Gilbert's were content-based and subject to strict scrutiny); *Matthews v. Needham*, 764 F.2d 58, 59-60 (1st Cir. 1985) (holding that law banning political signs but not commercial signs was content-based and subject to strict scrutiny).
13. *See* Brief of the National League of Cities, United States Conference of Mayors, National Association of Counties, International City/County Management Association, International Municipal Lawyers Association, American Planning Association, and Scenic America, Inc. as Amici Curiae in Support of Respondent, Reed v. Town of Gilbert, 2014 WL 6706843 (Nov. 21, 2014).
14. WEISS SEROTA HELFMAN COLE & BIERMAN, BLOG, *Susan Trevarthen Co-Authors Amicus Curiae Brief to the US Supreme Court*, http://www.wsh-law.com/blog/17146/#sthash.LemdFBTW.dpuf (last visited Mar. 5, 2015).
15. *See, e.g.*, Brief of Amicus Curiae General Conference of Seventh-Day Adventists in Support of Petitioners, *Reed v. Town of Gilbert*, 2014 WL 4726502 (Sept. 22, 2014); Brief Amicus Curiae of the Becket Fund for Religious Liberty in Support of Petitioners, *Reed v. Town of Gilbert*, 2014 WL 4726503 (Sept. 22, 2014).
16. 135 S. Ct. 2218 (2015).
17. Justice Kennedy suggested at oral argument that the petitioner was "forcing us into making a very wooden distinction that could result in a proliferation of signs for birthday parties or for every conceivable event," all of which would enjoy the benefits of political signs. A transcript and audio recording of the oral argument can be accessed at http://www.scotusblog.com/case-files/cases/reed-v-town-of-gilbert-arizona/?wpmp_switcher=desktop (last accessed Aug. 31, 2015).
18. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).
19. 135 S. Ct. 2218, 2228 (2015).
20. 135 S. Ct. at 2227.
21. 135 S. Ct. at 2228.
22. *Id.* at 2227 (quoting *Ward*, 491 U.S. at 791).
23. *Id.* at 2228.
24. *Id.* at 2229 (internal quotation marks and citation omitted).
25. *Id.* at 2230 (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)).
26. *Id.* at 2230.
27. *Id.* at 2227.
28. *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).
29. *Id.* at 2230 (quoting 707 F.3d at 1069 (internal quotation marks omitted)).
30. *Id.* (quoting *Citizens United v. Fed'l Election Comm'n*, 558 U.S. 310, 340 (2010)).
31. *Id.* at 2222.
32. *Id.* at 2230-31 (internal quotation marks and citation omitted).
33. *Id.*
34. *Id.* at 2233 (Alito, J., concurring).
35. *Id.* at 2239 (Kagan, J., concurring).
36. 512 U.S. 43 (1994).
37. 135 S. Ct. at 2239 (Kagan, J., concurring).
38. For a summary of the oral argument, see Lyle Denniston, *Argument Analysis: If a Law Turns Out to Be "Silly"…*, SCOTUS BLOG, Jan. 12, 2015, 2:09 pm, http://www.scotusblog.com/2015/01/argument-analysis-if-a-law-turns-out-to-be-silly/.
39. 135 S. Ct. at 2235 (Breyer, J. concurring) (citing N.Y. Gen. Bus. Law Ann. § 399–ff(3) (West Cum. Supp. 2015) (requiring petting zoos to post a sign at every exit "'strongly recommend[ing] that persons wash their hands upon exiting the petting zoo area'")).
40. No. CV 15–03172 MMM AGRX, 2015 WL 4163346, at *10 (C.D. Cal. July 9, 2015).
41. *Citizens for Free Speech, LLC v. Cnty. of Alameda*, No. C14-02513 CRB, 2015 WL 4365439, at *13 (N.D. Cal. July 16, 2015).
42. *Contest Promotions, LLC v. City & Cnty. of San Francisco*, No. 15-CV-00093-SI, 2015 WL 4571564, at *4 (N.D. Cal. July 28, 2015).
43. *See Thayer v. City of Worcester*, 135 S. Ct. 2887 (2015); *Central Radio Co. v. City of Norfolk*, 135 S. Ct. 2893 (2015); *Wagner v. City of Garfield Heights*, 135 S. Ct. 2888 (2015).
44. *Cent. Radio Co. v. City of Norfolk*, 776 F.3d 229, 232-33 (4th Cir.), *cert. granted, judgment vacated sub nom. Cent. Radio Co. v. City of Norfolk*, 135 S. Ct. 2893 (2015).
45. *Wagner v. City of Garfield Heights*, 577 F. App'x 488, 489-90 (6th Cir. 2014), *cert. granted, judgment vacated*, 135 S. Ct. 2888 (2015). The Court also vacated and remanded for consideration in light of *Reed* a case involving an ordinance that prohibited aggressive panhandling and walking on traffic medians for other than "lawful" purposes. *See Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir. 2014), *cert. granted, judgment vacated sub nom.*, 135 S. Ct. 2887 (2015).
46. *Wagner*, 577 F. App'x at 492 (citing and quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 (1961)).
47. *Norton v. City of Springfield*, 806 F.3d 411, 411 (7th Cir. 2015).
48. *Cahaly v. Larosa*, No. 14-1651, 2015 WL 4646922, at *4 (4th Cir. Aug. 6, 2015) (citing *Reed*, 135 S. Ct. at 2228 ("[A]n innocuous justification cannot transform a facially content-based law into one that is content neutral.")).

Sarah J. Adams-Schoen is a Professor at Touro Law Center and Director of Touro Law's Land Use & Sustainable Development Law Institute. She is the author of the blog Touro Law Land Use (http://tourolawlanduse.wordpress.com), which aims to foster greater understanding of local land use law, environmental law, and public policy. At Touro Law Center, she teaches Property, Land Use, Environmental and Environmental Criminal Law.

From the NYSBA Book Store >



Section Members get 20% discount*
with coupon code
PUB8215N

Author
Herbert A. Kline, Esq.
Coughlin & Gerhart LLP, Binghamton, NY

Editor
Nancy E. Kline, Esq.
Coughlin & Gerhart LLP, Binghamton, NY

"The Municipal Formbook is an invaluable and unique publication which includes information not available from any other source."
Gerard Fishberg, Esq.

"Many more forms than my prior edition. Bravo! Already found a form I need for my village today."
Chauncey J. Watches, Esq.

Product Info and Prices
Book and CD
PN: 41603 | 2013 | 216 pages | softbound

NYSBA Members $155
Non-Members $190

Order multiple titles to take advantage of our low flat rate shipping charge of $5.95 per order, regardless of the number of items shipped. $5.95 shipping and handling offer applies to orders shipped within the continental U.S. Shipping and handling charges for orders shipped outside the continental U.S. will be based on destination and added to your total.

***Discount good until February 1, 2016.**

For more information, go to
www.nysba.org/MunicipalFormbook

New York Municipal Formbook Fourth Edition

The *New York Municipal Formbook*, Fourth Edition, is the premiere compendium of forms for anyone whose practice touches on municipal law. For years, this has been the book that practitioners turn to for all the forms used in the broad range of issues that involve municipal law—agreements, property assessments, FOIL requests, bidding, employment, the environment, special districts and zoning. If you work as a municipal attorney, this is the go-to guide for the forms used in developing local laws; shared services and outsourcing agreements; utility contracts; easements and rights-of-way; highways and fire districts; and a host of other circumstances.

This edition of the *New York Municipal Formbook* replaces the three-volume forms compendium with a compact book and disk package. All of the more than 1500 forms are on the CD, which also includes a searchable Table of Forms and Index. The Fourth Edition adds more than 200 new and revised forms.

New York Municipal Formbook was compiled by Herbert A. Kline, Esq., a renowned municipal attorney with more than 50 years' experience, and edited by his law partner, Nancy E. Kline, Esq.

Table of Forms

Section Committees and Chairs

The Local and State Government Law Section encourages members to participate in its programs and to contact the Section Officers (listed on page 43) or Committee Chairs for information.

Employment Relations
Chris G. Trapp
Greco Trapp, PLLC
1700 Rand Building
14 Lafayette Square
Buffalo, NY 14203
cgtrapp@grecolawyers.com

Sharon N. Berlin
Lamb & Barnosky LLP
534 Broadhollow Road, Suite 210
P.O. Box 9034
Melville, NY 11747-9034
snb@lambbarnosky.com

Ethics and Professionalism
Steven G. Leventhal
Leventhal, Cursio, Mullaney & Sliney, LLP
15 Remsen Avenue
Roslyn, NY 11576-2102
sleventhal@lcmslaw.com

Mark Davies
N.Y.C. Conflicts of Interest Board
2 Lafayette Street, Suite 1010
New York, NY 10007
mldavies@aol.com

Finance
E. Thomas Jones
Town of Amherst
5583 Main Street
Williamsville, NY 14221
etjlaw@roadrunner.com

Land Use, Green Development and Environmental
Lisa M. Cobb
Wallace & Wallace, LLP
85 Civic Center Plaza, Suite LL3
Poughkeepsie, NY 12601
lcobb@wallacelaw.net

Daniel A. Spitzer
Hodgson Russ LLP
The Guaranty Building
140 Pearl Street, Suite 100
Buffalo, NY 14202-4040
dspitzer@hodgsonruss.com

Law Student
Amber Marie Gonzalez
2 Lafayette Street, Suite #1010
New York, NY 10013
Gonzalez@coib.nyc.gov

Legislation
Marisa Franchini
NYCOM
119 Washington Ave.
Albany, NY 12210
marisa@nycom.org

A. Joseph Scott III
Hodgson Russ LLP
677 Broadway, Suite 301
Albany, NY 12207-2986
ascott@hodgsonruss.com

Liability and Insurance
A. Kevin Crawford
New York Municipal Insurance Reciprocal
119 Washington Avenue, Suite 103
Albany, NY 12210-2204
kcrawford@kcnymir.org

Michael E. Kenneally Jr.
New York State Municipal Workers' Compensation Alliance
150 State Street, Suite 203
Albany, NY 12207
mkenneally@nycompalliance.org

Membership and Diversity
A. Thomas Levin
Meyer, Suozzi, English & Klein P.C.
990 Stewart Avenue, Suite 300
P.O. Box 9194
Garden City, NY 11530-9194
atl@atlevin.com

Hina Sherwani
City of Yonkers
City Hall
Yonkers, NY 10701
hina.sherwani@yonkersny.gov

Municipal Counsel
E. Thomas Jones
Town of Amherst
5583 Main Street
Williamsville, NY 14221
etjlaw@roadrunner.com

Jeannette Arlin Koster
Town of Yorktown
Town Hall
363 Underhill Avenue
Yorktown, NY 10598
jkoster@yorktownny.org

Carol L. Van Scoyoc
White Plains Corp. Counsel's Office
Municipal Office Building
255 Main Street
White Plains, NY 10601
cvanscoyoc@whiteplainsny.gov

State and Federal Constitutional Law
Adam L. Wekstein
Hocherman Tortorella & Wekstein, LLP
One North Broadway
White Plains, NY 10601
a.wekstein@htwlegal.com

Sharon N. Berlin
Lamb & Barnosky LLP
534 Broadhollow Road, Suite 210
P.O. Box 9034
Melville, NY 11747-9034
snb@lambbarnosky.com

Taxation, Finance and Economic Development
Kenneth W. Bond
Squire Patton Boggs LLP
30 Rockefeller Plaza, 30th Floor
New York, NY 10112
kenneth.bond@squiresanders.com

Lauren M. Trialonas
Squire Patton Boggs LLP
30 Rockefeller Plaza
New York, NY 10112-0015
lauren.trialonas@squirepb.com

Kathleen N. Hodgdon
Association of Towns
of the State of New York
150 State Street
Albany, NY 12207
katie.hodgdon@gmail.com

Publication—Editorial Policy—Subscriptions

Persons interested in writing for the *Municipal Lawyer* are welcomed and encouraged to submit their articles for consideration. Your ideas and comments about the *Municipal Lawyer* are appreciated.

Publication Policy: All articles should be submitted to the co-editors, Prof. Rodger Citron (rcitron@tourolaw.edu) and Prof. Sarah Adams-Schoen (sadams@tourolaw.edu), at the Touro Law Center and must include a cover letter giving permission for publication in the *Municipal Lawyer*. We will assume your submission is for the exclusive use of the *Municipal Lawyer* unless you advise to the contrary in your letter. If an article has been printed elsewhere, please ensure that the *Municipal Lawyer* has the appropriate permission to reprint the article.

For ease of publication, articles should be e-mailed or sent on a CD in electronic format, preferably Microsoft Word (pdfs are not acceptable). A short author's biography should also be included. Please spell check and grammar check submissions.

Editorial Policy: The articles in the *Municipal Lawyer* represent the author's viewpoint and research and not that of the *Municipal Lawyer* Editorial Staff or Section Officers. The accuracy of the sources used and the cases cited in submissions is the responsibility of the author.

Non-Member Subscription: The *Municipal Lawyer* is available by subscription to law libraries. The subscription rate for 2016 is $135.00. For further information contact the Bar Center, newsletters@nysba.org.

Publication Submission Deadlines: On or before the 1st of March, June, September and December each year.

Accommodations for Persons with Disabilities: NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact the Bar Center at (518) 463-3200.

This publication is published for members of the Local and State Government Law Section of the New York State Bar Association. The views expressed in articles in this publication represent only the authors' viewpoints and not necessarily the views of the Editors or the Local and State Government Law Section.

ISSN 1530-3969 (print) ISSN 1933-8473 (online)

MUNICIPAL LAWYER

NEW YORK STATE BAR ASSOCIATION
LOCAL AND STATE GOVERNMENT LAW SECTION
One Elk Street, Albany, New York 12207-1002

ADDRESS SERVICE REQUESTED

NEW YORK STATE BAR ASSOCIATION

ANNUAL MEETING 2016

LOCAL AND STATE GOVERNMENT LAW SECTION PROGRAM

Thursday, January 28, 2016